

The background of the cover is a photograph of a large, multi-story, light-colored building with many windows and balconies, situated behind a body of water. The building's reflection is clearly visible in the water. The sky is blue with some clouds. In the foreground, there are some green bushes and trees.

Georgia
Bar

Journal

April 2005 Volume 10 Number 6

Annual Meeting
Savannah, Georgia
June 9-12, 2005

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The Consumer Assistance Program has a dual purpose: assistance to the public and attorneys. CAP responds to inquiries from the public regarding State Bar members and assists the public through informal methods to resolve inquiries which may involve minor violations of disciplinary standards by attorneys. Assistance to attorneys is of equal importance: CAP assists attorneys as much as possible with referrals, educational materials, suggestions, solutions, advice and preventive information to help the attorney with consumer matters. The program pledges its best efforts to assist attorneys in making the practice of law more efficient, ethical and professional in nature.

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On the Cover

The 2005 Annual Meeting will be held in Savannah, Ga., June 9-12. More information is available on page 42.

Cover photo courtesy of the Westin Savannah Harbor Golf Resort & Spa.

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Publisher's Statement

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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: 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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Rhodes v. Slate

Ms. Kristin West's excellent review of *One Man's*

Castle, the tragic story of Dr. Ossian Sweet's defense of his home against a mob, reminds us that the story played out in Georgia many years before. The story is simply told, in the prose that distinguished Judge Arthur Gray Powell in *Rhodes v. Slate*:

For purposes of the ruling which we are going to make, the facts of this case may be stated as follows: A white boy had struck a negro boy with a rock. On a subsequent night a crowd of negro men—some six to ten of them—organized themselves into a party, and, without any warrant or authority, went out hunting for the white boy. They went to various houses of white persons in the community, where the boy who did the striking with the rock was supposed to be, but where, in fact, he was not, took white men out of their houses, and compelled them to go with them, fired pistols, made riotous noises, and finally came to the home of the defendant, a white man, at whose house he and a number of friends he had called in were sitting quietly reading. They demanded that he come out, and, when he refused to do so, surrounded the house. Some one within

fired on the party outside, and several shots from the outside party were fired toward the house. After the besieging party had remained around the house for about 30 minutes or more, and after one branch of their party had brought the defendant's brother on some pretext to this place, and when, in his endeavor to escape, he had been shot at and mortally wounded, some one within the house, alleged to have been the defendant, fired a shotgun, hitting one of the negroes in the leg; and for this offense, under these circumstances, this defendant has been convicted of assault with intent to murder.


Now, let him who will cry out "Impossible!" "Monstrous!" "Unheard of!" or what he pleases. The only difference in the suppositious case which has just been stated and the case at bar is that it was a negro boy who struck the white boy with a rock, and that it was a white crowd who were spreading terror among the negroes, and that the defendant is a negro, and not a white man, and that the man who was shot is a white man, and not a negro. It would be folly to speak of the equality of all men before the law, if we should allow this conviction to stand. We would have to write a racial exception into that section of the Code (Penal Code 1910, § 72) which provides that it shall be justifiable to shoot, and even kill, to prevent a forcible attack and invasion

upon the property or habitation. These white men, or boys, as the case may be (for the record does not disclose their ages), had no right in the world to enter upon this defendant's premises in the riotous and tumultuous manner in which they did. Their excuse that they were out hunting for a negro boy who had hit a white boy in no wise mitigates their offense, which under the law was nothing less than riot. They were not officers; they had no warrant; the person for whom they were looking was not even upon the premises of the defendant; and no reasonable cause whatever for suspecting he was there was shown. It was error even for the court to submit to the jury instructions on the subject of right to arrest without warrant, for no such issue was raised by the evidence. It is very probable that this instruction induced the jury into rendering the verdict which strikes us as so manifestly wrong.

Judgment reversed.

72 S.E. 518, 10 Ga. App. 68 (1911).

Judge Powell was a founder of the firm of Little and Powell, now Powell Goldstein LLP. Written in an era of segregation, it demonstrated that the Rule of Law did prevail when cases were submitted to Judge Powell.

We are proud of our heritage from Judge Powell. We attempt in our practice to live up to the ethical and legal standards set by our founder. 

Yours very truly,
Robert M. Travis

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"A great success for the State Bar this session was our ability to galvanize our membership to communicate with their elected representatives. Who is responsible for this success? Georgia lawyers."

Lessons From the Legislature

By Rob Reinhardt

The 2005 session of the Georgia General Assembly has addressed issues that draw great passion from various interest groups. Watching the session unfold was for me traveling along a steep learning curve. New committee chairs and new committee members are receptive to and promoted initiatives that will significantly change our civil justice system.

Your State Bar expended tremendous effort to get out the word that Georgia lawyers stand ready to participate in the crafting of real solutions to perceived problems in our system. Unfortunately, in some ways the political climate was hostile to our positions and legislation passed that raises serious concerns about impingement of constitutionally guaranteed rights. But the science of law is a moving target—a marathon and not a sprint—and I am confident that corrections will be made. So please allow me to share realizations brought home to me in working with our talented team of lobbyists:

Legislators are under enormous pressure—from their party leadership, from their constituents and from various interest groups. It is not a simple matter of standing for the Legislature to bring reason to the table, to "do what is right." Our comrades in the Legislature are faced with a Machiavellian system

of committee appointments and negotiations. I am convinced our elected political leaders are trying with all good faith to do what they think is right. But they are dealing in shades of gray.

A great success for the State Bar this session was our ability to galvanize our membership to communicate with their elected representatives. Who is responsible for this success? Georgia lawyers. Your Board of Governors invested countless hours in registering your positions with our legislators and all of you earned the sincere gratitude of the Bar. Effectively communicating our positions has become tremendously important—constituent input is crucial and many legislators reported to me that they appreciated hearing from lawyers in substantial numbers on important issues.

In talking with various stakeholders, I find that many users do not trust our civil justice system to deliver a fair result. That realization comes hard to lawyers who work daily in a system that is the model for the free world. Business people lack confidence that they will be fairly treated by our court system. Even fair minded business people who acknowledge that American juries generally come out with a reasonable result complain that getting to this fair result takes years and costs thousands upon thousands of dollars. These are issues we as a Bar must address.

Medical providers don't trust the safeguards of the system to protect them against sympathy verdicts. If

you inquire of the medical community as to what their perception of the problem is, you get a response that goes deeper than escalating malpractice insurance rates. You will hear many anecdotal accounts of cases where doctors were advised by their insurers that they did nothing wrong and the lawsuit pending against them is without merit but the facts are sympathetic and they have to settle.

Lawyers observe on a daily basis how the justice system works. We recognize that while no system is perfect, our legal system dispenses justice. We have problems with access, we are constantly striving to improve the administration of justice—but compared to any other system, ours performs admirably. But folks, this message is being drowned out by the system's critics. And pointing out that facts don't support these charges has very little effect.

We do not cause all of the problems attributed to us, but that is not to say that we cannot improve how we deliver legal services. And lawyers are the front guard of protection against the compromise of constitutionally guaranteed rights in the interest of competing causes.

What Do We Do? Here is My Short List


Lawyers need to improve public education as to the importance of the rule of law and how our system works to protect our individual rights. A primary mission of our new Bar Center is the education of our young people [and support of our educators] as to the workings of the legal system. My wife Susan works with the University of Georgia at its campus here in Tifton. She coordinates programs designed to interface the impressive research done through the University's agri-

cultural facilities with the public schools. I report with considerable pride that her programs reach students to promote interest toward careers in agricultural research. And she coordinates programs with teachers that expose them to cutting edge research to bring excitement to the classroom. That is the sort of long term effort we must adapt to our legal system and support with vigor. Complacency is the enemy of a free society; and we are overdue in engineering programs that help educators teach our young people about the importance of the rule of law in a free society. We are putting programs in place this year that will move public school teachers and students through the Bar Center. These programs will highlight the role of our legal system in insuring that we continue to deliver on the promise of our founding fathers that the promise of America is a system to safeguard the protection of the individual rights of all our citizens.

Lawyers must be vocal in public debate. We must continue to be the voice that insists on making laws based on good facts. I don't suggest we have to agree on all issues. But I state without apology that lawyers must be heard by their elected officials with an intensity lacking in recent years. Lawyers must involve themselves as candidates for public office.

And most importantly, lawyers must honor our traditional role of ensuring that public issues are decided on the basis of full and complete public discourse. The test of any system is how it treats the least influential of its users. I will confess disappointment at the efforts of some of our legislators to smother public debate of issues of great public importance. Traditionally in the country we sacrifice efficiency in two

areas: making laws and prosecuting persons charged with crimes. Our heritage places greater value on protecting the rights of our citizens than fast track legislation or efficient prosecutions. In fact, our criminal justice system is crafted on the premise that it is better to allow a guilty person to escape punishment than to convict innocent people. The same principles should operate in our Legislature. The rights of all stakeholders should be heard; and full public input should not fall prey to legislative maneuver. Good ideas will survive debate. And lawyers are the people who should insist on it.

It has been a great satisfaction this year to have the wise counsel of our team of talented lobbyists. Tom Boller, Mark Middleton, Randy Sewell and Charles Tanksley have engaged with great energy to support the State Bar's legislative program. Linton Johnson worked tirelessly to coordinate effective communication. I thank them—and I thank you, the lawyers of Georgia, for going on alert as our Legislature considers sweeping legislation that promises or threatens [depending on your viewpoint] to affect Georgia citizens in major ways. The stakes are high and our responses must be reasoned, effective and vigilantly pursued. 

Ralph Cunningham

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"Although I hope Casemaker can solve 100 percent of your research needs, I know it has limitations, so I like to tell members that Casemaker should take care of about 90 percent of most members' research needs 90 percent of the time."

Georgia Casemaker

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By Cliff Brashier

"I am so pleased with Casemaker. I do not have the words to express how grateful I am that I have this tool at my fingertips quickly, easily and as part of my membership. Thank you. This makes such a difference to solos or small firms."

Since introducing the Casemaker service on Jan. 1, I have heard a lot of comments from State Bar members. Although the large majority of comments have been positive, like the one you just read, I would like to address one comment in particular. A member criticized Casemaker by exclaiming, "It ain't Westlaw®."

I have to agree with this member, Casemaker is not Westlaw®, and it was never intended to be. For example, it is good on state and federal case law in Georgia, including the 11th Circuit, but weak as a national library of either state or federal cases. Casemaker is an online law library that provides Georgia attorneys with free, unlimited, 24-hour-a-day access to primarily Georgia related legal research materials. The purpose behind Casemaker is to provide you, our members, with another tool to more

successfully practice law in today's competitive market.

Realizing that research services are only becoming more expensive, Bar leaders took action by signing on with the Casemaker Consortium, which includes Alabama, Colorado, Connecticut, Idaho, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah and Vermont. They were convinced, as was our Board of Governors, that Casemaker would affordably meet many of your research requirements. On those occasions when you may need more than what Casemaker offers, you can move to pay-per-use services to expand your search. Although I hope Casemaker can solve 100 percent of your research needs, I know it has limitations, so I like to tell members that Casemaker should take care of about 90 percent of most members' research needs 90 percent of the time.

I would like to share with you a few of the hundreds of comments I have received regarding Casemaker:

"Casemaker is a great benefit for Georgia lawyers. As a sole practitioner this is great and very timely. The other services had become too costly for my needs."

"I am glad the State Bar approved this valuable research tool."


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In order to improve the service and increase content, we are always looking for more information to add to the library. Currently we are working on adding law reviews from Georgia law schools and an annotated version of Georgia's code. The other 19 Casemaker states are also enhancing their libraries, which benefit our members, too. If you have comments or suggestions, please send them to me, or the Bar's Casemaker Coordinator Jacqui Fitzgerald. You can reach her at (404) 526-8608 or toll free at (877) CASE-509. Send

email to: casemaker@gabar.org. Jacqui also conducts CLE training seminars on using Casemaker, as well as, upon request, travels to local bars to offer on-site training. Many of our local bars are sponsoring this training either as 2-hour local seminars or at their luncheon meetings. I hope your bar will take advantage of this opportunity.

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). 

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“People often ask me why I am involved in Bar activities and why they should be involved. The answer, although many more words can and have been used, is simple: relationships and service.”

How Wealthy Are You?

By Laurel Payne Landon

How wealthy are you? In order to answer this question, we have to determine the meaning of the word “wealth.” Many define wealth by looking at the size of their bank account, the growth of their 401(k) or other material possessions. I believe, however, that true wealth can be measured by asking yourself “What is most important to me in my life?”

I don’t think money or other material possessions even make the top 10 for most of us. Although we may use different words, I believe we would come up with two concepts that I have labeled “relationships” and “service.”


Relationships are the essence of life. Think about the relationships you have in your life and what your life would be without them. What if you had no one to love or be loved by, no one to share the good and the bad things that happened to you, no one to laugh at life with? What if you had no one you could depend on, no one to help you or no one to help? Would you be a wealthy person if you had millions of dollars and no relationships? Is it more important to you to have lots of money in the bank when you die or lots of people who genuinely mourn your loss and celebrate your life?

Service is also an essential part of a wealthy life. What kind of life would it be if you had someone to meet all your needs all the time and no one you were responsible to or for? (Okay,

this may not sound that bad in theory but in reality it wouldn’t be so great!) I believe service, a true desire to help someone else, is what separates human beings from other living creatures. At the end of your life, will you be concerned with how much you have or how much you have given?

People often ask me why I am involved in Bar activities and why they should be involved. The answer, although many more words can and have been used, is simple: relationships and service. I have the good fortune to meet and work with so many wonderful people as a result of my involvement with the local and state bars. Although I have heard that some think the YLD is a clique, I have found the opposite to be true. I have never been involved with a more diverse, welcoming group than the YLD. The same is true of the “Big Bar.” Great people working together provides a perfect place to build relationships.

Service is really the hallmark of the YLD. We often describe ourselves as “the service arm of the Bar” and it is true. I have often chronicled the many acts of service performed by the YLD in our communities and for our profession. Whether we are working on a large project like the Great Day of Service or helping one child with their homework in an after-school program, service is appreciated by those who receive it and enriches the lives of those who perform it.

How wealthy are you? Are you nurturing your relationships and building new ones? Are you performing acts of service on a regular basis? Let’s all resolve to “build our wealth” before we run out of time. 

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A Look at the Law

By Richard A. Schneider
and Eric M. Wachter

Thurman v. Applebrook County Dayschool, Inc.

Day Care and Crib Death: Do Day Care Centers Have A Higher Standard of Care Than An Average Parent?



In *Thurman v. Applebrook Country Dayschool, Inc.*,¹ the Supreme Court of Georgia considered the tragic case of a day care center crib death in which an infant was placed on his stomach, rather than on his back, to sleep. The plaintiffs argued that the day care center should have placed the infant on his back in accordance with the latest medical recommendations for putting babies to sleep. The court had to decide what negligence standard applied. Was it the relatively forgiving standard of the “average reasonable parent?” Surely, a parent would not ordinarily be considered negligent just for placing a baby on his or her stomach for a nap. But what if the standard was that of the “reasonable day care provider,” who should have knowledge of the latest medical recommendations, including those of the “Back to Sleep” campaign launched in 1994 to advise that babies be put on their backs to sleep to lower the risk of crib death?² If the latter standard applied, expert testimony on recommendations in the day care industry would be admissible.

The Supreme Court ruled in *Thurman* that the appropriate standard was "that of a reasonably prudent person under like circumstances" and that expert testimony on infant sleep positioning standards in the day care industry was admissible.³ The court rejected the Court of Appeals' conclusion that the issue of whether the day care provider breached the standard of care was a lay question, which the jury could answer without expert guidance. Further, the court ended a trend toward applying an "average reasonable parent" standard in all child supervision cases. The court held that the particular circumstances of a day care center setting affect the determination of whether the defendant was negligent. Expert testimony is admissible to assist juries in defining and applying the appropriate standard of care in cases involving allegations of negligent supervision by day care providers.⁴

Emphasis on the particularized "circumstances" of the day care setting should bring a suitable dose of professionalism to the child-care field by ensuring that courts hold providers to contemporary industry standards. On the other hand, the Supreme Court's movement away from the comparatively forgiving "average reasonable parent" standard to a more demanding circumstance-driven standard injects a troubling level of ambiguity for the ordinary parent. If a crib death occurs at home, what standard will apply to the parent? Will knowledge and implementation of the latest medical recommendations become the standard even for ordinary parents, or does that standard only apply to professional caretakers? In all likelihood, the Supreme Court's decision does not mean

that ordinary parents and other non-professionals will be accountable for the fulfillment of all of the latest child-care practices to which professional day care providers should be expected to adhere.

The Traditional Child-care Supervision Standard

The Court of Appeals of Georgia delineated the traditional standard of care in negligent child supervision cases in *Laite v. Baxter*.⁵ In that case, a nearly 13-year-old boy slipped and fell into the water while on a fishing trip with his friend's family and subsequently died from injuries received from the fall. His mother brought a wrongful death claim against the father of her son's friend on the basis of negligent supervision.⁶ In affirming summary judgment for the defendant, the Court of Appeals articulated the standard of care as follows:

[T]he measure of duty of a person undertaking control and supervision of a child to exercise reasonable care for the safety of the child is to be gauged by the standard of the average responsible parent; such person is not an insurer of the safety of the child and has no duty to foresee and guard against every possible hazard. The measure of precaution which must be taken by one having a child in his care, who stands in no relation to the child except that he has undertaken to care for it, is that care which a prudent person would exercise under like circumstances. As a general rule, a person who undertakes the control and supervision of a child, even without compensation, has the duty to use reasonable

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care to protect the child from injury. Such person is not an insurer of the safety of the child. He is required only to use reasonable care commensurate with the reasonably foreseeable risks of harm.⁷

Furthermore, “[c]hildren of tender years and youthful persons generally are entitled to care proportioned to their inability to foresee and avoid the perils that they may encounter, as well as to the superior knowledge of persons who come into contact with them.”⁸

Thus, the elements of the duty of care assumed by one who undertakes the care and supervision of a child include:

- action consistent with that of the “average responsible parent”;
- the care “a prudent person would exercise under like circumstances”;
- reasonable foreseeability of the risk of the type of harm suffered; and
- action in accordance with any superior knowledge the person may have.

In *Laite*, the court concluded that the decedent’s death resulted from a risk that should have been obvious to a child of his age; it was merely an accident that involved no breach of supervisory duty.⁹

Two decades later, in *Wallace v. Boys Club of Albany, Ga., Inc.*,¹⁰ the Court of Appeals applied and reaffirmed the standard of care it had adopted in *Laite*.¹¹ In that case, the parents of a 5-year-old boy alleged negligent supervision after the child left the defendant’s summer day camp unaccompanied and was subsequently abducted and assaulted by a third party.¹² In addition to applying and reaffirming the standard of care it had adopted in *Laite*, the Court of Appeals expanded the

duty owed by one who undertakes the supervision of a child to include obligations expressly assumed by the care provider, i.e., “the duty arising from defendant’s policies, its promises to [the] parents to enforce those policies, and [the] parents’ reliance on those promises.”¹³ In reversing summary judgment for the defendant, the Court of Appeals concluded that the risk of the type of harm suffered by the child—the risk that an unsupervised 5-year-old on the street could be abducted and assaulted—was sufficiently common and foreseeable for a jury to find that the defendant’s duty of care encompassed protection from such a danger.¹⁴

The Abandonment of Foreseeability

Later cases streamlined the formulation of the standard of care. In *La Petite Academy, Inc. v. Turner*,¹⁵ the plaintiff’s 2-year-old son broke his leg after falling off of a tricycle at the defendant day care center. The Court of Appeals reversed the trial court’s denial of the day care center’s motion for summary judgment because it found no evidence that the supervising teacher’s conduct was unreasonable, but that the child’s injury was merely an unfortunate accident.¹⁶ Citing *Wallace*, the court applied a standard of care defined by “that of the average parent” and “that care which a prudent person would exercise under like circumstances.”¹⁷ The court reiterated that “the [supervisor] is not an insurer of the safety of the child and has no duty to guard against every possible hazard.”¹⁸

Missing, however, was any mention of whether the danger of harm was reasonably foreseeable. The court apparently did not consider whether a day care provider

should know it to be reasonably likely that a 2-year-old child riding a tricycle at a relatively high rate of speed could physically injure himself. Two years later, in *Persinger v. Step By Step Infant Development Center*,¹⁹ the Court of Appeals once again did not expressly consider foreseeability.²⁰ There, the parents of an 18-month-old child alleged that the defendant day care provider’s negligent supervision allowed the child to fall while running and break his leg.²¹

Crystallization of the “Average Reasonable Parent” Standard

In *Ball v. Bright Horizons Children Center, Inc.*,²² the Court of Appeals further truncated the *Laite* standard of care, limiting its formulation to “the standard of the average responsible parent.”²³ In that case, the parent alleged that the day care provider’s negligent supervision permitted a 6-year-old classmate to sexually assault and sodomize her 4-year-old son.²⁴ The plaintiff’s expert testified that the standard of care for the supervision of children requires the care provider to maintain continuous observation of the children, since children of this age are apt to injure each other if unsupervised, and that the very fact that the alleged injury occurred signified that the day care provider’s supervision was negligent.²⁵ The court, however, in affirming summary judgment for the day care provider, noted that “the standard for recovery in Georgia is not compensation upon injury” and held that the plaintiff’s expert misstated the correct standard of care, “which is that a day care provider is not the insurer of a child’s safety.”²⁶

Although the court observed that “[f]oreseeability can be an

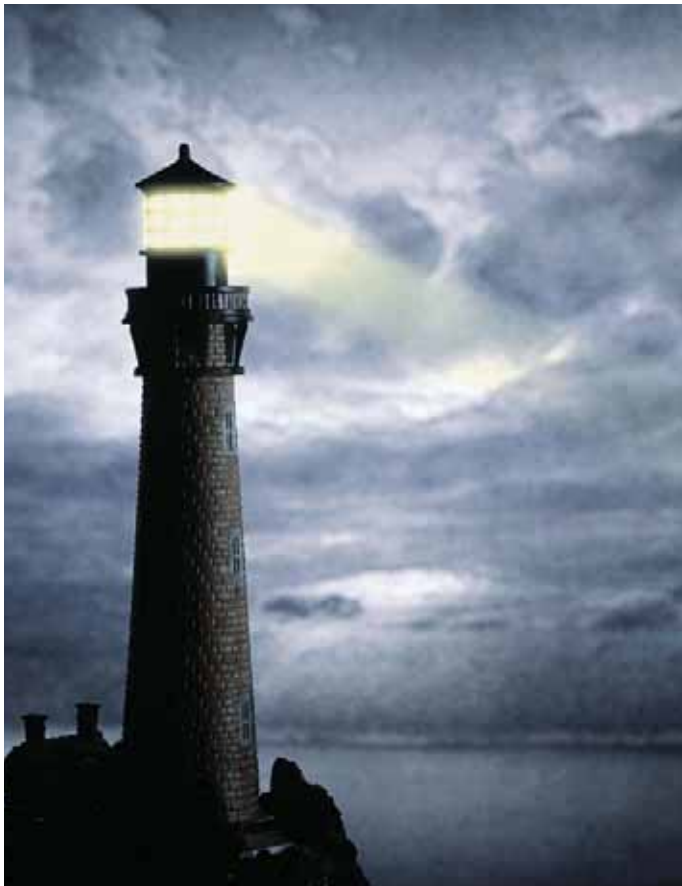
issue in negligent supervision cases," its statement of the controlling standard of care referred only to "the standard of the average responsible parent."²⁷ This description of the standard of care for supervision of children would heavily inform the Court of Appeals' analysis in *Thurman* just eight months later.

The Court of Appeals Opinion in *Thurman*

On the morning of Feb. 8, 1996, Garry Thurman dropped off his apparently healthy 8-week-old son Garrison at Applebrook County Dayschool (Applebrook), the day care center that the infant had been attending for approximately one month.²⁸ At approximately 1:15

p.m., one of the Applebrook caregivers placed Garrison on his stomach for a nap.²⁹ Another caregiver noticed him stirring at 2:05 p.m., so she patted him on his back, and he "settled right down."³⁰ However, when a third caregiver checked on Garrison 20 minutes later, she found that his hand was very pale, and, upon turning him over, she discovered a small amount of blood coming from his nose.³¹ The day care staff performed CPR until an ambulance arrived, and the baby reached the hospital in cardiac arrest.³² Although briefly resuscitated, Garrison died the next day, officially from bronchiolitis.³³ In the opinion of his treating physician, Garrison had stopped breathing some twenty minutes before his heart stopped.³⁴

The Thurmans, in an action brought in the Superior Court of Catoosa County, alleged that negligent supervision of their son caused his death.³⁵ At trial, the court permitted the Thurmans' expert, Dr. Linda Miller (the same expert who testified for the plaintiffs in *Ball*),³⁶ to testify, over objection, that the standard of care in a day care setting "is that a teacher is aware and can visually supervise the children in the room."³⁷ When directly asked whether Applebrook breached the standard of care by placing Garrison to sleep on his stomach, Dr. Miller responded by noting that "[s]ince 1992, and even earlier than that, there have been articles and public campaigns . . . to get both parents and teachers to put



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babies to sleep on their backs” and that, since 1994, this has been the well-settled standard of care in the day care industry.³⁸ The jury found that Applebrook had indeed been negligent in its supervision of Garrison, and it awarded the Thurmans \$1,000,000 in damages.³⁹

The Court of Appeals reversed the trial court’s judgment and remanded the case for a new trial.⁴⁰ Citing *Persinger* and *La Petite Academy*, the court described the applicable standard of care in child supervision cases as “that of the average reasonable parent.”⁴¹ The court further concluded that whether the Applebrook staff breached its duty to act as an “average reasonable parent” was “not hidden in the mystical confines of professional skill or knowledge,” but was instead a determination that ordinary jurors are capable of making without the aid of expert testimony.⁴²

According to the Court of Appeals, Dr. Miller mischaracterized the standard of care by defining it in terms of day care industry standards: “The legal standard of care, however, revolves around the conduct of an average parent—not the average day care center or day care worker.”⁴³ Therefore, the court concluded that, although the trial court properly admitted Dr. Miller’s unchallenged testimony regarding infant sleep positioning, it erred by permitting Dr. Miller to provide an incorrect legal standard of care and by allowing her essentially to assert that Applebrook breached that misstated standard. As a result, her testimony potentially confused the jury as to the appropriate standard of care—despite the trial court’s “average parent” standard jury charge—and invaded the province of the fact finder.⁴⁴

Significant to the Court of Appeals’ opinion were the elements that (1) the duty of care owed by day care providers is that of the “average reasonable parent,” and (2) the determination of whether a caregiver’s conduct comported with the standard is within the ken of the average juror, precluding the need for expert testimony.

Concurring in the result and agreeing with the “average reasonable parent” formulation of the standard of care, Chief Judge Smith disagreed with the majority’s position on the need for expert testimony in this case.⁴⁵ The chief judge was persuaded by the Connecticut Supreme Court’s opinion in *Estate of LePage v. Horne*,⁴⁶ a wrongful death case involving a baby who died of sudden infant death syndrome while in the care of a day care provider. That court noted the recent vintage of efforts to publicize the latest research regarding the relationship between infant sleep positioning and the risk of infant death and the resulting state-of-the-art recommendation to place babies to sleep on their backs, rather than in the prone position.⁴⁷ Emphasizing the novelty of this contemporary standard practice, the Connecticut Supreme Court noted, and Chief Judge Smith agreed, that “[i]ndeed, prior to 1992, parents in the United States predominantly placed infants to sleep in the prone position. *It is likely that many jurors who did their childrearing prior to this time would not know of the risks associated with the prone sleep position.*”⁴⁸

For this reason, the chief judge concluded that “attending to a sleeping infant is not necessarily ‘a commonplace activity’ about which the average juror would have knowledge enabling him or her to

determine whether a child-care provider breached the standard of care.”⁴⁹ Accordingly, although Dr. Miller’s testimony was overbroad to the extent that she opined that Applebrook actually breached the standard of care, the chief judge believed “that expert testimony is necessary to assist even the ‘average reasonable parent’ in understanding the risks associated with the prone position.”⁵⁰

The Standard Comes Full Circle: The Supreme Court’s Opinion in Thurman

The Supreme Court of Georgia granted certiorari in *Thurman* to consider the specific question, “Is expert testimony regarding infant sleep positioning admissible in a child-care supervision case and, if so, for what purpose?”⁵¹ In answering “yes” and reversing the Court of Appeals,⁵² Justice Thompson, writing for a unanimous court, pulled a wayward child supervision standard of care back into line with the original *Laite* formulation.⁵³ Thus, rather than the narrowly truncated “average reasonable parent” standard—in fact a product of the Court of Appeals’s evolutionary rhetorical drift—“as in every negligence case, the standard of care in a negligent child-care supervision case is that of a reasonably prudent person under like circumstances.”⁵⁴ As such, “[t]he question for decision was whether Applebrook exercised the measure of caution which a reasonably prudent person would have exercised *in the same or similar circumstances*”—not whether the Applebrook staff acted as an “average reasonable parent.”⁵⁵ Instead, “[a]lthough the applicable stan-

dard of care in a case of this kind may be said to *encompass* 'that of the average parent,' to say that it is *only* that of an average parent is an oversimplification."⁵⁶

Applying this more general standard, the court concluded that "like circumstances" in this case were those in which "the sleeping infant is one of many in a day care setting."⁵⁷ Obviously, the average parent—or juror—does not often encounter this particular situation. Therefore, particularly in light of the latest controversies and theories regarding infant sleep positioning noted by Chief Judge Smith and the Connecticut Supreme Court in *LePage*, the average juror could benefit substantially from expert testimony regarding how a "reasonably prudent person" would behave in the capacity of day care child supervisor.⁵⁸

Although the court noted that Dr. Miller did not actually opine in

this case that Applebrook breached the standard of care (she merely stated that the contemporary standard of care in the day care industry was to put babies to sleep on their backs), the court also indicated that, even if Dr. Miller had rendered an opinion that Applebrook breached its duty, no error would have occurred because "expert opinion testimony, even on the ultimate issue to be decided by the jury, is admissible if the expert's conclusion is beyond the ken of the average layperson."⁵⁹

Therefore, the *Thurman* decision restored the standard of care applicable to those supervising children to that of a "reasonably prudent person under like circumstances." In the day care setting, the specific standard of care becomes that of a reasonably prudent person simultaneously supervising numerous children. To the extent that the average parent (or, more specifical-

ly, the average juror) would not be expected to know of current standard practices in the professional day care industry, expert testimony is admissible to educate jurors regarding best practices in light of new and evolving medical research and knowledge and to assist jurors in applying the latest relevant research to define the particular standard of conduct to which the defendant should have adhered in an individual case.

Implications of the "Reasonably Prudent Person" Standard

The *Thurman* Court's articulation of the standard of care in negligent child supervision cases begs the question: To what extent should the "average parent" be aware of developments in child-care practice standards? Given that the court declined to adopt specifi-

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cally a “reasonable day care provider” standard, when could an ordinary parent or amateur caregiver, such as a friend or relative, be charged with knowledge of—or even deemed liable for failure to adhere to—the pediatric experts’ latest recommendations for the care and supervision of children?

Taking the example of infant sleep position, both Chief Judge Smith and the Connecticut court in *LePage* found it significant that many jurors who reared their children prior to public dissemination of the research associating the prone position with the risk of injury or death or the issuance of the consensus recommendation that infants be placed on their backs to sleep would have no reason to know of the risks associated with the prone position, presumably because they would have no direct interest in keeping up with leading knowledge in this area.⁶⁰ Hence, does *Thurman* suggest that a current parent, who has been involved in childrearing during the era in which the experts advise that infants should sleep on their backs, *should* be presumed to be aware of this recommendation such that she would not be acting as a “reasonably prudent person” should she place her own baby to sleep on her stomach?

Although only the Supreme Court will be able to answer these questions, several reasons suggest that average parents should not be held to the same standard of care as professional day care providers. For example, the *Thurman* Court noted Dr. Miller’s testimony “that teachers can monitor sleeping infants better when they are placed on their backs.”⁶¹ If ease of supervision is an important rationale for the day care industry standard of placing infants on their backs (e.g.,

to monitor breathing), then this standard would apply more forcefully in the day care setting, where the supervisor is likely monitoring several children, than in the case of an ordinary parent, who would probably rarely have occasion to supervise more than one or two infants at the same time. In this way, the day care provider and the parent are not “under like circumstances,” and, as such, perhaps reasonable conduct need not be identical in both cases.


Nevertheless, as the *LePage* court indicated, the recommendation favoring the supine sleeping position over the prone position aims not only to facilitate supervision of sleeping infants, but also directly to reduce risks to the baby’s health, irrespective of the issue of monitoring.⁶² Still, important differences exist between the circumstances of the parent and the day care provider. In deciding that the latest standards for attending to sleeping children are not within the knowledge or experience of the average prudent person,⁶³ the *Thurman* Court implicitly held that day care providers ought to have above-average knowledge on this subject. Were this not the case, it would be manifestly unfair to hold such providers to the standard of care about which the court permitted expert testimony.

Indeed, this differentiation is nothing more than common sense: those engaged in the business of caring for children should certainly be expected to remain abreast of the latest standard practices recommended for their profession, at least more so than the average parent.⁶⁴ This distinction is further evident in view of the state’s regulation of day care centers and group day care homes, including, for example, a

specific requirement that “staff shall put an infant to sleep on the infant’s back” unless a physician has provided written authorization for another sleep position for that child.⁶⁵ Moreover, Georgia jurisprudence has long held that children are entitled to “the superior knowledge of persons who come into contact with them.”⁶⁶ Without question, a day care professional ought to have “superior knowledge” with respect to child-care and supervision techniques as compared to the average parent, and she should be expected to adhere to those professional standards in the discharge of her duties.

Ultimately, the *Thurman* Court effectively, although not expressly, adopted a “reasonable day care provider” standard of care in cases involving alleged negligent supervision by child-care professionals. This conclusion is evident in light of the holding that expert testimony is admissible and helpful in aiding jurors in understanding and applying the negligence standard to circumstances involving supervision of children in a day care setting, which would be otherwise beyond the ken of ordinary jurors. However, by retaining (and reasserting) the general formulation of the “reasonably prudent person under like circumstances,” without clearly defining the bounds of those “like circumstances,” the court left room for an ambiguous, *ad hoc* approach to future negligence determinations in child supervision cases.

If the court intends to treat day care professionals like professionals, it ought formally and unmistakably to import into the standard of care those industry standards to which we should be able to expect day care providers to adhere.

While “under like circumstances” may afford the ethereal benefits of flexibility, adoption of a precise “reasonable day care provider” standard would offer much-needed clarity with respect to both the applicable standards of conduct and the range of individuals to which those standards apply. 



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Endnotes

1. 279 Ga. —, 604 S.E.2d 832 (2004).
2. See *Estate of LePage v. Horne*, 809 A.2d 505, 514 (Conn. 2002); see also, e.g., Nat’l Inst. of Child Health & Human Dev., Nat’l Insts. of Health, *SIDS: “Back to Sleep” Campaign*, at <http://www.nichd.nih.gov/sids> (last modified Jan. 28, 2005).
3. *Thurman*, 604 S.E.2d at 835.
4. *Id.*

5. 126 Ga. App. 743, 191 S.E.2d 531 (1972).
6. See *id.* at 744, 191 S.E.2d at 533.
7. *Id.* at 745-46, 191 S.E.2d at 534 (citations and quotations omitted); see also *id.* at 747, 191 S.E.2d at 535 (“the duty of reasonable care applicable to a custodian is to be gauged by the standard of the ordinarily prudent person or the average reasonable parent”).
8. *Id.* at 746, 191 S.E.2d at 534 (citations omitted).
9. *Id.* at 748-49, 191 S.E.2d at 535-36.
10. 211 Ga. App. 534, 439 S.E.2d 746 (1993), *cert. granted and vacated* (Ga. 1994).
11. *Id.* at 535, 439 S.E.2d at 748.
12. See *id.* at 534, 439 S.E.2d at 747.
13. *Id.* at 535, 439 S.E.2d at 748.
14. *Id.* at 536-37, 439 S.E.2d at 749.
15. 247 Ga. App. 360, 543 S.E.2d 393 (2000).
16. *Id.* at 361, 363, 543 S.E.2d at 395, 396.
17. *Id.* at 361-62, 543 S.E.2d at 395.
18. *Id.*
19. 253 Ga. App. 768, 560 S.E.2d 333 (2002).
20. *Id.* at 769, 560 S.E.2d at 336.
21. See *id.* at 768-69, 560 S.E.2d at 335. Although the day care provider insisted that the child’s injury resulted from a fall while running, the parents presented expert testimony from the child’s orthopedic surgeon that, due to the way in which the leg was broken, the injury could not have reasonably occurred in that manner, but that it must have resulted from a fall from a height greater than that of the child or from a significant twisting of the child’s leg while the foot was locked into place (such as in a crib slat). *Id.* at 769, 771-72, 560 S.E.2d at 335, 337. Given this testimony, which raised the direct inference that the accident happened, not in the manner in which the defendants claimed, but in a manner that does not ordinarily occur in the absence of negligence, the court held that the doctrine of *res ipsa loquitur* should apply, and, on that basis, it reversed the trial court’s grant of summary judgment in favor of the day care provider. *Id.* at 772, 560 S.E.2d at 337.
22. 260 Ga. App. 158, 578 S.E.2d 923 (2003).
23. *Id.* at 162, 578 S.E.2d at 927. The *Ball* court retained the provision

- that “such person is not an insurer of the safety of the child and has no duty to foresee and guard against every possible hazard.” *Id.*
24. See *id.* at 158, 578 S.E.2d at 924. In contrast, the day care center presented evidence that the incident merely involved benign “exploratory play of a sexual nature” that is common among children of this age. *Id.* at 161-62, 578 S.E.2d at 926.
25. See *id.* at 161, 163, 578 S.E.2d at 926, 928.
26. *Id.* at 163, 578 S.E.2d at 928.
27. *Id.* at 162, 578 S.E.2d at 927.
28. *Applebrook Country Dayschool, Inc. v. Thurman*, 264 Ga. App. 591, 591 S.E.2d 406, 408 (2003), *rev’d*, 279 Ga. —, 604 S.E.2d 832 (2004).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Ball v. Bright Horizons Children Center, Inc.*, 260 Ga. App. 158, 161, 578 S.E.2d 923, 926 (2003).
37. *Applebrook*, 264 Ga. App. at 592, 591 S.E.2d at 408. Similarly, Dr. Miller testified in *Ball* that “[t]eachers need to position themselves within a classroom so that they can observe every child.” *Ball*, 260 Ga. App. at 161, 578 S.E.2d at 926.
38. *Applebrook*, 264 Ga. App. at 592, 591 S.E.2d at 408-09; see also *Estate of LePage v. Horne*, 809 A.2d 505, 512-14 (Conn. 2002) (citing studies and published recommendations).
39. *Applebrook*, 264 Ga. App. at 591, 591 S.E.2d at 408.
40. *Id.* at 595, 591 S.E.2d at 411.
41. *Id.* at 592, 591 S.E.2d at 409.
42. *Id.* at 593, 591 S.E.2d at 409.
43. *Id.*
44. *Id.* at 594, 591 S.E.2d at 410.
45. *Id.* at 595-96, 591 S.E.2d at 411 (Smith, C.J., concurring specially).
46. 809 A.2d 505 (Conn. 2002).
47. *Applebrook*, 264 Ga. App. at 596, 591 S.E.2d at 411 (Smith, C.J., concurring specially) (quoting *LePage*, 809 A.2d at 515).
48. *Id.* (Smith, C.J., concurring specially) (emphasis in original) (quoting *LePage*, 809 A.2d at 515).
49. *Id.* (Smith, C.J., concurring specially).
50. *Id.* (Smith, C.J., concurring specially).
51. *Thurman v. Applebrook Country Dayschool, Inc.*, 279 Ga. —, 604 S.E.2d 832, 833 (2004).

52. *Id.* at 835.
53. *Id.* at 834 (quoting Laite v. Baxter, 126 Ga. App. 743, 745-46, 191 S.E.2d 531, 534 (1972)).
54. *Id.* at 835.
55. *Id.* (emphasis in original).
56. *Id.* at 834 (emphasis in original).
57. *Id.* at 835.
58. *Id.*
59. *Id.* (quoting Turtle v. State, 271 Ga. 440, 443(2), 520 S.E.2d 211 (1999)).
60. Applebrook Country Dayschool, Inc. v. Thurman, 264 Ga. App. 591, 596, 591 S.E.2d 406, 411 (2003) (Smith, C.J., concurring specially) (quoting Estate of LePage v. Horne, 809 A.2d 505, 515 (Conn. 2002)), *rev'd*, 279 Ga. —, 604 S.E.2d 832 (2004).
61. *Thurman*, 604 S.E.2d at 833.
62. See *LePage*, 809 A.2d at 512-14 (citing studies and published recommendations).
63. *Thurman*, 604 S.E.2d at 835.
64. Professional day care providers, by virtue of their line of business, have also been more likely than average individuals to receive information regarding prevailing infant sleep positioning recommendations: the nationwide “Back to Sleep” campaign, an effort by a coalition of health groups to promote awareness of the association between sleep position and SIDS, specifically targeted informative mailings to licensed child day care providers in 1999 after a study reported that an unacceptably high percentage of such providers remained unaware of the association. See *LePage*, 809 A.2d at 514 & n.15 (citing R. Moon & W. Biliter, *Infant Sleep Position Policies in Licensed Child Care Centers After Back to Sleep Campaign*, 106 PEDIATRICS 576, 579 (Sept. 2000)).
65. GA. COMP. R. & REGS. r. 290-2-1-.19 and 290-2-2-.19 (2004); see also *id.* r. 290-2-1-.11 (regulating operations, health, safety, and activities in group day care homes) and 290-2-2-.11 (same for day care centers). Further, in addition to regulatory policies imposed by the State, a day care provider is bound by any “duty arising from [its] policies, its promises to [the] parents to enforce those policies, and [the] parents’ reliance on those promises.” *Wallace v. Boys Club of Albany, Ga., Inc.*, 211 Ga. App. 534, 535, 439 S.E.2d 746, 748 (1993), *cert. granted and vacated* (Ga. 1994).
66. *Laite v. Baxter*, 126 Ga. App. 743, 746, 191 S.E.2d 531, 534 (1972).

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Spyware And The Internet: A Cyberspace Odyssey

By Brad Slutsky and Sheila Baran

In 1968, the late Stanley Kubrick brought us the movie *2001: A Space Odyssey*.

In the movie, the infallible HAL 9000 computer malfunctions and tries to kill the astronauts on the space ship Discovery. As the astronauts attempt to return to the ship to disconnect HAL, HAL reveals what he knows:

Dave Bowman: Hello, HAL do you read me, HAL?

HAL: Affirmative, Dave, I read you.

Dave: Open the pod bay doors, HAL.

HAL: I'm sorry Dave, I'm afraid I can't do that.

Dave: What's the problem?

HAL: I think you know what the problem is just as well as I do.

Dave: What are you talking about, HAL?

HAL: This mission is too important for me to allow you to jeopardize it.

Dave: I don't know what you're talking about, HAL?

HAL: I know you and Frank were planning to disconnect me, and I'm afraid that's something I cannot allow to happen.

Dave: Where the [heck did] you get that idea, HAL?

HAL: Dave, although you took thorough precautions in the pod against my hearing you, I could see your lips move.

Kubrick died on March 7, 1999—just as some of the country's largest purveyors of spyware/adware were beginning operations. He probably never saw spyware that tracks your every move on the Internet, gathers personal information about you, changes the search results that you see when you conduct searches at popular Internet search engines, and re-installs itself if you try to uninstall it. What would Kubrick think if he could see our computers today tracking our every move? Has HAL 9000 come back to life?

Of course, you don't have spyware on your computer. Only careless users mistakenly click

those installation boxes and get spyware, right?

In October 2004, America Online and the National Cyber Security Alliance conducted a survey (AOL/NCSA Survey) regarding security perceptions and risks. The survey found that:

- 91 percent of the respondents had heard of spyware;
- 53 percent thought they had spyware/adware on their computers; and
- 85 percent of those who thought they had spyware/adware on their computers could not name any spyware or adware program on their computer.

These users' computers were then scanned for spyware, and the scan indicated that:

- 80 percent of them had known spyware/adware; and
- The average infected computer had 93 spyware components.

The users were then shown the results of the scans and:

- 89 percent of the users did not know that all of the scanned spyware was on their computer;
- 90 percent of them did not know what the spyware found on their computer did;
- 95 percent of them said that they

did not give permission for all of the spyware to be loaded on their computer; and

- 86 percent of them responded that they would like the spyware removed.

So, the odds are good that you do have spyware on your computer. “Dave, although you took thorough precautions in the pod ...” your computer is still spying on you.

How can you tell if you have spyware? What can you do about it? What does the law say about it? Read on and your questions will be answered.

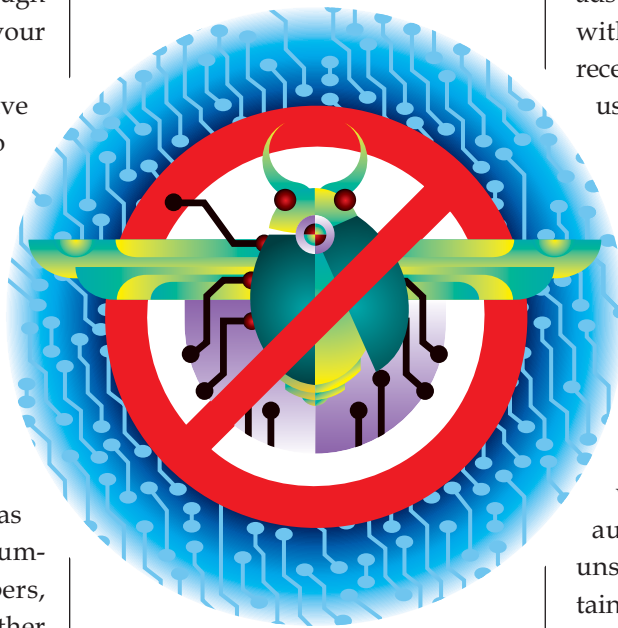
What Is Spyware?

Spyware comes in many forms. Some spyware logs a user’s keystrokes to gain access to personal information such as passwords, social security numbers, drivers’ license numbers, credit card numbers, and other financial or personal data, which could lead to identity theft. Some spyware can take over a user’s Internet connection for its own unlawful use—such as sending SPAM. Spyware also can take over a user’s Internet browser—resetting the user’s homepage or inserting toolbars into the user’s browser that link the user to products or services. Spyware can even make a query that is entered into a search engine report results that link only to products and services approved by the spyware developer.

Spyware can cause a host of other problems as well. The multitude of spyware that can infiltrate a user’s computer can limit the processing time, memory, and bandwidth available for other programs and can cause a user’s computer to slow down and in some cases become nearly unusable. Further,

spyware can be difficult or impossible to uninstall. It can entwine itself with critical system files, and some spyware, if deleted, regenerates the next time you are online. It can be like kudzu for your computer.

The most prevalent form of spyware is “adware.” While there is



some disagreement about whether adware should be considered spyware, most of the legislation that has been enacted or that is currently being reviewed by state and federal legislators contain broad definitions of spyware that encompass adware. Adware frequently tracks the Web sites a user visits, or the searches the user enters into a search engine

(sometimes sending this information back to the adware’s author), and then generates advertisements based on the Web sites visited or search terms entered. In the AOL/NCSA Survey, users without spyware/adware on their computers reported receiving 15 pop-up ads per week, on average. Users with spyware/adware reported receiving about 31. Of those who used a pop-up blocker, 63 percent reported that they still received pop-up ads even while running the pop-up blocker.

Where Does Spyware Come From?

Spyware makes its way onto computers in several ways. Spyware can be installed automatically by viewing an unsolicited e-mail message containing a virus or worm. Spyware also can be installed as a result of visiting certain Web sites. The most common way that adware is installed on a user’s computer is by “piggybacking” on the installation of other unrelated applications. This often is the case when users download free programs, such as programs providing weather information or programs that facilitate the swapping of recorded music. The author is able to offer the pro-

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One of the obstacles to anti-spyware legislation has been the difficulty of adequately defining “spyware” to separate legitimate from illegitimate software.

gram without charge because they have agreed to bundle the free program with a spyware program which may provide a source of revenue (such as advertising). While some free software will inform the user that adware is included as part of the installation process, frequently this information is buried in lengthy user agreements which are difficult to read online. Indeed, one company—PC Pitstop—included a clause in its end user license agreement that promised “a special consideration which may include monetary compensation ... to a limited number of authorize licensee to read this section of the license agreement and contact PC Pitstop at consideration@pcpitstop.com.” It took four months and more than 3,000 downloads before someone finally wrote in. That person received \$1,000. (See Larry Magid, *It Pays to Read License Agreements* at <http://www.pcpitstop.com/spycheck/eula.asp>)

Legislative Response

Just as they addressed telemarketing and spam, state and federal legislatures now are trying to take on the task of creating anti-spyware legislation to resolve the ever-growing spyware epidemic. On March 23, 2004, Utah enacted the first anti-spyware legislation. However, the Utah law was enjoined in July 2004, on the grounds that it impermissibly burdened interstate commerce. Undaunted, Utah responded by introducing new spyware legislation that recently passed both houses on March 3, 2005. Following

Utah’s lead, on Sept. 28, 2004, California enacted its version of anti-spyware legislation, which went into effect Jan. 1, 2005. Alabama, Arizona, Georgia, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Nebraska, New Hampshire, New York, Oregon, Pennsylvania, Tennessee, Texas, Virginia and Washington have been considering anti-spyware legislation as well. Georgia’s Computer Security Act—Senate Bill 127—was introduced on Feb. 7, 2005 and targets activities typically undertaken by spyware (such as keystroke logging and gathering personal information). The act requires that spyware programs provide users with certain types of notices, and gives consumers a private right of action for actual or liquidated damages and attorneys’ fees.

In addition, in 2004 several anti-spyware bills were introduced in both the U.S. Senate and the U.S. House of Representatives, with the House passing two bills and the Senate favorably reporting on one. In 2005, several of these bills have been reintroduced including H.R. 29—the Securely Protect Yourself Against Cyber Trespass Act (SPY ACT)—and H.R. 744—the Internet Spyware (I-SPY) Prevention Act of 2005. It seems likely that some form of anti-spyware bill will pass Congress this year.

Obstacles to Anti-Spyware Legislation

One of the obstacles to anti-spyware legislation has been the difficulty of adequately defining “spy-

ware” to separate legitimate from illegitimate software. Legitimate software that is similar to spyware comes in several forms. One such form that frequently is legitimate is the “cookie.” A cookie is a file that is downloaded to a user’s computer by a Web site to remember the user’s preferences each time the user returns to the site. Another arguably legitimate form of data collection stems from software used by security companies to collect information from users’ computers to analyze and prevent virus attacks. Additionally, programs such as error reporting applications, troubleshooting and maintenance programs, security protocols and Internet browsers also may gather information about users.

Most of the proposed federal and state legislation defines spyware broadly, possibly including such legitimate software. Some commentators argue that, instead of attempting to define spyware and outlaw certain types of technology, effective anti-spyware legislation should focus on the illegal actions spyware allows, such as the secret collection of consumer data.

Spyware Lawsuits

Separate from these legislative efforts to address spyware, businesses have filed lawsuits seeking to curtail the activities of spyware developers. These lawsuits allege that using trademarks to generate ads that then cover (or appear under) the plaintiff’s Web site infringes the trademarks and copyrights of the plaintiff, and violates state laws pro-

hibiting trespass to chattels and tortious interference. The results of these suits have been inconsistent, however. Compare *U-Haul International, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D. Va. 2003) and *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734 (E. D. Mi. 2003) with *1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc.*, 309 F. Supp. 2d 467 (S.D. N.Y. 2003).

In a twist on these lawsuits, businesses that have been targeted by pop-up ads also have started to file suits directly against the competitor who hired the spyware/adware vendor to generate ads. Weight Watchers has filed at least two such suits against companies advertising with The Gator Corporation (now Claria Corporation), and L.L. Bean filed similar suits against Claria clients Nordstrom Inc., J.C. Penney, Gevalia Kaffe and Atkins Nutritionals.

The Federal Trade Commission (FTC) also has sought to address the issue. In October 2004, the FTC announced plans to begin working with law enforcement officials to target spyware. In the first spyware case brought by the FTC, the court enjoined the defendant because he caused spyware to be installed on users' computers and then tried to sell them the software needed to remove the spyware. See *Federal Trade Commission v. Seismic Entertainment Productions Inc., et al.*, 2004 WL 2403124 (D. N.H. Oct. 21, 2004).

In another interesting turn of events, some spyware developers have begun to turn on each other. Having a multitude of spyware programs running on a computer can drain the computer's resources. One spyware developer—Direct Revenue—programmed its spyware to delete other companies'

spyware. In November 2004, one alleged victim of this practice—Avenue Media—brought suit against Direct Revenue seeking to put an end to such tactics.

Legal Advice In An Uncertain Legal Environment

Software developers whose products may fall under the broad category of spyware need to take into account the likely enactment of federal and/or additional state legislation placing restrictions on the activities of such software. Distribution methods that require no user consent or that fool users into downloading software likely already violate the law, or will soon. Misleading and confusing advertising already is regulated by the FTC and is likely to be even more heavily regulated through spyware legis-

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lation. Advertisements that are triggered by trademarks and that confuse users into visiting competitors' Web sites are likely to be the subject of continued lawsuits.

Companies adversely affected by spyware/adware also can learn much from the suits that have been brought to date. If your client is receiving complaints about competitors' ads appearing on your client's Web site, they should save records of those complaints and investigate them. Evidence of actual confusion often can be the best evidence of trademark infringement. Has your client registered its copyright in its Web site? Registration (or attempted registration) generally is a prerequisite to bringing a copyright infringement claim.

Antispyware Software


Businesses also can program their Web sites to "know" when a user has spyware on their computer and to take different actions for such users. Users also can protect themselves by using spyware detection and removal utilities. Only use security software from trusted vendors, though, as some spyware solutions have been found to introduce the adware components they purport to eradicate. Spy Sweeper (www.webroot.com), SpyBot Search & Destroy (www.spybot.info), and Ad-Aware (www.lavasoftusa.com) are antispyware programs that have been favorably reviewed by *PC Magazine*. A growing number of antivirus providers also are starting to make anti-spyware software available as part of their offerings (e.g., Norton Internet Security and McAfee Internet Security Suite).

Conclusion

Spyware is everywhere. The odds are good that you have spy-

ware on your computer right now. Run the free Spybot Search & Destroy program and see if you are not surprised by what it finds.

One of the biggest problems presented by spyware is that, whether or not the underlying software may be characterized as "useful," spyware frequently does not announce itself and inform the user that they are being spied on. Thus, even spyware with arguably legitimate purposes is objectionable to many people because most people are not aware that the software is on their computer.

You can act now to protect yourself against spyware, or you can sit back and wait for legislators and businesses to shape the law to protect your rights. In the meantime, the spyware companies will be watching you, and offering you goods and services that match your observed interests. Like HAL 9000, they have great enthusiasm and confidence in their mission, and they claim they just want to help you... 



Brad Slutsky is a partner on the Intellectual Property Team at King & Spalding. His practice focuses on intellectual property and technology litigation, including Internet disputes, privacy and security litigation, and patent, copyright, trademark, and trade secret litigation. Slutsky can be reached at (404) 572-3536 or bslutsky@kslaw.com.



Sheila Baran is an associate with King & Spalding's Global Transaction Group. She has experience reviewing, structuring, drafting and negotiating a wide variety of commercial agreements includ-

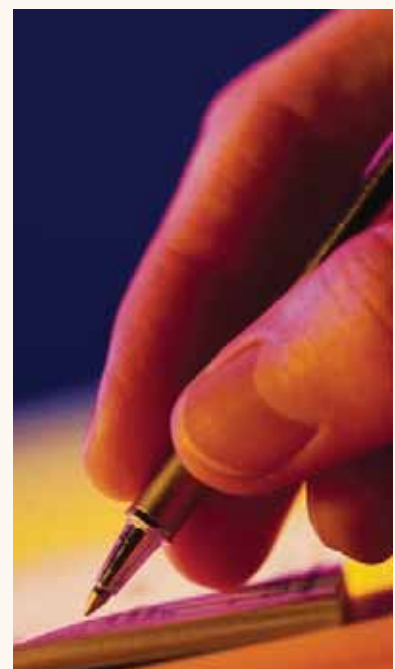
ing various types of professional services, transportation, procurement and licensing agreements. Baran also has experience with construction litigation and advising clients on issues relating to e-commerce, privacy, and marketing. She can be reached at (404) 572-2707 or sbaran@kslaw.com.

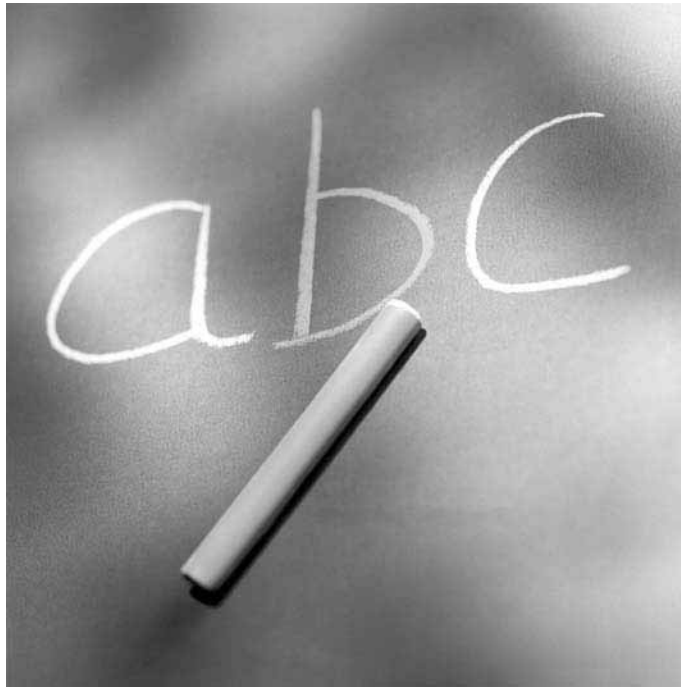
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Bar Center Dedication Ceremony Caps Midyear Meeting

By C. Tyler Jones

Excitement filled the air during the State Bar of Georgia's Midyear Meeting Jan. 13-15 at the Omni Hotel at CNN Center in downtown Atlanta. Attendees participated in numerous CLE presentations, section meetings and receptions. In all, more than 1,000 Georgia lawyers participated in this year's event and 16 of the Bar's 37 sections held activities.

The highlight of the meeting was the Bar Center Dedication with keynote speaker United States Supreme Court Justice Anthony M. Kennedy. More than 400 State Bar members and their guests braved the cold weather to witness one of the most significant events in the Bar's 122-year history.

Other Conference Highlights

The Women and Minorities in the Profession Committee hosted

the second annual Commitment to Equality Awards Luncheon to recognize the efforts of lawyers and legal employers who are committed to providing opportunities that foster a more diverse legal profession for women and minority lawyers.

Alston & Bird LLP and Joaquin R. Carbonnell III, from Cingular Wireless received the 2005 Commitment to Equality Award. The Randolph Thrower Lifetime Achievement award was then presented to Mary Ann B. Oakley. The Bar wants to thank the following luncheon sponsors for their support:

- Alston & Bird LLP
- Cingular Wireless
- Holland & Knight LLP
- Kilpatrick Stockton LLP
- King & Spalding LLP
- McKenna Long & Aldridge LLP
- Nokia Inc.

- Powell Goldstein LLP
- Sutherland Asbill & Brennan LLP

The sixth annual Justice Robert Benham Community Service Awards and reception took place Jan. 13. (For more information on this event, see p. 60)



Photos by C. Tyler Jones

Women and Minorities in the Profession awardees included John L. Latham, Mary Ann B. Oakley, Pinney L. Allen and Joaquin R. Carbonnell III.


Board Meeting Highlights

State Bar President Rob Reinhardt presided over the 200th meeting of the Board of Governors, which took place Jan. 15 at 8 a.m. at the State Bar of Georgia Headquarters in Atlanta, Ga. Following is an overview of the meeting.

- Following a report by State Bar General Counsel William P. Smith III, the Board approved recommending to the Judicial Qualifications Committee for adoption, proposed changes to Cannon 7 of the Code of Judicial Conduct.
- The Board approved the nominations of the following 2005-06 State Bar officers: Treasurer Bryan M. Cavan, Secretary Gerald M. Edenfield and President-elect J. Vincent Cook.
- The Board approved Georgia ABA delegates George Mundy (Post 2) and Donna G. Barwick (Post 4) to serve two-year terms. William D. Barwick will serve in Post 6 as the immediate past president.
- Following a report by Gregory L.

Fullerton on proposed legislation, the Board:

- Approved the Real Property Law Section's proposed recommendation of converting mobile homes to real property.
- Approved the Georgia Public Defender Standards Council proposal of funding a loan forgiveness program.
- Reinhardt announced that the Bar will work with Jay Morgan, a second lobbyist, to supplement Tom Boller's service on appropriate legislative issues. Mr. Morgan's services will be paid out of the voluntary legislative fund.

- Following a report by Reinhardt on tort reform issues, the Board approved a motion allowing the Executive Committee to act on its behalf on 2005 tort reform bills/issues consistent with the Bar's position dating back to 1986 and restated in the Bar's 2003 position paper on tort reform.
- Reinhardt provided a report on the Bar's legislative grassroots efforts and urged Board members to contact their legislators concerning upcoming legislative issues. 

C. Tyler Jones is the director of communications for the State Bar of Georgia.



Board Member Patrise Perkins-Hooker, Douglas Hooker, Gwendolyn S. Fortson Waring and Lauren Larmer Barrett pause for a photo.



President-elect Robert Ingram and his wife Kelly enjoy their time at the Midyear Meeting's Board dinner.



Board Member Terrance Lee Croft and his wife Merry (far right) pose with President Rob Reinhardt and his wife Susan prior to the YLD's Midyear Mingle.

Women's Bar Has Unique Past, Bright Future

By Johanna B. Merrill

When Minnie Hale Daniel graduated from the Atlanta Law School in 1911 in a class of 40 men she discovered that while she was educated in the field of law, she was not legally allowed to practice it in the state of Georgia. She set about remedying this, and over the next five years, lobbied for the passage of the "Woman Lawyer Bill" before the Georgia General Assembly. In 1916 her efforts paid off, and she and the women who followed after her were granted the right to practice law.

In 1928, Daniel and 18 other women founded the Georgia Association of Women Lawyers (GAWL).

In those early years, the number of female attorneys in Georgia were few, and the organization's

original constitution stated GAWL's purpose as: "to promote the welfare and interest of women lawyers; to maintain the honor and integrity of the profession of law; to promote legal science among women; to aid in the enactment of legislation for the common good, and in the administration of justice."

In a speech outlining GAWL's brief history on the occasion of its 16th anniversary in 1944, past president Kate McDougald, referring to the organization's forebearers, said, "Of course somebody had to take a stand for women—women have ever stood for progress and opening up new vistas. Where was the new world before a woman sold her jewels to send Columbus across the waters—who were Raleigh and Drake until Queen Elizabeth sent



Minnie Hale Daniel founded GAWL, along with 18 other women, in 1928 after becoming the first woman to graduate from law school in the state of Georgia in 1911.

them into the new wilderness of America to seek progress?"

GAWL's scrapbooks serve as a physical reminder of the long road female attorneys have traveled in

Georgia. They are filled with articles, yellow and faded, that picture vibrant subjects who found themselves working for the cause of advancing women's rights, simply by choosing their desired profession. An article from a 1972 issue of the *Marietta Daily Journal* describes Tobiane Schwartz, an attorney at Cobb County Legal Aide (as well as a GAWL past president) as "pretty" before it even discusses her education or career.

Over GAWL's 76-year history, the number of women lawyers in Georgia, and the United States, has grown exponentially. In 2004 there were 11,894 female members of the State Bar of Georgia, approximately 33 percent of the total membership. And close to 50 percent of all law school graduates are women.

As the demographics have changed, so has GAWL's mission. In the past the organization was community service oriented, with phases of political activism, but in 2002 GAWL created a strategic plan with its primary goals focusing on helping members gain networking and rainmaking skills, work/life balance and leadership training.

Laurie Speed-Dalton, current GAWL president, said, "There are still disadvantages that female lawyers face that organizations like GAWL try to work against."

One of those disadvantages is that work-life balance is still seen as a woman's issue, rather than a professional issue, as it is women who carry the majority of the housework burden while still holding full-time positions outside the home.

Speed-Dalton said, "One day, I hope that work-life balance is not seen as a woman's issue. In fact, we should all strive for such balance.

With women in the work force full-force, I think we all are beginning to see that professional and personal lives cannot always be separate. As such, it is important that we find happiness in the office, in building business contacts and in our home life."

Another of GAWL's strategic plan issues is to increase the number of female attorneys in leadership positions. Despite the larger numbers of women practicing law, leadership positions are still dominantly held by men. According to the American Bar Association, only 16 percent of law firm partners are women, 15 percent of Fortune 500 general counsels are women and less than 20 percent of U.S. Court of Appeals and District Court Judges are female. It wasn't until 1992 that Justice Leah Ward Sears became the first woman to serve on Georgia's Supreme Court.

"I have walked into a deposition and opposing counsel assumes that I am the court reporter rather than the attorney, while the baby-faced, male co-counsel does not have the same mistake made about his identity. Why do assumptions like this still get made when it is no longer rare for women to be lawyers? Perhaps it is because we often do not associate females as being leaders," Speed-Dalton said.

She said that one way to deal with this misconception is for more women to take on leadership roles. GAWL aims to assist women lawyers in this endeavor with its leadership training program. The strategic plan specifically states that the leadership objective is to "increase to 30 percent the number of GAWL members who are in leadership positions: publicly appointed officials, publicly elected officials, partners, business

executives, bar association leaders and non-profit board members." This year alone the Leadership Training Committee has planned and produced four training seminars to assist female lawyers in gaining leadership roles.

Over its long history, GAWL has evolved from a small band of women fighting for recognition and promoting the "welfare and interest of women lawyers" to a statewide organization that serves the more than 8,000 in-state female attorneys of the Bar, who are still working toward that same aim. For more information, or to join GAWL, visit their Web site at www.gawl.org or contact Betsy Giesler, executive director, at (770) 350-9500. 

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

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Georgia's Triplet Sister Courthouses

The Grand Old Courthouses of Georgia

By Wilber W. Caldwell

In the early 19th century when the first brick cubes rose to decorate the state's new courthouse squares, Georgians embraced an honest uncomplicated architecture that celebrated simple frontier values and fierce individualism. The unambiguous lines of this humble vernacular style and later the unadorned chastity of the Greek Revival Style supplied ideal architectural monuments for the early period.

But the defense of slavery imposed a corruption upon Greek symbols in the years leading up to the Civil War, and an increasing sophistication characterized national architectural models in the decade following Appomattox. By 1880, the American South was in need of new stylistic architectural symbols to give form to both the old and the new visions that were beginning to rise from the ashes of surrender.

Alexander Bruce's 1881-83 Hancock County Courthouse at Sparta and its two triplet sisters, the 1883-84 Walton County Courthouse at Monroe and the 1885 Hall County Courthouse at Gainesville mark a turning point in the history of public architecture in Georgia.

The Hancock County Courthouse at Sparta

In Hancock County, as in so many Georgia counties, new aspirations arrived by rail. After a long series of railroad disappointments, the first train arrived in Sparta on The Macon and Augusta Railroad in 1870. At last, Sparta had her long-awaited railroad. Movement for a new courthouse was quick to get underway. By 1874, *The Sparta Times and Planter* reported that a bond issue to fund a new courthouse had been approved and that the Atlanta architectural firm of Parkins and Allen had been hired to design a new Hancock County Courthouse. There followed several years of controversy regarding the county's authority to issue such bonds, and in 1877 the Georgia Supreme Court apparently ruled in the county's favor. By 1879, Bruce had replaced J. Warner Allen as

William Parkins's partner, and one of Bruce's designs was selected for the new court building at Sparta. Further delays ensued, and the contract for the construction of Bruce's courthouse was not let until July of 1881.

Bruce began his architectural career in Nashville as an apprentice to the English-born architect H. M. Akeroid, and in 1869 he moved to Knoxville to open his own office. Although the details of Bruce's work in Knoxville are incomplete, we know that he designed at least five court buildings in Tennessee including the 1879 Hamilton County Courthouse at Chattanooga. In 1879, he arrived in Atlanta to begin his practice with William Parkins with a large portfolio of completed designs. The design for the Hancock County Courthouse was among these, for Bruce had originated the plan four years earlier. Completed in 1875 and destroyed by fire in 1964, Bruce's McMinn County Courthouse at Athens, Tenn., was identical in almost every detail to Sparta's 1883 courthouse. In this era, there was substantial precedent for the re-selling of designs as evidenced by the fact that Bruce himself re-created this fine building twice more in Georgia:

first in 1884 in Walton County and later in 1885 in Hall County.

Bruce would go on to design 19 court buildings in Georgia, but this may well be his masterpiece. Remarkably, Bruce's Hancock County Courthouse achieves success by copying both old and new models. Bruce's magical synthesis here in Sparta imparts grace and sophistication upon the coarse geometry of the old brick vernacular, while it reshapes the crassly Baroque and inappropriately formal Second Empire Style into a soft, personal, rural idiom, altogether fitting for the slow airy ways of Sparta's 800 inhabitants in 1883. On its hilltop site, the building still achieves a proper degree of monumentality while retaining a disarmingly comfortable charm.

Bruce's great gift here was his ability to preserve a fundamental vernacular form while gracefully adorning it with Second Empire plasticity and up-to-date ornament. He began with the familiar four-sided cross-like

footprint, with its hipped roof and over-sized second story windows. Thus the central form is similar to many of the state's antebellum brick vernacular court buildings. For his Second Empire model, Bruce chose a courthouse designed by Cyrus Porter, whose long career had taken him to New York, Chicago, Buffalo and Bay County, Mich. Porter's Bay County Courthouse had appeared in *Bicknell's Village Builder and Supplement* in 1872. This popular pattern book had contained Bruce's own design for "A Cottage Villa." With its central pedimented bay, and almost identical silhouette and floor plan, Porter's design is clearly the source of Bruce's inspiration. There can be no doubt of Porter's influence on Bruce's ideas, for in 1877, Bruce copied Porter's design almost verbatim in Carthage, Tenn., where his 1879 Smith County Courthouse still stands today. Here in Sparta, the pedimented

central bay balanced by mansard corner pavilions, masonry quoining and segmental arched fenestration in the squat ground floor mirror Porter's model.

Neither vernacular models nor Porter's Bay County Courthouse rise to the heights achieved here in Hancock County where Bruce added his own gentle touch to their blending. The central section of the building is composed of several bays, and a decidedly French three-deminsionalism propels the central bay forward. This effect is heightened by the use of rustication in the second story quoining. The forward thrust of the central bay de-emphasizes the modern elements of the straight-roofed mansarded wings, which flank more Classical Second Empire convex mansards in the side elevations. For the rustic effect, Bruce added a ram-



Photo by Wilber W. Caldwell

Hancock County Courthouse at Sparta, built, 1881-83. Parkins and Bruce, architects.



Photo courtesy of Georgia Department of Archives and History

Hall County Courthouse at Gainesville; built 1884; destroyed by tornado, 1936. Bruce and Morgan, Architects.



Photo by Wilber W. Caldwell

Walton County Courthouse at Monroe, built, 1883-84. Bruce and Morgan, architects.

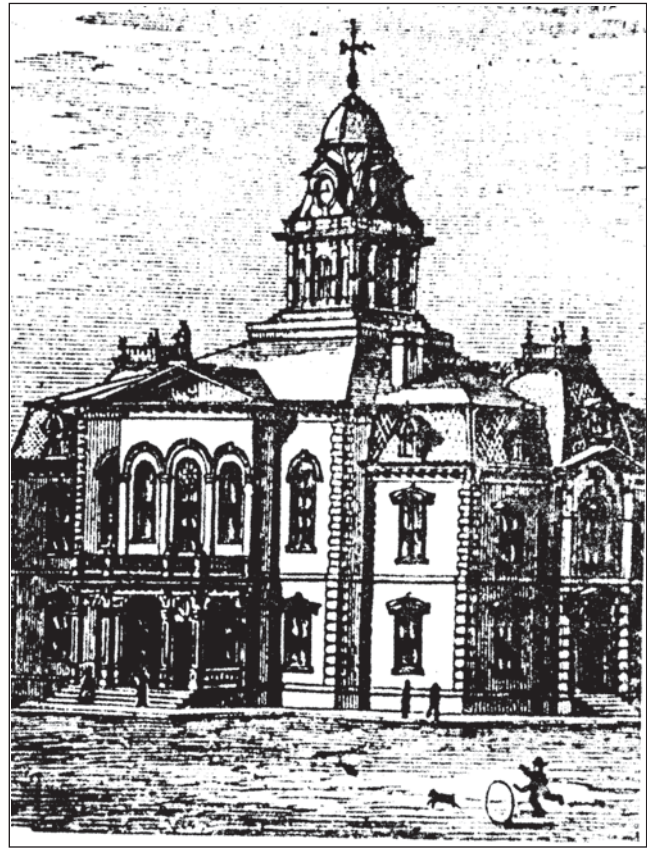


Photo courtesy of the Atlanta History Center

McMinn County Courthouse at Athens, TN, built 1875, burned 1964. Alexander Bruce, architect.

bling stick style porch across the front of the building, thus emphasizing the diminutive scale of the lower story, which seems to be almost crushed beneath the weight of the enormous courtroom. Lastly, as with most of Bruce's subsequent work, the tower was his own. Certainly not French Second Empire, nor vernacular by any stretch of the imagination, the complex lantern adds the required verticality without detracting from the unity of all that lies below. The overall effect is a charming combination of classic brick vernacular and modern forms. Here is an eclecticism born more of stylistic lag than any vision of the future. Nothing could have been more apt for Sparta.

The Walton County Courthouse at Monroe

Not far away at Monroe, we find the 1881-83 Sparta Courthouse's

almost identical twin. In the early 1880s, along with Gourdon P. Randall's 1872 Bibb County Courthouse at Macon and Parkins and Bruce's 1883 Fulton County Courthouse at Atlanta, this courthouse completed in 1884 and its sister at Sparta were arguably the finest, most up-to-date court buildings in Georgia.

There can be little doubt that in this period, designs were considered the property of the architect, and that little attention was attracted by the designer who resold his own work. Self-plagiarism of this sort was doubtless encouraged by unsophisticated clients, who were often so awed by these fine modern buildings that they demanded similar if not identical designs for their own squares. All of this was driven by a distorted sense of competition among neighboring counties.

Fueled by the wild myths of New South prosperity imported by the railroads of the era, the resulting boosterism and aggressive civic scheming clearly exaggerated the inherently Southern tendency toward boasting into ongoing duels of "oneupmanship."

The earlier Hancock County Courthouse at Sparta bares such a striking resemblance to this building that it is easier to point out the differences than to enumerate the similarities. There is considerable variation in the decoration especially in the fenestration. Notably only the three central courtroom windows have hooded arches in Monroe, while the remaining windows are adorned with masonry keystones and splays which are absent at Sparta. The dormers in the mansard roof of the wings appear more Gothic here in Monroe and

the elegant rusticated stone quoining found at Sparta is omitted here.

The most notable difference is the clock tower. The original tower was apparently destroyed in a wind-storm shortly after the building was completed. Although few local newspapers from this era survive, and there is no official record of this event, in March of 1890 *The Harris County Banner Messenger* reported that "the tower of the courthouse at Monroe has been declared dangerous and will be removed." One of Monroe's few surviving 19th century newspapers is an 1897 edition of *The Walton News* which contains a photograph of this courthouse with a tower identical to the one we see today, but with no clock. We know that the clock was installed in 1910, but records regarding the 1910 remodeling are sketchy. It is possible that in 1890 the county removed

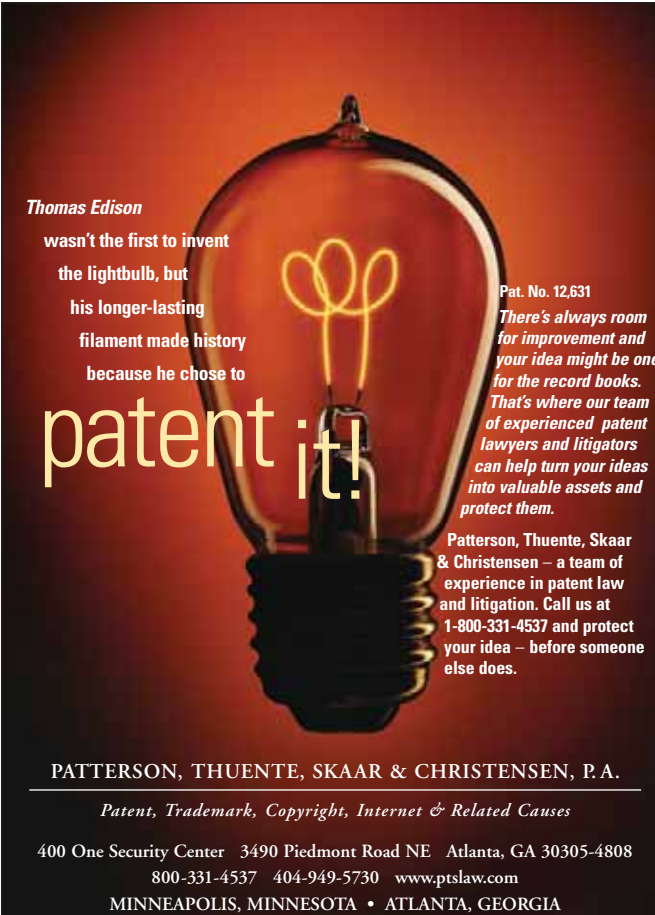
only the dome that crowned the tower. If this is the case, then the abbreviated tower we see today is original, and the 1910 "remodeling" involved only the installation of a new clock. It is more likely that the original tower, a copy of the one at Sparta, was removed in 1890 and replaced shortly thereafter.

Although these buildings clearly mirror the vocabulary of the Second Empire architecture so popular a decade earlier in the American North, Bruce apparently understood the dangers of employing "Yankee finery" to appeal to a Southern aesthetic. Thus, he was careful to subdue modern Parisian elements in the design and impose a simple rural blend of those Italianate and Gothic decorative ideas that had crept into the American brick vernacular in the years before the Civil War. The result was a stunning combination

of the modern architecture of the Gilded Age and the comfortable but archaic vernacular architecture of the American frontier. Nothing could have been more appropriate for Monroe in 1883 for, like most Southern towns, the place dreamed of the prosperity of a new age while it desperately struggled to retain frontier traditions and the social order of earlier times.

The Hall County Courthouse at Gainesville

Gainesville was the location of the last of Bruce's four nearly identical courthouses. Sadly this building, completed in 1885, was completely destroyed in 1936 by a devastating tornado, which wrecked a substantial portion of Gainesville and killed more than 200 people there. Before its untimely end, this building invit-



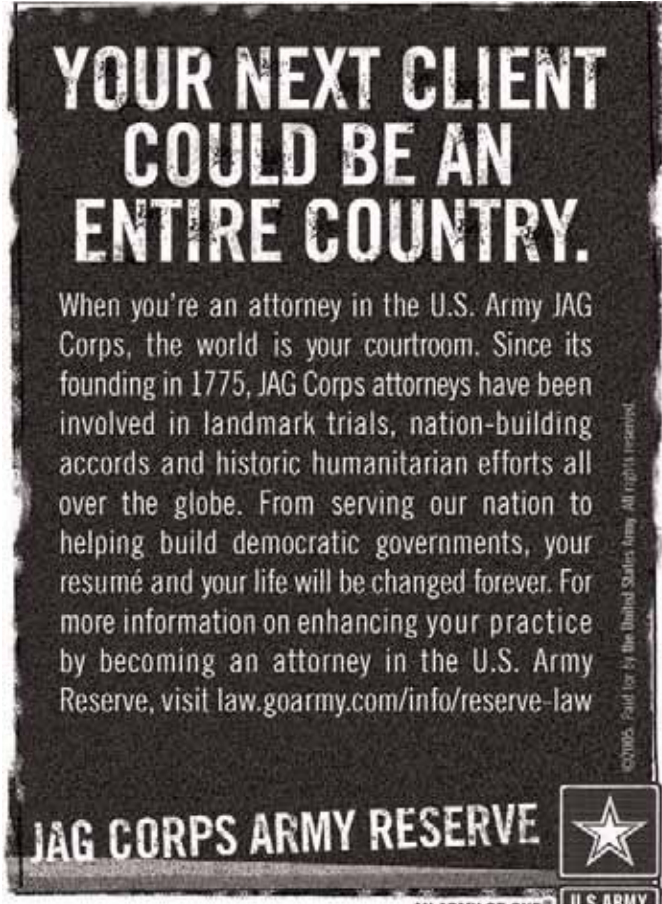
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ed comparison with its three triplet sisters, Bruce's 1875 McMinn County Courthouse at Athens, Tenn., his 1881-83 Hancock County Courthouse at Sparta and his 1883-84 Walton County Courthouse at Monroe. These four Second Empire court buildings all attested to the architect's considerable skill in combining the modernity of the fashionable Second Empire Style with soft comfortably Southern forms.

The Second Empire in the American North had begun as a fashionable voice of growing financial and industrial might, and by 1865 it was much employed in public building and especially popular with governmental builders. With the abuses of the Gilded Age and the corruptions of the Grant Administration in the North, the style quickly became tainted by the vices of the era. Informally called the "General Grant Style," needless to say, it knew little popularity in the rural South. All of this makes Bruce's achievement the more remarkable. Here in Gainesville, as in Sparta and Monroe, he fashioned an essentially Second Empire courthouse, which succeeded despite the mansard-roofed perils inherent in

its Yankee symbolism. Through a careful synthesis with more familiar forms, Bruce softened the building's modern effect by infusing a comfortable local vocabulary, like the high arched windows of the courtroom and the simple Classicism of the lantern. In 1885, Bruce's Hall County Courthouse was an apt symbol for the post-war South, for stylistically it looked backward and forward at the same time.

The likeness of this structure to its sisters on two other squares in the Georgia Piedmont seems to have drawn little remark in either Gainesville, Sparta or in Monroe. Although there were some differences, they were minor. The roofline of the lantern here in Gainesville is of a cleaner, more Classical type, the low porch is smaller, and there are some variations in the fenestration, banding and the decorative quoining. Nonetheless, it appears that exclusivity of design was not expected, or at least was of little importance at this early date in these then rather remote places. The connectivity that was provided by Georgia's blossoming rail system would soon put an end to such tolerance. But in 1885, when professional architects

were just beginning to make their mark in the far-flung corners of the state, this sort of self-plagiarism was apparently acceptable.

Bruce was not the only architect in Georgia who was copying himself by reselling plans. Augusta's Lewis Goodrich would build nearly identical court buildings at Crawfordville and Sylvania and Walter Chamberlain at Nashville and Oglethorpe. James W. Golucke would resell plans of several types, most notably those of the 1900 Schley County Courthouse at Ellaville, which was recreated in Jones County at Gray in 1905 and in Baker County at Newton in 1907. 

Excerpted by **Wilber W. Caldwell**, author of *The Courthouse and the Depot, The Architecture of Hope in an Age of Despair, A Narrative Guide to Railroad Expansion and its Impact on Public Architecture in Georgia, 1833-1910*, (Macon: Mercer University Press, 2001). Hardback, 624 pages, 300 photos, 33 maps, 3 Appendices, complete Index. This book is available for \$50 from book sellers or for \$40 from the Mercer University Press at www.mupress.org or call the Mercer Press at (800) 342-0841 inside Georgia or (800) 637-2378.

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Opening Night Festival

Be sure to join your fellow Bar members for the section-sponsored Opening Night Festival. Appearing for one night only at the State Bar of Georgia's Opening Night Festival—the Sensational Sounds of Motown! Join us for a fun filled evening of Motown music and hear wonderful oldies such as: *Sugar Pie-Honey Bunch*, *My Girl*, *Just My Imagination*, *Stand By Me*, *Soul Man*, *Knock On Wood* and of course *Mustang Sally*. So, come on down and twist and shout with the Sensational Sounds of Motown. This evening will be one you will not want to miss. Throw on your favorite casual attire and head for the lawn! In addition to the wonderful entertainment, great food and drinks will be provided throughout the evening. There will also be a myriad of activities for the children.

Presidential Inaugural Gala

Don't miss the installation of Robert D. Ingram as the incoming president for the State Bar of Georgia! Entertainment for the evening includes a mini production of a play from Colquitt, Ga., called "Swamp Gravy." It's an evening of entertainment you won't want to miss!

CLE & Section Events

Fulfill your CLE requirements or catch up with section members on recent developments in the areas you practice. Many worthwhile programs will be available, including updates in specific areas, section business meetings, alumni functions and the plenary session along with two Board of Governors meetings.



Social Events

Enjoy an exciting and entertaining welcoming reception, the Supreme Court Reception and Annual Presidential Inaugural Gala, along with plenty of recreational and sporting events to participate in with your colleagues and family.

Family Activities

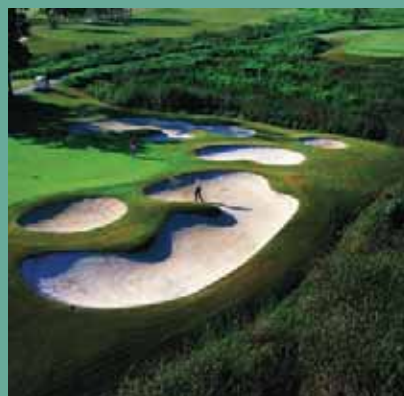
Golf, tennis, shopping, sight-seeing all available for your convenience.

Children/Teen Programs

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

Exhibits

Attendees please don't forget to visit the booths at the Annual Meeting. If you get your exhibitor card stamped with the appropriate number you will be entered into a drawing to win a 2-night stay at the Westin Savannah Harbor Resort & Spa.



KUDOS



Kilpatrick Stockton partner **Neil Falis** has been named **Atlanta Chapter President** of the National Association of Corporate Directors. Falis is a partner in the Corporate Group of Kilpatrick Stockton. His securities practice includes the counseling of public companies and their officers and directors on disclosure and reporting requirements, including advice on the effects and implications of the Sarbanes-Oxley Act of 2002 and related NYSE and Nasdaq regulations. He has published various articles, and frequently speaks to senior directors and officers of public companies on corporate governance-related matters.

Alston & Bird LLP is one of six Georgia companies listed on *FORTUNE* magazine's "**100 Best Companies to Work For**" for 2005. Alston & Bird, ranked ninth, holds the distinction of being the only law firm ever to make the top 10 in four consecutive years. In particular, the firm was cited for its unique work environment and the sense of humor among employees. Alston & Bird was also recognized as one of the best companies nationally in providing maternity leave and day care for employees. Alston & Bird was selected from among 356 finalists drawn from an overall candidate pool numbering more than 1,000 companies. A survey of randomly selected employees was used to capture employees' opinions about their workplaces and such topics as quality of workplace culture, diversity and encouragement of work-family balance.



Kilpatrick Stockton LLP announced that Atlanta attorney **Rey Pascual**, member of the Corporate Practice Group, has been elected to serve a three-year term on the firm's Executive Committee. Pascual practices corporate finance and securities laws, both domestically and in Latin America. He also heads the firm's investment management practice team and represents numerous investment funds and advisers. Pascual has been recognized as a leading lawyer for corporate and mergers and acquisitions law by *Chambers USA: America's Leading Business Lawyers*, as a Super Lawyer by *Atlanta Magazine*, and as a Who's Who in Law by the *Atlanta Business Chronicle*.

Atlanta-based firm **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**, (**Ogletree Deakins**) grew **40 percent** in spite of the 2004 national trend, solidifying itself as one of the nation's leading labor and employment law firms with significant

growth and recognition among a variety of peer groups. According to the National Law Journal's survey of the nation's 250 largest law firms, overall growth among firms was less than 2 percent. Ogletree Deakins increased its number of lawyers by 40 percent and moved from No. 223 to No. 159 on the highly regarded NLJ 250 list.

The March of Dimes Georgia Chapter has named Deloitte Tax LLP executive **Susan Boltacz** as **Downtown Atlanta WalkAmerica Chair**. The annual event raises funds to support the March of Dimes efforts to save babies from premature birth. As chair, Boltacz will oversee revenue development, sponsorship, team recruitment, promotion and logistics for the event, which is expected to attract nearly 8,000 walkers to Atlanta. A March of Dimes volunteer since 2004, she also leads Deloitte as a corporate sponsor for WalkAmerica.

George W. Jordan III of intellectual property law firm **Merchant & Gould** recently received the **Houston Bar Foundation award** for the **Outstanding Legal Article** published in *The Houston Lawyer* in 2004. Jordan was recognized for his contributions at the Houston Bar Foundation's Annual Luncheon at the Houston Club in Houston, Texas. The article, titled "Race-Conscious University Admission: Challenges in Attaining Student Body Diversity in the Grutter/Gratz Era" focuses on the Supreme Court decisions of *Grutter v. Bollinger* and *Gratz v. Bollinger* this past June, which offered new guidance for analyzing whether a university's race-conscious admission policies violate the Equal Protection Clause of the 14th Amendment.



Photo by Laura Heath Photography

Phil Bradley, office managing partner at **McKenna Long Aldridge, LLC**, was honored with Atlanta Habitat for Humanity's third annual **Golden Hammer Award**. In 2002, this award was established to recognize a person or organization that demonstrates outstanding dedication to affordable homeownership and enduring commitment to Atlanta Habitat for Humanity. Bradley's role is to serve as general counsel and member of the board of directors, providing legal guidance to

the organization. He provides, pro bono, the highest quality legal services that otherwise would be unaffordable to a nonprofit like Atlanta Habitat. As a member of the board of directors, Bradley provides leadership in setting strategic direction, developing policy and helping secure house sponsorships and donations on behalf of the organization. In 2004, he helped spearhead the new "Buildable Hours" program, targeting participation among small- and mid-sized law and professional firms that had not previously been involved with Atlanta Habitat.

James R. Osborne of Dallas, Ga., was sworn in by Gov. Sonny Perdue as **Judge of Paulding Superior Court** in January and began his term on the bench in February. Osborne, a Paulding county native, served as district attorney for the Tallapoosa Circuit (comprised of Haralson, Paulding and Polk counties) from 1994-2002. At that time, Paulding County became a circuit unto itself. Osborne most recently served as district attorney for Paulding County from 2002 through January 2005.

ON THE MOVE

In Atlanta

The law firm of **Holt Ney Zatcoff & Wasserman** announced that **Gregory A. Randall** has become a partner of the firm, and **Melissa J. Morrow** has joined the firm as an associate. Randall will continue to practice in the areas of real estate development, finance and investment law, mortgages, secured transactions and corporate law. Morrow practices in the trial and appellate law areas. The office is located at 100 Galleria Parkway, Suite 600, Atlanta, GA 30339; (770) 956-9600; Fax (770) 956-1490; www.hnzw.com.



The labor and employment law firm of **Constangy, Brooks & Smith, LLC**, welcomed **Jena Tarabula** to its Atlanta headquarters. Tarabula joins the firm as an associate and will assist clients in employment litigation. She formerly served as a legal clerk for the Southeastern Legal Foundation and as intern for the DeKalb County District Attorney. The Atlanta office is located at Suite 2400, 230 Peachtree St. NW, Atlanta, GA 30303; (404) 525-8622; Fax (404) 525-6955; www.constangy.com.

William M. Cummings II and **Tracy W. Middlebrooks III** announced the formation of a new partnership, **Cummings & Middlebrooks, LLP**. Both were formerly employed by Drew, Eckl

& Farnham, LLP. The firm's practice will focus on the representation of employees in workers' compensation cases. The office location is 3355 Lenox Road, Suite 600, Atlanta, GA, 30326; (404) 250-3292; Fax (404) 250-3293; www.cmlawllp.com.



Needle & Rosenberg added trial expertise to its intellectual property litigation practice when former DeKalb County District Attorney and former Assistant U.S. Attorney

Jeffrey Brickman joined the firm in January. Brickman served as DeKalb district attorney from February 2004, when he was appointed by Gov. Sonny Perdue to finish the term of J. Tom Morgan until December 2004. Previously, Brickman was an assistant U.S. attorney in Atlanta for six years, and before that, an assistant district attorney in DeKalb County for eight years. He is nationally recognized as an expert on the prosecution of child abuse cases and was a contributor to The American Prosecutors Research Institute's publication, *Investigation and Prosecution of Child Abuse Cases*. The firm will keep its focus on intellectual property, and support Brickman as he builds a criminal defense practice. Needle & Rosenberg is located at 999 Peachtree St., Suite 1000, Atlanta, GA 30309; (678) 420-9300; Fax (678) 420-9301; www.needlerosenberg.com.



Robert L. Florence has joined the Atlanta office of **McGuireWoods LLP** as an associate in the firm's Commercial Litigation Department. He will focus his practice on intellectual property and patent litigation.

Prior to joining McGuireWoods, Florence was an associate with Troutman Sanders. The firm's Atlanta office is located at 1170 Peachtree St. NE, Atlanta, GA 30309; (404) 443-5500; Fax (404) 443-5599; www.mcguirewoods.com.

Womble Carlyle Sandridge & Rice, PLLC, announced that **Liza Boswell** joined the law firm as a member in its Atlanta office. Boswell, who will practice in Womble Carlyle's environmental and toxic tort litigation group, has 18 years of experience representing manufacturing, mining, agribusiness, transportation and chemical companies in toxic tort, Superfund cost recovery, products liability, government enforcement and environmental litigation in the Southern United States. Her broad regulatory experience relates to all environmental laws, both as an advocate and in negotiation with the U.S. Department of Justice, U.S. Environmental Protection Agency, Georgia Environmental Protection Division and other federal and state agencies. Prior to joining Womble

Carlyle, Boswell was a partner at Smith Moore LLP in Atlanta, where she concentrated her practice on complex civil litigation, with an emphasis on environmental and toxic tort law. She also has worked as an associate and partner at Sutherland, Asbill & Brennan LLP in Atlanta. Boswell is a member of the American Bar Association and the Atlanta Bar Association and serves as a member of the board of directors of the National Kidney Foundation of Georgia. The Atlanta office is located at One Atlantic Center Suite 3500, 1201 West Peachtree St., Atlanta, GA 30309; (404) 872-7000; Fax (404) 888-7490; www.wcsr.com.

Jennifer A. Kennedy-Coggins recently joined **Cozen O'Connor's** Atlanta office as an associate in the insurance litigation department. Kennedy-Coggins concentrates her practice in products liability matters. Prior to joining Cozen O'Connor, she participated in the firm's summer associate program in 2003. She also served as a law clerk for Hon. William C. Koch Jr. of the Tennessee Court of Appeals. Kennedy-Coggins is a member of the Brainerd Currie Honor Society and the American Bar Association. The office is located at Suite 2200, SunTrust Plaza, 303 Peachtree St. NE, Atlanta, GA 30308; (404) 572-2000; Fax (404) 572-2199; www.cozen.com.



Attorneys **Robert D. "Bob" Boyd**, **John L. Collar Jr.** and **Catherine M. Knight** announced the formation of **Boyd Collar Knight LLC**, a law firm that will specialize in domestic relations and family law. Boyd was a partner and Knight was an associate with the firm of Davis, Matthews & Quigley, P.C. Collar was a partner at Warner, Mayoue, Bates, Nolen & Collar, P.C. The new firm opened in January with offices at the Atlanta Galleria. Boyd Collar Knight will take a comprehensive approach to family law. All of the attorneys have extensive experience, both in the courtroom and with all methods of alternative dispute resolution. The firm also will work to connect its clients with the support network they need to thrive during and after a divorce. The office is located at 400 Galleria Parkway, Suite 1920,

Atlanta, GA 30339; (770) 953-4300; Fax (770) 953-4700; www.lawbck.com.

Sutherland Asbill & Brennan LLP announced that in its Atlanta office, three attorneys have been elected to the firm's partnership and one attorney has been promoted to counsel. **Nikola R. Djuric**, **Ann G. Fort** and **R. Robinson Plowden** have been elected partner. Djuric concentrates his practice on estate planning, primarily in the areas of estate, gift and generation-skipping transfer tax; wills, trusts and administration of estates; tax controversies; and fiduciary litigation. He has experience in tax and succession planning for closely held businesses and multigenerational families, and works closely with private family officers and their teams of professional advisors. Fort practices in the litigation division of the firm's Intellectual Property Group. She has substantial experience representing clients in complex civil litigation with a particular emphasis on protecting client's rights in intellectual property matters, including obtaining TROs and preliminary injunctions. Plowden, who works with the commercial real estate group, focuses on retail, office and industrial sales, acquisitions, development and leasing. He regularly represents a large national retailer and owners and developers of retail, office and industrial properties. **N.E.B. "Jack" Minnear** has been promoted to counsel. Minnear practices in the firm's Intellectual Property Group and works primarily on patent infringement, trade secret and antitrust litigation matters across a range of technologies. He has extensive experience in multi-district litigation proceedings. The office is located at 999 Peachtree St. NE, Atlanta, GA 30309; (404) 853-8000; Fax (404) 853-8806; www.sablalaw.com.

Timothy N. Toler has formed the construction law firm of **Toler Associates LLC**. **Robert T. Tifverman**, formerly assistant general counsel for J.A. Jones, Inc., and a partner in Bishop & Tifverman, LLP, is of counsel to the firm. The firm's offices are located at the Candler Building, 127 Peachtree St., Suite 1301, Atlanta, GA 30303; (678) 799-3007; Fax (678) 799-3011; www.tolerlaw.com.



Porter



Banich

The Atlanta office of **Stites & Harbison** announced the promotion of **John Porter Jr.**, to member and **Catherine Banich** to counsel in the firm. Porter has been with Stites & Harbison since 2002, serving in the Business Litigation Service Group. Before joining Stites & Harbison, he held positions at Atlanta-area law firms, including counsel at Page Guard Smiley

& Bishop, partner at Schnader Harrison Segal & Lewis, and partner at Cashin Morton & Mullins. He is admitted to practice in Georgia and in the state and federal appellate courts and is a member of the American Bar Association. Catherine Banich joined Stites & Harbison in 2002, coming to work for the firm in the Labor & Employment Law Service Group, concentrating her practice on complex employment and commercial matters. She is also a member of the Business Litigation Service Group. Prior to Stites & Harbison, she was an associate at Schnader Harrison Segal & Lewis in Atlanta. Banich is also a member of the American Bar Association. The Atlanta office of the firm is located at 303 Peachtree St. NE, 2800 SunTrust Plaza, Atlanta, GA 30308; (404) 739-8800; Fax (404) 739-8870; www.stites.com.



Stanley

Esrey

Shoemake



Smith

Wright

Balch & Bingham LLP announced that they have launched a commercial law practice in Atlanta. Attorneys **Robert E. Stanley, Audra Esrey, Justin Shoemake, Sharon E. Smith and Daniel S. Wright** left Withrow, McQuade & Olsen, LLP, to join Balch & Bingham. Stanley and his team have extensive experience in the representation of commercial real estate developers, as well as in the acquisition and disposition of real property, and in commercial leasing for retail, office and industrial developments. In addition, Stanley and Shoemake are both certified through the U. S. Green Building Council as LEED® 2.0 Accredited Professionals, facilitating the group's growing practice of representing developers focused on sustainable design and development of commercial properties. The team currently represents more than 30 commercial real estate clients. The office is located at 14 Piedmont Center, Suite 1100, 3535 Piedmont Road NE, Atlanta, GA 30305; (404) 261-6020; Fax (404) 261-3656; www.balch.com.



Kilpatrick Stockton LLP announced the addition of former Turner Broadcasting System Senior Vice President and Chief Legal Officer **Donna K. Lewis** to the firm's Corporate Practice Group. She will

join the firm's Atlanta office as counsel. Lewis spent 14 years at Turner Broadcasting System, Inc., in a variety of legal and business positions, most recently as senior vice president and chief legal officer for Turner Entertainment Group. In this position, she was a member of senior management and head of legal and business affairs for Turner's subsidiary providing multiple entertainment television networks (e.g., TNT, TBS, Cartoon Network, TCM and Turner South) to distributors nationwide. In previous positions with Turner, she was responsible for all legal work related to Turner's digital media strategy and implementation for its news and entertainment networks. In addition to her legal and business affairs roles, she served as senior vice president, business development for CNN, with management and operational responsibility for business development matters for CNN Interactive, including CNN.com and CNN Mobile. Kilpatrick Stockton is located at Suite 2800, 1100 Peachtree St., Atlanta, GA 30309; (404) 815 6500; Fax (404) 815 6555; www.kilpatrickstockton.com.

In Duluth

Thompson & Slagle, P.C., announced that **Michael J. Hannan III**, formerly of counsel, has become a member of the firm and the firm name has changed to **Thompson, Slagle & Hannan, LLC**. The office location is 12000 Findley Road, Suite 250, Duluth, GA 30097; (770) 662-5999; Fax (770) 447-6063.

In Elberton

Phelps & Campbell announced that **R. Daniel Graves** joined the firm as an associate, engaged in the general practice of law. The office is located at 313 Heard St., P.O. Box 1056, Elberton, GA 30635; (706) 283-5000; Fax (706) 283-5002.

In Newnan

Glover & Davis, P.A., announced that **Taylor B. Drake** recently became a partner in its firm. Drake maintains a general practice but he specializes in the fields of family law and construction law. He will continue to practice in the firm's Newnan office which is located at 10 Brown St., Newnan, GA 30263; (770) 683-6000; Fax (770) 683-6010.

In Savannah

Robin and Weiss, P.A., and **Van Reynolds, P.C.**, announced the merger of their firms. The newly formed professional association is named

Reynolds, Robin, Smith and Weiss, P.A., maintaining offices in Savannah, Metter and Marietta. It will continue its statewide focus on retail, medical and commercial collections, creditors' rights and creditor bankruptcy representation. The firm also announced the addition of **Michael H. Smith**. Smith is a member of the Savannah Bar Association, the Commercial Law League of America and the National Association of Retail Collection Attorneys. The main office is located at 313 West Broughton St., Savannah, GA 31412; (912) 236-9271; Fax (912) 236-0439.

In Columbia, S.C.

Jeff Z. Brooker III formerly of Richardson, Plowden, Carpenter and Robinson opened **The Brooker Law Firm, P.A.**, in Columbia, S.C. The office is located at 717 Lady St., Suite G, P.O. Box 11415, Columbia, SC 29211; (803) 779-1065; Fax (803) 779-1094.

In Chattanooga, Tenn.



Allen



Blankenship

Leitner, Williams, Dooley & Napolitan, PLLC, announced that **Craig R. Allen** was named a partner of the firm and wel-

comed **Ann E. Blankenship** to an associate position. Allen joined the firm in 2003 as of counsel. His practice emphasizes the defense of civil litigation, with a concentration in construction, professional liability and railroad litigation. Blankenship is licensed in Tennessee and Georgia and will be based out of the firm's Chattanooga office. The firm is located at 801 Broad St., Third Floor, Pioneer Building, Chattanooga, TN 37402; (423) 265-0241; Fax (423) 266-5490; www.leitnerfirm.com.

In Brussels, Belgium



Porter Elliott of the law firm **Van Bael & Bellis** in Brussels, Belgium, has been appointed to partnership. Elliott, who joined the firm in 1997, specializes in European antitrust and merger control law. The firm is located at Avenue Louise 165, 1050 Brussels, Belgium; +32 2 647 73 50, Fax +32 2 640 64 99; www.vanbaelbellis.com.



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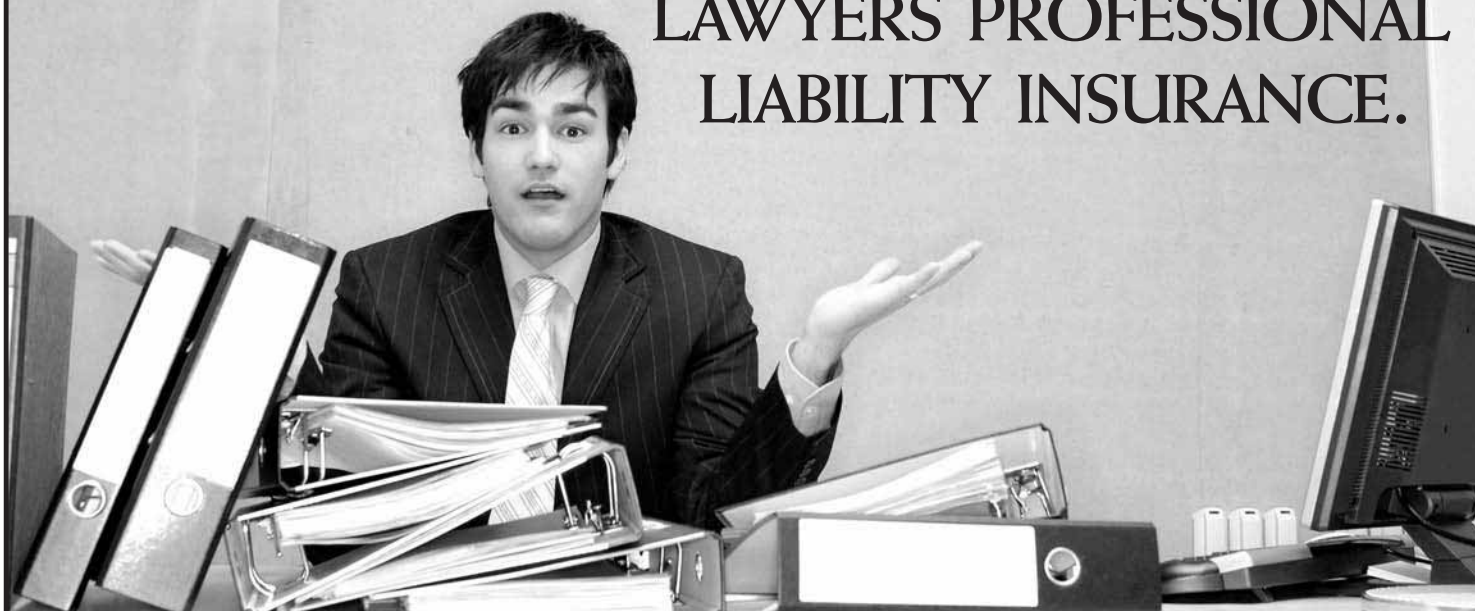
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GBJ MK-05-1827

Want to Sell Your Law Practice? Now You Can!

By Paula Frederick

“I’m cashing it all in and moving to Costa del Sol to buy that Bed & Breakfast I’ve always wanted,” announces Harriet Morris, your law school classmate and long-time rival.

She has truly shocked you this time, and without thinking you blurt a tactless response: “Cashing all *what* in? I thought you lost most of your retirement savings to the vagaries of the stock market a few years ago—just like I did!”

“Don’t be jealous,” Harriett admonishes. “If you hadn’t gotten out of the market altogether you’d know it’s looking up again. But that’s beside the point—I’m going to finance my career change by selling my law practice!”


“That can’t be legal!” you caution. “Good thing you’re planning a future running a B&B; you’re going to end up disbarred!”

“Jamie, you really need to keep up with changes to the Rules of Professional Conduct,” Harriet advises. “Georgia started allowing a lawyer to sell a law practice back in 2001, when we went to rules based on the ABA Model. I’ve found a lawyer downtown who says he’s interested. If he agrees to buy the entire practice, we’ll just have to send the required notice to clients and jump through a few other hoops imposed by the rule.”

A quick look at Rule 1.17 verifies that Harriet knows what she’s talking about. The rule allows a lawyer to sell a law practice, including goodwill.¹ The practice must be

sold in its entirety. The rule requires that a written notice inform clients of the sale, the terms of any prospective fee change,² and the client’s right to retain other counsel or to take possession of their file. The buyer and seller may presume client consent if the client does not object or take some action within 90 days of receipt of the notice. In addition, if any of the matters are pending in a court that requires approval for a substitution of counsel, the lawyers must get court approval before including that case in the sale.

“Wow! The Bar has finally acknowledged the value of the goodwill that a sole practitioner builds over years of practice,” you exclaim. “This rule helps solos and their estates by allowing them to benefit from that goodwill. It also helps clients who might otherwise be left vulnerable by the retirement or death of their lawyer.”

“I should get to Costa del Sol in time for the summer rush,” Harriet replies. 



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

Endnotes

1. Georgia’s rule differs significantly from the ABA Model, which requires the selling lawyer to cease practice in the locality and which allows individual areas of practice to be sold to separate lawyers or law firms.
2. The purchaser must honor fee agreements that already exist between the seller and the client. Part (d) of the Rule prohibits the lawyer buying the practice from charging the client an increased fee by reason of the sale.

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Discipline Notices

(Dec. 10, 2004, through Feb. 10, 2005)

By Connie P. Henry

DISBARMENTS/ VOLUNTARY SURRENDERS

Kevin E. Perry

Waco, Texas

Kevin E. Perry (State Bar No. 572729) has been disbarred from the practice of law in Georgia by Supreme Court order dated Jan. 10, 2005. Perry was disbarred in the State of Texas for violation of the Texas Disciplinary Rules of Professional Conduct involving client communication, diligence, improper withdrawal from representation, safekeeping client property, and misconduct involving fraud and deception. Perry did not respond to the Formal Complaint filed by the State Bar of Georgia.

Brian Ray Hutchison

Warrenville, Ill.

Brian Ray Hutchison (State Bar No. 383297) has been disbarred from the practice of law in Georgia by Supreme Court order dated Jan. 10, 2005. Hutchison was disbarred in the State of Illinois for violation of the Illinois Rules of Professional Conduct by engaging in multiple instances of commingling and converting \$192,477 worth of client funds; endorsing settlement checks without the payees' authority; giving false testimony to a disciplinary authority; making misrepresentations to a tribunal and to clients; preparing false court documents; and other misconduct. He did not respond to the Notice of Discipline filed by the State Bar of Georgia.

Anthony Charles Bruneio

Cheraw, S.C.

Anthony Charles Bruneio (State Bar No. 090686) has been disbarred from the practice

of law in Georgia by Supreme Court order dated Jan. 24, 2005. Bruneio was disbarred in the State of Pennsylvania. He did not respond to the State Bar of Georgia's Notice of Investigation or Notice of Discipline.

John H. Armwood

Marietta, Ga.

By order dated Jan. 10, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of John H. Armwood (State Bar No. 022545). In one case, Armwood was hired to represent a client in a legal matter involving another party's attempts to legitimate and establish visitation privileges with her child. Although the client made numerous attempts to contact Armwood, he failed to respond to the extent necessary to permit her to make informed decisions and to keep her reasonably informed regarding the status of the case. In another case Armwood was hired to represent a client in a dispute with an Atlanta gallery. He disregarded the matter although he knew it could cause his client injury, was without just cause, and resulted in her suffering needless worry and concern. Armwood had prior disciplinary action including a one-year suspension and a subsequent two-year suspension.

John L. Howard

Atlanta, Ga.

By order dated Jan. 10, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of John L. Howard (State Bar No. 370098). Howard pled guilty to the felony offense of false tax declaration in violation of 26 USC § 7206 (1) in the U.S. District Court for the Southern District of Georgia, Waycross Division.

Robert B. Ellis Jr.

Nashville, Ga.

By order dated Jan. 24, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Robert B. Ellis Jr. (State Bar No. 245875). In August 2004, Ellis pled guilty in the United States District Court for the Middle District of Georgia, Valdosta Division, to violating 18 U.S.C. § 1001, a felony involving giving false statements.

SUSPENSIONS

Lourdes Neely Coleman

Augusta, Ga.

By order dated Jan. 10, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Lourdes Neely Coleman (State Bar No. 177629) and suspended her from the practice of law in Georgia for a period of six months with credit given for interim suspension beginning June 25, 2004. A client terminated Coleman's services and requested the return of her file and any unused attorney's fees. She provided what she believed to be a complete copy of the file, which did not include Coleman's work product, but she did not provide the client with an accounting. The client and her new counsel repeatedly demanded the additional documents and after she failed to provide them, the client filed a grievance. The court suspended Coleman on June 25, 2004, for failing to respond to the Notice of Investigation. In October 2004, she provided the client with another copy of the file and an accounting showing that the client owed additional attorney's fees.

Jeffrey Bull Grable

Marietta, Ga.

By order dated Jan. 10, 2005, the Supreme Court of Georgia

accepted the Petition for Voluntary Discipline of Jeffrey Bull Grable (State Bar No. 303870) and suspended him from the practice of law in Georgia for a period of six months with conditions for reinstatement. In four separate cases Grable agreed to represent a client but failed to file suit, failed to inform the client as to the status of the case, to respond to inquiries, or to inform the client when he closed his practice. Grable could not return the client's files because he failed to properly maintain them. In mitigation of discipline, the court noted Grable had no prior disciplinary record; his relative inexperience in the practice of law; his good character and reputation; his interim rehabilitation; and his remorse.

William H. Norton

Marietta, Ga.

By order dated Feb. 7, 2005, the Supreme Court of Georgia suspended William H. Norton (State Bar No. 546850) for 120 days with the term to commence after his current indefinite suspension is lifted. Norton was hired by a client to file for child visitation modification. While Norton did not willfully disregard his client's interests, he did not act expeditiously with regard to handling the client's case.

EMERGENCY SUSPENSION

Charles F. Peebles


Norcross, Ga.

On Dec. 23, 2004, the Supreme Court of Georgia accepted the Petition for Emergency Suspension on Consent filed by Charles F. Peebles (State Bar No. 570125).

REVIEW PANEL REPRIMAND

Earnest H. DeLong

Atlanta, Ga.

On Jan. 10, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Earnest H. DeLong (State Bar No. 217300) and ordered the imposition of a Review Panel Reprimand. DeLong filed an application to be appointed as the administrator of his mother's estate to which he attached a notarized acknowledgment of service and assent purportedly signed by his brother. In fact, he had signed his brother's name, had the signatures improperly notarized, and filed the documents with the probate court. In mitigation, DeLong asserted that he believed he had his brother's permission to sign the documents on his behalf; that when apprised of his brother's objections, he immediately withdrew his application and consented to the appointment of his brother as permanent administrator of the estate; that he has resolved all issues regarding the handling of their mother's estate, including a full accounting of all funds; that he is sincerely remorseful for his actions; that he has had no prior disciplinary record in 33 years; and that he fully cooperated with disciplinary authorities. 

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

LPM Online

Hot Offerings on the Web

By Natalie R. Thornwell

The resources of the Law Practice Management Program have been expanded with the new design of the Bar's Web site. We have also had the pleasure of reviewing some of the latest Web technologies and online resources. Here are some of the exciting things that you can experience via an Internet connection while sitting at your desk.

LPM Discussion Board

The State Bar's new Members Only area of the Web site is the gateway to an interactive discussion board focused on Law Practice Management. Come visit and talk about the latest in marketing, technology, finance and firm management. Simply follow the prompts in the secure area to the boards. See you out there!

Casemaker

If you haven't tried Casemaker, you don't know what you're missing! This free online legal research tool is available to all Bar members. Log-in to Casemaker at the Bar's main Web page or enter the Members Only area and log-in there. The Georgia Library along with over 19 other states and a federal library are included. With regular updates, you are not limited to how many times you can visit or what number of searches you can perform. You should try Casemaker even if you use another legal research vendor. If you have comments or concerns, feel free to contact the LPM Casemaker coordinator, Jacqui Fitzgerald at jacqui@gabar.org or (877) CASE-509 or (877) 227-3509.



Be sure to visit the State Bar of Georgia's new Web site at www.gabar.org. From Casemaker to LPM tips, you'll be sure to find the tools you need for the practice of law.

LPM Web site Continued Items

The Bar's new Web design didn't take away any of the Law Practice Management resources to which you've grown accustomed. You can still find the Sample Practice Management Forms, Web site of the Week, Tip of the Week, Law Practice Management Articles, Consultation Information, Software Library Listings and Resource Library Checkout forms and information there. Don't forget to let us know if you want additional resources or if you have other ideas about these continued items.


Law Practice Management Blogs!?

Jim Calloway and Reid Trautz are fellow practice management advisors who have recently set up their own blogs focused on practice management issues and tips for lawyers. Check out their blogs at jimcal

loway.typepad.com and reid-trautz.typepad.com. Well, if you are lost about what a blog is, then you can certainly benefit from reading more about them online at www.lawpracticetoday.com or being one of the first persons to hit the Law Practice Management Discussion Board in the Members Only area of the Bar's Web site. P.S. You can learn about other legal blogs, RSS and News Aggregators too!

Law Practice Today

A list of online LPM resources would be remiss if they left off LPT. This webzine published by the ABA's Law Practice Management Section is a quick and easy way to catch up on the latest in legal office management and technology concerns. You won't be willing to miss an issue once you've read one. Visit the webzine online at www.lawpracticetoday.com or navigate there via the ABA's Law Practice Management Section's site at www.lawpractice.org.

With remote access growing common in many practices and the increased amount of time being spent by lawyers online doing business, it's no wonder that many of these resources are extremely hot. If you are a novice, don't worry, you too can use this information to help you increase your online skills and better manage your practice at the same time. Remember, the Internet doesn't sleep, and now, neither do Law Practice Management resources! 

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

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Wills for Heroes

By S. Kendall Butterworth, Lawrence E. Gill and Steve R. Wilson

Through Wills for Heroes, a program begun in 2001 in South Carolina, nearly 1,500 firefighters, police and emergency medical technicians across the Southeast have had wills composed free of charge. Anthony Hayes, an attorney with Nelson Mullins Riley and Scarborough, LLP, initiated the program with support from members of the firm, almost three years ago following the devastating terror attacks of Sept. 11, 2001, when several hundred emergency personnel perished.

The program expanded into Georgia in 2002 under the guidance of Steve Wilson, also an attorney with Nelson Mullins. In cooperation with attorneys and staff of BellSouth, over 400 wills have been provided to Georgia emergency response personnel. About 25 staff and attorneys each from Nelson Mullins and BellSouth have taken part in Wills for Heroes in Georgia. "We are very grateful for BellSouth's participation in this program," Wilson said. "We would never have been able to do so many wills without their assistance."

BellSouth attorneys Larry Gill and Leah Cooper co-chaired BellSouth's participation in the Wills for Heroes program. "All of the BellSouth participants have found this to be a very meaningful way to never forget Sept. 11, and to contribute in a small but very personal way to those worthy individuals who put their lives on the line for the safety of our communities every single day," Gill said.

For BellSouth, one of the best features of this project is that it provides an opportunity for both attorneys and staff to participate in BellSouth's pro bono activities. "The level of



(Left to right) Rusty Pickering, Leah Cooper, Linda Bryans and Rudine Davis are all project coordinators for the wills clinics. This photo was taken in connection with the Henry County wills for firefighters session.

participation by our staff in this project, and the teamwork between BellSouth and Nelson Mullins, has been particularly gratifying," Cooper said.

Wills have been written for Smyrna, East Point and Henry County Fire and Police departments, and for Dobbins Air Force Base Fire Department and the Henry County Sheriff's Office.


"Many firefighters, police and EMTs are under age 40 and many don't have wills," Hayes said. "Dying without a will can be a devastating experience for a family," he said. "With a will, there doesn't have to be a lot of questions about what goes where. Putting together these wills reduces the burdens families have should something happen."

The process is simple. The firefighters, police and EMTs receive questionnaires explaining the process and outlining certain basic questions that need to be answered to

draft a will. Then the attorneys and staff visit the locales to meet will recipients and review questionnaire answers.

Following confidential meetings, wills are prepared. The process generally takes about 45 minutes to an hour and the emergency response personnel are able to leave with fully executed wills, durable powers of attorney for health care and living wills, which together, could cost several hundred dollars.

The program is in the process of expanding into Arizona this year. It will be handled by the Young Lawyers Division of the Arizona Bar, in association with the 100 Club of Arizona, which is a support group for Arizona police officers and firefighters.

In Virginia, the young lawyers division of the bar will be taking on this project as well. 



S. Kendall Butterworth is Senior Litigation for BellSouth Corporation in Atlanta. She has served in that position since October 2001 and

is responsible for handling complex, commercial litigation for various BellSouth entities throughout the United States. Butterworth graduated with honors from the University of Virginia and earned her law degree from the University of Georgia's School of Law.



Lawrence E. Gill is a graduate of Cornell and Tulane Law School, where he was elected Articles Editor of the Tulane Law

Review. He clerked in Atlanta for U.S. District Judge William C. O'Kelley, and is a former Assistant U. S. Attorney for the Northern District of Georgia. He currently

practices with the BellSouth Legal Department as Vice President and General Counsel for BellSouth Business Systems.



Steve R. Wilson is a member of the California Bar and the State Bar of Georgia, and represents public and private companies

in the issuance of securities, venture capital financing, mergers and acquisitions, and structuring business transactions. He regularly advises clients on executive compensation issues, employee incentive plans and corporate governance, and is active in estate planning. He received a Master of Laws in Taxation from New York University School of Law in 1999. In 1998 he received a J.D., *cum laude*, from Santa Clara University School of Law.

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Section Events Start 2005

By Johanna B. Merrill

The 2005 Midyear Meeting, Jan. 13-15, at the Omni Hotel at CNN Center, served as a hub for section meetings, luncheons and receptions. On Jan. 13 the **Government Attorneys Section** held a breakfast meeting, which also served as their annual meeting. The **Appellate Practice, Labor and Employment Law, Criminal Law** and **Environmental Law** sections all hosted lunch meetings that day. The Criminal Law Section presented a ballistics seminar with speaker Kelly Fite. The Environmental Law Section co-sponsored a CLE luncheon with the Environmental Law Section of the Atlanta Bar Association.

On Jan. 14 nine sections hosted lunch meetings:

- **Entertainment & Sports Law** hosted speaker Robert Rosenblum from Greenberg Traurig, and offered attendees one hour of CLE credit
- The **Aviation Law Section** hosted speaker, Chris Madrid
- **Fiduciary Law** presented speaker Penny McPhell of the Arthur M. Blank Family Foundation
- **International Law Section**
- **Taxation Law Section**

- The **Bankruptcy Law Section** hosted a luncheon during their daylong CLE programming, where the section offered simultaneous programs—one that covered business bankruptcy and the other focused on consumer bankruptcy

■ **General Practice & Trial Section**

- The **Health Law Section** focused the topic of their lunch meeting on Headline Health Law News

- **School & College Law** hosted speakers Amy Totenberg and Tom Cox who spoke on the topic of recently filed lawsuit challenging the constitutional adequacy of the state's funding of public education

The **Bankruptcy Law, Family Law** and **Workers' Compensation Law** sections hosted receptions on the evening of Jan. 14 for their members at the hotel.

Sections have stayed busy this winter outside the events surrounding the Midyear Meeting, hosting several CLE luncheons and daylong institutes. The **Intellectual Property Law Section** hosted several events at the Bar Center, beginning on Jan. 20 with an hour-long CLE presented by the Copyright Committee, titled "Practice and Policy Under the Digital Millennium Copyright Act," with speakers Jenifer Jenkins, Kari Moeller and Les Seagraves. The roundtable was moderated by committee chair John Renuad. On Jan. 27 the Patent Committee, chaired by N. Andrew Crain, presented a patent roundtable titled "Patent Valuation—Key Concepts and Tools for Evaluating Clients," with speaker Dan Centempo. Attendees earned one hour of CLE credit. On Feb. 8 the section's Trademark Committee, chaired by Jeri

Upcoming Section Events

- May 12-14, 2005, Real Property Law Institute
Amelia Island Plantation, Amelia Island, Fla.
- May 25-29, 2005, Family Law Institute
The Ritz-Carlton, Amelia Island, Fla.
- July 14 -16, 2005, Fiduciary Law Institute
King and Prince, St. Simons Island, Ga.


More info at www.gabar.org.

Sute, presented a luncheon with Ari Leifman, staff attorney in the Office of the Commissioner for Trademarks in the U.S. Patent and Trademark Office. The section also hosted a full-day seminar titled "Intellectual Property Law in 2005" on Feb. 25 at the Bar Center. The section presented dual-programs hosted by the Trademark and Licensing committees on March 17 before a St. Patrick's Day social event at the Bar Center. Joan Dillon, Jim Johnson and Charlie Henn were featured speakers for the trademark program, "The Trademark Dirty Dozen—Practice Pitfalls and Popular Palliatives." The licensing program, "Patent Claim Drafting with an Eye Towards Licensing" was a panel discussion with Bill Hartselle, Cheryl Tubach, Brenda Holmes and Griff Griffin.

On Feb. 25 the **Entertainment & Sports Law Section** presented the 2005 Entertainment Law Institute at Tull Auditorium at Emory University School of Law. Section Chair Lisa Kincheloe coordinated the programming for the annual institute.

The **Technology Law Section** hosted a quarterly CLE luncheon on March 15 at the Bar Center. Speakers James A. Moore and Chuck Ross discussed the topic "Information Forensics: The 'real CSI'" about electronic evidence gathering.

The **International Law Section** presented the International Law Seminar at the Westin Buckhead in Atlanta on March 18. Dominique M.H. Lemoine of Sokolow, Carreras, Lemoine & Partners, LLP, was the program chair for the seminar.

Please save the dates of June 9-12 and join the Bar for the 2005 Annual Meeting at the Westin Savannah Harbor in Savannah. Several sections will host events during the meeting, and the section-sponsored opening night celebration is always a great way to kick off the three-day meeting for Bar members and their families alike. 

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

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Sixth Annual Justice Robert Benham Awards for Community Service

By Sally Evans Lockwood

In a special ceremony held during the Midyear Meeting of the State Bar of Georgia, the Justice Robert Benham Awards for Community Service were presented to four judges and six lawyers from around the state. The awards were created in 1997 by the State Bar in honor of the Hon. Robert Benham who, during his term as Chief Justice of the Georgia Supreme Court (1995-2001), made community service a primary focus of the professionalism movement in Georgia.

These statewide awards honor lawyers and judges who have combined professional careers with outstanding service and dedication to their communities. The objectives of the awards are: to recognize that volunteerism remains strong among Georgia's lawyers and judges; to encourage lawyers and judges to become involved in serving their communities; to improve the quality of life of lawyers and judges through the satisfaction they receive from helping others; and to raise the public image of lawyers.


This year's recipients are:

- Judge Louisa Abbot, Savannah
- Stephen F. Greenberg, Savannah
- Judge Maureen Gottfried, Columbus
- Christian F. Torgirson, Atlanta
- Antavius M. Weems, Atlanta
- Avery T. Salter, Jonesboro
- Judge Adele Grubbs, Marietta
- W. Allen Separk, Marietta
- Judge Kathlene Gosselin, Gainesville
- Dennis Sanders, Thomson

The Selection Committee is asking for nominations for the Seventh Annual Justice Robert



Justice Robert Benham presents the Sixth Annual awards to four judges and six lawyers from around the state.

Benham Awards for Community Service, to be presented at the Midyear Meeting of the State Bar in January 2006. Please consider making a nomination to assure that all worthy candidates are nominated for these prestigious awards. The Call for Nominations appearing on the opposite page outlines the awards criteria and procedures. 

Sally Evans Lockwood is the executive director for the Chief Justice's Commission on Professionalism.

SEVENTH ANNUAL JUSTICE ROBERT BENHAM AWARDS FOR COMMUNITY SERVICE

“The outstanding contributions of lawyers to their local communities often go unrecognized by their peers and the public. This award is designed to recognize those lawyers, who in addition to practicing law, also deserve recognition for their valuable contributions to their communities.”

**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 Atlanta 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 Nov. 1, 2005.

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.

C.H. (Charles) Abernathy
Roswell, Ga.
Admitted 1950
Died January 2005

Debra J. Blum
Atlanta, Ga.
Admitted 1986
Died March 2005

Judge William Augustus Bootle
Macon, Ga.
Admitted 1925
Died January 2005

James Cobb
Amarillo, Texas
Admitted 1978
Died September 2004

Luther M. Creel Jr.
Douglasville, Ga.
Admitted 1917
Died November 2004

Overton A. Currie
Atlanta, Ga.
Admitted 1962
Died February 2005

Lawrence Donovan
Savannah, Ga.
Admitted 1972
Died January 2005

J. Frank Myers
Americus, Ga.
Admitted 1947
Died January 2005

C.C. (Clifford) Perkins
Carrollton, Ga.
Admitted 1952
Died January 2005

Philip Ray Robertson
Augusta, Ga.
Admitted 2003
Died December 2004

Paul Allen Schwartz
Marietta, Ga.
Admitted 1978
Died October 2004

F. Odell Welborn
Naples, Fla.
Admitted 1956
Died July 2004



Judge William Augustus Bootle, 102, of Macon, died Jan.

25. Judge Bootle was born at a spot called Round O, just South of Walterboro. Bootle graduated from Reidsville High School and Mercer University. He graduated from Mercer's Walter F. George School of Law in 1925 and married Virginia Childs in 1928. He was appointed U.S. Attorney by President Herbert Hoover in 1928 and U.S. District Judge by President Dwight D. Eisenhower in 1954. Bootle, in the face of popular and

State Government opposition, ordered the admission of African-American students to the University of Georgia and successfully navigated through tumultuous social currents to find an avenue for peacefully and successfully desegregating Bibb County's schools. He courageously ordered voter registrars to allow African-Americans access to the polls. Bootle was a member of First Baptist Church and was a life trustee for Mercer University. Survivors include his daughter, Ann Bootle (Ellsworth) Hall of Macon; two sons, Dr. William Augustus Bootle Jr. of Warner Robins and Dr. James C. Bootle of Atlanta; eight grandchildren, Elizabeth Bootle Herp and her husband, Dan Herp of San Francisco, Calif., William Augustus Bootle III of St. Simons Island, Dr. Virginia Childs Hall and her husband, Dr. John D. Putzke of Jacksonville, Fla., Ellsworth Hall IV of Macon, Katherine Bootle Attie and her husband, Alexander of Paris, France, Robert Ashley Butler and his wife, Stephanie of Cumming, and David Ashley Butler of St. Simons Island; and five great grandchildren.




Debra J. Blum, 44, of Atlanta, died March 3. The New Jersey native earned a bachelor's degree in psychology from Emory University before getting her law degree there. Blum worked as a DeKalb County assistant solicitor and with Atlanta Legal Aid's mental health project before joining the Georgia Indigent Defense Council, now known as the Georgia Public Defender Standards Council. As director of the Georgia Indigent Defense Council's Mental Health Advocacy Division, she fought to protect the legal rights of people found not guilty by reason of insanity and tried to help lawyers and judges understand their specific needs. Away from work, Blum enjoyed relaxing at her family's Lake Oconee house and reading everything from beach books to Jane Austen novels. She volunteered at her daughters' schools, poured over cooking magazines and practiced making Tuscan-style Italian food, and belonged to the Key Sunday Cinema Club, a movie lovers' group. Blum is survived by her husband, Bob Rubin of Atlanta; two daughters, Jenna Blum and Amanda Blum of Atlanta; her mother, Bette Blum of Fairfield, N.J.; and sisters Amy Blum of San Diego, Calif., and Heidi Kushel of Livingston, N.J.



Overton A. Currie, 78, of Atlanta, died February 26. The second of three sons, Currie was born in Hattiesburg, Miss. He served honorably as a Merchant Marine during World War II and upon returning from service, attended the

University of Mississippi, where he received his law degree. At 22 Currie "reopened" his deceased father's law firm, Currie & Currie, in Hattiesburg where he practiced for six years while teaching Business Law at Mississippi Southern University. He left Hattiesburg in 1955 to attend Emory University Candler School of Theology and Columbia Theological Seminary. Currie also attended Yale University, where he pursued an interdisciplinary course of study in law and religion while obtaining his Masters in Law and concurrently serving on the Yale faculty. In 1959, he returned to the active practice of law and joined what would later become the Atlanta law firm of Smith, Currie and Hancock. There, he founded the firm's Construction Law Practice that became a national leader in the field of construction law. Currie, widely considered to have been the "first construction lawyer," worked internationally and was a lecturer and writer of over 800 seminars on construction law topics. He authored or co-authored over 14 published textbooks on construction law subjects.

Committed to the development of his profession, he became a founding fellow and served as president of the American College of Construction Lawyers. Reflecting his enduring search for the intersection of law and religion, he established The Overton and Lavona Currie Lecture series in Law and Religion at Emory University, featuring some of the most accomplished activists and scholars in the world, including Desmond Tutu and Martin E. Marty. Currie enjoyed active memberships in Trinity Church, where he taught Sunday School for many years. Currie is survived by his wife of 55 years, Lavona Stringer Currie, five children and their spouses, and five grandchildren: Terry Currie Banta and her husband Robert Banta and their daughters, Caroline and Sallie Banta; Andy and Betty Jo Currie and their children Anderson and Lucy Currie and Tyler Currie Wynne and her husband Robby Wynne; Martha Currie DeLuca and Anthony DeLuca; Lucy Currie Bush and Henry Bush; and Judy Currie Hellmann and Robert Hellmann; and brother Dan M. Currie of Hattiesburg, Miss. 



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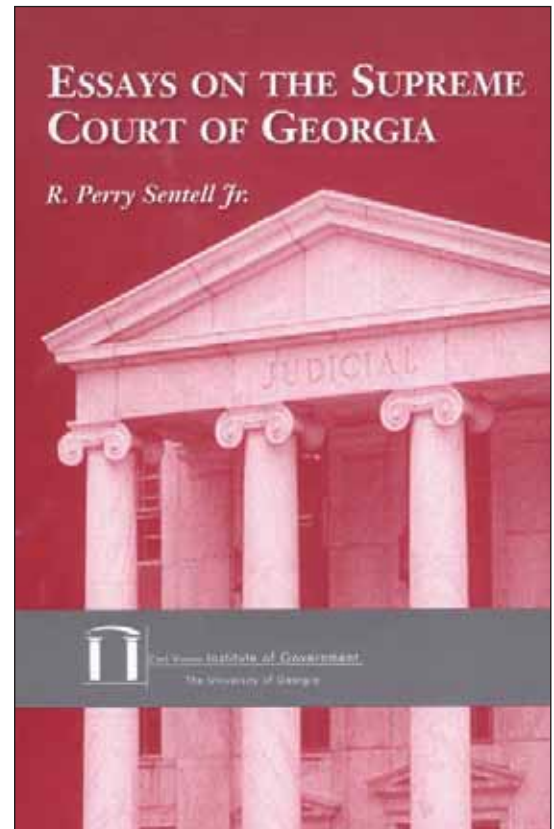
Essays on the Supreme Court of Georgia

By R. Perry Sentell, Jr., Carl Vinson Institute of Government (2004), 117 pages
Reviewed by Laura H. Robison

Although Professor R. Perry Sentell Jr., Carter Professor Emeritus at the University of Georgia School of Law, has specialized in the study of local government law, his position as a distinguished scholar and mentor to much of Georgia's legal community has given him a unique perspective on all aspects of state government. In his most recent publication, *Essays on the Supreme Court of Georgia*, Sentell turns his focus to the judicial branch and its highest court.

This volume, a compilation of four essays previously published in the Georgia and Mercer law reviews, will extend lawyers' understanding of the Supreme Court of Georgia, providing both historical perspective and current insight into that august body. While each of the four essays touches upon a distinct, somewhat esoteric aspect of the court's historical operations, when considered together they contribute to a more complete appreciation of the court's practices.

In his first essay, Sentell compares the relative influence of three legal luminaries—John Marshall, Oliver Wendell Holmes and Benjamin Cardozo—on the Georgia appellate courts. This study considers not only the rela-



tive frequency and context of citation by both the Supreme Court and the Court of Appeals, but also the extent of the courts' reliance upon each jurist's writings. The article addresses whether an opinion's author merely employed a citation or resorted to a lengthier quotation to explicate a principle of law or whether the author relied upon a broader legal aphorism to support the opinion's holding. A brief listing of the quoted aphorisms from each of the learned judges reminds the reader not only of the relative wit and wisdom of these scholars, but also provides a concise summary of those important legal

statements that have left their mark upon Georgia law. Attorneys would do well to remember the lasting impact of such well-turned legal phrases, and should read the article to determine whether the prose of Marshall, Holmes or Cardozo has proved the most persuasive to the Georgia courts.

The second essay turns a more practical eye to the Supreme Court's employment of what Sentell terms the "peculiar" format of the *per curiam* opinion. After noting that the phrase "*per curiam*" has been alternatively defined in legal references to mean an opinion of the whole court, a brief disposition without written opinion or an opinion of the court not attributable to any one judge, this study examines a sampling of *per curiam* opinions to demonstrate that the court's historic usage of this device does not fall neatly under any of these definitions. Surveying some 500 such opinions, the article traces the evolution of the device over a 154-year period. This analysis shows a gradual shift from its original use as a brief statement of the court's unanimity, through its later use in the early and mid-20th century by a markedly divided court, to its use today primarily as a device in disciplinary matters. Such analysis is useful not only to show the court's ability to adapt the *per curiam* format to its changing needs, but also, when considered in conjunction with the third essay, to shed light on the changing nature of the Georgia judiciary itself.


The third essay applies the same sampling technique to analyze the court's record of dissenting opinions. The American judiciary's use of the dissent has become so firmly entrenched that it is difficult to imagine a time when this was not

so. But Professor Sentell's investigation reveals that dissents were so rare in the early history of the court that it took 29 years to record 100 such disagreements. In contrast, counting from the year 2001 backwards, it required only 1.9 years for the justices to dissent in 100 cases. And while most recent dissenters explain their positions in a separate written opinion, this essay shows—perhaps surprisingly to the modern lawyer—that this has not always been the case.

While these historical surveys provide interesting evidence of the changing dynamics of Georgia's highest court, the fourth essay may prove of more direct interest to the appellate practitioner as it addresses the court's ability to control its caseload through its discretionary practices. This article examines both the court's option to issue a decision without opinion in accordance with its own Rule 59 and its practices in connection with petitions for *certiorari*. Perhaps the most interesting aspect presented regarding Rule 59 is the court's recent restraint in utilizing it. While in the late 1980s and early 1990s the court issued more than 100 decisions per year without opinion, the usage of the rule decreased to an average of less than 10 per year from 1996 through 2001. If that trend continues, most practi-

tioners can expect a written explanation for the Supreme Court's decision in their cases.

Sentell's analysis shows, however that the prospects are less optimistic for a petition for *certiorari* filed with the court. The calculations demonstrate that from 1993 through 2001, only 8 percent of the civil *certiorari* petitions and 7 percent of the criminal petitions were granted. The reasons behind the justices' decision to grant or deny a particular petition for *certiorari* may remain shrouded in mystery, but Sentell's essay at least affords Georgia attorneys a realistic understanding of their chances of pursuing a successful petition before the court.

In compiling these essays, Sentell has done a yeoman's task in sifting through countless Supreme Court opinions, analyzing the court's routine procedures and filtering them through his singular view of Georgia law to provide the most comprehensive study to date of the court's history and practices. This volume is a both important addition to Georgia's legal scholarship and a valuable supplement to the working lawyer's library. 

Laura Robison is a staff attorney on the Georgia Court of Appeals and a former student of Professor Sentell (Class of 1985).

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First Publication of Proposed Formal Advisory Opinion No. 05-1

Formal Advisory Opinion No. 87-6, issued by the Supreme Court of Georgia on July 12, 1989, provides an interpretation of the Standards of Conduct and 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 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. 87-6 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 87-6. Proposed Formal Advisory Opinion No. 05-1 is a redrafted version of Formal Advisory Opinion No. 87-6. Proposed Formal Advisory Opinion No. 05-1 addresses the same question presented in Formal Advisory Opinion No. 87-6; 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 May 15, 2005, in order for the comment to be con-

sidered 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. 05-1

QUESTION PRESENTED:

Ethical propriety of a lawyer interviewing the officers and employees of an organization when that organization is the opposing party in litigation without consent of organization.

SUMMARY ANSWER:

An attorney may not ethically interview an employee of a corporation which is an opposing party in pending litigation without the consent of the corporation or the corporation's counsel where the employee is either:

- 1) an officer or director or other employee with the authority to bind the corporation; or
- 2) an employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case; or whose statement may be imputed to the organization for the purpose of civil or criminal liability, or
- 3) a person with managerial responsibility on behalf of the organization.

OPINION:

Correspondent asks when it is ethically proper for a lawyer to interview the officers and employees of an organization, when that organization is the opposing party in litigation, without the consent of the organization's counsel.

The question involves an interpretation of Rule 4.2 of the Georgia Rules of Professional Conduct. Rule 4.2 of the Georgia Rules of Professional Conduct provides as follows:

A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by constitutional law or statute. The maximum penalty for a violation of this Rule is disbarment.

The American Bar Association has implied that the foregoing prohibition applies only to certain employees of the organization. ABA Informal Opinion 1410 (1978) concluded that no communication with an officer or employee of a corporation with the power to commit the corporation in the particular situation may be made by opposing counsel unless he has the prior consent of the designated counsel of the corporation or unless he is authorized by law to do so.

The consensus view in other jurisdictions seems to be that an attorney may interview an employee of a cor-

porate defendant without the consent of either the corporation or its counsel if the employee is not the person for whose acts or omissions the corporation is being sued and if the person is not an officer or director or other employee with authority to bind the corporation.

Comment 4A to Rule 4.2 of the Georgia Rules of Professional Conduct prohibits communications by a lawyer for another person or entity concerning the matter in representation with an employee who is either:

- 1) An employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case or whose statement may be imputed to the organization for the purpose of civil or criminal liability; or
- 2) A person having managerial responsibility on behalf of the organization.

If the employee does not fall into either of the foregoing categories, an attorney may contact and interview the employee without the prior consent of the corporation or its counsel.

First Publication of Proposed Formal Advisory Opinion No. 05-2

Formal Advisory Opinion No. 90-1, issued by the Supreme Court of Georgia on October 26, 1990, provides an interpretation of Directory Rules (DRs) 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 DRs and ECs, 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. 90-1 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 90-1. Proposed Formal Advisory Opinion No. 05-2 is a redrafted version of Formal Advisory Opinion No. 90-1. Proposed Formal Advisory Opinion No. 05-2 addresses the same question presented in Formal Advisory Opinion No. 90-1; 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:

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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 May 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. 05-2**

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.

First Publication of Proposed Formal Advisory Opinion No. 05-3

Formal Advisory Opinion No. 90-2, issued by the Supreme Court of Georgia on November 29, 1990, provides an interpretation of Standards of Conduct, Directory Rules (DRs), 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 DRs and ECs, 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. 90-2 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has

redrafted Formal Advisory Opinion No. 90-2. Proposed Formal Advisory Opinion No. 05-3 is a redrafted version of Formal Advisory Opinion No. 90-2. Proposed Formal Advisory Opinion No. 05-3 addresses the same question presented in Formal Advisory Opinion No. 90-2; 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
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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 May 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. 05-3

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 a law clerk before 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 accord-

ing 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, eg., 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 proceedings 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.

First Publication of Proposed Formal Advisory Opinion No. 05-4

Formal Advisory Opinion No. 91-3, issued by the Supreme Court of Georgia on November 13, 1991, provides an interpretation of Standards of Conduct and 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 DRs, 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. 91-3 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 91-3. Proposed Formal Advisory Opinion No. 05-4 is a redrafted version of Formal Advisory Opinion No. 91-3. Proposed

Formal Advisory Opinion No. 05-4 addresses the same question presented in Formal Advisory Opinion No. 91-3; 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 May 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. 05-4

QUESTION PRESENTED:

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

SUMMARY ANSWER:

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

OPINION:

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

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

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

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after his death, to the lawyer's estate or to one or more specified persons;

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

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

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

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

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

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

First Publication of Proposed Formal Advisory Opinion No. 05-5

Formal Advisory Opinion No. 92-1, issued by the Supreme Court of Georgia on January 14, 1992, provides an interpretation of Standards of Conduct, Directory Rules (DRs), 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 DRs and ECs, 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. 92-1 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 92-1. Proposed Formal Advisory Opinion No. 05-5 is a redrafted version of Formal Advisory Opinion No. 92-1. Proposed Formal Advisory Opinion No. 05-5 addresses the same question presented in Formal Advisory Opinion No. 92-1; 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
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Atlanta, Georgia 30303
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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. 05-5

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 law ¹ . . . 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 interest 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 and Opportunity for Comment on Amendments to the Rules and Internal Operating Procedures of the U.S. Court of Appeals for the Eleventh Circuit.

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

A copy of the proposed amendments may be obtained on and after April 1, 2005, from the Eleventh

Circuit’s Internet Web site at www.ca11.uscourts.gov. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St. NW, Atlanta, Georgia 30303 [phone: (404) 335-6100]. Comments on the proposed amendments may be submitted in writing to the Clerk at the above street address by May 2, 2005.

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

The 2005 Regional Champion Teams are:

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