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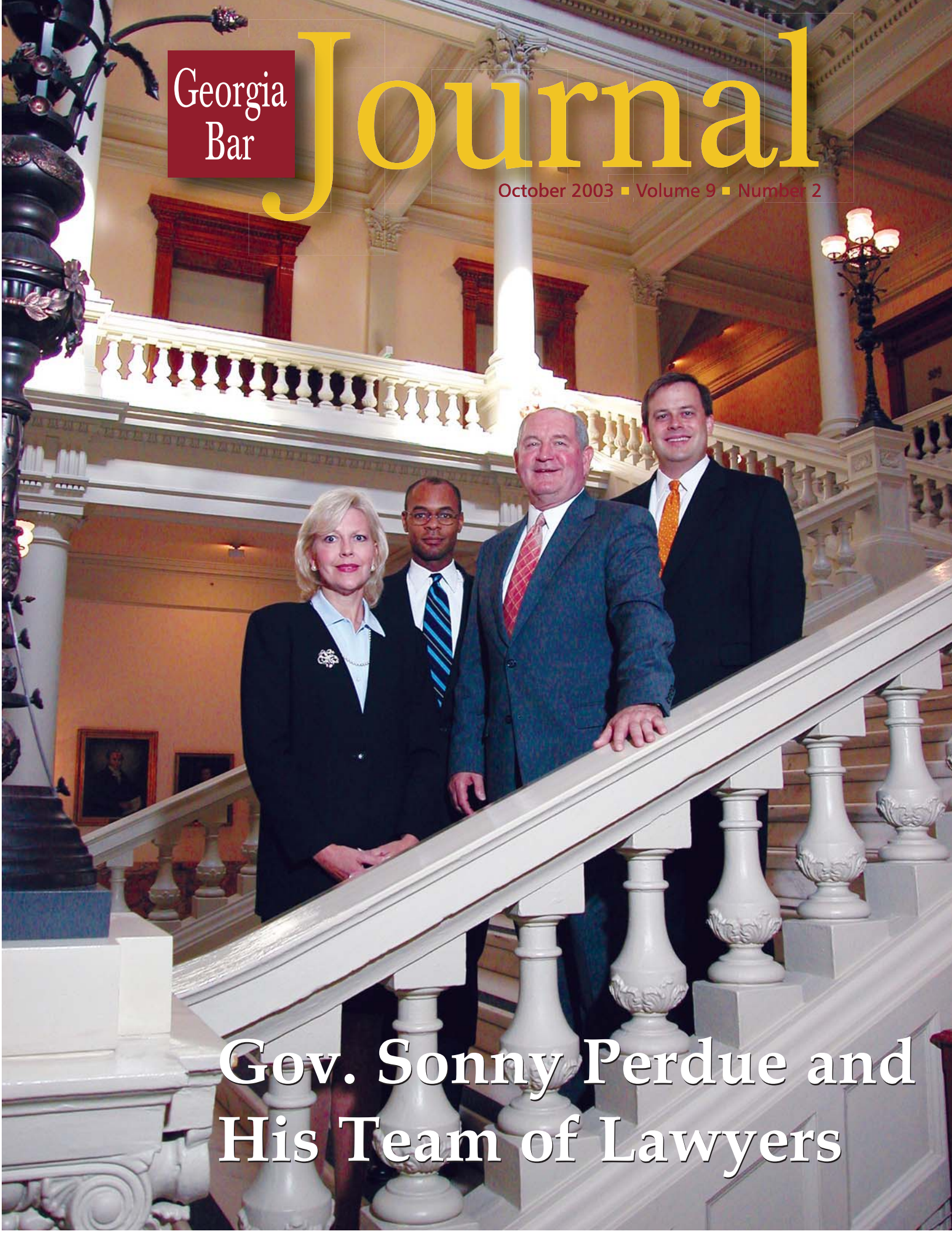
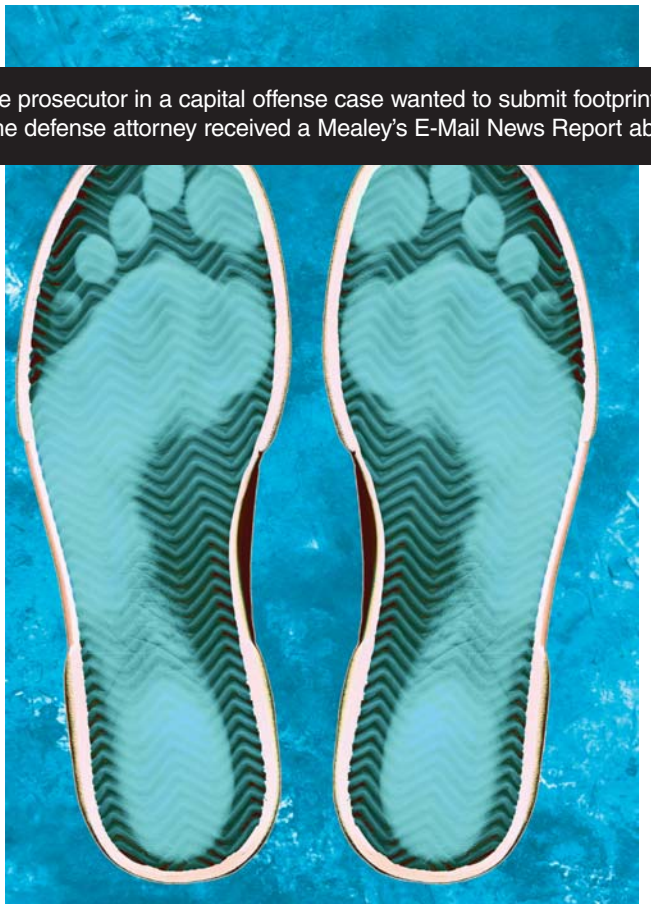


Gov. Sonny Perdue and His Team of Lawyers

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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This is an advertisement. Carl Davis is Chair of the Intellectual Property Group.

On the Cover
Gov. Sonny Perdue is pictured with his team of lawyers: Joy Hawkins, Harold Melton and Robert Highsmith.

Photo by: Bill Mahan

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Legal

Features

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from the President

"What will generate controversy, and litigation with the State Bar on the right hand side of the "v." are the arguments over trades and practices that seem routine and clerical, but which are integral to a legal process."

By William D. Barwick

Some Authorized Thoughts on UPL

Every bar president depends upon his or her executive director for guidance, background information and, most of all, fair warning of impending trouble.

Cliff Brashier, our exemplary State Bar executive director, has a distinctively understated way of alerting his charges to troubled waters ahead. He calls you, clears his throat, tells you what he has to report isn't anything you need to worry about, and that he is just giving you a "heads up." After a handful of these calls, I'm finally convinced that "heads up" were the last words spoken to Louis VI by his court advisers.

Cliff gave me a classic "heads up" several months before I took office. I asked him what might be some controversial issues that could arise during my administration. He stared at me for a moment, and then I added "besides me." He then told me to look out for the unauthorized practice of law – and the federal government.

Since virtually all the readers of this article are authorized to practice law, with all the toil and responsibility our licenses entail, the natural reaction should be to question why anyone would oppose our efforts to curb legal "quacks." But for lawyers, this isn't the first time that good intentions were both punished and criticized.

For years, lawyers tried to control or eliminate advertising by other lawyers, not out of trade protectionism, or price fixing, but to maintain an atmosphere of professionalism. The U.S. Supreme Court disagreed that the rules were purely altruistic, and not trade restrictive, and virtually eliminated most prohibitions against lawyer advertising. Although some advertising today provides legal services to clients with limited income and access to representation, the general public tends to view all lawyers in the negative light generated by a few overdone advertisements. Does anyone

else remember Fred Tokars' famous "attack dog" billboards?

This brings us to the unauthorized practice of law. Actually, the practice of law is defined in O.C.G.A. §15-19-50, and the elements of the unauthorized practice of law may be found in O.C.G.A. §15-19-51. Previously, misdemeanor prosecutions were the responsibility of local courts, and in metropolitan areas of the state (where the largest percentage of complaints originate), State Court judges and solicitors did not always treat violations with the fervor the Supreme Court of Georgia might have wished. Accordingly, the Supreme Court mandated the creation of a new enforcement system through the State Bar.

While misdemeanor penalties remain, the UPL Standing Committee will be empowered to seek restraining orders in courts of competent jurisdiction to enjoin the unauthorized practice of law. As most of us know, violations of a restraining order will usually catch a judge's attention, and the power of a contempt citation will usually catch the attention of even the most dedicated recidivists.

There will be little controversy over this enforcement mechanism as it pertains to fake lawyers preying, for example, on the immigrant community, or on disbarred lawyers who persist upon misapplying their trade. What will generate controversy, and litigation with the State Bar on the right hand side of the "v." are the arguments over trades and practices that seem routine and clerical, but which are integral to a legal process. One such example involves real estate closings, and some well-intentioned types believe that "witness only" closings can be done both cheaply and safely without the oversight of a lawyer. The Federal Trade Commission, the godfather of lawyer advertising, agrees. The UPL Advisory Opinion Board disagrees, and the Supreme Court of Georgia will have its say in the next few months.

It is important, however, to consider the position of the organized bar in this matter. We do not take actions such as these to protect our trade. On the contrary, one botched closing can produce quite a bit of well-paying litigation for many lawyers. For the majority of ordinary citizens, however, that "routine" home closing represents the single largest financial investment a person will make in his or her life. That seems sufficient justification to require the presence and oversight of a responsible member of our profession.

There is a joke circulating in the profession that the law office of the future will consist of a computer, a dog and a lawyer. The computer's job will be to practice law, the dog will be responsible for keeping the lawyer away from the computer, and the lawyer's job will be to feed the dog. As long as we remember that even the routine things we do can have a considerable impact upon our clients and others, we may still be able to keep that future at bay.

from the Executive Director

"I think we all agree that time is a precious commodity and we certainly do not want to waste it wading through unwanted e-mails and faxes."

By Cliff Brashier

Helping Stop Unwanted Blast E-mails and Faxes

The federal government recently unveiled the National Do Not Call Registry, whose goal is to make it easier and more efficient for people to stop receiving telemarketing sales calls they do not want.

Similarly, the State Bar of Georgia's Executive Committee recently adopted a policy with the goal of limiting the number of blast e-mail and fax messages Bar members receive.

I think we all agree that time is a precious commodity and we certainly do not want to waste it wading through unwanted e-mails and faxes. I personally receive more than 100 junk e-mails a week, which comes out to more than 5,000 a year.

Because of the ease and low cost of sending e-mail and fax messages, over the last several years, the Bar has seen requests for members' e-mail addresses and fax numbers grow dramatically. The majority of these requests come from vendors who want to market their services and products to Georgia lawyers.

Trying to balance the need to protect members' privacy with keeping all members informed about matters relating to the judicial system and legal profession, the new policy is designed to enhance communication by authorizing the use of faxes and e-mails for important information with appropriate limits on frequency and content.

Under the committee's new policy, all blast faxes are prohibited and e-mails are limited to the following authorized users:

- Supreme Court of Georgia (for limited, significant Bar matters)
- Court of Appeals of Georgia (for limited, significant Bar matters)
- State Bar President (for limited, significant Bar matters)
- Young Lawyers Division President (to YLD members for limited, significant YLD matters)
- Board of Governors members (to their circuit members)

- State Bar sections and committees (to their respective members)
- Candidates running for Bar office (limited to contested races and no more than two e-mails per election)
- Administrative Office of the Courts (to lawyers practicing in the respective courts)
- The Executive Committee may, for limited and urgent use, authorize additional group e-mails

There are other provisions of the policy such as a prohibition on the sale or use of the list for commercial purposes. The full text of the policy will be printed in the next Bar Directory and contained on the Bar's Web site. It is available now by request.

The Bar is here to serve and protect its members and all policies and procedures are made with members' best interests in mind. As always, if you have any questions regarding this policy or any other 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). GBJ

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from the YLD President

By Andrew W. Jones

What Does it Mean to Be a Successful Lawyer?

In August, the state of Georgia lost one of its finest citizens and one of its best lawyers. Judge Robert E. Flournoy Jr. served his community and this state like few others have or ever will.

As Judge Flournoy was eulogized, my question was answered. A successful legal career is not measured by the material possessions you accumulate or by how much money you make. Success means much, much more. It means that at the end of your career you are remembered not only as an accomplished advocate, but also as a person who made a positive difference in your community. Judge Flournoy did just that. He served as the mayor of Marietta from 1982-85, was a state representative and served on the Cobb County Superior Court Bench from 1987-2000. The Bar and the citizens of Cobb County will sorely miss Judge Flournoy.

Today the practice of law virtually moves at the speed of light. E-mails, faxes and overnight mail make it a challenge to keep up with the work on our desks. The speed and need for instant response extends the workday leaving precious little time to spend with families and loved ones. This rapid pace has also made it more difficult to be active in the community.

The YLD has many committees that organize worthwhile and rewarding projects around the state which serve the profession and the community. As YLD president, I wish every young lawyer would be involved. Realistically, I know that isn't going to happen. Fortunately, several young lawyers from around the state find the time to be involved.

I think the main reason that young lawyers don't get involved is because of the anticipated time commitment. The pressure to bill time and generate work consumes a young lawyer's life. One way to get started is by serving on a YLD committee. Service on a YLD committee takes less than one hour a month. With that one hour, many great things are done. Children are helped, young lawyers are educated at CLEs and the image of our profession is improved. If you haven't signed up for a YLD committee, give it a try. I don't think you will be disappointed. Take a step toward being a successful lawyer who, when it is all said and done, will be remembered as somebody who gave to the profession, but also made their community a better place to live. GBJ

"The YLD has many committees that organize worthwhile and rewarding projects around the state which serve the profession and the community."

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A Look at the Law

Bad Faith in Insurance Claim Handling in Georgia

An Overview and Update

By Dale C. Ray Jr.

Whether one is regularly involved in handling personal injury claims or providing advice to insurance companies, it is inevitable that at some point, every attorney will be presented with the issue of insurance company bad faith. This article will provide an overview of Georgia law in this area, dealing first with statutory remedies for bad faith handling of first party and uninsured motorist insurance claims, and then discussing bad faith issues involving the evaluation and settlement of liability insurance claims. As to the first, the law has been fairly consistent and predictable for several years; however, in the area of liability insurance claim bad faith, recent legislation has expanded the remedies available to victims, and recent case law signals an expansion of the risks liability insurers can face when dealing with settlement demands and limited coverage.

THE FIRST PARTY PENALTY STATUTE

The Georgia Code has provided for statutory penalties for bad faith failure to timely pay first party insurance claims since at least 1872. The current version, codified at O.C.G.A. §33-4-6, establishes a cause of action for penalties and attorney fees when an insurer refuses, "in bad faith," to pay a claim brought by its own insured.[1] Outside of the employee benefits arena, most first party insurance claims would be subject to this statute, including claims under homeowners policies, fire loss policies, title insurance, automobile med-pay, collision and comprehensive coverage, and personally held health, life and disability insurance. Life, health and disability coverage provided through most employee benefit plans, however, would be beyond the reach of Georgia's penalty provisions given the state law preemption provisions of the federal Employees Retirement Income Security Act (ERISA).[2]

If it is proven that an insurer has refused to pay a first party claim "in bad faith," section 33-4-6 allows a judge or jury to award a penalty of not more than 50 percent

of the insurer's liability for the loss or $5,000, *whichever is greater*, as well as reasonable attorney's fees for prosecution of the action against the insurer. Prior to 2001, the penalty could be no more than 25 percent of the loss. The award of attorney's fees is not limited to those incurred in the lawsuit against the insurer, but can also include fees incurred in litigating subsequent appeals. "All of the work done on a case of this type, including work done on appeal, may be considered in awarding attorney fees." [3]

The statute also includes, as a condition precedent to a recovery of penalties, a requirement that a demand must first be made upon the insurer and a 60 day window of opportunity allowed to pay the claim without exposure to penalties. Because penalties and forfeitures are not favored, the right to bad faith penalties must be clearly shown.[4] Code section 33-4-6 must also be strictly construed.[5]

Therefore, a proper demand for payment is essential, and compliance with the statute's demand requirements must be proven.[6] At least one Court of Appeals decision has indicated that the demand should specifically notify the insurer that the plaintiff asserts a claim for bad faith, but one judge concurred specially and argued that Georgia law has never required this.[7] Even if it is not required, providing such notice in the demand would seem to be the better practice and would likely give the document greater evidentiary value to the claimant in any future bad faith lawsuit. Merely filing a lawsuit will not serve as a proper demand,[8] nor will a proof of loss or the insurer's written denial of a claim suffice.[9]

Timing of the demand in relation to filing suit is also critically important. A failure to wait at least 60 days between making a demand and filing suit constitutes an

Once a timely demand has been shown, the insured must then prove that the insurer's refusal to pay the claim was "in bad faith."

absolute bar to recovery of penalties and attorney fees under the statute.[10] This time frame is inflexible and has barred bad faith liability even though suit had to be filed during the 60 day period in order to comply with the statute of limitations.[11] Nor may the demand be made unless the insured's right to payment from the insurer has vested. "Demand must be made at a time when the insured is legally in a position to demand immediate payment, and it is not in order if the insurer has additional time left under the terms of the insurance policy in which to investigate or adjust the loss and therefore has no duty to pay at the time the demand is made."[12] Thus, a proper demand cannot be made too soon, nor can the lawsuit be filed too soon after the demand has been made.

Once a timely demand has been shown, the insured must then prove that the insurer's refusal to pay the claim was "in bad faith."[13] Code section 33-4-6 does not define what this term means, but the appellate courts have held that under this Code section, "'bad faith' of the insurer means a frivolous and unfounded refusal to pay a claim."[14]

"Penalties for bad faith are not authorized where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact."[15] The issue is thus whether the insurance company had "reasonable and probable cause for refusing to pay a claim."[16]

The existence of a factual dispute regarding the merits of the claim will generally provide a complete defense to a first party bad faith claim.[17] Bona fide disputes concerning liability or damages should also preclude the imposition of bad faith penalties.[18] First party bad faith claims will also fail in cases involving "doubtful" questions of law.[19]

Although the defenses available to insurers in these cases are substantial and often lead to summary judgments or directed verdicts for the insurer, there are still multiple cases in which juries rejected the insurer's claims of reasonable cause to deny payment and imposed bad faith sanctions. In one case, denial of a burglary loss claim led to bad faith penalties despite evidence of lack of forced entry and inconsistencies in the claimants' stories.[20] The trial court had concluded that the insurer's intransigence and its tainted investigation, which overshadowed the lack of evidence of a staged burglary, warranted bad faith penalties. The Court of Appeals affirmed because the inconsistencies in the claimants' stories were minor, and the evidence did not show a staged burglary. In another case, a bad faith verdict was affirmed because there was evidence that the insurer had failed to properly investigate the claimant's theory of loss in a collision coverage claim.[21] Inadequate investigation also played a prominent role in an award of bad faith sanctions in a case involving denial of payment for medical expense reimbursement under the former No-fault Act.[22] In that case, the insurer refused to pay for treatment based on the adjuster's subjective opinions about the relation of treatment to the accident and the alleged billing excessiveness and the competency of a treating physician, without making a real attempt to properly investigate the validity of the medical expenses.

Independent professional reviews that support the denial of a claim will generally, but not always, defeat bad faith liability. Independent medical evaluations (IME) often produce expert opinions which will prompt denial or termination of insurance benefits and at the same time, insulate an insurer from bad faith exposure. Indeed, in one case, an insurer denied a claim based on the opinion of a doctor who had been hired by a consultant for the insurance company, yet despite the issue of potential bias, the insurance company was still insulated from bad faith penalties.[23] Notwithstanding reliance upon an IME opinion, however, bad faith liability can still result in these cases where the insurer timely learns that the doctor's opinion was "patently wrong" or where the IME was a "mere pretext for an insurer's unwarranted prior decision to terminate benefits."[24]

The remedies of O.C.G.A. § 33-4-

6 are considered exclusive.[25] Consequential damages due to delay in responding to claims are thus not recoverable.[26] Likewise, litigation expenses under O.C.G.A. § 13-6-11, and punitive damages under O.C.G.A. § 51-12-5.1 are not recoverable in a first party bad faith action.[27]

THE UNINSURED MOTORIST PENALTY STATUTE

O.C.G.A. § 33-7-11(j) provides for similar penalties and attorney's fees upon proof that an insurance carrier has refused to pay an uninsured motorist (UM) coverage claim "in bad faith." Although there are far fewer appellate decisions addressing bad faith in the UM context, UM bad faith has been described by the Court of Appeals in the same terms as bad faith under the first party penalty act. One such UM bad faith opinion quoted directly from a decision involving the first party bad faith statute stated that, "Refusal to pay in bad faith means a frivolous and unfounded denial of liability. If there is any reasonable ground for the insurer to contest the claim, there is no bad faith."[28] Given the similarities in the two statutes and the lack of case law drawing distinctions between the two, the large body of law defining the parameters of bad faith under Code section 33-4-6 should continue to provide reliable guidance as to what is and is not "bad faith" in handling UM claims.

The sanctions of the UM penalty statute are only available to insured UM claimants. The uninsured motorist defendant, therefore, while often deriving benefit from the existence of UM coverage, has no standing to seek penalties or otherwise complain when UM carriers fail to pay the claim, even if in bad faith, and even if the insurance company has exercised its right to answer suit in the name of the uninsured motorist.[29]

The sanctions available for bad faith include a monetary penalty and attorney's fees. However, the UM penalty statute limits the penalty recovery to not more than 25 percent of the UM claim recovery, rather than the general penalty statute's recently increased limit of

the greater of 50 percent or $5,000.[30]

The UM penalty statute also provides for recovery of reasonable attorney's fees, but whereas the general statute bases fees on those incurred "for the prosecution of the action against the insurer,"[31] O.C.G.A. § 33-7-11(j) is less specific, referring instead to fees incurred "for the prosecution of the case under this Code section." It is unclear exactly what is meant by the term "this Code section," since the penalty provision appears as one of several sub-parts of the comprehensive Code section governing uninsured motorist policies and claims. As such, the legislature's choice of wording could be taken to mean fees incurred in prosecution of the case against the uninsured motorist, fees incurred in a later prosecution of a suit for penalties against the insurer, or both. The appellate courts have yet to address this issue directly.

General penalty provisions such as those provided by O.C.G.A. § 13-6-11 and the punitive damages statute cannot be recovered where the general assembly has specifically provided a procedure and a penalty for non-compliance. Therefore, punitive damages are not recoverable in a UM bad faith action and a claim for litigation expenses is limited to the attorney fees remedy in the UM penalty statute.[32]

Like the general penalty statute, the UM statute requires a demand for payment of a loss and a refusal of the insurer to pay the claim within 60 days after the demand. Before 1989, there was a common belief that 60 day demands on UM carriers could not be made until after a judgment had been obtained against the uninsured motorist. In *Lewis v. Cherokee Insurance Company*,[33] however, the Georgia Supreme Court held that although a Plaintiff is required to first obtain a judgment against the uninsured motorist before filing suit for bad faith, a judgment against the uninsured motorist is not a prerequisite to submitting a demand for payment of a UM claim. The Court reasoned that the penalty statute should not be construed to permit an insurer to wait until the insured obtains a judgment against the uninsured motorist before considering the merits of the claim. Instead, the UM insurer must pay valid claims within 60 days of the demand for payment, even though months or years may pass before the insured obtains judgment against the uninsured motorist.[34] The Supreme Court noted that its holding was consistent with the UM statute's purpose of encouraging insurers to make a good faith examination and promptly pay all valid claims.[35]

NEGLIGENT OR BAD FAITH HANDLING OF LIABILITY INSURANCE CLAIMS

Although the remedies for bad faith in first party and UM coverage cases have been narrowly confined to percentage penalties and attorney fees, and insurers providing such coverage have received generally kind treatment in the appellate courts, the exposure insurers face for mishandling liability insurance claims is much broader.

Exactly what the term "bad faith" means in the liability insurance setting has never been clearly stated. In other contexts, such as claims for litigation expenses under O.C.G.A. § 13-6-11, the courts have indicated that, "bad faith is not simply bad judgment or negligence, but it imports a dishonest purpose or some moral obliquity, and implies conscious doing of wrong, and means breach of known duty through some motive of interest or ill-will."[36] ". . .[T]he term 'bad faith' has a meaning which is the opposite of good faith. It means bad purpose, bad intent, bad state of knowledge or desire."[37] A liability insurer's conduct need not always involve true "bad faith," however, for breach of duty to result in substantial liability beyond its coverage limits. Although the term "bad faith" is often used generically to describe the cause of action for failure to settle, an insurer's tort liability can in fact result from mere ordinary negligence.

The general legal standards governing the conduct of liability insurers in connection with settlement activity were summarized by the Supreme Court in the final chapter of what is now viewed as seminal Georgia appellate litigation on bad faith failure to settle, *Southern General Insurance Company v. Holt*.[38]

An insurance company may be liable for damages to its insured for

failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. . . In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interest of the insured. . . The jury generally must decide whether the insurer, in view of the existing circumstances, has accorded the insured "the same faithful consideration it gives its own interest."[39]

The *Holt* litigation attracted a lot of attention at the time because it produced the first Georgia appellate decisions condoning the use of a time-limited deadline within which a settlement demand had to be accepted. Although the Supreme Court eventually found that merely failing to settle within such a deadline cannot be the sole basis for imposing liability, it also held that a liability insurer has a duty to its insured to agree to a demand for settlement within policy limits, time limited or otherwise, if the company has knowledge of clear liability and special damages exceeding the policy limits.[40]

In the Court of Appeals, the *Holt* litigation also highlighted other potential trouble-spots for liability insurers. It noted the insurer's failure to communicate with the plaintiff's attorney during the settlement offer period in order to accept, reject, counteroffer or at least request an extension of time.[41] Also significant was the insurer's failure to inform its insured that the injured party was considering bringing suit, had provided documents indicating that damages might exceed the policy limits, or that an offer to settle within policy limits had been made.[42] The Court of Appeals was also troubled by Southern General's failure to act in response to the time limited demand due to rigid adherence to internal operating procedures. These bureaucratic procedures failed to recognize the relative weight of different claims and had the effect of elevating the insurance company's interest in the uniform management of it's claims process over its insured's interest in having potential financial ruin avoided.[43] Although the decision of the Court of Appeals was later reversed in part on the issue of whether an insured could recover punitive damages after assigning their compensatory damages claim to the accident case plaintiff, the Court's analysis of the ways in which Southern General had failed its insured continues to be instructive in identifying conduct that can lead to excess and even punitive damages liability for failure to settle.

For several years following the *Holt* decisions there was little Georgia appellate activity involving the topic of liability insurance bad faith. Two recent cases, however, likely signal a trend towards expanding the exposure liability insurers face when dealing with settlement opportunities.

The first case, *Thomas v. Atlanta Casualty Company*,[44] involved the dilemma insurers can face in

weighing the risk of bad faith sanctions for unreasonably exposing an insured to liability over coverage limits against the benefits of asserting potential coverage defenses which could entirely eliminate the insurer's liability on the claim. In *Thomas*, the policyholder had failed to provide notice that she had been served with suit, but the plaintiff's attorney had provided notice directly to the insurance company. The lawsuit was not initially defended and the plaintiff eventually obtained a default judgment for an amount in excess of Atlanta Casualty's coverage limits. Thereafter, Atlanta Casualty was given an opportunity to settle for policy limits, but opted to pursue a declaratory judgment based on the lack of notice from the insured. The declaratory judgment complaint was then met with a counterclaim for bad faith. Atlanta Casualty eventually obtained summary judgment on the bad faith counterclaim, but the Court of Appeals reversed and even suggested that punitive damages might be appropriate.

Judge Eldridge's opinion in *Thomas* also suggested that there is a fiduciary relationship between a liability insurer and insured.[45] While in so doing, he cited earlier appellate decisions which had not gone this far, nonetheless, if Judge Eldridge's conclusion is followed in future cases the implications for expanded liability would be considerable. Fiduciary relationships impose duties and obligations to communicate which are much greater than the duty to exercise ordinary care and give equal consideration to an insured's interests. That the relationship is truly a fiduciary one, however, is not yet established in Georgia law. At most, one early bad faith decision described the relationship as, "somewhat of a fiduciary one."[46] Moreover, decisions in other areas of insurance litigation have repeatedly found that, "no fiduciary or confidential relationship exists between an insured and the insurer and its agents."[47] It thus remains to be seen whether Judge Eldridge's characterization of the relationship will be followed in future bad faith cases.

An even more troubling decision for liability insurers is the recent case of *Cotton States Mutual Insurance Company v. Brightman*.[48] As with *Thomas*, *supra*, the opinion of the Court of Appeals in *Brightman* was not unanimous and thus was not binding precedent.[49] Cotton States appealed to the Georgia Supreme Court, however, which in a very unusual move, first denied certiorari, but then reconsidered and agreed to hear the case. When the dust had settled in the Supreme Court, Cotton States had not only lost again, but had created binding precedent when the excess judgment was affirmed with all justices concurring.

The *Brightman* plaintiff was seriously injured in an automobile accident and sued the other driver and the owner of the other vehicle. There was evidence that the defendant driver was speeding and perhaps driving under the influence of marijuana. On the other hand, the plaintiff turned in front of the other driver, raising legitimate comparative negligence and causation questions. Before the accident lawsuit was filed, the plaintiff offered to settle for Cotton States' policy limits, but the offer was refused based upon this liability dispute. Later evidence developed during discovery seriously weakened the liability defense, but unlike the facts in earlier cases, this was never a case of indisputable liability. During the litigation, the parties participated in non-binding arbitration which resulted in an award far exceeding the available coverage.[50] The plaintiff's lawyer then gave Cotton States a second opportunity to settle by serving a 10 day, time-limited settlement demand for its coverage limits which was, however, conditioned on a second insurer also paying its policy limits. Cotton States requested more time to respond, but this was refused and the deadline lapsed without a response from Cotton States.[51] Several weeks after the deadline had expired, Cotton States finally

In Thomas, the policyholder had failed to provide notice that she had been served with suit, but the plaintiff's attorney had provided notice directly to the insurance company.

offered to pay its limits, but the plaintiff's lawyer now refused to settle. The evidence was in dispute as to whether Cotton States' insured opposed settlement. After a substantial excess verdict was returned in the accident case, Cotton States' insured assigned any claim for bad faith to the injured plaintiff.[52] The bad faith lawsuit then resulted in a verdict for the full amount of the excess judgment plus interest.

On appeal, Cotton States argued that it was justified in refusing to accept the first unconditional settlement demand because there were legitimate liability defenses, and in refusing the second, post-suit settlement demand because it was conditioned on the actions of another insurer over which it had no control. Nonetheless, both the Court of Appeals and the Supreme Court found that the jury was authorized to find that Cotton States had breached its duties to its insured by not tendering its policy limits and affirmed the bad faith award. Neither appellate court specifically addressed whether conflicting evidence on who was at fault would have sufficed to avoid excess liability had there been only one pre-suit demand. Instead, they focused on whether the conditional nature of the second demand would preclude liability. Construing the evidence in favor of the bad faith case plaintiff, the Supreme Court found a jury issue on breach of duty based upon the fact that by the time the second demand was made, the police had concluded that Cotton States' insured was partially at fault, the claimed damage exceeded its policy limits, and the arbitration panel had expressed such a high opinion of the case value.[53] That there had been a conditional demand was insufficient to resolve, as a matter of law, that the insurance company had acted reasonably and like an ordinary prudent insurer in declining to tender its policy limits.[54]

The *Brightman* decisions now demonstrate, however, that even in cases involving bona fide liability disputes there can still be liability for negligent failure to settle within coverage limits.

After *Brightman*, liability insurers must now avoid multiple new hazards in dealing with settlement demands. First, the *Brightman* opinions implicitly condone the use of 10 day, time-limited settlement demands, even if the plaintiff refuses to grant an extension despite a timely request. Until now, many insurers would have believed that there was some protection in simply requesting extensions of narrow time limits.

Second, insurers have also historically felt safe in contesting rather than settling most cases where the evidence concerning liability was in dispute. This was due in no small part to the *Holt* decisions, in which much of the appellate courts' focus had been on the fact that there was clear liability for the accident. The *Brightman* decisions now demonstrate, however, that even in cases involving bona fide liability disputes there can still be liability for negligent failure to settle within coverage limits.

Third, insurers have also generally believed that before there could be bad faith exposure, a settlement demand needed to be unconditional. *Brightman* shows, however, that even conditional demands can require counteroffers to pay coverage limits. Although the Supreme Court was unwilling to impose a duty to make a counteroffer to every settlement demand that includes a condition beyond the insurer's control,[55] and clearly rejected the Court of Appeals' suggestion that insurers have an affirmative duty to engage in negotiations concerning settlement demands for more than coverage limits,[56] the Court had no trouble finding that the inclusion of a condition that the second insurer also pay its limits did not preclude the jury's consideration of whether Cotton States had acted reasonably in declining to tender its own policy limits.[57] On the other hand, the Court noted that an insurer faced with such a demand involving multiple insurers can create a "safe harbor" from liability on a bad faith claim by meeting the portion of the demand over which it has control.[58]

The *Brightman* decision also summarized and further explained the duties of care which the Supreme Court had discussed some 11 years earlier in its *Holt* decision.

Judged by the standard of the ordinarily prudent insurer, the insurer is negligent in failing to settle if the ordinary prudent insurer would consider choosing to try the case created an unreasonable risk. The rationale is that the interests of the insurer and the insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy. The insured is interested in protecting itself against an excess judgment; the insurer has less incentive to settle because litigation may result in a verdict below the policy limits or a defense verdict. . . . The holding in *Holt* was consistent with the general rule that the issue of an insurer's bad faith depends on whether the insurance company acted reasonably in responding to a settlement offer.[59]

If the earlier decisions left any doubt, *Brightman* has clearly confirmed that liability for failure to settle can be based on ordinary negligence. Moreover, as Cotton States learned the hard way, the Court sent a strong and unanimous message to insurers that breach of duty can lead to substantial excess exposure even in cases where accident liability is disputed, settlement demands are not unconditional, and deadlines for acceptance are rather short and inflexible. The lack of dissent in the Supreme Court will also likely give liability insurers much to ponder before seeking appellate review of jury decisions in future bad faith cases.

GEORGIA'S NEW STATUTE ALLOWING DIRECT ACTIONS FOR BAD FAITH IN FAILING TO SETTLE AUTOMOBILE LIABILITY CLAIMS FOR PROPERTY DAMAGE

Direct actions by accident victims against insurers for failing to settle liability insurance claims are not allowed in most cases.[60] The 2001 legislative session, however, passed a new law which now allows direct actions for bad faith failure to settle liability claims for damage to motor vehicles. The new Section 33-4-7[61] should now create powerful incentives for liability insurers to settle automobile accident property damage claims quickly and fairly. It may also remedy some of the problems inherent in the common disparity in bargaining power between unrepresented automobile accident victims and large insurance companies betting that many property damage claimants will be unwilling or unable to hire lawyers and sue for only property damage.

This new statute imposes an affirmative statutory duty on liability insurers to adjust property loss claims fairly and promptly, to make a reasonable effort to investigate and evaluate these claims, and where liability is reasonably clear, to make a good faith effort to settle.[62] An insurer found to have breached this duty can be held liable to pay the claimant, in addition to the loss, a penalty of up to 50 percent of the liability of the insured for the loss or $5,000, *whichever is greater*, plus all reasonable attorney fees incurred in prosecuting the action.[63]

Like the first party penalty act and the UM penalty statute, section 33-4-7 requires a demand for payment and gives the insurance company a 60 day period within which to pay the claim.[64] This demand must be in writing, must offer to settle for an amount certain, and must be sent to the insurer by certified mail or statutory overnight delivery.[65]

If the claim is not paid within the 60 day grace period, the claimant can then sue the other driver and serve a copy of the lawsuit on the insurer, which participates as an unnamed party.[66] To recover the penalty, the claimant must first

recover an amount equal to or greater than the amount of the demand.[67] The involvement of the insurance company is also not disclosed to the jury until there has been a verdict equal to or greater than the amount of the demand. Should such a verdict be returned, the trial is then recommenced in order for the judge or jury to receive evidence and make a determination as to whether bad faith existed.[68]

Insurers may argue that "bad faith" under this statute should be measured in the same way that bad faith has been measured under the first party penalty and UM penalty statutes, namely, a frivolous and unfounded denial of the claim must have occurred. So far, no reported appellate decisions have applied this or any other definition to the new law. Arguably, however, proof of bad faith under this statute should be much easier. Although subsection (d) of the statute calls for the trier of fact to receive evidence and make a determination that bad faith existed, subsection (c) says that a claimant *shall* be entitled to recover penalties and attorney's fees if a proper demand has been delivered, the insurer has refused to settle within 60 days of receipt of the demand, and the claimant ultimately recovers an amount equal to or in excess of the claimant's demand. Proof of bad faith in cases under this section should thus require nothing more than proof of demand, expiration of 60 days, and an award equal to or greater than the amount demanded.

CONCLUSION

Despite well known standards of care to which insurers must conform, and the sometimes considerable risks they face when claims are not settled, it is inevitable that in the sheer volume of claims and limited resources of insurance claim offices,

some claims will fall through the cracks, with injurious consequences to both claimants and insureds. It is also likely that escalating pressures to keep a tight grip on corporate purse strings will sometimes lead to conscious decisions to place an insurance company's desire to maintain profitability ahead of its obligations to protect insureds from personal exposure or otherwise to do the right thing. Litigation concerning whether an insurer has acted unreasonably or in bad faith in evaluating claims and responding to settlement demands is thus bound to continue, and in fact increase. Even as the push towards a patients' bill of rights appears to have lost some momentum at the federal level, the Georgia legislature has been willing to increase penalties for first party bad faith and has enacted powerful new direct remedies for bad faith in connection with auto liability claims for property damage. Recent appellate decisions also now suggest that both the Court of Appeals and Supreme Court will likely be less and less forgiving of liability insurers who make the wrong choices in their settlement positions. Armed with a better awareness of what is involved and at stake in these areas, we can all better serve our clients on whichever side of the "vs." they may find themselves.

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Endnotes

1. O.C.G.A. § 33-4-6 (2002 Supp.).
2. *See* Clarke v. Unum Life Ins. Co. of America, 14 F.Supp.2d 1351 (S.D. Ga. 1998). *See generally* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Walker v. Southern Company Services, Inc., 279 F.3d 1289 (2002); Gilbert v. Alta Health & Life Ins. Co., 276 F.3d 1292 (11th Cir. 2001); Amos v. Blue Cross-Blue Shield of Ala., 868 F.2d 430 (11th Cir. 1989).
3. American Assn. of Cab Companies, Inc. v. Olukoya, 233 Ga. App. 731, 738, 505 S.E.2d 761, 767 (1998).
4. Southern General Insurance Company v. Kent, 187 Ga. App. 496, 498, 370 S.E.2d 663, 665 (1988).
5. Stedman v. Cotton States Insurance Co., 254 Ga. App 325, 327, 562 S.E.2d 256, 258 (2002).
6. *Id.*
7. Primerica Life Insurance Company v. Humfleet, 217 Ga. App. 770, 458 S.E.2d 908 (1995).
8. Steadman, 254 Ga. App. at 328, 562 S.E.2d at 259.
9. *Id.*
10. Brown v. Ohio Casualty Insurance Company, 239 Ga. App. 251, 253, 519 S.E.2d 726, 728 (1999), *citing* Blue Cross and Blue Shield v. Merrell, 170 Ga. App. 86, 87, 316 S.E.2d 548, 549 (1984).
11. Cagle v. State Farm Fire & Casualty Company, 236 Ga. App. 726, 727, 512 S.E.2d 717, 718 (1999).
12. Dixie Construction Products, Inc. v. WMH, Inc., 179 Ga. App. 658, 659, 347 S.E.2d 303, 304 (1986).
13. Moon v. Mercury Insurance Company of Georgia, 253 Ga. App. 506, 507, 559 S.E.2d 532, 534 (2002).
14. United Services Automobile Association v. Carroll, 226 Ga. App. 144, 148, 486 S.E.2d 613, 616 (1997).
15. Moon, 253 Ga. App. at 507, 559 S.E.2d at 534-535.
16. *Id,* 253 Ga. App. at 507, 559 S.E.2d at 535.
17. *See* Southern Fire & Casualty Insurance Company v. Northwest Georgia Bank, 209 Ga. App. 867, 868, 434 S.E.2d 729, 730 (1993).
18. *See* Norfolk and Dedham Insurance Company v. Cumbaa, 128 Ga. App. 196, 199, 196 S.E.2d 167, 170 (1973), *U.S.* Fidelity and Guarantee Company v. Biddy Lumber Company, 114 Ga. App. 358, 151 S.E.2d 466 (1966). *See also* Georgia Farm Bureau Mutual Insurance Company v. Boney, 113 Ga. App. 459, 460, 148 S.E.2d 457, 460 (1966) (If there is a reasonable basis for doing so, an insurer is entitled to maintain its position as to the amount of its liability without the imposition of penalties.).
19. Schoen v. Atlanta Casualty Company, 200 Ga. App. 109, 111, 407 S.E.2d 91, 92 (1991).
20. Cincinatti Insurance Company v. Kastner, 233 Ga. App. 594, 504 S.E.2d 496 (1998).
21. Georgia Farm Bureau Mutual Insurance Company v. Murphy, 201 Ga. App. 676, 411 S.E.2d 791 (1991) (The claimant had alleged that her car was totaled in a collision with a tree, but the the insurer's investigation had focused almost exclusively on post-collision damage for which it was not responsible, but which would have been irrelevant if the vehicle was already a total loss from the initial collision.).
22. American Association of Cab Companies, Inc. v. Olukoya, 233 Ga. App. 731, 505 S.E.2d 761 (1998)
23. Shaffer v. State Farm Mutual Automobile Insurance Company, 246 Ga. App. 244, 245, 540 S.E.2d 227, 228 (2000)
24. *See* Wallace v. State Farm Fire & Casualty Company, 247 Ga. App. 95, 97 & n.6, 539 S.E.2d 509, 511 (2000).

25. Anderson v. Georgia Farm Bureau Mutual Insurance Company, 255 Ga. App. 734, 737, 566 S.E.2d 342, 345 (2002); Collins v. Life Insurance Company of Georgia, 228 Ga. App. 301, 304, 491 S.E.2d 514, 517 (1997).
26. Anderson, at *id*.
27. United Services Automobile Association v. Carroll, 226 Ga. App. 144, 149, 486 S.E.2d 613, 617 (1997).
28. St. Paul Fire and Marine Insurance Company v. Goza, 137 Ga. App. 581, 584, 224 S.E.2d 429, 431 (1976), *citing* Dependable Insurance Company v. Gibbs, 218 Ga. 305, 316, 127 S.E.2d 454, 461 (1962).
29. Jones v. Southern Home Insurance Company, 135 Ga. App. 385, 389, 217 S.E.2d 620, 623 (1975). *See also* Nationwide Mutual Insurance Company v. Turner, 135 Ga. App. 551, 554, 218 S.E.2d 276, 278 (1975) (UM carrier has no duty to protect uninsured motorist from liability for judgments in excess of the amount of available insurance.).
30. O.C.G.A. § 33-7-11(j).
31. *Id.*, § 33-4-6.
32. McCall v. Allstate Insurance Company, 251 Ga. 869, 872, 310 S.E.2d 513, 515-16 (1984). *See also* United Services Automobile Association v. Carroll, 226 Ga. App. 144, 149, 486 S.E.2d 613, 617 (1997).
33. Lewis v. Cherokee Insurance Company, 258 Ga. 839, 375 S.E.2d 850 (1989).
34. *Id.*, 258 Ga. at 840-41, 375 S.E.2d at 851.
35. *Id.*, 258 Ga. at 841, 375 S.E.2d at 851-52.
36. Jennings Enterprises, Inc. v. Carte, 224 Ga. App. 538, 541, 481 S.E.2d 541, 545 (1997). *See also* Rapid Group, Inc. v. Yellow Cab of Columbus, Inc., 253 Ga. App. 43, 49, 557 S.E.2d 420, 426 (2001) ("...bad faith cannot be prompted by an honest mistake as to one's rights or duties but must result from some interested or sinister motive").
37. Smith v. Maples, 114 Ga. App. 529, 151 S.E.2d 815 (1966).
38. Southern Gen. Ins. Co. v. Holt, 262 Ga. 267, 416 S.E.2d 274 (1992).
39. *Id.*, 262 Ga. at 268, 416 S.E.2d at 276, *citing* U.S. Fidelity & Guaranty Co. v. Evans, 116 Ga. App. 93, 156 S.E.2d 809 (1967).
40. *Id*. at 269.
41. Southern Gen. Ins. Co. v. Holt. 200 Ga. App. 759, 761, 764, 769, 409 S.E.2d 852, 855, 858, 861 (1991), *aff'd in part and rev'd in part on other grounds*, 262 Ga. 267, 416 S.E.2d 274 (1992).
42. *Id.,* 200 Ga. App. at 761, 769, 409 S.E.2d at 855, 861.
43. *Id.,* 200 Ga. App. at 761, 764, 769, 409 S.E.2d at 855, 858, 861.
44. Thomas v. Atlanta Casualty Company, 253 Ga. App. 199, 558 S.E.2d 432 (2001).
45. Thomas, 253 Ga. App. at 206, 558 S.E.2d at 339.
46. United States Fidelity and Guaranty Company v. Evans, 116 Ga. App. 93, 95, 156 S.E.2d 809, 811 (1967).
47. State Farm Fire & Casualty Company v. Fordham, 148 Ga. App. 48, 51, 250 S.E.2d 843, 845 (1978); Fowler v. Prudential Property & Casualty Insurance Company, 214 Ga. App. 766, 767, 449 S.E.2d 157, 158 (1994); Holland v. State Farm Mutual Automobile Insurance Company, 182 Ga. App. 405, 407, 356 S.E.2d 50, 52 (1987). *See also* Modern Woodmen of American v. Crumpton, 226 Ga. App. 567, 569, 487 S.E.2d 47, 49 (1997) (life insurance); Walsh v. Campbell, 130 Ga. App. 194, 198-199, 202 S.E.2d 657, 661 (1973) (uninsured motorist coverage).
48. Cotton States Mutual Insurance Company v. Brightman. 256 Ga. App. 451, 568 S.E.2d 498 (2002), *cert. denied* Sept. 16, 2002, *cert. granted* Oct. 28, 2002, *aff'd* 276 Ga. 683, 580 S.E.2d 519 (2003).
49. Georgia Court of Appeals Rule 33(a).
50. 276 Ga. at 684, 580 S.E.2d at 520 (The arbitration panel awarded $2,000,000.).
51. 256 Ga. App. at 452,568 S.E. 2d at 499.
52. 276 Ga. at 684, 580 S.E.2d at 520 (The verdict was for nearly $1,800,000 which exceeded available coverage by $1,387,500).
53. 276 Ga. at 687, 580 S.E.2d at 522.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. Brightman, 276 Ga. at 685, 580 S.E.2d at 521 (footnotes omitted).
60. Metropolitan Property & Casualty Insurance Company v. Krump, 237 Ga. App. 96, 513 S.E.2d 33 (1999) (rejecting direct claims using garnishment); Richards v. State Farm Mutual Automobile Insurance Company, 252 Ga. App. 45, 555 S.E.2d 506 (2001) (rejecting direct actions based on third party beneficiary theory).
61. O.C.G.A. § 33-4-7 (2002 supp.).
62. *Id.*, at (a).
63. *Id.*
64. *Id.*, at (c).
65. *Id.*
66. *Id.*, at (d).
67. *Id.*
68. *Id.*

A Look at the Law

By Michael B. Kent Jr.

Qualified Immunity in the Eleventh Circuit After *Hope v. Pelzer*

The defense of qualified immunity protects government officials performing discretionary functions from liability, trial, and other burdens of civil litigation (such as discovery), as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."[1] This defense, which ultimately derives from the common law immunity enjoyed by judicial officers[2], plays a significant role in lawsuits alleging constitutional or civil rights violations by officials of local governments.[3] In situations where officials are forced to make quick decisions under volatile circumstances — for example, when a police officer must use force to effect an arrest — the defense is particularly necessary to balance the rights of individuals legitimately falling victim to abuse of power against the costs that insubstantial litigation imposes on society.[4]

Since 1982, when the Supreme Court established the contemporary formula for granting qualified immunity, the Eleventh Circuit Court of Appeals has frequently been called upon to define the contours of the defense as it applies to government officials in Georgia, Florida and Alabama. Over the course of time, the Eleventh Circuit's decisions gave a distinct shape to the doctrine of qualified immunity and rendered the defense the decisive issue in most cases alleging civil rights violations by government officials. As the court explained as recently as 2001: "A government-officer defendant is entitled to qualified immunity unless, at the time of the incident, the 'preexisting law dictates, that is, truly compel[s],' the conclusion for all reasonable, similarly situated public officials that what Defendant was doing violated Plaintiffs' federal rights in the circumstances."[5] Although circumstances clearly existed under which qualified immunity would be denied, government officials could find comfort that, in most cases, their entitlement to qualified immunity would be upheld.

In July 2002, however, the Supreme Court issued a decision that threatened the stability of the Eleventh Circuit's qualified immunity jurisprudence and raised several questions about the doctrine's applicability in the states that comprise the Eleventh Circuit. In *Hope v. Pelzer*[6] — a case where a panel of the Eleventh Circuit had affirmed the district court's grant of qualified immunity — the Supreme Court held that the defense was not applicable and accused the Eleventh Circuit of imposing a "rigid gloss on the qualified immunity standard."[7] The decision in *Hope* potentially dealt a harsh blow to twenty years' worth of case law, as well as to the rules under which qualified immunity in the Eleventh Circuit was analyzed. Since *Hope*, however, the Eleventh Circuit has indicated that those rules, and the defense of qualified immunity, are very much alive and well despite premature reports to the contrary.

This article explains the law of qualified immunity in the Eleventh Circuit prior to the *Hope* decision and examines how the fundamental characteristics of that law were called into question by *Hope*. This article also examines the Eleventh Circuit's post-*Hope* decisions, demonstrating that the substance of qualified immunity in the Eleventh Circuit essentially remains the same.

QUALIFIED IMMUNITY IN THE ELEVENTH CIRCUIT PRIOR TO HOPE

In *Harlow v. Fitzgerald*, the Supreme Court laid down the general rule that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[8] Abandoning prior precedent that largely analyzed qualified immuni-

"government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

ty by looking to the subjective intent of the official, the Court announced that, from that point forward, the entitlement to qualified immunity would depend primarily on objective factors.[9] The Court explained that its new test struck the proper balance between the competing interests underlying most civil rights litigation. Where an individual's rights are clearly established, the official can be expected to know whether his conduct violates those rights, and he should be subject to liability. On the other hand, where an individual's rights are not clearly established, the public interest is better served by allowing the official to perform his duties "with independence and without fear of consequences."[10]

At first, the Eleventh Circuit seemed slow to adopt the new *Harlow* formula for qualified immunity[11], but the court clearly had become a believer by 1994 when it issued its en banc decision in *Lassiter v. Alabama A&M University*.[12] Latching on to *Harlow*'s rationale that an official can be charged with knowing whether his conduct violates a "clearly established" right, the court undertook to define what "clearly established" meant in the objective context of qualified immunity. Noting that "government agents are not always required to err on the side of caution," the court explained that rights generally are clearly established only when they previously have been developed in "such a concrete and factually defined context to make it obvious to all reasonable government actors, in the [official's] place, that 'what he is doing' violates federal law."[13] What this means in real life, according to the *Lassiter* court, is that a civil rights plaintiff cannot defeat the qualified immunity defense by pointing to general propositions and abstractions, such as a requirement that the official act reasonably.[14] Rather, to defeat qualified immunity, the rights at issue must have been defined by prior cases, the facts of which, although not required to be identical, must be "materially similar" to the facts of the case being decided.[15] Put differently, "[f]or qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*."[16]

The *Lassiter* formulation of qualified immunity itself became "clearly established" in the Eleventh Circuit, although the court did add two clarifications and one corollary. In *Jenkins v. Talladega City Board of Education*[17] — an opinion that explicitly reaffirmed *Lassiter*'s "guiding directives for deciding cases involving. . . qualified immunity"[18] — the en banc court clarified that the law could be clearly established only by decisions from the U.S. Supreme Court, the Eleventh Circuit itself, or the highest court of the state where the case arose.[19] Similarly, in *Hamilton v. Cannon*, the court clarified that only the holdings of such cases, as opposed to *dicta* contained in an opinion, could clearly establish the law for purposes of qualified immunity.[20] Finally, in *Smith v. Mattox*, the court noted an important corollary to the *Lassiter* rule: a controlling and factually similar case is not necessary to defeat the qualified immunity defense if "the official's conduct lies so obviously at the very core of what the [statute or Constitution] prohibit..... that the unlawfulness of the conduct was readily apparent to the official."[21] Such cases, however, represent a "slender category" of qualified immunity jurisprudence.[22]

These rules — the *Lassiter* test, the *Jenkins* and *Hamilton* clarifications, and the *Smith* corollary — were reaffirmed in the court's 2001 en banc decision in *Marsh v. Butler County*.[23] Thus, roughly twenty years after *Harlow*, the Eleventh Circuit had developed a stable body of qualified immunity law consisting of the following rules: (1) to defeat a defense of qualified immunity, preexisting case law with materially similar facts generally must compel the conclusion that all reasonable officials in the defendant's position would understand that the conduct in question violates federal rights; (2) only case law from the U.S. Supreme Court, the Eleventh Circuit, or the highest court of the relevant state can clearly establish the law; (3) only the holdings of such case law, and not the *dicta* contained in judicial opinions, are useful in the qualified immunity analysis; (4) preexisting case law is *not required* in the narrow category of cases where the official's misconduct obviously affects the very core of the rights at issue; and

(5) the official's entitlement to qualified immunity is the usual rule.

THE SUPREME COURT'S DECISION IN *HOPE V. PELZER*

Almost a year after *Marsh*, these rules were called into question by the Supreme Court's opinion in *Hope v. Pelzer*, which reversed the Eleventh Circuit's grant of qualified immunity. *Hope* involved an Eighth Amendment claim brought by an Alabama inmate alleging that prison guards restrained him on a hitching post for seven hours without water as punishment for disruptive conduct.[24] A panel of the Eleventh Circuit decided that the guards' actions in cuffing the inmate to the hitching post violated the Eighth Amendment.[25] Nonetheless, because preexisting case law had not established a bright-line rule against such actions, the Eleventh Circuit held that the guards were entitled to qualified immunity.[26] Calling the Eighth Amendment violation "obvious," the Supreme Court agreed that the use of the hitching post violated the inmate's constitutional right to be free from cruel and unusual punishment.[27] However, the Court rejected the Eleventh Circuit's holding — and more importantly, its analysis — with regard to qualified immunity.[28]

The Court began its qualified immunity discussion by criticizing the Eleventh Circuit for requiring preexisting cases with materially similar facts to defeat the guards' qualified immunity defense. Although acknowledging that the unlawfulness of the guards' actions must have been apparent in light of preexisting law,[29] the Court nonetheless accused the Eleventh Circuit of placing a "rigid gloss on the qualified immunity standard."[30] What the "clearly established" requirement means, according to the Court, is that an official is entitled to "fair warning" that his or her conduct deprives the victim of a federal right,[31] and "fair warning" can be given "even in novel factual circumstances."[32] Thus, the salient question was not whether the inmate could point to materially similar facts, but whether the state of the law at the time of the hitching post incident gave the guards "fair warning" that their actions violated the inmate's Eighth Amendment rights.[33] The Court held that it had.

Exactly how the guards received such warning, however, remains ambiguous from the Court's opinion. As noted, in deciding whether the guards had deprived the inmate of his constitutional rights, the Court described the constitutional violations as "obvious."[34] In addressing whether the guards had received fair warning that their conduct was unlawful, the Court again explained that their actions constituted "a clear violation of the Eighth Amendment."[35] The Court strongly suggested that, given the clarity and obviousness of the violation, the general principles of law laid down in the Court's prior Eighth Amendment cases were sufficient to provide fair warning.[36] Thus, the case appeared to fall within the slender category of cases captured by the Eleventh Circuit's corollary from

Smith v. Mattox — i.e., the guards' misconduct went to the very core of the Eighth Amendment's prohibition against cruel and unusual punishment — and the Court simply could have decided that the Eleventh Circuit failed to apply its own precedent in this regard. The Court did not discuss the *Smith v. Mattox* corollary, however, presumably because the Eleventh Circuit panel that decided the case failed to do so. Accordingly, while the Supreme Court's description of the case seemed to fit the *Smith v. Mattox* exception to the requirement for materially similar prior cases, the Court never addressed that exception or even acknowledged that it existed.[37]

Instead, the Court proceeded to explain that — in addition to the fair warning offered by the general principles underlying the Eighth Amendment — the guards also had received fair warning from other sources: (1) binding Eleventh Circuit precedent holding that several forms of corporal punishment, including handcuffing inmates to a fence, violated the Eighth Amendment;[38] (2) *dicta* from an Eleventh Circuit opinion cautioning against punishing an inmate by denying water and physically punishing an inmate who has ceased resistance to authority;[39] (3) an Alabama Department of Corrections regulation that actually allowed use of the hitching post under certain conditions, which conditions the Court determined were not followed by the guards;[40] and (4) a report by the U.S. Justice Department, which opined that the use of the hitching post was unconstitutional.[41] The exact weight and balance of each source in the "fair warning" analysis is unclear from the Court's opinion, but either separately or cumulatively, these sources were found to have provided fair warning that the guards' use of the hitching post violated the inmate's Eighth Amendment rights. Accordingly, the guards were not entitled to qualified immunity.

QUALIFIED IMMUNITY IN THE ELEVENTH CIRCUIT AFTER *HOPE*

Clearly, the Supreme Court's opinion in *Hope* raises serious questions about the state of qualified immunity law in the Eleventh Circuit. The Court sharply criticized the notion that preexisting case law with materially similar facts was necessary to defeat qualified immunity. And in focusing on this prong of the Eleventh Circuit's qualified immunity formula, it failed to acknowledge or apply the important exception established by the *Smith v. Mattox* corollary. Moreover, in applying its new "fair warning" test, the Court relied not only on the holding of a binding decision, but also to some degree on judicial *dicta*, a state regulation, and an advisory report from a federal executive branch agency. Finally, the Court's rejection of the guards' qualified immunity defense — despite the fact that no court had directly held unconstitutional the use of the hitching post (and, in fact, federal district courts in five other Alabama cases had specifically rejected the same Eighth Amendment claim at issue in *Hope*[42]) — rendered uncertain the proposition that official's entitlement to qualified immunity is the usual rule. Thus, in one swoop, the Supreme Court called into doubt each of the distinct rules characterizing the Eleventh Circuit's heretofore stable body of qualified immunity law. The question, after *Hope*, is how this doubt will be resolved.

Fortunately, that question seems already to have been answered. In three post-*Hope* decisions, the Eleventh Circuit has indicated that the substance of its qualified immunity law remains largely unchanged by *Hope*. In its first meaningful discussion of qualified immunity after *Hope*,[43] the Eleventh Circuit undertook to clarify how "fair warning" is provided by preexisting law. To begin with, the court noted that its prior discussions about the general necessity for materially similar facts emphasized, as did *Hope*, the requirement that preexisting law place an official on notice that his actions are unlawful.[44] The court then explained that such notice was given by three primary sources. First, "the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful."[45] Second, under certain circumstances, case law might set forth a broad principle with such obvious clarity that the principle itself will clearly establish the law for future cases regardless of any factual variations.[46] Third, in most cases where

the law is established by judicial precedents, notice can be given by preexisting cases with indistinguishable facts.[47] If the facts of prior precedents are "fairly distinguishable from the circumstances facing a government official," however, the law is not clearly established and qualified immunity attaches.[48] In addition, the court strongly suggested that only the holding of prior precedents, and not *dicta* contained in the court's analysis, can provide the requisite notice.[49] The judicial *dicta* cited in *Hope*, explained the court, merely strengthened the notice that already had been provided by binding precedent.[50]

The next Eleventh Circuit decision meaningfully to address *Hope* began by stating emphatically that *Hope* "did not change the preexisting law of the Eleventh Circuit much."[51] Taking its lead straight from *Hope*'s requirement that preexisting law give an official fair warning, the court explained that fair warning flowed from "the applicable law's being 'clearly established' at the time of the official's alleged unlawful conduct."[52] The court also explained that *Hope*'s "fair warning" standard was not substantively different than the law as stated by the Eleventh Circuit prior to *Hope*, which did not require the "rigid gloss" perceived by the Supreme Court. Citing a line of cases beginning with *Smith v. Mattox*, the court noted that it "ha[d] repeatedly acknowledged the possibility that a general statement of the law might provide adequate notice of unlawfulness in the right circumstances."[53] Nonetheless, as recognized in *Hope* itself, the unlawfulness must be apparent, and "[i]n many — if not most — instances, the apparency of an unlawful action will be established by (if it can be established at all) preexisting caselaw which is sufficiently similar in facts to the facts confronting an officer, such that we can say every objectively reasonable officer would have been on 'fair notice' that the behavior violated a constitutional right."[54]

The Eleventh Circuit echoed this sentiment in the final decision of the post-*Hope* triumvirate.[55] Again, the court explained that *Hope*'s "fair warning" standard stems from the requirement that the unlawfulness of the official's conduct be apparent in light of clearly established, preexisting law.[56] And again, citing *Smith v. Mattox*, the court acknowledged that "factually similar case are not *always* necessary to established that a government actor was on notice that certain conduct is unlawful."[57] In the narrow category of cases where an official's conduct is so beyond the pale that he or she must be aware of the unlawfulness of his actions, no factually similar prior precedent is needed.[58] But, where the applicable legal standard is characterized by broad generalities and abstract principles — which is true of many, if not most legal standards — "preexisting caselaw that has applied general law to specific circumstances will *almost always* be necessary to draw a line that is capable of giving fair and clear notice than an official's conduct will violate federal law."[59] And the court expressly reaffirmed that, in such circumstances, only decisions of the Supreme Court, the Eleventh Circuit, or the highest court of the state in which the case arose — in other words, precedent binding on the officials accused of the violation — can provide the requisite notice.[60]

Putting these three decisions together yields the conclusion that, despite the doubts raised by *Hope*, the Eleventh Circuit's qualified immunity law remains for the most part unchanged. All three decisions explain that "fair warning" flows from the need for clearly established law rendering the unlawfulness of an official's conduct apparent. All three decisions state that, under normal circumstances, the law is clearly established by prior cases with very similar facts. All three decisions

acknowledge that factually similar precedent is not always required, and all three make clear that the Eleventh Circuit has never required factually similar precedent in all cases. Finally, two of the decisions reveal that the body and type of precedent to which courts should look when analyzing qualified immunity remains the same as it was before *Hope*. Thus, the law of the Eleventh Circuit after *Hope* can be stated as follows: (1) to defeat a defense of qualified immunity, pre-existing case law with indistinguishably similar facts generally must define the law sufficiently to give every objectively reasonable officer "fair warning" that the behavior in question violates a federal right; (2) only case law from the U.S. Supreme Court, the Eleventh Circuit, or the highest court of the relevant state can provide the requisite warning; (3) only the holdings of such case law, and not the *dicta* contained in judicial opinions, are useful in the qualified immunity analysis; (4) pre-existing case law is *not required* in the narrow category of cases where the official's misconduct is so egregious that he or she must be aware that he or she is acting illegally; and (5) the official's entitlement to qualified immunity is the usual rule.

CONCLUSION

A comparison of the Eleventh Circuit's post-*Hope* qualified immunity cases with those rendered by the court prior to *Hope* demonstrates that *Hope* wrought no substantive change in the law governing an official's entitlement to qualified immunity. In fact, the rules applied post-*Hope* are almost identical to their pre-*Hope* counterparts. Accordingly, as it was before *Hope*, the defense of qualified immunity continues to be the threshold issue in civil rights cases against local government officials, and those officials can still find comfort that, in most cases, their entitlement to qualified immunity will be upheld. GBJ

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Endnotes

1. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).
2. *See* Spalding v. Vilas, 161 U.S. 483, 498 (1896).
3. The Supreme Court first recognized the qualified immunity defense for police officers sued under 42 U.S.C. § 1983 in Pierson v. Ray, 386 U.S. 547, 555-57 (1967).
4. *See* Harlow, 457 U.S. at 814. The Supreme Court has defined such social costs as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Id.*
5. Marsh v. Butler County, 268 F.3d 1014, 1030-31 (11th Cir. 2001) (en banc) (quoting Lassiter v. Ala. A&M Univ., 28 F.3d 1146, 1150 (11th Cir. 1994) (en banc)).
6. 536 U.S. 730, 122 S. Ct. 2508.
7. *Id.* at 2515.
8. Harlow, 457 U.S. at 818.
9. *Id.*
10. *Id.* at 819 (quoting Pierson v. Ray, 386 U.S. 547, 554 (1967)).
11. In its first two qualified immunity decisions after Harlow, the Eleventh Circuit rejected the defense based in large part on the subjective intent of the officials involved. *See* Espanola Way Corp. v. Meyerson, 690 F.2d 827, 830 (11th Cir. 1982) (stating that "qualified immunity is unavailable to officials . . . who act with malice or contrary to clearly established law"); Williams v. Bennett, 689 F.2d 1370, 1386 (11th Cir. 1982) (stating that, because intent was element of Eighth Amendment violation alleged by plaintiff, "subjective good faith and intent of the individual defendants remain relevant even in light of objectivity now associated with the [qualified immunity] defense").
12. 28 F.3d 1146 (11th Cir. 1994).
13. *Id.* at 1149.
14. *Id.* at 1150.
15. *Id.*
16. *Id.* (emphasis in original).
17. 115 F.3d 821 (11th Cir. 1997) (en banc).
18. *Id.* at 823.
19. *Id.* at 826 & n.4.
20. 80 F.3d 1525, 1530 (11th Cir. 1996).
21. 127 F.3d 1416, 1419 (11th Cir. 1997).
22. *Id.* at 1420.
23. 268 F.3d 1014 (11th Cir. 2001) (en banc).
24. *See* Hope v. Pelzer, 122 S. Ct. 2508, 2512-13 (2002).
25. *See* Hope v. Pelzer, 240 F.3d 975, 980-81 (11th Cir. 2001).
26. *Id.* at 981.
27. *See Hope*, 122 S. Ct. at 2514.
28. *See id.* at 2515-18.
29. *Id.* at 2515.
30. *Id.*
31. *Id.*
32. *Id.* at 2516.
33. *Id.*
34. *Id.* at 2514.
35. *Id.* at 2516.
36. *Id.*
37. It is presumed that the Court was aware of the Smith v. Mattox corollary since it previously had cited with approval to an Eleventh

Circuit decision applying that corollary. *See* Saucier v. Katz, 533 U.S. 194, 206 (2001) (citing Priester v. City of Riviera Beach, 208 F.3d 919 (11th Cir. 2000)).

38. Hope, 122 S. Ct. at 2516-17. The Court referred to the former Fifth Circuit decision in Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974). Decisions from the former Fifth Circuit rendered prior to October 1, 1981 are binding on the Eleventh Circuit. *See* Bonner v. Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).
39. Hope, 122 S. Ct. at 2517. The Court referred to Ort v. White, 813 F.2d 318 (11th Cir. 1987). The Court acknowledged that it was relying on *dicta*, stating that "[t]he reasoning, though not the holding" of Ort provided fair warning to the guards. As pointed out by the dissent, Ort actually held that there was no Eighth Amendment violation, s*ee id.* at 2526-27 (Thomas, J., dissenting), and it is therefore difficult to see how that decision fairly could have warned the guards that they were violating the inmate's constitutional rights.
40. Hope, 122 S. Ct. at 2517-18. As pointed out by the dissent, because the regulation actually allowed the use of the hitching post, it seems that the regulation would have favored the guards' qualified immunity defense by providing legal support for their actions. *See id.* at 2526 (Thomas, J., dissenting).
41. *Id.* at 2518.
42. *See id.* at 2524 (Thomas, J., dissenting).
43. Vinyard v. Wilson, 311 F.3d 1340 (11th Cir. 2002).
44. *Id.* at 1350 (citing Marsh v. Butler County, 268 F.3d 1014, 1031 (11th Cir. 2001)).
45. *Id.*
46. *Id.* at 1351.
47. *Id.*
48. *Id.* at 1352.
49. *Id.* at 1354 n.27 (noting that there exists "an important difference between the holding in a case and the reasoning that supports that holding").
50. *Id.*
51. Willingham v. Loughnan, 321 F.3d 1299, 1300 (11th Cir. 2003).
52. *Id.* at 1301.
53. *Id.* at 1302.
54. *Id.*
55. *See* Thomas v. Roberts, — F.3d — , No. 00-11361 (11th Cir. Mar. 10, 2003), *available at* 2003 WL 934249.
56. *Id.* at 2003 WL 934249 *3.
57. *Id.* at *6.
58. Id. One example of such a case is provided by Vaughan v. Cox, -F.3d -, No. 00-14380 (11th Cir. Aug. 29, 2003), available at 2003 WL 22025451. In Vaughan, the defendant officer fired three rounds without warning into a suspect vehicle on Interstate 85 in Coweta County. The court first held that the evidence, when viewed in the plaintiff's favor, would allow a reasonable jury to determine that the officer violated the plaintiff's Fourth Amendment right against unreasonable seizure. See id. at *3-4. Additionally, this same evidence, when viewed in the plaintiff's favor, would likewise defeat the officer's entitlement to qualified immunity because it permitted the following inferences: (1) the plaintiff did not pose an immediate threat of serious harm; (2) the use of deadly force was not necessary to effect a stop of the plaintiff's vehicle; and (3) it was feasible for the officer to warn the plaintiff before using such force. See id. at *4-5. Although the court did not cite Smith v. Mattox, its opinion shows that the court considered the case to fit (depending on the true facts) within the Smith v. Mattox corollary. If the facts were as alleged by the plaintiff, then "an objectively reasonable officer in [the defendant's] position could not have believed that he was entitled to use deadly force . . . ." Id. at *6. Put differently, if the plaintiff's version of events were true, then the officer's conduct lay "so obviously at the very core of what the Fourth Amendment prohibits" that it went beyond "[t]he hazy border between permissible and forbidden force." See Smith v. Mattox, 127 F.3d at 1419. On the other hand, if the plaintiff's version of events was not true, then "the qualified immunity analysis would be changed," and the defendant would be entitled to the defense. See Vaughan, 2003 WL 22025451 at *6. And because the officer's entitlement to qualified immunity depended on the actual version of events, the court held that the officer should be allowed to pose special interrogatories to the jury to resolve the specific factual disputes on which the qualified immunity analysis depended. Id. Of course, the jury would decide only "the issues of historical fact that are determinative of the qualified immunity defense," while the court (and it only) would determine as a matter of law whether those facts entitled the officer to the defense. See Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002); see also Cottrell v. Caldwell, 85 F.3d 1480, 1488 (11th Cir. 1996). The procedure employed in Vaughan thus comports with pre-Hope decisions of the Eleventh Circuit, and while the denial of qualified immunity seems anomalous at first blush, nothing in Vaughan suggests a sea-change in the Eleventh Circuit's qualified immunity jurisprudence.
59. Id.
60. Id. at *3.

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Governor Has Law on His Side

By C. Tyler Jones

As the first Republican governor since Reconstruc-tion, Sonny Perdue has a vision for a new Georgia that includes improving public trust in government, ensuring that the voice of the people is heard, and empowering Georgians to improve their lives.

To help make this vision a reality, Perdue has compiled a diverse team of lawyers who are dedicated to Georgia and to changing the culture of state government. Executive Counsel Harold D. Melton, Deputy Executive Counsel Robert S. Highsmith Jr. and Policy Advisor Joy Hawkins are three State Bar members leading the charge in answering the governor's call for change.

"Harold, Robert and Joy are three of the finest legal minds in the state, and more importantly good people as well," maintains Perdue. "With their diverse backgrounds, they present me a well-rounded, knowledgeable perspective that helps me make the best decisions for Georgia."

(Left to right) Policy Advisor Joy Hawkins, Gov. Sonny Perdue, Deputy Executive Counsel Robert S. Highsmith Jr. and Executive Counsel Harold D. Melton.

HAROLD MELTON

Melton, an 11-year veteran of the state law department, is the governor's chief legal advisor.

After receiving a bachelor's degree from Auburn University and his Juris Doctorate from the University of Georgia in 1991, Melton, who grew up in Marietta, began working for the Georgia Department of Law and held several important positions within the Attorney General's office. He served as an assistant to the attorney general in the Fiscal Affairs Division, serving as a senior assistant to the attorney general, and acting as section leader in the Consumer Interests Division. Mike Bowers was attorney general when Harold was hired at the law department. Bowers said, "Harold is one of the finest young people I have ever met. I hired him right out of law school and this is one of my proudest accomplishments."

As a state attorney, Melton was not actively involved in politics. But shortly after the election,

"Harold is one of the finest young people I have ever met. I hired him right out of law school and this is one of my proudest accomplishments."
– Former Attorney General Mike Bowers


Executive Counsel Harold D. Melton

Melton received a call "out of the blue" to ask if he would be interested in serving in the administration. The governor recognized that Melton's legal expertise developed in years of state service was exactly what he needed in the role of executive counsel. "I was thrilled when Harold decided to serve in my administration. He has a true sense of public service that is contagious," Perdue said. Within a week of receiving the call, Melton accepted the position.

Not wasting any time, Melton immediately began the process of dealing with the myriad of legal issues that face any new administration. Because of the governor's emphasis on ethics, the first order of business after the Jan. 13 inauguration was the signing of an executive order establishing a code of ethics for executive branch officers and employees.

In those harried first days, Melton spent much of his time coaching agencies and their contacts on ways to interpret the ethics order. In addition to training, Melton and his team have stayed busy establishing new operating policies and procedures, because there were no documented processes in place when they first made the move into the Capitol.

Juggling Act

In a typical week, Melton averages close to 300 e-mails and phone calls. "This is the hardest job I have ever had because I am pulled in so many different directions," Melton said. "This is also the job that I have had the most fun doing."

In addition to the daily routine of the governor's office, Melton has found himself juggling a host of complicated, and in some cases unprecedented legal matters. These include possible criminal sentencing guidelines, water negotiations, the impending ruling on the *Sonny Perdue, Governor, et al. v. Thurbert E. Baker*, Attorney General case, and setting up the Judicial Nominating Commission.

Sentencing Guidelines

Melton and his team have been studying the results of the previous administration's commission on sentencing guidelines. Two key pieces of the guidelines include:

Helping judges deliver consistent and uniform sentences for similar crimes throughout the state.

Giving more tools to the judicial corrections system to effectively manage the state's inmate population and improve successful reentry into the community.

Melton said his team will continue to research ways to improve the state's correctional system.

Water Negotiations

One issue that Melton inherited is the ongoing negotiations with Florida and Alabama (Apalachicola – Chattahoochee – Flint River basin) and Alabama (Alabama – Coosa – Tallapoosa River basin) over shared waters. Negotiations with both states have been dragging on for years, with Alabama and Florida seeking to ensure that Georgia does not take too much water from the river basins before they flow into neighboring states.

Melton said, "The governor is personally involved in the negotia-

tions and is determined to reach an agreement that is good for the state."

Perdue v. Baker

As the main liaison with the attorney general's office, Melton has been closely involved with the *Perdue v. Baker* case. The heart of the case is whether the governor or the attorney general has the authority to decide whether to appeal an adverse decision in litigation pursued in the name of the state.

The governor has requested that Baker drop the state's appeal of a federal court ruling that struck down the redistricting plan drawn by then-Gov. Roy E. Barnes. Baker refused and both sides are now awaiting the Supreme Court of Georgia's decision (a decision may be forthcoming while the *Georgia Bar Journal* is at press). Melton said that it is no small venture to sue the attorney general, but his team is confident in the legal merit of their position.

The Judicial Nominating Commission

When setting up the Judicial Nominating Commission, Melton said the governor sought a cross section of people with geographic, racial and gender diversity. Former state Attorney General Mike Bowers chairs the 18-member commission, which makes nominations to fill vacancies on the Georgia Supreme Court, Court of Appeals, Superior and State Courts. The governor also appointed past State Bar President James B. Franklin.

Melton said the governor values the work of the commission and depends on its recommendations to fill each judicial vacancy.

On the Governor

When asked about his new boss, Melton smiles. "The governor is a great client because he encourages his team and empowers them to make good decisions." He explained that the governor, on occasion, takes no for an answer, but only after hearing a convincing, well-thought-out and fully researched case.

Counseling the governor does have its challenges. "The governor has a memory that allows him to remember almost everything he hears," Melton said. "So you have to stay on your toes."

ROBERT HIGHSMITH

Even before graduating from Yale University and the University of Georgia Law School, Highsmith began a path of political involvement that makes him a valuable counselor to the governor.

Always interested in politics, Highsmith's first direct exposure to the political process came in 1986 when his father successfully ran for state court judge in Appling County in southeast Georgia. Then in 1992, Highsmith campaigned door-to-door with Jack Kingston in his successful bid for the United States Congress for the First Congressional District. In the 1994 and 1998 election cycles, Highsmith held positions of responsibility, including director of policy and research in Guy Millner's 1998 campaign for governor. Those experiences taught him the importance of the governor's office in the function of state government. Highsmith said, "I became fully committed to electing a Republican as governor of Georgia."

During the 1999 General Assembly, Highsmith served as chief of staff to the Republican caucus of the Georgia House of Representatives. This top-drawer legislative and political experience would prove valuable during Perdue's first legislative session. Former State Bar President Franklin said, "Robert Highsmith is one of the most talented young Republican lawyers in Georgia. I have observed Robert throughout his law school and professional career. He combines unusually sound legal and political judgment."

After resuming his private law practice at Holland & Knight LLP in Atlanta, Highsmith gained extensive experience in public policy litigation, representing both government entities and private parties. In particular, as counsel for numerous Republican candidates and office holders, he became one of the state's foremost experts on campaign and ethics law.

In February 2002, based on the recommendations of an overwhelming majority of Republican elected officials, then-Gov. Barnes appointed Highsmith to a four-year term on the State Ethics Commission, a quasi-judicial body having statewide jurisdiction over ethical

Deputy Executive Counsel Robert S. Highsmith Jr.

issues involving public officials, lobbyists and state vendors. While serving on the commission, Highsmith, realizing the need for clarity in regards to the ethics laws, worked hard to clarify the law through rulemaking. He was serving on the Ethics Commission when governor Perdue called after the election.

The Governor

Highsmith greatly admires the governor's commitment to principle. "The exciting thing about this governor is that he makes decisions based upon immutable principles," Highsmith said. "Our job is to help him align the state's policies and politics with those principles."

"For example, in the 40 days after the adjournment sine die of the legislative session, we analyzed and recommended approval or veto of each of the 446 bills that the General Assembly had passed," Highsmith continued. "As the governor reviewed these recommendations from staff, I saw that announced principles governed the decisions, not partisan politics."

Ethics in Government

As deputy executive counsel, Highsmith has responsibility for drafting and review-

ing the governor's legislative package. He shows great enthusiasm when discussing the governor's ethics package that easily passed the Senate in 2003, but stalled in the House of Representatives. "The most exciting thing to me about being the governor's lawyer is helping him fulfill his commitment to changing the culture of state government to one where ethics is the highest priority," Highsmith said.

It was a tough decision for Highsmith to step down from the State Ethics Commission because he felt like he was in a position to change the culture of government for the better, and to improve the public's perception of politicians' ethical conduct. In the end, Highsmith realized he could have a greater impact by engineering legislative change to ethics rules.

Highsmith said the governor's ethics agenda is the most sweeping ethics reform agenda ever proposed in the state — a true call for a culture change in state politics.

Some of the highlights of the governor's ethics reform package include:

- Vendor Lobbyist Registration — Individuals lobbying for contracts with the state will be required to register as lobbyists and file disclosure reports.
- Public Employee Whistle-blower Statute — State and local employees will be protected against retaliation for reporting a violation of or noncompliance with a law, rule or regulation.
- Contributions to the Governor by Potential Judicial Nominees — A person may not be considered as a judicial appointment if that person made a contribution to the governor within 30 days of the vacancy on the bench.
- Honoraria and Gifts — Public officials will be prohibited from receiving honoraria and will be prohibited from accepting any gift valued at more than $25.
- Conflicts of Interest — The ethics commission will have jurisdiction over all conflict of interest issues and stiff sanctions will be available for violations. The governor successfully increased, by 50 percent, the funding to support this commission.
- Technical Changes in Ethics in Government Act — The source of many formal complaints before the State Ethics Commission is the lack of clarity in many of the provisions in the Ethics in Government Act. Changes are proposed for clarifying terms in the Ethics in Government Act and providing a better opportunity for compliance with the act.

Ultimately, Highsmith said the rules should be clear and unambiguous, and those that break the rules should be punished.

"It is an awesome responsibility, because we have the ability to improve so many people's lives through the responsible exercise of governmental powers," Highsmith said.

Asked about the value Highsmith adds to the governor's legal and legislative team, Perdue said, "Having a former member of the Ethics Commission advising us and shepherding our ethics legislation has been invaluable. I also rely heavily on Robert's counsel and ideas in the full spectrum of matters coming before our office. His intellect and capacity for creative problem solving is boundless."

JOY HAWKINS

Hawkins, a policy advisor for the governor, earned a bachelor's degree from Georgia State University and her Juris Doctorate from the Georgia State College of Law in 1987.

Deciding early in her career that she wanted to work in the public sector, Hawkins interned at the Capitol in 1983. About a year after graduating from law school, she joined the non-partisan Georgia Senate Research Office, which provides all 56 state senators with legislative research and staff. She became director of the office in 1991, and stayed there until 1996 when she decided to be a stay-at-home mom. During her time away, she kept up with friends and colleagues at the Capitol and did some part-time work during legislative sessions.

The certified mediator first met Perdue when he was a freshman senator in 1990. After watching several freshman classes through the years, she said she developed a good sense of who would become the state's future leaders. "Perdue stood out from the beginning by taking on a lot more responsibility than other freshmen," she said.

Hawkins explained that she backs the governor because, like her, he has a lot of loyalty to

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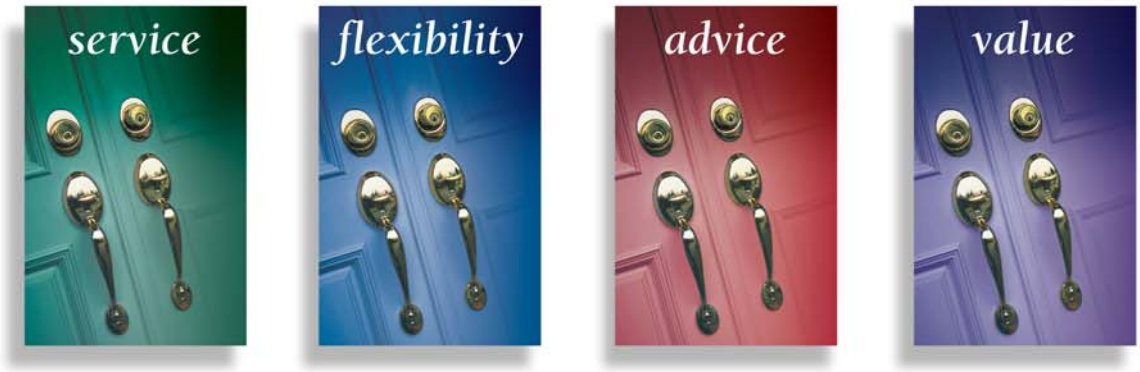

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Georgia. "I think the governor shares a lot of my values of looking at what is in the best interest of all citizens versus what is politically right for the times," she said.

In 1998, Hawkins ran for the vacated state senate seat in the 41st District. She did not win, but said it was a valuable networking experience. During her campaign she became more connected with the Georgia Republican Party and partisan politics. That year she also worked as the project coordinator for the Protective Order Registry Project associated with the Georgia Commission on Family Violence.

During Perdue's campaign she supported the governor and kept in touch with him. In November she was asked to join the team. With both her children in school, Hawkins decided to go back to work full-time. She said it was not an easy decision, but that the governor's vision, integrity, and loyalty to the state compelled her.

Hawkins primarily develops issues for the governor and stays in contact with the heads of general government departments as they implement and/or make policy decisions. She also acts as a mediator between the governor's office and the respective government departments to see how they can collaborate on specific issues.

Children's Issues

A natural fit for the governor is children's issues. From education to preventing child abuse, Hawkins said that the governor always looks at an issue based on the criteria of "how does this affect children" and "is this in the child's best interest." Hawkins said, "We need to be mindful that children are the voice that doesn't vote and we need to structure our policies in a way that helps children grow to be capable citizens."

As foster parents themselves, Hawkins said the governor and first lady want to educate people about the need for quality foster care. Last session the governor introduced and was instrumental in the passing of Senate Bill 236, which provides for additional placement options.

The governor will continue to focus on foster care issues legislatively and through awareness campaigns.

Domestic Violence

Some studies indicate that nearly one-third of American women report being physically or sexually abused by a husband or boyfriend at some point in their lives, and countless others never report being battered. Domestic violence is terrible in and of itself, but it becomes an even bigger problem when you consider that children who are raised in abusive families are more likely to grow up to be abusive themselves.

Hawkins said the governor wants to help stop the cycle of violence. To this end, the governor's office is working on an awareness campaign, and is teaming up with organizations in the private sector to help encourage community involvement in helping battered and abused women and children.

Indigent Defense

One of the highlights of the 2003 General Assembly was the passage of significant indigent defense reform. The governor demonstrated his early support by recommending a 77 percent budget increase for the Indigent Defense Council. The governor and his lawyers worked closely with Speaker Terry Coleman, Senator Chuck Clay, Chief Justice Norman Fletcher, and the State Bar for the bill, which ensures that all indigent defendants receive adequate counsel and equal protection under the law. "This legislative action was truly a collaborative effort among

Policy Advisor Joy Hawkins

all three branches and counties. We recognize our Constitutional responsibility to provide legal assistance to those who cannot afford it," Perdue said.

"The Indigent Defense Reform Bill was a tremendous legislative accomplishment for everyone involved in this lengthy effort to bring justice to all. The State Bar brought their expertise and legal talent into the process. This commitment went a long way towards passage of the legislation," Hawkins said.

On the Governor

Hawkins said that one of the things that she admires about the governor is his innovative thinking. Instead of just putting a bandage on the state's issues, she said that Perdue wants to deal with the issues on the front end and provide long-term solutions.

"The governor is trying to bring about a cultural change that improves services for Georgians and will transcend his tenure in office," Hawkins said.

THE FUTURE IS BRIGHT

Ralph Waldo Emerson once said that "Nothing great was ever achieved without enthusiasm." If the enthusiasm Melton, Highsmith and Hawkins share is any indication of the rest of Perdue's administration, then the sky is the limit on what will be accomplished during his tenure in office.

A year ago, the Capitol is the last place the trio thought they would find themselves working. But as fate would have it, Melton, Highsmith and Hawkins have been united to serve the citizens of Georgia by working together to achieve the governor's goals.

"I do not think you could find a group of lawyers that are more excited about their jobs and helping the people of their state than Harold, Robert and Joy," said the governor. "I feel lucky to have them on my team. Together we are on the frontlines of bringing meaningful change to Georgia, and there's no one I would rather have on my side." GBJ

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

Offenders Beware

The UPL Department Is on the Case

By C. Tyler Jones

As an official arm of the Georgia Supreme Court, one of the Bar's responsibilities is investigating the unauthorized practice of law and when warranted, prosecuting alleged offenders. The Bar's UPL Department takes this charge seriously and prides itself on thoroughly and fairly investigating all cases.

Last year the Bar received 216 formal UPL complaints. Investigators successfully closed 161 cases and 55 are still under investigation. While some of Georgia's UPL cases prove to be a case of a person's ignorance, others are egregious offenses involving the blatant disregard of the law.

By prohibiting the unauthorized practice of law, the Bar protects citizens of Georgia from receiving bad legal advice and from being bilked out of money.

What is UPL?

In defining what activities constitute the "practice of law," the Supreme Court of Georgia looks to statute, court rule and case law. Furthermore, the Official Code Of Georgia Annotated (O.C.G.A.) § 15-19-50 defines the practice of law in Georgia as "Representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body; Conveyancing; The preparation of legal instruments of all kinds whereby a legal right is secured; The rendering of opinions as to the validity or invalidity of titles to real or personal property; The giving of any legal advice; and Any action taken for others in any matter connected with the law." For information on how other states define the "Practice of Law," visit the American Bar Association at www.abanet.org/cpr/model-def/model_def_statutes.pdf.

Additionally, O.C.G.A. § 15-19-51 states that it shall be unlawful for any person other than a duly licensed attorney at law "To practice or appear as an attorney at law for any person other than himself in any court of this state or before any judicial body; To make it a business to practice as an attorney at law for any person other than himself in any of such courts; To hold himself out to the public or otherwise to any person as being entitled to practice law; To render or furnish legal services or advice; To furnish attorneys or counsel; To render legal services of any kind in actions or proceedings of any nature; To assume or use or advertise the title of "lawyer," "attorney," "attorney at law," or equivalent terms in any language in such manner as to convey the impression that he is entitled to practice law or is entitled to furnish legal advice, services, or counsel; or To advertise that either alone or together with, by, or through any person, whether a duly and regularly admitted attorney at law or not, he has, owns, conducts, or maintains an office for the practice of law or for furnishing legal advice, services, or counsel."

Typically, a person submits a complaint form to the UPL Department to open an investiga-

tion. Last year, 40 percent of UPL complaints came from lawyers. Individual citizens, federal agencies, judges, public corporations and state agencies filed the other complaints.

After UPL staff counsel reviews a complaint and determines that the activities, if proven, may constitute UPL, the case is assigned to an investigator. Based on the investigator's initial findings, if there is evidence to support the claim, it is passed on to the district or standing committee for review.

Although each case is unique, once the respective committee reviews a case, typically one of the following scenarios takes place: the committee decides to close the case, the committee authorizes staff counsel to file a suit for injunctive relief, or the case is forwarded to the appropriate enforcement agency for prosecution. Practicing law without a license in Georgia is a misdemeanor, punishable by up to a $1,000 fine and a year in jail. In many cases when a person can be charged with UPL, they can also be charged with felony counts of forgery, theft, making false statements and other similar crimes.

First-time Offenders are put on Notice

In most instances, first-time offenders are put on notice and the UPL department requires the person to sign an acknowledgment that they have received a comprehensive package regarding the unauthorized practice of law. Included in the package is information informing the offender of what activities they can and cannot legitimately participate in.

Many UPL cases are relatively easy to resolve. It is just a matter of someone from the UPL department

contacting the offending party to inform them that they are being investigated for the unauthorized practice of law. More times than not the person will explain that they did not know what they were doing was wrong, and will agree to stop.

Other cases are more complicated and the offender's punishment sometimes depends on how the person acts, and whether they cooperate with the investigation.

Following is an example of a recent UPL case:

Person A (non-attorney) charges $190 to give advice and fill out paper work so Person B can file for divorce. Person A prepares Person B's divorce petition and all other necessary paperwork, including where to file the divorce, how much it costs to file and how long it takes to complete the divorce.

In this situation, Person A signed a cease and desist order agreeing to never give legal advice or prepare any legal documents for any persons in Georgia unless employed by a supervising attorney and the attorney signs off on the legal document.

If it was later discovered that Person A had continued to practice law without a license, it is likely that he or she would be prosecuted civilly or criminally.

Egregious Offenses

Following are some examples of more serious UPL offenses investigated by the Bar:

In 1995, Gary Pernice was disbarred, received a 45-year probation and was ordered to make restitution totaling more than $3 million to victims of a Ponzi scheme he orchestrated with a friend. Two years later, Pernice was caught conducting business as a lawyer. He was sentenced to nine years in prison for UPL and defrauding a client out of $250,000.

In 1998 it was discovered that W. James Thompson had been conducting business as a lawyer for the previous13 years. Thompson deceptively practiced for years because he was very convincing as a lawyer and he avoided court appearances by preparing documents to make it appear as though the litigants were filing pro se. Thompson ultimately plead guilty to one felony (theft by taking) and 24 misdemeanor charges, to include UPL. Thompson was sentenced to 10 years probation.

Fortunately, Thompson and Pernice are exceptions rather than the rule when it comes to UPL. However, a growing issue involves people who call themselves Notarios.

Notario Publicos

According to the National Notary Association Web site, a notary is not the same as a Latin Notario Publico. In Latin countries a Notario Publico is a high-ranking official with considerable legal skills and training, who drafts documents, provides legal advice, settles disputes and archives documents. The NNA Web site states that in the United States a notary is forbidden from preparing legal documents or acting as a legal advisor unless he or she is also an attorney.

Steven J. Kaczkowski, director of the UPL department, explained that many new immigrants to the United States become confused when they see signs advertising Notary Public. They do not realize that in Georgia a person can become a notary by paying a small fee.

Kaczkowski said that over the last few years, many immigrants have not only lost a lot of money to people posing as Notario Publicos, but they have been deported, lost their work permits or have not been able to bring their spouse or other family members to the United States.

These immigrants are reluctant to report the notary to authorities. To address this growing challenge the General Assembly enacted Unannotated Georgia Code 45-17-8.2. Among other requirements, the code requires that notaries post in English and in every other language used to advertise their services the following, "I am not an attorney licensed to practice law in the state of Georgia, and I may not give legal advice or accept fees for legal advice."

Additionally, non-attorney notaries are prohibited from representing or advertising that the notary is a "legal consultant" or an expert on legal matters.

This problem is not unique to Georgia. Many states have passed similar codes.

The number of people illegally practicing law grows every year and the Bar's UPL staff continues to devote the necessary resources to help protect the people of Georgia. For more information on the unauthorized practice of law in Georgia, call (404) 527-8743 or visit www.gabar.org/upl.asp. GBJ

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

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The Georgia Bar Foundation: Your Quiet Charity

By Stephen A. Melton

As the president of Columbus Bank & Trust in Columbus, I am proud of the many ways our bank helps the community. As chairman of the United Way campaign of Columbus and of the Columbus Chamber of Commerce, I learned even more about the importance of charitable giving to a community's ability to solve its problems.

Four years ago the Supreme Court of Georgia honored me with my appointment to the Board of the Georgia Bar Foundation. My peers on that board, all lawyers except for another banker, gave me an additional honor by electing me the first banker to become a Bar Foundation president in Georgia and, I am told, the first in the nation. As my second term as president comes to an end, I pause to reflect on all I have learned and on the incredibly exciting and successful work of the Georgia Bar Foundation.

All of us on the 14-member Board of Trustees have been tapped by our Court to lead the activities of one of the most important legal charities in the nation. We represent the thousands of Georgia attorneys, and I assert bankers as well, whose hard work generates the cumulative revenue stream that since 1983 has surpassed $56 million.

The Trustees come from virtually every community in the state, bringing a unique perspective to the bigger needs of Georgia. While Atlanta certainly has a significant board representation, virtually every area of Georgia is or has been represented by board members. From Valdosta to Rome and from Columbus to Augusta, no area of Georgia has been left out.

You may never have heard of the corporation that describes itself as the quiet insurance company. Well, the Georgia Bar Foundation is the quiet charity.

Len Horton, our executive director, likes to tell the story of being asked as one of his first assignments to give the Georgia Bar Foundation a high profile. After that higher profile had been accomplished in the late 1980s, a bill was introduced in the Georgia legislature to take all the Bar Foundation's IOLTA money. As the struggle to save the money went on, the board then asked him to use all his skills to give the foundation back its low profile. From that moment the foundation decided to focus on its work and keep its head down.

As a banker I can probably say things that a lawyer could not say without sounding self-serving. All Georgia lawyers should be so very proud of their Georgia Bar Foundation. This quiet charity has generated a lot of noisy comments lately. Maybe it is time to have at least a temporarily higher profile so you will be sure to appreciate the impact your IOLTA accounts are having and so you can be proud of the work being done by the board and staff to make interest on your trust accounts go far and have the biggest impact.

I want you to know about costs. Few charities or any other organi-

zations want to talk about costs. You should know that the Bar Foundation's overhead as a percent of its revenues, a measure by which many charities are judged, is one of the best figures in the nation. Over the last decade it has typically been less than five percent. In other words we work hard not to spend your money on anything other than grants.

At a Georgia Bar Foundation reception at the annual meeting of the State Bar in Savannah several years ago, a reporter asked how in good conscience the Board of Trustees of the Georgia Bar Foundation could justify using IOLTA dollars to pay for the fancy hors d'oeuvres and expensive drinks, especially when those IOLTA dollars were intended to help the poor. When the reporter learned that the entire board and the executive director were not spending one cent of Bar Foundation money, but instead were funding the reception in its entirety by personal contribution from each of them, the article died.

Very much alive due to our cost cutting is our grantmaking. Once a year, typically at the end of summer, the Bar Foundation Board meets to award grants from IOLTA revenues accumulated for the fiscal year July 1 through June 30. The board carefully reviews all the applications and makes the tough decisions of who gets what. Later in the day after lunch, compromises are the rule among sometimes agonizing discussions. By the time all the decisions have been made, headaches and hoarseness compete with the happiness resulting from the knowledge that we have at last finished.

What is done with the revenues collected? In addition to the operating expenses, the money is used to award grants to law-related organizations throughout Georgia. If you have heard of the law-related organization, the Georgia Bar Foundation has probably awarded it a grant.

Most lawyers know the importance of funding criminal indigent defense and appreciate the recent efforts to solve that problem. Did you know, however, that the Georgia Indigent Defense Council gets 40 percent of IOLTA money, currently close to $2 million annually? Georgia is the only state in the union to use IOLTA money for that purpose.

Georgia Legal Services and Atlanta Legal Aid together receive the next largest sum, amounting typically to more than $1.5 million each year.

The Georgia Bar Foundation has been a staunch supporter of the State Bar of Georgia since IOLTA began. In fact, never has a request for funds from the State Bar been denied – Not once. The cumulative amount awarded to the Bar is in the multiple millions of dollars. Last year the Bar Foundation came quickly to the Bar's assistance when other funding sources were losing faith in the Bar Center idea. It sent a clear message to financial centers that Hal Daniel's Bar Center concept was sound. I am proud that the Georgia Bar Foundation could help.

A total of 10 percent of IOLTA revenues goes to the Georgia Civil Justice Foundation, which is the charitable arm of the Georgia Trial Lawyers Association. This approaches $500,000 annually.

The Bar Foundation provided startup funding for the Office of Dispute Resolution ($600,000), The

Lawyers Foundation of Georgia ($500,000) and several other organizations. It has provided, and continues to provide, core survival funding to Mock Trial, BASICS and the State YMCA's Youth Judicial Program.

It gave early support to LODAC in Valdosta (more than $600,000), Georgia CASA (more than $325,000), the State Bar's Lawyer Impairment Program and nearly $1 million to the LRE Consortium in Athens.

One of the major commitments of the Bar Foundation has been to helping children. Support for child advocacy centers throughout Georgia along with child abuse prevention programs puts the foundation in the forefront of making a difference where it counts. Recently the Bar Foundation has encouraged the statewide expansion of the Truancy Intervention Project, which was started in Fulton County by Terry Walsh.

This sort of support goes beyond anything envisioned by Bar leaders and our Court when IOLTA came into existence. You should be proud that interest from your IOLTA account is making this kind of difference.

The board members appointed by the Supreme Court of Georgia who currently are serving with me include Louisa Abbot, our vice president, who is a Superior Court Judge in Chatham County/Savannah. Joe Brannen, who heads the Georgia Bankers Association, is our treasurer. Rudolph Patterson, former president of the State Bar of Georgia and a resident of Macon, is our secretary. Bobby Chasteen, also former president of the State Bar of Georgia, from Fitzgerald; Hon. Sharon Hill, Fulton County Juvenile Court Judge, in Atlanta; Hon. Hollie Manheimer from Decatur; Nolie Motes, former State Bar YLD President, from Dahlonega; Aasia Mustakeem, member of the State Bar of Georgia's Executive Committee, from Atlanta; and Hon. Patsy Porter of the State Court of Fulton County show you why I think we have accomplished so much. Add to this brain trust the talents of State Bar President Bill Barwick, President-Elect Rob Reinhardt and YLD President Andrew Jones, and the Georgia Bar Foundation cannot help maintaining its positive influence on Georgia's legal community and the scores of law-related programs working to make Georgia a better place for all of us.

Be assured that even if the Georgia Bar Foundation is so quiet that you forget we are here, we are quietly at work for you and for all the people of Georgia.

Stephen A. Melton is the president of the Georgia Bar Foundation and president of the Columbus Bank & Trust Company.

Meeting the Most Critical Legal Needs

The Georgia Legal Services Program, Inc.

By Phyllis J. Holmen

Recent legal needs studies indicate that 40 to 60 percent of moderate and low-income Americans have a new legal problem every year. With almost 1,000,000 Georgians at or below the poverty line, this means that 400,000 or more have legal needs each year.

With demand far outstripping supply, the lawyers and paralegals at Georgia Legal Services Program choose carefully which problems to solve, and which clients to accept. Each year, the Board of Directors of GLSP establishes case acceptance priorities to address the most critical problems identified through local needs assessments by GLSP's regional offices. For 2003, GLSP staff accept critical cases that involve supporting families, preserving homes, maintaining economic stability, achieving safety, stability, and health, and assisting clients with special vulnerabilities, such as the elderly, persons with disabilities, the institutionalized, and those who cannot speak English.

GLSP also establishes partnerships to strengthen its efforts, offer clients other resources, and achieve maximum community benefit. GLSP works with the State Bar of Georgia, the Atlanta Legal Aid Society, domestic violence task forces, tenants' organizations, law schools, and a host of other organizations around the state on initiatives to improve delivery of legal services, develop more holistic approaches to clients' problems, and take other steps in pursuit of justice for all.

The critical problems of Georgians with low incomes have not changed significantly in GLSP's 32 years, though the legal issues, the strategies, and the remedies have evolved. Problems such as family disputes, consumer fraud, government errors, denial of health care benefits and more still plague the poor.

These actual case stories of people with critical legal problems illustrate the impact of GLSP's efforts to focus its resources strategically to provide access to justice and opportunities out of poverty for low-income Georgians.

A Home of Their Own

Georgia's affordable housing crisis makes achieving the American Dream of home ownership virtually impossible for many low-income families. The lack of new affordable housing in Georgia has spurred the boom in manufactured housing as a realistic option for families of modest means, helping to make Georgia the nation's second largest producer of these dwellings. The boom in manufactured housing has generated many new legal issues for low-income Georgians.

A GLSP lawyer provided the legal aid Troy needed to reinstate Medicaid coverage for his life-saving medication.

Last year, when the owners of the Garden Springs Mobile Home Park in Athens sold the park to developers, hundreds of low-income families, many of whom had lived in the park for decades, were in danger of becoming homeless. A team of GLSP lawyers in Athens and Gainesville, ten lawyers from the Atlanta law firm of Sutherland, Asbill & Brennan, LLP, and social work and law school students from the University of Georgia negotiated relocation terms with the developers, raised $200,000 to support relocation expenses, and are helping with the purchase of an 18-acre tract for a new mobile home park site. GLSP has assisted more than 50 families that have stayed together as a group to form a resident-owned and managed manufactured housing cooperative the residents have named, "People of Hope Cooperative, Inc."

Children at Risk

Residents of the rural communities served by GLSP often suffer from low wages and a lack of health care benefits because of the high cost of insurance. A sick child and a missed day at work almost certainly mean lost pay for those who can least afford it. It can mean losing a job. In low-income working families, 22 percent of children lack health insurance and only about 40 percent of parents receive paid sick leave, according to the *2002 Kids Count Data Book* published by the Annie E. Casey Foundation. For uninsured, low-income families, obtaining appropriate medical care for a child suffering from a terminal illness or a child needing surgery can sometimes require help from a lawyer.

Troy was born with a terminal illness five years ago. Due to the day-to-day care he requires, his mother is unable to hold a full-time job. Troy's father lives in another state and has no contact with his son. Troy's world came crashing down when Medicaid would no longer cover his medication, which costs $1,000 per month. Troy's father held an insurance policy which required his mother to pay 100 percent of the prescription costs out-of-pocket and seek reimbursement. Troy's father refused to cooperate and stated that he wanted the child to die. A GLSP lawyer unearthed special Medicaid regulations allowing waiver of the primary insurer requirements in situations like this one, and Troy's Medicaid coverage was reinstated. Troy is enjoying his childhood and is enrolled in school.

Parental Cries for Help

The road to family success, regardless of a family's income level, is more challenging today than ever. Family violence has become an issue of growing national concern. According to the Georgia Department of Human Resources *2002 Fact Sheet*, one in four women in the nation reports that at some point in their lives a husband or significant other physically abused them. Many of GLSP's clients are survivors of family violence. Many have urgent legal problems that impact the well-being and security of their children.

Ms. Burns and her baby daughter, Denise lived in fear. With Denise looking on, her father shot Ms.

Between 3.3 and 10 million children each year witness acts of violence against a parent, usually their mother, committed by the other parent or an intimate partner. (Attorney General Jane Brady, Delaware, 2002.)

Burns five times at close range over visitation rights. Denise's father was convicted and is serving time in jail. Ms. Burns believed that upon his release, he would come after her to kill her. Seeking safety, she and her daughter moved to Georgia. To retaliate, Denise's father sued Ms. Burns for defamation in California where the crime occurred. A GLSP lawyer assisted Ms. Burns in petitioning the court for a name change for herself and her daughter, obtained a court order preventing Ms. Burns from having to publish notice of her name change, referred the defamation case to Legal Services in California, and obtained a pro bono attorney in California who assisted Ms. Burns in getting the defamation case dismissed. Ms. Burns and Denise are now able to start new lives.

Relief From Shoddy Home Repairs

Georgia's population of seniors aged 60 and older is expected to increase 53 percent by 2010 according to the Georgia Department of Human Resources *2002 Fact Sheet*. Many of the elderly are easy victims of fraud, scams and other predators. Seniors seek legal advice on a variety of consumer problems. Sometimes it's the result of an unexpected financial hardship. Other cases include housing repairs and medical bills.

Ms. Mitchell is elderly and suffers from a physical disability. She desperately needed home repairs to eliminate eight health hazards, and she requested assistance from the United States Department of Agriculture's Rural Housing Service

The legal aid provided by GLSP enabled Ms. Mitchell's home to be properly repaired and rid of health hazards.

(RHS). She received a Section 504 home improvement grant and a loan to cover the home repair costs. Although RHS paid the contractor when he left, Ms. Mitchell complained to GLSP that the work was not complete and that most of the completed work was inadequate. A GLSP lawyer got RHS to reinspect the work, which led to additional grant funds for Ms. Mitchell to complete the work and to repair the contractor's substandard work.

These stories illustrate how GLSP lawyers work to help clients solve critical problems related to housing, domestic disputes, medical care and more. In every case, lives were dramatically impacted by timely legal help. Most cases are resolved without recourse to the courts. Individuals who can't be offered legal representation are offered advice or brief service, or sometimes written information about their legal problem. Many clients are referred to other resources and GLSP partners, including local bar associations and private attorneys, United Way and other social service agencies, the Housing Helpline at (800) 369-4706, and the new statewide website at www.legalaid-ga.org. By strategically targeting its limited resources to the most critical legal needs, GLSP works to solve the most important problems and help clients get back on their feet. The State Bar's Campaign for GLSP is critically important to help increase the number of clients who can be helped.

Phyllis J. Holmen is the executive director of the Georgia Legal Services Program.

Mock Trial Helps Train Next Generation of Lawyers

By Caroline Chapman and Daniel L. Maguire

They haven't earned their law degrees, taken the LSAT or even graduated from high school. In fact, some members of this young group of prospective lawyers haven't yet reached voting age — but this spring, they entered Georgia courtrooms and argued hypothetical cases in the 2003 Georgia Mock Trial Competition.

The mock trial program was founded under the Younger Lawyers Section (now known as the Young Lawyers Division) presidency of John C. Sammon in 1988. The following YLS president, Donna G. Barwick, promoted the program to full committee status. In the subsequent decade and a half, the program has grown into an esteemed national educational program. The competition trial is much like a real court trial, with all competing teams preparing the same case and presenting it before a judge and attorney evaluators. The winners of the regional competitions contend for the state championship, and the state champions have the option of competing nationally. Georgia produced national championship teams in 1995 and 1999. The state hosted the 1993 National High School Mock Trial Championship in Atlanta.

State Court Judge Edward Carriere presides over a preliminary match at the state mock trial competition.

As Georgia's Mock Trial coordinator, Stacy Rieke manages the competitions and programs associated with the Georgia High School Mock Trial Competition and assists the High School Mock Trial Committee with fundraising efforts. She facilitates all communication between the High School Mock Trial Committee, the YLD officers and the teams themselves, distributing case materials and rules and helping pair up teams with attorney coaches. Rieke also acts as the official representative for Georgia at the national tournament and helps the Georgia championship team prepare for nationals.

"We're not just training kids to become the next generation of lawyers," said Rieke, although she added that this is a common misperception of the program. "The Mock Trial program is a great way for students to learn about our legal system, and to become better-informed citizens in the process."

Students ages 14 to 19 comprise the competing mock trial teams.

While the majority of the teams are school-based, the program is structured to accept teams from independent schools, home school associations and other law-related programs. The program is strictly extracurricular, and practice during the regular school day is prohibited. Each team is comprised of 14 students divided into two squads — the plaintiff/prosecution squad and the defense squad. Each squad has three student attorneys, three student witnesses and one timekeeper. A teacher coach acts as manager to the team, while local volunteer attorneys assist in coaching and act as sponsors to the team. Together, the teacher and attorney coaches help the students prepare for court, where they will be judged on their ability to follow procedures and present a plausible case.

Competitors must become well versed in the trial rules, rehearse their roles in the trial, prepare a strong strategy and be capable of thinking quickly during competition. Attorney Steve Frey, who worked with the Jonesboro team for the 2002 season, said, "Being a criminal defense lawyer, it's a relief to see that not all kids are what you typically expect today. I thoroughly enjoyed the experience. The program is beneficial to community members because it keeps the community in touch with kids who are moving forward. It offers the opportunity to adults in the business community to know kids who'll be returning after a four-year degree."

The type of case is different every year: in even years, criminal cases are tried, and civil cases are heard in odd years. In 2003, the civil suit involved a collision between an automobile driven by a teenage musical celebrity being chased by a paparazzi photographer and a teenage bicycler riding on the wrong side of the road. In a personal injury case brought by the bicyclist and a counterclaim filed by the automobile driver, each blames the other for causing the accident and the resulting injuries suffered.

"Mock Trial was never intended to be grounds to inculcate new lawyers. I was one of three who started the program, and we were hoping to expose students in public and private high school civics classes to the real law…not the Hollywood perception," said Chief Judge Stephen E. Boswell of

Clayton County Superior Court, who presided with Judge M. Yvette Miller of the Georgia Court of Appeals over the final rounds of this year's competition.

"Mock trial has an extremely positive effect on students, and in my opinion is the best thing the Bar does for public relations. It involves the students, the parents, the teachers and other community members," said Boswell.

The Jonesboro High School team won the 2003 state championship, with Clarke Central High placing second. Karen Smith was a member of the Jonesboro teams in 2002 and 2003, and as captain in 2003 she developed a real appreciation for the efforts of the attorney coaches and sponsors.

"It was incredible that our attorney coaches put so much effort into helping us succeed…they didn't even know us when we started, and they worked so hard and made us into a championship team," said Smith. As captain, she occasionally had to lead practices on her own. "That gave me even more appreciation for what they do," she said, as well as helping her develop leadership skills.

Judge John Carbo has been an attorney coach for Jonesboro for the past five years, and he has spent a great deal of time with the team. "Coaching Jonesboro, and especially in winning the state championship the past two years, I have spent a large part of my life with the students, practicing at least three days a week and going out to eat together. We've become a family over the past five months. Mock Trial is the most rewarding thing I have ever done in my life," he said.

Members of the Jonesboro High School (left) and Clarke Central High School teams prepare for the final round in the state competition.

Carbo said the personal satisfaction of seeing young people interested in your area of work, and motivated to do whatever it takes to learn, is particularly rewarding. And winning championships has other intangible benefits. "Once you achieve a goal, there is more motivation to work, as you will see the same students participate year after year," said Carbo.

Jonesboro went on to the national competition in New Orleans in May, placing 16th. Tennessee's team won the national championship, which involved a hypothetical lawsuit concerning fraud in a high school election. The case involved themes similar to issues raised in Florida in the 2000 presidential election.

Currently, Georgia's High School Mock Trial Committee is creating a National Competition Planning Board with plans to host the 2008 national competition in Atlanta. The 2004 national competition will be held in Orlando, Fla. Students, teachers and local attorneys are already forming teams and rehearsing for the upcoming season.

The mock trial program continues to grow and gain support each year, both statewide and nationally. Students, attorneys and teachers who become involved experience widespread benefits and discover the true value of the program. Justice George H. Carley of the Supreme Court of Georgia said in the State Bar Overview of the Mock Trial Program, "From the very beginning of my participation, I have been amazed, impressed and thrilled with the enthusiasm, ability and perception of the young students and of the many attorney and teacher coaches and sponsors." GBJ

Caroline Chapman and **Daniel L. Maguire** are contributing writers for the *Georgia Bar Journal.*

keenan's kids foundation

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Celebrating 10 Years of Service

Charity

Clothing Drive for at Risk Kids

220,000 + items of clothing

Food for the Homeless

332,800 + bologna and cheese sandwiches

Community Awareness

Playground Safety Campaign

Survey metro area playgrounds

Playground Report Card

Trigger Lock Distribution

8,132 gunlocks given away

Trigger Lock Display Booth

Child Advocacy

Kathy Jo v. DFACS

First U.S. case to establish constitutional rights for foster kids

Terrell v. DFACS

Expanded constitutional rights for foster kids

State of NY v. John Doe

12-year-old drug mule / Nigeria

Other Projects Over the Past 10 Years...

- Transitional home for exiting foster children
- Award ceremonies for child advocates
- Educational seminars for lawyers
- Annual Law School Competition
- Airbag awareness program

Thank You to the Many Volunteers and Donors!

- Don C. Keenan

For Information on Volunteering and Giving
404-223-KIDS (5437) www.keenanskidsfoundation.com info@keenanskidsfoundation.com
member: Assoc. of Small Foundations

Notice of Expiring BOG Terms

Listed below are the members of the State Bar of Georgia Board of Governors whose terms will expire in June 2004. They will be candidates for the 2003-04 State Bar of Georgia elections. Please refer to the elections schedule for important dates.

Alapaha Post 2 .....Thomas C. Chambers, III, Homerville
Alcovy Post 2 .....Michael R. Jones, Sr., Loganville
Atlanta Post 2 .....Matthew H. Patton, Atlanta
Atlanta Post 4 .....Patrise M. Perkins-Hooker, Atlanta
Atlanta Post 6 .....Dwight L. Thomas, Atlanta
Atlanta Post 8 .....J. Robert Persons, Atlanta
Atlanta Post 10 .....Myles E. Eastwood, Atlanta
Atlanta Post 12 .....C. Wilson DuBose, Atlanta
Atlanta Post 14 .....Jeffrey O. Bramlett, Atlanta
Atlanta Post 16 .....William N. Withrow, Jr., Atlanta
Atlanta Post 18 .....Foy R. Devine, Atlanta
Atlanta Post 20 .....William V. Custer IV, Atlanta
Atlanta Post 22 .....Frank B. Strickland, Atlanta
Atlanta Post 24 .....Joseph Anthony Roseborough, Atlanta
Atlanta Post 26 .....Anthony B. Askew, Atlanta
Atlanta Post 28 .....J. Henry Walker, Atlanta
Atlanta Post 31 .....Brian M. Cavan, Atlanta
Atlanta Post 33 .....S. Kendall Butterworth, Atlanta
Atlanta Post 35 .....Terrence Lee Croft, Atlanta
Atlanta Post 37 .....Smuel M. Matchett, Atlanta
Atlantic Post 1 .....Thomas J. Ratcliffe, Jr., Hinesville
Augusta Post 2 .....Leland M. Malchow, Augusta
Augusta Post 4 .....William R. McCracken, Augusta
Bell-Forsyth .....Philip C. Smith, Cumming
Blue Ridge Post 1 .....David Lee Cannon, Jr., Canton
Brunswick Post 2 .....J. Alexander Johnson, Baxley
Chattahoochee Post 1 .....Joseph L. Waldrep, Columbus
Chattahoochee Post 3 .....Richard A. Childs, Columbus
Cherokee Post 1 .....S. Lester Tate, Cartersville
Clayton Post 2 .....Larry M. Melnick, Jonesboro
Cobb Post 1 .....Dennis C. O'Brien, Marietta
Cobb Post 3 .....David P. Darden, Marietta
Cobb Post 5 .....J. Stephen Schuster, Marietta
Conasauga Post 1 .....James Michael Brown, Dalton
Coweta Post 1 .....Gerald P. Word, Carrollton
Dougherty Post 1 .....Gregory L. Fullerton, Albany
Douglas .....Barry R. Price, Douglasville
Eastern Post 1 .....William C. Hartridge, Savannah
Eastern Post 3 .....J. Daniel Falligant, Savannah
Enotah .....Jeffrey L. Wolff, Dahlonega
Flint Post 2 .....Hon. A. J. Welch, Jr., McDonough
Griffin Post 1 .....James Richard Westbury, Jr., Griffin
Gwinnett Post 2 .....Barbara B. Bishop, Lawrenceville
Gwinnett Post 4 .....Phyllis A. Miller, Lawrenceville
Houston Post 1 .....Carl A. Veline, Jr., Warner Robins
Lookout Mountain Post 1 .....Larry Bush Hill, Lafayette
Lookout Mountain Post 3 .....Lawrence Alan Stagg, Ringgold
Macon Post 2 .....Hubert C. Lovein, Jr., Macon
Middle Post 1 .....Matthre Lanier Waters, Metter
Northeastern Post 1 .....Thomas S. Bishop, Gainesville
Northern Post 2 .....R. Chris Phelps, Elberton
Ocmulgee Post 1 .....Wayne B. Bradley, Milledgeville
Ocmulgee Post 3 .....Donald W. Huskins, Eatonton
Oconee Post 1 .....James L. Wiggins, Eastman
Ogeechee Post 1 .....Sam L. Brannen, Statesboro
Paulding .....Jeffrey B. Talley, Dallas
Rockdale .....John A. Nix, Conyers
Rome Post 2 .....S. David Smith, Jr., Rome
South Georgia Post 1 .....George C. Floyd, Bainbridge
Southern Post 1 .....James E. Hardy, Thomasville
Southern Post 3 .....William E. Moore, Jr., Valdosta
Stone Mountain Post 1 .....John J. Tarleton, Decatur
Stone Mountain Post 3 .....Lynne Y. Borsuk, Decatur
Stone Mountain Post 5 .....William Lee Skinner, Decatur
Stone Mountain Post 7 .....Hon. Anne Workman, Decatur
Stone Mountain Post 9 .....Hon. Edward E. Carriere, Jr., Decatur
Tallapoosa Post 2 .....Brad Joseph McFall, Cedartown
Tifton Post 1 .....Ralph F. Simpson, Tifton
Waycross Post 1 .....Joseph J. Hennesy, Jr., Douglas
Western Post 2 .....Edward Donald Tolley, Athens
Out-of-State Post 2 .....C. Randall Nuckolls, Washington D.C.
Member at Large Post 3 ..... Up for Appointment by President-elect

State Bar of Georgia 2003-04 Proposed Election Schedule

October	Official election notice, October *Georgia Bar Journal*
Dec. 15	Mail Nominating Petition Package to BOG Incumbents and any other member requesting package
2004	
January	Nomination of officers, Midyear Board of Governors' Meeting
Jan. 23	Deadline for receipt of nominating petitions for incumbent BOG Members (Article VII, Section 2)
Feb. 23	Deadline for receipt of nominating petitions by new BOG Candidates
Feb. 27	Deadline for write-in candidates for officer to file a written statement (not less than 10 days prior to mailing of ballots–Article VII, Section 1 (c))
March 5	Ballots mailed
April 6	12 p.m. deadline for ballots to be cast in order to be valid
April 8	Election results available

KUDOS

J. Lewis Sapp, partner at **Elarbee, Thompson, Sapp & Wilson**, was inducted into the **College of Labor and Employment Lawyers** in San Francisco last August. The college is a non-profit professional association honoring the leading lawyers nationwide in the practice of labor and employment law. He joins **Robert L. Thompson** and **Stanford G. Wilson**, both partners in the firm, in this distinguished honor.

James J. McAlpin Jr. was elected to succeed Armin G. Brecher as **Chair of the Executive Committee and the Board** at **Powell, Goldstein, Frazer & Murphy LLP**, effective in March 2004. McAlpin has served in a number of leadership positions in the firm, most recently as the chair of the Corporate and Technology Department and as a member of the firm's executive committee. He joined the firm in 1985 and was the youngest member to be elected to the firm's Board of Partners, the firm's governing body, in 1997. McAlpin is a graduate of The University of Alabama, earning his undergraduate degree in 1981 and his Juris Doctorate in 1984.

The Atlanta Bar Association's Women in the Profession Committee selected **Aasia Mustakeem** to receive the **Outstanding Woman in the Profession Achievement Award** for 2003, given at a luncheon at the Capital City Club. The award honors the woman whose contributions have assisted in promoting and empowering women in the profession. Mustakeem is a partner with **Powell, Goldstein, Frazer & Murphy LLP** and a member of the firm's Financial Products and Real Estate Department. She is also a member of the Executive Committee of the Board of Governors of the State Bar of Georgia and is the a past chairperson of the Real Property Law Section of the State Bar.

Janet E. Hill of **Hill and Beasley, LLP**, in Athens, was selected as **President-Elect of the National Employment Lawyers Association**. The organization has 3,000 members in affiliated chapters nationwide. In addition, Hill was selected as a **Fellow** in the **College of Labor and Employment Lawyers**. She is the first woman, and the first plaintiff's lawyer in Georgia, to have been chosen for the College.

Brian D. Burgoon of **Sutherland Asbill & Brennan** in Atlanta was named **Co-Chairman of the Florida Bar's Disciplinary Review Committee** for 2003-04. The committee reviews complaints against Florida lawyers, decides if penalties are warranted and recommends appropriate action. Burgoon is one of four out-of-state members of the Florida Bar Board of Governors.

Holly Sparrow, **Deputy Administrator of the Georgia Court of Appeals**, received a scholarship from the State Justice Institute to attend the annual seminar of the **Council of Appellate Staff Attorneys** in Charleston, S.C.

The **Savannah Bar Association's Professionalism Award** was presented to the **Honorable George E. Oliver**, senior judge of the Superior Court of Chatham County. The award is given annually to a lawyer or judge who has exemplified the highest professional standards throughout their career and made outstanding contributions in the area of community service.

Carl Pedigo of **McCorkle, Pedigo & Johnson** was recently sworn in as president of the **Savannah Bar Association** for 2003-04. Other incoming officers include President-Elect **Wade Herring** of **Hunter, Maclean, Exley & Dunn, P.C.**; Secretary **Langston Bass** of **Brennan, Harris and Rominger** and returning Treasurer **Terry Jackson** of **Jackson & Schiavone**.

ON THE MOVE

In Alpharetta

Townsend McKee, P.C., announced that **Bruce D. McKee** has become associated with the firm, which practices in the areas of business and corporate law; nonprofit organizations law; and wills, trusts, estate and tax planning. The firm is located at 1000 Mansell Exchange West, Suite 180, Alpharetta, GA 30022; (770) 640-1640; Fax (770) 640-1184.

In Atlanta

Susan R. Boltacz, formerly Senior Tax Counsel with BellSouth Corporation, has joined **Deloitte & Touche** as the leader of its **Southeast Region Tax Controversy Services Group**. She will focus her practice on federal income tax audits and appeals. Boltacz 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; (404) 220-1500; Fax (404) 220-1583.

Powell, Goldstein, Frazer & Murphy LLP announced that **Jason A. Bernstein** is joining his patent and trademark practice with the firm. Bernstein will lead and grow the firm's Intellectual Property Protection practice. He focuses his practice in patent, trademark and copyright law, licensing and related disputes. He received his Juris Doctorate from the University of Miami

and graduated with a bachelor's degree in chemistry from Vanderbilt University. The firm is located at 191 Peachtree St. NE, Sixteenth Floor, Atlanta, GA 30303; (404) 572-6600; Fax (404)572-6999.

Foltz Martin, LLC, announced that it has added **Laura G. Hester** as an associate. Hester has four years of experience in corporate, commercial real estate and technology law. The 16-lawyer Buckhead firm continues a tradition of retaining seasoned, multi-disciplinary practitioners to service its general corporate, real estate development and technology clients in transaction and litigation matters. The firm's offices are located at Five Piedmont Center, Suite 750, Atlanta, GA 30305; (404) 231-9397; Fax (404) 237-1659.

Smith Moore LLP announced the addition of **Elizabeth "Liza" Boswell** as a partner. Boswell comes to Smith Moore from the Atlanta office of Sutherland, Asbill & Brennan LLP where she was a partner and headed the firm's environmental and toxic tort 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.

Elarbee, Thompson, Sapp & Wilson, LLP, welcomed **Sanford Posner** to the firm as an associate. His practice will focus exclusively in the area of immigration law with a focus on employment-based non-immigrant and immigrant visas. The firm is located at 800 International Tower, 229 Peachtree St. NE, Atlanta, Georgia 30303; (404) 659-6700; Fax (404) 222-9718.

Fred T. Isaf was appointed managing partner in the Atlanta office of **McGuireWoods LLP**. Isaf is a member of the firm's corporate services department. His practice concentrates on middle-market companies and real estate capital markets. McGuireWoods' Atlanta office is located at The Proscenium, 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30309-7649; (404) 443-5500; Fax (404) 443-5599.

Edgar L. Crossett III and **Samuel P. Pierce** announced the formation of **Pierce and Crossett, LLP**. Their practices will continue to focus on personal injury matters, medical malpractice, worker's compensation and other liability matters. Their new office is located at 5064 Roswell Road, Suite C300, Atlanta, GA 30342; (404) 843-1640; Fax (404) 843-1512.

Schiff Hardin & Waite added **David H. Williams** as a partner and **Glenn D. Gunnels** as an associate in its Employee Benefits and Executive Compensation Group. Williams' practice centers on business mergers and acquisitions, while Gunnels focuses on all areas of employee benefits and executive compensation. The firm's newly established Atlanta office is located at 1230 Peachtree St., 18th Floor, Atlanta, GA 30309-3574; (404) 806-3800; Fax (404) 806-3801.

In Brunswick/Savannah

O'Donnell

de Vries

Hunter Maclean recently announced that **Christopher O'Donnell** has become of counsel in its Brunswick office and **Rose de Vries** has become an associate in the firm's Savannah office. O'Donnell will focus his practice on defense litigation, including FELA cases in the railroad industry, while de Vries practices in the area of commercial finance and leasing. The firm'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; and its Brunswick office is located at Bank of America Plaza, 777 Gloucester St., Suite 305, Brunswick, GA 31520; (912) 262-5996; Fax (912) 279-0586.

In Carrollton

Hopkins & Taylor, LLP, announced that **William E. Brewer** has become of counsel to the firm. Brewer was formerly a sole practitioner and Cobb County magistrate. He will practice in the areas of family and juvenile law, wills and probate litigation. The firm's Carrollton office is located at 307 Courtyard Square, Carrollton, GA 30117; (770) 830-0116; Fax (770) 830-0119.

In Gainesville

The law firm of **Carey, Jarrard & Walker, L.L.P.**, announced that **Lucy Kimbrough Henry** has become a partner, and **Ryan M. Reid** has become associated with the firm with an emphasis in real estate. The firm is located at 410 Bradford St. NW, Gainesville, GA 30503; (770) 534-7700; Fax (770) 534-0444.

In Marietta

Former Georgia **Gov. Roy E. Barnes** announced the formation of **The Barnes Law Group, LLC**. Barnes' daughter and son-in-law, Allison and

John Salter, joined the group, which will devote ten percent of its time to pro bono cases. The firm is located at 30 South Park Square, Marietta, GA 30061; (770) 419-8505; Fax (770) 590-8958.

In Raleigh, NC

Robert Meynardie has joined **Nelson Mullins Riley & Scarborough, L.L.P.**, in the firm's Raleigh office. He relocated to Nelson Mullins from Moore & Van Allen in Raleigh. Meynardie is one of eight new additions to Nelson Mullins' new office location in Raleigh. The new office will be located at GlenLake One, Suite 200, 4140 Parklake Ave., Raleigh, NC 27604; (919) 877-3800; Fax (919) 877-3799.

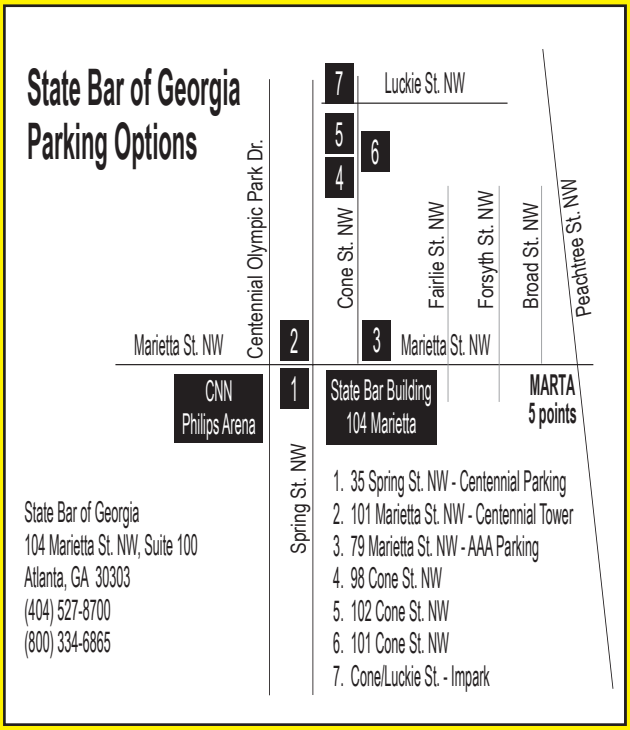
In Tucker

Jamene L. Christian recently announced the opening of **The Law Offices of Jamene L. Christian**. Christian's practice concentrates on immigration, employment and consumer. A former Atlanta Legal Aid Society intern, Christian is the creator of the "Every Day Law for Every Day People" seminar. The office is located at Tucker Office Park, 2321 Fourth St., Suite 104, Tucker, GA 30084; (770) 493-1545; Fax (770) 493-1723.

Directions & Parking Information for the State Bar of Georgia Headquarters

104 Marietta St. NW, Atlanta, GA 30303

- **From the East I-20:** Take the Windsor-Spring Exit. Turn right on Spring Street. Turn right on Marietta Street.
- **From the West I-20:** Take the Windsor-Spring Exit. Turn left on Spring Street. Turn right on Marietta Street.
- **From the South 75-85:** Take International Boulevard Exit. Turn left on International. Turn left on Centennial Parkway. Turn left on Marietta Street.
- **From the North 75-85:** Take Williams Street Exit. Turn right on International Boulevard. Turn left on Centennial Parkway. Turn left at Marietta Street.
- **From Marta — Five Points Station:** Exit the train station heading towards Peachtree Street. Turn left out of the station onto Peachtree Street. Follow Peachtree Street to Marietta Street. Turn left on Marietta Street. Follow Marietta Street for four blocks.



NOTE: The State Bar parking deck is under construction and scheduled to open in the summer of 2004. **Free parking for members will resume when the new deck is completed.** You may take MARTA (highly recommended) or park in one of the nearby garages.

NOW THAT'S A WALKIE-TALKIE

It's already starting. The built-in walkie-talkie that connects New York to New York or anywhere within 300 miles is now the walkie-talkie that you and a colleague can take with you to Boston and continue to use. Soon it will connect you between New York and Boston and before 2003 is over, this digital marvel, already built into your Nextel phone, will connect New York with Los Angeles. For the details and schedule of how soon the nationwide walkie-talkie is available in your market, visit nextel.com.

1-800-NEXTEL9

Demo Nextel at a Direct Sales Office

Metro Atlanta, 404-467-2800
Northeast Atlanta, 770-825-9400
Savannah, 912-692-4444
South Atlanta, 770-210-5900

Promo: NEXS03-095-226

Second Opinions Are Not Just for Doctors

"Let me be sure I understand this," you say to the caller. "Maya Brown is representing you, but you want me to look over your paperwork to be sure that she is handling your case properly?"

"Yes," the caller confirms, "kind of like a second opinion. I'll pay you for your time, whether you agree with what she's doing or not."

"I don't think I'm allowed to talk to another lawyer's client," you reply. "If you decide to fire her, I'd be happy to talk to you afterwards."

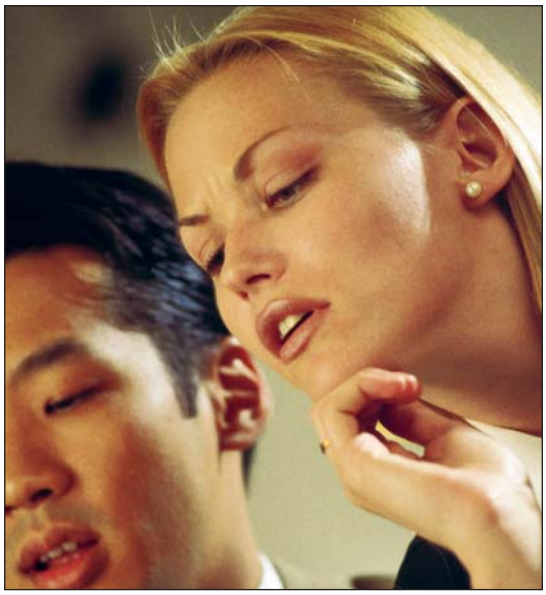
"I'm not sure I want to fire her," says the caller. "I just want to be sure the settlement she's proposing is reasonable."

You decide to check the ethics rules and get back to the caller later.

You are surprised to find that the Georgia Rules of Professional Conduct do not impose a blanket prohibition on a lawyer communicating with a person who is represented by counsel. Rule 4.2 does prohibit one lawyer from talking to another lawyer's client when the first lawyer represents someone with potentially adverse interest. It does not prohibit a completely disinterested lawyer from providing a second opinion to someone who is currently represented.

Lawyers are often reluctant to provide second opinions, either from an aversion to "second guessing" a colleague or from fear of being accused of "stealing" clients.

In fact, there are good reasons to give a second opinion upon request. The client who seeks a second opinion is either unhappy with their current lawyer or confused about



some aspect of the representation. A fresh perspective on the case can serve as reassurance to a nervous client. The second lawyer may fill a valuable role in explaining and validating the actions of the first, or may give the client a better understanding of her options in resolving the legal matter.

We in the Office of the General Counsel also see situations where a consultation with a second lawyer could have prevented significant harm as the result of misconduct by the first lawyer. For example, the lawyer who has "borrowed" settlement funds may assure his client that it is reasonable to wait six weeks for settlement checks to clear. Even when the client becomes suspicious and attempts to verify the lawyer's statements by talking to another lawyer, the client may be unable to find a lawyer willing to speak with her while she is represented.

Remember that the Office of the General Counsel operates a Lawyer Helpline during regular business hours. Please call (404) 527-8720 or (800) 682-9806 with your ethics questions.

Discipline Notices

(June 19, 2003 through Aug. 15, 2003)

By Connie P. Henry

DISBARMENTS/VOLUNTARY SURRENDER

Raymond J. Peery
Lithonia, Ga.

Raymond J. Peery (State Bar No. 570600) has been disbarred from the practice of law in Georgia by Supreme Court order dated July 10, 2003. In 1992 the Supreme Court of Georgia granted Respondent's petition for voluntary suspension of license pending his appeal of his conviction in the United States District Court for the District of Nebraska for money laundering and felony theft from a program receiving federal funds. Since the time of his suspension, the United States Court of Appeals for the Eighth Circuit has affirmed the judgment of conviction entered against Perry and the United States Supreme Court has denied his petition for a writ of certiorari. Since Perry has been convicted of felonies and has exhausted his appeals, he was disbarred.

Fred Carter
Atlanta, Ga.

Fred Carter (State Bar No. 113930) has been disbarred from the practice of law in Georgia by Supreme Court order dated July 11, 2003. On three separate occasions, Carter accepted money in exchange for legal services which he subsequently failed to provide. His failures in each case led to judgments which significantly harmed each client's interests. In addition, Carter failed to respond to his clients' requests about the status of their cases and, in one case, deceived his client about her case. Carter failed to refund any of the money paid to him by the clients. Carter failed to respond to disciplinary authorities.

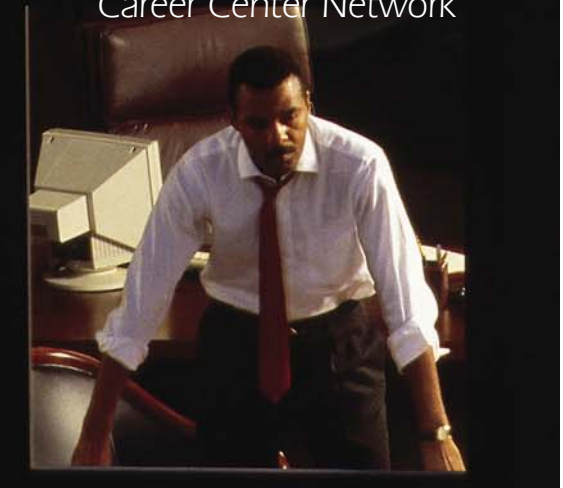
Ned Barrie Majors
Myrtle Beach, S.C.

Ned Barrie Majors (State Bar No. 466845) has been disbarred from the practice of law in Georgia by Supreme Court order dated July 11, 2003. Majors engaged in extensive commingling of personal funds with client and fiduciary funds, creating a situation which had the potential to cause serious injury to his clients. He engaged in a pattern of misconduct which he knew or should have known was in violation of the disciplinary rules. Majors did not recognize the wrongful nature of his conduct nor the threat to the public.

SUSPENSIONS

David B. Rechtman
Atlanta, Ga.

David B. Rechtman (State Bar No. 597272) has been suspended from the practice of law in Georgia for six months by Supreme Court order dated July 11, 2003. On two separate occasions Rechtman paid a company with non-lawyer officers and employees portions of legal fees he earned representing clients that had been referred to him by the company. In mitigation of discipline, Rechtman fully cooperated with disciplinary authorities, has no prior disciplinary record and is remorseful.



PUBLIC REPRIMANDS

Larry J. Barkley
Rome, Ga.

On July 14, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Larry J. Barkley (State Bar No. 037825) and ordered the imposition of a public reprimand. Barkley was hired on a one-third contingency fee agreement to represent a decedent's daughter and granddaughter in a claim against two individuals relating to assets formerly owned by the decedent. After obtaining verbal consent from the clients, Barkley settled the claim against one individual by having his clients pay $15,000 for the conveyance of certain real property by limited warranty deed to Barkley as the clients' attorney. The clients verbally authorized Barkley to borrow $15,000 from his bank, secure repayment of the money with a security deed from Barkley as the clients' attorney to Barkley individually, and use income from the rental or sale of the property to repay the loan. Barkley acknowledged that his actions could have affected his representation of his clients; that he failed to inform them that they might want to seek independent counsel; and that he did not have his clients consent in writing to the conflict of interest.

Dean Young
McDonough, Ga.

On July 14, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Dean Young (State Bar No. 782819) and ordered the imposition of a public reprimand. Young agreed to represent a couple in a matter involving their 2000 federal and state tax returns. Although his clients provided him with the necessary documents, paid him $250 and promptly signed and mailed the returns back to him, Young failed to return his clients' telephone calls; failed to respond to an e-mail sent by the clients, failed to return the clients' file or provide an accounting as requested by the clients; and failed to file a timely sworn response to the State Bar's Notice of Investigation. In mitigation, Young asserts that the majority of his inaction and failure to respond to his clients was due to illness and that he is deeply remorseful. Young states that he is under the care of a physician and that he is no longer impaired. Young has no prior disciplinary record.

INTERIM SUSPENSIONS

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since June 19, 2003, two lawyers have been suspended for violating this Rule and one has been reinstated.

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

"And Justice for All"

State Bar Campaign for the Georgia Legal Services Program

Your campaign gift helps low-income families and children find hope for a better life. GLSP provides critical legal assistance to low-income Georgians in 154 counties outside the metro Atlanta area.

The State Bar of Georgia and GLSP are partners in this campaign to achieve "Justice for All." Give because you care! Check-off the GLSP donation box on your State Bar Association Dues Notice, or use the campaign coupon below to mail your gift today!

Yes, I would like to support the State Bar of Georgia Campaign for the Georgia Legal Services Program. I understand my tax deductible gift will provide legal assistance to low-income Georgians.

Please include me in the following giving circle:

- ☐ Benefactor's Circle . . . . . .$2,500 or more
- ☐ President's Circle . . . . . .$1,500-$2,499
- ☐ Executive's Circle . . . . . .$750-$1,499
- ☐ Leadership Circle . . . . . .$500-$749
- ☐ Sustainer's Circle . . . . . .$250-$499
- ☐ Donor's Circle . . . . . .$125-$249
- ☐ or, I'd like to be billed on (date) _____ for a pledge of $_____

Pledge payments are due by December 31st. Pledges of $500 or more may be paid in installments with the final installment fulfilling the pledge to be paid by December 31st. Gifts of $125 or more will be included in the Honor Roll of Contributors in the *Georgia Bar Journal*.

Donor Information:

_____
Name

_____
Business Address

_____
City State Zip

Please check one:
☐ Personal gift ☐ Firm gift

GLSP is a non-profit law firm recognized as a 501(c) (3) by the IRS.
Please mail your check to:

State Bar of Georgia Campaign for Georgia Legal Services
P.O. Box 78855
Atlanta, Georgia 30357-2855

Thank you for your generosity.

Case Management Software:

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

By Natalie R. Thornwell

My prediction is that case management software will play a major part of the movement toward a fully integrated application for handling legal work. An application that will include front office, back office and peripheral software will be developed to cover any and every aspect of legal work. This killer application will have no division between its case management, time and billing, accounting, document assembly, document management, litigation support, trial presentation or word processing functionality.

For once and all, there will be one application that can "do it all" for law firms. Lawyers will be pleased to have their information available at any time – over the Web, on the handheld, at home or on the road, over the phone, even from the microwave?!

Well, maybe this killer application is just a prediction, and the marketplace will not be able to produce such a product. But, even now a suite of applications are within easy reach. As I mentioned in Part I of this article, case management vendors have stumbled upon "practice management software" as they have expanded their programs' features to accommodate attorneys' requests for more information.

These features include:

- Information from the case management system can be merged into word processing documents, and documents generated in the word processor can be added back into the case manager with document assembly features.
- Documents can be attached to files in the case managers and their location on the computer can be tracked and indexed for faster retrieval of the document by the case manager's document management capabilities.
- Client relationship management (CRM) features allow case management users to ascertain which user in the firm had last

contact with a particular person or company, what that contact entailed and what future contact needs to be made.

- Knowledge management is achieved by taking the information gained by the case management CRM-type features and incorporating the other system feature to act on or report on the information. Knowledge management in case managers will continue to develop as lawyers continue to analyze and look for better ways of working with the information that they are brining into the firm on the front end, and contemplating new and better ways beyond simple links to get information into the back office.

Case Management Software is a Very Sharp Tool – Don't Get Cut!

When a firm decides to use a case management software product, the decision can be made sloppily and the firm will experience a "dishrag" implementation of the program. This occurs when everyone feels the system has just been thrown on them and no one really knows how to use it, or even wants to use if for that matter. Often this type of implementation will lead to the death of case management in a law firm.

When the "sizzle" of the one feature that drew the firm to the software fades, the dying of the software in the firm quickly begins. Leaders of the "resistance to changing things in the firm" will reason that this venture was a waste of money and will internally sabotage the implementation by refusing to learn how to use the program. The dying continues as the rarely used system gets pushed back on the shelf and shortcuts are removed from the firm's desktops.

When a firm decides to use a case management software product, the decision can be made sloppily and the firm will experience a "dishrag" implementation of the program.

To avoid the mistakes that can occur with implementing case management software, make sure you follow some of these key tips for a successful implementation:

- Write out a plan for the implementation. This process, even when done informally, will help the firm immensely in terms of successfully implementing case management software. Write down what systems you plan to implement (the level or functions needed), the hardware requirements, people involved with implementation and their roles, customization needs based on how the software works, and every thing that you can think of that will help in getting the system up and running properly.
- Get proper training no matter how familiar you are with similar features from other more generic packages. This is paramount! You must learn the features of the tools you use. Don't waste time and money trying to teach yourself. Just think how long it would have taken you to learn to be a lawyer without going to law school. Engage a certified consultant or trainer for the software to assist you with teaching everybody in the firm.
- Get proper buy-in from the ground up. Make sure staff and the leaders of the firm are all in agreement and are excited (or made excited) about the improvement of the practice through careful and steady technology advances. Make sure everyone understands the economics of the decision. Whether it's the secretary that doesn't understand that she won't have to go to every single office in the firm and manually update the contact information for the new judge, or the senior partner or firm owner that can capture more billable time using the system, teach your firm that this system will help to save time and make more money.
- Be patient as the firm learns the various parts of the systems and work to apply the next level of features continuously over time. Do not give up at just the basics, and do not get left too far behind in the software's inherent upgrade cycle.
- Don't start from scratch if you don't have to. Use every electronic source of data that you have to get you going. Have a certified consultant review the current sta-

tus of your technology and help with migrating as much data as possible into your new system.

Picking Your Tool

When faced with deciding on what to purchase for your practice, these programs should top your list for consideration. They are, in my opinion, the best in class for solo and small law firm case management systems.

Amicus Attorney
www.amicusattorney.com
ABACUS Law
www.abacuslaw.com
Practice Master
www.practicemaster.com
TimeMatters
www.timematters.com

Another system that is often included in this list is ProLaw – www.prolaw.com. There are also several other systems, nearly 120 others to be exact, which classify themselves as case management software programs suitable for solo and small firm practitioners. And there are also some practice area specific case managers, like Needles, www.needleslaw.com, for personal injury firms. With this number of products, you must do your homework. Large law firms will find that their software offerings are more integrated, and because their feature sets are different, they are not discussed here.

Shopping Tips

- Look at the features provided in the programs and learn firsthand how they work
- Look at product reviews and articles (check out Law Office Computing, www.lawofficecomputing.com and Law Technology News, www.lawtechnews.com)
- Look at what you already have in terms of hardware and software
- Look at what this department recommends

Ultimately, every law firm will need to have case management software. This sharp tool is essential for the modern practice of law, and it can fix your firm's entire front end, and maybe even more! GBJ

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

Lawyer Assistance Program

This free program provides confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems and mental or emotional impairment. The program also serves the families of Bar members, law firm personnel and law students.

If you have a personal problem that is causing you significant concern, the Lawyer Assistance Program can help. Please feel free to call one of the volunteer lawyers listed below. All calls are confidential. We simply want to help you.

Area	Committee Contact	Phone
Albany	H. Stewart Brown	(229) 420-4144
Athens	Ross McConnell	(706) 369-7760
Atlanta	Melissa McMorries	(404) 688-5000
Atlanta	Brad Marsh	(404) 874-8800
Atlanta/Decatur	Ed Furr	(404) 284-7110
Atlanta/Jonesboro	Charles Driebe	(770) 478-8894
Cornelia	Steve Adams	(770) 778-8600
Fayetteville	Wiley Glen Howell	(770) 460-5250
Hazelhurst	Luman Earle	(478) 275-1518
Macon	Bob Berlin	(478) 477-3317
Macon	Bob Daniel	(912) 741-0072
Norcross	Phil McCurdy	(770) 662-0760
Savannah	Tom Edenfield	(912) 234-1568
Valdosta	John Bennett	(229) 333-0860
Waycross	Judge Ben Smith	(912) 449-3911
Waynesboro	Jerry Daniel	(706) 554-5522

Hotline: (800) 327-9631. All Calls are Confidential.

Annual Fiction Writing Competition

The editorial board of the *Georgia Bar Journal* is pleased to announce that it will sponsor an Annual Fiction Writing Contest in accordance with the rules set forth below. The purposes of this competition are to enhance interest in the Journal, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. For further information, contact C. Tyler Jones, Director of Communications, State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; (404) 527-8736.

Rules for Annual Fiction Writing Competition

The following rules will govern the Annual Fiction Writing Competition sponsored by the Editorial Board of the *Georgia Bar Journal*:

1. The competition is open to any member in good standing of the State Bar of Georgia, except current members of the Editorial Board. Authors may collaborate, but only one submission from each member will be considered.
2. Subject to the following criteria, the article may be on any fictional topic and may be in any form (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the Board will consider in judging the articles submitted are: quality of writing; creativity; degree of interest to lawyers and relevance to their life and work; extent to which the article comports with the established reputation of the Journal; and adherence to specified limitations on length and other competition requirements. The Board will not consider any article that, in the sole judgement of the Board, contains matter that is libelous or that violates accepted community standards of good taste and decency.
3. All articles submitted to the competition become property of the State Bar of Georgia and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental and that the article has not been previously published.
4. Articles should not be more than 7,500 words in length and should be submitted electronically.
5. Articles will be judged without knowledge of the identity of the author's name and State Bar ID number should be placed only on a separate cover sheet with the name of the story.
6. All submissions must be received at State Bar headquarters in proper form prior to the close of business on a date specified by the Board. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, C. Tyler Jones, Director of Communications, State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. The author assumes all risks of delivery by mail.
7. Depending on the number of submissions, the Board may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the Board. Contestants will be advised of the results of the competition by letter. Honorable mentions may be announced.
8. The winning article, if any, will be published. The Board reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the Board not to be of notable quality.

Deadline - Jan. 23, 2004

Sections Stay Busy Throughout the Fall

By Johanna B. Merrill

The State Bar of Georgia sections hit the ground running this fiscal year and their activity has continued into the fall. Following is an update of some of the section activities.

The **Environmental Law Section** began the 2003-04 fiscal year at the beach with their Annual Environmental Law Seminar held at the Ritz-Carlton in Amelia Island, Fla. on Aug. 1-2. On Sept. 29 the section, along with co-sponsor Alston & Bird, hosted a reception honoring the former director of the Georgia Environmental Protection Division, Harold Reheis.

The **Technology Law Section** hosted a well-attended lunchtime CLE event, titled "Copyrights and Copylefts" on Aug. 21 at McKenna Long & Aldridge LLP. Todd McClelland, an associate at Alston & Bird LLP as well as chair of the Intellectual Property Law section's Licensing Committee, spoke about the risks and legal considerations of open source software. Dick Gaylor, a C.S./I.S. professor at Kennesaw State University, also spoke.

On Sept. 10 several of the sections were represented at the Section Leaders Meeting held at the Bar Center in Atlanta. Topics ranging from the role of the Institute of Continuing Legal Education, to services that Bar departments can offer sections and ways to recruit and retain members were presented to section chairs and other officers. Cliff Brashier, executive director of the Bar, opened the meeting and spoke about plans for the Bar Center, including a progress report on the parking deck currently under construction, as well as legislative policy.

From Sept. 11 through 13 the **General Practice & Trial** and **Local Government Law** sections, along with I.C.L.E. and the Bar's Law Practice Management Department, co-sponsored the inaugural Solo and Small Firm Institute and Technology Showcase in Savannah.

The **International Law Section** and the **Intellectual Property Law Section** co-hosted a lunchtime CLE event at the Bar Center on Sept. 24. Roxanne Cenetempo, Chief IP Counsel for Imerys, James Harris, IP Counsel for UPS and Brenda Holmes, a partner at Kilpartick Stockton LLP, spoke on the topic of "Patent Issues and Strategies Outside the U.S." The discussion was moderated by Frank Landgraff, Senior IP Counsel for GE Power Systems.

On Oct. 2 the **Intellectual Property Law Section** will meet at the Park Tavern in Atlanta to recruit section members for their many committees. Following the business meeting members will have the opportunity to socialize and network. On Oct. 13 the section's Trademark Committee is hosting a lunchtime CLE at Bar Headquarters titled "European Trademarks: Strategies in a Changing Landscape." In November, the **Entertainment and Sports Law Section**, as well as sections from the Florida

and Tennessee bar associations will join the IPL section, for an I.C.L.E. Institute held at the Ritz-Carlton outside Montego Bay, Jamaica.

Reminder: The sections encourage you to submit your e-mail address to the Bar's Membership Department (membership@gabar.org) as sections are increasingly relying on electronic communication to alert their members about CLE events, social meetings and pertinent legislative and administrative information.

NEWS FROM THE SECTIONS

Appellate Practice Section

By Christopher McFadden

Caselaw Updated as of Aug. 14.

Rainey v. Ormond, 2003, Fulton County D. Rep. 1765, 2003 Ga. App. LEXIS 667, A03A1372 (June 4, 2003). The Court of Appeals extended a rule that makes appellate practice slightly less treacherous. The rule extended in *Rainey* was first handed down by the Supreme Court in *Housing Auth. &c. of Atlanta v. Geter*, 252 Ga. 196, 197, 312 S.E.2d 309 (1984). The *Geter* rule is an exception to the usual rule that a notice of appeal divests the trial court of jurisdiction. The *Geter* rule is that, notwithstanding the filing of a notice of appeal, the trial court retains jurisdiction to decide a motion for new trial. (Under *Geter*, a party moving for new trial notwithstanding that an appeal is pending should move the appellate court to stay the appeal.) *Rainey* extends *Geter* to the discretionary-appeal context. Following *Geter*, the *Rainey* court dismissed an application for discretionary appeal so that the trial court could rule on a pending motion for new trial. After that new-trial motion was denied, Rainey filed a second application for discretionary appeal; the Court of Appeals granted Rainey's second application and decided the appeal in his favor.

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

Future Lawyers Faced with Ethical Dilemmas

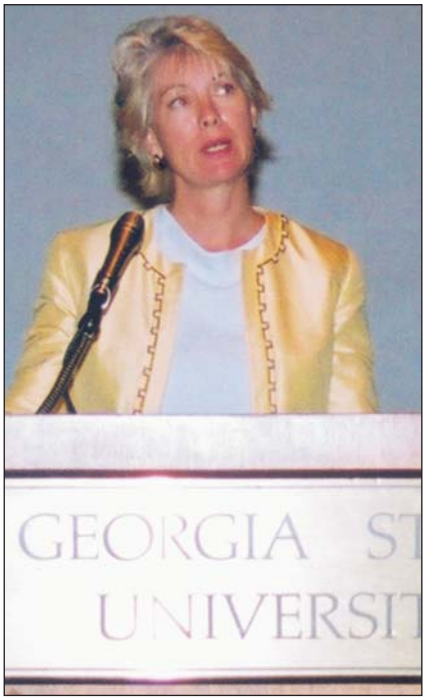
By Daniel L. Maguire

Suppose, as a law student, you get a summer job with a large firm based on the fact that your grades placed you in the top 20 percent of your class. Because of a car accident, you have to make up the last two final exams, and you do very poorly. This causes your cumulative average to drop, placing you in the top 40 percent of the class. Are you obligated to tell the firm about your new class rank?

Or perhaps you have quoted a package price to your client for the preparation of an estate plan, largely based on how long you think it is going to take for you to do it. The client pays your full fee in advance. It turns out that the work is going to take a lot less time than you thought, because a partner has done similar work for a client in similar circumstances. Are you compelled to give the client a refund, even though he has already agreed to the fee and paid it?

These and other hypotheticals were presented to incoming first-year law students at Emory University and Georgia State University as part of their orientation to professionalism. This orientation, sponsored by the Bar's Committee on Professionalism and the Chief Justice's Commission on Professionalism, was designed to encourage students to start thinking and acting according to the standards of the profession — and to start immediately, not three years down the road when they begin to practice. The speculative scenarios were part of a breakout session, where students met in small groups

First-year Emory Law students take an oath of professionalism as part of the Orientation on Professionalism program, co-sponsored by the Chief Justices Commission on Professionalism and the Bar Committee on Professionalism.



Judge Cynthia Becker speaks during the Orientation for Professionalism for first-year law students at Georgia State University.

led by volunteers from the legal community. They discussed each situation and tried to determine what they would do in such circumstances.

Jessica Day, a new student at Emory, said she appreciated the way the sessions integrated both scholastic and practical issues into the hypotheticals. "It was a great way to involve different backgrounds and experiences as tools for discussing what will be challenges during our time at Emory and throughout the rest of our careers," she said.

At Georgia State, Mariel Risner agreed that the seminar's benefits were wide-ranging. It served "to inculcate professional values within students at the very beginning of their study, so that they may maintain an appropriate mindset throughout their career and know what is expected of them," said Risner. She also appreciated the opportunity to discuss these issues in a group setting. "It allowed for greater individual participation than the auditorium lectures, and proved more conducive to meeting people," said Risner.

Prominent members of the Bar addressed the incoming students at both universities. DeKalb Superior Court Judge Cynthia Becker spoke at Georgia State's orientation. Becker is a 1987 alumna of GSU Law School, and the first GSU graduate to become a Superior Court judge. She noted that professionalism involves more than just ethics – and that it is a simple concept. Compared to the written code of ethics, Becker said, "Professionalism is a different thing. It's what I call 'What would my Mama say?'"

Becker encouraged the students to exercise civility and to "take the high road" when faced with the choice between professional and unprofessional conduct. "The really great lawyers and judges never waver," she said, from the simple concept of professionalism.

At Emory, the keynote speaker was Judge Herbert Phipps of the Court of Appeals of Georgia. Phipps reminded the students that they were under oath as long as they are in the legal profession. He cautioned them to stay away from shady practices, because they will affect your demeanor and reputation.

Phipps told a humorous story from his childhood in rural South Georgia to illustrate his point: "There are certain animals that will eat the (chickens') eggs (from their nests)…I don't know whether you've ever heard of a suck-egg dog, but they are bad. Even for dogs, there is a minimum standard of conduct beyond which you shouldn't go. My granddad could spot a suck-egg dog a mile away. Granddaddy used to say, as soon as he saw a dog, 'That's a suck-egg dog.' I would say, 'Granddaddy, how do you know that's a suck-egg dog? He's not sucking eggs now.' And Granddaddy would say, 'Well, if you suck eggs for a while, pretty soon you begin to look like you're sucking eggs, even when you're not.'"

Judge Phipps exhorted the students to "have the courage to do the right thing, even when nobody knows it," because, as he said, the test is not whether something is permissible; the test is whether it is right. After he spoke, the first-year class at Emory took an oath of professional conduct.

The efforts of the Chief Justice's Commission on Professionalism and the State Bar Committee on Professionalism were not lost on these future lawyers. First-year Emory law student Aaron Welch said, "I found it encouraging that the university and the Bar association went to such lengths to impress upon us the importance of professionalism and ethical behavior. It seemed a good start for all of us." GBJ

Daniel L. Maguire is the administrative assistant for the Bar's communications department and a contributing writer for the *Georgia Bar Journal*.

In Memoriam

The Lawyers Foundation Inc. 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 Inc., 104 Marietta St. NW, Suite 630, Atlanta, GA 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

William H. Alexander
Atlanta, Ga.
Admitted 1957
Died August 2003

Amy Gentry Becker
Savannah, Ga.
Admitted 1997
Died December 2002

William O. Carter
Hartwell, Ga.
Admitted 1948
Died August 2003

Robert E. Flournoy Jr.
Marietta, Ga.
Admitted 1952
Died August 2003

Gerald D. Ford
Atlanta, Ga.
Admitted 1985
Died June 2003

Charles E. Fraser
Brevard, N.C.
Admitted 1953
Died December 2002

Richard S. 'Stan' Gault
Cumming, Ga.
Admitted 1971
Died July 2003

Donald W. Gettle
Cartersville, Ga.
Admitted 1961
Died July 2003

Charles L. Goodson
Newnan, Ga.
Admitted 1950
Died April 2003

Charles Grossi
Savannah, Ga.
Admitted 1953
Died May 2003

James E. Hardy
Atlanta, Ga.
Admitted 1949
Died August 2003

Mark S. Hayes
Atlanta, Ga.
Admitted 2002
Died May 2003

Richard W. Morrell
Atlanta, Ga.
Admitted 1986
Died July 2003

Mary P. Siemen
Gaithersburg, Md.
Admitted 1986
Died July 2003

Robert H. Smalley Jr.
Dalton, Ga.
Admitted 1951
Died June 2003

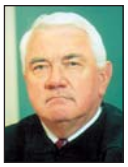
Oscar N. Vaughn
Anaheim, Ca.
Admitted 1973
Died March 2003

Henry S. Walker
Americus, Ga.
Admitted 1950
Died February 2003

David P. Wallace
Atlanta, Ga.
Admitted 1972
Died June 2003

Robert E. Flournoy Jr., 72, of Marietta, died Aug. 10. He practiced law from 1951 to 1987 and served all three branches of government in Georgia: as a member of the state legislature (1963-64), mayor of Marietta (1982-85), and as a Cobb Superior Court judge from 1987 until his retirement in 2001, when he was named a senior judge. History was made in 2000 when his son, Robert Flournoy III, was named a Superior Court judge in Cobb County, marking the first time in Georgia that a father and son were sitting judges on the same Superior Court bench. Judge Flournoy served on the State Bar Board of Governors, as president of the Cobb County Bar Association, as a member of the Judicial Nominating Commission, and as chairman of the Governor's Commission on Sentencing. He received the Traditions of Excellence

Award in 2001. He is survived by his wife, Linda Jones Flournoy; another son, Matthew C. Flournoy of Marietta; two daughters, Gwen Ross of Marietta and Natalie Boss of Greenville, S.C.; a stepdaughter, Shelby Weeks of Marietta; and six grandchildren.



Richard S. "Stan" Gault, 62, of Cumming, died July 23. He was Chief Judge of the Superior Court of the Bell-Forsyth Judicial Circuit. He graduated from the U.S. Air Force Academy in 1966 and Emory University School of Law in 1971. He served six years as Assistant and Special Attorney General of Georgia under Attorney General Arthur Bolton, and was appointed to the Superior Court bench in 1984. Judge Gault was involved in Forsyth County's Partners in Education program, and he coached and assisted teams from Forsyth County high schools in the State Bar's Mock Trial Program since 1989. Survivors include his wife, Paula Heard Gault; two daughters, Michelle Leak and Melanie Martin, both of Cumming; two stepdaughters, Kelley Story and Kristin Martin, also of Cumming; and eight grandchildren.

James Emmit "Jim" Hardy, 80, of Dunwoody, died Aug. 22. A U.S. Army veteran of World War II, he was admitted to practice law in 1949, and was a member of the State Bar of Georgia, the American Bar Association, and the American Judiciary Society. He was also vice president of the Georgia Trial Lawyers Association for many years. He is survived by his wife of 61 years, Doris M. Hardy; a son, James E. Hardy II; two daughters, Jill Hardy-Hobbs and Angela Landreth; and two grandchildren.

LAWYERS FOUNDATION OF GEORGIA

Memorial Gifts

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

A meaningful way to honor a loved one or to commemorate a special occasion is through a tribute and memorial gift to the Lawyers Foundation of Georgia. An expression of sympathy or a celebration of a family event that takes the form of a gift to the Lawyers Foundation of Georgia provides a lasting remembrance. Once a gift is received, a written acknowledgement is sent to the contributor, the surviving spouse or other family member, and the *Georgia Bar Journal*.

Information

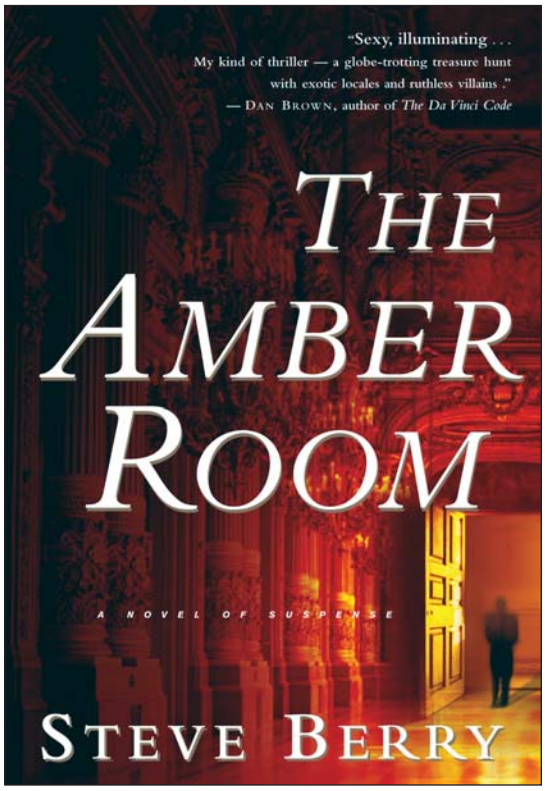
For information regarding the placement of a memorial, please contact the Lawyers Foundation of Georgia at (404) 659-6867 or 104 Marietta St. NW, Suite 630, Atlanta, GA 30303.

Debut Novel a Thriller

Reviewed by Robert E. Bailey

Maximum Bob, in drag, meets Indiana Jones's evil twin in Steve Berry's new thriller *The Amber Room* (Ballantine Books), a fanciful flight into a half-century old conundrum of European politics. Steve Berry offers his debut novel in the sweeping scale of the omniscient third person and the reader has access to the minds of all the players, which includes an American female Superior Court Judge and her probate lawyer ex-husband.

Greed kills, and ranks second only to stupidity as the mother's milk of human folly. Hitler thought he had a better idea than Napoleon. One Russian winter, though, demonstrated that they both had the same idea. With stupidity well served, greed certainly did not fail Hitler's minions. They carted off everything shiny including the Amber Room — a four wall jigsaw puzzle rendered entirely in thin slices of precious amber — from the Catherine Palace outside Leningrad.



The Nazis briefly displayed the reassembled Amber Room in Konigsberg Castle. Allied bombing is said to have caused some damage to the delicate panels, so the room was dismantled in 1945 to secure it from both advancing Allied Forces and, as author Berry suggests, competing cabals within the Third Reich. The whereabouts of the priceless 250-year-old amber panels have not been public knowledge since.

Enter Berry and his cast of characters, most of whom end up dead. Having specific knowl-

edge of the Amber Room seems to have the same effect as wearing a plutonium wrist watch. Time is short.

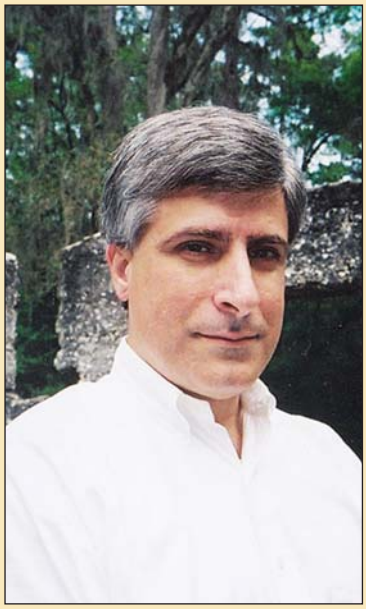
Karl Boyra survives the horrors of World War II to work as a Russian agent in search of stolen Russian art work, and harbors secrets even after he immigrates to the United States. He is the father of Rachel Cutler, an Atlanta Superior Court Judge. Rachel is long on hubris and short on social skills. Those of you who labor daily in the tasseled loafer vineyards of the law — where grapes get stomped daily — will, no doubt, allow Berry this little fiction. Goodness knows, no one with such a personality profile could ever become a judge. The death of Rachel's father at the hands of Euro-baddies launches her from the Superior Court bench to Europe in search of justice. Paul Cutler, Rachel's ex-husband and a probate lawyer, follows Rachel to Europe despite the fact that Rachel has ignored his advice to leave the matter to the authorities. Europe turns out to harbor a clutch of competing art connoisseurs who specialize in covertly, and violently, acquiring artifacts expropriated by the Third Reich. Rachel, armed with her father's secrets, soon becomes the focus of the art connoisseurs' henchmen. Paul arrives in time to aid Rachel, but finds they are both hopelessly entangled. Leaving the matter to the authorities becomes a moot point as they learn that they must solve the mystery simply to survive.

Berry brings his lawyers need for precise language to this thriller. Readers with an appreciation for art, and a respect for detail, will find *The Amber Room* hard to put down.

Book Information

The Amber Room, September, 2003. 400p. Ballantine Books, $24.95 (0-345-46003-0)

Robert E. Bailey retired to write mystery thrillers after 25 years as a licensed private investigator. His first novel *Private Heat* won the Josiah Bancroft Junior award at the Florida First Coast Writer's Festival in Jacksonville, Fla., and is currently on the short list of nominees for a 2003 Shamus award. His second novel, *Dying Embers*, is currently in store and on the short list of nominees for a Great Lakes Book Award.



Steve Berry is a trial lawyer who has practiced for nearly a quarter century in St. Marys, on the Georgia coast. He's also active politically, having served on the county Board of Education and, currently, he is one of five members of the Camden County Board of Commissioners. But he always wanted to be a writer. In 2000 and 2001 Berry won the *Georgia Bar Journal's* annual fiction writing contest with his stories, *The House* and *Equitable Division*. Random House came calling in early 2002 with a two book, high figure deal that was, to Berry, "more than a dream come true." The first of the two books, *The Amber Room*, was released in August. "Now the hard part," Berry says. "Seeing if readers will like the story. It's scary. For 12 years I wrote for myself. Now I have to build an audience." But Random House has lined up a six state fall tour and early sales have been strong. In August 2004 the second book, *The Fourth Rome*, will be published. For more information, check out Steve's Web site at www.steveberry.org.

Note: To verify a course that is not 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.

October 2003

2

ICLE
Title Standards
Atlanta, Ga.
6 CLE

ICLE
Effective Legal Negotiation & Settlement
Atlanta, Ga.
6 CLE

PROFESSIONAL EDUCATION SYSTEM
Nursing Home Negligence
Atlanta, Ga.
9.5 CLE with 1 ethics and 1.5 trial

NBI, INC
Georgia Probate Beyond the Basics
Atlanta, Ga.
6.7 CLE with 0.5 ethics

LORMAN BUSINESS CENTER, INC
A primer on S Corporations:
Tax & Non-Tax Issues
Atlanta, Ga.
6.7 CLE

2-4

ICLE
Workers Compensation Law Institute
St. Simons, Ga.
12 CLE

3-4

ICLE
Workers Compensation Law Institute
St. Simons, Ga.
12 CLE

8

LORMAN BUSINESS CENTER, INC
Commercial Lending Requirements
and Loan Documentation
Atlanta, Ga.
6.7 CLE with 0.5 ethics

LORMAN BUSINESS CENTER, INC
Financial Statement Analysis
Macon, Ga.
6.7 CLE

8-9

ICLE
Technology Law Institute
Atlanta, Ga.
13.5 CLE

9

ICLE
Technology Law Institute
Atlanta, Ga.
13.5 CLE

PRACTISING LAW INSTITUTE
Understanding Basic Copyright Law 2003
Atlanta, Ga.
4.8 CLE with 0.5 ethics

NBI, INC
Real Estate Title Examination in Georgia
Atlanta, Ga.
3 CLE

LORMAN BUSINESS CENTER
Solving Water Intrusion and Mold Problems
Atlanta, Ga.
6 CLE

10

ICLE
8 Keys to Art of Persuasion
Atlanta, Ga.
6 CLE

ICLE
Criminal Law
Atlanta, Ga.
6 CLE

PRACTISING LAW INSTITUTE
Understanding Basic Trademark Law 2003
Atlanta, Ga.
4.5 CLE

13

NBI, INC
Corporate Trade Secret Protection
in Georgia
Atlanta, Ga.
6 CLE with 0.5 ethics

14

NBI, INC
Emerging Issues in Georgia Indoor Air Quality and
Toxic Mold
Atlanta, Ga.
6 CLE with 0.5 ethics

NATIONAL EMPLOYMENT LAW
INSTITUTE
Affirmative Action Basic/
Affirmative Action Briefing
Various Locations
15.5 CLE

15-16

ICLE
Business Law Institute
Atlanta, Ga.
12 CLE

16

ICLE
Take a Killer Adverse Deposition
Atlanta, Ga.
6 CLE with 6 professionalism

ICLE
Risky Business: Surviving the Hazards of a Law Practice
Atlanta, Ga.
6 CLE

ALI-ABA
Focus on Depositions: Mastering the Latest in Litigation Technology
Atlanta, Ga.
2 CLE

NBI, INC
Mastering Real Estate Titles and Title Insurance in Georgia
Savannah, Ga.
6 CLE with 0.5 ethics

NATIONAL LAW FOUNDATION
The Great Western Tax & Estate Planning Conference
Multi-Sites
14.2 CLE with 2 ethics

17

ICLE
Business Law Institute
Atlanta, Ga.
12 CLE

NBI, INC
Family Limited Partnership and Limited Liability Companies in Georgia
Atlanta, Ga.
6.7 CLE with 0.5 ethics

22

LORMAN BUSINESS CENTER, INC
Media Relations for Government Officials
Atlanta, Ga.
6 CLE

23

ICLE
Federal Estate and Gift Taxation and Estate Planning
Atlanta, Ga.
6 CLE

ICLE
Consumer Credit
Atlanta, Ga.
6 CLE

NBI, INC
Stockbroker Fraud in Georgia
Atlanta, Ga.
6.7 CLE with 0.5 ethics

24

ICLE
Georgia Personal Injury Practice
Atlanta, Ga.
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