

The background of the cover is a photograph of a person in a dark pinstripe suit, seen from the side, holding a large, dark brown leather folder. The person's hand, adorned with a ring, is visible. In the background, several tall, fluted columns of a classical building are visible, suggesting a courthouse or government building. The lighting is bright, creating strong shadows and highlights.

Georgia
Bar

Journal

October 2005 ■ Volume 11 ■ Number 2

Georgia's New Expert Witness Rule:
Daubert & More

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The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (17th ed. 2000). Please address unsolicited articles to: Marcus David Liner, State Bar of Georgia, Communications Department, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. Authors will be notified of the Editorial Board's decision regarding publication.

The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: C. Tyler Jones, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; phone: (404) 527-8736; tyler@gabar.org.

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Don't Worry About Attacks on the Legal Profession

I have been on the Board of Governors for over 30 years, and active in Bar affairs for over 40. I am always amazed and amused at the constant and continuous concerns voiced by members of the Bar, that our profession is under attack.

We have always been under attack. There is a line in one of Shakespeare's plays written over 400 years ago, "the first thing we need to do is kill all the lawyers." I might remind you that after all that time, we ain't even on the endangered species list.

Let's face it. We as a profession are never going to win any popularity contests. We are always in the thick of things. We champion unpopular causes because of what

we believe. And generally we are the only ones with the guts to do it.

We run the government, the churches, the business world, the military, etc. Every athletic team has a lawyer, every art museum, every recording studio, you name it.

Contrary to popular opinion, most of us are well read intellectuals who will jump into the middle of a fray in a heartbeat.

The average person will never understand us and will never like us. No one likes anyone who they believe is smarter than they are and can do no harm.

If you want to be popular, be a doctor, a preacher, or the village idiot. If you want to make a difference and walk a long, lonely road, be a good lawyer.

Someone in France once said, "Everyone loves justice, but a just man has few friends."

Don't worry about it.

Alvin Leaphart

August Bar Journal Arbitration Article

I began reading with high hopes, but ended with them dashed. The August article on Arbitration cited four astounding—and unsubstantiated—propositions prior to the first footnote:

1. Arbitration should be limited because "attorneys comfortable with ... the courtroom often find it difficult to modify their approach" for arbitration.
2. We "find it difficult to restrict

the scope of the traditional discovery process.”

3. “Arbitrators too often ‘split the baby.’”
4. Businesses will be less likely to have arbitration clauses because of potential arbitration of class actions.

In response to these unsupported claims, (1) attorneys were more comfortable with demurrers and quill pens at one time, too; (2) see #1; (3) if attorneys stake out extreme positions, then a finding in the middle would be closer to justice, not splitting; and (4) if arbitration works for one claim and saves \$1,000, then using it for a class claim of 1,000 would save \$1,000,000: what’s not to like about that?

After an examination of the AAA’s class action policy the authors state that “the AAA has taken the position that a separate class action arbitration demand may be filed on behalf of each and every potential named claimant ...[thus]... a separate arbitrator must hear each separate class action demand filed, unless the claimants consent to consolidation.” Curious. First, the AAA does NOT take such a position—see its Rule 4(a) which makes the determination of class status a decision for the arbitrator; and second, if the problem is—as alleged—that class actions are bad for business in arbitrations, then avoiding class actions by individual claims would be good for business (if it were the rule, which—as noted—it is not).

Now let it not be said that I am a “fan” of the expensive and slow and bureaucratic AAA—I am not. But in commercial realms, arbitration before an arbitrator paid to be good and paid to pay attention is better than a hearing before a judge who is neither. I note that the authors’ combined 20 years’ experience has resulted in only 6 reported cases in Westlaw, none of which relate to arbitration—which may explain the lack of perspective on the issue.

John T. Longino, MBA/JD

Correction

On page 27 of the August 2005 *Georgia Bar Journal*, slain Superior Court Judge Rowland W. Barnes’ name was misspelled. The staff apologizes for the error.



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Judicial Independence: Inspiration for America's Independence

By Robert D. Ingram

Judicial independence has long been a cornerstone for the American way of life.

The importance of an independent judiciary was certainly not lost on our nation's founders. In fact, the quest for an independent judiciary, which was not allowed by the king of England, was one of the motivating factors for those who signed the Declaration of Independence. Those signing expressed a number of reasons for declaring independence including the following:

[The king] made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

How many of those who now question the independence of our judiciary recognize its presence at the core of the freedom and independence sought and established by our nation's founders? Alexander Hamilton and many others rejected allegiance to the British crown because the judiciary was dependent upon the king, and the parliament could override any judicial ruling it disliked.

Our founders established a government with three equal, coexistent branches, in an effort to balance power. They agreed with Montesquieu that if "the right of

making and of enforcing the laws is vested in one and the same man or the same body of men... there can be no liberty." While the law would be created by the legislative and executive branches, in a rough and tumble environment where partisanship often reigns supreme, it would be interpreted and applied by an independent judiciary. Although political parties play important roles in influencing decisions made by the executive and legislative branches, our founders attempted to remove this pressure from judges who were given lifetime appointments so that judicial decisions could be made by fair-minded jurists without regard to politics.

Today's Judiciary

Fast-forward to October 2005, and we find that many Americans do not understand the role of the judiciary. In a recently completed poll sponsored by the ABA, 82 percent felt that separation of powers is important, but only 45 percent correctly understand the concept. Only 55 percent knew the three branches of government. Lawyers and judges need to be invested in educating the public about these issues.

In Georgia, approximately 1,500 men and women struggle daily to fairly resolve disputes and to administer justice. Along with their capable staff, Georgia judges were able to process more than 2.7 million cases last year using less than 1 percent of the state's budget. The public needs to hear how hard the third or judicial branch is working to fulfill the function intended by

"The public needs to hear how hard the third or judicial branch is working to fulfill the function intended by our founders of peacefully resolving disputes with the help of average citizens serving on juries."

our founders of peacefully resolving disputes with the help of average citizens serving on juries.

No Opinion Poll Necessary to Dispense American Justice

America's constitutional democracy created a delicate balance between the power of the majority at the ballot box and the protection of the minority with the freedoms and liberties that are guaranteed by the Bill of Rights.

The role of the court is to fairly interpret and apply the laws created by the legislative and executive branches. Judges are called upon to apply the law without regard to public opinion polls or the popularity of the decision. In fact, judges erode public trust and confidence if they do otherwise.

Americans rich and poor, Republican and Democrat, conservative and liberal, should each expect the judiciary to render justice without regard to the status, popularity or perceived power of the parties before it. Those who understand the beauty and complexity of America's justice system

recognize that the judiciary should refuse to bow to political pressure and public opinion from the left or the right. Only then is the judiciary fulfilling the independent role our founders intended.

Ruthless Tyrants Hate Judicial Independence

America's 200-year history of a strong and independent judiciary stands in stark contrast with authoritarian governments like Hitler's Nazi Germany, Stalin's Soviet Union, the Taliban's Afghanistan, or Saddam Hussein's Iraq, all of which had two things in common: (1) a dependent judiciary, and (2) a weak or non-existent legal profession. Respect for the rule of law and the ability to access justice was only a dream under those authoritarian governments.

U.S. Justice System – Protecting America's Way of Life

Earlier this year, I watched with pride when 300,000 people cheered in the former Soviet Republic of Georgia as President Bush declared that the oppressed people of

Georgia "...are demanding their freedom, and they shall have it." Our president's speech emphasized America's admirable goal of spreading freedom and democracy throughout the world. Following his speech, President Bush met with leaders of the political opposition and was told that Georgia's democracy was still superficial because it lacked a strong and independent justice system.

Burgeoning democracies around the world see the need for a strong and independent judiciary in their search for the freedom and liberties which have given us the American way of life. Although lawyers and judges see the courts as an important check on the power of government and as our last bastion of protection, many who have not had their life, liberty or property threatened fail to appreciate the court's role. The State Bar needs to be a player in educating the public on these issues.

Respect for Rule of Law Goes Both Ways

My parents taught me that if you want respect, you must give it. If we want the legislative and executive branches to recognize and respect

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the independence of the judiciary, then we must show our own respect for the rule of law as it applies to their roles. Lawyers and judges must recognize that constitutional laws must be fairly interpreted and applied even if we do not like them. Our remedy for bad laws that do not violate the Constitution is to participate in the legislative process more effectively. In an effort to do just that, the State Bar needs to provide leadership in educating the public and in building relationships with legislators so that our input will be considered. The Foundation of Freedom Commission, chaired by Rob Reinhardt and vice-chaired by Jay Cook, is seeking to lead Georgia's lawyers and judges in developing an overall public legal education strategy. Below is a Draft Operational Plan to be considered by the Commission:

FOUNDATION OF FREEDOM COMMISSION - DRAFT OPERATIONAL PLAN

A. Public Legal Education (a process, not an event)

1. Draft speeches and message-point memos to assist lawyers in educating public about justice system and legal profession
2. Utilize brochures dispelling lawyer myths (Past-President Bill Cannon project)
3. Promote Justice Kennedy / ABA Dialogue on Law Program
 - Designed for high school students and community/civic organizations regarding important legal topics
 - Dialogue on Freedom (2002 program)
 - Dialogue on *Brown v. Board of Education* commemorating 50th anniversary of

- Supreme Court landmark ruling ending segregation in schools (2003 program)
 - Dialogue on American Jury, "We the People in Action" emphasizing right to trial by jury as cornerstone of individual freedoms guaranteed by Bill of Rights (2004 program)
4. Prepare educational handouts on importance of:
 - Independent judiciary
 - Rule of law in America's constitutional democracy
 - Role of lawyers in preserving America's way of life
 5. Create lists of opportunities for lawyer participation in public legal education
 - After-school programs
 - Law Day programs
 - Career Day programs
 - Civic clubs/organizations
 - Local business associations
 - State/local Chamber of Commerce programs
 - "Ask a Lawyer" call-in radio shows
 - Lawyer/Student Education Program
 - "Youth Justice in America," a youth-focused exploration of the criminal justice system
 - Publication *We the Students* covers the most interesting Supreme Court cases for and about students
 6. Educate and utilize Board of Governors to solicit assistance of local and specialty bar associations in public legal education
 7. Develop lawyer speakers bureau list
 - Recruit lawyers with passion and conviction about legal profession and justice system
 8. Utilize State Bar eNews serv-

ice and State Bar Communications Director to provide suggestions to state, local and specialty bar leaders on breaking news stories impacting justice system and legal profession

9. Utilize media consultant
 - Help draft clear and concise message points for current events
 - Open doors and introduce bar leaders to local newspaper editors to help spread truth about lawyers and justice system
10. State Bar Communications Tool Kit
 - Educating public about value of lawyers (Wisconsin Bar Project)
 - Value lawyers bring to clients and communities
 - Role of lawyers in providing expert advice, problem solving and community service
11. Jury Education memorandum/video
 - Work with Councils of Superior and State Courts to prepare memo and video/DVD designed to educate citizens reporting for jury duty about vital role our nation's founding fathers intended for the jury system
 - Emphasize important role of lawyers and judges in administering rule of law through the justice system
 - Emphasize importance of independent judiciary
 - Emphasize importance of providing access to justice
12. American Juror Project
 - Program to help citizens understand critical role jurors serve in U.S. justice

<p>system (Texas Bar project)</p> <ul style="list-style-type: none"> □ Informative video with movie clips from “My Cousin Vinnie” and “The Verdict” while educating and inspiring citizens about jury service □ Dispels common misconceptions about jury service <p>B. Bar Center Utilization (maximize use in public education)</p> <ol style="list-style-type: none"> 1. Justice Kennedy’s “challenge” at Jan. 15, 2005, Bar Center Dedication Ceremony <ul style="list-style-type: none"> • “One of the most important obligations of each generation, and especially the bar, is to transmit the idea of freedom and the importance of the rule of law to the next generation.” Hon. Anthony M. Kennedy, Justice, United States Supreme Court 2. Student Education <ul style="list-style-type: none"> • Bar Center provides many opportunities for student education because of its location in the heart of the state’s most sought-after field trip venue, including: <ul style="list-style-type: none"> □ Centennial Olympic Park □ CNN Center □ Philips Arena □ Georgia Dome □ Georgia World Congress Center □ Future World of Coke site □ Georgia Aquarium • More than 50,000 Georgia school children should benefit from their interactive day as participants in the judicial process and as observers at the Legal History Museum in the State Bar Center 3. Mock trial courtroom <ul style="list-style-type: none"> • Students will serve in assigned roles as judge, prosecutor, defense counsel, bailiff, court reporter, wit- 	<p>nesses, defendant, plaintiff and jurors</p> <ul style="list-style-type: none"> • Age-adapted scripts for mock trials • Elementary school students might try the “big bad wolf” for assault or “Goldilocks” for theft and trespass • High school students might prosecute school vandalism, DUI accident case or defend a personal injury arising from automobile accident • Students to be taught about the vital role jury trials play in the American justice system <p>4. Legal History Museum</p> <ul style="list-style-type: none"> • State Bar is working with Georgia Legal History Foundation to create a Museum of Law open for school tours <ul style="list-style-type: none"> □ Highlight landmark decisions □ Highlight trial by jury □ Provide facts on juries as democratic institution □ Highlight quotes from American leaders on jury trials <p>4. Lawyer-President Woodrow Wilson’s Office</p> <ul style="list-style-type: none"> • President Wilson’s 1882 law office in State Bar lobby generates interest for ABA’s Lawyer-President exhibit • Critical role lawyer-presidents played in developing America’s constitutional freedoms/liberties guaranteed each citizen <p>C. Explore Public Broadcasting Service Partnership</p> <ol style="list-style-type: none"> 1. Allows non-profit organizations to participate in public education programs on radio and TV at substantially reduced rates 2. Explore funding opportunities 	<p>with Georgia Bar Foundation and the Civil Justice Foundation</p> <ol style="list-style-type: none"> 3. Georgia Association of Broadcasters Partnership Program <ul style="list-style-type: none"> • The Alabama, Missouri and South Carolina State Bars have had successful media programs <ul style="list-style-type: none"> □ Educating public about the value lawyers bring to their clients □ Educating public about importance of a strong and independent judiciary <p>D. Rapid Media Response Program</p> <ol style="list-style-type: none"> 1. Ohio State Bar Media Response Program utilizes a media consultant to assist bar leaders in responding rapidly to unfair and unjust criticism against the judiciary <p>E. State Bar Web Site</p> <ol style="list-style-type: none"> 1. Include written message points and speeches for easy access for lawyers and judges 2. Create local bar activities page for purpose of posting and promoting their activities and community service projects <p>F. Lawyers in Legislature</p> <ol style="list-style-type: none"> 1. Encourage lawyers to offer their time for political office including Legislature 2. Support lawyers running for public office by volunteering, working in campaigns and helping in fund raising <p>G. Lawyers in Chamber of Commerce</p> <ol style="list-style-type: none"> 1. Join local, state and national Chambers of Commerce and become active within organizations to help business leaders identify lawyers as colleagues and to provide the legal profession with a voice at the table
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H. Law School for Legislators

1. Develop annual training program for new and veteran legislators providing instruction on constitutional issues, role of judiciary as third branch of government, role of lawyers in America's constitutional democracy, and practical tips on drafting legislation

I. Law School for Journalists

1. Develop annual program for print and media journalists
2. Educate regarding:
 - Common misconceptions about justice system and legal profession
 - Truths about jury system
 - Importance of independent judiciary and the role of our third branch of government

J. Legislator/Lawyer

Communication Project

1. State Bar is developing a data base which matches lawyers with the legislators elected from their home towns in an effort to increase opportunities for lawyer input through increased communications with local legislators

K. Take Your Legislator to Court Program

1. State Bar to work with Board of Governors members and superior and state court judges to arrange for legislators to visit their respective local court houses to observe a trial or hearing, meet local judges and develop a better understanding of the court's operations and needs.

Goal of Foundation of Freedom Commission


Our goal with the Foundation of Freedom Commission is to develop messages with the assistance of

communication experts which will resonate with Georgians from Valdosta to Brasstown Valley and from Savannah to Columbus. Our primary message topics include:

1. Importance of judicial independence;
2. Access to justice for all;
3. Respect for the rule of law;
4. Role of American citizen juries; and
5. Role of lawyers in preserving America's way of life.

Once the message is developed, all Georgia lawyers and judges will be needed to help deliver it. Our effort will be multifaceted and will involve building relationships with

many in order to effectively deliver the message. Although the task is formidable, and many naysayers will try to discourage our efforts, the stakes are too high to sit by idly. For those willing to help us in this effort, we ask that you call on or send an email to the State Bar Communications Director, Tyler Jones, at (404) 527-8736 or tyler@gabar.org.

We not only request your participation but also your prayers as we begin a long term process of rebuilding public trust and confidence in our system of justice so that justice will continue to be a reality to all Georgians who seek it. 

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"Recent news events have compounded and heightened what I have found to be a consistent negativism and lack of knowledge about our system of justice."

Role of the Judiciary:

Have we Forgotten Our Civics Lessons?

By Cliff Brashier

At the Bar Center Dedication ceremony earlier this year, U.S. Supreme Court Justice Anthony Kennedy said, "One of the most important obligations of each generation and especially the Bar, is to transmit the idea of freedom and the importance of the rule of law to the next generation." This has never been truer than it is today.

Justice Kennedy is an inspirational speaker who really makes you think about what your goals should be. As my father used to say to me almost daily, "Remember who you are." In this case we are members of the profession best qualified by education and experience to meet the obligations expressed by Justice Kennedy. And we have the resources to do the job well. We have 36,700 lawyers and judges already well trained in civics. We have a new Bar Center with a strong public education compo-

nent that emphasizes school students. We have the Georgia Law Related Education Consortium with 15 years of experience in this area. We have a new Foundations of Freedom Program, which will show Georgia citizens how the rule of law and our justice system protect each American's life, liberty, property, security and opportunity. In short, we make a huge difference and you will hear more about those efforts in upcoming months.

The following editorial was published in the Saturday, April 16, 2005, issue of the *Houston Chronicle*. It was written by State Bar of Texas Immediate Past President Kelly Frels. I hope you find it to be as interesting and on target as I did.

Recent news events have compounded and heightened what I have found to be a consistent negativism and lack of knowledge about our system of justice. It is directed not just at lawyers, but also at judges, juries and the rest of our third branch of government.

Have we forgotten our high school civics lessons? We might all recall that the framers of the United States Constitution created three

As a free society, we must all remember our civics lessons, educate our children, and ensure that the adult population knows how and why our judicial system works the way it does.

branches of government: the legislative, the executive and the judicial. Each has an important role in our democratic republic.

A strong and independent judiciary is essential to our democracy and freedom. This lesson was reinforced to me when I visited Eastern Europe last year supporting a United States sponsored program to encourage the teaching of democracy in schools. We found emerging democracies such as Romania struggling to establish an independent judiciary, a condition of joining the European Union.

I perceive the recent attacks on judges in the United States as symptomatic of a broader assault on our system of justice. Under the United States and Texas Constitutions, the legislative branch makes the laws and the courts apply those laws to the facts of each case. In a recent conversation, a former social studies teacher, now serving as an elected representative in local government, criticized activist judges. When reminded that many decisions are reversed on appeal, he replied, "The judges should have ruled like I wanted them to in the first place."

The recent killings of the family members of a federal judge in Chicago and of a state judge and three others in a courthouse in Atlanta, as well as a courthouse shooting in East Texas, briefly focused the nation's attention on the courageous and commendable sacrifice and service of the members of our judiciary. But during the final weeks of Terri Schiavo's life, politi-

cians excoriated judges at all levels of our judicial system for their perceived arrogance and lack of deference to the wills of members of Congress. It seems "activist judges" often equates not to whether a particular judge followed the law but whether the person making the accusation agreed with the judge's ruling.

In times such as these, we should recognize that judges are called upon daily to rule in cases to protect the rights and liberties afforded to all of us by our Constitution and laws. Judges do not have control over the cases they hear, so judges will inevitably become involved in high profile cases where someone is sure to find the results offensive. Each judge must rule solely on the Constitutions of the United States and Texas plus other laws passed by Congress or the Texas Legislature.

All jury verdicts and lower court judgments are, of course, subject to review and change by appellate courts. Members of the public must resist judging the judicial process until the appellate process is completed. Many lower court decisions are reversed or modified on appeal.


After 35 years as a lawyer, I'm accustomed to lawyer jokes and unfriendly comments about my profession. Occasionally they're deserved. More often, they're not. But it hits close to home when Texas politicians weigh in, especially when the targets are judges. After Terri Schiavo died, some declared ominously that judges will "answer for their behavior," and impeachment of some judges was suggested.

Public discourse, even criticism of judges or the judicial system, is our right under the First Amendment; but threats of retribution against judges in the environment of judges being the victims of violence and death is unacceptable. Instead, we must help secure the individual safety of all judges so they can independently administer the laws without fear of retribution.

We must firmly support the integrity of a strong and independent judiciary. If citizens do not like the result of how a law is applied by the courts, they can change the law through the legislative process. The recent approval of tort reform, regardless of your views on the issue, demonstrates that legislative change is a viable process.

As a free society, we must all remember our civics lessons, educate our children, and ensure that the adult population knows how and why our judicial system works the way it does. Legislative bodies make the laws and members of the judiciary apply the laws to the facts before them.

Most important, in our public discourse and our private conversations, we must affirm and support our judicial system as an independent third branch of government. Our system of democratic government, the most admired in the world, depends on it.

I would like to thank Kelly Frels for so eloquently addressing this important issue and letting us use his opinion piece in the *Georgia Bar Journal*. Your thoughts and suggestions are always welcome. My telephone numbers are (800) 334-6865 (toll free), (404) 527-8755 (direct dial), (404) 527-8717 (fax) and (770) 988-8080 (home). 



"I have come to learn that we should keep in mind that this thing we do called 'lawyering,' is supposed to be more than just time at the office."

A Little Bit of Praise Can Go a Long Way

By Damon E. Elmore

You gotta understand, it is tricky drafting analytical columns for the *Journal* without sounding self-serving or, worse, preachy. Survey any of my law school professors and they will tell you it is probably best if I leave the legal analysis and opinion to my colleagues on the pages that follow. More importantly, I have not thought about the I-R-A-C method in years.

Do not get me wrong; I do like those articles of analysis, especially when your YLD members assist with their drafting. It seems to me that it is important for us all to be constantly aware of the changes and nuances in our profession, despite practice area. Therefore, I reserve the right to bore you with my vast knowledge and expertise on the *Daubert* standard for future editions.

Lately, I have found myself focused on an area of practice not often glamorized and one which

the younger members of the Bar have commented. Sometimes it seems we may even overlook it. It is the *human capital* involved in our practice and execution of the business of the law. Those are the people who are your colleagues, and associates who, more often than not, are new and young lawyers.

I repeatedly wonder whether we, those of us who have been practicing for some time, view our practice partners (this includes private practice, government attorneys and corporate attorneys alike), as independent contractors and do not consider them as true members of the team.

Look, I respect the food chain and definitely know my place within it. However, it is important that we maintain a sense of duty as sculptor and conveyor of the constant stream of appreciation that should be given to our team members. It is important that we consistently display this quality so that our younger lawyers not only receive that appreciation, but also learn how to give it when their time comes. This is most important as the newest members of the Bar develop in their practice and take on leadership roles. With buzz phrases like "mentoring,"


"perception of the profession" and "image" of lawyers circulating each day, it is important for us to build and maintain these relationships.

Often, if you ask a young child, "What do you want to be when you grow up?" they will tell you, "A lawyer!" So when those kids grow up to realize their dreams, what are the rewards for getting the job done? We all enjoy the firm retreats, summer associate happy hours, holiday parties, year-end bonuses and the like. But, does it take a bit more?

I recently read, "few things feel better than heartfelt praise and appreciation from someone else." It should follow that if we show gen-

uine interest in the efforts of our newer colleagues, we will create a more productive working environment. Sit in on a hearing of one of our young associates, even if it will not appear in the *Fulton County Daily Report*, and compliment them on the job done. I reflect upon the input I received from veteran attorneys and remember how much it helped in my development as an attorney. Likewise, accept an invitation to the bar league softball game (even if it is just for the fellowship afterward); community service project; mentorship opportunity with a law student or recent admittee; or to the associate outing in Augusta, Columbus, Peachtree City, or wherever it may be.

Younger lawyers have often said that the "old hand" attorneys they most respect are those that take the time to create a sense of connection through these informal and non-routine events.

I have come to learn that we should keep in mind that this thing we do called "lawyering," is supposed to be more than just time at the office. Come on you guys, we are those kids who are, theoretically, living out our dreams. Done well, our profession can take on the same characteristics as a deep circle of friends. After all, a little bit of praise can go a long way. Tie them both together, and it will grow closer to the level of family for future generations of lawyers. 



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Georgia's New Expert Witness Rule: *Daubert* & More

By Robert E. Shields
and Leslie J. Bryan

The 2005 Georgia Legislature adopted a far-reaching tort reform package. In one broad piece of legislation, the General Assembly:

- Abolished Georgia's long history of joint and several liability;¹
- Changed Georgia's venue provisions;²
- Added criteria to the required O.C.G.A. § 9-11-9.1 affidavit for plaintiffs asserting claims for professional negligence;³
- Forced medical malpractice plaintiffs to relinquish federally-protected rights under the Health Insurance Portability and Accountability Act of 1996;⁴
- Adopted a confusing offer of judgment provision;⁵
- Altered the evidentiary rule concerning the admissibility of statements against interest;⁶ and
- Created a new rule on the admissibility of expert testimony loosely based on the federal *Daubert* rule.⁷

It is this last provision that is the subject of this paper.

The Development of the *Daubert* Rule

The so-called "*Daubert* rule" refers, loosely, to four United States Supreme Court opinions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁸ *General Electric Co. v. Joiner*,⁹ *Kumho Tire Co. v. Carmichael*,¹⁰ and *Weisgram v. Marley Co.*¹¹ These four cases, and literally thousands of lower court decisions citing them,¹² establish the basis for admitting expert testimony in the federal courts.

The facts in *Daubert v. Merrell Dow* were simple. The plaintiffs alleged that the ingestion of the anti-nausea drug Bendectin during pregnancy caused birth defects. At issue was the standard for ruling on the admissibility of the plaintiffs' expert causation evidence. The trial court rejected the plaintiffs' expert



testimony, holding that the experts' opinions were not "sufficiently established to have general acceptance."¹³ The United States Court of Appeals for the Ninth Circuit affirmed.¹⁴ The United States Supreme Court granted certiorari to resolve a split in the circuits.

Like the facts, the Court's holding was simple, but its impact has been enormous. In *Daubert*, the Supreme Court held that, because of the adoption of the Federal Rules of Evidence, the standard for determining the admissibility of scientific opinion evidence could no longer be the "general acceptance" test that originated in *Frye v. United States*¹⁵ because Rule 702 of the Federal Rules of Evidence supplanted *Frye* with a more "flexible" approach.¹⁶ This more flexible approach is sometimes referred to as the scientific reliability test. The trial judge, as the "gatekeeper" of the admissibility of evidence, should determine whether expert testimony is scientifically reliable and "fits" the facts of the case before it can be presented to the jury. The Court's holding in *Daubert* was codified in 2000 by an amendment to Rule 702.

Building on its opinion in *Daubert*, the Supreme Court ruled in *Joiner* that review of a trial judge's rulings on expert evidence would be limited to an abuse of discretion standard. In *Kumho Tire*, the Court broadened the reach of *Daubert* to impose the new evidentiary standard on all expert testimony, and not merely to the "scientific" evidence that was at issue in *Daubert* and *Joiner*. Finally, in *Weisgram*, the Court ruled, basically, that litigants get one bite at the apple. Under *Weisgram*, federal appellate courts that reverse a trial court's admission of expert evi-

dence can reverse and render judgment if, without the rejected evidence, the remaining record evidence is insufficient to sustain the verdict.

The *Daubert* rule has had far-reaching and unanticipated consequences in the federal courts.¹⁷ Now, the Georgia Legislature has attempted to adopt the *Daubert* rule¹⁸ and has replaced Georgia's historic rule on expert testimony, at least in civil cases. In this article, we discuss Georgia's historic approach to the admissibility of expert testimony, review the specific provisions of the new rule, and explore some of the concerns that have been raised because of opinions coming out of the federal courts.

The Historic Rule in Georgia and the Contrast with *Daubert*

The Georgia Court of Appeals and the Supreme Court of Georgia have declined to adopt the *Daubert* rule on several occasions. In *Orkin Exterminating Co. v. McIntosh*, the Court of Appeals rejected the *Daubert* rule on the ground that it was based on the Federal Rules of Evidence, which had not been adopted by the Legislature in Georgia.¹⁹ The Court of Appeals ruled similarly in *Jordan v. Georgia Power Co.*²⁰ The Court of Appeals also refused to adopt the *Daubert* Rule in *Norfolk Southern Railway v. Baker*.²¹ The Supreme Court of Georgia twice granted certiorari to consider whether to adopt the *Daubert* rule, but in both instances, after briefing and oral argument, it ruled that certiorari was improvidently granted.²²

Georgia's historic rule on the admissibility of expert testimony was much broader than either for-

mer Federal Rule 702 or Rule 702 as amended to incorporate the *Daubert* standard. Georgia law did not provide for the broad "gatekeeper role" described in *Daubert*. To the extent that prior Georgia law allowed trial judges to act as a "gatekeeper" at all, that role was appropriate only when a party attempted to introduce the results of a novel test or technique.

The basis for Georgia's historic rule was O.C.G.A. § 24-9-67, which provided in part, "The opinions of experts on any question of science, skill, trade or like questions shall always be admissible." Thus, the Supreme Court of Georgia repeatedly held that, provided an expert is properly qualified in the field in which he or she offers testimony and the facts relied upon are within the bounds of the evidence, whether there is a sufficient basis upon which to base an opinion goes to the weight and credibility of the testimony, not its admissibility.²³

The Supreme Court of Georgia adopted an exception to the general rule in a criminal case, *Harper v. State*.²⁴ In *Harper*, the court was asked to evaluate the standard for determining whether the results of an interview, conducted while the defendant was under the influence of truth serum, were admissible. The Court rejected the *Frye* rule of "counting heads" and instead held that it was proper for the trial judge to decide whether the procedure or technique in question had reached a scientific state of "verifiable certainty." This verifiable certainty test, however, did not address the admissibility of the opinions of expert witnesses generally; instead, it addressed only the admissibility of the results of novel "procedures and techniques."²⁵

The Georgia rule provides: “Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly.”

The Court of Appeals made this distinction in rejecting the argument that the *Harper* rule was the same as the *Daubert* rule:

With respect to a particular scientific procedure or technique, the trial court makes a determination “whether the procedure or technique in question has reached a scientific stage of verifiable certainty,” based upon evidence, expert testimony, treatises, or the rationale of cases in other jurisdictions. . . . However, Orkin does not challenge a particular scientific test or technique employed by plaintiffs’ experts; Orkin challenges the conclusions drawn by those experts from testimony and evidence in the record. This determination is for the jury, and the trial court did not err in denying Orkin’s motions for summary judgment and directed verdict.²⁶

In contrast, the *Daubert* rule requires a broad “gatekeeper” function for the trial court.²⁷ Although Justice Blackmun indicated that the *Daubert* rule was to be applied only to the methodology and not to the conclusions and opinions of experts, there can be little question, based upon review of the massive number of federal decisions applying the *Daubert* rule, that federal trial judges have not limited their evaluation to methodology.²⁸

The New Statute

Section 7 of Senate Bill 3, codified at O.C.G.A. § 27-9-67.1, attempts to adopt Rules 702 and 703 of the Federal Rules of

Evidence. Rule 702, as amended in 2000, is the codification of the *Daubert* rule. Subsection (a) of the new Georgia statute is word-for-word the same as Rule 703. Subsection (b) of Section 7 of Senate Bill 3 is *almost* word-for-word Rule 702. It is the “almost” that presents an apparent internal conflict in the statute. Another fundamental difference between the new statute and Federal Rules 702 and 703 is the fact that the new statute only applies in civil cases. Criminal cases will continue to be tried under the “shall always be admissible” standard. Neither the statute nor the legislative debate reveals the reason for this exclusion, but the original version of the new statute did not exclude criminal cases.²⁹

Turning to the conflicting provisions, subsection (a) addresses the basis of opinion testimony by experts. It is contrary to Georgia’s historic rule, which prevented an expert from relying on hearsay evidence and which required the basis of expert opinion to be admitted in evidence independently. Federal Rule 703, however, allows the facts or data upon which an expert bases his opinion to be hearsay if such evidence is of a type “reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.” In that event, “the facts or data need not be admissible in evidence for the opinion or inference to be admitted.” Subsection (b)(1) of Section 24-9-67.1 is inconsistent with—and contrary to—subsection (a), because it adds the following

language: “which are or will be admitted into evidence at the hearing or trial.” Thus, subsection (a) of the statute allows an expert to rely on “facts or data [that] need not be admissible in evidence” if of a type reasonably relied upon by experts in the field in forming opinions, but subsection (b), contrary to Federal Rule 702 and subsection (a), requires expert opinion to be based on facts and data “which are or will be admitted into evidence at the hearing or trial.” What one section gives, the other section takes away. This contradictory language will likely only confuse courts and litigants.

It is notable that Georgia has not adopted, in their entirety, either the Federal Rules of Civil Procedure or the Federal Rules of Evidence. That distinction is particularly important in analyzing the new statute for two primary reasons. First, Rule 26(a)(2) of the Federal Rules of Civil Procedure details the requirements for what must be included in the disclosure of expert testimony. The rule also directs the timing of such disclosures. Georgia has no parallel provision. Instead, discovery of experts is governed by O.C.G.A. § 9-11-26(b)(4). That statute says that, in response to an interrogatory, a party must disclose experts. The section provides very little direction to litigants, however, and both sides, historically, have provided scant information on their experts outside of depositions.

Second, the *Daubert* opinion speaks of “fit,” essentially a relevance inquiry into the subject of the proposed expert testimony. Georgia, however, has a different definition of relevance from that contained in the Federal Rules of Evidence. The Georgia rule pro-

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After attempting to adopt the *Daubert* standard for all civil cases, the Legislature focused on the articulated purpose of the statute, the “litigation-driven health care crisis,” and included subsection (c), which applies to professional negligence actions.

vides: “Evidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded.”³⁰ By way of comparison, the Federal Rule provides, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”³¹ Are they different standards? The language is certainly quite different. Whether they are subject to the same interpretations remains to be seen.³²

After attempting to adopt the *Daubert* standard for all civil cases, the legislature focused on the articulated purpose of the statute, the “litigation-driven health care crisis,” and included subsection (c), which applies to professional negligence actions. In addition to imposing a licensure requirement on anyone testifying as an expert in a professional negligence case, this subsection attempts to specify who may testify as an expert in a medical malpractice case. In medical malpractice cases, only one who has had “actual professional knowledge and experience” can testify.³³ To determine whether a potential witness has “actual professional knowledge and experience,” the expert must have practiced or taught (subject to certain

limitations) for at least three of the last five years “with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in [performing or teaching] the procedure. . . .”³⁴ That provision alone is likely to spawn considerable litigation since, under subsection (e), the requirement applies to pre-filing affidavits under O.C.G.A. § 9-11-9.1.

Subsection (d) provides that, upon motion of a party, the court may hold a pre-trial hearing to determine whether a witness qualifies as an expert and whether the expert testimony satisfies the requirements of the rule. The original version of the statute required the court to hold a pre-trial hearing, but the term “may” was later substituted for the “shall” language of the original version. There is no comparable provision in Federal Rule 702.³⁵ To the contrary, in *Kumho Tire Co. v. Carmichael*,³⁶ the United States Supreme Court held that it was not necessary to have a hearing on a *Daubert* motion, but that the trial court had the discretion to decide how to consider the motion. The practice in the Eleventh Circuit, based on the decisions of the Court of Appeals, is either to decide the matter based upon the written submissions or to have an evidentiary hearing during the trial so as to avoid the expense and

inconvenience of having expert witnesses appear for an evidentiary hearing prior to trial.³⁷

Perhaps the most unusual part of the new statute is subsection (f): “It is the intent of the legislature that, in all civil cases, the courts of the state of Georgia not be viewed as open to expert evidence that would not be admissible in other states.” Normally, legislative intent is expressed in the preamble and not included in the substantive provisions of the statute. In fact, this appears to be the only statute in Georgia containing statutory intent language. The meaning of the provision is far from clear. Will Georgia courts need to continually survey decisions of other *states* to determine whether an expert can testify under Georgia’s adoption of *federal* rules? If decisions of other states have reached inconsistent results, what implication does that have for admissibility in Georgia? If expert testimony is inadmissible in another state, but the other state follows a more restrictive and different rule, what is the relevance of such rulings under this provision? All in all, the intent subsection will no doubt result in extensive litigation. These authors have not been able to locate any similar provision in any other jurisdiction.

The rest of the subsection, which indicates that the courts of the state may draw upon opinions of the United States Supreme Court and specifically cites *Daubert*, *Kumho Tire*, and *General Electric v. Joiner*, compounds the problem. We have noted above that the new statute is not entirely consistent with either the *Daubert* or *Kumho Tire* cases. Despite this inconsistency, subsection (e) directs the courts to draw upon those decisions.

The New Rule May Have Far-reaching Consequences

In his partial dissent in *Daubert*, Chief Justice Rehnquist criticized the Court's formulation of the trial judge's responsibility in determining admissibility of expert testimony because it left open more questions than it answered.³⁸ He noted that the vagueness and ambiguity in defining the "gatekeeper" role would greatly test the capacity of trial judges and impose on them the obligation to become "amateur scientists" in order to do their job.³⁹

The *Daubert* rule has had far-reaching, and often unanticipated, consequences in the federal courts. It is likely to have similar consequences in Georgia. Specifically, if Georgia follows the federal example, it will increase the burden on trial courts, it will ask trial judges to make decisions that they may not be prepared by training and experience to make, it may lead to contradictory results, and it will add enormously to the costs of litigation.

Since the Supreme Court issued the *Daubert* opinion, much has been written about its impact on the federal courts. Undeniably it has added substantially to the burden on trial courts by requiring the expenditure of significant time and resources in evaluating "scientific reliability" in all cases in which such expert testimony is expected.⁴⁰ The premise for requiring the trial judge to be the "gatekeeper" of expert testimony is that the judge is more able to evaluate scientific evidence than a jury. Empirical studies, however, have demonstrated that trial judges often do not have the training and experience to decide complex scientific issues and are not more able to evaluate scientific evidence.⁴¹ A related


problem is the dramatic increase in the cost of litigation that *Daubert* has brought. Both sides now are compelled to require their experts to expend substantially more time preparing their testimony at significantly greater expense. There can be no question that it is extraordinarily expensive to prepare witnesses to deal with *Daubert* challenges.

Not surprisingly, *Daubert* has produced inconsistent results when trial courts examine the same expert evidence.⁴² That *Daubert* will lead to inconsistent evidentiary results should be expected given that appellate review is limited to an abuse of discretion standard. Nor is it surprising that *Daubert* has resulted in misinterpretations of science. The noted legal scholar and expert on evidence, Professor Margaret Berger, addressed the problem in her seminal work and observed that the *Daubert* trilogy had shifted the decision-making from juries in trials to judges in pretrial proceedings.⁴³ Federal judges are much more likely to exclude than to admit scientific evidence on a *Daubert* challenge, often on a basis of "new rules in the name of science that do not exist in the scientific community."⁴⁴ In fact, the prestigious American Public Health Association has become so aware of the possible conflicts between science and law that it has recently published an entire supplement dedicated to exploring the issues that *Daubert* has raised.⁴⁵ Indeed, that organization has even adopted a resolution urging "friend of the court briefs that address the problem inherent in the adoption of *Daubert* and *Daubert*-like court rulings, the application of *Daubert* in regulatory proceedings, and when judges

misinterpret scientific evidence in their implementation of the *Daubert* ruling."⁴⁶

Thus, the concerns that Chief Justice Rehnquist and others have expressed and that have come to fruition in the federal courts may soon plague the courts here.

Conclusion

There no doubt will be a period of time in which the Georgia trial and appellate courts sort out how they will deal with the new rule. It is likely that there will be constitutional challenges to the rule generally and to its application to existing cases. The *Daubert* rule can be applied fairly and in a way that does not take away the basic fact-finding function of the jury. Let us hope that the Georgia courts get it right. 



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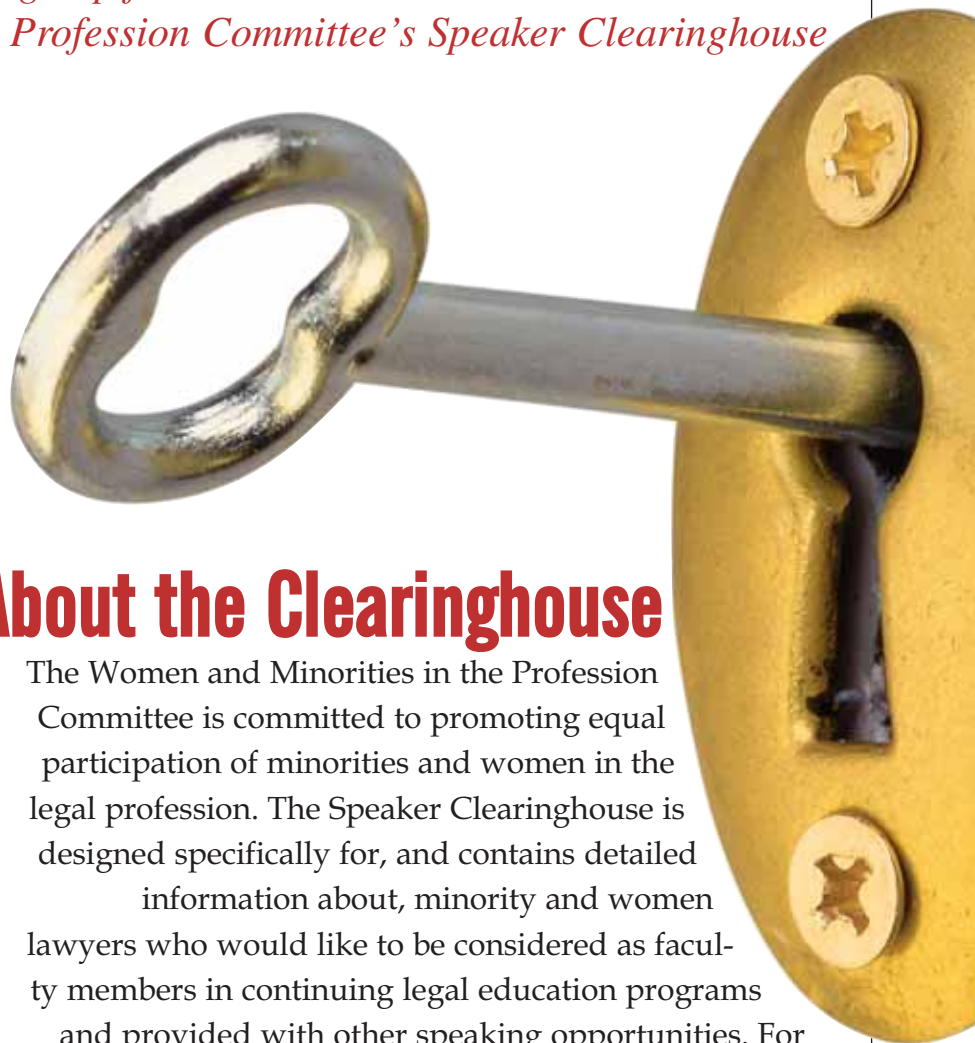
Endnotes

1. Senate Bill 3, Section 12, 148th Gen. Assem., Reg. Sess. (Ga. 2005) [hereinafter Senate Bill 3] (amending O.C.G.A. § 51-12-31 and § 51-12-33).
2. Senate Bill 3, Section 11 (enacting a new code section O.C.G.A. § 51-2-5.1).
3. Senate Bill 3, Section 3 and Section 7 (amending O.C.G.A. § 9-11-9.1 and § 24-9-67.1).
4. Senate Bill 3, Section 4 (enacting a new code section O.C.G.A. § 9-11-9.2). With HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996), Congress established standards to protect private health information. HIPAA, generally, preempts state laws that are less stringent than the federal standards. The new medical authorization requirement from Senate Bill 3 is less stringent. *See* 45 C.F.R. § 164.508(b)(5), (c)(2)(i) (2005); *see also* Lockard v. Weisberg, Civil Action No. 05V5078568D (State Court of Fulton County, July 26, 2005) (Order of Judge Newkirk denying Defense Motion to Dismiss for failure to provide required authorization).
5. Senate Bill 3, Section 5 (enacting O.C.G.A. § 9-11-68).
6. Senate Bill 3, Section 6 (enacting O.C.G.A. § 24-3-37.1).
7. Senate Bill 3, Section 7 (striking O.C.G.A. § 24-9-67 and enacting a new O.C.G.A. § 24-9-67 and enacting O.C.G.A. § 24-9-67.1).
8. 509 U.S. 579 (1993).
9. 522 U.S. 136 (1997).
10. 526 U.S. 137 (1999).
11. 528 U.S. 440 (2000).
12. A Westlaw search conducted on August 7, 2005 (query: daubert /s merrell) yielded the following results: citation in 10 United States Supreme Court cases; 1064 federal court of appeals cases; 1973 federal district court cases; and 1609 state court cases. There are also 3688 documents listed in response to the same search in the "Journals and Law Reviews" database.
13. *Daubert v. Merrell Dow Pharm., Inc.*, 727 F. Supp. 570, 572 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated and remanded*, 509 U.S. 579 (1993).
14. *Daubert v. Merrell Dow Pharm., Inc.*, 951 F.2d 1128 (9th Cir. 1991), *vacated and remanded*, 509 U.S. 579 (1993).
15. 293 F. 1013 (D.C. Cir. 1923).
16. The Court interprets the legislatively-enacted rules as it would any statute. *Daubert*, 509 U.S. at 587.
17. *See, e.g.*, Judge Janine M. Kern, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: "Gatekeeping" or Industry "Safekeeping?"*, 43 S.D. L. REV. 566, 575 (1998).
18. In picking and choosing between various of the Federal Rules of Evidence, the Legislature adopted a rule that is, in fact, internally inconsistent.
19. 215 Ga. App. 587, 592-93, 452 S.E.2d 159, 165 (1994).
20. 219 Ga. App. 690, 693, 466 S.E.2d 601, 604-05 (1995).
21. 237 Ga. App. 292, 294, 514 S.E.2d 448, 451 (1999).
22. *Orkin Exterminating Co. v. Carder*, 258 Ga. App. 796, 575 S.E.2d 664 (2002), *cert. granted* on whether to adopt the *Daubert* rule (Apr. 29, 2003), *cert. vacated* (Sept. 8, 2003); *Jordan v. Georgia Power Co.*, 219 Ga. App. 690, 466 S.E.2d 601 (1995), *cert. granted* on whether to adopt the *Daubert* rule (Apr. 12, 1996), *cert. vacated* (Nov. 22, 1996).
23. *Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 259, 416 S.E.2d 277, 278 (1992); *King v. Browning Co.*, 246 Ga. 46, 47-48, 268 S.E.2d 653, 655 (1980).
24. 249 Ga. 519, 292 S.E.2d 389 (1982).
25. *Id.* at 525-26, 292 S.E.2d at 395-96.
26. *Orkin Exterminating Co. v. McIntosh*, 215 Ga. App. 587, 593, 452 S.E.2d 159, 165 (1994) (quoting *Harper*, 249 Ga. at 525, 292 S.E.2d at 395).
27. *See, e.g.*, *McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005) (holding that a judge does not fulfill his gatekeeping responsibilities if he merely concludes that he lacks sufficient knowledge of the scientific issues to exclude the evidence).
28. In fact, the *Joiner* opinion itself contributed to the controversy when it muddled the distinction between methodology and conclusions. *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("But conclusions and methodology are not entirely distinct from one another.").
29. As one commentator noted:
One unexpected development has been *Daubert's* disparate impact in civil and criminal cases. The notion that expert testimony in criminal and civil cases should be treated differently does not seem to be a remarkable proposition. . . .
What is remarkable is that stricter admissibility standards would apply in civil cases than in criminal cases.
Paul C. Giannelli, *Daubert Revisited*, 41(3) CRIM. L. BULL. 5, at 302, 309 (2005).
30. O.C.G.A. § 24-2-1 (2005).
31. FED. R. EVID. 401.
32. *See Quinn v. State*, 255 Ga. App. 744, 747, 566 S.E.2d 450, 453 (2002) ("But the United States Supreme Court's interpretation of Rule 403 of the federal rules is not binding on this court as to the admissibility of similar crimes or extrinsic acts evidence."), *overruled in part by Ross v. State*, 279 Ga. 365, 366, 614 S.E.2d 31 (2005) ("Although the Supreme Court . . . was interpreting Federal Rule of Evidence 403, it is similarly the law of this State that 'relevant evidence' may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." " ") (quoting *Hicks v. State*, 256 Ga. 715, 720, 352 S.E.2d 762, 771 (1987)).
33. O.C.G.A. § 24-9-67.1(c)(2) (2005).
34. *Id.*
35. If a hearing is held in federal court, it is typically held pursuant to FED. R. EVID. 104, a provision in the federal rules that has no parallel in Georgia.
36. 526 U.S. 137 (1999).
37. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe County*, 402 F.3d 1092, 1113 (11th Cir. 2005); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000); *but see McClain v. Metabolife Int'l, Inc.*, 401 F.3d 1233, 1238 (11th Cir. 2005) ("Although the trial court conducted a *Daubert* hearing, and both witnesses were subject to a thorough and extensive examination, the court ultimately disavowed its ability to handle the *Daubert* issues. This abdication was in itself an abuse of discretion."). Thus, merely holding a hearing is not sufficient.
38. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 600 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).

39. *Id.* at 601.
40. See generally MOLLY TREADWAY JOHNSON ET AL., EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS, SF78 A.L.I.-A.B.A. (2001); Carol Krafka et al., *Judge and Attorney Experiences, Practices, and Concerns Regarding Expert Testimony in Federal Civil Trials*, 8 PSYCHOL., PUB. POL'Y & L. 309 (2002).
41. See Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 L. & HUM. BEHAV. 433 (2001); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Margaret Bull Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?*, 85 J. APPLIED PSYCHOL. 574 (2000); Gary L. Wells, *Naked Statistical Evidence of Liability: Is Subjective Probability Enough?*, 62 J. PERSONALITY & SOC. PSYCHOL. 739 (1992); see also Jerome P. Kassirer & Joe S. Cecil, *Inconsistency in Evidentiary Standards for Medical Testimony*, 288 JAMA 1382, 1382 (2002) ("The courts appear to be asserting standards that they attribute to the medical profession, but that are inconsistent and sometimes more demanding than actual medical practice.").
42. Compare *Rider v. Sandoz Pharm. Corp.*, 295 F.3d 1194 (11th Cir. 2002) (Parlodel; summary judgment to defendants on medical causation) with *Brasher v. Sandoz Pharm. Corp.*, 160 F. Supp. 2d 1291 (N.D. Ala. 2001) (Parlodel; summary judgment on medical causation denied) and *Globetti v. Sandoz Pharm. Corp.*, 111 F. Supp. 2d 1174 (N.D. Ala. 2000) (same).
43. Margaret M. Berger, *Upsetting the Balance Between Adverse Interests: The Impact of the Supreme Court's Trilogy on Expert Testimony in Toxic Tort Litigation*, 64 L. & CONTEMP. PROBS. 289 (2001).
44. *Id.* at 302.
45. See 95 AM. J. PUB. HEALTH (Supp. 1 2005).
46. Am. Pub. Health Ass'n Res. 2004-11 (adopted Nov. 2004).

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By Donald W. Benson
and Stephanie M. Bauer

New Growth Industry:

Racing to Georgia Courts Over Non-Competition Agreements

Employers and employees with multi-state noncompete contracts may want to lace up their best pair of running shoes and get ready for a race. On April 1, 2005, in *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*,¹ the Eleventh Circuit Court of Appeals revised a ruling of the United States District Court, Southern District of Georgia, that an employer's noncompete agreement was unenforceable only in Georgia. The employee initiated the case in Georgia in order to take advantage of the pro-employee Georgia law regarding non-compete and non-solicitation covenants (NCAs).

The Eleventh Circuit extended the unenforceability to any other lawsuits regarding the NCA between the same parties, *even if such other lawsuits are filed outside of Georgia*. Most importantly, this ruling may provide an avenue of escape from an otherwise valid NCA to employees who can relocate to Georgia and are willing to preemptively bring a declaratory judgment action in Georgia.

Because so many of these cases would be removable to federal court on the basis of diversity of citizenship, the *Palmer & Cay* decision is attracting significant attention nationwide by confirming that federal courts sitting in diversity in Georgia will issue declaratory judgments in NCA disputes that are as broad in scope as those rendered by Georgia state courts. Although the *Palmer & Cay* case continues as the Defendant filed a Notice of Petition for Writ of Certiorari to the United States Supreme Court,² the debate it is creating among commentators is likely to focus more and more attention on the importance of winning the race to the courthouse.



FACTUAL BACKGROUND

Marsh & McLennan Companies, Inc. (MMC) bought the brokerage that employed James Meathe in 1997. As part of the sale and transition, Meathe sold his shares in the acquired brokerage and accepted employment with MMC, ultimately becoming managing director and head of the Midwest Region of

MMC and (according to MMC) relocating to Illinois.³ In 1997, in connection with the sale of his interest in MMC, Meathe executed a stock sales agreement containing an NCA (the 1997 Agreement). In 2002, in order to be able to cash in MMC stock options, Meathe signed another NCA that was triggered upon the termination of his employment with MMC (the 2002 Agreement). In February of 2003, Meathe left MMC, relocated to Georgia, and joined Palmer & Cay in allegedly direct competition with MMC in both Georgia and his former Midwest territory.

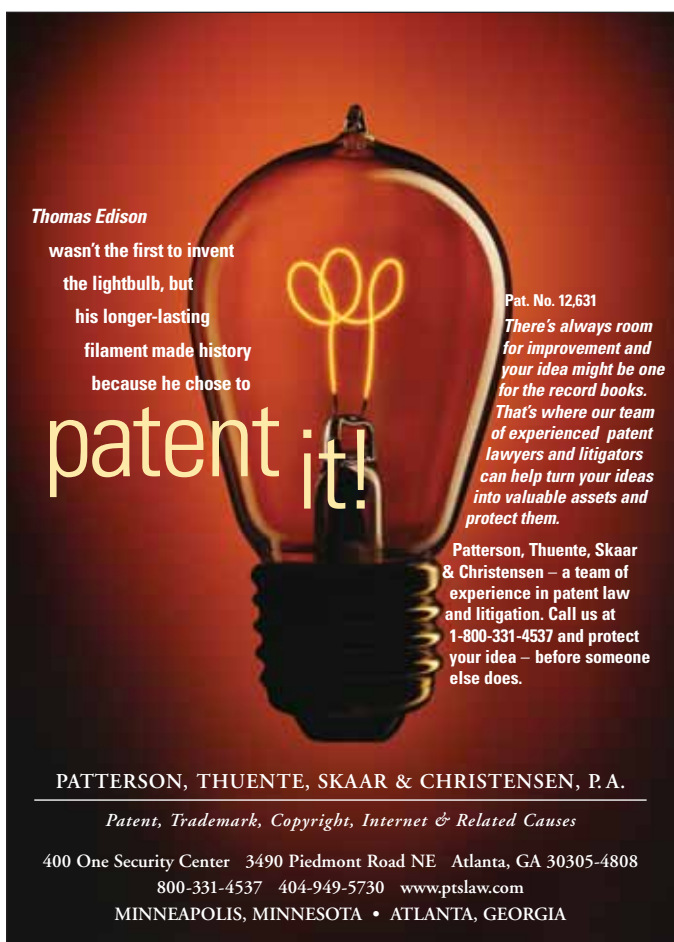
The 1997 Agreement included a provision preventing Meathe from soliciting or accepting unsolicited business for a specified time from any clients or prospects of MMC who were solicited by Meathe while with the company:

(b) Each Seller who is not a director of the Company as of the date hereof hereby agrees that during the Non-Solicit Period, such Seller will not (x) solicit, accept or service business that competes with businesses conducted by the Company, Buyer or any of their Subsidiaries (i) from any clients or prospects of the Company or its affiliates who were solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related to such clients or prospects or (ii) from any former client who was such within two (2) years prior to such termination and who was solicited directly by Seller or where Seller supervised, directly or indirectly, in whole or in part, the solicitation activities related

to such former client; or (y) solicit any employee of the Company or its affiliates to terminate his employment.⁴

The 2002 Agreement included a similar prohibition against accepting unsolicited business from clients of the company who were directly or indirectly solicited or serviced by employee within two years prior to the termination of employment. In it, Meathe agreed that he would not:

(a) solicit or accept business of the type offered by the Company during my term of employment with the Company, or perform or supervise the performance of any services related to such type of business, from or for (i) clients or prospects of the Company or its affiliates who were solicited or serviced directly by me or where I supervised, directly or



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indirectly, in whole or in part, the solicitation or servicing activities related to such clients or prospects; or (ii) any former client of the Company or its affiliates who was such within two years prior to my termination of employment and who was solicited or serviced directly by me or where I supervised, directly or indirectly, in whole or in part, the solicitation or servicing activities related to such former clients; . . . ⁵

To take advantage of Georgia's anti-NCA precedent, Meathe and his new employer, Palmer & Cay, filed a declaratory judgment action in the federal district court in Savannah, Georgia, seeking an order that both the 1997 stock sale NCA and his 2002 employment-related NCA were unenforceable. MMC counterclaimed for enforcement of both agreements.

Although both the 1997 and 2002 Agreements contained forum selection clauses, the district court found that the parties had waived these contractual rights by litigating the merits of the claims, counterclaims, and defenses without challenging venue:

As a preliminary matter, the parties have waived any "New York," contractually forum-selected, venue rights they might hold. Plaintiffs did so by filing its case here; MMC did so by Answering, Counterclaiming and litigating the merits without challenging venue.⁶

Unenforceability of the 2002 Agreement

Georgia is one of the most difficult states for an employer to obtain enforcement of an employment-related NCA. Georgia will not "blue pencil" an overly broad,

employment-related NCA to enforce it to the extent reasonable.⁷ The 2002 Agreement did not arise contemporaneously with Meathe's sale of stock (and was thereby employment-related), and the NCA was in essence a non-solicitation of customers covenant without a geographic restriction. A non-solicitation covenant that prohibits the solicitation of an employer's clients that the employee actually contacted as part of their job for a business purpose can be enforceable without a geographic restriction.⁸ Such an NCA can even extend to prospective customers where some business relationship was established by the employee as a part of the job.⁹

Unfortunately for MMC, although a non-solicitation NCA may be enforceable in Georgia without a geographic limit, it is not enforceable if the same restriction also precludes the former employee from accepting unsolicited business.¹⁰ Such restrictions without a geographic territory can only restrict affirmative actions by the former employee.¹¹ If the employer wants to prevent the acceptance of unsolicited business, then the non-solicitation clause must specify a geographic territory, thereby essentially transforming it into a non-competition restriction.

The district court declared unenforceable the 2002 employment-related NCA preventing Meathe from accepting unsolicited business,¹² and the Eleventh Circuit affirmed.¹³

The 1997 Agreement

The 1997 Agreement contained a nearly identical NCA that was not limited by a geographic territory and restricted the solicitation of customers and prospective customers

on whom Meathe called while employed.¹⁴ While such an NCA would appear to be unenforceable for the same reasons as the NCA in the 2002 Agreement, the fact that the covenant appeared in a stock sale agreement and not in an agreement that was employment-related affected the court's analysis.

Although Georgia law is quite antagonistic to employment-related NCAs,¹⁵ Georgia courts apply a lower level of scrutiny to NCAs ancillary to the sale of a business and will reform, or "blue pencil," those objectionable portions of such NCAs to enforce them to the extent allowed by Georgia law.¹⁶ Consequently, the first step for the *Palmer & Cay* Court was to determine whether the covenant in the 1997 Agreement should be classified as ancillary to employment or to the sale of a business.

If a stock sale occurs at the same time that an employee joins the buying company, Georgia law has its own peculiarities for determining whether the NCA in a stock agreement is entitled to the lower blue-pencil standard or the stricter standards for employment-related NCAs. Georgia analyzes the bargaining capacity of the seller to determine if it is more like the bargaining power of a business owner or an employee.¹⁷ The court will look to the facts of each situation, including whether there was consideration independent of employment for the NCA, the relative size of the seller's stock holding in the acquired company, the realistic power of seller's stock in a closely held corporation, and whether the seller had exercised control over the decision to pursue a merger or taken part in merger negotiations.¹⁸

Palmer & Cay and Meathe argued that the 1997 Agreement

should be treated as an employment agreement and the NCA be given strict scrutiny because the start of the non-solicitation period under the covenant was linked to the termination of Meathe's employment. The district court agreed, granting judgment on the pleadings in favor of Palmer & Cay and Meathe.¹⁹ The Eleventh Circuit rejected this argument, however, finding that "the link between the start of the non-solicitation period and Meathe's termination of employment is alone insufficient to allow us to conclude, at the pleading stage, that the 1997 Agreement, entitled 'Stock Purchase Agreement,' is a contract ancillary to employment."²⁰ Accordingly, the court remanded to the district court for further findings of fact.

SCOPE OF DECLARATORY JUDGMENT

The district court, perhaps mindful of having been reversed in an earlier case for granting nationwide injunctive relief against enforcement of an invalid NCA under similar circumstances,²¹ granted a declaratory judgment to plaintiffs Meathe and Palmer & Cay, finding the NCAs to be unenforceable *in Georgia*, and enjoined MMC from enforcing them against Meathe *in Georgia*.²² Thus, the territorial scope of both the declaratory judgment and the injunctive award were similarly limited to the state of Georgia by the district court. This appeared to leave open the possibility that, if MMC could obtain jurisdiction over Meathe in some other jurisdiction, the company could sue him for competitive activities outside of Georgia and obtain a favorable ruling in accor-

dance either with the other jurisdiction's law or the parties' agreed upon choice of law provisions in the 1997 and 2002 Agreements.²³

The Eleventh Circuit reversed the district court's territorial limitation of its declaratory judgment as to the 2002 Agreement. A federal court sitting in diversity in a state declaratory judgment action would apply that state's interpretation of its declaratory judgment statute's effect on claim and issue preclusion, unless that state's law conflicts with federal interests.²⁴ The Eleventh Circuit cited a Georgia case, *Hostetler v. Answerthink*,²⁵ involving a race to state courts in Georgia and Florida, in which the Georgia court was the first to issue a final declaratory judgment, fully resolving all issues and claims that the parties actually brought or could have brought based on the events before the court.²⁶ Because Georgia does not limit its declaratory judgments in employment-related NCA cases, the federal court sitting in diversity would adopt an equally broad (i.e., worldwide) scope for the declaratory judgment with respect to its issue and claim preclusion effects.

In essence, the Eleventh Circuit clarified that the declaratory judgment issued as to the 2002 Agreement fully resolved the dis-

pute between the parties based on the agreements and the facts alleged in the lawsuit. Although injunctive relief would not be issued on a nationwide basis due to limits in the federal statutory basis of injunctive authority, as confirmed in the earlier *Keener* case,²⁷ the declaratory judgment fully resolved the dispute wherever the parties may be, not just as to claims and issues presented in a Georgia state or federal court.²⁸

GROWTH INDUSTRY IN FORUM SHOPPING

Suppose an NCA is enforceable under Alabama's but not Georgia's substantive law on NCAs. Before *Palmer & Cay*, it was clear that if the employer could obtain jurisdiction in Alabama over its former employee now living in Georgia, the NCA would likely be enforced by an Alabama court, particularly if the agreement includes an Alabama choice of law clause. It was also clear that, if the same employee located in Georgia were sued in Georgia, a Georgia court applying Georgia law would not enforce the agreement, even if the agreement stated that Alabama law was to apply. Georgia's choice of law principles require its courts to

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As parties continue to assess the usefulness of the *Palmer & Cay* decision in avoiding NCAs, one message is clear: pro-active, aggressive litigation strategies have grown even more important for employers.

analyze such choice of law provisions by first determining whether the NCA is enforceable under Georgia law.²⁹ The strong Georgia public policy against NCAs would not allow a Georgia court to enforce an NCA contrary to that policy, despite a choice of law provision in the NCA. A federal court in Georgia hearing a case based on diversity jurisdiction would also apply Georgia law to such a contract dispute.

What was not clear prior to *Palmer & Kay* was whether the employee could gain anything by preemptively rushing to court in Georgia for a judgment declaring the NCA unenforceable under Georgia law.³⁰ Would that protect him only from suit in Georgia? Could he still be sued elsewhere for his prior competition outside of Georgia? *Palmer & Cay* now indicates that, in the Eleventh Circuit, the employee obtaining such a final declaratory judgment would be protected if he were simultaneously or later sued outside of Georgia, whether or not his competitive activities were restricted to Georgia. Rushing to court in Georgia assures that Georgia's substantive restrictions against NCAs will many times find an NCA unenforceable, even if courts in the state in which it was originally signed and drafted would reach a different conclusion.

RESPONDING WITHIN AND OUTSIDE OF GEORGIA

Employees can more easily relocate if their former territories include states like Georgia, or if their job can be performed primarily by telephone or Internet from any state. An employer with operations near Georgia should consider the likelihood of such relocations and draft its NCA provisions with an eye toward enforceability in Georgia, not just the current location of its employee. Companies often send "cease and desist" letters prior to an enforcement action. Now, prolonged letter writing may no longer be a useful tactic against a former employee willing to rush to the courthouse to obtain a declaratory judgment in a favorable jurisdiction.

Waiving venue and forum selection clauses may decide a case's outcome. Litigants must balance the merits of a forum where jurisdiction is easily obtained and where docket pressures allow for a quick hearing on a temporary restraining order (TRO) to be set against the importance of a forum applying favorable law. Employers may face multiple lawsuits, progressing in different forums. Litigation strategy must recognize that it is not the first court that enters a TRO or preliminary injunction, but the first to

enter a final judgment that will have its judgment followed in other jurisdictions.³¹

Consequently, employers may be forced to aggressively fight any Georgia litigation until a final judgment can be obtained outside Georgia in a forum willing to apply the NCA's choice of law provisions. Conversely, companies seeking to help a new employee avoid the enforcement of an NCA might pursue a declaratory judgment that it is unenforceable by rushing to a state or federal court in a state, like Georgia, whose laws disfavor NCAs.

In response to this development, an ounce of prevention may be worth a pound of cure, even for employers in jurisdictions that have not faced the issue yet. Employers should carefully examine their contracts to make sure that they include useful forum selection, consent to jurisdiction, and choice of law provisions. Recognizing that some choice of law provisions may not be enforced in declaratory judgment actions brought in Georgia, could the employer prevent a declaratory judgment preemptive strike by providing in a forum selection clause that all disputes must be brought in a specific forum, with parallel consents to jurisdiction and service?

FORUM SELECTION CLAUSES

The next major battle in Georgia may be over the enforceability of forum selection clauses in employment-related NCA cases. The dicta of two Georgia cases may indicate a willingness to refuse enforcement of forum selection clauses where enforcement would result in application of a choice of law pro-

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vision contrary to the public policy of Georgia disfavoring restraints on trade.

In *Iero v. Mohawk Finishing Products, Inc.*,³² a forum selection clause in a non-competition covenant was enforced by the Georgia Court of Appeals because Iero did not show that the clause was “unreasonable under the circumstances.”³³ Unfortunately, Georgia courts have shed little light on what constitutes “unreasonable under the circumstances.” Georgia courts consider more than whether the chosen forum would be merely inconvenient for one of the litigants, but also whether there is evidence of “fraud, undue influence or overweening bargaining power.”³⁴

Although *Iero* enforced a forum selection clause, the court noted that it was leaving open the issue of whether a forum selection clause would be unenforceable in Georgia as against public policy on a different factual record.³⁵ The Georgia Court of Appeals pointed out that the United States Supreme Court has noted “certain contractual forum selection clauses may be held unenforceable if such clause contravenes ‘a strong public policy of the forum in which the suit is brought, whether declared by statute or by judicial decision.’”³⁶ Perhaps this indicates that the Georgia courts will someday consider whether a forum selection clause is unenforceable because it damages the litigants by applying unfavorable law contrary to Georgia public policy in the selected forum, which the *Iero* Court expressly noted was an argument not raised by Iero.³⁷

A second Georgia Court of Appeals decision in *Hulcher v. R.J. Corman Railroad Co.*³⁸ also noted in

dicta that the *Iero* appellant “failed to carry the burden of showing how the application of New York law would be contrary to the public policy of Georgia and that ‘enforcement of his employment contract would be unreasonable under the circumstances.’”³⁹ The *Hulcher* decision seems to be willing to consider whether a forum selection clause may fail if it dictates an objectionable choice of law. The repeated efforts by both opinions to phrase the standard in terms of public policy and to note arguments not raised by those appellants may indicate that the enforceability of such forum selection clauses in employment-related NCA cases may see additional litigation.

As parties continue to assess the usefulness of the *Palmer & Cay* decision in avoiding NCAs, one message is clear: pro-active, aggressive litigation strategies have grown even more important for employers. 



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Endnotes

1. *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404 F.3d 1297 (11th Cir. 2005).
2. *Id.* (Notice of Filing Writ of Certiorari, filed September 6, 2005).
3. Defendant's Opposition to Plaintiffs' Motion For Judgment On The Pleadings, *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, No. CV403-094 (S.D. Ga. Nov. 11, 2003).
4. *Palmer & Cay*, 404 F.3d at 1300.
5. *Id.* at 1301.
6. *Palmer & Cay*, No. CV403-094 (S.D. Ga. Nov. 11, 2003) (order granting Motion for Schedule of Oral Argument).
7. *Id.*
8. *See, e.g., American Software USA, Inc. v. Moore*, 264 Ga. 480, 448 S.E.2d 206 (1994); *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 422 S.E.2d 529 (1992).
9. *See Paul Robinson, Inc. v. Haegel*, 218 Ga. App. 578, 462 S.E.2d 396 (1995). The situation regarding potential customers is not quite so clear where the prior contact was little more than an unsuccessful “cold call.” *Id.*
10. *Habif, Arogeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 498 S.E.2d 346, 353 (1998).
11. *Waldeck v. Curtis 1000, Inc.*, 261 Ga. App. 590, 583 S.E.2d 266 (2003); *Singer v. Habif, Arogeti & Wynne, P.C.*, 250 Ga. 376, 297 S.E.2d 473 (1982);
12. *Palmer & Cay*, No. CV403-094 (S.D. Ga. Nov. 11, 2003) (order granting Motion for Schedule of Oral Argument).
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4. *Palmer & Cay*, 404 F.3d at 1300.
5. *Id.* at 1301.
6. *Palmer & Cay*, No. CV403-094 (S.D. Ga. Nov. 11, 2003) (order granting Motion for Schedule of Oral Argument).
7. *Id.*
8. *See, e.g., American Software USA, Inc. v. Moore*, 264 Ga. 480, 448 S.E.2d 206 (1994); *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 422 S.E.2d 529 (1992).
9. *See Paul Robinson, Inc. v. Haegel*, 218 Ga. App. 578, 462 S.E.2d 396 (1995). The situation regarding potential customers is not quite so clear where the prior contact was little more than an unsuccessful “cold call.” *Id.*
10. *Habif, Arogeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 498 S.E.2d 346, 353 (1998).
11. *Waldeck v. Curtis 1000, Inc.*, 261 Ga. App. 590, 583 S.E.2d 266 (2003); *Singer v. Habif, Arogeti & Wynne, P.C.*, 250 Ga. 376, 297 S.E.2d 473 (1982);
12. *Palmer & Cay*, No. CV403-094 (S.D. Ga. Nov. 11, 2003) (order granting Motion for Schedule of Oral Argument).
13. *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, 404

- F.3d 1297, 1297 (11th Cir. 2005).
14. *Id.* at 1300.
 15. *Id.* at 1303 (citing *White v. Fletcher/Mayo/Assocs., Inc.*, 303 S.E.2d 746, 749 (Ga. 1983)).
 16. *Palmer & Cay*, 404 F.3d at 1303 (citing *Swartz Invs., LLC v. Vion Pharm., Inc.*, 556 S.E.2d 460, 463 (Ga. Ct. App. 2001)).
 17. *See, e.g., Advance Tech. Consultants, Inc. v. Roadtrac, LLC*, 551 S.E.2d 735, 737 (Ga. Ct. App. 2001); *Ward v. Process Control Corp.*, 277 S.E.2d 671, 673 (Ga. 1981).
 18. *Palmer & Cay*, 404 F.3d at 1303 (citing *White*, 303 S.E.2d at 751; *Drumheller v. Drumheller Bag & Supply, Inc.*, 420 S.E.2d 331, 334-35 (Ga. Ct. App. 1992)).
 19. *Palmer & Cay, Inc. v. Marsh & McLennan Companies, Inc.*, No. CV403-094 (S.D. Ga. Nov. 11, 2003) (order granting Motion for Schedule of Oral Argument). Although both agreements contained provisions declaring that the parties had agreed to interpret the contracts according to New York law, the district court looked to Georgia law in determining that the NCAs were unenforceable. The court relied on the decision in *Keener v. Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003), in which the Eleventh Circuit conformed its final judgment to the Supreme Court of Georgia's ruling that it would examine a choice of law provision in an NCA only if it first determined that the NCA did not violate Georgia's public policy. *See Palmer & Cay*, No. CV403-094 at 4-5.
 20. *Palmer & Cay*, 404 F.3d at 1306.
 21. *See Keener v. Convergys Corp.*, 205 F.Supp.2d 1374 (S.D. Ga. 2002), *rev'd*, 342 F.3d 1264 (11th Cir. 2003).
 22. *Palmer & Cay*, No. CV403-094, at 11.
 23. *See supra* note 19 (describing why the district court did not adhere to the choice of law provisions contained in the agreements).
 24. *Palmer & Cay*, 404 F.3d 1297, 1309.
 25. 599 S.E.2d 271 (Ga. Ct. App. 2004).
 26. *Palmer & Cay*, 404 F.3d 1297, 1309 (citing *Hostetler*, 599 S.E.2d at 275, which held that a declaratory judgment from a Georgia court precluded parties from re-litigating issue in simultaneous or subsequent litigation in another state's courts).
 27. *See Keener*, 342 F.3d at 1269.
 28. In *Palmer & Cay*, the District Court erred in ruling that on the pleadings there was no set of facts on which MMC could show that the 1997 Agreement was ancillary to the sale of a business. The Eleventh Circuit remanded for further proceedings regarding the 1997 Agreement. *Palmer & Cay*, 404 F.3d at 1311.
 29. *See supra* note 19 (explaining Georgia law on analyzing choice of law provisions in NCAs).
 30. *See, e.g., Enron Capital & Trade Resources Corp. v. Polasky*, 227 Ga. App. 727, 490 S.E.2d 136, 138 (1997) (holding that a declaratory judgment is available where a legal judgment is sought that would control or direct future action such as ongoing competition and employment).
 31. *See Hulcher Servs., Inc. v. R.J. Corman R.R. Co.*, 247 Ga. App. 486, 489, 543 S.E.2d 461, 464 (Ga. Ct. App. 2000) (holding that not first injunction, but final adjudication of the merits is entitled to res judicata and collateral estoppel).
 32. 534 S.E.2d 136 (Ga. Ct. App. 2000).
 33. *Id.* at 138-39.
 34. *Id.* (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)).
 35. *Iero*, 534 S.E.2d at 138 ("Under these circumstances, Iero fails to show that the mere enforcement of a freely negotiated forum selection clause violates Georgia public policy. Indeed he does not even address whether the New York court would apply New York law. Accordingly, our inquiry is limited to whether enforcement of the forum selection clause is inconvenient or would deprive Iero of his day in court.").
 36. *Id.* (quoting *The Bremen*, 407 U.S. at 15).
 37. *Iero*, 534 S.E.2d at 138 (noting that Iero only argued that the forum selection clause harmed the form, not the litigants.)
 38. 247 Ga. App. 486, 543 S.E.2d 461 (Ga. Ct. App. 2000).
 39. *Id.* at 489, 543 S.E.2d at 464 (quoting *Iero*, 534 S.E.2d at 137).



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Bankruptcy Law Changes Will Affect Business Cases Too:

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

By C. Edward Dobbs and Eric W. Anderson

On April 20, 2005, the president signed into law S.256, titled the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (the Act), which makes sweeping amendments to the current Bankruptcy Code (the Code).¹ While the Act's primary focus is on consumer debtors, and indeed most press coverage of the bill has centered on that aspect, the Act also makes numerous substantive revisions that will have far-reaching effects in business bankruptcy cases. This article will briefly discuss some of those provisions.²

As will be seen, the apparent intent of those changes is to quick-

en the pace of Chapter 11 cases. In addition, in several instances Congress conferred special benefits on certain constituencies in business cases. Finally, it is also apparent that one effect of the amendments will be to increase the liquidity needs of business debtors in the early stages of a Chapter 11 case and upon exit from bankruptcy.

The amendments generally apply to cases filed after Oct. 17, 2005. There are, however, a few notable exceptions that are indicated below.

COMMENCEMENT, DISMISSAL AND CONVERSION OF CASES

Involuntary Cases

Section 303 of the Code has been amended to provide that the holder of a claim against the debtor that is the subject of a *bona fide* dispute "as to liability or amount" is not eligible to be a petitioning creditor.³ Further, in assessing whether the

debtor is "generally not paying such debtor's debts as such debts become due," there is excluded any debt that is the subject of a *bona fide* dispute "as to liability or amount."⁴ These changes subject virtually all claims of a petitioning creditor to challenge by the debtor if there is any *bona fide* dispute, even as to a portion of the amount owed (such as the reasonableness of claims for accrued interest, attorneys' fees or termination charges). As a result, it may be more risky for a creditor to serve as a petitioning creditor in an involuntary case.

Single Asset Real Estate Debtors

Under existing law, certain provisions and procedures apply to "single asset real estate" debtors with total secured debt that is less than \$4 million. The Act removes that debt limit to eligibility for treatment of a case as a single asset real estate case,⁵ thereby opening the possibility for much larger cases to qualify as single asset real estate cases. The Act also requires a debtor in a single asset real estate

case to make monthly payments to secured creditors at the non-default interest rate or on the value of the creditor's interest, and allows payments to be made from rents or other income generated.

Dismissal or Conversion

The Act amends Section 1112(b) of the Code to require the bankruptcy court to convert or dismiss a Chapter 11 case if a movant establishes any one of 16 enumerated acts or omissions that constitute "cause" for such dismissal or conversion, absent specifically identified "unusual circumstances."⁶ Some of the enumerated causal grounds include (i) gross mismanagement of the estate, (ii) failure to maintain appropriate insurance posing a risk to the estate or the public, (iii) unauthorized use of

cash collateral substantially harmful to creditors, (iv) failure to pay post-petition taxes, (v) failure to attend an examination or meeting of creditors without good cause, (vi) failure to file a disclosure statement or confirm a plan within the required time period, (vii) revocation of a confirmation order, (viii) inability to effectuate substantial confirmation of a confirmed plan, (ix) material default under a confirmed plan, or (x) termination of a confirmed plan by reason of a condition specified in the plan.⁷

Furthermore, among a host of new filing and reporting requirements for debtors under amended Section 521, Congress created new provisions mandating conversion or dismissal of a case if the debtor fails to timely file certain post-petition tax returns.⁸ If a debtor does not timely file a tax return or

request an extension to do so, a taxing authority may request dismissal or conversion and, if the debtor does not file the return or obtain an extension within 90 days after the request, the bankruptcy court must dismiss or convert the case, whichever is in the best interests of creditors and the estate. This is one of several provisions in the Act that give important benefits to federal, state and local tax authorities.

An exception to mandatory dismissal or conversion exists if the debtor or another interested party objects and establishes that there is a reasonable likelihood of confirmation within a reasonable time (or within the time frame required for small business cases), the grounds for otherwise granting conversion/dismissal include an act or omission for which there is a reasonable justification and that



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will be cured within a reasonable period of time, and the bankruptcy court finds that no “unusual circumstances” exist establishing that dismissal/conversion is in the best interests of the estate.⁹

In addition, the Act provides that, in lieu of converting or dismissing a case, the court may appoint a trustee or examiner if such appointment is in the best interests of creditors.¹⁰ This provision may well increase the frequency of appointments of Chapter 11 trustees and examiners. Indeed, the appointment of an examiner may be the settlement option of choice for Chapter 11 debtors against which motions to dismiss or convert are filed. The new mandatory dismissal/conversion provisions represent a significant shift in leverage in favor of creditors.

Not only does the Act increase the likelihood of more frequent dismissal/conversion motions, it creates an expedited procedure for hearings on such motions by providing that the court must commence a hearing no later than 30 days after filing of the motion and must render a decision no later than 15 days after the commencement of the hearing on the motion,

absent consent from the movant or other compelling circumstances.¹¹

ADMINISTRATIVE POWERS

Automatic Stay

The new amendments create important new exceptions to the automatic stay. For instance, the stay is made inapplicable to the commencement or continuation of investigations or actions by “securities self regulatory organizations” (such as NASD or the NYSE) to enforce such organizations’ regulatory power or to delist, delete or refuse to permit quotation of any stock that does not meet applicable regulatory standards.¹²

The stay is also made inapplicable to certain pension plan obligations, such as an employer’s withholding from wages and collections of amounts under an agreement with the debtor for the repayment of loans made by plans established by the employer, so long as the amounts withheld are in fact applied to the repayment of the loan.¹³

New Section 362(b)(26) provides that a setoff of income tax refunds for pre-petition tax periods against income tax liabilities for tax periods ending prior to bankruptcy is not subject to the automatic stay, and allows income tax authorities to hold refunds pending resolution of the taxpayer-debtor’s challenge to tax liability.¹⁴

Finally, Section 362(b)(27) creates an exception to the stay to allow setoffs under master netting agreements related to derivatives and other securities.¹⁵ This is one of several changes to the Code designed to accommodate the burgeoning area of financial and derivative contracts.¹⁶

Utilities

The Act enhances the rights of utility providers by allowing a utility to “alter, refuse or discontinue” service if within the 30 days after the petition date it has not received adequate assurance of payment “that is satisfactory to the utility.”¹⁷ The court may modify the amount of assurances required, but in doing so, it may not consider certain facts and circumstances that courts routinely considered prior to the amendments, such as that the utility did not hold security prior to bankruptcy, that the debtor paid for utility services on a timely basis prior to bankruptcy, or that claims for post-petition utility services enjoy administrative expense priority.¹⁸ An administrative expense priority alone does not constitute an adequate assurance of payment, but adequate assurances may be provided by a cash deposit, certificate of deposit, letter of credit, surety bond or prepayment.¹⁹ Finally, a utility may recover or set off against a pre-petition security deposit without notice or court order.²⁰ These changes appear to represent a reaction to what had become an almost routine practice of limiting a utility’s rights under Section 366 in “first-day” orders. The new provisions will give significant leverage to utilities in the early stages of a bankruptcy case and may substantially increase the debtor’s liquidity concerns and financing needs.

CREDITORS AND CLAIMS

State and Local Taxes

The Act makes important and far-reaching changes in favor of

state and local tax authorities. For instance, under previous law a debtor was allowed to pay priority tax claims under a Chapter 11 plan over a period of six years from the date of assessment. Now, payment of priority tax claims under a plan must be made in regular installments in cash over a period not to exceed five years after the date of the order for relief,²¹ and must be paid in a manner "not less favorable than" payments to most favored non-priority unsecured claims under the plan (other than convenience claims).²² Further, secured tax claims that would be priority tax claims if not secured are entitled to the same treatment as priority tax claims.²³

The Act creates a new Section 511, which provides that if a provision of the Code requires the payment of interest on a tax claim or an administrative expense tax (or that the tax claimant receive the "present value" of the allowed amount of its claim), the rate of interest must be at the rate determined under applicable non-bankruptcy law (e.g., the applicable rate under state law on property taxes secured by a lien).²⁴ For taxes paid under a confirmed plan, the applicable interest rate is the rate pegged as of the calendar month in which the plan is confirmed.²⁵

Section 505 of the Code allowed debtors to ask the court to "determine" the amount of various tax liabilities, regardless of when the taxes were assessed. That provision has been amended so that the court now may not determine the amount or legality of an ad valorem property tax (for real or personal property) if the time for contesting or redetermining the tax has expired under applicable non-bankruptcy law.²⁶ This provision is significant because a frequent tactic

of debtors, particularly in Chapter 11 cases, has been to seek redetermination a property tax liability based upon the purchase price obtained in the Chapter 11 liquidation for specific property, as opposed to the possibly higher number previously determined for property tax purposes. This amendment will limit the ability of debtors to obtain such redeterminations.

Priority Claims

In Chapter 11 cases, the Act excludes from a corporate debtor's discharge liabilities associated with a fraudulent tax return or a willful attempt to evade or defeat the tax. The Act enlarges the statutory "look-back" period for wage and benefit priorities under Section 507(a)(4) from 90 to 180 days before filing and increases the combined monetary cap on priority wage and benefit claims from \$4,925 to \$10,000, subject to annual increases. This change is effective for all cases filed on or after April 20, 2005.²⁷ By doubling the time period and dollar amount for wage and benefit priorities, the Act is certainly more "employee friendly." However, the practical impact may be to deplete much needed liquidity for a debtor in the early stages of a Chapter 11 case when employees may pressure the debtor to seek bankruptcy court approval for the payment of pre-petition wages that are now entitled to a priority in greater amounts.

Administrative Expense Claims

Several new categories of administrative expenses were created under the Act. The amendments add the administrative expense priority under Section 503(b)(1)(A) for certain awards by courts or the National Labor

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Relations Board for back pay and benefits for services attributable to post-petition periods, even if no services are performed.²⁸

In another change favorable to tax authorities, the Act amends Sections 503(b)(1)(B) and (D) to include both secured and unsecured property taxes incurred by the estate, whether liability is *in rem* or *in personam*,²⁹ and further provides that a taxing authority is not obligated to file a request for payment in order for allowance of that type of claim as administrative expense.³⁰

The Act does contain a few provisions helpful to debtors. In cases where the debtor assumes, then subsequently rejects, an unexpired lease of non-residential real property, the Act creates a cap on the landlord's administrative claim arising from that rejection, limited to the amount of all monetary obligations due for a two-year period (excluding penalties or amounts arising from a failure to operate), less amounts recovered from guarantors or other sources.³¹

New Section 503(b)(8) creates an administrative expense priority for the actual necessary costs incurred by the trustee or governmental agencies in closing a healthcare business, including disposing of patient records and transferring patients to another healthcare facility.³²

Favorable treatment is afforded by the Act to unsecured trade vendors, which are given an administrative claim for the "value" of goods sold to a debtor (whether or not insolvent at the time) in the ordinary course and received by the debtor within 20 days prior to bankruptcy.³³ For debtors who are placed on "cash on delivery" or "cash in advance" basis by their suppliers during the 20-day period prior to bankruptcy, this amend-

ment will have little effect. However, it is not unusual for business debtors to "ride the trade" in the months or weeks before bankruptcy, with the result that trade debt is substantially increased in amount and the collateral position of the debtor's inventory lender potentially increased, to the chagrin of the trade vendors. This amendment will increase the upfront costs of exiting a Chapter 11 case for debtors that run up substantial trade debt to suppliers within the 20-day period before they file for Chapter 11 relief. In addition, the presence of these claims may result in the "administrative insolvency" of some Chapter 11 debtors, increasing the possibility of dismissal or conversion of their Chapter 11 cases.

THE ESTATE AND AVOIDING POWERS

Executory Contracts and Leases

Pre-amendment case law was divided on the question of whether a debtor was obligated to cure non-monetary defaults in a lease as an executory contract as a condition to assumption, particularly when the default was "impossible" to cure. The Act eliminates any requirement to cure those type of defaults under unexpired leases of real estate, except defaults caused by the failure to operate in accordance with the terms of a non-residential lease.³⁴ Instead, these non-monetary defaults must be cured by performance at and after the assumption date and the lessor must be compensated for any pecuniary losses resulting from breach or default.³⁵

Further, the initial period within which a debtor must assume or reject leases of non-residential real property has been lengthened to 120 days (from 60 days),³⁶ with only one 90-day extension for cause permitted without lessor's consent, and in any event assumption or rejection is required on or before confirmation date.³⁷ This amendment is designed to preclude a debtor from seeking, and a court from granting, repeated extensions of time to assume or reject leases of non-residential real property. This limitation to a maximum of 210 days in the aggregate within which a debtor may assume a non-residential real property lease will be particularly significant in large debtor cases, especially those involving debtors operating a number of retail stores.

Seller Reclamation Rights

Unpaid trade vendors and other sellers of goods to debtors have been given improved rights and remedies under the Act. The Uniform Commercial Code generally provides sellers of goods on credit with the right to reclaim those goods from an insolvent buyer if the seller delivers appropriate and timely notice to the insolvent buyer.³⁸

The Act extends the time for a reclaiming seller to make written demand for reclamation from 10 to 45 days after an insolvent debtor's receipt of goods (or, if the 45-day period expires after the petition date, within 20 days after the petition date).³⁹ Consistent with existing case law, the Act clarifies that those reclamation rights are subject to prior rights of lienholders. Although the Act prohibits a court from granting the seller an admin-

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New Section 503(c) prohibits retention and severance programs for “insiders” of the debtor unless they have a bona fide job offer from another business at the same or greater rate of compensation and the services provided by the insider are “essential to the survival” of the business.

istrative claim in lieu of reclamation, an unpaid vendor that does not seek or is not entitled to reclamation will nevertheless receive an administrative claim under new Section 503(b)(9) for any goods delivered to the debtor within 20 days of the petition date.⁴⁰

Voidable Transfers — Preferences

The Act closes the perceived loophole left by the 1994 amendments to the Code that attempted to override the well-known case of *In re DePrizio*.⁴¹ That case held that transfers made during the extended one-year insider preference period to non-insider lenders on account of loans guaranteed by insiders were preferential and could be recovered from the non-insider lenders. Some courts and commentators interpreted the 1994 amendments to exempt only “payments” made to non-insider creditors⁴² and not to other transfers, such as grants of security interests in property of the debtor during the extended insider preference period. To remove any lingering doubt about the earlier “DePrizio fix,” the Act clarifies that any preferential transfer to a non-insider creditor during the 90-day to one-year period preceding the petition date may not be avoided. This provision is effective for all cases filed on or after April 20, 2005.⁴³

Trade vendors (and other creditors) made gains in the preference area as well. A preference defendant now may invoke the “ordinary course of business defense” by demonstrating that the transfer was (i) in payment of a debt incurred in the ordinary course of business between the debtor and transferee, and (ii) that the transfer was made *either* (x) in the ordinary course of business between the debtor and transferee *or* (y) according to ordinary business terms.⁴⁴ Under current law, both of the latter two tests were required to be satisfied, as opposed to being alternatives, which many times made the defense very difficult to establish, especially without the testimony of an industry expert.

A debtor’s ability to set aside liens as preferential transfers was also curtailed under the Act. The Act extends the safe-harbor period within which a creditor may perfect a purchase money security interest from 20 to 30 days after the debtor’s receipt of the assets⁴⁵ and extends to 30 days (from 10 days) the time within which to perfect all other security interests.⁴⁶

The Act amends 28 U.S.C. § 1409(b) to provide that an action to avoid a nonconsumer debt against a noninsider defendant for less than \$10,000 must be filed in the district in which the defendant resides, thereby depriving the trustee of the home court advantage.

Voidable Transfers — Fraudulent Transfers

The so-called “reach back” period for setting aside fraudulent transfers and obligations is extended by the Act from one to two years, effective for all cases filed on or after April 20, 2005.⁴⁷ Further, the trustee may now avoid as a fraudulent transfer a pre-bankruptcy transfer to an insider under an employment contract not in the ordinary course of business, unless the recipient gave “reasonably equivalent value,” without any necessity for the trustee to allege fraudulent intent or any of the financial criteria for a constructive fraudulent transfer, such as insolvency. This provision is effective for all cases filed on or after April 20, 2005.⁴⁸

Under new Section 548(e), a trustee may avoid a transfer within 10 years prior to bankruptcy that was made by the debtor to a self-settled trust or similar device of which the debtor is a beneficiary, if the transfer was made with the intent to hinder, delay or defraud a person that was or became a creditor of the debtor after the transfer. This provision applies to all cases filed on or after April 20, 2005,⁴⁹ and could have a significant impact upon “estate planning” strategies that involve the establishment of so-called asset-protection trusts.

CHAPTER 11 — OFFICERS AND ADMINISTRATION

Executive Compensation

New Section 503(c) prohibits retention and severance programs for “insiders” of the debtor unless they have a *bona fide* job offer from another business at the same or greater rate of compensation and the services provided by the insider are “essential to the survival” of the business.⁵⁰ Section 503(c)(1)(C) imposes strict formulaic limits on such compensation, based upon similar compensation paid to non-management employees, and imposes a general prohibition on post-petition payments or other transfers to officers, managers or

consultants outside the ordinary course of business and not justified by the “facts and circumstances” of the case.⁵¹ This section of the code attempts to address perceived abuses in the use of key employee retention plans (KERPs), which were previously unregulated by the Code, by restricting both the amount that may be paid and the circumstances under which a bonus may be paid.

Appointment of Trustee/Examiner in Cases of Suspected Fraud

Under new Section 1104(e), applicable to all cases filed on or after April 20, 2005, the U.S. Trustee *must* move for the appointment of a trustee/examiner if “reasonable grounds” exist to suspect that the CEO or CFO (or members of the governing body of the debtor

who selected the CEO or CFO) participated in actual fraud, dishonesty or criminal conduct in the management of the debtor or public financial reporting.

Committees

Creditors committees in Chapter 11 cases are frequently given access to confidential and non-public information that is not always shared with creditors who are not committee members. To provide more access to such information, new Section 1102(b)(3) requires that an official committee must provide “access to information” for, and “solicit and receive comments” from, creditors who hold claims of the kind represented by that particular committee and have not been appointed to the committee. The Act provides that a committee shall be subject to a court

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order that compels additional reporting or disclosure to be made to the creditors.⁵² There are also new provisions that allow a court to direct the U.S. Trustee to change the membership of a committee appointed pursuant to Section 1102(a) of the Code, including requiring the U.S. Trustee to appoint a “small business concern” to the committee if the court determines that the change is necessary to ensure adequate representation of creditors.⁵³

Retention of Investment Bankers

The Act amends the definition of “disinterested person” (in Section 101(14)) by removing all of the references to “investment bankers,” with the result that an investment banker is no longer automatically disqualified under Section 327 solely because it served as an investment banker with respect to an outstanding security of the debtor or any security issued within three years of the bankruptcy filing.⁵⁴ However, the general disinterestedness standard still requires that an investment banker not hold an interest “materially adverse to the interest of the estate or any class of creditors or equity security holders.”⁵⁵

Notices to Creditors

Amendments to Section 342 of the Code add significant new notice requirements for debtors. Notices to creditors must contain the name, address and last four digits of the debtor’s taxpayer identification number and, if the notice relates to an amendment adding “a creditor to the schedules of assets and liabilities,” the debtor’s full taxpayer identification number must be included in the

notice sent to that creditor.⁵⁶ If a creditor, during the 90-day period prior to the initiation of a voluntary case, in at least two communications with the debtor, provides the debtor’s account number and the address to which the creditor desires to receive “correspondence,” the debtor must send notices under the Code to such address and include the account number in the notices.⁵⁷ Any notice not given in accordance with the requirements of amended Section 342 is not effective until it is “brought to the attention of” the creditor and, if the creditor has established internal procedures for dealing with such bankruptcy notices (by designating a person or organizational subdivision to be responsible for receiving notices), the notice will not be deemed to have been brought to the attention of the creditor until the notice is actually received by the person or subdivision designated in those procedures to receive such notices.⁵⁸ While these notice provisions appear benign on their face, they may create headaches for debtors in large Chapter 11 cases attempting to provide adequate and effective notice to hundreds or thousands of creditors.

CHAPTER 11 — PLANS AND CONFIRMATION

Exclusivity

To address perceived excesses in repeated extensions “for cause” of a debtors “exclusivity” period to proposed and confirm a Chapter 11 plan, the Act amends Section 1121(d) to limit the plan exclusivity period (currently 120 days) to 18 months from the date the order for

relief is entered and the exclusive period for solicitation of votes (currently 180 days) to 20 months.⁵⁹ These unextendable time restrictions could decrease incentives for negotiation of consensual plans, as recalcitrant creditors may elect to “wait out” the debtor until they have the right to file a creditor plan.

Prepackaged Plans


Recognizing the increasingly common practice of “prepackaged” plans in Chapter 11 cases (that is, reorganization plans that have been drafted, negotiated and voted upon prior to the debtor filing its petition, and which generally pass through Chapter 11 very quickly), Congress amended the Code to allow a debtor to continue soliciting acceptances of its “prepackaged plan” subsequent to bankruptcy even if there is not a court-approved disclosure statement. However, the solicitation (whether occurring prior to or after bankruptcy) must be in accordance with applicable non-bankruptcy law.⁶⁰ In the case of a pre-bankruptcy solicitation, the bankruptcy court, for cause, may order the U.S. Trustee not to convene a meeting of creditors or equity security holders.⁶¹

CHAPTER 15 — OTHER CROSS-BORDER CASES

The Act repeals the ancillary proceeding provisions of Section 304 and creates a new Chapter 15 to “provide effective mechanisms for dealing with cases of cross-border insolvency.”⁶² Chapter 15 largely incorporates the model law on cross-border insolvencies promulgated in the United Nations Commission on International Trade Law in 1997. Chapter 15

allows a foreign representative to commence in a U.S. bankruptcy court an ancillary proceeding of a foreign insolvency proceeding to protect, recover and liquidate assets in the U.S. of the debtor in the foreign proceeding. With the increased globalization of commerce, it is anticipated that such ancillary proceedings will be more frequently used.

CONCLUSION

The Act is the most comprehensive revision of our bankruptcy laws since The Bankruptcy Reform Act of 1978. The law's primary target was to correct perceived abuses in the burgeoning area of consumer bankruptcy cases. However, as this article has highlighted, Congress also made many important changes to the Code applicable to business cases. Creditors, shareholders and debtors will all be affected by the Act's broad reach. 



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Endnotes

1. 11 U.S.C. §§ 101, *et seq.*, (2005).
2. This summary does not cover all of the changes made by the Act to the Bankruptcy Code or that might impact business bankruptcy cases. In addition, this summary should not be looked upon as an expression of legal opinions by the authors as to the scope, applicability or effect of any provision of the Act to any specific set of facts.
3. 11 U.S.C. § 303(b)(1).
4. 11 U.S.C. § 303(h)(1).
5. 11 U.S.C. § 101(51B).
6. 11 U.S.C. § 1112(b)(4).
7. *Id.*
8. *See* 11 U.S.C. § 521(j).
9. 11 U.S.C. § 1112(b)(2).
10. 11 U.S.C. § 1104(a)(3).
11. 11 U.S.C. § 1112(b)(3).
12. 11 U.S.C. § 362(b)(5).
13. 11 U.S.C. § 362(b)(19).
14. 11 U.S.C. § 362(b)(26).
15. 11 U.S.C. § 362(b)(27).
16. *See, e.g.*, 11 U.S.C. §§ 556-62.
17. 11 U.S.C. § 366(c)(2).
18. 11 U.S.C. § 366(c)(3).
19. 11 U.S.C. § 366(c)(1).
20. 11 U.S.C. § 366(c)(4).
21. 11 U.S.C. § 1129(a)(9)(C)(ii).
22. 11 U.S.C. § 1129(a)(9)(C)(iii).
23. 11 U.S.C. § 1129(a)(9)(D).
24. 11 U.S.C. § 511(a).
25. 11 U.S.C. § 511(b).
26. 11 U.S.C. § 505(a)(2)(C).
27. 11 U.S.C. §§ 507(a)(4) and (a)(5).
28. 11 U.S.C. § 503(b)(1)(A).
29. 11 U.S.C. § 503(b)(1)(B).
30. 11 U.S.C. § 503(b)(1)(D).
31. 11 U.S.C. § 503(b)(7).
32. 11 U.S.C. § 503(b)(8).
33. 11 U.S.C. § 503(b)(9).

34. 11 U.S.C. § 365(b)(1)(A).
35. *Id.*
36. 11 U.S.C. § 365(d)(4)(A).
37. 11 U.S.C. § 365(d)(4)(B).
38. *See generally* O.C.G.A. § 11-2-702.
39. 11 U.S.C. § 546(c).
40. *Id.*
41. 874 F.2d 1186 (7th Cir. 1989).
42. 11 U.S.C. § 550 (c).
43. 11 U.S.C. § 547(i).
44. 11 U.S.C. § 547(c)(2).
45. 11 U.S.C. § 547(c)(3)(B).
46. 11 U.S.C. § 547(e)(2).
47. 11 U.S.C. § 548(a)(1).
48. 11 U.S.C. § 548(a)(1)(B)(iv).
49. 11 U.S.C. § 548(e).
50. 11 U.S.C. § 503(c)(1).
51. 11 U.S.C. § 503(c)(2).
52. 11 U.S.C. § 1102(b)(3).
53. 11 U.S.C. § 1104(a)(4).
54. 11 U.S.C. § 101(14).
55. *Id.*
56. 11 U.S.C. § 342(c)(1).
57. 11 U.S.C. § 342(c)(2).
58. 11 U.S.C. § 342(g).
59. 11 U.S.C. § 1121(d).
60. 11 U.S.C. § 1125(g).
61. 11 U.S.C. § 341(e).
62. 11 U.S.C. § 1501(a).

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From One Georgia to Another

By Sarah I. Bartleson

There are two law students studying at Georgia State University College of Law from Georgia. No, not the state, but the Republic of Georgia—the small country situated where Europe and Asia meet. Tamar Charbadze and Giorgi “Gigi” Liluashvili are here for the semester because of the efforts of the International Connection Program at Georgia State University College of Law.

The International Connection Program invites law students from foreign countries to come to the United States and study for a semester at GSU College of Law. Tamar and Gigi are the third set of students to rely upon the program for an educational opportunity they otherwise would never have.

Professor Charles Marvin, director of the program, and Senior Judge Dorothy Toth Beasley, who has played a central role in the program from the beginning, have

worked closely together on this program since 1993. Both have worked hard and are proud of what the program has accomplished.

History

In July 1993, Judge Beasley wrote a letter to the executive director of the Central and Eastern European Law Initiative (CEELI, now Central European and Eurasian Law Initiative) in Washington describing the idea for such a project, which referenced their discussion the previous May about the possibility of including within CEELI the arrangements for a foreign law student to come and study as a special student at GSU College of Law. She said, “My letter indicated that I had met the day before with Dean Marjorie Girth of the law school and Terrence Croft, president of the Atlanta Bar Association, to talk about it.” Each was enthusiastic and began exploration within their respective realms.

The program was initiated for a couple of different reasons. First, after the fall of the Berlin Wall, the turn toward the West of the



Photos courtesy of Judge Dorothy Toth Beasley and GSU

Tamar Charbadze and Giorgi Liluashvili arrive in Atlanta from the Republic of Georgia via a flight from Paris, courtesy of Delta Airlines.

Warsaw Pact countries formerly in the sphere of influence (not to mention occasional military occupation) of the Soviet Union, and finally the dissolution of the U.S.S.R. itself, the American Bar Association adopted as one of its major goals the promotion of “the rule of law” on a global scale, and established CEELI to help promote law reform, legal and judicial professionalism, and legal education in countries formerly under communism.

In 1992, CEELI invited several dozen deans of law faculties from those countries to come to visit law schools in the United States. They also promoted the idea that sister law school relationships be established

between law schools in countries where CEELI had operations and American law schools. The foreign law dean coming to GSU that fall was Svetlana Kamenova, dean of the Paissii Hilandarski Law Faculty in Plovdiv, Bulgaria. Professor Marvin of Georgia State University then paid a reciprocal visit to Plovdiv during the latter part of the Spring 1993 term, teaching comparative administrative law at the law faculty there. Nothing immediately came of that sister law school relationship probe, since Dean Kamenova soon thereafter was promoted to a position in the Bulgarian national Academy of Sciences in the capital, Sofia, and no follow-up contacts were forthcoming from Plovdiv.

Going Global

After learning that Atlanta would host the 1996 Olympic Games, various businesses and professional associations in the city committed themselves to involvement in various projects promoting international relationships during the lead-up to the games. The Atlanta Bar Association thought it would be a good idea to carry out a joint project with a locally based law school to invite graduates from foreign law faculties to come to Atlanta to obtain transnational law course work and externship training.

There would be a partnership among the bar, an Atlanta-based law school, and perhaps other private sector entities than the bar association itself. After discussions with then dean of the GSU College of Law, Marjorie Girth, an agreement was reached to launch the International Connection Program in 1995. The first two International Connection fellows were chosen. Since GSU and CEELI already had some contacts in Bulgaria, it was decided that the 1995 fellows

Q & A Time With the Fellows

How did you hear about the International Connection Program?

Giorgi: I heard about it from a classmate in law school, who knew that I was searching for a fellowship like this one. I was especially interested when I learned that ABA/CEELI was involved, because their office in the Republic of Georgia, in the capital of Tbilisi where I live. They do so many good things for young Georgian lawyers.

Tamar: I heard about it through the Georgian Young Lawyers Association branch office in Kutaisi, where I live.

Was it hard to apply for the International Connection Program and be accepted?

Giorgi: It was not hard to apply, but it was rather difficult to be accepted.

Tamar: It wasn't too hard to apply, but it was difficult to be a winner (note from Professor Marvin: the applicants had to go to Tbilisi to the CEELI office there and be interviewed. From a short list of six applicants that the CEELI committee cleared through as finalists, the International Connection Committee in Atlanta picked its first two choices to be winners of fellowships, with two alternates as backups. These two accepted the fellowships, so there was no need to follow through with the alternates.)

What is the most important thing so far that you have learned about Atlanta and being in the United States?

Giorgi: This is my first trip to the United States. My impression is that people here in Atlanta work hard and obey the law. It reminds me of what President Kennedy said, "Ask not what your country can do for you, but what you can do for your country." I am also impressed about how important it is for people and companies to pay their taxes.

Tamar: A few weeks in Atlanta is enough to recognize how industrious and lawful the people are here.

How do law classes at Georgia State differ from law classes in your country?

Giorgi: The differences between the law faculties in Georgia and the United States are so great that it is hard to know where to begin my comments. Two things that come to my mind first are that most of the law professors in the United States are highly educated, work full time at that job and are very professional about it, something that is not true in Georgia. And second that there are opportunities to be involved in practical clinics and externship courses in the United States, something that is not yet in place in Georgia.

Tamar: In the United States, the law students have the opportunity to learn much more about the substantive content, procedures and methods of the law while in law school than do the students in Georgia, although we in our country do have a 5-year law school training program and then required examinations to pass if one wants to become a government prosecutorial attorney or a career judge.

What do you plan on doing with your law degree? What kind of law will you practice?

Giorgi: I hope to be a prosecutor of criminal cases, focusing on problems of corruption, drug trafficking and other transnational criminal activities. But I would like to have the opportunity to do further graduate legal study abroad before I settle into my career back home in Tbilisi.

Tamar: I plan on working in the civil law (note from Professor Marvin: we in the common law world would say "private law" as opposed to criminal or public law) area in Georgia, but hope also to have some international law exposure. For that reason, I am enrolled in contract law, corporation law, and international law courses at Georgia State University this fall.



The guests and the airport welcoming committee from the International Connection Committee, left to right, Professor Charles Marvin, Tamar Charbadze, John Parkerson (Delta Airlines lawyer), Giorgi Liliashvili, Judge Dorothy Toth Beasley, and Tamuna Liliashvili (Southern Center for International Studies).



A reception at GSU was held for the fellows after they arrived in Atlanta. Pictured left to right, Giorgi Liliashvili, Liz Price (president of the Atlanta Bar Association), Tamar Charbadze, Judge Dorothy Toth Beasley, Professor Charles Marvin, John Parkerson, and Judge T. Jackson Bedford (chair of the Atlanta Bar Foundation).

Members of the International Connection Program Committee

- Professor Charles Marvin, director of the program
- David Walbert, who with his wife Charlotte is hosting law student Tamar Charbadze in their home for the first half of the semester
- Anton Mertens, chair of the International Law Section of the State Bar of Georgia and representing the section
- John Parkerson, chair of the International Transactions Section of the Atlanta Bar Association, representing that Section as well as Delta Air Lines
- Jill Pryor, representing the Possible Woman Foundation
- Rebecca Olson Gupta, representing the Georgia Association for Women Lawyers
- Ken Cutshaw, dean of the law school at the Georgian American University in Tbilisi, Atlanta attorney and long-distance
- Tamuna Liliashvili of the Republic of Georgia, who is program coordinator at the Southern Center for International Studies in Atlanta
- Dorothy Toth Beasley, Senior Judge, State of Georgia; Mediator & Arbitrator, Henning Med.& Arb. Svc., Inc.

Also instrumental were Claude Zullo and Nino Khurtsidze, CEELI Tbilisi office, who recruited, interviewed and recommended a slate of candidates and then helped students prepare for departure.

would be chosen from that country. CEELI personnel based in Sofia were prevailed upon to send notices of the competition out to the various law faculties in Bulgaria, to interview individual student applicants for the fellowships, and then send the resumes and CEELI interviewers' comments concerning a short list of finalist candidates to Atlanta for the International Connection Committee to make the final decision of who the invitees for the fellowships should be.

The experience was such a successful one, that a decision was made to repeat the International Connection Program in the Fall of 1997, when again a substantial financial contribution was made by the Georgia Power Foundation, followed by the Atlanta Bar Association, and Delta Airlines again provided transatlantic tickets to two fellows, this time chosen from Croatia. Two young women, Sanja Baric and Katerina Dominovic, from Pula and Split,

Judge Beasley wrote in her letter to CEELI in July 1993: “An exposure to our legal and court systems to a degree which cannot be achieved by a short visit, by a lawyer who can then return and share by teaching or contributing through participation in government or law practice, can assist in that (young lawyer’s) country’s democratic development.”

Croatia, were chosen to be International Connection Fellows.

Funding Challenges

Although the first two programs in 1995 and 1997 were successful, the program laid dormant for seven years because of lack of funding. Late in 2004, however, with strong encouragement from persons in the Atlanta Bar Association and with the help of Judge Beasley, Professor Marvin and Interim Dean Steven Kamenshine, the program got off the ground again, with added financial assistance from the Atlanta Bar Foundation, the International Law Section of the State Bar of Georgia and the Possible Woman Foundation. GSU again committed to provide free tuition and graduate research assistantships for the fellows, and Delta Airlines yet again committed to the generous contribution of free roundtrip transatlantic tickets for the fellows.


Value of Studying Abroad

When asked why she thought the Atlanta community should be engaged in and support the legal education of foreign students here, Judge Beasley replied, “It is important for us locally to participate in the education of young lawyers and law students in order to foster the kind of cross-pollination that emerging democracies need.”

Professor Marvin echoed the sentiments when he said, “It is important for foreign law graduates to

have the unique opportunity afforded by the International Connection experience to gain knowledge about how the legal community operates in a law-oriented society, and how civil society can best operate with cooperative programs involving both the public and private sector, profit-making and non-profitmaking organizations working together,” he said. “The International Connection Program is a unique joint effort of a wide swath of differing organizations and individuals, of which the city of Atlanta should be proud.”

Host families for the two current fellows, Tamar Charbadze and Giorgi Liluashvili, are still needed from mid-October until Dec. 8, when they depart Atlanta for their homeland at the end of the semester. David and Charlotte Walbert and Carey and Susan DeDeyn generously opened their homes to provide housing for the two students for the first half of the Fall semester.

Professor Marvin continues to be the coordinator of the International Connection Program. Those who wish to volunteer housing for either of the fellows, or who wish to provide them with some externship experience, leisure or weekend activities, or simply a meal, are encouraged to contact Professor Marvin at (404) 651-2436 or by e-mail at cmarvin@gsu.edu. 

Sarah I. Bartleson is the assistant director of communications for the State Bar of Georgia.

Sponsors of the International Connection Program

Georgia State University College of Law – tuition and all administrative work with respect to qualifying for admission to the law school, obtaining visas, travel arrangements, registration, and provision of courses, and a myriad of details

International Law Section, State Bar of Georgia – grant

Atlanta Bar Association Foundation – grant

Possible Woman Foundation – partial scholarship for Tamar Charbadze

Delta Air Lines – roundtrip transatlantic tickets

David and Charlotte Walbert – home hosts

Carey and Susan DeDeyn – home hosts

Georgia Association for Women Lawyers – honorary membership for the semester, for Tamar Charbadze

International Transaction Section, Atlanta Bar Association – activities for the fellows

Judge Rowland W. Barnes Endowment Fund

By Lauren Larmer Barrett

The unexpected and very tragic passing of Judge Rowland W. Barnes was a tremendous loss to the community and our profession. He was an inspiration to many people throughout his life—as a lawyer, as a judge, as a teacher and as a friend.

Though Judge Barnes served on the bench in Fulton County, his death touched many around the state and even throughout the nation. In Columbus, Ga., not too long after his death, the litigants and judge in a class action lawsuit were discussing the terrible event and decided that they would like to honor Judge Barnes in a way that would benefit the community and the profession throughout the state.

It just so happened that Mike McGlamry, one of the litigants in the class action lawsuit, had been active with the High School Mock Trial (HSMT) Program of the State



(Left to right) Judge Douglas C. Pullen, Superior Court of Muscogee County; Lauren Larmer Barrett, executive director of the Lawyers Foundation of Georgia; Claudia Barnes, widow of Judge Rowland W. Barnes; and Paul Kilpatrick Jr., former State Bar president, Pope, McGlamry, Kilpatrick Morrison & Norwood.

Bar of Georgia. He and his partners at the law firm of Pope, McGlamry, Kilpatrick, Morrison & Norwood discussed the idea of establishing a fund to benefit the High School Mock Trial Program and to honor Judge Barnes by awarding some of the residual funds in the class action suit they were concluding. Whenever a class action suit is settled in favor of the plaintiffs, there

is a sum of money left after distributions are made to benefit the class members. These leftover funds are referred to as “cy pres.” The court can award the cy pres funds to a not-for-profit organization that benefits the class and the community.


They met with the judge in the case, Judge Douglas Pullen of the Superior Court of Muscogee

County, and sought the cooperation of the firm of Sonnenschein, Nath & Rosenthal, the defendant's counsel. The Sonnenschein firm is based in Chicago, Ill., but they were familiar with both the circumstances surrounding the death of Judge Barnes as well as the benefits of the HSMT program, and they were quick to agree that this was an excellent use of the cy pres funds. The judge and the attorneys all agreed that such an endowment to honor Judge Barnes and benefit the HSMT program was a worthy use of the funds in this particular class action suit.

The HSMT program of the Young Lawyers Division of the State Bar of Georgia is 17 years old. Every year, lawyers and judges around the state devote hundreds of hours to the student participants, helping them develop skills in critical thinking and oral advocacy. Not just the students, but their families as well, learn a great deal about the law, their lawyer coaches and their judges. There are 129 teams in Georgia this school year. This effort takes not only volunteer time, but volunteer money as well. In the past, the HSMT program has not had an endowment. Thanks to the efforts of one Georgia law firm and one Georgia judge, that has changed.

On July 27, during the Annual Meeting of the Council of Superior Court Judges, Paul Kilpatrick Jr. of Pope, McGlamry, Kilpatrick, Morrison & Norwood, along with Judge Pullen and Lauren Larmer Barrett of the Lawyers Foundation of Georgia, and Claudia Barnes, widow of Judge Barnes, announced the establishment of the Judge Rowland W. Barnes Endowment Fund. Judge Pullen

presented a check for \$50,000 to Barrett to begin the fund. The endowment will benefit the efforts of the state champion HSMT team as they seek to win the National Championship. The fund will be housed at the Lawyers Foundation of Georgia, the philanthropic arm of the State Bar of Georgia. The foundation will continue to accept donations to the endowment for the foreseeable future. For infor-

mation about the foundation and the endowment, please contact Lauren Larmer Barrett at (404) 659-6867, lfg_lauren@bellsouth.net, or 104 Marietta St., NW, Suite 630, Atlanta, GA 30303. 



Lauren Larmer Barrett is the executive director of the Lawyers Foundation of Georgia.

Judge Rowland W. Barnes Endowment Fund

Established in 2005 at the Lawyers Foundation of Georgia in memory of Judge Rowland W. Barnes of the Superior Court of Fulton County to honor and uphold the standards of excellence he so valued.

The Fund benefits the high school mock trial team which wins the State Championship in order to assist each such team to participate in the National Competition.

Established with the assistance and generosity of:

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Whose Data Is It Anyway?

By Jeffrey C. Morgan

Richard Dreyfuss is one of my favorite actors. Who can forget his exasperated marine biologist in *Jaws*, sputtering “This was no boat accident!” Another of my favorite Dreyfuss roles was the quadriplegic artist who wanted to die with dignity in *Whose Life Is It Anyway?* That film asks the question: Who should control a patient’s life—the patient or his doctors?

Those two Dreyfuss roles exemplify, for me, a recent convergence of circumstance in Georgia and all over the country. Companies who collect personal data about virtually every adult in the United States recently have had very public “boat accidents” of their own, which raise the question: Who controls an individual’s personal data—the individual or the commercial data brokers who compile and sell that information as part of their businesses?



For many consumers the answer is surprising: The commercial data brokers do. At least with respect to the types of information that have been traditionally part of public records for years. Drivers license numbers, street addresses, mortgages, phone numbers, and criminal convictions. These bits of “private” information generally appear in records of local tax boards, credit reporting bureaus, telephone books, court records, and so on. Add to that the other commercially available information such as credit card numbers and late payment histories, and you have a set of

facts about a given person that is useful to determine a given person’s credit worthiness, employability, and so forth. That is where commercial data brokers—or CDBs—come in. CDBs, like Alpharetta-based ChoicePoint, collect, aggregate, package, and resell such publicly and commercially available information about individuals as a service to private-sector companies and government agencies alike.

In early 2005, ChoicePoint revealed that it had been the victim of data theft. ChoicePoint’s situation garnered the lion’s share of

public attention, but its situation was not unique. Within weeks of ChoicePoint's disclosure that criminals had misappropriated some of its data files, other CDBs and businesses who collect personally identifiable information, including LexisNexis and Bank of America, revealed that they too had experienced unrelated security breaches of their own. Indeed, according to Deloitte's Global Security Survey 2004, 83 percent of companies responding experienced a security breach in 2004, compared to 39 percent in 2002.¹

The truth is that hacking or "malicious intrusions" are everyday realities for today's businesses—and not just for the CDBs of the world. It is essential that businesses have an effective information security program to reduce the risk of data loss—and the damage to the businesses' credibility that goes with it. State and federal governments are also creating new regulatory responsibilities for companies whose data security breaches result in unauthorized disclosure of individuals' personal data.

Financial institutions and health care providers have for several years now had privacy and information security standards imposed on them by the Gramm-Leach-Bliley Act and in the Health Insurance Portability and Accountability Act (HIPPA), respectively. But what steps should businesses not within the regulatory schemes of those laws take to protect personally identifiable data from "malicious intrusion" or outright theft? Should they do anything at all?

The recent public outcry over the theft of this type of data from ChoicePoint and others shows that, even without a regulatory scheme

in place, the public demands (rightly or wrongly) that CDBs do more to safeguard personally identifiable information. To a number of industry observers, the public was blaming the victim of the crime—the CDBs—for having the information in the first place. To the public, it felt like their privacy had been violated. The popular media also stepped into the fray. The Atlanta Journal-Constitution, for example, suggested in an editorial that companies should be prohibited from warehousing personal information in the first place. How can companies legally amass all sorts of personal data about individuals and then resell it? After all, isn't the "right to privacy" part of our culture as Americans, if not an underling principle of the Constitution itself?

The Constitution, of course, actually cuts the other way. The First Amendment protects CDBs' rights to collect and share information about individuals. But like many aspects of commercial speech, the government can impose rules and regulations governing the rights and responsibilities CDBs may have with respect to such data.

For 10 years, the European Union has had a Data Privacy Directive governing the collection and use of personally identifiable information about EU citizens. The EU Directive generally prohibits the collection and processing of personal data unless "the data subject has unambiguously given his consent," or unless other exceptions, such as national security considerations, are present.²

Such prohibitions do not exist in the United States, largely due to First Amendment considerations. Until very recently, only California had a law requiring CDBs to



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inform individuals about a data security breach affecting personally identifiable information. California's law, California Civil Code § 1798.82, provides:

(a) Any person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, shall disclose any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subdivision (c), or any measures necessary to determine the scope of the breach and restore the reasonable integrity of the data system.

(b) Any person or business that maintains computerized data that includes personal information that the person or business does not own shall notify the owner or licensee of the information of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(c) The notification required by this section may be delayed if a law enforcement agency determines that the notification will impede a criminal investigation. The notification required by this section shall be made after the law enforcement agency deter-

mines that it will not compromise the investigation.

Under the California law, a "breach of the security of the system" means "unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the person or business." "Personal information" means an individual's first and last names in combination with certain other "data elements," such as the individual's social security number, driver's license number, or credit card number and password. Perhaps significantly, the California law also provides that:

(f) For purposes of this section, "personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

Lawmakers in a number of other states, including Georgia, have recently rushed to introduce legislation of their own that, similar to the California law, would require companies to notify individuals whose data has been the subject of a security breach.

On May 5, 2005, the Georgia General Assembly approved Act 163, S.B. No. 230. Act 163 would amend Title 10, Chapter 1 of the Official Code of Georgia by creating a new Article 34. The provisions of Article 34 are modeled after the California statute and provide:

10-1-912

(a) Any information broker that maintains computerized data that includes personal information of individuals shall give notice of any breach of the secu-

urity of the system following discovery or notification of the breach in the security of the data to any resident of this state whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The notice shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (c) of this Code section, or with any measures necessary to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system.

(b) Any person or business that maintains computerized data on behalf of an information broker that includes personal information of individuals that the person or business does not own shall notify the information broker of any breach of the security of the data immediately following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(c) The notification required by this Code section may be delayed if a law enforcement agency determines that the notification will compromise a criminal investigation. The notification required by this Code section shall be made after the law enforcement agency determines that it will not compromise the investigation.

Like the California law, the Georgia law defines "breach of the security of the system" as any "unauthorized acquisition of an

individual's computerized data that compromises the security, confidentiality, or integrity of personal information of such individual maintained by an information broker." But the Georgia law differs from the California law in certain important respects. For example, the reach of the Georgia law is not limited to any "person or business." Rather, it applies to "information brokers." An "information broker" under the Georgia law is:

any person or entity who, for monetary fees or dues, engages in whole or in part in the business of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning individuals for the primary purpose of furnishing personal information to nonaffiliated third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes.

O.C.G.A. § 10-1-911(2). The Georgia law raises important questions as to the types of businesses affected by the regulations. Although it seems fairly certain that the Georgia law would apply to large CDBs primarily engaged in the business of data collection and distribution, does it apply to other business who collect, compile, or transmit "information concerning individuals" such as credit card companies? What about retail businesses who collect information from users and then sell that information to "nonaffiliated third parties?" What exactly is a "nonaffiliated third party?" Do subsidiaries or affiliates qualify? And what about Internet Web sites located in

other states that collect information from users located in Georgia and then use that information for a wide variety of other purposes, sometimes for monetary compensation? These questions do not yet have clear answers.


Further, unlike California, the Georgia law imposes the additional requirement that:

(d) In the event that an information broker discovers circumstances requiring notification pursuant to this Code section of more than 10,000 residents of this state at one time, the information broker shall also notify, without unreasonable delay, all consumer reporting agencies that compile and maintain files on consumers on a nation-wide basis, as defined by 15 U.S.C. Section 1681a, of the timing, distribution, and content of the notices.

CDBs provide valuable services to the economy. Dr. Paul H. Rubin, a professor of economics and law at Emory University and author of "Privacy and the Commercial Use of Personal Information," has argued that CDBs "make it possible to purchase insurance quickly and with relatively little paperwork. Similarly, they reduce the cost and increase the speed of background checks for employment, apartment rental and numerous other day to day transactions. The reduction in hassles and increase in speed is something that directly benefits consumers."³

CDBs "might make access to information more difficult in order to deter theft, but this will also have costs.... If as a result it becomes more difficult for new businesses to purchase information from [CDBs] about potential cus-

tomers or suppliers, then entry into markets will be reduced. Economists know that facilitating entry is one of the best ways to keep consumer prices low, so making entry more difficult will have an unseen but substantial effect on consumer prices."⁴

Going forward, the question should not be whether CDBs should be "permitted" to collect, package, and resell data, but rather what balance should be struck between the rights of CDBs to provide their important services, and the rights of consumers to be notified when their personally identifiable data may have been compromised. In these uncharted waters, CDBs should seek appropriate legal counsel to minimize the legal and business risks involved in collecting and safeguarding data. There are sharks in these waters, and they are trolling for businesses' data. I can almost hear Richard Dreyfuss now: "Boys, oh boys... I think he's come back for his noon feeding." 

Jeffrey C. Morgan is a litigator in Troutman Sanders LLP's Intellectual Property Practice Group and a member of the firm's Privacy & Data Security Practice Team. He can be reached at (404) 885-3661 or by e-mail at jeffrey.morgan@troutmansanders.com.

Endnotes

1. www.deloitte.com/dtt/cda/doc/content/dtt_financialservices_SecuritySurvey2004_051704%282%29.pdf
2. www.cdt.org/privacy/eudirective/EU_Directive_.html#HD_NM_2
3. Paul H. Rubin, Data Security: Protect Our Information, Don't Banish it, Atlanta Journal-Constitution, April 11, 2005, at A9.
4. *Id.*

State Bar of Georgia: A Record of Legislative Achievement

The State Bar takes great pride in its legislative program that benefits Georgia businesses and citizens, as well as the legal profession, the judiciary, and our system of justice. The State Bar has been particularly effective in passing legislation and funding initiatives that serve the public and improve the delivery of legal services to all Georgians.

Recent highlights include the creation and funding of a statewide public defender system; substantial revisions and adoption of UCC Articles (2A, 3, 4, 5, 8 and 9); modernization of the probate, corporate, non-profit, and guardianship codes; and the creation of family and business law courts. The State Bar has also effectively defended against efforts to eliminate education requirements for taking the Bar exam, objected to initiatives that limit access to justice in the civil courts, and defeated efforts to impose a business/occupation tax for attorneys.



To accomplish these objectives, the State Bar has a process where the Advisory Committee on Legislation reviews legislative recommendations generated from the various sections of the State Bar. The State Bar's Board of Governors, in turn, debates the merits of each recommendation and decides whether to endorse a particular measure for inclusion in the State Bar's annual legislative agenda. Then, the State Bar's professional lobbyists create and implement a plan for navigating the agenda through the legislative process. Voluntary financial contributions by State Bar members make possible this important legislative program, which is viewed as one of the finest in the country.

The following is an overview of the State Bar's legislative achievements in recent years.

Business Law Section (Banking and Corporate, Partnership sections)

- HB 555 enhances corporate code relating to ability to use electronic transfers for certain notices, etc. (2004)
- HB 555 (Committee Substitute) modernizes the corporate non-profit code (2004)
- SB 211 conforms Georgia's merger provisions to Delaware standard (2003)
- HB 1253 completely revises Article V relating to letters of credit (2002)
- SB 253 clarification of LLC code

regarding LLC membership withdrawal rights (2002)

- HB 191 complete rewrite of Article IX of the UCC relating to secured transactions (2001)
- SB 397 strengthens corporate ability to fend off hostile takeover (2000)
- HB 224 included five separate Bar initiatives in annual corporate code revision (1999)
- SB 41 revised LLC statute regarding dissolution of companies (1999)
- SB 42 accomplished technical modification to LLP statute (1999)
- SB 402 amended Article 8 pertaining to transfer of securities (1998)
- HB 294 contained annual technical revisions to corporate code (1997)
- HB 349 allowed single member Limited Liability Companies (1997)
- HB 1388 revised significant portions of Article 3 and Article 4 of corporate code (1996)
- HB 1425 enacted annual revisions to corporate code (1996)
- HB 1627 permitted limited partnerships to become LLPs (1996)
- HB 563 provided for creation of LLPs (1995)
- HB 670 passed the annual corporate code revisions (1995)
- HB 1502 contained annual technical revisions to corporate code (1994)
- HB 264 authorized creation of LLCs (1993)
- HB 395 adopted Article 2A of the UCC (1993)
- HB 149 provided for various amendments as part of annual revision (1993)
- HB 761 regarded the treatment of certified securities (1992)
- HB 762 revised the law relating to wire transfers (1992)
- HB 226 revised Georgia's non-profit corporations code (1991)

Real Property Law Section

- HB 1311 creates statutory authority ensuring that only licensed attorneys can close real estate transactions (2004)
- SB 97 expands the transfer tax exemption to transactions involving individuals and entities that they control (2003)
- HB 1582 assures that real estate filing fees are used to complete electronic grantor/grantee index system (2002)
- HB 597 preserves integrity of grantor/grantee index by requiring written copies to be maintained by clerks (2000)
- HB 429 empowered closing attorneys to cancel satisfied security instruments (1999)
- HB 597 required clerks to maintain printed grantee/grantor index for attorneys (1999)
- HB 1522 allowed certain intangible taxes to be paid directly to the clerk (1998)
- HB 1189 required notice of special agriculture tax status (1998)
- HB 533 established a simple procedure for removing unauthorized liens (1997)
- HB 1587 validated tax deed after four-year period (1996)
- SB 243 clarified that duly recorded mortgage provides notice (1995)
- HB 1642 allowed collection of intangible taxes by county court clerk (1994)
- HB 515 eliminated "Equal Dignity Rules" regarding agency (1993)
- HB 1612 amended code regarding presumptions of corporate authority (1992)
- SB 267 changed the law relating to sealed documents (1991)
- HB 563 created exemptions to real estate transfer tax (1991)

Fiduciary Law Section

- HB 406 allows trustees to make investment decisions for best total return in situations where they have a duty to both the income beneficiary and remainderman (2005)
- HB 229 is a massive overhaul and modernization of guardian-ship code (2004)
- HB 646 states that a renunciation of future interests vests during the lifetime of the renouncing life estate holder (2002)
- HB 541 simplifies the probate court fee schedule (2001)
- HB 245 enacted additional revisions to probate code (1997)
- HB 1030 enacted complete overhaul of probate code (1996)
- SB 171 authorized conditional powers of attorney (1993)
- SB 189 confirmed authority of fiduciary to renounce property (1993)

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- HB 794 consolidated trust provisions into single code section (1991)
- SB 173 required certain wrongful death recoveries to be held by a guardian (1993)
- SB 670 amended Trust Act to protect fiduciary powers (1992)
- HB 1520 amended provision regarding administrators with Will Annexed (1992)
- HB 968 allowed provisions for non-terminal conditions in living wills (1992)
- SB 41 addressed the admissibility of will copies (1991)

Family Law Section

- Appropriation of \$2,600,000 for victims of domestic violence (2005)
- Appropriation of continuation for Court Appointed Special Advocates (1999)
- Appropriation of \$220,000 to establish a pilot family court (1998)
- Increased appropriation of \$63,000 for CASA (1997)
- HB 1288 allowing CASA to be appointed as guardian ad litem (1993)
- HB 1519 extended child support obligations past the age of 18 (1992)
- HB 251 specified criteria for inheritance by illegitimate child (1991)

Judicial Administration and Procedures Section and Appellate Practice Section

- \$800,000 appropriation for Georgia Appellate Practice Center (2005)
- \$100,000 appropriation for newly developed pilot business court (2005)
- HB 90 gives State Bar admissions statutory authority to conduct FBI background checks (2003)


- HR 68 and HB 164 allows Federal District Courts to certify questions of law to the Georgia Supreme Court (2003)
- HB 1256 prohibits public notaries from practicing law (2002)
- SB 465 created loan forgiveness program for public interest attorneys (2002)
- SB 346 conforms state law to federal rule allowing international service by mail (2002)
- HB 708 conforms services of process procedure to federal rule by allowing a waiver of service to initiate lawsuit against defendant (2000)
- SB 176 creates a procedure for collecting civil and criminal case filing data on a statewide basis (2000)
- Creation and funding of state funded juvenile court in each judicial circuit (2000)
- SB 59 expanded Court of Appeals to twelve members (1999)
- Appropriation of \$1,300,000 for new appeals judges (1999)
- HB 592 corrected an anomaly in venue law that had been criticized in case law (1997)
- Continued appropriation of \$300,000 for Appellate Practice Resource Center (1997)
- SB 133 amended ADR procedures (1997)
- SB 283 permitted recording of depositions by non-stenographic means (1996)
- Appropriation of \$500,000 for 10th Court of Appeals judge (1996)
- Appropriated significant money for trial and appellate court judges (1994)
- HB 143 created a local funding mechanism for ADR programs (1993)

Criminal Law Section

- \$32 million appropriation for full

- year of operation of statewide public defender system (2005)
- HB 1EX provides a reliable funding mechanism for the statewide indigent defense system (2004)
- SB 116 provides for discovery in juvenile court proceedings (2003)
- Two million dollars in funding for partial year of operation of Public Defender Council (2003)
- HB 770 Creation of statewide Public Defender Council (2003)
- Appropriation increase of \$1,250,000 for Indigent Defense Council (1997)
- HB 187 added Indigent Defense Council Director to Criminal Justice Council (1997)
- HB 1239 provided for representation of insane defendants (1996)
- Continued appropriation of \$3,000,000 for Indigent Defense Council (1996)
- Appropriation increase of \$1,000,000 for indigent defense (1994)
- HB 402 and 403 created interest accounts benefiting indigent defense fund (1993)

Elder Law Section

- HB 295 exempted DHR injunctions from automatic supersedeas provisions (1997)
- SB 182 reaffirmed right of ward to engage counsel to terminate guardianship (1997)
- HB 339 protected rights of wards (1996)
- SB 651 provided for administrative hearings for personal care residents (1994) 

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 Web site at www.gabar.org.

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KUDOS

Deborah S. Ebel, partner with McKenna Long & Aldridge LLC has received the **American Bar Association's** award for pro bono work on behalf of children. Given to a single lawyer in the nation annually, the **Ann Liechty Pro Bono Award** was presented to Ebel at the ABA's annual meeting in Chicago in August. The ABA's only award honoring pro bono legal services to children in custody cases, the Liechty Award is one of a total of five given annually by the ABA's Standing Committee on Pro Bono and Public Service. Ebel is the first Georgian to receive the Liechty Award. A co-founder in 1990 of the Atlanta Volunteer Lawyers Foundation's special program to represent the best interests of children in custody cases, she has accepted almost 30 cases involving thousands of pro bono hours. Since the program's inception, she also has regularly donated her time to developing new materials for the program's training manual and to training new volunteers, including traveling throughout Georgia to help other jurisdictions develop similar programs.



Gail Leverett Parenti, a partner with Parenti, Falk, Waas, Hernandez & Cortina, P.A., in Coral Gables, Fla., was installed as the **president of the Florida Defense Lawyers Association** at the organization's 2005 Annual Meeting at the Biltmore Hotel in Coral Gables.



Gary L. Sasso of **Carlton Fields, P.A.**, will succeed Thomas A. Snow as **president and CEO** of the firm when Snow retires in February 2006. Sasso has served in a number of leadership positions in the firm, most recently as a member of the firm's executive committee and board of directors. Sasso also chairs the firm's litigation and dispute resolution practice group. Prior to joining Carlton Fields in 1987, Sasso worked as a litigator for Bredhoff & Kaiser in Washington, D.C. He also served as a law clerk for Justice Byron R. White on the U.S. Supreme Court and as a law clerk for Judge Spottswood W. Robinson III, on the U.S. Court of Appeals for the District of Columbia Circuit. Sasso participates in numerous professional and community organizations. He serves as a member of the Council of the American Bar Association Section of Litigation. He is a co-chair of the civil section of the Tampa Bay chapter of the Federal Bar Association and the former editor-in-chief of *Litigation Journal*, which is published by the Section of Litigation of the ABA. He is a fellow of the International Academy of Trial Lawyers and

the American Academy of Appellate Lawyers. He is a member of the American Law Institute and the American Bar Foundation.



Richard Costigan III, who was recently named **deputy chief of staff** to Gov. Arnold Schwarzenegger, was honored by the **California Business Properties Association** as an **"Outstanding Public Servant"** and also received a **"Special Recognition Award"** from the **California Building Industry Association**. Over the past year, Costigan has delivered numerous keynote speeches on the administrations policies and objectives to the California Chamber of Commerce, the California Business Association, the California Bankers Association, the California Healthcare Institute/California LifeSciences Day, the board of directors of the California Restaurant Association, the National Public Affairs Council and numerous other organizations. In November of 2003, Costigan was named Legislative Affairs Secretary and now holds both titles. In his position, he is the governor's chief negotiator with the Legislature, responsible for developing and overseeing the governor's legislative agenda, advising the governor on all pending legislation and issues before the legislature and working with over 70 agencies and departments on legislative matters. Costigan has extensive interaction with agency secretaries, with the state budget and policy issues, communications and external affairs.



Kilpatrick Stockton announced associate **Kali Wilson Beyah** was selected to serve a two-year term on the **Commission on Access and Fairness in the Courts**. The commission, established by the Supreme Court of Georgia, is responsible for implementing the recommendations made in the final reports of the Supreme Court Committee for Gender Equality and the Supreme Court Commission on Racial/Ethnic and Gender Bias in the Courts and developing new initiatives that address racial/ethnic and gender bias and prejudice in Georgia's courts. The commission's members are voted upon and approved by the Supreme Court of Georgia. Beyah is a member of the firm's litigation practice group. Her practice includes representing clients in complex commercial disputes and defending clients in product liability and commercial tort claims.

Cohen Pollock Merlin Axelrod & Small, P.C., announced **Christopher T. Graham**, partner, has been chosen as a **2005 Georgia Super Lawyer-Rising Star**. Rising Stars represent less than 2.5

percent of Georgia attorneys each year. These individuals are recognized by their peers as being among the top up-and-coming lawyers in the state. Graham specializes in developing and implementing creative family wealth strategies for high net worth individuals. He has extensive experience in both personal and business tax and estate planning, including capital gain tax minimization, charitable planning, business succession, wills and trusts.



Hunton & Williams LLP announced that partner **Rita Sheffey** was selected by the Women in the Profession Section of the Atlanta Bar Association to receive the **Outstanding Woman in the**

Profession Achievement Award in June. The annual award honors the woman whose contributions have assisted in promoting and empowering women in the profession. Sheffey is the current president of the Atlanta Legal Aid Society. Within the law firm, she has been the director of Hunton & Williams' Southside Legal Center since it opened 10 years ago. The center was developed in cooperation with the Atlanta Project and serves residents of southside Atlanta who qualify for legal aid, as well as those whose incomes are too large for ALAS, yet too limited to hire a private attorney. Sheffey currently chairs the Atlanta office pro bono committee and coordinates the firm's Atlanta pro bono efforts. She has won the firm's Pro Bono Public Award and has received the firm's E. Randolph Williams Award for Pro Bono Service every year since its institution in 1995. For 10 years, Sheffey served as a member of the board of directors of the Atlanta Volunteer Lawyers Foundation, serving as president from 2002 to 2004. Recently, she agreed to co-chair the Atlanta Bar's One Child One Lawyer program in the juvenile courts of Fulton and DeKalb Counties. Sheffey also serves on the executive committee of the Atlanta Bar Association, is treasurer of the Atlanta Bar litigation section, and serves on the board of directors for the Atlanta Victim Assistance Program. Although she has made substantial contributions in the area of pro bono and community service, she also has a busy litigation practice. Sheffey, who holds a Ph.D. in chemistry, handles a variety of complex litigation matters ranging from environmental and toxic tort to trademark and trade secrets.

Nelson Mullins Riley & Scarborough placed 10 attorneys based in their Atlanta office in the **2005** list of **Georgia Super Lawyers**, in eight different practice areas. **Rick Herzog**, bankruptcy & work-out; **Richard Hines**, civil litigation defense; **Ugo**

Ippolito, general business; **Stan Jones**, health care law; **Caroline Kresky**, **Wade Malone** and **Ken Millwood**, business litigation; **Daniel Shea**, labor and employment; **Sara Turnipseed**, general litigation; and **Charles Vaughn**, mergers & acquisitions. Surveys were sent to more than 23,500 attorneys in Georgia and attorneys were asked to vote for the best lawyers they had personally observed in action. The top point-getters were selected as Super Lawyers, honoring the top 5 percent of licensed attorneys in the state.

Attorney **Carlos A. González** was invited into the membership of the **Academy of Court Appointed Masters**. Membership in the academy is by invitation and open to attorneys who have served as court-appointed masters in nationally important cases. González currently serves as a special master for federal courts in Alabama, Tennessee and Georgia.

The law firm of **Davis, Zipperman, Kirschenbaum & Lotito, LLP**, announced that all four of its name partners were named **Georgia Super Lawyers for 2005**. Super Lawyers identifies attorneys who have attained a high degree of peer recognition and professional achievement. Only 5 percent of the State Bar of Georgia receives this honor. **E. Marcus Davis** is a plaintiff's lawyer who has handled many significant cases especially in the area of medical malpractice. **Barry L. Zipperman** is a business and transactional lawyer representing individuals and corporations in their business ventures. **Seth D. Kirschenbaum** and **Nicholas A. Lotito** are both criminal defense lawyers. Kirschenbaum is a former president of the Atlanta Bar Association. Lotito is a past president of the Georgia Association of Criminal Defense Lawyers.

The Juvenile Law Committee of the Young Lawyers Division presented their annual **Child Advocate of the Year Awards** to those whose extraordinary contributions demonstrated a commitment to excellence in the field of child advocacy. The **2004 Child Advocate of the Year award** was presented to **Rep. Mary Margaret Oliver**. Award recipients in other categories included **Robert Coleman**, special assistant attorney general; **Rosamund Braunrot**, juvenile defense attorney; **Robert Keller**, district attorney, and the **Hon. Michael Key**, juvenile court judge.

Carlton Fields announced that Atlanta attorney **Benjamin Reid** was one of 39 Carlton Fields attorneys that were selected by their peers for inclusion in the **2006 edition of The Best Lawyers in America**. Reid's practice focuses on bet-the-company litigation, commercial litigation and personal injury litigation.



Atlanta attorney **John J. Scroggin** has been appointed as editor of the on-line estate planning publications of the **National Association of Estate Planners and Councils**. Scroggin has also been appointed to the **board of directors** of the **Historic Roswell Convention and Visitors Bureau**. In 2005, he had articles published in the *ABA Practical Lawyer*, the *Estate Planning Journal*, the *Georgia Bar Journal*, *Trusts and Estates*, *Taxes Magazine*, *Advisor Today*, *Practical Estate Planning*, various newsletters of the Society of Financial Service Professionals and *National Underwriter*.

ON THE MOVE

In Atlanta



Kim



Hopkins



Yost



Williams

Lord, Bissell & Brook LLP has elected four partners to the Atlanta office. **Paul T. Kim** represents publicly traded and privately held businesses throughout the United States and internationally in trial and arbitrations concerning complex business litigation matters. He has represented clients in matters relating to banking, finance transactions, joint ventures, cross-border transactions, licensing agreements, intellectual property and insurance. **J. David Hopkins** is a commercial litigator with extensive experience in complex business litigation, including both federal and state court class action defense, administrative hearings before the Georgia Commissioner of Insurance and alternative dispute resolution proceedings. **Jeffrey A. Yost** concentrates his practice in the areas of mergers and acquisitions, business formations and general corporate counseling. He has worked with an economically diverse group of clients, ranging from non-profit institutions and family-owned businesses to publicly and privately-held companies. **Gerry L. Williams** focuses on corporate finance matters for large institutional and middle-market companies, private equity and mezzanine funds and banks. Williams places a particular emphasis on mergers and acquisitions, public and private offerings of equity and debt securities and leveraged buyouts. The 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.



Morris, Manning & Martin, LLP, hired **Jennifer King** as **director of Business Development**. Her responsibilities will include strategic development and implementation of practice group initiatives in the identification and pursuit of new business while expanding the firm's role and reputation in the business, professional, civic and charitable communities. King most recently served as director of Business Development for Dixon Hughes PLLC, a large regional CPA and advisory firm. The Atlanta office is located at 1600 Atlanta Financial Center, 3343 Peachtree Road NE, Atlanta, GA 30326; (404) 233-7000; Fax (404) 365-9532; www.mmmlaw.com.

Cohen Pollock Merlin Axelrod & Small, P.C., announced that **Joshua Berman** joined the firm as a **partner** and **Anna M. Humnicky** and **Scott I. Merlin** joined the firm as **associates**. Berman, formerly an attorney with PowellGoldstein LLP, practices with the firm's family wealth planning group. He will continue his practice focusing on estate planning, probate and trust law. Humnicky's practice consists of commercial litigation, creditors' rights and bankruptcy. She was one of 23 attorneys selected by the Georgia Association of Women Lawyers as a Committee Star. Merlin's practice encompasses corporate, estate planning and franchise law. The newly expanded offices of Cohen Pollock are located at 3350 Riverwood Parkway, Suite 1600, Atlanta, GA 30339; (770) 858-1288; Fax (770) 858-1277; www.cpmas.com.



Powell Goldstein LLP announced the formation of a **Special Matters and Investigations practice**. **John T. Marshall**, senior partner at Powell Goldstein, will lead an experienced team of lawyers from the firm assisted by vice-chairs **Scott Sorrels** and **Ralph Caccia**. The practice will provide counsel in the areas of internal investigations, audit committee representation, grand jury and regulatory investigations, corporate and securities compliance and federal and state white-collar representation. The group includes former federal and state prosecutors with the U.S. Department of Justice and District Attorneys' offices. Corporate investigations, white-collar crime and corporate and securities compliance are among the main areas of focus for Marshall's new team. The team also will offer counsel for Sarbanes-Oxley and Securities and Exchange Commission compliance, as well as other federal and state laws and regulatory processes. Powell Goldstein's Atlanta office is located at One Atlantic Center, Fourteenth Floor, 1201 West Peachtree St. NW, Atlanta, GA 30309; (404) 572-6600; Fax (404) 572-6999; www.pogolaw.com.

The international law firm of **Jones Day** announced that **E. Kendrick (Ken) Smith** has joined its litigation practice as **partner**. Smith joins Jones Day's 150-attorney Atlanta office and 1,000 litigators worldwide after leading the litigation department at Atlanta's Smith, Gambrell & Russell, LLP. Smith is experienced in resolving fiduciary and shareholder controversies, in contract litigation and appellate work. He is trained in mediation and arbitration and serves as a professional neutral for Closure ADR Group. Smith was selected as one of Georgia Trend's "Legal Elite" in 2003 and 2004 and as one of the 25 most effective business litigation attorneys in Georgia. He was also named by *Atlanta Magazine* and *Law & Politics Media, Inc.* as a "Georgia Super Lawyer" for 2004 and 2005 in the area of business litigation. The Atlanta office is located at 1420 Peachtree St. NE, Suite 800, Atlanta, GA 30309; (404) 521-3939; Fax (404) 581-8330; www.jonesday.com.

In Dalton



Leitner, Williams, Dooley & Napolitan, PLLC, announced the opening of a Dalton, Ga. office. The firm's expansion into Dalton further strengthens the ability to offer service that is economic and efficient. **L.**

Hugh Kemp will be the senior attorney in the Dalton office and joins the firm as of counsel. Kemp has been in practice over 30 years and is active in community affairs including serving as president of the Dalton-Whitfield Chamber of Commerce. His primary practice areas are insurance defense, professional malpractice, personal injury and product liability. The Dalton office is located at 100 N. Selvidge St., Dalton, GA 30720; (706) 270-0222; Fax (706) 270-0021; www.leitnerfirm.com.

In East Point

After 25 years on Washington Road in East Point, **Glen Edward Ashman** announces the relocation of his law practice to the historic former Bank of Fulton County Building. In addition to practicing law, Ashman is also a municipal judge for the city of East Point. The office is now located at 2791 Main St., East Point, GA 30344; (404) 768-3509.

In Jonesboro



Keith C. Martin has joined the law firm of **Driebe & Driebe, P.C.** Martin served as solicitor of the State Court of Clayton County for 16 years and previously as an assistant district attorney. He will focus on trial practice including criminal cases and other litigation.

The firm is celebrating its 40th anniversary this year and is located at 6 Courthouse Way, Jonesboro, GA 30237; (770) 478-8894; Fax (770) 478-9606.

In Toccoa

The firm of **Sanders & Smith, P.C.**, announced that **Brian C. Ranck** has become an **associate** of the firm. Ranck will be assisting the firm with matters involving civil litigation, creditor bankruptcy, real estate, collections, personal injury and local government law. The office is located at 311 South Big A Road, Toccoa, GA 30577; (706) 886-7533; Fax (706) 886-0617; www.sanderssmith.com.

Mock Interview and Resume Review Workshop

This year's State Bar Committee on Women and Minorities in the Profession's Mock Interview and Resume Review Workshop was held on Saturday, Aug. 27, for Georgia law students, sponsored by King & Spalding. The subcommittee was chaired by Bettina Yip of Cingular Wireless and Jennifer Burns of Equifax.



(Left to right) Allegra Lawrence of Sutherland Asbill & Brennan, Bettina Yip of Cingular Wireless, Monique McDowell of King & Spalding and Dawn Jones of King & Spalding are all members of the Women and Minorities in the Profession Committee.

If you have an announcement of an office change or something you have accomplished and would like to share with the legal community, please e-mail journal@gabar.org.

To Pay or Not to Pay

By Paula Frederick

“Great news!” You announce to your client as she answers the telephone. “I just received the settlement check from your accident! I’m depositing it into my escrow account today, and I’ll send checks to you and Dr. Sappy immediately.”

“I’ve been meaning to ask you about that check to Dr. Sappy,” your client responds. “Her bill is awfully high. And those treatments really haven’t done me much good—I still have a stiff neck, and my knees hurt when it rains.”

“Are you saying you don’t want to pay the bill?” you ask, horrified. “I promised Dr. Sappy that if she would treat you without requiring payment up front, I’d pay her from the settlement proceeds. Remember? You agreed to the whole thing!”

“Well, that was before I knew how much she was going to charge! I’ll barely get one-fourth of the money after I’ve paid all those bills! I really don’t think I owe her that much. I want you to send the money to me, and I’ll decide whether to pay her or not.”


“I don’t know,” you respond. “Since I made her that promise, she may claim that I’m liable for the bill if you won’t pay. Why don’t you think it over and we’ll talk again tomorrow.”

With a sigh of resignation, you hang up the phone and begin to research your options. You quickly realize that your informal agreement with Dr. Sappy did not create a legally enforceable lien. Nonetheless, you did make a promise and you would like to keep it if possible.

Lawyers who last researched this issue before Georgia adopted an ethics code based



upon the ABA Model Rules of Professional Conduct may be surprised to learn that their obligations have changed. Under the old rule, a lawyer did not have any obligation to a client’s creditors unless the creditor had a legally enforceable lien. The current version of Rule 1.15(I)(b) requires a lawyer to “promptly notify” a third person upon receipt of funds in which that person has an interest, and to “promptly deliver” to the third person any funds they are entitled to receive.

In this case, unless you make a good faith determination that Dr. Sappy is not entitled to receive the amount she has billed, you need to notify her of the settlement and send her what she is owed. Although Comment 3 to Rule 1.15(I) discourages a lawyer from unilaterally assuming to arbitrate this type of dispute between clients and creditors, you could (with client consent) attempt to work out some compromise on the bill before sending Dr. Sappy her fee. If the matter cannot be resolved quickly, the prudent thing to do would be to interplead the money and ask a court to decide the rightful owner. 



Paula Frederick is the deputy general counsel for the State Bar of Georgia.

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AL8349

Discipline Notices

(June 17, 2005 through Aug. 10, 2005)

By Connie P. Henry

DISBARMENTS/ VOLUNTARY SURRENDERS

Swain Alvin Lewis
Dublin, Ga.

On June 30, 2005, the Supreme Court accepted the Petition for Voluntary Surrender of License of Swain Alvin Lewis (State Bar No. 451283). Lewis pled guilty in January 2005 to violating 18 USC § 4 (misprision of a felony).

William S. Shelfer Jr.
Decatur, Ga.

William S. Shelfer Jr. (State Bar No. 640100) has been disbarred from the practice of law in Georgia by Supreme Court order dated June 30, 2005. In January 2004 the bank at which Shelfer maintained his attorney trust account provided the State Bar with an overdraft notice. Although Shelfer initially made attempts to explain the overdraft, he eventually ceased responding to the State Bar's inquiries and failed to provide all of the documentation requested by the State Bar. Shelfer was personally served with a Notice of Investigation but failed to respond. Neither did he respond to the Notice of Discipline.

SUSPENSIONS

Marc Albert Pilgrim
Atlanta, Ga.

Marc Albert Pilgrim (State Bar No. 580160) has been suspended for 6 months from the practice of law in Georgia by Supreme Court order dated May 23, 2005. In one case Pilgrim was hired to handle a claim for wrongful termination of employment. Pilgrim appeared at a Georgia Department of Human Resources' hearing

in June 1996. After the client alleged facts at the hearing that may have constituted a claim for age discrimination, the hearing officer suspended the hearing to allow Pilgrim to investigate whether it was necessary to file a complaint on the client's behalf with the Georgia Commission of Equal Opportunity. Pilgrim subsequently determined that sufficient facts did not exist to file a claim but he failed to inform the hearing officer and failed to ask the hearing officer to place the case on the hearings calendar within the time designated by statute. When Pilgrim did ask for the case to be placed on the calendar, the hearing officer refused to do so and the client lost his rights to pursue the claim.

In another case Pilgrim was hired to represent a client in a sexual harassment and racial discrimination claim against her employer. Although Pilgrim filed a lawsuit, he failed to take any further action on her behalf; did not inform her about the status of her case; and filed a motion to dismiss the case without her authorization.

Although Pilgrim received an Investigative Panel Reprimand in 2003, the Court noted in mitigation of discipline that Pilgrim was remorseful, accepted responsibility for his conduct and resulting consequences, and he did not have a dishonest or selfish motive.

Harry Rand
Kennesaw, Ga.

Harry Rand (State Bar No. 593750) has been suspended for 5 years from the practice of law in Georgia by Supreme Court order dated July 8, 2005. Rand may seek reinstatement under the rules applicable at the conclusion of his suspension. Five formal complaints were filed against Rand based on separate instances of misuse of settlement funds received on behalf of personal injury clients.

The special master found that Rand suffers a significant mental disability and because of that he failed to properly account for funds held in a fiduciary capacity and that he applied settlement funds improperly. The special master found in mitigation of discipline that Rand had no prior discipline, the absence of a dishonest or selfish motive; existence of personal and emotional problems; timely good faith effort to make restitution and rectify consequences; full and free disclosure to the disciplinary board and cooperative attitude; good character and reputation; mental disability or impairment; interim rehabilitation; and remorse.

REVIEW PANEL REPRIMANDS

Suzanne M. Boykin
Norcross, Ga.

On June 30, 2005, the Supreme Court of Georgia ordered that Suzanne M. Boykin (State Bar No. 073445) be administered a Review Panel reprimand. A client's wife retained Boykin in June 2003 to represent a client in a criminal matter. She was paid \$600 in attorney's fees, and agreed to file a Motion to Modify Sentence. Although she drafted the motion in June 2003, she did not file the motion until May 17, 2004. After the client's wife discovered that the motion had not been filed until May 17, 2004, she terminated Boykin's services and Boykin provided her with a copy of the file and returned the attorney's fees. While the Court found in aggravation of discipline that Boykin received a letter of formal admonition in June 2001 in another case, the Court found in mitigation of discipline Boykin's full disclosure


to the Disciplinary Board, her timely good faith effort to make restitution, and her remorse.

Jeffrey Scott Denny
Dallas, Ga.

On July 8, 2005, the Supreme Court of Georgia ordered that Jeffrey Scott Denny (State Bar No. 218397) be administered a Review Panel reprimand. Denny was hired to represent a client in a personal injury action. He actively prosecuted the case, but later dismissed the case without prejudice, did not tell his client he dismissed the case, and effectively terminated his representation of the client, but without telling the client. After the filing of the formal complaint and appointment of a special master, Denny filed a petition for voluntary discipline seeking a Review Panel reprimand. In mitigation of discipline,

the special master found that Denny had no prior discipline; that he was suffering from a chronic and debilitating illness during the time of the representation; that he was remorseful; and that he lacked a dishonest or selfish motive.

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 June 17, 2005, five lawyers have been suspended for violating this Rule and none have been reinstated. 

Connie P. Henry is the clerk of the State Disciplinary Board.

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Capturing Time in the Law Office

By Natalie R. Thornwell

Whether you begrudgingly track time or are a real stickler about doing it every day, time tracking is an essential part of every lawyer's practice. Reviewing your current time tracking techniques can help identify weaknesses and lead to the discovery of more effective methods of dealing with this onerous task. Improved time tracking is a skill that is easily learned, and with today's technology it is easier than ever to keep up with.



Regardless of the type of law you practice, the only way to determine the profitability of your work is by tracking time spent on any given matter. Flat-fee bill lawyers, listen up. It is important for you to know whether you are losing or making money on matters. You can only determine this by tracking the amount of time you have worked on a matter and recording the expenses on the file. With proper time tracking, you will also have a record of the work you have done, and this can help immensely with the court or client that comes asking what was done on the file.

The most common way of tracking time is by writing it down on paper — listing what you have done and for how long. These pieces of paper, the stock in trade for lawyers, eventually make it to the bookkeeper or other accounting staff person to begin the billing cycle. If not handled properly, these pieces of paper can make the lawyer pay a price in terms of lost time and/or profit.

The other method for getting time to the billing stage is to dictate the information so that a paralegal or other legal assistant can transcribe it and enter it into a system that can bill it out. There is even a multi-step method that allows the paralegal or legal assistant to record time spent on any given matter and input it into the billing system at a later time. Because the time information can go through so many different transformations, it is easy to see that the likelihood of data entry errors and the mismanagement of information are increased in inefficient time tracking scenarios. Again, this can result in lost time and/or profit. This is espe-


cially true when the firm does not have a good pre-bill and final billing process.

The good news is that there are many methods of tracking time. Some of these not only address how many times information must be transformed before entering the final bill stage, but ensure that the frequency of time capture is such that time is not lost due to the egregious method of the lawyer recreating the time at the conclusion of a matter as opposed to tracking time as work is performed. Lawyers who track more time can bill more time, and consequently, can position themselves to receive more money.

Efficient time entry is accomplished best by using technology. Today's time and billing applications allow attorneys to directly input time. The popup timers in many of the programs keep track of time as it passes and the lawyer simply provides the work details and stops to the timer to enter the duration of the task performed. To ensure constant access to the process, many handheld devices and remote entry options are available for time tracking as well. These automated methods make it easier for lawyers to keep time as they work.

Regardless of the chosen method, make sure you:

- retain detailed information on the work performed
- keep track of the actual amount of time worked
- record both billable and non-billable time
- use terminology that will translate into an easily understood bill
- avoid redundancy in time capture techniques prior to getting information into your billing system

The bottom line is your time tracking techniques can usually be improved. There are many options when it comes to time tracking and billing programs. The Law Practice Management Department can help you choose proper time tracking techniques and tools so you can move toward a more productive and profitable practice. 

Natalie R. Thornwell is the director of the State Bar of Georgia's Law Practice Management Program.

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Keeping Up with the South Georgia Office

By Bonne Cella

Although the pace of life is a little slower in South Georgia, the Bar's satellite office has stayed busy experimenting with technology, hosting events and keeping tabs on other lawyer-oriented events taking place.

Experimenting with Technology

The State Bar's satellite office in Tifton now boasts state-of-the-art live video-teleconferencing capabilities. Georgia attorneys now have the ability to conduct meetings or depositions with their counterparts anywhere in the country. Just recently a successful meeting took place with the U.S. Attorney's office in Miami and an expert witness from South Georgia, saving time and money for both parties.

If you are interested in trying out the new equipment, call the Satellite office at (800) 330-0446. When reserving the conference room, keep in mind that the other party must have comparable equipment. For those attorneys in Atlanta who want to take advantage of video teleconferencing, call Kyle Gause, (404) 419-0160, conference center A/V manager at Bar headquarters to make arrangements.

Hosting Events

One of the agencies the satellite office has provided meeting space for is Children's Advocacy. Through tireless work and dedica-



Photos courtesy of Bonne Cella

Fred Graham, president of the Houston County Bar Association welcomes participants to The Nuts and Bolts of Recent Tort Reform.

tion, the organization now has its own home and serves, Tift, Worth, Turner and Irvin counties. Children's Advocacy Center (CAC) also reads: Caught in the Act of Caring. Director, Ina Woodroff stated that the center provides a child-friendly facility where professionals work together as a team to protect and treat child abuse victims while holding offenders accountable. Other objectives include increasing the number of children receiving immediate medical exams to avoid losing physical evidence due to time lapse; increase the number of children seen for mental health counseling and to increase the number of offenders prosecuted and convicted. The center provides videotaped interviews by professionally trained forensic interviewers as well as community education.

Another function of the satellite office is to help local bar associations with programs or CLE. An example of a recent program is, The



Rob Reinhardt, Lori Beaumont and John Tibbets share a laugh after Tibbets spoke to their local bar association.



A court reporter and attorney at the satellite office in Tifton prepare for a live videoconference with the U.S. Attorney's office in Miami, Fla.

Nuts and Bolts of Recent Tort Reform, which was held at the Houston County Justice Center. If your bar association would like help in facilitating a similar program, call the satellite office or e-mail bonne@gabar.org.

Keeping Tabs

The Tifton Circuit Bar along with other local sponsors held a reception in appreciation of the service of Immediate Past State Bar President, Rob Reinhardt and to welcome newly appointed Tift Superior Court Judge Ralph "Rusty" Simpson. Gov. Perdue appointed Simpson to fill the unexpired term of Judge Harvey Davis of Ocilla who passed away in May.

A memory table with photographs and roses was set up at the reception in honor of the beloved Judge Davis.


It is all too seldom that attorneys hear praise for their profession. Such was not the case when Col. John Tibbets (ret.) spoke at a recent Tifton Circuit Bar meeting. Tibbets, a West Point graduate served 21 years in the army before retiring. He was stationed at the Pentagon on 9/11 and also served in Desert Storm, Operation Iraqi Freedom, and Afghanistan. The nature of his missions called for him to work closely with Army attorneys. Tibbets praised their sharp minds, attention to detail and knowledge of law. The attorneys had the



Newly appointed Superior Court Judge Rusty Simpson addresses guests at a reception as Rob Reinhardt looks on.



Ina Woodroff, Director of the Children's Advocacy Center explains the mission of the program.

daunting task of facilitating a smooth transition of thousands of troops and tons of equipment through the quagmire of cultural diversity while adhering to international law. 

Bonne Cella is the office administrator for the South Georgia office of the State Bar of Georgia.

If you would like to hold a meeting at the South Georgia Office, call (800) 330-0446 or e-mail bonne@gabar.org.

Activity High in Early Fall

By Johanna B. Merrill

As the 2005-06 Bar year moved from late summer into early fall, section activity was high.

Several sections co-hosted their annual seminars and institutes with ICLE, such as the **Fiduciary Law Institute**, July 14-16, the **Environmental Law Seminar**, Aug. 5-6 and the one-day **Tech Law Institute** on Sept. 20.


The **Technology Law Section** also hosted a quarterly CLE lunch meeting on Aug. 25 at Witness Systems in Roswell, Ga. The topic discussion, "Streamlining the Transaction Process: a Focus on Forms, Negotiating, and the Business Process," was led by Brian Leslie, director, product licensing and in-house counsel for Witness Systems. The 30 attendees each received one hour of CLE credit.

On Aug. 17 members of the **Entertainment & Sports Law Section** were exposed to the titillating topic of legal issues in the adult entertainment industry at a CLE luncheon titled "The Other Side of Entertainment" held at the Food Studio in the King Plow Arts Center. Attorney panelists Alan Begner, partner, Begner & Begner, PC; Cary Wiggins, partner, Cook Youngelson & Wiggins; and Rich Merritt, terminated from Powell Goldstein LLP due to the release of his autobiography, *Secrets of a Gay Marine Porn Star*, for which he is currently negotiating film rights addressed issues involved in representation of nightclubs and adult entertainers, including First Amendment Rights, employment law, life story rights acquisitions, literary deals and property rights, and criminal representation. Joe Habachy of Law Offices of Joe Habachy, moderated. The section hosted another CLE luncheon on Sept. 28 at the Clubhouse at Lenox Square titled "Let's Talk This Out,"

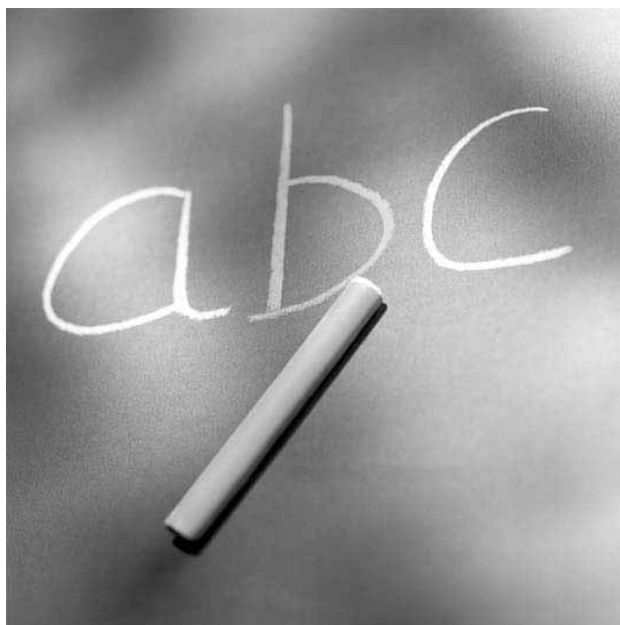
which was an entertainment mediation and dispute resolution panel. The panelists were Monica Ewing of Register Lett LLP and a Fulton County magistrate judge; Hank Kimmel of Hank Kimmel Mediation Services; and R. Wayne Thorpe of JAMS/Endispute.

The **Antitrust Law** and **International Law** sections hosted a well attended luncheon with Federal Trade Commission Chairman Deborah Platt Majoras at the offices of Kilpatrick Stockton in Atlanta on Sept. 7. Chairman Majoras spoke on "Creating a Global Competition Culture."

The **Intellectual Property Law Section** has had an event-filled fall with several roundtable lunches and a social event. On July 21 the section's patent committee, chaired by Tina McKeon, hosted a roundtable luncheon at the Bar Center with speaker Charles "Chico" Gholz, who discussed the topic "An Introduction to Patent Interference Practice." On Sept. 22 the patent committee and the litigation committee, chaired by Philip Burrus, hosted a luncheon titled "Baffled by *Phillips*? What is the Right Angle on Patent Drafting and Claim Construction in Light of *Phillips v. AWH Corp.*?" Panelists were Lawrence Nodie of Needle & Rosenberg and Eric Hanson of Smith, Gambrell & Russell. On Sept. 29 the social committee, chaired by Shane Nichols, hosted an open house happy hour featuring a panel discussion on how members could become more involved in the section's various committees at King & Spalding's offices.

If you are interested in joining one of the Bar's 38 sections, including the newly formed **Consumer Law Section**, please remit the appropriate dues, along with your name, Bar number, address and the name of the section you would like to join, to: State Bar of Georgia, Membership Department, 104 Marietta St., Atlanta, GA 30303. 

Johanna B. Merrill is the section liaison for the State Bar of Georgia.



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Starting with Professionalism

First Year Students Get Lessons in Professionalism

By Sally Evans Lockwood

For the 13th straight year, the Law School Orientations on Professionalism scored high marks from entering students at each of the five law schools in Georgia. The programs were initiated in 1993 with the goal of impressing upon law students at the outset of their careers the importance of professionalism in law school and in practice. A joint effort of the law schools, the State Bar Committee on Professionalism and the Chief Justice's Commission on Professionalism, the program is a central feature of the orientation process at each law school.

These programs emphasize the importance of adhering to a code or rule of ethics—whether as student or practitioner—while at the same time going beyond what is minimally required by rules to the values that define the legal profession: competence, character, civility, commitment to the rule of law, to the lawyer's role as officer of the court, to public and community service. The message to the law students is identical to the message of professionalism continuing legal



Students from the Emory University School of Law take the Professionalism Oath administered by Supreme Court Justice P. Harris Hines.

education required of all active members of the State Bar of Georgia: that the function of lawyers is to assist clients in the proper use of the legal system, that a lawyer acts as both advocate for the client and counselor to the client. When acting as advocate, the lawyer represents the client's interest to others in a vigorous and committed manner, while at the same time remaining conscious of duties to other lawyers, the legal system, and the community in general.

Each orientation on professionalism begins with an address by a judge or Bar leader, followed by a 90-minute breakout session. Here group leaders assist students in examining hypotheticals designed to provide a framework for discussion of some of the professionalism and ethical issues they may encounter in law school and to enable them to see the connections, and the differences, between their responsibilities as law students

and as lawyers. Breakout groups are composed of eight to 10 students and two leaders drawn from the bench, bar and law faculty. A reception or lunch follows the breakouts where students and group leaders can continue the discussions.

Each year, the orientations on professionalism reach more than 800 students and attract more than 200 Georgia lawyers, judges, and legal educators who volunteer as speakers and group leaders. Several of the schools now incorporate into these programs a ceremony where a judge administers the student conduct code or professionalism pledge to the students, lending symbolic importance to this moment in their professional development. As one student wrote, "The seminar's formal organization conveyed the gravity of an oath."

Emory pairs a faculty member with each judge or practitioner

The incoming students enter law school with a clean slate. Covering professionalism on their first day forms a platform for everything else they will learn during their next three years.

group leader to contour the law school and practice dimensions of the discussions and to encourage faculty to raise professionalism issues in substantive courses. Another variation at Emory is the addition of a follow-up session at the beginning of the second semester where the focus is the transformation the students are experiencing as they move from being novices in the legal system to participants who bear responsibility for it.

The 2005 evaluations from students and group leaders reveal that the programs are effective in giving the students a professionalism per-

spective to take into the law school experience. In fact, the only recurring complaint was "needed more time." Student comments range from enthusiastic to insightful:

"This was so helpful! Thank you!"

"Good job! I liked it."

"Outstanding program—continue this as long as possible."

"Looking forward to January!"

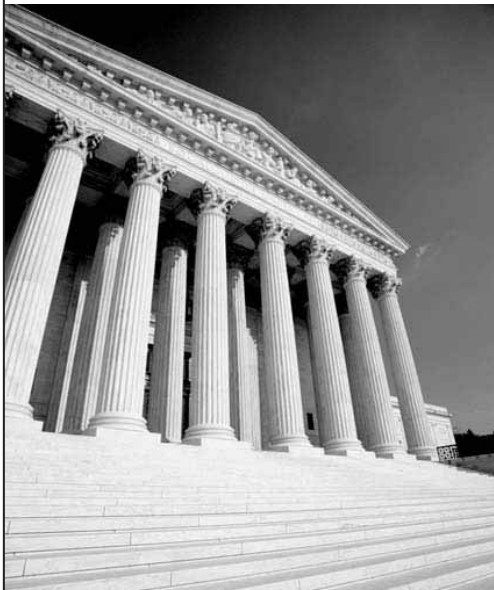
"The program underlines the fact that we have entered a profession and are now held to higher standards."

"It was effective in helping me to realize the high standard of ethical



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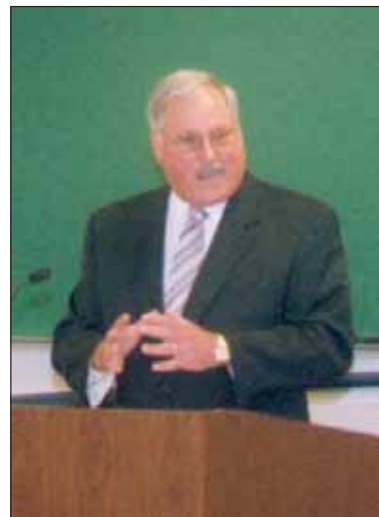
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Judge Robert Rodatus administers the Professionalism Oath to students from Mercer University School of Law.



Judge James Bodiford speaks to the students at John Marshall Law School.

2005 LAW SCHOOL ORIENTATIONS ON PROFESSIONALISM

School	Speaker
Emory University School of Law	The Honorable P. Harris Hines, Justice, Supreme Court of Georgia
Georgia State University College of Law	The Honorable Randy Rich, Judge, Gwinnett County State Court, Lawrenceville, Ga.
John Marshall Law School	The Honorable James G. Bodiford, Judge, Superior Court, Cobb Judicial Circuit, Marietta, Ga.
Mercer University School of Law	The Honorable Robert V. Rodatus, Judge, Gwinnett County Juvenile Court, Lawrenceville, Ga.
University of Georgia School of Law	Lisa Godbey Wood, U.S. Attorney, Southern District, Savannah, Ga.


conduct necessary to be an attorney in the state of Georgia.”

A practitioner leader wrote: “Thank you for doing this. It helped me as much as the students.” Welcoming the practice perspective, a law faculty member found, “The students really seem to appreciate the ‘real world’ view of the practitioner. Also—for faculty who have never practiced (e.g. me)

that input is really crucial.” She went on to say, “I think that when more is expected of students, they are more likely to rise to the challenge of professional behavior and personal integrity.”

Over the years, the law school professionalism programs in Georgia have attracted national attention. A number of law schools around the country conduct similar

programs based on the Georgia professionalism orientations.

These orientations have proved successful not only in fostering an awareness of professionalism in entering law students, but also in serving as a means of bringing the legal community—lawyers, judges, faculty and law students—together for a shared professional experience. As one group leader put it, “Thank you for permitting me to participate. I’m very encouraged about the future of our profession based on meeting the students and hearing their views.” 

Sally Evans Lockwood is executive director of the Chief Justice’s Commission on Professionalism.

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Justice Robert Benham
Supreme Court of Georgia

CALL FOR NOMINATIONS

The Community Service Awards Selection Committee and the State Bar of Georgia invite nominations for the Seventh Annual Justice Robert Benham Awards for Community Service.

Eligibility:

To be eligible a nominee must be: 1) Member in good standing of the State Bar of Georgia; 2) Participant in outstanding community service work; 3) Not a member of the Selection Committee; and 4) Not engaged in a contested judicial or political contest in calendar year 2005.

Nomination should include:

- I. Nominator:** Name (contact person for law firm, corporate counsel or other legal organization), address, telephone number and e-mail address.
- II. Nominee:** Name, address, telephone number, e-mail address.
- III. Nomination Narrative:** Explain how the nominee meets the following criteria:

These awards recognize judges and lawyers who have combined a professional career with outstanding service and dedication to their communities through voluntary participation in community organizations, government sponsored activities or humanitarian work outside of their professional practice. These judges' and lawyers' contributions may be made in any field, including but not limited to: social service, education, faith-based efforts, sports, recreation, the arts, or politics. Continuous activity over a period is an asset.

Specify the nature of the contribution and identify those who have benefitted.

- IV. Biographical Information:** Nominee's resume or other biographical information should be included.
- V. Letters of Support:** Include two (2) letters of support from individuals and organizations in the community that are aware of the nominee's work.

Selection Process:

The Community Service Task Force Selection Committee will review the nominations and select the recipients. One recipient will be selected from each judicial district for a total of ten recipients. If no recipient is chosen in a district, then two or more recipients might be selected from the same district. Stellar candidates may be considered for the Lifetime Achievement Award. All Community Service Task Force Selection Committee decisions will be final and binding. Awards will be presented at a special ceremony in Marietta in January.

Send Nomination materials to:

Mary McAfee, Chief Justice's Commission on Professionalism, Suite 620, 104 Marietta St. NW, Atlanta, Georgia 30303, (404) 225-5040

Nominations must be postmarked by November 1, 2005.

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In Memoriam

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

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Died July 2005

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Admitted 1944
Died February 2005

Charles Frank Fennell

Atlanta, Ga.
Admitted 1939
Died June 2005

Pamela J. Fightmaster-Wycoff

Lawrenceville, Ga.
Admitted 1994
Died July 2005

Leroy S. Fowler

Savannah, Ga.
Admitted 1949
Died March 2005

James Kilpatrick

Rome, Ga.
Admitted 1951
Died June 2005

Charles E. Leonard

Atlanta, Ga.
Admitted 1971
Died January 2005

Pope McIntire

Atlanta, Ga.
Admitted 1947
Died July 2005

Murphey Rogers

Ocilla, Ga.
Admitted 1946
Died June 2005

Meg J. Mantler Roop

Dunwoody, Ga.
Admitted 1986
Died June 2005

Spencer W. Saunders Sr.

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Admitted 1979
Died May 2005

Harold E. Smith Jr.

Decatur, Ga.
Admitted 1961
Died June 2005

Morgan Stanford

Atlanta, Ga.
Admitted 1947
Died June 2005

Gordan Lee Sullivan

St. Simons Island, Ga.
Admitted 1939
Died March 2005

Cornelius B. Thurmond Jr.

Augusta, Ga.
Admitted 1950
Died April 2005

John Turoff

Atlanta, Ga.
Admitted 1955
Died January 2005

Shannon Williams


Macon, Ga.
Admitted 1996
Died June 2005



Shannon Trippi

Williams, 35, of Macon, Ga., died in June. Williams was born in Macon, Ga., in

1970. He received an Associates of Arts in Political Science in 1990 from Macon State College, a Bachelors of

Science in Political Science and a Masters of Public Administration in 1993 at Georgia College, during which time he became a member of the Cordell Hull Chapter of the Phi Alpha Delta Law Fraternity. He then received his Juris Doctorate from Cumberland School of Law at Samford University in Birmingham, Ala., in June 1996. After being admitted to the State Bar of Georgia that same year, Williams worked as an attorney at a local law firm in Macon for a year before opening a private law practice. He spent the next seven years doing criminal defense and assorted trial work, including personal injury law. He was most recently working as an Assistant Public Defender for the Towaliga Judicial Circuit in Forsyth, Ga., a position he had held since Jan. 1, 2005. In addition to his practice, Williams taught paralegal courses at Macon State College and Business Law at Wesleyan University, both in Macon. He enjoyed going to the beach, his dog Autumn and being with friends and family. Williams is survived by his mother, Marcia Carol Williams of Warner Robbins, Ga.; grandmother Gloria E. Penland, Aunt and Uncle Gloria and John Marshall of Macon; Uncle and Aunt Buck and Sara Penland of Juliette, Ga.; Aunt Judy C. Walker of Warner Robbins; Uncle Randy and Aunt Brenna Williams of Panama City Beach, Fla., and several cousins. 

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First Publication of Proposed Formal Advisory Opinion No. 05-11

Formal Advisory Opinion No. 99-1, issued by the Supreme Court of Georgia on May 27, 1999, provides an interpretation of the Standards of Conduct and Ethical Considerations (ECs). On June 12, 2000, the Supreme Court of Georgia issued the Georgia Rules of Professional Conduct, which became effective on January 1, 2001, replacing the Standards of Conduct. The Canons of Ethics, including Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 99-1 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 99-1. Proposed Formal Advisory Opinion No. 05-11 is a redrafted version of Formal Advisory Opinion No. 99-1. Proposed Formal Advisory Opinion No. 05-11 addresses the same question presented in Formal Advisory Opinion No. 99-1; however, it provides an interpretation of the Georgia Rules of Professional Conduct. This proposed opinion will be treated like a new opinion and will be processed and published in compliance with Bar Rule 4-403(c).

As such, 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 only** 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 eighteen (18) copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board, through the Office of the General Counsel of the State Bar of Georgia, by November 15, 2005, in order for the comment

to be considered by the Board. Any comment to a proposed opinion should make reference to the number of the proposed opinion. After consideration of comments received from State Bar members, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

PROPOSED FORMAL ADVISORY OPINION NO. 05-11

QUESTION PRESENTED:

May an attorney ethically defend a client pursuant to an insurance contract when the attorney simultaneously represents, in an unrelated matter, the insurance company with a subrogation right in any recovery against the defendant client?

SUMMARY ANSWER:

In this hypothetical, the attorney's successful representation of the insured would reduce or eliminate the potential subrogation claim of the insurance company that is a client of the same attorney in an unrelated matter. Thus, essentially, advocacy on behalf of one client in these circumstances constitutes advocacy against a simultaneously represented client. "Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." *See*, Rule 1.7, Comment 8. This is true because adequate representation of any client includes a requirement of an appearance of trustworthiness that is inconsistent with advocacy against that client.

Thus, if the insurance company, *as opposed to an insured of that company*, is in fact the client of the attorney in the unrelated matter, then this representation would be an impermissible conflict of interest under Rule 1.7(a) and consent of both clients, as sometimes permitted under Rule 1.7 to cure an impermissible conflict, would not be available. *See*, Rule 1.7(c)(3).

If, however, as is far more typically the case, it is not the insurance company that is the client in the unrelated matter, but an insured of the insurance company, then there is no advocacy against a simultaneous representation client and the representation is not prohibited for that reason. Instead, in such circumstances, the attorney may have a conflict with the attorney's own interests under Rule 1.7(a) in that the attorney has a financial interest in maintaining a good business relationship with the non-client insurance company. The likelihood that the representation will be harmed by this financial interest makes this a risky situation for the attorney. Nevertheless, under some circumstances the rules permit this personal interest conflict to be cured by consent of all affected clients after compliance with the requirements for consent found in Rule 1.7(b). Consent would not be available to cure the conflict, however, if the conflict "involves circumstances rendering it reasonably unlikely that the lawyer [would] be able to provide adequate representation to one or more of the affected clients." *See*, Rule 1.7(c). The question this asks is not the subjective one of whether or not the attorney thinks he or she will be able to provide adequate representation despite the conflict, but whether others would reasonably view the situation as such. The attorney makes this determination at his or her own peril.

OPINION:

Correspondent asks whether an attorney may ethically defend a client pursuant to an insurance contract when the attorney simultaneously represents, in an unrelated matter, the insurance company with a subrogation right in any recovery against the defendant client? In this hypothetical, the attorney's successful representation of the insured would reduce or eliminate the potential subrogation claim of the insurance company that is a client of the same attorney in an unrelated matter.

This situation is governed by Rule 1.7, which provides:

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after:

(1) consultation with the lawyer;

(2) having received in writing reasonable and adequate information about the material risks

of the representation; and

(3) having been given the opportunity to consult with independent counsel.

(c) Client consent is not permissible if the representation:

(1) is prohibited by law or these rules;

(2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding; or

(3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

If the representation of the insurance company in the unrelated matter is, in fact, representation of the insurance company, and not representation of an insured of the company, then we get additional assistance in interpreting Rule 1.7 from Comment 8 which states that: "Ordinarily, a lawyer may not act as an advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated." This is true because adequate representation of any client includes a requirement of an appearance of trustworthiness that is inconsistent with advocacy against that client. This prohibition is not because Georgia lawyers are not sufficiently trustworthy to act professionally in these circumstances by providing independent professional judgment for each client unfettered by the interests of the other client. It is, instead, a reflection of the reality that reasonable client concerns with the appearance created by such conflicts could, by themselves, adversely affect the quality of the representation.

Thus, in this situation there is an impermissible conflict of interest between simultaneously represented clients under Rule 1.7(a) and consent to cure this conflict is not available under Rule 1.7(c) because it necessarily "involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients." *See, generally*, ABA/BNA *LAWYERS MANUAL ON PROFESSIONAL CONDUCT* 51:104-105 and cases and advisory opinions cited therein. *See, also*, ABA *Comm. on Ethics and Professional Responsibility, Informal Op. 1495* (1982) (lawyer may not accept employment adverse to existing client even in unrelated matter; prohibition applies even when present client employs most lawyers in immediate geographical area, thereby making it difficult for adversary to retain equivalent counsel).

If, however, as is far more typically the case, it is not the insurance company that is the client in the unrelated

matter, but an insured of the insurance company, then there is no advocacy against a simultaneous representation client and the representation is not prohibited for that reason. Instead, in such circumstances, the attorney may have a conflict with the attorney's own interests under Rule 1.7(a) in that the attorney has a financial interest in maintaining a good business relationship with the non-client insurance company. The likelihood that the representation will be harmed by this financial interest makes this a risky situation for the attorney. Nevertheless, under some circumstances the rules permit this personal interest conflict to be cured by consent

of all affected clients after compliance with the requirements for consent found in Rule 1.7(b). Consent would not be available to cure the conflict, however, if the conflict "involves circumstances rendering it reasonably unlikely that the lawyer [would] be able to provide adequate representation to one or more of the affected clients." See, Rule 1.7(c). The question this asks is not the subjective one of whether or not the attorney thinks he or she will be able to provide adequate representation despite the conflict, but whether others would reasonably view the situation as such. The attorney makes this determination at his or her own peril.

First Publication of Proposed Formal Advisory Opinion No. 05-12

Formal Advisory Opinion No. 00-1, issued by the Supreme Court of Georgia on January 31, 2000, provides an interpretation of Directory Rules (DRs). On June 12, 2000, the Supreme Court of Georgia issued the Georgia Rules of Professional Conduct, which became effective on January 1, 2001, replacing the Standards of Conduct. The Canons of Ethics, including Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 00-1 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 00-1. Proposed Formal Advisory Opinion No. 05-12 is a redrafted version of Formal Advisory Opinion No. 00-1. Proposed Formal Advisory Opinion No. 05-12 addresses the same question presented in Formal Advisory Opinion No. 00-1; however, it provides an interpretation of the Georgia Rules of Professional Conduct. This proposed opinion will be treated like a new opinion and will be processed and published in compliance with Bar Rule 4-403(c).

As such, 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 only** 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 eighteen (18) copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board, through the Office of the General Counsel of the State Bar of Georgia, by November 15, 2005, in order for the comment to be considered by the Board. Any comment to a proposed opinion should make reference to the number of the proposed opinion. After consideration of comments received from State Bar members, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

PROPOSED FORMAL ADVISORY OPINION NO. 05-12

QUESTION PRESENTED:

When the City Council controls the salary and benefits of the members of the Police Department, may a councilperson, who is an attorney, represent criminal defendants in matters where the police exercise discretion in determining the charges?

SUMMARY ANSWER:

Representation of a criminal defendant in municipal court by a member of the City Council where the City Council controls salary and benefits for the police implicates Rule 3.5(a), which prohibits attorneys from seeking to influence officials by means prohibited by law. In any circumstance where the representation may create an appearance of impropriety it should be avoided.

OPINION:

This opinion addresses itself to a situation where the City Council member votes on salary and benefits for

the police. Particularly in small municipalities, this situation could give rise to a perception that a police officer's judgment might be affected. For example, a police officer might be reluctant to oppose a request that he recommend lesser charges or the dismissal of charges when the request comes from a council member representing the accused. Situations like the one at hand give rise to inherent influence which is present even if the attorney who is also a City Council member attempts to avoid using that position to influence the proceedings.

Rule 3.5 provides that "A lawyer shall not, without regard to whether the lawyer represents a client in the matter: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law...." As a general matter, a police officer is a public official. *See White v. Fireman's Fund Ins. Co.*, 233 Ga. 919 (1975); *Sauls v. State*, 220 Ga. App. 115 (1996). *But see* O.C.G.A. §45-5-6. Where a police officer exercises discretion as to the prosecution of criminal charges, the police officer is a public official within the meaning of Rule 3.5(a). By its express terms, Rule 3.5(a) applies only when an attorney seeks to influence, that is where an attorney has the intent to influence, an official by means prohibited by law. If an attorney were to

indicate to an officer that as a result of the attorney's position as a member of the City Council a favorable recommendation as to one of the attorney's clients would result in benefits flowing to the officer, or that an unfavorable recommendation would result in harm, the attorney would have committed the offense of bribery, OCGA §16-10-2 (a)(1), or extortion, OCGA §16-8-16(a)(4). The attorney would also have violated Rule 3.5(a).

The mere fact of representation of a criminal defendant by an attorney who is a member of the City Council, when the City Council controls the salary and benefits of the members of the Police Department, and when the police exercise discretion in determining the charges does not, by itself, establish a violation of Rule 3.5(a). To establish a violation, there must be a showing that the attorney sought to exercise influence in a manner prohibited by law. We note, however, that Comment 2 to Rule 3.5 provides that "The activity proscribed by this Rule should be observed by the advocate in such a careful manner that there be no appearance of impropriety." Pursuant to Rule 3.5, therefore, an attorney should not represent a criminal defendant where an influence of improper influence can reasonably be drawn.

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

Second Publication of Proposed Formal Advisory Opinion No. 05-2 Hereinafter known as "Formal Advisory Opinion No. 05-2"

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after October 17, 2005.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **only the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia.** The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from

members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through the Office of the General Counsel of the State Bar of Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

In accordance with Rule 4-223(a) of the Rules and Regulations of the State Bar of Georgia, any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person.

Pursuant to Rule 4-403(e) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, if the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested

the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

**STATE BAR OF GEORGIA ISSUED BY
THE FORMAL ADVISORY OPINION
BOARD PURSUANT TO RULE 4-403
ON JULY 15, 2005
FORMAL ADVISORY OPINION NO.
05-2 (Redrafted Version of Formal
Advisory Opinion No. 90-1)**

QUESTION PRESENTED:

“Hold Harmless” Agreements Between Employers and Their In-House Counsel.

Whether an attorney employed in-house by a corporation may enter into an agreement by which his or her employer shall hold the attorney harmless for malpractice committed in the course of his employment.

SUMMARY ANSWER:

“Hold harmless” agreements between employers and attorneys employed in-house are ethical if the employer is exercising an informed business judgment in utilizing the “hold harmless” agreement in lieu of malpractice insurance on the advice of counsel and the agreement is permitted by law.

OPINION:

Georgia Rule of Professional Conduct 1.8(h) offers the following direction:

“A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement”

This rule seeks to prevent attorneys from taking advantage of clients and avoiding the removal of negative consequences for malpractice. *See*, Opinion 193 (D.C. 1989). Neither of these policies would be well served by prohibiting the use of “hold harmless” agreements between employers and attorneys employed in-house if the employer is exercising an informed business judgment in utilizing the “hold harmless” agreement in lieu of malpractice insurance and doing so on the advice of any counsel other than the counsel being employed. Consultation with in-house counsel satisfies the requirement of the rule. First, the position of the client as employer, and the sophistication of those who employ in-house counsel, eliminates almost all overreaching concerns. Secondly, the lawyer as employee does not avoid the negative consequences of malpractice because he or she is subject to being discharged by the employer. Apparently, discharge is preferred by employers of in-house counsel to malpractice suits as a remedy for negligent performance. *See*, Opinion 193 (D.C. 1989).

Accordingly, we conclude that “hold harmless” agreements are ethical when an employer of in-house counsel makes an informed business judgment that such an agreement is preferable to employee malpractice insurance, is done on the advice of counsel, and is permitted by law. The determination of whether such agreements are permitted by law is not within the scope of this Opinion. Finally, we note that the proposed “hold harmless” agreement does not limit liability to third parties affected by in-house counsel representation. Instead, the agreement shifts the responsibility for employee conduct from an insurance carrier to the organization as a self-insurer.

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

**Second Publication of Proposed
Formal Advisory Opinion No. 05-3
Hereinafter known as “Formal
Advisory Opinion No. 05-3”**

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has

issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after October 17, 2005.

Rule 4-403(d) states that within 20 days of the filing of

the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **only the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia.** The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through the Office of the General Counsel of the State Bar or Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

In accordance with Rule 4-223(a) of the Rules and Regulations of the State Bar of Georgia, any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person.

Pursuant to Rule 4-403(e) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, if the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

**STATE BAR OF GEORGIA ISSUED BY
THE FORMAL ADVISORY OPINION
BOARD PURSUANT TO RULE 4-403
ON JULY 15, 2005
FORMAL ADVISORY OPINION NO.
05-3 (Redrafted Version of Formal
Advisory Opinion No. 90-2)**

QUESTION PRESENTED:

Ethical propriety of a part-time law clerk appearing as an attorney before his or her present employer-judge.

SUMMARY ANSWER:

The representation of clients by a law clerk before a present employer-judge is a violation of Rule 1.7 of the Georgia Rules of Professional Conduct.

OPINION:

This question involves an application of Rule 1.7 governing personal interest conflicts. Rule 1.7 provides:

(a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).

(b) If client consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected or former client consents, preferably in writing, to the representation after: (1) consultation with the lawyer, (2) having received in writing reasonable and adequate information about the material risks of the representation, and (3) having been given the opportunity to consult with independent counsel.

(c) Client consent is not permissible if the representation: (1) is prohibited by law or these rules; . . . (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients.

There are two threats to professional judgment posed when a law clerk undertakes to represent a client before the judge by whom the law clerk is also currently employed. The first is that the lawyer will be unduly restrained in client representation before the employer-judge. Comment [6] to Rule 1.7 states that "the lawyer's personal or economic interest should not be permitted

to have an adverse effect on representation of a client.” And Comment [4] explains that:

“loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other competing responsibilities or interest. The conflict in effect forecloses alternatives that would otherwise be available to the client.”

Because of this risk, the representation of clients by an employer-judge is a violation of Rule 1.7. Moreover, the Georgia Supreme Court has ruled that for a full-time law clerk concurrently to serve as appointed co-counsel for a criminal defendant before one of the judges by whom the law clerk is employed constitutes an actual conflict of interest depriving the defendant of his Sixth Amendment right of counsel.¹

Rule 1.7 permits client waiver of personal interest conflicts through client consultation with the lawyer, providing reasonable and adequate written information about the material risks of the representation to the client, and giving the client the opportunity to consult with independent counsel. This waiver provision must be read consistently with other guidance from the profession. Because of a second threat to professional judgment, client waiver is impermissible in this situation. Client waiver is inconsistent with the guidance of Rule 3.5(a) of the Georgia Rules of Professional Responsibility, which prohibits a lawyer from seeking to influence a judge, juror, prospective juror or other official by means prohibited by law. (There is an implication of improper influence in the very fact of the employment of the attorney for one of the parties as the judge’s current law clerk.) It is also inconsistent with the guidance of Rule 3.5(a) Comment [2] which states,

“If we are to maintain integrity of the judicial process, it is imperative that an advocate’s function be limited to the presentation of evidence and argument, to allow a cause to be decided according to law. The exertion of improper influence is detrimental to that process. Regardless of an advocate’s innocent intention, actions which give the appearance of tampering with judicial impartiality are to be avoided. The activity proscribed by this Rule should be observed by the advocate in such a careful manner that there be no appearance of impropriety.

Accordingly, a part-time law clerk should not seek client waiver of the conflict of interest created by representation of clients before the employer-judge.²

A related rule is found in Rule 1.12(b), which states:

A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer

for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator. In addition, the law clerk shall promptly provide written notice of acceptance of employment to all counsel of record in all such matters in which the prospective employer is involved.

Rule 1.12(b) allows a law clerk for a judge to accept employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially with the approval of the judge and prompt written notice to all counsel of record in matters in which the prospective employer of the law clerk is involved. Rule 1.12(b) addresses future employment by a judge’s law clerk and should not be read to allow a law clerk to represent a party before the judge whom he is currently employed. Rule 3.5(a) and Comment [2] to that Rule would prohibit the appearance of tampering with judicial impartiality that the close employment relationship between judge and current law clerk would inevitably raise.

This opinion addresses the propriety of the lawyer’s conduct under the Georgia Rules of Professional Responsibility. It does not address the ethical propriety of the same conduct in his or her capacity as part-time clerk. We do note, however, that many courts have prevented the conduct in question here as a matter of court rules in accord with this opinion.³ We also note that judicial clerks are often treated as “other judicial officers” for the purpose of determining disqualifications and other ethical concerns.⁴ Under that treatment, the conduct in question here would be analogous to a request by a part-time judge to practice before his or her own court in violation of the Code of Judicial Conduct and statutory provisions.⁵ See O.C.G.A. § 15-7-21.⁶

Endnotes

1. 269 Ga. 446, 499 S.E. 2d 897 (1998).
2. In accord, Advisory Opinion CI-951 (Michigan) (1983). (Part-time law clerk may not work in any capacity as private counsel on any case pending in employer-judge’s circuit and must give notice to clients of his inability to appear in the circuit.)
3. Sup. Ct. R. 7. (An employee of the Supreme Court shall not practice as an attorney in any court while employed by the Court.)
4. See, e.g., ABA/BNA Lawyers’ Manual on Professional Conduct 91:4503 and cases cited therein; see, also, ABA Model Rules of Professional Conduct Rule 1.12 (1984); and Opinion 38 (Georgia 1984) (“Lawyers and members

of the public view a Law Clerk as an extension of the Judge for whom the Clerk works”).

5. Georgia Code of Judicial Conduct. (Part-time judges: (2) should not practice law in the court on which they serve, or in any court subject to the appellate jurisdiction of the court on which they serve, or act as lawyers in proceed-

ings in which they have served as judges or in any other proceeding related thereto.)

6. O.C.G.A. § 15-7-21(b). A part-time judge of the state court may engage in the private practice of law in other courts but may not practice in his own court or appear in any matter as to which that judge has exercised any jurisdiction.

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

Second Publication of Proposed Formal Advisory Opinion No. 05-4 Hereinafter known as “Formal Advisory Opinion No. 05-4”

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after October 17, 2005.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **only the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia.** The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through the Office of the General Counsel of the State Bar of Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

In accordance with Rule 4-223(a) of the Rules and Regulations of the State Bar of Georgia, any Formal Advisory Opinion issued pursuant to Rule 4-403 which

is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person.

Pursuant to Rule 4-403(e) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, if the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

STATE BAR OF GEORGIA ISSUED BY THE FORMAL ADVISORY OPINION BOARD PURSUANT TO RULE 4-403 ON JULY 15, 2005 FORMAL ADVISORY OPINION NO. 05-4 (Redrafted Version of Formal Advisory Opinion No. 91-3)

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 non-lawyer 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.

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

Second Publication of Proposed Formal Advisory Opinion No. 05-5 Hereinafter known as "Formal Advisory Opinion No. 05-5"

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after October 17, 2005.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **only the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia.** The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the brief-

ing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through the Office of the General Counsel of the State Bar of Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

In accordance with Rule 4-223(a) of the Rules and Regulations of the State Bar of Georgia, any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person.

Pursuant to Rule 4-403(e) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, if the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

**STATE BAR OF GEORGIA ISSUED BY
THE FORMAL ADVISORY OPINION
BOARD PURSUANT TO RULE 4-403
ON JULY 15, 2005
FORMAL ADVISORY OPINION NO.
05-5 (Redrafted Version of Formal
Advisory Opinion No. 92-1)**

QUESTION PRESENTED:

- 1) Ethical propriety of a law firm obtaining a loan to cover advances to clients for litigation expenses;
- 2) Ethical considerations applicable to payment of interest charged on loan obtained by law firm to cover advances to clients for litigation expenses.

OPINION:

Correspondent law firm asks if it is ethically permissible to employ the following system for payment of certain costs and expenses in contingent fee cases. The law firm would set up a draw account with a bank, with the account secured by a note from the firm's individual lawyers. When it becomes necessary to pay court costs, deposition expenses, expert witness fees, or other out-of-pocket litigation expenses, the law firm would obtain an advance under the note. The firm would pay the interest charged by the bank as it is incurred on a monthly or quarterly basis. When a client makes a payment toward expenses incurred in his or her case, the amount of that payment would be paid to the bank to pay down the balance owed on his or her share of expenses advanced under the note. When a case is settled or verdict paid, the firm would pay off the client's share of the money advanced on the loan. If no verdict or settlement is obtained, the firm would pay the balance owed to the bank and bill the client. Some portion of the interest costs incurred in this arrangement would be charged to the client. The contingent fee contract would specify the client's obligations to pay reasonable expenses and interest fees incurred in this arrangement.

The first issue is whether it is ethically permissible for lawyers to borrow funds for the purpose of advancing reasonable expenses on their clients' behalf. If so, we must then determine the propriety of charging clients interest to defray part of the expense of the loan.

In addressing the first issue, lawyers are generally discouraged from providing financial assistance to their clients. Rule 1.8(e) states:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; or
- (2) a lawyer representing a client unable to pay court costs and expenses of litigation may pay those costs and expenses on behalf of the client.

Despite that general admonition, contingent fee arrangements are permitted by Rule 1.5(c), which states:

- (1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer

in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

(2) Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the following:

- (i) the outcome of the matter; and,
- (ii) if there is a recovery, showing the:
 - (A) remittance to the client;
 - (B) the method of its determination;
 - (C) the amount of the attorney fee; and
 - (D) if the attorney's fee is divided with another lawyer who is not a partner in or an associate of the lawyer's firm or law office, the amount of fee received by each and the manner in which the division is determined.

The correspondent's proposed arrangement covers only those expenses which are permitted under Rule 1.8(e). Paragraph (e) of Rule 1.8 eliminates the former requirement that the client remain ultimately liable for financial assistance provided by the lawyer and further limits permitted assistance to cover costs and expenses directly related to litigation. See Comment (4) to Rule 1.8.

The arrangement also provides that when any recovery is made on the client's behalf, the recovery would first be debited by the advances made under the note, with payment for those advances being made by the firm directly to the bank. The client thus receives only that recovery which remains after expenses have been paid. The client is informed of this in correspondent's contingent fee contract, which states that "all reasonable and necessary expenses incurred in the representation of said claims shall be deducted after division as herein provided to compensate attorney for his fee."

In the case where recovery is not obtained, however, the lawyers themselves are contractually obligated to pay the amount owed directly to the bank. Correspondent's proposed contract as outlined in the request for this opinion does not inform the client as to possible responsibility for such expenses where there is no recovery. It is the opinion of this Board that Rules 1.5(c) and 1.8(e), taken together, require that the contingent fee contract inform the client whether he is or is not responsible for these expenses, even if there is no recovery.

Although the client may remain "responsible for all or a portion of these expenses," decisions regarding the appropriate actions to be taken to deal with such liability are entirely within the discretion of the lawyers. Since this discretion has always existed, the fact that the

lawyers have originally borrowed the money instead of advancing it out-of-pocket would seem to be irrelevant, and the arrangement is thus not impermissible.

The bank's involvement would be relevant, however, were it allowed to affect the attorney-client relationship, such as if the bank were made privy to clients' confidences or secrets (including client identity) or permitted to affect the lawyer's judgment in representing his or her client. See generally, Rule 1.6. Thus, the lawyer must be careful to make sure that the bank understands that its contractual arrangement can in no way affect or compromise the lawyer's obligations to his or her individual clients.

The remaining issue is whether it is ethically permissible for lawyers to charge clients interest on the expenses and costs advanced via this arrangement with the bank. As in the first issue, the fact that the expenses originated with a bank instead of the law firm itself is irrelevant, unless the relationship between lawyer and bank interferes with the relationship between lawyer and client. Assuming it does not, the question is whether lawyers should be permitted to charge their clients interest on advances.

In Advisory Opinion No. 45 (March 15, 1985, as amended November 15, 1985), the State Disciplinary Board held that a lawyer may ethically charge interest on clients' overdue bills "without a prior specific agreement with a client if notice is given to the client in advance that interest will be charged on fee bills which become delinquent after a stated period of time, but not less than 30 days." Thus, the Board found no general impropriety in charging interest on overdue bills. There is no apparent reason why advanced expenses for which a client may be responsible under a contingent fee agreement (whether they are billed to the client or deducted from a recovery) should be treated any differently. Thus, we find no ethical impropriety in charging lawful interest on such amounts advanced on the client's behalf.¹

In approving the practice of charging interest on overdue bills, the Board held that a lawyer must comply with "all applicable law¹ . . . and ethical considerations."

The obvious intent of Rule 1.5(c) is to ensure that clients are adequately informed of all relevant aspects of contingent fee arrangements, including all factors taken into account in determining the amount of their ultimate recovery. Since any interest charged on advances could affect the ultimate recovery as much as other factors mentioned in Rule 1.5(c), it would be inconsistent to permit lawyers to charge interest on these advances without revealing the intent to do so in the fee contract. Thus, we conclude that it is permissible to charge interest on such advances only if (i) the client is notified in the contingent fee contract of the maximum rate of inter-

est the lawyer will or may charge on such advances; and (ii) the written statement given to the client upon conclusion of the matter reflects the interest charged on the expenses advanced in the matter.

Endnotes

1. The opinion makes specific mention of O.C.G.A. 7-4-16, the Federal Truth in Lending and Fair Credit Billing Acts in Title I of the Consumer Credit Protection Act as amended (15 USC 1601 et seq.). We state no opinion as to the applicability of these acts or others to the matter at hand.

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

No earlier than thirty days after the publication of this Notice, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, 2004-2005 *State Bar of Georgia Directory and Handbook*, p. H-6 to H-7 (hereinafter referred to as "*Handbook*").

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

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

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT STATE OF GEORGIA

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

MOTION TO AMEND 2005-2

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

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors in regular meetings held on August 18, 2005, and upon the concurrence of its Executive Committee, presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, 2003-2004 *State Bar of Georgia Directory and Handbook*, pp. 1-H, et seq., and respectfully moves that the Rules and

Regulations of the State Bar of Georgia be amended in the following respects:

I.

Proposed Amendments to Part VIII, Continuing Lawyer Competency, of the Rules of the State Bar of Georgia

It is proposed that Rules 8-103, 8-104, 8-105 and 8-107 of Part VIII of the Rules of the State Bar of Georgia regarding continuing legal education requirements be amended as follows:

Rule 8-103. Commission on Continuing Lawyer Competency.

(A) Membership, Appointment and Terms:

(B) Powers and Duties of the Board:

(C) Finances:

(1) Purpose. The Commission should be adequately funded to enable it to perform its duties in a financially independent manner.

(2) Sources. Costs of administration of the Commission shall be derived from charges to members of the State Bar for continuing legal education activities.

(a) Sponsors of CLE programs to be held within the State of Georgia shall, as a condition of accreditation, agree to remit a list of Georgia attendees and to pay a fee for each active State Bar member who attends the program. This sponsor's fee shall be based on each day of attendance, with a proportional fee for programs lasting less than a whole day. The rate shall be set by the Commission.

(b) The Commission shall fix a reasonably comparable fee to be paid by individual attorneys who either (a) attend approved CLE programs outside

the State of Georgia or (b) attend un-approved CLE programs within the State of Georgia that would have been approved for credit except for the failure of the sponsor to pay the fee described in the preceding paragraph. Such fee shall accompany the attorney's annual ~~affidavit~~ report.

(3) Uses. Funds may be expended for the proper administration of the Commission. However, the members of the Commission shall serve on a voluntary basis without expense reimbursement or compensation.

Rule 8-104. Education Requirements and Exemptions.

(A) Minimum Continuing Legal Education Requirement.

(B) Basic Legal Skills Requirement.

(C) Exemptions.

(1) An inactive member shall be exempt from the continuing legal education and the reporting requirements of this Rule.

(2) The Commission may exempt an active member from the continuing legal education, but not the reporting, requirements of this rule for a period of not more than one (1) year upon a finding by the Commission of special circumstances unique to that member constituting undue hardship.

(3) Any active member over the age of seventy (70) shall be exempt from the continuing legal education requirements of this rule, including the reporting requirements, unless the member notifies the Commission in writing that the member wishes to continue to be covered by the continuing legal education requirements of this rule.

(4) Any active member residing outside of Georgia who neither practices in Georgia nor represents Georgia clients shall be exempt, upon written application to the Commission, from the continuing legal education, but not the reporting, requirements of this rule during the year for which the written application is made. This application shall be filed with the annual ~~reporting affidavit~~ report.

(5) Any active member of the Board of Bar Examiners shall be exempt from the continuing legal education but not the reporting requirement of this Rule.

(D) Requirements for Participation in Litigation.

Rule 8-105. Reporting Requirements.

On or before January 31 of each year, commencing in 1985, each active member shall make and file an ~~Affidavit~~ Annual Report with the Commission in such form as the Commission shall prescribe, reporting compliance with Rule 8-104.

Rule 8-107. Non-Compliance.

(A) Notice of Non-Compliance.

(1) In the event an active member shall fail to complete the required units at the end of each applicable period, the ~~Affidavit~~ Annual Report required under Rule 8-105 may be accompanied by a specific plan for making up the deficiency of necessary units within sixty (60) days after the date of the ~~Affidavit~~ Annual Report. The plan shall be deemed accepted by the Commission unless within fifteen (15) days after the receipt of the ~~Affidavit~~ Annual Report, the Commission notifies the ~~affiant~~ lawyer to the contrary. ~~Full completion of the affiant's plan shall be reported by Affidavit to the Commission not later than fifteen (15) days following the sixty (60) day period.~~ Failure by the ~~affiant~~ lawyer to complete the plan within the sixty (60) day period shall invoke the sanctions set forth in paragraph C.

(2) In the event that an active member shall fail to comply with these rules in any respect, the Commission shall promptly send notice of non-compliance. The notice shall specify the nature of the non-compliance and state that unless the non-compliance is corrected or a request for a hearing before the Commission is made within sixty (60) days, the statement of non-compliance shall be filed with the Supreme Court.

This notice, as well as any other notice or mailing required by Part VIII of these Rules, shall be mailed by first class mail to the member's current address contained in the membership records of the State Bar of Georgia. Service or actual receipt is not a prerequisite to actions authorized by these Rules.

(B) Hearing. If a hearing is requested, it shall be held within thirty (30) days by the full Commission, or one or more members designated by the Commission. Notice of the time and place of the hearing shall be given ten (10) days in advance. The party cited may be represented by counsel. Witnesses shall be sworn; and, if requested by the party cited, a complete electronic record or a transcript shall be made of all proceedings and testimony. The presiding member shall have the authority to rule on all motions, objections, and other matters presented in connection with the hearing. The hearing shall be conducted in conformity with the Georgia Rules of Civil Procedure, and the practice in

the trial of civil cases. The party cited may not be required to testify over his or her objection. The chairman of the Commission who conducted the hearing shall (1) make findings of fact and determine whether the party cited has complied with the rules; and (2) upon a finding of noncompliance, shall determine whether there was reasonable cause for noncompliance. A copy of the findings and determination shall be sent to the party cited. If it is determined that compliance has occurred, the matter shall be dismissed and the Commission's records corrected to reflect compliance. If it is determined that compliance has not occurred, the Commission shall proceed as follows:

(i) If the Commission determines that there was reasonable cause for noncompliance, the party cited shall be allowed fifteen (15) days to file a specific plan for correcting the noncompliance within the next sixty (60) days following submission of the plan. The plan shall be deemed accepted by the Commission unless, within fifteen (15) days after receipt, the Commission notifies the party cited. Completion of the plan shall be reported by Affidavit the lawyer in writing to the Commission not later than fifteen (15) days following the sixty (60) day period. If the party cited fails to file an acceptable plan, or fails to complete and certify completion within the sixty (60) day period, the Commission shall proceed as though there was not reasonable cause for noncompliance.

(ii) If the Commission determines that there was not reasonable cause for noncompliance, a record of the matter, including a copy of the findings, the determination, and the recommendation of the Commission for appropriate action, shall be filed promptly with the Supreme Court. If requested by the Commission, or the party cited, the record shall include a transcript of the hearing to be prepared at the expense of the requesting party.

(C) Supreme Court of Georgia Action.

SO MOVED, this _____ day of _____, 2005
Counsel for the State Bar of Georgia

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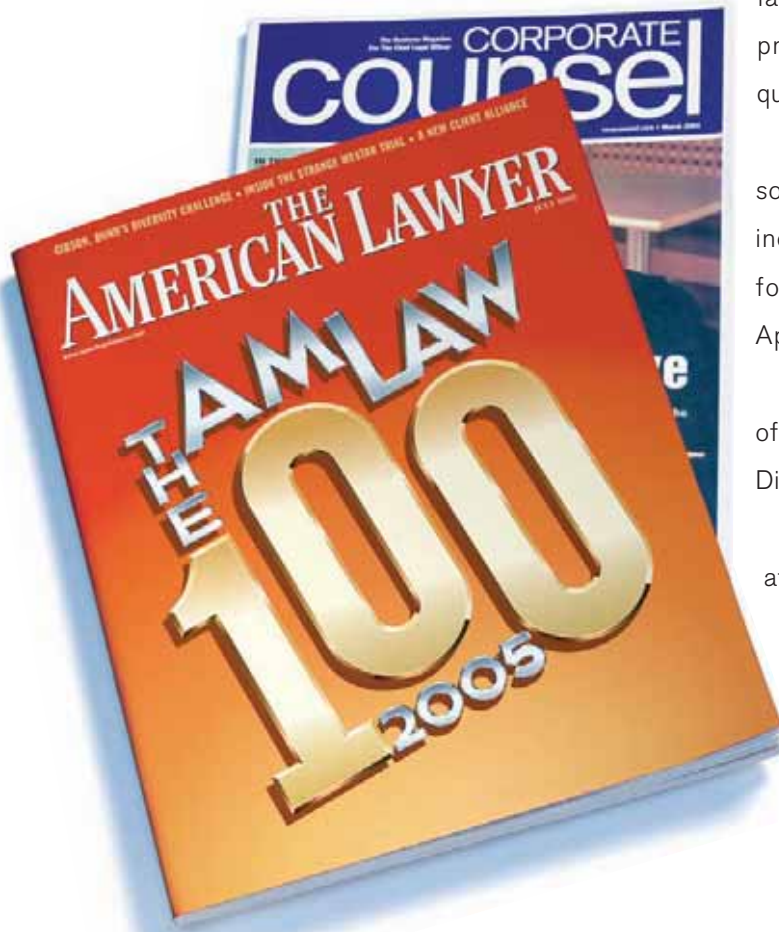


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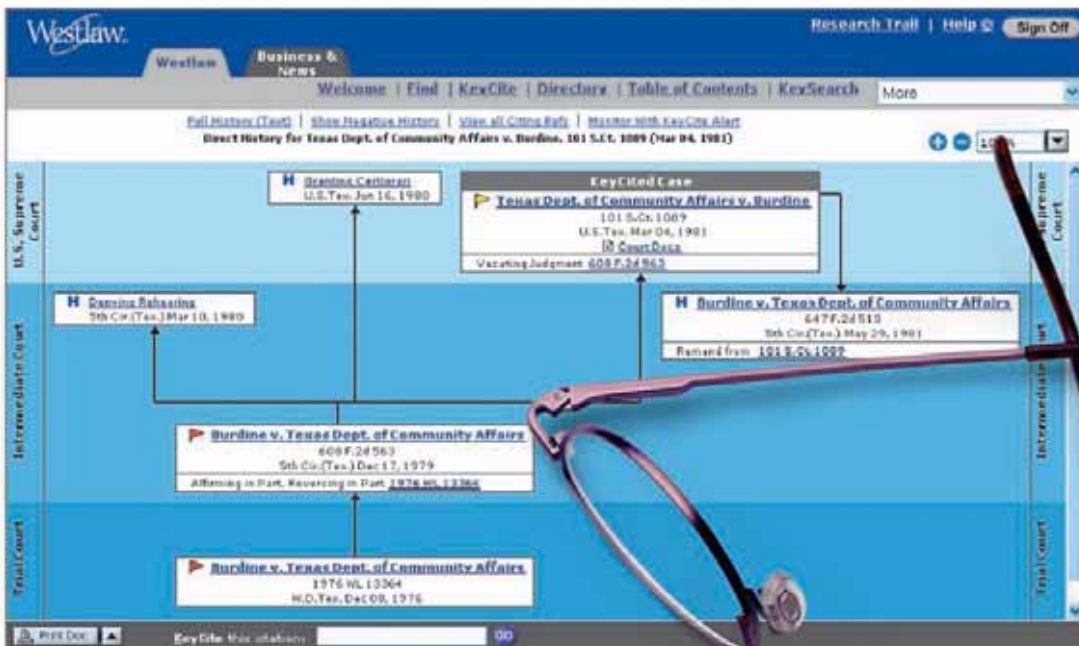
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