


Georgia  
Bar

# Journal

February 2004 □ Volume 9 □ Number 4



Administrative Law Judges  
“Ride the Circuit” to Provide  
Georgians with a Day in Court



# Are footprints as foolproof as fingerprints?

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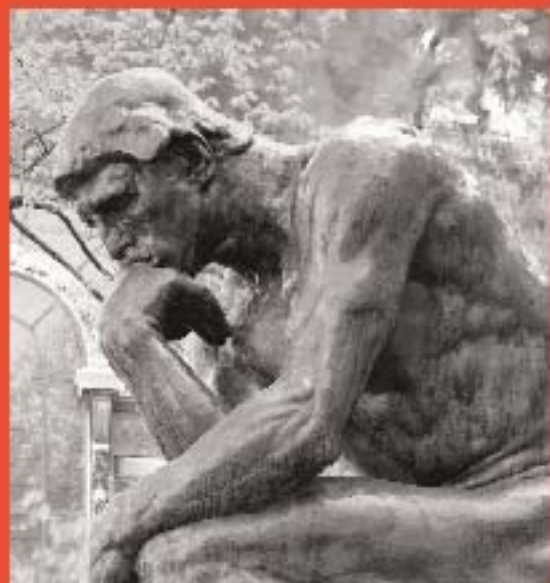
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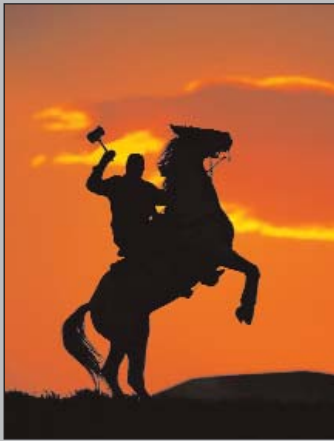
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Whether the courtroom is a living room or a nursing home bedside, administrative law judges travel the state providing Georgians with an impartial and efficient forum to resolve disputes involving state government. See page 19.

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# Georgia Bar Journal

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### Publisher's Statement

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

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"At the beginning of the Bar year, I requested that our Court Futures Committee undertake a thorough examination of the way Georgia and other states select/elect judges, with a view towards recommending possible changes for the better."

By William D. Barwick

## Court Futures

Over the last six months, many friends and colleagues have asked me if there were any specific problems that I had encountered to date as president of the State Bar. These inquiries were not, however, just polite conversation, as I could often see looks of true concern in the questioner's eyes. In response, I have been telling anyone who will listen that I am more concerned with a problem that has not yet developed, but which many of us feel will be upon our profession sooner than we might wish.

During the historic state election of 2002, we saw a changing of the

guard and an organizational upheaval in both the executive and legislative branches of our government. What went undetected at the time, however, was the fact that we may also be witnessing a major change in the way we select and retain judges at every level in this state. Part of this change will result from the 2002 elections, but federal court decisions at the 11th Circuit level and in the U.S. Supreme Court will also have a marked effect upon the way Georgians pick their judges in the future.

For years, Georgia has had an almost de facto selection and retention system, notwithstanding the fact that we are constitutionally empowered to elect our state, superior and appellate court judges. In a traditional one-party state, judicial candidates would often be selected for open seats by the governor, after vetting by the Judicial Nominating Commission, and often that judge could serve his or her entire career on the bench without election or opposition. Judges would intention-



ally retire several months before the end of their term, again permitting the governor to appoint their successor, who would then be listed on a ballot (if challenged) as the incumbent. In other words, the electoral system was traditionally and intentionally bypassed, with a number of notable exceptions who successfully campaigned for the bench. Within the last 18 months, however, we have seen a “triple witching hour,” in which an election ended one-party domination in the state of Georgia, the 11th Circuit eliminated the more stringent campaign conduct rules enforced by the Judicial Qualifications Commission, and the U.S. Supreme Court opened the door for judicial campaign finance battles that would ordinarily be associated with California recall elections.

If you haven’t noticed the decline and fall of the republic just yet, there is a reason: we haven’t had a judicial election since the confluence of these three events. Instead of waiting to see whether we have a problem, or the extent to which solutions may be proposed by the State Bar, efforts are already under way to have in place some mechanism for reform if problems occur in the upcoming elections and beyond.

The Bar has responded in the past. When judicial appointment problems developed during the Lester Maddox administration, the State Bar assisted then-Governor Jimmy Carter in the establishment of a Judicial Nominating Commission to help a governor review and evaluate the qualifications of judicial candidates. In 1972, after a number of judicial candidates ran successfully as Republicans against Democratic incumbents as part of the Nixon landslide over George McGovern,

the State Bar assisted in recommending a change to nonpartisan judicial elections (McGovern apparently did very little that year to beef up the campaigns of local judicial running mates).


At the beginning of the Bar year, I requested that our Court Futures Committee undertake a thorough examination of the way Georgia and other states select/elect judges, with a view towards recommending possible changes for the better. Under the chairmanship of Judge Ben Studdard, the committee has devoted this year to an examination of various methodologies, not with an eye toward what could be realistically accomplished in Georgia, but what might hypothetically be the best system for any state to adopt. If problems develop, the pragmatics can come later. Aided by an extremely hard-working group of committee members, the Court Futures Committee has done a thorough survey of the states, as well as a review of proposed ABA model selection systems.

Change will not come easy. Few states with an elected judiciary have successfully changed to a merit selection system in modern times. Although journalists are loath to cover judicial elections because they are (thankfully) low on political rhetoric, the same journalists would opine long and loud that control of the judiciary should never be taken away from the direct mandate of the voters.

This project and the work of the Court Futures Committee is one of those tasks that I knew would not be completed during my term, but which has received enthusiastic support from the executive officers of the State Bar who will likely follow. Admittedly, we cannot say for

certain that the procedure is broken, but the stakes are too high to wait until we have a full-blown predicament upon our hands before we begin the process of fixin’.

So far, Governor Perdue has worked well with his new Judicial Nominating Commission in the appointment of good men and women for judgeships recently created by the general assembly, or which became open because of the death or resignation of sitting judges. The State Bar stands ready to help both Governor Perdue and JNC Chairman Mike Bowers in any way we can. Further, a newly reconstituted set of rules from the Judicial Qualifications Commission should also help.

In the future, we must realistically investigate campaign finance reform, and the return of judicial evaluation polls with the active participation of lawyers throughout the state. There are things that can be done today to ensure that the elections in 2004 are both fair and high-minded, and there are things that we can think about for the future. In either event, the consequences are too great for our profession to use anything less than its best due diligence. 

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By Cliff Brashier

## The Bar Wants You To Help Make Better Laws For Georgia

**W**ith the legislative session in full swing, I thought it would be appropriate to mention an initiative by State Bar President Bill Barwick encouraging more lawyers to run for public office — specifically the state legislature.

Young Lawyers Division President Andrew Jones has pledged his support to this cause and will be offering seminars to interested YLD members on how to run for state office.

I think there is a public misconception that the General Assembly consists mostly of lawyers. In reality fewer than 17 percent of the state's 236 legislators are attorneys. Most people would be surprised by that fact. With 34,880 Georgia Bar members, we should be better represented.

Lawyers have a proud tradition of making a difference in our society:

- 24 of the 56 signers of the Declaration of Independence were lawyers.

- 31 of the 55 signers of the United States Constitution were lawyers.
- 28 of our 43 Presidents have been lawyers.

Bill Barwick firmly believes that the public would be well served by the overall education, legal training and experience with the law that only Georgia lawyers can provide.

Although legislators from other professions bring much needed diversity to the General Assembly, their ideas must be transferred into laws that are clear, unambiguous and constitutional. With fewer and fewer attorneys participating in Georgia's law-making process, their important contributions and services to their non-lawyer colleagues are diminishing. For example, the Georgia General Assembly does not have a sufficient number of lawyers to fill the seats on the judicial committee of the House and Senate.

So, my wish for the new year is for more Georgia lawyers with an interest in public service to get involved. The December 2003 issue of the *Bar Journal* profiled nine Georgia lawyers who have chosen to make this demanding but rewarding contribution. I commend their commitment.

"So, my wish for the new year is for more Georgia lawyers with an interest in public service to get involved."



If you do have an interest, there are many mentors available to you. Any of our 39 lawyer legislators would be happy to help. Bill Barwick and Andrew Jones would welcome your attendance at an upcoming YLD seminar on this topic. I would be happy to put you in touch with the Bar's legislative representatives: Tom Boller, Rusty

Sewell, Wanda Segars and Mark Middleton. They have a wealth of knowledge and would be most willing to share it.

Aristotle said, "Law is order, and good law is good order." I am convinced that no one in this state is better able to make good law and good order than members of the State Bar of Georgia.

I hope you will thank our fine group of current Georgia lawyer legislators, give them your support and consider joining them.

Your thoughts and suggestions are always welcome. My telephone numbers are (800) 334-6865 (toll free), (404) 527-8755 (direct dial), (404) 527-8717 (fax) and (770) 988-8080 (home). ☎



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"This year, many of the YLD committees did something to make the holiday season more special for some of Georgia's less fortunate families."

By Andrew W. Jones

## Young Lawyers Give Something Back

**T**he holiday season has come and gone. I hope Santa was good to everyone. Unfortunately, in the state of Georgia, many families and children don't wake up Christmas morning to a tree littered with shiny new bikes and holiday goodies.

This year, many of the YLD committees did something to make the holiday season more special for some of Georgia's less fortunate families. The YLD Community Service Projects Committee partnered with Fulton County DFACS to organize a gift drive. The YLD volunteers helped organize, sort and wrap gifts that had been donated to DFACS for the foster children in their care. There is a special feeling that comes from knowing that something you did will put a smile on a child's face on Christmas morning. I'm sure the volunteers of the Community Service Committee had that feeling.

The YLD Community Service Committee also hosted a suit drive during the State Bar's Midyear Meeting in Atlanta. Old suits and business clothing were

donated by lawyers around the state, and then given to area shelters and used by homeless or needy job seekers for job interviews. If you didn't get a chance to donate your clothing this year, please save it for next year's Midyear Meeting.

Another YLD committee, which was hard at work over the holidays, was the Women in the Profession Committee. They sponsored a family from Atlanta Legal Aid. The sponsor family was a grandparent who was the primary care giver for two teenage girls. Thanks to the generosity of the volunteers on the committee, the family received everything on their wish lists and more!


In addition to the good work done by the YLD committees, I'm sure that lawyers of all ages around this state did things in their community to make the holiday season more enjoyable for the less fortunate. Even though lawyers suffer through bad jokes, negative rhetoric and poor publicity, we continue to give something back to our communities. Very few professions do as much as lawyers do when it comes to helping the underprivileged.

If you would like to become active in the Young Lawyers Division, now is a great time to



start. The YLD Spring Meeting will be a three-day cruise to the Bahamas April 16-19. Thanks to help from our sponsors, the cruise only costs \$350 per person, which includes food and beverages. Space is limited to the first 100 people to sign up and only a few spots remain. If you are interested in signing up for the cruise, please contact Deidra Sanderson at the State Bar office.

If you cannot make it to one of the YLD meetings, please consider becoming involved in one of the YLD committees. The YLD has several committees that do great work around the state.

With the help of more energetic lawyers, hopefully we can make next year's holiday season a little brighter for Georgia's underprivileged families and children. 

## It's That Time Again. Don't Forget to Vote!

**All active members will be mailed a ballot with a return envelope enclosed on March 5. The ballot must be returned in that envelope to count. Only one ballot per envelope may be enclosed, or all ballots included in the envelope will be considered invalid.**

**Online voting will open March 5, the same date that the printed ballots will be mailed. The deadline to vote online or for ballots to be received by mail in order to count is April 6 (envelopes must be postmarked by April 6). Results will be validated by the election committee and will be available on April 8.**

**Additionally, Feb. 23 is the last day that petitions can be received for non-incumbent Board of Governors posts.**

**If you have questions about the election or election process, contact Gayle Baker, staff election liaison, at (404) 527-8700.**



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# **Georgia General Assembly Adopts “Manifest Disregard” as a Ground for Vacating Arbitration Awards:**

**How Will Georgia Courts Treat the New Standard?**



# A Look at the Law

By John W. Hinchey and  
Thomas V. Burch

Arbitration offers attractive alternatives to litigation in terms of speed, lower costs, flexibility of process and business-oriented decisions. However, these advantages can come at the price of a legally incorrect decision — a result that is significantly at odds with the judicial process. Over the last decade, state and federal courts have struggled to find an acceptable balance between these competing interests of arbitration and litigation, and their efforts have raised an important question: To what extent should courts respect the decisions of arbitrators?

Generally, courts may only set aside arbitration awards on the grounds listed in the Federal Arbitration Act<sup>1</sup> or the applicable state arbitration code. However, all federal circuit courts<sup>2</sup> and a few state courts<sup>3</sup> have adopted a non-statutory exception that allows a court to overturn an arbitrator's decision if the arbitrator has exemplified a "manifest disregard" of the law.<sup>4</sup>

The manifest disregard standard for vacating arbitration awards originated from the U.S. Supreme Court's decision in *Wilko v. Swan*,<sup>5</sup> and one court has since defined it as an arbitrator's "willful inattentiveness to the governing law."<sup>6</sup> However, in the fifty years following *Wilko*, only two federal courts have vacated an arbitration award based on the manifest disregard standard.<sup>7</sup> This may be attributed to problems associated with distinguishing "manifest disregard" from "ordinary legal error."<sup>8</sup> The *Wilko* Court was the first to make this distinction, but it did not give explicit guidelines for when or how lower courts should do the same. As a result, most courts have taken different approaches to, and have reached different results after, implementing the manifest disregard standard.<sup>9</sup>

In 2002, after several years of tentative lower court decisions, the Georgia Supreme Court, in *Progressive Data Systems v. Jefferson Holding Corporation*, held that manifest disregard is not a proper ground for vacatur in Georgia.<sup>10</sup> The court emphasized that Georgia's Arbitration Code does not implicitly contain the manifest disregard standard, and that Georgia courts should not liberally interpret the Code in a vain attempt to find it.<sup>11</sup> In 2003, however, the Georgia General Assembly amended the Georgia Arbitration Code to specifically include manifest disregard as a ground for vacating arbitration awards.<sup>12</sup> Governor Sonny Perdue signed the act in June of 2003, effectively nullifying the Georgia Supreme Court's decision in *Progressive Data Systems*, and thereby making Georgia the first state in the country to statutorily adopt the manifest disregard standard.<sup>13</sup> Nevertheless, because the new act does not instruct courts regarding how to apply manifest disregard, it is uncertain whether Georgia courts will adopt a broad or narrow interpretation of the doctrine.

## ARBITRAL DISCRETION AND THE DOCTRINE OF "MANIFEST DISREGARD"

As the time and expenses involved in litigating a case have risen in recent years, public policy has dictated an increasing emphasis on more efficient alternatives, including arbitration. Arbitration agreements commit parties to accept the decisions of a neutral arbitrator on questions of fact, contract, and law that may arise



during the course of a business relationship.<sup>14</sup> Win or lose, an arbitration agreement is an enforceable contractual commitment specifically entered into, among other reasons, to avoid the more expensive option of litigation.<sup>15</sup>

In the interest of speed and economic efficiency, courts have historically given broad deference to arbitrators' decisions. Arbitrators are not required to provide a record of their rationale,<sup>16</sup> and courts may not review an arbitrator's award solely on its merits.<sup>17</sup> This arbitral discretion is not entirely unfettered, however; arbitrators are still bound to follow the law.<sup>18</sup> Accordingly, judicial review of arbitration awards must be stringent enough to enforce arbitrators' compliance with the applicable laws, while respecting the strong federal policy in favor of deference to arbitration.<sup>19</sup>

Courts that allow application of the manifest disregard standard generally follow a two-part test in determining whether to vacate an award under this standard. First, a court must look to whether the arbitrator knew the applicable law and refused to apply it. Second, the court attempts to determine whether the law was explicit and clearly applicable to the case.<sup>20</sup> Thus, this standard requires more than a mere error or misunderstanding of the law. Instead, the arbitrator must have made a conscious decision to ignore known and applicable legal principles.<sup>21</sup> As one court explained, "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator made a serious mistake or committed grievous error will not furnish a satisfactory basis for undoing the decision."<sup>22</sup>

Further, determining whether an arbitrator manifestly disregarded the law can be a very difficult task because arbitrators do not have to disclose the reasons behind their awards. When an arbitrator fails to explain an award, a reviewing court can only infer from the record whether the arbitrator knew about the governing legal principle but decided to ignore it.<sup>23</sup> In such a case, the court must confirm the arbitration award even if the ground for the decision is based on error of fact or law.<sup>24</sup>

As one can see, courts that allow for the vacatur of an award based on an arbitrator's manifest disregard of the law have set an extremely high standard for review. Because of the strong public policy that exists in favor of arbitration, courts give great deference to arbitrators' decisions, and the judicial inquiry under the manifest disregard standard is quite limited.<sup>25</sup>

## **RATIONALE FOR APPLYING, OR REFUSING TO APPLY, THE MANIFEST DISREGARD STANDARD**

Courts evaluating whether to adopt the manifest disregard standard often reach different outcomes because of conflicting philosophies regarding two primary issues. First, courts disagree over the amount of deference they should grant to arbitrators' decisions.<sup>26</sup> Giving greater deference to the arbitrator will result in a more efficient judicial system. However, subjecting the arbitrators' decisions to higher scrutiny will encourage

arbitrators to comply with the requirements of the law.

Second, courts hold differing opinions on their ability to vacate arbitration awards on grounds that are not specifically listed in the applicable arbitration acts. Some state courts have refused to adopt the manifest disregard standard because it is not mentioned in their respective state laws on arbitration.<sup>27</sup> All of the federal circuits, however, have adopted the standard as a ground for vacating arbitration awards,<sup>28</sup> either accepting that manifest disregard is an official creation of the judiciary,<sup>29</sup> or finding that manifest disregard is implicit in the language of the Federal Arbitration Act.<sup>30</sup>

## **THE 11TH CIRCUIT'S APPLICATION OF THE MANIFEST DISREGARD STANDARD**

The 11th Circuit adopted two other non-statutory grounds for vacating arbitration awards before it accepted manifest disregard, and it only accepted manifest disregard when faced with a case where one party "explicitly urged [the arbitrator] to disregard the law."<sup>31</sup> In *Montes v. Shearson Lehman Brothers*, the court vacated an arbitration award because Shearson's attorney convinced the arbitrator to rule in favor of his client by saying: "I know, as I have served many times as an arbitrator, that you as an arbitrator are not ... strictly bound by case law and precedent. You have the ability to do what is right, what is fair and proper, and that's what Shearson is asking you to do."<sup>32</sup> The



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## For nearly 10 years, the Georgia Supreme Court and the Georgia Court of Appeals have reached differing opinions regarding the applicability of the manifest disregard standard.

11th Circuit analyzed the appropriateness of overturning an arbitration award under such circumstances and “conclude[d] that a manifest disregard for the law ... can constitute grounds to vacate an arbitration decision.”<sup>33</sup> Nevertheless, the 11th Circuit emphasized the narrow scope of the manifest disregard standard and noted that it would not reverse arbitrators’ decisions for mere errors or misinterpretations of applicable legal principles.<sup>34</sup> The court only applied the standard in *Montes* because “the arbitrators recognized that they were told to disregard the law.”<sup>35</sup>

The most interesting aspect of *Montes*, however, is that in order to find that the arbitrators manifestly disregarded the law, the 11th Circuit had to presume that the arbitrators actually followed the advice of Shearson’s counsel.<sup>36</sup> Thus, the court found “manifest disregard” without any type of admission by the arbitrators that they consciously ignored the law.<sup>37</sup> Once the court determined that the arbitration decision was legally incorrect, the statements of Shearson’s counsel created a presumption that the arbitrators knowingly disregarded applicable legal principles. Because there was no evidence in the record to refute this presumption, the court vacated the arbitration award.<sup>38</sup>

A potential problem with the 11th Circuit’s presumption is that, if construed broadly, it could be abused by the courts.<sup>39</sup> Under such

a standard, courts could find that virtually any improper evidence creates a presumption of arbitral wrongdoing. If there is no evidence in the record to refute the presumption once it arises (which will usually be the case because arbitrators normally do not provide written opinions), the court could freely vacate the award. However, the *Montes* court emphasized that manifest disregard is a narrow ground for vacatur and only adopted the standard where the record showed evidence that one party explicitly urged the arbitrator to ignore the law.<sup>40</sup> Therefore, because such factual circumstances are rare, the likelihood of abuse in the 11th Circuit (i.e., applying *Montes* without legitimate evidence of arbitral wrongdoing) should be minimal.<sup>41</sup>

## GEORGIA’S TREATMENT OF THE MANIFEST DISREGARD STANDARD

For nearly 10 years, the Georgia Supreme Court and the Georgia Court of Appeals have reached differing opinions regarding the applicability of the manifest disregard standard. In 1994, the Georgia Court of Appeals accepted the principle that “an arbitrator’s decision must be upheld unless it is completely irrational or it constitutes a manifest disregard of the law.”<sup>42</sup> Two years later, however,

the Georgia Supreme Court stated that courts should strictly construe the Georgia Arbitration Code<sup>43</sup> and that the four statutory grounds listed under Section 9-9-13(b) of the Code were the exclusive grounds for vacating an arbitration award.<sup>44</sup> Accordingly, the Court announced that a court may only vacate an arbitration award if the rights of a party were prejudiced by: (1) corruption, fraud, or misconduct, (2) a partial arbitrator, (3) an arbitrator’s overstepping his authority, or (4) a court’s failure to follow procedure.<sup>45</sup>

In 2002, the Georgia Supreme Court issued another opinion on the validity of manifest disregard as a ground for vacatur. *Progressive Data Systems v. Jefferson Randolph Corp.* involved an arbitrator’s decision to award future licensing fees as damages for a breach of contract. Even though the arbitrator recognized that future licensing fees were an unenforceable penalty, he awarded them anyway.<sup>46</sup> The Georgia Court of Appeals vacated the award by saying that the arbitrator manifestly disregarded the law, and it held that Section 9-9-13(b)(3) of the Georgia Arbitration Code implicitly contained manifest disregard as a ground for vacatur.<sup>47</sup> However, the Georgia Supreme Court reversed the Court of Appeals’ decision, emphasizing that manifest disregard is not implicit within Section 9-9-13(b)(3), which section only allows courts to overturn arbitration awards when arbitrators overstep their authority.<sup>48</sup> The Georgia Supreme Court noted that “[o]verstepping the arbitrator’s authority ... only comes into play when an arbitrator determines matters beyond the scope of the case,” and does not include the concept of manifest disregard.<sup>49</sup>





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Despite the Georgia Supreme Court's efforts to exclude manifest disregard as a ground for vacating arbitration awards, the standard now exists in the state because of recent actions taken by the Georgia General Assembly. In January 2003, a bill was introduced in the Georgia House of Representatives to specifically include manifest disregard as one of the grounds for vacatur contained in Section 9-9-13(b). Although that bill later died in the Senate,<sup>50</sup> a second version successfully passed through both houses in April 2003. The governor then signed the bill into law on June 4, 2003,<sup>51</sup> making Georgia the first state to legislatively adopt the manifest disregard standard. Therefore, effective July 1, 2003, "manifest disregard" is a valid ground for vacating arbitration awards in Georgia.

Because the General Assembly has enacted manifest disregard as part of Georgia's Arbitration Code, Georgia courts must now decide how to apply the standard to the vacatur of arbitration awards. The language of the amendment to the Georgia Arbitration Code does not give courts any instruction on how to do so. The Code simply states that courts should overturn arbitration awards if the rights of a party were prejudiced by "[t]he arbitrator's manifest disregard of the law."<sup>52</sup> Therefore, Georgia courts are free to interpret the breadth of the new manifest disregard standard.

## WHAT TO EXPECT

Considering the issues raised in state and federal courts over how to apply manifest disregard as a ground for vacatur, no clear

guidelines exist for how Georgia courts should treat the General Assembly's recent amendment to the Arbitration Code. One might argue that if the General Assembly had wanted to constrain arbitrators to be strictly bound by applicable law, the amendment could have been much more intentional. For example, the General Assembly could have enacted a specific ground for vacatur that the arbitrators "failed or refused to follow applicable law." Instead, the legislature incorporated into the General Arbitration Code a checkered judicial doctrine most often interpreted by other state and federal courts to have a limited reach.<sup>53</sup> Indeed, previous 11th Circuit and Georgia Court of Appeals decisions dealing with the issue of manifest disregard have attempted to place severe limitations on a court's authority to review the merits of an arbitrator's decision, and these limitations may well be instructive as to how Georgia courts will treat the standard.

If Georgia courts continue with this trend and treat the manifest disregard standard as they have in the past, the scope of the manifest disregard doctrine in Georgia will be very limited. 🍷



**John W. Hinchey** is a partner at King & Spalding LLP and leads the firm's Construction and Procurement Practice Group. His experience includes four years in public law, having served as Assistant Attorney General in Georgia, and as a special counsel to two governors' commissions to study and propose reforms to the judicial system.



**Thomas Burch** is an associate at King & Spalding LLP. He earned his J.D. from Florida State University.

## Endnotes

1. See Federal Arbitration Act, 9 U.S.C. §10 (2000). The FAA only includes the following as grounds for vacatur: fraud or corruption, partiality of the arbitrator, failure to follow applicable procedures, and overstepping the arbitrator's authority. 9 U.S.C. § 10(a) (2000). The federal circuits are split on whether parties may contractually expand judicial review under the FAA. See generally Victoria L. C. Holstein, *Co-opting the Federal Judiciary: Contractual Expansion of Judicial Review of Arbitral Awards*, 12 WORLD ARB. & MEDIATION REP. 276 (2001).
2. See *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 n5 (1st Cir. 1990); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 380 (3d Cir. 1995); *Remmey v. Paine Webber, Inc.* 32 F.3d 143, 149 (4th Cir. 1994); *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 758-59 (5th Cir. 1999); *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992); *Lee v. Chica*, 983 F.2d 883 (8th Cir. 1993); *Michigan Mut. Ins. v. Unigard Sec. Ins.*, 44 F.3d 826, 832 (9th Cir. 1995); *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995); *Montes v. Shearson Lehman Brothers*, 128 F.3d 1456, 1461-62 (11th Cir. 1997); *Sargent v. Paine Webber Jackson & Curtis, Inc.* 882 F.2d 529, 532-33 (D.C. Cir. 1989).
3. See *Swentor v. Swentor*, 520 S.E.2d 330, 338 (S.C. Ct. App. 1999) ("The court may vacate the award only upon the establishment of one of the grounds set forth in section 15-48-130, or the rarely applied non-statutory ground of 'manifest disregard or perverse misconstruction of the law.'"); *Geissler v. Sanem*, 949 P.2d 234, 237-38 (Mont. 1997) (accepting manifest disregard as a well reasoned approach to vacat-



- ing arbitration awards); *Wichinsky v. Mosa*, 847 P.2d 727, 731 (Nev. 1993) (“When an arbitrator manifestly disregards the law, a reviewing court may vacate an arbitration award”); *Garrity v. McCaskey*, 612 A.2d 742, 746-47 (Conn. 1992) (accepting manifest disregard as a ground for vacatur); *Board of Educ. v. Prince George’s County Educator’s Ass’n*, 522 A.2d 931, 938-41 (Md. 1987) (passing on the question of whether manifest disregard is a standard for vacatur under statutory law but stating that “[u]nder Maryland common law standards for reviewing arbitration awards, however, we hold that an award is subject to being vacated for a ‘palpable mistake of law or fact ... apparent on the face of the award’ or for a ‘mistake so gross as to work manifest injustice.’”).
4. 1 DOMKE ON COMMERCIAL ARBITRATION § 33.08 (2003) [hereinafter DOMKE].
  5. 346 U.S. 427, 436 (1953) *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *see also* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (approving of the manifest disregard standard in *Wilko*).
  6. *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1463 (10th Cir. 1995).
  7. DOMKE, *supra* note 4, at § 33.08; *see also* 4 IAN R. MACNEIL, ET AL., FEDERAL ARBITRATION LAW §40.7.1 (Supp. 1999) [hereinafter MACNEIL ET AL.] (“It is nearly impossible to find FAA arbitration decisions where application of the doctrine has resulted in upsetting of an award.”).
  8. *See* Michael P. O’Mullan, Note, *Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard*, 64 FORDHAM L. REV. 1121, 1127 (1995).
  9. *Compare* *Advest Inc. v. McCarthy*, 914 F. 2d 6, 8-9 (1st Cir. 1990) (stating that the First Circuit will enforce the manifest disregard standard where it is clear that the arbitrator knew the applicable law and ignored it) *with* *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (vacating an arbitration award based on the arbitrator’s manifest disregard of the law and facts).
  10. 568 S.E.2d 474, 475 (Ga. 2002).
  11. *Id.* at 475.
  12. *See* GA. HB 792 (2003).
  13. GEORGIA GENERAL ASSEMBLY: SIGNED BY THE GOVERNOR LIST, available at [http://www.legis.state.ga.us/legis/2003\\_04/leg/govsign.html](http://www.legis.state.ga.us/legis/2003_04/leg/govsign.html) (last visited June 23, 2003).
  14. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 740 (1996).
  15. *Id.* at 741.
  16. *See* *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972) (stating that forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process achieves).
  17. *See* *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (“An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it.”).
  18. *See id.* at 1459-60 (“By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).
  19. *See* *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 761 (5th Cir. 1999); MACNEIL ET AL., *supra* note 7, at § 40.7.2.1.
  20. DOMKE, *supra* note 4, at § 33.08.
  21. *Id.* at § 33.08; *see also* MACNEIL ET AL., *supra* note 7, at § 40.7.2.1 (expounding on the principles of the manifest disregard standard).
  22. *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 (1st Cir. 1990) (quoting *United Paper Workers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987)).
  23. *See* DOMKE, *supra* note 4, at § 33.08.
  24. *Id.*; *but see* *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 204 (2d Cir. 1998) (vacating an arbitration award where the arbitrator manifestly disregarded the evidence).
  25. *See* MACNEIL ET AL., *supra* note 7, at § 40.7.2.1.
  26. *See id.* at § 40.7.2.5 (discussing the degree to which courts should allow arbitrators to supersede applicable law with their own ideas of justice).
  27. *See, e.g.,* *Warbington Const., Inc. v. Franklin Landmark LLC*, 66 S.W.3d 853, 859 (Tenn. Ct. App. 2001) (refusing to adopt manifest disregard as a basis for vacating arbitration awards).
  28. *See* *Williams v. Cigna Financial Advisors*, 197 F.3d 752, 759 (5th Cir. 1999) (“Accordingly, each of the other numbered federal circuit courts and the D.C. Circuit have recognized manifest disregard of the law as either an implicit or nonstatutory ground for vacatur under the FAA.”). *See also* cases cited *supra* note 2.
  29. *See, e.g.,* *Advest, Inc. v. McCarthy*, 914 F.2d 6, 9 n5 (1st Cir. 1990) (“The lane of review that has opened out of this [manifest disregard] language is a judicially created one, not to be found in 9 U.S.C. § 10.”).
  30. *See, e.g.,* *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 850-51 (6th Cir. 1996) (“Although not mentioned in the statute itself, an award may be vacated under the Federal Arbitration Act if the arbitrator exhibits a manifest disregard of the law.”); *Progressive Data Systems v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (Ga. 2002) (Carley, J., dissenting) (“I strongly believe that the grounds set forth in that statute implicitly incorporate the concept of ‘manifest disregard of the law.’”).
  31. *Montes v. Shearson Lehman Brothers*, 128 F.3d 1456, 1458 (11th Cir. 1997) (recognizing that the 11th Circuit previously adopted “arbitrary and capricious,” and “contrary to public policy” as grounds for vacating an arbitration award before accepting the manifest disregard standard).
  32. *Id.* at 1459.
  33. *Id.* at 1461-62.
  34. *Id.* at 1460-62.
  35. *Id.* at 1462.
  36. Stephen L. Hayford, *Reining in the “Manifest Disregard” of the Law Standard: The Key to Restoring Order to the Law of Vacatur*, 1998 J. DISP. RESOL. 117, 129 (1998) [hereinafter Hayford II].



37. *Id.*
38. *See Montes*, 128 F.3d at 1461-64.
39. *See Hayford II*, *supra* note 36, at 129-31 (discussing a court's ability to "bootstrap" its way to finding manifest disregard of the law).
40. *See Montes*, 128 F.3d at 1460-62.
41. *But see Hayford II*, *supra* note 36, at 128-32 (arguing that the 11th Circuit's decision in *Montes* is a broad application of the manifest disregard standard and that it will give courts too much discretion in reviewing arbitration awards).
42. *Amerispec Franchise v. Cross*, 452 S.E.2d 188, 190 (Ga. Ct. App. 1994) (citation omitted).
43. GA. CODE ANN. § 9-9-1 et seq. (2002).
44. *Greene v. Hundley*, 468 S.E.2d 350, 352 (Ga. 1996); *see also Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474, 475 (Ga. 2002) (holding that Georgia courts cannot vacate an arbitrator's award based on manifest disregard of the law).
45. *See Greene*, 468 S.E.2d at 352 (citing GA. CODE ANN. § 9-9-13(b)(1)-(4) (2002)).
46. *See Progressive Data Systems*, 568 S.E.2d at 474.
47. *Jefferson Randolph Corp. v. Progressive Data Systems*, 553 S.E.2d 304, 309 (Ga. Ct. App. 2001) *rev'd by Progressive Data Systems, Inc. v. Jefferson Randolph Corp.*, 568 S.E.2d 474 (Ga. 2002).
48. *Progressive Data Systems*, 568 S.E.2d at 475.
49. *Id.*
50. *See* GA. HB 91 (2003).
51. *See* GA. HB 792 (2003); GEORGIA GENERAL ASSEMBLY: SIGNED BY THE GOVERNOR LIST, *available at* [http://www.legis.state.ga.us/legis/2003\\_04/leg/govsign.html](http://www.legis.state.ga.us/legis/2003_04/leg/govsign.html) (last visited June 23, 2003).
52. *See* GA. HB 792 (2003).
53. Most courts admit that manifest disregard is a limited ground for vacatur. Some, however, have adopted a very broad interpretation.

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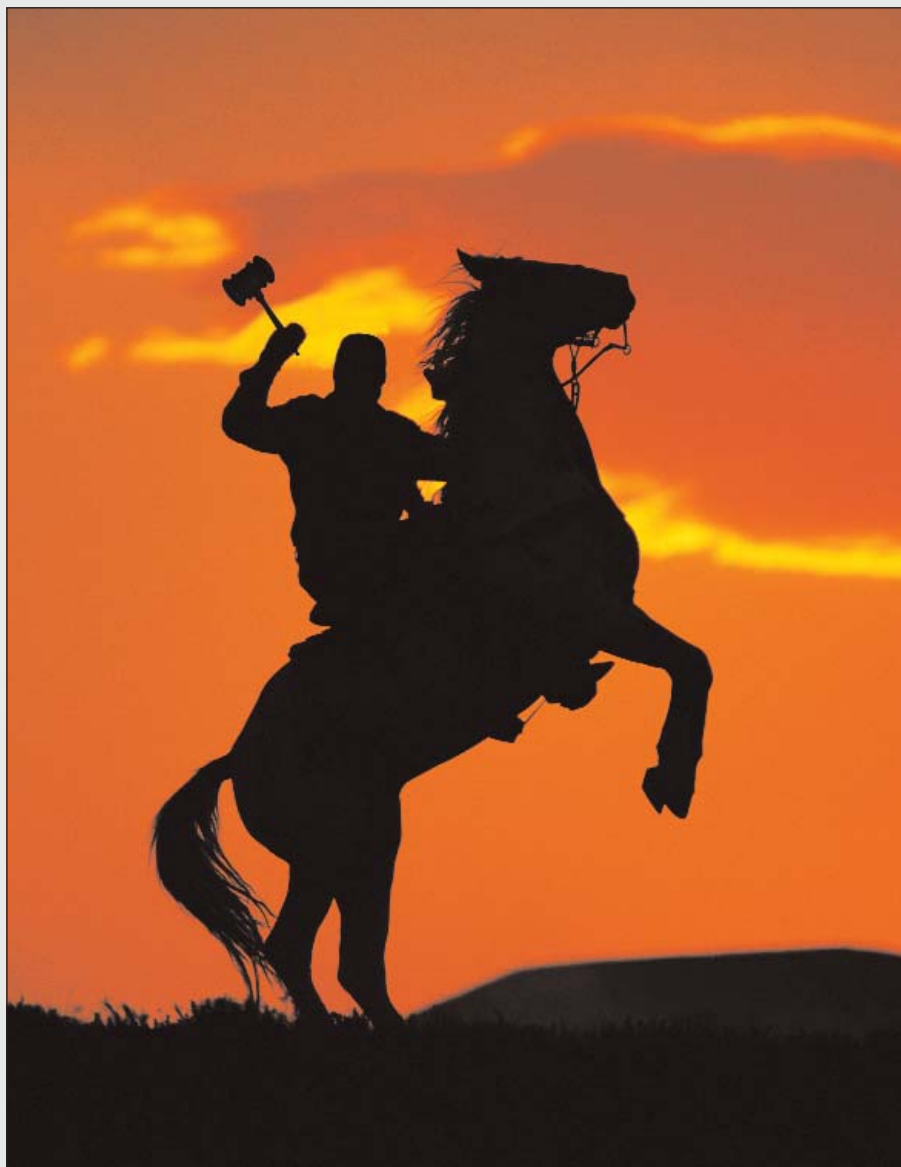
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## Administrative Law Judges “Ride the Circuit” to Provide Georgians with a Day in Court

By Judge Lois F. Oakley



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times, an unconventional location is required to provide Georgians with a “day in court.” Whether the courtroom is a living room or a nursing home bedside, OSAH judges go the distance to provide Georgians with an impartial and efficient forum to resolve disputes involving state government.

## ORIGIN OF OSAH

OSAH judges travel throughout the state to preside over administrative hearings. This practice is reminiscent of those judges who “rode the circuit” in days past. Interestingly, OSAH and its cadre of administrative law judges is a relatively modern creation.

In 1994, OSAH was created by the legislature as a quasi-judicial body within the executive branch of state government. Prior to this innovative legislation, many state agencies provided due process internally. Agency employees were charged with reviewing the decisions of their coworkers.

With the establishment of OSAH, the legislature provided Georgians with an independent entity for the review of disputed agency decisions. This central panel of administrative adjudicators was created to provide a structural and physical separation between agency decision makers and the review of those decisions.

Widely perceived as fostering impartiality, accountability and efficiency, the “central panel” model of administrative adjudication has been adopted by 26 states. Enabling legislation is pending in two additional states. Steve Gottlieb, the executive director of the Atlanta Legal Aid

Society, has remarked, “Many of our clients appeal actions of state agencies. Atlanta Legal Aid feels that it is far preferable for the administrative law judges at OSAH to conduct hearings on these appeals rather than employees of the very agency whose action is being contested.”

## OSAH CASES

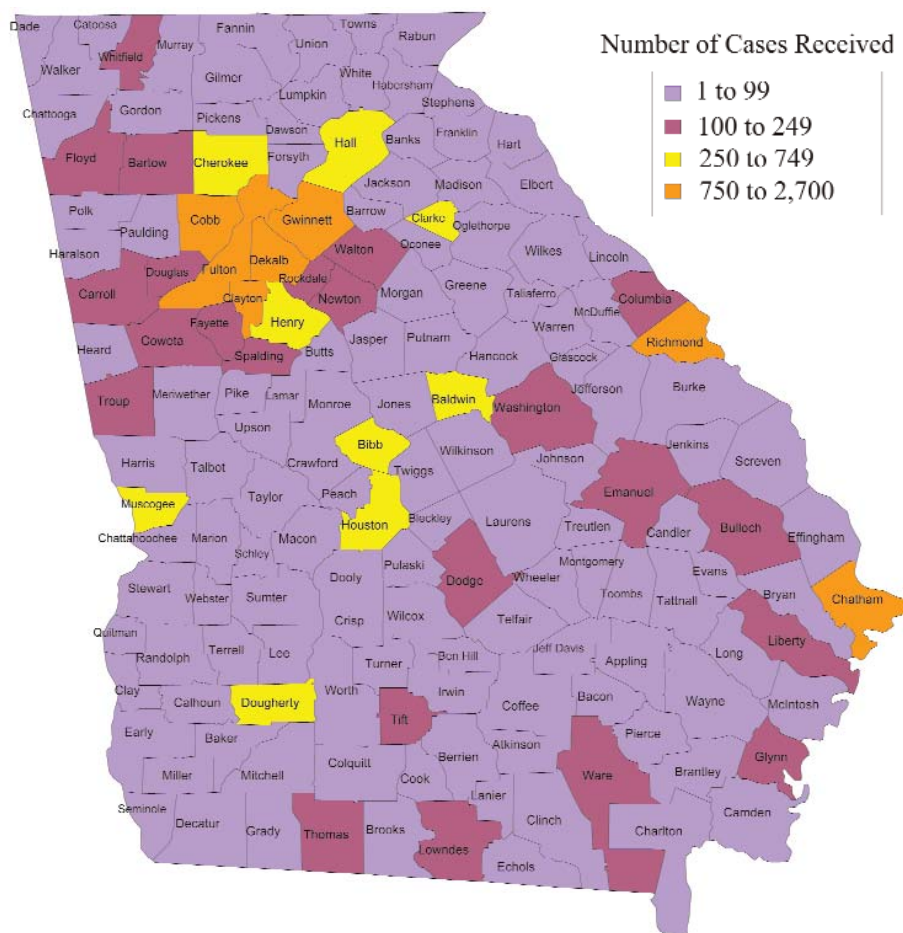
Throughout the state, OSAH judges adjudicate disputed agency decisions. The provision of accessible, neutral hearing sites in the state’s 159 counties is a daunting challenge. OSAH continues to benefit from the use of generously donated courtrooms throughout Georgia in which its traveling judges conduct hearings.

Efficiency, as well as impartiality, is a hallmark of administrative adjudication in Georgia. At any one time, only a fraction of OSAH’s pending cases have been awaiting disposition for more than 90 days. Moreover, the average case is adjudicated in less than six weeks.

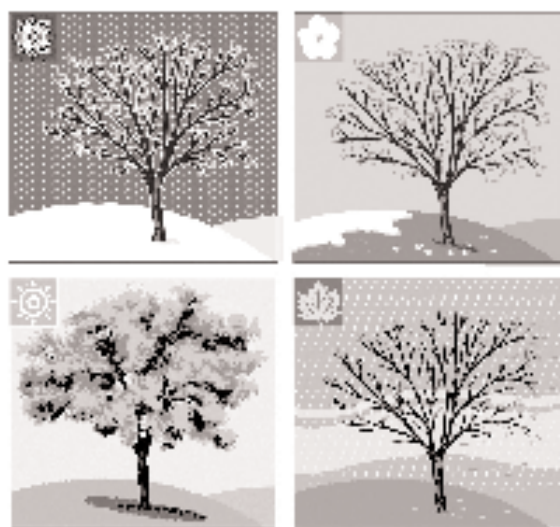
Much of OSAH’s case load involves pro se litigants. These cases challenge OSAH judges with the dual tasks of active listening and full development of the record. OSAH judges are vested with an important responsibility – that is, the creation and maintenance of a hearing environment in which the smallest, most inarticulate voice is respectfully heard.

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count, OSAH was referred over 300 types of cases. Much of the case load consists of administrative appeals of license suspensions, public assistance determinations, and child support commitments.

OSAH judges routinely adjudicate contentious matters involving complex and sensitive issues. These cases include resolution of environmental issues, professional licensing complaints, special education matters, labor and employment concerns, and election disputes, as well as real estate, tax and consumer fraud matters. These cases typically involve extensive prehearing practice, extended hearings and lengthy written decisions.

## **MEDIATION AND ALTERNATIVE DISPUTE RESOLUTION**

Parties appearing before OSAH are encouraged to participate in alternative dispute resolution. Mediations and other alternative dispute resolution techniques are less formal and are imbued with the flexibility to produce meaningful resolution of disputes. OSAH employs several administrative law judges who are certified as mediators by the Georgia Office of Dispute Resolution.

## **OSAH JUDGES**

OSAH judges bring many talents to the task of administrative adjudication.

**While administrative law judges are sometimes referred to as the “hidden judiciary,” OSAH judges have implemented nationally recognized programs to improve administrative adjudication in Georgia.**

## **OSAH provides a structure for ensuring that state agencies operate in accordance with established laws, rules and procedures.**

The diversity of professional experiences shared by OSAH administrative law judges is a valuable resource. As you may imagine, the analytical approach of a former prosecutor is, at times, quite different from the perspective of a former defense attorney. The dialogue between a former legal aid attorney and a retired private practitioner can prove insightful to both. Provocative exchanges among OSAH judges strengthen the thoughtfulness of the administrative adjudication process in Georgia.

OSAH judges mirror the cultural and ethnic diversity of the state. The diversity among the OSAH judges is an important facilitator of empathetic listening. The relational skills that develop from this diversity benefit those Georgians who voice grievances about their state government to OSAH judges. OSAH employs both judges and staff who are competent Spanish speakers.

While administrative law judges are sometimes referred to as the “hidden judiciary,” OSAH judges have implemented nationally recognized programs to improve administrative adjudication in Georgia. In 2002, OSAH piloted a

program to expedite the establishment of paternity and child support orders. The program has met with enormous success and has been recognized in the local press as an innovative process benefiting hundreds of children without placing a burden on the judicial system.

Judicial outreach to communities across the state is an expectation of each OSAH judge. Recently, OSAH launched a collaborative effort with the assistance of the Governor’s Office of Highway Safety to combat the destructiveness of drinking and driving. Georgia middle school students will benefit from an entertaining program about the dangerous consequences of destructive driving decisions.

## **PRACTICE TIPS**

Hearings held by OSAH judges are governed by the Georgia Administrative Procedures Act and OSAH rules. OSAH rules provide for a practice similar to that provided by the Civil Practice Act, and are available for review at OSAH’s Web site, [www.ganet.org/osah](http://www.ganet.org/osah). These rules are designed to provide uniformity, flexibility and ease of use for litigants. Model forms are also available at the OSAH Web site, and answers to frequently asked questions appear in both English and Spanish.

Complex cases may produce extensive prehearing motions. In certain circumstances, OSAH judges require the exchange of documents and witness lists prior to an evidentiary hearing. Subpoenas are avail-




able to compel attendance at OSAH hearings. The rules of evidence applied in OSAH hearings are similar to those in non-jury civil trials.

## NATIONAL RECOGNITION

The Office of State Administrative Hearings has attracted national recognition. Its novel approaches to case management were the topic of a continuing judicial education seminar at the Seattle University School of Law in July 2003. In September 2003, OSAH hosted a national conference for chief state administrative judges to share its innovative case management practices. Plans are under way for the presentation of a workshop at the

2004 annual meeting of the American Bar Association in Atlanta next August.

## FULFILLING ITS MISSION

In 1994, the Georgia General Assembly created a mechanism to provide Georgia citizens with confidence in the integrity of state government. OSAH provides a structure for ensuring that state agencies operate in accordance with established laws, rules and procedures. Also, OSAH provides an impartial forum in which parties may contest actions taken by state agencies in a fair, respectful, timely and professional manner. 



**Judge Lois Oakley** has served as the chief state administrative law judge for the Georgia Office of

State Administrative Hearings since 2000. Under her direction, this state agency has become a high-performing organization providing excellence in customer service to Georgia. She has 30 years of practical legal experience in the private and public sectors — 20 years of which have been in the field of administrative adjudication. She has served as both an attorney in private practice as well as an assistant attorney general for the state.



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## Alleviating the Pain of Electronic Discovery:

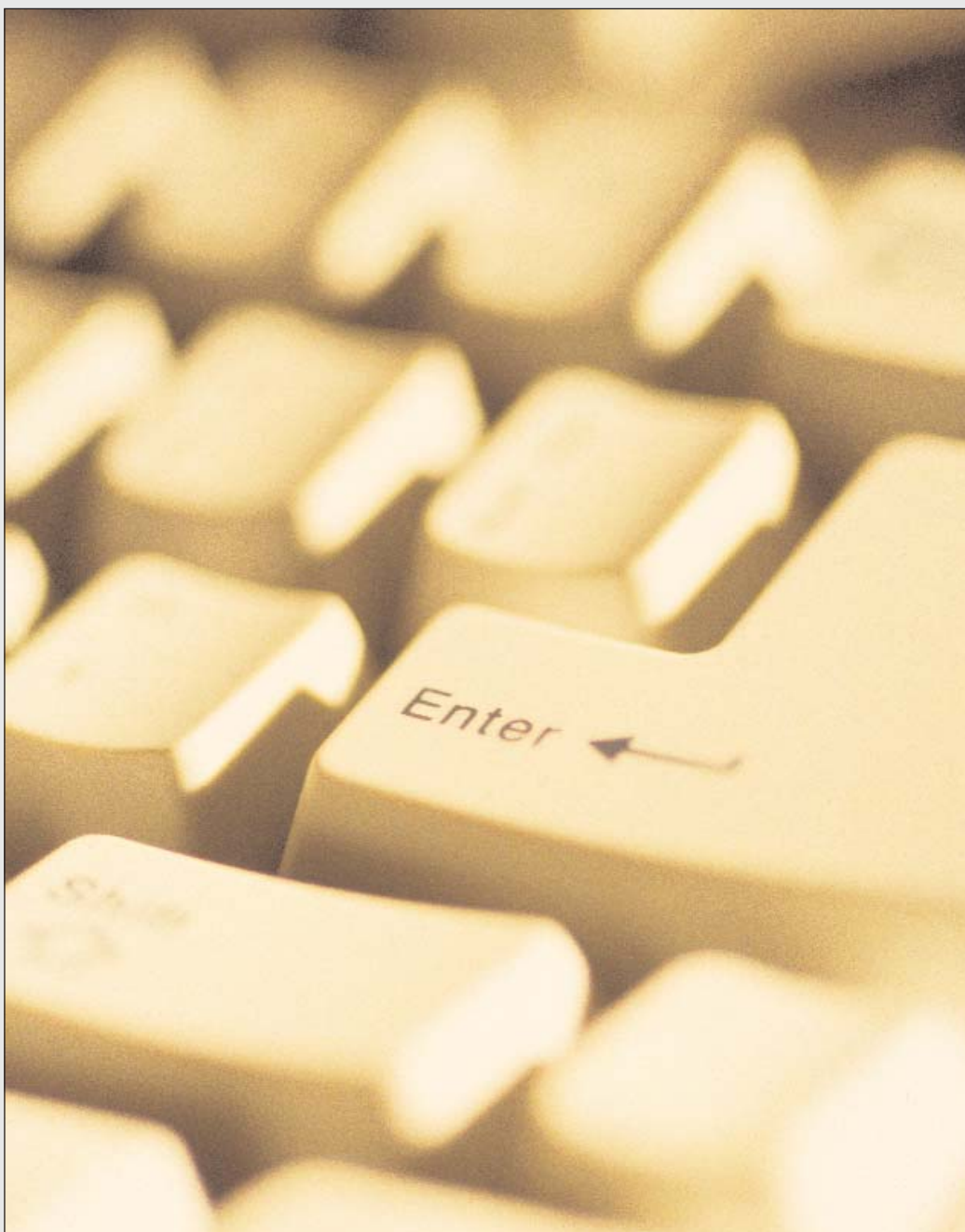
### Prospective Consideration of the Zubulake Factors

By John Livingstone

**T**he use of computers has created a new universe of discoverable documents.

Businesses now use computers to create and store documents, send e-mails, and make business deals. Not surprisingly, litigants are becoming increasingly aware of the information hiding in these electronic files and the treasures to be found there. But because of the potential amount of data, responding to a request for electronic data can be costly, time-consuming, and difficult for the responding party, begging the question, "Who should pay for all of this?"

With the advent of electronic data discovery, the answer to this question dwells in an evolving body of law, which tries to identify instances where the costs of electronic discovery requests should be shifted from the responder to the requestor. Arguably, nowhere has this issue attracted more attention than in a string of recent cases in the United States District Court for the Southern District of New York, captioned





*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003) (Zubulake I), *Zubulake v. UBS Warburg LLC*, 2003 WL 21087136 (S.D.N.Y. May 13, 2003) (Zubulake II),<sup>1</sup> *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003) (Zubulake III), and *Zubulake v. UBS Warburg LLC*, 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003) (Zubulake IV).

Zubulake sued UBS for gender discrimination, failure to promote, and retaliation, all under federal, state and city law. To support her claim, she sought discovery of electronic data only accessible through data retrieval of UBS's backup tapes. UBS argued that Zubulake should pay for the costs of restoring and producing these tapes. Using the facts in *Zubulake* as a "textbook example of the difficulty in balancing the competing needs of broad discovery and manageable costs,"<sup>2</sup> the court created a framework that identifies (1) when a court should consider cost-shifting and (2) when the allocation of electronic discovery costs should shift from the respondent to the requesting party.

## WHEN TO CONSIDER COST-SHIFTING?

Under the traditional presumption, the responding party bears the expense of complying with discovery requests. Fed. R. Civ. P. 26(c), however, provides that a responding party may request a protective order for discovery requests that run afoul of rule 26(b)(2), which places limitations on the scope of discovery. A protective order may condition discovery on the requesting party's paying some or all of the discovery costs. Thus, the first question in any cost-shifting analysis is whether to consider cost-shifting at all, that is, is

Whether responding to the requested electronic discovery is unduly burdensome or prohibitively expensive turns primarily on whether the electronic data is kept in an accessible or inaccessible format.

the discovery request unduly burdensome or cost prohibitive?

Whether responding to the requested electronic discovery is unduly burdensome or prohibitively expensive turns primarily on whether the electronic data is kept in an accessible or inaccessible format. To decide this, "it is necessary to thoroughly understand the responding party's computer system, with respect to both active and stored data."<sup>3</sup> This allows the court to classify the electronic data into five categories: (1) active, online data, (2) near-line data, (3) offline storage/archives, (4) backup tapes, and (5) erased, fragmented, or damaged data.<sup>4</sup> The first three categories of data are typically considered accessible, while categories (4) and (5) are typically considered inaccessible.<sup>5</sup> Because electronic data in categories (4) and (5) is not readily useable, production of the data is potentially burdensome and expensive. Thus, the court found that cost-shifting may be considered only when inaccessible data, such as back-up tapes and erased, fragmented, or damaged data, is sought.<sup>6</sup>

## WHEN IS COST-SHIFTING APPROPRIATE?

After deciding that cost-shifting may be considered, the court then created a seven-factor test to determine whether cost-shifting is appropriate. This seven-factor test is "designed to simplify applica-

tion of the Rule 26(b)(2) proportionality test in the context of electronic data and to reinforce the traditional presumptive allocation of costs."<sup>7</sup> The following seven factors should be considered, "weighted more or less in the following order:"

- The extent to which the request is specifically tailored to discover relevant information;
- The availability of such information from other sources;
- The total cost of production, compared with the amount in controversy;



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- The total cost of production, compared with the resources available to each party;
- The relative ability of each party to control costs and its incentive to do so;
- The importance of the issues at stake in the litigation; and
- The relative benefits to the parties of obtaining the information.<sup>8</sup>

The first two factors together constitute the “marginal utility test” and indicate how useful the discovery will be to deciding the issues in the case. These two factors are weighted the most heavily in the cost-shifting analysis, because they address the relevance of the requested discovery.<sup>9</sup> The more likely it is that the requested information contains information relevant to a claim or defense, the more fair it is that the responding party search at its own expense, and vice versa.

The second group of factors includes factors (3), (4) and (5) and addresses cost issues. The second group of factors asks the questions: “How expensive will this production be?” and, “Who can handle that expense?”<sup>10</sup> Factor (6) addresses the importance of the issues and “will only rarely come into play,”<sup>11</sup> while factor (7) is the least important, as “it is fair to presume that the response to a discovery request generally benefits the requesting party.”<sup>12</sup>

While these factors may be tallied mathematically, they are merely a guide to allocating discovery costs. The “precise allocation is a matter of judgment and fairness rather than a mathematical consequence of the seven factors discussed above. Nonetheless, the analysis of those factors does inform the exercise of discretion.”<sup>13</sup>


## PRACTICE GUIDELINES

Neither Georgia state courts nor federal courts in the 11th Circuit have addressed the issue of allocation of electronic discovery costs, making it an issue of first impression in Georgia. While *Zubulake* is not controlling in the 11th Circuit or in Georgia state courts, its seven-factor test appears well reasoned, and, at the very least, will be persuasive in any such analysis, even in state court.<sup>14</sup> In particular, factors one through five of the *Zubulake* test, which address the marginal utility test and expense issues, are likely to weigh heavily in any cost shifting analysis. Accordingly, practitioners should consider the guidelines provided by *Zubulake* in requesting and responding to discovery requests for electronic data.

If you are the requesting party, some strategies may help you reduce your chances of picking up part of the discovery tab (the court required *Zubulake* to pay 25 percent of the discovery tab, totaling over \$40,000).<sup>15</sup> For example, narrowly tailor your discovery request to target only relevant information. Initially, request only forms of accessible data, for which cost-shifting is inappropriate. Use this data to demonstrate the relevance and importance of obtaining inaccessible data. Make an effort to keep the costs of responding to your production request low as compared with the amount in controversy. Do not waste your time requesting costs associated with reviewing the data once it is in accessible form, because once the data has been restored to an accessible format and responsive documents located, cost-shifting is no longer appropriate.

The responding party is not without strategies either.<sup>16</sup> For example, as the respondent, argue that the

requested electronic data lacks relevance and the information is available from accessible sources. Demonstrate that you have not unnecessarily run up production costs. If the amount of the requested data is large, request that a small sample be restored.<sup>17</sup> Then try to demonstrate, from within the sample, the lack of relevant information, the high costs associated with restoring the electronic data, and the availability of the data from other, accessible sources. Lastly, argue that if any of the seven factors weighs towards cost-shifting, at least 25 percent of the costs should be shifted to the requesting party, as in *Zubulake*.

Consideration of the *Zubulake* factors before initiating discovery requests for electronic data can alleviate the headache of potential discovery disputes and reduce the costs of discovery for both parties. 



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## Endnotes

1. This case does not discuss electronic discovery.
2. *Zubulake I*, 217 F.R.D. at 311.
3. *Id.* at 324.
4. *Id.* at 318-19. The court provides a definition for each category of data, which is helpful to the uninitiated. *Id.*
5. *Id.* at 319-20.
6. *Zubulake III*, 216 F.R.D. at 284.
7. *Id.* The Court modified an 8-factor test articulated in *Rowe*



Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002), to comport with the FRCP presumption that the responding party bear the costs of responding to a discovery request. The Court felt, as had commentators, that the Rowe test improperly favored the responding party, resulting in an allocation of costs to the requesting party. Zubulake III, 216 F.R.D. at 284.

8. Zubulake I, 217 F.R.D. at 322.
9. *Id.* at 323.
10. *Id.*
11. *Id.*
12. *Id.*
13. Zubulake III, 216 F.R.D. at 289. In fact, in Zubulake, factors one through four weighed against cost-shifting, factors five and six were neutral, and factor seven favored cost-shifting. Despite the majority of factors weighing against cost shifting, Zubulake was required to pay for a portion of UBS's discovery

costs. The Court found that, because the seven factor test indicated that UBS should pay the lions share, the percentage assigned to Zubulake must be less than fifty percent. However, because the success of the discovery request is somewhat speculative, any cost that can fairly be assigned to Zubulake is appropriate and ensures that UBS's expenses will not be unduly burdensome. The Court found that a twenty-five percent assignment of electronic discovery related costs to Zubulake was appropriate in these circumstances. *Id.*

14. In Georgia, if discovery provisions are literally and in substance the same as the rules of the Federal Rules of Civil Procedure, "the decisions of the federal courts applying and interpreting those rules, while not absolutely binding on Georgia courts, must of necessity be looked to as highly respectable and persuasive authority." Atlantic Coast Line

R.R. Co. v. Gause, 156 S.E.2d 476, 479-80 (Ga. App. 1967). Georgia Code Annotated § 9-11-26(c) (2003), prescribing limitations on discovery, is virtually identical to and, in substance, the same as FRCP 26(c).

15. *Id.* at 289-90.
16. While this article addresses cost allocation in electronic discovery disputes, Zubulake IV also describes the duty of a party to maintain electronic data once litigation commences and the penalties for violations thereof. Thus, prospectively, if electronic discovery will be an issue in a case, Zubulake IV provides guidelines for the protection of electronic data, which may help your clients avoid discovery sanctions.
17. In Zubulake, UBS identified 94 backup tapes to be restored. The Court ordered 5 of the 94 tapes restored and then performed the seven-factor test based on this smaller sample. Zubulake I, 217 F.R.D. at 324.



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## Standing Orders: Filling the Gap Between the Civil Practice Act and the Practice

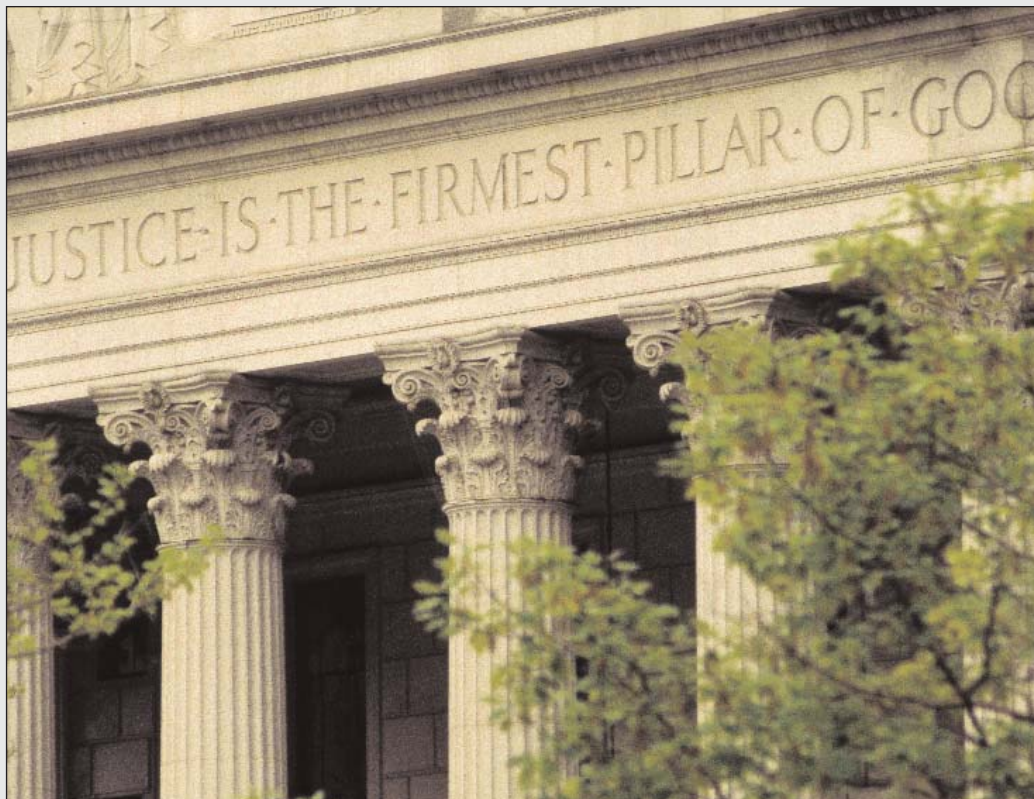
By Cary Ichter

“If we desire respect for the law, we must first make the law respectable.” — Judge

Louis Brandeis

Even as lawyers, we tend to take for granted the manner in which this country has largely privatized the enforcement of civil and administrative law. In the United States, much of what is accomplished in other industrialized nations through governmental bureaucracies in the areas of antitrust, trade regulation, consumer protection, civil rights, securities regulation and intellectual property is accomplished privately through litigation and discovery.<sup>1</sup>

The American system of civil justice provides private litigants with the power to enforce and vindicate not only their own rights, but also constitutional, civil and statutory rights of others. This power would be largely meaningless in the absence of some proxy for the investigative powers of the state. That power is delivered to private litigants through the discovery process, but it is only effective when the laws governing discovery are enforced by the courts.



### DISCOVERY ABUSE

In 1966, the Georgia legislature passed the Georgia Civil Practice Act. The purpose of the act was to facilitate the “just, speedy and inexpensive determination of every action.”<sup>2</sup> In the years that have passed since the CPA’s enactment, civil litigators, an admittedly clever and wily bunch, have made much mischief with the CPA.

The effect of this mischief on Georgia’s civil justice system

inevitably leads to a number of questions: Has the CPA achieved its stated goals? Is civil litigation handled in a speedy and inexpensive manner today? And how do the CPA’s failures frustrate the ability of private litigants to successfully vindicate the larger social goal of enforcing laws that are neither self-executing nor enforced by the state?

Few would dispute that the civil justice system and the CPA do not currently deliver swift and inexpensive



justice in many — perhaps most — cases, and most informed observers agree that the primary source of delay and expense is the discovery process.<sup>3</sup> Study after study has confirmed that practitioners and jurists agree on at least this much: discovery abuse is a major cause of delay and expense in litigation.<sup>4</sup>

Indeed, those who operate in the litigation trenches overwhelmingly agree that discovery abuse exists and that the courts are not doing enough about it. According to Professor Wayne Brazil, 77 percent of attorneys interviewed used overly broad discovery as a tactical weapon in litigation — and those are just the folks who fessed up.<sup>5</sup>

On the flip side of onerous discovery requests is the litigant who, absent a holy war, refuses to provide meaningful information or who asserts every known objection to every discovery request in an exercise that appears to be more focused on employing the block and copy function of their computer than on responding to the proponent's requests in any meaningful way. Anyone unfamiliar with these tactics need only serve a set of interrogatories in virtually any commercial case; as a general proposition, you could derive more facts from the interrogation of a mannequin.

While it is easy to find statistical support for the notion that more is made of discovery abuse than is justified, those statistics — just like those that your adversary always confuses and misuses — are taken out of context. If you want to find discovery abuse, follow the money. Studies have consistently found that behavior commonly described as “discovery abuse” is prevalent — as in epidemic — in cases involving large sums of money. In short, the high-

er the stakes, the more likely one is to encounter discovery hijinks.<sup>6</sup>

## WHO IS TO BLAME?

So, who is to blame? That's easy: the lawyers. Of course, virtually everyone involved in the process is a lawyer: the legislators who wrote the laws; the litigators who manipulate the rules; and the judges who are supposed to enforce the rules are lawyers. But the purpose of this article is to suggest that we fix the problem rather than fix the blame.

Discovery abuse is in the eye of the beholder. Ask any litigator about the problem, and they will generally tell you that discovery abuse is something their opponents engage in, and it is just awful. Many have suggested that better case management is the silver bullet that will reduce costs and delay in litigation, but more rules are not a substitute for enforcement of the rules already in place.

Case management only works when judges are willing to do the managing. More reporting, more paper and more deadlines do not reduce cost or increase judicial involvement in the process; at best, they simply increase the courts' access to information. Pointless access to information accomplishes nothing, other than to keep the courts awash in paper,

which makes the process no more fair or efficient.

In tort law, the last clear chance doctrine holds that the party who had the last reasonable opportunity to avoid an accident or injury and who fails to do so can be held solely responsible for the occurrence, notwithstanding the victim's own contributory negligence. In the case of the administration of the civil justice system, the last clear chance to stop discovery abuse resides with the courts. Legislators have provided a template for administration of the civil justice system. Litigators, being client-dedicated actors within the system, are incentivized to do all they can to pervert the system when doing so benefits their clients. It therefore is left to the judges to ensure that the system delivers on the promise of the CPA: a “just, speedy and efficient” system.

Unfortunately, under the last clear chance doctrine, the courts would be found liable. The Public Law Research Institute reported the following on the opinions of those most schooled in the process — the lawyers:

The judiciary also plays a role in facilitating discovery abuse through its failure to enforce the rules and impose sanctions. Study after study has confirmed

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that judges are reluctant to impose meaningful sanctions on errant lawyers and, even when they are so disposed, the sanction is often untimely and amounts to little more than a slap on the wrist. Professor Brazil reports that, depending on the kind of case, 50 to 90 percent of all lawyers interviewed reported dissatisfaction with the courts regarding the assistance received in resolving discovery problems and favored greater court involvement, while 70 to 90 percent favored more frequent use of sanctions.<sup>7</sup>

Why is this kind of court intervention necessary? Why must judges force lawyers to play nice and recognize their duty to the process? Why can't we all just be professional and let the system operate the way it was designed? Can't we all just get along? The answer is no.

"[D]iscovery has been engrafted onto a thoroughly adversarial process...[and a] system that promotes adversarial resolution of disputes through the efforts of client dedicated legal representatives cannot be expected to easily accommodate the process that mandates disclosure of vital case-related information through the simple expediency of one party making a request to another."<sup>8</sup>

Absent eliminating discovery altogether or changing the nature of lawyers' duties, client-centric advocates are dutybound — both at trial and in the discovery process — to zealously represent their clients' interests.

It is the courts that must protect the public's interest in the process and ensure that the public has access to a just, efficient and inexpensive justice system. If the courts

are not willing to become proactive in the litigation process and to monitor strict compliance with the rules, client-dedicated advocates will zealously find and exploit every weakness in the system that minimizes the damage done to their client's case through the discovery process. Many advocates view that to be their job.

How does a judge struggling to do justice — for the parties and advocates — navigate the narrow passage created by these competing interests? I would suggest that he or she do so by announcing that there is a new marshal in town, and the marshal has a supplemental set of rules that will be obeyed, or else.

## STANDING ORDERS

Standing orders are generally issued at the beginning of a case and set forth not only rules for the parties to live by, but also expectations of the court as to the conduct of the parties. A standing order governing the discovery process should be issued and served on all parties once discovery is ready to commence.

It is true that there are no silver bullets that will cure all the ills of the adversarial discovery process, but a judicially issued standing order that addresses the most common sources of dispute, delay, and discontent would go a long way to smooth the bumps in the process.

The proposed standing order that follows is designed to address the most common issues before they arise. This approach accomplishes two goals that should promote fairness and deter abuse: First, by issuing a standing order at the beginning of a case, the court places all parties on notice of its expectations regarding the manner in which discovery will proceed. If

the court is required to come down hard on one of the parties or their counsel, it can do so having issued a fair warning. Second, by having an order in place, any violations of the order by the parties will be immediately sanctionable pursuant to OCGA § 9-11-37(b)(2).

An additional advantage of standing orders is that they are highly flexible and adaptable. If an issue tends to arise in personal injury cases more than in other cases, for example, the court can make modifications to its standard standing order to address that issue in those cases. The courts do not have to wait for Uniform Rules to be adopted or for the CPA to be amended to deal with those issues regularly arise.

For the purpose of starting a dialogue regarding this much-needed reform, I have put together a proposed standing order that addresses issues I have consistently seen over the course of nearly 20 years in commercial litigation. Certainly, this proposed order is not the universal solvent that will wash away all discovery abuse. Rather, it is offered as an adaptable template that addresses issues that tend to consistently cause delay and undue expense in the discovery process. Seasoned jurists will have a clear idea of what issues present their greatest challenges in the process, and they can adapt their standing orders based upon that wealth of experience.

## PROPOSED STANDING ORDER

**1. Purpose:** The purpose of this Order is to promote an efficient, speedy, and just disposition of matters and to eliminate gamesmanship, abuse, and expense in the discovery process. Every party to this action has a duty to cooperate



with the Court and with other parties to facilitate the discovery of evidence bearing on facts in dispute with the least possible expense and inconvenience to the parties given the matters at issue. The Court will vigorously enforce this Order pursuant to OCGA §9-11-37(b)(2).

**2. Timing:** All discovery requests must be timely served and must comply with the requirements of the Georgia Civil Practice Act. The parties shall meet within twenty days of the commencement of discovery to prepare a Consolidated Discovery Plan. Any disagreements regarding discovery between the parties should, to the extent possible, be identified in the CDP. Upon the request of either party, the Court will schedule an Early Scheduling Conference and shall resolve any disputes regarding the CDP and assist the parties in mapping out a discovery plan for the case.

The CDP shall include the following:

(A) a list of the persons possibly having information relevant to the subject matter of the pending action, who are to be interviewed or deposed, with a tentative schedule of depositions;

(B) a description by category and location of all documents, data, compilations, and tangible things to be examined to determine their bearing on the disputed facts, with a tentative schedule for their examination;

(C) a tentative identification of any issues on which any party will present scientific or technical opinion evidence and a tentative schedule for the disclosure of the substance of such testimony;

(D) a schedule fixing the time frame within which discovery will be completed and a date for

a further conference to consider settlement in light of information acquired through discovery; and

(E) a list of any issues regarding the plan on which the parties are unable to agree and which therefore require a ruling by the Court, and the contention of each party with respect to all such issues.

Upon motion of the parties and a showing of good cause, the plan or order shall be modified by the Court to allow additional discovery:

(A) to accommodate the interests of parties joined and served after the initial plan is prepared;

(B) to investigate previously unrecognized issues of fact revealed in the course of discovery conducted in accordance with the initial plan;

(C) to allow for the examination of documents or the deposition of witnesses not recognized at the time of the initial planning as possible sources of probative evidence bearing on the disputed issues; or

(D) when justice so requires.

A proposed modification of the plan shall be signed by counsel for each party and filed with the court. To the extent that the parties are unable to agree on a proposed modification of a current tentative plan, they shall file a statement of their disagreement reciting any contentions of any party on which they are unable to agree and the court shall forthwith order any appropriate modifications.

If there is a disagreement among the parties regarding any aspect of discovery:

(A) The Court shall hear and decide the matter forthwith. Unless the Court otherwise orders and

except as otherwise provided for herein, submissions with respect to discovery shall be oral and on the record. The Court will make every effort to expeditiously schedule hearings, either in person or by conference call, when discovery issues arise.

(B) A party prevailing on any such issue shall be awarded costs of bringing the motion,

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If a party fails to properly confer on an issue before bringing the matter before the Court, the Court will, upon proper motion, and without prejudice to later consideration of the substance of the issue, strike the discovery motion.

administration of a CDP, the court shall appoint a special master to hear and decide the issues. The rulings of the special master shall be reviewed only to correct errors of law. The parties shall bear the costs of such a special master in a manner deemed equitable by the Court. In making such a decision, the Court will give great weight to the question of which party appears to be culpable in creating the issues presented to the Court.

(D) The fees and expenses of the special master appointed by the Court shall also be empowered to make awards of costs of motions, including reasonable attorneys' fees.

(E) The Court reserves the right to require counsel to pay any such sanctions.

**3. Presumptions as to reasonableness of discovery requests and objections thereto:** All discovery requests must be contextually limited. For example, a request for all documents that contain a party's name or a particular word will be regarded as *prima facie* overbroad. Such requests must provide contextual information that is related to one or more matters at issue in the case.

Similarly, general objections will be rejected out of hand by the Court. The only objections the Court will consider are those that are narrowly and precisely drawn to address particular discovery requests. The rote use of the same

set of standard objections will create a rebuttable presumption that the objections are without merit.

Any objection as to the burden imposed by complying with a given discovery request must be accompanied by a specific description of the burden that would be imposed upon the party in complying with the request. The description shall be calculated to enable the party seeking discovery to, where appropriate, narrow its request in a manner that will reasonably reduce the burden. Counsel's signature on the discovery responses shall constitute counsel's certification that counsel has investigated the issue of burden with his or her client and that such representations are, to the best of counsel's understanding and belief, true.

The parties must use their best efforts to confer on any discovery issue before bringing an issue to the Court. If a party fails to properly confer on an issue before bringing the matter before the Court, the Court will, upon proper motion, and without prejudice to later consideration of the substance of the issue, strike the discovery motion. In such an instance, the Court will award costs of the motion to strike to the prevailing party.

If a party objects to any discovery request based upon claims of trade secret protection or the need to limit the disclosure of confidential business information, then no later than ten days prior to the

date on which responses to discovery are due, the objecting party shall alert the party seeking discovery and shall prepare and propose a Consent Protective Order. The Court shall, upon the request of the parties, provide the parties with a form for the Protective Order. The Court will not grant protection to information that is not a genuine trade secret or that is not confidential business information, the disclosure of which would injure a party in its business. If a party classifies information as being confidential under the terms of a Protective Order that is not confidential or is not a trade secret, the Court will consider eliminating the protection afforded all such information or may sanction the party misclassifying information.

**4. Privileged documents:** To the extent that a party objects to the production of documents based upon a claim of privilege, the party must produce a privilege log no later than the date on which documents are produced. The privilege log shall identify the author of the document, all recipients of the document, including all persons who received copies, a brief description of who each recipient is, the date of the document, the subject of the document, the number of pages of the document, and why the party contends the document is privileged. If only part of a document is privileged, the non-privileged portions must be produced in a timely fashion. Abuse



of a privilege may be considered by the Court as a basis for a finding of waiver of the privilege.

**5. Production of documents:** Absent consent of the opposing party or leave of Court, requested documents must be available for inspection and copying within ten days of the date on which written responses to document requests are due.

If the Court determines that a document or other evidence has been willfully and improperly withheld during discovery, the Court may, at its option, exclude the document from evidence or sanction the withholding party an amount equal to the opposing party's costs of litigation from the date the document or evidence should have been disclosed through the date on which the documents or evidence were disclosed.

**6. Requests for Admission:** The universe of proper responses to Requests for Admission are: Admitted; Denied; or Without Knowledge Sufficient to Form a Belief as to the Truth or Falsity of the Request. To be sufficient, a response indicating a lack of knowledge must be accompanied by a detailed description of the steps taken by the party or its counsel to investigate the substance of the request. Any other responses, including objections, are presumptively improper, and additional verbiage shall be struck upon proper motion with costs awarded to the movant.

**7. Deposition conduct:** Counsel shall not instruct a witness not to answer a question during the course of a deposition, unless answering the question would

reveal some matter that is in some way legally privileged. An instruction to a witness to refuse to answer a deposition question, absent the assertion of some privilege or trade secret protection, is always improper and will not be tolerated by the Court. In the event that counsel for the deponent believes that an area of inquiry is improper or that the deposition is being conducted in bad faith, counsel's proper remedy is to suspend the deposition and to file a motion for protective order.

The Court does not favor speaking objections and will not tolerate counsel's interference with the deposition process. Argumentative objections or objections that appear to obstruct the taking of the witness' deposition will subject counsel to sanctions.

Depositions to preserve testimony may be taken of any witness



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who meets the standard of being unavailable for trial, regardless of whether the witness has been previously deposed in the case.

Any deposition may be videotaped, provided that the party taking the deposition provides written notice of its intention to videotape the deposition no less than five business days prior to the deposition.

**8. Depositions of corporate and other designees:** A party may notice the deposition of an entity by serving a notice of deposition upon the entity with a detailed description of the matters upon which the deponent is to testify. The entity shall identify the designee(s) to testify on the enumerated subjects. The party noticing the deposition may not choose the entity's designee. The notice defines only the scope of the subjects upon which the deponent must be prepared to testify. The deponent, like any other witness, may be questioned about any subject relevant to the subject matter of the pending action. The designee must be capable of testifying knowledgeably regarding all matters set forth in the notice. Failure to provide a designee who can testify as to all matters identified in the notice shall constitute an admission *in judico* that the entity has no knowledge with respect to the subjects for which a designee is not provided.

**9. Expert Witnesses:** Experts who are to testify at trial shall prepare a written report no later than ninety (90) days prior to trial. Such experts may be deposed any time after submission of their report. Rebuttal experts who are to testify at trial shall prepare a written report no later than forty-five (45) days prior to trial. Rebuttal

experts may be deposed any time after the submission of their report. No other experts may be designated after thirty (30) days prior to trial.

**10. Expert Reports:** Counsel shall preserve all drafts of expert reports (partial or complete) and evidence of communications with experts (or with any intermediaries between counsel and experts) on the subject of actual or potential testimony or any opinions relevant to the subject matter of the action, and shall instruct their experts and intermediaries to do likewise. All such material shall be produced upon expert designation and supplemented no less than two business days prior to the deposition of the expert (unless the parties otherwise agree in writing). This requirement shall not apply to drafts prepared solely by the testifying expert not provided to or discussed with anyone else. Counsel's private notes of conversations will be treated as work product and need not be produced absent a showing required under OCGA §9-11-26(3)(b). 



**Cary Ichter**, a partner with Balch and Bingham LLC, primarily handles commercial disputes. His clients include national franchise companies, which he represents both regionally and nationally. Ichter has litigated disputes between manufacturers and distributors throughout the country, with cases in New York, New Jersey, California, Minnesota, Wisconsin and Puerto Rico. Ichter is a Fellow in the Lawyers Foundation of Georgia and is listed in *The Best Lawyers in America*, 2002-2003.

## Endnotes

1. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 Duke L.J. 929, 933, n. 44 (1996).
2. See OCGA §9-11-1.
3. While the time and delay associated with discovery is a focal point of scholarly interest, in both the state and the federal system, many, if not the majority of cases, have no discovery at all. A Federal Judicial Center study of over 3,000 civil cases in six federal districts showed that in a slight majority of those cases, there was no formal discovery pursued, and that only five percent of the cases had more than ten discovery requests. See Connolly, Hooleman & Kuhlman, 1978, Judicial Control and the Civil Litigation Process: Discovery 28. Nonetheless, in a 1988 survey of federal district judges and attorneys who practice in federal court, a majority of the respondents expressed the belief that lawyers' abuse of the discovery process is the single greatest contributor to the high cost of litigation. See Louis Harris & Associates, 1989, *Procedural Reform of the Civil Justice System*.
4. Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) – "Much Ado about Nothing?"*, 46 Hasting L.J. 679, 697 n.57 (1995).
5. Wayne D. Brazil, *Views From the Front Lines: Observations from Chicago Lawyers About the System of Civil Discovery*, 1980 Am. B. Found. Res. J. 217.
6. Earl C. Dudley Jr., *Discovery Abuse: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. Rev. 189, 195-97 (1992). See also Sorenson, *supra* note 6, at 708.
7. Peggy E. Bruggman, *Reducing the Costs of Civil Litigation*, PLRI (citing Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 Clev. St. L. Rev. 17, 46-48 (1988)).
8. Wolfson, *supra* note 7.



## Fall 2003 Board of Governors Meeting Summary

**S**tate Bar President William D. Barwick presided over the 193rd meeting of the Board of Governors at Brasstown Valley Resort in Young Harris, Ga., Nov. 8.

Barwick began the meeting by recognizing past presidents of the Bar, new Board members, members of the judiciary and other special guests.

The first item of business was the approval of the 191st and 192nd meeting minutes from the June 13 and 14 BOG meetings at Amelia Island Plantation in Amelia Island, Fla. Following the approval of the minutes, the Board, by unanimous voice vote, approved the reappointment of Gary C. Christy, for a four-year term, to the Judicial Qualifications Commission. By a unanimous voice vote, the Board also approved the reappointments of Harold T. Daniel Jr. and Rudolph N. Patterson for three-year terms to the CCLC Board of Trustees.

Following a report by John Marshall, the Board, by majority voice vote, approved in concept the



Bar President William D. Barwick opens the 193rd meeting of the Board of Governors by recognizing past presidents of the Bar, new Board members, members of the judiciary and other special guests.

proposed mentor program of the Standards of the Profession Committee. The committee will seek the approval of the Supreme Court for the program in concept, and will present a proposed budget and detailed program to the Board in June.

Following a report by Barwick that the rules and bylaws amendments to be considered at the meet-

ing are not in conflict with any other rules, regulations or bylaws of the State Bar, the Board took the following action:

### Proposed Amendments

- Clients' Security Fund — Rule 10-104 (Trustees) — Approved, as revised





Members attend the 193rd meeting of the State Bar of Georgia Board of Governors meeting.

- Formal Advisory Opinion Board Rules 4-404 (Immunity) – Approved
- Bar Rules Relating to Lawyer Referral Services (Authorized Fee Sharing) – Tabled until the January meeting
- State Bar Rule 8-104(D) – CCLC Trial Experience – Approved
- Multijurisdictional Practice – Approved, as revised. The Board approved, forwarding the recommendation that Part E be so amended to the Office of Bar Admissions. The Board also forwarded the recommendation that Uniform Superior Court 4.4 be so amended to the Council of Superior Court Judges.

Following a report by Bob McCormack, the Board, by unanimous voice vote, approved proposed bylaws amendments for the Administrative Law, Elder Law and Criminal Law sections. By unanimous voice vote, the Board also approved the 2004 BOG election schedule.

Following a report by John A. Chandler, the Board took the following action on proposed legislation:

### Legislative Proposal

- Access to Justice and Women and Minorities in the Profession Committees (a) Funding for

Civil Legal Services for Domestic Violence at \$2,300,000 for fiscal year 2004-2005 – Passed

- Appellate Practice Section OCGA §5-6-4(b) and OCGA §9-11-23(f) – Passed
- Court Futures Committee (a) Dismissed Juror in Civil Cases Proposed New Code Section (15-12-44) – Failed
- Georgia CASA Funding for fiscal year 2004-05 at \$390,000 – Passed
- Georgia Public Defender Standards Funding for fiscal year 2004-05 – Passed

Barwick reported on the activities of the Court Futures and Evidence Study Committees.

Bar Treasurer J. Vincent Cook provided the income statements by department for the year ended June 30, 2003, and the three months ended Sept. 30, 2003.

Laurel Payne Landon reported on the various activities of the YLD, including its recent fall meeting in Athens, the orientation for committee chairs, the spring meeting/cruise scheduled for the Bahamas in April, and upcoming committee projects.

Barwick reported on the actions of the Executive Committee from the Aug. 22-23 and Sept. 25 meetings, and the Board, by unanimous

voice vote, approved the actions of the Executive Committee.

Sally A. Lockwood and Barwick reported on the Chief Justice's Commission on Professionalism's Fifth Annual Justice Robert Benham Awards for Community Service and the 2003 Law School Orientations on Professionalism.

Barwick updated the Board on State Bar Building issues and informed them the parking deck should be completed by June 2004.

Barwick reported that the Supreme Court of Georgia approved UPL Advisory Opinion 2003-2 regarding real estate closings.

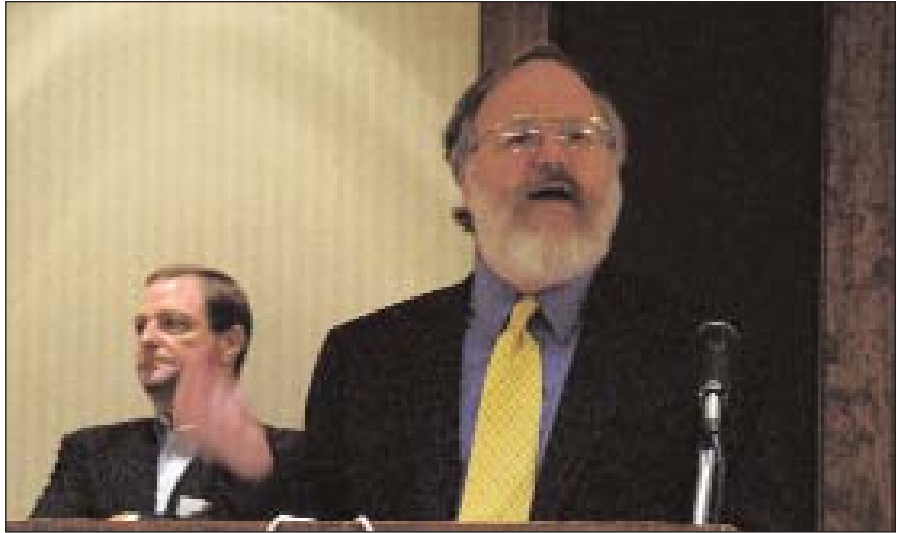
Phyllis Holmen reported on the activities of the Georgia Legal Services Program.

The Board received a copy of the future meetings schedule. Thereafter, Michael Elsberry provided an update on activities being planned in conjunction with the 2004 Annual Meeting scheduled for Orlando, Fla.

The Board received a copy of the Report on Matters Handled Administratively by the Office of the General Counsel for the month of September 2003, and a Year-to-Date Report on Lawyer Regulation for the period of May 1, 2003 through Sept. 30, 2003.

Robert Ingram announced that the Bench and Bar Professionalism





(Above) Judge Wayne Purdom, State Court of DeKalb County, discusses Court Futures Committee issues.


(Left) Bar Treasurer J. Vincent Cook updated Board members on the Bar's finances.

Awards have been renamed the Chief Justice Thomas O. Marshall Professionalism Awards and that the past presidents will select the award recipients annually at the

spring Board meeting. The awards will continue to be presented at the annual meeting.

Wilson DuBose thanked the Board for its continued support on indigent defense and requested that Board members nominate

potential appointees for the Georgia Circuit Public Defender Selection Panels.

After opening the floor and addressing some Board member's questions and concerns, Barwick adjourned the meeting. 


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## Society, Participants Benefit from BASICS

Submitted by the Lawyers Foundation of Georgia

**A**t a time when most mothers of 15-year-old daughters are helping them recover from their first serious high school crushes, cope with the tumultuous high school years and understand the responsibilities of being young women, 36-year-old Sherida Ragland was tearfully saying goodbye to her daughter and her husband to begin a term of at least two years in the Georgia prison system.

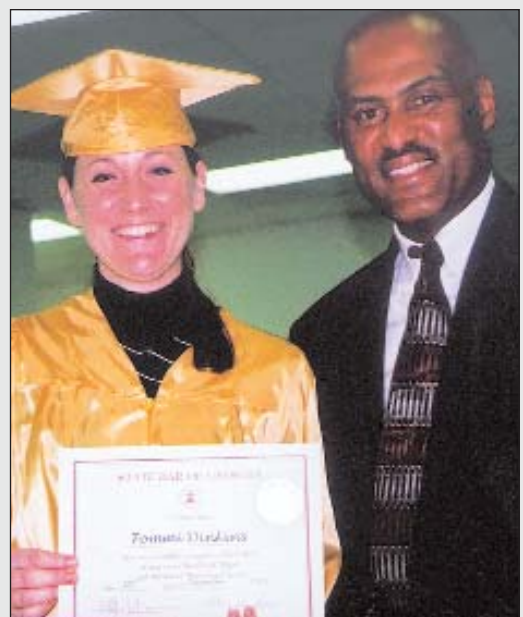
At a time when most young women are finishing college, looking for their first full time jobs, deciding which dates to accept for the upcoming weekend, or even planning their marriages, 21-year-old Tommi Dinkins was preparing to spend the next five years of her life in jail.

Neither of these women claims to be a victim of the "system." Each woman readily acknowledges her



**BASICS graduate Sherida Ragland and Philip Jackson, chair of BASICS.**

conviction for serious felony crimes in Georgia. Ragland was convicted of, among other things, theft by deception and forgery in the first degree. She wrote bad checks and engaged in transaction fraud. Ragland received a sentence of 10 years, to serve at least two years. Dinkins was convicted of robbery by intimidation. She drove the get-away car for her boyfriend who actually committed the robbery. Dinkins received a sentence of 15 years, to serve at least five years. Both women are scheduled for parole some time in the early part of 2004.



**BASICS graduate Tommi Dinkins and Philip Jackson, chair of BASICS.**



## BASICS strives to reduce recidivism by training, motivating and encouraging inmates to be productive, law-abiding, contributing members of society.

Both women have another thing in common — they are two of the 52 graduates of the BASICS class of Dec. 12, 2003, from the Metro Women's Transitional Center in Atlanta. Upon receiving their certificates, Ragland, Dinkins and the other 50 graduates became inductees into an alumni group of over 7,000 former inmates of the Georgia Prison system who have attended and successfully completed the "World of Work" program offered by BASICS, one of the oldest continuous programs of the State Bar of Georgia.

BASICS is an acronym for "Bar Association Support to Improve Correctional Services." It was started in 1976 as a project of the American Bar Association in response to a challenge by then-Chief Justice Warren Burger that attorneys take a more active role in the criminal reform system. The State Bar of Georgia rose to the challenge and created its BASICS program. Some 27 years later, the program is still in operation.

The BASICS program is offered at 26 transitional and diversion centers across the state. The centers are operated by the Georgia Department of Corrections. Transitional centers serve as go-between facilities for inmates who are completing their prison confinement and are nearing release back into the community. Diversion centers serve as alternative places of confinement for persons who have committed serious crimes, which ordinarily would

dictate prison time; however, for some extenuating reasons, the person is sentenced to serve his or her confinement in an institution less restrictive than a prison. Both institutions strive to return to society persons who are less likely to victimize society in the future.

The primary goal of BASICS is to reduce recidivism. The recidivism rate for the general inmate population in Georgia ranges from 37 percent upwards. BASICS strives to reduce recidivism by training, motivating and encouraging inmates to be productive, law-abiding, contributing members of society. Additionally, the program encourages participants to explore the possibility of owning and operating their own businesses. The ten-week program focuses on training participants in life-skills techniques such as balancing a checkbook, dressing for job interviews and meeting the expectations of employers. The BASICS curriculum requires all participants to attend weekly classes, partici-

pate in class work, complete homework and pass regular examinations. BASICS operates on the premise that society benefits when an inmate leaves prison with skills that enable them to find and keep a job. Society benefits when former inmates can find and keep honest and lawful means of support for themselves and their dependents. Such measures reduce recidivism.

The BASICS program has been and is very successful in Georgia. Available figures from the Georgia Department of Corrections show that, for centers where graduates of the BASICS program have been tracked, the recidivism rate among graduates is only 16 percent. To keep an inmate incarcerated, it costs Georgia an estimated \$18,937 per inmate, per year. By comparison, it costs just \$390 per participant, per year, to operate the BASICS program. Many graduates from the BASICS program have led highly successful lives subsequent to their release from prison. For example, one graduate owns an insurance agency, another graduate founded a printing business, another graduate is founder and CEO of a development company and still another graduate has earned her Ph.D.

Both Ragland and Dinkins seem poised to follow the path set by

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many previous BASICS's graduates. Ragland, now 38, has been recognized for her leadership abilities by, among other people, her fellow BASICS classmates, who elected her president of the class. Dinkins, now 26, has also been recognized for her leadership abilities. She was elected by her peers as class administrator and served as Mistress of Ceremonies for the graduation program on Dec. 12, 2003.


After release from prison, Ragland will return to her husband and her 17-year-old daughter and resume her parental duties. She also plans to resume her day job as a mortgage loan processor and go to school at night. Ragland credits

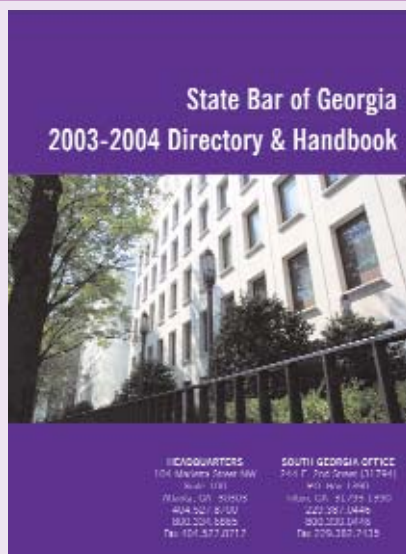
the BASICS program with changing her motivation from greed to preparation. Her focus will no longer be on the quick money, but on preparing herself for the job or opportunity that brings her success.

Dinkins has earned an associate's degree while in prison, and plans to pursue a bachelor's degree in graphic design once she is released. Dinkins credits BASICS with motivating her to succeed and teaching her to believe in herself.

While the BASICS program works to change the lives of its participants, it is society that is the ultimate beneficiary of the program. Society benefits from a reduced crime rate. Society benefits from the savings to

taxpayer dollars when fewer people are incarcerated. Society benefits when more people are gainfully employed and paying their share of taxes. Society benefits when more people leave prison ready and eager to become part of the solution, rather than more of the problem.

As Ragland, Dinkins and the other 50 graduates reenter this community, all eyes will be on them to see if they continue the grand tradition set by some 7,000 BASICS graduates before them. And, as for the BASICS program, it will enter its 28th year of answering the challenge of Chief Justice Warren Burger for lawyers to assist in improving the criminal reform system. 



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## Lawyers Foundation of Georgia's Fourth Annual Challenge Grants

By Lauren Larmer Barrett

**F**or the fourth year in a row, the Lawyers Foundation of Georgia, the philanthropic arm of the State Bar of Georgia, awarded challenge grants. Local and voluntary bar associations, sections and committees of the state, local and voluntary bars and other law-related organizations are eligible for the grants.

Awarding grants is one of the most rewarding aspects of working with a foundation, whether you are a board member, a committee member, a donor or an employee. It can also be one of the most frustrating parts of the job, as there never seems to be enough money to go around.

Each grant application is carefully reviewed. We make sure that the grants awarded enhance the system of justice and support and assist the lawyers of Georgia and the communities they serve. A total of seven grants were made in November. The recipients will each match the funds provided by the LFG with donations from other sources.

TeamChild is a program of the Atlanta Legal Aid Society which matches pro bono attorneys with children who are in the court system. The attorneys assist the children in obtaining the educational and mental health services that they need. Their challenge grant is in the amount of \$2,000.

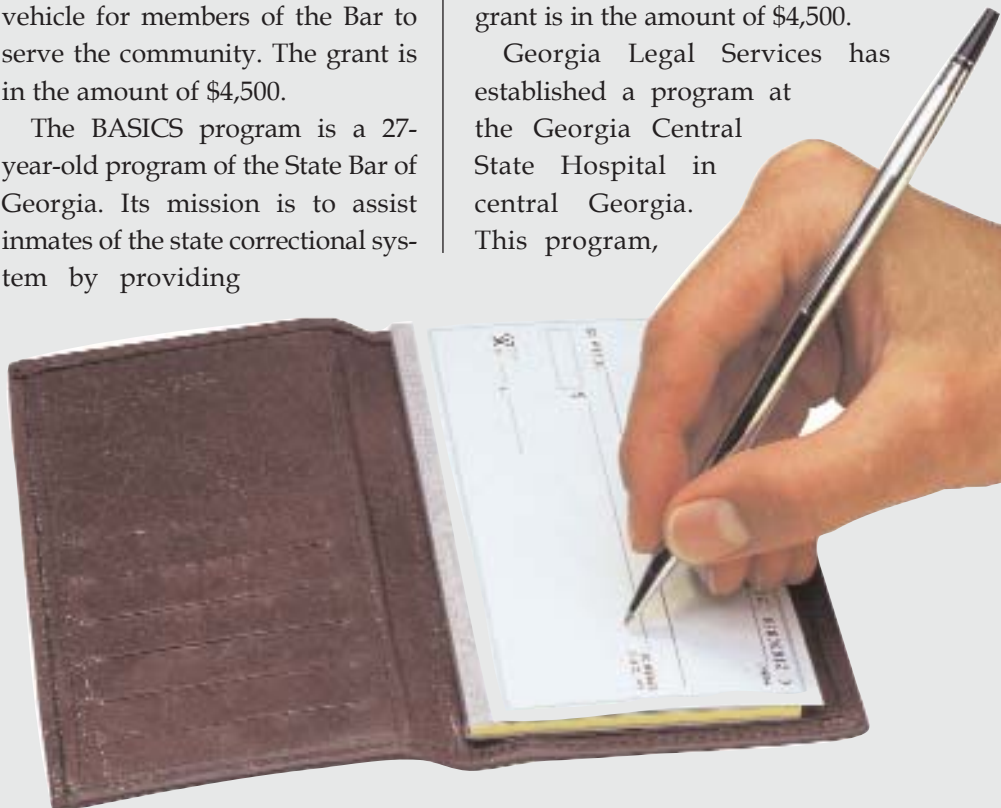
The Atlanta Volunteer Lawyers Foundation's Domestic Violence Project provides civil legal assistance, safety planning and referral services through pro bono representation. This project creates a vehicle for members of the Bar to serve the community. The grant is in the amount of \$4,500.

The BASICS program is a 27-year-old program of the State Bar of Georgia. Its mission is to assist inmates of the state correctional system by providing

training and developing skills to prevent a return to the prison system by inmates. The grant is \$4,500.

The Georgia Innocence Project Pro Bono Initiative works with the Georgia Association of Criminal Defense Lawyers to create a unique pro bono opportunity. The Innocence Project reviews post-conviction criminal cases to determine if DNA evidence will establish the innocence of the convicted individual. The grant will be used to hire a part-time attorney to assist the pro bono attorneys in their efforts. The grant is in the amount of \$4,500.

Georgia Legal Services has established a program at the Georgia Central State Hospital in central Georgia. This program,





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**The mission of the Lawyers Foundation of Georgia is to enhance the system of justice, to support the lawyers who serve it and assist the community served by it.**

the Olmstead vs. LC Project, will assist individuals who are in that facility, but capable of living and functioning in the community. It provides assistance in handling the paperwork for leaving the facility — Medicaid benefits, community placement applications and more. The grant will be used to provide a paralegal to work with an attorney in the Macon office of Georgia Legal Services. The grant is in the amount of \$4,500.

The Georgia Jury Composition Project seeks to develop an automated, statistically valid prototype for a statewide jury box from which local jurisdictions can pull representative jury pools. The Georgia Supreme Court has begun work on this project. The grant awarded is \$2,000.


The Juvenile Justice Fund has established a Special Education Advocacy Program. The purpose of this program is to provide Fulton County juvenile court judges with expertise in the area of special education. It gives the judges the detailed information they need to make appropriate decisions about the educational needs of juvenile offenders, particularly those whose special needs are not being met by the school system. The grant awarded is \$2,000.

The mission of the Lawyers Foundation of Georgia is to enhance the system of justice, to support the lawyers who serve it and to assist the community served by it. The foundation seeks to fur-

ther these principles through financial support of the charitable activities of local, state and voluntary bars of Georgia, including bar sections and other law-related organizations; by supporting education designed to enhance the public's understanding of the legal system; and by supporting access to justice. Educating the public about the law and lawyers, attracting high caliber individuals through the mock trial program and scholarships, and encouraging pro bono representation and community service by attorneys is just part of what the Lawyers Foundation of Georgia can do.

Members of the legal profession take great pride in the services and funds we provide to the public as responsible citizens and true professionals. Through the Lawyers Foundation, we can build our collective capacity to do good.

Congratulations to all involved with the challenge grants for your hard work and dedication, and good luck with your projects! These grants are made possible through the generous support of gifts to the Lawyers Foundation of Georgia.

For more information, please contact Lauren Larmer Barrett, 104 Marietta Street NW, Suite 630, Atlanta, GA 30303; (404) 659-6867; e-mail: [lfg\\_lauren@bellsouth.net](mailto:lfg_lauren@bellsouth.net). 



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



## A Few Tricks You Should Know

### Managing Your IOLTA Account

By Len Horton

**E**ven though IOLTA (Interest On Lawyer Trust Accounts) has been in existence in Georgia since 1983, many lawyers and bankers continue to have questions about it and especially about how to set up IOLTA accounts. This article will try to answer the most common questions and provide tips that can make having an IOLTA account “a totally painless way to give.” That phrase was the slogan promoting IOLTA by State Bar President Bob Brinson and by then Chief Justice Thomas O. Marshall during the beginning phase of the program in Georgia during the mid to late 1980s.





By following some of these tips, it will become apparent that IOLTA really can be a totally painless way to give.

## THE BASIC CONCEPT OF IOLTA

To make sure everyone understands the concept, a brief review of IOLTA may be useful. Most lawyers at some time must hold client funds in trust. If your practice requires you to do that, then you will require a trust account. Regarding the money you hold that belongs to any one of your clients, you must make a decision about whether to put it in your IOLTA account or whether to invest the money for the benefit of your client.

If the amount of money you must hold from one client is “nominal in amount” or is expected to be held for an insignificant period of time, then you put the money in your IOLTA account. In general, you put monies from more than one client in your IOLTA account at the same time. The basic idea is that, if you could invest the money for an individual client so that net interest could be generated for that client, then you should do so. The only client money going into your IOLTA account is typically too small to generate net interest for the client. When combined with other small or short-term amounts from many clients, however, the total becomes large enough to pay the account service charge and still have money left over.

You would be violating ethics rules if you pocketed the interest earned. And you have already concluded that it would cost more to invest the money for the client than the client would get, so it doesn't make sense to invest the money for

the client. You should put the money in your IOLTA account and have the interest in excess of charges go to a charity named by the Supreme Court of Georgia to receive that interest. The Supreme Court of Georgia has ordered that the Georgia Bar Foundation should be that recipient.

How do you know whether to invest the money for the client or to put the money in your IOLTA account? The Supreme Court of Georgia lets each Georgia lawyer decide. No matter where the Court drew the line, it would have changed the way some firms practice law. Instead, by deciding not to draw the line, it permitted each lawyer to make the decision based on his firm's cost structure and overhead. What does that freedom mean? If you can invest a client's funds so that the interest generated exceeds the cost of setting up the account and paying the costs associated with that account, then you should invest it for the client. Otherwise, put the money in your IOLTA account.

## SETTING UP YOUR IOLTA ACCOUNT

You need one piece of paper, the Notice To Financial Institution form. It is available from the Georgia Bar Foundation office or from the State Bar of Georgia's Web site at <http://www.gabar.org/gbf.asp>. Or, if you prefer, the Bar Foundation will be happy to mail or fax the form to you. Sign the form and give one copy to your banker and send another to the Georgia Bar Foundation at the address on the form. That's it.

The most common concern is how to get an IOLTA account free of charges. The Supreme Court of Georgia has never told banks what they must do. It created IOLTA

through its right to discipline attorneys. Any influence the Court may have on banks results only from the requirements it makes of lawyers and from competition from other banks.

## FACTS YOU NEED TO KNOW

Banks can make charges against IOLTA accounts.

You cannot have your IOLTA account at a bank that refuses to participate in the Overdraft Notification program of the Office of the General Counsel of the State Bar of Georgia. To be a financial institution approved by the Office of the General Counsel of the State Bar of Georgia, a bank must sign an agreement supplied by Regina Kelley, overdraft coordinator of the Office of the General Counsel. You can contact her at (404) 527-8737 or at [regina@gabar.org](mailto:regina@gabar.org) for the list of approved banks, or to discuss the specifics of any overdraft of your trust account.

You cannot have your IOLTA account at a bank that makes the following charges against the gross interest generated by your account: account reconciliation charges, NSF charges, overdraft interest charges, check printing charges, courier fees or wire transfer fees. That does not mean that the bank cannot charge you or your account for those charges, but merely that they cannot reduce the amount remitted to the Georgia Bar Foundation.

## NEGOTIATION WITH BANKS

In dealing with your banker, I suggest the following strategy in setting up your IOLTA account or modifying the one you already



have. First, ask to see your branch manager or even the president if your bank does not have branches. Second, ask the branch manager or president for a free IOLTA account. Explain that the money is not yours and that you are merely holding monies in trust for your clients, pending the resolution of legal matters. If the bank charges the account and reduces the balance in the account, then you, as the lawyer with fiduciary responsibility for those funds, must put the money back that was lost to the charges. That constitutes a lot of work over the lifetime of a practice. Often merely asking your account manager for a free account will be all that is required for you to get an account free of charges.

If your banker refuses, you have the option of finding a more supportive bank. If changing banks is not an option, ask what minimum amount of money could you keep in your IOLTA account to warrant having no charges. You might hear \$1,500 or \$2,000, sometimes more. Then ask whether you can keep the minimum balance in your operating account instead of your IOLTA

account and get your IOLTA account free of charges. Even if your banker denies an account free of charges, you should be able to get your banker to agree to apply any charges incurred against your IOLTA account to your operating account. This will save you the trouble each month of having to replace client money lost to the bank's charges.

## ASSISTING LAWYERS TO AVOID THE IOLTA REQUIREMENT

The Supreme Court of Georgia was exquisitely sensitive to the needs of lawyers when it issued the mandatory IOLTA order in 1989. If your IOLTA account has an average monthly balance of \$5,000 or less, then you qualify to be exempt from having to have an IOLTA account. By applying for and receiving an exemption, you can have a non-interest-bearing checking account for your pooled trust account just as if IOLTA had never existed. One possible advantage is the increased likelihood that the bank will provide the account free of charges.

The Court even provided for the possibility that you would think of a reason to be exempt that the Court had not considered. You can write a letter to me and make your best argument as to why you should not have to have an IOLTA account. If the IOLTA board agrees, you will get your exemption.

## FIXING MISTAKES IN YOUR IOLTA ACCOUNT

Suppose you have to hold in trust \$1 million from one client for several months, and you mistakenly put it in your IOLTA account for three months? Your client has just demanded the interest on those funds. The Georgia Bar Foundation has a policy in place to make a refund in that case. You will need to provide bank statements and an explanation about what happened, but you will be refunded the interest that came to the Bar Foundation.

As pleasing as this policy is, some lawyers have been disappointed with it. Sometimes the lawyer and his client calculate what would have been earned for the client if the lawyer had not

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

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made the mistake of putting it in his IOLTA account. Investing it separately for the client oftentimes will generate more interest than was remitted to the Bar Foundation from the IOLTA account. The official policy of the Georgia Bar Foundation is to refund only what was actually received from the bank for the client money held in an IOLTA account by mistake. The reduced amount can be explained by the fact that many banks charge IOLTA accounts more than they charge individual trust accounts set up to benefit just one client.

The Georgia Bar Foundation also refunds interest mistakenly remitted by banks. If the bank mistakenly remits more money to the Bar Foundation than it should have, the Bar Foundation will issue a refund directly to the bank once a valid explanation with documentation has been provided.

Sometimes a bank will send a 1099 to a law firm. Because an IOLTA account may not have been set up by the bank as an IOLTA account, the interest sent to the Georgia Bar Foundation is reported on a 1099 form to the I.R.S. as income to the law firm. In that situation the bank should be asked to issue a corrected 1099 to show that the interest generated is income to the Georgia Bar Foundation. Since the Bar Foundation is exempt from income taxation because of its 501(c)(3) status, banks are not required to send the 1099 to the Bar Foundation. Whenever a bank does send the 1099 to the Bar Foundation, it is placed in that bank's file.


One other common misunderstanding about IOLTA accounts involves the tax identification

number on the IOLTA account. You might think that the tax ID number would be that of the law firm. That is incorrect. The proper tax identification number on every IOLTA account in Georgia is 580552594, which is the ID for the Georgia Bar Foundation. If your law firm's tax identification number is on your IOLTA account, please ask your banker to correct the mistake. If your banker refuses, please call me, and I shall help your banker. Some bankers are troubled by the fact that the name on an account and the tax identification number must always agree. The banker is correct in every case except for IOLTA accounts.

We should all be grateful for the service rendered by bankers to make IOLTA work in Georgia. In recognition of this support, Georgia is the only state ever to have had its Bar Foundation president be a full-time banker.

You may have heard that there are questions about the legality of IOLTA. Last March the Supreme Court of the United States decided that IOLTA was not an unconstitutional taking of client property. That decision ended the biggest threat to IOLTA's existence. If any new legal attacks are launched against IOLTA, I shall let you know immediately.

If you encounter any IOLTA account problem not mentioned, please call me. Usually I can provide immediate assistance, but if your problem is unique or new, I will get an answer for you. In most cases, following these suggestions should make IOLTA a painless way to help your community and to solve some of Georgia's most pressing law-related problems.

The Georgia Bar Foundation is working to ensure that your IOLTA contributions have the biggest impact possible. Its overhead as a percentage of IOLTA revenues is one of the best figures in the nation, typically less than six percent. It has a rich history of working closely with the State Bar, never having declined to fund any request from the State Bar of Georgia. Your Georgia Bar Foundation is the largest and most inclusive legal charity in Georgia. On behalf of its Board of Trustees, we thank you for your support of IOLTA and the Bar Foundation. 



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

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## KUDOS



**Shayna M. Steinfeld**, of **Steinfeld & Steinfeld, P.C.**, received a joint certification in business bankruptcy law and consumer bankruptcy law from the American Board of Certification. She also spoke on “Hot Topics of Consumer Bankruptcy Cases” at the National Conference of Bankruptcy Judges in San Diego.

*Managing Intellectual Property Magazine* has ranked **Kilpatrick Stockton’s** trademark litigation practice as the fourth leading practice in the country. Kilpatrick Stockton is the highest-ranked general practice firm on the list.

The **Lawyers Foundation of Georgia**, the philanthropic arm of the State Bar of Georgia, elected **N. Harvey Weitz** to its **Board of Trustees**. Weitz is a partner with the Savannah firm of Weiner, Shearouse, Weitz, Greenberg & Shawe, LLC.

**Jesse G. Bowles III** became a Fellow of the **American College of Trial Lawyers** in a ceremony at the organization’s annual meeting. The college includes some 5,200 lawyers from all branches of trial practice in the United States and Canada. Its members must have at least 15 years of trial experience and exhibit the highest standards of ethical conduct, professionalism, civility and collegiality.

**Laurin M. McSwain**, of **Lekoff, Duncan, Grimes, Miller and McSwain**, was appointed vice chairperson of the board of directors of the southeast affiliate of the **American Heart Association**. She has volunteered for the AHA for three years and recently served as a member of the board of directors, Georgia Affiliate; chair of the Georgia Planned Giving Committee; member of the Southeast Affiliate Executive Committee; and pro bono legal counsel for the Southeast Affiliate.

The **National Association of Criminal Defense Lawyers** presented **Gary Parker** with the prestigious **Champion of Indigent Defense Award**. The annual award recognizes a group or individual for outstanding efforts in making positive changes to a local, county, state or national indigent defense system, through legislation, litigation or other methods.

For the fifth year in a row, **Kilpatrick Stockton** partner **Phillip Street** was named to the Atlanta Business Chronicle’s annual “**Who’s Who in Health Care**” list, which represents leaders of Georgia’s health care industry. Street is chair of Kilpatrick Stockton’s health care and life sciences practice group. His primary area of practice is health care and life sciences transactions, including business mergers, acquisitions and joint ventures and the commercialization of life sciences research.



Graves



Horder

Atlanta attorneys **Judson Graves** and **Richard A. Horder** have received a **Special Recognition for Outstanding Pro Bono Service** by the Florida Bar’s Out-of-State Practitioners

Division. Graves and Horder were two of six out-of-state Florida attorneys to receive this award, which recognizes their contribution of pro bono legal services both this year and throughout their career. Graves is a partner with **Alston & Bird**, and concentrates his practice in general litigation with an emphasis on medical malpractice and products liability defense. He chairs Alston & Bird’s pro bono committee. Horder is the head of the environmental practice group of **Kilpatrick Stockton** in Atlanta, and he also chairs his firm’s pro bono committee.

## ON THE MOVE

### In Alpharetta

**Alan L. Newman** announced that he has relocated his law firm to Alpharetta and will continue to practice in the areas of construction litigation, plaintiff’s personal injury and wrongful death litigation, including products liability, professional negligence and trucking accident cases. The firm, **Alan L. Newman, P.C.**, is located at Park Plaza, Suite 150, 178 South Main St., Alpharetta, GA 30004; (678) 205-8000; Fax (678) 205-8002.

### In Atlanta

**Rhett Laurens** recently announced the opening of **The Laurens Firm, LLC**. Rhett is both an attorney and CPA, and his practice will concentrate on income taxes, wills, trusts and estate planning. A native of Atlanta, he completed his undergraduate work at Oglethorpe, earned his MBA at Yale, and his juris doctorate at Harvard. His office is located near Ansley Mall at 1518 Monroe Drive NE Atlanta, GA 30324; (404) 228-4228; Fax (404) 881-0801.

**Freed & Berman, P.C.** announced that it has changed its name to **Berman Fink Van Horn P.C.** The firm will continue to represent clients in all types of commercial, employment and real estate litigation and transactions, dispute resolution, asset protection and succession planning. The firm is located at 3423 Piedmont Road NE, Suite 200, Atlanta, GA 30305-4802; (404) 261-7711; Fax (404) 233-1943.

**Powell, Goldstein, Frazer & Murphy LLP** announced that **Daniel C. Deckbar** has joined the firm’s product liability, environmental and personal injury practice. He focuses his practice in litigation, arbitrations, and mediations before administrative and regulatory boards. Deckbar earned a bachelor’s degree in communication at Vanderbilt University and his juris



doctorate at the University of Memphis. The firm is located at 191 Peachtree St. NE, 16th Floor, Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999.

**Smith Moore LLP** moved to a new, 14,250-square-foot office location on the 37th floor of the prestigious One Atlantic Center at 1201 West Peachtree Street, considered one of Atlanta's most prominent and desirable business addresses. The move signals Smith Moore's increasing presence in the Atlanta market and the Southeastern United States. The new address is One Atlantic Center, 1201 W. Peachtree St., Suite 3700, Atlanta, GA 30309; (404) 962-1000; Fax (404) 962-1200.

**Jim Woodward** joined the law firm of **Miller & Martin** as an associate in their Atlanta office. He will continue to build his practice in the areas of public finance and corporate and securities law. Woodward received a bachelor's degree in English from Stanford and earned his juris doctorate from the University of Virginia. Miller & Martin's Atlanta office is located at 1275 Peachtree St. NW, 7<sup>th</sup> Floor, Atlanta, GA 30309; (404) 962-6100; Fax (404) 962-6300.

**K. James Sangston** joined **McGuireWoods'** Atlanta office as an associate in the corporate services department. His practice will focus on emerging growth and technology, intellectual property, and mergers and acquisitions. Sangston earned his law degree *summa cum laude* from Georgia State University and his bachelor's degree from the University of Pennsylvania. He also holds a master's degree in electrical engineering from The George Washington University. McGuireWoods' Atlanta office is located at The Proscenium, 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30309-7649; (404) 443-5500; Fax (404) 443-5599.

**Needle & Rosenberg** announced that **Miles Hall** has joined the firm as an associate in the biotechnology practice group. Hall is a doctor of veterinary medicine; he earned his juris doctorate in 2003. The firm is located at Suite 1000, 999 Peachtree St., Atlanta, GA 30309; (678) 420-9300; Fax (678) 420-9301.

**Bridget Christian** has joined the law firm of **Hoffman & Associates, Attorneys-at-Law, L.L.C.** in the area of estate planning. Christian's former practice included estate planning, probate and business law, and corporate matters. The firm is located at 6075 Lake Forrest Drive, Suite 200, Atlanta, GA 30328; (404) 255-7400; Fax (404) 255-7480.

**McGuireWoods LLP** announced that **John A. Lockett III** has joined their Atlanta office as an associate in the commercial litigation department. His practice will focus on fiduciary litigation, partnerships and joint ventures, and intellectual property litigation. Lockett earned his bachelor's degree *magna cum laude* from the University of Alabama, his master's degree with merit

from the London School of Economics and Political Science, and his law degree from the University of Texas. McGuireWoods' Atlanta office is located at The Proscenium, 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30309-7649; (404) 443-5500; Fax (404) 443-5599.

**Glenn Loewenthal, Gordon M. Berger and Shannan S. Collier** announced the formation of a new law firm, **Berger, Collier & Loewenthal, LLC**. Loewenthal was formerly a founding partner with the Buckhead law firm of Loewenthal, Fleming & Fried, P.C.; Berger was a partner in Berger Posner, LLC, and Collier was a sole proprietor. The new office is located at One Overton Park, 3625 Cumberland Blvd., Suite 380, Atlanta, GA 30339; (678) 990-4910; Fax (678) 990-4919.

## In Columbus

**Page, Scrantom, Sprouse, Tucker & Ford, P.C.** announced that **Bobby L. Scott** and **Linda T. Dam** have become associates in the firm. The office is located at 1043 Third Ave., Columbus, GA 31901; (706) 324-0251; Fax (706) 323-7519.

## In Macon

**John P. Cole** was recently named vice president for charitable and estate planning at Mercer University. He will work with alumni, donors and their consultants to support Mercer's fund-raising efforts. Cole was previously vice president for university admissions at Mercer. He also serves as a major of in the Army Reserve, and was the headquarters commandant of the National Guard's 48th Infantry Brigade in Macon in 2000 and 2001. Mercer University is located at 1400 Coleman Ave., Macon, GA 31207-0001; (478) 301-2715; Fax (478) 301-4124.

## In Valdosta

**Young, Thagard, Hoffman, Smith & Lawrence, LLP** announced that **Charles A. Shenton IV** has become associated with the firm. The office is located at 801 Northwood Park Drive, Valdosta, GA 31602; (229) 242-2520; Fax (229) 242-5040.

## In Cincinnati, OH



**Ulmer & Berne LLP** announced the addition of **Jennifer L. Snyder** to its Cincinnati office as an associate in the firm's liability defense group. She will concentrate on product liability defense and pharmaceutical and medical device litigation. Snyder is a graduate of Kenyon College and Emory University School of Law, as well as a member of the American, Georgia and Ohio Bar Associations. The firm's office is located at 600 Vine St., Suite 2800, Cincinnati, OH 45202-2409; (513) 762-6200; Fax (513) 762-6245.



## Do Ethics Rules Require Lawyers to Keep the Confidences and Secrets of Potential Clients?

By Paula Frederick

**H**a!" your associate hoots as he enters your office. "You won't believe this one! We just got an e-mail from some guy who wants us to sue BigCo for him!"

"Does he realize that BigCo is our biggest client?" you wonder.

"I guess not; looks like he sent this same request for help to at least 20 other law firms. Look at this! He used to work for BigCo, and got fired for alleged misconduct. He's claiming he has a bunch of evidence that BigCo has violated environmental laws. He has even attached some of it to the e-mail."

A quick look at the e-mail confirms that this potential client has sent the same letter to two dozen lawyers. "This guy must be nuts," your associate exclaims. "I can't wait to send his e-mail to Big Guy over at BigCo!"

"Hold on," you caution. "Let's think this through. Don't the ethics rules require us to keep the confidences and secrets of even potential clients? It's possible that just by receiving this e-mail, we're going to be

conflicted out of work for BigCo. This guy could be crazy like a fox."

What are the obligations of a lawyer who receives unsolicited e-mail from potential clients? Does the sender have any right to the protection of the confidences and secrets rule, which normally does apply to consultations with potential clients? Can the sender rightfully expect that a lawyer who receives an unsolicited e-mail won't use information contained in the e-mail to the detriment of the sender or for the benefit of someone else?

Georgia Rule of Professional Conduct 1.6, Confidentiality of Information, requires a lawyer to maintain as confidential "all information gained in the professional relationship with a client."<sup>1</sup> It applies to information a lawyer learns in a consultation, even when that consultation does not lead to actual representation.

But what about unsolicited e-mails? Are they the same as a "consultation" for purposes of the ethics rules?

Georgia has not issued a formal advisory opinion on point; however, the American Bar Association and several states have rules or opinions addressing the topic. Uniformly, the ABA and other states have found that "a per-



Uniformly, the ABA and other states have found that “a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’” who deserves the protection of the confidentiality and conflicts rules.

son who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client’” who deserves the protection of the confidentiality and conflicts rules.<sup>2</sup>

One state makes a distinction for lawyers who receive e-mails in response to a Web solicitation. The Committee on Rules of Professional Conduct of the State Bar of Arizona cautions lawyers who advertise their services on the Internet that by doing so they implicitly agree to consider forming an attorney/client relationship with anyone who responds to the advertisement. A potential client responding to such a solicitation could expect that information would be held in confidence. To avoid problems, the Arizona opinion suggests that the Web site must contain disclaimers notifying potential clients whether

their inquiries will be treated as confidential.

No state has issued an opinion prohibiting the recipient of an unsolicited e-mail from using information contained in the e-mail, even to the disadvantage of the sender. Thus, in the hypothetical above, your associate is free to forward the e-mail to whomever he chooses.

For help with all your ethics dilemmas, don’t forget to call the Office of General Counsel on the Ethics Hotline, (404) 527-8720 or (800) 334-6865. ☎

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

## Endnotes

1. The limited exceptions to the requirement of confidentiality can be found at Rule 1.6(a) and (b).
2. In 2002 the ABA amended the Model Rules of Professional Conduct to add a new Rule 1.18, Duties to Prospective Client. The quote above is from Comment 2 to Rule 1.18.



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# Discipline Notices

(Oct. 17, 2003 through Dec. 11, 2003)

By Connie P. Henry

## DISBARMENTS/VOLUNTARY SURRENDER

**Edward James Brantley**

Atlanta, Ga.

By order dated Oct. 20, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Edward James Brantley (State Bar No. 078225). A mortgage company asked Brantley to close a real estate transaction for a borrower and wire transferred \$238,902.14 to Brantley's trust account. After the loan transaction failed to close, Brantley would not return the money. The funds are no longer in Brantley's trust account and he is unable to return the funds to the mortgage company.

**George Thomas Coumaris**

Washington, D.C.

By order dated Nov. 10, 2003, the Supreme Court of Georgia disbarred George Thomas Coumaris (State Bar No. 190250) from the practice of law in Georgia. Coumaris was convicted of conspiracy to commit crimes against the United States in the United States District Court for the District of Columbia.

## SUSPENSIONS

**R. Dale Perry**

Gainesville, Ga.

By Supreme Court of Georgia order dated Nov. 10, 2003, R. Dale Perry (State Bar No. 572785) has been suspended from the practice of law in Georgia for a period of six months. Perry received \$3,000 in fiduciary funds and commingled those funds with his own. When a grievance was filed, Perry forwarded a cashier's check to the Probate Court of Athens-Clarke County in the amount of \$5,495.27, including the principal amount plus interest.

**Leonard H. Queen Sr.**


Sparta, Ga.

By Supreme Court of Georgia order dated Nov. 10, 2003, Leonard H. Queen Sr. (State

Bar No. 590815) has been suspended from the practice of law in Georgia for a period of thirty months. In December 1997 Queen represented a client on a DUI charge. The client told Queen that she had received a notice of foreclosure on her home and that she could not pay the taxes. Queen and his client agreed that the client would transfer the property to Queen who would pay the taxes while the client continued to live on the property. In July 1998 Queen presented his client with a two-year lease/purchase document setting rent at \$500 per month and providing that title to the property would be reconveyed to the client at the end of the lease. When the client failed to perform under the lease, Queen dispossessed her. Queen did not inform the client of his possible conflict of interest in the transaction.

**Stephen T. Maples**

Decatur, Ga.

By Supreme Court of Georgia order dated Nov. 10, 2003, Stephen T. Maples (State Bar No. 469950) has been suspended from the practice of law in Georgia for a period of 24 months with conditions under reinstatement. Maples received \$10,000 in 1995 from the sisters of a convicted criminal defendant to represent their brother on motion for new trial and appeal. He filed the motion for new trial, met with the client and previous counsel, reviewed the transcript and forwarded it to the client asking him to call to discuss the appeal. The client did not call and Maples never contacted him again. The sisters attempted but failed to reach Maples on numerous occasions. Maples did not speak with them again until November 1997. Maples has been the subject of five prior disciplinary actions. 

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



## What a Wonderful Web Site!

By Natalie R. Thornwell

**W**ith over nine million Web sites on the Internet, who doesn't love discovering a useful Web site? We certainly do, and since we come across some great sites that a lot of attorneys say they have never heard of, we decided to share the sites we know about with you — every week! By visiting the LPM Department's Web page at [www.gabar.org/lpm.asp](http://www.gabar.org/lpm.asp), you can now not only access a listing of practice management resources, information on consultations, articles, sample forms, and a Tip of the Week, but also a brand new section: Web Site of the Week.

Under the new Web Site of the Week area, you will find sites that are useful, interesting, and even fun. From topics on practice management, legal research, technology to substantive law, you are bound to find a site that interests you. And, to whet your appetite a

bit more, here are a few of the sites you are likely to see in the weeks to come:

**[www.google.com](http://www.google.com)** — This is the ultimate search engine site on the Internet. You can find anything on the Internet, in group discussion boards, etc. You can search for images and even check out the news and stock quotes. Also, you can download the Google toolbar which can be added as a toolbar on your browser for faster searching. The toolbar also boasts some pretty cool popup-blocking functionality.

**[www.llrx.com](http://www.llrx.com)** — One of the greatest legal research sites ever! LLRX.com is a unique, free Web journal dedicated to providing legal and library professionals with the most up-to-date information on a wide range of Internet research and technology-related issues, applications, resources and tools, since 1996. The site has columns, feature articles, topical research guides, and legal-tech and library related news resources.

**[www.point.com](http://www.point.com)** — Need a new cell phone? Don't know what service plans cost? Want to know if your phone has coverage in that part of the state? This site is a good starting place for shopping for a new cell phone or new service. Enter your zip code to find out what phone vendors service your area and what phones and coverage areas are



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### Keynote: Visions of the Future



Lou Andreozzi,  
President and  
CEO of LexisNexis  
North American  
Legal Markets,



and Mike Wilens,  
President of West,  
will share their  
respective visions

of the future role of legal technology in day-to-day practice in a joint keynote address.

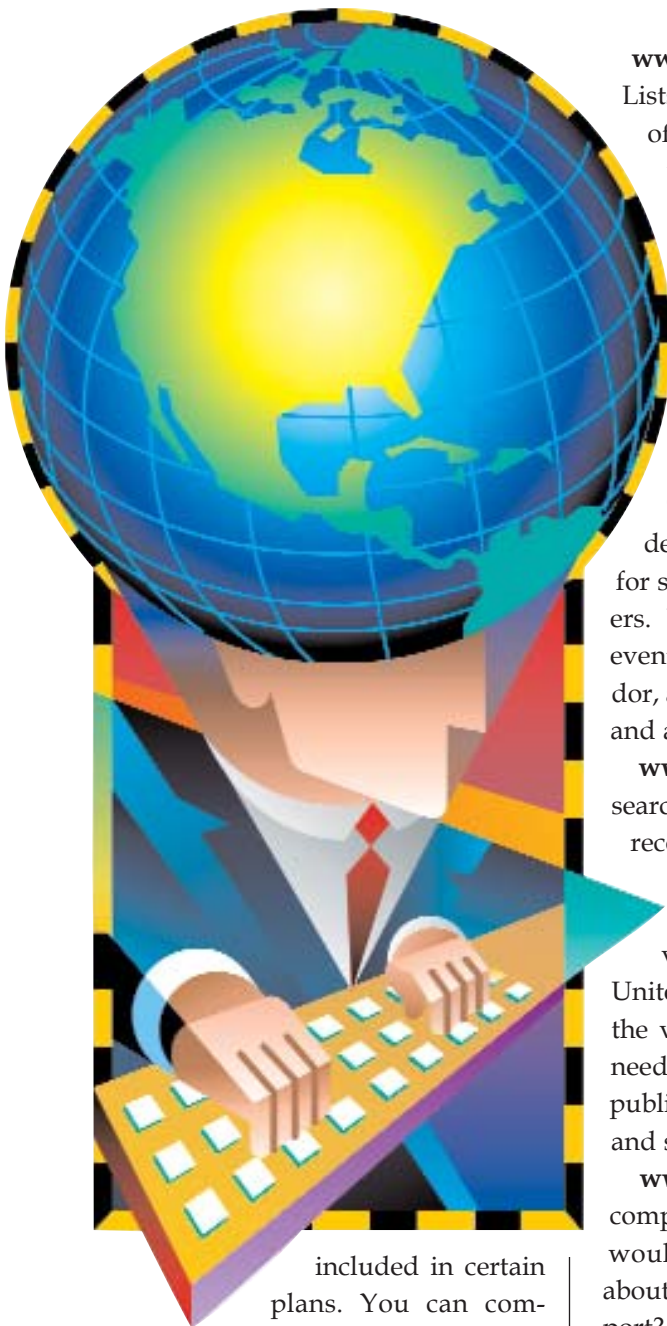
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**www.tinyurl.com** — Ever get those super-long URLs in an e-mail and attempt to copy and paste them into your browser? You can now eliminate the old “copy and paste; copy the remainder and paste” routine at this site. You can load in the long URL and the site converts it to a short URL that will work every time you need to get back to that site. You can even send the little guy back to the person who tagged you with the long URL in the first place.

**www.solosez.net** — Solosez is a Listserv that generates hundreds of e-mails a day. Some of the wonderful nuggets of information you need can easily be buried in that 135th message, but now the group has a Web site that helps getting to the meaningful stuff a little easier. The ABA’s Standing Committee on Solo and Small Firm Practitioners has developed this site of resources for solo and small firm practitioners. Learn about upcoming CLE events, find a consultant or vendor, access links for small business and a lot more.

**www.vitalrec.com** — You can search for and even order vital records from anywhere in the country on this incredible site. With a full listing of all vital records offices across the United States you are sure to find the vital records information you need. There are also links to other public record searching directories and sites.

**www.protonic.com** — Ever had computer problems that you think would be easy to solve? How about some good, free tech support? That’s right, the support here

is free. This site allows you to enter a brief description of your computer problem, and the tech expert volunteers working for the site will send you a solution via e-mail. It’s a good site for nagging problems for which you don’t need an immediate fix. Also, don’t forget to run the solution by your IT folks if you have them.

**www.gabar.org** — The State Bar of Georgia’s Web site is a wonderful resource for any Georgia Bar member. The site has a listing of resources for attorneys and the public. Learn about important Bar issues, visit departments and programs like Law Practice Management for resources, review Bar rules, check your CLE credits, browse the Bar Journal archives or even look up another Georgia lawyer in the online directory. If you are a Georgia Bar member, this site is a must for your favorites.

Visit our Web site today for even more great sites or call us with some that you know about at (404) 527-8770 or (404) 527-8772. ☎

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

## Free Report Shows Lawyers How to Get More Clients

Call!— Why do some lawyers get rich while others struggle to pay their bills?

“It’s simple,” says California attorney David M. Ward. “Successful lawyers know how to market their services.”

Once a struggling solo practitioner, Ward credits his turnaround to a referral

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“Lawyers depend on referrals,” Ward notes, “but without a system, referrals are unpredictable and so is your income.”

Ward has written a new report, “How to Get More

Clients in A Month Than You Now Get All Year!” which reveals how any lawyer can use his marketing system to get more clients and increase their income.

Georgia lawyers can get a FREE copy of this report by calling 1-888-562-4627 (a 24-hour free recorded message), or visiting Ward’s web site at [www.davidward.com](http://www.davidward.com)



# South Georgia Office Stays Busy


By Bonne Cella



The Valdosta Office of Georgia Legal Services meets monthly at the State Bar Satellite Office. Children who accompany their parents are encouraged to enjoy books provided by the local Reading Capitol of the World committee.

CASA (Court Appointed Special Advocate) is a program to see that abused children are placed in safe, loving homes as soon as possible. As a fundraiser for the program, civic groups and individuals built miniature houses and displayed them on the lawn of the Tift County Court House. Tickets were sold and drawings were held in three counties for the play-houses.



More than 25 clinical staff in behavioral health from around South Georgia attended a training seminar on how to be more effective in court and how to handle privacy issues while in court. This in-service program, held at the Tift County courthouse, was given by attorney Rob Reinhardt. After the training, the participants toured the State Bar Satellite Office where they enjoyed viewing local art work. 

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



(Left to right) Bruce Taylor, Greg Corman (Fireman's Fund), Tom Tobin (Henning Mediation) and Byron Hays (Structured Financial Assoc.).



# ICLE Conference Draws Hundreds to Jamaica

By Johanna B. Merrill

**T**he locals say, “Come back to Jamaica,” and it’s an easy request to fulfill. Things tend to stay the same in Jamaica — every morning the sun comes up in amazing brightness and curtains of white clouds pull back to expose an expanse of blue. The sea, in its swirling greens and blues, beckons to you as it laps the white sandy shore.

So come back they did. Sixteen years after the first Entertainment and Sports Law Conference was held in Negril with an attendance of only fifteen people (including guests), the Southern Regional Entertainment, Sports

Law and Intellectual Property Conference met at the Ritz-Carlton Hotel and Resort in Rose Hall, Jamaica, for a successful three-day seminar that gave attending attorneys a full year of CLE credit.

The conference began in 1987 with just a few entertainment and sports attorneys and has continued to grow each year. The group has always met “off shore” in locations such as Puerto Vallarta, Curaçao and Costa Rica. In 2000, Greg Kirsh, then-chair of the Bar’s Intellectual Property Law Section, along with Darryl Cohen, one of the conference’s founders, decided to join forces and the conference expanded to include the Intellectual Property Law Section.

This year the Entertainment and Sports Law and Intellectual Property Law sections of the State Bar of Georgia were joined by the entertainment, arts and sports sections from the



Sally Papacharalambous of MGM in Los Angeles; Entertainment and Sports Law Section Chair Alan S. Clarke and Craig J. Muench, CPA, Director of Business Management with Gursey Schneider & Co., LLP in Los Angeles share a coconut drink during the conference.





The Ritz-Carlton in Rose Hall, Jamaica hosted the 16th Annual Southern Regional Entertainment, Sports Law and Intellectual Property Conference.



YLD Director Deidra Sanderson; Lisa Furjanic and Maria Baratta, both associates with Kilpatrick Stockton LLP; and Section Liaison Johanna Merrill attend a social gathering during the conference.

Florida Bar and the Tennessee Bar Association to bring the total conference attendance to almost 300.

The long weekend kicked off on Thursday, Nov. 13, with a cocktail hour and dinner at the Rose Hall Great House, which was once home to the legendary “white witch” Annie Palmer. Attendees were able to tour the 223-year-old great house before dinner, and learned the story of its cruel mistress who, as legend has, murdered three husbands on the property before she was killed during a slave uprising in 1831. After the tours everyone made their way down a sloping, green hill to find a splendid Jamaican-style buffet and local musicians. Darryl Cohen, chair of the Florida Bar’s Entertainment, Arts and Sports Law Section, welcomed everyone to Jamaica and officially kicked off the conference and festivities.

Sessions started bright and early after registration on Friday with topics ranging from New Media



Licensing to Litigating in the Digital Age. The conference was structured to give attendees their afternoons free so they could spend time enjoying the sandy beaches and the greens of the world-renowned White Witch Golf Course.

On Friday night a cocktail party was held on the west lawn of the hotel's grounds. The reggae music and rum drinks were constant reminders of the tropical location.

Sessions on Saturday and Sunday mornings covered topics such as updates on patent, copyright and trademark case law, music contracts, technology trends in IP law, the state of the music industry, book deals, advanced IP litigation and sports and the lottery.

The farewell dinner on Sunday night took place on the beach. The palm trees were lit in an array of tropical colors, and attendees dined on Jamaican fare for a final time.

If you have any suggestions for future locations or events, contact Darryl Cohen at [dcohen@coco-law.tv](mailto:dcohen@coco-law.tv). For more information on past conferences, or to stay abreast of future planning, visit [www.selaw.org](http://www.selaw.org).

## NEWS FROM THE SECTIONS Appellate Practice Section

By Christopher McFadden

Case Law Update - Dec. 15, 2003.

*Canoeside Props. v. Livsey*, S03A0966, 2003 Fulton County D. Rep. 3496, 2003 WL 22794704, 2003 Ga. LEXIS 1020 (Ga., November 26, 2003).

The Supreme Court has liberalized one aspect of appellate practice, authorizing trial courts to save litigants who miss crucial deadlines in the interlocutory appeal


procedure. The Supreme Court held that trial courts may give litigants who miss crucial deadlines in the interlocutory appeal process a second chance. In so holding, however, the Supreme Court drew a fine distinction between dismissals because of procedural defaults of interlocutory appeals pursuant to O.C.G.A. § 5-6-34 (b) and dismissals because of procedural defaults of direct appeals, including direct appeals from partial grants of summary judgment pursuant to O.C.G.A. § 9-11-56 (h).

The interlocutory appeal process has three crucial deadlines. First, a certificate of immediate review must be secured from the trial court and filed with the clerk of that court within 10 days of entry of the order to be appealed. Second, an application to appeal must be filed with the appellate court within 10 days after the certificate is granted. Finally, after the application is granted, a notice of appeal must be filed within 10 days. O.C.G.A. § 5-6-34 (b).

In *Canoeside*, Ferdinand, a party seeking to appeal the denial of his motion for partial summary judgment timely secured and filed a certificate of immediate review. But he failed to properly file his application for interlocutory appeal in a timely fashion. The trial court vacated and re-entered the certificate of immediate review, but the Court of Appeals dismissed this second application because the second certificate of immediate review was filed more than 10 days after the summary-judgment order. On remand the trial court made another effort to rescue Ferdinand. This time the trial court vacated and reentered both the summary-judgment order and the certificate of immediate review. This time

Ferdinand filed his application in the Supreme Court, which was the proper court. The Supreme Court held that there was "no impediment to the trial court's action" and decided the appeal on its merits.

In holding that the merits could be decided, the Supreme Court overruled an earlier decision of the Court of Appeals, *International Indem. Co. v. Robinson*, 231 Ga. App. 236, 498 S.E.2d 795 (1998). The Robinson court had held "that a dismissal of an interlocutory appeal for a procedural fault carries with it *res judicata* effect which forecloses the issue from further appellate review." Overturning *Robinson*, the Supreme Court held, "A defective attempt to seek interlocutory review pursuant to O.C.G.A. § 5-6-34 (b) does not have the effect of making the judgment appealed from *res judicata* of the issue."

In overruling *Robinson*, the Supreme Court distinguished interlocutory appeals pursuant to O.C.G.A. § 5-6-34 (b) from direct appeals of partial grants of summary judgment pursuant to O.C.G.A. § 9-11-56 (h). As to appeals from partial grants of summary judgment, the Supreme Court adhered to an earlier holding that "if the losing party suffers dismissal of his § 9-11-56 (h) appeal for failure to fulfill procedural requirements, the losing party should, in return for his privilege of direct appeal, suffer the same sanction of *res judicata* which attaches to a final judgment from which a procedurally defective appeal is taken." 

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



# Updated Section Chair Listing

On page A-15 of the 2003-04 *Directory and Handbook*, the 2002-03 section chairs were listed instead of the 2003-04 chairs. Following is an updated listing. As a reminder, you can always find the most up-to-date information on the Bar's Web site at [www.gabar.org](http://www.gabar.org).

## **Administrative Law**

Hon. John B. Gatto, Atlanta  
404-818-373 Fax: 404-61-6309  
[jgatto@osah.state.ga.us](mailto:jgatto@osah.state.ga.us)

## **Agriculture Law**

Douglas A. Henderson, Atlanta  
404-885-3479 Fax: 404-885-3900  
[douglas.henderson@troutmansanders.com](mailto:douglas.henderson@troutmansanders.com)

## **Alternative Dispute Resolution Law**

R. Wayne Thorpe, Atlanta  
404-88-0900 Fax: 404-88-0905  
[wthorpe@mindspring.com](mailto:wthorpe@mindspring.com)

## **Antitrust Law**

Randall L. Allen, Atlanta  
404-881-7196 Fax: 404-881-7777  
[rallen@alston.com](mailto:rallen@alston.com)

## **Appellate Practice**

Dorothy Y. Kirkley, Atlanta  
404-892-8781 Fax: 404-892-3662  
[counsel@kirkleypayne.com](mailto:counsel@kirkleypayne.com)

## **Aviation Law**

E. Alan Armstrong, Atlanta  
770-451-0313 Fax: 770-451-0317  
[alanarmstrong@mindspring.com](mailto:alanarmstrong@mindspring.com)

## **Bankruptcy Law**

Laura E. Woodson, Atlanta  
404-786-0077  
[lwoodson@sgrlaw.com](mailto:lwoodson@sgrlaw.com)

## **Business Law**

Charles R. Beaudrot Jr., Atlanta  
404-233-7000 Fax: 404-365-9532  
[crb@mmmlaw.com](mailto:crb@mmmlaw.com)

## **Corporate Counsel Law**

Paul R. Shlanta, Atlanta  
404-584-3430 Fax: 404-584-3459  
[pshlanta@aglresources.com](mailto:pshlanta@aglresources.com)

## **Creditor's Rights Law**

Jay E. Loeb, Co-Chair, Atlanta  
678-686-6630 Fax: 678-686-6633  
[olim-loeb@mindspring.com](mailto:olim-loeb@mindspring.com)

Frank B. Wilensky, Co-Chair, Atlanta  
404-584-1200 Fax: 404-681-4355  
[fwilensky@maceywilensky.com](mailto:fwilensky@maceywilensky.com)

## **Criminal Law**

J. Michael Cranford  
478-746-0704 Fax: 478-746-0927  
[mike@maconlaw.com](mailto:mike@maconlaw.com)

## **Elder Law**

Ruthann P. Lacey, Atlanta  
770-939-4616 Fax: 770-939-1758  
[rlacey@elderlaw-lacey.com](mailto:rlacey@elderlaw-lacey.com)

## **Eminent Domain**

Charles L. Ruffin, Macon  
478-750-0777 Fax: 478-750-1777  
[cruffin@gambrell.com](mailto:cruffin@gambrell.com)

## **Entertainment & Sports**

Alan Stuckey Clarke, Atlanta  
404-816-9800 Fax: 404-816-0555  
[clarke.anderson@mindspring.com](mailto:clarke.anderson@mindspring.com)

## **Environmental Law**

Susan H. Richardson, Atlanta  
404-815-6330 Fax: 404-541-3366  
[surichardson@kilpatrickstockton.com](mailto:surichardson@kilpatrickstockton.com)

## **Family Law**

Thomas F. Allgood Jr., Augusta  
706-724-6526 Fax: 706-724-0043  
[tomallgood@augustalawyers.com](mailto:tomallgood@augustalawyers.com)

## **Fiduciary Law**

Neil A. Creasy, Savannah  
912-925-7200 Fax: 912-925-0500  
[nac@simpsoncreasy.com](mailto:nac@simpsoncreasy.com)

## **General Practice & Trial**

W. Wright Gammon Jr., Cedartown  
770-748-2815 Fax: 770-749-1811  
[wright@gammonanderson.com](mailto:wright@gammonanderson.com)

## **Government Attorneys**

Sharon T. Ratley, Macon  
478-621-2627 Fax: 478-621-2655  
[sharon.ratley@usdoj.gov](mailto:sharon.ratley@usdoj.gov)

## **Health Law**

Rod G. Meadows, Stockbridge  
770-957-1199 Fax: 770-954-1199

## **Individual Rights Law**

Michael Monahan, Atlanta  
404-527-8762 Fax: 404-527-8717  
[mike@gabar.org](mailto:mike@gabar.org)

## **Intellectual Property Law**

Scott M. Frank, Atlanta  
404-249-3345 Fax: 404-249-2822  
[scott.frank@bellsouth.com](mailto:scott.frank@bellsouth.com)

## **International Law**

James Y. Rayis, Atlanta  
404-261-6020 Fax: 404-261-3656  
[jyr@balch.com](mailto:jyr@balch.com)

## **Labor & Employment Law**

Georgia Kay Lord, Decatur  
404-601-4132 Fax: 404-601-4133  
[glord@attorneysforemployees.com](mailto:glord@attorneysforemployees.com)

## **Legal Economics Law**

Robert G. Brazier, Atlanta  
404-221-6506 Fax: 404-221-6501  
[rbrazier@gambrell.com](mailto:rbrazier@gambrell.com)

## **Local Government Law**

Laurel E. Henderson, Decatur  
404-378-7417 Fax: 404-378-7778  
[lhenderson@bellsouth.com](mailto:lhenderson@bellsouth.com)

## **Military-Veterans Affairs**

Stephen Scot Sikes, Richmond Hills  
912-756-2788  
[scot.sikes@stewart.army.mil](mailto:scot.sikes@stewart.army.mil)

## **Product Liability Law**

Albert M. Pearson III, Atlanta  
404-261-0016 Fax: 404-261-0024  
[apearson@mmkplaw.com](mailto:apearson@mmkplaw.com)

## **Real Property Law**

Rachel K. Iverson, Alpharetta  
770-781-3000 Fax: 770-781-3001  
[rki@mmmlaw.com](mailto:rki@mmmlaw.com)

## **School & College Law**

Patrick W. McKee, Newnan  
404-683-8900 Fax: 404-683-8905  
[pwmckee@mckeelaw.com](mailto:pwmckee@mckeelaw.com)

## **Senior Lawyers Law**

Harry L. Cashin Jr., Atlanta  
404-853-5050 Fax: 404-853-1812  
[hcashin@wbilegal.com](mailto:hcashin@wbilegal.com)

## **Taxation Law**

Douglas R. Thompson, Atlanta  
404-365-5682 Fax: 404-365-5685  
[drt@gsllaw.com](mailto:drt@gsllaw.com)

## **Technology Law**

Ann Moceyunas, Atlanta  
678-795-5700  
[ann@moceyunas.com](mailto:ann@moceyunas.com)

## **Tort & Insurance Practice**

James F. Taylor III, Atlanta  
404-874-8800 Fax: 404-888-6199  
[jft@scmhlaw.com](mailto:jft@scmhlaw.com)

## **Workers' Compensation Law**

Douglas A. Bennett, Atlanta  
404-888-6106 Fax: 404-888-6199  
[doug.bennett@swiftcurrie.com](mailto:doug.bennett@swiftcurrie.com)



## Views From a Prosecutor

By Dennis Sanders

**E**thics. Professionalism. Nothing seems to chase lawyers from a room more quickly than when those two words are spoken. While those standards are assigned to maintain the dignity of our profession, modern attorneys simply view those concepts as hurdles to overcome in order for us to become victorious. And victory in the mind of many attorneys has become synonymous with justice.

To regress in my personal life, I recall how I made up my mind as a freshman in high school that not only did I want to become a lawyer, but decided at the age of 15 that I wanted to attend Mercer University and Mercer Law School. The attraction to me even at that early age was that the practice of law was one of the most honorable professions to which an individual could dedicate his life. The profession of law was mentioned in the same breath as doctors and ministers. Today however, the practice of law is frequently mentioned with the same respect given to used car salesmen and sports agents.

The biggest problem that our Bar is facing is not if we should have the new Bar Center, nor is it whether Bar dues should be raised. Rather, the largest challenge facing our Bar and each of us as attorneys is that our profession is self-destructing. The saddest part is that we, the attorneys, are the ones destroying the profession that we all were so eager to enter. The enemy is not the media, or the public; the enemy is us.





## It is important that we retain the civility that is required for our profession to maintain its standards.

Chief Justice Clark used to say, “Ethics is what is required, and professionalism is that which is expected.” But how many of us agree with Justice Clark? I suspect that a large number of us view ethics as those things that are unfortunately required, and professionalism as that which is only suggested but thankfully not required. The Justices of our highest court are concerned over what they see as a general decline in values by our Bar members. Justice Benham has addressed this issue on many occasions. Justice Hunstein, addressing the prosecutors of Georgia a few years ago, expressed her concern over where our Bar was headed and how the public perception of our profession has diminished dramatically. Chief Justice Fletcher is sending out this message routinely as he chairs the commission on professionalism. Justice Carley will quickly tell you that he is genuinely concerned over the lack of professionalism that seems to be the trend in our profession. These leaders are in a position to see daily how our profession is ceasing to be the honorable profession it once was, and they are concerned over the direction that we are headed. Meanwhile, we attorneys are becoming much more concerned with the outcome of our cases rather than how we accomplish that outcome.

During my career of over 30 years as a prosecutor, I have had the pleasure of facing many outstanding attorneys. There are several within my own circuit that I

face on a regular basis and appreciate their friendship and skills. I have also had the pleasure of working with a number of outstanding attorneys outside of my circuit. Many come to mind, but most notably are Denmark Grover of Macon, Roosevelt Warren of Sparta, Ed Tolley of Athens, and Judges Jack Ruffin and Jim Blanchard of Augusta. Each of these attorneys had something in common in addition to their outstanding trial abilities. I have never known any of them to conduct themselves in anything but the highest manner as demanded by our honorable profession. Their word was their bond. If they told you something as a member of the Bar, you could write it down as true and factual. Their conduct was always more than ethical; it was professional under Justice Clark’s definition.

When we were young attorneys, we were not lacking in enthusiasm, but sometimes we were lacking in vision. Frequently our vision is still clouded as we find ourselves consumed only with the outcome of the case we are working on. Now, 50,000 cases later, it is very clear to me that there will always be another case. When we are young, we want our peers to appreciate our abilities and to recognize us for our victories. There is nothing wrong with trying to win every case and giving great effort with each challenge. Being competitive is a positive trait that is important in every trial attorney. However, as we get older, we begin to realize it is not the result of a case

that is everlastingly important, but rather it is the means by which our goals are achieved that creates the image by which we are judged and even remembered.

It is important that we retain the civility that is required for our profession to maintain its standards. As Justice Benham said, “Professionalism’s main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.” And as Justice Benham warns, “If we lose our civility, our justice system will be out of control.” How can we reasonably expect the public to respect our justice system and us when we show little, if any, respect toward each other?

We seem to have forgotten the oath that we took to become attorneys. As we stood side by side without a specialty, we were only young bright-eyed individuals who were anxious to embark in this great profession not knowing where the winds of fate would take us. Now we entrench ourselves among our immediate peers in our chosen specialties, and cast those who represent other legal interests outside of our own as the enemy.

Prosecutors love to point to members of the defense bar as unprofessional. The defense bar just as eagerly makes the same accusation toward the prosecutors. Civil attorneys seem to enjoy pointing the finger of unethical conduct and unprofessionalism toward both the defense counsels and prosecutors, while viewing themselves as somehow above the others. Too many of us spend our time explaining to ourselves why the ends justify the means and searching for loopholes in the rules of ethics to support the reasons for the conduct that others perceive as unprofessional or perhaps even unethical.



And meanwhile, our profession suffers. The oath that each of us took has conveniently been assigned to the files of the unimportant and insignificant. Was our oath just a formality? Does our oath have implied exceptions that can be invoked whenever we feel the necessity to do so in order for us to achieve justice, which is measured by the results that we desire?

Our oath of admission to the Bar is remarkably silent on winning and losing. The oath, our oath, only addresses our conduct and the manner in which we practice. We have sworn "I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia." The Atlanta Bar Association has a separate oath by which members have pledged to conduct themselves in a manner that will reflect honor upon the legal profession; that they will treat all participants in the legal process with civility and will conduct themselves honestly, courteously and fairly. A number of years have passed for many of us since we raised our hands to our respective God and swore our allegiance to the standards of our profession. Perhaps it is an oath that we should renew each year. You would think that a renewal of our oath would certainly be as important as a renewal of our annual Bar dues. Unfortunately, the emphasis

is only to insure that we pay our dues in a timely manner to retain our membership in our profession for yet another year.

Recently in an office meeting, I handed out to each of my assistants the canon of ethics that apply to prosecutors as a reminder of our duties. I am fortunate that those who work with me feel passionately about our duties as prosecutors. But it never hurts to review those standards of expected conduct. The

**If we remember our oaths and our duty, our profession will continue to be the dreams of the youth of today and tomorrow, and we can continue taking pride in being members of the greatest profession known to man — the honorable profession of law.**

special duty of a prosecutor is more than simply trying to obtain the conviction; it is to seek justice as well. Because of the power that is within our office, we cannot just be advocates, but we have to insure that our decisions are fair to all, including the defendant. In our system of justice, the accused is to be given the benefit of all reasonable doubt, and we must refrain from prosecuting any case in which we feel there is a lack of merit. Before my fellow prosecutors line up to debate or to distinguish those concepts, let me first remind them that those are not my words, but rather the words of the canon of ethics as outlined in EC 7-13, EC 7-14, and DR 7-104.

Prosecutors cannot allow themselves to be controlled by law enforcement officers who do not

understand our duties in making decisions. We must have the courage and strength to stand tall and make the tough decisions, even if that decision is unpopular with law enforcement officers or even the victim on occasions. And likewise we cannot cave in to the defense attorney who challenges our position and threatens to make our job tougher. The question for someone considering entering prosecution is, "Do you have the strength to do what you think is right?" It has been said that what is right is not always popular and what is popular is not always right. It takes a special person to become a prosecutor. It is not always easy, not always popular, but it is indeed rewarding if you vigorously perform your

duties in a professional and ethical manner.

I am proud of being a prosecutor over the last 30 years, but I am more proud of the fact that I am an attorney. We are members of a great profession. For many of us, we are living the dreams of our youth. However, we have a responsibility to the profession that we have joined. If we remember our oaths and our duty, our profession will continue to be the dreams of the youth of today and tomorrow, and we can continue taking pride in being members of the greatest profession known to man — the honorable profession of law. 🍷

**Dennis Sanders** is a district attorney in the Toombs Judicial Circuit.



**T**he 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.

**Ronald F. Adams**

Brunswick, Ga.  
Admitted 1941  
Died September 2003

**William R. Alford**

Athens, Ga.  
Admitted 1976  
Died May 2003

**Herbert L. Buffington**

Canton, Ga.  
Admitted 1942  
Died December 2003

**Jack N. Gunter**

Cornelia, Ga.  
Admitted 1960  
Died November 2003

**Damien S. Turner**

Atlanta, Ga.  
Admitted 1997  
Died November 2003

**Richard D. Hall**

Lilburn, Ga.  
Admitted 1981  
Died December 2003

**Stephen D. Hise**

Decatur, Ga.  
Admitted 1950  
Died November 2003

**John Michael Johnson**

West De Moines, Ia.  
Admitted 1975  
Died August 2003

**C. Stanley Lowery**

Augusta, Ga.  
Admitted 1980  
Died October 2003

**James H. McClure**

Atlanta, Ga.  
Admitted 1941  
Died December 2003

**L. Ray Patterson**

Athens, Ga.  
Admitted 1956  
Died November 2003

**Mark J. Sanger**

Atlanta, Ga.  
Admitted 1986  
Died November 2003

**J. Clinton Smith**

Buford, Ga.  
Admitted 1978  
Died December 2003



L. Ray Patterson, 74, of Athens, Ga., died Nov. 5. Since 1986, he had been the Pope F. Brock Professor of Professional Responsibility at the University of Georgia School of Law. Over a 45-year career, he taught at the law schools of Mercer, Vanderbilt and Emory, where he served as dean for seven years. Patterson earned his undergraduate and law degrees at Mercer, as well as a master's degree in English from Northwestern and the equivalent of a Ph.D. in law from Harvard. He is survived by his wife, the former Laura Adelyn Davis; two daughters, Dorvee and Adelyn Patterson Hilado; two sons-in-law; four grandchildren; two sisters; a brother; and numerous nieces, nephews and cousins. ☺



## 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.



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

## February 2004

**3**

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*Revised Article 9 of the Uniform Commercial Code*  
Atlanta, Ga.  
6.7 CLE

**12**

ICLE  
*Abusive Litigation*  
Atlanta, Ga.  
6 CLE

ICLE  
*Zoning*  
Savannah, Ga.  
6 CLE

AMERICAN ARBITRATION ASSOCIATION  
*A.C.E. Award Writing*  
Atlanta, Ga.  
2.5 CLE with 1 Ethics

**13-14**

ICLE  
*Caribbean Seminar*  
Mexico  
8 CLE

ICLE  
*Estate Planning Institute*  
Athens, Ga.  
12 CLE

**13**

ICLE  
*Georgia Automobile Law*  
Savannah, Ga.  
6 CLE

ICLE  
*Plaintiff's Medical Malpractice*  
Atlanta, Ga.  
6 CLE

**16**

ICLE  
*Bridge the Gap*  
Atlanta, Ga.

**18**

LORMAN BUSINESS CENTER, INC.  
*Bankruptcy*  
Atlanta, Ga.  
6 CLE



19

ICLE  
*Elder Law*  
Atlanta, Ga.  
6 CLE

ICLE  
*Taking Control of the Internet*  
6 CLE

20

ICLE  
*License Revocation and Suspension*  
Atlanta, Ga.  
6 CLE

ICLE  
*Georgia Auto Insurance*  
Atlanta, Ga.  
6 CLE

ICLE  
*Successful Trial Practice*  
Atlanta, Ga.  
6 CLE

ICLE  
*ADR in Workers' Comp Cases Before the Board*  
Atlanta, Ga.  
6 CLE

LORMAN BUSINESS CENTER, INC.  
*AIA Contracts*  
Atlanta, Ga.  
6.7 CLE

23

ICLE  
*Bridge the Gap*  
Atlanta, Ga.

25

ICLE  
*Advanced Criminal Practice*  
Kennesaw, Ga.  
6 CLE

LORMAN BUSINESS CENTER, INC.  
*Use of Force*  
Savannah, Ga.  
6 CLE with 0.8 Ethics

26

ICLE  
*Executive Branch Adjudication in Georgia*  
Atlanta, Ga.  
6 CLE

27

ICLE  
*Fundamentals of Health Care Law*  
Atlanta, Ga.  
6 CLE

ICLE  
*Dealing with the IRS*  
Atlanta, Ga.  
6 CLE

ICLE  
*Technology Show and Tell*  
Atlanta, Ga.  
6 CLE

LORMAN BUSINESS CENTER, INC.  
*Introduction to Workers' Compensation*  
Albany, Ga.  
6 CLE

## March 2004

2

LORMAN BUSINESS CENTER, INC.  
*ADA, FMLA and Workers' Compensation*  
Albany, Ga.  
6 CLE

4

ICLE  
*Hot Topics for the Estate Planning Attorney*  
Atlanta, Ga.  
3 CLE

ICLE  
*Current Issues in Arbitration*  
Atlanta, Ga.  
6 CLE

LORMAN BUSINESS CENTER, INC.  
*Community Association Law*  
Atlanta, Ga.  
6.7 CLE with 1.0 ethics

5

ICLE  
*Internet Legal Research*  
Atlanta, Ga.  
6 CLE

ICLE  
*Soft Tissue Injury Cases*  
Atlanta, Ga.  
6 CLE



ICLE  
*Georgia Appellate Practice*  
Atlanta, Ga.  
6 CLE

ICLE  
*Employment Law*  
Atlanta, Ga.  
6 CLE

10

ICLE  
*Government Attorneys Seminar*  
Atlanta, Ga.  
6 CLE

LORMAN BUSINESS CENTER, INC.  
*Finance: The Basics*  
Atlanta, Ga.  
6.7 CLE

11

ICLE  
*Women in the Profession*  
Atlanta, Ga.  
6 CLE

ICLE  
*Georgia Appellate Practice*  
Atlanta, Ga.  
6 CLE

ICLE  
*Product Liability*  
Atlanta, Ga.  
6 CLE

12

ICLE  
*Trial Evidence with Professor Paul Milich*  
Atlanta, Ga.  
6 CLE

16

LORMAN BUSINESS CENTER, INC.  
*Section 125 Cafeteria Plans*  
August, Ga.  
6.7 CLE

17

NATIONAL BUSINESS INSTITUTE  
*An Advanced Look at Georgia Real Estate Law*  
Atlanta, Ga.  
6 CLE with 0.5 Ethics

18

ICLE  
*Post Judgment Collection*  
Atlanta, Ga.  
6 CLE

ICLE  
*Proving Damages*  
Atlanta, Ga.  
6 CLE

19

ICLE  
*Business Research on the Internet*  
Atlanta, Ga.  
3 CLE

ICLE  
*Internet Marketing and Online Ethics*  
Atlanta, Ga.  
3 CLE

ICLE  
*Nuts & Bolts of Local Government Law*  
Atlanta, Ga.  
6 CLE

ICLE  
*Professionalism and Ethics Update*  
Atlanta, Ga.  
2 CLE

24

LORMAN BUSINESS CENTER  
*Foreclosure and Repossession*  
Macon, Ga.  
6 CLE

25-26

ICLE  
*Selected Video Replays*  
Atlanta, Ga.

25

ICLE  
*Long Term Disability*  
Atlanta, Ga.  
6 CLE

ICLE  
*Cutting Edge in Courtroom Persuasion*  
Atlanta, Ga.  
6 CLE



ICLE  
*LLCs and Other Flow-Through Entities*  
Atlanta, Ga.  
6 CLE

NATIONAL BUSINESS INSTITUTE  
*Skip Tracing Tools in Georgia*  
Atlanta, Ga.  
6 CLE

LORMAN BUSINESS CENTER  
*Practical Issues in Real Estate Title and Title Insurance*  
Atlanta, Ga.  
6 CLE with 0.5 Ethics

26

ICLE  
*Workers' Comp for the GP*  
Atlanta, Ga.  
6 CLE

ICLE  
*Basic Securities Law*  
Atlanta, Ga.  
6 CLE

NATIONAL BUSINESS INSTITUTE  
*Practical Guide to Zoning and Land Use Law in Georgia*

29

NATIONAL BUSINESS INSTITUTE  
*Georgia DUI Cases: Analyzing Cases for Trial*  
Atlanta, Ga.  
6 CLE

31

ICLE  
*McElhaney on Litigation (video replay)*  
Atlanta, Ga.  
6 CLE

## April 2004

1-3

ICLE  
*General Practice Institute*  
St. Simons, Ga.  
12 CLE

2

LORMAN BUSINESS CENTER, INC.  
*Understanding Transportation & Logistics Law*  
Atlanta, Ga.  
6 CLE

7

NATIONAL BUSINESS INSTITUTE  
*Using a Real Estate Appraiser in Georgia*  
Atlanta, Ga.  
6 CLE with 0.5 Ethics

8

ICLE  
*Advanced Elder Law*  
Atlanta, Ga.  
6 CLE

15

ICLE  
*Federal Appellate Practice*  
Atlanta, Ga.

16

ICLE  
*Foreclosures*  
Atlanta, Ga.  
6 CLE

ICLE  
*Trials of the Century*  
Atlanta, Ga.  
6 CLE

23

ICLE  
*International Law Section Seminar*  
Atlanta, Ga.  
6 CLE

ICLE  
*YLD Successful Trial Practice*  
Atlanta, Ga.  
2 CLE

27

NATIONAL BUSINESS INSTITUTE  
*Limited Liability Companies in Georgia*  
Multiple Sites  
6.7 CLE with 0.5 Ethics

29

ICLE  
*Selected Video Replays*  
Atlanta, Ga.

NATIONAL BUSINESS INSTITUTE  
*Fundamentals of Bankruptcy Law and Procedure in Georgia*  
Multiple Sites  
6 CLE with 0.5 Ethics



ICLE  
*Powerpoint in the Courtroom*  
 Atlanta, Ga.  
 6 CLE

30

ICLE  
*Writing to Persuade*  
 Atlanta, Ga.  
 6 CLE

## May 2004

6-8

ICLE  
*Real Property Law Institute*  
 Amelia Island, Fla.  
 12 CLE

13

ICLE  
*Winning at Mediation*  
 Atlanta, Ga.  
 6 CLE

14

ICLE  
*Defense of Drinking Drivers*  
 Atlanta, Ga.  
 6 CLE

ICLE  
*Nuts and Bolts of Immigration Law*  
 Atlanta, Ga.  
 6 CLE

20

ICLE  
*Construction, Materialmen and Mechanics' Liens*  
 Atlanta, Ga.  
 6 CLE

21

ICLE  
*Jury Trial*  
 Atlanta, Ga.  
 6 CLE

27-29

ICLE  
*Family Law Institute*  
 Destin, Fla.  
 12 CLE

## June 2004

24-27

ICLE  
*Georgia Trial Skills Clinic*  
 UGA Law School, Athens  
 24 CLE

25-26

ICLE  
*Southeastern Admiralty Law Institute (SEALI)*  
 Ponte Vedra Beach, Fla.  
 12 CLE

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

No earlier than thirty days after the publication of this Notice, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, 2003-2004 *State Bar of Georgia Directory and Handbook*, p. H-6 to H-7 (hereinafter referred to as “*Handbook*”).

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

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

Cliff Brashier  
Executive Director  
State Bar of Georgia

## IN THE SUPREME COURT STATE OF GEORGIA

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

MOTION TO AMEND 2004-1

### MOTION TO AMEND THE RULES AND REGU- LATIONS OF THE STATE BAR OF GEORGIA

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors in a regular meeting held on November 8, 2003, and upon the concurrence of its Executive Committee, presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, 2001-2002 *State Bar of Georgia Directory and Handbook*, pp. 1-H, *et seq.*, and respectfully moves that the Rules and Regulations of the State Bar of Georgia be amended in the following respects:

#### I.

#### **Proposed Amendments to the Georgia Rules of Professional Conduct relating to Multijurisdictional Practice**

It is proposed that certain provisions of the Georgia Rules of Professional Conduct be amended as shown below to expressly permit multijurisdictional practice in certain specific circumstances.

#### **a.) Proposed Amendments to the Terminology Section of the Georgia Rules of Professional Conduct**

The State Bar of Georgia proposes amending the “Terminology” section of the Georgia Rules of Professional Conduct by inserting the phrases in italicized and underlined typeface as follows:

#### TERMINOLOGY

“Belief” or “believes” denotes that the person involved actually thought the fact in question to be true. A person’s belief may be inferred from circumstances.

“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

“Firm” or “law firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10: *Imputed Disqualification*.

“Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Lawyer” denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice.



“Nonlawyer” denotes a person not authorized to practice law by either the:

(a) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

(b) duly constituted and authorized governmental body of any other State or Territory of the United States, or the District of Columbia or

(c) duly constituted and authorized governmental body of any foreign nation.

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance, or may refer to things of more than trifling value.

“Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.

Should the proposed amendment be adopted, the “Terminology” section of the Georgia Rules of Professional Conduct would read as follows:

## TERMINOLOGY

“Belief” or “believes” denotes that the person involved actually thought the fact in question to be true. A person’s belief may be inferred from circumstances.

“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

“Domestic Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia but not authorized by the Supreme Court of Georgia or its rules to practice law in the State of Georgia.

“Firm” or “law firm” denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a

legal services organization. See Comment, Rule 1.10: *Imputed Disqualification*.

“Foreign Lawyer” denotes a person authorized to practice law by the duly constituted and authorized governmental body of any foreign nation but not authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia.

“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

“Lawyer,” denotes a person authorized by the Supreme Court of Georgia or its Rules to practice law in the State of Georgia including persons admitted to practice in this state pro hac vice.

“Nonlawyer” denotes a person not authorized to practice law by either the:

(a) Supreme Court of Georgia or its Rules (including pro hac vice admission), or

(b) duly constituted and authorized governmental body of any other State or Territory of the United States, or the District of Columbia, or

(c) duly constituted and authorized governmental body of any foreign nation.

“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation.

“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

“Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance, or may refer to things of more than trifling value.

“Tribunal” denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party’s interests in a particular matter.



b.) Proposed Amendments  
to Rule 5.5 of the Georgia  
Rules of Professional Conduct

The State Bar proposes that Rule 5.5 of the Georgia Rules of Professional Conduct be amended as shown below by deleting the stricken portions of the Rule, and inserting the phrases shown below in italicized and underlined typeface.

**RULE 5.5: UNAUTHORIZED PRACTICE OF LAW;  
MULTIJURISDICTIONAL PRACTICE OF LAW**

(a) A lawyer shall not: ~~(a) practice law in a jurisdiction where doing so violates in violation of the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar another in the performance of activity that constitutes the unauthorized practice of law doing so.~~

(b) A Domestic Lawyer shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the Domestic Lawyer is admitted to practice law in this jurisdiction.

(c) A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the Domestic Lawyer, or a person the Domestic Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice.

(d) A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the Domestic Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the Domestic Lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A Foreign Lawyer shall not, except as authorized by this Rule or other law, establish an office or other sys-

tematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. Such a Foreign Lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice;

(4) are not within paragraphs (2) or (3) and

(i) are performed for a client who resides or has an office in a jurisdiction in which the Foreign Lawyer is authorized to practice to the extent of that authorization; or

(ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(5) are governed primarily by international law or the law of a non-United States jurisdiction.

(f) For purposes of this grant of authority, the Foreign Lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

**Comment**

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3; Responsibilities Regarding Nonlawyer Assistants.



[3] Likewise, it does not prohibit lawyers from providing. A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a Domestic Lawyer violates paragraph (b) and a Foreign Lawyer violates paragraph (e) if the Domestic or Foreign Lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the Domestic or Foreign Lawyer is not physically present here. Such Domestic or Foreign Lawyer must not hold out to the public or otherwise represent that the Domestic or Foreign Lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a Domestic or Foreign Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances for the Domestic Lawyer. Paragraph (e) identifies five such circumstances for the Foreign Lawyer. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a Domestic Lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a Foreign or Domestic Lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c) or paragraph (e). Services may be "temporary" even though the Foreign or Domestic Lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the Domestic Lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to Domestic Lawyers. Paragraphs (e) and (f) apply to Foreign Lawyers. Paragraphs (c) and (e) contemplate that the Domestic or Foreign Lawyer is authorized to practice in the jurisdiction in which the Domestic or Foreign Lawyer is admitted and excludes a Domestic or Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Domestic or Foreign Lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a Domestic Lawyer associates with a lawyer licensed to practice in this jurisdiction. Paragraph (e)(1) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice in this jurisdiction. For these paragraphs to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Domestic Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a Domestic Lawyer does not violate this Rule when the Domestic Lawyer appears before a tri-

bunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a Domestic Lawyer to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Domestic Lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a Domestic Lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the Domestic Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Domestic Lawyer is authorized to practice law or in which the Domestic Lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Domestic Lawyer may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the Domestic Lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a Domestic Lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate Domestic Lawyers may conduct research, review documents, and attend meetings with witnesses in support of the Domestic Lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a Domestic Lawyer, and Paragraph (e)(3) permits a Foreign Lawyer, to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic or Foreign Lawyer's practice in a jurisdiction in which the Domestic or Foreign Lawyer is admitted to practice. The Domestic Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a Domestic Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (e)(4)(i) permits a Foreign Lawyer to provide certain legal services in this jurisdiction on behalf of a client who resides or has an office in the jurisdiction in which the Foreign Lawyer is authorized to practice. Paragraph (e)(4)(ii) permits a Foreign Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to a matter that has a substantial connection to the jurisdiction in which the Foreign Lawyer is authorized to practice. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted. Paragraphs (e)(3) and (e)(4)(ii) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors evidence such a relationship. The Domestic or Foreign Lawyer's client may have been previously represented by the Domestic or Foreign Lawyer, or may be resident in or have sub-



stantial contacts with the jurisdiction in which the Domestic or Foreign Lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the Domestic or Foreign Lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Domestic or Foreign Lawyer in assessing the relative merits of each. In addition, the services may draw on the Domestic or Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a Domestic Lawyer who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a Domestic Lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The Domestic Lawyer's ability to represent the employer outside the jurisdiction in which the Domestic Lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the Domestic Lawyer's qualifications and the quality of the Domestic Lawyer's work.

[17] If an employed Domestic Lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the Domestic Lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a Domestic Lawyer may provide legal services in a jurisdiction in which the Domestic Lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. Paragraph (e)(5) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction.

[19] A Domestic or Foreign Lawyer who practices law in this jurisdiction pursuant to paragraphs (c), (d) or (e) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a Domestic Lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the Domestic Lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4.

[21] Paragraphs (c), (d) and (e) do not authorize communications advertising legal services to prospective clients in this

jurisdiction by Domestic or Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Domestic or Foreign Lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

If adopted, the amended Rule 5.5 of the Georgia Rules of Professional Conduct would read as follows:

#### **RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A Domestic Lawyer shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the Domestic Lawyer is admitted to practice law in this jurisdiction.

(c) A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the Domestic Lawyer, or a person the Domestic Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice.

(d) A Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the Domestic Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the Domestic Lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A Foreign Lawyer shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to



practice law in this jurisdiction. Such a Foreign Lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice;

(4) are not within paragraphs (2) or (3) and

(i) are performed for a client who resides or has an office in a jurisdiction in which the Foreign Lawyer is authorized to practice to the extent of that authorization; or

(ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(5) are governed primarily by international law or the law of a non-United States jurisdiction.

(f) For purposes of this grant of authority, the Foreign Lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority.

## Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See *Rule 5.3; Responsibilities Regarding Nonlawyer Assistants*.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants

and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a Domestic Lawyer violates paragraph (b) and a Foreign Lawyer violates paragraph (e) if the Domestic or Foreign Lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the Domestic or Foreign Lawyer is not physically present here. Such Domestic or Foreign Lawyer must not hold out to the public or otherwise represent that the Domestic or Foreign Lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a Domestic or Foreign Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances for the Domestic Lawyer. Paragraph (e) identifies five such circumstances for the Foreign Lawyer. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a Domestic Lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a Foreign or Domestic Lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c) or paragraph (e). Services may be "temporary" even though the Foreign or Domestic Lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the Domestic Lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to Domestic Lawyers. Paragraphs (e) and (f) apply to Foreign Lawyers. Paragraphs (c) and (e) contemplate that the Domestic or Foreign Lawyer is authorized to practice in the jurisdiction in which the Domestic or Foreign Lawyer is admitted and excludes a Domestic or Foreign Lawyer who while technically admitted is not authorized to practice, because, for example, the Domestic or Foreign Lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a Domestic Lawyer associates with a lawyer licensed to practice in this jurisdiction. Paragraph (e)(1) recognizes that the interests of clients and the public are protected if a Foreign Lawyer associates with a lawyer licensed to practice in this jurisdiction. For these paragraphs to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Domestic Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a Domestic Lawyer does not violate this Rule when the Domestic Lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a Domestic Lawyer to



obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the Domestic Lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a Domestic Lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the Domestic Lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the Domestic Lawyer is authorized to practice law or in which the Domestic Lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a Domestic Lawyer may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the Domestic Lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a Domestic Lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate Domestic Lawyers may conduct research, review documents, and attend meetings with witnesses in support of the Domestic Lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a Domestic Lawyer, and Paragraph (e)(3) permits a Foreign Lawyer, to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic or Foreign Lawyer's practice in a jurisdiction in which the Domestic or Foreign Lawyer is admitted to practice. The Domestic Lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a Domestic Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers. Paragraph (e)(4)(i) permits a Foreign Lawyer to provide certain legal services in this jurisdiction on behalf of a client who resides or has an office in the jurisdiction in which the Foreign Lawyer is authorized to practice. Paragraph (e)(4)(ii) permits a Foreign Lawyer to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to a matter that has a substantial connection to the jurisdiction in which the Foreign Lawyer is authorized to practice. These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted. Paragraphs (e)(3) and (e)(4)(ii) require that the services arise out of or be reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice. A variety of factors evidence

such a relationship. The Domestic or Foreign Lawyer's client may have been previously represented by the Domestic or Foreign Lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the Domestic or Foreign Lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the Domestic or Foreign Lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their Domestic or Foreign Lawyer in assessing the relative merits of each. In addition, the services may draw on the Domestic or Foreign Lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a Domestic Lawyer, who is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a Domestic Lawyer who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a Domestic Lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The Domestic Lawyer's ability to represent the employer outside the jurisdiction in which the Domestic Lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the Domestic Lawyer's qualifications and the quality of the Domestic Lawyer's work.

[17] If an employed Domestic Lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the Domestic Lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a Domestic Lawyer may provide legal services in a jurisdiction in which the Domestic Lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. Paragraph (e)(5) recognizes that a Foreign Lawyer may provide legal services when the services provided are governed by international law or the law of a foreign jurisdiction.

[19] A Domestic or Foreign Lawyer who practices law in this jurisdiction pursuant to paragraphs (c), (d) or (e) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a Domestic Lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d)



may have to inform the client that the Domestic Lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4.

[21] Paragraphs (c), (d) and (e) do not authorize communications advertising legal services to prospective clients in this jurisdiction by Domestic or Foreign Lawyers who are admitted to practice in other jurisdictions. Whether and how Domestic or Foreign Lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

**c.) Proposed Amendments  
to Rule 8.5 of the Georgia  
Rules of Professional Conduct**

The State Bar proposes that Rule 8.5 of the Georgia Rules of Professional Conduct be amended as shown below by deleting the stricken portions of the Rule, and inserting the phrases shown below in italicized and underlined typeface.

**RULE 8.5: DISCIPLINARY AUTHORITY;  
CHOICE OF LAW**

(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A Domestic or Foreign Lawyer is also subject to the disciplinary authority of this jurisdiction if the Domestic or Foreign Lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer or Domestic or Foreign Lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction ~~where the lawyer is admitted~~ for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a ~~proceeding in matter pending before a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding)~~ tribunal, the rules ~~to be applied shall be the rules of the jurisdiction in which the court tribunal sits, unless the rules of the court tribunal provide otherwise; and~~

(2) for any other conduct, the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer or Domestic or Foreign Lawyer shall not be subject to discipline if the lawyer's or Domestic or Foreign Lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer or Domestic or Foreign Lawyer reasonably believes the predominant effect of the lawyer or Domestic or Foreign Lawyer's conduct will occur.

~~(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and~~

~~(ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be~~

~~applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.~~

**Comment**

**Disciplinary Authority**

[1] ~~Paragraph (a) restates~~ It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to Domestic or Foreign Lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rule 9.4: Jurisdiction and Reciprocal Discipline. A Domestic or Foreign Lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the Domestic or Foreign Lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

**Choice of Law**

[2] A lawyer or Domestic or Foreign Lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer or Domestic or Foreign Lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer or Domestic or Foreign Lawyer is licensed to practice. ~~In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances. Additionally, the lawyer or Domestic or Foreign Lawyer's conduct may involve significant contacts with more than one jurisdiction.~~

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer or Domestic or Foreign Lawyer shall be subject to only one set of rules of professional conduct, ~~and~~ (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, ~~and~~ (iii) providing protection from discipline for lawyers or Domestic or Foreign Lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer or Domestic or Foreign Lawyer conduct relating to a proceeding ~~in~~ pending before a court before which the lawyer is admitted to practice (either generally or pro hac vice) tribunal, the lawyer or Domestic or Foreign Lawyer shall be subject only to the rules of ~~professional conduct of that court~~ the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice



*of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer or Domestic or Foreign Lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B shall be subject to the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.*

*[5] When a lawyer or Domestic or Foreign Lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer or Domestic or Foreign Lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer or Domestic or Foreign Lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer or Domestic or Foreign Lawyer reasonably believes the predominant effect will occur, the lawyer or Domestic or Foreign Lawyer shall not be subject to discipline under this Rule.*

*[5] [6] If two admitting jurisdictions were to proceed against a lawyer or Domestic or Foreign Lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer or Domestic or Foreign Lawyer on the basis of two inconsistent rules.*

*[6] [7] The choice of law provision is not intended to apply to applies to lawyers or Domestic or Foreign Lawyer engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. Choice of law in this context should be the subject of agreements between jurisdictions or of appropriate international law.*

If adopted, the amended Rule 8.5 of the Georgia Rules of Professional Conduct would read as follows:

#### **RULE 8.5: DISCIPLINARY AUTHORITY; CHOICE OF LAW**

**(a) Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the

lawyer's conduct occurs. A Domestic or Foreign Lawyer is also subject to the disciplinary authority of this jurisdiction if the Domestic or Foreign Lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer or Domestic or Foreign Lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

**(b) Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer or Domestic or Foreign Lawyer shall not be subject to discipline if the lawyer's or Domestic or Foreign Lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer or Domestic or Foreign Lawyer reasonably believes the predominant effect of the lawyer or Domestic or Foreign Lawyer's conduct will occur.

#### **Comment**

##### **Disciplinary Authority**

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to Domestic or Foreign Lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rule 9.4: Jurisdiction and Reciprocal Discipline. A Domestic or Foreign Lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the Domestic or Foreign Lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

##### **Choice of Law**

[2] A lawyer or Domestic or Foreign Lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer or Domestic or Foreign Lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer or Domestic or Foreign Lawyer is licensed to practice. Additionally, the lawyer or Domestic or Foreign Lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best



interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer or Domestic or Foreign Lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers or Domestic or Foreign Lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer or Domestic or Foreign Lawyer conduct relating to a proceeding pending before a tribunal, the lawyer or Domestic or Foreign Lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer or Domestic or Foreign Lawyer shall be subject to the rules of the jurisdiction in which the lawyer or Domestic or Foreign Lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer or Domestic or Foreign Lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer or Domestic or Foreign Lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer or Domestic or Foreign Lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer or Domestic or Foreign Lawyer reasonably believes the predominant effect will occur, the lawyer or Domestic or Foreign Lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer or Domestic or Foreign Lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer or Domestic or Foreign Lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers or Domestic or Foreign Lawyer engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

**d.) Proposed Amendments  
to Rule 9.4 of the Georgia  
Rules of Professional Conduct**

The State Bar proposes that the current Rule 9.4 of the Georgia Rules of Professional Conduct be deleted in its entirety, and the following Rule be substituted in its place.

**RULE 9.4: JURISDICTION AND RECIPROCAL  
DISCIPLINE**

(a) **Jurisdiction.** Any lawyer admitted to practice law in this jurisdiction, including any formerly admitted lawyer with respect to acts committed prior to resignation, suspension, disbarment, or removal from practice on any of the grounds provided in Rule 4-105 of the State Bar, or with respect to acts subsequent thereto which amount to the practice of law or constitute a violation of the Georgia Rules of Professional Conduct or any Rules or Code subsequently adopted by the court in lieu thereof, and any Domestic or Foreign Lawyer specially admitted by a court of this jurisdiction for a particular proceeding and any Domestic or Foreign Lawyer who practices law or renders or offers to render any legal services in this jurisdiction, is subject to the disciplinary jurisdiction of the State Bar of Georgia State Disciplinary Board.

(b) **Reciprocal Discipline.** Upon being disciplined in another jurisdiction, a lawyer admitted to practice in Georgia shall promptly inform the Office of General Counsel of the State Bar of Georgia of the discipline. Upon notification from any source that a lawyer within the jurisdiction of the State Bar of Georgia has been disciplined in another jurisdiction, the Office of General Counsel shall obtain a certified copy of the disciplinary order and file it with the Investigative Panel of the State Disciplinary Board.

(1) Upon receipt of a certified copy of an order demonstrating that a lawyer admitted to practice in Georgia has been disciplined in another jurisdiction, the Investigative Panel of the State Disciplinary Board shall forthwith issue a notice directed to the lawyer containing:

(i) A copy of the order from the other jurisdiction; and

(ii) An order directing that the lawyer inform the Office of General Counsel and the Review Panel, within thirty days from service of the notice, of any claim by the lawyer predicated upon the grounds set forth in paragraph (b)(3) below, that the imposition of the identical discipline in this jurisdiction would be unwarranted and the reasons for that claim.

(2) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this jurisdiction shall be deferred until the stay expires.

(3) Upon the expiration of thirty days from service of the notice pursuant to the provisions of paragraph (b)(1), the Review Panel shall recommend to the Georgia Supreme Court the identical discipline, or removal from practice on the grounds provided in Rule 4-104, unless the Office of General Counsel or the lawyer demonstrates, or the Review Panel finds that it clearly appears upon the face of the record from which the discipline is predicated, that:

(i) The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or



(ii) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the court could not, consistent with its duty, accept as final the conclusion on that subject; or

(iii) The discipline imposed would result in grave injustice or be offensive to the public policy of the jurisdiction; or

(iv) The reason for the original disciplinary status no longer exists; or

(v)  
(a) the conduct did not occur within the state of Georgia; and,

(b) the discipline imposed by the foreign jurisdiction exceeds the level of discipline allowed under these Rules.

If the Review Panel determines that any of those elements exists, the Review Panel shall make such other recommendation to the Georgia Supreme Court as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

(4) In all other aspects, a final adjudication in another jurisdiction that a lawyer, whether or not admitted in that jurisdiction, has been guilty of misconduct, or has been removed from practice on any of the grounds provided in Rule 4-104 of the State Bar, shall establish conclusively the misconduct or the removal from practice for purposes of a disciplinary proceeding in this state.

The maximum penalty for a violation of this Rule is disbarment.

#### Comment

[1] If a lawyer suspended or disbarred in one jurisdiction is also admitted in another jurisdiction and no action can be taken against the lawyer until a new disciplinary proceeding is instituted, tried, and concluded, the public in the second jurisdiction is left unprotected against a lawyer who has been judicially determined to be unfit. Any procedure which so exposes innocent clients to harm cannot be justified. The spectacle of a lawyer disbarred in one jurisdiction yet permitted to practice elsewhere exposes the profession to criticism and undermines public confidence in the administration of justice.

[2] The Office of the General Counsel of the State Bar of Georgia should be notified by disciplinary counsel of the jurisdiction where the original discipline was imposed. Upon receipt of such information, the Office of General Counsel should promptly notify the Investigative Panel. The Panel should promptly obtain and serve upon the lawyer an order to show cause why identical discipline should not be imposed in Georgia. The certified copy of the order in the original jurisdiction should be incorporated into the order to show cause.

[3] The imposition of discipline in one jurisdiction does not mean that Georgia and every other jurisdiction in which the lawyer is admitted must necessarily impose discipline. The Review Panel has jurisdiction to recommend reciprocal discipline on the basis of public discipline imposed by a jurisdiction in which the respondent is licensed.

[4] A judicial determination of misconduct by the respondent in another jurisdiction is conclusive, and not subject to relitigation in the forum jurisdiction. The Review Panel should recommend identical discipline unless it determines, after review limited to the record of the proceedings in the foreign jurisdiction, that one of the grounds specified in paragraph (b)(3) exists. This Rule applies whether or not the respondent is admitted to practice in the foreign jurisdiction. See also, *Rule 8.5: Disciplinary Authority; Choice of Law*, Comment [1].

[5] For purposes of this Rule, the suspension or placement of a lawyer on inactive status in another jurisdiction because of want of sound mind, senility, habitual intoxication or drug addiction, to the extent of impairment of competency as an attorney shall be considered a disciplinary suspension under the Rules of the State Bar of Georgia.

## II.

### Proposed Amendment to Part IV, Chapter 4, Advisory Opinions, of the Rules of the State Bar of Georgia

It is proposed that a new Rule 4-404 be added to Part IV, Chapter 4, of the Rules of the State Bar of Georgia. The proposed Rule would provide immunity to the members and staff of the Formal Advisory Opinion Board. The text of the proposed new Rule is as follows:

#### Rule 4-404. Immunity

The members of the Formal Advisory Opinion Board, as well as staff persons and counsel assisting the Board and its members, including, but not limited to staff counsel, advisors and the State Bar of Georgia, its officers and employees, members of the Executive Committee, and members of the Board of Governors, shall have absolute immunity from civil liability for all acts performed in the course of their official duties.

## III.

### Proposed Amendment to Part X, Rule 10-104, of the Rules of the State Bar of Georgia

It is proposed that Part X, Rule 10-104, Board of Trustees, be amended by deleting the stricken portions of the rule, and inserting the phrases shown below in italicized and underlined typeface.

#### Rule 10-104. Board of Trustees

(a) The Board of Trustees shall consist of ~~four (4)~~ *six (6)* lawyers and one (1) non-lawyer appointed by the President of the State Bar. ~~of Georgia, for terms as follows: one for one year, one for two years, one for three years, and one for five years. After the initial appointments, subsequent~~ *The initial appointments to the Board shall be of such terms as to result in the staggered expiration of the terms of all members of the Board. Thereafter,* the appointments shall be for a term of five (5) years.

(b) Vacancies shall be filled by appointment of the President of the State Bar of Georgia for any unexpired term.

(c) The Board members shall select a chairperson, and such other officers as the Board members deem appropriate.

*(d) A quorum for the transaction of business at any meeting of the Board shall consist of three current members in attendance.*



~~(d)~~ (e) The Board may adopt a regulation to terminate Trustees who fail to regularly attend meetings and may adopt additional regulations for the administration of the Fund which are not otherwise inconsistent with these rules.

If adopted, the amended Rule 10-104 would read as follows:

**Rule 10-104. Board of Trustees**

(a) The Board of Trustees shall consist of six (6) lawyers and one (1) non-lawyer appointed by the President of the State Bar. The initial appointments to the Board shall be of such terms as to result in the staggered expiration of the terms of all members of the Board. Thereafter, the appointments shall be for a term of five (5) years.

(b) Vacancies shall be filled by appointment of the President of the State Bar of Georgia for any unexpired term.

(c) The Board members shall select a chairperson, and such other officers as the Board members deem appropriate.

(d) A quorum for the transaction of business at any meeting of the Board shall consist of three current members in attendance.

(e) The Board may adopt a regulation to terminate Trustees who fail to regularly attend meetings and may adopt additional regulations for the administration of the Fund which are not otherwise inconsistent with these rules.

SO MOVED, this \_\_\_\_\_ day of \_\_\_\_\_, 2004

Counsel for the State Bar of Georgia

\_\_\_\_\_  
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General Counsel  
State Bar No. 665000

\_\_\_\_\_  
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## Notice

### Notice of Public Meeting

Pursuant to Bar Rule 14-9.1, the Standing Committee on the Unlicensed Practice of Law has received a request for an advisory opinion as to whether a certain activity constitutes the unlicensed practice of law. The particular situation presented is as follows:

*Is the preparation or filing of a lien considered the unlicensed practice of law if it is done by someone other than the lienholder or a licensed Georgia attorney?*

In accordance with Bar Rule 14-9.1(f), notice is hereby given that a public meeting concerning this matter will be held at **10 a.m. on March 19, 2004**, at the Macon Holiday Inn and Conference Center, 3590 Riverside Drive, Macon, Georgia. Prior to the meeting, individuals are invited to submit any written comments regarding this issue to UPL Advisory Opinions, State Bar of Georgia, Suite 100, 104 Marietta Street NW, Atlanta, Georgia 30303.



## Submitted Changes/Corrections to the 2003-04 State Bar Directory.

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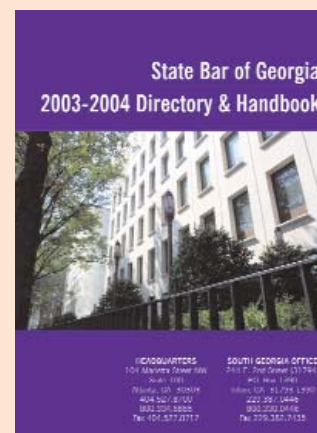
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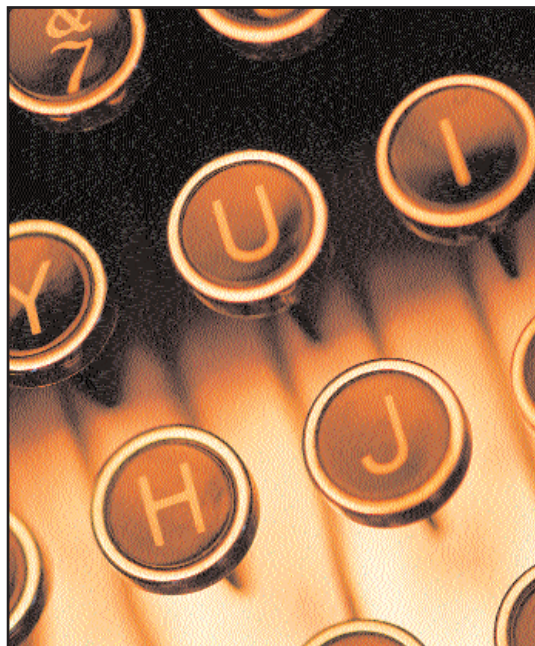
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