Georgia Bar Journal
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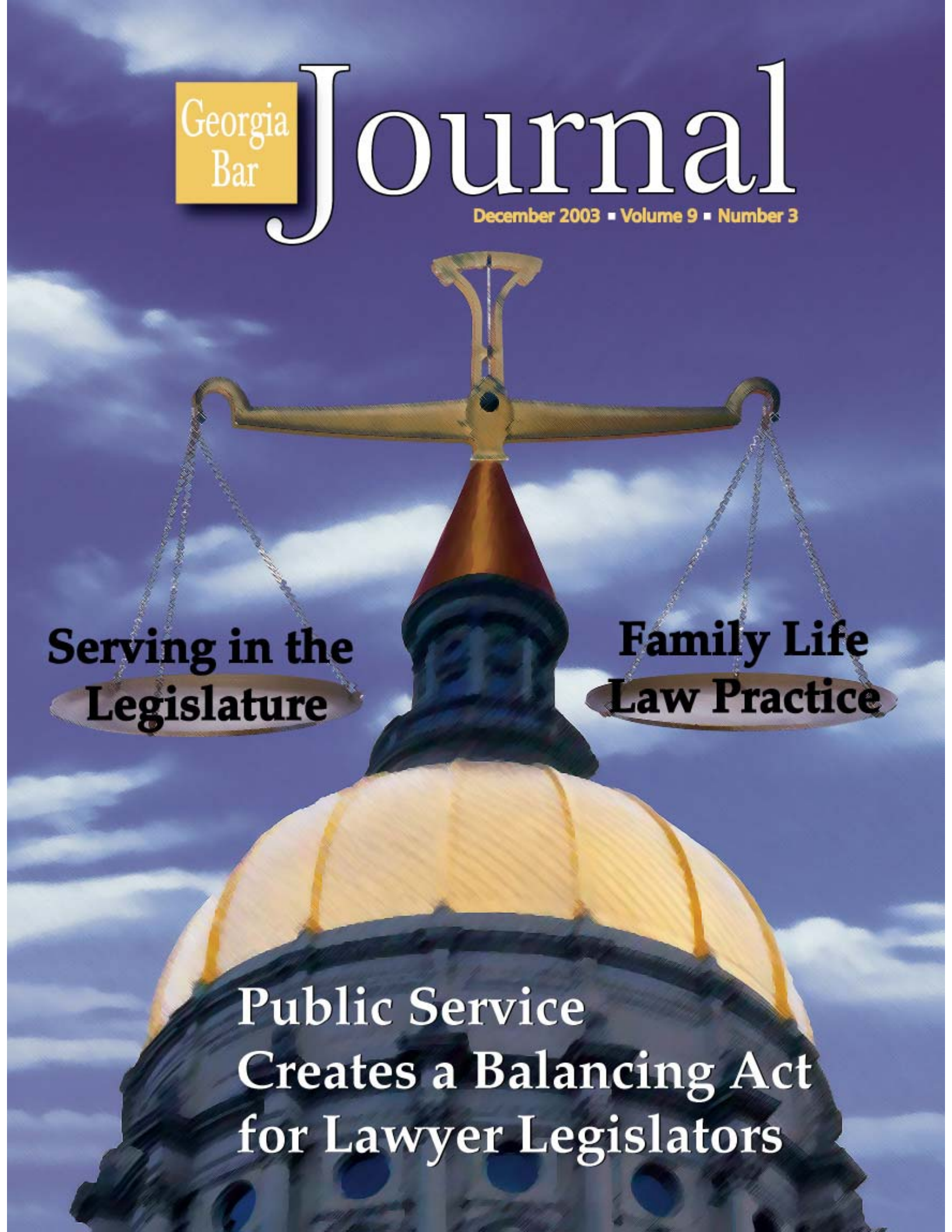
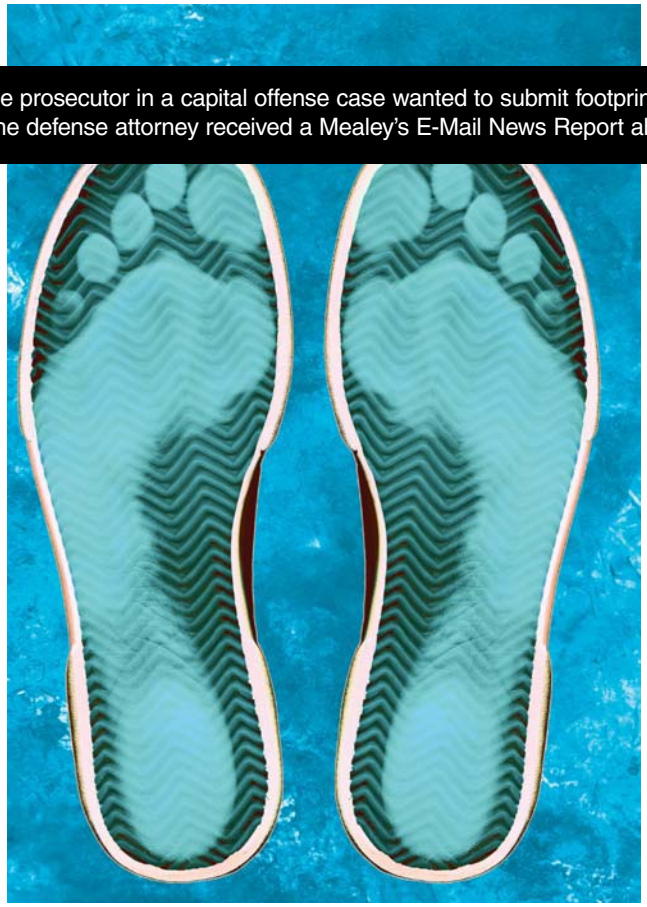


Serving in the Legislature

Family Life Law Practice

Public Service Creates a Balancing Act for Lawyer Legislators

Are footprints as foolproof as fingerprints?



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

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

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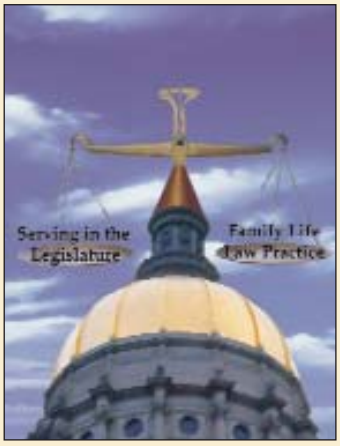

On the Cover
Lawyer legislators balance time between serving in the legislature, working in their law practice and spending time with their family. Read how nine Georgia lawyer legislators juggle their obligations.
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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: C. Tyler Jones, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, Georgia 30303; phone: (404) 527-8736; tyler@gabar.org.

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from the **President**

"It should be an exciting and challenging legislative session. And, if worse comes to worse, wait until they see the State Bar's proposal for a new state flag."

By William D. Barwick

This is Not Your Father's General Assembly

With the General Assembly's 2004 Session scheduled to begin in January, our thoughts turn to a topic near and dear to the hearts of lawyers — laws. Or, rather, the law-making process. In a non-election year, our state lawmakers have undergone few transitions since the last session, and this would ordinarily ensure a productive year of legislation, both substantive and decorative, to serve as a campaign springboard for the 2004 election year. This is not, however, your father's General Assembly.

It is often too easy to make fun of the state legislature. I once wrote that the House and Senate members could do what they so desired in the privacy of their own chambers, but when you see the State Capitol surrounded by yellow school buses during the session, you realize they are forcing small children to watch their actions. For the most part, however, in a one-party state, the actions of the General Assembly were predictable.

In 2002, the rules changed. Both the speaker of the house and the governor were defeated for re-election. Four senators switched parties shortly after Election Day. Both the Senate and the governor's office changed parties, and the House changed speakers for the first time in 28 years. The lieutenant governor became a "Big Guy" with a little job and the governor sued the attorney general seeking control of the state's litigation.

With such a dramatic change in players, a contentious session could be expected. The situation worsened when lawmakers realized there was not enough money to go around, not only for local projects, but also for

necessary government functions. Legislators were forced to introduce, debate and approve only those bills that did not require major funding. Hence, a fight that lasted for three months over the design (and motives) of our state flag.

Where does the State Bar of Georgia fit into the legislative scheme for the coming session? By percentage, there are fewer lawyers today in the legislature than at any recent time, approximately 17 percent. While some people argue, with some persuasiveness, that there are too many lawyers in society, this is no reason to reduce their number in the institutions that *make laws*. Last year I had the pleasure of reviewing some proposed bills that were apparently drafted by non-lawyers (or possibly by lawyers who had taken too much cold medicine), and the concept of "legislative intent" appeared to have been discarded. Legislators, especially non-lawyer legislators, need drafting assistance from our profession.

In addition to drafting and vetting legislation, the State Bar of Georgia proposes more new legislation every year than any other institution in the state. These bills include well-publicized initiatives, such as indigent defense, as well as lesser-known bills to reform guardianship procedures, UCC provisions, civil procedure, adoption, inheritance and other matters of interest to our profession. Many of our sections propose new legislation every year, which is then reviewed by the Advisory Committee on Legislation. If the proposed bills are deemed to be sufficiently related to the administration of justice (the *Keller* test for unified bars that sponsor legislation), the bills are then reviewed again by the Board of Governors at a meeting prior to the legislative session.

This year the State Bar will push for a fully funded indigent defense program throughout the state, and locating the funds will probably be the most interesting part of this legislative endeavor. We will also try to retain funding for law-related programs that assist victims of domestic violence or that support juvenile advocacy programs. The budgetary axes will be out in force this year.

Unfunded bills will also be considered, such as a more efficient use of alternative jurors, and some minor procedural reforms in the Georgia Appellate Practice Act. Sections and committees still have time to make their proposals to the ACL, and it is likely that there will be a heavier legislative agenda for the State Bar by the time this article is published.

The State Bar has a number of good friends in the legislature, and not all of them are lawyers. They help us with our legislative agenda year after year, and often have to defend themselves against challengers who highlight the incumbent's obvious character flaw, a law degree. In the coming election year, I hope the members of our profession will continue their support, monetary and otherwise, of these lawyer-legislators.

Finally, the ACL, the Board of Governors and the Executive Committee may be called upon to comment upon law-related proposals submitted by other groups. Examples will likely include a tort reform package similar to one submitted last year, and a jury service bill entitled the "Patriot Jury Act" (beware any bill entitled "Patriot" or "Common Sense" or "Fair"). Caps and immunities will again be debated, and if the *Keller* test is met, the State Bar will take a position. The readers' thoughts on these issues should be communicated to your Board of Governors representatives.

All in all, it should be an exciting and challenging legislative session. And, if worse comes to worse, wait until they see the State Bar's proposal for a new state flag.

PRESIDENT'S NOTE: Thanks to the eagle-eyed readers of my last GBJ editorial who correctly noted that it was Louis XVI, not Louis VI, who was beheaded. Now, get a life.

Also, some readers wondered what happened between the August and October issues to cause me to go bald. Actually, that is Governor Perdue on the October cover, and that is not my family next to him.

from the Executive Director

"Throughout my years as the executive director of the Bar, I have had the good fortune of working with many talented staff members."

By Cliff Brashier

Excellent Employees Equals Exceptional Member Services

Throughout my years as the executive director of the Bar, I have had the good fortune of working with many talented staff members. And although I am well aware of the staff's commitment to quality work, every once in a while other people remind me of the outstanding employees who work here.

In September, the Law Practice Management Program helped organize the first ever Solo and Small Firm Institute and Technology Showcase in Savannah. I want to publicly thank LPM Director Natalie Thornwell and her assistant Pamela Myers for putting together such a high-quality program. More than 100 lawyers attended and their feedback was extremely positive.

Some attendee comments include:

- "I appreciate the support you [the Bar] have given solo practitioners by allowing the funding for that particular seminar. Please keep the seminar going. I promise I will attend year after year."
- "Best seminar I have ever attended. Please do this again."
- "It is very obvious a lot of hard work went into this seminar. Please know that the hard work was noticed and appreciated."

Appreciation also goes to the Institute for Continuing Legal Education in Georgia for their administration of the program. Larry Jones, the director of ICLE, told me that participants gave the event the highest reviews he has ever seen. He said this was especially surprising and rewarding because it was one of the most difficult events to organize, consisting of a variety of breakout sessions and new technology used.

The Bar's LPM program is designed to provide law office management consulting services and materials to members of the Bar,

ultimately improving the delivery of legal services to the public. It is clear to me that the Solo and Small Firm Institute and Technology Showcase has provided some of the tools solo practitioners need to effectively run their practice.

If you do not have your own in-house law firm administrator or technology staff, you should make this institute an annual event. I really hope you will take advantage of this opportunity and let me know your thoughts after you do so. If you have questions in the meantime, call the Bar's Law Practice Management Program at (404) 527-8772.

Natalie and Pam are available to help Georgia lawyers and their employees pull together the pieces of the office management puzzle. Whether you need advice on new computers or copiers, personnel issues, compensation, workflow, file organization, tickler systems, library materials or software, the LPM Program has the resources and training to assist you.

As always, I am available if you have ideas or information to share; please call me. My telephone numbers are (800) 334-6865 (toll free), (404) 527-8755 (direct dial), (404) 527-8717 (fax) and (770) 988-8080 (home). GBJ

from the YLD President

By Andrew W. Jones

Dad, I Want to be a Lawyer

A few weeks ago my 6-year-old son said to me, "Dad, I want to be a lawyer." My 4-year-old daughter chimed in, "Me too." I was surprised to hear this since I have spent the last three years trying to explain to my children what I do, getting many empty stares in return, followed by questions like, "You help people?" "Why do they need help?" "Why can't their moms and dads help them?"

I asked my son why he wanted to be a lawyer, expecting the answer to be, because I can go with you to work and play golf whenever I want to. Instead he said, "Because I want to help people." My daughter said the same thing, but I knew her real reason was the bottomless candy jar in the office kitchen. Before inquiring further, I should have said, "Great, why don't you help me pick up this mess in your room." That probably wasn't the type of "help" they had in mind. Either way, as a parent that is a nice thing to hear.

If you reduce the practice of law to its lowest common denominator, what we do is help people. We help them resolve disputes, we help them forge relationships, and we help them preserve their liberty. Every client that walks through our door needs our help in some form or fashion.

I then asked myself, do I want my children to be lawyers? I thought about the lawyer bashing, the rhetoric, the jokes, the negative press, and so on. I also thought of the professionalism, integrity, respect and overall good spirit I see in the people I practice with and against. I thought about the feeling I get when I help someone who couldn't help themselves. I thought of the charity and benevolence that lawyers throughout this country give to their communities. Lastly, I thought about the pride that comes with being part of a profession that truly makes America free.

The answer to my question is a resounding yes. Very few professions provide the satisfaction that the practice of law does. Taking an oath to uphold the Constitution of the United States is an awesome responsibility. No other occupation is charged with such a task.

While the practice of law has its share of ups and downs, my experience has been that the ups far exceed the downs. Since I began practicing, there has been an internal push within the profession to improve professionalism. I think it is working. In the last five years, I have seen a growing cooperation between opposing counsel. Being cordial with opposing counsel doesn't compromise your client's position; it just makes the practice of law more enjoyable. You can be an effective advocate and still be professional. In my mind, the two go hand in hand.

As a parent, I will be proud of my children regardless of their chosen occupation. Maybe a little more candy in the office kitchen will give them a push in the right direction. GBJ

"Very few professions provide the satisfaction that the practice of law does. Taking an oath to uphold the Constitution of the Untied States is an awesome responsibility."

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12/02

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A Look at the Law

By John C. Weitnauer

Outsourcing Contracts, Licenses and Bankruptcy Law

Outsourcing contracts – where one party (the "Customer") obtains services from a third party (the "Service Provider") – abound in today's economy. Customers outsource a vast array of services, from the mundane (i.e., cleaning services for an office building), to the "mission critical" (i.e., data processing).

With every outsourcing contract comes the hidden possibility that the Service Provider may seek bankruptcy protection from its creditors, or perhaps worse still, simply go out of business. This article discusses what can happen to outsourcing contracts, and to any license that may be a material part of that outsourcing contract, from the perspective of the Customer when the Service Provider files bankruptcy.[1]

HOW CAN YOU PROTECT YOURSELF IN ADVANCE AGAINST THE POSSIBILITY THAT YOUR SERVICE PROVIDER MAY GO OUT OF BUSINESS?

While it is impossible to provide an exhaustive list of the protective steps that are appropriate for outsourcing contracts without knowing the specifics of the outsourced services, one of counsel's roles should be to ensure that an appropriate amount of consideration is given to the Customer's likely predicament in the event the Service Provider shuts down.

As an initial matter, the impact on the Customer if its Service Provider goes out of business is directly related to how "core" the services at issue are. While Customers typically devote substantial attention to what might happen if the service contract is terminated (i.e., the termination assistance provisions), less time is likely devoted to considering the possibility that the Service Provider may simply close its doors. If the services are critical to the Customer, it is unlikely that the Customer selected a Service Provider with a known financial weakness. With any long-term contract, however, at least some attention should be given to the possibility that the financial circumstances of the Service Provider could deteriorate. In some cases, of course, the services are so important to the Customer that they should not be outsourced at all, due to this type of risk.

If the Customer will be using the software of the Service Provider, ownership[2] of the software may be safer than a license; but if a license is all that can be negotiated, a license entitling the Customer to the Service Provider's source code (for use during maintenance of and upgrades to the software) is probably essential.

Further, in the event that the Service Provider's software creates or manipulates data important to the Customer, the Customer will want to have full copies of the relevant data communicated to its information systems as transactions occur, or have such data delivered on a periodic basis in a form that is accessible by the Customer's systems or commercially available software if and when needed.

WHAT HAPPENS AFTER YOUR SERVICE PROVIDER FILES BANKRUPTCY?

Chapter 7 or Chapter 11?

A company may file for liquidation under Chapter 7 of the Bankruptcy Code, or reorganization under Chapter 11 of the Bankruptcy Code.[3] If a Chapter 7 case is filed, a trustee is appointed to reduce the assets of the estate to money and to distribute those assets to the creditors in order of their priority.[4] While the trustee has the power to operate a company in Chapter 7 for a brief period of time,[5] it is extremely rare for a trustee to do so.

If a Chapter 11 case is filed, the company becomes a "debtor in possession" and attempts to continue its operations and confirms a plan of reorganization.[6] The plan of reorganization is, among other things, a complicated and comprehensive new loan agreement with all of its creditors. Under a typical plan, general unsecured creditors are paid only pennies on the dollar, and the pre-bankruptcy shareholders lose most, if not all, of their stock to one or more classes of creditors. In some cases, the debtor has negotiated its plan with key creditors before filing bankruptcy, and files the bankruptcy case to bind all creditors, since, in bankruptcy, the consent of the requisite majority of creditors can bind all of the creditors. This type of plan is sometimes referred to as a "pre-packaged" plan. But while a plan addresses the losses suffered by creditors and shareholders, it may also address the concerns of parties that have contracts with the debtor.

Before Assumption or Rejection

Unless a pre-packaged plan is filed and quickly confirmed—a process that can take as little as a few weeks or months—the larger, typical Chapter 11 case lasts for many months, sometimes years. During that time, what happens to the outsourcing contract? As will be discussed below, the ultimate disposition of an executory contract in bankruptcy is its assumption or rejection. In the meantime, what happens?

Broadly speaking, the Customer is likely to have one of the following perspectives: (i) get me out of this thing; or (ii) if I keep paying, will the debtor keep performing?

Can the Customer Terminate the Contract?

If the Debtor is Not Otherwise in Default of the Contract

If the debtor is not otherwise in default, can the Customer terminate the contract because the Service Provider has filed bankruptcy? After all, the default provisions in almost every outsourcing contract typically clearly define the filing of a bankruptcy as an event of default. The short answer, however, is "No."

Section 365(e)(1) of the Bankruptcy Code protects the debtor's interest in an executory contract by providing that:

> Notwithstanding a provision in an executory contract . . . or in applicable law, an executory contract . . . may not be terminated or modified, and any right or obligation under such contract . . . may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract . . . that is conditioned on —
>
> (A) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (B) the commencement of a [bankruptcy] case . . .; or
>
> (C) the appointment of or taking possession by a trustee in a [bankruptcy] case . . . or a custodian before such commencement.[7]

Does it help the Customer if the contract contains the right to terminate for convenience? Probably not. Courts have invalidated "termination at will" or "termination for convenience" clauses as unenforceable *ipso facto* defaults. However, if the Customer can point to a valid, reasonable basis for its decision to terminate the contract (even if the only contractual right would be "for convenience"), the termination might be recognized as valid and permit the Customer to extricate itself from the relationship reasonably quickly.

If the Debtor Is in Default Of the Contract But Notice of Termination Has Not Yet Been Given

If the debtor is in performance default, can the Customer terminate the contract pursuant to express provisions regarding termination for such default (typically after notice and opportunity to cure), even though the Service Provider has filed bankruptcy? Again, the short answer is "No," at least not without court approval.

The Service Provider will have the protection of the automatic stay, which protects the debtor until such time as the court grants relief to the other party.[8] While most non-bankruptcy lawyers have at least a passing awareness of the automatic stay, it is usually understood only in its primary application — that, so long as the stay is in place, creditors cannot take any steps to collect their pre-petition debts from the debtor without court approval. However, the reach of the automatic stay is much broader; it prevents a non-debtor party from attempting to terminate the debtor's rights in an executory contract. All hope is not lost, however. If the defaults are serious enough (i.e., performance defaults), a court may be persuaded to end the "breathing spell" provided by the bankruptcy filing so that the Customer can exercise its right of termination.

If the Debtor Is in Default Of the Contract But Notice of Termination Was Given Prior to the Bankruptcy Filing

There is one situation when the Customer can achieve an effective termination more quickly than otherwise. If (i) the Service Provider was in default pre-petition, (ii) any right to cure had expired, (iii) notice of termination had been given and (iv) nothing was left other than the expiration of time for the notice of termination to be effective, then the filing of the bankruptcy case will not prevent the running of time for the notice of termination, and the termination will be effective as soon as that period lapses.

Can the Customer Ensure Performance From the Service Provider?

In the case of a filing under Chapter 11 of the Bankruptcy Code, the filing is not necessarily disruptive of the day-to-day performance of services by the debtor. The reason for the bankruptcy may not be currently unprofitable operations, but excess debt on the corporation's balance sheet from acquisitions that turned out poorly. If the Customer is agreeable to accepting performance from the Service Provider, and the Service Provider desires to keep the contract in place, it may be worth the time and effort for the Customer and the debtor/Service Provider to file and seek approval of a joint (i.e., mutual) motion to assume the contract, which is discussed below.

If the debtor has not yet decided whether it wishes to assume the contract, and the Customer desires a definitive answer by a date certain, the Customer needs to file a motion with the bankruptcy court seeking (i) adequate protection of the Customer's interests pending that decision, and (ii) a deadline for the debtor to choose the status of the contract.

THE POWER TO ASSUME OR REJECT EXECUTORY CONTRACTS

The Debtor's Rejection of the Outsourcing Contract

Overview of Rejection

When a company files a Chapter 11 case and becomes a debtor-in-possession, the company, as debtor-in-possession, has the powers of a trustee. Section 365(a) of the Bankruptcy Code provides that "the trustee . . . may assume or reject any executory contract . . . of the debtor."[9]

Is the outsourcing contract an "executory contract" subject to Section 365 in the first place? Yes. While the term "executory contract" is not defined in the Bankruptcy Code, the most commonly accepted definition of an executory contract is a contract "under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." [10] It is difficult to imagine an outsourcing contract that would not meet this definition.

Contracts that are burdensome — for example, a long term, fixed price contract that is no longer profitable — may be rejected and the cash flow of the debtor improved. Rejection is not without consequence to the debtor, but the consequence is usually of little or no concern because damages arising from breach constitute a pre-petition, unsecured claim.

Considerations Relating To Rejection

There may be situations where the Service Provider's threat of rejection is simply part of a price or service level renegotiation, with the debtor now having the advantage that its refusal to perform is less costly than before, as monetary damages resulting from the rejection will be treated as pre-petition, unsecured claims.

If it is important for the Customer to retain the services of the Service Provider, and a new deal on pricing or other disputed terms cannot be reached, can the Customer defeat the Service Provider's motion to reject the contract? Probably not. While the debtor's decision to assume or reject the contract is "subject to the court's approval,"[11] the standard for a court's review of the debtor's decision is the deferential "business judgment" standard. Nevertheless, there are isolated decisions where, given

limited benefit to a debtor from rejection, and great harm to the non-debtor, the court has refused to approve the debtor's motion to reject.

Consequences of Rejection

From the Customer's standpoint, successful rejection is similar to the Service Provider going out of business; the Customer will need to insource the services or find a new service provider.

But are all of the Customer's rights lost? Generally speaking, yes. The debtor no longer has to perform, and the Customer is left with a claim for damages (often, however, this right is worth little or nothing because the debtor is not able to compensate fully the Customer for its loss).

If the Customer is a licensee of certain intellectual property, however, some protection is given by the Bankruptcy Code, which is discussed below.

The Consequences of The Debtor's Rejection of An Outsourcing Contract to A Licensee of Intellectual Property

Historically the courts, and later, Congress, recognized that even when the debtor could reject its ongoing obligations, certain rights of the other party needed protection. For example, if a landlord files bankruptcy and rejects the lease of its tenant, the Bankruptcy Code provides that the tenant can choose to retain the leasehold, but not all of the benefits of the lease.[12]

As originally enacted, the Bankruptcy Code contained no special protections for licensees of intellectual property. In 1985, the well-known case of *Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc.* demonstrated how punitive to the non-debtor rejection could be.[13] In *Lubrizol*, the debtor-licensor rejected a non-exclusive license agreement for a metal coating process and the court, applying the "plain meaning" of the statute, held that the result of the rejection was the absolute termination of the license, despite the fact that the former licensee's business was severely harmed thereby.[14] Recognizing the harsh result of *Lubrizol* and the importance of intellectual property licensing to the economy, Congress amended the Bankruptcy Code to add Section 365(n), thereby bestowing special protection to licensees of intellectual property who are parties to executory contracts with licensor/debtors.[15]

As will be seen below, Section 365(n) is not a panacea for all circumstances that can occur in the case of a licensor/debtor's rejection of an outsourcing contract. After all, in many outsourcing contracts, services are provided but no license to any intellectual property is ever granted to the Customer, even when the Service Provider/debtor uses proprietary software or patented processes in order to provide the services to the Customer. Accordingly, counsel for the Customer should be mindful of just what, if anything, is licensed or should be licensed, and the degree to which a licensee's right is protected in the event of a rejection.

The Customer/Licensee May Elect to Retain Its License Rights

Section 365(n)(1) outlines the options available to licensees in the event that the licensor has filed for bankruptcy protection:

> If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect —
>
> (A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or
>
> (B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for:
>
> (i) the duration of such contract; and
>
> (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.[16]

As an initial matter, to enjoy the benefits of Section 365(n)(1), the license must involve rights to "intellectual property."[17] The Bankruptcy Code defines intellectual property to mean "(A) trade secret; (B) invention, process, design, or plant protected under title 35; (C) patent application; (D) plant variety; (E) work of authorship protected under title 17; or (F) mask work protected under chapter 9 of Title 17;" to the extent protected by applicable nonbankruptcy law.[18]

The reference in Section 365(n)(1)(B) to "any agreement sup-

plementary to such contract"[19] is intended to include licenses to source code and agreements with escrow agents that hold such source code for the parties. Accordingly, in the case of a license of software, the licensee will need both access and a license to source code to make the ongoing modifications and improvements to the software which the licensor will no longer be obligated to make. Section 365(n)(3) ensures the licensee's access to same:

> If the licensee elects to retain its rights… then on the written request of the licensee the trustee shall —
>
> (A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and
>
> (B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.[20]

It is also important to note that Section 365(n)(1)(B) separates the "license" from other, related services (i.e., maintenance and periodic upgrades of software, training or related services based on the operation of the licensed software, and other obligations such as indemnification against infringement claims).[21] In an outsourcing contract, while Customer's rights to key software (whether licensed or owned) may be of critical importance, the Customer's payment for its use of the debtor/licensor's software is only a small portion of the Customer's total payment to the debtor/licensor. If the debtor rejects the contract, the debtor will no longer be required to provide the ancillary services to the Customer. Accordingly, even with the benefit of Section 365(n), the Customer may still have a serious problem.[22]

The Customer/Licensee Will Be Obligated to Continue to Make "Royalty Payments"

If the licensee elects to retain its rights under Section 365(n)(1), the licensee must make all royalty payments as they come due under such contract.[23]

As noted above, however, the rejecting debtor-licensor is no longer

required otherwise to perform under its agreement, so if software maintenance or other services are "included" in the royalty fee, then the licensee will be stuck, post-rejection, paying the pre-petition royalty fee, without receiving the benefit of all for which it bargained.[24] Accordingly, the licensee will suffer less impact if the agreement contains both (i) a royalty fee and (ii) a separate fee for maintenance, upgrades of the software, training and other services. Licensees should be aware, however, that, as courts have construed "royalty payments" broadly, artificial distinctions designed to minimize the amount of the royalty payment are not likely to be viewed with favor.[25]

The Customer/Licensor Will Likely Not Recover Damages for The Debtor/Licensor's Non-Performance of Other Obligations

As noted above, the debtor/licensor is not required to perform its other obligations under the license, such as maintenance or upgrades. Accordingly, the Customer/licensee usually will not have a meaningful claim for damages resulting from such non-performance. If the licensee elects to retain the license, then the licensee is deemed to have waived any right of setoff, including any claim allowable as an administrative expense.

The Customer/Licensee Is Afforded Protection Pending a Decision of the Debtor to Reject or Assume The Outsourcing Contract

The benefits of Section 365(n) can be of assistance to a licensee even before the debtor has decided whether to assume or reject the outsourcing contract.

Section 365(n)(4) outlines the protection available to the licensee:

> Until the trustee rejects such contract, on the written request of the licensee the trustee shall —
>
> (A) to the extent provided in such contract or any agreement supplementary to such contract —
>
> (i) perform such contract; or
>
> (ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and
>
> (B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.[26]

The Debtor's Assumption of the Outsourcing Contract

Overview of Assumption

The Service Provider may wish to assume its contract with the Customer, rather than reject it. The path for assumption will vary, depending on the willingness of the Customer to have the contract assumed.

The Debtor's Assumption of the Outsourcing Contract with the Consent of the Customer

If the Customer and Service Provider both desire for the Service Provider to assume the outsourcing contract, services should continue with little difficulty during the pendency of the bankruptcy case or the entry of an order approving the assumption.

In some cases, however, the creditors' committee (which represents the interests of the general unsecured creditors) could oppose the debtor's assumption of the outsourcing contract early in the bankruptcy case. The unsecured creditors might be concerned that, after the debtor's assumption of the contract, the debtor might breach its obligations under the assumed contract, thereby incurring post-petition obligations which have a higher priority in the distribution scheme of the Bankruptcy Code.[27]

The Debtor's Assumption of the Outsourcing Contract Over the Objection of the Customer

What happens when the debtor/Service Provider wants to assume the contract but the Customer objects to having the contract assumed? This situation is likely to arise when the Service Provider is in performance default, and the Customer desires to terminate the contract.

As might be expected, the Bankruptcy Code gives the opportunity to the debtor to salvage the situation for the benefit of the estate by rectifying the default. Section 365(b)(1) provides:

> If there has been a default in an executory contract . . . the trustee may not assume such contract … unless, at the time of assumption . . ., the trustee:
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract... , for any actual pecuniary loss to such party

resulting from such default; and

(C) provides adequate assurance of future performance under such contract . . ..[28]

The issues of "cure" and "adequate assurance of future performance" are factual issues. Evidence of a debtor's persistent, pre-petition failure to perform over the course of the contract, if sufficiently serious, with no expectation of improved performance in the future, may be sufficient to block assumption.

Please note, however, that the Service Provider is not required to cure "ipso facto" defaults (i.e., defaults resulting from the mere commencement of a bankruptcy proceeding or becoming insolvent).[29] In addition, the Service Provider is not required to cure nonmonetary obligations that result in a penalty rate or provision.[30] The effect of this provision on "service credits" (i.e., liquidated damages from nonperformance) or the like for the Service Provider's failure to meet performance metrics is not clear.[31]

The Debtor's Assignment of the Outsourcing Contract

In addition to the power to reject or assume executory contracts, the bankruptcy trustee is also given the power to assign executory contracts.[32]

Section 365(f)(2) provides:

The trustee may assign an executory contract . . . only if —

(A) the trustee assumes such contract . . . in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee . . . is provided, whether or not there has been a default in such contract . . ..[33]

The power to assign given to the trustee overrules a contractual restriction or prohibition on assignment, and such contract cannot be terminated based on such a prohibition.[34] For the Customer who does not consent to assignment, the likely battle will be over the "adequate assurance of future performance" by the proposed assignee, a fact-based inquiry.[35]

PRACTICE POINTERS

As can be seen, the consequences to the Customer of its Service Provider ceasing operations, or filing bankruptcy and rejecting the contract, can be extreme. Section 365(n) may not even apply to the outsourcing contract, but even if it does, the protections, while important, are not complete.

So, what is a Customer to do? The flippant answer is to contract only with Service Providers whose financial health is not in question. However, the Customer is still vulnerable to changes in the Service Provider's financial status over the term of a long-term outsourcing arrangement.

Since an acquisition of the Service Provider may result in a change to the Service Provider's financial stability, the outsourcing contract should provide that a change of control constitutes a default.

Although it would be unusual, if the Customer wanted an early warning of a possible bankruptcy, a net worth covenant or other covenants typical of a loan agree-

ment could be negotiated. Upon a breach of the financial covenants, the Provider could choose to terminate the contract[36] and transition to a new service provider well in advance of a bankruptcy filing.[37]

While the typical outsourcing deal will contain a non-solicitation of employees provision, another idea that might help cushion the blow from a worst case situation would be to permit the Customer of the Service Provider's key employees in the event of the outsourcing contract is terminated. This might be particularly appropriate in the case of a Service Provider that is a smaller, start-up company, whose future is uncertain.

If the Service Provider is using software to provide the services under the outsourcing contract, then the Customer should try to purchase the software.

If the Service Provider is only willing to grant a license to the Customer, the Customer should insist that the license include access to and use of source code. The license to source code should be a present grant, not a "contingent" license intended to "spring" into effect upon bankruptcy, as such a contingent license will probably not be recognized in Section 365(n).[38] Further, the license to the source code should permit the Customer to use the source code for maintenance or improvements in the event the Service Provider fails to maintain or improve the software as required by the outsourcing contract.

Given the broad interpretation of "royalty payments" the contract should separately price all services that are not, in fact, compensation for the use of the software.

Some commentators suggest that the Customer obtain a security interest in all of the assets of the Service Provider necessary to provide the services, so that, in the event of a breach and damages, the Customer could foreclose on the needed assets to satisfy the claim and then use the assets to insource the services. In most cases, however, this approach will not provide any tangible benefit to the Customer. First, the time and trouble necessary to negotiate and perfect such a security interest is likely significant. Second, the Customer is unlikely to obtain a first priority lien position, and a subordinate position behind institutional lenders would probably hold little value. Third, the value of such a secured position is limited by the debt secured, which would only arise on breach, and will be difficult to quantify. Finally, even banks with undisputed debts and first priority security interests in collateral often find that foreclosure is a difficult and time-consuming process.

CONCLUSION

When a Service Provider enters bankruptcy, the bankruptcy likely will affect the Service Provider's relationship with its Customers. In many instances, the Bankruptcy Code affords protection to the Service Provider that prevents a Customer from taking action to preserve its position under an outsourcing contract or license. Nevertheless, as reflected in the foregoing practice pointers, there are several ways that a Customer can protect itself on some issues when first entering into an outsourcing contract, or when a license is first granted. GBJ

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Endnotes

1. When the situation is reversed, *i.e.*, the Customer files for bankruptcy, in the typical case the Service Provider's primary concern is whether the Service Provider will get paid. In a case where the Service Provider is not the debtor, but as licensor has licensed patents or software to a debtor and wishes to end the relationship or prevent the assignment of such licenses, numerous complicated and unsettled issues of bankruptcy law arise, because of the interaction of bankruptcy and other (*i.e.*, patent) law. These issues are beyond the scope of these materials. *See, e.g.,* In re Patient Education Media, Inc., 210 B.R. 237, 243 (Bankr. S.D.N.Y. 1997) (chapter 11 debtor/licensee cannot assign its nonexclusive license without copyright owner's consent); In re Buildnet, Inc., No. 01-82293, 01-82294, 01-82295, 01-82296, 01-82297, 01-82298, 01-82299, 2002 WL 31103235, at *5 (Bankr. M.D.N.C. Sept. 20, 2002) (a nonexclusive software license cannot be assigned without the express consent of the licensor).
2. These materials do not address the methods by which a transfer of ownership of various forms of intellectual property must be documented or recorded on the public record.
3. 11 U.S.C. §§ 701 *et seq.*; 11 U.S.C. § 1101 *et seq.*
4. 11 U.S.C. §§ 701, 702, 704.
5. 11 U.S.C. § 721.
6. 11 U.S.C. §§ 1106-1108.
7. 11 U.S.C. § 365(e)(1).
8. 11 U.S.C. § 362.

9. 11 U.S.C. § 365(a).
10. Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers' Union, 734 F.2d 1020, 1022 (4th Cir. 1984) (citation omitted). While there are other ways that courts have defined executory contracts, a true outsourcing contract will likely be found to be executory. By contrast, certain licensing agreements have been found not to be executory. *See, e.g.,* Microsoft Corp. v. DAK Indus., Inc. (In re DAK Indus., Inc.), 66 F.3d 1091, 1095 (9th Cir. 1995) (court construed "license" to install copies of word processing program on computers as a sale of software units, not a license). *But see* In re KMart Corp., 290 B.R. 614, 618 (Bankr. N.D.Ill. 2003) ("Generally speaking, a license agreement is an executory contract as such is contemplated in the Bankruptcy Code.") (citation omitted).
11. 11 U.S.C. § 365(a).
12. 11 U.S.C. § 365(h)(1).
13. Lubrizol Enterprises, Inc. v. Richmond Metal Finishers, Inc., 756 F.2d 1043 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986).
14. *Id.* at 1047-48.
15. 11 U.S.C. § 365(n).
16. 11 U.S.C. § 365(n)(1).
17. 11 U.S.C. § 365(n)(1).
18. 11 U.S.C. § 101(35A). The category of intellectual property rights that is conspicuously absent, but probably not especially relevant to most outsourcing deals, is trademark licenses. *See, e.g.,* Raima UK Ltd. v. Centura Software Corp. (In re Centura Software Corp.), 281 B.R. 660, 674-75 (Bankr. N.D. Cal. 2002) (upon debtor/licensor's rejection of executory trademark licensing agreement, licensee no longer had any right to use licensed trademarks, and was limited to a claim for damages).
19. 11 U.S.C. § 365(n)(1)(B).
20. 11 U.S.C. § 365(n)(3).
21. 11 U.S.C. § 365(n)(1)(B).
22. *See, e.g.,* In re Quad Sys. Corp., No. 00-35667F, 2001 WL 1843379, at *15 (E.D. Pa. Mar. 20, 2001) (discussing 365(n) and noting, in dicta, that licensee's rights are only in the intellectual property as it existed at the time of the bankruptcy filing); Szombathy v. Controlled Shredders, Inc., No. 97C481, 1997 WL 189314, at *13 (N.D. Ill. Apr. 14, 1997) (after the debtor/licensor rejected the license agreement, the licensee elected to retain its rights under the license, which were limited to "the underlying intellectual property [but only] in the state that it existed on the day of the bankruptcy filing"; the licensee was not entitled to any subsequent modifications or improvements to the intellectual property made by the licensor).
23. 11 U.S.C. § 365(n)(2)(B).
24. *See, e.g.,* Encino Bus. Mgmt., Inc. v. Prize Frize, Inc. (In re Prize Frize, Inc.), 32 F.3d 426, 429 (9th Cir. 1994) (Section 365(n) clearly implies that payments due for the use of intellectual property are "royalties," regardless of whether the payments were denominated by the parties as "license fees" or "royalty payments." And because the issue was not raised before the court below, the appeals court held that the licensee could not now raise the issue of whether some portion of the license fees should be allocated to the contractual obligations from which the debtor had been freed by virtue of its rejected of the contract.)
25. *See* Id.
26. 11 U.S.C. § 365(n)(4).
27. 11 U.S.C. §§ 503(b), 507(a). *See also* In re KMart Corp., 290 B.R. 614, 620 (Bankr. N.D. Ill. 2003) ("Courts rarely force a debtor into assuming or rejecting a contract.").
28. 11 U.S.C. § 365(b)(1).
29. 11 U.S.C. §§ 365(b)(2)(A), 365(b)(2)(B), 365(b)(2)(C).
30. 11 U.S.C. § 365(b)(2)(D).
31. *See, e.g.,* Eagle Ins. Co. v. BankVest Capital Corp. (In re BankVest Capital Corp.), 290 B.R. 443, 447 (B.A.P. 1st Cir. 2003) (even though the debtor assumed the contract, the debtor was not obligated to cure the nonmonetary default arising from its pre-petition, improper delivery of substituted equipment). *But see* In re Williams, No. 03-40058-JDW, 2003 Bankr. LEXIS 1084, at *8 (Bankr. N.D. Ga. 2003) (debtor must cure nonmonetary default).
32. 11 U.S.C. §§ 365(c), 365(f). The power to assign (and assume) is subject to certain important conditions:
    The trustee may not assume or assign any executory contract . . ., whether or not such contract . . . prohibits or restricts assignment . . ., if – (1)(A) applicable law excuses a party, other than the debtor, to such contract . . . from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract . . . prohibits or restricts assignment . . .; and
    (B) such party does not consent to such assumption or assignment; or
    (2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor . . ..
    11 U.S.C. § 365(c).
    Where the Customer's performance is only to pay money to the Service Provider/debtor as consideration for the services rendered, this section is of no benefit, either to block assumption or assignment. However, this section can have a critical impact on a debtor's operations where the debtor relies on certain licensed intellectual property, such as patent licenses, to operate its business. Such licensees may be personal and therefore not assignable, but the decisions of the courts are in conflict on the proper way to apply 11 U.S.C. § 365(c) in such circumstances. Those issues are beyond the scope of these materials.
33. 11 U.S.C. § 365(f)(2).
34. 11 U.S.C. § 365(f)(1).
35. 11 U.S.C. § 365(f)(2). *See also* In re Nedwick Steel Co., 289 B.R. 95, 100 (Bankr. N.D.Ill. 2003) (assignment of exclusive distribution agreement between supplier and debtor/distributor to competitor of supplier not permitted).
36. Emplexx Software Corp. v. AGI Software, Inc. (In re AGI Software, Inc.), 199 B.R. 850, 860 (Bankr. D.N.J 1995)(pre-petition termination prevents licensee from asserting any rights).
37. In connection with any such termination the Customer must take into account any steps required by the contract for it to continue to enjoy its rights as a licensee.
38. 11 U.S.C. § 365(n); In re Storm Tech., Inc., 260 B.R. 152, 157 (Bankr. N.D. Cal. 2001) (because a condition precedent to the commencement of the license had not occurred prior to the petition date, the debtor had no rights in the license.).

A Look at the Law

Employment Agreements

Long-Term Employment Agreements With In-House Counsel: Employment Security or Ethical Quagmire?

By Richard Moberly and John Hutchins

The relationship between a company and its in-house corporate counsel involves a fragile mixture of the corporate counsel's fiduciary obligations as the company's attorney and the company's legal and contractual responsibilities as the attorney's employer. Although these roles and expectations often blend smoothly, the relationship can become problematic when the corporate counsel's position as an attorney conflicts with the counsel's status as an employee. Put another way, when a company's expectations as a client are at odds with its responsibilities as an employer, the relationship between the employer-client and the employee-attorney can become strained and expose each to difficulty, if not liability.

One situation that may breed such tension occurs when an in-house attorney enters into a long-term employment contract with an employer-client. In a typical attorney-client relationship between a company and its *outside* counsel, the client may terminate its relationship with its attorney at any point.[1] The attorney would be entitled to *quantum meruit*, or payment for services rendered, but the attorney would not be entitled to payment for loss of future fees, even if the client already agreed to such payment.[2] In this situation, the law gives priority to the client's right as the beneficiary of a fiduciary relationship with its attorney to terminate the relationship (the client's "beneficiary rights").

A long-term employment contract with a corporate or *in-house* counsel, however, involves subtle, but important, differences. Depending on how such a contract is structured and the current state of the law in the jurisdiction at issue, in-house counsel may have an argument that the contract obligates the client to a continued employment relationship, even if the client desires to terminate the attorney-client relationship. If true, this would infringe upon the client's ability to terminate its relationship with its attorney immediately (or without future consequence). Enforcing this type of contract would implicitly value an attorney's contractual rights more than a client's beneficiary rights.

Thus, when an in-house counsel enters into a long-term employment contract with a client, a tension is created between the client's beneficiary rights and the attorney's contractual rights. This article addresses two issues that may arise as a result of this tension.

First, it is unresolved in Georgia whether long-term employment contracts are enforceable by in-house counsel through a breach of contract action. In Georgia, "express contracts between attorney and client as to compensation are generally recognized."[3] At the same time, it is also the state's public policy that "a client has the absolute right to discharge the attorney and terminate the relation at any time, even without cause."[4] At the intersection of these two competing forces are long-term employment contracts for in-house counsel. For example, a long-term contract that provides for a significant severance benefit should the employment be terminated prematurely may arguably limit the ability of a corporation to terminate the attorney's employment. Whether a discharged in-house attorney may succeed in a breach of contract action against a former employer is entirely dependent upon whether this type of contract is enforceable.

Second, if a general counsel is permitted to bring a breach of contract action against an employer-client, the limits on the attorney's ability to use the client's own confidential information against the client in that litigation are somewhat murky. This issue has been hotly debated in other jurisdictions in the context of wrongful discharge claims, but the issues are relevant even in a breach of contract action. Georgia's Rule of Professional Conduct 1.6 provides some guidance, in that it only permits an attorney to reveal a client's confidential information if the attorney reasonably believes it is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client."[5] In application, however, that standard can be difficult to apply, particularly in the context of an attorney taking the offensive against a client based upon a breach of contract claim.

Unfortunately, neither of these issues is resolved easily under current Georgia law, which should be unsettling to Georgia's in-house counsel and their clients alike.

THE ENFORCEABILITY OF A LONG-TERM EMPLOYMENT CONTRACT FOR GEORGIA'S IN-HOUSE COUNSEL

Two seminal Georgia cases dominate the issue of the enforceability of a long-term employment con-

tract between a company and its in-house counsel: *Henson v. American Family Corp.*[6] and *AFLAC, Inc. v. Williams*.[7] These cases, however, reach differing conclusions regarding the balance between a company's beneficiary rights as a client and an attorney's contractual rights as an employee.

Henson v. American Family Corp.: Contracts Should Be Enforced

In 1984, the Georgia Court of Appeals determined that a discharged general counsel could bring a breach of contract action against his former employer under a long-term retainer contract.[8] In *Henson*, a company and its general counsel executed a ten-year employment contract, "subject to removal by action of the board [of directors] at any time it shall be deemed necessary."[9] Six years later, the board removed the general counsel.[10] As part of litigation resulting from the termination, the general counsel filed a breach of contract claim to obtain the fee for the remainder of his contract.[11]

In permitting the action to go forward, the Court of Appeals rejected the company's argument that such a long-term retainer contract is against public policy. Relying on a 1922 Georgia Supreme Court case, the Court of Appeals stated that express contracts between an attorney and client are generally recognized, even if the contemplated services are not rendered.[12] The *Henson* Court stated that it was aware of no public policy precluding the enforcement of such contracts.[13] Therefore, although the board of directors was permitted to remove the general counsel, the company was bound by the general counsel's contractual rights.[14]

AFLAC, Inc. v. Williams: The Client Has the Absolute Right to Fire Its Attorney

The public policy apparently hidden from the *Henson* Court was identified a decade later by the Georgia Supreme Court in *AFLAC, Inc. v. Williams*.[15] In *AFLAC*, the Court held that a long-term retainer contract for an *outside* counsel was unenforceable because it contained a penalty clause if the client prematurely terminated the contract.[16] Under the contract in *AFLAC*, the company paid an outside counsel a monthly retainer under a seven-year contract; however, if the company terminated the contract early, even for good cause, it agreed to pay "as damages an amount equal to 50 percent of the sums due under the remaining terms, plus renewal of this agreement."[17]

The Court relied upon important public policies underlying the attorney-client relationship to determine that such a contract was unenforceable.[18] Specifically, the Court held that this contract was void as against public policy, because "[r]equiring a client to pay damages for terminating its attorney's employment contract eviscerates the client's absolute right to terminate. A client should not be deterred from exercising his or her legal right because of economic coercion."[19] The Court consciously chose to uphold the client's beneficiary rights to the detriment of the attorney's contractual rights: "To force all attorney-client agreements into the conventional status of commercial contracts ignores the special fiduciary relationship created when an attorney represents a client."[20]

Yet, despite this apparent rejection of *Henson*'s reasoning, the *AFLAC* Court distinguished *Henson*, without expressly overruling it, by basing its decision on the invalidity of the AFLAC contract's damages provision, a type of provision which the Court noted was not involved in *Henson*.[21] Moreover, the Court specifically stated that it was not addressing the employment relationship between employers and in-house counsel, as that issue was not before the Court.[22] Therefore, the *AFLAC* Court's judicial restraint left unresolved what effect, if any, its emphasis on a client's right to terminate its attorney without consequence has on *Henson*'s contrary holding. In short, *AFLAC* may cause Georgia's in-house counsel to wonder whether their long-term employment contracts are enforceable.

The Conflict Between a Client's Beneficiary Rights and an Attorney's Contractual Rights

At its core, the conflict between *Henson* and *AFLAC* is a conflict between which value to uphold: a client's unfettered right to fire its attorney or an employee's right to rely on his or her contract. The policy arguments supporting each value are compelling.

The Georgia Supreme Court's articulation of the theoretical underpinning of its holding in *AFLAC* with regard to outside counsel applies equally to in-house counsel. The "relationship between a lawyer and client is a special one of trust that entitles the client to the attorney's fidelity."[23] In fact, the

"unique" relationship between a client and its attorney, whether outside counsel or in-house, is "founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney."[24] Therefore, it would seem logical that a client must be free to end the relationship with its in-house counsel whenever it "ceases to have absolute confidence in either the integrity or the judgment or the capacity of the attorney."[25]

Courts in other jurisdictions have expressly applied these policy rationales to in-house counsel and prohibited breach of contract and other actions between companies and their in-house counsel.[26] These courts note that permitting an attorney to bring a breach of contract action after being fired would intrude not only upon the right to fire one's attorney, but also upon the entire fiduciary relationship of trust that is the cornerstone of the attorney-client relationship.[27]

Indeed, permitting an in-house counsel to sue a client raises unique problems. For example, qualifying the right of a client to fire its attorney by subjecting the client to potential liability for that firing "would have a chilling effect upon the ability of a client to exercise the right to discharge as the cost of exercising that right could be litigation with the former attorney."[28] Such litigation is more threatening than typical litigation because the attorney has had unique access to the client's confidential information as a fiduciary and has an awareness of the client's strategies and resources that would be protected from any other plaintiff by the attorney-client privilege.[29] In short, employer-clients "will be put in the untenable position of having to rely on outside counsel that knows less about the [the company-client] than does the party suing it."[30]

Courts across the country, including Georgia, have reached different conclusions and assessments regarding which inherent value to uphold: the beneficiary rights of an employer-client or the contractual rights of an employee-attorney.

Thus, according to this line of reasoning, the right to terminate the relationship is an implied term of every employment contract between an attorney and client.[31] As the Georgia Supreme Court held in *AFLAC*, "[a] client's discharge of his attorney 'is not a breach of the contract of employment but the exercise of his right.'"[32] After *AFLAC*, clients in Georgia may assert that this reasoning should extend to in-house counsel as well.

By contrast, in permitting breach of contract actions by in-house counsel, courts in other jurisdictions have relied upon the inherent differences between an in-house lawyer and outside counsel, as well as the value of upholding the right to contract.[33] In the seminal case espousing this point of view, *General Dynamics Corp. v. Superior Court*,[34] the California Supreme Court enumerated several policy reasons to permit in-house counsel to bring a breach of contract claim against a former employer-client. For example, an in-house counsel is economically dependent upon the employer-client and also under unique and powerful organizational pressures to conform the counsel's legal advice to organizational goals.[35] Moreover, the Court asserted that the general rule permitting a client to fire an attorney for any reason or for no reason does not apply in every case, and it particularly does not always apply "without consequence."[36]

Another California court permitted a breach of contract action because it recognized that the employment relationship between a company and its in-house counsel had aspects that may override the client's right to terminate its attorney: for example, the in-house attorney "was a salaried employee, required to work exclusively for the employer. The employer had the sole discretion to determine the employee's duties and to supervise such duties."[37] Simply because the attorney also owed ethical obligations toward his employer, asserted the court, does not require that the attorney lose all contractual rights as an employee. Therefore, the attorney should be paid upon discharge in accordance with the attorney's contract.[38] Similarly, another court upheld an in-house attorney's breach of contract claim and stated that "an employee status as an attorney cannot excuse an employer's violation of its contractual or statutory obligations. Attorneys may be unpopular, but they are not yet fair game."[39] These courts, then,

echoed the type of reasoning used by the Georgia Court of Appeals in *Henson* by declaring that a company could fire its in-house attorney if it was dissatisfied, but that the attorney did not lose the contractual right to payment for the remainder of the contract.[40]

In summary, courts across the country, including Georgia, have reached different conclusions and assessments regarding which inherent value to uphold: the beneficiary rights of an employer-client or the contractual rights of an employee-attorney. Yet the battle for supremacy between these important values does not fully consider another aspect of these disputes that should, but only occasionally does, play a role in a court's analysis. Specifically, the danger of revealing attorney-client confidences during the course of a dispute between a client and an in-house attorney is significant. Regardless of which side of the dispute a court supports, both the parties and the court should be cognizant that the true danger of these disputes lies in their potentially destabilizing effect on the essence of the attorney-client relationship: the attorney's ethical obligation to maintain client confidences.

AN IN-HOUSE COUNSEL'S USE OF CLIENT CONFIDENCES IN LITIGATION AGAINST THE CLIENT

In Georgia, the boundaries of an attorney's ability to use client confidences in a dispute with a former client are set by Rule 1.6 of the Rules of Professional Conduct. Rule 1.6 provides that:

> (a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information . . . the disclosure of which would be embarrassing or would likely be detrimental to the client . . . .
>
> (b) (1) A lawyer may reveal information covered by paragraph (a) which the lawyer reasonably believes necessary:
>
> . . .
>
> (iii) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . . .
>
> (e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The comments to Rule 1.6 clarify some of these requirements. For example, Comment 5 confirms that this rule applies to "all information related to the representation, whatever its source," not merely to matters communicated in confidence by the client. In other words, more than just the attorney-client privilege is protected — any of the client's information learned by the attorney during his or her role as attorney is protected from disclosure, whether or not the information also is a "privileged" communication.

At certain times, Rule 1.6 permits an attorney to disclose information "the attorney reasonably believes necessary," including when necessary "to establish a claim or defense."[41] Comment 17 to Rule 1.6 states that when a lawyer uses confidential information to establish a claim or defense, the lawyer "must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure."

The problem in litigation, of course, is where to draw the line between permissible and impermissible disclosure. Once a dispute has reached the litigation stage, it may involve a "no-holds-barred" confrontation in which neither party can be trusted to voluntarily maintain the lofty precepts embodied by the Rules of Professional Conduct. In other words, whether information is "reasonably necessary" to assert a claim or defense may be in the eye of the beholder. Is the client confidence technically required to prove an element of the breach of contract claim or does it merely provide the factual background of

the employee's dismissal? For example, if an attorney is discharged "for cause" related to job duties as an attorney under a long-term employment contract, then should the attorney be permitted to disclose purportedly confidential information to explain that a "for cause" firing was not justified? If this is permissible, then how does a court evaluate a case in which an attorney claims he or she was fired for conduct related to a confidential situation but the employer claims the discharge was for reasons not related to any confidential situation? The employer would argue the attorney does not need to use confidential information to prove the untruth of the employer's accusations, but the attorney will assert that it is necessary to reveal the confidential information in order to present the entire picture of the relationship. Even more problematic, this argument likely will be made "after the fact." The attorney may not wait to get a ruling from the court regarding the use of the client's information, but may simply include the information in a complaint.

These questions are not easily resolved and present a dilemma that lies beneath every dispute between a client and its attorney, particularly when that attorney is an in-house lawyer who has access to a broader swath of confidential information than a typical outside attorney who is retained for a specific matter. Although no Georgia appellate court has addressed in a reported opinion the scope of an in-house attorney's obligation to maintain the confidentiality of client information in a dispute with a client, other courts have analyzed this problem as integrally related to the issue of whether to permit in-house counsel to sue a client for breach of contract in the first place.

As a result of considering the impact of an attorney's obligation not to reveal confidential information, some courts present a compromise solution between the "contract rights" emphasis in *Henson* and the "beneficiary rights" emphasis in *AFLAC*. These courts permit breach of contract actions by in-house counsel, but restrict such claims to situations in which the claim is related to the attorney's relationship with the company as an employee, rather than as an attorney.[42] As long as the claim can be brought "without violence to the integrity of the attorney-client relationship," a breach of contract action will be permitted by these courts.[43]

For example, in *Nordling v. Northern States Power Co.*,[44] the Minnesota Supreme Court permitted a breach of implied contract claim by an in-house counsel who was fired without the employer following the progressive disciplinary steps required by the employee handbook.[45] According to the Court in that case, such an action was permitted because the firing was not related to the employee's role as an attorney; rather, it was "a case of deteriorating personal relations between an employee and his supervisor."[46] Seemingly recognizing the line between the two more-extreme viewpoints discussed above, the Court hinted that its holding would be different in a case in which the in-house attorney's discharge was the result of a dispute that implicated company confidences or secrets confided to the attorney.[47] In so doing, the Court rejected the attorney's argument (apparently based upon *General Dynamics*) that in-house counsel ought to be treated differently because their position has limited mobility and marketability. "Maybe so. But it is not clear to us that these circumstances, which may or may not be present in a particular case, entitle in-house counsel to consideration different from that of private attorneys. It can be argued with equal plausibility that many of those in private practice, who remain subject to the *quantum meruit* rule, are confronted also with problems of mobility and marketability."[48] Thus, the *Nordling* Court was willing to uphold contractual rights to some extent, but not at the expense of a client's beneficiary rights.

Similarly, in *Kiser v. Naperville Community Unit*,[49] a court in the Northern District of Illinois upheld the right of an in-house attorney to bring a breach of contract action because the client fired the attorney before the end of his contract and cited "cost effectiveness" as its rationale.[50] The client attempted to argue that it had the absolute right to fire its attorney, but the court rejected that argument.[51] Stating that the "right" asserted by the client to fire its attorney was merely a "general" — as opposed to an "absolute" — right, the court permitted the breach of contract claim to go forward because (1) the reason for the termination was not related to the attorney-client relationship; (2) the defendant company did not argue that litigating the attorney's claim would force disclosure of confidential communications or that allowing such claims generally would affect client trust or attorney autonomy; and (3) it appeared that the attorney's role was much broader than simply being an attorney — he had administrative duties to perform as well.[52] Thus, the

Kiser court attempted to balance the two competing interests: "A client may lose trust in and terminate his attorney for reasons that are wholly unrelated to the attorney's performance and therefore insufficient to constitute 'cause' under the contract. Post-termination breach of contract damages are generally unavailable to the terminated attorney in such a case, because a client must be free to fire an attorney he does not trust."[53] Moreover, as noted above, the fact that the dispute did not implicate attorney-client confidences made the court more willing to consider the attorney's claims.

Indeed, even the *General Dynamics* Court held that a claim by an employee-attorney should only be brought if it can be done without revealing any client confidences.[54] Thus, the seminal case undermining the client's "absolute" right to fire its attorney recognized that the fiduciary relationship between the employer-client and the employee-attorney demanded different treatment than the typical employment dispute.

Therefore, the unique access of in-house counsel to a client's confidential information may require different treatment of claims by such attorneys against their employer-clients. Even if a court takes a middle ground between *Henson*'s contractual rights focus and *AFLAC*'s beneficiary rights emphasis and permits limited breach of contract claims by in-house counsel, courts will have to consider the possibility that such litigation may reveal a client's confidential information. Revealing such information in litigation potentially could undermine the attorney-client relationship between a company and its in-house counsel, because companies may be wary of disclosing sensitive information to their in-house attorneys if they are concerned about it later being used against them.

PREEMPTIVE STEPS EACH PARTY CAN TAKE TO PROTECT THEIR INTERESTS WITHIN THE CONTEXT OF A FIDUCIARY RELATIONSHIP

Until the Georgia Supreme Court resolves the uncertainties faced by corporations and their in-house counsel as a result of the conflicting holdings of *Henson* and *AFLAC*, both parties have options they can utilize to bargain *ex ante* for a contractual resolution that provides protection to the attorney's need for financial security and the client's desire to protect its confidential information. Although it may seem odd to resolve a dispute about whether a contract is enforceable by proposing a contractual solution, one must remember that the tensions created by the fiduciary obligations of an in-house attorney with a long-term employment agreement are whether the client's right to fire its attorney has been infringed and whether the client's confidences are at risk. The suggestions below do not undermine these rights; rather, they reinforce them by providing up-front protections to both parties.

First, to protect client confidences, any employment agreement between a company and its in-house counsel should have a provision requiring the attorney, in any lawsuit the attorney brings against

REMINDER
The Annual Fiction Writing Competition Deadline is Jan. 23, 2004.

the company, to seek a protective order upon initiating the litigation, prior to disclosing any client information, permitting both parties to file their pleadings under seal. Although this procedure may be met with resistance by the media in highly publicized cases, it should be noted that this exact procedure is recommended by Comment 17 to Rule 1.6 of the Rules of Professional Conduct, which suggests that a lawyer who seeks to utilize a client's confidences against the client in litigation "make every effort practicable" to limit the disclosure, and "to obtain protective orders or make other arrangements" to minimize the risk of disclosure. The absolute obligation of this contractual commitment should supplement the pliable language of Rule 1.6, which permits disclosure of confidential information if the attorney deems it "reasonably necessary," and only recommends the use of protective orders if "practicable." A contractual provision making a protective order mandatory would eliminate the dangerous possibility of confidential information being revealed improperly.

Second, in-house counsel should attempt to receive financial security up-front as a signing bonus rather than rely upon a tenuous contractual commitment for a specific number of years of employment. Such up-front payments will most likely be deemed to be a "general" retainer, which the attorney will be able to keep even if the contractual commitment is not fulfilled.[55] Moreover, a signing bonus may be appealing to a client if the attorney is willing to give up a contractual measure of damages should the client terminate the contract before the end of the contract's term. For example, rather than use a long-term contract to protect the in-house counsel, the agreement could provide for a signing bonus and a limited notice period before the contract can be terminated early. A court examining a short notice period might perceive that such a provision does not unnecessarily burden the client's right to terminate its attorney in the same manner that paying the attorney's salary for the remaining years on a long-term contract might burden the client.[56]

CONCLUSION

An in-house attorney is an employee and, to some degree, deserves to have contractual protections afforded other employees. A company is a client of its in-house counsel and deserves to have the right to terminate its relationship with its attorney without suffering drastic financial consequences or facing the public exposure of its confidential information. Balancing the rights and responsibilities of these complex and, at times, conflicting roles can be difficult, particularly when courts refuse to recognize the dual-roles of each party and attempt to characterize the relationship as solely employee-employer (as in *Henson*) or attorney-client (as in *AFLAC*). Until the Georgia Supreme Court resolves the *Henson-AFLAC* dichotomy, companies and their in-house counsel should work together to resolve these issues before a dispute arises. GBJ

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Endnotes

1. *See* Dorsey v. Edge, 75 Ga. App. 388, 392, 43 S.E.2d 425, 428 (1947).
2. *See* Myszka v. Henson & Henson, P.C., 170 Ga. App. 878, 879, 318 S.E.2d 672, 673 (1984).
3. Henson v. Am. Family Corp., 171 Ga. App. 724, 728, 321 S.E.2d 205, 210 (1984) (*quoting* Pickens Co. v. Thomas, 152 Ga. 648, 652, 111 S.E. 27, 29 (1922)) (internal quotation marks omitted).
4. AFLAC, Inc. v. Williams, 264 Ga. 351, 353, 444 S.E.2d 314, 316 (1994) (*quoting* White v. Aiken, 197 Ga. 29, 32, 28 S.E.2d 263, 265 (1943)) (internal quotation marks omitted).
5. Georgia Rules of Prof. Conduct, Rule 1.6(b)(1)(iii).
6. 171 Ga. App. 724, 321 S.E.2d 205 (1984).
7. 264 Ga. 351, 444 S.E.2d 314 (1994).
8. *See* Henson, 171 Ga. App. at 728,

321 S.E.2d at 209-10. The contract in *Henson* makes clear that the attorney was the company's "general counsel" and was considered under the contract to be a full-time employee of the company; however, the arrangement also recognized that the attorney would receive a long-term retainer and would retain some independence through an outside practice. *Id*. at 726, 321 S.E.2d at 208. Therefore, it appears that the attorney's position had both outside counsel independence as well as the ongoing responsibilities and commitment of a typical in-house counsel. Regardless, in-house counsel in Georgia will certainly rely on its holding to support claims regarding the enforceability of their employment agreements.

9. *Id.* at 727, 321 S.E.2d at 209.
10. *Id.*
11. *Id.* at 724, S.E.2d at 207.
12. *Id.* at 728, 321 S.E.2d at 210 (*quoting* Pickens Co. v. Thomas, 152 Ga. 648, 652, 111 S.E. 27, 29 (1922)) (internal quotation marks omitted).
13. *Id.*
14. *Id.*
15. 264 Ga. 351, 352-53, 444 S.E.2d 314, 315-16 (1994).
16. *See* 264 Ga. at 353-54, 444 S.E2d at 317.
17. *Id.* at 352, 444 S.E.2d at 316.
18. *Id.* at 353, 444 S.E.2d at 316.
19. *Id.* at 353, 444 S.E.2d at 317.
20. *Id.* at 353, 444 S.E.2d at 316. Oddly, despite the *Henson* Court's upholding of the general counsel's contractual rights, the Court's opinion later recognizes the very concept emphasized by the Supreme Court in *AFLAC*. In rejecting a conspiracy claim, the *Henson* Court stated it was reluctant to permit a conspiracy claim "where the alleged wrongful act is the discharge of legal counsel, for due to the confidential and highly sensitive nature of the relationship between an attorney and client, public policy mandates that the client be absolutely free to discharge his attorney at any time, for any reason he chooses." *Henson*, 171 Ga. App. at 730, 321 S.E.2d at 211.
21. *AFLAC, Inc.*, 264 Ga. at 353-54 n.4, 444 S.E.2d at 317 n.4.
22. *Id.* at 352 n.1, 444 S.E.2d at 315 n.1.
23. *Id.* at 353, 444 S.E.2d at 316.
24. *Id.* (*quoting* Demov, Morris, Levin & Shein v. Glantz, 53 N.Y.2d 553, 556, 428 N.E.2d 387, 389, 444 N.Y.S.2d 55, 57 (1981) (internal quotation marks omitted).
25. *Id.* (*quoting* Fracasse v. Brent, 6 Cal.3d 784, 790, 494 P.2d 9, 13, 100 Cal. Rptr. 385, 389 (1972) (*quoting* Gage v. Atwater, 136 Cal. 170, 172, 68 P. 581, 582 (1902))) (internal quotation marks omitted).
26. *See, e.g.*, Anastos v. Chicago Reg. Trucking Assoc., Inc., 250 Ill. App.3d 300, 302-303, 618 N.E.2d 1049, 1051, 188 Ill. Dec. 479, 481 (1993) (rejecting a breach of contract claim by a former general counsel based upon a ten-year employment agreement); Cohen v. Radio-Electronics Officers Union, 146 N.J. 140, 154, 679 A.2d 1188, 1196 (1992) (refusing to award contractual damages to in-house attorney when client discharged attorney without giving contractually required notice of six months).
27. *See Anastos*, 250 Ill. App. 2d at 301-02, 618 N.E.2d at 1050; *Cohen*, 146 N.J. at 155-57, 679 A. 2d at 1195-97.
28. *Anastos*, 250 Ill. App.2d at 302, 618 N.E.2d at 1051.
29. *See* Santa Clara County Counsel Attorneys Assoc. v. Woodside, 7 Cal. 4th 525, 559, 869 P.2d 1142, 1162, 28 Cal.Rptr.2d 617, 637 (1994) (Panelli, J., dissenting) (noting that an in-house counsel's "insider's familiarity" will give him or her "an invaluable advantage in making legal argument, but particularly in pursuing settlement") (internal quotation marks omitted).
30. *Id.* at 560, 28 Cal.Rptr.2d at 637, 869 P.2d at 1162 ("When . . . in-house lawyers sue their clients, the former relationship of trust and confidence becomes an unfair tactical and informational advantage that the client may well view as a serious betrayal.").
31. *AFLAC, Inc.*, 264 Ga. at 353, 444 S.E.2d at 316.
32. *Id.* (*quoting* Dorsey v. Edge, 75 Ga. App. 388, 392, 43 S.E.2d 425 (1947)).
33. *See, e.g.*, General Dynamics Corp. v. Superior Ct., 7 Cal. 4th 1164, 1178-79, 876 P.2d 487, 496, 32 Cal.Rptr.2d 1, 10 (1994) (holding that in-house attorney could bring breach of implied contract claim); Chyten v. Lawrence & Howell Investments, 23 Cal. App. 4th 607, 612, 46 Cal.Rptr.2d 459, 462 (1993) (rejecting argument that client had absolute right to discharge attorney-employee); Slifkin v. Condec Corp., 13 Conn. App. 538, 549, 538 A.2d 231, 236 (1988) (permitting breach of contract action by in-house attorney against employer); Klages v. Sperry Corp., No. 83-3295, 1986 WL 7636, *3-5 (E.D. Pa. July 8, 1986) (same).
34. 7 Cal 4th 1164, 876 P.2d 487, 32 Cal.Rptr.2d 1 (Cal. 1994).
35. *Id.* at 1172, 876 P.2d at 491-92, 32 Cal.Rptr.2d at 5-6.
36. *Id.* at 1174-75, 876 P.2d at 493, 32 Cal.Rptr.2d at 7 (emphases added).
37. *Chyten*, 23 Cal. App. 4th at 613, 46 Cal. Rptr.2d at 463.
38. *Id.* at 614, 46 Cal. Rptr.2d at 464.
39. Golightly-Howell v. Oil, Chem. & Atomic Workers Intern'l Union, 806 F. Supp. 921, 924 (D. Colo. 1992).
40. *Henson*, 171 Ga. App. at 728, 321 S.E.2d at 210.
41. Rule 1.6(b)(1)(iii) of Georgia Rules of Prof. Conduct.
42. *See, e.g.*, Kiser v. Naperville Community Unit, 227 F. Supp. 2d 954, 965-66 (N.D. Ill. 2002); *Golightly-Howell*, 806 F. Supp. at 924; Nordling v. Northern States Power Co., 478 N.W.2d 498, 501-502 (Minn. 1991).
43. Nordling, 478 N.W.2d at 502.
44. 478 N.W.2d 498 (Minn. 1991).
45. *Id.* at 502.
46. *Id.*
47. *Id.*
48. *Id.* (internal footnote omitted).
49. 227 F. Supp. 2d 954 (N.D. Ill. 2002).
50. *Id.* at 966.
51. *Id.* at 964-65.
52. *Id.* at 966.
53. *Id.*
54. *General Dynamics*, 7 Cal. 4th at 1189, 876 P.2d at 503-505, 32 Cal. Rptr.2d at 17-18.
55. *See generally* Ryan v. Butera, Beausang, Cohen & Brennan, 193 F.3d 210, 216 (3rd Cir. 1999) (distinguishing between "general" and "specific" retainers); Brickman & Cunningham, *Nonrefundable Retainers Revisited*, 72 N.C. L. Rev. 1, 6 (1993) (discussing difference between general and specific retainers).
56. *See, e.g.*, *AFLAC, Inc.*

Public Service Creates a Balancing Act for Lawyer Legislators

By C. Tyler Jones

One need only glance at the biographies of the nation's founding fathers to know that lawyers have long played a significant role in government and in shaping the laws of the country. Of the 56 men who signed the Declaration of Independence, more than 20 were lawyers. Since then, it has not been uncommon for lawyers to run for political office. After all, their day-to-day business consists of providing legal advice and working in the law. It seems logical that attorneys should help draft and pass the laws they swore to uphold.

Surprisingly, over the last two decades there has been a decline in the number of lawyers serving in the Georgia state legislature. For the upcoming term, fewer than 16 percent — 28 of 180 representatives — and fewer than 20 percent — 11 of 56 senators — are lawyers. In 1980, 52 lawyers served in the General Assembly.

The *Journal* asked nine of Georgia's 39 lawyer legislators questions to learn why they chose public service, what motivates them to serve, how they balance service with their law practice and family, and whether their "special understanding" of the law helps them to be more effective legislators.

FROM THE SENATE

Senator Randy Hall (Republican, District 22)

Sen. Randy Hall has always had a strong desire to give something back to his community. Because of his interest in politics, running for office seemed like a good way to contribute.

After participating in his first session, Hall quickly realized the key role attorneys play in the legislative process. "Lawyers have the ability to spot the potential problems with legislative language and to recognize the impact that a bill might have on existing law," he said. For this reason, Hall strongly encourages lawyers to get involved in the legislative process.

For lawyers considering running for office, Hall advises them "to estimate the amount of time that one must devote to service and then multiply that by four." Because of the significant time commitment, Hall said, "A lawyer also needs the enthusiastic support of his or her partners, staff and most importantly, family. These are the players that are most impacted by the decision." He pointed out that it also helps to have loyal and patient clients.

Hall said maintaining balance between public service, the practice of law and family is extremely difficult. The time commitment is so great that Hall does not practice law during the session. Fortunately, when Hall hands off his practice for the first three or four months each year, his partners and clients are understanding.

Even after the session, Hall spends about four hours a day working on senate matters. Despite the challenges of balancing time between his law practice, his role as a state senator, and being a father and husband, Hall said the ability to really help people, improve his community and shape the laws of the state make it all worthwhile.

Senator Preston Smith, (Republican, District 52)

As the youngest state senator and the first Republican elected in his district in modern times, Sen. Preston Smith said he became involved in politics because he was frustrated with the status quo and believed that he could make a positive impact in the General Assembly. "I observed some politicians who seemed more interested in perpetuating their own political career than representing the constituents they were elected to represent," Smith said.

Being a lawyer helps make Smith a more effective legislator. "The study, understanding and practice of law gives attorneys certain advantages in perspective, application and insight. It also allows us to shorten the learning curve and make an impact sooner than some others," Smith said.

Because the legal profession suffers from a poor reputation in the public eye, Smith said it is important for lawyers to become actively involved in their communities and their state government. "I believe that it is important for lawyers to overcome that perception by applying their skills, talents and abilities in volunteer work, community involvement and public service. It is also personally enriching to play a role in the function of government, formation of policy and the foundations of our statutory law," Smith said.

Smith warns that prior to making the decision to run for public office, attorneys "must have the full blessing, support and accommodation of his or her family and employer." He also recommends that those interested in public service talk to current lawyer legislators to get their feedback to truly understand the sacrifice and commitment required.

"I have found that it is very difficult to balance the commitments to family, church and work while serving in the legislature," Smith said. He explained that this year was especially challenging with the complete restructuring of state governmental leadership on several levels. Changes included the election of the first Republican governor in over 130 years; a change in the Speaker of the House; and the first Republican controlled legislative body in Georgia's history, with the change of power in the state Senate. "This change of leadership was accompanied by the pending war in Iraq, the worst state budget situation since the Great Depression and one of the longest legislative sessions ever recorded in Georgia. Legislators like myself are, and should be, humbled by all of the support we receive in order to find balance in our lives under these circumstances," Smith said.

As a lawyer legislator, Smith finds it challenging to balance the time required to be an effective legislator with being a good husband, father and person of faith. He also finds it challenging to deal with bitter partisanship while trying to accomplish positive change.

"The greatest reward comes in the form of support and encouragement from constituents who express their appreciation for the work I do," he said. But there is more — "There is an esprit de corps among my fellow colleagues and a shared goal of restoring public trust in a government that is responsive to its citizens," Smith explained. "I especially enjoy serving my constituents in the district and speaking to students about the process of government and the opportunity for leadership."

Smith added that he believes in the Governor and is proud to serve as his Administration Floor Leader. "I share the vision he has articulated for a new Georgia that is educated, healthy, safe and growing," he said.

Senator Charlie Tanksley (Republican, District 32)

"The primary reasons I got involved in politics are the example set by my parents and a family tradition of public service primarily in the military, elective politics, and the judiciary dating back to the 1700s," Sen. Charlie Tanksley said.

As a lawyer legislator, Tanksley feels he has an advantage over non-lawyers because lawyers "have better insight as to what legislation should say to accomplish a particular purpose as well as what the effect of any particular piece of legislation is likely to be. If one couples a sufficient level of integrity with that advantage, he or she can gain the confidence of other legislators and interested parties on many subjects."

Tanksley encourages other lawyers to get involved in public service. "Whatever debate has raged in the past about there being too many lawyers in the legislative bodies around the country, we are approaching a situation where those numbers unquestionably are insufficient," he said.

Tanksley believes that other lawyers considering public service should "have some basic philosophical principles he or she believes in and make a commitment to be faithful to them, win or lose. I would also advise anyone to grow very thick skin before you get involved. In politics today, you will not enjoy it or gain much satisfaction if you can't take an emotional whipping then just smile, laugh and get back on the bar stool."

"I balance my participation in the legislature and my law practice primarily through the tremendous support and sacrifice of an extremely loyal and competent staff and understanding partners," Tanksley said. He also continues to schedule depositions and other matters during afternoons in the early part of the 40-day session. Additionally, he undertakes to prepare pre-trial orders and requests that cases be placed on jury trial calendars so that he comes out of the session prepared to move cases to a conclusion.

"I balance my participation in the legislature and my law practice with my family by adhering to three basic practices. By word and action, my wife, Kathryn, a State Court Judge, and my children know they are primary," Tanksley said. In addition to making it a point to have breakfast or morning snack with his family, he takes time for family discussions and devotions.

Another key to striking a balance for Tanksley is to turn down most invitations for political functions in the evening. Instead, he goes home to prepare the evening meal and help with the children. "Living within 10 miles of the Capitol and my law office makes all of this much more feasible. I cannot comprehend how my colleagues who come from a hundred or more miles away manage all this," he said.

For Tanksley, the primary challenge of public service is the time demand and the pressures it brings to bear on family and business. He adds that the second major challenge is that over the past 10 years certain issues and general partisan-

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ship have become much more intense, personalized and sometimes just ugly.

"The rewards of public service for me have been the opportunity to have a significant impact on legislation and policy by virtue of having been a governor's floor leader for four years and a committee chair for six years. Another source of real satisfaction has been the opportunity I have had to help constituents, including friends dating back to high school, with very difficult problems involving medical care and/or other assistance they were entitled to under the law," Tanksley said.

FROM THE HOUSE

Representative Stephanie Stuckey Benfield (Democrat, District 56, Post 1)

Because her father served in Congress (Billy Stuckey, 8th District of Georgia, 1966-1976), Rep. Stephanie Stuckey Benfield said she grew up "eating grits and politics for breakfast every morning." Politics and public service were just another part of life in Benfield's family. She explained that her grandfather was a state representative from Dodge County, and her great-grandfather was the sheriff of Dodge County for decades. Coming from such a political bloodline, elected office was a natural fit.

Besides the obvious advantage of practicing law in a courtroom, Benfield said being a lawyer has given her critical interpersonal skills, which helps her when working with her fellow legislators. She explained that as a lawyer, she is trained to advocate for an issue in the courtroom and not take opposing views as a personal affront. Benfield said that is an extremely valuable trait to have in the General Assembly, where she has to debate issues and disagree with colleagues while still getting along with them professionally.

Benfield encourages other lawyers to get involved, but not necessarily by running for office. She explained that public service takes a huge toll on a person's time and finances. For a lawyer who is trying to get on the fast track to partnership with a big firm, the legislature is not for them. But, she said, lawyers still can be involved in advocacy. "Since the number of lawyers in the legislature is dwindling, their expertise is needed now more than ever. When a complex issue (such as the tort reform debate which is currently raging) arises, it is critical that attorneys who practice in this area of the law contact the legislature to share their knowledge and experience," Benfield said.

Some of the advice Benfield offers other lawyers who are considering running for office is to:

- Communicate fully with clients, co-workers and superiors about the huge time and money commitment involved.
- Make arrangements for other attorneys to handle your caseload for the three to four months a year that the legislature is in session.
- Look out for potential conflicts of interest in doing business with state entities.
- Consider adding a clause to your retainer agreement stating clearly that you will be away from the practice of law while the legislature is in session.

Benfield said the hardest part of being a lawyer in the legislature is balancing participation in the legislature with her law practice and her family commitments. When her son was born last year, Benfield realized that she could not juggle the law, the legislature and a newborn. Something had to give, and she made the difficult decision to quit actively practicing law. "At some point, you have to cut back on what you're doing or you end up doing a lot of things poorly," she said.

Although being a lawyer is the noblest profession and gives tremendous opportunities for helping others, Benfield said one of her greatest challenges is convincing her colleagues in the legislature of this. She explained that there is a definite anti-lawyer bias in the legislature. "Some of my colleagues think nothing of going to the well and railing against lawyers when they wouldn't dream of criticizing any other profession," she said.

Benfield said the greatest reward is seeing legislation become law. "There's nothing more exciting than seeing ideas turned into action, especially when you're implementing real change in our legal system," she said.

"There's nothing more exciting than seeing ideas turned into action, especially when you're implementing real change in our legal system." — **Rep. Stephanie Stuckey Benfield**

Representative Mike Boggs (Democrat, District 145)

"I chose to offer myself for public service primarily because I desired to have a direct and personal involvement in the growth of Georgia and specifically, the southeastern portion of the state," Rep. Mike Boggs said. As a political science major in college, Boggs developed an interest in politics and public policy and after graduating worked as a legislative aide in Washington, D.C., to former Georgia 8th District U.S. Congressman J. Roy Rowland.

"Equally important in my decision [for public service] was my rearing." Boggs said his father was a former president of the Waycross City Board of Education; and both parents were involved in community activities. They instilled in him an appreciation for community and of the virtues of public service.

Boggs said he does not know if being a lawyer gives him special "insight" as a legislator, but he said his legal education and years of practicing law have provided him with a unique understanding of interpreting and witnessing the application of state laws. This ultimately leads him to pay special attention to the way bills are drafted and better understand the consequences of poorly drafted legislation.

Whether through elective office, through service in lobbying for issues or serving on a State Bar committee, Boggs said lawyer participation in the legislative process is needed now more than ever because there are fewer and fewer lawyers willing to serve. "Having served on the House Judiciary Committee for three years, I have a significant appreciation for the work of that committee. The attention to detail and bill drafting, which often leads to criticism by other legislators, while understandingly frustrating, is very much needed in the legislature," Boggs said.

"I would encourage other lawyers to become involved in the legislative process. Unfortunately, many lawyers simply cannot afford to serve in elective office in a part-time legislature that requires a full time commitment," he said. Boggs advises attorneys with an interest in legislative service to speak to other attorney legislators to obtain a clear understanding of the time commitment involved.

The most challenging part of public service for Boggs is balancing his legislative commitments with his law practice and his family. This is even more challenging for Boggs because his home is 240

"What I have seen is that many legislators — especially new ones — come into office thinking that they are voting on ideas. They are not. They are voting on words." **— Rep. Tom Bordeaux**

miles away from the Capitol. "It is not uncommon for me to work 70-hour work weeks, nearly every weekend, and most nights while out of the legislative session," he said. From January through April, Boggs tries to maintain his practice in Atlanta, but it is not easy. "While I'm afforded a legislative continuance for my litigated cases, this means that all matters are pushed off until after April each year," Boggs said. After adjournment, Boggs explained that there is little time to catch up on legal matters, such as trials, depositions and hearings, as legislative time commitments extend year round. Without understanding and receptive clients, opposing counsel and judges, Boggs said his legislative service would be impossible.

"While the legislature is viewed as a part-time job, its duties, if accurately assessed and appreciated are really year round. This affects not only time spent with family, but also can affect dramatically, the revenue generated by a lawyer/legislator through his law practice," Boggs warns. This is especially true for sole practitioners.

"As for the rewards of legislative service, I thoroughly enjoy having a part in helping the communities I serve. Whether it is through securing local economic development projects and funding that brings jobs and an improved quality of life to our district, or through the sponsorship and passage of bills that protect children for example, legislative service can provide a legislator with a personally rewarding experience," Boggs said.

Representative Tom Bordeaux (Democrat, District 125)

"I got involved in politics because I grew up believing that democracy was great, the United States of America was great, and that a responsible citizen in America got involved in his government and the law. I still believe those things, by the way," Rep. Tom Bordeaux said.

According to Bordeaux, the chairman of House Judiciary Committee, legal training gives a person an advantage in just about every job he/she could have. That includes service in the legislature. "What I have seen is that many legislators — especially new ones — come into office thinking that they are voting on ideas. They are not. They are voting on words. Unless the legislation says the right thing, then our great ideas and our good intentions don't mean anything. Being a lawyer helps me craft those words to reflect a legislator's intent," Bordeaux said.

Although it can be exhausting, frustrating, and "will make a person's hair fall out," serving in the General Assembly is also incredibly satisfying and fulfilling for Bordeaux. He encourages other lawyers to serve and reminds them that "we're so fortunate to have received a legal education and we owe so much to our community."

Before running for office, Bordeaux advises other lawyers to talk to their family and make sure it's okay with them. Once the decision is made, Bordeaux suggests getting involved in somebody else's political campaign to learn something about how to campaign, including what not to do. Then find a district, hopefully the one you're living in now, in which you are electable. Bordeaux cautions that "all your great ideas and plans for the state do not matter if you are out of touch with the people who vote."

Bordeaux concedes that it is incredibly difficult to balance work, family and politics. "You can't be gone to the legislature three months out of the year and get as much work done for your boss or your clients as you would if you'd been at your desk for 12 months," he said. Because of the delicate balancing act, lawyer legislatures have to work harder at everything.

For most of the 13 years that Bordeaux has participated in the legislature, he was single, but about three and a half years ago, he got married and already has two children. He explained "each Sunday night during the legislative session, I have to get into my car and wave goodbye to my little girl standing in her crib at her bedroom window. It breaks my heart and I cry all the way to the airport. But I do believe that, by being in the legislature, I'm playing some small part to make our community a better place for her and her little brother to grow up."

"We as lawyers have a special training. We belong to a tradition of public service that has forever made where we live a better place to live. And the simple truth is that we add something to the discussion that retired educators, pharmacists, undertakers, insurance brokers, and the scores of other professions represented in the legislature can never provide," Bordeaux said.

"Next to having my wife and children, and even though I love practicing law, being in the legislature has been the best experience of my life," Bordeaux said. During his involvement in government, he has met some bright and dedicated people, who want to make life better for others. In the end, Bordeaux said he feels he is the one who is better for having served.

Representative Mary Margaret Oliver (Democrat, District 56, Post 2)

"Traditional politics was not part of my family experience growing up, and I was only on the fringes of student protests during college and law school. But my first job with Georgia Legal Services brought me into contact with the good and bad of Georgia politics," Rep. Mary Margaret Oliver said. She explained that one of her first assignments was to lobby in the General Assembly for low income Georgians. As a young, not very well connected lawyer Oliver said she learned a great deal quickly and immediately became engaged in the competition under the "Gold Dome" and was fascinated with how accessible the issues were to her.

After she went into private practice with then state Sen. Pierre Howard, a House seat unexpectedly opened in her DeKalb county neighborhood and she jumped into a special election.

"Being a lawyer is a big advantage in actually serving on committees and understanding both procedural and substantive issues. Other legislators often look to the lawyers for help, and assume that we know about lots of issues, which sometimes we do," Oliver said. She explained that being on the judiciary committees gives lawyer legislators extensive contact with most of the important bills that pass through the legislature.

"It is essential that more lawyers engage in campaigns and the traditional political world. The percentage of lawyers who run, win and serve has dropped in recent years," Oliver said.

For those lawyers considering public service, Oliver's advice is to "get ready to enjoy yourself with fascinating and diverse legislators who are often better strategic street fighters than even the best litigators. And try not to spend more time than minimally necessary with lobbyists and the 250 receptions and political events to which you are invited that are not in your political district."

Serving in the Georgia General Assembly is part-time work, designed historically for citizen legislators. Oliver encourages lawyers to respect this tradition, and do not go broke. "Make a plan and try to stick with it on what percentage of your time will be devoted to your political job outside of the session. Find ways for your family members to be involved and have opportunities to enjoy the experience," she said.

Representative Glenn Richardson (Republican, District 26)

"I have always been interested in politics since I ran for student council in grade school. It was my college major and I have served as a county attorney for 15 years," Rep. Glenn Richardson said.

As a lawyer legislator, Richardson believes that being an attorney gives him an advantage, especially while speaking on the floor and in reading and drafting legislation. His background as a lawyer and knowledge of the Constitution makes the process easier for him.

Richardson, the governor's Floor Leader, encourages lawyers to participate in the legislature because the state "definitely needs more legal minds helping write the laws."

For those lawyers considering legislative involvement, Richardson advises them to "have a good written partnership agreement, which contemplates the serious time commitment required to do a good job. And if you do not have partners or a good agreement, save a lot of money in the non-session time because otherwise you and your family might go hungry."

"The balance is difficult and at times almost impossible," Richardson said. Fortunately, he said his law partners are absolutely the best in the state, and they continue to pay him even when he is away from the practice for three or four months. Professionally, Richardson said it is difficult to keep cases moving and keep track of deadlines and discovery goals. He said some opposing attorneys understand and work with him but many could care less.

As for his family, Richardson makes it a priority to spend quality time with his wife and three children during the session.

Although dealing with the "deluge of daily phone calls demanding assistance from their elected official while trying to schedule depositions/discovery/hearing and return lawyer calls" is a major challenge, Richardson said it is worth it when he sees the laws he has influenced help the citizens of Georgia.

Representative Rob Teilhet (Democrat, District 34, Post 2)

"I got involved in politics because I want to help extend opportunity to more people than have ever had it before, and I think that shaping good public policy is the best way to do that," Rep. Rob Teilhet said. "I believe that we all have a responsibility to leave our state and our world better than we found it," he added.

"Being a lawyer is definitely a plus in the General Assembly. You start with a better understanding of what the law is and how it works and affects everyday lives. Also, lawyers are taught to think critically and to ask tough questions, which is very valuable in the legislative process," Teilhet said.

Teilhet strongly encourages other lawyers to get involved in public service. He added that "Contrary to popular belief, there are fewer and fewer lawyers serving and they are missed. Our expertise is needed."

The advice Teilhet offers lawyers considering public service is to start early, work hard, be honest, and let the chips fall where they may.

Teilhet said he is lucky to work at the firm of Brock, Clay, Calhoun, Wilson & Rogers. He explained that the firm's support helps him balance the requirements of the General Assembly and law practice.

"The primary challenge in serving in the General Assembly and maintaining a private law practice is finding the time to excel at both." Teilhet warns"it's easy to let one or the other start to slip if you're not careful. That's even truer for young lawyers still establishing themselves."

Teilhet said the main reward of public service "is knowing that you are helping to shape the future of the state. Georgia has been so good to me that it feels good to give something back."

SAFEGUARDING THE PUBLIC

Georgia lawyer legislators do not take their role as lawmakers lightly. Despite time away from their families, increased workloads and reduced compensation, these lawyers answer a higher altruistic calling. They are willing to make the required sacrifice because they care about Georgia and its citizens.

Lawyers bring invaluable skills to the General Assembly. Their familiarity with the law helps them draft bills with language that is well written and fulfills the intent of the legislature. Without this safeguard the citizens of Georgia would likely face many ambiguous laws plagued with loopholes; because as Rep. Bordeaux said, legislators do not vote on ideas, they vote on words.

All of the lawyers the Journal spoke to plan to continue serving the citizens of Georgia — voters, partners and family willing. GBJ

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

State Bar Seeks Continued Legislative Success in 2004

By Mark Middleton

As an action-filled 2003 comes to an end, the State Bar's legislative efforts have begun for the 2004 session of the General Assembly. The year began with a historic legislative session that brought continued State Bar success in passing eight important bills, including an initiative to create a statewide indigent defense system.

After the 2003 regular session, the State Bar's legislative efforts continued as members and the professional staff supported section activities, and advanced carry-over legislation. "We are working to create another productive year at the General Assembly," stated State Bar President Bill Barwick.

2004 State Bar Legislative Agenda

The 2004 State Bar agenda consists of bills that were filed last year but did not pass, and new bills and funding initiatives developed by the State Bar's sections since the 2003 session.

Carry-Over Bills

The following State Bar bills will be taken up again in the 2004 session.

HB 229: Guardianship Code Revision — The Fiduciary Section's bill reorganizes and updates the Guardianship Code. The bill has received intense scrutiny from lawmakers in the House. "The Judiciary Committee is very meticulous in its examination of bills that affect the practice of law," said Tom Boller, legislative representative. "Particularly in an important area like guardianship law."

At a legislative subcommittee meeting this summer at the Fiduciary Law Institute, House Judiciary members conducted a very thorough analysis and review of the bill. The committee meeting was well attended by many fiduciary and probate law practitioners who expressed their support for the modernization of the Guardianship Code. The State Bar is looking forward to continuing its work with Representatives Mary Margaret Oliver (D-Decatur) and Wendell Willard (R-Dunwoody), co-sponsors of the bill in the House of Representatives during the 2004 session.

A special thanks should go to the Fiduciary Law Section's Guardianship Code Revision Committee, which has worked diligently to produce the recommendations set forth in the bill that reorganize, modernize, and clarify the statutes relating to the guardianship of persons and property of minors and adults.

HB 322: Appellate Code Revision — This bill, authored by Rep. Nick Moratakis (D-Atlanta), would cross-reference all statutory rights of appeal, and provide a safe harbor for interlocutory appeals that are mischaracterized by practitioners. The bill passed the House of Representatives and will be considered again next year. "This bill would provide an important clarification of the procedural law relied upon by appellate practitioners," said Chris McFadden, an appellate expert and former chair

of the State Bar's Appellate Section.

HB 654: Recordation of Notices of Foreclosure of Right to Redeem — This Real Property Section proposal requires a public notice that the third party right to redeem has been exercised. This bill, authored by Rep. Mack Crawford (R-Pike County), received favorable consideration from the House Ways and Means Committee in 2003. The State Bar will work once again to pass the initiative in 2004.

Georgia Limited Liability Company Revision — This proposal is designed to strengthen the Georgia LLC statute in order to make Georgia more competitive with the State of Delaware. Currently, many Georgians are forced to go to Delaware to create business entities in order to accomplish sophisticated business transactions. This proposal seeks to address that problem, and will:

- Allow a person without an economic interest in an LLC to be a member or manager of an LLC;
- Grant voting rights to certain members and managers by written operating agreement; and
- Allow non-members to own an interest in profits, etc. of an LLC. This change would conform Georgia's law to the Delaware statute.

New Agenda Items

This year, the various State Bar sections have once again prepared legislative proposals comprised of issues of importance to the State Bar. The State Bar's Advisory Committee on Legislation has considered these proposals, and forwarded recommendations for approval to the State Bar's Board of Governors, which met in November and will meet again at the Midyear Meeting in January.

The following proposals were approved by the BOG at its November meeting:

Georgia Public Defender Standards Council Appropriations Request — The newly created Georgia Public Defender Standards Council seeks $4,195,696 in state funding to continue the current operation until Dec. 31, 2004. After this period, the new circuit offices are expected to be in place. The council is also seeking approximately $3.7 million for operations of the Capital Murder Defender Office. Finally, and most significantly, the council seeks approximately $25 million to establish the new Circuit Public Defender Offices beginning in January 2005. Lawmakers are expected to pursue new and creative sources for these funds during the 2004 General Assembly.

CASA Appropriations Request — The request from the Georgia Court Appointed Special Advocates for fiscal year 2005 budget is an increase of $390,000 to serve 2,000 more children by developing new programs and enhancing existing programs.

Domestic Violence Appropriations — This program seeks a continuation of the $2.3 million to nonprofit entities to provide legal representation to the victims of domestic violence.

Other issues will undoubtedly be added to the State Bar's legislative agenda at the Midyear Meeting in January. "The legislature is impressed with the expertise that our sections and ACL members bring to the deliberation of these important issues," said ACL Chairman John Chandler. "The participation of lawyers in their sections is a strength for the State Bar legislative program."

Summary

Just as 2003 was a busy and productive year for the State Bar, 2004 promises more of the same. As the State Bar continues its efforts in the 2004 General Assembly, do not hesitate to contact your legislative representatives and section chairs regarding issues of importance to you. GBJ

Tom Boller, Rusty Sewell, Wanda Segars and Mark Middleton are the State Bar's professional legislative representatives. They can be reached at (404) 872-2373, via fax at (404) 872-7113, or by e-mail at tom@bsspublicaffairs.com and mark@middletonlaw.net.
Also, the State Bar's legislative agenda can be found online at www.gabar.org/legislat.htm.

Trained Court Interpreters Are Now Available to Georgia Lawyers

By Philippa Maister

As the number of languages spoken in Georgia rises with the explosive growth of the immigrant population, so does the demand for skilled interpreters to help the courts provide justice to the growing number of non-English speakers who appear before them. Attorneys, too, often need to find individuals capable of interpreting two foreign languages — that spoken by their clients and that of the law.

But finding qualified interpreters — especially ones who understand the American legal system — has been a problem. To ease it, the Georgia Commission on Interpreters has launched a new Web site (www.georgiacourts.org) that lists individuals who have been recruited and trained to work in the courts.

The new Web site gives Georgia judges and the legal community a single resource to locate qualified

interpreters able to bridge the communication gap between them and non-English speakers who appear in court as witnesses, plaintiffs or defendants. It also provides information for individuals interested in becoming a qualified court interpreter.

One reason for increasing the number of qualified court interpreters in Georgia is purely practical. According to the 2000 Census, 751,000 people in Georgia — 10 percent of the population — speak a language other than English at home. And of these, half speak English "less than very well."

Between 1990 and 2000 the increase in residents who spoke a non-English language at home was higher in Georgia than in any other state in the nation, except Nevada. During that period, the number of non-English speakers in Georgia rose by 164 percent — more than double — according to the Census Bureau. The courts, like many other social institutions, have felt the impact of that growth.

Orders of the Georgia Supreme Court are also behind the drive to secure more qualified interpreters. In October 2001, the Court created the Georgia Commission on Interpreters. The commission is authorized to establish qualifications for court interpreters, approve training programs and set standards of conduct for interpreters. The commission is chaired by Presiding Justice Leah Ward Sears. Its members include judges representing all levels of courts, attorneys, court administrators and interpreters.

A second Supreme Court order in January 2003 established rules regulating the use of interpreters in courts. "An interpreter is needed and a court interpreter shall be appointed when the judge determines, after an examination of a party or witness, that: (1) the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (2) the witness cannot speak English so as to be understood directly by counsel, court and jury," the order stated. Judges can make this determination at the request of a party or counsel, or based on their own observation of the witness or party.

"The fact that a person for whom English is a second language knows some English should not prohibit that individual from being allowed to have an interpreter," the order further stated.

Since its creation, the Commission on Interpreters has qualified over 400 bilingual interpreters speaking 14 languages: Arabic, Bosnian,

Chinese Mandarin, Chinese Cantonese, Creole, Farsi, French, German, Italian, Korean, Persian, Polish, Portuguese, Russian, Spanish, Ukrainian and Vietnamese.

Following its mandate, the commission has set standards for individuals to qualify as either a "registered" or "certified" court interpreter. Registered court interpreters must participate in a two-day orientation session, an English proficiency written exam and an oral interview intended to evaluate their skills in the foreign language of their choice.

Registered interpreters are eligible to become certified — the highest rating — if they meet additional requirements. Certified interpreters must score at least 70 percent on each part of a three-part oral language proficiency exam. The first part is a sight translation from English to the foreign language and vice versa. The second part consists of consecutive interpreting, where the speaker completes a thought before interpretation begins. Finally, there is a test of simultaneous interpreting, which is done contemporaneously with the speaker whose statements are being heard. Certified court interpreters must also take an interpreter's oath, agree to abide by a professional code of ethics, and undergo a background check.

In all cases, testing, registration, certification and renewals are handled by the Administrative Office of the Courts, in accordance with policies established by the commission.

The 2003 Supreme Court order specifies that "courts should make a diligent effort to appoint a certified interpreter. If a certified interpreter is unavailable, a registered interpreter is to be given preference… Faced with a need, where no [qualified] interpreter is available locally, courts should weigh the need for immediacy in conducting a hearing against the potential compromise of due process, or the potential of substantive injustice, if interpreting is inadequate."

Currently, some Georgia courts, especially in rural areas, are turning to local merchants, policemen and residents who may have taken a course in a foreign language in high school.

Currently, some Georgia courts, especially in rural areas, are turning to local merchants, policemen and residents who may have taken a course in a foreign language in high school. Some courts have gone so far as to ask prison inmates to serve as interpreters.

But there is a vast difference between being able to speak a language, even with fluency, and being an effective interpreter in a court of law, according to Sandra Bravo, a court interpreter and vice president of the Atlanta Association of Interpreters & Translators. AAIT is one of the organizations certified by the commission to train court interpreters. Bravo points out that individuals who are bilingual and have been living in the United States for many years often become rusty in their native or second language. Even people who are fully bilingual are not necessarily effective interpreters.

"The skills an interpreter needs are a good vocabulary, knowledge of legal terminology, concentration, accuracy, a good memory, the ability to take notes, and to be absolutely impartial. You need to be very responsible because someone's life can be determined by your work," Bravo said. "An interpreter's role in court is just to interpret. We are not social workers, not cultural brokers, not lawyers. We are just the voice for this person before the court."

The training program authorized by the commission is designed to develop court interpreters with these skills. Training of registered interpreters covers modes of interpreting, courtroom procedures, legal process and interpreter ethics, as well as English grammar, idioms, synonyms and antonyms. The commission is in the process of developing a continuing education program for trained interpreters.

Superior Court Judge Walter C. McMillan Jr., chief judge of the Middle Circuit, says having an interpreter who has been trained and certified by the commission improves court proceedings. "I don't have to do as much explaining of the process to them. When an interpreter has been certified, you don't have to wonder if they are doing it right."

For this reason, the judge supports an initiative begun by Nolan E. Martin, district court administrator for the Eighth Judicial District, which includes the Middle Circuit. Martin has identified funding to pay for interpreters from the district to attend training programs authorized by the commission.

Even though the Eighth District includes 27 mostly rural counties, Martin said he has seen an increased number of Spanish-speaking people moving into the area. Presumably, the newcomers are attracted to work in the region's agribusiness sector, its poultry industry and service-related jobs. The growth has led to a 50 percent increase in the need for interpreter services. Martin has also received

several requests for interpreters who speak Mandarin Chinese.

Martin began the interpreter initiative in July. He has already successfully put five interpreters through the program. Now he is working with other district administrators to obtain funding from the legislature to expand the program. They are requesting $100,000 in the 2005 budget to fund training of interpreters for 21 circuits in the Second, Third, Seventh, Eighth and Tenth Judicial Administrative Districts. This would support the training of 12 interpreters in each district.

Martin has succeeded in finding recruits for the interpreter program by asking all judges in his district — not just superior and juvenile court judges — to identify interpreters with whom they are already working. Martin then invites these interpreters to participate in the training program. So far, half have taken him up on his offer to pay for the training.

The Administrative Office of the Courts is also working to recruit interpreters on a statewide basis, according to Marla Moore, AOC associate director, whose office manages the program. The AOC has presented material about the program at the meetings of various judicial councils encouraging judges, lawyers and district court administrators to refer interpreters to the commission for certification. News articles about the program and the AOC's Web site have also helped spread the word. In addition, training providers have initiated advertising campaigns in Spanish-language newspapers throughout the state.

To facilitate the process, orientation and training programs are offered in locations throughout the state.

Sharon Reiss, AOC program manager, notes that the AOC's efforts have expanded to encourage registered interpreters to renew their licenses each year and to increase the number of registered interpreters who go on to become certified interpreters. The AOC is also working to increase the availability of interpreters who speak languages other than Spanish.

The commission is considering establishing a set fee schedule for interpreters who work in courts. Interpreters currently set their own rates.

In criminal cases, each non-English speaking defendant must be provided with an interpreter at each step of the proceedings. The same applies to non-English speakers who are parties, or have been subpoenaed or summoned, to appear in a court proceeding. However, this right may be waived and noted in the record. Within the judge's discretion, costs can be assessed upon a defendant when appropriate.

In civil cases, non-English speakers are entitled to an interpreter at every step of the proceedings, but at their own expense. At their request, they must be provided with the fee schedule for interpreter services, and a list of approved interpreters. The court must provide an interpreter at no cost to individuals who have an approved pauper's affidavit.

In juvenile cases, children involved in delinquency or deprivation proceedings are entitled to an interpreter at each step of the proceedings, as are parents whose custody of a child is challenged. The interpreter must be present at all times if needed to enable legal counsel to communicate with a client. The right to an interpreter may be waived, but failure to request an interpreter does not constitute waiver.

Finally, the order states, "the expenses of providing an interpreter in any court proceeding may be assessed by the court as costs in such proceeding."

Cost can be a factor influencing a judge's willingness to use an interpreter, according to commission member Ralph Perales, who is active in the Spanish-speaking community. Perales said he has heard complaints from lawyers about specific judges in metro-Atlanta counties who are not following the Supreme Court rule regarding the use of interpreters. "What it boils down to is some of these courts don't want to spend their money on interpreters, either because they don't have the money, or because they don't want to spend it on this service. I believe it's a matter of enforcement, not awareness on their part," Perales said.

While cost plays a role, it's likely that more judges are of the view of Judge Melodie Clayton, president of the Council of State Court Judges, who recently pleaded, at her council's request, for more interpreters to service the courts she represents.

"Interpreting services improve access to justice for non-English speaking participants in the judicial system, and enhance public confidence in the court system," Martin noted.

Lawyers interested in finding qualified interpreters or learning more about AOC services are invited to visit the AOC Web site at www.georgiacourts.org, or call (404) 463-6478. GBJ

Philippa Maister is a public information officer in the Administrative Office of the Courts.

Web-Based Tools to Enhance Access to Legal Services:

LegalAid-GA.org and GeorgiaAdvocates.org

By Tracey Roberts

Nationally, 75 percent of the legal needs identified by low- and moderate-income households are either not brought into the justice system or are brought into the system without the help of a lawyer.[1] During the past two years, Atlanta Legal Aid Society, Georgia Legal Services Program and the Pro Bono Project of the State Bar of Georgia have combined their efforts to meet these needs through the use of technology. In 2001 the programs applied for and received funding from the Legal Services Corporation to develop a Web site for all the legal services organizations in the state and their clients. The collaboration has spawned both a public-access Web site — LegalAid-GA.org — and a site for attorneys — GeorgiaAdvocates.org.

LEGALAID-GA.ORG
Georgia's web site guide to free legal information and legal services

LEGALAID-GA.ORG

The public-access Web site, LegalAid-GA.org, provides over 700 resources to help Georgians help themselves with their legal issues. Georgians may now:

- Know their rights and legal responsibilities in 24 areas of law;
- Obtain copies of complaint letters, statutory legal forms, court documents and online applications for benefits;
- Find lawyers who will provide free and low-cost legal help;
- Locate nearby social service providers; and
- Find the courts in each county.

By collaborating with 30 other organizations to develop content and by linking to state and federal government Web sites, Atlanta Legal Aid Society and Georgia Legal Services Program have been able to cover legal information for areas in which the programs do not generally represent clients because of funding limitations and federal restrictions. These areas include civil rights, criminal law, employment law, environmental law, immigration, personal injury and tax.

Len Horton, executive director of the Georgia Bar Foundation, has been instrumental in helping Atlanta Legal Aid and Georgia Legal Services find collaborators and content for the site. "The Law Related Consortium of the Carl Vinson Institute of the University of Georgia, a major grant recipient of the Georgia Bar Foundation, has agreed to provide all the contents of its book, *An Introduction to the Law in Georgia*, for free use on this Web site," Horton said. "Funds from the Georgia Bar Foundation and from other sources have been found to translate this excellent book into Spanish. As with the English version of the book, the full Spanish version also will be available for free use on the Web site."

Last year, under the direction of former Atlanta Bar President William deGolian and supported by newly-elected President Wade Malone and Vice President William Ragland, the Atlanta Bar

Association volunteered to review the substantive content of the Web site and to provide new information for additional areas of law that legal service organizations do not usually cover. According to deGolian the launch of the LegalAid-GA.org Web site coincided with a decision by the directors of the Atlanta Bar Association to develop a Web site to expand access to the civil and criminal justice system. "I was delighted to learn that the Atlanta Legal Aid Society, in conjunction with Georgia Legal Services, had already developed such a site and was readying its launch," he explained. "This program will be of significant help to that enormous segment of the public in need of legal services the most: not only the poor, but also the working poor, those with employment but who simply don't have the cash to hire an attorney to handle the legal problems that plague the middle and lower income segments of society, such as bankruptcies, divorce and consumer disputes."

Legal services advocates and private attorneys can use the Web site to enhance the services they provide to low-income clients. Bill Broker, managing attorney for the Savannah Office of Georgia Legal Services Program, uses the program regularly in his practice. "One of my clients, a 67-year-old with Parkinson's disease, had some questions about his Social Security and Supplemental Security Disability Income checks. Through the Web site I requested an account summary electronically for him from SSA. He also noted that he was not getting food stamps because he thought it would have an adverse effect on his check. I told him this was not the case and was able to use an online food stamps eligibility calculator to figure out how much he would be entitled to receive in food stamp benefits. I also learned from the Web site what documentation he needed to take with him to the food stamp office. It was really helpful," Broker said.

LegalAid-GA.org has also received broad support from the staff and directors of the Public Library Service in the state. Jennifer Milstead, reference librarian for the West Georgia Regional Library, indicated that her experience was not unusual. "The Web site has provided our patrons with legal information and printable forms that cover 23 different topics. I personally have used it to answer questions concerning consumer laws, housing information, purchasing cars and disability issues. This information is seldom found in smaller public library collections and legal information is difficult to keep updated in libraries," Milstead said.

The Web site appears to be a hit with the public. Since January 2003, over 37,000 separate users have viewed and downloaded over one million pages from the Web site. In February, Atlanta Legal Aid Society and Georgia Legal Services Program were named as finalists for the 2003 TechBridge Advancing Community Through Technology Award for the Web site.

GEORGIAADVOCATES.ORG

Atlanta Legal Aid Society, Georgia Legal Services Program and the Pro Bono Project of the State Bar of Georgia have also constructed an advocate Web site to enhance communication between pro bono attorneys and legal service organizations and improve the effectiveness of attorneys providing pro bono services through communication tools, training materials and outreach mechanisms.

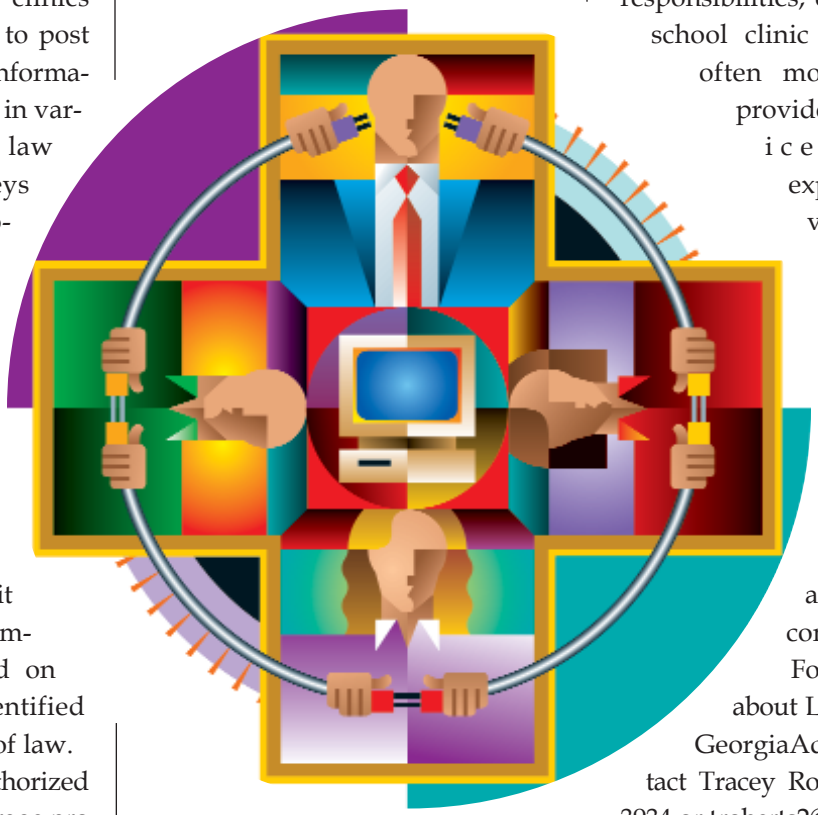
The GeorgiaAdvocates.org Web site contains the Georgia Online Justice Community, an online resource for pro bono attorneys and staff of legal services organizations throughout Georgia. This Web site contains the following resources:

- Law Library — a library with continuing legal education materials in the areas of civil procedure/evidence/trial skills, ethics and professionalism, AIDS/HIV/terminal illness, family law and domestic violence, community economic development, consumer law and bankruptcy, criminal law, health law, housing, public benefits and unemployment, seniors, wills and

estates, and military and veterans' affairs.

- Calendar — for private firms, legal aid organizations and pro bono programs to post information about attorney training programs and fundraising events.
- News Page — for private firms, legal services organizations, community education clinics and pro bono programs to post news items and share information about developments in various areas of poverty law with pro bono attorneys and poverty law advocates.
- Roster — listing pro bono attorneys and programs throughout the state.
- Listserv — to allow legal service organizations, community education clinics and pro bono programs to solicit pro bono help from members of the roster based on their location and identified interest in specific areas of law.

In order to prevent unauthorized practice of law and to encourage pro bono efforts, the programs will limit access to certain portions of the GeorgiaAdvocates.org Web site. Mike Monahan, the director of the Pro Bono Project of the State Bar of Georgia explained the membership requirements for the Georgia Online Justice Community. "All members of the Georgia Online Justice Community must be law school graduates and be a member in good standing of the State Bar of Georgia. We will also admit students currently attending law school that have received an endorsement from their law school clinic professors indicating that they are practicing under the third-year practice rule. To be admitted to the site you must also pledge to do 50 hours of pro bono service per year on average. We also ask that you report your pro bono activity to the State Bar of Georgia Pro Bono Project in March along with your bar dues. We may set up an online survey to collect pro bono activity information over time."



Atlanta Legal Aid, Georgia Legal Services and the Pro Bono Project launched GeorgiaAdvocates.org recently to make the site available for use by the Pro Bono Committee of the Young Lawyers Division of the State Bar of Georgia to recruit pro bono attorneys at the semiannual Bridge the Gap Program. Ryan Schneider, an attorney with Troutman Sanders, LLP, co-chairs the committee with Tonya Boga, a Decatur attorney formerly affiliated with Atlanta Legal Aid Society. Schneider explained that because Bridge the Gap is mandatory for all attorneys admitted to practice in Georgia, "the program is a great opportunity to recruit new attorneys to provide pro bono service."

"Primarily, younger attorneys fresh out of law school attend the program. The younger lawyers are hungry for trial experiences and opportunities for direct client representation. They are also less encumbered with managerial responsibilities, closer to their law school clinic experiences, and often more motivated to provide pro bono service," Schneider explained. "By providing the tools they need to get up to speed in the areas of poverty law, we are able to direct their energy and ambition to the benefit of the least advantaged in our communities."

For more information about LegalAid-GA.org or GeorgiaAdvocates.org, contact Tracey Roberts at (404) 614-3934 or troberts2@glsp.org. GBJ

Tracey Roberts is the state technology advocate for Atlanta Legal Aid Society and Georgia Legal Services Program and founder of The Associates' Campaign for Legal Services.

Endnotes

1. American Bar Association Legal Needs Study - http://www.algodonesassociates.com/legal_services/assessing_needs/abalegal.htm.

Georgia Bar Foundation Awards $2.3 Million in Grants

By Len Horton

At the annual grant awards meeting in the Bar Center on Sept. 12, the Board of Trustees of the Georgia Bar Foundation awarded $2.3 million to 41 different law-related organizations throughout the state.

"I am particularly pleased that, given the drop in interest rates on IOLTA accounts, we were able to keep our grant awards at the same level as last year," said new Bar Foundation President Louisa Abbot. "I hope we can do even better next year." Judge Abbot, a Superior Court judge in Chatham County, was elected president at the grants meeting.

The Bar Foundation's statement of purpose provided the 14-member board with guidance in reviewing the applications and awarding grants. Its purpose includes funding legal services for the poor, improving public access to legal services, improving the administration of justice (including finding ways to speed up the resolution of disputes), fostering professionalism in the practice of law, assisting children affected by the legal system and advancing the legal system through the study of its history. Following is a sampling of the various organizations that received grant awards at the meeting.

The Board of Trustees of the Georgia Bar Foundation labored all day to make grant awards totaling $2.3 million.

Georgia's two Legal Services Coporation supported providers of civil legal services to the poor are Atlanta Legal Aid and Georgia Legal Services. Together they received $1.4 million. Both organizations are nationally known and respected for being well managed and effective. Less well known, but also well managed, is the Georgia Law Center for the Homeless. Targeting a niche that has become obvious to many Georgians, the center received a grant award in the amount of $30,000.

The Pro Bono Project of the State Bar of Georgia and of Georgia Legal Services received $63,500. Under the leadership of Mike Monahan, this organization seeks to create a large group of lawyer volunteers. It maintains a database of Georgia attorneys who want to give something back to their communities through representing those who cannot afford an attorney.

More than $100,000 was awarded to 10 organizations dealing with domestic violence. These organizations cover most of the state, including Savannah, Rome and Columbus. In recognition of the importance of this problem, over the last decade the Georgia Bar Foundation has steadily increased its support for organizations who deal with domestic disputes.

A related area of focus by the Bar Foundation is children at risk. Both Adopt-A-Role Model in Macon and Ash Tree in Savannah are programs that strive to reduce the likelihood that children will get in trouble with the law. The Atlanta Volunteer Lawyers Foundation received funding for its guardian ad litem program. In disputed custody cases this program makes a real difference in the lives of affected children.

Murphy-Harpst in Cedartown helps children in detention facilities who should be assessed and treated in a different facility for mental health problems. The grant award was for $10,000.

Northeast Georgia Project Healthy Grandparents focuses on adoption, custody and guardianship cases for grandparents raising their grandchildren in the absence of the children's parents. Serving Clarke, Oconee, Jackson and Madison counties, this program received $5,000.

The Bar Foundation awarded $15,000 to Rome's Exchange Club for the prevention of child abuse. The program provides supervised visitation and monitored exchange services for families torn by custody disputes.

The educational needs of children are addressed by several recipients of Bar Foundation grant awards. The Law-Related Education Consortium of the Carl Vinson Institute at the University of Georgia received $75,000 to continue its work promoting "civics" instruction in Georgia's grade schools. Making sure that children understand our form of government and how it works is the focus of this well-respected program run by Anna Boling.

Do you remember the day when children take over the state Capitol and judiciary and learn how to be legislators and judges? Since 1986 the Georgia Bar Foundation has awarded more than $100,000 to the State Y.M.C.A. Youth Judicial Program. This impressive program lets youngsters learn what it is like to be a judge facing the real problems of running the judicial system.

Another education program seeking to educate young people is the Mock Trial program of the Young Lawyers Division of the State Bar of Georgia. Since 1993 the Georgia Bar Foundation has awarded more than $500,000 to this program, which enables students to act out the roles of lawyers and judges and juries in simulated trials. This is one of the most respected legal education programs in Georgia and is personally assisted by Georgia Supreme Court Justice George Carley.

These education programs presuppose that children stay in school. What if they don't? Terry Walsh and the Atlanta Bar Association have created the Truancy Intervention Project, which works with juvenile courts and lawyer volunteers to encourage truant children to stay in school. In response to the program's success and to the Bar Foundation's encouragement to export the program statewide, TIP is in the middle of an aggressive effort to find interested communities throughout Georgia and help them set up TIP programs. The Bar Foundation awarded this program $75,000, making the total awarded since 1992 $381,725. By reaching children while they can still turn their problems around, TIP is making Georgia better for them and for all of us.

The Georgia Bar Foundation awarded two grants to try to deal with the changing demographics of the state. Catholic Social Services received $25,000 for its Detention Project, which helps immigration detainees seeking asylum in the Atlanta area. Furthermore, as anyone with experience in today's judicial system knows, a great need exists for interpreters. Cristina Franco manages the Georgia Commission on Interpreters, which with the support of the Supreme Court of Georgia, especially Presiding Justice Leah Sears, trains bilingual candidate interpreters and registered interpreters and helps certify them. For this work the Bar Foundation awarded $26,000.

Interest On Lawyer Trust Accounts is the source for most of the Bar Foundation's revenues. While IOLTA was created for the primary purpose of raising funds to support civil legal services, it supports a number of initiatives to provide assistance on the criminal side. One of the highest rated programs in this genre is BASICS, managed by Ed Menifee. It's a program that helps prisoners who are about to be released. Its goal is to provide graduates of the program with the skills to survive outside prison without having to return to a life of crime.

This year BASICS received $100,000 (versus $60,000 last year) and a great deal of attention by the Board of Trustees. Under financial pressure, the state of Georgia funding for BASICS was cut from $160,000 to zero. $100,000 was restored in the state budget but was then cut again to zero. Apparently, the state funding crisis has become so critical that the cost savings to all Georgia taxpayers of the BASICS program, which produces an impressively low recidivism rate, was not considered. Facing significant demand for

funding from applicants, the Bar Foundation Board awarded as much as it thought possible to try to compensate for the reduction. As more freed prisoners return to society and fall back into crime, legislators may be asked to reconsider the increased costs to Georgia that BASICS could have held down.

The Athens Justice Project received $20,000 to sustain it until it becomes fully established. Modeled on the Georgia Justice Project, which under the dynamic leadership of Doug Ammar applies a holistic approach to helping criminals, the Athens Justice Project is showing to anyone willing to look that even questionable members of our society can become law-abiding citizens and fine human beings. Thank you to Doug and John Pickens for showing the way, as well as Amy Gellins and the Board of ATJ.

The Georgia Association of Black Women Attorneys received $20,000 for its program that helps mothers and their children when the mother is in prison. The Southern Center for Human Rights, led by nationally recognized Steve Bright, received $25,000 to ensure that our prisons do not deny people their rights.

The Georgia Innocence Project received $10,500 to continue its efforts to use DNA to identify and eventually free people mistakenly convicted of serious crimes.

The State Bar of Georgia's Court Futures Project received $15,000 and the Evidence Study Committee of the State Bar received $20,000. The first deals with how to select and retain Georgia's judges. The second deals with the desirability of consolidating evidentiary provisions of Georgia law under one title and making it consistent with the Federal Rules of Evidence.

The Supreme Court's Commission on Equality received $15,000 to produce a Spanish-language video for divorcing parents.

The Disability Law and Policy Center of Georgia received $20,000 to continue its work making sure that public buildings become accessible to the disabled.

The Georgia First Amendment Foundation received $10,000. Increasingly GFAF is recognized as a significant resource for public officials and the media regarding the meaning of and the application of the First Amendment in local government.

Also, the Georgia Unit of the Recording for the Blind and Dyslexic received $5,000 for the production of law books on audio tape.

A number of excellent organizations had their requests for funds denied. The large demand for funds, combined with limited funds availability, necessitated not funding a number of worthy programs.

These awarded grants represent the Bar Foundation's discretionary grants. By order of the Supreme Court of Georgia, the Georgia Bar Foundation also awards 40 percent of its net funds to the Georgia Indigent Defense Council and 10 percent to the Georgia Civil Justice Foundation. In the last fiscal year, this amounted to more than $2.3 million. With all the concern about funding criminal indigent defense, your IOLTA account contributions last year sent almost $1.9 million to the state to help provide representation for those who are charged with a crime but who are without the resources to defend themselves.

Your Georgia Bar Foundation IOLTA account contributions are awarded to law-related organizations throughout the state. If your community has a law-related organization that needs funds, please obtain a grant application from the Georgia Bar Foundation's web page on the State Bar of Georgia's Web site beginning in January. The application deadline is June 1, 2004.

We are working to secure more favorable rates and charges on IOLTA accounts at Georgia banks in order to increase funds available for grants. If you have any suggestions for improving those rates or lowering those charges, please contact us.

The Georgia Bar Foundation is Georgia's largest and most inclusive grantor to law-related programs statewide. Contributions from virtually every law firm and lawyer in the state have generated cumulative revenues in excess of $56 million since 1986. The Bar Foundation has a history of tight fiscal management, holding operating expenses typically to less than six percent of revenues, which is among the best foundations in the United States. The Board of Trustee's solicitation and careful scrutiny of applications has resulted in an outstanding record of giving over the last 18 years. During the last decade, Interest On Lawyer Trust Accounts has proven itself to be one of the most successful charitable initiatives supported by Georgia's legal profession. You can be proud that, in this time of receding financial support for non-profits, your contributions via IOLTA have the Georgia Bar Foundation standing tall, helping to provide direct services to economically disadvantaged Georgians. GBJ

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

The Gwinnett County Courthouse at Lawrenceville

The Grand Old Courthouses of Georgia

By Wilber W. Caldwell

Gwinnett County was created in 1818 from lands ceded to the state by Cherokee Indians and from parts of Jackson County. After two temporary log court buildings briefly served the new county in two temporary locations, the permanent county site was established at Lawrenceville, and a brick courthouse was erected there in 1824.

With the completion of The Lawrenceville Branch Railroad in 1881, an unrealistic helping of New South zeal steamed into Lawrenceville. Shortly thereafter, the county's second railroad, The Gainesville, Jefferson and Southern was built across northern Gwinnett, and with it came agitation for a new court building. In January of 1884, Atlanta architect Edmund George Lind presented his plans for a new Gwinnett County Courthouse to the county commissioners.

Lind was born in London in 1829. He studied architecture at the Government School of Design and apprenticed in London from 1849 to 1855, when he sailed to Baltimore to work in the offices of the noted church architect, N. G. Starkeweather. In 1857, he was elected a charter member of the American Institute of Architects. After the Civil War, Lind began his own practice and is best known for his designs for the Peabody Institute in Baltimore, the Arlington Hotel in Washington, D. C., and for numerous Italian Villa style private mansions in Maryland, Virginia and North Carolina. During the Grant

Photo by Wilber W. Caldwell

Built in 1884, Edmund G. Lind, architect.

administration, he worked as assistant to the government's noted Supervising Architect Alfred B. Mullet. Lind moved to Atlanta around 1881 and practiced in Georgia for over 10 years before returning to Baltimore in 1892.

Few of Lind's designs still stand in Georgia today, but this courthouse at Lawrenceville and Atlanta's Central Presbyterian Church remain to celebrate the work of one of the first architects to practice in Atlanta after the Civil War.

Lind's creation at Lawrenceville is an early example of Picturesque Eclecticism in Georgia. Fundamentally an echo of the older Romantic music of the Italian Villa Style, the building features an elegant broken based pediment above the entrance and graceful scrolling modillions supporting the eaves. Lind's original tower was a massive, squat affair of a vaguely Norman design crowned with a Picturesque round lantern and a conical cap. The result was fanciful and imposing, but like the American South itself in 1885, this building seems to look both forward and back at the same time. Despite its up-to-date romantic lantern and arched entrance, in the final analysis, Lind's Gwinnett County Courthouse was as much a voice from the past, as a reflection of the future.

Beginning in the 1880s, clock towers had become standard features on many Georgia court buildings, and by 1910, in all but the poorest of counties, new courthouse clocks were pounding out the hours from picturesque squares all across in the state. Accordingly, in 1908 Lind's romantic lantern at Lawrenceville was removed and the crown of his rather medieval low tower blossomed into an elaborate Neoclassical affair that recalled earlier Second Empire towers as much as it did the new American Neoclassicism. In fact, Lawrenceville's tower, which was designed by "Mr. McKinney," presumably a local builder, bore a strong resemblance to several of Alexander Bruce's earlier clock towers, most notably the crown atop Bruce's no-longer-standing replacement tower, which was added to the 1894 Pike County Courthouse at Zebulon in 1898. Despite what might have been an unpleasant collision of mismatched styles, the ornate neoclassical decoration of McKinney's new tower at Lawrenceville and the earlier Italian elements of Lind's old court building both generally looked to the Italian Renaissance for their inspiration, and the resulting blend is remarkably pleasing. Once again, the architecture of the New South had managed to look both forward and back at the same time. GBJ

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

KUDOS

The **American Tort Reform Association** named Atlanta lawyer **Griffin B. Bell** as one of its **"Legal Reform Champions"** — a list of high-profile lawyers who are dedicated to "restoring equal justice under law and reclaiming the civil justice system from the grip of plaintiffs' lawyers." Bell is a partner with **King & Spalding LLP**. He represents clients in all phases of trial and appellate litigation, with a recent focus on matters related to corporate investigations. ATRA's honorees have distinguished themselves by doing pro bono work on behalf of civil justice reform organizations, and also have supported pro-reform candidates, refused to accept cases that abuse tort law, and taken a public stand against abusive lawsuits.

Bill Needle, founding partner of **Needle & Rosenberg P.C.**, was selected as one of *Georgia Trend Magazine's* **Legal Elite** for 2003. Needle was selected in the area of intellectual property law and will be featured in the magazine's December 2003 issue. Needle practices in patent, trademark, copyright and trade secret law. He is an adjunct professor at both Emory University (licensing law) and at Georgia State University (patent law).

Pedigo, Herring and Curriden

The **Savannah Bar Association** held a luncheon in September at the Westin Savannah Harbor Resort. This meeting was the first for the group's newly appointed officers. Dallas journalist, author and lawyer **Mark Curriden** was the guest speaker for the meeting. Curriden is the author of *Contempt of Court: The Turn-of-the-Century Lynching that Launched 100 Years of Federalism*, an acclaimed book which is soon to be made into a motion picture.

Georgia Trend Magazine selected **Brent L. Wilson** of **Elarbee, Thompson, Sapp & Wilson** as one of Georgia's **Legal Elite**. He was also named one of America's leading lawyers by *Black Enterprise* magazine in its November 2003 issue.

Curtis L. Mack, a partner in the Atlanta office of **McGuireWoods**, was named one of the country's leading lawyers in the November issue of *Black Enterprise* magazine. Mack practices in the firm's labor and employment department. He is a nationally recognized labor and employment lawyer, having served as lead counsel in numerous labor and employment cases in state and federal courts. *Black Enterprise* is a premier business news source with approximately four million readers.

Thomas, Kayden, Horstemeyer & Risley announced that founding partner **James Kayden** has been elected president of the **Association of Patent Law Firms**, a national organization devoted to supporting the expertise of specialty law firms that focus on patent law. Kayden previously served on the board of directors and as secretary of the organization. He brings more than 20 years experience to the position in practice areas such as biotech and chemical patents, copyrights and trademarks. His major responsibilities as president include serving as the chair of monthly board meetings, recruiting new members and generating news stories about patent law.

ON THE MOVE

In Atlanta

Mark T. Hurst has become an associate with the Atlanta office of the law firm of **Constangy, Brooks & Smith, LLC**, a firm providing labor and employment law counseling on behalf of management since 1946. His services include assisting clients in the areas of sexual harassment, racial and disability discrimination/retaliation, and disputes involving pension. The firm is located at Suite 2400, 230 Peachtree St. NW, Atlanta, GA 30303-1557; (404) 525-8622; Fax (404) 525-6955.

The Roberts Law Firm, P.C., announced that senior partner **John A. Roberts** has been appointed to the **Municipal Bench** as a part-time judge. Judge Roberts was sworn in by the Hon. Ronald B. Ramsey at the firm's open house gala for its new office, located at 462 East Paces Ferry Road NE, Atlanta, GA 30305; (404) 841-0661; Fax (404) 841-0775.

Burr & Forman announced that **Karie D. Davis** has joined the firm as an associate and will practice with the ERISA & Employee Benefits group

and the Labor & Employment group in the firm's Atlanta office. Davis previously worked at Smith Currie & Hancock LLP, where she gained extensive experience representing owners, general contractors and subcontractors in a variety of employment and construction-related disputes. The firm is located at One Georgia Center, 600 West Peachtree St., Suite 1200, Atlanta, GA 30308; (404) 815-3000; Fax (404) 817-3244.

N. Wallace Kellerman was named the new chairperson of the State Bar of Georgia's **Lawyer Assistance Program**, which provides confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. The office is located at 2921 Piedmont Road, Suite D, Atlanta, GA 30305; (800) 327-9631; Fax (404) 233-2252.

Randy Evans and **Stefan Passantino** have joined the Financial Institutions practice of **McKenna Long & Aldridge LLP**. They will also work in the professional and governmental ethics and government relations arenas. The firm is located at 303 Peachtree Street NE, Suite 5300, Atlanta, GA 30308; (404) 527-4000; Fax (404) 527-4198.

Dana C. Borda joined **Banta Immigration Law Ltd.** as an associate attorney specializing in business immigration law. The office is located at 1175 Peachtree St. NE, 100 Colony Square, Suite 700, Atlanta, GA 30361; (404) 249-9300; Fax (404) 249-9291.

In Columbus

Hatcher, Stubbs, Land, Hollis & Rothschild, LLP, announced that **Nicole D. Quinn** has joined the firm as an associate. The office is located at 233 12th St., Suite 500 Corporate Center, Columbus, GA 31901; (706) 324-0201; Fax (706) 322-7747.

In Lawrenceville

Harold D. Holcombe announced the opening of his law office. Holcombe maintains a civil practice focusing primarily on family law, estates and wills, and business law. He formerly worked as a sole practitioner in Rockdale County and more recently worked as a legal writing consultant to several Fortune 500 companies. The office is located at Nine Lumpkin St. SW, Lawrenceville, GA 30045-8452; (770) 962-4244; Fax (801) 340-9161.

In Madison

The Law Firm of Charles W. Merritt Jr., Attorney at Law PC, announced that **Christian G. Henry** has been elected partner, and the firm will now be called **Merritt & Henry LLC.** The firm will continue its general practice including real estate, estate planning, corporate and municipal law, and general civil litigation. The office is located at 155 South Main St., Madison, GA 30650; (706) 342-9668; Fax (706) 342-9843.

In Milledgeville

Frier & Oulsnam, P.C., announced the relocation of its law firm to new offices on South Jefferson Street. The firm will continue its focus on real estate, estate planning, probate and business law. The firm's new office is located at 110 South Jefferson St., Milledgeville, GA 31061; (478) 454-5444; Fax (478) 454-9138.

In Savannah


Ziblut


Marling


Kachmar


Geiger


Strain


Langston

Hunter Maclean recently announced the expansion of their Savannah office by promoting three associates to partners and adding three new associates. **Triece Gignilliat Ziblut**, **Marc G. Marling** and **Shawn A. Kachmar** have been named partner, and **Debra R. Geiger**, **Kate Dodson Strain** and **Jessica C. Langston** join the firm as new associates. Ziblut practices real estate and environmental law; Marling practices in the areas of maritime law, bankruptcy and litigation; and Kachmar practices in the areas of employment law and business litigation. Geiger practices in the area of real estate development; Strain practices mainly in the areas of commercial real estate, bankruptcy and intellectual property; and Langston practices maritime law and general litigation. Hunter Maclean's Savannah office is located at 200 E. Saint Julian St., Savannah, GA 31412; (912) 236-0261; Fax (912) 236-4936.

In Valdosta

Trent L. Coggins announced the relocation of his practice. He will continue his real estate and corporate practice at 706 North Patterson St., Valdosta, GA 31601; (229) 259-0525; Fax (229) 259-0533.

In Vidalia

Massie H. McIntyre and **Hugh Peterson III** announced the formation of **McIntyre and Peterson, LLC**. The firm will specialize in real estate transactions, wills and estates, corporate and business law and general trial matters. The office is located at 116 SW Main St., Vidalia, GA 30475-0506; (912) 537-2700; Fax (912) 538-0544.

In Fort Lauderdale, Fla.

Viva International Airlines, Inc., announced the appointment of **E. Thomas Septembre** as house counsel in their Fort Lauderdale administrative offices. Septembre brings an extensive corporate and business background to the airline. Viva International owns and operates the flag carriers Royal Aruban Airlines N.V. and Viva Dominicana Airlines LLC. The office is located at 1100 Lee Wagener Blvd., #204, Fort Lauderdale, FL 33315; (954) 359-4141; Fax (954) 359-4140.

Former Mock Trial Students

Justice George Carley hosted a luncheon recently for former members of the Therrell High School Mock Trial team who are now lawyers or law students. Pictured *(left to right)* are Darius T. Pattillo, Nekia S. Hackworth, Justice Carley, Rhea R. Smith and Claude C. Davis. Pattillo, Smith and Davis are all recent law school graduates, and Hackworth will graduate in 2004.

Mock Interview and Resume Review Workshop

(Above) Paula Frederick, deputy general council for the State Bar of Georgia, was one of the volunteers for the workshop. She helped students with their resumes, giving them pointers on how to make their resumes read better and look more professional.

In September, law school students had the opportunity to sharpen their resume and practice their interviewing skills for the much anticipated job search facing them.

The workshop, sponsored by the State Bar of Georgia Women and Minorities in the Profession Committee and the Atlanta Bar Association Multi-Bar Leadership Council and hosted by Sutherland Asbill & Brennan LLP, showed students what employers really look for when they evaluate potential employees.

A sincere thank you goes to all of the volunteers who made the workshop possible.

You Don't Have to Tell, But You are Responsible

Lately you and your partners have spent a lot of time discussing your associate, Andrea. She has been wrestling with emotional problems since her divorce, and what began as social drinking has turned into a real problem. You've watched her drinking progress from an occasional overindulgence at happy hour into nightly binges. She's late for work most days and is obviously hung over when she finally arrives.

Although it pains you to delve into the private lives of your employees, you realized you had to take some action after yesterday, when Andrea missed a client meeting and turned up drunk after lunch.

She has agreed to talk to her doctor and attend an Alcoholics Anonymous meeting. You trust that her doctor and the other professionals can help Andrea along the road to recovery.

In the meantime, Andrea seems to think that it is 'business as usual' with her cases and clients. Is it?

Not quite.

The Georgia Rules of Professional Conduct include several provisions that might apply to your situation with Andrea. The rules require that a lawyer represent a client competently.[1] If Andrea makes a habit of drinking her lunch, she's undoubtedly falling short of the level of competence required of Georgia lawyers.

In addition, Rule 1.16 prohibits a lawyer from representing a client when the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. Although Andrea plans to continue working while she undergoes treatment, Rule 1.16 certainly requires her to be sober while handling client matters.

For you and your partners, Rule 5.1 may be the most important of the applicable rules. Rule 5.1 imposes an obligation upon partners and supervisory lawyers to "make reasonable efforts" to ensure that subordinate lawyers comply with the Georgia Rules of Professional Conduct. A lawyer with direct supervisory authority over another lawyer can be disciplined for not complying with the rule. You will have to keep a close eye on Andrea during her rehabilitation.

Finally, do you have an obligation to reveal Andrea's impairment to the Bar or to your clients? No. Georgia's Rule 8.3, Reporting Professional Misconduct, is aspirational. While the rule suggests that a lawyer *should* report known violations of the rules by another lawyer, it does not *require* reporting.

Likewise, the Georgia rules do not impose any specific requirement that the firm inform clients of a lawyer's impairment. However, when there is a significant risk that the lawyer's own interest will materially and adversely affect representation, the rule prohibiting conflicts of interest, Rule 1.7, could apply. The rule allows representation in the face of a conflict when the client gives informed consent.

The American Bar Association recently issued a Formal Advisory Opinion titled "Obligations with Respect to a Mentally Impaired Lawyer in the Firm."[2] Although it is not specifically binding in Georgia, the opinion is based upon rules that are identical to Georgia's. It provides useful guidance to lawyers attempting to deal with these issues.

Don't forget to call the Lawyer Helpline at (404) 527-8720 or (800) 334-6865 with all of your ethics questions. GBJ

Endnotes

1. Rule 1.1 of the Georgia Rules of Professional Conduct states, "A lawyer shall provide competent representation to a client."
2. Formal Advisory Opinion 03-429, issued by the American Bar Association Standing Committee on Ethics and Professional Responsibility on 6/11/03.

"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!

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Thank you for your generosity.

Discipline Notices

(Aug. 16, 2003, through Oct. 16, 2003)

By Connie P. Henry

DISBARMENTS/VOLUNTARY SURRENDER

Alvin L. Kendall
Atlanta, Ga.

Alvin J. Kendall (State Bar No. 414040) has been disbarred from the practice of law in Georgia by Supreme Court order dated Sept. 8, 2003. Previously, the Court suspended Kendall pending the appeal of his criminal conviction for conspiracy to give notice of impending search and seizure warrants and for conspiracy to distribute cocaine. Subsequent to his suspension, the United States Court of Appeals for the Eleventh Circuit affirmed his conviction and the United States Supreme Court denied his Petition for Writ of Certiorari.

Stephen M. Friedberg
Donald J. Stein
Howard Warren Goldstein
Atlanta, Ga.

Stephen M. Friedberg (State Bar No. 277350), Donald J. Stein (State Bar No. 677825) and Howard Warren Goldstein (State Bar No. 300413) have been disbarred from the practice of law in Georgia by Supreme Court order dated Sept. 8, 2003. Respondents are members of the same law firm and on Oct. 20, 2000, they pled guilty in the United States District Court for the Northern District of Georgia to conspiracy to defraud the United States and false statements on 1997 tax returns. Respondents failed to report their total income by distributing cash payments to themselves without reporting the payments as income; by not reporting as income amounts of "fee splitting" to non-lawyers; and by paying referral fees to runners. They engaged in this conduct from 1994 until 1999 and filed a joint tax return as partners for 1997 that they knew was untrue.

William Lewis Vaughn
Macon, Ga.

On Sept. 8, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of William Lewis Vaughn (State Bar No. 726450). Vaughn admitted that on two occasions he represented a mortgage company and prepared a HUD-1 settlement statement regarding the sale of certain real property. Vaughn knew one of the settlement statements did not reflect the actual payments the parties made and did not reflect the actual value of the property. Vaughn was aware a second HUD-1 contained untrue statements and that it did not accurately reflect the transaction between the parties.

Vaughn willfully delayed filing until May 2002 a security deed and a release of a second mortgage after serving as the settlement agent when the owner refinanced the property in July 1999. When the individual attempt-

ed in April 2002 to sell the property for which the security deed had not been filed, the attorney handling the 2002 closing determined that the security deed had not been recorded. Vaughn informed the attorney that the unrecorded deed and the release of a second mortgage were in a file in Vaughn's office. Vaughn recorded the security deed and the release on May 2, 2002; however, Vaughn's delay in recording the documents prevented the individual from closing the sale of her property in April 2002. Vaughn has prior disciplinary violations for which he received a 12-month suspension with conditions for reinstatement.

Thomas Ricardo Cirignani
Chicago, Ill.

The Supreme Court accepted Thomas Ricardo Cirignani's (State Bar No. 170108) Voluntary Surrender of License on Sept. 8, 2003. Cirignani, an Illinois resident who has been a member of the State Bar of Georgia since 1998, was convicted on Feb. 3, 2003, of possession of controlled drugs, a Class 1 felony.

David Roy Hege
Tifton, Ga.

David Roy Hege (State Bar No. 343450) was disbarred by Supreme Court order dated Sept. 22, 2003.

Hege was hired to represent a client in a divorce action. The client paid Hege $2,500 but Hege failed to pursue the discovery requested, to otherwise initiate or complete work on the divorce case to prepare it for trial, or to respond to the client's inquiries. After the client discharged Hege, Hege failed to return the file or any unearned portion of the retainer and failed to seek permission from the Court to withdraw from the divorce case.

In another case Hege agreed to represent two clients in a case pending before the Magistrate Court of Colquitt County. Hege failed to appear at trial on his clients' behalf and the Court entered a judgment against the clients. He subsequently promised to file an appeal of the judgment and, although he did not file the appeal, falsely told one of the clients that he had. After the sheriff sought to levy on personal property to satisfy the judgment, Hege filed a bankruptcy petition on their behalf. Hege failed to file the appropriate bankruptcy plan and schedules, failed to attend two hearings in bankruptcy court, and did not inform the clients of the hearings or the additional filings that were required. After Hege failed to attend a hearing on the motion to dismiss the case, the bankruptcy court dismissed the case and the sheriff resumed efforts to levy on the clients' property. Hege also loaned one of the clients $2,000 as an advance on a settlement of her workers' compensation case and to assist her with her living expenses.

M. Bernt Meyer
Savannah, Ga.

M. Bernt Meyer (State Bar No. 503525) was disbarred by Supreme Court order dated Oct. 6, 2003. On two separate occasions Meyer acted as settlement agent and closing attorney for loan closing transactions involving the purchase of real estate. In each instance he received the seller's proceeds and commingled the funds with his personal funds and appropriated them for his own use.

In another case Meyer was hired to represent a couple in claims arising from personal injuries sustained in an automobile accident. He failed to communicate with his clients and did nothing to pursue their case. He allowed the statute of limitations to expire on their claim without filing a complaint.

Finally, the investigative panel initiated a grievance against Meyer after learning that he had been convicted of felonies in the state of Florida in 1964, 1983, and again in 1987, but had never informed the State Bar of Georgia. Nor did he tell the State Bar of Georgia that following his 1987 felony conviction he resigned his membership in the Florida Bar.

Linell A. Bailey
Brunswick, Ga.

Linell A. Bailey (State Bar No. 032205) was disbarred by Supreme Court order dated Oct. 6, 2003. Bailey agreed to defend a client in a criminal charge and accepted two rare coins from the client as evidence in the case. After the client was convicted, Bailey filed a motion for new trial but then did nothing further. Eventually, the trial court ordered replacement counsel but Bailey claims he cannot find the rare coins.

In another case a client retained Bailey in the late 1990s to represent her in an employment discrimination claim. In 2001 Bailey ceased all communication with the client and it appears that he never filed suit or even initiated contact with the former employer, and the statute of limitation has run out on the client's claim.

In still another case Bailey handled a divorce for a client in 1994 and agreed to assist in determining a method to divide marital property. Bailey failed to submit a plan for division and failed to seek correction of the final divorce decree. The

decree excluded several provisions favorable to the client and her children, including one that required the client's ex-husband to maintain a $50,000 life insurance policy on the children and division of the husband's pension on behalf of the children. Bailey then filed a motion for contempt against the ex-husband for his failure to comply with the provisions of the divorce decree and told the client the motion was set for a hearing on Sept. 25, 2001. A motion had not been set for a hearing. Bailey's failures in this case contributed to the loss of the client's home through foreclosure. As in the other cases, Bailey failed to respond to the Office of the General Counsel regarding its investigation into these grievances.

SUSPENSIONS

Lloyd E. Thompson Jr.
Brunswick, Ga.

On Sept. 8, 2003, the Supreme Court indefinitely suspended Lloyd E. Thompson Jr. (State Bar No. 708950) from the practice of law for a period of no less than three years with conditions on reinstatement.

Thompson was hired to represent a client on a DUI charge and he requested a hearing before the Office of State Administrative Hearings but failed to appear or to instruct his client to appear. His client's hearing request was subsequently dismissed and an order was entered denying Thompson's untimely-filed motion for reconsideration.

In another case Thompson was hired by a client to represent her and her siblings in a property forfeiture case and to probate her mother's will. The client's sister paid Thompson $3,500. The client and her siblings had a remainder interest in the property after the death of their mother but the property had been seized following the arrest of their father. Thompson failed to answer the forfeiture complaint and the Charlton County Superior Court entered a default and ordered the property forfeited to the State of Georgia. Thompson failed to communicate with the client about the case. Although Thompson filed a petition to probate the mother's will in July 2001 after a grievance was filed against him, he did nothing else on either case.

L. B. Kent
Columbus, Ga.

L. B. Kent (State Bar No. 415300) has been suspended from the practice of law for one year by Supreme Court order dated Sept. 8, 2003. In his Petition for Voluntary Discipline, Kent admitted that after successfully representing a client in a personal injury suit, he subsequently filed a lawsuit in 1998 on his own behalf and on behalf of the client seeking recovery of his earned attorneys' fees. Kent instituted the legal proceeding on behalf of his client without obtaining proper authorization.

Thomas E. Cowan Jr.
Elizabethton, Tenn.

On Sept. 22, 2003, the Supreme Court entered an order suspending Thomas E. Cowan Jr. (State Bar No. 191195) for one month retroactive to Dec. 15, 2002. In his petition for voluntary discipline, Cowan admitted that the Tennessee Supreme Court suspended him from the practice of law for one month effective Dec. 15, 2002, and that by virtue of the Tennessee suspension, he violated Rule 9.4(a) of the Georgia Rules of Professional Conduct.

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 Aug. 16, 2003, two lawyers have been suspended for violating this Rule and one has been reinstated.

SUSPENSION LIFTED

Diane Lindsey Perry
Tifton, Ga.

Diane Lindsey Perry (State Bar No. 572510) was indefinitely suspended on Sept. 14, 1998, pursuant to her petition for voluntary discipline for mental incapacity and substance abuse. Perry satisfied all the conditions imposed for her readmission and on Sept. 8, 2003, the Court lifted the suspension.

REINSTATEMENT

Jed L. Silver
Marietta, Ga.

Jed L. Silver (State Bar No.004030) was suspended from the practice of law for two years in April 2001 for participation in his law firm's payment of runners to obtain client referrals. Silver met the conditions for reinstatement and on Sept. 8, 2003, the Supreme Court accepted Silver's Petition for Reinstatement. GBJ

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

Your Year-End Practice Management Checklist (AGAIN)

By Natalie R. Thornwell

At the end of last year, I wrote a *Year-End Practice Management Checklist* for your firm. It's hard to believe that a whole year has gone by already. But, it has, and with changes in the economic fabric of our country and the legal market as a whole, I think it is once again time to consider how you are managing your firm. So here is this year's *Year-End Practice Management Checklist.*

Whether you are a sole practitioner, small-firm, corporate, government, or large-firm attorney, you can benefit from taking a look at the way you have been doing things with an eye towards improving. Use the following year-end checklist to help you get a head start on improving your law office.

Year-End Office Management Review

- Do you have a written policies and procedures manual?
- Do you have enough staff for the workload of your firm?
- If not, have you planned on hiring additional staff?
- Do you need to hire an office manager or administrator?
- Have you reviewed your salaries and benefits offerings recently?
- Do you need to open a branch office?
- If you are in a partnership, do you have a written partnership agreement?
- Do you have an associate training and review program?
- Do you have regular (monthly at least) meetings for partners and/or associates?
- Have all employees signed employment agreements with the firm?
- Does every position (not person) in your firm have a written job description – including yourself?
- Do you have proper malpractice insurance coverage?
- Do you have written and signed fee agreements for every client you represent?
- Do you perform a conflict of interest check on every new client?
- Do you use file opening and closing checklists for each client file?
- Do you have a detailed disaster recovery plan that you have shared with everyone in your office?
- Have you reviewed your filing and storage procedures lately?
- Is your vendors list up-to-date with all of the correct contact, taxpaying identification, and product/service-specific information?
- Are all of your legal research products/services current?
- Have you recently completed an inventory of your law office library for completeness and relevancy to your current practice areas and needs?

Year-End Technology Checks

- Do you have up-to-date computer systems for the entire office?
- Are the computers in your office networked together so you and your staff can easily share work product and network devices like printers and copiers?
- Is your network reliable?
- Do you have the latest service releases, fixes and patches needed for your hardware and software systems?
- Is your Internet connection reliable?
- Have you prepared a technology budget for the coming year(s)?
- Does your current technology budget include funds for training?
- What are the training methods you have used for keeping you and your staff up on the software tools you are using in your law practice?
- Do you have or need a network administrator in-house or can you use an outside vendor?
- Are all of your technology vendor contracts current and relevant to your present technology situation?
- Are your monitors adequate, especially for staff, if they are in front of the monitor all day?
- Do you have a regular backup and restore routine for your daily work product?
- Do you keep backups both off and on site?
- Are you in need of a PDA – (Palm, Handspring, or Blackberry), Pocket PC, or all-in-one convergent (Phone + PDA) device for working while away from the office?
- Can your office fax from the desktop?
- Do you know how to use PowerPoint and other presentation software tools?
- Are your telephone, voicemail and other communication systems up-to-date?
- Do you have computerized case management, time and billing, and accounting systems that are appropriate for a firm of your size and practice area?
- If you are in a firm that litigates, are your litigation support tools adequate for the courtroom?
- Do you have a firewall set up for your office (and home) networks?
- If you are striving to become paperless, do you have a high-end or volume appropriate sheet fed scanner with appropriate OCR scanning software?
- Does your technology promote firm "knowledge management"?

Year-End Financial Checks

- Are you billing monthly or as soon as you complete a matter or major parts of a matter?
- Do you review your accounts receivable monthly and have staff follow-up with non-paying clients?
- Do you track and bill for all expenses incurred on behalf of your clients?
- Have you been charging interest on past due account balances?
- Do you have a merchant account that allows clients to pay your fees via a credit or debit card?
- Do you have your books up-to-date?
- Do you track time for all matters regardless whether you are charging by the hour or charging a flat fee?
- Is time-tracking required of all employees?
- Are your operating and trust accounts balanced and reconciled through last month?
- Have you paid all of your required quarterly and annual taxes for the year?
- Do you have an accountant or bookkeeper?
- Have you met with your accountant or bookkeeper to go over your chart of accounts and reporting needs for the coming tax year(s)?
- Have you developed a budget for your firm?
- Is your payroll processed on time and with the appropriate withholdings?
- Does your payroll service send you regular reports on your account?
- Are you and your associates bringing in the amount of revenue you budgeted for over the past year?
- Have you written off uncollectible accounts for the year?
- Have you reached your billable hours goals for the year?
- Have all shareholders in the firm received current profit and loss statements?
- Do you share firm financial information with staff to enhance productivity?

Year-End Marketing Assessment

- Did you bring in new clients in the past year?
- Is your written marketing plan up-to-date?
- Have you met recently with your top-paying clients?

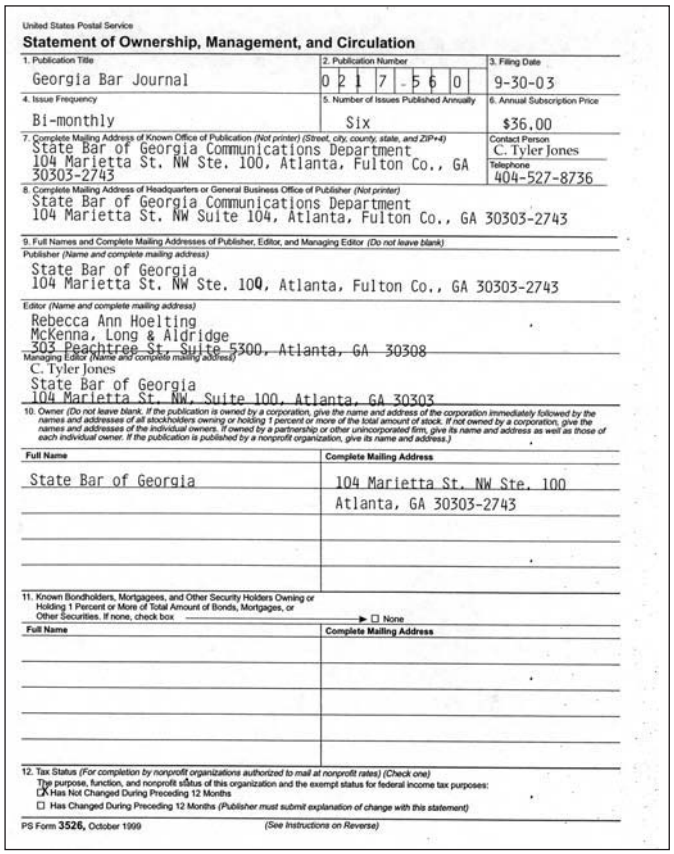
- Have you met recently with your lowest-paying clients?
- Have you been in your own reception area lately?
- Are you getting feedback on your service from your existing clients via a client satisfaction survey?
- Do you have a Web site that invites new business?
- Have you changed/do you need to change your firm brochure?
- Are client-focused newsletters offered via e-mail?
- Are all of your practice areas covered in your client newsletter marketing?
- Do you accept online or credit card payments?
- Are you in the habit of creating and sharing with your clients a case plan and budget?
- Does your file closing letter invite repeat and new business?
- Does your advertising set you apart from the competition?
- Do you carry high-quality business cards?
- Have you developed an "electronic business card" and marketing message for all of your e-mail correspondence?
- Are you getting the best deal on your Yellow Pages advertising?
- Have you developed a marketing script for use by your staff when asked, "What does your firm do?"
- Have you monitored how and why clients chose you as their attorney?
- Have you been fired by any of your clients?
- What do you say when someone asks, "What do you do?"
- Does your firm "brand" really fit the firm?

Resources for the New Year

You may find that you desperately need to improve certain areas of your practice after completing the above checklist. The Law Practice Management Program will gladly assist you with materials from our resource library; an e-mail query response, a no-cost telephone consultation; or low-cost, in-person consultation to help with any of your specific practice management needs. In fact, your first New Year's resolution should be: Contact the Bar's Law Practice Management Program at (404) 527-8770 or 8772, visit the Law Practice Management Program online at www.gabar.org/lpm.asp; or e-mail us at natalie@gabar.org to help improve your practice management skills.

The Law Practice Management Program wishes you a happy and prosperous New Year! GBJ

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



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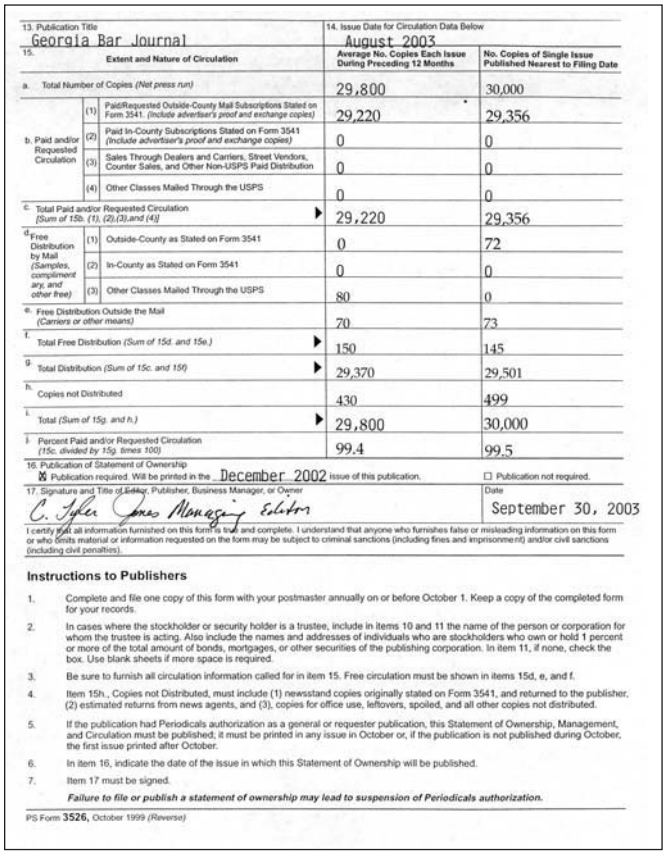
PS Form 3526, October 1999 (See Instructions on Reverse)



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e. Free Distribution Outside the Mail (Carriers or other means)	70	73
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☒ Publication required. Will be printed in the December 2002 issue of this publication. ☐ Publication not required.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner: C. Tyler Jones Managing Editor — Date: September 30, 2003

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

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2. In cases where the stockholder or security holder is a trustee, include in items 10 and 11 the name of the person or corporation for whom the trustee is acting. Also include the names and addresses of individuals who are stockholders who own or hold 1 percent or more of the total amount of bonds, mortgages, or other securities of the publishing corporation. In item 11, if none, check the box. Use blank sheets if more space is required.
3. Be sure to furnish all circulation information called for in item 15. Free circulation must be shown in items 15d, e, and f.
4. Item 15h., Copies not Distributed, must include (1) newsstand copies originally stated on Form 3541, and returned to the publisher, (2) estimated returns from news agents, and (3), copies for office use, leftovers, spoiled, and all other copies not distributed.
5. If the publication had Periodicals authorization as a general or requester publication, this Statement of Ownership, Management, and Circulation must be published; it must be printed in any issue in October or, if the publication is not published during October, the first issue printed after October.
6. In item 16, indicate the date of the issue in which this Statement of Ownership will be published.
7. Item 17 must be signed.

Failure to file or publish a statement of ownership may lead to suspension of Periodicals authorization.

PS Form 3526, October 1999 (Reverse)

South Georgia Office Hosts Meetings and Programs

By Bonne Cella

Tifton Circuit Bar Association

State Court Judge Larry Mims addressed the Tifton Circuit Bar Association on upcoming legislative issues that will affect the budget of state courts. He also discussed the recent increase in the caseload in the Tift State Court and the measures implemented by the court for more efficient processing of the cases.

General Practice and Trial Section

The officers, board members and trustees of the General Practice and Trial Section recently held their quarterly meeting at the State Bar Satellite Office. This year's section chair is Wright Gammon of Cedartown. A large membership drive and upcoming seminars were on the meeting agenda.

The Parole Handbook

Marion Rae Clein, program coordinator for Georgians for Equal Justice, visited the satellite office and brought copies of *The Parole Handbook for Friends and Families of Georgia Prisoners*. Clein authored the publication after extensive research and interviews with all of the major divisions of the parole agency.

According to Clein, "Prisoners and their families and even their attorneys have numerous misconceptions about the parole process. When and who parole is given to is very complex and not very well explained. Add to that, the parole files are classified as 'state secrets' by statute, and that makes parole decisions even more deeply mysterious."

Another publication available from her agency is *The Advocacy Handbook for Friends and Families of Georgia Prisoners*. It identifies the proper procedures and the right people to contact for any concerns such as medical care and safety. In addition, it includes tips for advocating more effectively for someone behind bars. This handbook is an excellent resource for criminal defense attorneys who receive calls from their clients' families asking for help for their loved ones. "Rather than turning those calls away because a busy attorney does not have the answers, those calls can be referred to our program," Clein stated. Both of the handbooks are free for prisoners' families. To contact Georgians for Equal Justice, call (404) 688-9440 or e-mail fairness@gejustice.org.

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

Marion Clein, while at the State Bar satellite office, explains the "Fairness to Prisoner's Families" program to an interested consumer.

(Left to right) Tifton Circuit Bar Association President Brian Walker, Tift County State Court Judge Larry Mims, Turner County State Court Judge John Holland, Turner County Solicitor Steve Ivy and Tift County Solicitor Bob Richbourg.

Sections Close Out 2003 With Successful Events

By Johanna B. Merrill

Sections stayed busy this fall and many have big plans for well into 2004.

The Patent Committee of the **Intellectual Property Law Section** organized a well-attended patent roundtable lunch meeting at Alston & Bird LLP on Oct. 16. Attendees discussed recent developments in interpretation of preamble limitations in patent claims with speaker Jon Jurgovan of Alston & Bird.

The **Business Law Section** co-sponsored the annual Business Law Institute along with ICLE at Atlanta's Swissôtel on Oct. 16 and 17.

The **Entertainment & Sports Law Section** held a lunchtime CLE event at Maggiano's Little Italy Restaurant in Buckhead on Oct. 30. Marc Jacobson, from Greenberg Traurig's New York office, spoke about representing minors in the entertainment industry.

The **Creditors' Rights Section** also held a luncheon at Maggiano's at the end of October. Ron C. Bingham II spoke on calculating post judgment interest on state court judgments entered after July 1, 2002, and whether interest accrues from what date on judgments partially avoided in bankruptcy cases. Michael Lamberth spoke on the present status on fraudulent transfer causes of action based upon pre July 1, 2002, transfers, as O.C.G.A. §18 2 22 was repealed effective July 1, 2002. David Dolinsky spoke on what state courts are charging to file post judgment motions to compel discovery. Attendees received one hour of CLE credit.

On Nov. 11 the **Labor & Employment Law Section** held a lunch meeting at the Bar Center. Seasoned litigators Penn Payne and Kelly Jean Beard spoke about facilitating early settlement of employment disputes.

The **Appellate Practice Section** co-sponsored an Advanced Appellate Seminar along with the Atlanta Bar Association at the Sheraton Colony Square on Nov. 14. After the seminar, the section held a lunch meeting for all its members.

The **Intellectual Property Law** and **Entertainment & Sports Law** sections recently spent a long, event-filled November weekend in Montego Bay, Jamaica, along with sports and entertainment sections from the Tennessee and Florida bar associations for the sections' annual institute and seminar. Attendees earned a full year's worth of CLE credit.

Plans for the Bar's Midyear Meeting are in full effect. Sheraton Colony Square in Atlanta will host the meeting from Jan. 15 - 17. Nineteen of the 35 sections will have events during the three days of meetings, from breakfasts to lunches to receptions. The **Entertainment & Sports Law Section** will offer one CLE credit hour during their lunchtime meeting on Jan. 16, where Bertis Downs, UGA Professor and attorney for R.E.M. will speak about the business and legal realities of the music industry.

Several of the sections will host holiday parties, so keep an eye on the section meetings page at www.gabar.org for more details! You can also visit each section's Web page for back issues of newsletters, membership rosters and schedules of events.

NEWS FROM THE SECTIONS
Appellate Practice Section

By Christopher McFadden

Caselaw Updated as of Oct. 17, 2003.

Wilson v. State, 2003 Fulton County D. Rep. 2829, S03A0548, 2003 Ga. LEXIS 775 (September 22, 2003).

Addressing waiver of ineffective assistance of counsel claims, the Supreme Court corrected "an error which has crept into our case law." That error was blurring the distinction between waiver of the ineffective-assistance claim itself and waiver only of the right to an evidentiary hearing on ineffective assistance. Overruling a raft of decisions which had equated waiver of a hearing with a per se waiver of the claim, the Court recognized that, "The effect of the absence of trial counsel's testimony will vary with the nature of the claims asserted."

On the other hand, the Court reaffirmed that, "In evaluating an attorney's performance, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Where trial counsel does not testify at the motion for new trial hearing, it is extremely difficult to overcome this presumption." Indeed, the court made short work of the ineffective assistance claim before it. "Since the instances of ineffectiveness alleged by *Wilson* involve matters as to which evidence is required and no evidence was produced to establish either matter, the trial court did not err in rejecting the claims of ineffective assistance asserted in the motion for new trial." GBJ

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

Annual Fiction Writing Competition Deadline is Jan. 23, 2004

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.

Judicial District Professionalism Program

By Dick Donovan

Trial advocacy is by its nature antagonistic. Litigators, as advocates for their clients, usually have another litigator as adversary. They routinely find themselves pitted against good friends, but sometimes against lawyers whom they have never met. While career litigators may practice before judges with whom they have been friends and colleagues for years, they may also find themselves in different venues, appearing for the first time before judges whom they have never seen and whose names are familiar only from the advance sheets.

Trial lawyers, their egos being a very large part of their psychological makeup and often the reason for their success, tend to argue just for the fun of it. When tempers flare, it's often tough to smile.

All of these factors make litigation an area fraught with dangers of incivility and discord between lawyers and between lawyers and judges.

The Bench and Bar Committee of the State Bar of Georgia has developed the voluntary, informal and private Judicial District Professionalism Program to address these pitfalls, to move toward improvement of the legal profession, and reinforce the public's faith in our judicial system. The goal of the JDPP is to "promote professionalism through increased communication, education, and the informal use of local peer influence" so that trial lawyers and judges begin to communicate voluntarily when — and, hopefully, eventually before — problems manifest themselves in angry glances across the courtroom, or, worse yet, contumacious conduct and the judge's ire.

The JDPP is made up of committees from each of Georgia's 10 judicial districts. The members of the Board of Governors from each judicial district comprise that Judicial District Professionalism Committee, who select for that district at least one judicial advisor. The member of the Board of Governors with longest service chairs the district committee. Individual committees may work either as a committee of the whole for the district or divide into subcommittees for larger judicial districts.

These district committees attempt to advance and encourage traditions of civility and professionalism by promoting an increase in education and communication. It is hoped that through the JDPC, local peer influence will help to change unprofessional conduct through voluntary modification, rather than the use of disciplinary programs of the State Bar. The JDPP and JDPC will work apart from the disciplinary systems now available through the Office of the General Counsel and the Judicial Qualifications Commission. The key words are "informal, voluntary and private," which it is hoped will encourage members of the bench and bar to avail themselves of the pro-

gram's benefits. The JDPP or JDPC will not refer to or deal with violations of the Rules of Professional Conduct or Code of Judicial Conduct. The JDPC's role will be as a mentor to members of the profession who are willing to alter unprofessional conduct willingly without the intervention of a coercive tribunal.

The JDPP and JDPC will handle referrals involving unprofessional judicial conduct or unprofessional conduct by lawyers, including incivility, bias, lack of deference or respect, failure to follow Uniform Superior Court Rules, extreme delays, failure to prepare, consistent lack of preparation, abusive discovery practices, communication problems and deficient practice skills.

The JDPP will not take referrals in lawyer/client disputes, fee disputes, employment matters, or disciplinary matters, all of which are adequately handled by existing programs within the State Bar. The JDPP is aimed at improving and promoting good relations between litigators and between litigators and judges. The program will attempt to provide, when necessary, a proper lubricant for the constant friction of the adversarial process.

To begin a JDPP inquiry, contact Cliff Brashier, State Bar executive director, or any member of the Board of Governors or the State Bar Consumer Assistance Program. The inquiry will be properly routed on a form for that purpose. This form will not contain the name of any person about whom a concern has been expressed.

The JDPP will forward the form to the chair of the appropriate JDPC, who will then handle the matter locally as the rules may require after an initial determination. All inquiries are private, and all records are kept for statistical purposes only, and will never contain names of those about whom inquiries have been made.

For more information on the JDPP, contact either of the co-chairs of the Bench and Bar Committee, Judge Melvin Westmoreland or Robert D. Ingram, the State's Bar's Executive Director Cliff Brashier, the Executive Director of the Chief Justice's Commission on Professionalism Sally Lockwood, or Cynthia Clanton, general counsel of the Administrative Office of the Courts of Georgia. GBJ

Dick Donovan is a partner in the Douglasville firm of Donovan, Chambers, P.C., and a member of the State Bar's Committee on Professionalism.

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.

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Admitted 1959
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Williamson, Ga.
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Donalsonville, Ga.
Admitted 1989
Died May 2003

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Savannah, Ga.
Admitted 1958
Died October 2002

Samuel Adams Dorsey
Atlanta, Ga.
Admitted 1934
Died September 2003

Johan Droogmans
Atlanta, Ga.
Admitted 1992
Died September 2003

Virgil D. Griffis
Adel, Ga.
Admitted 1948
Died July 2002

Phyllis Delores Veal Harris
Acworth, Ga.
Admitted 1992
Died September 2003

James H. Keen
Dunwoody, Ga.
Admitted 1947
Died August 2003

Edward H. Lee
Savannah, Ga.
Admitted 1953
Died August 2003

Rufus B. McCall
Atlanta, Ga.
Admitted 1942
Died September 2003

William H. Moore Jr.
Atlanta, Ga.
Admitted 1962
Died August 2002

Ernest A. Moran
Atlanta, Ga.
Admitted 1950
Died August 2003

Douglas L. Mutert
Valdosta, Ga.
Admitted 1999
Died September 2003

Vickers Neugent
Lakeland, Ga.
Admitted 1950
Died July 2003

Will R. Ott Jr.
Cumming, Ga.
Admitted 1964
Died May 2003

Robert L. Royal
Rome, Ga.
Admitted 1944
Died August 2003

Henry T. Smith
Brunswick, Ga.
Admitted 1971
Died October 2003

John J. Sullivan
Savannah, Ga.
Admitted 1939
Died March 2003

James M. Sutherland
Douglasville, Ga.
Admitted 1944
Died September 2003

Roy M. Thornton Jr.
Columbus, Ga.
Admitted 1955
Died October 2003

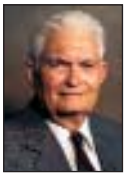
Julian Webb
St. Simons Island, Ga.
Admitted 1932
Died October 2002

Fred V. Westberry
Atlanta, Ga.
Admitted 1985
Died December 2002

Edward D. Wheeler
Decatur, Ga.
Admitted 1950
Died October 2003

James L. Wilkerson
Lansing, Mich.
Admitted 1999
Died June 2003

William L. Young
McDonough, Ga.
Admitted 1948
Died June 2003



Hon. Robert Lee Royal, 82, of Rome, died Aug. 15. He graduated from the University of Georgia School of Law in 1944 where he was chief justice of the student body his senior year of law school, and was a member of the Phi Beta Kappa national honor society. He began a private practice in Rome in 1947. He served as a special assistant attorney general of Georgia, was a past president of the Rome Bar Association and was a member of the Council of Superior Court Judges. He also served as administrative judge of the Seventh Judicial District. He served four terms on the Floyd County Superior court, the last three as chief judge. Judge Royal was a member of the First Baptist Church and was a founder of the Rome Boys' Club, serving on its first board of directors. He is survived by his wife, the former Betty Jane Wheeler; two daughters, Suzanne Royal of Atlanta and Caroline Royal of St. Simons Island; 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.

6th Annual LRE Golf Tournament

September 22, 2003

Special thanks to the following sponsors who supported the 6th Annual Law-Related Education golf tournament, hosted by the Young Lawyers Division of the State Bar of Georgia.

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December 2003

2

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3

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4-5

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5

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10 CLE with 2 Ethics

8

ALI-ABA
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12.5 CLE

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Forsyth, Ga.
31.3 CLE with 1.3 Trial

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Nursing Home Malpractice in Georgia
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6 CLE with 0.5 Ethics

9

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How to Draft Wills and Trusts in Georgia
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11

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11-12

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16-17

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16

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Domestic Law in Georgia
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18

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CLE Calendar

19

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Labor and Employment Law
Atlanta, Ga.
6 CLE

ICLE
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6 CLE

23

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Various Dates and Locations
11.3 CLE with 0.5 Ethics

January 2004

7

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Toxic Tort and Environmental Litigation in Georgia
Atlanta, Ga.
6 CLE with 0.5 Ethics

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Critical Issues in Ga. Water Law and Policy
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6.5 CLE

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14

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15

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3 CLE

15-16

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Various Hours

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A.C.E. Award Writing
Various Dates and Locations
2.5 CLE with 1 Ethics

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6 CLE

16

LORMAN BUSINESS CENTER, INC.
Construction Lien Law
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21

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28-29

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29

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6 CLE

February 2004

3

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The Probate Process From Start to Finish in Georgia
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12 CLE

Formal Advisory Opinion Issued Pursuant to Rule 4-403(d)

The second publication of this opinion appeared in the August 2003 issue of the *Georgia Bar Journal*, which was mailed to the members of the State Bar of Georgia on August 7, 2003. The opinion was filed with the Supreme Court of Georgia on August 21, 2003. No review was requested within the 20-day review period, and the Supreme Court of Georgia did not order review on its own motion. On September 11, 2003, the Formal Advisory Opinion Board issued Formal Advisory Opinion No. 03-1 pursuant to Rule 4-403(d). Following is the full text of the opinion issued by the Board.

STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY OPINION BOARD
PURSUANT TO RULE 4-403 ON SEPTEMBER 11, 2003
FORMAL ADVISORY OPINION NO. 03-1
(Proposed Formal Advisory Opinion No. 98-R7)

QUESTION PRESENTED:

May a Georgia attorney contract with a client for a nonrefundable special retainer?

SUMMARY ANSWER:

A Georgia attorney may contract with a client for a non-refundable special retainer so long as: 1) the contract is not a contract to violate the attorney's obligation under Rule 1.16(d) to refund "any advance payment of fee that has not been earned" upon termination of the representation by the attorney or by the client; and 2) the contracted for fee, as well as any resulting fee upon termination, does not violate Rule 1.5(a)'s requirement of reasonableness.

OPINION:

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

A special retainer is a contract for representation obligating a client to pay fees in advance for specified services to be provided by an attorney. This definition applies regardless of the manner of determining the amount of the fee or the terminology used to designate the fee, *e.g.*, hourly fee, percentage fee, flat fee, fixed fees, or minimum fees. Generally, fees paid in advance under a special retainer are earned as the specified services are provided. Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed[1]. The portion of the fee reasonably allocated to these services are, therefore, earned immediately. These fees, and any other fees that have been earned by providing specified services to the client, need not be refunded to the client. In this sense, a special retainer can be made nonrefundable.

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

"Terminology as to the various types of fee arrangements does not alter the fact that the lawyer is a fiduciary. Therefore, the lawyer's duties as to fees should be uniform and governed by the same rules regardless of the particular fee arrangement. Those duties are . . . : 1) To have a clear understanding with the client as to the details of the fee arrangement prior to undertaking the representation, preferably in writing. 2) To return to the client any unearned portion of a fee. 3) To accept the client's dismissal of him or her (with or without cause) without imposing any penalty on the client for the dismissal. 4) To comply with the provisions of Standard 31 as to reasonableness of the fee."

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

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

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

The ethical obligation to refund unearned fees, however, does not prohibit an attorney

from designating by contract points in a representation at which specific advance fees payments under a special retainer will have been earned, so long as this is done in good faith and not as an attempt to penalize a client for termination of the representation by refusing to refund unearned fees or otherwise avoid the requirements of Rule 1.16(d), and the resulting fee is reasonable. Nor does this obligation call in to question the use of flat fees, minimum fees, or any other form of advance fee payment so long as such fees when unearned are refunded to the client upon termination of the representation by the client or by the attorney. It also does not require that fees be determined on an hourly basis. Nor need an attorney place any fees into a trust account absent special circumstances necessary to protect the interest of the client. See Georgia Formal Advisory Opinion 91-2. Additionally, this obligation does not restrict the non-refundability of fees for any reason other than whether they have been earned upon termination. Finally, there is nothing in this obligation that prohibits an attorney from contracting for large fees for excellent work done quickly. When the contracted for work is done, however quickly it may have been done, the fees have been earned and there is no issue as to their non-refundability. Of course, such fees, like all fee agreements, are subject to Rule 1.5, which provides that the reasonableness of a fee shall be determined by the following factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) the fee customarily charged in the locality for similar legal services;
(4) the amount involved and the results obtained;
(5) the time limitations imposed by the client or by the circumstances;
(6) the nature and length of the professional relationship with the client.
(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
(8) Whether the fee is fixed or contingent.

Endnotes

1. The "likelihood that the acceptance of the particular employment will preclude other employment by the lawyer" is a factor the attorney must consider in determining the reasonableness of a fee under Rule 1.5. This preclusion, therefore, should be considered part of the service the attorney is providing to the client by agreeing to enter into the representation.
2. Georgia Formal Advisory Opinion 91-2.

The second publication of this opinion appeared in the August 2003 issue of the Georgia Bar Journal*, which was mailed to the members of the State Bar of Georgia on August 7, 2003. The opinion was filed with the Supreme Court of Georgia on August 21, 2003. No review was requested within the 20-day review period, and the Supreme Court of Georgia has not ordered review on its own motion. In accordance with Rule 4-403(d), this opinion is binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.* GBJ

Formal Advisory Opinion Issued Pursuant to Rule 4-403(d)

The second publication of this opinion appeared in the August 2003 issue of the *Georgia Bar Journal*, which was mailed to the members of the State Bar of Georgia on August 7, 2003. The opinion was filed with the Supreme Court of Georgia on August 21, 2003. No review was requested within the 20-day review period, and the Supreme Court of Georgia did not order review on its own motion. On September 11, 2003, the Formal Advisory Opinion Board issued Formal Advisory Opinion No. 03-2 pursuant to Rule 4-403(d). Following is the full text of the opinion issued by the Board.

STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY OPINION BOARD
PURSUANT TO RULE 4-403 ON
SEPTEMBER 11, 2003
FORMAL ADVISORY OPINION NO. 03-2
(Proposed Formal Advisory Opinion No. 01-R5)

QUESTION PRESENTED:

Does the obligation of confidentiality described in Rule 1.6, Confidentiality of Information, apply as between two jointly represented clients?

SUMMARY ANSWER:

The obligation of confidentiality described in Rule 1.6, Confidentiality of Information, applies as between two jointly represented clients. An attorney must honor one client's request that information be kept confidential from the other jointly represented client. Honoring the client's request will, in most circumstances, require the attorney to withdraw from the joint representation.

OPINION:

Unlike the attorney-client privilege, jointly represented clients do not lose the protection of confidentiality described in Rule 1.6, Confidentiality of Information, as to each other by entering into the joint

representation. See, e.g., D.C. Bar Legal Ethics Committee, Opinion No. 296 (2000) and Committee on Professional Ethics, New York State Bar Association, Opinion No. 555 (1984). Nor do jointly represented clients impliedly consent to a sharing of confidences with each other since client consent to the disclosure of confidential information under Rule 1.6 requires consultation. Id. Consultation, as defined in the Rules, requires "the communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Terminology, Georgia Rules of Professional Conduct.

When one client in a joint representation requests that some information relevant to the representation be kept confidential from the other client, the attorney must honor the request and then determine if continuing with the representation while honoring the request will: a) be inconsistent with the lawyer's obligations to keep the other client informed under Rule 1.4, Communication; b) materially and adversely affect the representation of the other client under Rule 1.7, Conflict of Interest: General Rule; or c) both.

The lawyer has discretion to continue with the representation while not revealing the confidential information to the other client only to the extent that he or she can do so consistent with these rules. If maintaining the confidence will constitute a violation of Rule 1.4 or Rule 1.7, as it most often will, the lawyer should maintain the confidence and discontinue the representation.

Consent to conflicting representations, of course, is often permitted under Rule 1.7. Consent to continued joint representation in these circumstances, however, ordinarily would not be available either because it would be impossible to conduct the consultation required for such consent without disclosing the confidential information in question or because consent is not permitted under Rule 1.7 in that the continued joint representation would "involve circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients." Rule 1.7(c)(3).

Whether or not the attorney, after withdrawing from the representation of the other client, can continue with the representation of the client who insisted upon confidentiality is governed by Rule 1.9: Conflict of Interest: Former Clients and by whether or not the consultation required for the consent of the now former client can be conducted without disclosure of the confidential information in question.

The potential problems that confidentiality can create between jointly represented clients make it especially important that clients understand the requirements of a joint representation prior to entering into one. When an attorney is considering a joint representation, consultation and consent of the clients is required prior to the representation "if there is a significant risk that the lawyer's . . . duties to [either of the jointly represented clients] . . . will materially and adversely affect the representation of [the other] client." Rule 1.7. Whether or not consultation and consent is required, however, a prudent attorney will always discuss with clients wishing to be jointly represented the need for sharing confidences between them, obtain their consent to such sharing, and inform them of the consequences of either client's nevertheless insisting on confidentiality as to the other client and, in effect, revoking the consent. If it appears to the attorney that either client is uncomfortable with the required sharing of confidential information that joint representation requires, the attorney should reconsider whether joint representation is appropriate in the circumstances. If a putative jointly represented client indicates a need for confidentiality from another putative jointly represented client, then it is very likely that joint representation is inappropriate and the putative clients need individual representation by separate attorneys.

The above guidelines, derived from the requirements of the Georgia Rules of Professional Conduct and consistent with the primary advisory opinions from other jurisdictions, are general in nature. There is no doubt that their application in some specific contexts will create additional specific concerns seemingly unaddressed in the general ethical requirements. We are, however, without authority to depart from the Rules of Professional Conduct that are intended to be generally applicable to the profession. For example, there is no doubt that the application of these requirements to the joint representation of spouses in estate planning will sometimes place attorneys in the awkward position of having to withdraw from a joint representation of spouses because of a request by one spouse to keep relevant information confidential from the other and, by withdrawing, not only ending trusted lawyer-client relationships but also essentially notifying the other client that an issue of confidentiality has arisen. See, e.g., Florida State Bar Opinion 95-4 (1997) ("The attorney may not reveal confidential information to the wife when the husband tells the attorney that he wishes to provide for a beneficiary that is unknown to the wife. The attorney must withdraw from the representation of both husband and wife because of the conflict presented when the attorney must maintain the husband's separate confidences regarding the joint representation.") A large number of highly varied recommendations have been made about how to deal with these specific concerns in this specific practice setting. See, e.g., Pearce, Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses, 62 FORDHAM L. REV. 1253 (1994); and, Collett, And The Two Shall Become As One . . . Until The Lawyers Are Done, 7 NOTRE DAME J. L. ETHICS & PUBLIC POLICY 101 (1993) for discussion of these recommendations. Which recommendations are followed, we believe, is best left to the practical wisdom of the good lawyers practicing in this field so long as the general ethical requirements of the Rules of Conduct as described in this Opinion are met.

The second publication of this opinion appeared in the August 2003 issue of the Georgia Bar Journal, *which was mailed to the members of the State Bar of Georgia on August 7, 2003. The opinion was filed with the Supreme Court of Georgia on August 21, 2003. No review was requested within the 20-day review period, and the Supreme Court of Georgia has not ordered review on its own motion. In accordance with Rule 4-403(d), this opinion is binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.* GBJ

Notice of Filing of Formal Advisory Opinions in Supreme Court

Second Publication of Proposed
Formal Advisory Opinion Request No. 02-R4
Hereinafter known as "Formal Advisory
Opinion No. 03-3"

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after December 15, 2003. Unless the Supreme Court grants review, Formal Advisory Opinion No. 03-3 shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only.

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

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

STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY
OPINION BOARD
PURSUANT TO RULE 4-403
FORMAL ADVISORY OPINION NO. 03-3
(Proposed Formal Advisory Opinion Request No. 02-R4)

QUESTION PRESENTED:

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

SUMMARY ANSWER:

While it may be possible to structure a solicitation agreement to comply with ethical requirements, it would be both ethically and legally perilous to attempt to do so. In addition to numerous other ethical concerns, Rule 1.7 Conflicts of Interest: General Rule, would require at a minimum that a "solicitation agreement" providing referral fees to the attorney be disclosed to the client in writing in a manner sufficient to permit the client to give informed consent to the personal interest conflict created by the agreement after having the opportunity to consult with independent counsel. Comment 6 to Rule 1.7 provides: "A lawyer may not allow related business interest to affect representation by, for example, referring clients to an enterprise in which the lawyer has an undisclosed business interest." Additionally, the terms of the "solicitation agreement" must be such that the lawyer will exercise his or her independent profes-

sional judgment in deciding whether or not to refer a particular client to the financial investment adviser. Prudentially, this would require the lawyer to document each referral in such a way as to be able to demonstrate that the referral choice was not dictated by the lawyer's financial interests but by the merits of the institution to whom the client was referred. The agreement must not obligate the attorney to reveal confidential information to the adviser absent the consent of the client; the fees paid to the attorney under the agreement must not be structured in such a way as to create a financial interest adverse to the client or otherwise adversely affect the client, and the agreement must itself be in compliance with other laws the violation of which would be a violation of Rule 8.4 Misconduct, especially those laws concerning the regulation of securities enforceable by criminal sanctions. This is not an exhaustive list of ethical requirements in that the terms of particular agreements may generate other ethical concerns.

OPINION:

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

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

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

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

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

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

1) The agreement must not bind the attorney to make referrals or to make referrals only to the adviser for such an obligation would be inconsistent with the attorney's obligation to exercise independent professional judgment on behalf of the client in determining whether a referral is appropriate and to whom the client should be referred. Both determinations must always be made only in consideration of the client's best interests. Prudentially, this would require the lawyer to document each referral in such a way as to be able to demonstrate that the referral choice was not dictated by the lawyer's financial interests but by the merits of the institution to whom the client was referred. In order to be able to do this well the lawyer would need to stay abreast of the quality and cost of services provided by other similar financial institutions.

2) The agreement cannot restrict the information the attorney can provide the client concerning a referral by requiring, for example, the attorney to use only materials prepared or approved by the adviser. Such a restriction is not only inconsistent with the attorney's obligations to exercise independent professional judgment but also with the attorney's obligations under Rule 1.4 Communications concerning the attorney's obligation to provide information to clients sufficient for informed decision making.

3) The agreement cannot obligate the attorney to provide confidential information, as defined in Rule 1.6 Confidentiality, to the adviser absent client consent.

4) The fees paid to the attorney for the referral cannot be structured in such a way as to create a financial interest or other interest adverse to the client. Rule 1.8 Conflicts of Interest: Prohibited Transactions provides ". . . nor shall the lawyer knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client . . ."

5) Finally, any such agreement would have to be in compliance with other laws the violations of which could constitute a violation of Rule 8.4 Misconduct. For example, the agreement may not violate any of the legal or administrative regulations governing trading in securities enforceable by criminal sanctions.

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

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

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

A copy of the proposed amendments may be obtained on and after Dec. 5, 2003, from the Eleventh Circuit's Internet Web site at www.ca11.uscourts.gov. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303 [phone: (404) 335-6100]. Comments on the proposed amendments may be submitted in writing to the Clerk at the above street address by Jan. 5, 2004. GBJ

Report of the Uniform Rules Committee of the Council of Superior Court Judges of Georgia – July 14, 2003

PROPOSED AMENDMENT TO UNIFORM SUPERIOR COURT
Rule 9: Telephone Conferencing
(First Reading July 14, 2003)

Rule 9. Telephone and Video Conferencing

9.1 Telephone conferencing. The trial court on its own motion or upon the request of any party may in its discretion conduct pre-trial or post-trial proceedings in civil actions by telephone conference with attorneys for all affected parties. The trial judge may specify:

(A) The time and the person who will initiate the conference;

(B) The party which is to incur the initial expense of the conference call, or the apportionment of such costs among the parties, while retaining the discretion to make an adjustment of such costs upon final resolution of the case by taxing same as part of the costs; and

(C) Any other matter or requirement necessary to accomplish or facilitate the telephone conference.

9.2 Vidoeconferencing.
(A) The following matters may be conducted by videoconference:

1. Determination of indigence and appointment of counsel;
2. Hearings on appearance and appeal bonds;
3. Initial appearance hearings;
4. Probable cause hearings;
5. Applications for arrest warrants;
6. Applications for search warrants;
7. Arraignment or waiver of arraignment;
8. Pretrial diversion and post-sentencing compliance hearings;
9. Entry of pleas in criminal cases;
10. Impositions of sentences upon pleas of guilty or *nolo contendere*;
11. Probation revocation hearings in felony cases in which the probationer admits the violation and in all misdemeanor cases;
12. Post-sentencing proceedings in criminal cases;
13. Acceptance of special pleas of insanity (incompetency to stand trial);
14. Situations involving inmates with highly sensitive medical problems or who pose a high security risk; and
15. Testimony of youthful witnesses;
16. *Ex-parte* applications for Temporary Protective Orders under the Family Violence Act and the Stalking Statute;
17. Appearances of interpreters;
18. *All mental health, alcohol and drug hearings held by the Probate Court pursuant to Title 37 of the Official Code of Georgia provided that the confidentiality prescribed by Title 37 be preserved. (requested by Probate Court)*

Notwithstanding any other provisions of this rule, a judge may order a defendant's personal appearance in court for any hearing.

(B) Confidential Attorney-Client Communication. Provision shall be made to preserve the confidentiality of attorney-client communications and privilege in accordance with Georgia law. In all criminal proceedings, the defendant and defense counsel shall be provided with a private means of communications when in different locations.

(C) Witnesses. In any pending matter, a witness may testify via video conference. Any party desiring to call a witness by video conference shall file a notice of intention to present testimony by video conference at least thirty (30) days prior to the date scheduled for such testimony. Any other party may file an objection to the testimony of a witness by video conference within ten (10) days of the filing of the notice of intention. In civil matters, the discretion to allow testimony via video conference shall rest with the trial judge. In any criminal matter, a timely objection shall be sustained; however, such objection shall act as a motion for a continuance and a waiver of any speedy trial demand.

(D) Recording of Hearings. A record of any proceedings conducted by video conference shall be made in the same manner as all such similar proceedings not conducted by video conference. However, upon the consent of all parties, that portion of the proceedings conducted by video conference may be recorded by an audio-visual recording system and such recording shall be part of the record of the case and transmitted to courts of appeal as if part of a transcript.

(E) Technical Standards. Any videoconferencing system utilized under this rule must conform to the following minimum requirements:

1. All participants must be able to see, hear, and communicate with each other simultaneously;

2. All participants must be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding, either by video, facsimile, or other method;

3. Video quality must be adequate to allow participants to observe each other's demeanor and nonverbal communications; and

4. The location from which the trial judge is presiding shall be accessible to the public to the same extent as such proceeding would if not conducted by video conference. The court shall accommodate any request by interested parties to observe the entire proceeding.

PROPOSED AMENDMENT TO UNIFORM SUPERIOR COURT
Rule 24.2. Financial data required.
(First Reading July 14, 2003)

Rule 24.2. Financial data required.

Every action for temporary or permanent child support, alimony, equitable division of property, modification of child support or alimony or attorneys fees shall be accompanied by an affidavit specifying the party's financial circumstances. The affidavit shall be served at the same time that the notice of interlocutory hearing is served. The opposing party shall make an affidavit regarding his or her financial circumstances and shall serve it upon opposing counsel at least five days prior to the interlocutory hearing. If the parties are ordered to participate in mediation at any time prior to trial, each shall serve the affidavit upon the other at least five days prior to the mediation. Each shall furnish the mediator with a copy at the time of the mediation.

If no application for a temporary award is made and the parties do not participate in mediation prior to trial, then the parties shall make and serve the affidavits at least ten days before trial. If a party is not represented by an attorney, sufficient time will be allowed the party to prepare the required affidavit at hearing or trial. On the request of either party, and good cause shown to the court, the affidavits and any other financial information may be sealed, upon order of the court.

Failure of any party to furnish the above affidavit, in the discretion of the court, may subject the offending party to the penalties of contempt and result in continuance of the hearing until such time as the required affidavit is furnished.

The affidavit shall be under oath and in substantially the following form:

IN THE SUPERIOR COURT OF _____ COUNTY, GEORGIA

_____, PLAINTIFF
vs CIVIL ACTION NO. _____
_____, DEFENDANT

DOMESTIC RELATIONS FINANCIAL AFFIDAVIT

1. AFFIANT'S NAME _____ Age _____

~~Affiant's Social Security No. _____~~

Spouses Name _____ Age _____

Date of Marriage _____ Date of Separation _____

Names and birth dates of children of this marriage:

Name Date of Birth Resides with
_____
_____

PROPOSED AMENDMENT TO UNIFORM SUPERIOR COURT
Rule 31.1: Motions, demurrers, special pleas, and similar items in criminal matters; Time for filing
(First Reading July 14, 2003)

Rule 31.1. Time for filing; requirements.
All motions, demurrers, and special pleas shall be made and filed at or before the time set by law ~~of arraignment~~, unless time therefor is extended by the judge in writing prior to trial. Notices of the states intention to present evidence of similar transactions or occurrences and notices of the intention of the defense to raise the issue of insanity or mental illness, or the intention of the defense to introduce evidence of specific acts of violence by the victim against third persons, shall be given and filed at least ten [10] days before trial unless the time is shortened or lengthened by the judge. Such filing shall be in accordance with the following procedures.

PROPOSED AMENDMENT TO UNIFORM SUPERIOR COURT
Rule 31.5: Motions, demurrers, special pleas, and similar items in criminal matters;
Motions and orders for mental examination at public expense.
(First Reading July 14, 2003)

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA **INDICTMENT NO.**
v. _____ **CHARGE(S):**

ORDER FOR MENTAL EVALUATION re COMPETENCY TO STAND TRIAL

WHEREAS the mental competency of the above defendant has been called into question, and evidence presented in the matter, and this court has found that it is appropriate for evaluation to be conducted by public expense;

IT IS HEREBY ORDERED that the Department of Human Resources (or Forensic Psychiatry Service) conduct an evaluative examination of said defendant, provide treatment of the defendant, if appropriate, and provide to this court a report of diagnosis, prognosis and its findings, with respect to:

Competency to stand trial. Whether the accused is capable of understanding the nature and object of the proceedings~~.~~, whether ~~he~~the defendant comprehends his ~~or~~ /her own condition in reference to ~~such~~the proceedings against him/her; and~~,~~ whether the accused is capable of rendering to counsel assistance in providing a proper defense.

IT IS FURTHER ORDERED that the department (or service) arrange with the county sheriff, or ~~the sheriffs~~his/her lawful deputies, for the prompt examination of said defendant, either at the county jail or at a designated hospital, with transportation of the defendant to be provided by the sheriff, where necessary, with transportation costs to be borne by the county. Upon completion of the examination, the examining facility shall notify the sheriff~~,~~ who shall promptly reassume custody of the defendant. The evaluation report is to be sent to this court, with copies sent to the attorney for the defendant and the prosecuting attorney.

Copies of documents supporting this request are attached hereto, as follows:
( ) Indictment/Accusation
( ) Summary of previous mental health treatment and prior medical records
( ) Copy of arrest report
( ) Other _____

So ordered, this the _____ day of _____, 19__.

_____
JUDGE, SUPERIOR COURT

_____
JUDICIAL CIRCUIT, GEORGIA

SPECIMEN PSYCHIATRIC EVALUATION ORDER NO. 1

IN THE SUPERIOR COURT OF _____ COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA **INDICTMENT NO.**
v. _____ **CHARGE(S):**

ORDER FOR MENTAL EVALUATION
RE: DEGREE OF CRIMINAL RESPONSIBILITY or SANITY AT THE TIME OF THE ACT

WHEREAS the sanity of the above defendant at the time at which he/she is alleged to have committed the offense(s) charged in the above indictment(s) has been called into question, and evidence presented in the matter, and this court has found that it is appropriate for an evaluation to be conducted by public expense;

IT IS HEREBY ORDERED that the Department of Human Resources (or Forensic Psychiatry Service) conduct an evaluative examination of said defendant, provide treatment of the defendant, if appropriate, and provide to this court a report of diagnosis, prognosis and its findings, with respect to:

Degree of Criminal Responsibility or Sanity at the Time of the Act. Whether the accused had the mental capacity to distinguish right from wrong in relation to the alleged act; whether or not the presence of a delusional compulsikon overmastered his/her will to resist committing the alleged act.

IT IS FURTHER ORDERED that the department (or service) arrange with the county sheriff, or ~~the sheriffs~~his/her lawful deputies, for the prompt examination of said defendant, either at the county jail or at a designated hospital, with transportation of the defendant to be provided by the sheriff, where necessary, with transportation costs to be borne by the county. Upon completion of the examination, the examining facility shall notify the sheriff~~,~~ who shall promptly reassume custody of the defendant. The evaluation report is to be sent to this court, with copies sent to the attorney for the defendant and the prosecuting attorney.

Copies of documents supporting this request are attached hereto, as follows:
( ) Indictment/Accusation
( ) Summary of previous mental health treatment and prior medical records
( ) Copy of arrest report
( ) Other _____

So ordered, this the _____ day of _____, 19__.

_____
JUDGE, SUPERIOR COURT

_____
JUDICIAL CIRCUIT, GEORGIA

SPECIMEN PSYCHIATRIC EVALUATION ORDER NO. 1

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2. Number of Support Staff: _____
3. Number of Claims/Incidents filed against Firm during the past 5 years:
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4. Firm knowledge of *any* circumstance(s) or acts(s) which may give rise to a claim: ☐ Yes ☐ No
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6. Number of Docket Control Systems: _____ Are they Computerized: ☐ Yes ☐ No
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Indicate the percentage of Firm income derived from each of the following areas of practice. Total must = 100 %

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_____ Ad Valorem Tax
_____ Admiralty - Plaintiff
_____ Admiralty - Defendant
_____ Antitrust / Trade Regulation
_____ Banking
_____ Bankruptcy
_____ Bonds
_____ Civil Rights
_____ Collections
_____ Commercial Lit - Plaintiff
_____ Commercial Lit - Defendant
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_____ Estate / Probate / Trust
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_____ Mediation / arbitration
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_____ Real Estate - Residential
_____ Social Security Admin
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_____ Water Law
_____ Wills and Trusts
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