

Georgia  
Bar

# Journal

June 2005 • Volume 10 • Number 7



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#### On the Cover

John Marshall, chair of the Bar's Standards of the Profession Committee, welcomes Douglas Ashworth, Transition Into Law Practice Program Director, to the Bar.

*Cover photo by C. Tyler Jones.*

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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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# Lawyers Helping Veterans

**T**he “Wills for Heroes” article in the April 2005 issue of the *Georgia Bar Journal*


aroused my interest and I wanted to share it with you.

For 36 years I practiced law in Atlanta, retiring in 1986. Some seven years ago it occurred to me that veterans seeking medical attention at the V.A. Hospital in Decatur probably had many problems requiring the attention of a lawyer. While the voluntary office at the hospital was somewhat cautious, as well as reluctant to get involved, eventually I was furnished with a cubbyhole where I could ply my trade.


It was slow getting the word around that a lawyer was provid-

ing pro bono service to veterans at the hospital, but surprisingly many of the patients began coming in with various problems, including unpaid traffic tickets, child support, divorces, bankruptcy, the need for wills and powers of attorney, lease problems and many other similar difficulties.

Suffice it to say, the need for more attorneys was evident, and now there are several pro bono lawyers at the hospital helping Veterans who can't afford a lawyer.

My interest in bringing this to the forefront is that it might encourage other retired attorneys to volunteer their services. I am 84 years old and I have never found a more rewarding endeavor than in providing this service to our heroes. 

Sincerely yours,  
M.D. McLendon



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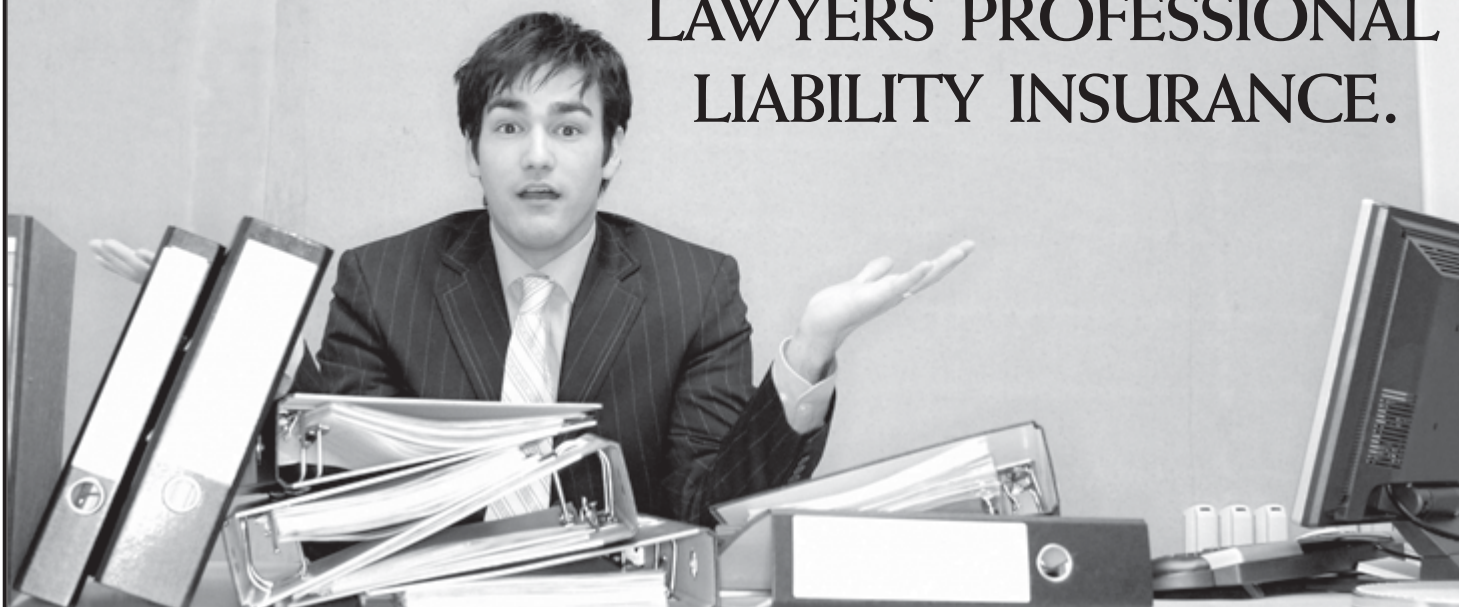
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**"The genius of our forefathers allocated to our legislatures the responsibility of enacting laws reflecting the political will of the people."**

# An Independent Judiciary Anchors the Rule of Law

By Rob Reinhardt

**C**omplacency seems a symptom of the American condition.

Petroleum prices currently threaten the health of our economy because we refused to heed warning signs that encouraged the development of a coherent energy policy. We ignored evidence of terrorist designs on America until Sept. 11; then we rushed to implement safeguards that require we be virtually disinfected before boarding an airliner.

Our history reveals that we respond vigorously in the immediate aftermath of a threat to our security or our well-being. But we sometimes fail to stay the course. This generation of Americans has never experienced a real threat to the opportunity, affluence and stability that we take for granted in this country. And I fear that we remain complacent in the face of a clear and present danger—the insidious undermining of our judicial system.

The architects of our system of government designed a structure that has provided all of us the

opportunity and security to engage in the "pursuit of happiness." The genius of our forefathers allocated to our legislatures the responsibility of enacting laws reflecting the political will of the people. The executive branch of government is entrusted with enforcement of these laws; and the "checks and balances" that protect us against abuse at the hands of our government are the province of the third branch—the judiciary—which tests legislative and executive action against constitutional standards. Three branches were crafted of equal dignity to form a government that is the servant of its citizens and protector of our individual rights. An indispensable component of a system that supports the rule of law is an independent judiciary. Robert Grey, President of the American Bar Association, eloquently describes the vital role of an independent judiciary:

In a democratic society where the governed relinquish a portion of their autonomy, the legal system is the guardian against abuses by those in positions of power. Citizens agree to limitations on their freedom in exchange for peaceful coexistence, and they expect that when conflicts between citizens or between the state and citizens arise, there is a place that is independent from undue influence, that is trustworthy, and that has authority over all the parties to



solve the disputes peacefully. The courts in any democratic system are that place of refuge.

Compare this description to newspaper headlines quoting elected officials holding high office threatening reprisals against judges because of their rulings. My friends at the Florida Bar tell me that the judge who ruled in the shamelessly politicized Terri Schiavo case moves with round-the-clock security and bullet proof vests in response to death threats. Personalized attacks on judges are becoming commonplace from special interest groups that chafe under the "checks and balances" our judges enforce. Business interests assemble lists of "activist judges" with the stated goal of financing opponents more likely to rule in a business friendly fashion. Recent tragic violence against judges in Atlanta and Chicago underscores the risks faced daily by our brethren that man the bench. But recognition of these actions as a serious threat to our way of life has yet to penetrate public consciousness.

A wholesome perspective to this discussion suggests two realities. First, members of our judiciary are in a difficult position to educate the public as to the crucial importance of an independent judiciary. Second, lawyers should be the missionaries preaching the gospel to the infidel. Again I suggest to you that complacency is the enemy. Few of us have experienced the tyranny possible with a judicial system where outcomes are not decided by uniformly applying law to facts. We take for granted the protection offered by courts where judges decide based on the rule of law—regardless of the relative influence of the parties, the

political popularity of a particular ruling or the desire to appease special interest groups. Annually in this country 2,200 federal judges and 31,000 state judges decide 100,000,000 cases. From the U. S. Supreme Court to courts of local jurisdiction our court system provides an honest and reliable system for dispute resolution. One has only to watch the evening news reporting events in Iraq to observe an alternative to the rule of law.

Theodore Olson, writing recently for the Wall Street Journal, stated the case clearly and powerfully:

Our courts are essential to an orderly, lawful society. And a robust and productive economy depends upon a consistent, predictable, evenhanded and respected rule of law. That requires respected judges. Americans understand that no system is perfect and no judge immune from error, but also that our society would crumble if we did not respect the judicial process and the judges whom make it work.

That message is being eclipsed by interest groups in our society focusing tremendous resources to intimidate members of our judiciary. And no one is better placed or better armed to unmask these efforts and explain the dangers they pose than Georgia lawyers. We are the foot-soldiers of the Constitution. It is our obligation to speak out when rights protected by our laws are threatened. We must communicate the crucial role of an impartial and independent judiciary. Judges threatened by violence at the hands of disgruntled litigants are no less victims of terrorism than those lost in the destruction of the World Trade Center. Intimidation of the bench cannot be

tolerated; and lawyers must be the ones to declare it intolerable. The first step on the road to anarchy is compromise of the judiciary. Without its protection liberty, property and freedom are at risk.

What is the best approach to combat the erosion of our freedoms that accompanies attacks on our judiciary? Lawyers must speak out for our judiciary when it cannot. Public education is key: we need the committed involvement of all Georgia lawyers [the bench and the bar] in the effort of educating the people of Georgia as to the crucial importance of a third branch protected from intimidation in the various forms we see emerging.

Your State Bar is instituting programs through our Bar Center to expose school children to age appropriate instruction as to how our legal system works. Our ambition is to combine that education with programs designed to support our teachers and educators as they mentor our young people in the workings of our legal system.

But these initiatives are not enough. We need judges educating jurors. We need lawyers speaking at civic clubs and high school assemblies and law day ceremonies. Georgia lawyers need to be about the business of refining this message and effectively communicating it to all Georgians. It is an effort that will require innovative thinking and the collective commitment of will by our bench and bar to getting out the message that attacks on our judiciary are attacks on sacred principles we live by as Americans.

This will not be a pilgrimage for the short winded. Our greatest success in the 2005 legislative session is that we galvanized lawyers to contact their elected representa-


tives on crucial issues involving our legal system. Legislators confirmed that they heard from lawyers as they considered legislation impacting our legal system.

Robert Ingram and I view this disconnect between public perception of the operation of the judiciary and reality—the fact that the public has lost sight of the vital importance of the protections offered by independent and impartial judges—as a challenge the State Bar of Georgia is obligated to engage upon. Our goal is to harness the tremendous talent and glorious diversity of the lawyers of Georgia—lawyers from all areas of the profession—through a commission charged with design-

ing and implementing this public information effort. Our intent is to announce the formation of this commission at the Annual Meeting in Savannah.

My purpose with this column is to issue my personal request that you invest your time and talent in this effort. We are determined to design a mechanism to get the word out; and we will be calling on you to participate. We seek your input as to how to effectively deliver this message. Our purpose is to defeat the threat complacency poses to our courts and to preserve and promote the rule of law in Georgia as administered by an impartial and independent judiciary.

I recently took this appeal before the Council of State Court Judges and their response was encouraging. I hope to put the same plea for support before the Council of Superior Court Judges at its July meeting. Georgia lawyers are equal to the task—but it is time to get about the business of focusing on it.

Look for and utilize every opportunity in your practices or in administering your courts to raise public consciousness of the importance of protecting the independence of our judges. Nothing less than our sacred freedom and the stability of our society is at stake. And it will take all of us to meet the challenge. 

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**"The State Bar's Court Futures committee is hard at work studying trends that may affect the legal profession and the judicial branch of our democracy."**

## The Vanishing Trial

By Cliff Brashier

**T**he National Center for State Courts is a well-respected, independent, national, nonprofit organization. It serves state courts through conducting original research, publishing magazines and newsletters and providing consulting and education services. The center's trends database contains the most extensive information currently available on the trends of trials held in state courts.

Recently, I read an interesting research report titled "The Vanishing Trial: Implications for the Bench and Bar," which was conducted by the center in cooperation with the American Bar Association. Following are some of the trends and comments identified in that report.

- Jury and bench trials are disappearing in state and federal courts.
- Between 1976 and 2002, the civil jury trial rate decreased by two-thirds in state and federal courts, from 1.8 percent to 0.6 percent in state courts of general jurisdiction, and from 3.7 percent to 1.2 percent in federal courts. During

the same period, the number of civil dispositions increased 168 percent in state courts and 144 percent in federal courts.


- From 1992 to 2002, the number of civil jury trials declined between 24 percent and 46 percent in tort and contract cases resolved in state and federal courts.
- The number of criminal jury trials, and the criminal jury trial rate, also declined significantly between 1976 and 2002.
- The shift in focus from judges presiding over trials to managing the resolutions of disputes has resulted in fewer cases moving to full trial.
- The growing use and availability of mediation, arbitration and other forms of alternative dispute resolution contribute to the decline in trials.
- Twenty-four percent of adult Americans have experienced the rule of law through jury service.

Some may consider the reduction of civil trials as a positive development, and rightly so if the reductions are a result of effective judicial case management. But, according to the article, vanishing trials are cause for concern "if they are a result of 'forced' or 'coerced' settlements, if parties simply cannot afford discovery, or if the push for efficiency overrides due process."

The article goes on to contend that, "The perception of fairness and the opportunity for a day in

court or judgment by a jury of one's peers may be altered if most cases result in settlement before trial." According to U.S. District Judge William G. Young, "the most stunning and successful experiment in direct popular sovereignty in all history is the American jury." But he warns that, "When juries are the rare occurrence, when only state supreme courts and the Supreme Court of the United States are interpreting the organic law, we will still have a democracy, but it will not be American democracy."

The State Bar's Court Futures committee is hard at work studying trends that may affect the legal profession and the judicial branch of our democracy. With vanishing juries, judicial independence, judicial selection and the rule of law under greater public discussion today than in any prior period I can recall, the three purposes of the State Bar of Georgia are more important than ever: (1) to foster among the members of the Bar of this state the principles of duty and service to the public; (2) to improve the administration of justice; and (3) to advance the science of law.

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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## Grady High School Wins '05 State Title



### Grady High School Mock Trial Team Members

(Left to right) Matt Westmoreland, Walker Rick, Josie Duffy, Katalin Ritz, Laura Jones, Kenny Jones, Marcus Brooks, Katherine Hagan, Curry Andrews, Kimberly Hagan, Sean Corley, Caroline McGlamry, Janna Kaplan and Dyci Manns. Not pictured are the coaches: Carl Gebo, DeAnn Gibson, Delores Henriquez, Trinh Huynh, Ashley Palermo and Jay Patton.

The Grady Grey Knights Mock Trial team from Atlanta is the 2005 Georgia State Champion. After earning this distinction, Grady represented Georgia at the National High School Mock Trial Championship May 4-8 in Charlotte, N.C., placing 16th out of 44 teams.

The Mock Trial Program would like to offer special thanks to those who made the 2005 season an overwhelming success:

**Georgia Bar Foundation**  
**Georgia Civil Justice Foundation**  
**Lawyers Foundation of Georgia**  
**Council of State Court Judges**  
**Criminal Law Section**  
**Labor & Employment Law Section**  
**Young Lawyers Division**  
**General Practice and Trial Law Section**  
**Bankruptcy Law Section**  
**Creditor's Rights Law Section**

A complete list of donors will be published later this year in the Mock Trial Department's 2005 Annual Report.

Make an impact in your community by joining the Mock Trial Committee. For more information, visit [www.gabar.org](http://www.gabar.org) and look for Mock Trial under the YLD link, or contact the Mock Trial Office for a registration form at (404) 527-8779 or [mocktrial@gabar.org](mailto:mocktrial@gabar.org). Read the season wrap up on page 13.



**“Isn’t it ironic that lawyers who are such strong, vocal advocates for their clients are not generally good advocates for their own profession?”**

## **Proud to be a Georgia Lawyer**

By Laurel Payne Landon

**I**t should not come as news to any of you that our profession is under attack. We must and we will address this problem as we go forward. I want to think about a few ways that we can address this problem starting now. Please spend a few minutes thinking about these suggestions and others that you may have.

### **We Need to Be Positive About Our Profession**

Yes, there are bad lawyers just as there are bad doctors, bad accountants and bad teachers. In all of these professions, I believe the bad ones are few and far between. I realize that it is easy to get real negative real fast about our profession if you have a supervising lawyer or opposing counsel that you consider to be bad. Please resist this urge.

Resist the urge to be negative by thinking about the lawyer role models you have had in your life. Think about all the good lawyers you have worked with in your career. Think about all the times professional

courtesy has been extended to you just upon a simple request.

Resist the urge to be negative by making a list, your own personal list, of great things lawyers have done. Start with the decisions that have been hard-fought and hard-won in our courts throughout the years that you consider important. Add to the list the things that lawyers you know have done that you consider to be good and important. Complete the list by looking at your own career and the people you have helped, the battles you have fought, and the results you have achieved.

I am not suggesting that we turn a blind eye to bad lawyers or to things that need to be done to improve our profession. On the contrary, we all have a responsibility to address such problems. We should do so, however, in a constructive way and not turn on our own profession. Stay positive because there is much to be positive about.


### **We Need to Defend Our Profession**

Isn’t it ironic that lawyers who are such strong, vocal advocates for their clients are not generally good advocates for their own profession? There are a variety of reasons for this which I will not discuss here,



but the bottom line is that this must change. Our voices must be heard, both individually and collectively, to defend the profession we are in against unfair criticism.

We can start doing this in small but important ways. I believe it is good to have a sense of humor and not take yourself too seriously, but I don't think it is appropriate to endorse or let go unanswered mean-spirited jokes or comments about lawyers. It is also important to explain the legal process to our clients and not unfairly demonize other lawyers or judges when things don't go our way. We should urge our clients to respect opposing counsel, the judge involved, and the process while also acknowledging that the process is not perfect.

For too long we have sat by while those outside our profession, and even a few inside of it, have unfairly criticized and blamed our profession for a multitude of societal problems. I, for one, have usually assumed that the speaker was merely ignorant, but even if that is the case, we can no longer afford to remain silent. I am proud to be a Georgia lawyer and hope you are too. 

### Did You Know?

- 26% of Bar members are under age 35.
- 32% of Bar members are female.
- The Bar has grown by 62% since 1990.
- 789 members have been admitted to practice for 50 years or more.

## Georgia Mock Trial Competition Wrap Up

The 2005 season was a very good year for the Georgia Mock Trial Competition, with over 130 teams registering throughout the state.

The case this year involved a grieving parent, Hatty Fields, who filed a civil wrongful death suit after the death of her daughter, Hilly Fields. Hilly, a well-known supermodel, was killed by her uncle during the grand finale of a charity fashion show. Reese Register, the CEO of rival fashion house McKoy Designs, Inc., was alleged to have planned Hilly's demise and recruited Cappy Fields, Hilly's uncle, to do the dirty deed. Both sides were supported by a fascinating cast of characters and team members did an exceptional job of bringing Ari Ricardi, Teagan Tyson Shields, Flannery Starr and Hunter Sherlock, as well as Reese and Hatty to life at the regional and state competitions.

Being the Mock Trial Program's 17th season, the 15 regions from around the state produced an exceptional batch of regional champion teams that competed for the state title March 12-13. This year's state champion, Henry W. Grady High School in Atlanta, represented the state over Mother's Day weekend in Charlotte, N.C., at the national tournament.

Again this year, the Mock Trial Committee sponsored the statewide Craig Harding Court Artist and Journalism Contests. Hanna Cho from Ringgold High School in Ringgold, was named the 2005 Court Artist State Champion. Sarah Schachet of Riverwood High School in Atlanta, was named the overall winner of the Journalism Contest. Sarah accompanied the Grady team to Charlotte to cover the tournament through art and writing. Hanna and Sarah's submissions will be included in the 2005 annual report scheduled for release in the fall.

In addition to looking forward to the 2006 season, the Mock Trial Committee is excited to announce its plans to place a bid to host the 2009 National High School Mock Trial Championship in Atlanta.



## A Look at the Law

By J. Steven Parker  
and Jason R. Doss

# Georgia Securities Act— Let the Buyer Beware!

**G**eorgia investors beware! On Jan. 24, 2005, in a 4-3 decision, the Supreme Court of Georgia denied certiorari and let stand the decision of the Court of Appeals in *Keogler v. Krasnoff*.<sup>1</sup> In that case, the court held that a chief financial officer who misrepresented his company's financial track record in connection with a securities offering was not liable to investors to whom the misrepresentations were made because the CFO did not intend to deceive the investors. The Court of Appeals imposed the common-law elements of scienter and reasonable reliance as prerequisites for recovery by a purchaser of securities. Plaintiffs now bear a significantly more difficult burden than previously assumed by many state securities lawyers based upon the language and history of the Georgia Securities Act of 1973<sup>2</sup> and dicta contained in a 1983 decision of the 11th U.S. Circuit Court of Appeals.<sup>3</sup>



As a result of *Keogler*, Georgia investors seeking protection pursuant to O.C.G.A. §§ 10-5-12(a)(2)(B) and 10-5-14(a) have less protection than investors in other states whose statutes contain similar provisions. Georgia now stands as the first and only state to find a scienter requirement under a civil liability provision modeled on section 410(a)(2) of the Uniform Securities Act of 1956 (the Uniform Securities Act) and section 12(a)(2) of the Securities Act of 1933<sup>4</sup> (the '33 Act). In addition, Georgia joins Washington as the only state requiring proof of reliance,<sup>5</sup> and joins Louisiana as the only state imposing an affirmative duty of investigation upon purchasers of securities.<sup>6</sup> The rule of *caveat emptor* is therefore fully restored for investors in Georgia.

Georgia's civil liability scheme, as interpreted in *Keogler*, is a significant departure from the pattern that emerged in the last 70 years. In 1933 Congress passed the '33 Act, which protected investors by including a provision giving them the right to rescind an investment if a material misrepresentation was made by a company or its officers or underwriters during the offering process.<sup>7</sup> This law changed the general rule from *caveat emptor* (buyer beware) to *caveat venditor* (seller beware). States, including Georgia, followed suit by passing similar statutes as part of their Blue Sky laws.

These statutory provisions forced companies and their officers and underwriters to conduct greater "due diligence," a process whereby they sought scrupulously to verify all facts presented in a prospectus in order to avoid having an investment rescinded based upon negligent or innocent misrepresentations.

The result benefited everyone. While investors achieved a new level of protection, companies gained greater access to capital because the new rules created conditions that generated confidence in the disclosures. The benefits of such a system can be seen in several studies, including the one published in 2003 by the National Bureau for Economic Research. The authors of that study compared the securities regulatory system of 49 countries and identified the chief determinant of successful financial markets to be the existence of rules facilitating private recoveries by investors.<sup>8</sup>

## THE KEOGLER DECISION

In 1997, William Keogler was introduced by his attorney to Robert Krasnoff, the largest investor in and chief financial officer of a mortgage company based in Tifton, Ga., known as SGE Mortgage Funding Company (SGE). SGE used capital raised from private investors to make mortgage-secured loans to homeowners.<sup>9</sup> Krasnoff told Keogler that SGE had



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With respect to both scienter and reliance, the Keogler decision is not only incorrect from the standpoint of statutory interpretation, but also is inconsistent with the Legislature's expressed policy of uniform interpretation of the Georgia Securities Act with the securities laws of other states.

an excellent track record, that its investors made money, and that it was a good investment.<sup>10</sup> Thereafter Keogler and his wife invested more than \$750,000 in SGE. At no time had either of them requested SGE's financial statements to verify Krasnoff's statements regarding the company.<sup>11</sup>

In September 1998 Krasnoff and two other investors reviewed SGE's books and records and discovered the company was insolvent. Krasnoff filed a petition to place SGE into receivership, which later became a bankruptcy proceeding. The president of the company and several other employees pled guilty to criminal charges relating to their conduct of the company's affairs.<sup>12</sup>

The Keoglers filed a civil action in December 1998 against Krasnoff and others, asserting claims under O.C.G.A. § 10-5-14(a) based upon an alleged violation of O.C.G.A. § 10-5-12(a), which provides in part:

(a) It shall be unlawful for any person:

...

(2) In connection with an offer to sell, sale, offer to purchase, or purchase of any security, directly or indirectly:

...

(B) To make an untrue statement of a material fact or omit to state a material fact necessary in order to make the statements

made, in the light of the circumstances under which they are made, not misleading . . . .

In its charge, the trial court instructed the jury that in order to find in favor of the Keoglers, it must find that Krasnoff acted with scienter, which the court defined as "the false statement . . . knowingly made with a false design or . . . in a severely reckless manner. Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve *not merely simple or even an excusable negligence, but an extreme departure from the standards of ordinary care.*"<sup>13</sup>

The court also instructed the jury that in order to find the defendants liable, it must determine that the plaintiffs justifiably relied on the defendant's misrepresentation. The court charged the jury "[t]o show justifiable reliance on the misrepresentation or omitted information sufficient to constitute securities fraud, the plaintiffs must show *that with the exercise of reasonable diligence they still could not have discovered the truth behind the fraudulent misrepresentation or omission.*"<sup>14</sup> The type of reliance referred to in the court's charge is customarily referred to in the securities law context as "investor due diligence."<sup>15</sup>

The jury returned a verdict in favor of Krasnoff and against the Keoglers, and judgment was entered on the jury's verdict. On appeal, the Court of Appeals affirmed the judgment of the trial court and upheld the jury charges quoted above as being correct statements of the law.<sup>16</sup>

## WHY THE KEOGLER ANALYSIS IS FLAWED

One of the Georgia statutory provisions interpreted by the court in *Keogler*, O.C.G.A. § 10-5-12(a)(2)(B), is patterned after section 410(a)(2) of the Uniform Securities Act, which does not include the elements of scienter or reliance. Because the court incorrectly concluded that the Georgia provisions were modeled after section 10(b) of the Securities Exchange Act of 1934<sup>17</sup>, it erroneously applied case law involving actions brought under Rule 10b-5, the Securities and Exchange Commission Rule promulgated under section 10(b).<sup>18</sup>

### Scienter

With respect to the scienter requirement, the Court of Appeals ignored O.C.G.A. § 10-5-14(a)(2), which provides the remedy for a violation of § 10-5-12(a)(2)(B). O.C.G.A. § 10-5-14(a) states:

A person who offers or sells a security in violation of paragraph (2) of subsection (a) of Code Section 10-5-12 is not liable under this subsection if:

...

(2) The seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

Because this provision expressly relieves a seller from liability if he or she is not negligent in making a misrepresentation or omission, the necessary implication is that a seller is liable for negligent misrepresentations or omissions. In finding a requirement of scienter, or a knowing or reckless state of mind, the Court of Appeals rendered section 14(a)(2) meaningless, since any knowing or reckless misrepresentation is by definition knowable in the exercise of reasonable care. It cannot be presumed that the Legislature intended that any part of a statute would be without meaning and therefore mere surplusage.<sup>19</sup>

Other state Blue Sky laws patterned after section 410(a)(2) of the Uniform Securities Act have been interpreted to require only negligence as a basis for liability.<sup>20</sup> It is more accurate, however, to refer to it as an inverse negligence standard, since the defendant may avoid liability by proving himself free of negligence.<sup>21</sup>

## Reliance

In finding a reasonable reliance or “investor due diligence” requirement, the Court of Appeals ignored O.C.G.A. § 10-5-14(a), which provides:

A person who offers or sells a security in violation of paragraph (2) of subsection (a) of Code Section 10-5-12 is not liable under this subsection if:

(1) the purchaser knew of the untrue statement of a material fact or omission of a statement of a material fact . . . .

This subsection clearly establishes *actual* knowledge as the standard that will defeat a purchaser’s action. It does not impose any obligation of inquiry upon the purchaser. Other courts interpreting provi-

sions based on Section 410 of the Uniform Securities Act have so concluded.<sup>22</sup> As the Indiana Court of Appeals said in interpreting its version of section 410(a)(2):

[I]f the Legislature had intended to impose a duty of investigation upon the buyer, it would have expressly included such in the wording of the statute. The proscriptions of [Section 410(a)(2)], however, embrace a fundamental purpose of substituting a policy of full disclosure for that of caveat emptor. That policy would not be served by imposing a duty of investigation upon the buyer.<sup>23</sup>

With respect to both scienter and reliance, the *Keogler* decision is not only incorrect from the standpoint of statutory interpretation, but also is inconsistent with the Legislature’s expressed policy of uniform interpretation of the Georgia Securities Act with the securities laws of other states.<sup>24</sup>

Similarly, if the Court of Appeals had looked to section 12(a)(2) of the Securities Act, the statute upon which section 410(a)(2) of the Uniform Securities Act is based, it would have found that neither scienter nor investor due diligence are required elements.<sup>25</sup>

The Court of Appeals’ chief error was relying upon its own prior decision in *GCA Strategic Investment Fund, Ltd. v. Joseph Charles & Associates, Inc.*<sup>26</sup> In that case, the court evaluated the plaintiff’s claims of common-law fraud and securities fraud together, since they “involve similar elements.”<sup>27</sup> The court went on, in evaluating a claim of “securities fraud under O.C.G.A. 10-5-12(a),” to adopt the elements required in a federal action under Rule 10b-5.<sup>28</sup>

The *Keogler* court should not have considered itself bound by

*GCA Strategic Investment Fund*. The claim presented in that case was one for “securities fraud,” and therefore was presumably asserted under O.C.G.A. § 10-5-12(a)(2)(A) or (C), subsections that mention fraud specifically. By contrast, O.C.G.A. § 10-5-12(a)(2)(B), does not mention fraud at all. Since it was not clear what subsection of O.C.G.A. § 10-5-12(a) the court had interpreted in *GCA Strategic Investment Fund*, the *Keogler* court could have distinguished the holding as inapplicable to any interpretation of subsection (a)(2)(B).

Alternatively, the court could have disapproved of its holding in *GCA Strategic Investment Fund*, which appears to be incorrect even if limited to claims under subsections 12(a)(2)(A) and (C). This is because the elements of the causes of action inferred by a reading of O.C.G.A. § 10-5-14, as discussed *supra*, apply to claims under all three subsections of section 12(a)(2). Furthermore, although claims asserted under all three subsections are sometimes referred to as “securities fraud,” that phrase is technically incorrect because the statutes are patterned after a common law claim of rescission, not fraud.<sup>29</sup>

Prior to the decision in *Keogler*, the 11th U.S. Circuit Court of Appeals, while not ruling directly on whether the Georgia Act requires proof of scienter, correctly observed that “[a]rguably, because the language of [Section 12(a) of the Georgia Act] tracks the language of Section 410(a) of the Uniform Securities Act and Section 12(2) of the Securities Act of 1933 . . . scienter is not required.”<sup>30</sup> Unfortunately, the *Keogler* court reached the opposite conclusion by failing to recognize the provisions analogous to O.C.G.A. § 10-5-12(a)(2)(B).

# THE IMPLICATIONS OF KEOGLER

*Keogler* leaves many Georgia investors without an effective remedy. Unlike O.C.G.A. § 10-5-12(a)(2)(B), the protections of section 12(a)(2) of the Securities Act apply only to public offerings and not private investments.<sup>31</sup> Additionally, unlike under the Georgia statute, successful litigants under the federal act are not entitled to an award of attorneys' fees, making a federal rescission action an unattractive alternative for all but the wealthiest investors.<sup>32</sup>

Furthermore, the *Keogler* decision may have significant regulatory implications. Investors who are misled often obtain assistance from their state securities regulator, the Secretary of State. Under the new decision, the Secretary of State's powers to enjoin securities issuers or to seek restitution for investors may be hampered.<sup>33</sup>

Georgia has positioned itself admirably as a financial center and a fertile ground for enterprise. If it wants to continue to be taken seriously as a friendly place to invest, hopefully the Legislature will act swiftly to correct the potential impact of the Court of Appeals' decision in *Keogler*. CBI



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Division and the former assistant commissioner of securities for the State of Georgia.



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seeking to recover losses from brokers and their firms for engaging in unlawful conduct.

## Endnotes

1. 268 Ga. App. 250, 601 S.E.2d 788 (2004), *cert. denied* (Jan. 24, 2005).
2. O.C.G.A. §§ 10-5-1 to -24.
3. *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983).
4. 15 U.S.C. § 771(2) (2004).
5. *Hines v. Data Line Sys., Inc.*, 787 P.2d 8, 12 (Wash. 1990).
6. *Landry v. Thibaut*, 523 So. 2d 1370, 1380 (La. Ct. App. 1988).
7. *Id.*
8. Rafael La Porta et al., *What Works in Securities Laws*, NBER Working Paper No. 9882 (August 2003).
9. *Keogler v. Krasnoff*, 268 Ga. App. 250, 251, 601 S.E.2d 788, 789 (2004).
10. *Id.* Although these representations were made to *Keogler's* attorney, the Court of Appeals, for reasons not clear from the record, treated the representations as if they had been made to *Keogler* himself.
11. *Id.*
12. *Id.*
13. *Id.* at 253, 60 S.E.2d at 791 (emphasis added).
14. *Id.* (emphasis added).
15. See generally 12A Joseph C. Long, *Blue Sky Law* § 9:30 (2002).
16. See *Keogler*, 268 Ga. App. at 253-54, 601 S.E.2d at 791-92.
17. 15 U.S.C. § 78j (b) (2004).
18. See *Keogler*, 268 Ga. App. at 255, 601 S.E.2d at 792.
19. See *Transp. Ins. Co. v. El Chico Restaurants, Inc.*, 271 Ga. 774, 776, 524 S.E.2d 486, 488 (1999).
20. See, e.g., *Pottern v. Bache Halsey Stuart, Inc.*, 589 P.2d 1378, 1379 (Colo. Ct. App. 1978) (Colo. Rev. Stat. § 11-51-125(1) does not require scienter); *Bradley v. Hullander*, 249 S.E.2d 486, 494 (S.C. 1978) (S.C. Code Ann. § 62-309(2) requires only negligence); *Sprangers v. Interactive Techs., Inc.*, 394 N.W.2d 498, 503 (Minn. Ct. App. 1986) (Minn. Stat. § 80A.23(b) requires only negligence); *Rousseff v. Dean Witter & Co.*, 453 F. Supp. 774, 779 (N.D. Ind. 1978) (Ind. Code § 23-2-1-19 (a)(2) does not require scienter); *Kittilson v. Ford*, 608 P.2d 264, 265-66 (Wash. 1980) (no requirement of scienter).
21. See generally 12A Long, *supra* note 15, §9:23.
22. See, e.g., *Bradley*, 249 S.E.2d at 494; *Duperier v. Tex. State Bank*, 28 S.W.3d 740, 745 (Tex. App., 2000); *McCracken v. Edward D. Jones & Co.*, 445 N.W.2d 375 (Iowa Ct. App. 1989) (Iowa Securities Act does not allow reduction of damages based upon comparative fault).
23. *Kelsey v. Nagy*, 410 N.E.2d 1333, 1336 (Ind. Ct. App. 1980).
24. See O.C.G.A. § 10-5-10(g) (2004).
25. See *Franklin Sav. Bank of NY v. Levy*, 551 F.2d 521 (2d Cir. 1977) (no scienter required); *Cassella v. Webb*, 883 F.2d at 805, 809 (9th Cir. 1989) (constructive knowledge by investor is not a bar to recovery); *MidAmerica Fed. Sav. & Loan Ass'n. v. Shearson/American Express, Inc.*, 886 F.2d 1249 (10th Cir. 1989); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 782 (11th Cir. 1988) (no reliance element in claims brought under §12(a)(2) of the Securities Act of 1933).
26. 245 Ga. App. 460, 537 S.E.2d 677 (2000).
27. *Id.* at 463, 537 S.E.2d at 681.
28. *Id.* at 464, 537 S.E.2d at 682.
29. *E.F. Hutton & Co. v. Rousseff*, 537 So. 2d 978 (Fla. 1989); see generally 12A Long, *supra* note 15 § 9:23.
30. *Diamond v. Lamotte*, 709 F.2d 1419, 1423 (11th Cir. 1983).
31. *Gustafson v. Alloyd Co.* 513 U.S. 561 (1995).
32. Under Section 11(e) of the Securities Act, the court may award attorneys' fees in an action brought under Section 12(a)(2) only if it finds the defense is frivolous or was made in bad faith. *Johnson v. Yerger*, 612 F.2d 953, 959 (5th Cir. 1980).
33. Although O.C.G.A. § 10-5-14 does not govern administrative or civil actions by the Secretary of State, the *Keogler* court seemed to derive the scienter requirement from O.C.G.A. § 10-5-12(a). Therefore, any action undertaken by the Secretary based upon a violation of that section would arguably require proof of the same elements as a civil action.



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## The State Bar Wants You Mentors Sought to Aid Beginning Lawyers

By C. Tyler Jones and Johanna B. Merrill

**I**, (state your name), swear that I will truly and honestly, justly, and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor, and that I will support and defend the Constitution of the United States and the Constitution of the state of Georgia. So help me God.

The attorney's oath captures the essence of the highest ideals of the practice of law, but one of the most important elements of the oath is unspoken—it is the noble calling of experienced attorneys to mentor those just starting out.

Law schools are adept at teaching law students to think critically and apply the law to the facts at hand, but by the nature of the academic setting, schools are limited in their ability to effectively relay the intricacies of the day-to-day practice of law. Ultimately, the only way to learn to be a lawyer is to practice first hand.

To assist lawyers in their transition from student to professional, the Supreme Court of Georgia, on Feb. 2, authorized the State Bar of Georgia to proceed with the cre-

ation of the Transition Into Law Practice Program. The core of the program, informally known as the Mentoring Program, is to match beginning lawyers, after admission to the Bar, with a mentor during their first year of practice.

According to John Marshall, chair of the Bar's Standards of the Profession Committee, the purpose of the program is to "continue the legal education of the beginning lawyers during the first year of practice." He explains that the program will afford "every beginning lawyer with meaningful access to an experienced lawyer equipped to teach the practical skills, seasoned judgment, and sensitivity to ethical and professionalism values that represent the best traditions and highest aspirations of the legal profession."

Because the first class of beginning lawyers who will be required to participate in the mandatory program will be those who are admitted after June 30, Transition Into Law Practice Program Director Doug Ashworth is currently seeking Bar members willing to serve as mentors. "Although we anticipate that most beginning lawyers will be paired with an experienced lawyer in the same law firm, office, or practice setting who will serve as the beginning lawyer's mentor, roughly 150 to 200 newly admitted lawyers each year will enter practice on their own and not in associa-

tion with a lawyer who is qualified to serve as a mentor," Ashworth said.

To be eligible to serve as a mentor, interested attorneys must meet minimum qualifications, including being a member in good standing with at least five years practice experience with a reputation in the local legal community for competence and ethical and professional conduct. After meeting the eligibility requirements, mentors will be appointed by the Supreme Court of Georgia for one-year terms.

Mentors who find the experience rewarding may serve for more than one term. In addition to the intrinsic reward, mentors will receive three hours of CLE credit for attending the Mentor Orientation and will be given special recognition by the Bar for each year of service.

The following questions and answers are designed to assist those who are considering serving as a mentor.

**If I agree to serve as a mentor to a beginning lawyer not in an employment relationship with me, what kind of advice am I allowed to offer?**

All outside mentors and beginning lawyers are required to sign the Transition Into Law Practice

Program Continuing Legal Education Agreement. According to the terms of the agreement, the mentor is an educational resource for the beginning lawyer, and the purpose of the mentoring component of the program is to provide opportunities for the discussion of general issues confronted by the beginning lawyer in the practice of law. Moreover, the beginning lawyer agrees not to ask the mentor for case specific advice, nor to give to the mentor actual names of clients. The mentor and beginning lawyer further agree to deal with any problems the beginning lawyer has in only a general, hypothetical manner.

### **How much time is a mentor expected to spend with the beginning lawyer?**

The mentor and beginning lawyer are expected to spend sufficient time together to carry out the Mentoring Plan mutually agreed upon. While regular meetings are suggested, the program does not specify the number or length of meetings. For an outside mentorship, one personal meeting a month, in addition to frequent telephone and e-mail contact, is suggested to maintain the mentorship.

### **Is there a Mentor Orientation Program?**

Yes, although the Mentor Orientation is not required, mentors are strongly urged to attend the live course or take it online at their convenience. The Mentor Orientation Program is a three-hour course created by ICLE and offered once a year at the Bar Center in Atlanta and available online through the ICLE Web site. Each mentor who completes the Mentor Orientation will receive three hours of complimentary CLE credit,

including one hour of ethics and one hour of professionalism.

### **What is included in the Mentor Orientation?**

The Mentor Orientation presents information that mentors need to know about the operation of the program, including an overview of the CLE for beginning lawyers and topical questions to assist the mentor in taking the lessons presented in the classroom back into the practice setting. The lessons from the CLE for beginning lawyers form the basis of the discussions for the mentors and beginning lawyers. Mentoring skills are also covered in the Mentor Orientation.

### **Are communications between the outside mentor and the beginning lawyer confidential?**

No. The beginning lawyer shall not reveal to the outside mentor any confidential communications between the beginning lawyer and the beginning lawyer's client, according to the terms of the CLE agreement that outside mentors and beginning lawyers are required to sign.

### **What is the mentor's role in supervision of the beginning lawyer?**

For an outside mentorship, the mentor cannot be expected to supervise the practice of law by the beginning lawyer. The role of the outside mentor is to offer the beginning lawyer extended education in learning the ways of practicing law. An outside mentor is expected to provide instruction in practical skills, as well as ethical and professional issues frequently encountered by lawyers

## **Meet the New Director**

The first-ever director of the Transition Into Law Practice Program of the State Bar of Georgia, **Doug Ashworth**, began his new job on May 2. Ashworth brings more than 12 years experience in the private practice of law, including the establishment of his own general law practice and experience as a municipal court judge. A native of Royston, he most recently served as staff attorney for the Council of Superior Court Judges, traveling throughout the state's judicial districts, while working with Georgia's 188 superior court judges and their staff members.

As the Standards of the Profession Committee developed the Mentoring Program, it became apparent that in order to succeed, the program would need to have the support of judges from all over the state, as well as their help in identifying qualified mentors. Ashworth's working relationships with the judges should help provide a vital link to lawyers throughout the state.

In the coming weeks, Ashworth will travel throughout the state recruiting mentors and talking to bar groups about the program. He will work with registrants for the July bar exam, identify mentors in area law firms and other legal employers and help design Mentor Orientation and CLE programs for new lawyers with University of Georgia Law Professor Ron Ellington and Larry Jones, executive director of ICLE.





University of Georgia Law  
Professor C. Ronald Ellington will help design Mentor Orientation and CLE programs for new lawyers.



Photo by C. Tyler Jones

The director and administrative assistant of the mentoring program will work under the supervision of Sally Lockwood, executive director of the Chief Justice's Commission on Professionalism.

in practice. Neither the program nor the outside mentor assumes any responsibility to the beginning lawyer's clients for legal services performed by the beginning lawyer, according to the CLE agreement.

## What is the mentor's role in evaluation of the beginning lawyer?

The outside mentor assumes no responsibility for evaluating the work of the beginning lawyer. The


role of the outside mentor is to assist the beginning lawyer in developing practical skills, good legal decision-making and sensitivity to ethical and professionalism values. The mentor and the beginning lawyer both have responsibility for evaluating the mentoring relationship. The mentor is responsible for assessing whether the beginning lawyer has satisfactorily completed the program.

## I am the professional development director of a law firm. We already have a New Associate Training Program. How do we integrate it with the Bar's program?

The State Bar's Program is composed of both the mentoring component and the CLE component that lays the groundwork for and supports the Mentoring Program. Each beginning lawyer will be required to attend one of the two new CLE programs created by ICLE: the Enhanced Bridge-the-Gap Program or the Fundamentals of Law Practice Program. The mentoring component, based on the Model Mentoring Plan, takes place within the firm or office and is to be tailored to the particular practice setting.

The program does not intend to dictate to law firms and other practice settings what kind of training and mentoring programs they should have; rather, it asks them to reevaluate their programs and measure them by the Model Mentoring Plan. Firms and other practice settings may keep the parts of the Mentoring Plan that work for them and tailor the model to their situations.

## What happens if the mentor resigns from the firm or office or otherwise becomes unavailable to serve as mentor?

As soon as possible after the mentor's resignation from the firm or office or the mentor's otherwise becoming unavailable to serve as mentor, the mentor shall notify the program director of the situation. In the event the mentor is unable to do so, the beginning lawyer shall notify the Program director of the situation. In all situations of migration and turnover, completion of a full year of mentoring is strongly preferred. Decisions regarding how and whether to reconstitute a mentorship because of migration and turnover will be made by the program director, using a rule of reason. The decision will be made on a case-by-case basis, taking into consideration individual circumstances and what has or has not been achieved during the original mentorship. The Mentor Subcommittee will have the ultimate authority and responsibility for policies and procedures for situations where a mentorship ends prematurely. 

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

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

**For more information on the Mentoring Program, contact Douglas Ashworth, [tilpp@gabar.org](mailto:tilpp@gabar.org).**

# Mentoring Program Summary

The Board of Governors approved the Transition Into Law Practice Program on Aug. 19, 2004. Eight years in the making, the program was developed by the State Bar of Georgia's Standards of the Profession Committee, and was first implemented as a two-year pilot project from January 2000 through December 2001. The pilot project supported the conclusion that the program can be effective in "helping to make more competent, professional lawyers." The first class of attorneys to be required to participate in the program are those who are admitted to the Bar after June 30.

The goal of the program is to provide professional guidance and counsel to assist beginning lawyers who are newly admitted to the Bar by assigning them mentors. The mentor's guidance will help continue the legal education of the beginning lawyer during his or her first year of practice.

The program combines the mentoring aspect with a CLE component, which "lays the groundwork" for and supports the mentoring component. The CLE component will be provided by ICLE. Two CLE programs will be offered to beginning lawyers who are involved in the program: an Enhanced Bridge-the-Gap Program along with a Fundamentals of Law Practice Program. Beginning lawyers who do not have an "inside mentor" (a mentor that is assigned to them by their employer and is an experienced lawyer in their office or firm) are strongly encouraged to attend the Fundamentals of Law Practice Program. While the length and content of instruction in the Fundamentals Program are the same as the Enhanced Bridge-the-Gap, the Fundamentals Program is limited to 100 attendees, resulting in smaller breakout groups.

The beginning lawyer is responsible for making him or herself available for guidance from the mentor, to devise with his or her mentor a mentoring plan, to complete the plan and to complete the CLE component within a year of admission or in the next calendar year. Failure to complete the program may expose the beginning lawyer to license suspension in the same manner as a person who fails to complete CLE requirements.

The program does not apply to new admittees who are out-of-state Bar members, inactive members, admittees who are members of other bar jurisdictions for two or more years prior to admission in Georgia or judicial law clerks during the period of their clerkship.

The program will be operated under the auspices of the Commission on Continuing Lawyer Competency pursuant to its general supervisory authority to administer the continuing legal education rules. The Standards of the Profession Committee, now a committee of the Commission on Continuing Lawyer Competency, is responsible for the operation of the program. A director and administrative assistant, who will work under the supervision of Sally Lockwood, executive director of the Chief Justice's Commission on Professionalism, will staff the program. Pursuant to State Bar policy, the program will be evaluated for effectiveness in its third year, and the results will be presented to the Board of Governors at the 2008 Annual Meeting.

For more complete information on this program, including the Transition Into Law Practice Program Executive Summary, Frequently Asked Questions and the Model Mentoring Plan, visit [www.gabar.org](http://www.gabar.org).

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\*The Committee acknowledges with gratitude the contributions of the late Honorable Ross J. Adams as liaison from the Young Lawyers Division of the State Bar.

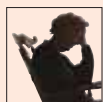
# 2005 LegalUpdates

During the 2004-05 Bar year, there were significant changes in many different practice areas of the law. Important decisions were made that affect all Georgia attorneys, not just those who practice in the highlighted areas. Because these changes cover so many different areas, the *Journal* asked section chairs to summarize the notable cases and updates to the law in their respective practice areas. We thank the contributing authors and section chairs.



## Bankruptcy Law

From Legislation to Legislation:  
What's New in Bankruptcy  
By Kathleen Horne and Matthew E. Mills



## Elder Law

2004 Elder Law Update  
By Ruthann P. Lacey and Heather L. Durham



## Fiduciary Law

Fiduciary Law  
By Alan F. Rothschild Jr.



## Intellectual Property Law

Top Trademark Decisions of 2004  
By Michael D. Hobbs Jr. and Anne E. Yates



## Taxation Law

Georgia 2005 Tax Legislation Update  
By Jeffrey C. Glickman and Michael T. Petrik



## Technology Law

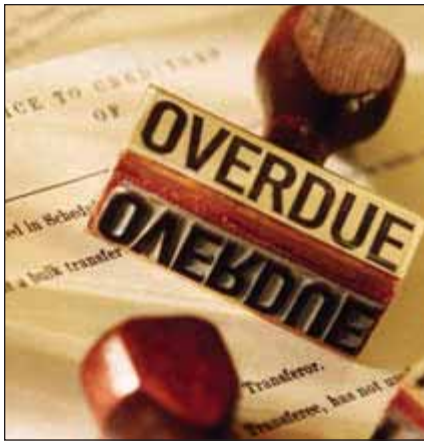
Recent Developments in Technology Law  
for Georgia Attorneys  
By Mari L. Myer



## Tort & Insurance Practice

Tort Reform Comes to Georgia:  
An Overview of Senate Bill 3  
By Halli D. Cohn and Sarah T. Sloan





## FROM LITIGATION TO LEGISLATION: WHAT'S NEW IN BANKRUPTCY

By Kathleen Horne  
and Matthew E. Mills

What happens when a plaintiff in pending litigation files bankruptcy and fails to list the litigation claim as an asset in his bankruptcy schedules? Depending on the facts of the particular case, it is possible that the defendant in the pending litigation can use the omission to deal a death blow to the plaintiff's case. In *DeLeon v. Comcar Industries, Inc.*, 321 F.3d 1289 (11<sup>th</sup> Cir. (Fla.) 2003), the debtor/plaintiff failed to list his employment discrimination claim in his bankruptcy schedules as an asset of his Chapter 13 bankruptcy estate. When the defendant in the employment discrimination case learned of the plaintiff's omission in the bankruptcy schedules, the defendant moved for summary judgment under the doctrine of judicial estoppel.<sup>1</sup>

The Eleventh Circuit Court of Appeals agreed with the defendant, concluding that "because [the debtor] certainly knew about his claim and possessed a motive to conceal it because his amount of

repayment [in the Chapter 13 case] would be less, we can infer from the record his intent to make a "mockery of the judicial system." *DeLeon*, 321 F.3d at 1292 (citing *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285-87 (11<sup>th</sup> Cir. (Ala.) 2002)); see also *Barger v. City of Cartersville*, 348 F.3d 1289 (11<sup>th</sup> Cir. (Ga.) 2003); but cf. *Parkers v. Wendy's Int'l Inc.*, 365 F.3d 1268 (11<sup>th</sup> Cir. (Ala.) 2004) (declining to apply judicial estoppel when party pursuing case against employer was not employee/debtor but rather bankruptcy trustee who did not make any inconsistent statements to the courts and when omission was inadvertent and not done in bad faith as shown by debtor disclosing pending lawsuit to bankruptcy trustee before defendant moved to dismiss underlying litigation).

From the perspective of the bankruptcy courts, however, the debtor's failure to list a claim as an asset may be an amendable defect. In the case of *In re Upshur*, 317 B.R. 446 (Bankr. N.D. Ga. 2004), the debtor moved to reopen her closed Chapter 7 case in order to amend her schedules to reflect an employment discrimination action pending in district court. The debtor moved to reopen her case only after the defendant in the district court litigation moved to dismiss the plaintiff's claim on the ground of judicial estoppel. Bankruptcy Judge Joyce Bihary granted the debtor's motion, noting that the court has "a duty to reopen the estate whenever there is proof that it has not been fully administered" and that "the proper focus is on the benefit to the creditors, so that if the action has any value, the case should be reopened." *In re Upshur*, 317 B.R. at 451.

Similarly, in the case of *In re Strickland*, 285 B.R. 537 (Bankr. S.D. Ga. 2001), the debtors moved to reopen their "no asset" Chapter 7 case to allow the debtor-wife to amend her bankruptcy schedules to list a personal injury cause of action. Bankruptcy Judge Lamar W. Davis Jr. held that the debtor's good faith, or lack thereof, in failing to schedule the personal injury claim was irrelevant to whether her "no asset" case should be reopened and the bankruptcy court allowed the debtor-wife to reopen the bankruptcy case and list the claim.

In the case of *In re Rochester*, 308 B.R. 596 (Bankr. N.D. Ga. 2004), Judge Homer Drake held that a Chapter 7 debtor's initial failure to disclose his products liability claims as an asset in his bankruptcy schedules, and even his subsequent failure to promptly reopen the bankruptcy case after the state court products liability action was filed, would not judicially estop the debtor/plaintiff from pursuing his products liability claims. Judge Drake's opinion contains a thoughtful analysis of Eleventh Circuit precedent in this area.

There are many Georgia decisions addressing the effect of a plaintiff's failure to list a claim in his/her bankruptcy schedules and the application of judicial estoppel. *Southmark Corporation v. Trotter, Smith & Jacobs*, 212 Ga. App. 454, 442 S.E.2d 265 (1994) (debtor corporation that did not list its pre-petition malpractice claim against its attorneys in its bankruptcy disclosure statement and reorganization plan was judicially estopped from subsequently bringing malpractice claims against attorneys); *Wolfolk v. Tackett*, 241 Ga.App. 633, 526 S.E.2d

436 (1999) (car accident victim was judicially estopped from pursuing her tort claim since she failed to supplement her bankruptcy petition or to reopen the bankruptcy proceeding in order to list the claim); *Cochran v. Emory University*, 251 Ga.App. 737, 555 S.E.2d 96 (2001) (plaintiff was judicially estopped from asserting a medical malpractice claim against health care provider approximately six months after a bankruptcy court discharged debtor's debts pursuant to a bankruptcy petition on which debtor did not disclose her potential malpractice claim as an asset); but cf. *Dillard-Winecoff, LLC v. IBF Participating Income Fund*, 250 Ga.App. 602, 552 S.E.2d 523 (2002) (debtor did not benefit from its assertion, in bankruptcy case, that it had no contingent or unliquidated claims, and thus doctrine of judicial estoppel did not bar debtor's later action on fraud and other counts against lender, where bankruptcy court dismissed bankruptcy case); *Weiser v. Wert*, 251 Ga.App. 566, 554 S.E.2d 762 (2001) (judicial estoppel did not preclude debtors from pursuing malpractice claim following voluntary dismissal of bankruptcy petition).

On a different issue, any article addressing recent bankruptcy developments must necessarily mention the new bankruptcy legislation, which is expected to become law shortly. It is generally accepted that the new law, which has been eight years in the making, is a creditor-sponsored bill. The credit card companies, the bill's strongest proponents, contend that the legislation, which represents the most significant changes to the Bankruptcy Code since 1978, is needed in order

to fix the current system which overly protects borrowers. While the details of the proposed legislation are beyond the scope of this article, a few key provisions are worth noting.

The proposed law would require that all debtors receive credit counseling prior to filing bankruptcy. Another controversial aspect of the bill is the "means testing" provision which would require the bankruptcy court to determine whether debtors have the means to repay some of their debt in a Chapter 13 rather than a Chapter 7.<sup>2</sup>

Another proposed change relates to the bifurcation of debt for automobile loans. Under current bankruptcy law, a Chapter 13 debtor may reduce car loan debt by bifurcating the lender's claim into two claims, one secured and one unsecured. For example, if the debtor owes \$20,000 on a vehicle with a current market value of \$12,000, the debtor may pay \$12,000 of the claim as secured and the \$8,000 balance will be placed in the pool of unsecured claims which may be paid at a rate of pennies on the dollar, sometimes as little as zero percent. Under the new law, a debtor would not be able to bifurcate debt secured by an automobile purchased within 30 months prior to bankruptcy.

Although the official name of the new bill is "The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005," the bill also makes significant changes to Chapter 11 cases. For example, there are changes affecting the deadline for filing disclosure statements and plans. There are also substantial changes to the treatment of reclamation claims in Chapter 11 cases.

Needless to say, bankruptcy practitioners will be hard at work this year trying to absorb the new litigation which will go into effect six months after the bill is signed by the president. We can probably expect increased filings in the months before the effective date so that debtors can take advantage of the current law which, in some instances, offers more alternatives to debtors.

**Kathleen Horne** practices law in Savannah, Ga., with the law firm of Inglesby, Falligant, Horne, Courington & Chisholm, P.C. Horne serves as president of the Bankruptcy Law Section of the State Bar of Georgia and is a Fellow in the American College of Bankruptcy. She specializes in the areas of bankruptcy and creditors' rights.

**Matthew E. Mills** is an associate attorney at the firm and specializes in bankruptcy, creditors' rights and commercial litigation.

## Endnotes

1. Under the doctrine of "judicial estoppel," a party is precluded from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in another judicial proceeding. The purpose of the doctrine is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. *Burnes v. Penco Autoplex, Inc.*, 291 F.3d 1282, 1285-87 (11<sup>th</sup> Cir. (Ala.) 2002).
2. It is likely that this requirement will not significantly affect Georgia as much as other states, as debtors in Georgia, especially the Southern District, tend to file more Chapter 13 cases than debtors in other states.



## 2004 ELDER LAW UPDATE

By Ruthann P. Lacey  
and Heather L. Durham

### Implementation of Estate Recovery

On Aug. 1, 2004, the Georgia Department of Community Health implemented Estate Recovery, giving the State the authority to place liens against the estates of Medicaid recipients who, while 55 years of age or older, received nursing home care which was funded by Medicaid.

The state is not limited to probate assets in attaching its lien. Any assets owned by the individual at the time of death are subject to an Estate Recovery lien. Such assets can include, but are not limited to, a homeplace (even if passing by right of survivorship), bank and retirement accounts, burial accounts, and annuities. Additionally, transfers made by an individual within three years prior to becoming eligible for Medicaid may be deemed "voidable" under the Regulations and can be subject to Estate Recovery.

If the Medicaid recipient is survived by a spouse, child under 21 years of age, or child with a disability, enforcement of the Estate

Recovery provisions will be postponed until these exceptions are no longer present.

Estates valued at less than \$25,000 are exempt from Estate Recovery. Though the Regulations took effect on Aug. 1, 2004, recovery has not yet been sought against any Medicaid recipients who have passed away since that date.

### Elimination of Adult Medically Needy Medicaid

On Sept. 1, 2004, as part of the fiscal year 2005 Budget, Georgia eliminated the Adult Medically Needy Nursing Home Medicaid program making Georgia an "income cap" state. Prior to this date, individuals who required nursing home level care were allowed to "spend down" by deducting medical expenses, including the cost of nursing home care, from their monthly income to become eligible for Medicaid benefits.

The result of the elimination of the Adult Medically Needy Nursing Home Medicaid program was a group of people whose gross monthly income was more than the cap, but was less than what it would cost for these individuals to pay privately for care in a nursing home.

The state initially determined that becoming an income cap state

would save Georgia roughly \$10 million in the first year. However, officials failed to take into consideration that federal law allows for individuals whose income is more than the monthly cap, but less than the actual cost of a nursing home, to establish a Qualified Income Trust (or Miller Trust). After this income-only trust is established, the nursing home resident directs income in excess of the cap to the trust each month and that income is no longer considered in determining Medicaid eligibility. Due to the wide availability of Miller Trusts, the savings resulting from the elimination of the Adult Medically Needy Nursing Home Medicaid program will be minimal.

### HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) continues to be an issue in the arena of elder law. The implementation of this law in April 2003 and subsequent interpretation of this law by doctors, hospitals, and other health care providers has made it more difficult for family members (even those named as agents in a Durable Power of Attorney for Health Care) to obtain information or medical records. The only way to ensure that an agent making medical decisions on

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a principal's behalf has full access to that person's medical records is for the principal to execute a Durable Medical Power of Attorney which specifically addresses HIPAA and explicitly appoints the agent as the principal's "Personal Representative," as defined by HIPAA.

## Guardianship/ Conservatorship

The Georgia Guardianship Code (O.C.G.A. Title 29) has undergone significant revisions which take effect on July 1, 2005. The purpose of this revision was to reorganize, modernize and clarify the Georgia laws that relate to the guardianship of the person and property of minors and adults. The new Guardianship Code adopts terminology which is consistent with that used in the majority of other states. The term "guardian of the person" is being replaced with "guardian" and the term "guardian of the property" is being replaced with "conservator."

The revision makes significant changes with regard to emergency guardianships, the evaluation of proposed wards, and allowable investments and spending by guardians. New forms consistent with the revision are expected to be issued by the Georgia Probate Courts prior to the effective date.

**Ruthann P. Lacey** is an attorney in private practice in Tucker. She concentrates her practice in Elder Law and Special Needs Law, a general practice which is dedicated to the unique and often complex planning concerns of the senior population and individuals with special needs. She is the incoming chair of the Elder Law Section of the State Bar of Georgia.

**Heather Durham** practices law in Tucker, Ga., with the law firm of Ruthann P. Lacey, P.C. She practices exclusively in the areas of Elder and Special Needs Law. Durham is a member of the National Academy of Elder Law Attorneys and an active speaker on the local and state levels, both to professional and public groups and organizations.



## FIDUCIARY LAW

By Alan F. Rothschild Jr.

Although trust and estate lawyers have been primarily focused on the federal estate tax repeal debate, there were important state case law, legislative and administrative developments in the fiduciary law area over the last year.

### Who is the Client in the Administration of an Estate?

Until recently, a significant ethical issue remained unanswered for Georgia lawyers engaged in estate administration—where do the attorney's duties and loyalties lie in the administration of an estate? Most states have determined that the attorney represents the fiduciary alone, not the beneficiaries of the estate or the estate itself. In

1999, the Fiduciary Law Section's Ethical Standards Committee, chaired by Joe Gerstein of Doraville, concluded that no Georgia court had ever directly addressed this issue. Consequently, in 2001, the Ethics Standards Committee submitted a request for a formal advisory opinion on this question to the State Bar of Georgia's Formal Advisory Opinion Board. The Board concluded that the question presented by the Ethical Standards Committee did not fall within the jurisdiction of the Board because it was a matter of law rather than a matter of the interpretation of the Georgia Professional Rules of Conduct (Formal Advisory Opinion Board Request No. 01-R3).

Last year, the Georgia Court of Appeals finally addressed this issue in *Rhone v. Bolden*, 270 Ga App 712. The court held that while the administrator clearly owed duties to the beneficiaries of the estate, "the existence of a duty by the administrator to the heirs does not translate into a duty by the administrator's lawyer to the heirs. While the estate may or may not ultimately pay the lawyer's fee, the lawyer's client is the administrator, not the estate." The court found that the heirs were also not third-party beneficiaries of the attorney-client relationship between the administrator and the estate's attorney.

Notwithstanding the court's finding that the estate's attorney owed no duty to any one other than the fiduciary, estate planning attorneys are well-advised to enter into a written engagement letter with the fiduciary which disclaims any duty to the estate's beneficiaries and to provide a copy of the engagement letter to such beneficiaries.

## Breach of Fiduciary Duty

In a high profile case, *Namik v. Wachovia Bank of Georgia*, 2005 WL 395192, a unanimous Georgia Supreme Court reversed a 2003 Georgia Court of Appeals decision and reinstated a trial court's holding that Wachovia Bank of Georgia breached its fiduciary duty to the trust beneficiaries by not considering the estate tax implications of its investment choices in an inter vivos revocable trust.

In 1989, former Iraqi General Ibrahim N. Ali traveled to Atlanta to visit his son, Issam Namik, a Georgia Tech exchange student. While in Atlanta, Ali established a revocable living trust with certificates of deposits totaling \$2.65 million. According to a Wachovia memorandum, Ali directed the bank to invest the money only in U.S. government issues. After the certificates of deposits matured, the bank was unable to contact Ali and re-invested the trust assets in a non-government money market account.

The bank later learned that Ali died in an Iraqi prison soon after he returned from his visit to Atlanta. Had the trust assets been invested in government securities, the funds would not have been subject to estate taxes under the rules applicable to non-resident aliens. Because the money was invested contrary to Ali's instructions, his estate was subject to estate taxes of \$933,000, and, because of the lapse of time between his death and the filing of an estate tax return, interest of \$540,000.

Then Fulton County Sr. Judge Floyd E. Probst III ruled at trial for Ali's family and ordered Wachovia to pay \$1.1 million in damages. The Court of Appeals reversed the trial

court's finding of liability, which mooted the question of damages.

In *Namik*, the Supreme Court concluded that the Court of Appeals had correctly determined that parol evidence is admissible only if the trust agreement is ambiguous. However, the Supreme Court found the trust agreement between Wachovia and Ali to be ambiguous as to the type of investments, which could be made. The Court concluded that it was proper for the trial court to consider the bank's memorandum regarding Ali's investment instructions and to determine that Wachovia had failed to invest Ali's trust assets as directed. Writing for the Court, Justice Benham stated, "the evidence authorized the trial court to find, as it did, that a trustee in Wachovia's position should have been aware of the consequences of not following Ali's instructions and of investing as it did. These findings supported the trial court's conclusion that Wachovia's failure to be aware of such consequences and to comply with Ali's instructions constituted a failure to exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purpose of the account." The

case has been remanded to the Court of Appeals to determine damages.

## Guardianship Code

In 2004, the Georgia legislature adopted a new Guardianship Code that becomes effective July 1, 2005. The new code follows the majority of states by dropping the term "guardian of the person" in lieu of "guardian," while the former term "guardian of the property" will now be called a "conservator." A number of recent judicial decisions are also incorporated into the revised code.

## Medicaid

There were two major developments in Georgia's Medicaid rules related to long-term care last year.

### *Medically Needy Nursing Home*

Federal law allows states to provide Medicaid payments to three types of recipients, the "mandatory categorically needy," the "optional categorically needy," and the "medically needy." The first category, as its name indicates, is a mandatory category—states must provide payments to people who fall into this category. The other two categories are optional. Georgia retains the "categorically needy" assistance category.

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However, in 2004, as part of the state's budget reduction efforts, the Georgia Department of Community Health eliminated funding for those adults who are "medically needy." These are basically people who are not poor enough to qualify for mandatory Medicaid coverage (because, in 2004, their incomes exceed \$1,692) but who do not have adequate funds to pay the nursing home bills themselves.

People who were previously "medically needy" may be able to use a "Medicaid Qualifying Trust" (also known as a Miller Trust) to avoid the disqualifying income limits. The trust is designed to receive the excess income that causes the recipient to be ineligible for Medicaid. The income paid into the trust and the interest earned by the trust is not counted for Medicaid qualifying purposes. At the individual's death, Georgia will receive all amounts remaining in the trust up to the amount of medical assistance that the state paid on behalf of the individual.

### ***Estate Recovery***

At the end of July 2004, the Department of Community Health (the Department) issued regulations instituting a process for the State to recover the amounts expended by the State on Medicaid recipients. Although Federal law and OCGA §49-4-147.1 previously authorized this recovery, Georgia has not engaged in estate recovery.

The Regulations became effective Aug. 5, 2004, but the effective date of the Medicaid Recovery Program was "retroactive" to Aug. 1, 2001. A personal representative of an individual who was receiving Medicaid assistance must notify the Department of the individual's

death within 30 days. When the Department is notified of the death, it will file a claim against the estate (unless the individual is survived by a spouse, child under age 21, or blind or disabled child of any age). Among other things, the regulations would hold a personal representative personally liable if the estate assets were distributed without first complying with the recovery rules. The regulations dictate that Medicaid recovery falls in the fifth category of debts payable from the estate. Under the regulations, year's support, funeral expenses (up to \$5,000), expenses of administration and expenses of the decedent's last illness appear to take priority over Medicaid recovery. The regulations also allow the Department to satisfy the claim out of bank accounts owned by the decedent even if no estate proceedings are initiated.

The regulations also allow the state to place a lien on the home of a living Medicaid recipient if the individual has entered a nursing home and there is no reasonable expectation that the individual will return home. The lien will not be imposed if any of the following are living in the home: the individual's spouse, a child under age 21, a disabled child of any age or a sibling with an equity interest in the home who lived in the home for at least one year prior to the time the individual entered the nursing home. Also, the lien will not be enforced if any of the following are alive after the individual's death: their spouse, a child under age 21, a blind or disabled child (none of whom need to be living in the home); an adult child who is living in the home and had done so at least two years prior to the individual entering the nursing home and

had provided care that kept the individual from entering the home; or a sibling who is living in the home if he or she had done so for at least two years prior to the individual entering the nursing home. Hardship waivers are allowed and may be requested by the estate's representative.

**Alan F. Rothschild Jr.**, a partner with Hatcher, Stubbs, Land and Rothschild, LLP in Columbus, is chair-elect of the Fiduciary Law Section. He gratefully acknowledges Professor Mary F. Radford, Georgia State University College of Law, for allowing the author to borrow liberally from her annual fiduciary law update materials.



## **TOP TRADEMARK DECISIONS OF 2004**

By Michael D. Hobbs Jr.  
and Anne E. Yates

2004 proved to be an interesting year in the world of trademarks, perhaps best characterized as evolutionary rather than revolutionary. In *KP Permanent Make-Up v. Lasting Impression*, the Supreme Court clarified (sort of) the scope of the "fair use" defense and the burden on a defendant raising the





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John Marshall	August 13, 2005 (Sat.)	9:00 a.m.-11:30 a.m.	11:30 - 12:30 p.m.	TBA
Mercer	August 12, 2005 (Fri.)	1:30 - 3:30 p.m.	3:30 - 4:30 p.m.	TBA
UGA	August 12, 2005 (Fri.)	2:30 - 4:30 p.m.	4:30 -5:00 p.m.	TBA

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defense. Circuit and district courts issued opinions painting in the figures sketched by the Supreme Court in *Traffix Devices, Dastar and Mosely*. Lastly, courts wrestled with the inevitable changes brought by technology, applying the 50-year-old Lanham Act to the new technology of Internet key word searching. Like a 50-year-old man at a rap concert, the courts moved and shook the Lanham Act a few different ways, confused a few people, scared several others, but ultimately showed that the Lanham Act remains flexible enough to still remain relevant even in the electronic age. With the mental image of that analogy firmly planted, away we go.

### **KP Permanent Make-Up v. Lasting Impression**

Society condones the actions of lovers and soldiers with the proverb "All's fair in love and war." TV's *The Simpson's* condoned the culinary excesses of Marge Simpson in the episode "All's Fair in Oven War." In an important decision issued earlier this month, *KP Permanent Make-Up v. Lasting Impression*, the U.S. Supreme Court held that all's fair when a defendant in a trademark infringement case relies on the "fair use" defense, which allows the use of trademarks for descriptive purposes, as the defendant does not have the burden of proving that no consumer confusion exists. "It takes a long stretch to claim that a defense of fair use entails any burden to negate confusion" opined Justice David Souter writing for the Court. Although hailed by trademark owners as a partial victory because it did not eliminate the relevance of the likelihood of consumer confu-

sion, the decision will certainly make trademark enforcement more difficult for the owners of descriptive trademarks.

Writing for the Supreme Court, Justice David Souter reversed the Ninth Circuit's decision, holding that the Lanham Act does not contemplate the burden of proof shifting to a defendant invoking the "fair use" defense to prove that no likelihood of confusion will result from the fair use. Although the Lanham Act places the burden of proving likelihood of confusion on the party charging infringement, even when relying on an incontestable registration, "Congress said nothing about likelihood of confusion in setting out the elements of the fair use defense." In fact, the Court noted that the House Subcommittee on Trademarks declined to forward to Congress a proposal that expressly included, as an element of the defense, that a descriptive use be "[un]likely to deceive the public." It thus follows that "some possibility of consumer confusion must be compatible with fair use." Finding little sympathy for the trademark owner, the Court chided, "If any confusion results, that is a risk that the plaintiff accepted when it elected to identify its product with a mark that uses a well known descriptive phrase."

Giving at least one point for trademark owners to cheer about, the Court held that the decision that fair use can occur along with some degree of confusion "does not foreclose the relevance of the extent of any likely consumer confusion in assessing whether a defendant's use is objectively fair." The Court declined to give any guidance as to the amount and weight consumer confusion should play in future analysis.

### **Post-Traffix: Talking Rain Beverage Co. v. S. Beach Beverage Co.**

In 2001, the U.S. Supreme Court ruled that the functionality of a design is not undermined by evidence of available design alternatives. *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 58 U.S.P.Q.2d (BNA) 1001 (2001). The Ninth Circuit, however, held that "the existence of design alternatives itself might help determine whether the design was functional in the first place." *Talking Rain Beverage Co. v. S. Beach Beverage Co.*, 349 F.3d 601, 68 U.S.P.Q.2d (BNA) 1764 (9th Cir. 2003). In affirming the ruling that the shape of the disputed "bottle" was functional, the court noted both that money spent determining the bottle's useful properties weighed against the plaintiff and that the validity of the plaintiff's trademark registration could be rebutted through demonstration of functionality. Since the evidence presented demonstrated the functionality of the design, the court ordered the cancellation of Talking Rain's design registration.

### **Internet Search Engines: Gov't. Emples. Ins. Co. v. Google, Inc. and Playboy Enters. v. Netscape Communs. Corp.**

In *Gov't. Emples. Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700 (E.D. Va. 2004), the district court held that an allegation that the defendant's search engine used a mark as a keyword to trigger displays of online advertising is an allegation of use in commerce sufficient for a *prima facie* trademark infringement claim. In denying a motion to dismiss for failure to

state a claim, the court rejected a line of cases including *U-Haul Int'l Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 68 U.S.P.Q.2d (BNA) 1038 (E.D. Va. 2003) (holding that pop-up ads that covered up or appeared alongside Internet sites did not infringe the site owner's trademarks); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 69 U.S.P.Q.2d (BNA) 1171 (E.D. Mich. 2003) (concluding that the use of a company's trademarks as keywords to trigger the display of pop-up advertisements did not constitute a use in commerce); *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, *supra* (holding that using a trademark as part of a web address, but not part of the second-level domain name, was not infringing).

In *Playboy Enters. v. Netscape Communs. Corp.*, 354 F.3d 1020, 69 U.S.P.Q.2d (BNA) 1417 (9th Cir. Cal. 2004), the Ninth Circuit held that users who enter the term "playboy" into a search engine may be initially confused into thinking that unlabeled banner advertisements triggered by the search terms are connected to the publisher of *Playboy* magazine. Reversing a district court's award of summary judgment for Netscape, the court said that evidence presented by plaintiff established a strong likelihood of initial interest confusion as set forth in *Brookfield Communs., Inc. v. West Coast Entm't Corp.*, 174 F.3d 1036, 50 U.S.P.Q.2d (BNA) 1545 (9th Cir. Cal. 1999). In that case, the court observed that although users searching for the plaintiff's site would realize they had not arrived there, they might be distracted from pressing on with their search if the competitor's site offered a similar service.

## Post-Dastar: Larkin Group, Inc. v. Aquatic Design Consultants, Inc.

A U.S. District Court held that the Supreme Court's ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003) precludes a claim for reverse passing off under the Lanham Act against a company and its founders who used without attribution an uncopyrighted design proposal and layout obtained from the founder's former employer. *Larkin Group, Inc. v. Aquatic Design Consultants, Inc.* 323 F. Supp. 2d 1121 (D. Kan. 2004). The court explained that the Supreme Court declined to read "origin" in Section 43(a) to require attribution of uncopyrighted materials but held that "origin of goods" in Section 43(a)(1)(A) "refers to the producer of tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods." The court applied the *Dastar* ruling to the current facts stating that Larkin's reverse passing-off claims are materially identical to those at issue in *Dastar*. In dismissing the reverse passing off claim, the court explained that the "plaintiff is essentially claiming that defendants took plaintiff's uncopyrighted and unpatented ideas and concepts, edited and repackaged them, and passed them off as their own without attributing any credit to plaintiff." The court continued stating that "... Even if those proposals are, however, considered goods or services offered for sale within the meaning of *Dastar*, in this case plaintiff does not allege that plaintiff actually produced those proposals. Instead, plaintiff alleges that the defendants took plaintiff's

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materials and incorporated them into defendant's proposals without attributing any credit to plaintiff. Thus, the "origin" of the proposals was actually defendants, not plaintiff." The court concluded that "even if plaintiff authored some of the ideas and concepts embodied in those proposals, the Lanham Act does not provide protection for such plagiarism, i.e., the use of otherwise unprotected works and inventions without attribution." Accordingly, the court dismissed the reverse passing off claim.

## Post-Moseley: *Savin Corp. v. Savin Group*

In *Savin Corp. v. Savin Group*, 391 F.3d 439 (2<sup>nd</sup> Cir. 2004), the Second Circuit overturned a district court ruling which had held that the fact that the defendant's and plaintiff's marks were identical does not mean that the plaintiff is excused from presenting evidence of actual dilution under the Federal Trademark Dilution Act of 1995, 15 U.S.C. §1125(c) ("FTDA"). Citing the Supreme Court in *Moseley v. Secret Catalogue, Inc.*, 537 U.S. 418, (2003) (stating that a plaintiff alleging dilution must present evidence of "actual dilution, rather than a likelihood of dilution."), the Second Circuit rejected the defendant's argument that *Moseley* required such a demonstration even when the marks in question were identical. The court's holding was grounded in a sentence in *Moseley* that said that "direct evidence of dilution such as consumer surveys will not be necessary if actual dilution can be reliably proven through circumstantial evidence—the obvious case is one where the junior and senior marks are identical." Since the marks at issue were identical, the court

vacated the district court's entry of summary judgment for the defendant and remanded the case. See also *Nike Inc. v. Variety Wholesalers, Inc.*, 274 F. Supp. 2d 1352, 1372 (S.D. Ga. 2003) ("The Court concludes that Variety has diluted the Nike trademarks due to the identical or virtually identical character of the marks on the Accused Goods to the Nike trademarks."); *Pinehurst v. Wick*, 256 F. Supp. 2d 424, 432 (M.D.N.C. 2004) (finding actual dilution where defendant used domain names identical and nearly identical to plaintiff's trademarks).

**Michael Hobbs and Anne Yates** practice intellectual property law in the Atlanta office of Troutman Sanders LLP. Hobbs is also the chair of the Intellectual Property Law Section of the State Bar of Georgia.



## GEORGIA 2005 TAX LEGISLATION UPDATE

By Jeffrey C. Glickman and Michael T. Petrik

The 2005 Georgia legislative session produced several changes to the Georgia tax code (the Code), including one of the most significant income tax bills this state has

seen in recent memory (H.B. 191). As of the date this article was written, the following tax bills passed both the House and Senate and have either been signed by Governor Perdue (as of the date noted) or are expected to be signed (or pass without signature).<sup>1</sup>

1. **H.B. 191** (signed April 6, 2005, and effective Jan. 1, 2006) — (a) provides what is commonly referred to as an "add-back" statute and (b) revises Georgia's apportionment formula to provide a phase-out, over a three-year period, of the property and payroll factors, resulting in a single-factor gross receipts apportionment formula;
2. **H.B. 488** (signed April 12, 2005) — "The State and Local Tax Revision Act of 2005" makes several changes requested by the Department of Revenue, including updating the state's income tax conformity date to the Internal Revenue Code (the IRC), clarifying the treatment of Georgia net operating losses, and codifying the state's treatment of corporate limited partners.
3. **H.B. 389** — Provides for an additional jobs tax credit of \$500 per eligible job for existing business enterprises that create new full-time jobs on or after Jan. 1, 2006 and before Jan. 1, 2011.
4. **H.B. 539** — Repeals the income tax credit for business growth and enacts a new credit for qualified production activities.

This article will focus on the key provisions of House Bill 191 and House Bill 488, the two most significant tax bills from this session.

### House Bill 191

#### *The "Add-Back" Provision*

Georgia joins 11 other separate-company reporting states (those

states that generally require a corporation to file as a separate entity—i.e., not as part of a combined or consolidated return) in enacting a mandatory add-back provision related to certain expenses associated with intangible assets. This provision is intended to counter a common tax planning device whereby a corporate taxpayer conveys intangible assets to an affiliate located in a tax favorable jurisdiction, which then licenses the use of such intangibles back to the taxpayer, thereby generating new deductions for the taxpayer.

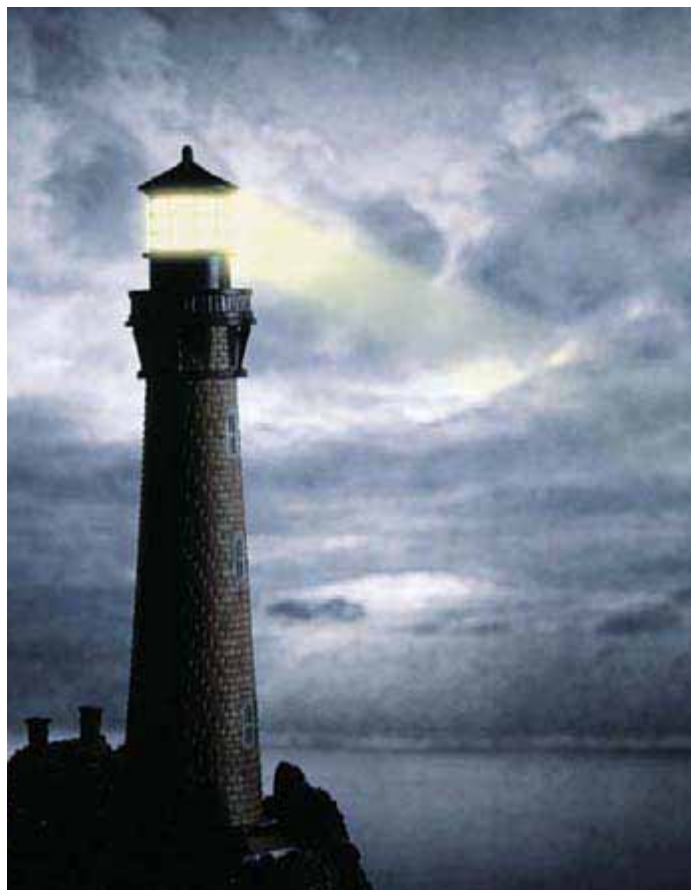
Effective for tax years beginning on or after Jan. 1, 2006, the new law<sup>2</sup> requires that a corporate taxpayer<sup>3</sup> add back to its income any interest or intangible expenses and

costs related to the acquisition, use, maintenance, management, ownership, sale, exchange, or disposition of intangible property (including, but not limited to, patents, trademarks, copyrights, trade secrets, and other similar intangible assets)<sup>4</sup> that were paid to a “related member” and that were deducted for federal income tax purposes.<sup>5</sup>

A “related member” includes (i) any individual or entity that owns at least 50 percent of the value of the taxpayer’s outstanding stock or a corporation in which the taxpayer owns at least 50 percent of the value of such corporations outstanding stock (for purposes of determining whether or not the ownership requirement is met, the attribution rules of IRC Section 318 are applied),

and (ii) a component member with respect to the taxpayer as defined in IRC Section 1563(b).<sup>6</sup>

There are three exceptions to the add-back requirement, and each requires proper disclosure on the return. First, the add-back amount is reduced (but not below zero) to the extent (i) the income is received by the related member in an arm’s length transaction, and (ii) such income (post allocation and apportionment) is taxed by Georgia or another state that imposes a tax on or measured by the income of the related member (other than a state in which the related member and the taxpayer file a combined or consolidated return where, as a result of filing such return, the tax effects of the transaction between



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the taxpayer and the related member are eliminated).<sup>7</sup>

Second, the add-back amount is reduced (but not below zero) to the extent (i) the interest or intangible expenses and costs are paid to a related member that is domiciled in a foreign nation that has in force a comprehensive income tax treaty with the United States, (ii) the transaction has a valid business purpose (i.e., the transaction does not have as a principal purpose the avoidance of tax and, apart from tax effects, meaningfully changes the economic position of the taxpayer),<sup>8</sup> and (iii) the amounts paid were determined at arm's length rates.<sup>9</sup>

Finally, the add-back requirement does not apply to the portion of the interest or intangible expenses and costs that the taxpayer establishes by a preponderance of the evidence (i) was paid by the related member to a person that is not a related member during the same taxable year, and (ii) the transaction has a valid business purpose.<sup>10</sup>

In addition to other penalties that may be imposed, if a taxpayer fails to comply with the statute, there is a penalty equal to 10 percent of the additional tax that results from application of the add-back adjustment.<sup>11</sup>

### ***Single-Factor Apportionment***

As part of the state's desire to attract new business to the state (and keep existing business here in the face of competing state tax incentives), the Georgia Assembly passed legislation that will phase out Georgia's three-factor formula for apportioning corporate income to the state and replace it with a single-factor formula based solely on gross receipts.

Currently, O.C.G.A. § 48-7-31 sets forth a weighted three-factor

apportionment formula consisting of a property factor (weighted 25 percent), a payroll factor (weighted 25 percent) and a gross receipts factor (weighted 50 percent). House Bill 191 shifts the weights of those factors over a three-year period as follows:

- For tax years beginning in calendar year 2006—property (10 percent), payroll (10 percent), and gross receipts (80 percent);<sup>12</sup>
- For tax years beginning in calendar year 2007—property (5 percent), payroll (5 percent), and gross receipts (90 percent);<sup>13</sup> and,
- For tax years beginning in calendar year 2008—gross receipts (100 percent).<sup>14</sup>

## **House Bill 488—The State and Local Tax Revision Act of 2005**

The State and Local Tax Revision Act of 2005 made over 20 changes to the Code (mostly dealing with income tax provision). Several of the more noteworthy changes are discussed below.

### ***IRC Conformity***

Effective for tax years beginning on or after Jan. 1, 2005, the Georgia Code is updated to conform to the IRC as enacted on or before Jan. 1, 2005.<sup>15</sup> IRC section 199 (allowing a deduction for certain qualified production activities income) is added to the list of IRC sections to which Georgia does not conform.<sup>16</sup> The other IRC sections to which Georgia does not conform are 168(k) (bonus depreciation) and 1400L (New York Liberty Zone credits).<sup>17</sup>

### ***Taxable Nonresident***

Currently, Georgia provides a safe-harbor from Georgia personal income tax filing and payment

obligations for nonresidents whose only activity in Georgia is the performance of services as an employee for an employer when the remuneration for those services is 5 percent or less of the total income received by the nonresident for performing services everywhere.<sup>18</sup> Effective for all tax years beginning on or after Jan. 1, 2005, his legislation would revise that safe harbor to be the lesser of the amount discussed above or \$5,000.<sup>19</sup>

### ***Like-Kind Exchange***

House Bill 488 repeals the constitutionally suspect provision in O.C.G.A. § 48-7-21(b)(5) that disallowed the nonrecognition of gain or loss for like-kind exchanges on the sale of Georgia property when the replacement property was not located in Georgia.<sup>20</sup> This amendment is effective for all tax years beginning on or after Jan. 1, 2004.<sup>21</sup>

### ***Net Operating Losses***

The new legislation codifies Georgia's treatment of net operating losses. Prior to the legislation, the only specific guidance regarding the treatment of net operating losses was in the regulations.<sup>22</sup> The new law essentially enacts the principles set forth in the regulations by (i) requiring that taxpayers add back the federal net operating loss deduction to federal taxable income and (ii) providing for a separate Georgia net operating loss deduction based on the aggregate of Georgia net operating loss carryovers to the tax year plus Georgia net operating loss carrybacks to such tax year.<sup>23</sup>

In addition, the new law conforms the Code to IRC section 172, regarding the number of years in which a Georgia net operating loss may be carried forward or carried back, and to IRC sections 381-384,



regarding the carry over of net operating losses to successor taxpayers and limitations relating to their use.<sup>24</sup> Finally, refund claims arising from a net operating loss carry back for a period prior to the period in which such loss is incurred will not be entitled to interest provided the claim for refund is processed within 90 days from the last day of the month in which the claim for refund is filed.<sup>25</sup>

These net operating loss provisions are effective for tax years beginning on or after Jan. 1, 2005.<sup>26</sup>

### **Investment Partnerships**

Georgia law, under O.C.G.A. § 48-7-24(c), currently exempts from income tax the distributive share of a nonresident member (individual or corporate) of a limited partnership (or similar nontaxable entity) that is doing business in Georgia provided that the limited partnerships derives income exclusively from buying, selling, dealing in, and holding securities on its own behalf and not as a broker (such partnership is commonly referred to as an investment partnership). The new legislation excludes from

the exemption the distributive share of a nonresident member if such member participates in the management of the limited partnership or is engaged in a unitary business with another person that participates in the management of the limited partnership.<sup>27</sup> This amendment is effective upon approval by the governor or upon it becoming law without approval.<sup>28</sup>

### **Corporate Limited Partners**

House Bill 488 amends O.C.G.A. § 48-7-31 (relating to corporate taxation and allocation and apportionment) to read as follows (new language highlighted):

The tax imposed by this chapter shall apply to the entire net income, as defined in this article, received by every foreign or domestic corporation owning property *within this state, doing business within this state, or deriving income from sources within this state to the extent permitted by the United States Constitution.*<sup>29</sup>

The new phrase “deriving income from sources within this state to the extent permitted by the United States Constitution” might

at least arguably suggest that the Department of Revenue wishes to take an expanded view of nexus to include the much-debated “economic nexus” standard. For example, the Department could conceivably seek to tax a nonresident corporation that sells to customers located in the state but that does not have any physical presence here. However, it is our understanding based on discussions with Department personnel that this language was added to codify Department policy, as expressed in Regulations 560-7-3-.08 and 560-7-7-.03(a),<sup>30</sup> whereby a corporate limited partner, whose sole connection with Georgia is its ownership of a limited partnership interest in a limited partnership that does business in the state, is subject to Georgia corporate income tax. The Department has indicated to the authors that it does not view this amendment as providing a warrant to change its current practice of requiring physical presence in the state in order to subject a corporation to tax. This amendment is effective upon approval by the Governor or upon it becoming law without approval.<sup>31</sup>

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## Vendor Registration

House Bill 488 does not only address income taxes; it adds new section 48-8-14 (sales and use tax statutes). That section prohibits a state agency from entering into a contract with a nongovernmental vendor for the sale of goods and/or services in an amount exceeding \$100,000 if the vendor, or an affiliate of the vendor, is a "dealer" under O.C.G.A. § 48-8-2(3) but fails or refuses to collect Georgia sales or use taxes on sales delivered to Georgia.<sup>32</sup> This amendment is effective upon approval by the Governor or upon it becoming law without approval.<sup>33</sup>

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**Michael T. Petrik** is a partner of Alston & Bird LLP and chair of the firm's state and local tax group.

## Endnotes

1. This list is intended to provide a summary of the more significant tax legislation from the 2005 session and is not intended to be exclusive.
2. H.B. 191, Laws 2005, Section 3, adding new Code section 48-7-28.3. All future references will be to the new Code section.
3. The statute also applies to individual taxpayers, but this article will focus on the corporate taxpayer.
4. O.C.G.A. § 48-7-28.3(a)(5).
5. O.C.G.A. § 48-7-28.3(b).
6. O.C.G.A. § 48-7-28.3(a)(7), (a)(8).
7. O.C.G.A. § 48-7-28.3(d).
8. O.C.G.A. § 48-7-28.3(a)(9).
9. O.C.G.A. § 48-7-28.3(e).
10. O.C.G.A. § 48-7-28.3(f).
11. O.C.G.A. § 48-7-28.3(j).
12. H.B. 191, Laws 2005, Section 4.
13. H.B. 191, Laws 2005, Section 5.
14. H.B. 191, Laws 2005, Section 6.
15. H.B. 488, Laws 2005, Section 2, amending Code section 48-1-2(14); H.B. 488, Laws 2005, Section 27(a).
16. H.B. 488, Laws 2005, Section 2, amending Code section 48-1-2(14).
17. See O.C.G.A. § 48-1-2(14).
18. See O.C.G.A. § 48-7-1(11)(A), effective prior to January 1, 2005.
19. H.B. 488, Laws 2005, Section 7, amending Code section 48-7-1(11)(A); H.B. 488, Laws 2005, Section 27(c).
20. H.B. 488, Laws 2005, Section 9, amending Code section 48-7-21(b)(5).
21. H.B. 488, Laws 2005, Section 27(h).
22. See Ga. Reg. Rule 560-7-3-.06(3).
23. H.B. 488, Laws 2005, Section 11, amending Code section 48-7-21(b)(10).
24. *Id.*
25. *Id.*
26. H.B. 488, Laws 2005, Section 27(c).
27. H.B. 488, Laws 2005, Section 12, amending Code section 48-7-24(c).
28. H.B. 488, Laws 2005, Section 27(f).
29. H.B. 488, Laws 2005, Section 15, amending Code section 48-7-31(a).
30. These regulations were amended effective for tax years beginning on or after January 1, 2002 to subject corporate limited partners of limited partnerships that are doing business in Georgia to the corporate income tax.
31. H.B. 488, Laws 2005, Section 27(f).
32. H.B. 488, Laws 2005, Section 22, adding new Code section 48-8-14.
33. H.B. 488, Laws 2005, Section 27(f).



## RECENT DEVELOPMENTS IN TECHNOLOGY LAW

By Mari L. Myer

This article will provide Georgia attorneys with a summa-

ry of some recent state and federal court decisions pertaining to technology matters.

## Employment Law and Restrictive Covenant Agreements

### *Injunctive Relief is Available to Employees Across State Lines Once Final Judgment is Entered*

The Georgia Court of Appeals recently held that a permanent injunction may bar a former employer from enforcing restrictive covenants in an employment agreement, even in the other states referenced in the covenants.<sup>1</sup> The Court of Appeals first applied Georgia law to determine that restrictive covenants in an employment agreement specifying a Florida choice of law, but binding a Georgia resident, were not enforceable as a matter of Georgia public policy. The injunction at issue prevented the employer from continuing pending litigation in Florida, and protected against the possibility of inconsistent results in other jurisdictions.

Although this interpretation is now Georgia law, the U.S. Court of Appeals for the Eleventh Circuit has rejected this approach.<sup>2</sup> Instead of seeking injunctive relief, a party challenging the enforceability of a restrictive covenant encompassing territory located in another state must seek a declaratory judgment that a restrictive covenant is not enforceable, as the Eleventh Circuit limits the enforceability of an injunction to the state in which the litigation is pending. The Eleventh Circuit leaves it to the courts of the other states referenced in the covenants to reach their own interpretation of the declaratory judg-

ment, and to enter injunctive relief only to the extent that the other courts deem appropriate.<sup>3</sup>

### ***Trial Court May Examine Enforceability of Restrictive Covenants Prior to Referring Matter for Mandatory Arbitration***

The Court of Appeals has affirmed a Superior Court's ruling on the enforceability of a covenant not to compete prior to referring a case to arbitration pursuant to an arbitration clause in the parties' contract, even though the result was that the arbitrator was denied the right to consider the covenant not to compete.<sup>4</sup>

### ***Covenants Not to Solicit Employees May Stand or Fall With Other Restrictive Covenants***

The Georgia Court of Appeals appears to have included covenants not to solicit employees within the scope of its determination that restrictive covenants stand or fall together, with the result being that an invalid covenant not to compete, covenant not to solicit customers or covenant not to solicit employees will fatally taint all of the otherwise valid covenants in the same agreement.<sup>5</sup>

## **First Amendment/ Child Online Protection Act**

The U.S. Supreme Court has held that Internet content providers and civil liberties groups are likely to prevail on their claim that the Child Online Protection Act (COPA)<sup>6</sup> violates the First Amendment to the United States Constitution by burdening adults' access to some protected speech.<sup>7</sup> As occurred with respect to an earlier effort by Congress to restrict

content on the Internet,<sup>8</sup> the Supreme Court held that COPA is constitutionally suspect. For this reason, the Court upheld the district court's imposition of a preliminary injunction against the enforcement of COPA pending a trial on the merits.<sup>9</sup>

The Court concluded that the government would be unlikely to meet its burden of proof that COPA is narrowly tailored to serve a compelling governmental interest, is not overbroad and is not the least restrictive means available for the government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them. Blocking and filtering software was among less restrictive, and more effective, means that the Court instructed the district court to consider upon remand. The Court surmised that filters, restricting speech at the receiving end, would be as effective in protecting minors as COPA would be, without forcing adults who seek access to adult content on the Internet to identify themselves or provide credit card information as COPA requires. Thus, with the use of filters there would be no chilling effect on free speech on the Internet, but children would still be protected.

## **Wiretap Act Claims**

### ***Pirate Access Devices***<sup>10</sup>

The intentional manufacture, distribution, possession, and advertising of pirate access devices is a criminal offense.<sup>11</sup> In recent years, the United States District Courts, including the Northern District of Georgia, have been inundated by suits by DirecTV<sup>12</sup> against individuals whom DirecTV accuses of civil violations of the

Wiretap Act<sup>13</sup> by virtue of the individuals having allegedly purchased or otherwise acquired pirate access devices. The Eleventh Circuit has rejected DirecTV's premise that the mere possession of a pirate access device creates a private right of action in favor of the entity that allegedly has been harmed by such conduct.<sup>14</sup> Instead, the Eleventh Circuit held that "[p]ossession of a pirate access device alone ...creates nothing more than conjectural or hypothetical harm."<sup>15</sup> Because mere possession of a pirate access device is still a criminal violation, those defendants who have escaped civil penalties may still be subject to criminal prosecution.

### ***Computer Hacking***

Interception in violation of the Wiretap Act requires an acquisition of the information *during its transmission*.<sup>16</sup> In other words, the interception must occur in "real time", while the information is in transit. In the case at issue, a computer hacker had posted on a Web site a message containing a "Trojan Horse" virus attachment. When Steiger clicked on the message, the hacker gained access to Steiger's computer hard drive. Because there was no contemporaneous acquisition of an electronic communication while in transit—but instead access to information already stored on Steiger's computer—this conduct did not constitute an interception of electronic communications in violation of the Wiretap Act.<sup>17</sup>

## **Antitrust Principles in the Telecommunications Context**

The Federal Telecommunications Act of 1996 (FTCA)<sup>18</sup> has been held



to preempt the application of traditional antitrust principles;<sup>19</sup> thus, a complaint that an incumbent local exchange carrier (ILEC) had breached its duty to share its network with competitors did not state a monopolization claim under Section 2 of the Sherman Antitrust Act.<sup>20</sup>

In the case at issue, New York State's ILEC, Verizon, was accused of failing to offer access to its operations support systems, even though the FTCA requires ILECs to make those systems available to competitive local exchange carriers (CLECs). This failure to offer access allegedly resulted in an inability of CLECs to electronically interface with Verizon's ordering system in order to relay service orders. A customer of CLEC AT&T alleged that Verizon violated Section 2 of the Sherman Act when it either delayed filling, or failed to fill, orders placed by CLECs' customers, in an effort to discourage customers from becoming or remaining CLEC customers. The Court rejected these and other allegations, concluding that the FTCA created a broad regulatory environment that abrogated the need for antitrust scrutiny. The remedy was to seek a regulatory review rather than proceed in court.

## Arbitration

In an intersection of the law governing both arbitration and insurance, the Eleventh Circuit has held<sup>21</sup> that the provision of the Georgia Arbitration Code<sup>22</sup> excluding arbitration clauses in insurance contracts from its coverage is not preempted by the Federal Arbitration Act<sup>23</sup>. Instead, a provision of the McCarran-Ferguson Act<sup>24</sup> leaves regulation of the insurance industry to the states.

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## Endnotes

1. Hostetler v. Answerthink, 599 S.E.2d 271 (Ga. App. 2004).
2. Palmer & Cay v. Marsh & McLennan Companies, 2005 WL 737048, n. 16 (11<sup>th</sup> Cir. April 1, 2005).
3. Id.
4. BellSouth v. Forsee, 265 Ga. App. 589 (Ga. App. 2004), *cert. denied*.
5. Dent Wizard Int'l. Corp. v. Brown, 2005 WL 704349 (Ga. App. March 29, 2005).
6. 47 U.S.C. §231. COPA prohibits the knowing posting, for commercial purposes, of World Wide Web content that is "harmful to minors", with material that is "harmful to minors" (e.g., anyone under 17 years of age) being defined as: "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. §231(e)(6). Speech which falls with-

in these definitions is deemed criminal under the statute, but those who employ specified means to prevent minors from gaining access to such prohibited materials on their web site have an affirmative defense. Such approved means include restricting access to minors by requiring the use of a credit card, debit card, adult access code, adult personal identification number, digital certificate that verifies age, or other reasonable measure. 47 U.S.C. §231(c)(1).

7. Ashcroft v. American Civil Liberties Union, 124 S.Ct. 2783 (2004).
8. *See, e.g., Reno v. American Civil Liberties Union*, 117 S.Ct. 2329 (1997).
9. Ashcroft v. ACLU, 124 S.Ct. at 2788-89. The decision was 5-4, with Kennedy, Stevens, Souter, Thomas and Ginsburg in the majority and Scalia, Breyer, Rehnquist and O'Connor in the dissent.
10. This is a term of art used to describe devices that illegally decrypt satellite transmissions.
11. 18 U.S.C. §2512.
12. The author has represented clients in litigation against DirecTV in the past, but is not currently handling any such litigation.
13. Electronic Communications Privacy Act of 1986, 18 U.S.C. §§2510-2522. DirecTV has also alleged violations of 47 U.S.C. §605, 18 U.S.C. §2511 and 18 U.S.C. §2512.
14. DirecTV, Inc. v. Treworgy, 373 F.3d 1124 (11<sup>th</sup> Cir. 2004).
15. Treworgy, 373 F.3d at 1127.
16. United States v. Steiger, 318 F.3d 1048-1049 (11<sup>th</sup> Cir. 2003).
17. Steiger, 318 F.3d at 1050.
18. Pub.L.104-104, 110 Stat. 56.
19. Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 124 S.Ct. 872 (2004).
20. 15 U.S.C. §2.
21. McKnight v. Chicago Title Insurance Co., Inc., 358 F.3d 854 (11<sup>th</sup> Cir. 2004).
22. O.C.G.A. §9-9-2.
23. 9 U.S.C. §81 et seq.
24. 15 U.S.C. 1012(b).



## TORT REFORM COMES TO GEORGIA: AN OVERVIEW OF SENATE BILL 3

By Halli D. Cohn  
and Sarah T. Sloan

Tort reform has proved an elusive target in Georgia. For three years or more, Georgia doctors struggled to persuade the General Assembly to cap non-economic damage awards in medical malpractice cases.<sup>1</sup> Unconvinced, the General Assembly sent measures capping damages to languish in committee. Advocates of tort reform launched a new attack and turned their attention to changing the composition of the General Assembly. Their new strategy worked<sup>2</sup>, and in 2005, the battle for tort reform finally bore fruit. After the state's largest malpractice insurer, MAG Mutual, gave Georgia senators a written promise to drop premiums by 10 percent upon enactment of Senate Bill 3, the Senate voted 39 to 15 to pass an amended version of the tort reform bill.<sup>3</sup> Then, after raising the cap on non-economic damages in medical mal-

practice cases,<sup>4</sup> the Georgia House of Representatives approved Senate Bill 3. Governor Sonny Perdue signed the tort reform legislation into law on Feb. 16, 2005.

Sponsors of the legislation sold tort reform to Georgians as a much-needed response to a burgeoning healthcare crisis brought on by "high malpractice awards [that are] making health care too expensive."<sup>5</sup> Opponents of the legislation blamed insurance companies, not malpractice litigation, for high premiums.<sup>6</sup> Others argued that, at its roots, Senate Bill 3 was less about helping doctors and more about punishing trial lawyers.<sup>7</sup> Whatever the impetus behind Senate Bill 3, the aggressive new tort reform package packs quite a punch. But medical malpractice plaintiffs are not the only ones on the receiving end. Senate Bill 3 effects dramatic changes in



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all areas of civil litigation in Georgia. Following is an overview of the all provisions of Senate Bill 3, with particular emphasis on those provisions likely to have the most significant impact on product liability litigation in Georgia: the adoption of the *Daubert* standard and the elimination of joint and several liability.

## Provisions Affecting Medical Malpractice Litigation

Supporters of Senate Bill 3 touted the measure as a medical malpractice reform bill. Indeed, all provisions in Senate Bill 3 will affect medical malpractice litigation, and most of the provisions will only affect medical malpractice suits. Eight of the bill's 13 substantive sections<sup>8</sup> take specific aim at matters involving healthcare providers or healthcare facilities.

### Section 3: The Affidavit Requirement

Section Three amends the provisions of O.C.G.A. § 9-11-9.1 relating to affidavits in professional malpractice cases. In any action for damages alleging professional malpractice, O.C.G.A. § 9-11-9.1 requires a plaintiff to file with the complaint an affidavit of a competent expert. That affidavit must specifically state at least one negligent act or omission and its factual basis. If a plaintiff filed suit within ten days of the expiration of the statute of limitations (or had a good faith belief that he filed suit within that ten day window), the old law lifted the contemporaneous filing requirement and allowed that plaintiff to submit the expert affidavit within 45 days after filing the complaint. Under the newly amended § 9-10-9.1,

however, the contemporaneous filing requirement applies regardless of when a plaintiff files the malpractice complaint.

### Section 4: Medical Authorization Forms

O.C.G.A. § 9-11-9.2, the new code section set forth in Section 4, requires medical malpractice plaintiffs<sup>9</sup> to file a medical authorization form contemporaneously with the complaint. The form must authorize the defendant's attorney to obtain and disclose protected health information necessary defend the allegations set forth in the complaint; it must authorize the defendant's attorney to discuss the care and treatment of the plaintiff or the plaintiff's decedent with all treating physicians. The form also has to authorize the release of all protected health information, unless that information is protected by privilege. The failure to provide this authorization shall subject the complaint to dismissal.<sup>10</sup>

### Section 6: Expressions of Sympathy or Regret

As a general rule, admissions by a party-opponent are admissible evidence. However, Section Six introduces a code section that creates a new species of privileged or barred communications. The newly enacted O.C.G.A. § 24-3-37.1 affords special protection to all "statements, affirmations, gestures, activities or conduct expressing benevolence, regret, apology, sympathy, commiseration, condolence, compassion, mistake, error or a general sense of benevolence" that a healthcare provider<sup>11</sup> makes to a patient, a patient's relative, or a patient's representative. Now, when a patient or her representative sues

a healthcare provider for "an unanticipated outcome of medical care,"<sup>12</sup> she may not introduce such expressions as evidence of liability or as an admission against interest.<sup>13</sup>

### Section 8: Reporting Medical Malpractice Awards

Section Eight amends O.C.G.A. § 33-3-27(b) as it relates to reports of medical malpractice judgments and settlements. The new subsection requires every medical malpractice insurer in Georgia to provide written notice to the Composite State Board of Medical Examiners every time it pays a judgment or enters a settlement agreement against a licensed Georgia physician, regardless of the amount paid. The old law required such reports only for judgments and settlements in excess of \$10,000.

### Section 9: Physician Discipline

This section modifies O.C.G.A. § 43-34-37, which regulates disciplinary actions involving physicians. Under the amendments set forth in Section Nine of Senate Bill 3, the Composite State Board of Medical Examiners must assess a physician's or resident's fitness to practice medicine if the board has disciplined him three times in 10 years. The assessment must include an on-site visit to the physician's practice. The board must conduct the assessment within six months of the third disciplinary action and may take any action necessary to reduce errors and promote patient safety.<sup>14</sup> Also, if an insurance company notifies the board that it has paid a medical malpractice judgment or settlement in excess of \$100,000, the board must investigate that insured physician.<sup>15</sup>



## ***Section 10: Actions Arising out of the Provision of Emergency Medical Care***

Section Ten adds a new code section to Title 51 of the Georgia Code. O.C.G.A. § 51-1-29.5 begins by defining various terms, including emergency medical care,<sup>16</sup> health care institution,<sup>17</sup> and health care liability claim.<sup>18</sup> More importantly, subsections (c) and (d) raise the standard of proof for actions arising out of the provision of emergency medical care in a surgical suite or in a hospital's emergency department or obstetrical unit. The new law requires the plaintiff in such an action to prove by clear and convincing evidence that the defendant-physician acted with gross negligence. Further, the court must instruct the jury to consider:

- whether the person providing care did or did not have the patient's medical history or was unable to obtain a full medical history, including the knowledge of pre-existing medical conditions, allergies, and medications;
- the presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;
- the circumstances constituting the emergency; and
- the circumstances surrounding the delivery of the emergency medical care.<sup>19</sup>

## ***Section 11: Hospitals & Vicarious Liability***

Premised upon the doctrines of actual and apparent agency, the new law set forth in Section 11 of Senate Bill 3 limits hospitals' vicarious liability for the negligence of a non-employee physician or other health care professional. Under O.C.G.A. § 51-2-5.1, a hospital is not vicariously liable for the acts of

independent contractors; a hospital is only vicariously liable for the acts of its agents or employees. Section 51-2-5.1 directs courts to look first at unambiguous contracts between the healthcare professional and the hospital to decide whether the professional is an employee or an independent contractor. Where no such unambiguous contract exists, a plaintiff can prove that the healthcare professional is an employee if she can show by a preponderance of the evidence that the hospital reserves the right to control the time, manner, or method in which the healthcare provider performs his services. Subsection (g) lists factors that may and may not be considered as evidence of such control.<sup>20</sup>

O.C.G.A. § 51-2-5.1 also allows hospitals to avoid vicarious liability by expressly notifying patients that a health care professional is an independent contractor. The hospital can either post a notice containing statutorily required language,<sup>21</sup> or it can obtain a written acknowledgement from the patient or the patient's personal representative containing language similar to that required for the notice.

## ***Section 13: Limiting Non-Economic Damages Awards***

This section of Senate Bill 3 adds a thirteenth Chapter to Title 51 of the Georgia Code. Chapter 13 limits the award of non-economic damages in medical malpractice actions. In any action, including an action for wrongful death, against healthcare providers, a plaintiff may not recover more than \$350,000 in non-economic damages regardless of the number of causes of action asserted and regardless of the number of defendant-healthcare providers found liable. Similarly, a plaintiff may not recover

more than \$350,000 in non-economic damages in any action, including wrongful death actions, against a single medical facility. In actions against multiple medical facilities, a plaintiff may not recover more than \$700,000 in non-economic damages from all medical facilities found liable. In no event can the aggregate amount of non-economic damages in a medical malpractice award exceed \$1,050,000.<sup>22</sup>

## **Provisions Affecting All Areas of Civil Litigation**

### ***Section 2: Vanishing Venue & Forum Non Conveniens***

Generally, venue lies in the county where the defendant resides. The Georgia Constitution provides special exceptions to this rule for certain cases, including

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cases involving divorce, title to land, equity, and makers and endorsers of notes. The Georgia Constitution also contains a commonly-relied-upon exception regarding suits against joint tortfeasors, joint obligors, joint trespassers, joint promisors and the like.<sup>23</sup> In a suit against joint tortfeasors residing in different counties, venue is proper in any county where one of the defendant-tortfeasors resides.

Under the old venue doctrine, if the resident defendant was somehow discharged from the case, venue vanished as to the nonresident defendants. The nonresident defendant could then move to set aside the judgment, and the case would start over again in another county. In 1999, the General Assembly enacted O.C.G.A. § 9-10-31, hoping to eliminate the problem of vanishing venue. The original § 9-10-31 provided that if all resident defendants were discharged from liability before the trial commenced, the nonresident defendant could require the transfer of the action. If venue would be proper in more than one county, the plaintiff could choose the county. If, however, the trial had commenced before the resident defendant's departure from the case, the court could transfer the case only if all parties agreed.

Section 2 of Senate Bill 3 sets forth an amended version of § 9-10-31. After expressly recognizing the constitutionality of the long-recognized joint tortfeasor exception,<sup>24</sup> the General Assembly did something remarkable. It resurrected the vanishing venue doctrine. In § 9-10-31(d), the General Assembly removed the language that required consent from all parties before a court could transfer a

trial that had commenced before the resident defendant's departure from the case. It struck the very provision enacted less than 10 years before "to eliminate the waste of time and resources to courts and parties under the vanishing venue doctrine" and "to provide for a fairer and more predictable rule of venue."<sup>25</sup> Under the new law:

If all defendants who reside in the county in which an action is pending are discharged from liability before or upon the return of a verdict by [the trier of fact], a nonresident defendant may require that the case be transferred to a county and court in which venue would otherwise be proper. If venue would be proper in more than one county, the plaintiff may elect from among the counties in which venue is proper and the court in which the action shall proceed.<sup>26</sup>

Additionally, O.C.G.A. § 9-10-31(c) changes the venue rules for medical malpractice claims. In any action involving a medical malpractice claim, a nonresident defendant may require the court to transfer the case to the county of that defendant's residence *if* the tortious act upon which the plaintiff bases her medical malpractice claim occurred in that same county.

Vanishing venue is not the only surprise for Georgia litigants in Senate Bill 3. Section 2 contains another new code section, O.C.G.A. § 9-10-31.1. This new statute finally brings the doctrine of forum non conveniens to Georgia. Under § 9-10-31.1, a court can simply dismiss a claim if it is one that would be more properly tried out of state. Further, if the claim would be more properly

tried in a different county or venue in Georgia, the court can transfer the claim to the appropriate county. Forum non conveniens factors include: access to sources of proof; availability of witnesses; possibility of viewing the premises; expense and burden to the defendant; administrative difficulties for the court; and the traditional deference to the plaintiff's choice of forum.<sup>27</sup> Importantly, § 9-10-31.1(d) provides that the court may not dismiss a claim under this Code section until the defendant files with the court a written stipulation that all defendants waive the right to assert a statute of limitations defense in all other states where the claim was not barred at the time the plaintiff filed suit in Georgia.

### ***Section 5: Offer of Judgment***

Section 5 of Senate Bill 3 proffers a new code section, O.C.G.A. § 9-11-68, that applies only to actions in tort. Under § 9-11-68, either party may serve a written offer to settle a tort claim for a specified amount. A party making an offer of judgment (the "offeror") must do so at least 30 days after service of the complaint but no later than 30 days before trial. The offeror must serve the offer via certified mail or statutory overnight delivery in the form required by O.C.G.A. § 9-11-5; the offeror must also include a certificate of service with the offer. Section 9-11-68(a) dictates that the offer be in writing and state it is made pursuant to § 9-11-68. Further, the offer must identify: 1- the parties making the offer; 2- the parties to whom the offer is being made; 3- the claim or claims the offer is attempting to resolve; 4- any conditions of the offer; 5- the amount proposed; 6- the amount proposed to settle a claim for puni-

tive damages, if any; and 7-whether the amount includes attorneys fees.<sup>28</sup>

An offer for judgment remains open for 30 days unless the offeror withdraws it in writing or the offeree either expressly accepts or rejects the offer. If an offeror withdraws the offer before the 30 days is up, he cannot get attorney's fees. Counteroffers operate as both a rejection and an offer.<sup>29</sup>

When a complaint sets forth a tort claim for money and a litigant rejects or otherwise fails to accept an offer of judgment, that litigant may have to pay the offeror's attorney's fees. If the judgment the litigant finally obtains is not at least 25 percent more favorable than the last offer, § 9-11-68(b) requires him to pay the offeror's attorney's fees and costs incurred after the last rejection of the offer. Section 9-11-

68(d) provides that, upon motion made within 30 days after the entry of the judgment, voluntary dismissal or involuntary dismissal, the court shall determine if the offer of judgment was 25 percent more favorable than the monetary award. If so, the court will then award reasonable attorney's fees and costs or set off such fees and costs against any award. Further, if a party is entitled to costs and fees, the court will also decide whether the offeror made the offer in good faith. The court may disallow an award of costs and fees if it finds the offer lacked good faith.

The last subsection of § 9-11-68 provides a procedure for penalizing frivolous claims or defenses. Subsection (e) allows the prevailing party to make a motion asking the finder of fact to determine whether the opposing party presented a

frivolous claim or defense. The court will then hold a separate bifurcated hearing where the finder of fact will decide whether the opposing party actually did assert frivolous claims or defenses and, if he did, whether to award damages. This procedure stands as an alternative to O.C.G.A. § 9-15-14—a party may elect to pursue one or the other, but not both.

### **Section 7: The "New" Daubert Standard**

The old Georgia statute on expert opinion evidence provided simply that, "[t]he opinions of experts on any question of science, skill, trade, or like questions" were always admissible.<sup>30</sup> Its broad language allowed courts to fashion their own standards for admitting expert testimony. Despite imposing some requirements, the courts' approach to expert testimony in



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Georgia has never come close to the substantive evaluation of expert testimony found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Instead, Georgia courts evaluated expert testimony under the standard set out in *Harper v. State*, 249 Ga. 519 (1982). Under *Harper*, expert testimony was admis-

**The common law rule of joint and several liability, or the “deep pocket” rule, makes each and every defendant in a tort lawsuit liable for the entire amount of the plaintiff’s damages regardless of the defendants’ relative degrees of fault or responsibility.**

sible so long as the expert relied on scientific principles or techniques that had reached a “stage of verifiable certainty.”<sup>31</sup> The Supreme Court of Georgia, however, never gave the lower courts any guidance as to how to determine whether scientific principles or techniques had reached the requisite stage of verifiable certainty, and the resulting confusion led to a complete departure from *Harper*. A *de facto* standard for the admissibility of expert testimony eventually emerged. Under the *de facto* standard, courts admitted experts’ opinions so long as the expert had “adequate credentials.” Any lack of scientific support for the opinion or deficiency in the expert’s methodology or reasoning only affected the weight of the testimony. Trial courts regularly admitted marginally-credentialed expert testimony that was often undeniably unscientific and unreliable.

No case better illustrates the folly of the “pre-Senate Bill 3” approach than *Home Depot U.S.A., Inc. v. Tvrdeich*, 268 Ga.App. 579

(2004). There, the Georgia Court of Appeals held that *Harper* only applied to expert testimony supported by a test, procedure or technique. Expert testimony that *was not* supported by a test, procedure or technique need not meet the *Harper* standard. Contrary to both precedent and logic, the *Home*

*Depot* approach would afford an untested scientific theory less scrutiny than a tested one.

Before the *Home Depot* confusion had a chance to set in, however, the General Assembly enacted O.C.G.A. § 24-9-67.1. Included in Section 7 of Senate Bill 3, § 24-9-67.1 clearly delineates the criteria for admissible expert testimony. It applies to all civil actions and provides that, to be admissible at trial, expert testimony must assist the trier of fact to understand the evidence or determine a fact in issue. The testimony must stand on sufficient facts or data that are or will be admitted into evidence at the hearing or trial; it must derive from reliable principles and methods; and the witness must have applied the principles and methods reliably to the facts of the case.<sup>32</sup> Experts may only rely on facts of the kind reasonably relied upon by other experts in that field. Moreover, § 24-9-67.1(f) provides that:

It is the intent of the legislature that, in all civil cases, the courts

of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. V. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.<sup>33</sup>

The admittedly vague statutory language appears to enact a most-favored-nation rule for Georgia litigants. If some significant body of jurisdictions would reject the expert testimony, then Georgia’s courts should reject it as well.<sup>34</sup>

The *Home Depot* approach would have left courts confused and expert testimony unchecked. Indeed, it would have essentially exempted most expert testimony from any standard of reliability. Fortunately, O.C.G.A. § 24-9-67.1 stops the confusion before it ever really had the chance to start. All expert opinions—based on tested and untested theories—will now be admissible only if they have sufficient scientific support to provide a reliable basis for a jury verdict.

### ***Section 12: Joint & Several Liability***

The common law rule of joint and several liability, or the “deep pocket” rule, makes each and every defendant in a tort lawsuit liable for the entire amount of the plaintiff’s damages regardless of the defendants’ relative degrees of fault or responsibility. Some com-

plain that joint and several liability converts lawsuits into little more than searches for financially viable defendants, while others applaud the doctrine for advancing the cause of full and fair compensation for injured plaintiffs.

Fair or not, the joint and several liability doctrine has two definite effects: it creates the risk that one defendant will bear sole responsibility for the fault of the other defendants, and it leaves the onus of joining other potentially liable parties on the defendant. Under Georgia law, joint and several liability put even more burden on defendants. Each defendant-tortfeasor was individually responsible for the entire amount of damages suffered.<sup>35</sup> Worse, that defendant-tortfeasor did not have the right to join a party simply because he might be a joint tortfeasor.<sup>36</sup> Unable to bring in the other responsible parties, a defendant often had to wait until judgment was rendered against him before pursuing a separate action for contribution or indemnity.<sup>37</sup>

Set out in Section 12 of Senate Bill 3, O.C.G.A. § 51-12-31 eliminates joint and several liability. Further, if the trier of fact finds the plaintiff responsible for some portion of his injuries, O.C.G.A. § 51-12-33 allows the trier of fact to reduce the amount of any damages awarded in proportion to the plaintiff's percentage of fault. Section 51-12-33 also allows the trier of fact to consider the fault of all persons or entities who contributed to the alleged injuries, regardless of whether the person or entity was, or could have been, named as a party to the suit.<sup>38</sup> The trier of fact can then apportion damages among the persons liable accordingly.<sup>39</sup> Importantly, § 51-12-33

still prevents a plaintiff from recovering any damages if he is 50 percent or more responsible for the injury or damages claimed.<sup>40</sup>

Doing away with joint and several liability ameliorates the risk that one defendant will bear the entire loss, even if the every other defendant is judgment proof.<sup>41</sup> With the enactment of § 51-12-31 and § 51-12-33, plaintiffs will have much less incentive to pursue deep pocket defendants—like manufacturers or other corporations—who did not behave tortiously or are only minimally responsible.

## Conclusion

Some code sections, as amended and enacted by Senate Bill 3, apply only to causes of action arising on or after Feb. 16, 2005.<sup>42</sup> Most of the aggressive tort reform package, however, reaches back to causes of action pending on Feb. 16, 2005.<sup>43</sup> Indeed, many litigants in this state have already felt the impact of Senate Bill 3. Tort reform has finally come to Georgia. But only years of litigation and judicial interpretation will tell whether Georgia should let it stay.

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## Endnotes

1. Proponents of tort reform in Georgia had hoped that the General Assembly would enact "meaningful" legislation during the two-year legislative session that ended April 7, 2004. The General Assembly did pass some measures aimed at reducing medical malpractice insurance premiums in 2003. Ultimately, however, the General Assembly vanquished hopes for tort reform in 2004. See [www.gachamber.com/story-404127EED91B40F78.html](http://www.gachamber.com/story-404127EED91B40F78.html) (March 30, 2005).
2. In 2004, MAG Mutual, Georgia's largest malpractice insurer, supported thirteen candidates for election to the Georgia General Assembly; twelve won.
3. For the complete text of Senate Bill 3, see [http://www.legis.state-ga.us./legis/2005\\_06/fulltext/sb3.htm](http://www.legis.state-ga.us./legis/2005_06/fulltext/sb3.htm).
4. As approved by the Senate, the bill capped non-economic damages in medical malpractice cases at \$250,000.
5. See Kristen Wyatt, *Medical Reform Passes State Senate*, THE MACON TELEGRAPH, available at <http://www.macontelegraph.com> (February 23, 2005). Further, Section One of Senate Bill Three provides that:  
The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state....The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will

- thereby assist in promoting the provision of health care liability insurance by insurance providers.
6. Allison Wall, executive director of the consumer group Georgia Watch, said, "no one wins except for insurance companies.... When you want reductions in insurance costs, you need better regulation of the insurance industry." Mike Norbut, *Georgia Enacts Tort Reform Package*, Amednews.com (March 7, 2005).
  7. See [www.redstate.org/story/-2005/2/2/91955/37358](http://www.redstate.org/story/-2005/2/2/91955/37358) (February 23, 2005) ("The Georgia State Senate has taken up and aims to pass an extremely aggressive tort reform package. For years the state's trial lawyers have backed Democrats. Now it's payback time.")
  8. Section 1 of Senate Bill 3 contains the preamble; Section 14 contains a severability clause; Section 15 sets the effective date of the legislation; and Section 16 repeals all laws in conflict with Senate Bill 3.
  9. This statute addresses actions filed against professionals, professional corporations, or other legal entities that provide health care services through a professional licensed by the State of Georgia and listed in O.C.G.A. § 9-11-9.1(d) as well as any licensed health care facility alleged to be liable based upon the action or inaction of a health care professional licensed by the State of Georgia and listed in O.C.G.A. § 9-11-9.1(d). See O.C.G.A. § 9-11-9.2(a).
  10. *Id.*
  11. O.C.G.A. § 24-3-37.1 also applies to expressions made by a health-care provider's employee or agent.
  12. An "unanticipated outcome" means the outcome of a medical treatment or procedure, whether or not resulting from an intentional act, that differs from an expected or intended result of such medical treatment or procedure. O.C.G.A. § 24-3-37.1(b)(2).
  13. O.C.G.A. § 24-3-37.1(c).
  14. O.C.G.A. § 43-4-37(j).
  15. O.C.G.A. § 43-4-37(i).
  16. Emergency medical care means bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. O.C.G.A. § 51-1-29.5(a)(5).
  17. Georgia law deems the following "health care institutions": ambulatory surgical centers, personal care homes licensed under Chapter 7 of Title 31, institutions providing emergency medical services, hospices, hospitals, hospital systems, intermediate care facilities for the mentally retarded, and nursing homes. O.C.G.A. § 51-1-29.5(a)(8).
  18. A health care liability claim is a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care, health care, or safety or professional or administrative services directly related to health care, which departure from standards proximately results in injury to or death of a claimant. O.C.G.A. § 51-1-29.5(a)(9).
  19. O.C.G.A. § 51-1-29.5(d).
  20. Factors that may be considered include: 1- the parties believed that they were creating an actual agency or employment relationship; 2- the healthcare professional receives substantially all the employee benefits received by actual employees of the hospital; 3- the hospital directs the details of the health care professional's work step-by-step; 4- the healthcare professional's services are terminable at the will of the hospital without cause and without notice; 5- the hospital withholds, or is required to withhold, federal and state taxes from the remuneration paid to the healthcare professional for services to the patients of the hospital; and 6- factors not specifically excluded in O.C.G.A. § 51-2-5.1(g)(2). Factors that *may not* be considered include: 1- a requirement by the hospital that such health care professional treat all patients or that any health care professional or group is obligated to staff a hospital department continuously or from time to time; 2- the hospital's payment to the health care professional on an hourly basis; 3- the provision of facilities or equipment by the hospital; 4- the fact a health care professional does not maintain a separate practice outside the hospital; 5- the source of the payment for the professional liability insurance premium for that health care professional; 6- the fact that the professional fees for services are billed by the hospital; or 7- any requirement by the hospital that such health care professional engage in conduct required to satisfy any state or federal statute or regulation, any standard of care, any standard or guideline set by an association of hospitals or health care professionals, or any accreditation standard adopted by a national accreditation organization.
  21. The notice must contain language substantially similar to the following: Some or all of the health care professionals performing services in this hospital are independent contractors and are not hospital agents or employees. Independent contractors are responsible for their own actions and the hospital shall not be liable for the acts or omissions of any such independent contractors. O.C.G.A. § 51-2-5.1(c)(3).
  22. O.C.G.A. § 51-13-1(b).
  23. Art. IV, Sec. 11, Para. IV, GA CONST. (1983).
  24. O.C.G.A. § 9-10-31(b).
  25. *Robinson v. Star Gas of Hawkinsville, Inc.*, 533 S.E.2d 97 (Ga.App. 2000).
  26. O.C.G.A. § 9-10-31(d).
  27. O.C.G.A. § 9-10-31.1(a)(1) – (7).
  28. O.C.G.A. § 9-11-68(a).
  29. O.C.G.A. § 9-11-68(c).
  30. Formerly O.C.G.A. § 24-9-67.
  31. *Id.*
  32. *Id.*
  33. O.C.G.A. § 24-9-67.1(f).
  34. This provision applies to all defendants, not just product liability defendants. For example, the new rule also applies to medical malpractice defendants. Some critics marvel at Georgia's unabashed determination to lead the Nation in the inadmissibility of expert evidence in malpractice cases. See [www.daubertontheweb.com](http://www.daubertontheweb.com) (February 23, 2005).
  35. *Trice v. Wilson*, 113 Ga.App. 715, 725 (1966). See *Gay v. Piggly Wiggly S., Inc.*, 183 Ga.App. 175, 176.
  36. See *Ford v. Olympia Skate Ctr. Inc.*, 213 Ga.App. 600, 602 (holding that a defendant does not have the right to join a party under O.C.G.A. § 9-11-19 or § 19-11-20 simply because he may be a joint tortfeasor).
  37. See O.C.G.A. § 51-12-32; *Satilla*



*Cnty. Serv. Bd. v. Satilla Health Servs., Inc.*, 251 Ga.App. 881 (2001).

38. The trier of fact can only consider the negligence of a nonparty, however, if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice at least 120 days before trial that the nonparty was at fault. To give the plaintiff "notice," the defending party has to file a pleading in the action designating the nonparty and providing his name and last known address along with a brief statement of the basis for believing the nonparty to be at fault. Findings of fault against nonparties do not

subject the nonparty to liability in any action and cannot be introduced as evidence of liability in any action. O.C.G.A. § 51-12-33.

39. O.C.G.A. § 51-12-33(b).  
 40. O.C.G.A. § 51-12-33(g).  
 41. *But see The Effects of Tort Reform: Evidence from the States*, available at <http://www.cbo.gov> (February 27, 2005) (noting that the elimination of joint and several liability has not had the effect that defendants had hoped for; at least one study found that the elimination of joint and several liability led only to an increase in the value of non-economic awards).  
 42. The following code sections apply

only to causes of action arising on or after February 16, 2005:

- O.C.G.A. § 51-12-31 (the elimination of joint and several liability);
  - O.C.G.A. § 51-12-33 (reduction of damages in proportion to plaintiff's fault);
  - O.C.G.A. § 51-1-29.5 (actions arising out of the provision of emergency medical care);
  - O.C.G.A. § 51-2-5.1 (hospitals and vicarious liability); and
  - O.C.G.A. § 51-13-1 (cap on non-economic damages in medical malpractice claims).
43. Every other provision in Senate Bill 3 applies to causes of action pending on February 16, 2005.

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## Medical Decision-Making in Georgia

By John J. Scroggin

“**E**very human being of adult years and sound mind has a right to determine what shall be done with his own body...”

—Justice Cardozo<sup>1</sup>

Creating documents for medical decision-making is an essential part of virtually every estate plan. The single fastest growing demographic group in the United States is those persons age 85 and above. But it is not just the aging elderly who need to plan for incapacity decision-making. The conflicts in the Florida family of Terri Schiavo

(and the recent Supreme Court decisions not to get involved in her treatment) are a ready example of why every client should plan for incapacity.

The debate over the withdrawal of nourishment and hydration for Terri Schiavo continues a long and costly legal, political and moral conflict.<sup>2</sup> The debate is fundamentally the result of advancements in medicine. By the 1960s, medical science had advanced to the stage that permanently unconscious clients could be kept alive even with little brain activity. As a result, debates began to occur about a patient’s “right to die.” In 1976, California became the first state to approve living wills. By 1992, all 50 states had adopted similar legislation.

It did not take much time for the debate to enter the court system. In 1976, the New Jersey Supreme Court rendered *In re Quinlan*.<sup>3</sup> The court decided that a heart/lung machine could be withdrawn from Karen Ann Quinlan, but provided that intravenous fluids and nourishment must continue, even though Miss Quinlan had no brain activity. Although doctors had expected her to die after being



taken off the heart/lung machine, she continued to breathe. She lived almost 10 more years on intravenous fluids and nourishment.

Fourteen years later, in *Cruzan v. Director, Missouri Department of Health*,<sup>4</sup> the U.S. Supreme Court acknowledged a constitutionally protected right to refuse lifesaving hydration and nutrition. The Supreme Court largely deferred to states to determine how this constitutional right would be exercised, particularly when the decision is made by surrogates or there is no written declaration. Missouri applied a “clear and convincing” evidence standard to determine whether such a refusal had been made by Nancy Cruzan. Although this evidence standard would necessitate a written medical directive in most cases, the Missouri courts found that Cruzan had made sufficient verbal declarations to permit withdrawal of nourishment. Eight years after the accident which rendered her permanently unconscious and without significant brain activity, Nancy Cruzan died.

The legislative branch has also established a presence in this arena. In 1990 Congress passed the Patient Self-Determination Act,<sup>5</sup> which requires health care providers (e.g., hospitals, nursing homes, hospice programs, and home health care agencies that receive Medicaid and Medicare payments) to ascertain the intent of patients about advance directives for health care and to provide patients educational materials about their rights under state law. Congress and the Florida legislature became quite involved in the Terri Schiavo case, increasing the debate over the role of the legislature in such cases.

Although the Supreme Court recognizes a constitutional right to refuse life saving medical treatment, the limits on a person’s right to die have been tested by questions over physician-assisted suicides. In 1994, an Oregon referendum<sup>6</sup> resulted in the adoption of a new statute that permitted physician assisted suicide in certain circumstances.<sup>7</sup> The implementation of the act was enjoined by the district court in *Lee v. Oregon*,<sup>8</sup> but the Ninth Circuit lifted the injunction, and the Supreme Court denied the appeal.<sup>9</sup>

In *Compassion in Dying v. Washington*,<sup>10</sup> the Ninth Circuit court of appeals overturned a Washington statute which made physician-assisted suicide a criminal act. The Ninth Circuit found a due process constitutional right to physician-assisted suicides. One month later, in *Quill v. Vacco*,<sup>11</sup> the Second Circuit Court of Appeals struck down a New York statute which prohibited physician-assisted suicide. The Second Circuit ruled that the law violated the equal protection provisions of the U.S. Constitution. On June 26, 1997, the U.S. Supreme Court overturned both circuit court decisions in *Washington v. Glucksberg*<sup>12</sup> and *Vacco v. Quill*.<sup>13</sup> The Supreme Court left it up to the states to determine whether to prohibit physician-assisted suicide. The court found no constitutional right for terminally ill patients to obtain a physician’s assistance in ending their lives. The battle over physician-assisted suicides has continued around the country.<sup>14</sup> Like 38 other states,

Georgia provides that it is a criminal act to assist in any suicide.<sup>15</sup>

In April 1998, President Clinton signed into law the Assisted Suicide Funding Restrictions Act of 1997,<sup>16</sup> which prevents the federal government from reimbursing

**As attorneys, we have a duty to assure that our clients are fully informed about the choices they are entitled to make and the implications of those choices.**

costs, associated with physician-assisted suicide. The bill also provided for the funding of programs to reduce the rate of suicide by persons with disabilities or terminal or chronic illnesses.

Cases such as the Terri Schiavo case have also created greater discussion of the religious and ethical issues over a person’s “right to die.” In a talk on March 20, 2004, Pope John Paul II indicated that patients in persistent vegetative states should be fed and hydrated. The pope indicated that such treatment is “morally obligatory” and that the withdrawal of food and hydration constitutes “euthanasia by omission.”<sup>17</sup> The Pope’s remarks have created new concerns about the proper treatment of incapacitated patients<sup>18</sup> and were cited in the Terri Schiavo cases.

The Supreme Court of Georgia first addressed this issue in 1984 in the decision, *In re L.H.R.*,<sup>19</sup> a case involving the withdrawal of life support for a newborn who was diagnosed as being in a chronic vegetative state. The court noted



that the decision was for the express purpose of setting guidelines for the future handling of decisions involving the withdrawal of life support. The court held that under Georgia law, “a competent adult patient has the right to refuse medical treatment in the absence of a conflicting state interest”<sup>20</sup> and that the right “rises to the level of a constitutional right which is not lost because of the incompetence or youth of the patient.”<sup>21</sup>

The court then addressed the issue of who may exercise this right on behalf of a terminally ill patient. The court concluded that the decision-making rests in the parents or legal guardians of an infant, if the infant has been diagnosed as terminally ill and exists in a chronic vegetative state with no reasonable possibility of attaining cognitive function.<sup>22</sup> The diagnosis must be made by the attending physician, with concurrence by two other physicians who have no interest in the outcome of the case.<sup>23</sup> The court expressly stated that prior judicial review was not required, but the courts would remain available to resolve disputes.<sup>24</sup> The court made a particularly important statement that “the state has no interest in the prolongation of dying.”<sup>25</sup> Although the case involved an infant, the court held that it would apply equally to an “incompetent adult who has made no living will.”<sup>26</sup> The court concluded “that the family of the adult or the legal guardian may make the decision to terminate life-support systems without prior judicial approval or consultation of an ethics committee.”<sup>27</sup>

The constitutional right to refuse medical treatment was the focus of a 1989 Georgia Supreme Court decision, *State v. McAfee*.<sup>28</sup> Mr. McAfee was a quadriplegic who

was incapable of breathing on his own. Although there was no expectation that Mr. McAfee’s condition would ever improve, he was not incompetent, nor was he terminally ill. Mr. McAfee petitioned the Fulton County Superior Court to permit him to turn off his ventilator. The supreme court agreed with the superior court’s determination that, in the exercise of his constitutional rights, Mr. McAfee could turn off his ventilator.<sup>29</sup>

*In re L.H.R.* left open the question of whether life support would be withdrawn if the parents of a minor child disagreed. In *In re Doe*,<sup>30</sup> the Georgia Supreme Court ruled that because the parents disagreed over the whether a “do not resuscitate” order should be made for their terminally ill child, the hospital could not enter such an order for the child.<sup>31</sup> Had the patient been an incompetent adult and the dispute been over the wishes of the patient, *In re L.H.R.* would appear to permit the courts to make a determination of the patient’s wishes. Because the patient was a minor, the decision was left up to the parents.<sup>32</sup>

The legal, medical and moral controversies over euthanasia and the right to die will continue. As attorneys, we have a duty to assure that our clients are fully informed about the choices they are entitled to make and the implications of those choices. This article will discuss some of those choices in Georgia.

## MEDICAL DIRECTIVES

Most clients would prefer to decide themselves who will make their medical decisions and, in some cases, restrict the manner that the decisions can be made. Failure to

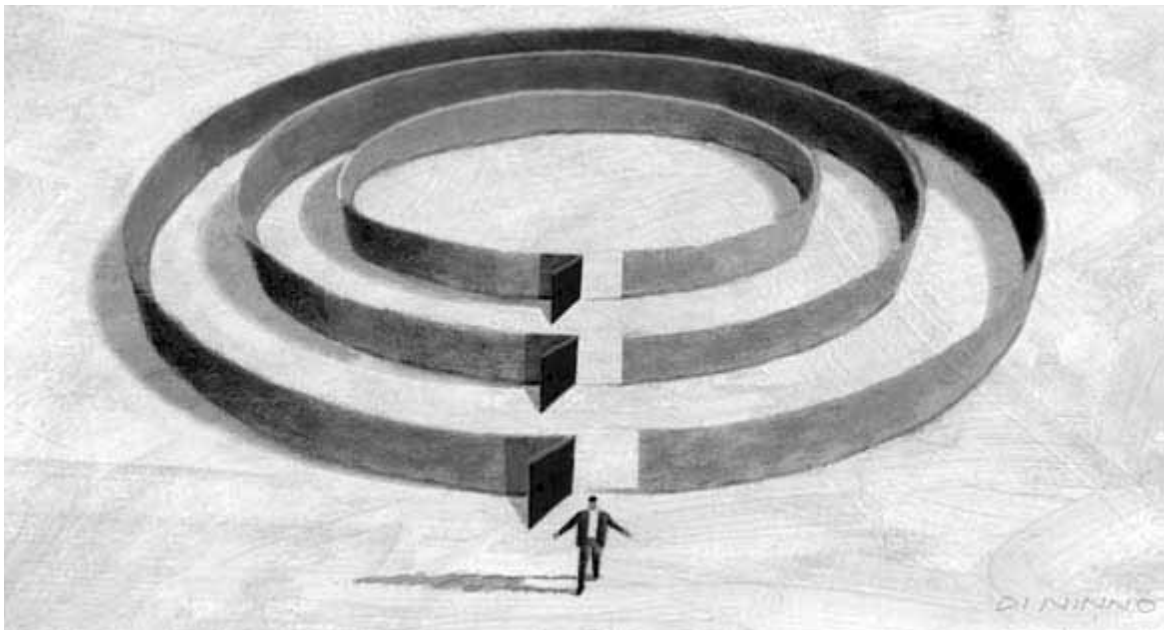
establish a legal structure by which the decisions can be made breeds both additional costs and the potential for family turmoil. For example, a 1994 study reported that having a living will or medical power of attorney saved almost \$65,000 per patient in the final stay in the hospital.<sup>33</sup> The average cost from 1990 through 1992 of persons without medical directives was \$95,305 versus \$30,478 for those who had medical directives. Since 1992, medical care costs have increased at a significant rate.

## Living Wills

A living will is a declaration not to provide life-sustaining treatment if there is no significant hope of recovery. A living will is only operative when its maker can no longer make medical decisions. Although verbal declarations have been approved by the courts (e.g., Nancy Cruzan), Georgia residents are well advised to sign written documents which meet the requirements of the Georgia statutes. Failure to sign a proper living will may result in family conflicts over the client’s declared intentions (e.g., the Schiavo case) and necessitate court cases to discern what the client’s intentions were.

O.C.G.A. § 31-32-3 provides the statutory form for Georgia living wills. The statute provides that the exact form of the statutory form does not have to be followed.<sup>34</sup> Because the statutory form contains double negatives and confusing language (e.g., the pregnancy clause), many attorneys have modified the form to make it easier to understand. However, the form must be executed with the required formalities to be enforceable under Georgia law.

The Georgia form provides that life-sustaining treatment (includ-



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ing nourishment and hydration) can be removed if a person is in a "terminal condition," "coma with no reasonable expectation of regaining consciousness," or "in a persistent vegetative state with no reasonable expectation of regaining significant cognitive function." Each of these conditions is defined in the statute.<sup>35</sup>

Under Georgia law, if a living will was executed prior to March 28, 1986, it may have a seven-year

drawal of life support. The document can name successor power holders and guardians.

Although living wills and powers of attorney both deal with life-sustaining issues, clients should generally sign both documents. Having a medical power of attorney generally assures that the family, not the doctors have the final say in treatment. But if it is clear that life cannot be sustained, the power holder can step away and

making over both the client's living will and any guardian.<sup>40</sup> Unless otherwise provided in an order by a probate or superior court having jurisdiction, the appointment of a guardian does not revoke the health care power of attorney.<sup>41</sup> The statute also provides that the healthcare power of attorney can extend beyond the principal's death if "necessary to permit anatomical gifts, autopsy or disposition of remains."<sup>42</sup>

Georgia provides that a health-care provider or other person who acts in good faith in reliance upon the direction of the decision of the person named in the power of attorney is protected and released from liability. The statute also limits the liability of agents who act in good faith.<sup>43</sup>

Unless the power of attorney expressly provides otherwise, if marriage occurs after signing the document, the marriage is an automatic revocation of the designation of any person to serve as power holder other than the principal's spouse.<sup>44</sup> Effectively, powers of attorney completed before marriage that do not name the new spouse as power holder are revoked at the time of the marriage, unless drafted in contemplation of the marriage. The Georgia statutes provide that if a marriage is dissolved or annulled, the dissolution revokes the principal's former spouse as the principal's agent to make healthcare decisions.<sup>45</sup> Thus, it is important to name one or more successors to a spouse in case a divorce occurs or the named surrogate is not able to serve.

Who should be the power holder? Married clients usually name a spouse. However, if the marriage has not been in existence long, some people will name another

## Georgia provides that a healthcare provider or other person who acts in good faith in reliance upon the direction of the decision of the person named in the power of attorney is protected and released from liability.

period of effectiveness.<sup>36</sup> However, the person may be able to cross-out the paragraph that limits it to seven years indicating an intent to go to a longer time period.<sup>37</sup> Generally, clients should sign a new living will that complies with all changes in the law, including the specific right to withdraw nourishment and/or hydration.

Do only elderly clients need to consider living wills? No. Remember, Nancy Cruzan, Karen Ann Quinlan and Terri Schiavo were all in their 20s and 30s when they became incapacitated.

### Durable Power of Attorney for Healthcare

A living will is simply a declaration not to use life-sustaining measures. A health care power of attorney (sometimes called a medical power of attorney) is designed to give someone the power to make medical decisions upon incapacity, including the with-

drawal of life support. The document can name successor power holders and guardians.

allow the living will to take effect. Saying "this is his decision, not mine" makes it much easier psychologically for the power holder. O.C.G.A. § 31-36-10 contains the statutory form of a Georgia Durable Power of Attorney for Healthcare. The statute provides that the exact form of the Georgia statutory form does not have to be followed in order for the document to be enforceable and provides that the language can be combined with any other form of a power of attorney, such as a general power of attorney governing property decisions.<sup>38</sup> To be enforceable, the document must be executed in compliance the statutory formalities (e.g., in front of two witnesses who are at least 18 years of age and who are unrelated to the person signing the living will). Only competent adults may sign a health care power of attorney.<sup>39</sup>

Georgia statutes provide that the person holding a Healthcare Power of Attorney has priority decision-



family member. It is generally advisable not to name emotional individuals or children under age 30 as power holders (i.e., they may not be able to emotionally handle the required decision-making). Having someone who has medical training can be particularly useful.

It is especially important that unmarried individuals appoint power holders to minimize the risk of fights over who should act as guardian or decision-maker. But as the Schiavo conflict demonstrates, questions can even be made about a spouse's right to make medical decisions.

Can more than one person be named as power holder? The statute does not recognize multiple power holders. The statute provides that the power is delegated to "a trusted agent."<sup>46</sup> Therefore, it is generally advisable to appoint one power holder at a time.

## Medical Directives

Many clients are concerned about how the holder of a power of attorney will exercise his or her discretionary authority. If the client is concerned about specific decisions the agent may make, review using a more detailed medical directive. Copies of the more detailed directives can be obtained at [www.Medicaldirective.org](http://www.Medicaldirective.org). A similar form is available at [www.help4srs.com](http://www.help4srs.com).

## Personal Notes

It is also important for clients to leave information for their family on the types of decisions they want to be made if they become incapacitated. For example, "I want to be kept at home as long as possible." Clients may want to consider executing ethical wills<sup>47</sup> in which they discuss their thoughts on receiving

## Internet Resources for the Elderly

- **[www.aoa.gov](http://www.aoa.gov)**  
The federal government's Agency on Aging
- **[www.eldercare.gov](http://www.eldercare.gov)**  
A website of the Agency on Aging
- **[www.medicare.gov](http://www.medicare.gov)**  
The national website for Medicare
- **[www.cms.gov](http://www.cms.gov)**  
The government's center for both Medicare and Medicaid advice
- **[www.socialsecurity.gov](http://www.socialsecurity.gov)**  
The Social Security website
- **[www.aarp.org](http://www.aarp.org)**  
American Association of Retired Persons website
- **[www.caremanager.org](http://www.caremanager.org)**  
A helpful website on care giver resources
- **[www.nia.nih.gov](http://www.nia.nih.gov)**  
Providing information on gerontology

## Articles Discussing the Moral, Ethical and Religious Issues of Medical Directives

- Rabbi Yitchok Breitowitz, The Right to Die: A Halachic Approach  
[www.us-israel.org/jsource/Judaism/right\\_to\\_die.html](http://www.us-israel.org/jsource/Judaism/right_to_die.html)
- A discussion of the topic and how different cultures deal with the issue can be found at [www.ethics.acusd.edu/applied/euthanasia/](http://www.ethics.acusd.edu/applied/euthanasia/)

## Websites on Aging and Critical Care Issues

- [www.critical-conditions.org](http://www.critical-conditions.org)
- [www.abanet.org/aging/toolkit](http://www.abanet.org/aging/toolkit)
- [www.ama-assn.org/public/booklets/livgwill.htm](http://www.ama-assn.org/public/booklets/livgwill.htm)
- [www.help4srs.com](http://www.help4srs.com)
- [www.mag.org/content](http://www.mag.org/content)
- [www.nolo.com](http://www.nolo.com)
- [www.Medicaldirective.org](http://www.Medicaldirective.org).
- [www.caregiver.org](http://www.caregiver.org)

## Books On Medical Decision Making

- *Living Wills Made E-Z: Includes Power of Attorney for Healthcare (Made E-Z Guides 2001)*
- *Let Me Decide: The Health and Personal Care Directive That Speaks for You When You Can't*, William Molloy (2003)
- *What Dying People Want*, David Kuhl (2003)
- *The Needs of the Dying*, David Kessler (2000)
- *The Right to Die*, Alan Meisel & Kathy L. Cerminara (2003)

life sustaining treatment and other philosophical perspectives.

## Other States

Given the mobility of Americans, questions may arise as to how a Georgia statutory form would be treated in another state.<sup>48</sup> For example, the formal requirement governing living wills can vary substantially from state to state. In Alabama, the witnesses must be at least 19 years old<sup>49</sup> instead of the 18 years of age required in most other states. In Tennessee, the living will must be signed by witnesses and a notary.<sup>50</sup> In some states, in lieu of having two witnesses sign the living will, a notary can acknowledge the signature.<sup>51</sup> Clients should be strongly encouraged to have all of their incapacity documents reviewed if they change their state of domicile.

## LETTING THE STATE DETERMINE THE PROCESS

If a client fails to leave directions on how he or she wants decisions to be made, the decisions may be made in accordance with applicable state statutes. Among the processes are:

### Guardian Over the Person

If a Georgia resident does not sign a medical power of attorney or living will, it may be necessary to have a guardian appointed to make medical decisions.<sup>52</sup> Pursuant to the *In re L.H.R.* decision, the guardian appears to have broad authority to make medical decisions,<sup>53</sup> including the withdrawal of hydration and nourishment. The Georgia statutes create an order of

preference for guardians, with the person properly nominated by the incapacitated person having first priority.<sup>54</sup> The appointment of a guardian removes from the ward any right to consent to medical treatment.<sup>55</sup>

### Temporary Healthcare Placement

Georgia provides a process by which certain designated persons have the authority to approve the placement of an individual in a healthcare facility.<sup>56</sup> The statute does not govern the involuntary examination and treatment for mental illness<sup>57</sup> and does not give the surrogate any authority to make medical decisions for the incapacitated party. The act requires a certification that the physician believes the adult cannot consent for himself or herself and that it would be in the person's best interest to transfer to or be admitted to an alternative facility, including, but not limited to, nursing facilities, personal care homes, rehabilitation facilities and home and community-based programs.<sup>58</sup>

### Do Not Resuscitate Orders

Georgia statutes provide a decision process by which a competent adult, parents of a minor child, or a physician can make a "do not resuscitate" order, so that cardiopulmonary resuscitation will not occur for that patient.<sup>59</sup> A candidate for non-resuscitation must be someone who is diagnosed by the attending physician (and a second physician) as having a medical condition that can reasonably be expected to result in imminent death, is in a non-cognitive state

with no reasonable possibility of regaining cognitive function, or a person for who cardiopulmonary resuscitation would be medically futile.<sup>60</sup> It should be noted that a "do not resuscitate" order deals only with cardiopulmonary resuscitation and does not cover the withdrawal of hydration or nourishment.

### Medical Consent

The Georgia Medical Consent Law sets up a process by which Georgia residents or their surrogates can consent to any medical procedure "suggested, recommended, prescribed or directed" by a physician.<sup>61</sup> The law is primarily focused on cases where a durable health care power of attorney is not in place. The law provides that it shall not abridge the right of any person to refuse any medical or surgical treatment.<sup>62</sup>

### Quarantine

The Department of Human Resources and all county boards of health have the legal authority to quarantine "carriers of disease and persons exposed to, or suspected of being infected with, infectious diseases."<sup>63</sup>

## ANATOMICAL GIFTS

In many cases the body of the decedent can benefit others (e.g., cornea transplants). Power holders under medical powers of attorney have the authority to make anatomical gifts.<sup>64</sup> If a client wants only particular parts of his or her body be made available, consider attaching such a statement to the medical power of attorney. In many states (including Georgia) residents can

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acknowledge making anatomical gifts by providing a declaration on their driver's license.<sup>65</sup>

The Georgia Anatomical Gift Act<sup>66</sup> provides a priority list of persons who have the right to make anatomical gifts of parts of a deceased relative's body. It provides that the gift cannot be made if persons having the same priority of decision making disagree. However, if a person with a higher priority makes the decision, persons down the list cannot stop the gift. For example, a person having a medical power of attorney has priority over a spouse who has priority over children.<sup>67</sup>

## THE ETHICS AND MORALS SURROUNDING MEDICAL DIRECTIVES

The issues surrounding medical incapacity and the withdrawal of life support involve more than legal and medical decision-making. There are ethical, moral and religious issues that must also be addressed by both the person signing a medical directive and those who will be called upon to implement the document.

Our clients are not well served if we treat medical directives as perfunctory, standard-form documents containing a few blanks to be cavalierly initialed. As lawyers, we should help the client address the personal issues and hard decisions that can occur in both executing and implementing these documents. Once you experience the trauma of a family's struggle over such decisions, the importance of a carefully considered process becomes profoundly more clear.

Incapacity planning involves more than planning for medical decision-making upon incapacity. Clients should also consider having documents in place to assure that decisions with regard to their property, businesses and income are handled by people they have selected. They should consider drafting durable general powers of attorney, and if imminent death or incapacity is an issue, consider using a living trust.



**John J. Scroggin, AEP, J.D., LL.M.(tax),** practices from a historic home in Roswell and is a graduate of the University of Florida

Law School. He is a frequent speaker on estate, tax and business planning issues. Scroggin is the author of more than 140 published articles, three books and four prior articles for the *Journal*.

### Endnotes

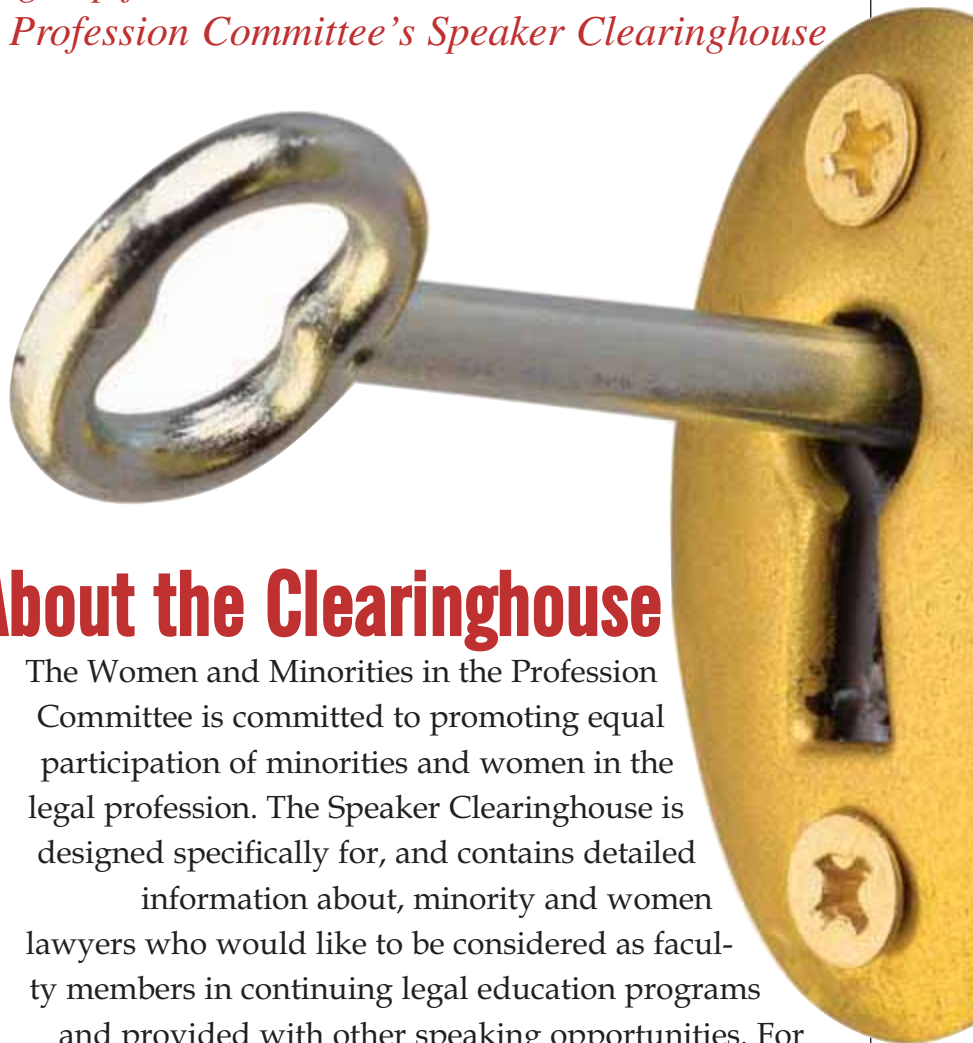
1. *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914), *overruled on other grounds*, *Bing v. Thunig*, 143 N.E.2d 3, 9 (N.Y., 1957).
2. See Peter G. Filene, *In the Arms of Others: A Cultural History of the Right to Die in America*, 1998; Alan Meisel & Kathy L. Cerminara, *The Right to Die, The Law of End-of-Life Decision Making*, (2003).
3. 355 A.2d 647 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).
4. 497 U.S. 289 (1990).
5. 42 U.S.C. § 1395cc *et seq.* (2005).
6. The referendum passed 51% to 49%.
7. The Oregon Death with Dignity Act, O.R.S. § 127.800-.897 (2003).
8. 891 F. Supp. 1429 (D. Or. 1995), *vacated*, 107 F.3d 1382 (9th Cir. 1997), *cert. denied sub. nom.* *Lee v. Harclerod*, 522 U.S. 927 (1997).
9. *Lee v. Oregon*, 107 F.3d 1382 (9th Cir.), *cert. denied sub. nom.* *Lee v. Harclerod*, 522 U.S. 927 (1997).
10. 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom.* *Washington v. Glucksberg*, 521 U.S. 702 (1997).

11. 80 F.3d 716 (2d Cir. 1996), *rev'd*, 521 U.S. 793 (1997).
12. 521 U.S. 702 (1997).
13. 521 U.S. 793 (1997).
14. *McIver v. Kirscher*, 697 So.2d 97 (Fla. 1997); *Sampson v. State*, 31 P.3d 88 (Alaska 2001); *Oregon v. Ashcroft*, 192 F. Supp.2d 1077 (D.Or. 2002), *aff'd*, 368 F.3d 1118 (9th Cir. 2004), *cert. granted sub nom.* *Gonzales v. Oregon*, 125 S.Ct. 1299 (2005).
15. O.C.G.A. § 16-5-5 (1999).
16. 42 U.S.C. § 14401-08 (2005).
17. *Catholic Hospitals Grapple with Pope's Remarks*, THE ASSOCIATED PRESS, April 15, 2004, *available at* <http://msnbc.msn.com/id/4750805>.
18. More information on the Catholic Church's position can be found at the United States Conference of Catholic Bishops website at [www.usccb.org](http://www.usccb.org).
19. *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984).
20. *Id.* at 446, 321 S.E.2d at 722. For example, the state's interest might include providing medical treatment to an incompetent individual so he can regain competence and be tried for his actions. See *Sell v. United States*, 539 U.S. 166 (2003).
21. *In re L.H.R.* at 446, 321 S.E.2d at 722.
22. *Id.* at 446, 321 S.E.2d at 722-23.
23. *Id.* at 446, 321 S.E.2d at 723.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 447, 321 S.E.2d at 723.
28. 259 Ga. 579, 385 S.E.2d 651 (1989).
29. *Id.* at 581, 385 S.E.2d at 652.
30. 262 Ga. 389, 418 S.E.2d 3 (1992).
31. *Id.* at 394, 418 S.E.2d at 7.
32. *Id.* at 393-94, 418 S.E.2d at 7.
33. See C.V. Chambers, J.J. Diamond, R.L. Perkel & L.A. Lasch, *Relationship of Advance Directives to Hospital Charges in a Medicare Population*, 154 ARCHIVES INTERNAL MED. 541 (1994). See also P.A. Singer & F.H. Lowy, *Rationing, Patient Preferences and Cost of Care at the End of Life*, 152 ARCHIVES INTERNAL MED. 478 (1992).
34. O.C.G.A. § 31-32-3(b) (2001).
35. *Id.* § 31-32-2.
36. *Id.* § 31-32-6.
37. See *id.*
38. *Id.* § 31-36-10(a).
39. *Id.* § 31-32-3.
40. *Id.* §§ 31-36-11, 31-32-11(d).

41. *Id.* § 31-36-6(c).
42. *Id.* § 31-36-4.
43. *Id.* § 31-36-8.
44. *Id.* § 31-36-6(b).
45. *Id.*
46. *Id.* § 31-36-2(a).
47. See, e.g., Barry K. Baines, *The Ethical Will: Reviving a Biblical Tradition and Applying it to Retirement Planning*, J. RETIREMENT PLAN. (1999); Kathleen M. Rehl, *Help Your Clients Preserve Values, Tell Stories and Share the "Voice of Their Hearts" Through Ethical Wills*, J. PRACTICAL ESTATE PLANNING, (2003); A. Josephine Turner, *Estate Planning: Ethical Wills*, found at <[http://edis.ifas.ufl.edu/BODY\\_FY536](http://edis.ifas.ufl.edu/BODY_FY536)>; Robert Flashman, Melissa Flashman, Libby Noble & Sam Quick, *Ethical Wills: Passing on Treasures of the Heart*, found at <[www.ces.ncsu.edu/depts/fcs/pub/1998/wills.html](http://www.ces.ncsu.edu/depts/fcs/pub/1998/wills.html)>.
48. The nuances of medical decision making vary widely from state to state. Most states have adopted revised versions of the Uniform Health Care Decisions Act which was adopted by the National Conference of Commissioners on Uniform State Laws in 1993. A copy of the Act can be found at <<http://www.law.upenn.edu/blj/ulc/fnact99/1990s/uhcda93.htm>>.
49. Ala. Code § 22-8A-4(c)(4) (2005).
50. T.C.A. § 32-11-105 (2005).
51. Such states include California, Hawaii, Iowa, Kansas, Kentucky, Mississippi, Nebraska, New Jersey, North Dakota, Ohio.
52. O.C.G.A. § 29-5-1 (2003).
53. *L.H.R.*, 253 Ga. 439, 446-47, 321 S.E.2d 716, 723 (1984).
54. O.C.G.A. § 29-5-2.
55. *Id.* § 29-5-7(d)(3).
56. *Id.* § 31-36A-1 to -7.
57. *Id.* § 31-36A-4. Title 37 governs such actions.
58. *Id.* § 31-36A-5.
59. *Id.* § 31-39-1 to -9.
60. *Id.* § 31-39-2.
61. *Id.* § 31-9-1 to -7.
62. *Id.* § 31-9-7.
63. *Id.* § 31-12-4.
64. *Id.* § 31-36-4.
65. *Id.* § 40-5-6.
66. O.C.G.A. § 44-5-140 to -151 (1991).
67. *Id.* § 44-5-143(b).

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The Women and Minorities in the Profession Committee is committed to promoting equal participation of minorities and women in the legal profession. The Speaker Clearinghouse is designed specifically for, and contains detailed information about, minority and women lawyers who would like to be considered as faculty members in continuing legal education programs and provided with other speaking opportunities. For more information and to sign up, visit [www.gabar.org](http://www.gabar.org).

To search the Speaker Clearinghouse, which provides contact information and information on the legal experience of minority and women lawyers participating in the program, visit [www.gabar.org](http://www.gabar.org).

## Attorneys Play a Prominent Role in the Historic 2005 General Assembly

By Mark Middleton

In the House of Representatives, Speaker Glenn Richardson (R-Hiram) took the gavel on January 10, and is credited with exercising strong leadership in a year that saw a complete turnover in House leadership, and many new members. Rep. Barry Fleming (R-Harlem) served as majority whip and as chairman of the House Special Committee on Civil Justice Reform, and was extremely effective in those roles. Rep. Rich Golick (R-Marietta) championed many important bills as he served as the governor's floor leader. Rep. Dubose Porter (D-Dublin) served admirably as minority leader.



Rep. Wendell Willard (R-Dunwoody) and Rep. David Ralston (R-Blue Ridge) served well as chairs for the two House Judiciary Committees, and exercised great leadership to the benefit of both bar and bench. Rep. Mack Crawford (R-Zebulon) worked tirelessly as the appropri-

ations sub-committee chair for judicial funding.

In the Senate, attorneys were also in important positions. Sen. Preston Smith (R-Rome) served as chairman of the Senate Judiciary Committee, and authored a bill initiated by the State Bar's Real Property Committee. Sen. Michael



Meyer Von Bremen (D-Albany) served as the chairman of the Senate Special Judiciary Committee, and was supportive of various State Bar positions. Sen. Bill Hamrick (R-Carrollton) served as the appropriations subcommittee chair for judicial appropriations.

Many non-attorneys also supported positions of the State Bar, including Senate President Pro Tem Eric Johnson (R-Savannah), appropriations chairs Sen. Jack Hill (R-Reidsville) and Rep. Ben Harbin (R-Evans), and Senate Rules Chairman Don Balfour (R-Snellville).

We are grateful to these members and the numerous others that supported the legal profession in the 2005 General Assembly.

## Funding of Public Defenders Council

The State Bar's Board of Governors approved an agenda for the 2005 session, which included appropriations requests, specific legislative initiatives and positions against certain legislation. A highlight of the 2005 session is the \$32 million in state funding for the statewide public defender's office. This is the culmination of many years of planning and advocacy that led to the passage of the needed legislation two years ago, the implementation of a funding source last year, and finally, funding for the first full year of operation in fiscal year 2006. The State Bar is extremely grateful to Gov. Sonny Perdue for his steadfast support of this monumental move toward equal justice for all in our state.

## Passage of Trust Total Return Bill

The State Bar is also pleased with the passage of HB 406 by Rep. Wendell Willard and Rep. Mary

Margaret Oliver (D-Decatur). This was a very important proposal from the Fiduciary Law Section that provides additional options for trustees in making investment decisions that produce the best total returns for a trust. The bill was supported by friends in the financial community, and by members of both parties in the legislature. Sen. Casey Cagle (R-Chestnut Mountain) handled the bill in the Senate.

## Appropriations

There were other important appropriations supported by the State Bar. The legislature included \$100,000 to create a business court that will hear commercial matters between consenting business entities. Also, there were five new Superior Court judgeships created in the Southern, Gwinnett, Cherokee, Appalachian and Flint districts. The total state appropriation is approximately \$900,000 for these judgeships. The General Assembly also continued funding for CASA, the Georgia Resource Center and the Victim of Domestic Violence programs.

## Other Legislation

In addition to the trust bill, the State Bar supported a proposal from the Real Property Law Section that will assist real estate closing attorneys, manufactured

housing owners and lenders by clarifying the process for characterizing a manufactured home as real property.

The bill passed the Senate and the House Judiciary Committee, but did not reach the floor of the House for a vote. David Burge of the Real Property Section spent hours with representatives from the manufactured housing industry, lenders, and the bill's author, Sen. Preston Smith redrafting and perfecting the bill before it was introduced in late February.

The State Bar also took defensive positions on other bills. Citing separation of powers issues, the Executive Committee acted to oppose a bill affecting eligibility to take the Georgia Bar exam. The Executive Committee also took a position supporting a compromise version of a bill revising the opt out provisions of the Public Defenders Standards Council. Now, some counties will be able to resubmit an application to opt out of the system.

Finally, the State Bar opposed provisions in Senate Bill 3 that created \$250,000 caps and immunity for emergency room care. While the bill passed, the immunity language was removed and the cap was raised to \$350,000 for an individual defendant and a cumulative cap of \$1,050,000 for medical

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providers. A House Floor Amendment that would have raised the cap to \$750,000 and provided for a catastrophic exception failed narrowly.

## Bills of Interest that Passed

**SB 19:** This bill by Senate President Pro Tem Eric Johnson revises judicial procedures relating to class action lawsuits. The bill requires certain elements to be met in the certification procedure, including 1) entering a scheduling order; 2) allowing discovery on issues relating to certification; and 3) issuing a written opinion providing reasoning for the certification. The bill also changes the certification decision from a discretionary appeal to a mandatory appeal. The bill also requires that the discovery process is stayed during the appeal.

**SB 100:** This is the Georgia Residential Mortgage Fraud Act by Sen. Bill Hamrick. The bill defines residential mortgage fraud as a criminal act, and authorizes the Attorney General to prosecute residential mortgage fraud, and adds residential mortgage fraud to the list of activities covered under state RICO actions.

**SB 139:** This bill by Sen. Mitch Seabaugh (R-Sharpsburg) would provide immunity for liquefied petroleum gas providers if the applicable equipment is modified or if the gas is used in an unforeseeable way.

**HB 166:** This bill provides that health care professionals working as volunteers for a state agency shall have the state's sovereign immunity extended to the volunteer.

**HB 170:** This bill is part of the governor's crime package. This bill would equalize the jury strikes,

allow for the impeachment of all witnesses who testify (without requiring the defendant make 'character' an issue first), and allow for reciprocal rights of appeal of a decision regarding a motion to recuse a judge.


**HB 212:** This bill by Rep. Judy Manning (R-Marietta) requires a child's guardian ad litem to receive training administered by the Child Advocate. Judiciary Chairman Wendell Willard added a floor amendment to clarify that a lawyer would need no training beyond the current CLC requirements.

**HB 221:** This bill changes the child support guidelines to allow accounting for income of custodial parent in figuring child support, and creates a commission to report findings for further action in 2006.

**HB 254:** This bill establishes authority for a drug court division within the Superior Court.

**HB 416:** This bill by Judiciary (Non-Civil) Chair David Ralston changes provisions in the law relating to asbestos litigation. It requires a physical impairment in order to bring a claim, provides for dismissal of certain claims and changes procedures relating to asbestos litigation.

## Carry Over Legislation

Many bills of interest to the judicial and legal communities will carry over to the second session of the two-year term. HR 855 would amend the Georgia Constitution to require partisan election of all judges. HB 150 is the bar exam bill, and HB 763 would limit contingency fees. 

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

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## April 9 Board of Governors Meeting Summary

By C. Tyler Jones

**S**tate Bar President Rob Reinhardt presided over the 201st meeting of the Board of Governors, which took place at the State Bar Building in Atlanta April 9. Reinhardt began the meeting by recognizing past presidents of the Bar, new Board members, members of the judiciary and other special guests.

The first item of business was the approval of the minutes of the 200<sup>th</sup> meeting of the Board of Governors held Jan. 15 at the State Bar Building. Following the approval of the minutes, Reinhardt recognized the following individuals in memoriam: Hon. Rowland W. Barnes, Sgt. Hoyt Keith Teasley, Julie Ann Brandau and David Gray Wilhelm.

Frank Jones, on behalf of the past presidents of the State Bar of Georgia and Georgia Bar Association, recognized Cliff Brashier for his dedication and hard work on behalf of the Bar Center and the State Bar of



Photos by C. Tyler Jones

**Rob Reinhardt presents Phyllis Holmen with a \$334,00 check, representing contributions raised in conjunction with Georgia Legal Service's annual giving campaign.**

Georgia. Much to Jones' surprise, Reinhardt and Brashier then recognized him for his dedication and commitment to the Bar Center by presenting him with a framed collage, which included images of past Bar president's and mementos from the Bar Center dedication.

Continuing with the theme of honoring worthy members of the Bar, Rudolph N. Patterson presented the James M. Collier Award to Charles T. Lester Jr., for his continued support to the Georgia Bar Foundation and the legal profession.


Reinhardt then presented Phyllis Holmen with a \$334,000 check, representing contributions raised in conjunction with Georgia Legal Service's annual giving campaign.

Following the check presentation, Holmen asked Board members to watch a video covering the work of Georgia Legal Services. Supreme Court of Georgia Justice Carol Hunstein, Greg Fullerton and Bill Rumer gave presentations following the video.

After the presentations, the Board took the following actions:

- Set the 2005-06 dues level at \$218 for active members (\$109 for inactive members), which incorporates the \$10 dues increase approved by the Board on Aug. 19, 2004, for the Transition into Law Practice Program, and 0 percent dues indexing.
- Approved Section dues ranging from \$10 to \$35.
- Approved assessments for the Bar Facility and Clients' Security Fund for new members.
- Approved a \$25 negative (opt out) check-off for legislation, which is a \$5 increase from 2004-05.
- Approved a \$150 negative (opt out) check-off for Georgia Legal Services Program, which will be accompanied with a letter of explanation regarding the new negative check-off. This was a positive (opt in) check-off with a \$150 suggested amount in previous years.

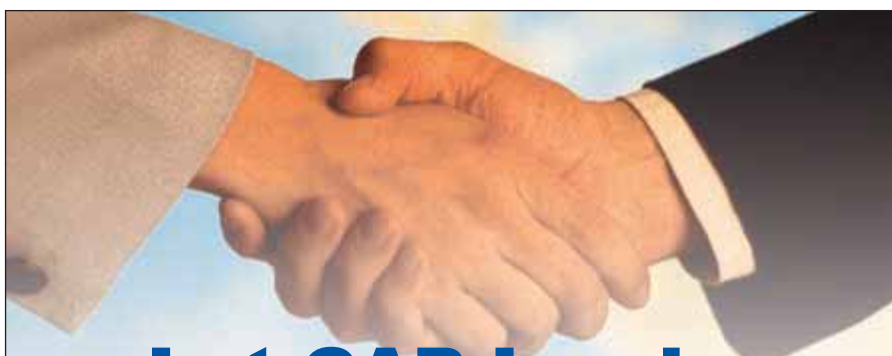
Other agenda items included a report by Laurel P. Landon on Young Lawyers Division activities, a report and overview of the Transition into Law Practice Program by John Marshall and Seaborn Jones reporting on The Professional Reform Initiative, a project of the National Conference of Bar Presidents, regarding the public's declining respect for the legal profession.

After opening the floor for questions and addressing some Board member's questions and concerns, Reinhardt adjourned the meeting at 2 p.m. 

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



After being recognized for his hard work and dedication to the Bar, State Bar of Georgia Executive Director Cliff Brashier explains the important role Frank Jones played in taking the Bar Center from conception to reality.



## Let CAP Lend a Helping Hand!

### What is the Consumer Assistance Program?

The State Bar's Consumer Assistance Program helps people with questions or problems with Georgia lawyers. When someone contacts the State Bar with a problem or complaint, a member of the Consumer Assistance Program staff responds to the inquiry and attempts to identify the problem. Most problems can be resolved by providing information, calling the lawyer or suggesting various ways of dealing with the dispute. The department sends a grievance form when serious unethical conduct may be involved.

In addition to assisting consumers, CAP helps lawyers by informing them when the department hears from dissatisfied clients. CAP also provides information and suggestions about effectively resolving conflicts in an ethical and professional manner.

**Call the State Bar's Consumer Assistance Program  
at (404) 527-8759 or (800) 334-6865  
or visit [www.gabar.org/cap](http://www.gabar.org/cap).**

## Georgia and the First Amendment

By Jennifer N. Riley

**I**f at first you don't succeed, try, try again." This simple statement from childhood describes the scheduling of the 14th Annual Bar Media & Judiciary Conference. Originally planned for Jan. 29, the ICLE sponsored event was cancelled when an ice storm virtually shut down the city. Better weather was on the horizon, and the rescheduled conference with the theme "Georgia and the First Amendment: A Primer for Judges, Journalists and Lawyers on Emerging Issues and the Law" took place March 4 at The Westin Buckhead in Atlanta.

The conference opened with a session titled "Let's Talk: Indecency, Civility and the First Amendment." Attendees were treated to a panel discussion revolving around the right of agen-

cies and governments to monitor and regulate the content the public is exposed to through various media vehicles. This panel engaged in the most entertaining discussions and elicited the largest audience response of all the sessions and was composed of: Neil Kinkopf, Georgia State University School of Law; Eric Von Haessler, formerly of WKLS-FM (96Rock); Kent Middleton, Grady College of Journalism and Mass Communication, the University of Georgia; Carolyn Forrest, Vice President Legal Affairs with Fox Television Stations, Inc.; and Randy Hicks from the Georgia Family Council.

The second session offered a choice between three different breakout groups.

"What's Hot on Campus: The Academy and the First Amendment," was a discussion addressing student journalists and their increasingly strained relationship with campus administration and the recent trend of campus administrators desiring to regulate state college newspapers. "Open



**Ken Foscett, AJC reporter and author of *Judging Thomas: The Life and Times of Clarence Thomas* speaks during the luncheon about the First Amendment and the Supreme Court Bench.**

Photos by Jennifer N. Riley

Government: An Advocacy Workshop" advocated the use of the Open Records Act and Open Meetings Act by the press and public to stay aware of important issues. The panel reiterated the public's right to know information when a business or government makes decisions that affect the pop-



ulation. In "Access to Electronic Records," panelists and participants discussed the recent trends in making public records available for inspection by electronic means, including by remote electronic access, and issues surrounding electronic access to court and other governmental records.

Ken Foskett, AJC reporter and author of *Judging Thomas: The Life and Times of Clarence Thomas*, was the featured speaker. In July 2003, Foskett secured the first on-the-record interview with Justice Thomas since his confirmation in 1991. During lunch, the audience was treated to personal anecdotes from his interviews with Justice Thomas as well as remarks about the First Amendment in relation to the current and future make-up of the bench.

The focus of the opening afternoon session was evident in its title, "Ethics and Openness: A 'Fred Friendly'-style Discussion of the Issues and Their Administration." Panel members participated in a role-playing exercise that addressed the questions of ethics and openness in the arena of campaign finance and self-funded campaigns. The exercise addressed limits for self-funded campaigns under Georgia and federal law; the difference, if any, between city campaign laws and state laws; the definition of independent expenditure; and what constitutes a self-funded campaign. Panelists included Richard Gard of the *Fulton County Daily Report*; Bill Bozarth, Director of Common Cause; Robert Highsmith of Holland & Knight; Alan Judd of the *Atlanta Journal-Constitution*;




**Bob Barr, Chris McFadden, Vernon Keenan, Lucy A. Dalglish and David Nahmias react to a question posed by CNN's Richard Griffiths during the "Open Government and National Security: Homeland Security, The Patriot Act and the National Intelligence Director" session.**

Teddy Lee from the State Ethics Commission; Ginny Looney from the City of Atlanta Ethics Office; and James Washburn of McKenna Long & Aldridge LLP.

The fourth session, "Judicial Elections: Questions and Answers," gave participants an overview of the landscape of judicial elections in Georgia and how the rules of those elections have changed. The panel consisted of: Neil Kinkopf, Georgia State University School of Law; Jeff DiSantis, Executive Director, Georgia Democratic Party; Eric Segall, Georgia State University of Law; Eric P. Schroeder of Powell Goldstein LLP; Norman Underwood, Troutman Sanders, member of the Georgia Committee for Ethical Judicial Campaigns; and Ed Been of the *Fulton County Daily Report*.

The final session of the day focused on a subject unique in its application. "Open Government and National Security, the Patriot Act and the National Intelligence Director." Again the participants were treated to a role-playing exercise that recounted a hypothetical situation following a security breach at a major defense contractor plant.

The panelists debated the need for open information about individuals and sources involved versus the need to keep sources confidential so information will not be disclosed through the media to the public. This highly respected panel consisted of: Richard Griffiths of CNN; Bob Barr, former U.S. Representative and former U.S. Attorney; Atlanta attorney Chris McFadden; Lucy A. Dalglish of the Reporters Committee for Freedoms of the Press; Vernon Keenan, director, Georgia Bureau of Investigation; and David Nahmias, U.S. Attorney.

The fourth annual Weltner Freedom of Information Banquet took place following the conference. Supreme Court of Georgia Chief Justice Norman Fletcher received the Weltner Award, named for Charles L. Weltner, a former chief justice of the Supreme Court of Georgia and a champion of open government. 

**Jennifer N. Riley** is the administrative assistant in the Bar's communications department and a contributing writer for the *Georgia Bar Journal*.

## 23rd Annual Georgia ALI Meeting

By Pamela L. Tremayne

**P**rofessor Deborah A. DeMott, reporter for the Restatement (Third) of Agency since the inception of the project in 1995 and the David F. Cavers Professor of Law at Duke University School of Law, spoke at the 23rd annual Georgia meeting of the American Law Institute in February. As of the *Journal's* publish date, the last Restatement (Third) draft was slated to be considered at the May 17 ALI meeting.

This 23rd annual meeting of the American Law Institute in Georgia was co-sponsored by the Judicial Procedure & Administration Committee of the State Bar of Georgia. The Judicial Procedure & Administration Committee was established to observe the practical workings of the judicial system in all courts in the state and to recommend changes to the law or to the uniform or other court rules. The committee is also charged with

conferring with the American Law Institute in its endeavors and promoting its programs which may be of interest and benefit to the State Bar of Georgia.

Work on the first Restatement of Agency spanned 10 years, and was completed in 1933 by Professor Warren Seavey of Harvard Law School who finished the work after the death of the initial reporter, Professor Floyd Mechem of the University of Chicago.

Seavey was also the reporter for the Restatement (Second) which was completed in 1957. Although the Restatement (Second) shaped the development of agency law, it became dated following nearly 40 years of ongoing legal development and changes in the business world and society.

The creation of durable powers of attorney extending an agent's authority to act on behalf of a principal after the principal no longer had the capacity to act is an exam-



**Judge Dorothy Toth Beasley, Professor Deborah A. DeMott and Committee Chair Pamela L. Tremayne**

Photos by Michelle Priester

ple of one development that was counter to the Restatement (Second). More general updating was needed as evidenced by the fact that the legal subject in the Restatement (Second) was always an individual person rather than a corporation, partnership or any other entity. Other issues and pre-occupations of current society also called for a reconsideration of the subject of agency. For tort applications of agency, the agent in the Restatement (Second) was often identified as a chauffeur.

However, common law concepts also influenced how courts interpreted and applied statutes. In *Meyer v Holley*, 123 S.Ct. 824 (2003), a private action under the federal Fair

Housing Act, the U.S. Supreme Court applied vicarious liability to the corporation that employed the person who violated the statute, but not to its president, based on the facts that the statute does not explicitly impose such liability, nor is liability imposed by "ordinary ...vicarious liability rules." The ordinary common law of agency would render only the principal liable. In *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998), the Colorado Supreme Court determined that an agent who enters into a contract with an individual without disclosing the principal can be held personally liable on the contract. Also, in *Kaycee Land & Livestock v. Flahive*, 46 P.3d 323 (Wyo. 2002) the Supreme Court of Wyoming determined that simply acting as an agent does not insulate one from personal liability, although the literal interpretation of the LLC statute would have precluded individual liability. This outcome is consistent with the long held principle of agency that acting as an agent generally does not protect one from wrongful personal acts.


In *United States v. President and Fellows of Harvard College*, 323

F.Supp.2d 151 (D. Mass. 2004), the court considered whether two employees violated the False Claims Act when they did not disclose their personal investment activities which resulted in a conflict of interest. The False Claims Act is silent on the question of whether the principal is liable when agents fail to disclose their personal investments giving rise to a conflict of interest and personal, independent fraud. The court held that the employee's knowledge could not be imputed to the college even though the employees knew their statements were false. The employees were engaged in independent fraudulent acts solely to serve their own interests, rather than the interests of the principal.

Also addressed in the Restatement (Third) is the role of the independent contractor which arises out of the confluence of agency and tort law. *Respondeat superior*, as applied to physical torts, is both a tort doctrine and an agency doctrine. The underlying issues are the employers' power of control and the question of who is better able to reduce the risks.

DeMott noted that many courts have proceeded in "cheerful obliv-

ion" of some of the content of the Restatement (Second) as evidenced by the fact that, while there are some 528 individual sections in the Restatement (Second), the citations taper off the further one goes into the volume. However, the basic ideas continue to be frequently used and cited.

When asked how she kept the momentum and interest up, while undertaking such a lengthy and enormous project as this, DeMott responded that it has helped that she had a "day job" in a vibrant academic setting with good access to others' thoughts and opinions, including those of her students. After nearly 10 years on this project nearing completion, DeMott still maintains abundant good humor. She was enthusiastically accorded much deserved applause for her discussion and appreciation for her efforts in clarifying the law on agency. 

**Pamela L. Tremayne, J.D., Ph.D.**, is the chair of the State Bar of Georgia's Judicial Procedure and Administration Committee.



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## Charlie Lester Wins James M. Collier Award

By Len Horton

**C**harles T. Lester, former president of the State Bar of Georgia and partner in the law firm of Sutherland, Asbill & Brennan LLP, has received the second annual James M. Collier award. Rudolph Patterson, vice president of the Georgia Bar Foundation, presented the award at the April 2005 Board of Governors meeting of the State Bar of Georgia.

"Charlie and his firm exemplify service to the Georgia Bar Foundation and to IOLTA and the many grant recipients who depend on the Georgia Bar Foundation for funding," said Patterson.

"Over the last decade Charlie has always been there whenever the Bar Foundation needed legal advice or assistance in responding to the many challenges it has received. During the tense moments when lawsuits threat-



Photos by C. Tyler Jones

Past Bar President Rudolph N. Patterson presents the James M. Collier Award to Charles T. Lester Jr., for his support of the Georgia Bar Foundation and the legal profession.

ened IOLTA nationally, he and his firm were on standby to defend the Georgia IOLTA Project, the Georgia Bar Foundation and its Board of Trustees and staff, if needed."


Patterson went on to say, "Without Charlie's guidance in a number of areas over the years, the Georgia Bar Foundation likely would have made missteps that could have reduced its ability to help fund a number of law-related organizations throughout Georgia. Furthermore, his work and the work of his firm in assisting the Bar

Foundation were done pro bono in recognition of the crucial need served by the Georgia Bar Foundation."

The James M. Collier award is presented annually to a person whose efforts in support of the Bar Foundation and its mission are so extraordinary that they must be recognized. The award honors the extraordinary financial support of Jim Collier, who as an officer in the Bank of Dawson, has been able to provide certificates of deposit with significantly higher interest rates than are available anywhere else.

Over the last decade Charlie has always been there whenever the Bar Foundation needed legal advice or assistance in responding to the many challenges it has received.


He and his bank together have set a standard of support for the Georgia Bar Foundation that led to the creation of the James M. Collier Award.

Since 1983, the Georgia Bar Foundation has been working with the assistance of the State Bar of Georgia in accordance with orders from the Supreme Court of Georgia to provide funding for law-related organizations throughout the state. In the process, thousands of economically disadvantaged Georgians benefit each year. 

**Len Horton** is the executive director of the Georgia Bar Foundation.



James M. Collier receives the award named in his honor during the 2004 State Bar of Georgia Midyear Meeting. The James M. Collier award is presented annually to a person whose efforts in support of the Bar Foundation and its mission are so extraordinary that they must be recognized.

A photograph of a large, multi-story resort building with a classical architectural style, featuring two prominent towers with domes. The building is situated on a waterfront, and its reflection is visible in the water in the foreground.

*See you at the  
Westin Savannah Harbor  
Resort & Spa for the  
2005 Annual Meeting.*

A close-up photograph of a vintage black telephone receiver, showing the earpiece and the coiled cord. The background is a soft, out-of-focus yellow.

Alexander  
Graham Bell  
may not have been  
the first to invent  
the telephone,  
but he was  
the first to **patent it!**

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## Annual Fiction Writing Competition

For the first time ever, the Editorial Board of the Georgia Bar Journal announces co-winners of the Fiction Writing Contest. The quality of both entries was excellent, and both works deserve recognition. The Journal presents “Doubting Thomas” by Gerry Carty and “A Puff of Wind” by J. Ellis Millsaps as co-winners of the 14th Annual Fiction Writing Competition. The purposes of the competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. As in years past, this year’s entries reflected a wide range of topics and literary styles. In accordance with the competition’s rules, the Editorial Board selected the winning story through a process of reading each story without knowledge of the author’s identity and then ranking each entry. The story with the highest cumulative ranking was selected as the winner. The Editorial Board congratulates Carty, Millsaps and all of the other entrants for their participation and excellent writing.

## Doubting Thomas

By Gerry Carty

“There are two types of men who shouldn’t drink,” Judge John Lamphart said.

Thomas had awakened him accidentally by dropping his cleaning brush behind him.

“Those who do and those who don’t.”

It was June 1, 1830.

He would remember that date for the rest of his life. It was printed on the newspaper beneath the judge’s gray head as it rested on the desk and the black print of the date was embossed in reverse on the judge’s shiny pate as he raised it to see who had disturbed his sleep.

“Though I am the former now, I have been both,” the judge said, sniffing then slapping his lips together, a man with the bad morning taste of whisky in his mouth.

Thomas liked the way the judge spoke. It made it seem that every word he uttered was important.

Pathfinder came into the room. Pathfinder was the judge’s ‘man’—someone who brought his food, cleaned up after him, carried his papers to the courthouse, and conveyed communications from the judge’s office in Dawsonville to his wife on the judge’s farm, a few miles down the road. In the 40 years or so that the judge had been a circuit rider, Pathfinder had kept his office open and his appointment book up-to-date. Pathfinder was old. So was the judge. To Thomas, who was 16 then, they both seemed ancient.

Most of the judge’s business had dissipated once he took up the Cherokee cause. What was left of it came from the rich Cherokee landowners. Wilson Lumpkin, Georgia’s senator, railed against him for his activism but it was well known that Judge Lamphart didn’t give a hoot. He had hundreds of acres under cotton and indigo, 3,000 chickens, and more than 100 dairy cows. He was in no danger of losing what he had spent a lifetime acquiring. He wasn’t Cherokee.

“You woke him up. That’s good.”

Pathfinder spoke as if the judge was not there.

“Has he been drinking again? Where is he hiding the whisky today?”



Pathfinder came around the desk and, pushing the judge back gently, he opened the long, flat drawer from which he removed a slender bottle of Kentucky whisky and slipped it into his pants' pocket.

"The judge has had one drink," Judge Lamphart said with dignity. "The judge is sober as a — well, as a judge. He does not appreciate being maligned."

"He should not drink then."

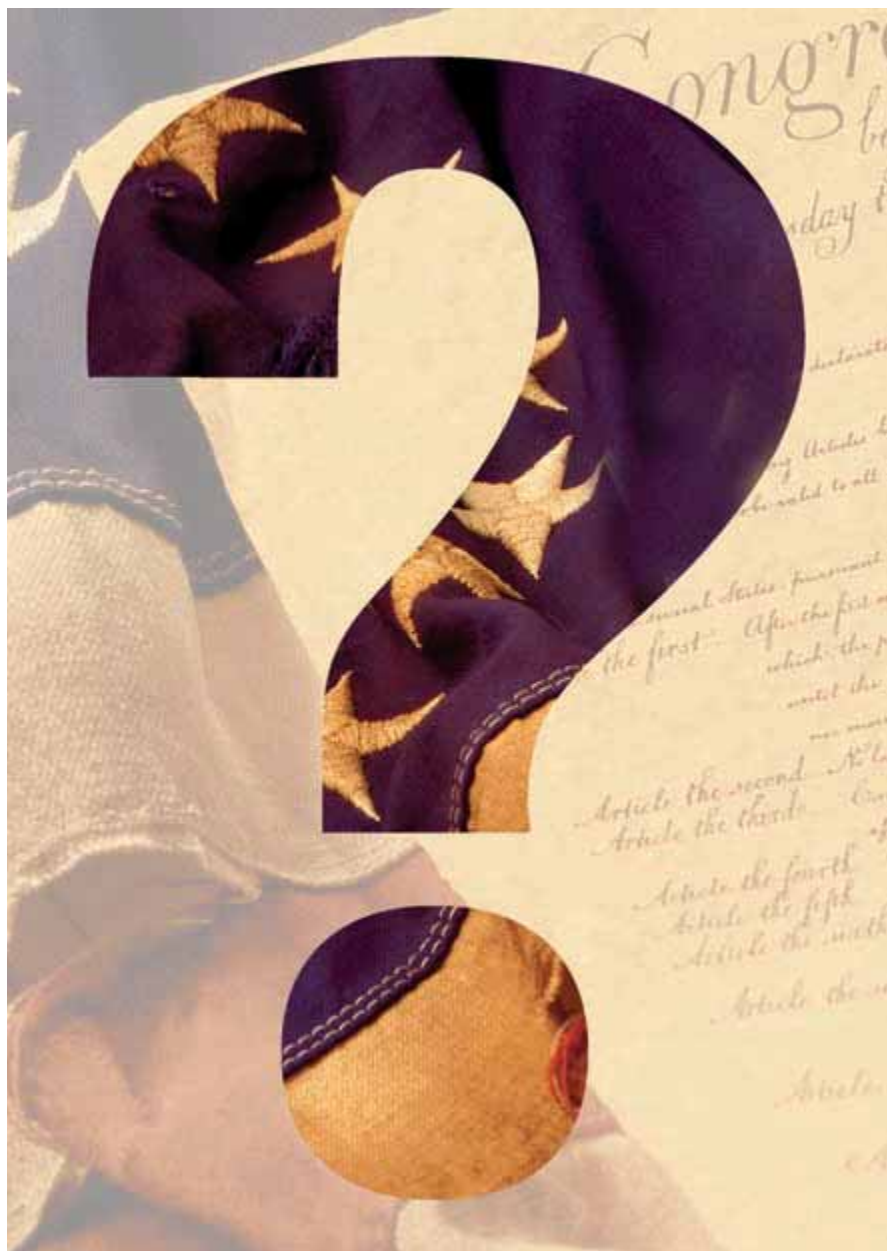
Thomas watched this conversation in fascination. He had never heard two people speak to each other in the third person.

"The Indian delegation will be here in 20 minutes," Pathfinder said. "And the judge must be ready to meet them." He walked to the door. Before leaving the room he glanced at Thomas. "Watch him," he said. Then he left.

Thomas had started working for the window cleaner a week before. It was his first real job, besides farm work, and this was the first time he had been sent to the judge's office to clean the inside of the windows. He stared nervously at the judge after Pathfinder had gone, uncertain what to do. The judge seemed to be considering whether he should put his head back down on the desk. After a moment he made a decision and raised it up to Thomas and said, "Get me a book off the shelf."

Thomas found the book the judge wanted among a row of green books and, after giving it to him, he went back to cleaning the windows with bunched-up newspaper. His rubbing made squeaking sounds on the glass panes but he could still hear the judge 'tut-tutting' behind him as he read from the book. Whatever he was reading, it did not sound good.

Thomas knew the Indian delegation had come to town for the gather-



ing which would take place at New Echota, a mile down the road. Everyone knew that. John Ross and Alexander McCoy, the Cherokee chiefs, were there for the largest Indian group in Georgia. John Ridge, a lawyer himself and the son of Major Ridge, had been asked to represent the Creek. There were representatives of the Choctaw and the Osage, and what was left of the Seminole.

The evening before at the long house at New Echota, the Cherokee capital, there had been a meeting attended by more than 800. Three thousand Indians, mostly Cherokee

from North Georgia and North Carolina, had gathered around the long house for the event and the drums pounded and the chanting filled the warm North Georgia night and there was the smell of frying chicken and deer and rabbit on the spit. The event went on till past three in the morning.

At that time there were less than 9,000 Cherokee in all of Georgia in a population of half a million. That one third of them had shown up for the event was truly remarkable.

Thomas had been at the festivities too and had enjoyed every

moment, but he could not help but feel that his fellow Indians were attempting to lock the stable door after the horse had bolted, for Congress had passed the Indian Removal Bill two days earlier, on May 28. The sponsor of that bill had been none other than Wilson Lumpkin, soon to be governor of Georgia, and with Andrew Jackson in the White House there was no hope of presidential intervention.

Thomas finished cleaning the windows with a piece of chamois leather and put all his stuff back in the wooden box he carried with him to jobs. He walked to the door. He wasn't sure how he should take his leave of the judge. As he was about to go out, Pathfinder came back in carrying a tray.

"Where are you going?" he asked, surprised, as if Thomas should not be leaving. Before Thomas could answer, Pathfinder said, "Stay here. Sit in the corner. If the chiefs need anything other than what's on this tray, let me know."

He put the tray down on a small table in the corner. There was a stack of sandwiches, a coffee pot, some cups, a pitcher of water, and some glasses. The bottle of whisky had reappeared.

Pathfinder saw Thomas stare at it. He smiled. This was the first time Thomas had seen him smile.

"None for him," he said, nodding towards the judge who was still engrossed in the green book. "John Ross likes a nip."

Thomas wondered how he could give the Cherokee chief some whisky and refuse the judge.

When the delegation arrived he tried to make himself invisible in the corner. He sat in awe as the most famous Indian chiefs in the Southeast came into the room and sat in a circle in front of the judge's desk.

They talked of the Indian Removal Bill, now an Act. How to fight it. What would Georgia do to enforce it? President Jackson has professed sympathy with the Cherokee and had invited John Ross and Alexander McCoy to the Hermitage to discuss the removal. But he was known to favor and encourage the Cherokee's departure to Oklahoma. It was better, he had said, that the Cherokee bow to the inevitable and remove themselves. The settlers coming in would only make their lives a misery.

No one doubted that, but the evening before, at the long house meeting, the Council had overwhelmingly voted to reject the president's invitation. William Wirt, a brilliant lawyer who had been President Monroe's attorney general, had taken up the Cherokee cause and vowed to have the Removal Act repealed before Georgia began to enforce it. But federal troops were gradually pulling out of the state and the Georgia Guard was just as gradually increasing the strength of its forces. Everyone in the Cherokee Nation knew why.

Thomas pretended to be asleep in the corner but he listened avidly, particularly at the mention of Jackson. He opened his eyes at one point as Pathfinder popped his head into the room and made a flicking motion with it like a dog trying to remove a gnat from his ear. Pathfinder quickly closed the door again. Thomas took this to mean he should serve refreshments.

He was seized with anxiety. How could he keep the whisky bottle away from the judge? He had to think fast. He slipped the bottle into his pocket and carried the tray to the judge's desk. The men lightened their conversation as they

anticipated the refreshments and began to help themselves to sandwiches. Without asking, Thomas poured a cup of coffee for the judge and passed it across the desk. The judge's eyes narrowed and he looked up at Thomas.

"Didn't I see a whisky bottle on this tray before?"

Thomas, not sure if the question was even directed to him, said nothing for a moment, and then he said, "Would you like cream, judge?"

The judge shook his head and sat back with the coffee cup balanced on his knee. He began talking to Chief Ridge about the Creek's problems over in Alabama.

Thomas handed a cup to John Ross and held up the coffee pot.

John Ross put his hand against the spout of the coffee pot then moved it up in front of Thomas's face and made a motion with it, thumb and index finger an inch apart, then swept the same hand down to pat the whisky bottle in Thomas's pocket. These three movements were accomplished quickly and gracefully. Thomas understood and was sure no one else noticed.

He returned to the small table. With his back to the group, he poured a generous measure of whisky into a delft cup and carried it to John Ross. The Indian chief looked in it and his eyes widened. He pulled Thomas down by the collar so that Thomas could feel his hot breath on his ear as the chief whispered in his thick accent, "I said a wee dram, man. Are you tryin' to drown me?"

Before Thomas could comment that the chief hadn't said anything, the chief released him and was back in the conversation with the other men.

When the meeting was over, the judge showed the group to the office door. Pathfinder was there to take them down the lobby to the street where their horses were tethered. Thomas stood in the corner as the men left. John Ross winked at

"Write it here. Anything you like."

Thomas took the offered quill pen, dipped it in the ink, let it drain for a moment then wrote in a firm, cursive script, "The Indian Removal Act will not be repealed, particular-

As the judge was about to wither before the stone-faced magistrate, Thomas leaned towards him and whispered in his ear, "Put the homeowners up, Judge. Surely it cannot be arson if you burn down your own house?"

him before leaving the room. When the judge closed over the door, he turned to Thomas.

"I could have sworn the whisky bottle was on that tray," he said.

He went over to the small table and smelled the cups. When he smelled John Ross's cup, he turned again to Thomas and squinted at him. He patted both his pockets lightly. Over the judge's shoulder, Thomas could see the whisky bottle beneath the hydrangea in the planter.

"Huh." The judge scratched his head and looked away. When he looked back at Thomas his eyes were completely focused.

"How old are you, Mr. Magician?"

"Sixteen, sir."

"Have you any kind of education?"

"Yes. A little, sir."

Thomas had been in the small school of the Methodist ministry at New Echota for six years.

"Write me a sentence."

The judge walked him to the desk and pulled a sheet of paper towards him.

ly after the discovery of gold in the Cherokee Nation."

The judge stared open-mouthed at what the boy had written for some time. Thomas could hear the old man's breath wheeze in his chest. When the judge looked up at him again he said, "that might better be two sentences, son, but what does it matter? You shouldn't be cleaning windows. Put on your best pants and vest and be at this office six o'clock Monday morning."

Though Thomas did not realize it then, he had just written his first legal opinion.



On Monday morning they mounted up and set out just after six from the judge's office in Dawsonville. The judge liked to ride a big mule, which he said was more sure-footed for a hilly journey. Pathfinder and Thomas rode horses. They headed for Lawrenceville where they arrived at the old wooden courthouse in the square just before noon. There had been an incident the week before. A group of settlers had come in through the

mountains from Tennessee and in anticipation of the Indian Removal Act, had taken over a cluster of Cherokee homes in north Gwinnett County, forcing their owners to leave. They had clearly jumped the gun but the sheriff would do nothing to dispossess them.

A few days later, some Cherokee teenagers dressed for war made themselves look fierce, one even donning a buffalo head, and rode into the hamlet on horseback. They forced the would-be settlers out of the homes then set fire to the structures and destroyed them.

The sheriff subsequently arrested the boys and they were being held in his jail, charged with five counts of arson. Judge Lamphart had gotten them a probable cause hearing before a magistrate and this is what brought him to Lawrenceville that Monday.

The hearing had not been going well. The magistrate was unsympathetic to the plight of the Cherokee. He repeatedly cut off Judge Lamphart and treated the defendants in a sneering, derisive manner. Thomas held the judge's books and papers as the old man tried to break the testimony of a settler's wife who dolefully spoke of being terrorized in the middle of the night by a warrior on horseback wearing the head of a buffalo. The prosecutor had put up only this one witness. Judge Lamphart surmised that the other settlers had warrants out for their arrest in other parts of the state or in Tennessee and would not risk entering a courthouse. This was the kind of riff-raff that was coming in since gold had been discovered, he said.

Thomas knew the case well before it came to court. Every Cherokee in a 50-mile radius knew



## Thomas was resigned to losing. But, at the last moment, out of the corner of his eye he noticed something peculiar take place.

that Judge John Lamphart had the preliminary hearing that Monday morning.

The hamlet with the burned-out houses was a stone's throw from New Echota, where Thomas lived. That weekend, before the hearing, Thomas got on his horse and rode out there to do some investigation of his own.

As the judge was about to withdraw before the stone-faced magistrate, Thomas leaned towards him and whispered in his ear, "Put the homeowners up, Judge. Surely it cannot be arson if you burn down your own house?"

The judge stared at him and blinked.

"The boys didn't own the homes," he said.

"But the homeowners did."

The judge seemed to be following him, but he was uncertain.

"Do what you have to do," he said.

What I have to do? Thomas's heart leaped in his chest. He did not know what to do. But he knew with certainty that the gavel was about to come down on the lives of the five young men who sat miserably at the defendant's bench.

"If you have no more witnesses and nothing else to offer..." the magistrate said.

Thomas blurted out, "Your Honor, we call to the witness stand, Yellow Bird."

"This—Yellow Bird—" the magistrate intoned as the woman approached, making his distaste for the name obvious, "- I presume is Cherokee and will, therefore,

need two corroborating witnesses..."

"There are many, Your Honor," Thomas said, and spread his hand to the benches behind the defendants where all of the former occupants of the burned-out houses sat. "And they will testify that these defendants were fully authorized to set fire to the houses."

There it was. Thomas raised his voice when he said 'fully authorized to set fire to the houses,' laying it out for Judge Lamphart before the magistrate could focus on another, more obvious issue of authorization. The judge rallied. He looked at the 18 or so nodding heads behind the defendants. He turned back to Thomas and whispered in his ear, "Good try, my young friend. But the law requires two white corroborating witnesses. Do you have two white corroborating witnesses?"

Thomas's heart sank. The law that had recently been passed in Georgia requiring that the testimony of an Indian against a white be corroborated by two white witnesses was so odious and so new, it was rarely enforced. Thomas had been hopeful that in the fairly informal setting of a magistrate's court it would be overlooked.

"The magistrate may not know that," Thomas whispered to the judge.

"Oh, I'm sure this one will," Judge Lamphart said.

For the next hour, following the testimony of Yellow Bird, the Cherokee testified one by one that they didn't like the houses anyway,

that they had authorized the boys to remove them and, my goodness, when they went to do so there were people in them who were respectfully asked to leave and did so without protest.

Judge Lamphart was correct. The magistrate knew the law. After each witness testified, he asked for the required corroboration, then obliged the prosecutor by striking the testimony. Thomas's spirits sank with the hopes of the defendants. Judge Lamphart was beginning to sweat.

Thomas was resigned to losing. But, at the last moment, out of the corner of his eye he noticed something peculiar take place. The lone witness for the prosecution was a plain mountain woman, about 40 years of age. She wore a shawl and a bonnet tied close around her chin. Her weather beaten, work-worn face was only partially exposed and so unremarkable that few in that courtroom gave it more than a passing glance. Thomas noticed that while the prosecutor was at the bench making his consecutive motions to strike the testimony of the witnesses, one of the young defendants had leaned over and said something to the woman. She answered back. It was a brief exchange, quickly shushed by the bailiff. Thomas wondered what the two could have said to each other for he knew that the defendant who spoke to the woman was the one from New Echota—a boy who did not go to school and spoke no English. How then had the prosecution witness been able to converse with the lad?

"If you have no other witnesses, Judge Lamphart, I am about to rule," the magistrate said.

The judge looked confused and miserable.

"We call the prosecution's witness back to the stand," Thomas blurted out, wondering where his voice was coming from.

"Are you trying to add insult to injury, son?" the judge asked him in a grunting voice as the surprised woman pulled her shawl tightly around her and made her way back to the stand.

"You have something to ask this witness, Judge Lamphart?" the magistrate asked.

The judge stared from the witness to Thomas.

"Are you Cherokee?" Thomas blurted out to the witness.

"I didn't say I wasn't," the woman said indignantly. "Nobody asked me."

Thomas knew at that moment that they had won. The magistrate knew it too, for his voice was low and disappointed and he gave the prosecutor a venomous look as he said 'case dismissed' and walked off the bench.

As they left the courthouse, Judge Lamphart put his arm around Thomas's shoulder and said, "You, my boy, are in great danger of becoming a genius."

Thomas turned to the Cherokee boy from New Echota and asked, "What was it you said to that woman?"

"I said 'Auntie, why are you testifying against me?'" the boy explained, "For I recognized her. She is from Hiawassee, my village in North Carolina. She said to me 'I'm married to a Scotsman from Tennessee but they told me they would put me in jail if I didn't testify.'"

Judge Lamphart did not have the strength to ride home that afternoon so he put himself up in a hotel in Lawrenceville after the celebrations. Pathfinder said he would bring the hackney to take him home the next day. As Thomas and Pathfinder left Gwinnett

County and rode side by side through the hills back to Dawsonville, trailing the judge's big mule behind them, the old Indian said to him, "I must go back to my village and prepare my family for the removal, for I know it must surely come. You stay and look after the judge. You will be more to him than I have ever been. You will be a great lawyer one day. You are half of one now."

Thomas was not sure he wanted to be a lawyer, not even half of one. It seemed to him as the rest of that year wore on and into the next that what the Cherokee Nation needed was fewer lawyers and more of what it once had in abundance—warriors.

He remained with the judge. He stopped cleaning windows and was given a small apartment above the office in Dawsonville. He continued at the little Methodist school in New Echota and took days off to

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work with the judge, clerking for him. Once or twice in that year he got to cross-examine a witness or present a motion and he worked on dozens of the land dispute cases which were popping up with greater frequency as the gold prospectors poured into the northern part of the state and laid claim to Cherokee territory.

He was a lawyer in every sense of the word but did not admit it to himself. A warrior was what he wanted to be, more and more as indignation over what was happening to his beloved Cherokee Nation flooded deeper into him. His fury at Andrew Jackson for doing nothing about it grew.

In March of 1831, Attorney Wirt argued before the Supreme Court of the United States that Georgia's interference in Indian affairs was unconstitutional and should be prohibited. Georgia, he said, had no power to interfere in Indian affairs. The Cherokee Nation was, in fact, a foreign nation over which the state of Georgia had no control and the Cherokee Nation was, in a limited fashion, answerable only to the United States which surrounded it.

If this argument succeeded, the Georgia Guard would not be able to enforce the removal nor enforce property claims of prospectors and settlers.

The Cherokee pinned their hopes on Wirt's argument during the months it took the Supreme Court to come down with a decision. Thomas was not optimistic. He did not waste a minute fooling himself. It was time, he thought, for action of another kind. No statement of the Cherokee or their clever Philadelphia lawyers had resonated with conviction in the halls of Congress and certainly would not in the Georgia capital of Milledgeville.

It was time for a statement that would ring out in the parliaments of the world.

Thomas was thinking of such a statement when, in July of that year, 1831, it was announced that Chief Justice John Marshall was about to read the decision of the Supreme Court. President Jackson had invited Judge Lamphart to the White House. The judge asked Thomas to join him on the trip. The judge was an old crony of Jackson and had been one of the president's commanders when he fought the British in New Orleans in 1812. Judge Lamphart had accompanied Jackson on his famous march back to Tennessee, both men denying authority together. He held him in the highest esteem and repeatedly tried to assure Thomas that Andrew Jackson was a friend of the Cherokee.

But Thomas did not believe it. He believed that you could not be a friend of the Cherokee and support the removal. Besides, had not Jackson's military campaigns decimated the Creek and the Seminole? No Indian could call Andrew Jackson a friend. Thomas kept his opinion to himself. The cloud which hung over him darkened even as Judge Lamphart's household eagerly prepared for the journey north.

On July 18, 1831, Chief Justice John Marshall read the opinion of the court. He was old by then and, in a quavering voice, he expressed regret that the Supreme Court could not support the position that the Cherokee Nation was a foreign nation. The United States was powerless to prevent Georgia from enforcing its laws against the Cherokee.

This was the last nail in the Indian coffin. Land forfeiture and removal were now certain.

Thomas, listening to the words of Chief Justice John Marshall, made a decision.

He would kill Andrew Jackson.



It was hot and humid in Washington. On the night of July 18 it had rained heavily. It stopped at early morning. The streets were now puddled as the Georgia Indian delegation squelched its way towards the White House, ankle deep in mud and horse manure. The place stank to the heavens. The mosquitoes were huge and bit furiously at exposed flesh. The men slapped at them and cursed the capital and talked lovingly of the relative coolness of their North Georgia Mountains.

The president saw the chiefs first and spoke with them for about half an hour. Judge Lamphart and Thomas did not join them. When their meeting was over Jackson led the party out and shook hands with each one in the main vestibule of the White House. Carriages had been made available to take them back to their hotels. Thomas could not help but think that if they had made the carriages available to bring them, the place would be much cleaner and the chiefs would be leaving in a better mood.

President Jackson came into the anteroom and greeted Judge Lamphart with a great bear hug, calling him 'Johnnie' and keeping an arm around his shoulder as he shook Thomas's hand.

"This is the young man I was telling you about who shows every sign of being a genius," the judge said.

"I have heard about him from Lawyer Wirt," the president said.

He led them into the drawing room of the White House. After a



## Thomas brought the shiv up in his right hand in a swift arc to take the president just below his rib cage, dead in the center of his chest.

moment, the servants withdrew and the three were on their own and sat down.

Thomas had not been diligent that morning in keeping the judge away from the bottle. The judge, he knew now, was not a heavy drinker, but rather, one of those men—fortunate in their liver but not in their social graces—who would fall asleep after a shot or two of whisky.

It was in Thomas's plan to allow the judge to slumber.

"I understand you are destined to be a brilliant lawyer," the president said. "I was a lawyer myself at the age of 20. You were an orphan too, at an early age. We have much in common."

Thomas tried not to be surly yet did not want to be friendly. The only thing we may have in common, he thought, is the dagger I possess. He steeled himself. He felt his resolve would melt if he seemed friendly. He had come here, he told himself, to do one thing. He felt that destiny had brought him here to make a statement to the world about his people, about his nation, before it disappeared. Why else would a 17-year-old Indian boy be sitting in the White House talking to the president of the United States?

At the back of the room there was a kind of scullery, a kitchen-like recess, where decanters of liquor had been set up. The president got up and continued to converse with him, in his one-sided way, as he walked to the scullery. He picked up a whisky decanter. Thomas followed him into the scullery. Jackson

was all vertical lines, like a pine forest in the dead of winter. His face was hollowed, gaunt, yellowish. It was a face, Thomas could tell, that had seen a great deal of hardship and Thomas's nature drew him to sympathize with it. But he told himself to resist, to be strong. He felt the cold steel of the shiv he had made and placed inside his pants, against the flesh of his thigh, just behind his trouser pocket.

Jackson put down the decanter, then turned to the counter of the scullery and began to break a lump of ice by thumping on it with a heavy spoon as he continued to speak. Thomas felt for the shiv with his right hand. He withdrew it. The blood was rushing in his ears. In that moment he debated with himself whether he should drive it into Jackson's back. What did honor matter after all, if you were an assassin? Was not honor suspended for that moment? But he knew he could not stab a man in the back. Would Old Hickory be tough as hickory?

Jackson turned.

Thomas brought the shiv up in his right hand in a swift arc to take the president just below his rib cage, dead in the center of his chest.

To his astonishment, Jackson had turned with nothing in his hands and Thomas realized in that instant that the president had fully anticipated his murderous act. His right hand came up over the top of Thomas's arm and he clutched the wrist above the clenched fist and knife cleanly. There was no struggle. Jackson's long fingers easily circled the boy's wrist.

He held tightly and kept the rest of his body perfectly still.

"I believe this young man, judge, has a great future ahead of him in Georgia," he said, raising his voice so the judge would hear him in the main part of the room. The two stared each other in the eyes.

The judge, in the armchair, had his back to them. If he had turned he could have seen them. But he did not turn. He mumbled something in agreement.

Thomas continued to drive the knife, which now touched Jackson's chest, and his hand and arm were shaking violently with the pressure of his forward momentum and the one-handed resistance of the other man.

"Not all Cherokee will leave at the removal or before, isn't that true, Johnnie?"

"Indeed, it is," Judge Lamphart agreed.

Thomas wondered why the president had not begun to call for the guard. It struck him also in that moment as odd that neither of them attempted to use their left hand, either in attack or defense. It was a one-armed duel. Like arm wrestling, though deadly.

"And if you'll forgive me for saying so, Johnnie, your days are numbered, is that not so?"

"I will go when I'm called," the judge said. "I do not delude myself that time is on my side. Are you trying to make a point, Mr. President?"

"Indeed, I am, Johnnie. A man cannot live forever," the president said. He was grinning now, even as he continued to hold Thomas's wrist. "Even a good man who does good work. But other good men will step forward to take his place and do the job that needs to be done, eh, Johnnie?"

"They will," said the judge, as he got the point. "But those good men must be made to see it."

Thomas felt his resolve slipping away.

"That is exactly my point, Johnnie. We must find a way to make Mr. Rainwater here recognize that even genius has its duty."

"I believe he knows it," the judge said.

"Then if he knows it he must declare it and announce to his people and to the world that he will use his God-given talents the best way he can. And you, Johnnie, must give him his place."

"He is somewhat resistant," Judge Lamphart said. "He is young. Thoughts of the glory of war dance in his head... If he is willing he will be called to the bar. When that happens I will step aside."

"This removal business," the president went on, "there is courage in going to Oklahoma, don't you think? It will be a long trek. But there is also great courage in remaining. If Mr. Rainwater chooses to serve his people, he must choose to serve those who remain. There will be no need for brilliant lawyers among the Cherokee in Oklahoma. Not for some time. Those who leave will need help, of course, but oh, so will those who remain. They will need advocates of the greatest skill! The question is, Johnnie, is our Thomas a 'doubting Thomas' or is he a 'redoubtable Thomas'?"

At a point in this conversation between the judge and the president, the blood had stopped rushing in Thomas's ears and he had begun to listen. As he later retold it, he believed it was when the president said, 'Those who leave will need help... so will those who remain.'

From that moment he felt he was not guiding his own hand. As the forward thrust eased, he felt that someone, or something—not he and not President Jackson—was easing it. Soon there was no pressure, and the president, feeling this, removed his hand from around Thomas's wrist. Thomas let his own hand, still holding the knife, fall to his side. He bowed his head. The blood which had been rushing in his ears was now hot in his face and he felt foolish and hopeless as he awaited the full wrath of the president, the entry of the guards, the loss of his freedom.

But Jackson simply took the knife from his hand, placed it on the counter, turned his back again, and dropped several pieces of the broken ice into the judge's glass. He poured a generous shot of whisky and walked it back to the outer room.

"Come, Thomas, join us," he called as he took his seat next to the judge again.



In 1851, the town of Dawsonville, where Judge Lamphart's practice was located, changed its name and became the City of Calhoun and is to this day. It sits next to Interstate 75, north of the 'new' Georgia capital of Atlanta. A few miles from Calhoun, the few buildings which comprise the Cherokee capital of New Echota remain, not exactly a ghost town, but a museum piece for the curious, the tourist, and for those who come to pay their respects at the Indian mounds.


Thomas Rainwater practiced law for almost 70 years following his meeting with Andrew Jackson. He kept the same office with Judge Lamphart and after the judge died, every Rainwater generation since has had a lawyer in that office. The

building was replaced on the same site in the 1950s.

Many Cherokee made the arduous journey—the 'removal'—to Oklahoma. Some by land, some by water. Many who set out did not make it. As President Jackson predicted, many also remained, dispossessed of ancestral lands. Life which had been hard for them in the best of times was suddenly more difficult.

Thomas Rainwater came to understand that Jackson's speech was not about the removal. It was a metaphor, those who go and those who remain, no right or wrong in it.

For the rest of his life, when clients came to see Thomas Rainwater they would say they were 'going to see Mr. Rainwater down at Judge Lamphart's office.' Everyone knew about his visit to Andrew Jackson in the summer of 1831, but they did not know what took place there. Upon leaving his office, they would often stop at the door and say, "Counselor, we heard you met with President Jackson, how did you find him?"

Thomas would pretend to think about it for a moment, then he would say, "I found him disarming." 



**Gerry Carty** attended Langside College, Glasgow, Scotland, before coming to Atlanta where he graduated from John

Marshall Law School in 1980. He has practiced plaintiff's personal injury law since then. Carty was also the winner of the Journal's 13th Annual Fiction Writing Competition for his story, "First Tuesday."

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## A Puff of Wind

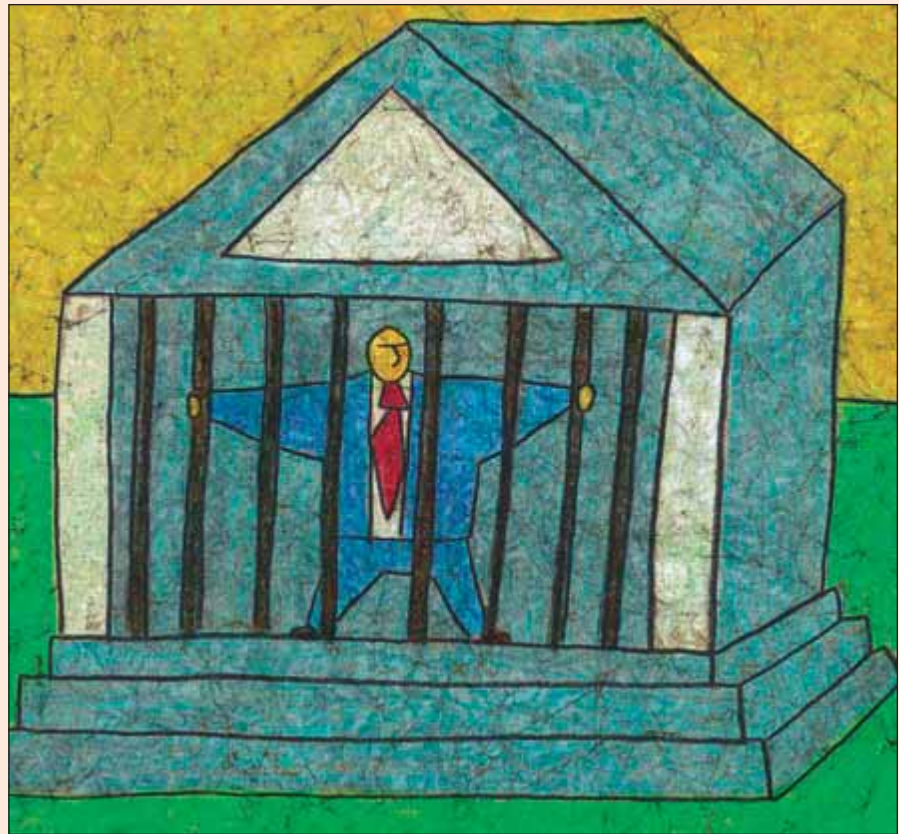
By J. Ellis Millsaps

**A**ngels appear unannounced, or so I've read. I don't know how Angela Kent came to be standing in front of my desk. My secretary said she didn't see her come through the reception room, but there she stood saying, "Mr. Hollis, may I please talk with you, sir?"

I could have said, "Do you have an appointment?" "Have you paid a consultation fee?" "Do I know you?" But I didn't say any of those things. I said, "I'd be delighted. Have a seat."

I'd never had what I later learned to be a 16-year-old girl seek my services, unless she came about her boyfriend in jail, more often than not with a poorly tended infant wedged on a jutting hip. Angela looked more like my teenaged daughter, maybe come to ask the high school counselor if she could take another advanced class. I wondered briefly if they knew each other.

Most people, in my observation, if they're ever going to be good looking, will at least show strong signs of future beauty at 16. Some



at that age have reached their peak of pulchritude and begun their descent into the ubiquitous, flabby sameness of American middle age, but Angela Kent had the kind of face you see on magazine covers. Time would change that face, but not its perfect proportions.

"It's about my father," she said, then, "Excuse me," and blotted a tear. There seemed to be no make-up to smear.

"Who is your father?" I asked.

"C.W. Kent. He's in jail. He's charged with murder." She squeezed her eyes shut and opened them, lashes glistening.

The middle Georgia town in which I live is not a large one. We have our share of murders, but as a criminal defense attorney I make it my business to be aware of them all. Most of those accused at least inquire about my services.

"I've read something about this in the paper, I think. Your father—" I

paused to consider the delicacies of the situation, then realized the poor child was already acquainted with the facts, probably read the same article I had. It was a familiar story: man finds wife at motel with man and shoots him, in this case with a single-shot 12-gauge shotgun.

People say you win cases nobody else can win. My friend's brother says you're 'more powerful than death.' Please, please, say you'll be his lawyer.

"Is the woman your mother?"

"No sir. My mother died when I was 3. Lynette's my stepmother." She leaned forward on stiff arms, hands gripping the sides of her chair.

"Does your father have a lawyer?"

"He's got the public defender. He says he's guilty and there's no sense wasting money on a lawyer."

"Since you're here, I'm guessing you think otherwise."

"I don't want my father to go to prison. He's not a criminal; he's the kindest, best man I know." She released her hold on the chair and leaned back, resting folded hands in her lap. The tears had stopped. I could tell she'd rehearsed this part.

"He raised me by himself. He married Lynette five years ago, but...well, she's not my mother. She's a whore, Mr. Hollis. I was in the sixth grade and I could see that but he couldn't. I never said anything because she seemed to make him happy, and I wanted him to be happy. Nobody deserves to be happy more than him.

"He's a cabinet maker, Mr. Hollis. He makes beautiful cabinets. He's got a shop behind our house. He could get a job doing woodwork anywhere and make

more money but he never did that because of me, so he'd be home. When I had something at school where other kids' mothers showed up, my daddy was there. He's always been there and now—". Her voice cracked, but she stopped herself, sighed and went off script.

"My father wouldn't hurt a flea. Well, O.K., we like kill the fleas on our dogs. We spray for ants, but he won't like kill snakes or spiders. The gun, the shotgun, was one my grandfather owned. He didn't even have shells for it. He had to like stop at Wal-Mart to buy shells.

"I saw an old movie on T.V. where Jimmy Stewart was a lawyer. This soldier had killed a guy who had like raped his wife or whatever. The lawyer won the case because...something about temporary insanity I think. I know you could do that for Daddy, Mr. Hollis. People say you win cases nobody else can win. My friend's brother says you're 'more powerful than death.' Please, please, say you'll be his lawyer."

I'd heard things like this before, but my pleasure at hearing them is undiminished by repetition. It's one of the reasons I do what I do.

Before I got whole hog into fantasizing myself as the protagonist of *Anatomy of a Murder*, I broached the subject of another reason I do what I do. "My services don't come cheaply in a case like this and if your father doesn't want to hire a lawyer, I can't make him. I can't go down to the jail and try to talk him into hiring

me. It's against the rules."

"I can pay you, Mr. Hollis. I don't know what you charge, but I've got this." She handed me an envelope. "And I can get a job and like pay you every week. My mother's parents can pay you some; they get social security."

The envelope was from one of the local banks. Inside was a savings account statement. The balance was \$6,134.27.

"It's none of my business, but I'd like to know where you got this money."

She smiled and my heart fluttered. I was then 46 years old. I don't lust after young women. If I were not married, I'd be embarrassed to date a woman, say, 15 years younger than me. It's like the schoolyard maxim about picking on somebody your own size, but although it had been years since I could touch a basketball rim, my eyesight was still good, and there was no denying the female seated across from me was a visual credit to the gender.

"I've been saving it all of my life. It's my college fund. Every time Daddy gave me my allowance he like matched it with a savings deposit. But it's my money," she added with an assurance the conversation hadn't elicited to that point, "and it's all yours if you'll help my daddy."

"Now how are you going to go to college if you give me your college money? Your father's very likely—you need to face this—going to prison, and your grandparents are living on social security. I'm sorry to be so blunt, but this is serious business. It's your future. I know this is a horrible thing you're going through. I couldn't imagine being in your situation, but someday you'll wish you had this money."

"If I didn't give you the money, I might someday be like a doctor or a lawyer, but I'd also be dead inside. I mean there's more to life than money, right?"

I can't help it. I get choked up every time I watch "It's a Wonderful Life" when George Bailey reaches in his watch pocket and finds Suzu's petals. I've been known to find Suzu's petals during closing argument. I sat tapping the corner of the bank envelope on my desk and I knew two things.

I knew I was going to visit a man named C.W. Kent at the county jail, and I knew I wasn't taking a penny of his daughter's college fund.

I waited until I thought my voice was steady to say, "I'll see what I can do. I can't promise anything, but I'll go talk to Mr. Kent."

"Oh, thank you. Thank you. Would it be O.K. if I hugged you?"

"No, young lady, it would not. You shouldn't be hugging old geezers you've just met. You don't know where they've been."

She laughed. "Well, we'll shake hands then," she said standing and we did. She looked at me so intensely I had to look away. "You'll call me?"

"Yes, I'll call you."

She turned around as I followed her out. "About college," she said, "there's always the Hope Scholarship, and I'm a pretty good basketball player. Ask Charlotte," she added, mentioning my daughter's name and giving me another shot of the heartbreaker smile.



I'd like to say that the reason I found myself sitting with a phone to my ear looking at C.W. Kent through a plexiglass window had nothing to do with his daughter's dazzling smile. I'd like to say that,

I'd like to say that the reason I found myself sitting with a phone to my ear looking at C.W. Kent through a plexiglass window had nothing to do with his daughter's dazzling smile. I'd like to say that, but I indulge in the conceit that I'm an honest person.

but I indulge in the conceit that I'm an honest person.

A county-issued orange jump suit is a leveler of social classes. I've seen professionals and beggars, the morally reprobate and the just plain unlucky wearing them and, until they spoke, you might not know which was which, but before C.W. Kent spoke I could tell he was a good man. His face was strong featured, kindly. I think I would have guessed he was Angela's father if I hadn't already known.

"Good afternoon, Mr. Kent. My name's Hubert Hollis. I'm a lawyer. Your daughter asked me to come see you."

"Pleased to meet you, Mr. Hollis. Angela said you'd be coming." He smiled engagingly, as if we were meeting to discuss some cabinets I wanted built. He didn't have the air of desperation I usually encounter in these short-distance phone calls. He wasn't talking a mile a minute about how he'd been wronged; he was matter of factly saying, "I apologize for taking up your time, but I'll talk to you for her sake. I'd do anything for Angela, but I've put myself in a situation where this is about all I can do for her."

"I'm afraid there's nothing you can do for me, Mr. Hollis. People in here tell me you can move mountains with a wave of your hand. I've had jailers tell me I ought to hire you, so I know you're a good

lawyer, but you can't change the fact that I murdered a man who was trying to get his pants on. I can't afford to hire you but that's beside the point. What's done is done."

If I were going to be his lawyer he'd stop saying "murder," but that could wait.

"You let me decide about that after I know a little more. Don't concern yourself with money for the time being. We can talk about that later if I decide to take your case."

"It's your dime," he said. "What would you like to know?"

"Did you give a statement to the police?"

"I don't know about giving a statement. I told them what happened."

"Did they tell you that you didn't have to talk to them if you didn't want to?"

"Oh yeah. They read me that Miranda thing right off the bat. The deputy who arrested me at the motel was Clyde Ferguson. I've known Clyde all my life. When he put me in the back of his car he said, 'I'll swear I never told you this C.W., but if I were in your shoes I'd tell anybody who asks that you're not saying a word until you get a lawyer.'"

"And you're telling me, I take it, that you disregarded the best legal advice anybody could have given you at that point."

"It's like I told Clyde when he



told me that. Them two made a fool out of me, or at least showed me up for the fool I am. Taking credit for killing that boy is the last shred of dignity I got."

"I see. I want you to tell me as best you can exactly what you told the police."

"I told them I was an old fool when I married Lynette and this is what it got me. She was divorced twice when I met her and young enough that anybody but an old fool like me could see I was headed for trouble. I didn't want to see that anymore than what her and that boy was doing right under my nose.

"The funny thing is the boy wadn't a bad worker. Only good help I ever had and I killed him. Ain't that a hell of a note?

"Maybe I should've fired him the first time I saw them making eyes at each other, but I didn't. I didn't think the boy would do me that way after I give him the chance I did. You know he was an ex-con?"

I in fact knew the "boy" to be Shane Davis, a 26-year-old imprisoned three times for burglary, drugs and probation violations.

I nodded.

"Lynette started coming up with more and more reasons why she needed to be gone for a few hours, but I'm such a fool it took me six months to realize this only happened when Shane wadn't working. Last week when he called in sick I followed her, followed her to the Days Inn and saw her park by his old truck and go in 13B. '13' be their unlucky number wouldn't you say?"

He paused for me to acknowledge his joke, and I did, hoping for his sake he didn't offer this pun to the cops.

"Anyhow, I drove home, got my shotgun, stopped at Wal-Mart,

bought some shells, went back to the motel, kicked the door in, shot Shane while he was putting his pants on and...and I don't know why I didn't kill Lynette too, but the truth is I don't remember that part. The next thing I remember is Clyde putting handcuffs on me."

"You ever done things and not remembered them before?"

"Not right after the fact as far as I know, but look Mr. Hollis, I'm an old fool, but I'm not stupid. I see where you're going with this and I appreciate it, I really do, but I was crazy when I married the woman but I wadn't crazy when I killed that boy. I was just plain humiliated and mad enough to kill. I don't know why I didn't kill her too. I meant to.

"I've got to pay the piper now and I know it. Nothing's going to change that.

"You tell Angela that you talked to me and I think you're a helluva lawyer but we both decided there's nothing can be done.

"I'm not looking forward to prison but a man can face what he's got to. The thing I really feel bad about is that I won't be there for Angela."



That night I asked my daughter about Angela Kent.

"Angela Kent? She's amazing. The most amazing thing about her, aside from the fact that she can shoot three-pointers better than anybody on the boys team, is her clothes."

I revisited her attire at my office. A corduroy skirt that challenged the school system's fingertip-length rule and a little knit top that didn't quite reach the skirt. I know the outfit well. I've purchased my share of them.

"What about her clothes?"

"Well, she like makes them her-



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self and they're so cool. Some of the snottier girls like make fun of her for that, but they're just jealous because their boyfriends have the hots for her."

"She have a boyfriend?"

"Just you, Lawyer Hollis. It's all over the school that she's saying you're going to get her dad off for murder."

I winced at that, not only because her father didn't want my representation but because of the girl's naive faith that I could do what was likely impossible.

The following afternoon I called Angela. Her father had obviously prepared her because she accepted the news with a polite, "Thank you, Mr. Hollis. I'm sorry to have wasted your time. Please let me pay you."

When I declined she said she wasn't a charity case yet and she would pay because it was right. I finally convinced her that free tickets to her first basketball game was about fair.



November passed and my contact with the Kents was apparently over, but not my interest in the situation.

The fact that C.W. Kent was not my client hadn't stopped me from keeping posted through Charlotte as to his daughter's well-being, which, not surprisingly, was not well at all: quiet, withdrawn, frequent absences.

Nor had it stopped me from visiting the Days Inn and marveling that anyone, let alone an average-sized, 55-year-old man, could kick in one of its metal doors. Kick it in with apparently one blow, because Shane Davis hadn't had time to whip out the .45 he was illegally carrying.

Nor had it stopped me from going to the PD's office and gather-

ing information like the fact of the gun in Shane Davis' possession and reading a copy of C.W. Kent's confession. They were happy to have any insights I might offer and hoped that I would take that case and a few hundred other losers off their hands.



Angela appeared again on December 3, this time having made an appointment. She was thinner and pale but animated.

"I've got great news, Mr. Hollis. Daddy wants you to take his case." She was writing a check as she talked.

"Hold on here. If I take your father's case I'll work out the financial arrangements with him. What changed his mind?"

"You'll have to ask him. He didn't tell me and I didn't ask because I didn't want to do anything to like change his mind back."

She was so happy she was giddy.



As I waited for Mr. Kent to make his way through doors being electronically opened, I sifted through conflicted emotions. True, I was fascinated with the case and highly empathetic to the plight of C.W. and his daughter. I very much wanted to help, but seriously doubted I could. C.W. would take things in stride, I thought, but Angela had higher hopes than the situation warranted. I was very likely going to shatter her dream and just thinking about it saddened me.

Before Angela's second visit, I had, for a person who loves praise and approval as much as I, the best of both worlds. I was in Angela's eyes a miracle-working attorney who could save the day if only her father's obstinacy would allow it.

Not only was that immensely flattering, it was invaluable advertising with the future generation of felons the "war on drugs" would create among Angela's classmates. Now I would lose those things.

Also, I would likely never be paid. C.W. would go to prison or, in the highly unlikely event the only defense of which I could conceive were successful, he'd stay in a state mental institution indefinitely. Neither venue offered lucrative employment opportunity. I particularly like to be paid well if I'm going to lose because, unlike winning, it's not good advertising.

But there I sat, looking at a loser for which I was being paid in high school basketball tickets, thinking that all I had to do was insist on payment up front and I could walk away with my reputation in tact. No one, no lawyer anyway, would think less of me for that.

I was looking at that, looking hard at that, as I was looking at C.W. Kent's genial face, a telephone receiver at his ear.

"We meet again," he said.

"What changed your mind, Mr. Kent?"

"Call me C.W. Everybody else does. My parents named me Clark so you can see why I go by C.W. It wasn't that their expectations were that high; they were old country folks, farmers—kind of like the place where the super baby landed—they'd actually never heard of Clark Kent.

"But they were good people, Mr. Hollis. Solid as a rock. We never had more than one old car. I was grown before I lived in a house with a color T.V. or air conditioning, but they always had money when my tires went bald or I couldn't make my house payment. Growing up I thought they could

handle anything that came our way. I was grown before—I'll never forget—it dawned on me that they were poor, that any minute during my childhood I thought was so secure a puff of wind could have wiped out what little we had.

"It's more than just my life at stake here. Angela's just turned 16. One thing I've always done is make sure that girl had everything she needed so she never knew about that puff of wind thing. Till now. Trying so hard, I thought, and in one fool moment I unleashed a damn tornado."

Clark Kent hung his head and cried.

"I've got to do whatever I can to get out of here for her sake. I know you can't keep me from doing some time but I need you to help me. I don't want to spend the rest of my life talking to my little girl through prison bars and, to tell you the truth," he looked up and grinned, "I'm scared to death of prison for my own sake. You hear things in here."

I grinned back. "I sure as hell can't blame you for that."

"I don't have any money, Mr. Hollis, but I do own most of a house. I'll give you that to sell. If there's any change back you can put it in Angela's savings. I want you to take my case. I'll do whatever you tell me, say whatever you tell me to say to get me back to Angela as soon as the Good Lord's willing."

This was my last chance to walk away from a situation that would consume my time and drain me emotionally for a long time to come, but I didn't take it. I wouldn't be telling you this story if I had.

You recall that I crave approval.

"I'll take your case C.W., but we're going to do it on my terms. The house is Angela's. You're

going to sign a promissory note for \$25,000 and whatever expenses we incur. When and if you get out we'll set up a payment plan.

"Take it or leave it."



Of course there's more to the story, but five years later that's the part I remember best. A lot of the rest is kind of a blur, but I'll hit the high points for you.

The first trial came seven months later. The core of the defense was one of the best you can have in a murder case: the son of a bitch needed killing anyway. Juries are sympathetic to that defense, especially out here in the sticks, but you've got to, as we say, give them something to hang their hat on. Something in the judge's charge that makes it "legal."

The hat peg, of course, was insanity. After a lot of shopping around I found a psychiatrist with halfway decent credentials who was willing to get with the program. C.W. took the stand and in response to the crucial question, "Did you at the time you shot Shane Davis know the difference between right and wrong?" answered, "I knew the day before. I of course know now I did wrong. I'm a fool but I'm not stupid—I like to think so anyway—but from the time I saw their cars at the motel till they put the cuffs on me, the only thing I knew was I was going to kill the both of them."

We put up 20 character witnesses including the president of the P.T.A., a county commissioner, and the aforementioned Deputy Clyde Ferguson.

You wouldn't think that would work and it only sort of did.

The first jury hung 8-4 for conviction. C.W. went back to jail and six months later we tried the case in


another county, there being hardly anyone left in our bailiwick who hadn't followed the first trial.

After three days deliberation the second jury announced they were hung, this time reportedly 7-5 for acquittal. The following week, after 16 months in the county jail, C.W. Kent was granted bond over the state's objection.

C.W. never spent another day in jail. He eventually pled guilty to voluntary manslaughter with a sentence of five to serve one, credit for time served. Every month I get a check from him for \$250.

I only see Angela Kent when C.W. and I can make it to a Tennessee Lady Volunteers' game, but every April when my birthday rolls around I get a handmade linen shirt. Embroidered on the pocket of each is "Angela Loves Mr. Hollis."

When I'm trying a case I don't have a snowball's chance of winning, when I wonder whether I can give my closing with a straight face, when the odds of winning are so low a bookie wouldn't give you a line and I know they'll take my client off in handcuffs and drag his wailing mother from the courtroom, I wear one of Angela's shirts.

They're one of the reasons I do what I do. 



**J. Ellis Millsaps**, a life member of the Georgia Association of Criminal Defense Attorneys, practices out of Covington, Ga.

His two children attend Emory University where his wife, Cynthia, is an employee. He writes a weekly humor column for The Covington News and is currently putting the finishing touches on a novel, "Good Cop, Bad Cop."



## KUDOS

Cozen O'Connor named **Samuel S. Woodhouse III**, a member of the firm's subrogation and recovery department, as the **managing attorney** for its Atlanta office. Concentrating his practice in the area of personal injury, products liability and general liability claims, Woodhouse has tried jury trials, non-jury trials and arbitrations to verdict in federal and state courts. He also practices in the field of alternative dispute resolution and is a registered mediator in Georgia.



**Hon. James G. Blanchard Jr.**, 8th Superior Court judge for the Augusta Judicial Circuit, was honored with the **Distinguished Alumnus Award** from the Augusta State University Alumni Association. The association presents

the Distinguished Alumnus Award to an individual who has achieved a level of excellence in their chosen profession and who has provided outstanding support to the community and ASU. Active in professional organizations, he is a member of the Augusta Bar Association, the American Bar Association, the Trial Lawyers Association of America, and the Family Law Section of the State Bar of Georgia.



**Cozen O'Connor attorney Karen D. Fultz** was sworn in as **president** of the **Gate City Bar Association**, the oldest African-American Bar Association in the state. Chief Justice Robert Benham presided over the ceremony, with more than 31 judges from the Georgia Court of Appeals and other courts in attendance. Fultz will lead the 300-member organization, which facilitates continuing education programs, participates in the selection process for federal and state judges, and works to ensure the representation of African-American attorneys in local government decision making. As president, Fultz will be a member of the Atlanta Bar Association's board of directors, and plans to focus on expanding Gate City's community outreach initiatives. Fultz, who joined Cozen O'Connor's Atlanta office in 2002, concentrates her practice in subrogation and recovery.



**Kilpatrick Stockton LLP** announced the recipients of the second annual **Kilpatrick Stockton Pro Bono Awards**, which recognize those individuals and groups whose contributions made the greatest impact upon people in their communities: **Rick Horder, Pro Bono Managing Partner Award**, and **Rich Dolder, Pro Bono Associate of the Year**. Horder,

partner in the Real Estate Group, began Kilpatrick Stockton's "Grandparent Adoption Program" over eight years ago. This signature program addresses the needs of low-income relatives caring for children whose parents are absent. The Grandparent Adoption program allows grandparents and other relatives to formalize their relationships with grandchildren in their care, provide stability for the children and make appropriate decisions about children's lives. Dolder was recognized for a series of victories in a variety of cases that materially affected the lives of four low-income clients.

Additionally, Kilpatrick Stockton announced that **The Florida Bar** presented Horder with the **President's Service Award** at the Florida Supreme Court in Tallahassee. He was selected from a group of nominees for the "Out of State" circuit. The purpose of the award is to encourage more lawyers to freely contribute their time and expertise in providing legal services to people in their community who cannot afford these services.



Garber



Martin



Shapiro



Smotherman

Four attorneys of Atlanta-based **Shapiro Fussell, LLP**, were chosen as **2005 Georgia Super Lawyers**, a joint project of *Law & Politics* and *Atlanta* magazines since 1991. Only 5 percent of the State Bar of Georgia receives this honor, and Shapiro Fussell is one of the smallest Georgia firms to receive four attorney nominations. Super Lawyers identifies attorneys who have attained a high degree of peer recognition and professional achievement. **Ronald J. Garber** joined Shapiro Fussell in 1977 and has been a partner in the firm since 1983. His practice areas are construction law, government contracts and commercial litigation. **H. Fielder Martin** has practiced alternative dispute resolution, construction law, professional liability and surety at Shapiro Fussell since 1993. **Ben Shapiro** founded Shapiro Fussell in 1970. His practice areas are alternative dispute resolution, commercial litigation and construction law. **Ira J. "Mickey" Smotherman Jr.** joined Shapiro Fussell in 1972 to practice alternative dispute resolution, construction law, government contracts, and employment and labor.

**Hunton & Williams** announced that eighteen attorneys from its Atlanta office have been named **Georgia Super Lawyers** for 2005. The attorneys

honored were: **Jerry B. Blackstock**, **Russell S. Bogue III**, **Lawrence J. Bracken II**, **Arthur D. Brannan**, **Matthew J. Calvert**, **L. Traywick Duffie**, **Mark E. Grantham**, **Scott M. Hobby**, **Robert E. Hogfoss**, **Elizabeth Ann "Betty" Morgan**, **Robert E. Muething**, **Kurt A. Powell**, **William M. Ragland Jr.**, **Rita A. Sheffey**, **Caryl Greenberg Smith**, **C. L. "Mike" Wagner Jr.**, **Stephen F. White**, and **Dennis L. Zakas**. In addition to being named to the Super Lawyers list, Blackstock was also selected as one of the **Top 10 Georgia Super Lawyers**; Duffie was named one of the **Top 100 Georgia Super Lawyers**; and Elizabeth Ann Morgan and Caryl Greenberg Smith were included among the **Top 50 Female Georgia Super Lawyers**.



**Jerry B. Blackstock**, a partner in the Atlanta office of **Hunton & Williams**, was selected in a national election to serve as one of two new trustees on the **Foundation of the American Board of Trial**

**Advocates**. Founded in 1958, ABOTA is a national association of over 6,000 experienced trial lawyers and judges nationwide, whose members are "dedicated to the preservation and promotion of the civil jury trial right provided by the 7th Amendment to our U.S. Constitution." Blackstock has been a member of ABOTA for 21 years, and has served on its National Board of Directors, representing the Georgia chapter, for 15 years. He has achieved the highest classification, diplomate, which recognizes members who have tried at least 100 civil cases. Blackstock chairs the firm's Atlanta Litigation Team, and is annually lauded for professional achievement. He was named in *Atlanta Magazine* for the second consecutive year as a Top 10 Super Lawyer in Georgia. *Georgia Trend* called him one its Legal Elite for the second year in a row. In 2002, the General Practice & Trial Section of the State Bar of Georgia bestowed on him one of its highest honors, the Tradition of Excellence Award for Defense Lawyer of the Year. In addition, he is listed in *Best Lawyers in America* and *Chambers USA* as a leading lawyer for business in intellectual property and commercial litigation.

Kilpatrick Stockton announced attorneys **Rupert Barkoff** and **Mort Aronson** have been named "**Legal Eagles**" by their peers in this month's issue of *Franchise Times*, a leading resource for franchise owners. Barkoff, the firm's Franchising Practice Group Chair, is located in Kilpatrick Stockton's Atlanta office. He has been practicing franchise law since 1973 and has served three years as chair of the ABA's Forum on Franchising. Barkoff is rec-

ognized as one of the country's leading franchise attorneys by The Best Lawyers in America® and The International Who's Who of Business Lawyers. Before joining Kilpatrick Stockton, **Aronson**, counsel in the firm's Franchise Practice Group, spent 25 years with the Holiday Inn hotel chain, most of which as vice president and general counsel-franchising. He has written numerous articles on franchising and has spoken before the International Franchise Association, the British Franchise Association, the Mexico Franchise Association, the Asian American Hotel Owners Association and the American Bar Association's Forum on Franchising. Aronson has served as chair of the National Franchise Council and of the National Franchise Mediation Program, and is also an adjunct professor at Emory University Law School, where he teaches franchise law.

The law firm **Chamberlain Hrdlicka** announced that **David D. Aughtry** and **Thomas E. Jones Jr.** were named to the **2005 Georgia Super Lawyers list**. Aughtry joined Chamberlain Hrdlicka in 1982. In 1986, he opened the firm's Atlanta office, where he serves as managing shareholder and head of the tax planning and controversy practice. Previously, he served as tax shelter coordinator and trial attorney for the Office of Chief Counsel, Internal Revenue Service. Jones joined Chamberlain Hrdlicka in 1997. Jones is a shareholder and member of Chamberlain Hrdlicka's executive committee, and heads up the Atlanta office's corporate team. His practice areas include mergers and acquisitions; business financings; corporate and partnership organization and governance; estate and business planning; estate administration; and estate and gift taxation.

**Richard W. Schiffman Jr.**, shareholder at the Atlanta-based law firm of **Davis, Matthews & Quigley P.C.**, has been elected president of the **Georgia Chapter of the American Academy of Matrimonial Lawyers**. Schiffman has practiced in the firm's domestic relations and family section since joining Davis, Matthews & Quigley in 1988. Schiffman is listed in *The Best Lawyers in America*, was named by *Atlanta Magazine* as one of Atlanta's best lawyers in the area of family law and has published numerous articles on family law matters.

**Schiff Hardin LLP** partner **David H. Williams** has been voted a **Georgia Super Lawyer**. In addition to the personal recognition for Williams, this is a particular distinction for Schiff Hardin's Atlanta office, which he opened in 2003. Williams has particular expertise in employee stock ownership plans (ESOPs), other tax qualified retirement

plans, health and welfare plans, and executive compensation. His practice focuses on business mergers and acquisitions; the design, implementation, and administration of employee benefit plans; and representation of retirement plan fiduciaries.



Asbill

Austin

Buffenstein

Connell



Johnson

Jospin

Marzetti

Molen



Parker

Scott

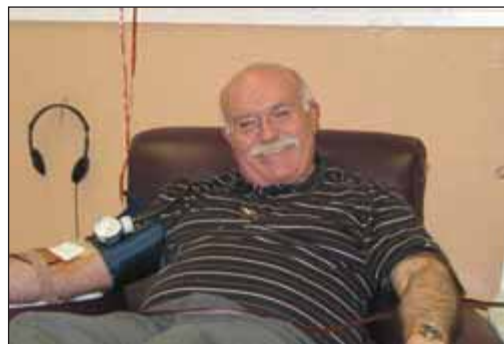
Weirich

The following attorneys in the Atlanta office of **Paul, Hastings, Janofsky & Walker, LLP**, have been named **"The Best Lawyers in America"**: **Richard M. Asbill**; **Jesse H. Austin III**; **Daryl R. Buffenstein**; **Paul Connell**; **Weyman T. Johnson Jr.**; **Walter Jospin**; **Philip Marzetti**; **Chris D. Molen**; **John G. Parker**; **W. Andrew Scott** and **C. Geoffrey Weirich**.

**Kilpatrick Stockton LLP** announced that it has been identified as a **"leading" firm**, the top honor a firm can receive in the recently released **PLC Which Lawyer? Yearbook 2005**. The firm earned this distinction in two key areas: intellectual property and labor and employee benefits. The survey also noted the firm's strategic expansion of capabilities in several key practice areas. Due to this expansion, the firm was **"highly recommended"** in the areas of corporate real estate, banking and finance, company and corporate transactions, dispute resolution, and restructuring and insolvency. Overall, Kilpatrick Stockton was named one of the top three firms in Atlanta. Formerly known as **Global Counsel 3000**, the *Yearbook* provides law firms and individual lawyer recommendations by core commercial practice areas in over 70 jurisdictions worldwide.

*Multicultural Law* magazine recognized **McGuireWoods LLP** in its **"Top 100 Law Firms for Diversity"** list. The annual survey, pub-

lished in the magazine's March 2005 issue, ranked law firms based on diversity of their lawyers, use of diversity committees and mentoring programs, and leadership initiatives to support diversity.



**Jack Fishman**, Atlanta attorney, donated platelets for the **American Red Cross** for the **500th** time in March. Platelets are the clotting factor in blood, which are used to help cancer and leukemia patients. Most healthy people age 17 or older who weigh at least 110 pounds can donate platelets every two weeks, up to 24 times each year. Since it takes approximately two hours to donate, Fishman has at least 60,000 minutes—or 1,000 hours—donating platelets for the American Red Cross. Donating 500 times, he alone would have supported Atlanta with a week's goal of collections for platelets. Fishman has given platelets with the American Red Cross Blood Services, Southern Region more than any other regional donor. (The Southern Region covers most of Georgia, parts of Florida and parts of South Carolina.)

**Krevolin & Horst** announced that **Jeffrey D. Horst** was selected by *Georgia Trend* magazine as one of Georgia's **Legal Elite for Business Litigation**. Horst has a complex trial and appellate business litigation practice with an emphasis on accounting malpractice, corporate governance, officer/director liability and trade secrets.

**Sutherland Asbill & Brennan** announced that **Charles T. Lester Jr.** was awarded the **Elbert P. Tuttle Award** for his outstanding civic activities and dedication to justice by the Anti-Defamation League, Southeast Region. The Elbert P. Tuttle Award was established to recognize individuals in the legal community who best exemplify the Anti-Defamation League's mission to secure justice and fair treatment for all people. As co-chair of the firm's Bar and Public Services Committee, Lester devotes much of his time to pro bono work. As Past President of the State Bar of Georgia, he was a founder and co-chair of the State Bar's Diversity Program.



## ON THE MOVE

### In Atlanta

The law firm of **Alembik, Fine & Callner, P.A.**, has relocated to SunTrust Plaza, 37th Floor, 303 Peachtree St. NE, Atlanta, GA 30308; (404) 688-8800; Fax (404) 420-7191; [www.afclaw.com](http://www.afclaw.com).

**Arnall Golden Gregory LLP** has moved their office to 171 17<sup>th</sup> St. NW, Suite 2100, Atlanta, GA 30363; (404) 873-8500; Fax (404) 873-8501; [www.agg.com](http://www.agg.com).

**Hoffman & Associates, Attorneys-at-Law, L.L.C.**, specializing in estate and tax planning in addition to general business legal services, has relocated their office to 6100 Lake Forrest Drive, Suite 300, Atlanta, GA 30328; (404) 255-7400; Fax (404) 255-7480; [www.hoffmanandassoc.net](http://www.hoffmanandassoc.net).



**Thomas, Means, Gillis and Seay, P.C.**, announced the addition of **Eugene Felton Jr.** as attorney-at-law in its Atlanta office. Prior to joining TMG&S, Felton served as assistant district attorney for the Bibb County

District Attorney's Office. He practiced law as a partner in the law offices of Davis & Felton, P.C., located in Warner Robbins, Ga. He also worked as an associate for George Melville Johnson & Associates in Atlanta. Felton has extensive experience in both criminal and civil litigation cases, including numerous employment discrimination cases. The Atlanta office is located at The Equitable Building, Suite 400, 100 Peachtree St. NW, Atlanta, GA 30303; (404) 222-8400; Fax (404) 222-0080; [www.tmgpc.com](http://www.tmgpc.com).

A former partner and a former senior counsel of Holland & Knight's Atlanta office, and a former Alston & Bird partner have joined **Morris, Manning & Martin, LLP**. **James "Mac" Hunter** and **Jason P. Wright** joined Morris Manning & Martin as partner and of counsel. **John P. Fry** of Alston & Bird also joined as partner. Hunter, a partner with Schnader Harrison Segal & Lewis prior to joining Holland & Knight in 2000, was a partner in the former Hurt Richardson Garner Todd & Cadenhead firm. Hunter will continue to practice in the areas of business, finance, health-care, employment, eminent domain and international law. Wright was a Schnader Harrison associate before joining Holland & Knight in 2000 with Hunter. He will continue to handle general and commercial litigation and eminent domain work. Fry comes to the firm from Alston & Bird where

he was a partner in the IP Litigation Group for eight years. He regularly serves as a primary advisor to public and private companies on all aspects of intellectual property management and strategy and focuses in the areas of patent, trademark and copyright infringement, unfair competition and trade secret litigation. The firm is located at 1600 Atlanta Financial Center, 3343 Peachtree Road NE, Atlanta, GA 30326; (404) 233-7000; Fax (404) 365-9532; [www.mmmlaw.com](http://www.mmmlaw.com).

**V. Justin Arpey** and **Wayne A. Morrison** joined the Atlanta-based law firm **Davis, Matthews & Quigley, P.C.** Arpey is an associate in the firm's civil litigation practice, while Morris is an associate in its domestic law practice. The firm provides services in the practice areas of civil litigation, corporate representation, family law, real estate law, estate planning, estate administration and taxation. The office is located at 3400 Peachtree Road NE, 14th Floor, Atlanta, GA 30326; (404) 261-3900; Fax (404) 261-0159; [www.dmqlaw.com](http://www.dmqlaw.com).

**McGuireWoods LLP** announced two former partners of Troutman Sanders and a former Prudential Financial executive have joined McGuireWoods as partners in its Atlanta office. The three new partners include: **John C. Beane**, who chaired Troutman Sanders' corporate and securities practice group for 11 years; **William B. Marianes**, who chaired Troutman Sanders' intellectual property practice group for 15 years; and **Andrew Cataldo**, who left Troutman Sanders in the late 1980s to work for Prudential Financial, and most recently has served as an Atlanta-based independent management consultant. Beane focuses his practice in mergers and acquisitions and finance transactions. Marianes focuses his practice in corporate law, mergers and acquisitions, technology, intellectual property, licensing, franchising, outsourcing and business succession planning. Cataldo, a former Troutman Sanders corporate attorney, spent more than 11 years at Prudential Financial in Atlanta and at Prudential's headquarters in New Jersey. In joining McGuireWoods, Cataldo will leverage his diverse legal and business experience in the areas of corporate law, mergers and acquisitions, securities, corporate governance, finance and asset securitization. The firm's Atlanta office is located at The Proscenium, 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30309; (404) 443-5500; Fax (404) 443-5599; [www.mcguirewoods.com](http://www.mcguirewoods.com).

The Atlanta-based law firm of **Cohen, Cooper, Estep & Mudder** announced that **Harold Whiteman Jr.** joined the firm in March. He will practice in the areas of workers compensation, insurance and commercial litigation. The office

can be found at 3350 Riverwood Parkway, Suite 2220, Atlanta, GA 30339; (404) 814-0000; Fax (404) 816-8900; [www.ccemlaw.com](http://www.ccemlaw.com).

**Kilpatrick Stockton** announced the election of **David Eaton** as counsel to the firm's Corporate Practice Group. Eaton represents companies and investors in corporate, securities and transactional matters. He is experienced in corporate finance and securities offerings, mergers and acquisitions, and counseling to public companies and their directors and officers on securities regulatory, corporate governance, stock market, and fiduciary issues. The Atlanta office is located at Suite 2800, 1100 Peachtree St., Atlanta, GA 30309; (404) 815 6500; Fax (404) 815 6555; [www.kilstock.com](http://www.kilstock.com).

**Krevolin & Horst** announced that **Kira Goodloe** and **Mike Jacobs** have joined the firm as associates. Goodloe formerly was associated with Huriton & Williams and her practice encompasses corporate and commercial real estate. Jacobs comes from Alston & Bird and currently serves in the Georgia House of Representatives representing District 80 in DeKalb County. The firm is located at 1175 Peachtree St. NE, 100 Colony Square, Suite 2150, Atlanta, GA 30361; (404) 888-9594; Fax (404) 888-9577; [www.krevolinhorst.com](http://www.krevolinhorst.com).

Intellectual property law firm **Merchant & Gould** announced that **D. Kent Stier** joined the firm as an associate in its Atlanta office. Stier is a member of Merchant & Gould's electronics and computer law practice group. His practice involves patent procurement, patent prosecution, and opinion writing. The Atlanta office is located at 133 Peachtree St. NE, Suite 4900, Atlanta GA 30303; (404) 954-5100; Fax (404) 954-5099; [www.merchant-gould.com](http://www.merchant-gould.com).

**Lori Spencer** has joined the Atlanta office of **Smith Moore LLP**. Spencer, who chairs the Health Law Section of the State Bar of Georgia and is a former president of the Georgia Academy of Healthcare Attorneys, began work as counsel in Smith Moore's health care practice group. Spencer spent most of her 25-year career at Emory University, serving first as chief legal counsel for the Emory hospitals and later as General Counsel for Emory Health Care, Inc., the health care system at the university. The Atlanta office is located at One Atlantic Center, 1201 W. Peachtree St., Suite 3700, Atlanta GA 30309; (404) 962-1000; Fax (404) 962-1200; [www.smithmoorelaw.com](http://www.smithmoorelaw.com).

The Atlanta firm of **Welch, Spell** announced that after 29 years in the legal department at the Coca-Cola Company, **Louis D. Coddon II** has joined former Georgia classmates Bill Welch and Penn Spell

in the practice. The firm also announced its cooperation with the independent firm of **Bridgehouse Rueckel and Bolthausen, LLC**, with offices in Atlanta, Munich and London. The 10 lawyer Welch, Spell firm is in new offices at The Proscenium, Suite 1750, 1170 Peachtree St., Atlanta GA 30309; (404) 892-2100; Fax (404) 875-0798.



Bardell



Fultz

**Cozen O'Connor** announced that **Kathleen F. Bardell** and **Karen D. Fultz** were named as members of the firm. Bardell practices with the firm's products li-

ability and complex tort practice group, focusing on construction defect, mass tort, environmental and commercial litigation and insurance coverage matters. Fultz concentrates her practice on subrogation and recovery matters. The Atlanta 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](http://www.cozen.com).

## In Athens

**Debra M. Finch**, formerly of the University of Georgia School of Law Legal Aid Clinic, opened the firm of **Debra M. Finch, P.C.** Her office is located at 150 East Washington St., Athens, GA 30603; (706) 353-1533; Fax (706) 353-0167.

## In Calhoun

**Cox, Byington, Corwin, Niedrach, Atkins, Smith & Perkins, P.C.**, announced that **Terry Brumlow** has joined the firm as a shareholder. Brumlow, who concentrates in real property law, will continue to practice at his office located at 1287 Curtis Parkway, Calhoun, GA 30701; (706) 625-0872; Fax (706) 625-1731.

## In Canton

**Dana M. Thompson & Associates, P.C.**, announced that **John D. Cline** has become a member of the firm, and the firm name has changed to **Thompson & Cline, P.C.** The firm also welcomed **Adam L. Katz** and **Janna D. Akins** as associates, engaged in the general practice of law. The office is located at 341 East Main St., Canton, GA 30114; (770) 479-1844; Fax (770) 479-4999.

## In Commerce

**Gregory M. Perry** announced the formation of a partnership with his son, **Jeffrey M. Perry**. The **Perry Law Firm** is a general practice and represents clients in real estate, domestic relations, criminal, corporate and litigation matters. The office is

located at 1774 North Broad St., Commerce, GA 30529; (706) 335-3500; Fax (706) 335-5299.

## In Madison

**Christian G. Henry** announced the formation of his new firm, **Christian G. Henry LLC**, which opened in April. He will continue his general litigation practice, primarily representing plaintiffs and defendants in personal injury matters and commercial litigation disputes. Additionally, Henry has been appointed county attorney for Morgan County, and will represent the County in civil matters. The new office is located at 204 B Thomason St., Madison, GA 30650; (706) 342-0500; Fax (706) 342-3232; [www.christianhenry.com](http://www.christianhenry.com).

## In Savannah



**Lauren McKenzie** has joined the law firm of **Buchsbaum and Lowe, LLP**, as an associate. She practices in the area of personal injury and civil litigation. The firm is located at 311 W. Broughton St., Savannah, GA 31401; (912) 234-2581; Fax (912) 234-4190.

## In Safety Harbor, Fla.

**Wade A. Buser** has become associated with the firm of **Forlizzo Law Group, P.A.** Offices are located at 2903 Rigsby Lane, Safety Harbor, FL 34695; (727) 669-0550; Fax (727) 669-6929.

## In Chattanooga, Tenn.

**Marlene J. Bidelman-Dye** has joined **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, as an associate in the firm's Chattanooga office. Bidelman concentrates her practice representing financial institutions and borrowers regarding construction, lending and re-financing issues. She also provides counsel on real estate issues such as commercial sales and acquisitions, leases, development, easements and eminent domain and is licensed in Pennsylvania, Georgia, Massachusetts and Tennessee. The Chattanooga office is located at 1800 Republic Centre, 633 Chestnut St., Chattanooga, TN 37450; (423) 756-2010; Fax (423) 756-3447; [www.bakerdonelson.com](http://www.bakerdonelson.com).

## In Paris, France

**Debevoise & Plimpton LLP** announced that **Barton Legum** rejoined the firm as counsel resident in their Paris office. Legum returned to the firm after service as the first Chief of the NAFTA Arbitration Division at the U.S. Department of State (2000-04). The Paris office is located at 21, Avenue George V, Paris 75008 France; 33 1 40 73 12 99; Fax 33 1 47 20 50 82; [www.debevoise.com](http://www.debevoise.com).

## Sixth Annual Justice Robert Benham Awards

This year's recipients of the Sixth Annual Justice Robert Benham Awards for Community Service are Judge Louisa Abbot, Savannah; Stephen F. Greenberg, Savannah; Judge Maureen Gottfried, Columbus; Christian F. Torgrimson, Atlanta; Antavius M. Weems, Atlanta; Avery T. Salter, Jonesboro; Judge Adele Grubbs, Marietta; W. Allen Separk, Marietta; Judge Kathlene Gosselin, Gainesville; and Dennis Sanders, Thomson.



(Left to right, back) Stephen F. Greenberg, Judge Maureen Gottfried, Avery T. (Tom) Salter, Judge Adele Grubbs, W. Allen Separk, Antavius M. Weems, Dennis Sanders, Judge G. Alan Blackburn (Chair, Community Service Selection Committee). (Front) Justice Robert Benham, Sally Lockwood, Judge Louisa Abbot, Christian F. Torgrimson, Judge Kathlene Gosselin.

**Have a suggestion  
on how to improve  
the *Journal*?**

**Send your comments  
to C. Tyler Jones at  
[tyler@gabar.org](mailto:tyler@gabar.org)**



# Taking Reasonable Remedial Measures

By Paula Frederick

“Look here, Art,” you begin, using your sternest voice. “I need you to come clean with me. Why do the 2004 tax returns you’ve given me in connection with your business acquisition show income almost double what we declared on the financial affidavit from your divorce case last year?”

“You know my ex didn’t deserve a penny of the alimony the court awarded her,” your long-time client whines. “There was no way I was going to let her benefit from the increased value of my business.”

Art just doesn’t get it, and you realize that there’s one sure way to bring home to him just how serious his situation is.

“You swore to that affidavit, and we presented it to the court. The judge used it in determining the appropriate amount of alimony. I may have an obligation to let the judge know that it wasn’t truthful.”


“What!” Art squeals. “I thought you had to keep my secrets!”

“Not when you are using my services to defraud your ex-wife out of court-ordered alimony!” you respond. “I can’t risk the judge thinking I had anything to do with this if it comes out later. I could lose my good reputation. Heck, I could lose my *license*.”

After a pause you add, “Let me look into this and call you back. Maybe we can just let this one go. But if you ever pull a stunt like this again....”

A review of the applicable ethics rules followed by a call to the Ethics Helpline, and your worst fears are confirmed. A lawyer cannot knowingly allow a client to submit false documents to a tribunal. Rule 3.3 even requires a lawyer who has submitted documents and later comes to know of their falsity to “take reasonable remedial measures.”

Comment 13 to the rule clarifies that the obligation to “fix” a client’s fraudulent act ends at the conclusion of the proceeding. The lawyer who you speak with on the Ethics Helpline agrees with you, however, that because Art is making ongoing alimony payments based on false income information the proceeding has not “concluded” in the way the rule anticipates.

Armed with information about your options, you brace for an unpleasant return call to Art. If you can’t convince him to come clean with his ex, you are prepared to withdraw, to counsel Art to hire a replacement for you (he may even need criminal defense counsel!) and to take the “remedial measure” of placing a call to opposing counsel. 



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

**Call the Ethics Hotline  
at (404) 527-8720  
with all of your  
ethics questions.**

# Discipline Notices

(Feb. 11, 2005 through April 7, 2005)

By Connie P. Henry

## DISBARMENTS/ VOLUNTARY SURRENDERS

**Timothy Robert Brennan**  
Atlanta, Ga.

Timothy Robert Brennan (State Bar No. 079755) has been disbarred from the practice of law in Georgia by Supreme Court order dated Feb. 21, 2005. In one case Brennan told the client that he had requested an extension to file a motion for summary judgment when he had not. He failed to respond to the defendant's motion for summary judgment and failed to respond to the Notice of Investigation.

In another case Brennan accepted a \$1,000 retainer but would not return the client's calls and later told the client that he had filed a lawsuit when he had not. He never told his client that he was not in good standing with the State Bar, nor did he advise the client that he had moved his office or closed his practice. He did not return his client's file or the unearned portion of the retainer.

**Barry R. Price**  
Douglasville, Ga.

By order dated March 7, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Barry R. Price (State Bar No. 587640). Price pled guilty to a single count of Theft by Receiving Stolen Property, a felony violation of the Criminal Code of Georgia.

**Pearlie L. Lewis Bush**  
Lithonia, Ga.

Pearlie L. Lewis Bush (State Bar No. 098918) has been disbarred from the practice

of law in Georgia by Supreme Court order dated March 28, 2005. On June 14, 2004, Bush pled guilty to three counts of first-degree forgery and one count of financial identity fraud. Bush was sentenced to one year in prison and six years of probation.

## REVIEW PANEL REPRIMANDS

**Michael Joseph Davis**  
Atlanta, Ga.

On Feb. 21, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Michael Joseph Davis (State Bar No. 212040) and ordered the imposition of a Review Panel reprimand. In Docket No. 4414 Davis was hired by a collection company to represent some of the company's customers in collection matters. In one case he filed suit and discovery but then ceased working on the matter. In another case he filed suit but the case was dismissed and sanctions were granted for failure to respond to a contempt motion after he failed to answer discovery.

With regard to Docket No. 4718 Davis was retained by an insurance company to handle collection matters. He failed to respond to the company's attempts to contact him and failed to provide progress reports. Although he closed the files and returned them to the company, there was delay in doing so.


In mitigation of discipline, the court noted that Davis was undergoing medical treatment that caused him to be exhausted and unable to handle his caseload.

**Robert A. Meier IV**  
Atlanta, Ga.

On March 7, 2005, the Supreme Court of Georgia accepted the Petition for Voluntary

Discipline of Robert A. Meier IV (State Bar No. 501025) and ordered the imposition of a Review Panel reprimand. A client paid Meier \$20,000 to handle post-conviction proceedings and requested that he allege ineffective assistance of counsel. Meier neither raised the claim nor informed the client of such in writing. The Court of Appeals affirmed the client's conviction after considering the enumeration of errors and brief filed by the client's former appellate attorney. Meier returned the money, acknowledged his failures to communicate in writing and to document verbal communications adequately, and retained the services, and implemented the recommendations, of the State Bar's Law Practice Management Program. In aggravation of discipline, the court noted Meier's prior disciplinary offense. In mitigation of discipline the court noted Meier's cooperative attitude towards disciplinary proceedings and his remorse.

## INTERIM SUSPENSIONS

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Feb. 11, 2005, the court entered four orders, which suspended three lawyers for violating this Rule and one attorney has since been reinstated. 

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

# Consumer Pamphlet Series

The State Bar of Georgia's Consumer Pamphlet Series is available at cost to Bar members, non-Bar members and organizations. Pamphlets are individually priced at 25 and 75 cents each plus shipping. Questions? Call (404) 527-8761.



The following pamphlets are available:

Auto Accidents ■ Bankruptcy ■ Buying a Home ■ Divorce ■ How to Be a Good Witness ■ How to Choose a Lawyer ■ Juror's Manual ■ Lawyers and Legal Fees ■ Legal Careers ■ Legal Rights of Nursing Home Residents ■ Patents, Trademarks and Copyrights ■ Selecting a Nursing Home ■ Selecting a Personal Care Home ■ Wills

Visit [www.gabar.org/cps.htm](http://www.gabar.org/cps.htm) for an order form and more information or e-mail [jenniferr@gabar.org](mailto:jenniferr@gabar.org).



## Why Can't I Kick the Computer?!

By Natalie R. Thornwell

**C**omputer problems in the law office are not only aggravating, but can be very costly both in terms of time and money. Here are some helpful tips and planning options to consider so that you are not a regular victim of the inevitable computer gremlins.

### Back up Systems Regularly

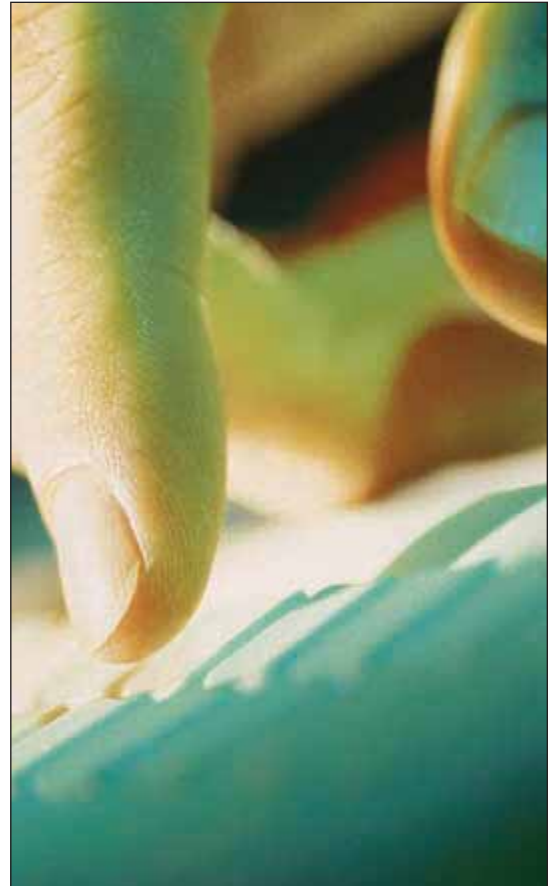
Without any backups you make your firm's data vulnerable to loss. Often it is only after a disaster that one realizes a backup could have saved his or her practice. Backups should be performed daily! Include backup information in your disaster recovery plan.

### Verify That Backups are Complete

Many firms have mistakenly believed that their data was being backed up, but failed to adhere to on-screen information showing otherwise. You also have to make sure that data is being captured properly.

### Take Computer Backups Offsite

When backups remain in the office where the other data resides, you again expose your firm's information to the possibility of loss. Fire, theft or other "acts of God" could potentially take away all of your hard work.



Leaving a copy on site or near your firm is also a good safeguard. It is acceptable to use reputable online or remote backup sources provided you understand the risk of not being able to access your data in the event of nonpayment to the vendor or other eventualities that cause them to prohibit your access. Make sure you understand what type of backups are being performed. Is your entire system backed up? Are rolling backups performed or complete overwrites or just data that registers as changed or added?

## Do Regular Test Restores

You ensure your backups are actually working by restoring information from the backups. Be sure you can retrieve and use the data you restore.

## Don't Assume Your Software is the Problem

Technology issues can be very difficult to diagnose. There are so many little factors that go into the equation. Is everything compatible? Was a new driver needed? The sound card could be the culprit. There are simply too many possibilities, so work with a good "techie" to get a reasonable answer. Sometimes it really is the hardware and not the software.

## Re-Index Database Programs and Perform Maintenance Services Regularly or as Needed

Like changing oil in your car, you service your software programs with these steps. Don't forget to backup your data before you run any maintenance programs!

## Write Down Your Computer Hardware and Software Problems

Note dates, other applications that were running and the exact thing you were doing at the time of the problem. Capture error messages by using ALT + PrtScrn (Print Screen) and pasting in your word processor. Keeping a log is not only helpful to you, but any support personnel you work with. You might also log the answers and share everything with your entire office.

## Force Vendors to Deal With Support Issues

Don't get caught in the finger pointing game that keeps you running from vendor to vendor for support. Have them identify concerns they have from their respective ends. Seek help from a third party if you can't come to some reasonable choice about who to believe.

## Purchase Support Agreements if Necessary

Agreements can safeguard you in the event of emergencies routinely handled by tech support. Otherwise, you may find yourself having to pay astronomical minute charges for assistance. Again, write down any solutions and share them with your firm.

## Update Virus Protection and Security Software Regularly

Have a routine of checking for the latest fixes and utility applications. Hackers and virus authors work every day. You have to remain vigilant about keeping up with them. Turn on any available automatic updates if you think you won't remember to do the updates yourself and have the software prompt you before installing them. Layered protection is your best defense against the outside forces.

## Hire Technology Consultants Who Have Experience With Law Firms

Your computer staff should be able to assist you in your time of need—even if that means every day.

## Only Do It Yourself If You Have the Time or It's In Your Job Description


Do not get yourself and your firm into a computer bind if you do not have expertise but simply like to play around with computers. Your firm information is much too valuable. Insist on using experts.

## Refer to Online Sources and General Support Vendors

Some technology solutions are easily located online. Even typing in error messages to your favorite search engine could lead to valuable information or even a solution to your problem. Visit your vendors' sites and look for discussion forums and knowledge bases. Call general tech companies that provide support.

## Don't kick the computer!

You might actually have a greater problem on your hands if you do.

Technology is a wonderful tool in law offices. But like all tools, you may have to tweak or work with them in unexpected ways in order for them to behave properly. Understanding that computer problems are inevitable can help after you have done everything you can to ensure they are working smoothly otherwise. 

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

# Tifton Satellite Office Keeps Pulse on South Georgia



(Above) Following the “A Voice For All Children” ceremony, Juvenile Court Judge Holly Martin swears in new Court Appointed Special Advocate Executive Director Greg Millette, on the courthouse steps.

(Left) Sen. Joseph Carter stands among 578 pinwheels (representing the number of child abuse cases reported in Tift County last year) as he addresses attendees.



(Above) The State Bar of Georgia Executive Committee recently met in the Satellite Office in Tifton.

(Left) Board Members David Lipscomb, Jeff Bramlett and Bryan Cavan tour the recently restored Tifton Museum of Arts and Heritage.



# Pro Bono Honor Roll

The Pro Bono Project of the State Bar of Georgia salutes the following attorneys, who demonstrated their commitment to equal access to justice by volunteering their time to represent the indigent in civil pro bono programs during 2004.

**Georgia Legal  
Services Program  
Abbeville**  
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(Sponsored by  
The Albany Bar  
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Cawthon Custer  
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Meredith W. Ditchen  
Bryan Keith Wood

**Wrens**  
Christopher N. Dube

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the Pro Bono Project in 2004  
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Laura Cunard Reis  
DaVida S. Sams  
Darrell Lee Sutton  
Rachael Lee Zichella

**Cumming**  
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**Douglasville**  
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# Sections Start Out Summer with Active Schedules

By Johanna B. Merrill

The end of spring saw several receptions hosted by sections. The first, held on March 30 at the offices of Paul, Hastings, Janofsky & Walker LLP, was co-hosted by the **Government Attorneys Section** and the Securities Committee of the **Business Law Section**. The sections welcomed Tonya Curry Cureton, assistant commissioner of securities and division director for securities and business regulation, Office of Secretary of State Cathy Cox.

On April 14 the **Administrative Law Section**, **Government Attorneys Section** and **Environmental Law Section** hosted a reception to welcome Noel Holcomb, commissioner, Georgia Department of Natural Resources at the offices of Troutman Sanders LLP. And on May 10 the **Government Attorneys Section** welcomed David Nahmias, the new U.S. attorney for the Northern District of Georgia, at a reception held at the Bar Center.

The **General Practice & Trial Section** sponsored their annual Institute April 13-14 at The King & Prince Beach and Golf Resort in St. Simons. Past Section Chair Wright Gammon chaired the program.

The Patent Committee of the **Intellectual Property Law Section** sponsored a three-hour CLE program, "Learn about New Patent Office Policies, Rules and Professionalism," with speaker Bob Spar, director of the Office of Patent Legal Administration, United States

Patent and Trademark Office. N. Andrew Crain, patent committee chair, and Steven P. Wigmore, licensing committee chair, organized the programming.

On April 22 the **Entertainment and Sports Law Section** co-sponsored a three-hour CLE program titled, "Hot Topics and Trends in Sports Licensing, Sponsorships, and Athlete Endorsements," at ESPN Zone in Atlanta. Bruce Siegal, the section's vice-chair of sports, chaired the program.

The 27<sup>th</sup> annual **Real Property Law** Institute was held at the Amelia Island Plantation on Amelia Island May 12-14. Chair-elect Linda Bryant Curry was the program chair for the Institute.

Memorial Day weekend saw the arrival of the 2005 Family Law Institute, the **Family Law Section's** annual seminar and gathering, which was held at the Ritz-Carlton, Amelia Island. Section Vice-chair Steven Steele served as program chair.

Don't forget to renew your section membership when you send in your dues for the 2005-06 Bar year! For a complete list of sections and to visit their individual web pages, please visit [www.gabar.org/sections](http://www.gabar.org/sections).

## NEWS FROM THE SECTIONS

### Appellate Law Update

By Christopher McFadden

#### *Appellate Courtrooms*

Both Georgia appellate courtrooms are now equipped with sophisticated audiovisual equipment. The layout of the courtrooms is such that using that equipment is generally

more effective than using posters.

### ***Rules Changes***

Both appellate courts revised their rules at the beginning of 2005. None of the changes are major, but several are worth noting.

### ***Supreme Court Rules***

The Supreme Court has modified the rule as to certified questions to reflect a recent expansion of its statutory and constitutional authority to answer such questions. As a result of a legislative initiative by the Appellate Practice Section, the Supreme Court now has authority to answer questions from U.S District Courts, and that change is reflected in Supreme Court Rule 46.

### ***Court of Appeals Rules***

The rules of the Court of Appeals now expressly prohibit conformed signatures. Materials filed with the court which are to be signed by an attorney or pro se party must be signed by an attorney or pro se party, not by law firm staff or an attorney's employee. Court of Appeals Rule 1. Similarly the copies of orders exhibited with applications for interlocutory or discretionary appeal must show copies of judges' signatures, not conformed signatures. Court of Appeals Rules 30 (b), 31 (d).

The rules setting out what briefs may be filed have been clarified. Absent permission of the court, only three are permitted: the Brief of Appellant, the Brief of Appellee, and the Reply Brief of Appellant. Appellees may not file reply briefs without permission of the court. Court of Appeals Rules 24 (a), 27.

Electronic briefs are not yet required in the Court of Appeals. At present they are allowed only with the permission of the court. Court of Appeals Rule 24 (b).



Photos by Allison Danaceau


Scott Griffin and Jeri Sute at the Intellectual Property Law Section's March 17 happy hour held at the Bar Center.



John Greenwald, Jim Meadows and Griff Griffin.

Reflecting the applicable statute, the Court of Appeals Rules now specify that applications for discretionary appeal in dispossessory actions must be filed within seven days of entry of the trial court's order. Court of Appeals Rule 32 (b).

Emergency supersedeas motions filed with the Court of Appeals

must now, "Contain an explanation why an order of [the Court of Appeals] is necessary and why the action requested is time sensitive." Court of Appeals Rule 40 (b) (i). 

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



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

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Atlanta, Ga.  
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Died March 2005

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Savannah, Ga.  
Admitted 1970  
Died December 2004

**Rita D. Coleman**

Atlanta, Ga.  
Admitted 1984  
Died February 2005

**Frank H. (Chick) Edwards**

Atlanta, Ga.  
Admitted 1946  
Died February 2005

**H. Arnold Hicks**

Cartersville, Ga.  
Admitted 1951  
Died April 2005

**Douglas Kessler**

Atlanta, Ga.  
Admitted 1973  
Died February 2005

**Elizabeth (Betty) Leonard**

Atlanta, Ga.  
Admitted 1977  
Died February 2005

**D. Jane (Dorothy) Marshall**

Atlanta, Ga.  
Admitted 1959  
Died April 2005

**Paul A. Martin**

Columbia, S.C.  
Admitted 1961  
Died February 2005

**Earle Benjamin May Jr.**

Jasper, Ga.  
Admitted 1952  
Died March 2005

**William C. McFee Jr.**

Atlanta, Ga.  
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Died March 2005

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Atlanta, Ga.  
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Died April 2005

**Stanley Rosenkranz**

Tampa, Fla.  
Admitted 1970  
Died July 2004

**H. A. Stephens Jr.**

Atlanta, Ga.  
Admitted 1932  
Died February 2005

**Howard Mason Taft**

Lawrenceville, Ga.  
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Died February 2005

**Franklin H. Thornton**

LaGrange, Ga.  
Admitted 1978  
Died November 2004

**S. Ernest Vandiver Jr.**

Lavonia, Ga.  
Admitted 1946  
Died February 2005

**Judge J. Carlton Warnock**

Soperton, Ga.  
Admitted 1937  
Died February 2005



**Judge Rowland**

**W. Barnes**, 64, of Atlanta, died March 11. Barnes was born in Cheyenne, Wyo.,

and graduated from Frankfurt American High School in Frankfurt, Germany. Barnes attended his freshman year of college at Grand Rapids Junior College in Grand Rapids, Mich., and finished his undergraduate schooling at Lebanon Valley College in Annville, Penn. He attended his freshman year of law school at George Washington University and finished up at Emory

University in Atlanta, graduating in 1972. Before being appointed to the Superior Court bench, Barnes presided over the following courts in Georgia: Superior Court; State Court, Magistrate Court; Municipal Court and Juvenile Court, and sat in the counties of Fulton, Clayton, Hall, Fannin, Gilmer, White and Pickens. He first served in the City of Hapeville Municipal Court as Pro Hac Vice in 1982, where he became the assistant judge, then chief judge from 1990-98. Barnes was appointed as chief judge in Fairburn from 1990-98, and served in Fulton County Magistrate Court as a part-time magistrate from 1987-98. He was appointed to the Superior Court Bench on Aug. 5, 1998, by Gov. Zell Miller, was elected to his first four-year term in November 2000, again being re-elected for another four-year term in 2004. He served in the National Guard and thereafter on active duty with the U.S.A.F. in 1968-69 following the Pueblo Crisis. Barnes leaves behind a wife, Claudia Bannister Barnes, daughters and sons-in-law, Holly Ditmar, Kiley Barnes, Dia and Scott Johnston, Leah and Curtis Smith; sons and daughter-in-law, Lonnie and Michelle Ford, Jesse Ford; brothers, Edwin Weih and Mark Weih; 14 grandchildren and five nieces and nephews.

**I. Henry Bracker**, 61, of Savannah, died Dec. 13, 2004. Born in Savannah, Ga., Bracker graduated from Armstrong Junior College before getting his J.D. degree from Walter F. George School of Law at Mercer University. He served in the U.S. Air Force and was a single practitioner in private practice in Savannah from 1970-96.

Bracker is survived by his wife, Nancy Asher Bracker, two daughters and a son-in-law; Susan A. Bracker of Atlanta and Marci and Scott Satterlee of Covington, La.

**Elizabeth "Betty" Leonard**, 60, of Atlanta, died February 25. Leonard was born in Grand Rapids, Mich., and attended school there receiving a BS degree in Psychology from Grand Valley University. She attended law school at Emory University where she received a J.D. degree in 1977. Leonard began her professional career in Marietta in the area of family law. She served on the Investigative Panel of the State Disciplinary Board from 1991-96, and was chair from 1994-95. She also served as chair of the Client Security Fund of the State Bar from 1998-2002, which she chaired in 2000 and 2001. Leonard was very active with The Men Stopping Violence group serving as president of the board of directors. She also served on the Atlanta Legal Aid board for 16 years and as president in 2002. Leonard was a member of the State Bar of Georgia, Cobb County Bar Association, Georgia Trial Lawyers Association; served as chair of the Family Law Section of the Atlanta Bar Association and president of the Georgia Women Lawyer Association. She is survived by her husband, Tony Azzaro, her daughter Kathy Wilson and a grandson, Charles Wilson.



**D. Jane Marshall**, 80, of Chamblee, formerly of Marietta, died April 5. Born in Red Oak, Iowa, Marshall moved to Atlanta in 1956. After receiving her law degree from Atlanta's John Marshall University in 1958, she teamed up with three other female attorneys who had already struck out on their own. The firm Leachman, King, Thurman and Marshall was Georgia's first all female law firm. Marshall practiced civil and criminal law. Before her retirement she worked in real estate with the Harry Norman Agency. She attended St. Jude's Catholic Church in Sandy Springs. She was married to H. Grady Marshall, who preceded her in death on Nov. 15, 1993. Survivors include 3 sons and a daughter-in-law, Michael G. and Helen Marshall of Lawrenceville, Clay D. Marshall of Tucker and Blaine


P. Marshall of McClellanville, S.C.; 4 grandchildren, Rebecca Davis, Brandi Danielle, Robert Marshall and Samantha Jane Marshall; 1 great-granddaughter, Madeline Davis and several nieces and nephews.



**Earle Benjamin May Jr.**, 74, of Birmingham, died March 24. After graduating from the University of Georgia School of Law, he served in the Judge Advocate General corps with one-year service in Korea. In 1955, he began the private practice of law in his hometown of Bainbridge, Ga; served as a Deputy Assistant Attorney General for the state of Georgia; and later as Assistant United States Attorney for the Middle District of Georgia. In 1961, May joined the Atlanta law firm of Jones, Bird & Howell and practiced as a trial lawyer with that firm and its successor, Alston & Bird, until 1991. He then served as executive director of the Georgia Judicial Qualifications Commission for a period of seven years. He was admitted to practice in all State and Federal Courts in Georgia; the 5th and 11th Circuit Courts of Appeals; and the U.S. Supreme Court. During his career, May was elected as a fellow in the American College of Trial Lawyers; a member of the State Bar of Georgia; the Atlanta Bar Association; the Lawyers Club of Atlanta; the National Association of Railroad Trial Counsel; the Board of Visitors of the University of Georgia Law School; the Georgia Defense Lawyers Association; and an arbitrator for the Supreme Court of Georgia and the American Arbitration Association. A long time Sunday school teacher, Bible study leader and officer at numerous churches, he also served on the Council of Atlanta Presbytery; as a director of Lay Renewal Ministries, Inc; and on the Development Committee for Young Life's Outreach Camp. At the time of his death, he was an active member of the Mountain Brook Community Church in Birmingham. He is survived by his wife of more than 51 years, Marceline Turner May; his daughter and son-in-law, Cathy May and Neal McMullian of Bourbonnais, Ill.; his son, Ben and daughter-in-law, Sally May and two grandsons, Benjamin Phillips May and Andrew Ramsey May, all of Birmingham. Also surviving are one brother, Dr. Charles

B. May of Macon; a niece, Mary M. McInnis of Birmingham and a nephew, Dr. Charlie May of Rome.



Former Georgia Gov. **S. Ernest Vandiver**, 86, of Lavonia, died February 21. Vandiver was born in Canon, Ga. He earned a bachelor's degree in 1940 and a law degree in 1942, both from the University of Georgia, before serving in the Army Air Corps during World War II as a prosecutor and defense counsel in courts-martial. In 1946 he was elected mayor of Lavonia and aided Eugene Talmadge's campaign for governor. Vandiver was elected lieutenant governor in 1954, vowing to oppose any attempts to abolish school segregation and the county unit system. In 1959 he was elected governor on an anti-integration platform, but at a critical moment persuaded lawmakers to repeal a law requiring schools to be closed rather than desegregated. His stand was credited with sparing the state the turbulence that swept much of the rest of the South in that period. Vandiver also was governor when the federal courts ordered the state to abandon its "county unit" system of voting, which had enabled rural politicians to control the state for decades. After leaving the governor's office in 1964, he served as chairman of a Lavonia bank and farmed cattle. Vandiver was a past president of the National Association of State and Territorial Civil Defense Directors, the Georgia Association of Independent Bankers and the Lavonia Development Corp. He received the distinguished service medal of the National Guard Association of the United States, belonged to the President's Club of the University of Georgia, and was a deacon at Lavonia First Baptist Church. Surviving are his wife, Betty Russell Vandiver; a son, S. Ernest "Chip" Vandiver III of Lavonia and two daughters, Beth Vandiver of Lavonia and Jane Kidd of Athens; and four grandchildren. 

For information regarding the placement of a memorial, please contact the Lawyers Foundation of Georgia. 104 Marietta St. NW, Suite 630, Atlanta, GA 30303; (404) 659-6867; Fax (404) 225-5041.

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## June 2005

**1**

PLI  
*Patent & High Technology Licensing 2005*  
Various Dates & Locations  
6 CLE

**2**

ICLE  
*Tort Reform*  
Atlanta, Ga.  
6 CLE

PLI  
*Tax Planning for Domestic & Foreign Partnerships*  
Various Dates & Locations  
15.5 CLE including 0.5 Ethics

NATIONAL INSTITUTE OF TRIAL ADVOCACY  
*Control in the Courtroom*  
Various Dates & Locations, Ga.  
12.5 CLE

NBI, INC.  
*Legal Aspects of Condominium Development & Homeowners Association*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

**4**

PROSECUTING ATTORNEYS COUNCIL OF GEORGIA  
*2005 Basic Litigation Course*  
Forsyth, Ga.  
29.5 CLE including 1 Ethics, 27.5 Trial and 1 Professionalism

**6**

PLI  
*6th Annual Institute on Privacy Law*  
Various Dates & Locations  
11.8 CLE including 1.0 Ethics

**8**

LORMAN BUSINESS CENTER, INC.  
*Urban Development & Redevelopment*  
Atlanta, Ga.  
6 CLE

**9-10**

ICLE  
*Annual Bar Meeting CLE Seminars*  
Savannah, Ga.  
3 CLE (seven seminars)

**9**

PLI  
*Acquiring or Selling the Privately Held Company*  
Various Dates & Locations  
11.8 CLE

LORMAN BUSINESS CENTER, INC.  
*Activity Workers' Compensation*  
Macon, Ga.  
6.0 CLE

LORMAN BUSINESS CENTER, INC.  
*Sarbanes-Oxley Act*  
Atlanta, Ga.  
6.7 CLE

**15**

NBI, INC.  
*Child Custody & Visitation in Georgia*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

**16**

NBI, INC.  
*Corporate Opportunities & Legal Responsibilities in Hiring Foreign Workers*  
Atlanta, Ga.  
3 CLE

NBI, INC.  
*How to Obtain Good Title in Georgia Real Estate Transactions*  
Various Locations, Ga.  
6.0 CLE including 0.5 Ethics

LORMAN BUSINESS CENTER, INC.  
*Advanced Like Kind Real Estate Exchanges*  
Atlanta, Ga.  
6.7 CLE

**17**

LORMAN BUSINESS CENTER, INC.  
*Public Works Construction*  
Atlanta, Ga.  
6 CLE



## 21

LORMAN BUSINESS CENTER, INC.  
*Water Rights Sales & Transfers*  
Athens, Ga.  
6 CLE

## 23-26

ICLE  
*Georgia Trial Skills Clinic*  
Athens, Ga.  
24 CLE

## 23

LORMAN BUSINESS CENTER, INC.  
*LLC's: Advising Small Business Start-Ups  
& Larger Companies*  
Atlanta, Ga.  
6.7 CLE including 1 Ethics

LORMAN BUSINESS CENTER, INC.  
*The Fundamentals of Construction Contracts*  
Macon, Ga.  
6.7 CLE

LORMAN BUSINESS CENTER, INC.  
*Commercial Real Estate Financing*  
Atlanta, Ga.  
6.7 CLE

## 24-25

ICLE  
*Southeastern Admiralty Law Institute*  
Atlanta, Ga.  
9 CLE

## 24

LORMAN BUSINESS CENTER, INC.  
*The Fundamentals of Construction Contracts*  
Atlanta, Ga.  
6.7 CLE

LORMAN BUSINESS CENTER, INC.  
*Advanced Workers' Compensation*  
Savannah, Ga.  
6 CLE

# July 2005

## 2-7

ICLE  
*Advanced Urgent Legal Matters*  
Caribbean Cruise  
12 CLE

## 8

LORMAN BUSINESS CENTER, INC.  
*Medicaid & Elder Law Issues*  
Atlanta, Ga.  
6.7 CLE

LORMAN BUSINESS CENTER, INC.  
*Zoning & Land Use*  
Savannah, Ga.  
6 CLE

LORMAN BUSINESS CENTER  
*Human Resource Audits*  
Atlanta, Ga.  
6.7 CLE

## 14-16

ICLE  
*Fiduciary Law Institute*  
St. Simons Island, Ga.  
12 CLE

## 18

NBI, INC.  
*How to Draft & Prosecute Patents That Win  
at the Federal Circuit*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

## 19

LORMAN BUSINESS CENTER, INC.  
*Foreclosure & Repossessions*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

## 19

LORMAN EDUCATION CENTER, INC.  
*Internal Controls*  
Atlanta, Ga.  
6.7 CLE

## 21

LORMAN BUSINESS CENTER, INC.  
*Real Estate Lending Requirements  
& Loan Documentation*  
Macon, Ga.  
6.7 CLE

## 21

LORMAN BUSINESS CENTER, INC.  
*Change Orders*  
Atlanta, Ga.  
6.7 CLE

## 22

LORMAN BUSINESS CENTER, INC.  
*Discovery Skills for Legal Staff*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics and 6 Trial

## 26

LORMAN BUSINESS CENTER, INC.  
*Advanced Sales and Use Tax*  
Albany, Ga.  
6.7 CLE

29

ICLE  
*Bridge the Gap (Video Replay)*  
Atlanta, Ga.  
6 CLE

## August 2005

5-6

ICLE  
*Environmental Law Summer Seminar*  
Hilton Head, S.C.  
8 CLE

5

NBI, INC.  
*How to Protect Assets During Life  
& Avoid Estate Tax at Death*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

9

NBI, INC.  
*Successfully Negotiating & Drafting Acquisitions  
Agreements in Georgia*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

10-11

ICLE  
*Real Property Law Institute (Video Replay)*  
Atlanta, Ga.  
12 CLE

16

NBI, INC.  
*Preventing Employee Lawsuits Through Compliance  
with GA Human Resources*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

17

NBI, INC.  
*Preventing Employee Lawsuits Through Compliance  
with GA Human Resource*  
Savannah, Ga.  
6 CLE including 0.5 Ethics

19

ICLE  
*Contract Litigation*  
Atlanta, Ga.  
6 CLE

24

NBI, INC.  
*Georgia Family Law Practice*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics

26

ICLE  
*Nuts and Bolts of Family Law*  
Savannah, Ga.  
6 CLE

ICLE  
*Winning Settlement Demand Packages (Video Replay)*  
Atlanta, Ga.  
6 CLE

26-28

ICLE  
*YLD Summer Seminar*  
Charleston, S.C.  
2 CLE

30

NBI, INC.  
*Medical Evidence in Georgia Court*  
Atlanta, Ga.  
6 CLE including 0.5 Ethics and 6 Trial

## September 2005

2-4

ICLE  
*Urgent Legal Matters*  
Sea Island, Ga.  
12 CLE

8-10

ICLE  
*Solo and Small Firm Institute*  
Atlanta, Ga.  
12 CLE

15

ICLE  
*Family Immigration Law*  
Atlanta, Ga.  
6 CLE

ICLE  
*School and College Law*  
Atlanta, Ga.  
6 CLE

16

ICLE  
*Federal Criminal Practice*  
Atlanta, Ga.  
6 CLE

ICLE  
*Hot Topics in Guardianship*  
Atlanta, Ga.  
6 CLE

19

ICLE  
*Bridge the Gap*  
Atlanta, Ga.  
6 CLE

20

ICLE  
*Technology Law Institute*  
Atlanta, Ga.  
6 CLE

22

ICLE  
*White Collar Crime*  
Atlanta, Ga.  
6 CLE

ICLE  
*Trial of a Child Molestation Case*  
Atlanta, Ga.  
6 CLE

22-24

ICLE  
*Insurance Law Institute*  
St. Simons Island, Ga.  
12 CLE

23

ICLE  
*Punitive Damages*  
Atlanta, Ga.  
6 CLE

ICLE  
*Trial Advocacy*  
Atlanta, Ga.  
6 CLE

24

ICLE  
*City and County Attorneys*  
Savannah, Ga.  
6 CLE

28

ICLE  
*Doing Business in China*  
Atlanta, Ga.  
6 CLE

29

ICLE  
*Advanced Health Care Law*  
Atlanta, Ga.  
6 CLE

30

ICLE  
*Title Standards*  
Atlanta, Ga.  
6 CLE



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## First Publication of Proposed Formal Advisory Opinion No. 05-6

Formal Advisory Opinion No. 92-2, issued by the Supreme Court of Georgia on July 30, 1992, provides an interpretation of the Standards of Conduct, Ethical Considerations (ECs), 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 Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 92-2 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 92-2. Proposed Formal Advisory Opinion No. 05-6 is a redrafted version of Formal Advisory Opinion No. 92-2. Proposed Formal Advisory Opinion No. 05-6 addresses the same question presented in Formal Advisory Opinion No. 92-2; 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  
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 July

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. 05-6

#### QUESTION PRESENTED:

Ethical propriety of a lawyer advertising for legal business with the intention of referring a majority of that business out to other lawyers without disclosing that intent in the advertisement.

#### SUMMARY ANSWER:

It is ethically improper for a lawyer to advertise for legal business with the intention of referring a majority of that business out to other lawyers without disclosing that intent in the advertisement and without complying with the disciplinary standards of conduct applicable to lawyer referral services.

#### OPINION:

Correspondent seeks ethical advice for a practicing attorney who advertises legal services but whose ads do not disclose that a majority of the responding callers will be referred to other lawyers. The issue is whether the failure to include information about the lawyers referral practices in the ad is misleading in violation of the Georgia Rules of Professional Conduct. Rule 7.1 of the Georgia Rules of Professional Conduct governing the dissemination of legal services permits a lawyer to "advertise through all forms of public media...so long as the communication is not a false, fraudulent, deceptive, or misleading communication about the lawyer or the lawyer's services." A commu-

nication is false or misleading if it “[c]ontains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading,” Rule 7.1(a)(1).

The advertisement of legal services is protected commercial speech under the First Amendment. Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Commercial speech serves to inform the public of the availability, nature and prices of products and services. In short, such speech serves individual and societal interests in assuring informed and reliable decision-making. Id. at 364. Thus, the Court has held that truthful ads including areas of practice which did not conform to the bar’s approved list were informative and not misleading and could not be restricted by the state bar. In re R.M.J., 455 U.S. 191 (1982).

Although actually or inherently misleading advertisements may be prohibited, potentially misleading ads cannot be prohibited if the information in the ad can be presented in a way that is not deceiving. Peel v. Attorney Registration and Disciplinary Comm’n of Illinois, \_\_\_ U.S. \_\_\_, 110 S.Ct. 2281, 2287-2289 (1990). Requiring additional information so as to clarify a potentially misleading communication does not infringe on the attorney’s First Amendment. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

Georgia Rules of Professional Conduct balance the lawyer’s First Amendment rights with the consumer’s interest in accurate information. In general, the intrusion on the First Amendment right of commercial speech resulting from rationally based affirmative disclosure requirements is minimal.

A true statement which omits relevant information is as misleading as a false statement. So, for example, when contingency fees are mentioned in the communication, the fees must be explained. Rule 7.1(a)(5). The Rules prohibit communications which are likely to create an unjustified explanation about results the lawyer can achieve or comparison of service unless the comparison can be substantiated. Rule 7.1(a)(2), (3).

The Rules evidence a policy of full disclosure enabling the client to investigate the attorney(s) and the services offered. Any advertisement must be clearly marked as an ad, unless it is otherwise apparent from the context that it is such a communication and at least one responsible attorney’s name must be included. Rule 7.1(a)(4), (6)(b). Law firms practicing under a trade name must include names of practicing attorneys. The firm’s trade name cannot imply connections to an organization with which it has no connection. Rule 7.5(a)(2). An attorney is prohibited from implying associations with other attorneys when an association does

not exist and may state or imply practice in a partnership or other organizations only when that is the fact. Rule 7.5(d). These disclosure requirements assure that the public receives accurate information on which to base decisions.

Similarly, other jurisdictions have required disclosure of attorney names and professional associations in the advertisement of either legal services or referral services. A group of attorneys and law firms in the Washington, D.C. area planned to create a private lawyer referral service. The referral service’s advertising campaign was to be handled by a corporation entitled “The Litigation Group.” Ads would state that lawyers in the group were willing to represent clients in personal injury matters. The person answering the telephone calls generated by the ad would refer the caller to one of the member law firms or lawyers.

The Virginia State Bar Standing Committee on Legal Ethics found the name misleading because it implied the entity was a law firm rather than simply a referral service. The Committee required the ad include a disclaimer explaining that “The Litigation Group” was not a law firm. Virginia State Bar Standing Committee on legal Ethics, Opinion 1029, 2/1/88.

The Maryland State Bar Association Committee on Ethics was presented with facts identical to those presented in Virginia. The Maryland Committee also required additional information in the ad to indicate the group was not a law firm or single entity providing legal services. Maryland State Bar Association Committee on Ethics, Opinion 88-65, 2/24/88.

Similarly, an opinion by the New York Bar Association prohibited an attorney from using an advertising service which published ads for generic legal services. Ads for legal services were required to include the names and addresses of participating lawyers and disclose the relationship between the lawyers. New York Bar Association, Opinion 597, 1/23/89.

The situations presented to the Virginia, Maryland and New York committees are analogous to the facts presented here. The advertiser in all these cases refers a majority of the business generated by the ad, without disclosure. The ad here does not disclose any association with other attorneys.

The advertisement at issue conveys only the offer of legal services by the advertising attorney and no other service or attorney. The ad does not accurately reflect the attorney’s business. The ad conveys incomplete information regarding referrals, and the omitted information is important to those clients selecting an attorney rather than an attorney referral service.

Furthermore, the attorney making the referrals may be circumventing the regulations governing lawyer referral services. Attorneys may subscribe to and accept referrals from a “a bona fide lawyer referral service operated by an organization authorized and qualified to do business in this state; provided, however, such organization has filed with the State Disciplinary Board, at least annually a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service.” Rule 7.3(c)(1). These regulations help clients select competent counsel. If the attorney is not operating a bona fide

lawyer referral in accordance with the Rules, the client is deprived of all of this information. The attorneys accepting the referrals also violate Rule 7.3(c) by participating in the illicit service and paying for the referrals.

Assuming that the advertisements at issue offers only the advertising attorneys services and that the attorney accepts cases from the callers, the ad is not false or inherently misleading. However, where a majority of the responding callers are referred out, this becomes a lawyer referral service. The Rules require disclosure of the referral as well as compliance with the Rules applicable to referral services.

## First Publication of Proposed Formal Advisory Opinion No. 05-7

Formal Advisory Opinion No. 93-2, issued by the Supreme Court of Georgia on June 7, 1993, 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 Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 93-2 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 93-2. Proposed Formal Advisory Opinion No. 05-7 is a redrafted version of Formal Advisory Opinion No. 93-2. Proposed Formal Advisory Opinion No. 05-7 addresses the same question presented in Formal Advisory Opinion No. 93-2; 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  
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 July 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. 05-7

#### QUESTION PRESENTED:

Ethical considerations of an attorney representing an insurance company on a subrogation claim and simultaneously representing the insured.

#### SUMMARY ANSWER:

A lawyer representing an insurance company on a subrogation claim should not undertake the simultaneous representation of the insured on related claims, unless it is obvious that the lawyer can adequately represent the interests of both the insured and the insurer, and only if both the insurance company and the insured have consented to the representation after the lawyer has fully disclosed in writing to each the possible affect the representation of both parties might have on the exercise of his independent professional judgment on behalf of each client. Rule 1.7, Conflict of Interest: General Rule.



## **OPINION:**

This inquiry addresses several questions as to ethical propriety and possible conflicts between the representation of the client, the insurance company, and its insured.

### **Hypothetical Fact Situation**

The insurance company makes a payment to its insured under a provision of an insurance policy which provides that such payment is contingent upon the transfer and assignment of subrogation of the insured's rights to a third party for recovery with respect to such payment.

**Question 1:** May the attorney institute suit against the tortfeasor in the insured's name without getting the insured's permission?

Pursuant to the provisions of Rule 1.2(a), a lawyer may not institute a legal proceeding without obtaining proper authorization from his client. The ordinary provision in an insurance policy giving the insurance company the right of subrogation does not give the lawyer the right to institute a lawsuit in the name of the insured without specific authority from the insured. The normal subrogation agreements, trust agreements or loan receipts which are executed at the time of the payment by the insurer usually give the insurance company the right to pursue the claim in the insured's name and depending upon the language may grant proper authorization from the insured to proceed in such fashion. The insurance company in a such a situation does have a fiduciary relationship with its insured, which must be respected by the attorney. Appropriate authorization to bring the suit in the insured's name should be obtained and the insured should be kept advised with respect to developments in the case.

**Question 2:** Does the attorney represent both the insured and the insurance company, and, if so, would he then have a duty to inform the insured of his potential causes of action such as for diminution of value and personal injury?

The insurance policy does not create an attorney/client relationship between the lawyer or the insurance company and the insured. There is, however, a fiduciary relationship, which must be respected with respect to advising the insured as to other potential causes of action such as diminution of value and personal injury. Rule 1.7(b);

see also, Comment 10 (assuring independence of counsel) and Comment 12 (common representations permissible even with some differences in interests).

**Question 3:** Is there a conflict of interest in representing the insured as to other potential causes of action?

In most instances no problem would be presented with representing the insured as to his deductible, diminution of value, etc. Generally an insurance company retains the right to compromise the claim, which would reasonably result in a pro-rata payment to the insurance carrier and the insured. The attorney and the insurance company must be cautious to avoid taking any action, which would preclude the insured from any recovery to which the insured might otherwise be entitled. Rule 1.7, Conflict of Interest: General Rule, (b); see also, Comment 10 (assuring independence of counsel) and Comment 12 (common representations permissible even with some differences in interest.) to Rule 1.7.

A much more difficult problem is presented in the event an attorney attempts to represent both an insurance company's subrogation interest in property damage and an insured's personal injury claim. In most cases the possibility of settlement must be considered. Any aggregate settlement would necessarily have to be allocated between the liquidated damages of the subrogated property loss and the unliquidated damages of the personal injury claim. Any aggregate settlement would require each client's consent after consultation, and this requirement cannot be met by blanket consent prior to settlement negotiations. Rule 1.8(g); see also Comment 6 to Rule 1.8. Only the most sophisticated of insureds could intelligently waive such a conflict, and therefore in almost all cases an attorney would be precluded from representing both the insurer and the insured in such cases.

In conclusion, a lawyer representing an insurance company on a subrogation claim should not undertake the simultaneous representation of the insured on related claims, unless it is obvious that the lawyer can adequately represent the interests of both the insured and the insurer, and only if both the insurance company and the insured have consented to the representation after the lawyer has fully disclosed in writing to each the possible affect the representation of both parties might have on the exercise of his independent professional judgment on behalf of each client. Rule 1.7(a) and (b).

## **First Publication of Proposed Formal Advisory Opinion No. 05-8**

Formal Advisory Opinion No. 96-2, issued by the Supreme Court of Georgia on March 18, 1996, provides an interpretation of the Standards of Conduct, Ethical Considerations (ECs), 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 Ethical

Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 96-2 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 96-2. Proposed Formal Advisory Opinion No. 05-8 is a redrafted version of Formal Advisory Opinion No. 96-2. Proposed Formal Advisory Opinion No. 05-8 addresses the same question presented in Formal Advisory Opinion No. 96-2; 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  
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 July 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. 05-8**

#### **QUESTION PRESENTED:**

The question presented is whether an attorney may stamp client correspondence with a notice stating that the client has a particular period of time to notify the lawyer if he/she is dissatisfied with the lawyer and that if the client did not notify the lawyer of his/her dissatisfaction within that period of time, the client would waive any claim for malpractice.

#### **SUMMARY ANSWER:**

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. Therefore, in the absence of independent representation of the client, the lawyer should not condition the representation of a client upon the waiver of any claim for malpractice and should not attempt to cause the waiver of any claim for malpractice by the inclusion of language amounting to such a waiver in correspondence with a client.

#### **OPINION:**

A member of the Investigative Panel of the State Disciplinary Board has brought to the attention of the Formal Advisory Opinion Board a practice by lawyers of adding the following language (by rubber stamp) to correspondence with clients:

#### **Important Message**

If you disagree with anything set forth in this communication or the way I have represented you to date, please notify me by certified mail at the address set forth herein immediately. If I do not hear from you, it shall be an acknowledgment by you per our agreement that you are satisfied with my representation of you to date and you agree with my statements in this communication.

The intended effect of this "message" is to create a short period of time within which the client must decide whether he or she is satisfied with the representation, and if not satisfied, the client must notify the lawyer "immediately." If such notification is not provided "immediately," the client will have acknowledged an "agreement" that the client is satisfied with the representation.

It is apparent from reviewing this "message" that the lawyer is attempting to exonerate himself or herself from any claim of malpractice or to cause a waiver of any claim for malpractice by the client against the lawyer. By attempting to limit his or her liability for malpractice or to cause a waiver of any claim for malpractice, the lawyer is putting himself or herself into an adversarial relationship with the client. While providing advice to the client on the one hand, the lawyer is attempting to limit or excuse his or her liability for claims of malpractice resulting from the provision of such advice on the other hand. Such conduct places the lawyer's personal interests ahead of the interests of the client. This conduct is expressly forbidden by Rule 1.8(h), which provides that "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."

In summary, the use of a message or notice, such as described herein, is a violation of Rule 1.8(h), and subjects an attorney to discipline, including disbarment.

# First Publication of Proposed Formal Advisory Opinion No. 05-9

Formal Advisory Opinion No. 97-1, issued by the Supreme Court of Georgia on June 5, 1998, provides an interpretation of the Standards of Conduct and Ethical Considerations (ECs). On June 12, 2000, the Supreme Court of Georgia issued the Georgia Rules of Professional Conduct, which became effective on January 1, 2001, replacing the Standards of Conduct. The Canons of Ethics, including Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 97-1 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 97-1. Proposed Formal Advisory Opinion No. 05-9 is a redrafted version of Formal Advisory Opinion No. 97-1. Proposed Formal Advisory Opinion No. 05-9 addresses the same question presented in Formal Advisory Opinion No. 97-1; however, it provides an interpretation of the Georgia Rules of Professional Conduct. This proposed opinion will be treated like a new opinion and will be processed and published in compliance with Bar Rule 4-403(c).

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

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

An original and eighteen (18) copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board, through the Office of the General Counsel of the State Bar of Georgia, by July 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. 05-9

### QUESTION PRESENTED:

Is it ethically proper to work on a temporary basis for other attorneys? Is it ethically proper for a lawyer, law firm, or corporate law department to hire other attorneys on a temporary basis?

### SUMMARY ANSWER:

Yes. While a temporary lawyer and the employing firm or corporate law department must be sensitive to the unique problems of conflicts of interest, confidentiality, imputed disqualification, client participation, use of placement agencies and fee division produced by the use of temporary lawyers, there is nothing in the Georgia Rules of Professional Conduct that prohibits the use of temporary lawyers.

### OPINION:

#### I. Conflicts of Interest

An attorney is ethically obligated to avoid conflicts of interest with respect to that attorney's client. A temporary lawyer represents the client of a firm when that lawyer works on a matter for a client. Thus, a temporary lawyer employed to represent clients or assist in representation of clients enters into an attorney/client relationship with those particular clients as an associate of the firm. Accordingly, the general rules pertaining to all attorneys regarding conflicts of interest are applicable to the temporary lawyer. Specifically, the temporary lawyer and the employing law firm or corporate law department must comply with Rules 1.7, 1.8, 1.9, and 1.10 governing personal interests, simultaneous representation, and subsequent representation conflicts of interest, and imputed disqualification. Generally, a temporary lawyer should not 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 without obtaining the consent of the affected clients in accordance with the consent requirement of Rule 1.7.

The opportunity for conflicts of interest is heightened in the context of the employment of temporary lawyers. The very nature of a temporary lawyer invokes conflict of interest issues. Obviously, a temporary lawyer is likely to be employed by many different firms or legal



departments during the course of his or her practice. Therefore, the potential for conflicts of interest is great. As a practical matter, this potential for conflict imposes upon temporary lawyers and employing law firms or corporate law departments an obligation of great care in both record keeping and screening for conflicts. In fact, the potential for conflict is so high that law firms or corporate law departments that employ temporary lawyers would be acting unethically if they did not carefully evaluate each proposed employment for actual conflicting interests and potentially conflicting interests. Additionally, the temporary lawyer should maintain a record of clients and matters worked on in order to evaluate possible conflicts of interest should they arise. All firms employing temporary lawyers should also maintain a complete and accurate record of all matters on which each temporary lawyer works.

One of the most difficult issues involving conflict of interest in the employment of temporary lawyers is imputed disqualification issues. In other words, when would the firm or legal department be vicariously disqualified due to conflict of interest with respect to the temporary lawyer? Since a temporary attorney is considered to be an associate of the particular firm or corporate law department for which he or she is temporarily working, the normal rules governing imputed disqualification apply. Specifically, Rule 1.10(a) provides that if any attorney is individually precluded from undertaking representation by Rules 1.7, 1.8(c), 1.9, or 2.2, then a firm with whom the attorney is associated is also precluded from undertaking that representation. Also, and most importantly in the temporary lawyer context, Rule 1.9(b) says that a lawyer “shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) whose interests are materially adverse to that person; and (2) about whom the lawyer had acquired [confidential] information . . . , unless the client consents after consultation.” The effect of these rules working in conjunction is that a firm employing a temporary lawyer would be disqualified by imputed disqualification from any unconsented to representation materially adverse to a former client of the former firms of the temporary lawyer in the same or a substantially related matter if the temporary lawyer had acquired confidential information about the former representation.

## II. Confidentiality

In addition to avoiding conflicts of interest, an attorney also is obligated to protect the client’s confidences. As noted above, a temporary lawyer who is involved in the representation of clients or who provides assistance in the representation of clients enters into an attorney/client relationship with those clients. Therefore, the temporary attorney is obligated not to disclose client

confidences. A temporary attorney is required to keep all information gained in the professional relationship with a client confidential in accordance with Rule 1.6.

Furthermore, Rule 5.1 requires:

- (a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Georgia Rules of Professional Conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable effort to ensure that the other lawyer conforms to the Georgia Rules of Professional Conduct.

This Rule obligates the employing firm or corporate law department to impose upon temporary lawyers obligations of confidentiality identical to those requirements imposed on an associate or any other employee. This obligation of confidentiality includes all information regarding the representation of all clients of the firm or departments when the temporary lawyer acquires that information during his or her engagement.

To protect confidentiality and to avoid excessive risks of imputed disqualification it is a prudent practice for all law firms and corporate law departments, to the extent practicable, to screen each temporary lawyer from access to any information relating to clients that is not related to the temporary lawyer’s assignment. Moreover, a temporary lawyer working for several firms shall make every effort to avoid exposure within those firms to any information relating to clients on matters not assigned to the temporary attorney.

## III. Use of Placement Agency for Temporary Attorneys

Placement agencies participate in a business that furnishes law firms and corporate departments with the services of lawyers desiring to obtain part-time or temporary employment. Firms and corporate legal departments look to these agencies to find temporary attorneys. In accordance with ABA Formal Opinion 88-356 (1988), a firm does not violate ethical regulations by utilizing a placement agency. However, there are certain guidelines that should be followed to ensure that no ethical violations occur. First of all, the firm or corporate legal department must prevent any third party from exerting any control as to the client representation. Such control would be a violation of Rule 5.4(c). For example, an agency may have an interest in an attorney’s taking additional time on a project so that it will result in higher fees. The solution is to prevent any control by the agency of the attorney’s time.

Furthermore, there is an increased risk of disclosure of confidential information even though there must be

compliance with the Rules relating to confidential information and conflicts of interest. This risk of disclosure may be lessened by the screening of temporary attorneys by the firm that, as discussed above, insures the temporary lawyers do not obtain unnecessary information. Moreover, a client is entitled to be informed that a temporary attorney is being used. A client reasonably assumes that only attorneys within the firm are doing work on that client's case, and thus, a client should be informed that the firm is using a temporary attorney to do the firm's work. Because there is some risk of third party interference with the representation, the client should be advised of that risk. Compliance with Rule 5.4(c), which prohibits third party control of the client representation requires full disclosure to the client of the arrangement.

#### IV. Fee Arrangements

The last consideration that needs to be addressed is the appropriate manner in which to handle the fee arrangement. In accordance with the rationale contained in ABA Formal Opinion 88-356, a fee division with a temporary attorney is allowed. If a temporary attorney is directly supervised by an attorney in a law firm, that arrangement is analogous to fee splitting with an associate in a law firm, which is allowed by Rule 1.5(e). Thus, in that situation there is no requirement of consent by the client regarding the fee. Nevertheless, the ethically proper and prudent course is to seek consent of a client under all circumstances in which the temporary lawyer's assistance will be a material component of the representation. The fee division with a temporary attorney is also allowed even if there is no

direct supervision if three criteria are met: (1) the fee is in proportion to the services performed by each lawyer; (2) the client is advised of the fee splitting situation and consents; and (3) the total fee is reasonable. Rule 1.5(e).

In that the agency providing the temporary lawyer is not authorized to practice law, any sharing of fees with such an agency would be in violation of Rule 5.4(a). Therefore, while it is perfectly permissible to compensate an agency for providing a temporary lawyer, such compensation must not be based on a portion of client fees collected by the firm or the temporary lawyer.

In summary, employment as a temporary lawyer and use of temporary lawyers are proper when adequate measures, consistent with the guidance offered in this opinion, are employed by the temporary lawyer and the employing firm or corporate law department. These measures respond to the unique problems created by the use of temporary lawyers, including conflicts of interest, imputed disqualification, confidentiality, fee arrangements, use of placement agencies, and client participation. Generally, firms employing temporary lawyers should: (1) carefully evaluate each proposed employment for conflicting interests and potentially conflicting interests; (2) if conflicting or potentially conflicting interests exist, then determine if imputed disqualification rules will impute the conflict to the firm; (3) screen each temporary lawyer from all information relating to clients for which a temporary lawyer does not work, to the extent practicable; (4) make sure the client is fully informed as to all matters relating to the temporary lawyer's representation; and (5) maintain complete records on all matters upon which each temporary lawyer works.

## First Publication of Proposed Formal Advisory Opinion No. 05-10

Formal Advisory Opinion No. 98-1, issued by the Supreme Court of Georgia on June 1, 1998, provides an interpretation of the Standards of Conduct. On June 12, 2000, the Supreme Court of Georgia issued the Georgia Rules of Professional Conduct, which became effective on January 1, 2001, replacing the Standards of Conduct. The Canons of Ethics, including Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 98-1 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 98-1. Proposed Formal Advisory Opinion No. 05-10 is a redrafted version of Formal Advisory Opinion No. 98-1. Proposed Formal Advisory Opinion No. 05-10 addresses the same question presented in Formal Advisory Opinion No. 98-

1; however, it provides an interpretation of the Georgia Rules of Professional Conduct. This proposed opinion will be treated like a new opinion and will be processed and published in compliance with Bar Rule 4-403(c).

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

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

An original and eighteen (18) copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board, through the Office of the General Counsel of the State Bar of Georgia, by July 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. 05-10**

**QUESTION PRESENTED:**

Can a Georgia attorney, who has agreed to serve as local counsel, be disciplined for discovery abuses committed by an in-house or other out-of-state counsel who is not a member of the State Bar of Georgia?

**SUMMARY ANSWER:**

A Georgia attorney, serving as local counsel, can be disciplined under Rule 5.1(c) for discovery abuses committed by an out-of-state in-house counsel or other out-of-state counsel when the local counsel knows of the abuse and ratifies it by his or her conduct. Knowledge in this situation includes “willful blindness” by the local counsel. Local counsel can also be disciplined for discovery abuse committed by an out-of-state in-house counsel or other out-of-state counsel when the local counsel has supervisory authority over the out-of-state counsel also in accordance with Rule 5.1(c). Finally, the role of local counsel, as defined by the parties and understood by the court, may carry with it affirmative ethical obligations.

**OPINION:**

A client has asked in-house or other out-of-state counsel, who is not a member of the State Bar of Georgia, to represent him as lead counsel in a case venued in Georgia. Lead counsel associates local counsel, who is a member of the State Bar of Georgia, to assist in the handling of the case. Local counsel moves the admission of lead counsel *pro hac vice*, and the motion is granted. During discovery, lead counsel engages in some form of discovery abuse.

Discipline of local counsel for the discovery abuse of lead counsel would, in all cases, be limited to discovery abuse that is in violation of a particular Rule of Professional Conduct. If the discovery abuse is a viola-

tion of a Rule of Professional Conduct, for example, the destruction of documents subject to a motion to produce, Rules 5.1(c) and 3.4(a) defines local counsel’s responsibility for the abuse. Because Rule 5.1(c) is entitled “Responsibilities of a Partner or Supervisory Lawyer” it may not be obvious to all attorneys that the language of this statute applies to the questions regarding ethical responsibilities between lead and local counsel. Nevertheless, the language of the Rule clearly applies and is in accord with common principals of accessory culpability:

A lawyer shall be responsible for another lawyer’s violation of the Georgia Rules of Professional Conduct if: (1) The . . . supervisory lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved; . . .

Under this Rule the extent of local counsel’s accessory culpability for lead counsel’s discovery abuse is determined by the answers to two questions: (1) What constitutes knowledge of the abuse by local counsel? (2) What constitutes ratification of the violative conduct by local counsel?

Actual knowledge, of course, would always be sufficient to meet the knowledge requirement of this Rule. Consistent with the doctrine of “willful blindness” applied in other legal contexts, however, sufficient knowledge could be imputed to local counsel if he or she, suspicious that lead counsel was engaging in or was about to engage in a violation of ethical requirements, sought to avoid acquiring actual knowledge of the conduct. The doctrine of “willful blindness” applies in these circumstances because local counsel’s conduct in avoiding actual knowledge displays the same level of culpability as actual knowledge.

Thus, if local counsel was suspicious that lead counsel was “engag[ing] in professional conduct involving dishonesty, fraud, deceit, or misrepresentation” in violation of Rule 8.4(a)(4), local counsel would meet the knowledge requirement of accessory culpability if he or she purposely avoided further inquiry. What would be sufficient suspicion, of course, is difficult to determine in the abstract. To avoid the risk of the effect of the doctrine of willful blindness, a prudent attorney should treat any reasonable suspicion as sufficient to prompt inquiry of the in-house or other out-of-state counsel.

What constitutes ratification is also difficult to determine in the abstract. Consistent with the definition of accessory culpability in other legal contexts, however, an attorney should avoid any conduct that does not actively oppose the violation. The specific conduct required may include withdrawal from the representation or, in some cases, disclosure of the violation to the court. Which measures are appropriate will depend



upon the particular circumstances and consideration of other ethical requirements. In all circumstances, however, we would expect local counsel to remonstrate with lead counsel and to warn lead counsel of local counsel's ethical obligations under Rule 5.1(c).

Other than accessory culpability, and depending upon how the parties and the court have defined it in the particular representation, the role of local counsel itself may include an affirmative duty to inquire into the conduct of lead counsel and other affirmative ethical obligations. This is true, for example, if the court understands the role of local counsel as carrying with it any direct supervisory authority over out-of-state in-house counsel or other out-of-state counsel. In such circumstances, Rule 5.1(c) provides:

A lawyer shall be responsible for another lawyer's violation of Rules of Professional Conduct if: (2) the lawyer . . . has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Furthermore, at times lead and local counsel may have defined the relationship so that it is indistinguishable from that of co-counsel. In such cases the usual principles of ethical responsibility apply. Even short of this co-counsel role, however, typical acts

required of local counsel such as moving of admission *pro hac vice* or the signing of pleadings, always carry with them affirmative ethical obligations. For example, in this, as in all circumstances, the signing of pleadings by an attorney constitutes a good faith representation regarding the pleadings and the conduct of the discovery procedure of which the pleadings are a part. There is nothing in the role of local counsel that changes this basic ethical responsibility. Local counsel, if he or she signs the pleadings, must be familiar with them and investigate them to the extent required by this good faith requirement.

Finally, there is nothing in the role of local counsel that excuses an attorney from the usual ethical requirements applicable to his or her own conduct in the representation, either individually or in conjunction with lead counsel. If local counsel engages in any unethical conduct, it is no defense to a violation that the conduct was suggested, initiated, or required by lead counsel.

Generally, Rules 1.2(a) and (d); 1.6; 3.3(a)(1) and (4); 3.3(c); 3.4(a), (b) and (f); 3.5(b); 4.1(a); 4.2(a); 4.3(a) and (b); 5.1(c); 5.3; 5.4(c); 8.4(a)(1) and (4) may apply to the conduct of local counsel depending upon the degree of local counsel's involvement in the discovery process. While all these Rules might not be applicable in a given case, taken together they cover the range of conduct that may be involved.

## Report of the Uniform Rules Committee of the Council of Superior Court Judges of Georgia January 20, 2005

At its business meeting on January 20, 2005, the Council of Superior Court Judges tentatively proposed the following amendments to the Uniform Superior Court Rules:

**Rule 4.4:** Admission Pro Hac Vice

**Rule 4.11:** Attorneys: Appearance, withdrawal and duties; to attend and remain

**Rule 31.4 and 31.5:** Motions, demurrers, special pleas, and similar items in criminal matters; Motions and orders for mental examination at public expense

**Rule 36.1:** Filing and processing; Preparation of documents

Pursuant to O.C.G.A. Section 19-13-53, the Council also revised and resubmitted Mutual/Respondent Protective Order Forms for consideration.

The proposed mutual/respondent protective order forms and the proposed amendments are posted at [www.cscj.org](http://www.cscj.org).

Comments and questions can be submitted to Michael J. Cuccaro, Staff Attorney of the Council of Superior Court Judges, at [cuccarom@superior.courts.state.ga.us](mailto:cuccarom@superior.courts.state.ga.us) or at (404) 651-7087.

Written correspondence may be mailed to: Council of Superior Court Judges is located at 18 Capitol Square, Suite 108, Atlanta, Georgia 30334. These proposals and any comments will be re-considered in July, 2005.

# Additional Changes/Corrections to the 2004-05 State Bar Directory

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## Order Additional Copies of the *State Bar 2004-05 Handbook & Directory*



Additional printed copies of the Bar's annual *Directory and Handbook* are available to members for \$36 and to nonmembers for \$46. There is a \$6 discount for orders that are picked up. Contact Jennifer Riley at (404) 527-8761 or [jenniferr@gabar.org](mailto:jenniferr@gabar.org).

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