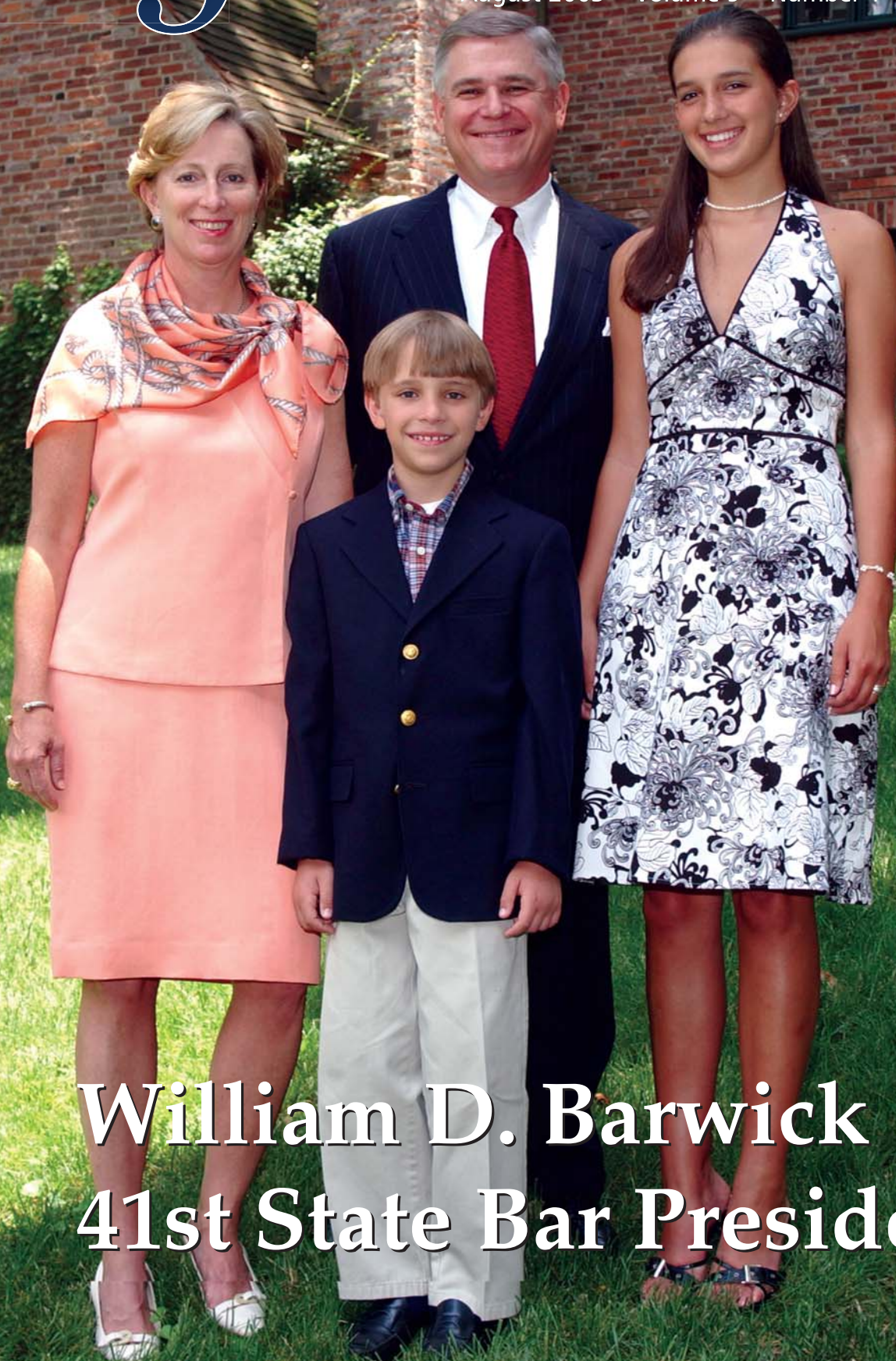


Georgia
Bar

Journal

August 2003 ■ Volume 9 ■ Number 1



William D. Barwick
41st State Bar President

Are footprints as foolproof as fingerprints?

The prosecutor in a capital offense case wanted to submit footprints taken inside a shoe as evidence. Two nights before the trial, the defense attorney received a Mealey's E-Mail News Report about a case that questioned the admissibility of this evidence.



The Mealey's E-Mail News Report notified the defense attorney of a recent court decision from the highest court in a neighboring state. He was surprised to find the prosecution's expert witness had also testified in that case. But the court held that footprints from inside a shoe were not a recognized area for expert testimony under the Daubert standard. As the defense attorney continued his search of analytical sources from Matthew Bender®, including *Moore's Federal Practice*® on the LexisNexis™ services, he quickly found further supportive commentary and analysis. When you need to go a step beyond cases and codes in your research, use the LexisNexis™ Total Research System—**It's how you know.**



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On the Cover

State Bar President William D. Barwick is pictured with his wife, Donna, and their children, Libby, 15 and Jack, 10.

Photo by: James E. Fitts

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

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

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By William D. Barwick

Assisting Young Lawyers During the Early Transition

During my first week as president of the State Bar of Georgia,

I was called upon to address the new inductees of the Bar at a large swearing-in ceremony in Fulton County. This has to be one of the most pleasant duties a bar officer is called upon to discharge. Law school is behind them, the dreaded bar exam has been passed, and their proud parents are in attendance, hoping once and for all that their children will no longer be a financial burden upon them.

The whole affair is like an uncontested adoption: the parents are happy; no one is yelling at the lawyer; and even the judge can get sentimental. For their part, the lawyers-to-be, like the adopted children, expect that they will be cared for and nurtured. Oh, well, every analogy has its flaws.

These are tough times economically for incoming lawyers. Many of the inductees I spoke to at the

ceremony are still looking for jobs, and those with jobs were mindful about how much time they were willing to spend with mom and dad before returning to the office.

The State Bar of Georgia has attempted a number of initiatives over the years to assist young lawyers during the early transition from law school. Bridge the Gap seminars and trial experience requirements are two such programs, and both have generated a fair share of criticism. The problem is that both are "one size fits all" solutions.

New associates in medium and large firms, where specialization begins early, detest BTG seminars, where one-half of the course material covers matters unrelated to their practice. Partners in every size law firm throughout the state dislike having associates spend time away from the office attending various litigation events before they can be turned loose on firm business. Is there another alternative, or should we just let several hundred new lawyers be raised by wolves every year during the formative stage of their practice?

Glad you asked. The Standards of the Profession Committee of the State Bar has developed a pilot program for mentoring lawyers "in transition," and the Board of

"The Standards of the Profession Committee of the State Bar has developed a pilot program for mentoring lawyers 'in transition,' and the BOG has approved its staged implementation over the next three years."


Governors has approved its staged implementation over the next three years. This program will not fundamentally change the way young lawyers are trained by established firms in professionalism, ethics and practice specialties. There will be limited reporting requirements and some CLE credit. The primary focus of the program will be to provide mentors to new lawyers who are not employed by established firms, and who really need some degree of support and training as they begin their careers.

The traditional impediments to hanging out one's shingle right out of law school have been eroded over the years. Law libraries can be purchased on-line or by disc, and

the need for secretarial help has been obviated by voice mail, e-mail and the keyboard skills required in law school. Common sense and judgment, however, cannot be purchased over the counter, and the mentoring program is designed to provide some "gray hair" assistance where it is most needed.

John Marshall, the committee chair, has worked prodigiously on this project for over seven years, and the committee has designed the first true internship program employed by the Bar. Some practical details remain, such as the recruitment and training of mentors for portions of the state that are shockingly under-lawyered. To its credit, the committee has also

acknowledged that other "feel good, do good" projects with a similar intent have either failed or are deeply despised (see previous statement). For this reason, the mentor project has a sunset provision that causes it to expire in 2008 unless otherwise affirmatively reinstituted.

This project can only work if it is mandatory, but it is a service that members of the Bar should willingly support. I encourage anyone with suggestions, comments or problems to contact the State Bar directly to obtain the committee's final report and recommendations, read it, and then share your thoughts with your representative on the Board of Governors. 



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"Volunteering to serve on a committee is vital to the Bar's success in achieving its mission."

By Cliff Brashier

State Bar Committees: Doing the Work of the Bar

Lady Bird Johnson once said, "Any committee is only as good as the most knowledgeable, determined and vigorous person on it. There must be somebody who provides the flame."

With hundreds of dedicated volunteers, the State Bar of Georgia has more than its fair share who are willing and eager to provide the necessary spark that committees need to succeed.

Next to the members, committees are the life blood of the Bar, providing strategic and tactical guidance "to foster among the members of the Bar of this State the principles of duty and service to the public; to improve the administration of justice; and to advance the science of law."

Volunteering to serve on a committee is vital to the Bar's success in

achieving its mission. Standing and special committee members continue to do important work from year to year. For example:

- **Advisory Committee on Legislation** — This committee, along with the State Bar's substantive law sections, the Board of Governors and the Executive Committee, administers a legislative program that is second only to the governor in the number of bills considered and passed annually.
- **State Disciplinary Board** — Through its investigative panel, review panel and formal advisory opinion board, this dedicated group of volunteers assists the Supreme Court, the legal profession and the public by investigating complaints involving unethical conduct and making recommendations to the Court when discipline is warranted.


■ Unauthorized Practice of Law —

This committee is charged with the duty of considering, investigating and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders. The purpose is to help protect the important legal rights of Georgia's citizens through competent legal advice from licensed, well-educated attorneys.

President Bill Barwick recently announced the revival of the Evidence Study Committee. This committee will suggest legislation for the revision and unification of the Rules of Evidence used in Georgia State Courts under one title, and within the general framework of the Federal Rules of Evidence.

If you are not currently participating in the Bar, please consider getting involved. Volunteering has an uncanny ability to foster a sense of professional and personal growth and development. With more than 50 active committees, there is room for any and all who want to volunteer. Area of practice sections of the State Bar, local bars and special interest bar associations also provide opportunities for professional service.

The president-elect appoints committee members each spring for the next Bar year. If you are interested in serving on a committee, please write or e-mail your preferences to President-elect Rob Reinhardt or to me after the first of the year.

As always, I am available if you have ideas or information to share; please call me. 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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"Without energetic young lawyers, the YLD committees could not prosper and serve the community and the profession."

By Andrew W. Jones

The YLD Wants You

In 1947, the Young Lawyers Division was created to aid and promote the advancement of the young members of the State Bar of Georgia. Today, the YLD continues to serve the young lawyers throughout Georgia, but has also evolved into a major community service arm of the Bar. To promote that objective, the YLD has established several committees that promote and serve the community and the legal profession.

Over the last five years, under the leadership of Ross Adams, Joe Dent, Kendall Butterworth, Pete Daughtery and Derek White, the Georgia YLD has received national recognition as one of the most active and productive young lawyers divisions in the country.

This national recognition is a direct result of the hard work of young lawyers from around the state of Georgia. As president, I plan to continue this good work and hope to increase involvement in the YLD.

YLD Only as Strong as Its Members

Without energetic young lawyers, the YLD committees could not prosper and serve the community and the profession. Committee sign-up sheets have recently been sent to every young lawyer in the state. I would encourage you to participate. Committee involvement not only allows you to return something to the profession and the community, but also allows you to meet and work with young lawyers from around the state.

The following is a list of YLD committees: Advocates for Special Needs Children, Appellate Admissions, Aspiring Youth Program, Bridge the Gap, Business Law, Career Issues, Community Service Projects, Criminal Law,

Disability Issues, Disaster Legal Assistance, Elder Law, Employer's Duties and Problems, Ethics and Professionalism, High School Mock Trial, Indigent Criminal Defense, Intrastate Moot Court Competition, Judicial Liaison, Juvenile Law, Kids and Justice, Law Related Education, Legislative Affairs, Litigation, Membership and Affiliate Outreach, Minorities in the Profession, National Moot Court Competition, Pro Bono, Publications, The Great Day of Service, Truancy Intervention, William W. Daniel National Invitational Mock Trial, Women in the Profession and Youth Judicial Program.

YLD Works Hard, but Also Plays Hard


Five times a year the YLD meets to report the work of the commit-

tees and also to have fun. During the 2003-04 Bar year, the YLD will meet in Highlands, N.C., Aug. 15-17; in Athens for the Georgia-Alabama game Oct. 3-5; in Atlanta Jan. 15-17, 2004 (tentative), for the Midyear meeting; April 16-19, 2004, on a three day cruise to the Bahamas; and Orlando, Fla., June 17-20, 2004, for the Annual Meeting. I would encourage all of you to come to our meetings and see what the YLD is all about.

Large Atlanta Firms, the YLD Needs You

One of my goals this year as YLD president is to increase participation in the YLD by the young lawyers from the large Atlanta law firms. For years, the YLD leadership has viewed the Atlanta legal community as an untapped resource for the YLD. Percentage

wise, the majority of the young lawyers practicing in Georgia do so in the metro area. A few energetic young lawyers from each large Atlanta law firm could take the YLD to new heights.

I look forward to serving as YLD president and working with other young lawyers from around the state. I am fortunate to follow in the footsteps of several great past presidents. During the upcoming Bar year, I will use this column to recognize the young lawyers who have become active in the YLD. I hope to include your name. If you have questions, or would like to become more involved in the YLD, please contact Deidra F. Sanderson, YLD Director, at (404) 527-8778, (800) 334-6865 ext. 778 or deidra@gabar.org. 



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By Larry Roberts

Patent Law For the General Practitioner

If you are a general practitioner, sooner or later one of your clients is going to come to you with an invention and seek your advice as to whether he or she can (or should) get it patented. Would you know how to help your client determine whether an invention is potentially patentable? How can you help your client decide whether he or she needs a patent attorney? Is there anything your client should be doing before meeting with a patent attorney? Here are some tips to help you through that first meeting.

WHAT IS A PATENT?

Patent law is one of the few areas of law that is actually provided for in the U.S. Constitution. Our founding fathers were sufficiently convinced of the benefits of a patent system that the Constitution authorizes Congress “to promote the progress of ... [the] useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their ... discoveries.”¹

How does a patent promote the “useful arts?” There are several ways. First, there is an incentive for inventors to invest their time, efforts and resources to innovate because an inventor will be granted a period of exclusivity within which to practice his or her invention. The public thus benefits from the availability of inventive products from the patent owner or the owner’s licensees. Second, in return for that period of exclusivity, the inventor must disclose to the public how to make and use the invention.² Third, the inventor also must disclose the best way known to him or her for carrying out the invention.³ Accordingly, once the patent has expired, anyone can make and use the invention of the expired patent by following the inventor’s own instructions. In addition, even before the patent expires, others can read the patent and use the knowledge thereby obtained as a “springboard” for designing around the patent, adapting the technology to other fields of use or developing new technology. Overall, in return for a patent, the inventor contributes to the sum total of public knowledge, and the public benefits both from this knowledge and from the innovation that this knowledge spurs.

It is important to note that a patent grants the patent owner only the right to exclude others from making, using, selling or offering to sell the patented invention — it does not grant an affirmative right to the patent owner to practice his or her own invention.⁴ It is entirely possible to obtain a patent for an improvement to an existing product that cannot be practiced without infringing a dominant patent for the existing product.⁵ For example, an inventor might be able to get a patent on a toaster with a timer on it, but not be able to practice his or her patented invention because someone else has a patent on the basic concept of a toaster.⁶

DOES YOUR CLIENT REALLY NEED A PATENT?

Just as obtaining a patent does not grant an affirmative right to practice the patented invention, it also is not necessary to patent a product before it can be brought to market. The majority of new products brought to market today probably do not qualify for a patent because they are merely obvious modifications of known products. Nevertheless, these unpatented products can generate a tremendous amount of revenue.

Patents are not inexpensive. There are government fees for filing the application, and if the

application is successful, there are government fees for having the patent issued.⁷ Patent attorney's fees can run \$6,000 and up for preparation and filing of a patent application for even a simple invention, and these fees climb even higher for more complex inventions. Once the application is filed, the fees for the patent attorney to review and respond to official actions from the patent examiner in an effort to get the application allowed can add several thousand dollars more. There also is the possibility that an applicant might spend all of this money only to find out that the invention is not patentable, or that it is only so narrowly patentable that the patent can easily be circumvented by

designing around it. If the patent does issue, then maintenance fees that can run upward of several thousand dollars must be paid every four years in order to keep the patent in force. Finally, if a competitor is infringing a patent, then it is up to the patent owner to enforce his or her patent rights, and patent infringement litigation can be *very* expensive.⁸

Some inventions are better protected by maintaining them as "trade secrets," rather than by patenting them. As its name implies, trade secret protection relies upon keeping the invention secret in order to protect the technology. Trade secret protection, however, cannot protect against competitors buying a product on

PAT. PENDING



the market and reverse-engineering it (*i.e.*, taking it apart and finding out how it functions).⁹ Further, trade secret protection will not guard against another person independently inventing the same invention.¹⁰ Nevertheless, for certain types of technology, such as manufacturing processes, trade secret protection can be superior to patent protection because trade secret protection does not lapse after 20 years. Trade secret protection also has the added benefit that it costs little or nothing to obtain; the inventor need only take appropriate steps to protect the technology as a secret.

With all of that said, there can be significant advantages to having a patent. First, a patent can be used to carve out a niche for a product in the marketplace and make it difficult for others to enter the market with a competing product. Second, a patent protects against others independently developing the same technology.¹¹ Third, a well-drafted patent will not only prevent competitors from copying the patent owner's product but will also prevent them from "designing around" the patent by making only minor changes. Fourth, a patent can help the patent owner secure the financing that he or she may need to bring the product from

inception to market. Finally, even if the patent owner does not have the resources to bring a product to market, he or she can license the patent to others, or sell the patent outright to a company that is in a position to exploit it. Overall, there are many advantages to patenting an invention, but the inventor must approach the patenting process with reasonable expectations and eyes wide open.

WHAT IS PATENTABLE?

Subject matter that can be patented includes machines, manufactured articles, compositions of matter and processes, as well as improvements on these four classes of subject matter.¹² It is not possible, however, to obtain a patent on an invention that is already known to the public,¹³ or that is only an obvious modification of an invention that is already known to the public.¹⁴

Something that is already known to the public is called "prior art."¹⁵ Prior art falls generally into one of three categories: things known before the patent applicant invented his invention;¹⁶ things known more than a year before the patent applicant filed an application for patent;¹⁷ and other miscellaneous

bars against patentability.¹⁸ Each of these categories has distinct implications and is discussed separately.

Things Known Before the Applicant's Date of Invention

Whereas virtually all other countries award priority for a patent based upon which inventor is the first to file a patent application, the U.S. patent system instead awards the patent to the first person to invent, even if he or she is not the first to file a patent application.¹⁹ Invention is a two-step process. First, there is "conception," which is the mental formulation of the invention, or coming up with the idea. The second step, "reduction to practice," is the physical aspect of invention, which encompasses the process of constructing and using the invention, and proving it useful for its intended purpose.²⁰ If an inventor is diligent in reducing the invention to practice following conception, the date of invention is the date he came up with the idea.²¹

In determining what information the public knew before an inventor's date of invention, the most common types of prior art are printed publications and public uses. A printed publication is just about any type of printed material published anywhere in the world.²² On the other hand, public uses are limited to activities that occur within the United States.²³ Absent proof to the contrary, the Patent Office will assume that the date of invention is the date a patent application was filed. Thus, if an invention is disclosed in a publication three months before the filing date of a patent application, but the inventor actually

Whereas virtually all other countries award priority for a patent based upon which inventor is the first to file a patent application, the U.S. patent system instead awards the patent to the first person to invent, even if he or she is not the first to file a patent application.

invented his invention six months before the filing date of his application, the burden will fall on the applicant to prove that his or her date of invention was earlier than the date of the publication so that the publication does not prevent a patent from issuing.

The need to prove a date of invention earlier than the filing date of a patent application can arise not only in the context of proving the invention was made prior to the date of some prior art, but also in the context of a dispute between two inventors of the same subject matter.²⁴ In such a dispute, the patent is awarded to the applicant who can prove the earlier date of invention.²⁵

You should advise your client to begin keeping good records of his or her activities relating to the invention even before he or she sees a patent attorney because of the potential need for being able to prove an early date of invention. Good records alone, however, are not sufficient to establish a date of invention.²⁶ Conception and reduction to practice must be established by *corroborated* evidence, which

consists of evidence that can be confirmed by persons other than the inventors. Uncorroborated evidence of the inventor is legally insufficient to establish conception or reduction to practice.²⁷ Thus, it is imperative that the inventor's ideas and efforts to reduce those ideas to practice be disclosed to someone on a regular basis who can corroborate the inventor's activities. Further, the third party must be able to corroborate the inventor's activities by reference to particular dates to provide the best possible protection for a date of invention.²⁸

There are two basic ways to corroborate a date of invention. First, with regard to evidence maintained in the custody and control of the inventor, a third party must be able to corroborate events, documents and other evidence of conception and reduction to practice, based upon the third party's observations and understanding of the evidence.²⁹ The theory is that if the inventor has access to such documents or other evidence of conception and reduction to practice, then he or she would be able to make

additions or changes to the documents.³⁰ Accordingly, the witness must be able to attest that no such changes have been made, or that facts exist which are consistent with the inventor's records. Alternatively, evidence of conception and reduction to practice can be delivered to a party other than the inventor, who maintains exclusive control of the evidence. The third party can corroborate the evidence as of the date it was received, on the theory that the inventor could not have had access to the evidence to alter it after the third party took custody of it.

Even before your client sees a patent attorney, you should advise him or her to begin keeping an "inventor's notebook" or "lab notebook" in order to record and to corroborate acts of conception and reduction to practice. The inventor should record inventive ideas and the efforts made to reduce those ideas to practice in the inventor's notebook. Then periodically, preferably at least weekly, the inventor should have another person (not a co-inventor) review his or her notebook entries and sign

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and date each page with a notation similar to the following: "Read and understood, John Smith, January 15, 2003."

It is important that the person witnessing the inventor's notebook have a level of skill sufficient to enable him to understand what he or she is reading. A witness who signs and dates a notebook page without understanding its contents and then returns the notebook to the inventor will not be able to convincingly testify later that changes or additions were not made subsequent to the date of the witness' review of the notebook.

It is not advisable to try to establish a date of invention by the fairly common practice of mailing oneself a certified letter disclosing the invention.³¹ The practice of having a document notarized also will not corroborate a date of invention. The notary can establish only that the inventor signed the document on a given date and cannot testify as to the contents of the document being signed.³²

Things Known More Than a Year Before the Filing Date

The second broad category of events that constitute prior art includes those events that occurred more than a year prior to the date a patent application is filed. This one-year "grace period" strikes a balance between two competing interests: the inventor's interest in testing the invention and assessing its commercial potential before incurring the expense of a patent application versus the public interest in the prompt disclosure of inventions. Some examples of events that fall into this category include printed publications

regarding the invention; public uses of the invention; and offers for sale of the invention.

An insidious aspect of this category of prior art is that an inventor's own actions can constitute a bar to his or her getting a patent on the invention. In this respect, courts are usually fairly liberal in interpreting uses as being "public" in nature. For example, in one very old, but still interesting case, an inventor designed a new type of corset stay that a woman tested by wearing the corset under her clothes (as was the style in the days before the advent of the pop star Madonna), but out in public.³³ Even though no one could see the novel corset stay beneath the woman's clothes, the court nonetheless held this use to be "public" such as would bar a patent on an application filed more than a year later.³⁴

Similarly, commercial activities of the inventor can constitute an unintended "offer for sale" such as would bar a patent application filed more than a year later. For instance, a patent applicant's negotiations to sell a product were held to start the one-year clock running even when the patent applicant did not yet have a product available for sale and a commercial embodiment of the product was not yet finalized.³⁵

So, when a client comes to you with an invention, you should discuss what activities have taken place relative to the invention, and how long the activities have been ongoing. If there are events that even arguably constitute a public use or offer for sale and the one-year date is approaching, then the inventor cannot afford to put off the trip to the patent attorney any longer. By the same token, if the

client advises you that he has been using the inventive plow to plow his fields for the last five years and has finally decided he ought to get it patented, then you can probably save your client the trouble and expense of a trip to the patent attorney because that train has left the station.

Other Bars to Patentability

There are a few other types of events that do not fall into the "prior to the date of invention" or "more than a year before the filing date" categories. Chief among those is the prohibition against an inventor patenting something that he or she did not invent.³⁶ If a client comes back from a trade show and tells you about a nifty product she saw that was not patented, and asks for your help in trying to patent the product before anybody else does, you will have to decline, because your client cannot patent it if she did not invent it. This same rule applies to the client who wants to patent grandma's cookie recipe: if he did not invent it, then he cannot apply for a patent.

PATENT INFRINGEMENT

As previously indicated, a U.S. patent gives the patent owner the right to exclude others from making, using or selling the patented invention.³⁷ Suppose your client is concerned about whether his or her invention is infringing upon an existing patent. In such a case, how can you determine what the patented invention is? All active U.S. patents can be downloaded from the Patent Office Web site at www.uspto.gov. The cover sheet of

the patent will contain various information about the patent, including the following items: patent number; name of the inventor; name of assignee, if any; filing date; name of the examiner; name of the patent attorney who represented the applicant; prior art considered by the examiner; and a representative drawing of the invention. In the case of electro-mechanical inventions, the sheets following the cover page contain drawings. Next comes the specification, which generally includes a discussion of the background of the invention, followed by a disclosure of the invention. The disclosure includes a description of the best way known to the inventor of practicing the invention. This description must be written in detail sufficient to enable a person skilled in the field to which the invention

pertains to be able to know how to make and use the invention after reading the specification.

The patent ends with a series of numbered paragraphs, known as the "claims," that define the subject matter of the invention. The claims determine the scope of a patent, *i.e.*, what it does or does not cover. The claims of a patent are like the property description in a deed in that they set forth the metes and bounds of the invention. No matter what is disclosed in the specification of the patent, the patent covers only what is recited in the claims.³⁸

In determining whether a patent has been infringed, one must first figure out what the claims mean. The claims are interpreted by reference to the plain meaning of the words of the claims; the disclosure found in the patent specification; the amendments and representations

made by the applicant during the prosecution of the application which resulted in the patent; and the context provided by the prior art.³⁹

Once the claims of the patent have been properly construed, the claims are compared to the product under consideration of infringement. To infringe a patent claim, the device under consideration must include each and every limitation recited in the claim or its equivalent.⁴⁰ If even a single limitation or its equivalent is absent from the structure under consideration, then the claim is not infringed. Thus, the omission of a single claimed element generally avoids infringement, but adding additional elements usually does not avoid infringement. Further, even if only a single claim of a patent is infringed, then the entire patent is infringed.



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A patent does not afford any enforceable rights until it has issued.⁴¹ The fact that a patent application has been filed does not give the patent applicant any enforceable rights.⁴² The patent applicant may mark his invention as "patent pending," but this is at best a psychological deterrent to competitors seeking to market a competing product.

Under the American Inventor's Protection Act of 1999, patent applications are now routinely published 18 months after their filing date.⁴³ If a patent issues with the claims in substantially the same form as published, and if a competitor with knowledge of the published application has been practicing the claimed invention after the publication date, then once the patent issues, the patent owner can recover reasonable royalties for the activity that occurred after the publication date but prior to the issuance of the patent.⁴⁴ The right to seek royalties, however, is provisional and arises only if a patent issues; there are still no enforceable patent rights prior to issuance.⁴⁵


If a party is found liable for patent infringement for actions occurring after the issuance of the patent, then the patent owner may be awarded lost profits for the infringement, and in any event shall be awarded not less than a reasonable royalty.⁴⁶ If the infringement is found to have occurred with willful disregard to the rights of the patent owner, damages can be tripled.⁴⁷ Further, in exceptional cases, the court can award the prevailing party its attorneys' fees.⁴⁸

Perhaps even more devastating than monetary damages that can be assessed for patent infringement is the injunctive relief that is almost

always awarded the patent owner against the infringer.⁴⁹ If a company has to take a major product off the market as a result of patent infringement, the future financial damage, as well as the public relations damage, can be devastating.

So how does your client avoid the possibility of being found liable for patent infringement? If your client is about to launch a new product, or if there is reason to believe there may be patents covering the technology, then he or she should consider contacting a patent attorney to discuss the advisability of a clearance study. It is particularly important to follow this maxim if the new product is one that is outside the company's normal area of technology. A clearance study will attempt to identify patents that might pose an infringement issue with respect to the new product. The patent attorney will review the patents located during the search and render an opinion as to whether the manufacture, use, sale or offer for sale of the proposed new product will infringe any of those patents. If the patent attorney is unable to clear the proposed product over one or more of the patents identified during the search, the patent attorney can work with your client to try to "design around" the problematic patents so that your client can get a competing product to market without infringing the patents.

It is perhaps even better to get the patent attorney involved at the early stages of product design and development. By identifying potential problematic patents early, the appropriate design changes can be made before significant expenses are incurred in developing the product and tooling up for manufacture.

Overall, as a general practitioner, you do not necessarily need to know the answers to all of your clients' patent problems, but if you can recognize the issues and know when to refer your clients to a patent attorney, you will be doing your clients a tremendous service. 



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ENDNOTES

1. U.S. CONST. art. I, § 8, cl. 8.
2. 35 U.S.C. §112 (2001).
3. *Id.*
4. *Id.* § 154(a)(1); see also *Leatherman Tool Group v. Cooper Indus.*, 131 F.3d 1011, 1015 (Fed. Cir. 1997) (noting that a patent affords no affirmative right to the patentee to practice his invention).
5. See, e.g., *Temco Elec. Motor Co. v. Apco Mfg. Co.*, 275 U.S. 319, 328 (1928); *Rolls-Royce, Ltd. v. GTE Valeron Corp.*, 800 F.2d 1101, 1110 n.9 (Fed. Cir. 1989).
6. See *Rolls-Royce, Ltd.* at 1110 n. 9 (discussing dominant patents).
7. See 37 C.F.R. §§ 1.16 – 1.21 (2002) for a listing of Patent Office fees.
8. Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. REV. 1495, 1502 (2001) (noting that the median cost of patent litigation through trial and appeal is roughly \$1.5 million per party).
9. See, e.g., *Roboserve, Ltd. v. Tom's*

- Foods, Inc., 940 F.2d 1441, 1455 (11th Cir. 1991) (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 160 (1989)).
10. Specifically, the Supreme Court has stated that “a trade secret law, however, does not offer protection against discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 476 (1974).
 11. See 35 U.S.C. § 271(a) (2001) (stating that it is infringement for another to make, use, sell, or offer for sale a patented invention without permission of the patent owner).
 12. *Id.* § 101.
 13. *Id.* § 102.
 14. *Id.* §103(a).
 15. 1 DONALD S. CHISUM, CHISUM ON PATENTS G1-18 (2003).
 16. See 35 U.S.C. §102(a), (e), (g) (2001).
 17. *Id.* § 102(b), (d).
 18. *Id.* §102(c), (f).
 19. See *id.* § 102(g); see also *Paulik v. Rizkalla*, 760 F.2d 1270, 1272 (Fed. Cir. 1985) (stating that “the patent right is granted to the first inventor rather than the first to file a patent application”).
 20. See, e.g., *Genentech, Inc. v. Chiron Corp.*, 220 F.3d 1345, 1352 (Fed. Cir. 2000).
 21. See 35 U.S.C. § 102(g); *Christie v. Seybold*, 55 F. 69, 76 (6th Cir. 1893).
 22. See, e.g., *In re Hall*, 781 F.2d 897, 900 (Fed. Cir. 1986) (finding that a single, cataloged dissertation in a German university library constitutes a publication sufficient to prevent the issuance of a patent); cf. *In re Cronyn*, 890 F.2d 1158, 1161 (Fed. Cir. 1989) (concluding that copies of undergraduate theses in a school library were not publications because they were not “catalogued or indexed in a meaningful way”).
 23. Specifically, the Patent Act precludes issuance of a patent when the invention has been “used by others in this country.” 35 U.S.C. § 102(a) (2001) (emphasis added).
 24. 35 U.S.C. §102(g) (2001).
 25. *Id.*
 26. See, e.g., *Hahn v. Wong*, 892 F.2d 1028, 1033 (Fed. Cir. 1989) (pages from inventor’s laboratory notebook were insufficient to establish date of invention in the absence of additional, “corroborating” evidence).
 27. *Id.*; see also *Markman v. Lehman*, 987 F. Supp. 25, 30 (D.D.C. 1997), *aff’d*, 178 F.3d 1306 (Fed. Cir. 1998) (“To establish an actual reduction to practice, an inventor must provide independent corroborating evidence in addition to his or her own statements and documents”); *Price v. Symsek*, 988 F.2d 1187, 1194 (Fed. Cir. 1993) (stating that “an inventor’s testimony, standing alone, is insufficient to prove conception, some form of corroboration must be shown”); *Townend v. Smith*, 36 F.2d 292, 294-95 (C.C.P.A. 1929) (relying on testimony of a third party witness to corroborate inventor’s testimony regarding date of invention).
 28. In *Hahn*, discussed *supra* in note 26, the inventor also submitted affidavits from two individuals who had “read and understood” pages from the inventor’s laboratory notebook. *Hahn*, 892 F.2d at 1031. However, neither of these affidavits identified any specific dates of invention. *Id.* Relying on this fact, the court found that these affidavits were insufficient as corroborating evidence, stating that “[t]hey established only that those pages existed on a certain date; they did not independently corroborate the statements made on those pages.” *Id.* at 1033.
 29. See 37 C.F.R. § 1.608(b) (2002); *Hahn*, 892 F.2d at 1033; see also *Townsend*, 36 F.2d at 294-95 (third party’s observation of inventor’s machine provided corroborating evidence as to inventor’s date of invention).
 30. See, e.g., *Price*, 988 F.2d at 1194-95 (noting that, without corroboration, “establishing priority of invention [based upon the inventor’s mere allegation] would, in many cases, offer great temptation to perjury” (quoting *Mergenthaler v. Scudder*, 11 App. D.C. 264, 278 (D.C. Cir. 1897))); *Berry v. Webb*, 412 F.2d 261, 267 (C.C.P.A. 1969) (stating that “[t]he purpose of the rule requiring corroboration is to prevent fraud”); *Harper v. Zimmerman*, 41 F.2d 261, 265 (D. Del. 1930) (discussing the necessity for corroboration).
 31. The problem with mailing oneself a certified letter is that the letter ultimately returns to the custody of the inventor. Once back in the inventor’s hands, the inventor can alter the letter to include additional statements, drawings, and other evidence of conception and reduction to practice. Effectively, a certified letter mailed to oneself only establishes the existence of the letter on a certain date.
 32. In other words, a notary cannot “independently corroborate” statements made on the notarized documents. See *id.*; see also Fed. R. Evid. 801, 802 (discussing hearsay).
 33. *Egbert v. Lippmann*, 104 U.S. 333, 335 (1881).
 34. *Id.* at 337.
 35. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 58-59, 68-69 (1998).
 36. 35 U.S.C. §102(f) (2001).
 37. *Id.* § 154(a)(1).
 38. See, e.g., *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U.S. 274, 278-79 (1877) (limiting patentees to their claims); *Merrill v. Yeomans*, 94 U.S. 568, 570 (1876) (stating that the “distinct and formal claim is . . . of primary importance”).
 39. See, e.g., *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1562 (Fed. Cir. 1991); *Autogiro Co. of Am. v. United States*, 384 F.2d 391, 397-99 (Ct. Cl. 1967).
 40. E.g., *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 264 F.3d 1326, 1333 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 986 (2002) (paraphrasing the “all-elements rule” by stating that “an accused device must contain every claimed element of the invention or the equivalent of every claimed element”); *Bell Atlantic Network Services, Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1279 (Fed. Cir. 2001) (stating that “there can be no infringement under the doctrine of equivalents if even one element of a claim or its equivalent is not present in the accused device”).
 41. 35 U.S.C. § 154 (a)(2) (2001) (stating that the patent term begins “on the date on which the patent issues”).
 42. *Id.*
 43. *Id.* § 122(b)(1)(A).
 44. *Id.* § 154(d).
 45. *Id.*
 46. *Id.* § 284.
 47. *Id.*
 48. *Id.* § 285.
 49. *Id.* § 283.

Opening Statement Making it Stick

By Ronald L. Carlson and Michael S. Carlson

Every lawyer who sits down to plan her opening remarks for a coming trial has the same question: How far can I go in arguing my case during the opening statement? Can I mention the law? What about drawing a diagram of the accident on a blackboard? Will my opponent be able to stop me from displaying a couple of my dramatic exhibits to the jury?

Making one's theory of the case "stick" from the very start of the trial depends mightily on how far the lawyer can go in opening statement. Where the defense is primarily a legal or statutory one, knowledge of whether counsel can guide the jury by reading a defense-friendly regulation to them is critical. If a plaintiff is catastrophically injured, exposing to the jury a photo of his mangled body at the scene of a collision is strong medicine at the start of the case. Is it allowed?

The aim of this article is to assist Georgia practitioners in effectively preparing an opening statement and to provide a blueprint for responding to objections that would frustrate that goal. By working within the legal boundaries that control opening remarks, counsel can creatively present their case at this vital stage of the trial. She can indeed make her theories stick.

Visual Aids

Suppose there is an issue in a criminal case regarding space and dimensions. Two people were killed in a stabbing attack. It took place late at night in a townhouse entryway. The defense claims the defendant, who was clearly alone that night, could not have committed the double homicide; a single person could not have controlled both victims without one of them running away. Wrong, says the prosecutor. The space where the murders occurred is so constricted that a burly attacker would have been able to pin two people down. An excellent way for the prosecutor to convey the tight fit is with an accurate diagram of the murder scene, drawn to scale. Working with the diagram in front of the

jury to point out where the bodies were discovered gets everyone believing that the lone defendant could have pulled it off.

Where the defense is alibi, a defense attorney may strategically employ a timeline, demonstrating that the presence of the accused at a distant location precluded his presence at the crime scene when the crime occurred. He could not have been at point A at an established time and then traveled to point B in time to murder, the defense persuasively asserts.

Commercial civil cases, on the other hand, frequently involve a blizzard of names, dates and business associations. The jury will see this information as a morass of trivia unless counsel creates an opening statement strategy that dispels the confusion. The prepared chart seems to be the answer. When counsel is involved in a complex case and is dealing with a plethora of names, dates and companies, she is authorized to utilize charts which identify the "cast of characters."

Retention of the otherwise distracting details improves remarkably. The names stick.

Will case law support the use of a prepared chart? The Georgia

Supreme Court says “yes.” In *Highfield v. State*,¹ the Court allowed the use of a chalkboard listing the participants in the crimes and the expected witnesses. It was properly displayed in opening statement. In civil cases, a statutory rule allowing the practice has caused Georgia appellate courts to wax even more strident about the propriety of visual aids.² In *Lewyn v. Morris*,³ the Court of Appeals held that the trial court “overstepped its bounds” by sustaining an objection to use of a blackboard to identify the locations of the cars involved in a wreck.

Lewyn suggests an interesting possibility. There are dozens of areas of trial practice law where the bench can go either way on a contested question, without fear of reversal. Multiple issues fall under the umbrella of “judicial discretion.” Counsel’s right to go to the blackboard during opening may not be one of those. Under *Lewyn*, a successful claim of reversible error may be constructed around a trial judge’s arbitrary decision to bar use of the blackboard.

Of course, in this electronic age, some attorneys may prefer PowerPoint and other technological methods over a simple blackboard. The controlling case law does not preclude electronically creative strategies for previewing trial evidence.

Display of Trial Exhibits

Often a particular piece of physical evidence is critical to a case. This might be the object itself, like a gun or a knife or a gasoline tank, or a photograph of one of these items. Obviously, counsel wants the jury to be familiar with such evidence at the outset, but a nagging question

resounds: Is displaying trial exhibits in opening statement allowed? As with visual aids, the answer supplied by the Georgia Supreme Court is “yes.” In *McGee v. State*, the Court ruled that displaying an exhibit during the initial remarks to the jury “is a permissible part of the opening statement, as its purpose is to help the jury understand and to remember the evidence.”⁴

This technique often depends upon counsel knowing in advance that she can expose such items. At times like this, a pretrial motion in limine to admit particular evidence is advisable.

Stating the Applicable Law

In a criminal case, a federal prosecutor tells the jury:

“The accused is charged under



the U.S. Currency Structuring statute. What is currency structuring, ladies and gentlemen? Congress passed a law in the 1970s that provides that whenever a bank receives more than \$10,000 in cash from a customer, the bank must file a report with the government. Some sharp characters then designed their deposits to come in just under the \$10,000 deposit ceiling. To remedy this abuse of the reporting law, in more recent years Congress enacted another statute. It provides that if an individual structures his banking so as to avoid the reporting law, he is guilty of currency structuring. That is exactly what the defendant did in this case."

At this point counsel is interrupted by a defense objection: "Objection, he is instructing the jury on the law."

Does an attorney venture into "argument" when he describes the applicable law in his initial remarks to a jury? "Not so," said the Georgia Supreme Court, which held in *Kinsman v. State* that counsel's referring to "the applicable law" in opening statement was not error, and did not violate the Georgia proscription against "reading law" to the jury.⁵

In addition to Georgia, do federal courts permit moderate reference to highly relevant legal principles in opening? Indeed, they seem to have exceeded Georgia courts in granting license to counsel to explore legal doctrines. In *United States v. Strissel* the prosecutor explained the RICO statute in opening, and that it applied to the defendant, not just to racketeers like Al Capone. The United States Court of Appeals held that "[a] defendant need not be a mobster [in order] to forfeit [his] assets,"

There is a distinction between making brief reference to favorable legal principles on one hand versus intensively arguing the law on the other.

and accordingly the prosecutor's comment was not prejudicial.⁶ *United States v. Rodgers* also approves prosecutorial legal direction to the jury. In opening statement the prosecutor explained: "It's the United States Attorney's responsibility to present this case to a grand jury. If the grand jury finds probable cause that a crime has been committed then an indictment is returned."⁷ The defense complained on appeal about the nature of these remarks, to which complaint the Court of Appeals responded: "The prosecutor's comment about the grand jury was merely prefatory to the reading of the indictment and was a correct statement of how a federal indictment comes to be."⁸

There is a distinction between making brief reference to favorable legal principles on one hand versus intensively arguing the law on the other. It is only the latter which is prohibited. Having said that, one commentary provides wise advice about how far counsel should push the envelope when urging law in opening:

[T]he attorney ought to avoid any extended discussion of the law. The witness usually cannot testify about the law, and it is therefore improper for the attorney to go on at any length during opening about the law. As we shall see, near the end of the opening while she is expressing confidence in her case, the attorney can make a passing refer-

ence to the burden of proof. If the attorney's case rests on a statutory cause of action or defense which lay jurors are likely to be unfamiliar with, the judge has discretion to allow the attorney to read the statute during opening.... However, if the attorney spends more than a few sentences discussing the law, the judge might intervene *sua sponte*; in the jury's presence, the judge may remind the attorney that it is the judge's province to instruct the jury on the law and admonish the attorney to refrain from legal instruction.⁹

Colorful Language

Using colorful verbiage in closing argument is not only tolerated, but encouraged.¹⁰ Less has been said about the propriety of theatrical speech in opening statement. What if counsel wants to engage in dramatic language? Contrary to what courtroom folklore might suggest, counsel is entitled to utilize colorful language in opening statement.¹¹ Georgia courts allow this in civil cases if the evidence supports the terms invoked. For example, no error was ascribed to the trial court's allowing plaintiff's counsel to refer to the defendant's train as "barreling through Stockton" to characterize its speed at the time of the collision in question.¹²

In *Teems v. State*,¹³ the Georgia Supreme Court allowed the prosecutor to state that the defendant was

"riding shotgun," to describe his occupancy in the passenger seat of a vehicle on the night of the murder. The court held that "[t]he remark was a colloquial and colorful way of stating what the evidence was expected to prove, but was not inappropriate or harmful error."¹⁴

Similarly, in federal courts it has been held that where colorful language of a prosecutor indicates "a permissible preview of the charges and the evidence to be presented at trial," no error is present.¹⁵ In a civil case, the United States Court of Appeals for the Eleventh Circuit determined that describing the opposing party in opening statement as having been "stoned out of his mind" was not error.¹⁶

In *United States v. Johnson* the defendants were convicted of sending bombs to injure and destroy British military helicopters in Northern Ireland. The trial lasted 28 days. Later, certain of the prosecution's opening remarks were challenged as improperly inflammatory. The prosecutor had characterized the Irish conflict in which the defendants were involved as "an echo of sadness from the graves of dead generations."¹⁷ Armed activism against England was described as "bloody but abortive."¹⁸ The prosecutor provided an image of ambush and sabotage committed by the Provisional Irish Republican Army "amongst the hedgerows, stone walls and narrow lanes of the Irish countryside."¹⁹

How did the United States Court of Appeals react to this colorful language? Extremely well, according to the court's opinion. "The challenged statements, in our view, were not improperly inflammatory. Though vivid and rhetorical, against a background redolent of

long continued violence and carnage they did not exceed the bounds of adversarial propriety."²⁰

Don't Get Stuck

While it adds interest for counsel to utilize impact language, she needs to avoid getting carried away. At least three major pitfalls can trip her up.

First, if counsel becomes passionate and swings too wildly, she may make unwise concessions in her speech. In a federal trial these will bind her client and may cost the party a victory. As indicated in *United States v. Blood*, "a clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party."²¹

Georgia decisions have been mixed on the right to send a party down to defeat based upon what her attorney said in opening. In a civil proceeding it seems that a client is bound by statements of her attorney made in open court when such statements are made in the client's presence and are not denied by the client.²² However, criminal cases appear to be different. A much higher level of certitude regarding the intent of the party to admit or concede a point is required.²³ Notwithstanding, instead of simply relying upon uncertain precedent in an effort to avoid the damage, why not exercise a measure of caution about making careless admissions during opening?

A second pitfall is abundantly clear in Georgia jurisprudence: If you promise too much in opening, it can be held against you. It is appropriate in closing argument for an opposing attorney to look back at the opening statement of an

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opponent and deplore an opponent's omission of proof.²⁴ Thus, it is appropriate for a defense attorney to argue as follows in closing a personal injury case: "The plaintiff promised in his opening remarks that he would supply, and I quote, 'ample proof of the plaintiff's damaged mental state as a result of this accident.' Members of the jury, where was the expert testimony regarding psychological injury? Not one expert took the witness stand to support his claim of post-accident mental trauma. I submit the plaintiff has broken the promise he made to you in his opening statement." Put bluntly, overstatement at the start can kill you in the end.

Opening the Door

A final pitfall worthy of mention is the inartful speech that allows one's opponent to open a can of worms. Assume there is certain damaging evidence that your opponent is barred from exposing. Can you activate his right to disclose the prejudicial stuff by your own opening statement? Yes, say the Georgia courts, and examples abound. Evidence otherwise prohibited under a motion in limine, for example, can be introduced after an opening statement by the movant explores the proscribed topic.²⁵ Similarly, the United States Court of Appeals for the Eleventh Circuit has ruled that in federal courts, a verbal attack by a lawyer on a witness during opening is sufficient to allow introduction of evidence on direct which is typically only relevant after the witness' credibility has been attacked upon cross-examination.²⁶

Objection Strategy

In this segment of the article, we shift gears. What should be coun-

sel's objection strategy during opposing counsel's opening?

While it makes good sense to avoid casual or technical objections during an opponent's opening, there will be times when a lawyer is virtually compelled to object. It is hornbook law in Georgia that an objection to an offensive opening must be made when the offending remark is uttered, and not later.²⁷ Some cases even hold that waiting to the end of an opposing attorney's speech and then moving for a mistrial is too late.²⁸

Checklist of Objections

A list of relevant objections to an improper opening statement may be helpful at this point. In Georgia, objections can and should be made for the following:

- Addressing jurors by name
- Argument of the law
- Arguing the credibility of expected witnesses
- Arguing facts, and drawing inferences and conclusions from them
- Emotional appeals
- Inflammatory rhetoric
- Racial or ethnic appeals
- Referencing inadmissible evidence

Argument

The central objection that will likely be made to your opening, or which you will be compelled to assert against an opponent, is "objection, argument." Argument occurs when your opponent infers or concludes from the expected evidence. A hypothetical example from defense counsel's opening in a civil fraud case illustrates: "Members of the jury, the real culprit in this case is the plaintiff's first witness, the plaintiff himself, Harry S. Dexter. Wait to form impressions

until you have heard my cross-examination. In between his falsehoods, I will tear out the few bits of truth contained in this man. It will be tough. But at the end of the day, you will be able to conclude that the supreme liar in the case is none other than Mr. Dexter!"

Objectionably argumentative statements usually take one of three forms. First, there is an improper diatribe about credibility of a witness, as the prior paragraph illustrates. Next, the attorney sometimes improperly draws an inference from the circumstantial evidence in the case. Finally, the attorney ought to avoid any extended discussion of the law.²⁹

It is helpful to note what does not constitute improper argument. Counsel's description of the trial process—who goes first and who goes last—is not argument.³⁰ Further, counsel does not err by "framing the case," as when she tells the jury what the key issue will boil down to.³¹

Preparation

This article would be incomplete without a word about preparing the successful opening. It is advisable to practice the opening statement in advance of trial. Few lawyers become good persuaders by giving their speeches for the first time at trial. Practice them in nonlegal settings, on friends and with family. It is a truism that speaking in public — the very thing a lawyer must do when delivering a courtroom opening — is a major fear faced by human beings. Practice and rehearsal help to control this fear.


Conclusion

Perhaps no area of trial practice is as critical or enigmatic as that of

opening statements. It is an area that successful lawyers must master, because a slow start can doom one's effort. As one commentator remarked: "A trial is like an athletic contest in this respect: It's hard to come from behind and win."³²

While some pundits of trial advocacy claim that as many as 80 percent of jurors decide the outcome of a case right after openings, few sources provide specific, case-based guidelines as to what is and is not allowed. As a consequence, advocates all too often artificially constrain their initial presentations to juries, and fail to make the kind of "first impression" that will last.

In criminal cases, a prosecuting attorney may state in opening statement what she expects in good faith that the evidence will show during the trial of the case.³³ Similarly, in the civil context, Georgia courts authorize counsel to state to the jury what she expects to prove at the trial.³⁴ Within those parameters, attorneys are entitled to use compelling language, show exhibits and illustrate their theories with visual aids.

With jurors becoming more and more demanding about the level of advocacy counsel must employ at all stages of a trial, trial lawyers must know of all the legal tools at their disposal. Hopefully, this article has provided Georgia practitioners with guidance and a fresh perspective on achieving more during their critical opening statements. 



Professor Ronald L. Carlson teaches at the University of Georgia School of Law and has written 13 books on evidence and trial practice. In 2000, he received the Harrison Tweed Award from the American Bar Association/-

American Law Institute in recognition of his contributions to continuing legal education.



Michael S. Carlson currently serves as a prosecutor in the office of the District Attorney for the Augusta Judicial

Circuit. He previously practiced law with the Augusta firm of Hull, Towill, Norman, Barrett and Salley.

Endnotes

- 246 Ga. 478, 272 S.E.2d 62 (1980).
- See O.C.G.A. § 9-10-183; Tench v. Galaxy Appliance & Furniture Sales, Inc., 255 Ga. App. 829, 567 S.E.2d 53 (2002).
- 135 Ga. App. 289, 217 S.E.2d 642 (1975).
- 272 Ga. 363, 364, 529 S.E.2d 366, 368 (2000).
- 259 Ga. 89, 92, 376 S.E.2d 845, 849 (1989).
- 920 F.2d 1162, 1167 (4th Cir. 1990). See *United States v. Retos*, 25 F.3d 1220 (3d Cir. 1994) (prosecutor described currency structuring statute).
- 981 F.2d 497, 499 (11th Cir. 1993).
- Id.*
- Ronald L. Carlson and Edward J. Imwinkelried, *Dynamics of Trial Practice* 119-120 (3d ed. 2002).
- Waits v. Hardy*, 214 Ga. 41, 43, 102 S.E.2d 590, 593 (1958).
- Teems v. State*, 256 Ga. 675, 352 S.E.2d 779 (1987).
- Seaboard Coast Line R.R. Co. v. Zeigler*, 120 Ga. App. 276, 170 S.E.2d 60 (1969).
- 256 Ga. 675, 352 S.E.2d 779 (1987).
- 256 Ga. at 676, 352 S.E.2d at 781.
- United States v. Hoelker*, 765 F.2d 1422 (9th Cir. 1985).
- Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1476-77 (11th Cir. 1984).
- 952 F.2d 565, 574 (1st Cir. 1991).
- Id.*
- Id.*
- Id.*
- 806 F.2d 1218, 1221 (4th Cir. 1986).
- In re M.O., 233 Ga. App. 125, 503 S.E.2d 362 (1998).
- Johnson v. State*, 231 Ga. App. 823, 499 S.E.2d 145 (1998); *Everett v. State*, 216 Ga. App. 444, 454 S.E.2d 620 (1995).
- Salters v. State*, 244 Ga. App. 219, 535 S.E.2d 278 (2000); *Day v. State*, 203 Ga. App. 186, 416 S.E.2d 548 (1992). In federal court, see *United States v. Downs*, 615 F.2d 677 (5th Cir. 1980). Sometimes the failure of proof results in reversible error. See *Alexander v. State*, 270 Ga. 346, 509 S.E.2d 56 (1998); *Williams v. Knight*, 211 Ga. App. 420, 439 S.E.2d 507 (1993).
- Cornelius v. Macon-Bibb County Hosp. Auth.*, 243 Ga. App. 480, 533 S.E.2d 420 (2000). See *Volkswagen of Am., Inc. v. Gentry*, 254 Ga. App. 888, 564 S.E.2d 733 (2002); *Bailey v. State*, 273 Ga. 303, 540 S.E.2d 202 (2001).
- United States v. Knowles*, 66 F.3d 1146 (11th Cir. 1995).
- Burgeson v. State*, 267 Ga. 102, 475 S.E.2d 580 (1996); *Waldrip v. State*, 266 Ga. 874, 471 S.E.2d 857 (1996); *S. Cellular Telecom, Inc. v. Banks*, 208 Ga. App. 286, 431 S.E.2d 115 (1993); *Hightower v. McKintyre*, 170 Ga. App. 269, 316 S.E.2d 849 (1984).
- This is clearly the rule for Georgia closing arguments, see *Butler v. State*, 273 Ga. 380, 541 S.E.2d 653 (2001), and the courts are inclined to apply similar procedural rules to opening and closing. See, e.g., *Bailey v. State*, 273 Ga. 303, 540 S.E.2d 202 (Ga. 2001); *Wilson v. State*, 271 Ga. 811, 525 S.E.2d 339 (1999).
- Carlson and Imwinkelried, supra* note 9, at 119.
- Worthy v. State*, 237 Ga. App. 565, 515 S.E.2d 869 (1999). See *United States v. Casamayor*, 837 F.2d 1509 (11th Cir. 1988).
- Havron v. State*, 234 Ga. App. 413, 506 S.E.2d 421 (1998); *Preferred Risk Ins. Co. v. Boykin*, 174 Ga. App. 269, 329 S.E.2d 900 (1985); *Johnson v. Jackson*, 140 Ga. App. 252, 230 S.E.2d 756 (1976).
- Perdue, Starting Strong*, Trial 12 (July 2002).
- Ross v. State*, 233 Ga. App. 26, 503 S.E.2d 308 (1998). Compare *Billings v. State*, 251 Ga. App. 432, 558 S.E.2d 10 (2001), where the prosecutor told the jury in opening "welcome to your part in the war on drugs." The remark was deemed to be inflammatory.
- Williams v. United Parcel Serv., Inc.*, 180 Ga. App. 387, 349 S.E.2d 264 (1986).

State Bar Makes Grand Return to Amelia Island

By Sarah I. Bartleson

A great time was had by all at the 2003 Annual Meeting in Amelia Island, Fla., June 12-15. The meeting was complete with CLE opportunities, law school gatherings, section breakfasts and receptions, great speakers, artists and much more. If you were not able to attend, you missed an exciting weekend filled with family, law friends and networking.

Opening Night Paintathon

Attendees enjoyed Thursday's opening night, which featured Master Painter Michael Ostaski, who stunned the crowd with his spontaneity, creativity and talent. In minutes, he created huge paintings of an eagle, the Statue of Liberty and Senator Saxby Chambliss, using his hands, arms



(Left to right) Mike Mears, multi-county public defender; Chief Justice Norman S. Fletcher; and Justice Robert Benham enjoy the opening night activities.

and paintbrushes, with a whirlwind of motion.

Fun activities for the kids and teens were also available during the opening night reception. Faces were painted, sand art toys were made, spin art was created, bead necklaces were a hit and a caricature artist captured the children at their best. The younger crowd was

also fascinated by Ostaski and his paintings, sitting at the foot of the stage and not taking their eyes off of him as he created his masterpieces.

Special thanks to the sections (listed on page 28) whose support in giving more contributions than ever before helped make the opening night event the best in recent memory.



(Left to right) Kimberly Copeland joins Gillian and Judge Johnny Mason (board member) and daughter Justina during the opening night reception.

Full Day of Events

Friday, June 13, began with some attendees participating in section breakfasts, while others opted to begin their morning with the YLD/LFG 5K Fun Run.

After breakfasts were complete, the plenary session took place, which included reports from Attorney General Thurbert E. Baker; the Honorable J. Owen Forrester, U.S. District judge; and the Honorable Norman S. Fletcher, chief justice of the Supreme Court of Georgia.

State of the Law Department

Baker, the 52nd Attorney General of Georgia, began by saying, "I'm happy to report to you, as I have on several other occasions, that the state law department is sound. We're busy. We don't have enough people. We never do. So you learn not to complain too much about that in state government, but the law department, my friends, is sound."

Attorney General Baker also reported that the major responsibilities of the law department continue to be advising the executive branch of state government, representing the state in all civil actions pending before any court in the state, representing the state in all capital felony appeals brought before the Georgia Supreme Court, representing the state in all actions before the United States Supreme Court, and prosecuting a number of public corruption cases in Georgia.

Attorney General Baker said that Georgia's state government is now a \$16 billion government. He added, "Our overall budget for the internal operations of the law department and the outside lawyers that we use, special assistant attorneys general, or SAGAs as you know them, amounts to about \$32 million now."

He went on to say that the state's law department generally has about 15,000 open cases pending at any given time. "We try and keep up



Master Painter Michael Ostaski mesmerized and entertained attendees with his paintings.

with that through an internal staff of about 106 lawyers, coupled with about 85 support staff," he said. "I will tell you it keeps us extremely busy, and without the support of special assistant attorneys general, many of you who have had that honor and pleasure of working with us and us with you, we simply could not do it."

Having the opportunity to utilize his office to generate and push legislation as the state's chief prosecutor, Attorney General Baker believes that it is important to fight serious crime in this state. This year, the department has been involved in fighting cyber crime, passing a child protection act in the Georgia General Assembly. Attorney General Baker has also been active in capital felony appeals, Medicaid fraud, identity theft and open government.



U.S. Senator Saxby Chambliss, keynote speaker, enjoys dinner with his wife, Julianne, prior to giving his speech.

State of the Federal Judiciary

Following Attorney General Baker, Judge J. Owen Forrester, who has been a federal judicial officer for 27 years, commented on the state of the federal judiciary.

"As most of you know, it began in the early 1980s with 12 judgeships. Today it has 12 judgeships, except one of those has been vacant for 18 months," Judge Forrester said. The vacancy was created by the retirement of Senior Judge Emmett Ripely Cox in January 2001.

In 2002, they handled 7,400 appeals, which is up 22 percent in the last five years, and ranked first in the nation in appeals filed per panel, in appeals terminated per panel, and merits determinations per active judge, he said.

According to Judge Forrester, in Georgia, there were 6,700 civil cases filed last year and about 2,000 federal cases. The most common offenses were drugs, fraud, firearms and

immigration. Most common civil actions were civil rights, generally employment related; contract cases; prisoner litigation; habeas corpus; and torts, in that order, Judge Forrester reported.

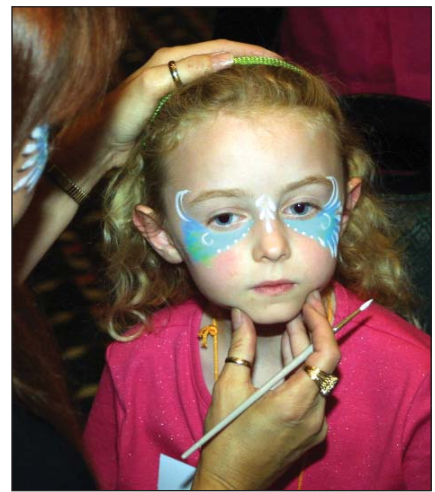
In closing, Judge Forrester paraphrased Garrison Keeler, "That's all the news from the federal courts where the women are tough, the men are patient and all the lawyers are above average," he said.

State of the Judiciary

Following Judge Forrester's comments, Chief Justice Norman S. Fletcher of the Supreme Court of Georgia shared his thoughts on the state of the judiciary and outlined two potential problems.

"One has to do with the fact that we have hard budget times in the state," he said. "The other thing that is troubling is that our non-partisan judicial elections have somehow become partisan races again."

According to Chief Justice Fletcher, none of the additional Judicial Council recommended



Sarah Durham, daughter of Immediate Past President Jim Durham, has her face painted during the opening night festivities.

Superior Court judgeships were created. "Unless we have a great turn in the economy, I'm afraid the same might be true in this next session of the legislature," he said.

In response to the partisan races, Chief Justice Fletcher is concerned that Georgia will get into the big money races "that actually destroy the confidence of the public in our judicial system."

"I'm very encouraged that we have lawyers from all sides — from the plaintiffs, the defense, criminal defense lawyers, everyone in Georgia wants to keep this under control," he said. Additionally, Chief Justice Fletcher said he appreciates that the State Bar is reviewing suggestions that will hopefully prevent Georgia from being plagued with the issues facing Texas, Alabama, Mississippi, Ohio and Michigan.

The chief justice also said, "I wasn't asked to speak on the state of the Bar, but I think it is really excellent at this time. And it's excellent because of your interest in justice in Georgia."

Chief Justice Fletcher made note of the fact that when the indigent defense bill was being drafted, it was from all over the Bar. "We had lawyers who haven't been in a criminal courtroom perhaps in their entire life, but certainly not in the last 20 or 30 years, who were devoting all of their time. It was a network of e-mails and telephone calls. There were people all over the state contacting representatives, and as you can see the proof of the pudding is in the results here," he said. "We've got a great bill in place. It's a nice framework. And I commend all of you."

His address to the Georgia General Assembly in January 2003 regarding the state of the judiciary is posted on the Supreme Court of Georgia's Web site at www2.state.ga.us/Courts/Supreme.

Changing of the Guard

The 192nd meeting of the Board of Governors took place Saturday, June 14. Marking another new year, Incoming President William D. Barwick addressed the Board with his proposed program of activities for the 2003-04 Bar year (full comments on page 32).

Other highlights of the meeting include:

- New YLD President Andrew Jones reported on the YLD, including increasing volunteerism by Atlanta young lawyers to participate in committee work and programs, and he announced his upcoming YLD meetings.
- Following a report by Aasia Mustakeem that the rules and bylaws amendments to be considered at this board are not in conflict with any other rules, regulations or bylaws of the State Bar, the board, by unanimous voice vote, approved pro-



President William D. Barwick and Chief Justice Norman S. Fletcher share a laugh at the 2003 Annual Meeting.



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Justice George H. Carley and Wade Malone, president of the Atlanta Bar, share a candid moment.

posed rules amendments, as revised, to the Lawyer Assistance Program.

- The board, by unanimous voice vote, approved the appointment of Allegra J. Lawrence, for a three-year term, to the Chief Justice's Commission on Professionalism.
- William D. Barwick recognized former Georgia Legal Services Board Member Frank Strickland, who was recently named chair of the national Legal Services Corporation Board. Thereafter,

the board, by unanimous voice vote, approved the appointment of Lisa Ellen Chang, Jeffrey O. Bramlett, William C. Rumer, Mark F. Dehler and Leigh Martin Wilco to serve on the Georgia Legal Services Board for two-year terms.

After the adjournment of the BOG meeting, attendees gathered in the exhibition halls for the Pro Bono/LFG Bloody Mary Reception. This reception also concluded the end of the Lawyers Foundation of Georgia Silent Auction, which raised more than \$7,000 for the Challenge Grant Program.

Attendees were free for the afternoon to enjoy the many recreation activities that Amelia Island had to offer, including golf and tennis tournaments. In tennis, Court of Appeals Judge Harris Adams won the men's title, and Nancy Gary was the women's title winner.

On the golf course, Joseph Roseborough, Teresa Roseborough, Kevin Moore and Chuck Hodges

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placed first; the team of Tasca Badcock, Richard Hagler, Terry Hommel and Ken Hommel finished second; and third place went to John Pridgen, James Wiggins, J. Robert Persons and Steven Hathorn. Rob Register won the longest drive competition, and Roger Murray shot closest to the hole.

The Final Night, A New Year

Following the tennis and golf tournaments, attendees gathered for a reception honoring the

Supreme Court of Georgia, which led into the Presidential Inaugural Dinner.

After dinner, two special Bar awards were presented. Frank Love Jr. of Atlanta was named the 2003 recipient of the State Bar of Georgia's Distinguished Service Award. This award is "the highest honor bestowed by the State Bar of Georgia for conspicuous service to the cause of jurisprudence and to the advancement of the legal profession in the state of Georgia." (For more information, see page 41.)



Exhibitor Ryan Haslam from Hancock Askew & Co., poses with Judge Kenneth O. Nix.

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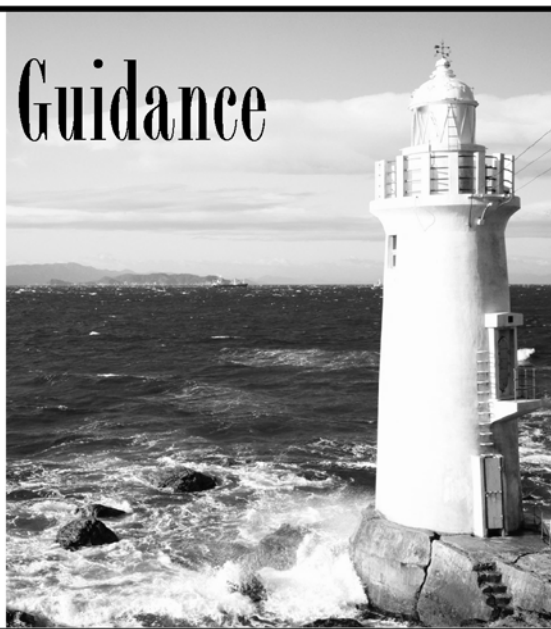
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Exhibitor Martha Hazelton, from Georgia Technology Authority, and Eunice Mixon discuss the importance of technology in Georgia.

(Left) President James B. Durham presents Bonne Cella with the 2003 Employee of the Year Award.

The second award presented was the State Bar of Georgia Employee of the Year. This year's recipient is Bonne Cella, who has faithfully served as the office administrator for the State Bar of Georgia's South Georgia Office in Tifton since Dec. 1, 1994.

As a sincere thank you for all of his hard work, outgoing President Jim Durham was presented with a set of golf clubs, with the hope that he will have more time to enjoy playing golf. He then passed the gavel to William D. Barwick, who was sworn into office by the Hon. Duross Fitzpatrick.

Following the changing of the guard, those gathered at the dinner enjoyed the comments of Senator Saxby Chambliss, who was elected Georgia's 63rd U.S. Senator in November 2002.

Senator Chambliss remarked on several issues, including tax money and the issue of whether to provide

and what the form should be of a prescription drugs benefit under Medicare; the issue of terrorism; tort reform; and malpractice liability reform.

At the closing of the evening, Durham thanked Senator Chambliss. "We appreciate all the service that you gave to the State Bar while you were actively practicing law, and we're extremely proud to have one of our members go into public service," Durham stated. (GBJ)

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

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A New Bar Year

The following is the speech delivered by incoming President William D. Barwick to the Board of Governors on June 14. In it, he outlines some of his expected goals and programs for the coming Bar year.

Members of the judiciary, past presidents of the State Bar of Georgia, members of the Board of Governors and fellow attorneys, this is my first opportunity to speak as president of the State Bar of Georgia. It is traditional for the president, at this time, to outline the expected goals and programs for the coming year.

I have been fortunate enough to have been president of two other Bar organizations in this state, twenty years ago as State Bar Young Lawyers president, and ten years ago as president of the Atlanta Bar Association. I learned two things during those two terms, the first being that you cannot accomplish any one goal in a year, and the second being that you cannot accomplish anything unless you are both preceded and followed by people who are good leaders and good friends.



Hon. Duross Fitzpatrick delivers the oath of office to incoming State Bar President William D. Barwick of Atlanta. Barwick's wife, Donna, joins in the ceremony.

It is for this reason that I am very optimistic about the coming year. I have been preceded by two Bar presidents, Jimmy Franklin and Jim Durham, who have served our organization extremely well under trying circumstances. Each was forced to expend critical time and energy on dealing with matters ranging from the tree litigation and the financial integrity of the Bar Center to a major legislative push for indigent defense. In particular, Jim Durham, during the last year, has been forced to split his time between being an Atlanta leasing agent and a legislative lobbyist. Jim has observed that after this year, he is looking forward to appearing once again before Judge Avant Edenfield. For Jim's hard work and

sacrifice, the State Bar of Georgia owes a debt of gratitude that will be difficult to repay.

This continuity is critical to the effective governance of the State Bar. Indigent defense presents, perhaps, the best example of how a program can be successfully implemented over multiple administrations, with Bar leaders who enjoy working with one another. The State Bar was called upon to issue an opinion on indigent defense before the Chief Justice's Commission made its final report. Although our action was criticized by some, under Jimmy Franklin's leadership, the State Bar effectively got out in front of the issue, and issued a call for reform that virtually mirrored the subsequent report

from the Morgan Commission. Jim Durham has worked tirelessly during his Bar year to implement the first legislative reforms, again in spite of heavy opposition. In the coming year, and certainly subsequent years as well, both Rob Reinhardt and I will be called upon to work with the legislature and our Indigent Defense Committee to see that the indigent defense program is properly and constitutionally funded.

With regard to some initiatives that I want to begin this year, I have consulted with Rob Reinhardt, and he has agreed to make these programs part of his Bar year priorities, in the event that the goals cannot be achieved in a year. I will speak about these programs in more detail in a moment.

There is another important part of Bar governance that I would like to call to your attention, and that is the role of the Executive Committee. At every meeting of the Board of Governors, you see up here at the dais the executive officers of the State Bar. Periodically, you elect members from the Board to serve on the Executive Committee, but seldom is the group recognized as a whole, nor are the contributions of the non-officer members properly recognized. I have had the pleasure of working with the following members of the Executive Committee over the last few years, and I would like to recognize them at this time. They are: Bryan Cavan, Gerald Edenfield, Phyllis Holmen, David Lipscomb, Aasia Mustakeem, and last, but not least, Harvey Weitz. This group contributes the real core of consistency in Bar governance. Both by geography and by practice area, this group is about as diverse as you can get within our organiza-

tion. We do not always agree on issues, in fact, initially we seldom do. But the ability of this group to argue and compromise and to reach, ultimately, a consensus, has set it apart as one of the best Executive Committees to serve the State

Bar of Georgia in its entire history.

So, to put it in context, I have one of the best groups of elected officers in recent memory, one of the finest Executive Committees of all time, and the Bar Center is currently on less of a crisis alert than it has been in the last two years. The question that must be in most of your minds is just exactly how am I going to screw this up. Let's start by looking at some problem spots that will remain for the foreseeable future.

First, the Bar Center, while currently in remission, will remain a concern as long as the economy remains stagnant, and in particular as long as the Atlanta real estate market endures its worst slump in over 30 years. The most immediate task we have before us is the leasing of the building to the "friends" of the State Bar of Georgia, so that we have a substantial amount of square footage leased by the time the parking deck is completed next summer.

Jim Durham, who has, ex officio, become the spokesperson for the current status of the Bar Center, will discuss specific initiatives in



(Left to right) Members of Bill Barwick's family, who made the trip to Amelia Island, include: front row: Anne Phillips, Donna Barwick, Jack Barwick, Jane Barwick, Libby Barwick. Back row: Stephen Barwick, Milton Barwick, Bill Barwick, Clarke Barwick, Susan Barwick.

more detail later during the meeting. I do want the Board of Governors to be clear, however, on two points: First, it is and always has been our intention that the Bar Center must pay for itself. Second, we remember the commitment that was made by the Board of Governors and its Executive Committee in 1997, when the Federal Reserve Building was purchased, that, with the exception of the special assessment, Bar dues from members would not be used to pay for the building. We remember that commitment, and it is our intention to remain obligated to it. This has caused us to spend a significant percentage of Bar time in finding alternative means of funding during the current financial climate. I want to assure the Board of Governors that we have looked under every cushion on the couch for spare change, and we will continue to do so in order to fulfill the commitment that we made. Please remember, however, that this is no six-month, one-year or even two-year project. You will be involved and fully informed at every step, but we will be dealing with Bar

Center finances for the next three to five years.

I have already discussed the State Bar's indigent defense initiatives in the past, and our expected role in obtaining funding for this program. We have a state legislature that, contrary to popular myth, contains too few attorneys as legislators. We need to ensure that indigent defense receives not just funding, but adequate and constitutional funding, and we must ensure that the money does not come from judicial or legal programs that also need state financing.

In addition to continuing the work that will be ongoing for some time, I wish to propose several new initiatives this year. The first is the revival of the Evidence Study Committee that was last chaired by Frank Jones in 1995. This committee will suggest legislation for the revision and unification of the Rules of Evidence used in our state courts under one title, and within the general framework of the Federal Rules of Evidence. Where appropriate, state law variations will be retained if they allow a trier of fact to fairly and impartially consider testimony and evidence. Frank Jones, whose service to the State Bar is legendary, will be replaced by his law partner Ray Persons as chair of this committee.

I would also like to initiate, through the offices of the Young Lawyers Division, a new initiative with regard to standing for elective office in the Georgia legislature. I have a special affection for the YLD, which we used to call the Younger Lawyers Section, as it gave me my first opportunity to be

involved in organized Bar activities. Candidly, I confess that many of those activities during the early 1980s may have been largely social, but they served an important function. It brought groups of lawyers together from all over the state, and gave them the opportunity to work together and to play together. Over the last few years, the social conscience of the YLD and its commit-



President William D. Barwick speaks at the Inaugural Dinner after being sworn in.

ment to community programs has grown even stronger, even as, sadly, the toga parties have diminished.

I have a new project, however, for the YLD. I want us to actively recruit and support members of our profession under 36 years of age to become involved in politics, and to run for office in the state legislature. I do not ask for this on a partisan basis, and I encourage young lawyers to run as either Republicans or Democrats. I do not endorse the opposition of any sitting legislator, lawyer or otherwise, as we may need the friendship of sitting legislators for the next few years.

Yet, our young lawyers are perfectly positioned for an entry into politics. They have the enthusiasm,

the energy, and certainly their legal training makes them highly qualified to both draft and interpret the laws of this state. In many precincts throughout this state, major campaign funding is far less important than the spirit and energy of a candidate willing to go door to door, shopping center to shopping center, and barbecue to barbecue to seek votes. If any young lawyer thinks that the current status of their practice makes thinking about political office inconvenient at this time, I have news for them. Your practice will never allow you the time you think you need, so just do it now.

My third initiative will be one that addresses a potential problem that has not yet manifested itself. In the coming years, we can anticipate an unprecedented increase in the number of contested judicial races in our state, at every level. This is the coincidental result of a change in state administration, coupled with Eleventh Circuit and U.S. Supreme Court decisions that affect the way states can limit (or punish) campaign speech during a contested judicial campaign. Contested judicial races will require money, and the solicitation of campaign funds from both lawyers and litigants creates the awful possibility that Georgia might become the next Mississippi.

If judges are to continue being elected, should there be limits on campaign contributions, or the way solicitations are conducted? Are there constitutionally permissible controls that can be reestablished, allowing some basic control over campaign speech by the Judicial Qualifications Commission? Is an

appointment and retention system better? If so, what type of retention system would free judges from the fear that they have to run periodically against a phantom opponent? All of these topics have been assigned to the Court Futures Committee under the chair of Judge Ben Studdard for discussion and consideration, beginning this year.

These are the things that we have planned. I have been a member of the Board of Governors for approximately 20 years. However, I do know that no Bar year goes by without a visitation from the unexpected and unwelcome. This year will be no different. We already know that our new Unauthorized Practice of Law program may be subject to a lawsuit filed by the Federal Trade Commission as an alleged restraint on trade. It may be both expensive and time-consuming, but every member of this board and every member of our profession must understand that the State Bar of Georgia is not and never will be a trade association. We are a profession, and we protect the delivery of professional, qualified legal services to the citizens of this state. We will expect no less, and we will zealously guard our ability to govern and police the practice of law, in accordance with our mandate from the Supreme Court of Georgia. We do this not for our own financial well being, but for the protection of the citizens of this state.


And with regard to the truly unexpected developments that await us this year, I can only point out again that we have a committed group of men and women serving on this Board of Governors, on its Executive Committee, and at the officer level of the State Bar of

Georgia. In addition, we have some of the most gifted lawyers in this state who have served as State Bar president in the past, and who have generously offered and continue to offer their time and service decades after their terms of office ended. We should be thankful for this extraordinary pool of available talent. And, finally, we have a dedicated and hard working Bar staff, led by the most indispensable and dedicated member of the State Bar of Georgia, our executive director, Cliff Brashier. Sometimes it seems as though his sole purpose in life is to make the President of the State Bar of Georgia look good. This year, he will be tested as never before.

I am currently a partner in an Atlanta law firm, Sutherland Asbill & Brennan. I am extremely grateful to the lawyers in that firm for their support in allowing me to become president of the State Bar of Georgia, and their promise to let me have my office back at the end of this year. My gratitude goes not only to my partners, but to the associates who are covering for me on almost a daily basis through the coming year, doing what they always do, making the partners look smarter than they really are.

I do not forget, however, that I started off at a medium-sized firm, worked for many years in a five-man firm, and nearly starved to death as a sole practitioner. I remember well when a Bar dues notice in the amount of \$75 appeared to be an insurmountable financial burden. While I believe in the many wonderful programs supported and sponsored by the State Bar of Georgia, I am committed to making our entire organization both fiscally responsible and responsive to the needs of its members.

I am also grateful to my family, including the three generations of lawyers and judges who preceded me. I am the son, the grandson and the great grandson of lawyers and judges from Louisville, Ga., in Jefferson County. My brother, my sister and my wife are lawyers. My children's godparents are lawyers. Throughout my life, I have chosen as friends the people I love and respect the most, the lawyers in this state. I am happiest in the company of lawyers.

This is the proudest day of my professional career. I am excited, and more than a little nervous. I need your help and support for this year to be a success, but most of all, I need what lawyers do best: I need your advice and counsel. Thank you, God bless you, and let's get to work. 

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Leadership Responsively Addresses State Bar Issues

By James B. Durham

The bylaws of the State Bar of Georgia specify the duties of the president. One of the responsibilities is to "deliver a report at the Annual Meeting of the members of the activities of the State Bar during his or her term of office and furnish a copy of the report to the Supreme Court of Georgia." Following is the report from President James B. Durham on his year, 2002-2003, delivered on Friday, June 13, at the State Bar's Annual Meeting.

Year in Review

When I began my year as president of the State Bar of Georgia, I knew we had a number of difficult, but important issues to face and resolve. From indigent defense reform, to the Bar Center, to legislation concerning tort reform, Georgia lawyers have been vocal about their positions,

whether pro or con, and I think the Bar leadership has acted responsively and appropriately in addressing these issues.

Although the road was not always smooth, we persevered and made some significant achievements. Following is a recap of some of the accomplishments we made and some of the challenges that remain.

Indigent Defense

The Bar's success in working to pass a new Indigent Defense Act

will undoubtedly be the greatest success of this year. In December of 2002, the Chief Justice's Commission on Indigent Defense issued its report and recommendations to improve the fairness of the Georgia courts for indigent defendants in criminal cases. The report called on the state to assume responsibility for paying for indigent defense services and to establish and enforce basic standards for indigent defense programs. To this end, legislation was introduced, Senate Bill 102, which was intended to implement many of the components of the Commission's report.



Outgoing President James B. Durham receives a standing ovation during his report on the 2002-2003 Bar year activities.

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This legislation passed the Senate with some revisions. A new version of the legislation was introduced in the House. After numerous public hearings, committee meetings, and long discussions, the legislation passed the House and was placed in conference committee. The conference committee reached a compromise and a new Indigent Defense Act was enacted. The legislation will create a framework for building a viable, constitutional and fair way for the state to provide legal counsel to poor defendants who are accused of crimes.

Many people have dedicated countless hours to achieving a framework that will ensure all Georgians are treated fairly by the judicial system. Although there are far too many people to thank, I would be remiss if I did not thank Chief Justice Norman Fletcher, Justice Robert Benham and all the Justices of the Georgia Supreme Court. They have shown their dedication in making Georgia's judicial system second to none. Also I must thank Wilson DuBose and the entire Indigent Defense Committee of the State Bar of Georgia, who were instrumental from the beginning to the conclusion of the process. The passage of this legislation is a landmark step in ensuring that legal services are delivered appropriately to poor defendants accused of crimes. This assurance is a principle on which our country was founded. Nonetheless the work is not yet done; we must strive to guarantee that the system is appropriately funded to accomplish its goals.

Bar Center

Last June, the Bar Center project was on hold, pending litigation

over the removal of the nine trees necessary to begin construction of the new parking deck. Additional and well-configured parking was vital to the overall mission of the Bar Center. As many of you will recall, this lengthy process caused delays of more than one year. The fate of the Bar Center was determined in August of 2002 when the Georgia Court of Appeals refused to hear an appeal from the plaintiffs, thus rendering the decision of the Fulton County Superior Court in our final favor.

The trees were removed beginning on Aug. 16, 2002, and the project was back on track. That being said, however, the groundwork for beginning had to start over. The construction bids had to be re-secured, new permits obtained and financing re-bid. Also, we spent much time and effort in raising \$4 million in new contributions from foundations, cypress awards and other entities. I am pleased to report that construction has indeed started and the new deck should be operating in about 13 months.

The next and final step is the completion of the Bar Center's third-floor conference center. This area will be utilized for continuing legal education, judicial education, mock trials, public education concerning the legal system and countless meetings for lawyers. We expect to re-bid this project prior to the spring of 2004. At the Spring 2004 Board of Governors meeting, the Executive Committee will make recommendations as to how we can complete the project. We hope to begin construction on the conference center shortly thereafter. In the meantime, the third-floor meeting space is being used by many law-related organizations and State Bar committees and sections.

Leasing to legal/judicial-related entities continues. The Georgia Indigent Defense Council, Georgia Prosecuting Attorneys Council, Chief Justice's Commission on Professionalism, Georgia Bar Foundation and Lawyers Foundation of Georgia already call the Bar Center their home. Lease negotiations with three other important entities are underway, and the new construction is creating new inquiries each week. In a difficult rental market, we are doing better than expected.

Although the Bar Center has produced challenging obstacles in the short term, the long-term future of the Bar Center is bright. We have been successful in hurdling many of the obstacles and remain firmly convinced that the lawyers of Georgia will benefit from and be proud of their Bar Center for years to come.

Tort Reform

At the beginning of the year I said we would be confronted with issues that we might not expect. Although we were aware there were discussions concerning tort reform, we had no idea as to whether legislation would in fact be introduced or what that legislation might say. In an already hectic year, the issue of tort reform became volcanic. This issue created tremendous emotional response on both sides of the legislation. There were well-reasoned beliefs and opinions on both sides of the issue of tort reform. The leadership of the State Bar knew we had an obligation to hear from interested parties and to analyze the legislation carefully because it would have a direct impact on the civil justice system.

Senate Bill 133 was introduced 14 days into the legislative session.

Because legislation was initially introduced when full board consideration was not practical, the issue fell to the Executive Committee in accordance with Standing Board Policy 100. After hearing from supporters and opponents, the Executive Committee opposed Senate Bill 133. I testified before the Senate Judiciary Committee to express the Bar's concerns and presented a detailed position paper and presented specific objections. I made it clear the Bar would support changes to tort laws which improved justice. The Executive Committee's opposition was limited to the specific provisions of SB 133, not to whether there should or should not be any reform to the tort system. At its spring 2003 meeting, the Board reaffirmed the position taken by the Executive Committee by a substantial majority vote.

The Senate Judiciary Committee passed a revised version of SB 133, and ultimately legislation did pass during the final hours of the session. The final tort reform package reflected many of the suggestions made by the State Bar. The package included class action reform, forum non-conveniens language to make it more difficult for out-of-state plaintiffs to maintain a suit in Georgia, and a dismissal rule change that reduces the number of times a plaintiff can dismiss a lawsuit.

We realized that this issue would result in heated debate within the Bar. I firmly believe that through debate and differing opinions we ultimately reached the best result. The concerns addressed by tort reform supporters are legitimate. It is important to recognize, however, that this is a multifaceted problem that should be studied comprehensively. The



Outgoing President James B. Durham and his wife, Kathleen, attend the Inaugural Dinner during the Bar's 2003 Annual Meeting.

answers do not lie in emotional anecdotes on either side. We must always do our part to make the civil justice system better, while not infringing on an individual's right to have access to the system.

ANLIR

In 1997, the State Bar of Georgia endorsed ANLIR as a professional liability carrier in Georgia. Over the years Georgia lawyers who were insured with ANLIR had expressed satisfaction with dealings they had with ANLIR. Unfortunately, at the beginning of this calendar year, ANLIR's primary re-insurer went into receivership in the state of Virginia, leading ANLIR to go into receivership in the state of Tennessee. Many Georgia lawyers, including my law firm, were affected by ANLIR going into receivership. The Board of Governors decision six years ago to endorse ANLIR was extensively debated and great effort went into review of the company as it existed. Nonetheless, the ultimate result

makes it clear that the State Bar of Georgia or any other entity or person cannot accurately predict how future markets may affect an individual company.

By endorsing, the State Bar of Georgia can never guarantee the economic viability of a particular company. The fact remains, however, that such an endorsement may lead some attorneys to have a greater comfort level than they might otherwise have if they were analyzing the company on their own. As a result, it is my personal belief that the State Bar of Georgia should not endorse insurance carriers of any type in the future.

Multi-Jurisdictional Practice

Twelve months ago I wrote that the issue of multi-jurisdictional practice would be an issue the Board of Governors would need to address. The Board of Governors did address this issue and passed comprehensive multi-jurisdictional practice rules. Part of multi-juris-

dictional practice included the Supreme Court's decision to adopt a reciprocity rule allowing non-Georgia lawyers to become members of the State Bar of Georgia without taking the bar exam under certain conditions. Georgia has become one of the leaders in the country in endorsing implementation of multi-jurisdictional practice rules in this state.

Discipline

The Investigative Panel, Review Panel, Formal Advisory Opinion Board and the Office of the General Counsel have continued to enhance the disciplinary function of the Bar, and for the past year report the following:

- 3,052 grievance forms were mailed (4,152 in the previous year);
- 2,712 grievance forms were filed (2,490 in the previous year);
- 2,256 grievances were dismissed for lack of jurisdiction;
- 261 grievances were referred to the IP members for investigation (393 in the previous year);
- Each IP member averaged 20 cases;
- 241 grievances were dismissed after IP investigation (57 of those included a letter of instruction);
- 30 cases were placed on inactive status because of disbarment in a different case;
- 192 cases met probable cause (155 in the previous year);
- 130 cases are pending before the IP (195 in the previous year);
- 35 interim suspensions were issued for failure to respond;
- The Lawyer Helpline averaged 20 informal ethics opinions per day; and
- OGC lawyers made 54 CLE ethics presentations.

In addition, confidential disci-

As I turn the gavel over to the capable hands of Bill Barwick, I want to thank the outstanding group of officers, members of the Executive Committee and State Bar staff.

pline was ordered for 75 lawyers in the form of reprimands and letters of formal instruction. Public discipline was ordered for 54 lawyers as follows: 24 disbarments; 26 suspensions; one public reprimand; two panel reprimands; and one letter of admonition.

The Formal Advisory Opinion Board's activity included: four new requests for formal advisory opinions, and three requests from previous Bar years.

The Overdraft Notification Program received 308 notices from financial institutions approved as depositories for attorney trust accounts. Of these, 135 files were dismissed, three were referred to Law Practice Management and six were forwarded to the Investigative Panel of the State Disciplinary Board. (Several attorney files contained more than one overdraft notice.)

Fee Arbitration


This year marked the fee arbitration program's 23rd year. Requests for information came from 1,533 parties, with referrals by the consumer assistance program accounting for 47 percent, inquiries from the public accounting for 46 percent and referrals from the Office of General Counsel accounting for three percent of the inquiries. There are 424 cases in process today. Approximately 128 new disputes over attorney fees are reported to the program each month. The

Fee Arbitration Committee, its staff and the parties involved are able to resolve a majority of these; however, hearings and awards to conclude the disputes are required in about 10 cases per month.

Consumer Assistance

The Consumer Assistance Program has dealt with over 145,000 inquiries (calls, letters and walk-ins) since it began in 1995. In the past year, the program has received inquiries totaling about 20,000. CAP is resourceful in identifying problems and resolving them before they become serious disciplinary problems. Through CAP, an average of two out of three cases are resolved quickly and informally.

Conclusion

As I turn the gavel over to the capable hands of Bill Barwick, I want to thank the outstanding group of officers, members of the Executive Committee and State Bar staff. I appreciate the support I have received from the Board of Governors of the State Bar as well as many attorneys throughout the state. Serving as your president has been an experience that I will treasure for the rest of my life. Best of luck on another successful year. 

Frank Love Jr. Receives the Bar's Highest Accolade

Franks Love Jr. of Atlanta was named the 2003 recipient of the State Bar of Georgia's highest accolade, the Distinguished Service Award. The honor was bestowed June 13, during the organization's annual meeting at the Amelia Island Plantation in Amelia Island, Fla.

The Distinguished Service Award is "the highest honor bestowed by the State Bar of Georgia for conspicuous service to the cause of jurisprudence and to the advancement of the legal profession in the state of Georgia."

In presenting the award, State Bar of Georgia President James B. Durham of Brunswick said Love "is a truly remarkable lawyer—and a remarkable person. For half a century, he has exemplified the qualities celebrated by the State Bar of Georgia's Distinguished Service Award. This recipient is most worthy of this recognition."


Love received a bachelor's degree from Washington & Lee University in 1950, and his law degree from Washington & Lee in 1951. He was admitted to the Georgia Bar in 1952. He is a Fellow of the American College of Trial Lawyers and a Life Fellow of the American Bar Foundation. Love served as president of the Georgia Defense Lawyers Association from 1974-75, and as chairman of the Fifth Congressional District of the Republican Party of Georgia from 1983-87. He is also a former member of the Lawyers' Advisory Committee and the Rules Committee of the Eleventh Circuit Court of Appeals.

A member of both the Atlanta and American Bar Associations, Love was president of the State Bar of Georgia from 1982-83. He is a trustee and former president of the Eleventh Circuit Historical Society and a member of the Lawyers Club of Atlanta and the Old War Horse Lawyers Club.



Frank Love Jr.

Love has conducted nearly two dozen seminars on trial skills for Georgia's Institute for Continuing Legal Education. He has written numerous articles for the Institute's publications as well as for the Georgia Defense Lawyers Journal.

Congratulations on behalf of Georgia lawyers to Love for his very deserving award. 

Bar Recognizes Outstanding Law Professionals

By Sarah I. Bartleson

The State Bar of Georgia recognized the hard work and dedication of some of the Bar's most outstanding members during the 2003 annual meeting in Amelia Island, Fla.

Local/Voluntary Bar Awards

Many local and voluntary bar associations were honored, with winners selected by the Local Bar Activities Committee of the State Bar.

This year's recipient of the Excellence in Bar Leadership Award is the **Honorable Edward D. Wheeler**, who was nominated by the DeKalb County Bar Association. This award, presented annually, honors an individual for a lifetime of commitment to the legal profession and the justice system in Georgia through dedicated service to a voluntary bar, practice bar, specialty bar or area of practice section.



President James B. Durham presents Judge Ron Ginsberg with the Bench and Bar Professionalism Award.

Awards of Merit are given to voluntary bar associations for their dedication to improving relations among local lawyers and devoting endless hours to serving their communities. The bar associations are judged according to size. This year's recipients include:

Under 50 members:

Augusta Conference of African American Attorneys

101 to 250 members:

**Gainesville-Northeastern Circuit Bar Association;
Doughtery Bar Association**

251 to 500 members:

DeKalb Bar Association

501 members or more:

Atlanta Bar Association

In 1961, Congress declared May 1 as Law Day USA. It is a special time for Americans to celebrate

their liberties and rededicate themselves to the ideals of equality and justice under the law. Every year, voluntary bar associations plan Law Day activities in their respective communities to commemorate this occasion. The bar associations are judged in size categories. This year's recipients include:

51 to 100 members:

Blue Ridge Bar Association

101 to 250 members:

Doughtery Circuit Bar Association

251 to 500 members:

Gwinnett County Bar Association

501 members or more:

Cobb County Bar Association

The Best Newsletter Award was presented to voluntary bars that provide the best informational source to their membership, according to their size. This year's recipients are:

51 to 100 members:

Fayette County Bar Association

251 to 500 members:

Gwinnett County Bar Association

501 members or more:



Peter Gleishman receives the President's Cup and Law Day awards on behalf of the Blue Ridge Bar Association.

C o b b County Bar Association

The Best New Entry Award recognizes the efforts of those voluntary bar associations that have entered Law Day or Award of Merit competitions for the first time in four years. This year's recipient is the **Paulding County Bar Association**.

The President's Cup Award is a traveling award presented annually to the voluntary bar association with the best overall program. This year's recipient is the **Blue Ridge Bar Association**.

Bench & Bar Professionalism Awards

In addition to the Local Bar Awards, the 2nd Annual Professionalism Awards were presented by the Bench and Bar Committee of the State Bar of Georgia. These awards honor one lawyer and one judge who continually demonstrate the highest professional conduct and paramount reputation for professionalism. This year's recipients are:



President James B. Durham presents E. Wycliffe Orr with the Bench and Bar Professionalism Award.

Attorney—**E. Wycliffe Orr**, Orr & Orr, Gainesville, Ga.

Judge—**Honorable Ronald E. Ginsberg**, State Court of Chatham County, Savannah, Ga.

Pro Bono Awards

During its annual awards ceremony, the State Bar of Georgia Pro Bono Project, the Access to Justice Committee and the Bar's A Business Commitment Committee conferred their highest awards to several deserving individuals and firms.

The H. Sol Clark Award is named for former Georgia Court of Appeals Judge Clark of Savannah, who is known as the "father of legal aid in Georgia." The Clark award honors an individual lawyer who has excelled in one or more of a variety of activities which extend legal services to the poor. This year's H. Sol Clark Award was presented by the Access to Justice Committee of the State Bar of Georgia and the 2003 Pro Bono Project to **Amy K. Alcock**, of Hunton & Williams. She was chosen because of her proven commitment to, and support for, the delivery of civil legal services

to the poor through the coordination of the Associates Campaign for Legal Services. Alcoke dedicated many hours to pro bono service and pro bono projects development within the State Bar Young Lawyers Division.

The William B. Spann Jr. Award is given each year to a local bar association or a community organization in Georgia, which has developed a pro bono program that has satisfied previously unmet needs or extended services to underserved segments of the population. The award is named for a former president of the American Bar Association and former executive director of the State Bar of Georgia. The William B. Spann Jr. Award was presented by the Access to Justice Committee of the State Bar of Georgia and the Pro Bono Project to **King & Spalding, LLP**, for its commitment to legal services for the poor through its Eviction Defense Project, which provides pro bono representation to low income persons facing eviction from their homes. Through the project, King & Spalding's attorneys have protected the homes and prevented the improper eviction of hundreds of low-income families. The project, done in cooperation with the Atlanta Legal Aid Society and the Atlanta Volunteer Lawyers Foundation, is but one example of the firm's dedication to professionalism and the call to service.

The Dan Bradley Award honors the commitment to the delivery of high quality legal services by a lawyer from the Georgia Legal Services Program or the Atlanta Legal Aid Society. The award,



President James B. Durham presents the H. Sol Clarke award to Amy K. Alcoke from Hunton & Williams.

which honors the memory of Georgia native and Mercer Law graduate Dan J. Bradley, was presented by the Access to Justice Committee of the State Bar of Georgia to **Mark S. Redden** of the Albany Regional Office of Georgia Legal Services. Redden was recognized for his exemplary service and dedication to the delivery of legal services to the poor and to the ideals of the legal profession.

The A Business Commitment (ABC) Pro Bono Business Law Award honors the business law pro bono contributions of an individual lawyer, corporate legal department or law firm to the nonprofit and community economic development sectors in Georgia. The A Business Commitment Business Law Pro Bono Award was presented by the State Bar of Georgia A Business Commitment Committee to **Robert Mark Williamson** for professionalism and strong commitment to the delivery of pro bono business law services to the nonprofit and community economic development sectors. His work with Kids in Need of Dreams, Inc., and the Truancy Intervention

Project exemplify his commitment to helping others.

Section Awards

These awards are presented to outstanding sections for their dedication and service to their areas of practice, and for devoting endless hours of volunteer effort to the profession.


Section of the Year:

Intellectual Property Law, Jeffrey Ray Kuester, chair.

Awards of Achievement:

Technology Law, L. Kent Webb, chair;

Health Law, Jeffrey C. Baxter, chair.

Congratulations to all of these deserving individuals for their dedication to the profession. 

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

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Lawyers Foundation of Georgia

By Lauren Larmer Barrett

Silent auction, Fellows meeting, fun run, annual dinner, oh my! The Lawyers Foundation had a very busy time at the 2003 State Bar of Georgia Annual Meeting, held once again at Amelia Island Plantation. The stormy spring weather hardly interfered, as the attorneys in attendance wielded their pens, running shoes and forks at the various events and functions.

The silent auction was even bigger and better this year. With 70 items up for bid, the annual meeting attendees kept their pens flying at the auction, especially in the last half-hour during the Lawyers Foundation/Pro Bono Bloody Mary Reception. Thanks to all those who participated — both the donors and the bidders.

The fun run followed a mostly shady route under the live oaks of the Plantation, and all the participants completed the run, to be




(Left to right) Tom Chambers, Bill Auld, Rudolph Patterson and Carol Chambers socialize at the Lawyers Foundation Dinner.

greeted with their just reward of a beautiful T-shirt, and an even more welcome treat, cold water to drink.

The Fellows meeting, held each year to provide the Fellows of the Foundation with an update on the Foundation and to elect the officers and trustees of the Foundation, was held at 2 p.m. on Friday, when many folks may have preferred to be on the beach, in the pool or on the links. Nonetheless, we had a good turnout — and we will order more T-shirts next year. Please see the sidebar for the slate of trustees and officers for the coming year.

What can one say about the Ritz-Carlton Amelia? It is one of the

prettiest locales in Florida, and the Fellows annual dinner was wonderful. The turnout was even better than expected, and with the same DJ as last year, the Fellows and their guests had a great time. The food was as good as one would expect, and the indoor venue, while it did not provide a view of the Atlantic Ocean as promised, was cool and dry. The dinner was a celebration of 20 years of the Fellows program. Thank you to the all our sponsors, particularly the Gold & Silver level organizations: The Coca-Cola Company; Law & Media; Ikon; LexisNexis; and Insurance Specialists, Inc.

To all those who support of the Lawyers Foundation of Georgia, thank you! The continued growth of the Foundation is due to your participation and contributions. If you have any questions about the activities, events and programs of the Foundation, please contact Lauren Larmer Barrett, 104 Marietta St. NW, Suite 630, Atlanta, GA 30303 lfg_lauren@bellsouth.net, (404) 659-6867. 

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

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Justice Robert Benham entertains a group of attendees during the Lawyers Foundation Dinner.



BOG Member Nancy Whaley visits Lauren Barrett at the Lawyers Foundation of Georgia exhibit booth.

Cobb Bar Association Celebrates Law Day, 50 Years of Service

By Debra Halpern Bernes

On May 8, 1953, the 52 Cobb County lawyers who banded together to form the Cobb County Bar Association celebrated their beginnings with a pheasant dinner attended by the governor and other dignitaries at the Marietta Country Club. Not to be outdone by the bar's forefathers, on May 2, Cobb County Bar Association members celebrated 50 years of service to the community with a golden anniversary/Law Day gala at the Marietta Conference Center, the site formerly known as the Marietta Country Club.

Members were treated to an elegant tent full of twinkling lights, fine food, music and memorabilia. The only glitch of the evening



Charter member Fred Bentley Sr. poses with his wife, Jane, his son, Cobb Bar member Randall Bentley, and his daughter-in-law Sue.

occurred when a 65-mph wind roared through the tent. Not to be deterred, the party moved inside until the weather passed and attendees could move back outside to dance the stormy night away.

Law Day chairs, Cobb Superior Court Judge Lark Ingram and Kevin Moore of Johnson, Moore, Ingram and Steele, worked diligently for many months exploring the history of Cobb County's bar association, reading minutes from meetings long past and planning all the

events that marked the bar's golden anniversary celebration.

On May 1, *The Marietta Daily Journal* recounted the bar's beginnings, noting several intergenerational members in an article entitled "Raising the Bar." In the article, Cobb bar member Sam Huff spoke about the hardships and triumphs his mother, Helen Winn Huff, faced as the first female lawyer in Cobb County.

That same day, over 300 members attended the Law Day lunch-

eon, which took place at the Cobb Galleria Centre. Attendees paid tribute to charter members and renewed their commitment to the law profession. Supreme Court Justice Harris Hines administered the new oath of admission to the State Bar of Georgia.

While members took great pride in the many awards given to Cobb lawyers and to other Cobb Countians, the Cobb County Bar Association took special delight in presenting the Administrative Professionalism Award to Wendy Portwood. Portwood, who is the current president of the Cobb County Legal Secretaries, is the consummate professional. She is well organized, competent and always smiling. She really deserves a Congressional Medal of Honor for all she does. In any event, we went to great lengths to keep the award a surprise, including a bogus vote at the board of trustees meeting.

Cobb Superior Court Judge Adele Grubbs honors the bar every year by allowing the bar to recognize winners of the Alexis Grubbs Memorial Scholarship. The scholarship is awarded to Marietta High School seniors in memory of Judge Grubbs' daughter. This year's winners, who all plan to enter the legal profession, have already distinguished themselves with outstanding records of accomplishment.

As part of the festivities, on April 29 the Southern National Bank sponsored a breakfast at the Marietta Country Club. Cobb bar member and Georgia Supreme Court Justice Harris Hines delivered a thought provoking and humorous presentation about the changing demographic trends in Cobb County and Georgia.

On the morning of May 2, the Cobb County Legal Secretaries hosted their annual breakfast at the Cobb Superior Court Jury Assembly room.

Additionally, on May 3, in celebration of the Great Day of Service, some of the bar's young lawyers (and a few older ones as well) volunteered their time and efforts at the Must Ministries shelter.

By far one of the most significant events in the Cobb bar's golden anniversary and Law Day celebration was the creation of a videotape, with the assistance of Cobb County's Channel 23, which memorialized interviews with presidents from each of the bar's past decades.

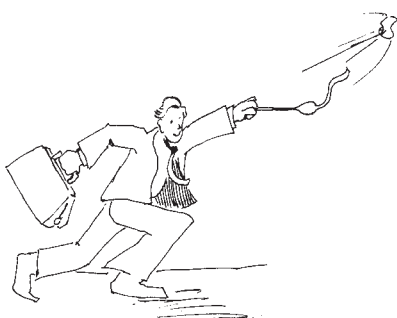
The past presidents took great pride in how well the bar met the legal needs of indigent persons during their respective terms of office. They all spoke of the collegiality promoted by the Cobb Bar Association and they all boasted of the many community service projects that the bar has successfully undertaken. Several of the presidents also referred to the bar's achievements in continuing legal

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Cobb Bar members take the new professionalism oath, administered by Supreme Court Justice Harris Hines.

education during their terms of office.

One thing that became clear during the interviews with the past presidents is the more things change, the more they remain the same. The goals and challenges that faced the bar in the 1950s when there were 52 members are the same goals and challenges the bar faces today as the second largest bar association in the state with over 700 members.

As stated 50 years ago, the bar's goals have always been "to maintain the honor and dignity of the profession of law; to promote the welfare of the bar and its members, to cultivate social intercourse among members and to promote legal science and the administration of justice." For 50 years, the Cobb Bar Association has fulfilled its purposes, creating along the way a colorful history and rich heritage of service to the community. We are looking forward to the future and our continued success in meeting these goals. 

Debra Halpern Bernes is the president of the Cobb County Bar Association.



(Left to right) Cobb County Assistant District Attorneys Richard Belvins and Tom Cole join local attorney Kelli Cross and Assistant Cobb County District Attorney Mazi Malzoom at the 2003 Law Day breakfast.



(Left to right) Nell Benham and Supreme Court Justice Robert Benham; Cobb Superior Court Judge and Board of Governors Member Adele Grubbs; Supreme Court Justice Harris Hines and wife Helen at the May 2 Law Day Gala.



(Left to right) Julie and Cobb Superior Court Judge Rob Flournoy III; Cobb Bar members: Eddie Varnadore; Ron Lowry; Ray Gary Jr.; Chuck Clark; Board of Governor Dennis O'Brien; and Secretary of the State Bar of Georgia, Robert Ingram and wife Kelly at the May 2 Law Day Gala.



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Local Bar Activities Meeting

By Margaret Washburn and Judge Gordon Zeese

The last meeting of the Bar year for the Local Bar Activities committee was held at the State Bar headquarters in May. We had the pleasure of judging the entries for the Local Bar Activities Awards, which are presented annually at the State Bar of Georgia Annual Meeting.

We had time to have a pleasant lunch and peruse the entries prior to voting. There were excellent entries from the Gainesville/-Northeastern Judicial Circuit Bar Association, the Gwinnett County Bar Association, the Cobb County Bar Association, the Atlanta Bar Association, the North Fulton Bar Association, the Fayette County Bar Association, the Georgia Association of Women Lawyers, the Dougherty Bar Association and the DeKalb Bar Association, among others. This year, the Paulding Bar Association and the Augusta Conference of African-American

Attorneys submitted entries for the first time within the past four years.

The Atlanta Bar Association provided a very entertaining DVD of their recent play "A Courthouse Line IV: Phantom of the Courthouse." For the fourth year, the Atlanta Bar performed their play at the 14th Street Playhouse. Some of those lawyers are excellent singers and dancers!

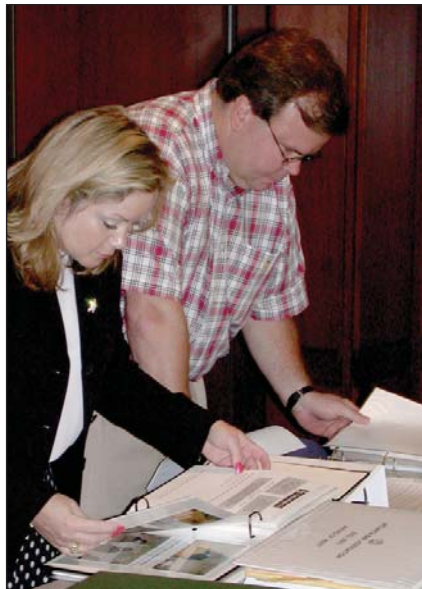
Local and voluntary bar associations submitted entries for the Award of Merit, the Law Day Award, Best Newsletter, Best New Entry and Excellence in Bar Leadership. This year the awards were spread out among the applicants and there was no one bar association that captured a majority of the awards. The President's Cup was awarded to the Blue



(Left to right) Committee Chair Daniel Digby, Margaret Washburn, Ray Gary Jr. and Judge Gordon Zeese (board member) review the Local Bar Activities Award entries.

Ridge Bar Association in recognition of a great program put together by a bar association with a very small budget.

We were also honored to have the opportunity to vote upon the



Margaret Washburn and YLD Past President Pete Daughtery read the Law Day Award entries.


Excellence in Bar Leadership award. That award was presented to the Hon. Edward D. Wheeler, nominated by the DeKalb Bar Association, for his lifetime commitment to the legal profession and the justice system in Georgia through dedicated service to a voluntary bar. Hon. Linda S. Cowen, submitted by the Clayton County Bar Association, received an honorable mention in this category. (For a complete list of the awards and recipients, see pages 44-46.)

Daniel Digby led a discussion about creating a CD or DVD for new bar associations and bar association leaders. The disc will provide information on the creation of bylaws, sections, voting procedures, newsletters, suggestions for bar activities, community service projects, Law Day projects with the ABA and how to create presentations for the annual Local Bar Activities Awards.

Ray Gary, president of the Cobb County Bar Association, brought

us up-to-date on how he keeps increasing the membership in his bar. They have projects for community service and for their bar members. The Cobb Bar has an active bar referral service, and they have two full-time employees. They are able to collect enough fees through the referral service to pay the salary of one of their employees.

The Cobb Bar is now 50 years old, having split from the Blue Ridge Circuit many years ago. The newsletter is Gary's pet project, and he praised his editor, Cindi Yeager, for her efforts this year.

Our next meeting will be this fall in conjunction with the State Bar's Fall Meeting. Digby took nominations for next year's committee members. If you are interested, please contact Daniel Digby at dsdigby@bellsouth.net. We enjoyed the opportunity to serve you this year. 

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The Wilcox County Courthouse at Abbeville

The Grand Old Courthouses of Georgia

By Wilber W. Caldwell

In 1857, the year after Wilcox County was created from Pulaski and Irwin Counties, a log courthouse was built at Abbeville. In the 1860 edition of Adiel Sherwood's *Gazetteer of Georgia*, the village was described as "a new and small place." Almost twenty years later, Sholes' 1879 *Gazetteer of Georgia* lists Abbeville as a town of only 50 residents with a small store and a sawmill. In that year, the old courthouse burned and a two-story frame building replaced it.

As the simple wooden structure rose, Wilcox County was still a

sparsely populated region not much changed from its frontier beginnings and inhabited by highly individualistic stockmen, subsistence farmers and the new breed of rough and ready independent timbermen. By 1886, Abbeville counted 150 inhabitants, but it was not until after the arrival of the railroad that the town began to earn her reputation as a river port. In an 1886 revision to the charter of The Savannah, Americus and Montgomery Railroad (SAM), the company obtained the state's permission to operate steamboats on the Okmulgee River, and soon the SAM had built a sizable wharf at Abbeville and constructed three steamboats there. In the years that followed, five steamboats operated on the Okmulgee between Abbeville and the ports of Brunswick and Savannah, and the steamer, *J. C. Stewart*, made the trip from Abbeville to Hawkinsville and back three times a week. In

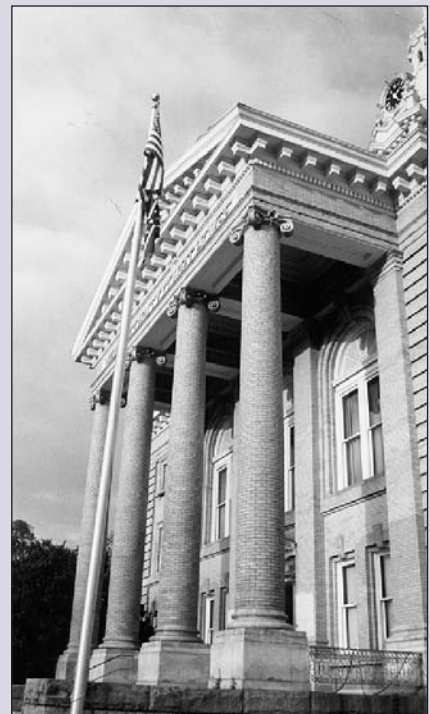


Photo by Wilber W. Caldwell

Built in 1903, Frank Pierce Milburn, architect.

1890, Abbeville boasted 657 residents. By 1900, her population exceeded 1100. By this time, the town had begun to sip the intoxicating wine of the New South

myth, and agitation for a new courthouse had already begun.

Along with the early Neoclassical designs of James Golucke, Frank Pierce Milburn's grand 1903 Wilcox County Courthouse at Abbeville led the way to a new era of courthouse design in Georgia and opened the door for the Neoclassical Revival.

In the North, in the years following Chicago's 1893 Columbian Exposition, the new Classicism had come to symbolize the nation's emerging financial and industrial progress. Thus, it is not surprising that the style was slow to take root in the impoverished soil of the American South. In Georgia, late 19th century efforts like Andrew Bryan's rather Neocolonial 1895 Stewart County Courthouse at Lumpkin and the more purely Neoclassical lines of his 1896 Muskogee County Courthouse at Columbus had failed to inspire the great waves of Classical excess that were engulfing the North.

Only after the success of carefully nostalgic designs by Milburn and Golucke in the first years of the new century were Georgians moved to embrace the new architecture of the so-called "American Renaissance."

Of all the early Neoclassical court buildings in the state, Milburn's Wilcox County Courthouse is certainly one of the finest. Milburn understood the historical allure of both Jeffersonian Classicism and the Greek Revival in the American South. More than any of his contemporaries in Georgia, he was thoroughly versed in the vocabulary of the Italian Renaissance and thus comfortable with the baroque ornament of the new Beaux-Arts Classicism. It was Milburn's marriage of modern Beaux-Arts elements to familiar Old South archi-


tectural forms that supplied the region with acceptable symbols for both the past and the future. Here, draped in all the finery of the emerging industrial age, we find the grand temple-like portico attached to a rectangular mass, the same Classical form which had remained so dear to the nostalgic, agrarian Southern heart. Here, in one enigmatic and inherently contradictory symbol, is the architecture of the New South, an architecture that embraced the new in order to recall and preserve the old.

Milburn was born in Louisville, Ky., in 1868. The son of an architect and builder, Milburn worked first in West Virginia, later in Kentucky and then in Charlotte, N.C. He finally settled in Columbia, S.C., where he became one of the most prolific Southern architects of the era. Between 1895 and his death in 1926, he designed over 250 major structures in the South, including four courthouses in Georgia, at least six in North Carolina and two in South Carolina, as well as court buildings in Kentucky, Florida, Oklahoma and elsewhere. He worked on three state capitol buildings and would later become the chief architect for The Southern Railway, designing depots at Durham and Salisbury, N.C.; Charleston, Columbia, Spartanburg, and Greenville, S.C.; and Augusta and Savannah, Ga., to name but a few.

Exactly how county leaders in Abbeville, came to commission Milburn in 1903 is not known. Although the town had experienced considerable growth after the arrival of The Savannah, Americus and Montgomery Railroad in 1887, Abbeville's boom was pale when compared to the miracles the SAM would perform

at Richland, Cordele and Vidalia. Although the town was built on the banks on the Okmulgee River, her early history lay in the shadow of Hawkinsville, and Abbeville's significance as a river port was negligible before the arrival of the SAM.

Beginning in 1897, the more centrally located upstart town of Rochelle, which had been first called "Center," waged a formidable campaign to wrestle the county seat away from Abbeville on the county's eastern border. As emotions flared, increasingly angry rhetoric and threats of violence marked the contest. Along the way, *The Rochelle New Era* published a letter suggesting that the matter be settled with shotguns. Finally, the Oconee Circuit court rendered judgment in favor of Abbeville, and the town retained architect Milburn and rushed to build a new courthouse in order to cement her hold on the prize.

But the war was far from over. After much more squabbling the matter was finally settled, "Winchesters and pistols notwithstanding," the old frame courthouse was moved from Abbeville's square to make way for Milburn's masterpiece. 

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

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KUDOS

The State Bar of Georgia honored **King & Spalding LLP** with its **William B. Spann Jr. Pro Bono Award** at its annual awards ceremony in June. The Spann Award is given annually to an organization that has "extended services to underserved segments of the population." King & Spalding's Eviction Defense Project has assisted over 150 indigent tenants with their defense in eviction proceedings through the efforts of over 100 King & Spalding lawyers.

Greg Kirsch of **Needle & Rosenberg** was recently appointed to the "List of Neutrals" of the **World Intellectual Property Organization**. WIPO is the United Nations' agency responsible for administering international intellectual property treaties. As part of his appointment to the List of Neutrals, Kirsch will be participating in a mediation workshop at WIPO headquarters in Geneva, Switzerland.

Paul Steven Miller, a Commissioner of the U.S. Equal Employment Opportunity Commission, was awarded an **Honorary Doctor of Law Degree** from the City of New York School of Law at Queens College in May. The degree, which is the highest award given by the institution, was presented to Miller in recognition of his commitment to equal rights, especially his concentration on persons with disabilities.

Needle & Rosenberg P.C. was one of only 12 firms cited nationally for their expertise in the area of intellectual property in a national review published in the *Chambers USA American's Leading Business Lawyers 2003-2004*. Needle & Rosenberg tied with **Kilpatrick Stockton LLP** for top intellectual property law firm in Georgia. Partners **Bill Needle**, **Larry Nodine**, and **Sumner Rosenberg** also were named leading individuals in the intellectual property law arena.



Frank Strickland of **Strickland, Brockington & Lewis** was recently voted **Board Chairman of the Legal Services Corporation**. The nonprofit organization is funded entirely by Congress and funds the Atlanta Legal Aid Society, Georgia Legal Services and other similar groups nationwide that provide legal services for the poor. Strickland is a member of the Georgia Republican Party counsel and has been active in Georgia Legal Services for several years.

The inaugural "**Lawyers for Literacy Trivia Challenge**" was held in June. The event benefited **Everybody Wins!**, an Atlanta children's literacy and mentoring organization that joins attorneys with children to encourage them to develop reading skills. The competition consisted of trivia questions on such topics as literature, sports, movies and pop culture. State Bar president **Bill Barwick** and Atlanta Bar Association President **Wade Malone** participated, as well as teams from

law firms **Powell Goldstein Frazer & Murphy LLP**, **Kilpatrick Stockton LLP**, **King & Spalding LLP**, **Smith Gambrell & Russell**, and **Sutherland Asbill & Brennan LLP**.

Entertainment attorney **Darryl Cohen**, outgoing president of the **National Television Academy-Southeast Chapter**, attended the Southeast Regional Emmy Awards Ceremony, an annual production of the NTA. The ceremony was held in June, and welcomed incoming NTA-Southeast President Evelyn Mims.

Lanny B. Dean was named the recipient of the **Tifton Judicial Circuit Bar Association's 2003 Liberty Bell Award**. The award recognizes community service that reinforces the effectiveness of our democratic system of freedom under law. Dean is an investigator for the Tift Judicial Circuit District Attorney's Office.

Assistant Magistrate Judge Charles Morgan received the **Lookout Mountain Judicial Circuit's Liberty Bell Award**, given each year to acknowledge outstanding community service in the court system. Recipients of the award must meet numerous conditions, including encouraging respect for law and the court system and promoting a sense of civic responsibility.

Joe Farris was presented with the **Liberty Bell Award** in a special ceremony at the Mitchell County Courthouse in Camilla. The annual award gives public recognition to a citizen of the community for exceptional service. Farris is known at St. Jude's Children's Research Hospital in Memphis as the "Real Santa Claus" because he travels there twice each year with gifts for the children and a monetary contribution he collects through fundraisers.

Needle & Rosenberg P.C. celebrated its 20th anniversary in June by moving to new offices at 999 Peachtree St. in Atlanta. The firm will occupy more than 37,000 square feet of space on the ninth and 10th floors, illustrating the growth the firm has seen over the past two decades.



Judge Aaron Cohn of the Juvenile Court of Muscogee County was honored with the **Cliff Livingston Citizen/Soldier of the Year Award** at a formal ceremony in May in Columbus, Ga. The Fort Benning chapter of the Association of the U.S. Army presented the award, which honors a former member of the U.S. military who has gone on to achieve significant success in other areas of life, especially service to the community and continued support of soldiers. With three U.S. Congressmen and several generals in the crowd, the award was presented by Gen. Barry McCaffrey, former director of the White House Office on National Drug Control Policy and former assistant commander at Fort Benning.

Elarbee, Thompson, Sapp & Wilson was ranked among the leading labor and employment law firms in the country by the Chambers USA Guide to America's Leading Business Lawyers, and partner **Stanford G. Wilson** was named one of Georgia's best labor and employment attorneys.

Governor Sonny Perdue issued a commendation recognizing the contributions of the Atlanta law firm of **Alembik, Fine & Callner, P.A.**, during its 17-year patronage of the Georgia Shakespeare Festival. The governor noted that five different AFC partners have served as members of the Festival's Board of Trustees and that members of the firm have been involved from the inception of the Festival in such varied capacities as president of the board to landscaping and painting risers.

Womble Carlyle Sandridge & Rice, PLLC, announced that they are the first law firm in the nation to receive the prestigious **Thurgood Marshall Scholarship Fund 2003 Corporate Leadership Award**. The award is the highest honor presented by the fund to recognize those businesses that have demonstrated an exemplary commitment to the fund, its 45 member institutions and the students educated at those schools. The fund provides merit-based scholarships and support for the nation's 45 historically black public colleges, universities and law schools. **Keith Vaughan**, Womble Carlyle managing partner, will accept the award on behalf of the firm in New York City this November.

Floyd County Juvenile Court **Judge Timothy A. Pape** was appointed **Interim Chair of the Georgia Courts Automation Commission**. GCAC is an independent agency created to develop and maintain sophisticated software programs to streamline the process of filing and managing court documents. Pape served on GCAC from 1990-96 and from 2001 to the present; he has also served on the Information Systems Committee of the Georgia Council of Juvenile Court Judges.

ON THE MOVE

In Atlanta

Powell, Goldstein, Frazer & Murphy LLP announced the election of **M. Todd Wade**, **Carl A. Gebo**, **Nicole Jennings Wade** and **Ilene H. Ferenczy** as partners and **Brad A. Baldwin** as counsel. Todd Wade concentrates his practice in the areas of business combinations, corporate finance and corporate governance. Gebo brings experience in the areas of transactions and dispute resolution relating to public contracting and construction issues. Nicole Wade practices fiduciary, trust and estate, and general commercial litigation. Ferenczy specializes in qualified pension and profit sharing plans, employee stock ownership plans and tax sheltered annuity plans. Baldwin concentrates on corporate reorganizations in

Chapter 11 bankruptcy and creditors' rights. The firm's Atlanta office is located at 191 Peachtree St. NE, Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999.

Womble Carlyle Sandridge & Rice, PLLC, announced that **Dick Vincent** has joined the firm as an equity member. The veteran Atlanta attorney brings much experience to the firm in the health law field. The Atlanta office is located at One Atlanta Center, Suite 3500, 1201 W. Peachtree St., Atlanta, GA 30309; (404) 872-7000; Fax (404) 888-7490.

Crowley, Appel, Starkey & Holbrook, LLC, have announced that **Helen N. Cleveland** has joined the firm and that the new name of the firm is **Crowley, Cleveland & Starkey, LLC**. Cleveland brings experience in employee benefits and executive compensation. The firm continues its general practice of law concentrating in business and real estate, civil litigation, taxation and estate planning and is located at Suite 1410 Resurgens Plaza, 945 East Paces Ferry Road, Atlanta, GA 30326; (404) 237-2502; Fax (404) 233-2914.



Banick

The law firm of **Insley and Race, LLC**, announced that **G. Michael Banick** joined the firm. Banick brings 25 years of experience in civil tort litigation, primarily in products liability defense. The firm also added **W. David Sims** as of counsel and **Laura L. Voght** as an associate. Sims practiced law in Savannah for 20 years, where he was president of the Savannah Bar Association. The office is located at Two Midtown Plaza, Suite 1450, Atlanta, GA 30309; (404) 876-9818; Fax (404) 876-9817.

Marie Boyce Russell has been appointed associate general counsel in **Emory University's Office of the General Counsel**. Formerly associate general counsel with Children's Healthcare of Atlanta, Russell will be practicing primarily in the health care area. Emory Healthcare is part of Emory University, and includes Emory University Hospital, Emory Crawford Long Hospital, Wesley Woods Hospital and The Emory Clinic.

Kilpatrick Stockton LLP announced the addition of **Morton Aronson**, former vice president general counsel of franchising of Holiday Inn Hotels. Bringing over four decades of experience in the legal profession, Aronson will be responsible for expanding Kilpatrick Stockton's client base with a specific focus on conflict avoidance through mediation and other alternate dispute resolution methods and implementing new procedures to strengthen franchisor/franchisee relations. Since 1995, Aronson has served as an adjunct professor of law at Emory Law School, where he teaches a course on franchising and franchising law. The firm's offices are located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309-4530; (404) 815-6500; Fax (404) 815-6555.

Alysa B. Freeman, formerly of Parks, Chesin & Walbert, P.C., has joined the firm of **Miller, Billips & Ates, P.C.**, as an associate attorney. Freeman's practice is concentrated in the representation of plaintiffs in employment, civil rights and constitutional law matters. The firm is located at 730 Peachtree St., Suite 750, Atlanta, GA 30308; (404) 969-4101; Fax (404) 969-4141.

Kilpatrick Stockton announced the formation of the firm's **Diversity Council** and appointment of a full-time manager to support the implementation of the firm's long-range strategic plan developed as part of its Diversity Action Program. **W. Randy Eaddy** is diversity council chair, and **Monica Jones** has been appointed as manager of the diversity action program to support and help drive Council initiatives. The establishment of a budget for the Council, along with creating a full-time, administrative staff position to support its work, are additional tangible indicators of the executive committee's new level of strategic commitment to diversity. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309-4530; (404) 815-6500; Fax (404) 815-6555.

Susan R. Boltacz has joined **Deloitte & Touche** as the leader of its Southeast Region Tax Controversy Services Group. She will focus on federal income tax audits and appeals. Boltacz is both a CPA and member of the State Bar of Georgia, and she has held several positions in the American Bar Association's Section of Taxation, including chair of the Regulated Public Utilities Committee. The firm is located at 191 Peachtree St. NE, Atlanta, GA 30303-1924.

Smith Moore LLP announced the hires of **Clancy Mendoza** and **Jennifer Pritzker Sender** in its Atlanta office. Mendoza will add her skills and knowledge to the firm's business practice, while Pritzker Sender will support Smith Moore's health care practice. The firm's Atlanta office is located at The Peachtree, 1355 Peachtree St. NE, Suite 750, Atlanta, GA 30309; (404) 962-1000; Fax (404) 962-1200.



Ragland



Morgan

Hunton & Williams LLP announced that **William M. Ragland Jr.** and **Elizabeth Ann "Betty" Morgan** have both become partners in the firm's Atlanta office.

Ragland, who chaired Powell Goldstein's Technology and Intellectual Property Litigation Group, will continue his work in that area. His clients' industries range from telecommunications, computer and e-commerce to biotech, entertainment and manufacturing. Morgan will continue to focus her trial practice on prosecuting, enforcing and defending trademark rights, trade secrets, copyrights, covenants-not-to-compete and patents in litigation. Her clients have ranged from Fortune 500 companies whose famous marks or

copyrights required protection to start-up companies and individuals accused of infringement. She has done trademark work for major league sports teams and copyright work for internationally known entertainment companies. The firm's Atlanta office is located at Bank of America Plaza, Suite 4100, 600 Peachtree St. NE, Atlanta, GA 30308-2216; (404) 888-4000; Fax (404) 888-4190.

Caroline Wight Donaldson has been named **vice president of the Atlanta office of Counsel On Call**. Donaldson brings over five years of experience to the company, having practiced as a labor and employment attorney with the Atlanta and Washington, DC, offices of Ford & Harrison, LLP, and as an assistant attorney general for the State of Georgia. Counsel On Call provides law firms and corporate clients with top-level legal talent on an as-needed basis. Their Atlanta office is located at 1230 Peachtree St. NE, Promenade II, Suite 1900, Atlanta, GA 30309; (404) 942-3525; Fax (404) 942-3401.

Hunton & Williams LLP announced that **Elizabeth Ann "Betty" Morgan**, along with **Douglas W. Kenyon** of the Raleigh office, will co-chair the trademark practice. Kenyon and Morgan are members of the firm's Litigation, Intellectual Property & Antitrust Team. Morgan concentrates her trial practice on the prosecution, enforcement and defense of trademark rights, trade secrets, copyrights, covenants-not-to-compete and patents in litigation. Kenyon has over 20 years experience practicing antitrust and intellectual property law. He advises clients on a wide range of competition law matters and represents clients in civil and criminal antitrust cases. The firm's Atlanta office is located at Bank of America Plaza, Suite 4100, 600 Peachtree St. NE, Atlanta, GA 30308-2216; (404) 888-4000; Fax (404) 888-4190.

The law firm of **Baker, Donelson, Bearman & Caldwell** announced the addition of **R. Blake Chisam**, a nationally recognized immigration litigator. Chisam has joined the Atlanta office as an associate and will focus his practice in the area of immigration and nationality law. He is also a member of the American Immigration Lawyers Association, which is dedicated to advancing immigration issues in the United States. He serves on AILA's national Amicus Litigation Committee, which provides guidance and direction with respect to immigration-related litigation priorities and issues nationwide. The firm's Atlanta office is located at 5 Concourse Parkway, Atlanta, GA 30328; (678) 406-8700; Fax (678) 406-8701.

The **Prosecuting Attorneys' Council of Georgia** has relocated its metro Atlanta office from Smyrna to the State Bar Building. The new address for the Council is 104 Marietta St., Suite 400, Atlanta, GA 30303.

Needle & Rosenberg P.C. announced the addition of **Michael J. Tempel** and **Douglas M. Isenberg** to the firm's counsel. A practitioner of intellectual

property law since 1996, Tempel concentrates on the preparation and prosecution of patents in electrical and electromechanical arts. Isenberg practices intellectual property, technology and Internet law, and is vice chair of the State Bar of Georgia's Intellectual Property Law Section. The firm's office is located at 999 Peachtree St., Suite 1000, Atlanta, GA 30309-3915; (678) 420-9300; Fax (678) 420-9301.

McGuireWoods LLP and **Ross & Hardies** announced the unanimous agreement to merge the two law firms, to be known as McGuire Woods LLP. The new-formed international firm has one of the largest human resource practices in the country, as well as strong litigation and corporate and health care practices. McGuireWoods' Atlanta office is located at The Proscenium, 1170 Peachtree St., N.E. Suite 2100, Atlanta, GA 30309-7649; (404) 443-5500; Fax (404) 443-5599.

In Evans

Atiya M. Mosley, formerly with the Georgia Legal Services Program in Augusta, announced that she has entered the private practice of law. Her new firm, **Atiya M. Mosley, P.C.**, focuses on the practice of domestic relations law. The new office may be contacted through P.O. Box 1844, Evans, GA 30809; (706) 364-2307; Fax (706) 364-2308.

In Lawrenceville

Emily J. Brantley recently announced the opening of **The Law Office of Emily J. Brantley**. Brantley's practice concentrates on civil litigation and is located at 154 Stone Mountain St., Lawrenceville, GA 30045; (770) 682-0890; Fax (770) 982-2231.

In Savannah



Hunter Maclean announced the expansion of its practice to include an entertainment division headed by recently named partner **Deborah Wagnon**. She brings extensive experience as an entertainment lawyer to the firm, which also has a strong practice in all areas of litigation, corporate, tax, real estate and business planning matters. Hunter Maclean's Savannah office is located at 200 East Saint Julian St., P.O. Box 9848, Savannah, GA 31412; (912) 236-0261; Fax (912) 236-4936.

In Suwanee



Diana Barber, former Ritz-Carlton Hotel Company vice president and associate general counsel, has formed **LodgeLaw**, a legal hospitality services company. LodgeLaw, P.C., is focused on providing professional hospitality legal services to hotel owners and operators who do not have in-house counsel to assist with their everyday legal needs.

LodgeLaw is located at 5925 Masters Club Drive, Suwanee, GA 30024; (770) 813-9363; Fax (770) 813-9695.

In April, the Women & Minorities in the Profession Committee of the State Bar of Georgia, the Georgia Association of Black Women Attorneys, Kilpatrick Stockton LLP and Sutherland Asbill & Brennan LLP co-sponsored a Clerkship Symposium for law students on how to achieve a clerkship and how to make the most of the experience.

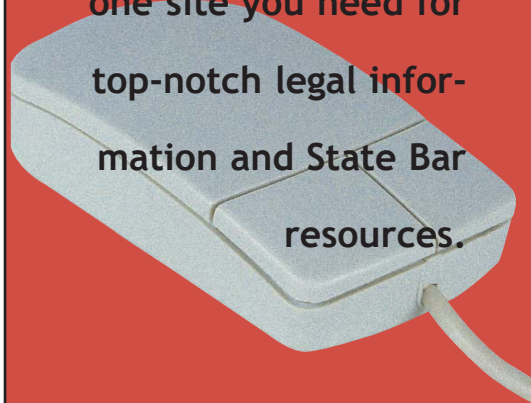
Judge Frank Hull, guest panelist, said to the students, "You have 40 years to practice law. There's no downside to clerking — it will only give you experience you will greatly appreciate later in your career."



(Left to right) Panelists included Judge Brenda Hill Cole, Judge Penny Brown Reynolds, Judge Antonio DelCampo, Judge Frank Hull, Judge C. Ray Mullins and Judge Herbert Phipps.

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Collecting Fees

Think Twice Before You Sue Your Client

I worked like a dog to get Hal Boyd a decent deal in his divorce case, and this is how he thanks me,” you grumble as you review the past-due accounts for your law office. Hal fell behind on his monthly payments and hasn’t sent you a dime for the past few months. All told, you are looking at a \$5,000 bill that’s now 90 days overdue. “I oughta sue him,” you threaten.

“It’s not like he doesn’t have the money,” your assistant Katy agrees. “He’s just mad at you because he’s paying more alimony than he wants to.”

Katy continues, “But everybody knows you should only sue a client as a last resort. Our insurance carrier keeps reminding me that many malpractice cases begin as counterclaims when a lawyer sues over a fee. The Bar really encourages lawyers to avoid the obvious conflict presented by suing someone you have represented.”¹


“Anyhow, I’ve got a couple of other ideas about how to get the money out of him,” Katy continues. “First, I think we need to tell him we’re charging interest on his past due balance. That ought to give him some incentive to pay. I checked the Bar rules, and there’s a formal advisory opinion that says you can charge interest on a client’s past due account if you give advance notice.”² I’m sending Boyd a letter today reminding him about the balance and telling him we’re charging interest as of next month.”

Katy hates to dun clients, so her next suggestion doesn’t surprise you. “I’ve been looking

into sending some of the older accounts out for collection by professionals,” she says. “You and I are no good at bugging people about money.”

Katy shows you Formal Advisory Opinion 49, which provides that a lawyer may use a collection agency to collect overdue accounts for legal services. The confidentiality rules limit the information the lawyer can share with the agency to “such minimal background information about the client as is absolutely necessary for the agency to properly perform its job.”³

Getting paid is sometimes the hardest aspect of running an office. Even so, think twice before you sue your client.

Don’t forget to call the Office of the General Counsel’s Ethics Helpline Monday through Friday with your ethics questions. You can reach us at (404) 527-8720 or (800) 334-6865. 

Endnotes

1. If the client isn’t paying because s/he thinks the bill is too high, the Bar’s Fee Arbitration Division may be able to help. Contact them at (404) 527-8700.
2. Formal Advisory Opinion 45 requires notice in advance that interest will be charged on fee bills which become delinquent after a stated period of time, but not less than 30 days. It recommends that notice about the interest charge appear on the initial bill. The opinion also reminds lawyers that they must comply with any additional notice and disclosure requirements imposed by law.
3. Rule 1.6 of the Georgia Rules of Professional Conduct, “Confidentiality of Information,” provides in part that a lawyer may reveal information which the lawyer reasonably believes necessary to establish a claim on behalf of the lawyer in a controversy between the lawyer and client. Comment 17 clarifies that the lawyer “must make every effort practicable to avoid unnecessary disclosure of information relating to a representation,” and to limit disclosure to those having the need to know it.

Discipline Notices

(April 22, 2003 through June 18, 2003)

By Connie P. Henry

DISBARMENTS/VOLUNTARY SURRENDER

James Joseph Gormley
Atlanta, Ga.

James Joseph Gormley (State Bar No. 302682) has been disbarred from the practice of law in Georgia by Supreme Court order dated June 2, 2003. On May 1, 2000, based on the admission of Respondent that he had been convicted of a felony in the United States District Court for the Southern District of West Virginia, the Court accepted his petition for voluntary suspension of license pending the appeal of his conviction. Since the time of his suspension, the United States Court of Appeals for the Fourth District has affirmed the judgment of conviction and has denied his petition for a writ of certiorari.

Kenneth L. Drucker
Duluth, Ga.

Kenneth L. Drucker (State Bar No. 231050) has been disbarred from the practice of law in Georgia by Supreme Court order dated June 2, 2003. Drucker was personally served with a Notice of Discipline, and failed to reject the notice. Drucker was hired in December 2000 to represent a client in a civil lawsuit filed against her personally and against a company. Although Drucker spoke several times with the registered agent for the company and obtained information that would be needed to file an answer on behalf of the client, he failed to return any of the client's calls and failed to file an answer on her behalf. After being served with a Motion for Entry of Default Judgment in February 2001, Drucker failed to tell the client about the motion and failed to file any response. A default judgment was entered in the case and the client was not able to have the default opened.

REVIEW PANEL REPRIMAND

John Alfred Roberts
Atlanta, Ga.


On April 29, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of John Alfred Roberts (State Bar No. 608705) and ordered that he receive a Review Panel reprimand. Roberts was hired to represent a client in claims arising from an automobile accident. He filed the suit and negotiated a settlement pursuant to discussions with the client. Roberts accepted a settlement offer from the corporate defendant with his client's approval. The client later expressed dissatisfac-

tion with the settlement and terminated Roberts' services and ordered him to dismiss her claims against the individual co-defendant with whom she had not reached a settlement. Rather than immediately returning the file and the settlement proceeds to the client, Roberts first dismissed her claims against both defendants.

Robert E. Knox
Thomson, Ga.

On June 9, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Robert E. Knox (State Bar No. 427200) and ordered that he receive a Review Panel reprimand. Knox represented a client in a real estate transaction in which the client had contracted to purchase property. The son of the owner of the property listed the property for sale with a real estate agent and claimed to be acting on his father's behalf. Knox handled the closing and mailed the closing documents to the son's address in Detroit, Michigan. The son returned the documents, but they were not witnessed and notarized. The son said there was no notary available but that his father had authorized him to sign the documents. Knox witnessed the signatures and directed a staff member to notarize the signatures, closed the real estate transaction and received a fee of \$150. Knox did this though he had not seen the owner sign the documents and though his staff member had not seen the owner sign the documents. The owner had not authorized the son to sign the documents and did not receive the \$7,500 from the sale. In mitigation of discipline, Knox directed his counsel to make every reasonable effort to protect the owner. Knox comes to the proceeding with an unblemished record; has served in many civic, charitable and church organizations and has served the public in many pro bono capacities.

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 April 22, 2003, one lawyer has been suspended for violating this Rule and one has been reinstated. 

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

Case Management Software:

One of the Sharpest Tools in the Lawyer's Techno Toolbox – Part I

By Natalie R. Thornwell

Fixing the Front End

Lawyers work with information—gathering facts, determining issues, inserting the players surrounding the facts, and relating back in words the solutions to the problems presented by their clients. Technology affords the astute solo or small firm practitioner an efficient means for processing this information. So much so that the legal industry now understands that the solo or small firm possessing and properly utilizing technology will often make for a formidable opponent, and in a more general sense, is a competitor to the larger firms that are not as technologically advanced. This phenomenon and the embracing of the Internet have catapulted the legal industry into the 21st century.

In the current climate, when solo and small firm practitioners seek the “there’s got to be a better way to do this” solution, case management software often fits the bill. Myths remain among practitioners about this multifaceted, relational database software. “It’s just for litigators” or “it is too expensive for

solo and smaller firms” are two of the most popular myths. These myths are not true. Many firms are beginning to realize that case management software has the ability to fix the entire front end of their practice. This acknowledgement and acceptance has made case management software an essential piece of technology in the modern law practice, no matter the firm size.

The Legal Swiss Army Knife

Legal case management software has so many features that it can easily be likened to a Swiss army knife. The Swiss army knife:

Seems to have features that can handle almost any task and it was designed that way

Case managers take in client information. Because they are mainly designed on relational databases, they can integrate information from contacts to case file to calendars and a whole lot more.

Most don’t know what all of the features really are or what they are for

As previously mentioned, myths still exist that case managers are just for litigators simply because of what the software genre is called. Practice management software is now a more apt term, and will hopefully work to

do away with this myth. Also, many firms that have implemented case management software do not fully understand the advanced features of the programs or what those features can accomplish for them. A good example is the document management capabilities of the case managers.

Most claim openly that they don't need or won't use all of the features

To justify why their firm should not invest in case management software, many attorneys erroneously state that case management software won't help them or that they won't ever have the need for their advanced features. This is rarely the case.

Most will misuse the features they do know or not use them as effectively as they can

Case management contact features are often simply used to track client contact information. Firms often do not realize the benefit that could be gained by adding all contacts the firm encounters and grouping or sorting them into various categories for easier retrieval of the subsets for mailings and the like. This is just one way to misuse your case manager's features.

As a general rule, case management software packages will have these main features:

Files—All of the information for case files can be arranged and kept in the case manager. This feature makes the genre of legal specific case

management what it is. No other calendaring/task managing combo program includes this vital part for attorneys — not even the popular systems like Microsoft Outlook.

Calendaring/Appointments—Both group and individual calendars are a standard feature in case managers. A lot of flexibility is afforded users needing to move dates around to reset appointments or to schedule a chain of events together, or even create recurring appointments.

To Do Lists—Case management vendors have included proactive, interactive task or to do lists that make keeping up with

deadlines and things that must be done relatively easy. Various alarms and reminders can also be easily set for these items.

Contacts—Taking over from the contact management or PIM (personal information managers) that were first introduced in the sales and marketing industries, contacts in case managers allow users to include all contact information for people and companies the firm encounters. The contacts features outperform the more general con-


tact management systems because they integrate with other information found in the case manager.

Phone Call Management—Users can track incoming and outgoing telephone calls, and even though the user might not know whether the ringing phone will result in tracking the conversation or not, the ability to easily manage phone messages is also a standard part of case management systems.

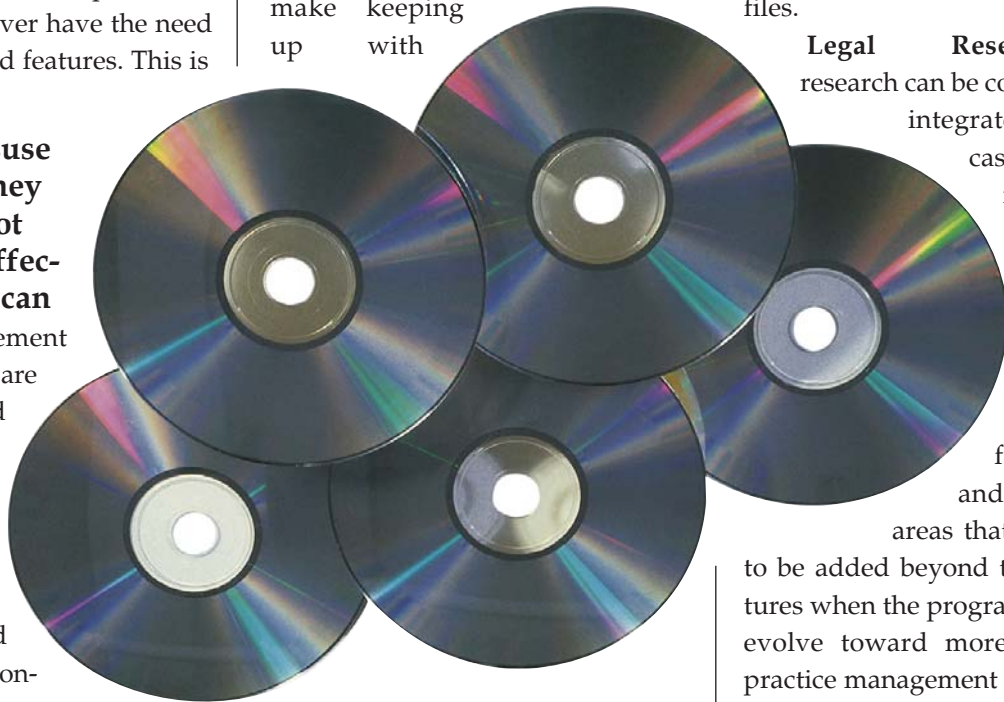
Notes—Mainly as a part of their files feature, case managers do not overlook the need for extensive space to keep and track general case information like memos to files.

Legal Research—Legal research can be conducted and integrated with the case files in case management systems. This is yet another vital part of the law practice front end, and one of the areas that first started

to be added beyond the basic features when the programs started to evolve toward more full-bodied practice management products.

This is just the beginning of a long list of features for today's case management systems, and is also why it might be best to start calling it "practice management software." In my next article, we will examine specific systems and the best means of utilizing one of the law office's best "techno tools." 

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



Soaring with Presidents


Son Recounts Father's Exploits

By Bonne Cella

The Houston County Bar Association held its quarterly meeting at the Houston Lake Country Club. The guest speaker was Tift Myers, the son of the first presidential pilot, Col. Henry Tift Myers.

Members were entertained with stories and an audio visual presentation of Myers' illustrious career flying President Roosevelt and President Truman as well many other world leaders. Myers, who was born and raised in Tifton, Ga., has recently been nominated for membership into the Georgia Aviation Hall of Fame for his many aviation firsts.

You may visit the Houston County Bar's Web site at www.houstonbar.org for information on upcoming programs and meetings.

The State Bar of Georgia Satellite Office facilitated this presentation. If your bar association would like help in planning a program, you may call (800) 330- 0446 or e-mail bonne@gabar.org. 

Bonne Cella is the office administrator of the State Bar's South Georgia Office.



Tift Myers, son of Presidential Pilot, Col. Henry Tift Myers, was the guest speaker for the Houston County Bar Association.



Col. Myers shakes hands with President Truman prior to the "Sacred Cow" take off.

(Left) Picture from 1947 *Colliers Magazine*.

Sections Make Impact at Annual Meeting

By Johanna B. Merrill

Sections made a bright impact on the State Bar's 2003 Annual Meeting in Amelia Island, Fla.

Twenty-two of the Bar's 35 sections sponsored the colorful Opening Night Festival on Thursday, June 12, which was an art explosion that delighted all ages and featured Master Painter Michael Ostaski.

The annual General Practice and Trial Section Breakfast was held on Friday, June 13, and was attended by over 65 section members and their guests. The 2003 Tradition of Excellence Awards were presented during the meeting and were awarded to Judge H. Arthur McClane (Judicial), Hugh B. McNatt (Defense), T. Hoyt Davis, Jr. (General Practice) and Billy Ned Jones (Plaintiff).

Past President James B. Franklin said, "I always go to the General Practice and Trial Section Breakfast because after I listen to the award recipients, I leave feeling a little taller and better about the profession."

The School and College Law, Taxation Law and Tort & Insurance Practice sections hosted intimate breakfast meetings while in Amelia Island. It was an opportunity for colleagues and friends to get together in the casual, resort atmosphere and accomplish section business.

The Criminal Law Section presented a well-attended CLE luncheon with guest speaker Amy H. Morton LMFT, an expert in child witnesses, who presented an informative presentation titled "Interviewing Child Witnesses."

The Workers' Compensation Law Section also hosted a lunch meeting during the Annual Meeting where they recognized the



Intellectual Property Section Chair Jeffrey R. Kuester accepts the Section of the Year award from President James B. Durham.

late E. Lamar Gammage Jr. and posthumously awarded him the section's Distinguished Service Award. Gammage's friends, family and law partners attended the event to honor him and his contributions to the practice. KIDS' CHANCE Inc. scholarships were awarded during the meeting and were presented to the recipients by Justice Robert Benham. Section Chair Douglas Bennett presented Thomas Herman, immediate past chair, with a plaque to express the section's appreciation of his time and dedication.

The General Practice & Trial and Workers' Compensation Law sections also hosted receptions during the Annual Meeting on Friday, June 13. Both receptions presented section members and guests with outstanding food and drink and provided an excellent way to relax after an event-filled day.

Section Awards

State Bar President James Durham presented three sections with awards during

Friday's plenary session. Section Achievement Awards went to the Health Law Section, Jeffrey Baxter, chair, and the Technology Law Section, L. Kent Webb, chair.

The Section of the Year Award was presented to the Intellectual Property Law Section. Section Chair Jeff Kuester was in attendance to accept the honor on behalf of the section. The IPL Section was extremely active during the past Bar year, hosting several social events such as a holiday party and a get-together for summer associates as well as many CLE events including patent roundtables, copyright seminars and an interactive discussion on trademark. The section also produced four newsletters and boasts the highest percentage of registered e-mail addresses than any other section of the Bar.

The Bar offers many thanks to all sections for an outstanding year and a superb showing at the Annual Meeting.

NEWS FROM THE SECTIONS

Appellate Practice Section

By Christopher J. McFadden

Caselaw and Legislative Update as of June 19.

Ross v. State, 259 Ga. App. 246, 576 S.E.2d 633 (2003). The Court of Appeals held that entry of an order nunc pro tunc can shorten the time for filing a post-judgment motion or notice of appeal. Ross was convicted and sentenced on Aug. 15, 2000, but a written judgment of conviction was not entered until Sept. 11, 2000. The judgment was designated "nunc pro tunc to Aug. 15, 2000." This nunc pro tunc designation, the Court of Appeals held,



(Left to right) General Practice & Trial Chairman Mark Dehler (far right) presents the Tradition of Excellence Awards to the 2003 recipients (left to right): Billy Ned Jones, T. Hoyt Davis Jr., Hugh B. McNatt and Judge H. Arthur McLane.



(Left to right) General Practice & Trial Section leaders Mark Dehler, his wife Secretary of State Cathy Cox, Wright Gammon and Catherine Helms during the section's Friday night reception.



(Left to right) Workers' Compensation Law Section Chairman Douglas Bennett, U.S. Attorney Richard Thompson and his wife enjoy themselves at the Workers' Compensation Law Section Reception.



Mike Cranford, chair of the Criminal Law Section, and his wife Theresa Cranford enjoy dinner and a keynote address by U.S. Senator Saxby Chambliss during the 2003 Inaugural Dinner.



Mark Redden of the Georgia Legal Services Program and Mike Monahan, Individual Rights Section chair, converse during a reception hosted by Sutherland Asbill & Brennan for President William D. Barwick.

reduced Ross's time to file a post-judgment motion or notice of appeal from 30 days to four days. The Court of Appeals dismissed Ross's appeal on the basis that the motion for new trial he filed on Sept. 28, 2000, was untimely.

Ross is wrongly decided. Ross overlooks the well-settled rule that, "There can be no appeal from an oral announcement that a judgment will be rendered, since no judgment is effective until it is

signed by the judge and filed with the clerk." *Crowell v. State*, 234 Ga. 313, 215 S.E.2d 685 (1975). For discussions of the function of nunc pro tunc orders, see *Yancey v. Poe*, 254 Ga. App. 410, 562 S.E.2d 798 (2002); *Andrew L. Parks, Inc. v. SunTrust Bank*, 248 Ga.App. 846, 545 S.E.2d 31 (2001); *In the Interest of H.L.W.*, 244 Ga. App. 498, 535 S.E.2d 834 (2000).

It follows from *Ross* that a nunc pro tunc order could reduce the

time to file appeal down to zero. In such a case, a litigant seeking to appeal should consider a motion to correct clerical errors pursuant to O.C.G.A. §9-11-60(g). See *Cambren v. Canal Ins. Co.*, 246 Ga. 147, 269 S.E.2d 426 (1980).

Head v. Thomason, 276 Ga. 434, 578 S.E.2d 426 (2003). By a 5-2 vote, the Supreme Court imported a portion of the Civil Practice Act into the Appellate Practice Act. It applied the provision in O.C.G.A. § 9-11-6 (e) for three extra days when a notice is served by mail to the computation of time for filing a cross-appeal.

In re Singh, 276 Ga. 288, 576 S.E.2d 899 (2003). The Supreme Court construed the constitutional rule that requires appellate decisions to be handed down within two terms of court. The rule applies only to cases that fall within the court's "general and exclusive appellate jurisdiction."

Legislative Update

The tort reform legislation passed in the 2003 session of the General Assembly includes a new procedure for interlocutory appeal of class certification, without a certificate of immediate review. New O.C.G.A. § 9-11-23(f) will provide:

The appropriate appellate court may in its discretion permit an appeal from an order of a trial court granting or denying class action certification under this code section if application is made to it within 10 days after entry of the order. An appeal does not stay proceedings in the trial court unless the trial judge or the appellate court so orders. GBJ

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

Officers of the Court

By Paul W. Bonapfel

Editor's note: This is the third part in a three part series.

Above all else, lawyers and judges must exercise good ethical judgment as they practice their profession. The advice they give and the decisions they make can have dire consequences for those who find themselves in a court of law.

During his first year on the bench, a California trial judge recognized his awesome responsibility in imposing sentences when he said, "People stand before you waiting for you to change their lives."¹

With such power and influence, how do we as law professionals behave?

To begin with, we have substantive rules of law, procedural rules, and ethical rules. But our concepts of professionalism require more than compliance with rules. Because of the special status and responsibilities of lawyers as officers of the court, our conduct must rise above mere rules compliance.

Judge Margaret Murphy has expressed it this way:²

Simply put, ethical behavior can be viewed as merely adhering to the letter of the law. Professionalism exceeds the letter

of the law and is that higher quality of conduct and character to which professionals should aspire. Professionalism is the exercise of honor, civility, trustworthiness, thoroughness, kindness, courtesy, decency, fair play and, above all, integrity that marks the higher calling of the profession.

Our Rules of Professional Conduct require us to act with diligence and promptness in representing clients. As lawyers, we are told to "act with zealous advocacy upon the client's behalf." But aren't the rules we follow enough? Does our responsibility to act professionally conflict with our ethical duty to represent our clients zealously?

And what is the source of standards other than the rules to guide our conduct? If we have an obligation to take a higher moral ground than that mandated by the rules, what is the source of those moral standards?

Philosophers and theologians have debated ethical and moral issues throughout recorded history. History has shown the dangers of societies that demand blind, dogmatic adherence to an inflexible theological or sociological order. Adolf Hitler and Osama bin Laden readily come to mind.

The genius of American civilization is its rejection of such regimes and its commitment to the rule of law. Our people revere the

words of Thomas Jefferson in the Declaration of Independence – that all men are created equal, that they are endowed with certain unalienable rights, and that among them are life, liberty, and the pursuit of happiness.

We have a Constitution that establishes a government, in Abraham Lincoln's words, that is of the people, by the people, and for the people.

On the third Monday in January, we celebrate the life of Dr. Martin Luther King Jr. who dedicated and gave his life to the cause of bringing the promise of these noble words to all people.

The morality that shapes our law — the rules that govern our conduct — and the source of that law as enacted by our legislatures or applied by our courts may be debated. Ethicists, legal scholars, theologians, and sociologists may find that law to be rooted in spiritual or humanistic or utilitarian ideas. The law is changing and evolving through legislative decisions, executive discretion in enforcement, and judicial interpretation.

We may not know, at any given time, what "the law" is or how it applies, but we are confident that there is "law" out there.

I submit that it is "the law" that is the source of our professionalism, the source of "morality," as it were, to guide the lawyer's professional responsibility. We do not have to accept the substance or the procedure of the law as it is or may be interpreted. As lawyers, we are charged to improve the law. But we must be committed to the law, to the process, to the courts of which we are officers, to the orderly resolution of disputes in an agreed-upon manner. And professionalism means we must act in ways

that support and uphold and strengthen these things.

The rules have changed in 25 years. Neon signs and articles in national publications, billboards and sponsoring of radio and television programs are no longer considered to be "unprofessional." Technological advances have changed many aspects of our lives, including the way we practice law. The practice of law is more complex and specialized. Who can

We may not know, at any given time, what "the law" is or how it applies, but we are confident that there is "law" out there.

imagine the changes we will witness over the next 25 years?

Yet the fundamental responsibilities of being a lawyer, the basic justification for our practice, the importance of what we do, the standards that define "professionalism" have remained, and will remain, the same.

We have seen how the ethical rules relating to "solicitation," now known as "marketing" have changed. What was unethical 25 years ago is now perfectly within the rules.

Although the rules have changed, our professional duties have not and must not. Whether we advertise or market does not determine our professionalism. It is determined by how we fulfill our responsibilities as officers of the court.

Lawyers are officers of the court as we always have been, and we have the same duties that we always have had. In Judge Murphy's words, lawyers must

possess honor, civility, thoroughness, kindness, courtesy, decency, fair play, and, above all, integrity.

Lawyers practice law for a living, to make money. In this sense they are engaged in business, and rightfully so. Perhaps it is healthy for the practice of law to evolve so that the realities of business are recognized. "Profits per partner and revenues" may be useful in managing our business.

Recognizing that lawyers are in business and that their ability to make a living depends on bringing more money in than they spend does not, however, mean that

lawyers are just another "legal service provider."

For the 25 years I practiced law (I now officially qualify as ancient), a picture given to me by Judge Owens hung in my office. It shows two elderly gentlemen in 19th century business attire seated at a table surrounded by books and papers. One is studying a paper in his hand while the other appears to be directing the reader's attention to a part of the paper or perhaps making a statement or asking a question. It is titled, "The Consultation," and my version has a caption beneath it that reads, "A lawyer's time and advice is his stock in trade."

Lawyers sell time and advice, reasoned judgment. We share and dispense our knowledge, experience, and expertise with our clients, and seek more of it when necessary. We do not package it and convince our clients to buy it.

While I know that lawyers run businesses in order to make

As a community of professionals, we should strive to make the internal rewards of service, craft and character, and not the external reward of financial gain, the primary rewards of the practice of law.

money, I do not accept the legal profession's abandonment of the idea that lawyers have special responsibilities as officers of the court, and I reject the proposition that lawyers must pursue profit over professionalism.

It is in the context of all of this that I ask you to think about these words from the Aspirational Statement on Professionalism adopted by the Chief Justice's commission:³

There are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful

manner and to prevent future disputes. We should remember, and we should help our clients to remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

The Aspirational Statement continues with a number of ideals that follow from this concept. I commend all of them to you, but I want especially to note these:

As a lawyer, I will aspire:

To put fidelity to clients and through clients, to the common good, before selfish interests.

To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution process.

To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status or national origin. The social goals of equality and fairness will be personal goals for me.

To preserve and improve the law, the legal system and other dispute resolution processes as instruments for the common good.


To make the law, the legal system and other dispute resolution processes available to all.

To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.

To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.

To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.

To practice law not as a business, but as a calling in the spirit of public service.

As we look back at the changes in the practice of law over the last 25 years and look ahead to the changes we will encounter over the next 25, let this final thought on professionalism ring as clear as a bell: **Practice in the Grand Style.** 

Endnotes

1. Mahoney, My First Year As a Judge, California Lawyer 37, 39 (November 2001).
2. Ethics and Professionalism in the Bankruptcy Court, Seminar Materials for Atlanta Bar Association Bankruptcy Section Seminar (April 24, 1997).
3. Aspirational Statement on Professionalism, reprinted at State Bar of Georgia Handbook (2002-2003) H125-126.

FIFTH ANNUAL JUSTICE ROBERT BENHAM AWARDS FOR COMMUNITY SERVICE

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

Robert Benham, Justice
Supreme Court of Georgia

CALL FOR NOMINATIONS

The Community Service Task Force and the State Bar of Georgia invite nominations for the Fifth Annual Justice Robert Benham Awards for Community Service.

The State Bar of Georgia presents these awards to honor individual lawyers and judges who have made outstanding contributions in the area of community service.

NOMINATING GUIDELINES

To be eligible a candidate must: 1) be admitted to the State Bar of Georgia; 2) be currently in good standing; 3) have carried out outstanding work in community service; 4) not be a member of the Task Force; and 5) not be engaged in a contested political contest in calendar year 2003.

The nomination packet should include four parts:

I. Nominator Information Name (contact person for law firms, corporate counsel or other legal organization nomination), address, telephone number and e-mail address

II. Nominee Information

Name, address, telephone number, e-mail address. Individual nominee's resume or description of nominee's background and relevant activities should be included.

III. Nomination Narrative

Using as many pages as necessary, explain how the nominee meets the following criteria:

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

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

IV. Letters of Support

Include three (3) letters of support from individuals and organizations in the community that are aware of the nominee's work.

SELECTION PROCESS: The Community Service Task Force Selection Committee will review the nominations and select the recipients. One recipient will be selected from each judicial district for a total of 10 winners. If no recipient is chosen in a district, then two or more recipients might be selected from the same district. Stellar candidates may be considered for the Lifetime Achievement Award. All Community Service Task Force Selection Committee decisions will be final and binding. Awards will be presented at a special ceremony in Atlanta.

SUBMISSION OF MATERIALS

Send nomination packet to:

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

Nominations must be postmarked by Oct. 1, 2003.

The Lawyers Foundation of Georgia 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, 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.

William Shaw Abney
Lafayette, Ga.
Admitted 1958
Died November 2002

Eugene C. Black Sr.
Albany, Ga.
Admitted 1948
Died January 2003

Randy Broadway
Silver Creek, Ga.
Admitted 1980
Died April 2003

Joseph Y. Carlisle
Macon, Ga.
Admitted 1937
Died July 2002

William B. Clark
Stillmore, Ga.
Admitted 1952
Died October 2002

Harvey A. Clein
Lawrenceville, Ga.
Admitted 1954
Died June 2003

James O. Creech Sr.
Savannah, Ga.
Admitted 1948
Died May 2003

Allene Davis
Orange Park, Fl.
Admitted 1948
Died March 2003

Adie N. Durden Jr.
Albany, Ga.
Admitted 1950
Died September 2002

Steven G. Eichel
Atlanta, Ga.
Admitted 1993
Died June 2003

James R. Evans
Atlanta, Ga.
Admitted 1936
Died January 2003

Curtis M. Ford Sr.
Augusta, Ga.
Admitted 1950
Died March 2003

C. Henry Freas Jr.
New York, N.Y.
Admitted 1962
Died January 2003

Michael J. Gannam
Savannah, Ga.
Admitted 1948
Died June 2003

H. Baxter Harcourt
Columbus, Ga.
Admitted 1951
Died November 2002

James R. Harper
Atlanta, Ga.
Admitted 1956
Died October 2002

William Colbert Hawkins
Sylvania, Ga.
Admitted 1939
Died February 2003

Robert M. Heard
Elberton, Ga.
Admitted 1940
Died June 2003

Scott Hogg
Atlanta, Ga.
Admitted 1934
Died April 2003

Maynard H. Jackson
Atlanta, Ga.
Admitted 1965
Died June 2003

Edward H. Kellogg Jr.
Atlanta, Ga.
Admitted 1973
Died June 2003

Thomas Marshall
Atlanta, Ga.
Admitted 1947
Died June 2003

Samuel A. Miller
Atlanta, Ga.
Admitted 1926
Died June 2003

J. Harry Mobley
Atlanta, Ga.
Admitted 1974
Died June 2003

Hugh F. Newberry
Atlanta, Ga.
Admitted 1958
Died January 2003

Scott Orbach
Decatur, Ga.
Admitted 1989
Died December 2002

George J. Polatty Sr.
Roswell, Ga.
Admitted 1942
Died May 2003

Shepherd Green Pryor III
Atlanta, Ga.
Admitted 1974
Died May 2003

Franklin D. Resnick
Atlanta, Ga.
Admitted 1972
Died April 2003

John L. Respass Jr.
Atlanta, Ga.
Admitted 1949
Died June 2003

L. Carroll Russell
Blackshear, Ga.
Admitted 1951
Died January 2003

Charles S. Saphos
Atlanta, Ga.
Admitted 1977
Died December 2002

Robert L. Smith
Macon, Ga.
Admitted June 1947
Died December 2002

Robert E. Stagg Jr.
Atlanta, Ga.
Admitted 1972
Died June 2003

Robert G. Stephens Jr.
Athens, Ga.
Admitted 1941
Died February 2003

V.D. Stockton
Clayton, Ga.
Admitted 1952
Died June 2002

C. Vinson Walters II
Ocilla, Ga.
Admitted 1992
Died May 2003

Patricia W. Worrell
Dunwoody, Ga.
Admitted 1995
Died April 2003



James O. "Jim" Creech Sr., 87, of Savannah, Ga., died May 31. He worked for the FBI before passing the Georgia Bar in 1948, when Creech & Creech became the first husband and wife legal team in Savannah. Creech was preceded in death by his wife, Mary Clark Creech, and his daughter, Carolyn F. Creech. He is survived by a daughter and son in law, Martha C. and Stewart Martin of Savannah; two sons, James O. Creech Jr. of Burlingame, Ca., and John Creech of Tulsa, Okla.; four sisters, Ida C. Barber of Savannah, Gloria C. Denny of Dunwoody, Myrtle C. Edenfield of Atlanta, and Mary Frances C. Brough of Tucker; seven grandchildren; and many nephews and nieces.



Michael Gannam, 80, of Savannah, Ga., died June 10. He taught law, political science and history at Armstrong State College from 1951-62. He was president of the Legal Aid Society from 1960-62 and served on the Board of Governors in 1968-69. Gannam was president of the Savannah Bar Association in 1972. He is survived by his wife of 54 years, Marion DeFrank Gannam; four children and their spouses, James Gannam and Cynthia Heitger, Ann Gannam and Dan Gourde, Elizabeth and Ron Jorde, and Joe Gannam and Melanie Marks; and three grandsons, Joshua, Nathan and Joseph Gannam.



Robert M. Heard, 88, of Elberton, Ga., died June 12. He was elected to the State Legislature in 1939, and resigned to enter the Navy in 1942. He practiced law for over 60 years, serving as president of the Georgia Bar Association in 1958-59. Heard also served as president of the Northern Circuit Bar Association and the Elberton Bar Association. He was a member of the American College of Trial Lawyers and recipient of the Law School's Distinguished Service Scroll. He was president of the University of Georgia Alumni Society and Judge of the State Court for 25 years. Heard was preceded in death by his son, John Thomas Heard. He is survived by his wife, Peggy Price Heard; a daughter, Peggy Heard Galis and her husband Denny Galis of Athens; and two grandsons, Anthony Middleton Galis and Charles Heard Galis.



Thomas O. Marshall Jr., 82, of Americus, Ga., died June 12. He was appointed a Georgia Supreme Court justice in 1977 and served as chief justice from 1986 until his retirement in 1989. Marshall was elected to the


Joseph Gannam, 80, of Savannah, Ga., died June 10. He taught law, political science and history at Armstrong State

Southwestern Judicial Circuit in 1960 and the Georgia Court of Appeals in 1974. His best-known ruling came in 1962 in a Sumter County election fraud case that started Jimmy Carter's climb to the White House. Marshall is survived by his wife, Angie; one sister; three daughters; and six grandchildren.



Robert Grier Stephens Jr., 89, of Athens, Ga., died Feb. 20. He was a former U.S. Representative from Georgia's 10th Congressional district. Born in Atlanta, Ga., on August 14, 1913, Stephens was the son of the late Dr. Robert Grier and Lucy Evans Stephens. He graduated from Boys High School in Atlanta in 1931, then attended the University of Georgia where he received an AB in 1935, MA in 1937 and LLB in 1941. While at the University he was elected to Phi Beta Kappa and Phi Kappa Phi, Sphinx and Gridiron societies, and was a member of the Kappa Alpha fraternity and ODK. He attended the University of Hamburg, Germany, on an exchange student scholarship in 1935-36.



John Joseph Sullivan, 86, of Savannah, Ga., died March 23. He was admitted to the Georgia Bar in 1939. As an ensign in the Coast Guard, Sullivan was assigned as the Assistant District Law Officer for the Territory of Hawaii and as Law Officer for the Captain of the Port of San Francisco, and he worked with the United States District Attorney's office prosecuting all violations and illegal importation of firearms. He is survived by his wife of 60 years, Christine "Teena" Coyle Sullivan of Savannah; two daughters, Maureen O. Sullivan of Laguna Niguel, Ca., and Christine G. Westgate of Savannah; grandchildren, Jessica G. Westgate of Savannah and John S. and Kerrienne Westgate of Savannah; and several cousins. 

Note: To verify a course that you do not see listed, please call the CLE Department at (404) 527-8710. Also, ICLE seminars only list total CLE hours. For a breakdown, call (800) 422-0893.

August 2003

5

LORMAN BUSINESS CENTER
Complete Guide to Retirement Plans in Georgia
Atlanta, Ga.
6.7 CLE

LORMAN BUSINESS CENTER
Collection Law in Georgia
Albany, Ga.
6.7 CLE

6

NATIONAL BUSINESS INSTITUTE
Real Estate Contracts in Georgia
Atlanta, Ga.
6 CLE with 0.5 ethics

7

NATIONAL BUSINESS INSTITUTE
Georgia Wage and Hour Update
Atlanta, Ga.
6 CLE with 0.5 ethics

LORMAN BUSINESS CENTER, INC.
Unclaimed Property Reporting in Georgia
Savannah, Ga.
6.7 CLE

8

ICLE
HIPAA Its Terms and Impact on the Legal Profession
Walter F. George School of Law,
Macon, Ga.
6 CLE

12

PRACTISING LAW INSTITUTE
State and Local Taxation 2003
Multi-Sites
5.5 CLE

LORMAN BUSINESS CENTER
Unclaimed Property Reporting in Georgia
Athens, Ga.
6.7 CLE

LORMAN BUSINESS CENTER
Trucking Litigation D.O.T. Regulations in Georgia
Atlanta, Ga.
6 CLE with 1 ethics

13-14

ICLE
Real Property Law Institute (Video Replay)
Atlanta, Ga.
12 CLE

13

PRACTISING LAW INSTITUTE
Securities Arbitration 2003
Multi-Sites
6.5 CLE with 0.5 ethics

14

LORMAN BUSINESS CENTER
Payroll Management in Georgia
Athens, Ga.
6.7 CLE

18

PRACTISING LAW INSTITUTE
Basics of Accounting & Finance Summer 2003
Multi-Sites
12.8 CLE with 1.0 ethics

20

LORMAN BUSINESS CENTER
Unclaimed Property Audits in Georgia
Atlanta, Ga.
6.6 CLE

21

LORMAN BUSINESS CENTER
Florida Records Retention & Destruction Programs Post Enron
Jacksonville, Ga.
6 .5 CLE

21-22

ICLE
Selected Video Replays
Atlanta, Ga.

22

ICLE
Nuts & Bolts of Family Law
Savannah, Ga.
6 CLE

ICLE
Law of Contracts
Atlanta, Ga.
6 CLE

LORMAN BUSINESS CENTER
ADA, FMLA & workers Compensation in Georgia
Savannah, Ga.
6.6 CLE

25

NATIONAL BUSINESS INSTITUTE
How to Protect Assets During Life and Avoid Estate Tax at Death in Georgia
Atlanta, Ga.
6 CLE with 0.5 ethics

28

LORMAN BUSINESS CENTER
Current Lending Compliance Issues
Atlanta, Ga.
6 CLE

ICLE
Predatory Lending
Atlanta, Ga.
6 CLE

29-30

ICLE
Urgent Legal Matters
Sea Island, Ga.
12 CLE

Sept. 2003

3

ICLE
Bridge The Gap (Video Replay)
Atlanta, Ga.

4

ICLE
U.S. Supreme Court Update
Atlanta, Ga.
6 CLE

LORMAN BUSINESS CENTER
Understanding Business Valuations in Georgia
Atlanta, Ga.
6 CLE

NATIONAL BUSINESS INSTITUTE
Challenges in Georgia Insurance Coverage Litigation
Atlanta, Ga.
6 CLE with 0.5 ethics

5

ICLE
Nuts & Bolts of Family Law
Atlanta, Ga.
6 CLE

ICLE
Internal Corporate Investigations
Atlanta, Ga.
6 CLE

6

LORMAN BUSINESS CENTER
HIPAA, ADA, and FMLA in Georgia
Atlanta, Ga.
6.6 CLE

8

NATIONAL BUSINESS INSTITUTE
*Handling Georgia Divorce Cases
From Start to Finish*
Atlanta, Ga.
6 CLE with 0.5 ethics

9

NATIONAL BUSINESS INSTITUTE
*Eviction & Landlord/Tenant Law
in Georgia*
Atlanta, Ga.
6 CLE with 0.5 ethics

10

PROFESSIONAL EDUCATION SYSTEMS, INC.
The Art of the Deal
Atlanta, Ga.
5.8 CLE

LORMAN BUSINESS CENTER, INC.
Real Estate Broker Liability in Georgia
Atlanta, Ga.
6 CLE

11

ICLE
Business Immigration Law
Atlanta, Ga.
6 CLE

11-13

ICLE
Solo and Small Firm Institute
Savannah, Ga.
12 CLE

11-13

ICLE
City and County Attorneys Institute
Athens, Ga.
12 CLE

12

PROFESSIONAL EDUCATION SYSTEMS
*Police Liability & Civil Rights
Litigation in the 11th Circuit*
Atlanta, Ga.
6.3 CLE, with 1 ethics and 4.3 trial

LORMAN BUSINESS CENTER
Partnerships, LLC, & LLPs
Atlanta, Ga.
6.6 CLE

ICLE
Emerging Tax Issues
Atlanta, Ga.
6 CLE

ICLE
Advanced Health Care Law
Atlanta, Ga.
6 CLE

ICLE
Federal Criminal Practice
Atlanta, Ga.
6 CLE

16

LORMAN BUSINESS CENTER
*What You Need to Know About Public
records and Open Meetings*
Atlanta, Ga.
6 CLE

LORMAN BUSINESS CENTER, INC.
*Like Kind Real Estate Exchanges
in Georgia*
Atlanta, Ga.
6.7 CLE

17

NATIONAL BUSINESS INSTITUTE
*How to Litigate Your First Civil Trial
in Georgia*
Atlanta, Ga.
6 CLE with 0.5 ethics and 0.6 trial

18

ICLE
School and College Law
Atlanta, Ga.
6 CLE

19

ICLE
Tort Law
Macon, Ga.
6 CLE

ICLE
Adult Guardianship
Atlanta, Ga.
6 CLE

NATIONAL BUSINESS INSTITUTE
*Legal Issues Relating to Consumer
and Debt Collection in Georgia*
Atlanta, Ga.
6 CLE with 0.5 ethics

19-20

ICLE
Solo and Small Firm Institute
Savannah, Ga.
12 CLE

23

PROFESSIONAL EDUCATION
SYSTEMS, INC.
*Ga. Boundary Law & Landowner
Disputes*
Atlanta, Ga.
7 CLE

LORMAN BUSINESS CENTER, INC.
Cafeteria Plans 125/COBRA
Atlanta, Ga.
6.7 CLE

24

NATIONAL BUSINESS INSTITUTE
Fundamentals of Water Law in Georgia
Atlanta, Ga.
6 CLE with 0.5 ethics

LORMAN BUSINESS CENTER, INC.
*Form 5500: What You Need to Know to
File*
Atlanta, Ga.
6.6 CLE

25

ICLE
Georgia Auto Insurance Law
Atlanta, Ga.
6 CLE

25-27

ICLE
Insurance Law Institute
St. Simons Island, Ga.
12 CLE

26

ICLE
YLD Employers' Duties and Problems
Atlanta, Ga.
6 CLE

ICLE
*Buying and Selling Privately Held
Businesses*
Atlanta, Ga.
6 CLE

29

PROSECUTING ATTORNEYS
COUNCIL OF GEORGIA
*Finding Words: Interviewing Children
and Preparing for Court*
Forsyth, Ga.
31.3 CLE with 1.3 trial

30

ICLE
Construction Law for the GP
Atlanta, Ga.
6 CLE

NOTICE FROM THE GEORGIA COURT OF APPEALS

Recycling of Appellate Court Record

In 1993, the Georgia Department of History and Archives announced it would no longer accept for storage paper records from the Georgia Court of Appeals. As a result of this announcement and the severe shortage of storage space, the Court adopted a records retention policy, which is summarized in Rule 42. It states all trial court records and transcripts filed in the Court of Appeals "will be recycled one year after the remittitur has issued unless the parties notify the Clerk, in writing, that the record should be maintained and the reason therefore."

Since then, as a courtesy, except for cases in which a judgment of affirmance or dismissal was issued, the Court has provided advanced mailed notice to the parties or their attorneys that the record would be destroyed. Due to the caseload level, limited staff and budgetary constraints, the Court is curtailing this mailing. Unless parties notify the Court in writing prior to the expiration of one year from the date the remittitur is issued, the record will be recycled. There will be no further notice of the recycling date to the parties other than a notation printed on the face of the NOTICE OF REMITTITUR form.

This policy does not affect the original trial court record which remains in the trial court.

NOTICE OF AND OPPORTUNITY FOR COMMENT ON AMENDMENTS TO THE RULES OF THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Pursuant to 28 U.S.C. ' 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit, and of proposed amendments to Addendum Three, Rules of the Judicial Council of the Eleventh Circuit Governing Complaints of Judicial Misconduct or Disability.

A copy of the proposed amendments may be obtained on and after August 4, 2003, from the Eleventh Circuit's Internet Web site at www.ca11.uscourts.gov. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303 [phone: (404) 335-6100]. Comments on the proposed amendments may be submitted in writing to the Clerk at the above street address by September 5, 2003.

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

No earlier than thirty days after the publication of this Notice in the *Georgia Bar Journal*, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, 2002-2003 *State Bar of Georgia Directory and Handbook*, p. H-6 and H-7 (hereinafter referred to as "*Handbook*").

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

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

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT STATE OF GEORGIA

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

MOTION TO AMEND 03-2

MOTION TO AMEND THE RULES AND
REGULATIONS OF THE

STATE BAR OF GEORGIA

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors, and presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, 2002-2003 *State Bar of Georgia Directory and Handbook*, pp. 1-H, *et seq.*, and respectfully moves that the Rules and Regulations of the State Bar of Georgia be amended in the following respects:

I.

Proposed Amendments to Part VII, Lawyer Assistance Program, of the Rules of the State Bar of Georgia

It is proposed that Part VII (Lawyer Assistance Program) of the Rules of the State Bar of Georgia be amended as shown below by deleting the stricken portions of the rules and inserting the phrases in bold underlined typeface as follows:

Part VII

Lawyer Assistance Program

PREAMBLE

~~Studies show that at least ten percent (10%) of the adult population in the United States have alcohol and other drug abuse problems. There is every reason to believe that this serious problem affects the attorney population in this country in the same or even greater percentages.~~

~~Alcohol or other drug abuse (substance abuse or chemical dependency) has an adverse effect on the professional, social and family relations of the chemically dependent attorney and often times on the attorney's clients' interests as well. It can easily lead to Bar disciplinary proceedings resulting in suspension or disbarment. The~~

~~consequences to the chemically dependent attorney and the attorney's family can be disastrous; such disasters also result in an unfortunate image for the Bar as a whole.~~

~~This program is established by the State Bar to aid and assist chemically dependent lawyers to understand and arrest the disease which afflicts them (1) by educating and informing the attorney, the attorney's partners, family, colleagues and friends of alternatives available for treating and overcoming the disease; (2) by providing an intervention process to assist and alert the attorney that the chemical dependency is adversely affecting the attorney's professional, family and social life, and that the attorney should take steps to rehabilitate himself or herself; and (3) by assisting the chemically dependent attorney to find a method of treatment and rehabilitation through recommended drug and alcohol rehabilitation programs. Additionally, this Program is established by the State Bar to aid and assist lawyers impaired by mental illness.~~

Preamble

The purpose of the Lawyer Assistance Program is to confidentially identify and assist Bar members who are experiencing problems which negatively impact their quality of life and their ability to function effectively as members of the Bar through education, intervention, peer support and professional clinical treatment.

Chapter 1

Lawyer Assistance Committee

Rule 7-101. Committee

The program will be administered by the State Bar Bar's Lawyer Assistance Committee ("Committee"). The Committee shall monitor and render advice to the staff, Executive Committee, and Board of Governors with respect to the rules,

procedures, policies and operation of a Lawyer Assistance Program ("LAP").

Rule 7-102. Membership

~~The Committee shall consist of seven lawyers, two psychiatrists, and two laypersons. All members should have, but are not required to have, some experience in the field of chemical dependency. The two laypersons appointed to the Committee shall have experience in conducting alcohol and drug rehabilitation intervention programs. Any member of the Committee who is a recovered chemical dependent should have a period of sobriety of at least two years. All members shall be appointed by the President of the State Bar. The Lawyer Assistance Program's Executive Director and Assistant Executive Director shall be non voting ex officio members of the Committee.~~

The Committee shall be appointed by the President of the State Bar in accordance with Article VIII, Section 1, of the Bylaws of the State Bar. In addition, the President, at his or her discretion, may appoint up to four non-lawyers to serve on the Committee, provided that such non-lawyers are licensed, certified addiction counselors, certified employee assistance professionals, licensed therapists, or other persons who have experience in conducting alcohol and drug rehabilitation intervention programs or mental health assistance programs. The term of such non-lawyer appointment shall be one year. Any member of the

Committee who is a recovered chemical or alcohol dependent person must have a period of sobriety of at least five years.

Rule 7-103. Terms:

Initially, four members of the Committee, including one of the laypersons and one of the psychiatrists, shall be appointed for a period of three years; four members, including the remaining layperson and remaining psychiatrist, for a period of two years; and one member for a period of one year. As each member's term of office on the Committee expires, his or her successor shall be appointed for a period of three years. The President of the State Bar shall appoint the chairperson of the Committee each year from among the members. Vacancies in unexpired terms shall be filled by the appointing authority.

Rule 7-103. Responsibility

The Committee shall be responsible for implementing an impairment program that provides education, referral and intervention.

Rule 7-104. Responsibility:

The Committee shall be responsible for implementing an impairment program through education, intervention and referral.

Rule 7-104. Funding

The work of the Committee and any treatment provider selected to assist the Committee in carrying out the work of the program shall be funded from the general budget of the State Bar and/or through donations and grants from the Georgia Bar Foundation or other

public or private sources.

Rule 7-105. Staff and Funding:

The State Bar may provide such staff as it deems necessary, including a Lawyer Assistance Program Executive Director and Assistant Executive Director. The work of the Committee and its staff shall be funded from the general budget of the State Bar or through donations and grants from the Georgia Bar Foundation or from other public or private sources.

**Chapter 2
Guidelines for Operation**

Rule 7-201. Education, Information and Awareness

The Committee shall establish, design, promote and implement all procedures to communicate to impaired attorneys, their families, friends and colleagues and the Bar in general the fact that there are members of the State Bar who are ready and eager to discuss the problem and can is a program available and ready to assist impaired attorney attorneys to overcome his or her their problems.

Rule 7-202. Volunteers

The Committee shall may establish a network of attorneys and laypersons throughout the State of Georgia, experienced or trained in impairment counseling, treatment or rehabilitation which can conduct education, awareness, programs and assist in counseling and intervention programs and services.

Rule 7-203. Intervention and Counseling

The members of the

Committee shall establish, design and implement all procedures necessary to receive information from lawyers, spouses, family members, colleagues, and others concerning an impaired attorney attorneys, and to provide whatever assistance may be appropriate in an individual situation. Upon a determination that an attorney is impaired, the Committee shall implement such resources as to the Committee appear appropriate in each individual case. In carrying out its duties under this rule, the Committee, subject to the approval of the Executive Committee, is authorized to outsource the clinical portion of the Lawyer Assistance Program to private sector health care professionals. Such health care professionals and their related staff, consultants and other designees shall be authorized to communicate with each other and with the Committee regarding the program or persons referred to the program by the Committee. Said communications shall not constitute a violation of the confidentiality rules established herein.

Rule 7-204. Intervention:

Upon determining and identifying an impaired lawyer, the Committee shall arrange and implement interventions using all resources available and appropriate as each case may require.

Rule 7-205. Referral:

The Committee shall provide, in all cases where appropriate, the impaired attorney with assistance in finding an appropriate reha-

bilitation program.

Rule 7-206. Powers and Duties of Special Master.

In accordance with these rules, a duly appointed Special Master shall have the following powers and duties:-

(a) To exercise general supervision over the disability hearing assigned to the special master and to perform all duties specifically enumerated in Bar Rule 7-305;

(b) To pass on all questions concerning the sufficiency of the Petition for Appointment of Special Master;

(c) To grant continuances and to extend any time limit provided for herein as to any matter pending before the special master;

(d) To apply to the Supreme Court of Georgia for an order naming a successor in the event that the special master becomes incapacitated to perform duties or in the event that the special master learns that the Respondent resides in the same judicial district as the special master;

(e) To defer any action on any Petition pending before the special master if the Respondent has agreed to seek the treatment recommended by the Lawyer Assistance Committee;

(f) To preside over hearings and to decide questions of law and fact raised during such hearings;

(g) To make findings of fact and conclusions of law as well as recommendations and to submit findings for consideration by the Supreme Court of Georgia;

(h) To compel attendance of witnesses and the production of books, papers, and documents, relevant to

the hearing, by subpoena, and as further provided by law in civil cases under the laws of Georgia.

Rule 7-207—Definitions.

Lawyer as used in this Part VII shall include active, inactive, emeritus and foreign law consultant members of the State Bar.

Rule 7-204. Definitions

Attorney, as used in this Part VII, shall include active, inactive, emeritus and foreign law consultant members of the State Bar of Georgia.

An impaired attorney is an attorney who, in the opinion of the members of the Committee, the State Disciplinary Board, the Supreme Court of Georgia, or the members of the professional health care provider selected in accordance with Rule 7-203 above, who suffers from a psychological, emotional, or stress-related disease or problem, or who is actively abusing alcohol or other chemical substances, or has become dependent upon alcohol or such substances, such that the attorney poses a substantial threat of harm to the attorney, or the attorney's clients, or the public.

**Chapter 3
Procedures**

Rule 7-301. Procedures.

Other than responding to a request for information concerning the program, no Committee member or volunteer authorized by the Committee may proceed to counsel or assist an impaired attorney or institute the intervention process under claim or sanction of

authority of this Committee without authorization of at least three members of the Committee.

Rule 7-301. Contacts Generally

The Committee shall be authorized to establish and implement procedures to handle all contacts from or concerning impaired attorneys, either through its chosen health care professional source, the statewide network established pursuant to Rule 7-202, or by any other procedure through which appropriate counseling or assistance to an impaired attorney may be provided.

Rule 7-302. Referrals from The State Disciplinary Board

Upon the referral of any case to the ~~Lawyer Assistance~~ Committee by the State Disciplinary Board of the State Bar, the Committee shall ~~attempt to assist~~ provide assistance to the impaired attorney referred by the Disciplinary Board in rehabilitation as otherwise authorized by these rules. The Committee shall report to the Board, from time to time, the progress or lack of progress of the attorney ~~in issue so~~ referred.

Rule 7-303. Confidentiality

Except as provided in Bar Rule 4-104(b), Bar Rule 4-104(c), Bar Rule 4-108, and Bar Rule 7-203, and Bar Rule 7-305, all investigations, proceedings, and records of the ~~Lawyer Assistance~~ Committee, its members, staff, consultants and ~~its other~~ other designees shall be confidential unless the attorney who is the subject of the ~~investigations,~~ proceedings and records otherwise elects. ~~Any person~~

who is connected with the Lawyer Assistance Committee in any way and who makes a publication or revelation which is not specifically permitted under these rules shall be subject to rule for contempt by the Supreme Court of Georgia.

Rule 7-304. Reports

The Lawyer Assistance Committee shall implement and design such reports and documentation as it deems necessary, or as is requested by the president of the State Bar, subject to the confidentiality provisions of Rule 7-303. In any event, the Committee shall maintain confidential records on each case at State Bar Headquarters. All records shall be maintained and kept separate from those involving disciplinary actions.

Rule 7-305. Disability Hearing:

(a) If an attorney (hereinafter "Respondent") refuses to cooperate after an authorized intervention or refuses the treatment recommended by the Lawyer Assistance Committee (hereinafter "Committee"), and it appears that the Respondent poses a substantial threat to himself or herself or others, then the members of the Committee may petition the Supreme Court of Georgia for the appointment of a Special Master to conduct a disability hearing.

(b) The Petition for Appointment of a Special Master shall state any evidence of Respondent's impairment and the Committee's recommended treatment.

(c) Upon receipt of a Petition for Appointment of Special Master, the Clerk of

the Supreme Court shall file the matter in the records of the Supreme Court of Georgia, give the matter a docket number and notify the Court that appointment of a Special Master is appropriate. The entire proceeding, including the Petition for Appointment of Special Master, shall remain under seal and shall be revealed to the public only at the discretion of the Supreme Court of Georgia.

(d) Upon notification that a Petition for Appointment of Special Master has been filed by the Committee, the Supreme Court of Georgia shall within seven days nominate a Special Master to conduct a disability hearing. The Court shall select as Special Masters experienced members of the State Bar, however, a Special Master may not be appointed to hear the evidence against a Respondent who resides in the same judicial circuit as that in which the Special Master resides. The disability hearing shall be held in the county of residence of the Respondent unless the Respondent otherwise agrees.

(e) Upon notification of the appointment of a Special Master, the Committee shall immediately serve the Respondent in person or by certified mail, return receipt requested, and by regular mail to the last known address contained in the official membership records of the State Bar with a copy of the Petition for Appointment of the Special Master and the Order Appointing Special Master.

(f) Within five business days of service of the Notice of Appointment of a Special Master and of the Order

Appointing Special Master, the Respondent shall file any and all objections or challenges the Respondent may have to the competency, qualifications or impartiality of the Special Master with the Clerk of the Supreme Court. A copy of the objections or challenges shall be served upon the Committee Chairperson, who may respond to such objections or challenges. If, after reviewing the arguments presented by the Respondent and the Chairperson of the Committee, the Supreme Court elects to disqualify the appointed Special Master, the Special Master and the parties shall be notified of the disqualification and nomination of a successor Special Master shall proceed.

(g) Except as otherwise provided by these Rules, the disability hearing shall be held within ten business days after service of the Petition for Appointment of Special Master and of the Order Appointing Special Master.

(h) The Special Master shall conduct a disability hearing and receive whatever evidence deemed appropriate, including the examination of the Respondent by such qualified medical experts as the Special Master shall designate. At all times during the disability hearing, the burden of proof shall be on the Committee. The quantum of proof required of the Committee shall be a preponderance of the evidence.

(i) The disability hearing shall be stenographically reported and transcribed at the expense of the Committee. A copy of the transcript shall be furnished

to the Respondent at no cost. Upon receipt of the original transcript by the Chairperson of the Committee, the original transcript shall be filed with the Clerk of the Supreme Court.

(j) Within ten business days of the filing of the original transcript with the Clerk of the Supreme Court, the Special Master shall file Findings of Fact and a Recommendation with the Supreme Court of Georgia. In the Findings of Fact, the Special Master shall determine whether the Respondent is disabled by virtue of the Respondent's impairment to the extent that the Respondent poses a substantial threat to himself or herself or others. Upon receipt of the Findings of Fact and Recommendation, the Supreme Court of Georgia shall order such action as deemed appropriate, including as a maximum sanction a temporary suspension of the Respondent from the practice of law, upon such terms and conditions as the Court may direct, including treatment in a qualified medical facility.

(k) If the Supreme Court of Georgia elects to temporarily suspend the Respondent's license to practice law due to impairment, then after a minimum of sixty (60) days, either the Respondent or the Committee may request that the Special Master conduct a hearing to place in evidence proof demonstrating whether the Respondent has successfully complied with the Supreme Court's Order as well as proof demonstrating whether the Respondent poses a substantial threat to himself or herself or others.

The burden of proof shall be on the movant and the quantum of proof shall be the same as described in (h) above.

(l) Within ten days after the hearing provided for in (k) above, the Special Master shall make Findings of Fact and a Recommendation for Consideration of the Supreme Court for any action the Supreme Court deems appropriate.

(m) No record made of the proceedings authorized in this Rule shall be admissible against a Respondent in any proceeding before the State Disciplinary Board of the State Bar.

Rule 7-305. Emergency Suspension

Upon receipt of sufficient evidence demonstrating that an impaired attorney's conduct poses a substantial threat of immediate or irreparable harm to the attorney's clients or the public, or if an impaired attorney refuses to cooperate with the Committee after an authorized intervention or referral, or refuses to take action recommended by the Committee, and said impaired attorney poses a substantial threat to the attorney, the attorney's clients, or the public, the Committee may request that the Office of General Counsel petition the Supreme Court of Georgia for the suspension of the attorney pursuant to Bar Rule 4-108. All proceedings under this part which occur prior to the filing of a petition in the Supreme Court of Georgia pursuant to this rule shall remain confidential and shall not be admissible against the

attorney before the State Disciplinary Board of the State Bar.

Rule 7-306. Pleadings and Communications Privileged/Immunity.

Pleadings and oral and written statements of members and designees of the Lawyer Assistance Committee, Special Masters, witnesses, and respondents and their counsel made to one another or filed in the record during any investigation, hearing or other proceeding under this Part VII are made in the performance of a legal and public duty, are absolutely privileged and under no circumstances form the basis for a right of action.

Rule 7-306. Immunity

The State Bar, its employees, and members of the Committee and its selected clinical outsource private health care professionals shall be absolutely immune from civil liability for all acts taken in the course of their official duties pursuant to this part.

Rule 7-307. Definitions.

(a) Attorney: A member of the State Bar of Georgia or one authorized by law to practice law in the state of Georgia.

(b) Disability hearing: A hearing before a Special Master duly appointed by the Supreme Court of Georgia to determine whether an attorney is disabled by virtue of the attorney's impairment to the extent that the Respondent poses a substantial threat to himself or herself or others.

(c) Impaired: A condition determined in a judicial

proceeding under the laws of this or any other jurisdiction that an attorney poses a substantial threat to himself or herself or others by reason of excessive use of intoxicants, drugs, or other cause.

Should the proposed amendment be adopted, Part VII of the Rules of the State Bar would read as follows:

Part VII

Lawyer Assistance Program

Preamble

The purpose of the Lawyer Assistance Program is to confidentially identify and assist Bar members who are experiencing problems which negatively impact their quality of life and their ability to function effectively as members of the Bar through education, intervention, peer support and professional clinical treatment.

Chapter 1

Lawyer Assistance Committee

Rule 7-101. Committee

The program will be administered by the State Bar's Lawyer Assistance Committee ("Committee"). The Committee shall monitor and render advice to the staff, Executive Committee, and Board of Governors with respect to the rules, procedures, policies and operation of a Lawyer Assistance Program ("LAP").

Rule 7-102. Membership

The Committee shall be appointed by the President of the State Bar in accordance with Article VIII, Section 1, of the bylaws of the State Bar of Georgia. In addition, the President, at his or her discretion, may appoint up to four non-lawyers to serve on the

Committee, provided that such non-lawyers are licensed, certified addiction counselors, certified employee assistance professionals, licensed therapists, or other persons who have experience in conducting alcohol and drug rehabilitation intervention programs or mental health assistance programs. The term of such non-lawyer appointment shall be one year. Any member of the Committee who is a recovered chemical or alcohol dependent person must have a period of sobriety of at least five years.

Rule 7-103. Responsibility

The Committee shall be responsible for implementing an impairment program that provides education, referral and intervention.

Rule 7-104. Funding

The work of the Committee and any treatment provider selected to assist the Committee in carrying out the work of the program shall be funded from the general budget of the State Bar and/or through donations and grants from the Georgia Bar Foundation or other public or private sources.

Chapter 2

Guidelines for Operation

Rule 7-201. Education, Information and Awareness

The Committee shall promote and implement procedures to communicate to impaired attorneys and the Bar in general the fact that there is a program available and ready to assist in helping the impaired attorneys to overcome their problem.

Rule 7-202. Volunteers

The Committee may establish a network of attorneys and lay persons throughout the State of Georgia, experienced or trained in impairment counseling, treatment, or rehabilitation, who can conduct education and awareness programs and assist in counseling and intervention programs and services.

Rule 7-203. Intervention and Counseling

The members of the Committee shall establish, design and implement all procedures necessary to receive information concerning impaired attorneys. Upon a determination that an attorney is impaired, the Committee shall implement such resources as to the Committee appear appropriate in each individual case. In carrying out its duties under this rule, the Committee, subject to the approval of the Executive Committee, is authorized to outsource the clinical portion of the Lawyer Assistance Program to private sector health care professionals. Such health care professionals and their related staff, consultants and other designees shall be authorized to communicate with each other and with the Committee regarding the program or persons referred to the program by the Committee. Said communications shall not constitute a violation of the confidentiality rules established herein.

Rule 7-204. Definitions

Attorney, as used in this Part VII, shall include active, inactive, emeritus and foreign law consultant members of the State Bar of Georgia.

An impaired attorney is

an attorney who, in the opinion of the members of the Committee, the State Disciplinary Board, the Supreme Court of Georgia, or the members of the professional health care provider selected in accordance with Rule 7-302 above, who suffers from a psychological, emotional, or stress-related disease or problem, or who is actively abusing alcohol or other chemical substances, or has become dependent upon alcohol or such substances, such that the attorney poses a substantial threat of harm to the attorney or the attorney's clients, or the public.

Chapter 3 Procedures

Rule 7-301. Contacts Generally

The Committee shall be authorized to establish and implement procedures to handle all contacts from or concerning impaired attorneys, either through its chosen health care professional source, the statewide network established pursuant to Rule 7-102, or by any other procedure through which appropriate counseling or assistance to an impaired attorney may be provided.

Rule 7-302. Referrals from The State Disciplinary Board

Upon the referral of any case to the Committee by the State Disciplinary Board of the State Bar of Georgia, the Committee shall provide assistance to the impaired attorney referred by the Disciplinary Board as otherwise authorized by these rules. The Committee shall report to the Board, from time to time, the progress or lack of progress of the attorney so referred.

Rule 7-303. Confidentiality

Except as provided in Bar Rule 4-104(b), Bar Rule 4-104(c), Bar Rule 4-108, and Bar Rule 7-203, all proceedings and records of the Committee, its members, staff, consultants and other designees shall be confidential unless the attorney who is the subject of the proceedings and records otherwise elects.

Rule 7-304. Reports

The Committee shall implement and design such reports and documentation as it deems necessary or as is requested by the president of the State Bar, subject to the confidentiality provisions of Rule 7-303.

Rule 7-305. Emergency Suspension

Upon receipt of sufficient evidence demonstrating that an impaired attorney's conduct poses a substantial threat of immediate or irreparable harm to the attorney's clients or the public, or if an impaired attorney refuses to cooperate with the Committee after an authorized intervention or referral, or refuses to take action recommended by the Committee, and said impaired attorney poses a substantial threat to the attorney, the attorney's clients, or the public, the Committee may request that the Office of General Counsel petition the Supreme Court of Georgia for the suspension of the attorney pursuant to Bar Rule 4-108. All proceedings under this part which occur prior to the filing of a petition in the Supreme Court of Georgia pursuant to this rule shall remain confidential and shall not be admissible against the attorney

before the State Disciplinary Board of the State.

Rule 7-306. Immunity

The State Bar, its employees, and members of the Committee and its selected clinical outsource private health care professionals shall be absolutely immune from civil liability for all acts taken in the course of their official duties pursuant to this part.

II.

Proposed Amendment to Part IV of the Rules of the State Bar of Georgia Rule 4-219(b)

It is proposed that Part IV (Discipline), Rule 4-219(b) of the Rules of the State Bar of Georgia be amended as shown below by deleting the stricken portions of the rules and inserting the phrases in bold underlined typeface as follows:

(b) In cases in which the Supreme Court orders disbarment, voluntary surrender of license or suspension, or the respondent is disbarred or suspended on a Notice of Discipline, the Review Panel shall publish **in a local newspaper or newspapers and on the official State Bar website**, notice of the discipline, including the Respondent's full name **and business address**, the nature of the discipline imposed and the effective dates. ~~as a paid advertisement in a local newspaper or newspapers of general circulation. In order to best notify those who will be affected by the respondent's misconduct, the Panel shall determine the appropriate newspapers in which the information shall be published.~~

Should the proposed amend-

ment be adopted, Part IV, Rule 4-219(b) of the Rules of the State Bar would read as follows:

(b) In cases in which the Supreme Court orders disbarment, voluntary surrender of license or suspension, or the respondent is disbarred or suspended on a Notice of Discipline, the Review Panel shall publish in a local newspaper or newspapers and on the official State Bar website, notice of the discipline, including the Respondent's full name and business address, the nature of the discipline imposed and the effective dates.

SO MOVED, this _____ day of _____, 2003

Counsel for the State Bar of Georgia

William P. Smith, III
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FIRST PUBLICATION OF PROPOSED FORMAL ADVISORY OPINION REQUEST NO. 02-R4

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

to this proposed opinion with the Formal Advisory Opinion Board at the following address:

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

An original and eighteen copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board by September 15, 2003, in order for the comment to be considered by the Board. Any comment to a proposed opinion should make reference to the request number of the proposed opinion. After consideration of comments, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

PROPOSED FORMAL ADVISORY OPINION REQUEST NO. 02-R4

Question Presented:

Is it ethically permissible for an attorney to enter into a "solicitation agreement" with a financial investment adviser under which the attorney, in return for referring a client to the adviser, receives fees based on a percentage of gross fees paid by the client to the adviser?

Summary Answer:

While it may be possible to structure a solicitation agreement to comply with ethical requirements, it would be both ethically and legally perilous to attempt to do so. In addition to numerous other ethical concerns, Rule 1.7 Conflicts of Interest: General Rule,

would require at a minimum that a "solicitation agreement" providing referral fees to the attorney be disclosed to the client in writing in a manner sufficient to permit the client to give informed consent to the personal interest conflict created by the agreement after having the opportunity to consult with independent counsel. Comment 6 to Rule 1.7 provides: "A lawyer may not allow related business interest to affect representation by, for example, referring clients to an enterprise in which the lawyer has an undisclosed business interest." Additionally, the terms of the "solicitation agreement" must be such that the lawyer will exercise his or her independent professional judgment in deciding whether or not to refer a particular client to the financial investment adviser. Prudentially, this would require the lawyer to document each referral in such a way as to be able to demonstrate that the referral choice was not dictated by the lawyer's financial interests but by the merits of the institution to whom the client was referred. The agreement must not obligate the attorney to reveal confidential information to the adviser absent the consent of the client; the fees paid to the attorney under the agreement must not be structured in such a way as to create a financial interest adverse to the client or otherwise adversely affect the client, and the agreement must itself be in compliance with other laws the violation of which would be a violation of Rule 8.4 Misconduct, especially those laws concerning the regulation of securities enforceable by criminal sanctions. This is not an exhaustive list of ethical requirements in that the terms of particular agreements may generate other ethical concerns.

Opinion:

"Anytime a lawyer's financial or property interests could be affected by advice the lawyer gives a client, the lawyer had better watch

out.” ABA/BNA LAWYERS MANUAL ON PROFESSIONAL CONDUCT 51:405. In the circumstances described in the Question Presented, a lawyer, obligated to exercise independent professional judgment on behalf of a client in deciding if a referral is appropriate and deciding to whom to make the referral, would be in a situation in which his or her financial interests would be affected by the advice given. This conflict between the obligation of independent professional judgment and the lawyer’s financial interest is governed by Rule of Professional Conduct 1.7 which provides, in relevant part, that:

(A) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer’s own interests . . . will materially or adversely affect the representation of the client . . .

The Committee is guided in its interpretation of this provision in these circumstances by Comment 6 to Rule 1.7:

A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Under Rule 1.7, client consent to such a personal interest conflict is permissible after: “(1) consultation with the lawyer, (2) having received in writing reasonable and adequate information about the materials risks of the representation, and (3) having been given an opportunity to consult with independent counsel.” Thus, at a minimum, a “solicitation agreement” providing referral fees to the attorney would have to be disclosed to the client in writing in a manner sufficient to permit the client to give informed consent to the personal interest conflict created by the agreement after having the opportunity to consult with independent counsel.

In addition to this minimum requirement, there are numerous other ethical obligations that would dictate the permitted terms of such an agreement. The following obligations are offered as a non-exhaustive list of examples for the terms of particular agreements may generate other ethical concerns.

- 1) The agreement must not bind the attorney to make referrals or to make referrals only to the adviser for such an obligation would be inconsistent with the attorney’s obligation to exercise independent professional judgment on behalf of the client in determining whether a referral is appropriate and to whom the client should be referred. Both determinations must always be made only in consideration of the client’s best interests. Prudentially, this would require the lawyer to document each referral in such a way as to be able to demonstrate that the referral choice was not dictated by the lawyer’s financial interests but by the merits of the institution to whom the client was referred. In order to be able to do this well the lawyer would need to stay abreast of the quality and cost of services provided by other similar financial institutions.
- 2) The agreement cannot restrict the information the attorney can provide the client concerning a referral by requiring, for example, the attorney to use only materials prepared or approved by the adviser. Such a restriction is not only inconsistent with the attorney’s obligations to exercise independent professional judgment but also with the attorney’s obligations under Rule 1.4 Communications concerning the attorney’s obligation to provide information to clients sufficient for informed decision making.
- 3) The agreement cannot obligate the attorney to provide confi-

dential information, as defined in Rule 1.6 Confidentiality, to the adviser absent client consent.

- 4) The fees paid to the attorney for the referral cannot be structured in such a way as to create a financial interest or other interest adverse to the client. Rule 1.8 Conflicts of Interest: Prohibited Transactions provides “. . . nor shall the lawyer knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client . . .”
- 5) Finally, any such agreement would have to be in compliance with other laws the violations of which could constitute a violation of Rule 8.4 Misconduct. For example, the agreement may not violate any of the legal or administrative regulations governing trading in securities enforceable by criminal sanctions.

Thus, while it may be possible to structure a solicitation agreement to comply with ethical requirements, it would be both ethically and legally perilous to attempt to do so.

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

Second Publication of Proposed Formal Advisory Opinion Request No. 98-R7 Hereinafter known as “Formal Advisory Opinion No. 03-1”

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

with the Supreme Court of Georgia on or after August 15, 2003.

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

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

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

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

STATE BAR OF GEORGIA ISSUED BY THE FOR- MAL ADVISORY OPIN- ION BOARD PURSUANT TO RULE 4-403 FORMAL ADVISORY OPINION NO. 03-1 (PROPOSED FORMAL ADVISORY OPINION NO. 98-R7)

Question Presented:

May a Georgia attorney contract with a client for a non-refundable special retainer?

Summary Answers:

A Georgia attorney may contract with a client for a non-refundable special retainer so long as: 1) the contract is not a contract to violate the attorney's obligation under Rule 1.16(d) to refund "any advance payment of fee that has not been earned" upon termination of the representation by the attorney or by the client; and 2) the contracted for fee, as well as

any resulting fee upon termination, does not violate Rule 1.5(a)'s requirement of reasonableness.

Opinion:

This issue is governed primarily by Rule of Professional Conduct 1.16(d) which provides: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests such as . . . refunding any advance payment of fee that has not been earned."

A special retainer is a contract for representation obligating a client to pay fees in advance for specified services to be provided by an attorney. This definition applies regardless of the manner of determining the amount of the fee or the terminology used to designate the fee, *e.g.*, hourly fee, percentage fee, flat fee, fixed fees, or minimum fees. Generally, fees paid in advance under a special retainer are earned as the specified services are provided. Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed¹. The portion of the fee reasonably allocated to these services are, therefore, earned immediately. These fees, and any other fees that have been earned by providing specified services to the client, need not be refunded to the client. In this sense, a special retainer can be made non-refundable.

In FORMAL ADVISORY OPINION 91-2 (FAO 91-2), we said:

"Terminology as to the various types of fee arrangements does not alter the fact that the lawyer is a fiduciary. Therefore, the lawyer's duties as to fees should be uniform and governed by the same rules regardless of the particular fee arrangement. Those duties are 1) To have a clear understanding with the client as to the details of the fee arrangement prior to undertaking the representation,

preferably in writing. 2) To return to the client any unearned portion of a fee. 3) To accept the client's dismissal of him or her (with or without cause) without imposing any penalty on the client for the dismissal. 4) To comply with the provisions of Standard 31 as to reasonableness of the fee."

The same Formal Advisory Opinion citing *In the Matter of Collins*, 246 Ga. 325 (1980), states:

"The law is well settled that a client can dismiss a lawyer for any reason or for no reason, and the lawyer has a duty to return any unearned portion of the fee."²

Contracts to violate the ethical requirements upon which FAO 91-2 was based are not permitted, because those requirements are now expressed in Rule 1.16(d) and Rule 1.5(a). Moreover, attorneys should take care to avoid misrepresentation concerning their obligation to return unearned fees upon termination.

The ethical obligation to refund unearned fees, however, does not prohibit an attorney from designating by contract points in a representation at which specific advance fees payments under a special retainer will have been earned, so long as this is done in good faith and not as an attempt to penalize a client for termination of the representation by refusing to refund unearned fees or otherwise avoid the requirements of Rule 1.16(d), and the resulting fee is reasonable. Nor does this obligation call in to question the use of flat fees, minimum fees, or any other form of advance fee payment so long as such fees when unearned are refunded to the client upon termination of the representation by the client or by the attorney. It also does not require that fees be determined on an hourly basis. Nor need an attorney place any fees into a trust account absent special circumstances necessary to protect the interest of the client. See Georgia Formal Advisory Opinion 91-2. Additionally, this obligation does

not restrict the non-refundability of fees for any reason other than whether they have been earned upon termination. Finally, there is nothing in this obligation that prohibits an attorney from contracting for large fees for excellent work done quickly. When the contracted for work is done, however quickly it may have been done, the fees have been earned and there is no issue as to their non-refundability. Of course, such fees, like all fee agreements, are subject to Rule 1.5, which provides that the reasonableness of a fee shall be determined by the following factors:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
 - (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
 - (3) the fee customarily charged in the locality for similar legal services;
 - (4) the amount involved and the results obtained;
 - (5) the time limitations imposed by the client or by the circumstances;
 - (6) the nature and length of the professional relationship with the client.
 - (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
 - (8) Whether the fee is fixed or contingent.
1. The "likelihood that the acceptance of the particular employment will preclude other employment by the lawyer" is a factor the attorney must consider in determining the reasonableness of a fee under Rule 1.5. This preclusion, therefore, should be considered part of the service the attorney is providing to the client by agreeing to enter into the representation.
 2. Georgia Formal Advisory Opinion 91-2.

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

Second Publication of Proposed Formal Advisory Opinion Request No. 01-R5

Hereinafter known as "Formal Advisory Opinion No. 03-2"

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after August 15, 2003.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia. The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory

Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

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

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

STATE BAR OF GEORGIA ISSUED BY THE FOR- MAL ADVISORY OPIN- ION BOARD PURSUANT TO RULE 4-403 FORMAL ADVISORY OPINION NO. 03-2 (PROPOSED FORMAL

ADVISORY OPINION NO. 01-R5)

Question Presented:

Does the obligation of confidentiality described in Rule 1.6, Confidentiality of Information, apply as between two jointly represented clients?

Summary Answer:

The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation.

Opinion:

Unlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to each other by entering into the joint representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other since client consent to the disclosure of confidential information under Rule 1.6 requires consultation. *Id.* Consultation, as defined in the Rules, requires "the communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Terminology, Georgia Rules of Professional Conduct.

When one client in a joint representation requests that some information relevant to the representa-

tion be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or c) both.


The lawyer has discretion to continue with the representation while not revealing the confidential information to the other client only to the extent that he or she can do so consistent with these rules. If maintaining the confidence will constitute a violation of Rule 1.4 or Rule 1.7, as it most often will, the lawyer should maintain the confidence and discontinue the representation.

Consent to conflicting representations, of course, is often permitted under Rule 1.7. Consent to continued joint representation in these circumstances, however, ordinarily would not be available either because it would be impossible to conduct the consultation required for such consent without disclosing the confidential information in question or because consent is not permitted under Rule 1.7 in that the continued joint representation would "involve circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients." Rule 1.7(c)(3).

Whether or not the attorney, after withdrawing from the representation of the other client, can continue with the representation of the client who insisted upon confidentiality is governed by Rule 1.9: Conflict of Interest: Former Clients and by whether or not the consultation required for the consent of the now former client can be conducted without disclosure of the confidential information in question.

The potential problems that confidentiality can create between jointly represented clients make it especially important that clients understand the requirements of a joint representation prior to entering into one. When an attorney is considering a joint representation, consultation and consent of the clients is required prior to the representation "if there is a significant risk that the lawyer's . . . duties to [either of the jointly represented clients] . . . will materially and adversely affect the representation of [the other] client." Rule 1.7. Whether or not consultation and consent is required, however, a prudent attorney will always discuss with clients wishing to be jointly represented the need for sharing confidences between them, obtain their consent to such sharing, and inform them of the consequences of either client's nevertheless insisting on confidentiality as to the other client and, in effect, revoking the consent. If it appears to the attorney that either client is uncomfortable with the required sharing of confidential information that joint representation requires, the attorney should reconsider whether joint representation is appropriate in the circumstances. If a putative jointly represented client indicates a need for confidentiality from another putative jointly represented client, then it is very likely that joint representation is inappropriate and the putative clients need individual representation by separate attorneys.

The above guidelines, derived from the requirements of the Georgia Rules of Professional Conduct and consistent with the primary advisory opinions from other jurisdictions, are general in nature. There is no doubt that their application in some specific contexts will create additional specific concerns seemingly unaddressed in the general ethical requirements. We are, however, without authority to depart from the Rules of Professional Conduct

that are intended to be generally applicable to the profession. For example, there is no doubt that the application of these requirements to the joint representation of spouses in estate planning will sometimes place attorneys in the awkward position of having to withdraw from a joint representation of spouses because of a request by one spouse to keep relevant information confidential from the other and, by withdrawing, not only ending trusted lawyer-client relationships but also essentially notifying the other client that an issue of confidentiality has arisen. See, e.g., Florida State Bar Opinion 95-4 (1997) ("The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.") A large number of highly varied recommendations have been made about how to deal with these specific concerns in this specific practice setting. See, e.g., Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62 *FORDHAM L. REV.* 1253 (1994); and, Collett, And The Two Shall Become As One . . . Until The Lawyers Are Done, 7 *NOTRE DAME J. L. ETHICS & PUBLIC POLICY* 101 (1993) for discussion of these recommendations. Which recommendations are followed, we believe, is best left to the practical wisdom of the good lawyers practicing in this field so long as the general ethical requirements of the Rules of Conduct as described in this Opinion are met. 

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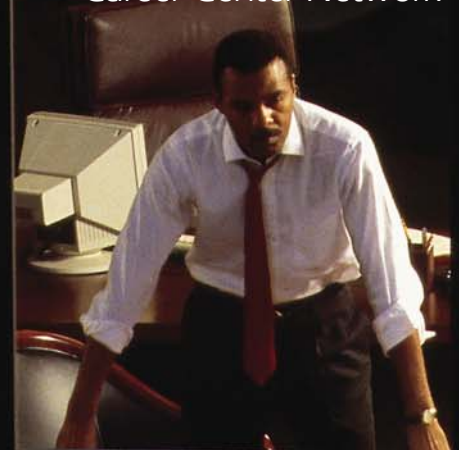
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