

Georgia  
Bar

# Journal

April 2004 ■ Volume 9 ■ Number 5



*Annual Meeting*  
*June 17-20*  
*Orlando, Florida*

# State Bar of Georgia *Local Bar Awards*

## *Attention!*

The Deadline is Friday, May 7, 2004,  
to submit your entry for the State Bar's  
Local Bar Activity Awards.

Administered by the Local Bar Activities Committee, the Local Bar Activity Awards recognize excellence in local and circuit bar associations, and are presented to winners at the State Bar's Annual Meeting. Awards are presented for the Bar year that begins July 1, 2003, and ends June 30, 2004, with an exception for the Law Day Award, which may be submitted for events in either 2003 or 2004.

## *Eligibility and competition categories*

Each local or circuit bar association is eligible to submit an entry. The following categories relating to membership size will be used in judging the Award of Merit, Newsletter and Law Day Awards:

- Over 500 members
- 251 to 500 members
- 101 to 250 members
- 51 to 100 members
- Under 50 members

## *Award categories*

- Award of Merit
- Law Day Award
- The President's Cup
- Best New Entry Award
- Newsletter Award
- Excellence in Bar Leadership

## *Form of entry*

Send one copy of your entry to:  
Communications Department  
Local Bar Activities Committee  
State Bar of Georgia  
104 Marietta St. NW, Suite 100  
Atlanta, GA 30303

Entries should be typewritten (double-spaced) on letter paper (8.5 x 11). Photographs, news articles, programs, etc. are welcome and encouraged. Please include: name; address; president; number of members; amount of dues; and person(s) responsible for entry preparation.



For more information, visit the State Bar's Web site, [www.gabar.org](http://www.gabar.org) or contact Bonne Cella, 229.387.0446 or [bonne@gabar.org](mailto:bonne@gabar.org); Tyler Jones, 404.527.8736 or [tyler@gabar.org](mailto:tyler@gabar.org)



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#### On the Cover

The 2004 State Bar of Georgia Annual Meeting will take place at the Portofino Bay Hotel in Orlando, Fla., June 17-20. The Portofino Bay Hotel is a stunning re-creation of the seaside village of Portofino, Italy, complete down to the cobblestone streets and sidewalk cafes.

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## Publisher's Statement

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

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

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# Member Applauds Bar President's Candor

**T**he February issue of the Georgia Bar Journal was particularly interesting—the articles on arbitration, Zubulake, and standing orders will each cause changes for the better in the way I practice law.

However, the article by William D. Barwick (“Court Futures”) astounded me in publicly commenting on a thinly veiled secret. Barwick bemoans the coming democratization of the judicial selection process and recounts how (in what must have been the good ol’ days) Article VI Section VII Paragraph I of the Constitution of the State of Georgia—the section which requires that the judges of the state be elected by the citizens of the state—had been intentionally circumvented by the judiciary.


He writes: “In a traditional one-party state, judicial candidates would often be selected for open seats by the governor... and often that judge could serve his or her entire career on the bench without election.... Judges would intentionally 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....”

Section 1971(c) of the Voting Rights Act of 1965 states:

“Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice which would deprive any other person of any right or privilege secured by sub-

section (a) or (b) of this section” [essentially, the right to vote] “the Attorney General may” [unfortunately not “shall” since the Attorney General is not elected either] “institute for the United States, or in the name of the United States, a civil action or other proper proceeding for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.”

It would seem now that the “intentional” bypassing of the citizens’ right to elect their judges is coming to an end, there is some panic: “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 changes],” says President Barwick, who goes on to note that while these changes are certain, they may be temporary, because a (non-elected) committee is spending a whole year to “undertake a thorough examination of the way Georgia [elects] judges with a view towards recommending possible changes for the better.”

I applaud his candor, I applaud the coming changes, and I decry the good ol’ boy system, which is on its way out (and which was created and maintained by the very persons who falsely promised—upon undertaking their government jobs—to assure equal justice to all). Hopefully, the 21st century Bar shares these feelings of joy at our turning from vestiges of mid-19th century “tradition” and hopefully Georgia’s citizens—if not its aristocracy—will stand squarely against any efforts by the committee (or anyone else) to return us to “better” disenfranchisement. America continues to be great because, slowly but surely, she excises the abuses of the past. 

John T. Longino  
Ellijay, GA

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Some people see mermaids.  
Some see ducks.



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“Even though the State Bar of Georgia is a unified bar, we are committed to providing membership benefits that are customarily offered by private bar associations and whenever financially feasible.”

By William D. Barwick

## Playing the Back Nine

It really does seem as though my year as Bar president only began a few weeks ago, but I was reminded how quickly the time passes when I visited Cliff Brashier’s office at Bar Headquarters several days ago. On the wall was a sign with detachable paper numbers that read: “ONLY 123 DAYS TO GO.” When I asked my executive director what the sign meant, he mumbled something about a reminder to change the oil in his car.

It is usually in the last president’s message that an outgoing Bar president laments about unfinished business and projects that were never quite completed. I have a slightly different take on the timing issues, however, as I stated in my opening message at the State Bar Annual Meeting last June. As a former bar association president, and a member of the State Bar Board of Governors for almost 20 years, I am

well aware of the fact that few things can be accomplished from beginning to end in the course of a year. It has been my great privilege this year to work on a number of long standing projects, such as indigent defense funding and the new mentoring program, while at the same time ushering along newer projects such as a Georgia Business Court and the implementation of an online, legal research library service that will be available to all Georgia lawyers at no cost other than their Bar dues.

I am also happy that we have now revived the committee that is charged with implementing the passage of new legislation that will allow Georgia to become the 42nd state to adopt, in large part, the Federal Rules of Evidence. It is my hope that this legislation can be presented in the General Assembly’s 2005 legislative session. It is also my hope that our Court Futures Committee can prepare proposed legislation that will address the way we conduct judicial elections and retain our judges. In other words, I still have a lot of balls in the air, and I am trying to keep them from hitting me in the nose.

I have had the opportunity to report on a number of these proj-



ects in past speeches and articles, and I hope to outline the Business Court proposal in a subsequent president's message. We are just now finalizing our plans for the recommendation of the purchase of an online legal research program called Casemaker, which was originally created by the Ohio Bar Association, and which is now licensed and sold to state bar organizations in 15 states. Access will be available to every state bar member with access to a computer. The cost for online research is free, and is covered by a flat payment made by the State Bar to Casemaker's owners on an annual basis. This fee will add approximately \$10 to annual dues, but the savings to lawyers at every level could amount to well into the thousands of dollars.

This is not a program or a service that we have approached casually, since it means an increase in dues. These dues will have to be paid by our Bar members even if they have no use for Casemaker, or if their legal research needs are sophisticated enough to require larger case report libraries than will be initially available through this service.


Under the leadership of the State Bar Treasurer Jay Cook, a select committee drawn from a wide range of legal practices has determined that this research program may be one of the best member benefit services offered by the State Bar of Georgia in years.

Within the last few weeks, I have discussed Casemaker with the president of the State Bar of Texas and the State Bar of Alabama, both unified bars. Texas has committed to the program, and Alabama is likely to follow suit. As more states sign up for this research service, the case law libraries, including Federal Reporters, will increase, at no additional cost to existing subscribers. In addition to Texas, both North and South Carolina have enrolled.

Even though the State Bar of Georgia is a unified bar, we are committed to providing membership benefits that are customarily offered by private bar associations and whenever financially feasible. Our unfortunate foray into the sponsorship of legal malpractice insurance several years ago has forced Bar leadership to be cautious consumers, particularly when a deal seems to have no downside. It

is for this reason that the Executive Committee and Jay Cook's team have been studying this offering for over a year before recommending it to the Board of Governors for approval and implementation.

The purpose of this president's message is to call upon members of the State Bar to comment on Casemaker, as well as to provide our members with any additional information that they may wish to review. Letters or e-mails to me will be answered as soon as I can get to them, unless they are unusually threatening, and Bar members are also encouraged to contact their Board of Governors representative to ask questions or make comments.

The parking garage at our Bar Center will be completed this July, on time and within budget, and the completion of the third floor conference center and mock trial courtroom will begin shortly thereafter. This has been an exciting Bar year, made possible by the hard work of our staff and Bar leaders. Just keep hoping that I resist the temptation to actually touch the control knobs, and remember—"JUST 123 DAYS TO GO!" 

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"I would also like to thank all Bar members and staff for their patience as we strive to provide our members and guests with convenient, enclosed parking."

By Cliff Brashier

## The Bar Center Parking Deck — A Progress Report

**T**he 500-space parking deck for the Bar Center, the home of all Georgia lawyers, has a projected opening date of July 15. When completed, the Bar's parking deck will be one of the nicer decks in town.

We've come a long way since SKANSKA started razing the old deck in April 2003. As of the Bar Journal's publication date, all the concrete has been poured and the deck is structurally complete. The contractors are now focusing on completing the interior and exterior of the deck, to include adding elevators, stairwells, sidewalks and numerous architectural details to complement the historic building that it will serve.

Completion of the parking deck will conclude the second phase of the Bar Center renovation project and will allow the Bar to provide parking for Bar members, Bar staff, tenants and public users of the conference center.

Following is a breakdown of who can use the parking deck:

### Members During Business Hours

Subject to space availability, all Bar members visiting or using the Bar Center may park free of charge. Because there are a limited number of parking spaces, free parking cannot be provided for lawyers who work in other downtown buildings. Subject to space availability, members who need downtown parking for business or social purposes, on occasion, may park free of charge.

### Members Nights and Weekends

Subject to availability, all Bar members may park free of charge. Non-business hour parking is planned for night and weekend operation during events at the World Congress Center, the Georgia Dome, Centennial Olympic Park, the Atlanta Aquarium (currently under construction) and other area attractions to the extent it is economically feasible to do so. Membership cards and personal identification will be required.

### Tenants

Tenants will be entitled, at market rates, to lease monthly parking





"My message to younger lawyers is to cherish the time you spend with your family and loved ones. Take advantage of your good health and good fortune."

By Andrew W. Jones

## Thoughts from Twenty-Eight Thousand Feet

**T**he fasten seat belts light just went off. "Dad, can we turn the DVD on now?" Yes, finally after 20 prior requests, as if I could tell how long it was going to be until we reached 10,000 feet. The Jones family is going skiing—the first time with the three children. Rutledge and Elinor, ages 6 and 4 won't be a problem, it is 20-month-old Reid who will test every nerve in my body.

At the moment, little Reid is giving the guy in front of him a Swedish massage by repeatedly kicking his seat. How long is it to Salt Lake? The Delta pilot informs us only three and a half hours of relaxing flight time, "sit back and enjoy the flight." Yeah, no problem, tell that to the guy in 34A with the whiplash from Reid's kicking.


Here come the drinks. "I want a Sprite, no a Coke, no lemonade!" The ordering process sounds a lot like a scene from *Caddyshack*. Finally, Sprite it is. Nothing for Reid, he is almost asleep. My patient and loving wife Ashley is holding a magazine up, blocking her face so Reid can't see her. It appears that if she looks at him he cries. The people around us are starting to give her

strange looks. Movie time, oh good, one and a half hours of Greg Kinnear and Matt Damon attached at the hip, no thanks. Just got the nod from Ashley, Reid is down for the count. Two and a half hours to go, pray for a long nap.

We made it! Only slightly trashed the airplane and didn't make too many people miserable. I'm going to have a hard time getting our pack mule out of the overhead which is required to transport our carry on luggage.

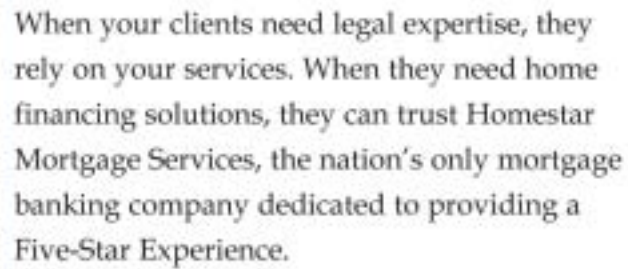
As we leave, the flight attendant says, "thanks for flying Delta," which really means, I hope I'm not working their return flight. Off the plane, heading to Deer Valley, let the fun begin!

While this column doesn't have a whole lot to do with the practice of law, it is titled "from the YLD President." My message to younger lawyers is to cherish the time you spend with your family and loved ones. Take advantage of your good health and good fortune. Leave the practice of law behind every now and then, because it will be there when you return. Life is about making memories with your family. These memories are what put a smile on your face when you are old and retired. Cases and clients come and go, but family memories last a lifetime.

We're off to the slopes. I think I just set a record for the amount of ski equipment one person can carry. I will remember that for the rest of my life, and smile. 



deserve the *best*.

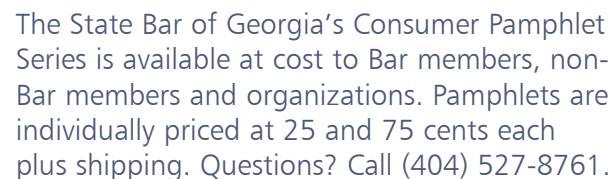


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# Theories of Stockbroker and Brokerage Firm Liability

By Robert C. Port

Over a lifetime, even modest savings, contributions to an IRA, or participation in an employee pension plan can result in significant accumulations of wealth.<sup>1</sup> However, many individuals have neither the interest nor the desire to learn about financial markets and investments, nor do they have the time necessary to monitor their investments on an ongoing basis. Their aversion to and confusion about financial matters has been further accentuated by the “irrational exuberance”<sup>2</sup> of the “Internet bubble” of the late 1990s, and subsequent significant decline in the value of technology and telecommunications stock. As a result, many individuals turn to stockbrokers, investment advisors, financial planners, insurance agents, and others claiming to have the knowledge and experience to offer investment advice.

Stockbrokers and other financial advisors are highly motivated to cultivate their clients’ trust and allegiance, and clients who lack knowledge and sophistication on financial matters have powerful incentives to believe that such advisors are trustworthy and acting solely in the customer’s best interests.<sup>3</sup> This trusting relationship

creates an opportunity for exploitation by the advisor, which may form the basis for a variety of legal claims. Common fact patterns associated with broker misconduct include misrepresentation, churning, unsuitable recommendations, unauthorized trading, and failure to supervise. Outright misrepresentation and fraud may also be practiced on the unsuspecting and trusting client.

Federal and state securities statutes and state common law typi-



cally govern civil liability in connection with losses arising from the purchase and sale of securities. The self-regulatory rules of the National Association of Securities Dealers and the New York Stock Exchange are also relevant to the issue of whether a broker or financial advisor owed or breached a duty to the customer. The following is a brief overview of common legal theories of liability that apply to broker misconduct.<sup>4</sup>

## **FRAUDULENT MISREPRESENTATIONS AND OMISSIONS**

Material misrepresentations and omissions made in connection with the purchase or sale of a security can violate federal and state securities statutes. Such claims may also proceed as common law fraud claims.

### **Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5**

Section 10 of the Securities Exchange Act of 1934,<sup>5</sup> is an anti-fraud provision prohibiting the use "in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance." Rule 10b-5 promulgated by the Securities Exchange Commission amplifies these prohibitions by making it unlawful:

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which oper-

ates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.<sup>6</sup>

The essential elements of a Rule 10b-5 claim are: (1) a misstatement or omission; (2) of a material fact; (3) made with scienter, (4) upon which the plaintiff relied; (5) that proximately caused the plaintiff's loss.<sup>7</sup>

The standard for determining materiality is whether "there is a substantial likelihood that a reasonable shareholder would consider it important" or "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."<sup>8</sup>

"To constitute fraud, a misrepresentation generally must relate to an existing or pre-existing fact."<sup>9</sup> A misrepresentation of future profit generally cannot constitute fraud, as it is a type of opinion and prediction of future events.<sup>10</sup> "[O]utrageous generalized statements, not making specific claims, that are so exaggerated as to preclude reliance by consumers" generally will be deemed "puffing" rather than fraud.<sup>11</sup> Furthermore, the "in connection with" requirement in Rule 10b-5 is not satisfied by any misrepresentations or omissions that occur after the claimant purchases or sells the security in question.<sup>12</sup>

The Supreme Court has expressly left open the question of whether the scienter requirement encompasses not only intentional conduct, but also reckless conduct.<sup>13</sup> The rule in the 11th Circuit is that a showing of "severe recklessness" satisfies the scienter requirement.<sup>14</sup> "Severe recklessness is limited to those highly unreasonable omissions or misrepresentations that involve not merely simple or even

inexcusable negligence, but an extreme departure from the standards of ordinary care, and that present a danger of misleading buyers or sellers which is either known to the defendant or is so obvious that the defendant must have been aware of it."<sup>15</sup>

The plaintiff's reliance must have been reasonable or justified.<sup>16</sup> Relevant factors include: (1) the sophistication and expertise of the plaintiff in financial and security matters; (2) the existence of long standing business or personal relationships between the plaintiff and the defendant; (3) the plaintiff's access to relevant information; (4) the existence of a fiduciary relationship owed by the defendant to the plaintiff, (5) concealment of fraud by the defendant; (6) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations.<sup>17</sup>

To prove the causation element, a plaintiff must prove both "transaction causation" and "loss causation."<sup>18</sup> Transaction causation is a synonym for reliance, and is established when the misrepresentations or omissions cause the plaintiff "to engage in the transaction in question."<sup>19</sup> Loss causation is more difficult to prove: the misrepresentation must have caused the loss suffered by the claimant. Loss causation is satisfied "only if the misrepresentation touches upon the reasons for the investment's decline in value."<sup>20</sup> Proof of loss causation is a statutory requirement.<sup>21</sup>

### **Section 12(2) of the Securities Act of 1933**

Section 12(2) of the Securities Exchange Act of 1933 provides that any person who offers or sells a security by use of an oral or written



communication that contains an untrue statement of material fact or omits to state a material fact necessary in order to make the statement not misleading is liable to the purchaser, *unless* the seller can show that he did not know and in the exercise of reasonable care could not have known of the untruth or omission.<sup>22</sup> Scienter is *not* an element of a Section 12(2) claim.

Although the scope of liability under Section 12(2) is potentially broad, its reach for broker misconduct nonetheless is limited by four factors. First, the claimant is limited to rescission or rescissionary damages (the purchase price of the security, plus interest, less income received thereon) and must tender the security back to the seller. If the claimant no longer owns the security, he may seek damages representing the difference in the purchase price and the sale price. Second, only purchasers may assert claims under Section 12(2), and they may assert them only against sellers and persons who control them. A “seller” is one who either transfers title to the security or who solicits the sale and receives a benefit from doing so or acts with the intent to benefit the owner of the security.<sup>23</sup> Third, the statute of limitations is a substantive element of the claim and compliance must be affirmatively pled. Fourth, Section 12(2) applies only to initial public offerings by means of a formal offering document (not private placements or secondary market transactions).<sup>24</sup>

## Georgia Securities Act

The Georgia Securities Act provides a cause of action against a seller of securities for making “an untrue statement of a material fact or omit[ing] to state a material fact necessary in order to make the state-

ments made, in the light of the circumstances under which they are made, not misleading.”<sup>25</sup> Liability will not be found however, if “(1) [t]he purchaser knew of the untrue statement of a material fact or omission of a statement of a material fact; or (2) [t]he seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.”<sup>26</sup>

The remedies provided under the Georgia Act are available only to a buyer of securities.<sup>27</sup> Because there is very little case law construing the Georgia Securities Act, the courts often look to analogous federal statutes for interpretive assistance. For example, although the language of the Georgia statute does not appear to require scienter, courts have construed the section in accordance with Rule 10b-5 as requiring proof of scienter.<sup>28</sup> One of the advantages of a claimant proceeding under the Georgia Act, however, is provision for recovery of attorney’s fees, interest, and court costs.<sup>29</sup>

## Common Law Fraud

Under Georgia law, fraud is shown when (i) a representation of material fact is made (or there is a failure to disclose a material fact); (ii) that was known or should have been known to be false (or should have been disclosed); (iii) that was made (or omitted) for the purpose of being relied upon by another; (iv) that was in fact relied upon; (v) that caused damage.<sup>30</sup> Under Georgia law, a “promise to perform some future act is not fraud unless made with the present intent not to perform or with a present knowledge that the future event will not take place.”<sup>31</sup>

Nondisclosure may provide the basis for constructive fraud where a party is under an obligation to com-

municate. “The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.”<sup>32</sup> Under Georgia law, “a confidential relationship imposes a greater duty on the parties to reveal what should be revealed, and a lessened duty to discover independently what could have been discovered through the exercise of ordinary care.”<sup>33</sup>

Not all representations by a broker are actionable by an investor. For example, an investor is not justified in relying upon representations consisting of mere expressions of opinion, hope, expectation and puffing.<sup>34</sup> Thus, speculations or puffing as to future performance and statements that a particular security is a “safe investment” are generally not actionable.<sup>35</sup>

## CHURNING

“Churning occurs when a securities broker buys and sells securities for a customer’s account, without regard to the customer’s investment interests, for the purpose of generating commissions.”<sup>36</sup> Churning is a violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.<sup>37</sup> Similarly, Georgia’s “Blue Sky” regulation promulgated under the Georgia Securities Act authorizes the Georgia Commissioner of Securities to take action against brokers who “induc[e] trading in a customer’s account which is excessive in size or frequency in view of the financial resources and character of the account.”<sup>38</sup> Violation of this rule is an “unlawful practice” under the Georgia Securities Act<sup>39</sup> and may allow the buyer to invoke a statutory rescissionary remedy in a civil action against the seller.<sup>40</sup>



## Proving a Churning Claim

The essence of a churning claim is that the broker has used his control over an account to generate excessive commissions, "while at the same time leading his customer to believe that he is attempting to fulfill the customer's investment objectives."<sup>41</sup> Churning requires proof of three elements: (1) control over the account by the broker; (2) trading in the account that is excessive in light of the customer's investment objectives; and (3) the broker's intent to defraud or his willful or reckless disregard of the customer's interest.<sup>42</sup>

## Control of Account by Broker

The broker's control may be shown either by (i) the customer's express grant of discretionary trading authority over the account, or (ii) the broker's acquiring de facto control over the account by, for example, gaining the customer's confidence and inducing the customer to engage in excessive trading.

### *Express grant of discretionary power*

In a discretionary account, the customer gives the broker discretion as to the purchase and sale of securities, including selection, timing and price to be paid or received. Any formal grant of discretionary control given to a broker must be in writing.<sup>43</sup> A broker or his representative who exercises discretionary authority over an account owes his client "the highest obligation of good faith and fair dealing."<sup>44</sup>

### *De facto control*

A broker may exercise *de facto* control if an investor places his trust

and faith in a broker and routinely follows the advice of his broker. Whether a broker has acquired control over the account is a fact-based inquiry. The factors used in evaluating control include: 1) the age, education, intelligence, and investment and business experience of the customer; 2) the relationship between the customer and the account executive; 3) the customer's knowledge of the market and the account; 4) the regularity of discussions between the account executive and the customer; 5) whether the customer actually authorized each trade; and 6) who made the recommendations for trades.<sup>45</sup>

## Excessive Activity

Courts examine various factors to determine whether there is excessive activity indicative of churning, including the rate of turnover in the customer's account, account maintenance costs, the holding periods for the securities in the customer's account, and the significance of the fees generated to the broker.

The turnover ratio is a statistical measure of how many times in a given period the securities in a customer's account have been replaced by new securities recommended by the broker. "Excessive trading is generally held to exist when there is an annual turnover rate in an account in excess of six."<sup>46</sup> The turnover ratio is the cost of all purchases for the relevant period divided by the average monthly account value for that period. Whether a particular turnover rate is excessive depends on the investment objectives of the customer. In long term accounts, a lower turnover rate may be deemed excessive.<sup>47</sup> In trading accounts, a higher turnover rate is expected.<sup>48</sup>

The account maintenance cost, also known as "equity maintenance factor" or the "cost-equity ratio," is a computation of the rate of return the client must earn on the account to pay the commissions and other trading fees (such as margin interest) caused by churning. For example, if an account with average annual equity of \$100,000 generates \$25,000 in fees and commissions in a year, the investor would have to earn a 25 percent annualized return just to break even. A high account maintenance cost indicates that the account has been excessively traded not for the client's benefit, but for the benefit of the broker.<sup>49</sup>

Churning may also be suggested by an analysis of the period of time a security is held from the date of purchase to the date of sale. Very short holding periods, with the sale

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proceeds immediately reinvested in other securities, may be indicative of churning activity.<sup>50</sup> If a single customer's account provides a significant portion of the commissions earned by a broker or the branch office in which that account is located, this may be additional evidence of churning.<sup>51</sup>

## UNSUITABLE RECOMMENDATIONS

Unsuitable recommendations can encompass a variety of factual circumstances, including over concentration or failure to diversify,<sup>52</sup> use of excessive margin,<sup>53</sup> failure to use hedge strategies,<sup>54</sup> and mutual fund or annuity switching.<sup>55</sup> NASD Conduct Rules allow a broker to recommend a securities transaction only if the broker has "reasonable grounds for believing that the recommendation is suitable for such customer" based on "the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."<sup>56</sup>

To prove a Rule 10b-5 cause of action for unsuitability, the plaintiff must show (1) that the securities purchased were unsuited to customer's needs; (2) that the broker knew or reasonably believed the securities were unsuited to the customer's needs; (3) that the broker recommended or purchased the unsuitable securities for the customer anyway; (4) that, with scienter, the broker made material misrepresentations (or, owing a duty to the customer, failed to disclose material information) relating to the suitability of the securities; and (5) that the customer justifiably relied to its detriment on the broker's fraudulent conduct.<sup>57</sup>

Unsuitable recommendations may also give rise to state law causes of action under theories of breach of contract, breach of fiduciary duty, and negligence. The Georgia Blue Sky Regulations prohibit a broker from recommending a security transaction "without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the [broker]."<sup>58</sup> Violation of the rule is a violation of the Georgia Securities Act.<sup>59</sup>

## UNAUTHORIZED TRADING

A broker is prohibited from executing a trade in an account unless the client has approved and authorized the trade, *before* the trade has been made, either by written discretionary authority given to the broker (such as a Power of Attorney), or by oral "time and place" discretion granted to the broker.<sup>60</sup> Unauthorized trading occurs when a broker effects trades in a client's account without having either written or oral authority to do so.<sup>61</sup>

Generally, the courts have concluded that unauthorized trading, by itself, does not constitute a violation of Rule 10b-5.<sup>62</sup> However, unauthorized trading may be sufficient to maintain state law claims of breach of contract, breach of fiduciary duty, and negligence. Georgia's Blue Sky Regulations also prohibit unauthorized trading.<sup>63</sup>

## STATE COMMON LAW CLAIMS

Claims may also be brought against brokers based on negligence

or breach of fiduciary duty. Under Georgia law, a confidential, fiduciary relationship exists between a broker and his client.<sup>64</sup>

A broker's violation of his regulatory duties, while generally recognized to not give rise to a private right of action, may provide evidence in evaluating whether the broker properly exercised the required degree of care in his dealings with a customer.<sup>65</sup> Securities statutes and conduct rules also require broker/dealer to reasonably supervise their brokers "with a view to preventing violations [of the securities law]."<sup>66</sup>

A number of courts have held that a violation of regulatory rules may be the basis of a claim sounding in negligence.<sup>67</sup>

## SELLING AWAY

"Selling Away" describes instances where a broker sells securities outside of the firm with which he or she is associated.<sup>68</sup> NASD Conduct Rules 3030 and 3040 prohibit, respectively, unapproved outside business activities and private securities transactions. The ability of a broker to engage in "selling away" may be indicative of the brokerage firm's failure to adequately supervise its brokers.

Securities firms have been held liable for the activities of their brokers in selling away under the "control person" liability imposed by Section 20 of the Securities and Exchange Act.<sup>69</sup> The fact that the firm had "potential control" over the conduct giving rise to the violation is generally sufficient to impose liability.<sup>70</sup> Additionally, respondeat superior provides a basis for recovery in such circumstances, since the broker conducted the transactions in the apparent ordinary course of business of that broker.<sup>71</sup>

## **VIOLATION OF MARGIN REGULATIONS**

Rule 10b-16<sup>72</sup> provides that it is unlawful for a broker to extend credit to a customer in connection with any securities transaction unless the broker has established a procedure to assure that the customer received, at the time he opens his account, a written disclosure regarding interest and other charges. There is a division of opinion on whether there is an implied private right of action under Rule 10b-16.<sup>73</sup>

## **BREACH OF CONTRACT**

Most customer agreements and trade confirmations incorporate industry rules and regulations into

the contract with the customer.<sup>74</sup> Therefore, violations of industry rules and regulations by the broker/dealer or registered representative may give rise to a breach of contract claim if damage results. Additionally, there is implied in all contracts the duty of good faith and fair dealing.<sup>75</sup>

## **CONTROL PERSON LIABILITY**

Under Section 20(a) of the Securities and Exchange Act, any person who directly or indirectly controls any person who is liable for selling securities in violation of the Act is liable to the same extent as the seller, unless he acted in good faith and did not directly or indirectly induce the conduct at issue.<sup>76</sup> A broker/dealer may be liable as a "controlling person" for the acts of its brokers if the bro-

ker/dealer has "some indirect means of discipline or influence" over them.<sup>77</sup>

The Georgia Securities Act also provides for liability of "control persons," subject to a "good faith defense."<sup>78</sup> Liability under the statute is predicated on control of the agent, and habit and course of dealing may be considered in determining control.<sup>79</sup> Further, a controlling person may be deemed to have ratified the unauthorized act when facts put him on notice of the act and he takes no steps to further investigate or return proceeds from the act.<sup>80</sup> A controlling person may escape liability by showing that "he did not take an active part in the violation, that he did not know of the violation and that as a reasonably prudent man he would not have discovered the violation."<sup>81</sup>



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## RESPONDEAT SUPERIOR/AGENCY PRINCIPLES

Under common law agency principles, the principal (the broker/dealer) is liable for the torts of its agents (its registered representatives) done within the scope of the principal's business.<sup>82</sup> Under this theory, broker/dealers typically are held responsible for a representative's unintentional acts in handling a customer account as well as some intentional actions taken within the scope of handling the account, such as churning and placing unauthorized trades. Georgia law has codified a number of duties of the agent to his principal, including: (1) the duty to exercise ordinary care, skill and diligence respecting the business of his principal;<sup>83</sup> (2) the duty to follow his principal's instructions;<sup>84</sup> (3) the duty not to sell to or purchase from his principal for his own account without first disclosing all of the facts;<sup>85</sup> (4) the duty to account to his principal for all profit he makes from his principal's property.<sup>86</sup>

## RICO


As a result of the Private Securities Litigation Reform Act of 1995, conduct which could have been pursued under the federal securities laws cannot now be used as predicate acts for federal RICO.<sup>87</sup> The Georgia RICO statute, on the other hand, specifically provides that "racketeering activity" includes committing, attempting to commit, soliciting, coercing, or intimidating another person to commit a willful violation of the Georgia Securities Act of 1973, O.C.G.A. § 10-5-24.<sup>88</sup> Under Georgia's RICO Act, the claimant is entitled to recover "three times the actual damages sustained

and, where appropriate, punitive damages. Such person *shall* also recover attorneys' fees . . . and costs of investigation and litigation reasonably incurred."<sup>89</sup>

## FAIR BUSINESS PRACTICES ACT

The Fair Business Practices Act, O.C.G.A. § 10-1-390 *et seq.* has been found not to apply to securities or commodities transactions. In considering the question, the court concluded that "where a consumer remedy exists, with no need to fill in a legal gap or create a consumer right, and where the industry which is the subject matter of the situation explicitly defines wrongful conduct or unfair and deceptive practices, the FBPA has no application."<sup>90</sup>

## CONCLUSION

Bank robber Willie Sutton is purported to have said that he robbed banks "because that's where the money is." The many trillions of dollars invested annually in stocks, mutual funds, money market accounts, and other investment vehicles provides numerous opportunities for unscrupulous stockbrokers and other financial advisors to devise schemes to part investors from their hard earned money. A variety of legal claims can flow from negligent, reckless, or fraudulent acts of financial advisors who have caused their customers harm. Familiarity with these various legal theories of recovery can provide counsel with the means and opportunity to recover losses a client has experienced not because of the natural fluctuations of the marketplace, but because of the unscrupulous or unlawful conduct of a stockbroker or financial advisor. 



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member of the board of directors of the Sole Practitioner/Small Firm Section of the Atlanta Bar, and an arbitrator with the National Association of Securities Dealers. He received his J.D., with honors, from the University of North Carolina in 1983.

## Endnotes

1. A 2003 study by the Internal Revenue Service concluded that at the end of 2002, \$2.3 trillion was invested in IRA assets, compared to \$637 billion invested at the end of 1990. For the year ending in 2002, 46 percent of those IRA assets were in mutual funds, 34 percent were in securities held in brokerage accounts, 11 percent were held in bank deposits, and the remaining 9 percent were held in annuities at life insurance companies. Peter Sailer & Kurt Gurka, Internal Revenue Service, *Accumulation and Distributions of Retirement Assets, 1996-2000-Results from a Matched File of Tax Returns and Information Returns*, available at <http://www.irs.gov/pub/irs-soi/03pete.pdf> (2003).
2. Federal Reserve Chairman Alan Greenspan, *The Challenge of Central Banking in a Democratic Society*, Address at the American Enterprise Institute for Public Policy Research Annual Dinner and Francis Boyer Lecture (December 5, 1996) available at <http://www.federalreserve.gov/boarddocs/speeches/1996/19961205.htm>.
3. Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996).
4. Since the Supreme Court's 1987 decision in *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the overwhelming majority of disputes between individual investors and their stock-





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- brokers have been resolved by compulsory arbitration under the auspices of the NASD, NYSE, AMEX, or other self-regulatory organizations. The decisions reached by arbitration panels, though publicly available, do not generally give a written rationale for the decision, and are deemed final and not subject to appeal or judicial review except in very limited circumstances. *See, e.g.*, 9 U.S.C. § 10 (setting forth grounds vacating an arbitration award); O.C.G.A. § 9-9-13 (Supp. 2003) (same). Nor do such arbitration awards have the precedential value of a court decision. *See, e.g.*, *El Dorado Technical Services, Inc. v. Union General de Trabajadores de Puerto Rico*, 961 F.2d 317, 321 (1st Cir. 1992). As a result, the development of the law in this area has been stagnant, since it is not subject to the continued refinement, analysis, and appellate review that would otherwise have occurred in litigated claims.
5. 15 U.S.C. § 78j(b) (2000).
  6. 17 C.F.R. § 240.10b-5 (2000).
  7. *See Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1046 (11th Cir. 1987); *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809 (11th Cir. 1989).
  8. *TCS Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *see also SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1323 (11th Cir. 1982) (“The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action.”).
  9. *Miller v. Premier Corp.*, 608 F.2d 973, 981 (4th Cir. 1979).
  10. *Id.*; *see also Bogle v. Bragg*, 248 Ga. App. 632, 637, 548 S.E.2d 396, 401 (2001) (finding a statement that security was “a safe investment” to be an opinion, not actionable fraud).
  11. *Cook, Perkiss & Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242, 246 (9th Cir. 1990) (quoting *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 643 F. Supp. 1289, 1292 (D. Ariz. 1986), *rev’d without opinion*, 803 F.2d 724 (9th Cir. 1986)).
  12. *See Shamrock Assocs. v. Moraga Corp.*, 557 F.Supp. 198, 203 (D. Del. 1983); *Troyer v. Karcagi*, 476 F. Supp. 1142, 1148 (S.D.N.Y. 1979).
  13. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12, (1976).
  14. *McDonald v. Alan Bush Brokerage Co.*, 863 F.2d 809, 814 (11th Cir. 1989).
  15. *Broad v. Rockwell International Corp.*, 642 F.2d 929, 961 (5th Cir. 1981) (en banc).
  16. *Bruschi v. Brown*, 876 F.2d 1526 (11th Cir. 1989).
  17. *Id.* at 1529.
  18. *Robbins v. Koger Props.*, 116 F.3d 1441 (11th Cir. 1997).
  19. *Id.* (quoting *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 785 (11th Cir.1988)).
  20. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), *aff’d in part, rev’d in part on other grounds*, 459 U.S. 375 (1983); *see also Currie v. Cayman Resources*, 835 F.2d 780, 785 (11th Cir. 1988); *Rousseff v. E.F. Hutton*, 843 F.2d 1326, 1329 (11th Cir. 1988).
  21. 15 U.S.C. § 78u4(b) (2000).
  22. 15 U.S.C. § 771 (2000).
  23. *See Pinter v. Dahl*, 486 U.S. 622 (1988); *Ryder International Corp. v. First American Nat’l Bank*, 943 F.2d 1521 (11th Cir. 1991).
  24. *Gustafson v. Alloyd Co. Inc.*, 513 U.S. 561 (1995).
  25. O.C.G.A. §§ 10-5-12(a) (2000); 10-5-14(a) (2000).
  26. O.C.G.A. § 10-5-14(a) (2000).
  27. *Kirk v. First Nat’l Bank*, 439 F. Supp. 1141, 1145 n.1 (N.D. Ga. 1977); *Collins v. Norton*, 136 Ga. App. 105, 220 S.E.2d 279 (1975).
  28. *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984), *aff’d in part, rev’d on other grounds*, 835 F.2d 780 (11th Cir. 1988); *GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs.*, 245 Ga. App. 460, 464, 537 S.E.2d 677, 682 (2000).
  29. O.C.G.A. § 10-5-14(a) (2000).
  30. *See, e.g., Fuller v. Perry*, 223 Ga. App. 129, 131, 476 S.E.2d 793, 795 (1996); *Oklejas v. Williams*, 165 Ga. App. 585, 586, 302 S.E.2d 110, 111 (1983).
  31. *Simpson Consulting v. Barclays Bank PLC*, 227 Ga. App. 648, 651, 490 S.E.2d 184, 188 (1997).
  32. O.C.G.A. § 23-2-53 (1982).
  33. *Hunter, Maclean, Exley & Dunn, P.C. v. Frame*, 269 Ga. 844, 848, 507 S.E.2d 411, 414 (1998); *see generally O.C.G.A. § 23-2-51 to § 23-5-55* (providing a statutory basis for fraud claims).
  34. *GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs.*, 245 Ga. App. 460, 464, 537 S.E. 2d 677, 682 (2000).
  35. *Bogle v. Bragg*, 248 Ga. App. 632, 637, 548 S.E.2d 396, 401 (2001) (noting that the statements were made by an attorney who owed no duty to the investor).
  36. *Thompson v. Smith Barney, Harris Upham & Co.*, 709 F.2d 1413, 1416 (11th Cir. 1983); *see also McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888, 890 n.1 (5th Cir.1979).
  37. *See Hecht v. Harris, Upham & Co.*, 430 F.2d 1202, 1206-1207 (9th Cir. 1970); *Armstrong v. McAlpin*, 699 F.2d 79 (2d Cir. 1983).
  38. GA. COMP. R. & REGS. r. 590-4-2-.14(1)(a)(2).
  39. O.C.G.A. § 10-5-12(a)(1) (2000) (providing that it is “unlawful for any person . . . [t]o offer to sell or to sell any security in violation of . . . any rule [or] regulation . . . promulgated or issued by the [Georgia Commissioner of Securities].”).
  40. O.C.G.A. § 10-5-14(a) provides that “[a]ny person [committing an unlawful practice under O.C.G.A. § 10-5-12(a)] shall be liable to the person buying such security.”
  41. *Manela v. Garantia Banking, Ltd.*, 5 F. Supp. 2d 165, 173 (S.D.N.Y. 1998).
  42. *See, e.g., Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 767 F.2d 1498, 1501 (11th Cir. 1985).
  43. NASD Conduct Rule 2510(b), NASD Sec. Dealers Man. (CCH) R.2510 (2002); NYSE Rule 408(a), 2 N.Y.S.E. Guide (CCH) P2408 (1996). A broker may also be given oral “time and price” discretion to sell a specified quantity of securities. NASD Conduct Rule 2510(d)(1); NYSE 408(d). Unless provided otherwise in writing, such “time and price discretion” is generally understood to be limited to the day it is granted. *See, e.g., Hanford v. Marion Bass Securities Corp.*, NASD No. 98-01422 (August 12, 1999).
  44. *Pierce v. Richard Ellis & Co.*, 310 N.Y.S.2d 266, 268 (N.Y. Civ. Ct. 1970).
  45. *M&B Contracting Corp. v. Dale*,

- 601 F. Supp. 1106,1111 (E.D. Mich. 1984), *aff'd*, 795 F.2d 531 (6th Cir. 1986); *accord* Leib v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 954-55 (E.D. Mich. 1978), *aff'd*, 647 F.2d 165 (6th Cir. 1981); Nunes v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 635 F. Supp. 1391, 1393-94 (D. Md. 1986).
46. Moran v. Kidder Peabody & Co., 609 F. Supp. 661, 666 (S.D.N.Y. 1985), *aff'd*, 788 F.2d 3 (2d Cir. 1986); *see also* Freundt-Alberti v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 134 F.3d 1031 (11th Cir. 1998).
47. *See, e.g.*, In re Thomson McKinnon Securities, Inc., 191 B.R. 976, 983-84(Bankr. S.D.N.Y. 1996) (finding that a turnover rate of 2.22 creates a question of fact for a jury to decide if activity was excessive).
48. *See, e.g.*, Thompson v. Smith Barney, Harris Upham & Co., 539 F. Supp. 859 (N.D. Ga. 1982), *aff'd*, 709 F.2d 1413 (11th Cir. 1983) (Plaintiff who was aware that his options account was being constantly traded, who had financial acumen to determine his own best interests, and who desired frequent trading could not establish excessive trading.)
49. *See, e.g.*, Cmty. Hosp. of Springfield & Clark County, Inc. v. Kidder, 81 F. Supp. 2d 863 (S.D. Ohio 1999).
50. *See, e.g.*, Hecht v. Harris, Upham & Co., 283 F. Supp. 417, 435-36 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970); Mihara v. Dean Witter & Co., 619 F.2d 814, 819 (9th Cir. 1980) (finding that excessive trading was established where, among other facts, fifty percent of the securities were held for less than fifteen days).
51. *See, e.g.*, Smith v. Petrou, 705 F. Supp. 183 (S.D.N.Y. 1989) (noting that commissions generated in the customer's account represented a substantial portion of the broker's income); Stevens v. Abbott, Proctor & Paine, 288 F. Supp. 836 (E.D.Va. 1968) (finding that the registered representative derived 40 percent of his income from commissions from customer's account); Hecht v. Harris, Upham & Co., 283 F. Supp. 417 (N.D. Cal. 1968), *modified on other grounds*, 430 F.2d 1202 (9th Cir. 1970) (noting that commissions earned by the broker on plaintiff's account exceeded the commissions earned on all but 11-14 of the other 8,000-9,000 accounts in that office and amounted to 39 percent of all security commissions generated by the broker).
52. *See, e.g.*, Robertson v. Central Jersey Bank & Trust Co., 47 F.3d 1268, 1275 n.4 (3rd Cir. 1995). ("Diversification is a uniformly recognized characteristic of prudent investment and, in the absence of specific authorization to do otherwise, a trustee's lack of diversification would constitute a breach of its fiduciary obligations."). Commentators agree that it takes at least ten, and usually fifteen to twenty, non-correlated securities to achieve adequate diversification and thereby reduce nonsystematic risk. *See* EDWIN J. ELTON & MARTIN J. GRUBER, MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS 31 (3d ed. 1987). "Diversification does reduce risk, and the reduction can be greater, the wider the range of possible investments." WILLIAM F. SHARPE, INVESTMENTS 115 (1978).
53. In re Laurie Jones Canady, Securities Exchange Act Rel. No. 41250, 1999 SEC LEXIS 669, \*30 n.27 (Securities Exchange Commission Apr. 5, 1999) ("Trading on margin increases the risk of loss to a customer for two reasons. First, the customer is at risk to lose more than the amount invested if the value of the security depreciates sufficiently, giving rise to a margin call in the account. Second, the client is required to pay interest on the margin loan, adding to the investor's cost of maintaining the account and increasing the amount by which his investment must appreciate before the customer realizes a net gain. At the same time, using margin permit[s] the customers to purchase greater amounts of securities, thereby generating increased commissions for [the salesperson].")
54. For example, an advisor representing a client with a concentrated position in one security may recommend the purchase of a put option to protect against a continuing decline in value. The put option fixes the minimum price at which the position can be sold during a specific period of time. Another strategy is to create an "equity collar" using both put and call options, which establishes both a floor on the stock's value, and a cap on future price appreciation.
55. A broker looking to improperly increase his commission may recommend that his customer sell a mutual fund he owns, and purchase a fund offered by a different mutual fund company. Switching can generate significant commissions and sales charges benefiting the broker. Many funds impose a surrender charge, typically one percent, if the fund was not held for a minimum period (usually six months or one year). Every switch is a sale and purchase of securities, so it must pass suitability requirements. Switching may not place the investor in a better mutual fund, and may in fact place the investor in a lesser known, lower-quality fund.
56. NASD Conduct Rule 2310(a), NASD Sec. Dealers Man. (CCH) R. 2310 (2002).
57. Brown v. E.F. Hutton Group, Inc., 991 F.2d 1020, 1031 (2d Cir. 1993).
58. GA. COMP. R. & REGS. r. 590-4-2-.14(1)(a)(3).
59. O.C.G.A. § 10-5-12(a)(1).
60. *See, e.g.*, NYSE Rule 408, 2 N.Y.S.E. Guide (CCH) P 2408 (1996); NASD Conduct Rule 2510, NASD Sec. Dealers Man. (CCH) R.2510 (2002); Glisson v. Freeman, 243 Ga. App. 92, 99 532 S.E.2d 442, 449 (2000); Gochnauer v. A.G. Edwards & Sons, Inc. 810 F.2d 1042, 1049 (11th Cir. 1987).
61. NYSE Rule 408(a); *see also* NASD Conduct Rule 2510, NASD Sec. Dealers Man. (CCH) R. 2510 (2002).
62. Brophy v. Redivo, 725 F.2d 1218, 1220 (9th Cir. 1984); Kayne v. PaineWebber, Inc., 703 F. Supp. 1334, 1340 (N.D. Ill. 1989); Baker v. Wheat First Securities, 643 F. Supp. 1420, 1432 (S.D.W.V. 1986); Bischoff v. G. K. Scott & Co., Inc., 687 F. Supp. 746, 750 (E.D.N.Y. 1986).
63. GA. COMP. R. & REGS. r. 590-4-2-.14(1)(a)(4).
64. *See, e.g.*, E. F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 445, 304 S.E.2d 420, 422 (1982) ("[T]he broker's duty to account to its cus-

- tomers is fiduciary in nature, resulting in an obligation to exercise the utmost goodfaith.”); *Minor v. E.F. Hutton & Co.*, 200 Ga. App. 645, 409 S.E.2d 262 (1991). The Securities & Exchange Commission (“SEC”) also concludes that the common law of agency, coupled with the rules of the self-regulatory agencies such as the NASD and the NYSE, also give rise to a fiduciary duty owed by brokers. See, *In re E.F. Hutton & Co.*, Exchange Act Release No. 25,887 [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 84,303 (July 6, 1988); accord, Restatement (Second) of Agency § 425 (agents who are employed to make, manage, or advise on investments have fiduciary obligations).
65. See, e.g., *Allen v. Lefkoff, Duncan, Grimes & Dermer P.C.*, 265 Ga. 374, 453 S.E.2d 719 (1995) (finding that the violation of a Bar Rule is not determinative of the standard of care applicable in a legal malpractice action, but it may be a circumstance that can be considered, along with other facts and circumstances, in determining negligence).
  66. Securities Exchange Act of 1934, 15 U.S.C. § 78o (b)(4)(E) (2000); See also NASD Conduct Rule 3010(b)(1), NASD Sec. Dealers Man. (CCH) R. 3010 (2002); NYSE Rule 405(2), 2 N.Y.S.E. Guide (CCH) P 2405 (1996); GA. COMP. R. & REGS. r. 590-4-2-.08(1).
  67. *Quick & Reilly, Inc. v. Walker*, 1991 U.S. App. LEXIS 5472, at \*8 (9th Cir. 1991) (NASD “suitability” rules were relevant to “establish the standard of care to which reasonable broker must adhere,” and the jury found broker negligent.); *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 333 (5th Cir. 1981) (Industry rules are “excellent tools against which to assess in part the reasonableness or excessiveness of a broker’s handling of an investor’s account.”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 697 F. Supp. 1224, 1227 (D.D.C. 1988) (finding that a violation of a NASD rule provided evidence of broker’s negligence); *Kirkland v. E.F. Hutton & Co.*, 564 F. Supp. 427 (E.D. Mich. 1983); *Piper, Jaffray & Hopwood, Inc. v. Ladin*, 399 F. Supp. 292, 299 (S.D. Iowa 1975) (NYSE and NASD suitability rules “are admissible as evidence of negligence.”); *Lang v. H. Hentz & Co.*, 418 F. Supp. 1376, 138384 (N.D. Tex. 1976) (NASD Rules provide evidence of the standard of care that a member should receive.); see also O.C.G.A. § 51-1-6 (2000) (“When the law requires a person to perform an act for the benefit of another or to refrain from doing an act which may injure another, although no cause of action is given in express terms, the injured party may recover for the breach of such legal duty if he suffers damage thereby.”); O.C.G.A. § 51-1-8 (2000) (“Private duties may arise from statute or from relations created by contract, express or implied. The violation of a private duty, accompanied by damage, shall give a right of action.”).
  68. See, e.g., *Martin v. Shearson Lehman Hutton, Inc.*, 986 F.2d 242 (8th Cir. 1993).
  69. 15 U.S.C. § 78t(a) (2000).
  70. See, e.g., *Martin v. Shearson Lehman Hutton, Inc.*, 986 F.2d 242, 244 (8th Cir. 1993); *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 614 (7th Cir. 1996).
  71. See, e.g., *Hunt v. Miller*, 908 F.2d 1210 (4th Cir. 1990).
  72. 17 CFR 240.10b-16 (promulgated under the Securities Exchange Act of 1934).
  73. See, e.g., *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1358 n.8 (11th Cir. 1985); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 950 (3rd Cir. 1985); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534-39 (9th Cir. 1984); *Liang v. Dean Witter & Co.*, 540 F.2d 1107, 1113 n. 25 (D.C. Cir. 1976). But see *Bennett v. United States Trust Co.*, 770 F.2d 308 (2d Cir. 1985) (holding that no private right of action exists under Securities Exchange Act of 1934, Section 7, which controls the amount of money a brokerage firm may lend its customers); *Walck v. American Stock Exchange Inc.*, 687 F.2d 778 (3rd Cir. 1982) (holding that no private cause of action exists for violations of Sections 6 and 7 of the 1934 Act.); *Stern v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 603 F.2d 1073 (4th Cir. 1979) (holding that no private right of action exists for violations of Regulation T).
  74. For example, the Customer Agreement of a major brokerage firm provides: APPLICABLE LAW, RULES AND REGULATIONS. All transactions shall be subject to the applicable laws, rules and regulations of all federal state and self-regulatory authorities, including, but not limited to, the rules and regulations of the Board of Governors of the Federal Reserve System and the constitution, rules and customs of the exchange or market (and clearing house) where such transactions are executed.
  75. O.C.G.A. § 11-1-203 (2002); *Jackson Electric Membership Corp. v. Georgia Power Co.*, 257 Ga. 772, 364 S.E.2d 556 (1988); see also Restatement (Second) of Contracts § 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”). But see *Lake Tightsqueeze, Inc. v. Chrysler First Fin. Servs. Corp.*, 210 Ga. App. 178, 435 S.E.2d 486 (1993) (“[T]he failure to act in good faith in the performance of contracts or duties under the Uniform Commercial Code does not state an independent claim for which relief may be granted.”).
  76. 15 U.S.C. § 78t(a) (2000).
  77. *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609, 614 (7th Cir. 1996); see also *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (en banc) (finding control where the primary violator was a registered representative of the firm).
  78. O.C.G.A. § 10-5-14(c) (2000).
  79. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 159, 273 S.E.2d 907, 909 (1980).
  80. *Id.*
  81. *Gilbert v. Meason*, 137 Ga. App. 1, 5, 222 S.E. 2d 835, 838 (1975); see also *Hamilton Bank & Trust Co. v. Holliday*, 469 F.Supp. 1229, 1244 (N.D. Ga. 1979).
  82. O.C.G.A. § 51-2-2 (2000).
  83. O.C.G.A. § 10-6-22 (2000).
  84. O.C.G.A. § 10-6-21 (2000).
  85. O.C.G.A. §10-6-24 (2000).
  86. O.C.G.A. §§10-6-25 (2000); 10-6-30 (2000).
  87. 18 U.S.C. § 1964(c) (2000).
  88. O.C.G.A. § 16-14-3(9)(A)(xxi) (2003). See O.C.G.A. § 10-5-24(a) (2000) (providing that a willful violation of the Act is a felony).
  89. O.C.G.A. § 16-14-6(c) (2003) (emphasis added).
  90. *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 675 (N.D. Ga. 1983).





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# The Affirmative Action Debate Continues:

## *Bakke* and Its Progeny Revisited

By Laverne Lewis Gaskins

**E**ver since the United States Supreme Court issued its decisive, but fragmented, holding in *Regents of the University of California v. Bakke*,<sup>1</sup> the question of when, if ever, colleges and universities may consider race as a factor in admissions practices has beleaguered state systems of higher education. The plurality opinion in *Bakke* spawned numerous cases in the appellate courts, including the 11th Circuit. In the 25 years since the *Bakke* opinion was issued, these courts have wrestled with questions of whether promoting diversity within the student body is a sufficiently compelling state interest to justify the use of racial preferences in admissions policies, and if so, when is the process for employing preferences narrowly tailored enough to pass constitutional muster, as opposed to being an impermissible quota system.

As the debate surrounding the use of affirmative action in higher education admissions intensified, the University of Michigan took center stage when the Supreme Court issued opinions in *Gratz v. Bolinger*<sup>2</sup> and *Grutter v. Bolinger*<sup>3</sup> on June 23, 2003. These cases arose out of admissions practices in the university's undergraduate programs and the University of Michigan law school, respectively. The Supreme Court's consideration of these cases spawned an unprecedented number of *amicus curiae* briefs, as colleges and universities throughout the United States eagerly hoped that the Court would provide definitive answers to questions surrounding the role of diversity in higher education.

This article will provide a summary and analysis of the Supreme Court's landmark decisions in the *Gratz* and *Grutter* cases. It begins with a detailed analysis of the holding in *Bakke*, followed by a discussion of the various ways in which federal appellate courts interpreted and applied the *Bakke* decision. The article concludes with a discussion of the *Gratz* and *Grutter* decisions, including the Court's interpretation of the *Bakke* holding.

## THE FRAGMENTED HOLDING OF *BAKKE*

At issue in *Bakke* was the University of California at Davis' medical school's dual system of admissions: a regular program for non-minority applicants and a special program for disadvantaged members of certain minority races.<sup>4</sup> The plaintiff, a white male, who was denied admission to the medical school, argued violations of the Equal Protection Clause of the Fourteenth Amendment<sup>5</sup> (hereafter the "Equal Protection



Clause”) and Section 601 of Title VI of the Civil Rights Act of 1964<sup>6</sup> (hereafter “Title VI”). While Justice Powell announced the judgment of the Court in striking down the university’s admissions policy, the justices were unable to reach consensus as to a single opinion on which to base this result. It is this plurality opinion of *Bakke* that resulted in confusion and uncertainty as to the use of race in admissions. The only definitive aspect of *Bakke* is that the multiple opinions provided fertile ground for a multitude of subsequent interpretations as to its true holding in the context of affirmative action practices in higher education.

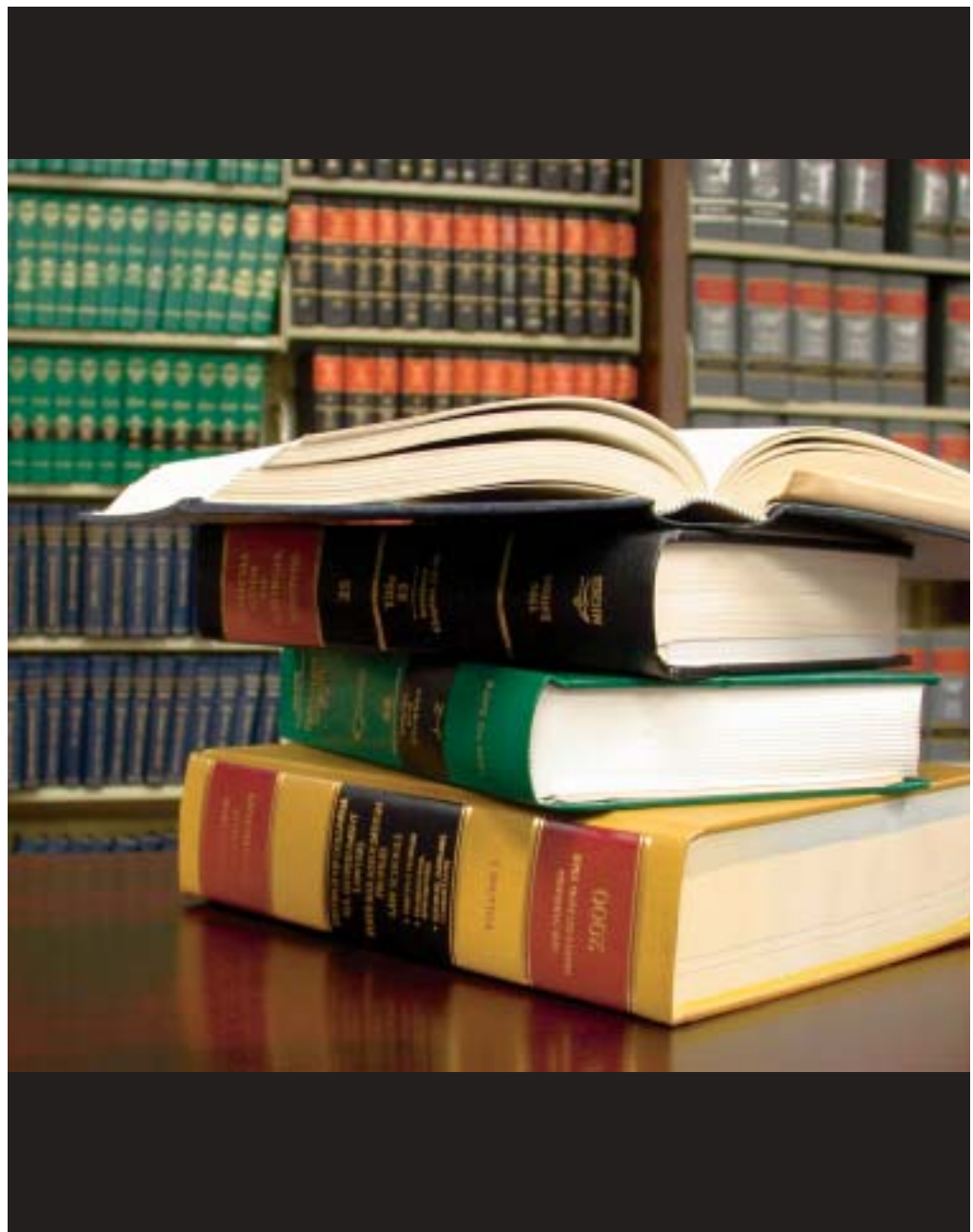
Justice Powell delivered the judgment of the Court in *Bakke* and affirmed the California Supreme Court’s finding that under strict scrutiny,<sup>7</sup> the university’s special admissions system violated the Equal Protection Clause.<sup>8</sup> Justice Powell reasoned that the university’s use of quotas would be facially invalid if its purpose was to “assure within [the] student body some specified percentage of a particular group merely because of its race or ethnic origin.”<sup>9</sup> Powell found that the issue of remedying past societal discrimination “does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered” as the result of such discrimination.<sup>10</sup> Nevertheless, Justice Powell stated that the attainment of a diverse student body was a “constitutionally permissible goal for an institution of higher education,”<sup>11</sup> and that “[t]he nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peo-

ples.”<sup>12</sup> Powell wrote in his opinion that the use of race could be properly tailored to achieve the compelling governmental interest of racial diversity, and he favorably cited an admissions process in place at Harvard University that he believed met these criteria.<sup>13</sup> The other justices, however, did not join in that part of his opinion that held that diversity constituted such a compelling interest.

Unlike Powell, Justices Rehnquist, Stevens, Burger and Stewart did not consider the case as

a class action and consequently reasoned that “the question of whether race can ever be used as a factor in an admissions decision” was not an issue before the Court.<sup>14</sup> In declining to address the issue of race in the context of a constitutional analysis under equal protection grounds, Justice Stevens stated that the admission practices violated Title VI because of the use of race as a factor.<sup>15</sup>

In contrast to Justices Rehnquist, Stevens, Burger and Stewart, Justices Marshall, Brennan, White



and Blackmun did not interpret Title VI as barring the use of racial preferences. Rather, they concluded that “Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by the State or its agencies.”<sup>16</sup> These justices dissented as to that part of the judgment announced by Justice Powell that held that the special admissions program was unlawful.<sup>17</sup> Instead they concluded that although racial classifications call for strict scrutiny,<sup>18</sup> state governments may adopt race-conscious programs if the purpose of the program was to remove the disparate impact of past discrimination.<sup>19</sup>

Overall, *Bakke* stands for the proposition that racial classifications although suspect, are permissible if supported by a compelling state purpose or interest, and the classifications are necessary to the accomplishment of such purpose or the safeguarding of such interest. Although Justice Powell stated in *Bakke* that ethnic diversity in the context of university admission policies may advance a state’s compelling interest “in attaining the goal of a heterogeneous student body,”<sup>20</sup> the fragmented nature of the opinion fostered the ensuing debate regarding whether or not Powell’s opinion was controlling.

## POST-BAKKE: THE QUESTION OF DIVERSITY

The crux of the debate that followed in the wake of *Bakke* is whether diversity is a compelling state interest such that it justifies race-sensitive admissions practices. This debate is most evident in the split opinions on the issue of affirmative action that surfaced after the *Bakke* decision, as evidenced in

the cases discussed below: *Hopwood v. Texas*,<sup>21</sup> *Smith v. University of Washington Law School*,<sup>22</sup> and *Johnson v. Board of Regents of the University of Georgia*.<sup>23</sup>

### *Hopwood v. Texas*

In *Hopwood v. Texas*,<sup>24</sup> the 5th Circuit Court of Appeals struck down the University of Texas Law School’s affirmative action component of its 1992 admissions program as violating equal protection standards. Four white applicants who were rejected by the law school sued, claiming that the university’s preferential treatment of Mexican-Americans and African-Americans was unconstitutional, violated Title VI and 42 U.S.C. Sections 1981 and 1983.<sup>25</sup> The 5th Circuit acknowledged the lower court’s finding that “Texas’s long history of racially discriminatory practices in its primary and secondary schools” had an impact on the law school that included “an under-representation of minorities in the student body.”<sup>26</sup> Under the 1992 admissions process, the law school considered an applicant’s race in an effort to cure this under-representation and achieve a diverse student body.

The 5th Circuit rejected Justice Powell’s diversity opinion in *Bakke* as binding precedent citing the fact that “no other Justice joined in that part of the opinion discussing the diversity rationale.”<sup>27</sup> The court held that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body was not a compelling interest.”<sup>28</sup> Further, the court stated that under the Fourteenth Amendment, “the classification of persons on the basis of race for the purpose of diversity frustrates rather than facilitates the goals of equal protection.”<sup>29</sup>

### *Smith v. University of Washington Law School*

In contrast to the 5th Circuit, the 9th Circuit Court of Appeals in *Smith v. University of Washington Law School*,<sup>30</sup> upheld the university’s use of race-based admissions to promote racial diversity. The plaintiffs in *Smith* alleged violations of 42 U.S.C. Sections 1981 and 1983<sup>31</sup> and Title VI.<sup>32</sup> After the case was filed, the state of Washington passed Initiative Measure 200<sup>33</sup> prohibiting the use of any future race-based initiatives in public school, thus rendering the issue of enjoining the law school’s use of preferential treatment of minorities moot.<sup>34</sup> Having determined that the plaintiff’s request for prospective relief was moot, the court then addressed the issue of consideration of race in admission decisions that were made prior to the passage of the initiative. The court held that *Bakke* was controlling and concluded that Justice Powell’s analysis “is the narrowest footing upon which a race-conscious decision making process could stand.”<sup>35</sup> The 9th Circuit also held that educational diversity was a compelling governmental interest, but that race-conscious measures to achieve this goal required strict scrutiny.<sup>36</sup> The court concluded that prior to the passage of the initiative the law school could operate a race-conscious admissions program if it was properly designed and not be in violation of Title VI or the Equal Protection Clause.<sup>37</sup>

### *Johnson v. Board of Regents of the University of Georgia*

Consistent with the 5th Circuit, but in contrast to the 9th Circuit, the 11th Circuit in *Johnson v. Board*



of Regents of the University of Georgia,<sup>38</sup> struck down the university's race-conscious admissions policy finding it violated Title VI. For the first 160 years of its existence, the University of Georgia refused to admit African-American students until it integrated in 1961.<sup>39</sup> To increase minority representation in the student body, UGA utilized a three-layer system of evaluation for the purpose of admission: Academic Index, Total Student Index and Edge Read.<sup>40</sup> The AI was calculated using each applicant's high school GPA and SAT test scores.<sup>41</sup> The TSI was utilized for those applicants who were not admitted under the AI level. The TSI awarded bonus points to applicants on the basis of other factors such as parent or sibling ties to UGA, race and gender.<sup>42</sup> The ER process was used for TSI applicants who were on the edge of the admis-

sion pool. Under this process the applicant's file was read and qualitatively evaluated and scrutinized by admission officers.<sup>43</sup>

Three rejected, white female applicants alleged that UGA's use of the bonus points resulted in racial preferences and sexual discrimination in violation of Title VI, Title IX,<sup>44</sup> and the Equal Protection Clause.<sup>45</sup> In striking down UGA's admission practices, the 11th Circuit declined to consider Justice Powell's opinion in *Bakke* as binding precedent and chose not to resolve the issue of whether promoting student body diversity ever may be considered a compelling interest.<sup>46</sup> While the court recognized that UGA had a history of intentional discrimination against African-Americans,<sup>47</sup> it reasoned that even if diversity was a compelling state interest, UGA had failed to show that its policy was

narrowly tailored to serve that interest.<sup>48</sup> In response to UGA's assertion that its admission practices were analogous to those of Harvard University, which Justice Powell favorably cited in *Bakke*, the 11th Circuit disagreed and went on to dismiss Justice Powell's example as mere dicta.<sup>49</sup>

## THE DECISIONS IN GRATZ AND GRUTTER

Against the legal backdrop of the conflicting decision in the appellate courts, the Supreme Court reviewed the admissions practices of the University of Michigan in the *Gratz* and *Grutter* cases.

In *Gratz*, white applicants who were denied admission to UM's undergraduate program asserted that the school's use of race in its admission policies violated Title VI

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and the Equal Protection Clause.<sup>50</sup> Two admissions programs were at issue: one in place from 1995 until 1998 and the other in place from 1999 until 2000.<sup>51</sup> In reviewing the university's admission practices, the district court held that under *Bakke*, a properly devised admissions program involving the competitive consideration of race and

Protection Clause, Sections 1981 and 1983 and Title VI.<sup>57</sup> The law school's admission policy sought a "mix of students with varying backgrounds and experiences who will respect and learn from each other."<sup>58</sup> Consistent with this goal, the law school's admission policy considered "racial and ethnic diversity with special reference to

dard of review that racial classifications under the Equal Protection Clause are subject to strict scrutiny.<sup>66</sup> To withstand strict scrutiny, the Court stated that the university's use of race in its admission program must be narrowly tailored and further a compelling governmental interest.<sup>67</sup> The Court found that the university's automatic award of 20 points, or one-fifth of the points need to guarantee admission to every single "applicant from an underrepresented minority group, as defined by the university," was not narrowly tailored to achieve educational diversity<sup>68</sup> and thus this use of race in the admissions process violated the Equal Protection Clause, Title VI and Section 1981.<sup>69</sup> The Court relied on *Bakke* in its assessment of the university's admissions practices, and noted that Justice Powell explained that it would be reasonable "for a university to employ an admissions program in which 'race or ethnic background may be deemed a "plus" in a particular applicant's file.'"<sup>70</sup> In striking down Michigan's freshman admission practices, the Court reasoned "the admission's program Justice Powell described did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity."<sup>71</sup> The Court found that Michigan's policy in awarding 20 points to every underrepresented minority applicant did not contemplate individualized consideration other than determining whether an applicant was a member of a minority group.<sup>72</sup>

In *Grutter*, the Supreme Court analyzed and upheld the University of Michigan's law school admission practices.<sup>73</sup> Justice Sandra Day O'Connor issued the majority opin-

## Universities continue to grapple with the reality of balancing the after-effects of historical discrimination against competing individuals' interests in an effort to strike a fair balance.

ethnic origin was constitutional.<sup>52</sup> Nevertheless, the court found UM's admission policies from 1995 until 1998 unconstitutional because they operated as the functional equivalent of a quota, and therefore ran afoul of Justice Powell's opinion in *Bakke*.<sup>53</sup> The court, however, upheld UM's admissions program from 1999 to 2000 stating that under *Bakke* "diversity constitutes a compelling governmental interest in the context of higher education justifying the use of race as one factor in the admissions process."<sup>54</sup> The court did not find that the policy from 1999 to 2000 constituted a quota because the use of race operated as a "plus" factor, as opposed to supporting a system that allowed for a rigid predetermined number of minority students.<sup>55</sup>

In *Grutter*, the University of Michigan's law school faced a challenge to its race-conscious admissions program.<sup>56</sup> The named plaintiff in *Grutter* alleged that the university's law school's practice of considering race in admissions decisions violated the Equal

the inclusion of students from groups which have been historically discriminated against like African-Americans, Hispanics and Native Americans."<sup>59</sup> The 6th Circuit found Justice Powell's opinion binding<sup>60</sup> and instructive<sup>61</sup> and reversed the district court's injunction prohibiting the school from considering race and ethnicity in its admissions.<sup>62</sup> The court held that the law school had a compelling interest in achieving a diverse student body and that the law school's policy was consistent with the Harvard plan cited favorably by Justice Powell in *Bakke*.<sup>63</sup>

On June 23, 2003, the Supreme Court issued its opinion in *Gratz*, with Chief Justice William Rehnquist delivering the opinion of the Court, and Justices O'Connor, Scalia, Kennedy, and Thomas concurring.<sup>64</sup> Justice Breyer concurred in the judgment and dissented in part, and Justices Souter, Stevens and Ginsburg dissented.<sup>65</sup> In reversing the lower court's decision, the Court reaffirmed the well-established stan-

ion<sup>74</sup> with Justices Stevens, Souter, Ginsburg and Breyer concurring<sup>75</sup> and Justices Rehnquist, Scalia, Kennedy and Thomas dissenting.<sup>76</sup> In affirming the lower court's decision, Justice O'Connor reaffirmed Justice Powell's *Bakke* opinion that "student body diversity is a compelling state interest that can justify the use of race in university admissions."<sup>77</sup> The Court noted that access to legal education must "be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."<sup>78</sup>

In upholding the lower court's decision O'Connor reaffirmed that

under the Equal Protection Clause the "government may treat people differently because of their race only for the most compelling reasons," and that all racial classifications imposed by government "must be analyzed by a reviewing court under strict scrutiny."<sup>79</sup> In recognizing that all governmental uses of race are not necessarily invalidated by strict scrutiny, the court held that when "race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantees of equal protection so long as the narrow-tailoring requirement is also satisfied."<sup>80</sup>

The law school in *Grutter* engaged in a broad admissions approach,

conducting a review of each applicant's file that took into account not only race and ethnicity, but a wide variety of other characteristics that contribute to a diverse student body.<sup>81</sup> The Court endorsed these efforts on the part of the law school to achieve a "critical mass" of minority students, noting that this admissions process bore the hallmark of a narrowly tailored plan because unlike the policy analyzed in *Gratz* it did not function as a quota.<sup>82</sup>

## CONCLUSION

Universities continue to grapple with the reality of balancing the after-effects of historical discrimination against competing individuals' interest in an effort to strike a fair balance. As the opinions and



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dissents in *Gratz* and *Grutter* demonstrate, opinions regarding affirmative action are numerous, varied, and sometimes polarized. Nevertheless, the Supreme Court in *Gratz* and *Grutter* provided a firm answer to the post-*Bakke* question of whether diversity is a compelling governmental interest such that the narrowly tailored use of race in admission decisions is permissible. While the framework for the use of race may have been preserved, the exact blueprint for achieving diversity that would satisfy strict scrutiny remains to be determined.

Although the decisions in the *Grutter* and *Gratz* cases provided some clarification regarding the use of race as a factor in educational admissions policies, the larger issues concerning the legacy of *de facto* and *de jure* discrimination and what constitutes an appropriate remedy for that legacy continues to be fraught with legal complexity and challenges. Nowhere is this fact more profoundly evident than in the juxtaposition of the opinions of Justice Thurgood Marshall in *Bakke* and Justice Clarence Thomas in *Grutter*, the nation's only two African-American justices.

Dissenting in *Grutter*, Justice Thomas invoked the words and memory of the great abolitionist and statesman, Frederick Douglass, in support of Thomas's position that the actions of the law school were unconstitutional. Quoting from a speech Douglass delivered in January 1865, Thomas wrote in his dissent:

"The American people have always been anxious to know what they shall do with us . . . I have had but one answer from the beginning. Do nothing with us! . . . And if the Negro cannot


stand on his own legs, let him fall also. All I ask is give him a chance to stand on his own legs! Let him alone! . . . Your interference is doing him positive injury."<sup>83</sup>

Justice Thomas went on to state that "[l]ike Douglass, I believe blacks can achieve in every avenue of American life without the meddling of university administrators."<sup>84</sup> Given that Douglass was a former slave who lived during an era in which the vestiges of recent slavery were firmly entrenched in American society, it is debatable whether Justice Thomas captured the true meaning of Douglass' plea by quoting him in this context.

Rather, at the end of day on June 23, 2003, the eloquent sentiments expressed by Justice Thurgood Marshall in *Bakke* may have echoed in the minds of many as they struggled with the issue of affirmative action in higher education:

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.<sup>85</sup> I do not believe that the Fourteenth Amendment requires us to accept that fact. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race . . . <sup>86</sup> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro

into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society."<sup>87</sup>

As the struggle for equality for all individuals continues, so will the debate about what is right and wrong with affirmative action. 



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## Endnotes

1. 438 U.S. 265 (1978).
2. 539 U.S. 244 (2003).
3. 539 U.S. 306 (2003).
4. *Bakke*, 438 U.S. at 273-75.
5. U.S. CONST. AMEND. XIV. § 1.
6. Title VI provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d). (Title VI); *Bakke*, 438 U.S. at 278.
7. *Bakke*, 438 U.S. at 290-91.
8. *Id.* at 320.
9. *Id.* at 307.
10. *Id.* at 310.
11. *Id.* at 311-12.
12. *Id.* at 313 (quoting in part *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).
13. *Id.* at 323-24.
14. *Id.* at 408 & 411.
15. *Id.* at 412-13.
16. *Id.* at 328.
17. *Id.* at 325-26.
18. *Id.* at 357 & 362.
19. *Id.* at 368-69.
20. *Id.* at 314.

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21. 78 F.3d 932 (5<sup>th</sup> Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996).
22. 233 F.3d 1188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001).
23. 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).
24. Hopwood, 78 F.3d. at 932.
25. *Id.* at 934-38.
26. *Id.* at 939.
27. *Id.* at 944.
28. *Id.*
29. *Id.*
30. 233 F.3d 1188 (9<sup>th</sup> Cir. 2000), *cert. denied*, 532 U.S. 1033, 121 S. Ct. 2192 (2001).
31. 42 U.S.C. § 1983.
32. Smith, 233 F.2d at 1191.
33. Initiative Measure 200 (I-200) provided: "[T]he [S]tate [of Washington] shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting." Smith, 233 F.3d at 1192.
34. *Id.* at 1195 (the court stated that the issue of injunctive relief being moot, "[t]here can be no real expectation that the alleged wrongs will recur now that the people of the state have prohibited them").
35. *Id.* at 1200.
36. *Id.* at 1201.
37. *Id.*
38. 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).
39. Johnson, 263 F.3d at 1239.
40. *Id.* at 1240-41.
41. *Id.*
42. *Id.* at 1241.
43. *Id.* at 1240-41.
44. 20 U.S.C. §1681.
45. Johnson, 263 F.3d 1238.
46. *Id.* at 1244-45.
47. *Id.* at 1265.
48. *Id.* at 1264.
49. *Id.* at 1261.
50. Gratz v. Bolinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *rev'd in part and remanded*, 539 U.S. 244 (2003).
51. Under the University's 1995 and 1996 admission practices, decisions were based on a set of guideline tables ("grids") based on four classifications: (1) in-state non-minority applicants; (2) out-of-state non-minority applicants; (3) in-state minority applicants; and (4) out-of-state minority applicants. In 1996, only two grids were used: (1) in-state and legacy applicants; and (2) out-of-state applicants, with non-minority applicant action codes listed in the top row of grids' cells and minority action codes listed in the bottom row. In 1997, the same grids that were used in 1996 were used again. Gratz, 122 F. Supp. at 826-27.
52. *Id.* at 819-20.
53. *Id.* at 832.
54. *Id.* at 820.
55. *Id.* at 827.
56. 288 F.3d 732 (6<sup>th</sup> Cir. 2002), *aff'd*, 539 U.S. 306 (2003)
57. Grutter, 288 F.3d at 735.
58. Grutter, 288 F.3d at 736.
59. *Id.* at 737.
60. *Id.* at 739.
61. *Id.* at 745.
62. *Id.* at 752.
63. *Id.* at 747.
64. Gratz v. Bolinger, 539 U.S. 244 (2003).
65. *Id.*
66. *Id.* at 2427.
67. *Id.*
68. *Id.* at 2428.
69. *Id.* at 2430.
70. *Id.* at 2428 (quoting Bd. of Regents of Univ. of California v. Bakke, 438 U.S. 307, 317 (1978)).
71. *Id.*
72. *Id.*
73. Grutter v. Bolinger, 539 U.S. 306 (2003).
74. *Id.* at 2331.
75. *Id.* at 2347.
76. *Id.* at 2365.
77. *Id.* at 2337.
78. *Id.* at 2341.
79. *Id.* at 2337 (quoting Adarand Contractors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).
80. *Id.* at 2338.
81. *Id.* at 2343-44.
82. *Id.* at 2342-43.
83. *Id.* at 2350 (quoting "What the Black Man Wants: An Address Delivered in Boston Massachusetts on January 26, 1865," reprinted in 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan 1991). 4 The Frederick Douglass Papers 59, 68
84. *Id.*
85. Bd. of Regents of Univ. of California v. Bakke, 438 U.S. 265, 387 (1978)
86. *Id.* at 396.
87. *Id.*



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## Post-Creation Checklist for Georgia Business Entities

By John J. Scroggin

**T**he business has been created and organizational documents have been signed. The remaining requirements on a new business may appear to be a mindless set of complex rules, restrictions, limitations, exclusions and limitations on exclusions. This checklist is intended to provide some order to that maze. It is designed to aid clients in completing the various post-creation requirements that generally apply to corporations, limited liability companies, partnerships, and limited liability partnerships created under Georgia law.

The list assumes the entity is transacting business in Georgia, has its principal place of business in Georgia, is a for-profit entity, and has only U.S. citizens as owners. The list does not deal with state or federal securities laws or the Georgia Close Corporation statutes (O.C.G.A. § 14-2-9). Please note that the checklist is not intended to cover every rule or requirement and that tax and state laws change constantly. This outline reflects the laws as they existed at the beginning of 2004. Always consult with legal, business and tax advisors before taking any action in reliance of this outline.

The checklist provides supporting citations to the Official Code of Georgia and Internal Revenue Code.

Copies of the Georgia statutes can be found by going to [www.georgia.gov](http://www.georgia.gov) and typing "Code" in the search command. Copies of the IRC can be found at [http://uscode.house.gov/title\\_26.htm](http://uscode.house.gov/title_26.htm).

**Caution:** Any document sent to a government agency should be sent using a method which assures that you obtain a return receipt (e.g., certified mail, next day delivery). In the absence of a receipt, there is no proof that the form was properly filed.

**I. Immediate Post-Creation Matters.** *After the business entity's creation:*

### **A. Immediate Federal Tax Matters**

**1. Federal Tax Number.** A Federal Employer Identification Number (commonly referred to as FEIN or EI #) is used on most state and federal tax returns and is needed to create a business financial account. It is roughly equivalent to an individual's social security number. In order to obtain an FEIN, a business must file Form SS-4 with the IRS (available at [www.irs.gov/form-spubs/index.html](http://www.irs.gov/form-spubs/index.html)) by:

- Mailing the SS-4 to: EIN Operation, Holtsville, NY 00501; or
- Faxing the SS-4 to: 631-687-3891 or 631-447-8960; or
- Applying online at [www.irs.gov](http://www.irs.gov); or
- Having an officer of the business call 770-455-2360 or 866-816-2065.

a. Most filings will result in a 10-14 day delay. To speed up this process, a request for an FEIN

can be made by telephone by an officer of the business. If this approach is made, the SS-4 should be prepared in advance. The new FEIN is given to the officer over the phone. However, getting the IRS on the line can be a frustrating task.

- b. The SS-4 also contains a number of questions about the new business's activities. Do not leave any blanks on the form. For those decisions which have not yet been made (e.g., tax year), enter "To be Determined." Some entries must be completed (e.g., address).

**2. S Corporation.** If the entity will be an S corporation (formerly referred to as a Sub-Chapter-S corporation), file one copy of IRS form 2553 by:

- Mailing it to: Internal Revenue Service Center, Ogden, Utah 84201; or
- Faxing it to: 801-620-7116 (preferred approach).

- a. To be effective for the current tax year, the election must be filed by the 15th day of the 3rd month after the corporation's tax year begins (IRC Section 1362(b)(1)). Make sure the form is properly filled out. An improperly filled out or incomplete form may be returned and the filing deadline may be missed.
- b. If the corporation is formed at a time other than the first day of the month, the Treasury Regulations provide for a 75-day period to make the election (Temp. Treas. Reg. § 18.1362-1(b)).
- c. A number of restrictions must be met to qualify as an S corporation (e.g., many types of trusts cannot be S corporation shareholders). (IRC § 1361 et seq.).

**3. Tax Year.** Select the business entity's tax year. Generally, once the tax year is selected, it can only be changed with IRS permission. (IRC §§ 441-42). The tax year is selected on the entity's first income tax return. S corporations, LLCs, partnerships, and personal service corporations are generally required to use a calendar year, although some limited exceptions apply. (IRC §§ 441(i), 444, and 1378).

**4. Accounting Method.** Select the tax accounting method for the entity. Generally, once the tax accounting method is selected, it can only be changed with IRS permission. (IRC § 446). Generally, the business must report its income to the IRS using the method regularly used in

keeping its books. For most businesses the choice is between the cash and accrual method. However, the IRC may restrict the client's choice of an accounting method used for tax purposes. Consult with your tax accountant.

**B. Immediate Georgia Filing.** The Georgia Secretary of State has a First Stop Business Information Center which can provide valuable information to a new business owner. Such information can be accessed at [www.sos.state.ga.us/firststop](http://www.sos.state.ga.us/firststop) or by calling 404-656-7061.

**1. Corporate First Annual Registration.** A corporate annual registration must be filed with the Georgia Secretary of State within 90 days of the creation of any corporation (O.C.G.A. § 14-2-1622). The rules differ slightly for LLCs (O.C.G.A. § 14-11-1103) and LLPs (O.C.G.A. § 14-9-206.5). File the annual registration with and filing fee by:

- Mailing registration to: Georgia Secretary of State, Business Services and Regulation, Suite 315, West Tower, 2 Martin Luther King Jr. Drive, Atlanta, GA 30334-1530, 404-656-2817; or
- Filing online at <http://www.ganet.org/sosonline/> (preferred approach).

**2. Georgia Net Worth tax Return.** All new corporations (both S and C) are required to file a Georgia net worth tax return (Georgia Form 600) by the 15<sup>th</sup> day of the 3<sup>rd</sup> month after incorporation. After the initial filing, the return is a part of the annual income tax return.

**3. Department of Revenue—Tax Registrations.**

There are a number of filings that must be made for state purposes. The Georgia Department of Revenue has adopted a uniform registration packet to be used in registering for the various state tax numbers. The form is available by:

- Contacting the Department of Revenue, Centralized Taxpayer Registration Unit, P.O. Box 49512, Atlanta, GA 30359-1512, 404-417-4490 or 404-656-7061 or (outside Atlanta) 800-656-4558; or
- Accessing <http://www2.state.ga.us/departments/dor/forms>.

These filings may include Georgia sales tax registration numbers, Georgia withholding tax numbers and other Georgia filings, such as motor carrier applications and tobacco license application filings. These forms are also available online at [www.gatax.org](http://www.gatax.org).



**4. Department of Labor.** If a business is expected to have any employees, it should file Georgia form DOL-1A to obtain a Georgia Department of Labor number (DOL number). This form is in addition to the withholding tax number obtained from the Georgia Department of Revenue. The DOL number is used on all filings of Georgia state unemployment tax returns (form DOL-4N). To obtain copies of the form, see [www.dol.state.ga.us](http://www.dol.state.ga.us).

**5. Business License.** The business should apply for local business or occupation licenses. The license fees are generally due each Jan. 1. Contact both county and city governments to determine what local licenses are required.

**Caution:** If you file a non-applicable tax registration, expect to hear from the respective governmental authorities if you subsequently fail to file the appropriate tax returns.

**C. Document the Transactions Creating the Entity.**

As soon as possible after the business is created, the transactions which created the business should be documented, including property transfers, loan assumptions, and issuance of documents evidencing the ownership interests of the owners (e.g., stock certificates). If you are creating a new business entity to hold an existing business, make sure to transfer to the new entity the assets, leases, debts, and other aspects of the old business.

**Caution:** If the liabilities transferred to the new business entity exceed the basis of the assets being transferred, the transferors may incur taxable income. Consult with your tax advisor.

**D. Opening a Bank Account.** As soon as possible after creating the business open a bank account. In order to open the account you will generally need the FEIN, copies of the documents filed with the secretary of state to create the business entity, a resolution of the members of an LLC or directors of a corporation authorizing the opening of the account and naming the persons authorized to sign checks. Most banks will provide this last form to you.

**E. Managing the Relationship of the Owners.** The initial documents filed with the secretary of state's office are the bare bones of the business's legal structure. When there is more than one owner, make sure to document the rights and obligations of the owners, the provisions for income allocations, any voting limitations, any restrictions on

the rights of owners to sell their ownership interests, how the owners will run the business, and how the business relationship is terminated.

**II. Ongoing State and Federal Tax Filings.** *Among the ongoing State and Federal Filings (see the chart on page 37):*

**A. Federal Tax Filings.** A business has a number of ongoing federal tax filings. The following list is not exhaustive, but does provide a list of the typical taxes and returns. Consult with your tax advisor.

**1. Income Tax Returns.** All active business entities are required to file an annual income tax return. Extensions can be generally granted by filing IRS form 7004. The extension delays only the due date of the return; payment of any unpaid tax liability must be made with the filing of the extension.

**2. Estimated Corporate Income Tax Returns.** A regular corporation having more than \$500 in income tax liability must estimate its income tax and pay that tax in equal quarterly installments over the corporation's tax year (IRC § 6655). Each quarterly payment should be deposited at a national financial institution (e.g., national bank or savings and loan) using IRS Form 8109. Failure to prepay sufficient corporate income taxes can result in the corporation's incurring substantial penalties and interest. If the business is a "flow-through" entity (e.g., S Corporation, LLC or LLP), it does not generally pay entity level taxes. Instead, the entity's taxable income is allocated directly to the owners, who have the responsibility to pay estimated taxes, or assure that their W-2 withholding makes payment of estimated taxes unnecessary.

**3. Employment Forms.** A business entity faces a number of employee reporting and tax filing requirements. More information about these filing requirements can be found at [www.irs.gov](http://www.irs.gov).

a. **Employee-completed Forms.** When an employee is hired, he or she is required to fill out the following forms:

(1) **W-4.** Each employee of the business is required to file out a W-4 prior to the first day of employment. The W-4 contains the information necessary to determine the proper federal income tax withholding for each employee. If the employee claims excessive exemptions, the IRS has authority to deny the stated exemptions by notifying the employer.

(2) INS form I-9, Employment Verification Form. Prior to starting employment each new employee must fill out this form which demonstrates that he or she is qualified to work in this country.

(3) Georgia Form G-4. The Georgia equivalent of the W-4 is the G-4 and determines the state income taxes to be withheld.

b. Form 941. Form 941, Employer's Quarterly Federal Tax Return, is filed quarterly and provides information on a business's withholding of its employees' income taxes and social security taxes and the business's payment of social security taxes. Withholding tables and form 941 are normally sent to the business as a part of IRS Circular E, which is sent to the business after filing for a FEIN.

c. Form 940. Form 940, Employer's Annual Federal Employment Tax Return, is filed annually and computes the business's federal unemployment taxes.

**Caution:** Failure to file payroll tax returns or pay the applicable tax as required can result in the imposition of substantial penalties. For example, the parties

responsible for withholding the above payroll taxes may be personally responsible for the unpaid tax. See IRC § 6672, which imposes a 100 percent "penalty" on "responsible parties" who do not withhold and pay the tax to the government. Consider hiring a payroll reporting service to handle your state and federal payroll tax filings. The cost is worth avoiding the headaches of missing a payment or filing deadline.

**4. Information Returns.** In addition to the above tax returns, there are a number of information returns which must be filed. (*See the partial list below.*)

**B. Georgia Tax Filings.** A Georgia business may be subject to a number of state and local filings, including:

**1. Business Income Taxes.** Georgia business entities are required to file an income tax return annually. A C corporation is taxed on its Georgia taxable income at a flat rate of 6 percent. (O.C.G.A. § 48-7-21).

a. S corporations are exempt from Georgia corporate income taxes. (O.C.G.A. § 48-7-21(b)(8)(B)). If the corporation has out-of-state residents as shareholders, the S corporation

Quarterly Tax Returns (general rules)	
<u>Tax Return</u>	<u>Normal Due Date</u>
Federal Payroll Tax Return - Form 941	One Month After End of Calendar Quarter
C Corporation Estimated Income Tax Return	15 <sup>th</sup> Day After the End of the Calendar Quarter
Georgia Payroll Tax Return - Form G-7	One Month After End of Calendar Quarter
Georgia Quarterly Tax and Wage Report	One Month After End of Calendar Quarter
Annual Tax Returns (general rules for filings with the government)	
<u>Tax Return</u>	<u>Normal Due Date</u>
Federal Unemployment Return - Form 940	By January 31 <sup>st</sup>
Federal Wage and Tax Statements - Form W-2 and W-3	By February 28 <sup>th</sup> (Electronic Filing: March 31 <sup>st</sup> )
Partnership Federal Income Tax Return - Form 1065	By April 15 <sup>th</sup> (can be extended)
S Corporation Return - Form 1120S	By April 15 <sup>th</sup> (can be extended)
C Corporation Return - Form 1120	By the 15 <sup>th</sup> Day of the 4 <sup>th</sup> Month After Year End (can be extended)
Federal Information Returns (e.g., 1098s, 1099s)	By February 28 <sup>th</sup> (Electronic Filing: March 31 <sup>st</sup> )
Personal Property Tax Return	Generally by March 1 <sup>st</sup> or April 1 <sup>st</sup>
Georgia Income Tax Returns	See Federal Filing Dates
Annual Return to Georgia Secretary of State	By April 1 <sup>st</sup> (can be done online)
Tax Returns Delivered to Payees	
<u>Document</u>	<u>Normal Due Date</u>
Federal Information Returns (e.g., 1098s, 1099s)	January 31 <sup>st</sup>
Wage Statements (W-2)	January 31 <sup>st</sup>

election is denied, unless the out-of-state shareholders pay the Georgia income tax on their portion of the corporate income. (O.C.G.A. § 48-7-21(b)(8)(B)). Use Georgia form 600 S-CA.

b. LLCs and LLPs file returns, but the taxable income or losses of the entity are allocated to the members.

c. S corporations, LLCs, and LLPs may be required to withhold the Georgia income taxes on non-Georgia owners. (O.C.G.A. § 48-7-129).

**2. Corporation Net Worth Taxes.** Georgia corporations (both C and S) must file a net worth tax

return as part of their annual income tax return. The net worth tax is a progressive tax rate based upon the net worth of the corporation. The tax ranges from \$10,000 to \$5,000. The net worth tax is due whether or not the corporation has any taxable income. (O.C.G.A. § 48-13-70 et seq.)

**3. Annual Registration.** All Georgia corporations, LLCs, and LLPs are required to file a registration with the Secretary of State between January 1<sup>st</sup> and April 1<sup>st</sup> of each year. See also I(B)(1), *supra*.

**Caution:** If the registration is not filed and/or the fee is not paid, the entity may be involuntary dissolved by the Georgia Secretary of State. (corporations: O.C.G.A.

## IMPORTANT PHONE NUMBERS AND WEBSITES

Organization	Phone #	Website
<b>Internal Revenue Service</b> * Federal Tax ID# * Forms	770-455-2360 800-829-3676	www.irs.gov
<b>Federal Department of Labor</b>	404-562-2444	www.dol.gov
<b>Social Security Administration</b>	800-772-1213	www.ssa.gov
<b>Securities and Exchange Commission</b>	404-842-7600	www.sec.gov
<b>Small Business Administration</b>	800-827-5722	www.sbaonline.sba.gov
<b>Immigration and Naturalization Service</b>	800-375-5283	www.ins.usdoj.gov
<b>Patent and Trademark Office</b>	Not Applicable	www.uspto.gov
<b>State of Georgia Website</b>	Not Applicable	www.state.ga.us
<b>Georgia Department of Revenue</b> * Income Taxes * Forms * Sales & Use Tax	404-656-4165 404-656-4095 404-656-4293 404-656-4071	www.gatax.org
<b>Georgia Secretary of State</b> * Good Standing * First Stop Booklet (for new businesses) * Trademarks * Securities	404-656-2817 404-656-2817 404-656-7061 404-656-2861 404-656-4910 or 656-3920	www.sos.state.ga.us
<b>Georgia Department of Labor</b>	404-656-3061	www.dol.state.ga.us
<b>Board of Workers' Compensation</b>	404-656-2048	www.state.ga.us/sbwc
<b>Tax Forms for Other States</b>	Not Applicable	www.taxadmin.org/fta/link/forms.html
<b>State and Local Governments on the Web</b>	Not Applicable	www.statelocalgov.net/index.cfm
<b>CT Corporation</b>	404-888-6488	www.ctadvantage.com
<b>Paychex</b> (payroll services)	678-354-7776	www.paychex.com
<b>ADP</b> (payroll services)	800-225-5237	www.adp.com
<b>Quicken Business Software</b>	Not Applicable	www.quicken.com/small_business

§ 14-2-1420; LLCs: O.C.G.A. § 14-11-603). LLPs do not have a similar dissolution provisions (O.C.G.A. § 14-9-206.7 was repealed), although the failure to file an annual registration for three consecutive years may allow other partnerships to reserve the LLP's name.

#### 4. Other State Tax Returns.


- a. Sales Taxes. In general, Georgia sales tax returns are required to be filed by applicable taxpayers each month. Depending upon the local sales tax options, the sales tax rates generally range from 5 percent to 7 percent.
- b. Payroll Taxes. The following tax returns must be filed with Georgia authorities and the taxes paid as noted. Copies of these returns can be obtained by calling the Withholding and Estimated Tax Section of the Georgia Department of Revenue at 404-656-4181.
  - (1) DOL-4. Form DOL-4, Employer's Quarterly Tax and Wage Report, is filed quarterly and reports the state unemployment taxes due. Call the Georgia Department of Labor at 404-656-3061 or 404-656-5590 for more information. The unemployment tax is a percentage of each employee's wages. The federal

tax wage base is \$7,000, while the state wage base is \$8,500. The percentage is set by a number of factors, including the employer's unemployment record. Payment is made with the filing of the return. You may want to review the Employer's Handbook (DOL-224), available from the Georgia Department of Labor at [www.dol.state.ga.us](http://www.dol.state.ga.us).


- (2) G-1. Form G-1, State of Georgia Employer's Quarterly Return of Income Tax Withheld, is filed quarterly and reports the state income taxes withheld from the employees' wages. Withheld taxes are normally paid before the return is filed.
- (3) G-3. Form G-3, State of Georgia Employer's Withholding Tax Annual Reconciliation, is filed annually by February 28th. One copy of each employee's federal W-2 should be attached to the return.

**5. Personal Property Tax Returns.** Georgia's city and county governments impose personal property taxes on the assets of the business. Contact local city and county governments to determine what taxes may be due.


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**C. State and Federal Employment Related Filings and Notices.** There are a number of state filing and notice requirements, including:

**1. Worker's Compensation.** Georgia law may require the business to obtain worker's compensation insurance for its employees. (O.C.G.A. § 34-9-1, et seq.) The insurance is obtained from a commercial insurance company. The cost of the insurance is dependent upon the number of employees and the type of work of each employee. Call the State Board of Worker's Compensation at 404-656-2048 or see [www.state.ga.us/sbwc](http://www.state.ga.us/sbwc) for more information.

**2. Reporting New Hires.** Georgia requires employers to report the hiring of new employees to the Georgia Department of Labor. More information and online reporting are available at [www.dol.state.ga.us](http://www.dol.state.ga.us) or by calling 404-525-2985.

**3. Termination Notice.** If an employee is terminated, the employer is required to provide a separation notice to the employee using Georgia Department of Labor form DOL-800. A fine of up to \$1,000 can be imposed for failing to comply with the notice requirement. The form is available at [www.dol.state.ga.us](http://www.dol.state.ga.us).

**4. Hiring Aliens.** There are a number of pre-employment obligations that must be satisfied before hiring a non-U.S. citizen. See [www.dol.state.ga.us](http://www.dol.state.ga.us) and <http://uscis.gov>.

**5. COBRA.** If an employee loses his or her health care coverage (e.g. because of termination of employment), the employer may be required to give the employee notice of his or her right to continue the coverage.

**D. Filing in Other States.** If the entity is doing business in other states, it may be required to file tax returns similar to the State of Georgia returns in those other states. Contact your tax advisor to determine the appropriate taxes. Copies of applicable returns may be found at [www.taxadmin.org/fta/link/forms.html](http://www.taxadmin.org/fta/link/forms.html).

**III. Other Post-Creation Matters.** In addition to the above requirements, the following are some of the post-creation decisions that the business's organizers should review.

**A. Maintaining the Entity's Separateness.** Corporations, LLCs, and LLPs each have a legal existence separate from the legal existence of its owners. In general, owners cannot be held liable for the entity's liabilities. However, if the entity


has not been operated as a separate legal entity, its "liability shield" can be pierced and the owners could be held liable for the entity's debts. Always treat the business entity as a business separate from your personal assets (e.g., do not pay personal expenses from the business, document business loans and other decisions, etc.).

**B. Trademarks.** Determine whether the business should seek trademarks for its products and services. A federal trademark may provide protection across the United States. You may search the existing records of the Patent and Trademark office at [www.uspto.gov](http://www.uspto.gov). A trademark can be obtained solely for Georgia. (O.C.G.A. § 10-1-440 et seq.). Call the Georgia Secretary of State's office at 404-656-2861 for more information.

**C. Tradename Filings.** If the business is going to operate under a tradename other than its legal name, it should register that name in each county where it plans to do business under the assumed name and in the counties in which it has its principal business activity and business domicile. (O.C.G.A. § 10-1-490 et seq.). Call the clerk of the county's Superior Court for copies of the required forms. However, a tradename filing does not grant a company the exclusive right to the name. If you want to protect your business's name, consider filing a state or federal trademark.

**D. Property and Casualty Insurance.** Make sure you have in place the proper property and casualty insurance to protect you and the business entity from litigation or other claims.

**E. Workplace Notices.** Both state and federal laws require that certain employment posters be prominently displayed at a workplace. A list of the forms can be found at [www.dol.state.ga.us](http://www.dol.state.ga.us).

**F. Foreign Qualifications.** If the business anticipates doing business in other states, determine whether the business must be qualified in those states. 



**John J. Scroggin, J.D., LL.M.,** practices from a historic home in Roswell and is a graduate of the University of Florida Law School. He is a frequent speaker on estate, tax and business planning issues. Scroggin is the author of more than 130 published articles and three books. More information on estate and business planning issues can be found at [www.scrogginlaw.com](http://www.scrogginlaw.com).

## Midyear Meeting Draws Record Number of Attendees

By C. Tyler Jones

One of the hottest tickets in town was to the Jan. 15-17 State Bar of Georgia Midyear Meeting as a record 1,139 attendees made their way to the Sheraton Hotel at Colony Square in Atlanta. Members participated in numerous CLE presentations, section meetings, receptions and a board dinner at the Capital City Country Club - Brookhaven.

### Conference Highlights

Recipients of the Justice Robert Benham Awards for Community Service were honored during the Jan. 16 Board of Governors Dinner. The objectives of the award are: to recognize that volunteerism remains strong among Georgia's lawyers; to encourage lawyers to become involved in serving their communities; to improve the quality of life of lawyers through the satisfaction they receive from helping others; and to raise the public image of lawyers. This year's recipients include:



Photos by C. Tyler Jones

Recipients of the 2003 Justice Robert Benham Awards for Community Service include: (back row) James J. Dalton II, Judge William P. Adams, Judge Robin S. Nash, Constance McManus, John B. Miller, Judge Stephen E. Boswell and Kenneth B. Hodges III; (front row) Cynthia Hinrichs Clanton, Justice Robert Benham, Jacquelyn H. Saylor and David M. Zacks.

- John B. Miller of Savannah (Lifetime Achievement Award)
- Kenneth B. Hodges III of Albany
- Judge William P. Adams of Macon
- Judge Robin S. Nash of Decatur
- Cynthia Hinrichs Clanton of Atlanta
- Jacquelyn H. Saylor of Atlanta
- David M. Zacks of Atlanta
- Judge Stephen E. Boswell of Jonesboro
- James J. Dalton II of Jonesboro
- Constance McManus of Marietta
- Judge James E. Drane of Canton

During the board dinner, former Bar President Frank Love Jr. of Atlanta received the 2003 State Bar of Georgia's Distinguished Service Award. The Distinguished Service Award is the highest honor bestowed by the Bar for conspicuous service to the cause of jurisprudence and the advancement of the legal profession in the state.

Earlier in the day, the Women and Minorities in the Profession Committee hosted the first-ever Commitment to Equality Awards Luncheon to recognize the efforts of

lawyers and legal employers who are committed to providing opportunities that foster a more diverse legal profession for women and lawyers of color. Charles T. Lester Jr. and Charles R. Morgan received the 2004 Commitment to Equality Award. Randolph Thrower was recognized by having the Randolph Thrower Lifetime Achievement Award named in his honor. The Thrower award was then presented to Justice Robert Benham. The Bar thanks the following luncheon sponsors for their support:

- Alston & Bird LLP
- BellSouth
- Dow Lohnes & Albertson PLLC
- Hunton & Williams
- Kilpatrick Stockton LLP
- King & Spalding LLP
- Sutherland Asbill & Brennan LLP
- Womble Carlyle Sandridge & Rice PLLC



(Above) Former Bar President Frank Love Jr. of Atlanta received the 2003 State Bar of Georgia's Distinguished Service Award.

(Right) Members of the WMPC Commitment to Equality Awards Subcommittee are seen here with recipients of the committees inaugural awards.

## Board Meeting Highlights

State Bar President William D. Barwick presided over the 194th meeting of the Board of Governors of the State Bar of Georgia on Jan. 17. Following is an abbreviated overview of the meeting:

- The Board, by majority voice vote, approved Bar rules relating to a lawyer referral service, which authorizes fee sharing in certain circumstances.
- The Board approved the nomination of State Bar officers as follows: J. Vincent Cook as treasurer, Gerald M. Edenfield as secretary and Robert D. Ingram as president-elect.
- The Board approved the nominations of the following attorneys to serve two-year terms as Georgia ABA Delegates: Post 1 - Rudolph N. Patterson, Post 3 - Cubbedge Snow Jr. and Post 7 - Linda A. Klein. Post 5 is designated to be filled by the immediate YLD past president.
- Barwick presented a resolution to Sen. Chuck Clay recognizing his many contributions on behalf of indigent defense reform. Thereafter, he reported that a similar resolution was presented

to Speaker of the House Rep. Terry Coleman at an earlier occasion at the state Capitol.

- In regards to legislation issues, the Board took the following action:

### Proposed Amendments to Loan Forgiveness Legislation

- The Board approved requesting \$3 million from the state for the Public Interest Lawyers' Fund.
- The Board approved amending the original legislation to waive a six-month waiting period. The proposed legislation now requires two years of service from participants. Anything short of the two-year service requirement requires a pro rata repayment of the loan for any unserved months.

### Business Law Section

- Proposed changes to the Corporate Code and Non-Profit Code Revisions were approved.

### Real Property Law Section

- Proposed changes to the Cancellation of Satisfied Tax Executions and the Cancellation of Satisfied Judgment Executions were approved.







State Bar President Bill Barwick presents resolutions from the Chief Justice's Commission on Professionalism to the families of Chief Justice Thomas O. Marshall (*right*) and Judge Richard S. Gault (*above*) expressing the commission's sincere and profound appreciation to their families for their lifetime of service to the legal profession and the State Bar of Georgia.




#### Georgia Appellate Practice and Educational Resource Center Funding request was approved.

- Tom Boller provided a preview of the upcoming legislative session (For up to date legislative updates as they relate to the Bar, visit [www.gabar.org/legislat.asp](http://www.gabar.org/legislat.asp)).
- Barwick and Sally Lockwood, executive director of the Chief Justice's Commission on Professionalism, presented resolutions to the families of Chief Justice Thomas O. Marshall and Judge Richard S. Gault expressing the commission's sincere and profound appreciation to their families for their lifetime of service to the legal profession and the State Bar of Georgia.
- J. Vincent Cook and R. Chris Phelps provided information on Casemaker, a legal research service to Bar members that is being studied by the Bar Computer-Accessed Legal Research Committee.

- YLD President Andrew W. Jones reported on various activities of the YLD, including its annual Legislative Affairs breakfast, increased involvement by young Atlanta lawyers, the Community Services Committee's suit drive at the Midyear Meeting and its holiday project in which it sponsored a family through the Department of Family and Children Services.
- Immediate Past President James B. Durham provided an update on Bar Center activities, including leasing and the third floor renovation, which is expected to cost approximately \$4.1 million. The Bar has received \$2 million in grants for the educational facilities of this renovation of which \$1 million will be withdrawn if full funding is not obtained in 2004. The building's \$9 million cost has already been paid in full and the new parking deck is funded and scheduled to open on July 15, 2004. The Board

will be asked how best to proceed with the 3rd floor renovation at the spring meeting.

- Barwick announced that Allen Tanenbaum would be sending Board members proposed resolutions to be considered by the ABA's House of Delegates.
- Durham provided a report on the actions of the Executive Committee at its meetings held Oct. 23, 2003 and Dec. 11, 2003. Following that, the Board, by unanimous voice vote, approved the actions of the Executive Committee.
- Georgia Bar Foundation Executive Director Len Horton presented Jim Collier with the first ever James M. Collier Award in recognition of his invaluable service to the Georgia Bar Foundation. 

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

## Lawyers Foundation of Georgia Winter Update

By Lauren Larmer Barrett

Jane and Foy Devine graciously hosted “An Evening in Old Buckhead” for the fellows of the Lawyers Foundation of Georgia during the Midyear Meeting.

Guests were greeted with mint juleps served in traditional silver cups and encouraged to stroll through the Devine’s Italian Renaissance villa. Completed in 1921, the villa is nestled in the wooded hills of one of Atlanta’s oldest neighborhoods, creating a perfect setting to enjoy a winter’s evening of cocktails and conversation.

The reception benefited the Challenge Grant Program of the Lawyers Foundation. Jane Devine, with the help of Melitta Ester, decorated the home and grounds with dozens of candles and magnolia blossoms. Jerry Dilts and Associates catered the event and provided guests with a terrific variety of foods.

In addition to the gracious support of the Devines, the foundation would like to thank Donna and Bill Barwick for their time and effort in arranging the reception, which raised over \$10,000. The foundation also wants to thank the reception sponsors:



Photos by Daniel L. Maguire

**Harvey Weitz, Terrence Croft, Merry Croft and Jan Wellon take a moment to smile for the camera.**

### **Gold:**

- Ikon Legal Document Services
- Mellon Private Wealth Management

### **Silver:**

- Attorney’s Title Guaranty Fund, Inc.
- The Coca-Cola Company

### **Bronze:**

- Brown Reporting, Inc.
- Cushman & Wakefield
- Esquire Depositions
- Gilsbar, Inc.
- Insurance Specialists, Inc.
- LexisNexis
- Prolegia
- Special Counsel
- Mauldin & Jenkins

### **Fellows Program Update**

Members of the fellows program met on Jan. 16 during the Midyear

Meeting, where the newest members were introduced and welcomed. The foundation was created with the vision of outstanding legal professionals administering a fund to enhance the system of justice, to support the lawyers who serve it, and to assist the community served by it. The fellows program is the backbone of the foundation, providing not only funds, but inspiration and ideals as well.

During the meeting, Ben Easterlin, chairman of the Board of Trustees of the Foundation, and Lauren Larmer Barrett, executive director, brought the fellows up to date on the progress and goals of the foundation. In addition, William Jenkins and Judge Philip Jackson introduced attendees to the BASICS Program, a State Bar of Georgia pro-

gram that provides training, motivation and encouragement to inmates in the Georgia Correctional System. It is a successful anti-recidivism program, and the Lawyers Foundation of Georgia is proud to be able to support the BASICS program in its efforts to help more people throughout the state.

The Lawyers Foundation is becoming an important part of the statewide legal community. By



Jane and Foy Devine graciously opened their home during the Midyear Meeting.

**The following individuals joined the fellows program between September 1, 2003 and January 15, 2004:**

Bert Adams, <i>Atlanta</i>	Gwendolyn R. Keyes, <i>Decatur</i>
Tara Lee Adyanthaya, <i>Atlanta</i>	Laurel Payne Landon, <i>Augusta</i>
John Ballard, <i>Atlanta</i>	Edward H. Lindsey Jr., <i>Atlanta</i>
Debra Halpern Bernes, <i>Marietta</i>	Stephen M. Lore, <i>Atlanta</i>
B. J. Bernstein, <i>Atlanta</i>	Maria Maistrellis, <i>Atlanta</i>
Judge Diane E. Bessen, <i>Atlanta</i>	Brad J. McFall, <i>Cedartown</i>
Loyd Black, <i>Brooks</i>	Melanie S. McNeil, <i>Marietta</i>
Daniel Bloom, <i>Atlanta</i>	Michael Douglas McRae, <i>Cedartown</i>
Rebecca Louise Burnaugh, <i>Atlanta</i>	James D. Meadows, <i>Atlanta</i>
David Lee Cannon, <i>Canton</i>	Wilson B. Mitcham Jr., <i>Greensboro</i>
Mary Jane Cardwell, <i>Waycross</i>	Judge Thelma W. Moore, <i>Atlanta</i>
Alan Stuckey Clarke, <i>Atlanta</i>	Charles Morgan, <i>Atlanta</i>
Judge Myra Hudson Dixon, <i>Atlanta</i>	William NeSmith, <i>Americus</i>
John Floyd, <i>Atlanta</i>	Judge Henry M. Newkirk, <i>Atlanta</i>
Judge Susan Barker Forsling, <i>Atlanta</i>	Judge Carlisle Overstreet, <i>Augusta</i>
W. Wright Gammon Jr., <i>Cedartown</i>	James E. Patterson, <i>Macon</i>
Melissa Gifford, <i>LaFayette</i>	Elizabeth A. Price, <i>Atlanta</i>
Judge Janis C. Gordon, <i>Decatur</i>	William M. Ragland Jr., <i>Atlanta</i>
Steven Gottlieb, <i>Atlanta</i>	Robert B. Remar, <i>Atlanta</i>
Stephen F. Greenberg, <i>Savannah</i>	Judge Penny Brown Reynolds, <i>Atlanta</i>
John G. Haubenreich, <i>Atlanta</i>	John E. Robinson, <i>Decatur</i>
Judge Nina Hickson, <i>Atlanta</i>	Rita Arlene Sheffey, <i>Atlanta</i>
Judge Sharon Hill, <i>Atlanta</i>	Paul R. Shlanta, <i>Atlanta</i>
Rebecca Ann Hoelting, <i>Atlanta</i>	James L. Smith III, <i>Atlanta</i>
Kathleen Horne, <i>Savannah</i>	Warren Kevin Snyder, <i>Atlanta</i>
John Husser, <i>Rome</i>	J. Edward Sprouse, <i>Columbus</i>
J. Alexander Johnson, <i>Baxley</i>	A. Thomas Stubbs, <i>Decatur</i>
Weyman T. Johnson Jr., <i>Atlanta</i>	Nancy F. Terrill, <i>Macon</i>
N. Wallace Kelleman, <i>Stone Mountain</i>	Wade Tomlinson, <i>Columbus</i>
Robert Keller, <i>Jonesboro</i>	Laura Elizabeth Woodson, <i>Atlanta</i>



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funding many projects around the state, it encourages community service among Bar members. The attorneys who support the foundation demonstrate a commitment to the highest standards of the profession. Without their help, many needed and worthwhile projects would not come to fruition. Their support is gratefully accepted and most warmly appreciated. 



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



State Bar President Elect George Robert "Rob" Reinhardt Jr., Executive Director of the Georgia Legal Services Program Phyllis J. Holmen and Bar Member Fielder Martin enjoy the evening's festivities.

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## Putting a CAP on Lawyer-Client Misunderstandings

By C. Tyler Jones

One of the most utilized, but least recognized services the Bar provides is the Consumer Assistance Program, which responds to inquiries from the public regarding Georgia's attorneys. But do not let the name mislead you; CAP is as much for lawyers as it is for the general public.

Since its inception in 1995, CAP has handled over 150,000 requests for assistance (calls, walk-ins and letters). It is a tribute to the five-member department's mediation and conflict management skills that less than 33 percent of these cases are referred to the Office of the General Counsel. In January, the number of cases referred to OGC was less than 31 percent.

Because, in most cases, the client's problem does not involve professional misconduct, CAP attempts to help consumers solve problems by improving lawyer-client communications and resolving conflicts through informal

methods. CAP Director Lynda Hulsey, who is an attorney, said, "CAP does not get involved when a caller alleges serious unethical conduct, such as commingling of client funds, lying or stealing. These cases are referred to OGC."

CAP assists attorneys as much as possible by providing a courtesy call or sending a letter when it hears from dissatisfied consumers. Hulsey said the department also provides information and suggestions about effectively resolving conflicts in an ethical and professional manner. In some cases, Hulsey explained that CAP refers



The customer-service oriented Donna Hunt logs another call.



Photos by Daniel L. Maguire

The CAP Department is staffed by: (back row) Donna Hunt, Ebony Smith, Steven Conner and (front row) Barbara Dailey and Lynda Hulsey.

lawyers to the Bar's Law Practice Management Program, Lawyer Assistance Program or the Ethics Hotline to get the information and help they need to better serve the public.

Assistant CAP Director Steven Conner, who is also an attorney, said that many of the calls the department receives can be categorized as communication issues, and can be resolved by calling the lawyer or providing the client with ways to deal with the dispute. Sometimes, he said, consumers just need someone to vent to. He added that the attention the department's staff gives callers helps "create a positive perception of lawyers."

It is this success that has led other state bar associations to use Georgia's CAP as a model. The department's strong commitment to customer service is one of the hallmarks of its success. CAP's goal is to return calls within 24 hours and to respond to letters within 10 days. They usually exceed both these goals.

"While we cannot successfully resolve every problem," Hulsey said, "we listen to every problem and try our best to help lawyers and their clients reach a mutually beneficial solution." Although Hulsey, Conner and other CAP staff are not permitted to give legal advice, they can suggest places for callers to go to get the advice they need. Throughout the years CAP has compiled an extensive list of local bar associations, government agencies and nonprofit organizations that may provide services that meets a caller's needs.

On occasion, consumers think they have a valid complaint when they do not. In those situations, Hulsey said, "We provide consumers with a dose of reality" and



Lynda Hulsey takes time to catchup on paperwork during a brief reprieve from the 45 to 55 calls the department receives daily.

explain that their lawyer has not violated the Georgia Rules of Professional Conduct.


It is important to note that everything CAP deals with is confidential, except:

- Where the information clearly shows that the lawyer has misappropriated funds, engaged in criminal conduct, or intends to engage in criminal conduct in the future;
- Where the caller files a grievance and the lawyer involved wants CAP to share some information

with the Office of General Counsel; or

- A court compels the production of the information.

The purpose of the confidentiality rule is to encourage open communication and resolve conflicts informally.

For more information on CAP, call the Bar at (404) 527-8759 or visit [www.gabar.org/cap](http://www.gabar.org/cap). 

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

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Please consider participation in this project and encourage your colleagues to volunteer. Please respond by completing the form below or calling the Chief Justice's Commission on Professionalism at (404) 225-5040; fax: (404) 225-5041. Thank you.

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Georgia State	August 10, 2004 (Tues.)	TBA		TBA
John Marshall	August 21 (Sat. - Tentative)	TBA		TBA
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# State Bar of Georgia



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## June 17-20 Portofino Bay Hotel at Universal Orlando, A Loews Hotel Orlando, Florida

### Opening Night

Be sure to join your fellow Bar members for the section-sponsored Opening Night Extravaganza at CityWalk®, one of Orlando's hottest spots for entertainment. Don't forget to pack your dancing shoes because the dazzling 30-acre entertainment complex offers a potpourri of live music options sure to satisfy a variety of tastes.

Conference attendees will have exclusive use of select venues for Thursday evening. Venues include Pat O'Brien's® Orlando, Bob Marley—A Tribute To Freedom<sup>SM</sup>, and CityJazz®. There will be food stations set up throughout the block area outside and the bars will be open in each of the restaurants, along with special entertainment for kids and teens!

### Keynote Address by Carl Hiaasen

Carl Hiaasen will speak to attendees at the Presidential Inaugural Dinner on Saturday, June 19. Hiaasen is an entertaining and humorous commentator on the state of Florida and its political and economic scandals. He is a columnist for *The Miami Herald* and an author.

The film "Striptease," based on one of Hiaasen's novels, was a major motion picture starring Demi Moore and Burt Reynolds. Some of his other novels include *Double Whammy*, *Sick Puppy*, *Basket Case*, and *HOOT*, a Newbery-award winning book for young readers.

# 2004 Annual Meeting

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## CLE & Section Events

Fulfill your CLE requirements or catch up with section members on recent developments in the areas you practice. Many worthwhile programs will be available, including law updates, section business meetings, alumni functions and a plenary session.

## Social Events

Enjoy an exciting and entertaining welcoming reception, the Supreme Court reception and Annual Presidential Inaugural Dinner, along with plenty of recreational and sporting events to participate in with your colleagues and family.

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Golf, tennis, cycling, shopping, and sight-seeing all available for your convenience.

## Children's Programs

Programs designed specifically to entertain children and teens will be available.

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## In the Trenches with the First Amendment

By C. Tyler Jones

**T**he First Amendment is often inconvenient. But that is besides the point.

Inconvenience does not absolve the government of its obligation to tolerate speech," Justice Anthony Kennedy is quoted as saying.

Lawyers, judges and journalists gathered at the Westin Buckhead in Atlanta for the 13<sup>th</sup> Annual Bar Media Conference to discuss some of the more controversial issues of the day and how they relate to the law. The theme of the Jan. 31 Institute of Continuing Legal Education sponsored event was "In the Trenches with the First Amendment: Controversial Speech, Judicial Elections and Protecting the Unprotected."

The first session, "Protecting Children," treated attendees to a panel discussion regarding the impact of the courts and media reporting and commentary on the state's protection of children. The diverse group of panelists included Jim Martin, former Department of Human Resources commissioner; Thomas D. Morton, M.S.W., from the Child Welfare Institute; and Jane Hansen, from the *Atlanta Journal-Constitution*. Maureen Downey,

from the *Atlanta Journal-Constitution*, moderated the session.

For the second session, attendees had a choice between three different small group break out sessions. Choices included: "Atlanta's Perspectives on the World and Vice Versa," which focused on Atlanta's varied news coverage of local and international events; "The First Amendment and the War on Terror," which brought together a senior Justice Department official and a civil liberties advocate to debate how to draw the lines between secrecy, security, intrusion and protection; and "Open Government: A Primer," which offered a practical nuts-and-bolts approach to teaching people how to make effective use of the state's open government laws.

During lunch, Steve Oney, author of *And the Dead Shall Rise: The Murder of Mary Phagan and the Lynching of Leo Frank*, provided an insightful account of the role the media played in the trial and subsequent lynching of Leo Frank.

The afternoon kicked off with an issue that is starting to generate a lot interest in the state, "Electing Judges: Campaigning in the 00s." Panelists, who included Cobb County Superior Court Judge James Bodiford; Henry County State Court Chief Judge Benjamin W. Studdard III; R. Keegan Federal Jr., Keegan Federal & Associates; Richard Gard, *Fulton County Daily Report*; Bobby Kahn, attorney and political consultant; James C. Rawls, Powell, Goldstein, Frazer &



Photos by C. Tyler Jones

State Bar President Bill Barwick (left) and Chief Justice Norman Fletcher (right) present Atlanta Journal-Constitution journalist Bill Rankin and columnist Martha Ezzard with resolutions honoring their coverage of indigent defense.



WSB-TV's Richard Belcher facilitates the "Electing Judges: Campaigning in the 00s" session with panelists Judge James Bodiford, Dr. Beth Schapiro, Chief Judge Benjamin W. Studdard III, Richard Gard, James C. Rawls, R. Keegan Federal Jr. and Bobby Kahn.

Murphy LLP; and Dr. Beth Schapiro, Schapiro Research Group, Inc., wrestled with a hypothetical Georgia judicial election.

WSB-TV's Richard Belcher facilitated the discussion, which centered around:

- The propriety of judges soliciting funds to run their campaigns.
- How judges should respond to personal attack campaigns.
- Tactics judges can use to defend their record.
- Whether judges' reputations will suffer by resorting to different campaigning strategies.
- What role the Judicial Nominating Commission plays in judicial elections.

During the next session, "Thou Shalt Not?: Religious Speech and the First Amendment," panelists, who included Wendell Bird, Bird & Loechl; Neil Kinkopf, Georgia State University; and Rep. Glenn Richardson discussed issues surrounding religious speech. One of the more controversial discussion items was Richardson's revelation that he will introduce a bill to require all 159 Georgia county courthouses to display the Ten Commandments. Chief Justice Norman S. Fletcher, who was in the audience said, "I don't understand how the Legislature can trump the federal courts."

The last session of the day, "Protecting the Unprotected: Indigent Defense" moderated by Gard, consisted of a high-profile panel that included: Chief Justice Fletcher, former Gov. Roy Barnes, Sen. Chuck Clay and *Atlanta Journal-Constitution* Columnist Martha Ezzard. The panel discussed the roles lawyers, judges, legislators and journalists played in spurring indigent defense reform in Georgia. The panel also debated different ways to fund indigent defense.

Much to the surprise of panelist Ezzard and fellow AJC journalist Bill Rankin, State Bar of Georgia President Bill Barwick presented the pair with framed resolutions honoring their coverage of indigent defense.

In conjunction with the conference, the Georgia First Amendment Foundation held its annual Charles L. Weltner Freedom of Information Award Banquet. The dinner is named in honor of the late Chief Justice Weltner, who was known as a champion of open government. Former Gov. Barnes was the recipient of this year's award. CBI

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

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## The Lowndes County Courthouse at Valdosta:

### The Grand Old Courthouses of Georgia

By Wilber W. Caldwell

**W**hen the new rails of The Georgia Southern and Florida Railroad, Macon's direct route to Central Florida, crossed the antebellum rails of the old Atlantic and Gulf Railroad at Valdosta in 1889, they set in motion a series of events that culminated in the construction of Frank Milburn's 1905 Beaux-Arts Lowndes County Courthouse. But Lowndes County's story is not a tale of just one courthouse. Six courthouses preceded Milburn's.

Lowndes County had been cut from Irwin and Early Counties in 1825, and the county seat had been established first at Franklinville in 1828 and later at Lowndesville in 1833. A rough courthouse was erected at Franklinville and probably a second at Lowndesville. By 1837, Troupville was the new county town, and a frame courthouse was completed there in 1847. This was wild and empty country before the railroad arrived, but Troupville prospered apparently on trade with Florida. Troupville grew, and the town achieved a population of over 500 before 1850.

In the early 1850's, it appeared that the rails from Savannah, bound for Thomasville, would at last pass through Troupville. But alas, when the courthouse burned in 1858 and The Atlantic and Gulf began grading four miles south of the town, there was little left for the

hapless and frustrated citizens of Lowndes to do but move the county seat again. A courthouse described as a "rough frame building" was built at the new railroad town of Valdosta, a village that boasted a population of about 200 in 1860. This crude building was replaced by a larger frame structure in 1871, followed in 1875 by a substantial two-story brick courthouse with stylish broken based pediments and bracketed eaves. When The Georgia Southern and Florida Railroad arrived in 1889, Valdosta was a city of more than 2,500 residents.

By 1900, Valdosta had doubled its 1890 population, boasting over 5,500 residents, and a movement for a new courthouse was underway. With the arrival of The Georgia Southern and Florida, the city had begun a festive period of self-promotion and local mythmaking that exemplified the



kind of zeal the New South's tempting promises could generate in out-of-the-way places. Frank Milburn's 1905 Lowndes County Courthouse was the finale to these years of theatrical self-promotion. The town had struggled up and out of the post-war period, experiencing a terrible tornado, devastating fires and occasional skirmishes with yellow fever and cholera, in addition to poverty and the usual ongoing battle with those uniquely Southern demons, ignorance, intransigence and brooding nostalgia. But by the turn of the century, Valdosta had known a decade of growth despite the clouds of national depression that darkened the years after 1893. By 1900, the town was drunk on the new wine of prosperity that had been imported on the rails of The Georgia Southern and Florida Railroad. Along with population explosion had come the trappings of New South success including brick buildings, electric lights, improved sanitation, a proper fire department, beautification programs and finally a cotton mill in 1899.

There can be little doubt about the message broadcast by Milburn's stunning 1905 Lowndes County Courthouse. Here is a work of architectural sophistication. Perhaps nothing could have better voiced Valdosta's self-proclaimed coming-of-age than the selection of Milburn, who in 1905 was arguably the South's most successful architect. Permanently retained by the prestigious Southern Railway and designer of over 250 major public structures from Florida to Oklahoma, Milburn was at home with most of the Picturesque modes.



Built in 1905, Frank Milburn, architect.


Photo by Wilber W. Caldwell

Additionally, unlike the previous generation of Southern architects, he seemed comfortable with Beaux-Arts Classicism both architecturally and as the emerging voice of American economic success.

Although there can be little doubt that the poetically pure neoclassical lines of Milburn's exceptional 1903 Wilcox County Courthouse at Abbeville inspired the Lowndes County Commissioners to engage this accomplished architect, in Valdosta, Milburn would create an inspiring Beaux-Arts monument that rivaled any other Georgia court building of the era. The paired columns and the corner pavilions with their low domes sing Parisian songs as do the Ionic pilasters and the high balustrade.

But Lowndes County was a long distance from Paris in 1905. Trickle of inspiration flowing into the American South from the Ecole des Beaux-Arts arrived via a circuitous route, being first filtered through an often insensitively commercial and shamelessly trendy American North. What is more, when these modern architectural

ideas finally arrived south of the Mason Dixon line, they were often further diluted by obligatory doses of Jeffersonian Classicism and Millsian Greek Revivalism. Thus, Southern interpretations often displayed regional characteristics unlike anything found on the Rue de Rivoli. For many Southerners, the elegant

columns of the central portico breaking away from the familiar horizontal mass only sang the songs of an Old South not forgotten. All of this notwithstanding, Milburn's Valdosta courthouse is a fitting, and unusually pure, Beaux-Arts monument and a proper symbol for Valdosta's success. By 1910, five railroads met at Valdosta. 

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

## It's About Time: An Overview of Part-Time Policies and Practices in Atlanta Law Firms

By Lynn M. Adam, Emily Hammond Meazell, and Lisa Vash Herman

**W**omen lawyers place enormous value on flexible work schedules. Firms that support such schedules reap benefits in the form of higher retention, increased profitability, and more diverse leadership. In turn, the legal profession—and, on a broader level, society—experiences benefits in the form of part-time lawyers who are better situated to devote time to activities that make lawyers better citizens.

These core conclusions emerged from a new study conducted by the Georgia Association for Women Lawyers and the Atlanta Bar Association Women in the Profession Committee, with additional funding from the Georgia Commission on Women. This article summarizes the full study, *It's*

*About Time: Part-Time Policies and Practices in Atlanta Law Firms*, which is available online at [www.gawl.org](http://www.gawl.org) and [www.atlantabar.org](http://www.atlantabar.org).<sup>1</sup>

For law firms, the study's results and recommendations invite a re-examination of scheduling options to offer in order to stem attrition of desirable attorneys. For attorneys and law students, the study offers guidance about a variety of work schedules that are now available as well as insight from practicing attorneys about their experiences with what law firms say about working part-time and what law firms do in practice.

This article first describes the genesis of *It's About Time* and how the study was conducted. We next present key findings and address specific law firm practices and cultures that undermine part-time arrangements even in law firms that try to support them. The article then explores the importance of part-time schedules to retaining women lawyers and maintaining client relationships. Lastly, after challenging common myths about the profitability of part-time attorneys, we offer a summary of best

practices for the benefit of law firms and individual lawyers.

### Background

A major impetus for the study was a call to action by the commission on Women in the Profession of the American Bar Association, which has published numerous reports on the dearth of women leaders in the law. In 2001, the commission urged employers and professional organizations like GAWL and WIP to study women's progress in the legal profession.<sup>2</sup> From the commission's admonition that "what isn't measured isn't done," this study was born.<sup>3</sup>

To produce *It's About Time*, GAWL and WIP surveyed three categories of respondents in the summer of 2002: (1) Atlanta-area law firms with 10 or more attorneys ("Survey I"); (2) law firm lawyers with any part-time experience during the three previous years ("Survey II"); and (3) Atlanta-area lawyers who had left a law firm during the three previous years ("Survey III").

With the assistance of Schapiro Research Group, GAWL and WIP

developed a confidential questionnaire for each category of respondent.<sup>4</sup> The questionnaires defined “part-time” to mean a reduced work schedule for reduced pay.<sup>5</sup> Thirty-seven law firms, representing more than 7,000 lawyers, responded to Survey I, including 11 of the top 12 revenue-producing law firms in Atlanta.<sup>6</sup> Additionally, 69 individual attorneys responded to Survey II and 98 responded to Survey III, many writing lengthy and heartfelt comments about their experiences. The individual respondents were associates and partners, part-time and full-time, and retired and active attorneys. About three-fourths of them were women, while one-fourth were men.

*It's About Time* thus presents the first comprehensive study of part-time policies and practices among Atlanta-area law firms. It also evaluates important ramifications—for individuals, firms, and the profession—of the finding that many women, who are the “emerging majority” in the law, truly value the opportunity to work part-time while continuing to advance their legal careers.<sup>7</sup>

## Study Results

Key results from the study include the following highlights:

- Women lawyers now comprise about one-third of law firm lawyers in Atlanta. At the current rate of growth, women will make up 50 percent of Atlanta law firm lawyers within 10 years.
- A noticeable gender gap in attrition persisted during the three years in the study, from 1999 through 2001. The average annual attrition rate among women lawyers ranged from 15 percent to 19 percent, whereas it ranged from only 11 percent to 12 percent for men.

- According to law firm data, about three-fourths of part-time attorneys are women.
- Ninety percent of part-timers said their schedule affected their decision to stay with their firms, making it more desirable to remain at the firm.
- Full-time lawyers (adding men and women together) who recently left a law firm left for better schedules more often than they left for bigger paychecks. Only 22 percent reported that they left for “more money” in contrast to 33 percent who left because they “wanted fewer hours” and 19 percent who “wanted a different schedule.”

## Law Firm Policies and Expectations

Most Atlanta law firms reported that they permit part-time schedules, placing varying conditions on eligibility and billable-hour requirements. Only about one-third of firms reported having written part-time policies. Most of the remaining two-thirds reported that while they had no written policy, they nevertheless allowed attorneys to work part-time or had done so in the past. Nearly every firm in this category described its policy using the terms “case by case,” “ad hoc,” “individual,” or “flexible.”

**Reasons To Work Part-Time.** Of law firms that provided written policies or otherwise commented on the issue, “permissible” reasons to go part-time most often included newborn care, the care of a seriously ill relative or personal health issues.<sup>8</sup> However, at least two law firms did not restrict part-time arrangements to any particular group or reason:

“[I]n the last two years [our policy, which formerly permitted

women to work part-time due to family obligations, was] changed to allow any lawyer the option [of going part-time] for family, personal or professional reasons.” —*Law-Firm Policy*

**Billable Hours, Advancement & Benefits.** Although most firms did not report minimum-hour requirements for part-time, the part-time attorneys provided data on the requirements of their particular arrangements. The highest percentage of part-time respondents, 24 percent, cited a target of 1200 billable hours per year. Actual total hours reported worked by part-time respondents, however, were as high as 2250, with billable hours as high as 1650, and mean billables at 1130.<sup>9</sup>

One-third of surveyed law firms did not permit part-time attorneys to advance to partnership. In those firms, part-time lawyers (who were mostly women) were not considered for partnership—regardless of their performance and their seniority. Of responding law firms that reported that their part-time attorneys were eligible for partnership, nearly a third stated that it takes longer for part-timers to become partners. Most law firms offered full benefits to part-time attorneys as well as bonuses and annual raises. Several, however, reported that part-timers were simply not eligible for either bonuses or annual raises.

**Practice Areas.** Most law firms stated that part-time work was neither more nor less suitable for any particular practice area. Those that did differentiate noted that part-time schedules were less suitable in litigation, but more suitable in transactional, residential real estate, or trusts and estates practices. Many emphasized that the individual attorney’s flexibility was more important than the practice area.



Nearly half of the part-time attorneys in the study were litigators; significant numbers practiced labor and employment law, intellectual property law, and corporate, banking, or business law.

## Obstacles To Success

One noticeable result of our research was the incongruity between firms' reported policies and the impressions of the firms' lawyers—both full-timers and part-timers.<sup>10</sup> This disconnect seems to be attributable to several factors, including insufficient dissemination of firms' part-time policies, failure to monitor part-time arrangements, and cultural attitudes within firms (even those attempting to support part-time attorneys).

**Lack of Publicity.** For example, even firms with written policies did little to publicize them; lawyers typically learned of the availability of a part-time schedule through word-of-mouth or other informal channels. Insufficient publicity not only gives the appearance that a firm discourages part-time, but "secret deals" with part-time attorneys can also cause a backlash of envy among attorneys.<sup>11</sup> Further, appropriate publicity ensures that all attorneys who are interested in a part-time arrangement—especially those who are not mothers and may be uncertain about firm support—are informed about a firm's policy and thus know what to expect.<sup>12</sup>

**Lack of Monitoring.** Another problem revealed by the study was that firms tended to enter into ad hoc arrangements for part-time schedules proposed by individual attorneys, many of whom felt they were left alone to make the arrangements work. While many part-timers stated that partners or practice group leaders had worked with

them to develop their part-time arrangements, more than one-third of part-timers reported that no one at the firm worked with them.

Moreover, part-timers overwhelmingly (81 percent) responded that no one met with them to evaluate the implementation of their arrangements. The Survey III participants who had left a firm after working part-time reported similar results. These findings correspond with those of a study conducted in Massachusetts, where almost 80 percent of attorneys who worked reduced hours reported that no one met with them regularly to discuss their work arrangement and/or work satisfaction.<sup>13</sup>

These reports have led us, like authors of similar studies, to recommend careful monitoring of part-time schedules to ensure their success.<sup>14</sup> Among the benefits a law firm could achieve from monitoring part-time arrangements is an understanding of how the arrangements are working culturally. In this study for example, most of the participating part-time attorneys felt marginalized in some respect in their law firms, with 63 percent reporting that "some partners question [their] commitment," and one-third writing that they are viewed as "a partial member" of the firm because of their part-time status.

"[After the birth of each of my children,] people in my firm were watching to see how I would handle the increased responsibilities and to see whether I would lose my commitment to my career. These perceptions, which are not always articulated to the part-time attorney, can be damaging." — *Part-Time Attorney*

**Environmental Static.** A source of part-timers' feelings that they

are marginalized is the "environmental static" that accompanies some part-time arrangements; that is, the knowledge that some partners refuse to work with or vote to advance part-time associates and the sense that some peers disrespect or resent part-time attorneys.

"Others in my firm view me as less committed to the practice of law and therefore unavailable to work in certain cases or for certain clients. While I do have time limitations, I have always been and remain committed to getting the work done and doing the best possible job for the client." — *Part-Time Attorney*

Based on the foregoing data from the surveys, we concluded that many law firms send mixed signals about part-time arrangements. Firms make part-time available, at least in theory, but fail to establish written policies, fail to publicize the availability of part-time schedules, fail to monitor the success of their part-time arrangements, and fail to ensure their part-time attorneys receive fair and proportionate treatment in terms of compensation, work assignments and promotion. As a result, part-time arrangements remain relatively uncommon in law firms.

**Low Usage Rates.** Indeed, while the vast majority of law firms ostensibly allow attorneys to work part-time, relatively few attorneys take advantage of the option even when they are dissatisfied and prepared to leave their firms. The study found an average usage rate among Atlanta law firms of 4 percent, which held steady in the three years studied, from 1999 through 2001. The legal community thus lags behind its business counterparts in actual usage of part-time schedules.

According to the Bureau of Labor Statistics, approximately 14 percent of professionals (e.g., physicians and engineers) worked part-time in 2002, compared to just over 4 percent of attorneys nationwide.<sup>15</sup>

A usage rate higher than 4 percent and balance between the numbers of women and men who work part-time signal that a law firm's part-time policy is not stigmatized and is working effectively. In this study, firms with fair and supportive written policies had higher usage rates, and their part-time attorneys were far more likely to include large numbers of men. The law firms with the lowest usage rates tended to have only women part-timers, suggesting the arrangements are stigmatized in those firms.

In *Balanced Lives: Changing the Culture of Legal Practice*, the ABA cautions that law firm culture can suppress usage rates. The ABA cites numerous studies finding a "huge

gap between what [part-time] policies say on paper and what people feel free to use," and "only one quarter of women attorneys believed that they could use a flexible work arrangement without jeopardizing their prospects for advancement."<sup>16</sup> These very sentiments are evident in the comments made by Atlanta part-timers—as well as departing lawyers who opted not to consider part-time at their former firms:

"I believe that long-term my arrangement is hampering my career."

— *Part-Time Attorney*

"My first part-time arrangement . . . had an enormous and negative impact on my career."

— *Part-Time Attorney*

"I am not convinced that there really is such a thing as true 'part-time' work in a law firm. It

is my general impression that part-time attorneys are viewed as not taking their careers as seriously as full-time attorneys. It is my further impression that part-time arrangements are more tolerated than embraced or encouraged."

— *Departing Full-Time Attorney*

## Women: The Pipeline Leaks

"The pipeline leaks, and if we wait for time to correct the problem, we will be waiting a very long time."<sup>17</sup>

**Attrition.** A key finding of the study is that women's attrition rates were noticeably higher than men's during each year, 1999 through 2001, in the study. Women's attrition rates (the percentage of women who left a firm) ranged from 15 percent to 19 per-



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cent during this period, whereas men's attrition rates (the percentage of men who left a firm) ranged from only 11 percent to 12 percent. Like other studies, this study therefore confirmed that women are significantly more likely than men to "vote with their feet" rather than work an inhospitable schedule.<sup>18</sup>

Contrary to a common misperception, moreover, the National Association for Law Placement has found that most women do not quit working as attorneys when they leave law firms; they move to more hospitable employers. NALP found that only 3.7 percent of lawyers leaving firms did so to pursue family or community responsibilities.<sup>19</sup> This finding correlates with the results of Survey III in the study, in which 97 percent of the responding lawyers who recently left law firms reported that they still practice law, even though many wanted more flexible work schedules. As the ABA has commented, lawyers "move to more accommodating workplaces. The firms that lose such women, and live with high turnover rates, are paying a price in disrupted client and collegial relationships, as well as in recruitment and retraining expenses."<sup>20</sup>

**Gender Shift.** Women now comprise about one-third of law-firm lawyers in Atlanta, and at the current rate of growth, women will make up 50 percent of Atlanta law-firm lawyers within 10 years, according to trends found by this study. Moreover, roughly one-third of women attorneys work part-time at some point during their legal careers, compared to only 9 percent of men.<sup>21</sup>

**Partnership.** Given these trends, part-time policies that are ineffective or that preclude partnership for part-time attorneys drive a disproportionate number



of women out of law firms and leave the women who choose to stay with less hope of achieving real power. In Atlanta, as nationwide, women now comprise less than 17 percent of law firm partners.<sup>22</sup> Thus even 20 years after women began to account for 40 percent or more of law school students, women still do not approach those percentages in law firm partnerships.<sup>23</sup> Ensuring that part-time attorneys have a fair opportunity to advance to partnership is one of the surest ways a law firm can increase the ranks of its women partners.

"More than one [member of the partners' committee] told me I got 'screwed' because of [my]

part-time year when it came time to make me a partner."

— *Departing Full-Time Attorney*

## Profitability Myths

The cost of attrition is a crucial but often overlooked factor in evaluating part-time profitability. Fifty-eight percent of responding law firms had not studied the profitability of part-time attorneys at all. Of those who had studied profitability and had found part-timers "not profitable," fixed overhead costs were most often cited as the cause. Yet a closer look at the survey responses revealed that firms were not evaluating the whole picture when studying the profitability of part-time arrangements.



Many firms neither prorate overhead costs nor account for the value of retention—and are conversely including the cost of attrition (for recruiting, hiring and training replacement attorneys) in calculations of overhead costs. This is “flawed accounting” because as a significant Washington D.C. study notes:

“When attrition is included in overhead, it skews the picture. In some firms, the only way attrition is counted economically is as overhead. In that context, the high cost of attrition dramatically inflates the overhead figure and makes [part-time arrangements] look costly, despite the fact that a usable part-time policy, by reducing attrition, would reduce overhead.”<sup>24</sup>

Indeed, firms in this study that had assessed the costs of attrition concluded that part-time arrangements are profitable:

“[It] is essential to retention and cheaper in the long-run to allow flexible schedule[s].”

— *Large Law Firm*

“Our firm understands the importance of retaining valued, long-term employees and the cost of hiring and training new employees.”

— *Small Law Firm*

Part-time attorneys’ responses bore out these conclusions. Ninety percent of part-time attorney respondents said that the availability of a part-time schedule impacted their decision to stay at their firms. Furthermore, 71 percent of part-timers stated that they were not considering leaving their firms.

“My part-time arrangement saved my legal career. I was not happy with the hours required

of partnership-track attorneys, and the part-time arrangement has kept me at my firm and in the legal profession.”

— *Part-Time Attorney*

Consistent with these responses, NALP and other organizations have found that the availability of alternative work schedules is more likely than any other factor to increase retention rates, and improved retention directly enhances the bottom line.<sup>25</sup> In a comprehensive 2000 report, NALP reported that firms offering alternative work schedules (including flex-time, part-time, telecommuting and job sharing) experienced a 37.1 percent aggregate third-year attrition rate—a full 7 percent less than the 44.3 percent experienced by those who did not offer such schedules.<sup>26</sup>

## Client Relationships

Closely related to profitability are client relationships. Client satisfaction was a main concern voiced by law firms, some emphasizing the value of attorney retention as a component of client satisfaction and others citing potential limitations on client service as a weakness of part-time arrangements. In practice, however, part-timers who split their time between clients and other pursuits are not necessarily less available than full-timers who split their time among various clients.<sup>27</sup>

Looking at the issue from the perspective of a client, retaining outside counsel educated in their industry and in tune with their business sensitivities—even on a part-time basis—is preferable to losing this institutional knowledge when an attorney leaves. “Clients invest a substantial amount of time and energy in educating their outside counsel . . . High attrition rates frustrate clients who have to train

new attorneys—again and again.”<sup>28</sup> Another often-overlooked component of client satisfaction is the fulfillment of corporate clients’ increasingly common diversity requirements.<sup>29</sup>

Lastly, a firm’s alumni often become its clients or sources of business referrals, and alumni are much more likely to retain their former firms as outside counsel or to refer business to their former firms if they had a positive experience as

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For firms, the single most important finding of the GAWL and WIP Study is that women will continue to walk away from law firms (as profitable mid-level and senior associates) at high attrition rates until they find a work schedule that makes sense for their lives.

members of the firm.<sup>30</sup> In this study, 46 percent of lawyers who left their firms for fewer hours and/or a different schedule became in-house counsel. Law firms need to grasp that significant numbers of their lawyers end up as potential clients and referral sources and will not hire or refer business to a firm that has mistreated them or does not reflect their values.<sup>31</sup>

## Best Practices

As the highlights above suggest, this study revealed that there are numerous benefits to firms that encourage and support equitable part-time schedules, among them:

- Improved retention;
- Greater profitability; and
- More diversity in firm leadership positions.<sup>32</sup>

### **Institutional Commitment.**

Firms should demonstrate institutional commitment to part-time arrangements through mentoring, monitoring, fair treatment, flexibility, and thorough written policies that reflect these values.<sup>33</sup> Based on the results of the study, and recommendations of similar studies, we suggest several practices for firms wishing to achieve the benefits of effective part-time policies:

- Develop and communicate written policies that serve as guidelines; avoid ad hoc arrangements.
- Ensure that compensation, bonuses, and opportunities for

advancement for part-timers are proportional to those of their full-time counterparts.

- Encourage a firm culture that supports flexible work schedules as a legitimate choice for any attorney.

**Written Policies.** Firms that adhere to written policies help remove the stigma attached to working reduced hours, ensure equitable treatment among part-time attorneys, and ensure proportionate treatment between part-time attorneys and their full-time peers. A written policy should provide general guidelines on eligibility and duration, types of permissible schedules, compensation, work assignments, advancement, case origination, non-billable work, and monitoring. It should expressly state that reduced schedules are available to men and women for any reason—including, but not limited to, parenthood, pro bono work, medical needs, bar or political activities, or personal needs.

The ABA recommends that to further recruitment and retention, firms should require only minimum seniority, such as a year, to determine satisfactory performance, and consider the hiring of experienced attorneys on a part-time basis with no minimum full-time requirement.<sup>34</sup> In particular, the latter option would facilitate reentry into the workforce of mothers who have taken a temporary

leave of absence from the practice of law. Moreover, both the ABA and the Massachusetts Study discourage arbitrary durational limitations—according to the ABA, part-time arrangements should instead be periodically reviewed to determine their feasibility and adjusted if necessary.<sup>35</sup>

A written policy should affirm that part-time compensation, although it may be calculated under any of several methods, is proportionate to salaries for full-time cohorts. Moreover, to encourage and reward business development by part-time attorneys, the firm should consider stating that the customary compensation for origination is paid to part-time attorneys.

“I like my arrangement generally, but wish I were given more incentive to bring in business. There is no mechanism for that in my current arrangement, and I have encountered resistance when I have raised the issue.”

— *Part-Time Attorney*

As discussed above, making partnership tracks available to part-time attorneys is essential to increasing the number of women partners and to making part-time arrangements an attractive alternative to leaving the law firm. Law firms should therefore affirmatively state in their policies when they will consider part-time attorneys for partnership and the criteria on which partnership decisions are based, which should be the same factors considered for full-time attorneys.

**Monitoring.** Law firms should also consider hiring a coordinator or designating a senior partner to serve as a monitor and mentor to part-time attorneys. This person should be someone who makes it a point to keep track of the schedules,

pay, and work assignments of all of the part-time attorneys to ensure ongoing fairness and proportionality. The appointment of such a coordinator would ensure a firm's interests in retention are served and would give a part-timer an outlet to discuss how the arrangement is working or might be improved.

**Flexibility.** Finally, law firms and individual attorneys participating in the study frequently cited flexibility as a component of success. For example, one small firm wrote, "Our firm has found that flexibility and adaptability regarding both workload and schedules are the key to successful part-time situations." Recognizing the value of flexibility, the Massachusetts Study, the ABA, and the PAR Study all recommend allowing as much individualization as possible in constructing a part-time arrangement—even within written policies.<sup>36</sup>

## Conclusion

For firms, the single most important finding of the GAWL and WIP Study is that women will continue to walk away from law firms (as profitable mid-level and senior associates) at high attrition rates until they find a work schedule that makes sense for their lives. Relatedly, the survey responses also debunked a common myth that part-time schedules are unprofitable. *It's About Time* reveals that although law firms are off to a good start in promoting part-time arrangements, there remain significant areas for improvement.

The bottom line is that flexible schedules and paths to partnership are crucial to increasing the number of women leaders in law firms. The opportunity to work and advance to partnership on a reduced-hours schedule is about

fairness, it's about long-range profit making, it's about the integrity of the legal profession, and it's about our devotion to our families and communities.

Isn't it About Time? 



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## Endnotes

1. See generally Lisa Vash Herman, Lynn M. Adam & Emily Hammond Meazell, *It's About Time: Part-Time Policies and Practices in Atlanta Law Firms* (2004), available at <http://gawl.org> and <http://atlantabar.org> [hereinafter *It's About Time*].
2. Deborah L. Rhode, for ABA Commission on Women in the Profession, *The Unfinished Agenda: Women and the Legal Profession*, at 10 (2001), available at <http://www.abanet.org/women/unfinishedagenda.html> [hereinafter ABA Unfinished Agenda].
3. *Id.* at 33.
4. Many bar organizations in other states have conducted similar studies. In particular, this study is modeled on one conducted by the Women's Bar Association of Massachusetts. See generally Women's Bar Association of Massachusetts, *More Than Part-Time: The Effect of Reduced-Hours Arrangements on the Retention, Recruitment, and Success of Women Attorneys in Law Firms* (2000), available at <http://www.womensbar.org/WBA/partTimeReport.htm> [hereinafter Massachusetts Study].
5. Throughout this article, the authors use the terms "part-time" and "reduced-hours" interchangeably. The study did not assess flex-time or telecommuting practices in the Atlanta legal community.
6. See *Daily Dozen*, Fulton County Daily Report, June 24, 2002.
7. Press Release, Catalyst, Law Women Anticipate Leaving Their Employer Three Years Earlier Than Men (Jan. 30, 2001) (quoting Martha W. Barnett, past President of the American Bar Association), available at [http://www.catalystwomen.org/press\\_room/press\\_releases/women\\_in\\_law.htm](http://www.catalystwomen.org/press_room/press_releases/women_in_law.htm). Catalyst is a nonprofit research and advisory organization founded more than 40 years ago to study and promote women's advancement in business.



8. One firm unwittingly admitted a possible Title VII violation when it reported that it permits only women lawyers to work part-time.
9. One complaint of part-timers is the phenomenon of schedule creep whereby projects are assigned and cannot be completed in the part-time attorney's allotted schedule, so that the part-time attorney is then forced to work extra time. *See, e.g.,* Deborah L. Rhode, *for American Bar Association Commission on Women in the Profession, Balanced Lives: Changing the Culture of Legal Practice*, at 35 (2001), available at <http://www.abanet.org/women/balancedlives.html> [hereinafter ABA Balanced Lives] (describing allocation of work); Joan C. Williams & Cynthia Thomas Calvert, *for The Project for Attorney Retention, Balanced Hours: Part-Time Policies for Washington Law Firms*, at 18 (2d ed. 2001), available at [http://www.pardc.org/final\\_report.htm](http://www.pardc.org/final_report.htm) [hereinafter PAR Study] (describing schedule creep); Massachusetts Study, *supra* note 4, at 28-29 (describing failure to honor schedules).
10. In the full report, this disconnect is particularly highlighted in three case studies that compare and contrast the responses of three unidentified firms and their attorneys. *See It's About Time*, *supra* note 1, at 40-47.
11. PAR Study, *supra* note 9, at 27 ("The 'secret deal' approach to balanced hours often creates resentment among those who are not offered the deal. Even attorneys who do not have demands on their time from sources outside the office feel resentful if they believe they cannot reduce their hours and must 'pick up the slack' caused by attorneys who are working reduced hours."); Massachusetts Study, *supra* note 4, at 43.
12. PAR Study, *supra* note 9, at 27.
13. Massachusetts Study, *supra* note 4, at 18.
14. *See id.* at 53; ABA Balanced Lives, *supra* note 9, at 45.
15. *See* U.S. Department of Labor, Bureau of Labor Statistics, *Persons at work in nonagricultural industries by class of worker and usual full- or part-time status*, available at <http://www.bls.gov/cps/cpsaat21.pdf> (2002).
16. ABA Balanced Lives, *supra* note 9, at 16.
17. ABA Unfinished Agenda, *supra* note 2, at 14.
18. *See, e.g.,* Press Release, Catalyst, *Law Women Anticipate Leaving Their Employer Three Years Earlier Than Men*, (Jan. 30, 2001) ("Women are less satisfied with advancement opportunities than men.").
19. Paula A. Patton, *for NALP, Beyond the Bidding Wars: A Survey of Associate Attrition, Departure Destinations, and Workplace Incentives*, at 31 (2000) [hereinafter Beyond the Bidding Wars].
20. ABA Balanced Lives, *supra* note 9, at 20-21.
21. *See* Catalyst, *Women in Law: Making the Case* at 19 (2001).
22. The NALP 2003-2004 National Directory of Legal Employers includes data on 34 Atlanta law firms. *See* NALP, *Women and Attorneys of Color at Law Firms – 2003*, available at <http://www.nalpdirectory.com/nalpresearch/mw03sum.htm>.
23. NALP reports that 2.1 percent of Atlanta partners worked part-time in 2003. *See* Press Release, NALP, *Availability and Use of Part-Time Provisions in Law Firms – 2003*, available at <http://www.nalp.org/nalpresearch/pt03summ.htm> (2003).
24. PAR Study, *supra* note 9, at 42.
25. Beyond the Bidding Wars, *supra* note 19, at 83.
26. *Id.*
27. *See* PAR Study, *supra* note 9, at 45 (reasoning that even standard-hours attorneys are not always available to a client because they divide their time among several clients).
28. *Id.* at 11.
29. *See, e.g.,* Jeremy Feiler, *Diversity Gets Closer Scrutiny, Corporate Clients Keep the Pressure on Outside Lawyers*, PHILA. BUS. J., May 20, 2002, available at <http://www.bizjournals.com/philadelphia/stories/2002-05/20/story5.html>; Lisa Walker Johnson, Altman Weil, Inc., *Responding to the Diversity Challenge*, available at [http://careers.findlaw.com/diversity/altmanweil/diversity\\_challenge.html](http://careers.findlaw.com/diversity/altmanweil/diversity_challenge.html).
30. PAR Study, *supra* note 9, at 11.
31. *Id.*
32. An additional benefit is that part-time attorneys have the option of limiting their work schedules in an era of ever-escalating billable-hour requirements. On average, part-time respondents in this study reported that they work about 1400 hours annually. Interestingly, 1400 hours of work was considered a full-time schedule in the past – the American Bar Association noted in its 1962 handbook that, given a lawyer's civic, administrative, and other non-billable matters, there were only about 1300 billable hours in a year. *See* Massachusetts Study, *supra* note 4, at 13 (citing American Bar Association, *Lawyers Handbook* at 287 (1962)).
33. For a model part-time policy, see *It's About Time*, *supra* note 1, at 37-39.
34. ABA Balanced Lives, *supra* note 9, at 34.
35. *Id.* at 37.
36. PAR Study, *supra* note 9, at 28; ABA Balanced Lives, *supra* note 9, at 34-35; Massachusetts Study, *supra* note 4, at 48.

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## KUDOS

**Brian C. Meadows**, an associate in **Needle & Rosenberg's** chemical patent practice, was named **chair-elect** of the **American Chemical Society's Division of Chemistry and the Law** for 2004. He will serve on the division's board for three years, as chair of the Division of Chemistry and the Law in 2005 and past chair in 2006. In addition to serving on the ACS board, Meadows is the new program chair; he will organize educational programs and symposiums for the division at the ACS's two annual meetings.

**Powell, Goldstein, Frazer & Murphy LLP** announced that partner **Aasia Mustakeem** was appointed to the **Fulton County Board of Zoning Appeals** for a three-year term. Mustakeem is a member of the firm's financial products and real estate department and practices in the area of commercial real estate. She is also a member of the Executive Committee of the Board of Governors of the State Bar of Georgia and is a past chairperson of the Real Property Law section of the State Bar of Georgia.

**Gary S. Freed** was named one of **Georgia's Legal Elite Business Litigators** by *Georgia Trend* magazine in December 2003. Freed is a member of the Atlanta Bar Association, the Georgia Trial Lawyers Association, the Federal Bar Association, the American Bar Association, and the Lawyers Club of Atlanta and is a fellow in the Lawyers Foundation of Georgia. He served as president of the DeKalb Bar Association from 1998-99.

**Elizabeth Ann "Betty" Morgan**, a partner and co-head of the trademark group at **Hunton & Williams LLP**, was appointed **vice chair of the Trademark Law Committee for the Intellectual Property Owners Association**. IPO is a trade association of owners of patents, trademarks, copyrights and trade secrets. It advocates effective protection for all types of intellectual property, and communicates its positions to Congress, the U.S. Copyright Office, the U.S. Patent and Trademark Office and other agencies. Morgan focuses her trial practice on the prosecution, enforcement and defense of trademark rights, trade secrets, copyrights, covenants-not-to-compete and patents in litigation. She currently teaches trial techniques at Emory University School of Law.

Six attorneys at **Needle & Rosenberg** were highlighted as some of Georgia's **"Super Lawyers"** in *Atlanta Magazine* in March. **Bill Needle, Sumner Rosenberg, Larry Nodine, David Perryman, Gwen Spratt** and **Jackie Hutter** were all selected

for this honor, for which more than 24,000 lawyers across the state were polled to determine the best in their field.

**McGuireWoods LLP** was ranked by **The Bond Buyer** as one of the **Top Ten Bond Counsel firms in the Southeast** for 2003. McGuireWoods has one of the largest public finance practices in the region, defined by The Bond Buyer to include Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia.



**James M. Collier**, former president of the Georgia Bar Foundation and a 14-year member of the Board of Governors, accepted the **first annual James M. Collier Award** from the Georgia Bar Foundation. The award was presented to him for his extraordinary service to the Bar Foundation and to the lawyers and citizens of Georgia.

**Jesse G. Bowles III** of **Bowles and Bowles** in Cuthbert, **Ralph Knowles Jr.** of **Doffermire, Shields, Canfield, Knowles & Devine** in Atlanta, and **Marc T. Treadwell** of **Adams, Jordan & Treadwell, P.C.**, in Macon were inducted into the **Fellowship of the American College of Trial Lawyers** at its annual meeting in Montreal. The college strives to improve the standards of trial practice, the administration of justice and ethics, and civility and collegiality of the trial profession. Lawyers must have a minimum of 15 years of trial experience before they can be considered for fellowship, and membership in the college cannot exceed one percent of the total lawyer population of any state.

## ON THE MOVE

### In Albany

**Langley & Lee, LLC**, announced that **Joseph P. Durham Jr.** has become an associate in the firm. Durham obtained his undergraduate degree from Valdosta State University in 2000, graduating *magna cum laude*. He graduated from Mercer University's Walter F. George School of Law in May 2003. Langley & Lee, LLC, is located at 323 Pine Ave., Suite 300, Albany, GA 31701; (229) 431-3036; Fax (229) 431-2249.

**Charles K. "Chuck" Wainright II** was named a partner with the law firm of **Watson, Spence, Lowe and Chambless, LLP**, and **F. Faison Middleton IV**



also joined the firm as a partner. Wainright maintains a general civil litigation and trial practice with an emphasis in business/corporate litigation and medical malpractice defense. Middleton will continue his civil litigation and trial practice. The firm is located at 320 Residence Ave., Albany, GA 31701; (229) 436-1545; Fax (229) 436-6358.

## In Atlanta



**Stites & Harbison** announced that **Michael M. Sullivan** has joined the firm's Atlanta office as counsel. He will be a member of the firm's business service group. Before joining Stites & Harbison, Sullivan was general counsel and senior vice president at Sanmina-SCI Corporation in Huntsville, Ala. and San Jose, Calif., one of the largest electronic manufacturing service providers in the world. The office is located at 2800 SunTrust Plaza, 303 Peachtree St. NE, Atlanta, GA 30308; (404) 739-8800; Fax (404) 739-8870.

**Rich M. Escoffery** has been named a partner with **Elarbee, Thompson, Sapp & Wilson**, and **Constance A. Walters, James J. Park**, and **Elliott M. Friedman** have joined the firm as associates. In addition, partners **Alisa L. Pittman** and **Vic A. Cavanaugh** have been selected to lead the firm's hospitality and service industries practice group, which will focus on labor and employment issues particular to the restaurant and lodging industries. The office is located at 800 International Tower, 229 Peachtree St. NE, Atlanta, GA 30303; (404) 659-6700, Fax (404) 222-9718.

Three attorneys at **Needle & Rosenberg** became shareholders: **Jacqueline F. Hutter, William F. Long** and **Tina Williams McKeon, Ph.D.** are all new equity officers. Hutter is a registered patent attorney whose practice focuses on chemical patent prosecution and licensing and counseling of clients in intellectual property matters. Long has trial and litigation experience in complex commercial matters involving patents, technology, trade secrets and related contract and licensing issues. McKeon is active in the firm's biotechnology and litigation practice groups; she is experienced in copyright, trademark and patent law. Needle & Rosenberg is located at Suite 1000, 999 Peachtree St., Atlanta, GA 30309-3915; (678) 420-9300; Fax (678) 420-9301.

**Ruthann P. Lacey, P.C.**, announced that **Heather L. Durham** has joined the firm as an associate and will practice in the areas of probate and elder law. Durham previously worked at McGee & Oxford, LLP. The firm also announced the relocation of its office to 3541-E Habersham at Northlake, Tucker, GA 30084; (770) 939-4616; Fax (770) 939-1758.



Hodges



Medlin



Zidar



Tempel

**Needle & Rosenberg** promoted three associates, **Robert A. Hodges, Ph.D.**; **Jennifer Pearson Medlin** and **Bernard L. Zidar** and one of counsel, **Michael J. Tempel**, to officers of the firm. Hodges' practice focuses on biotechnological, medical and chemical inventions. Pearson Medlin, working in the firm's electronics and software technology patent practice, handles all aspects of domestic and foreign patent prosecution. Zidar is part of the firm's litigation and mechanical patent practice groups, with his focus on patent prosecution and counseling in the mechanical arts and litigation of patent, trademark and copyright matters. Tempel is a member of the firm's electronics and software practice group. His practice focuses on the preparation and prosecution of patents in the electrical and electromechanical arts. The firm is located at Suite 1000, 999 Peachtree St., Atlanta, GA 30309-3915; (678) 420-9300; Fax (678) 420-9301.

**Troutman Sanders LLP** announced that **Jeffrey W. Kelley** joined the law firm as a partner in the bankruptcy practice group. He was previously a partner with Powell Goldstein Frazer and Murphy LLP. Kelley represents debtors, creditors' committees and large creditors in commercial and business bankruptcy matters and related restructurings. The firm is located at 600 Peachtree St. NE, Suite 5200, Atlanta, GA 30308-2216; (404) 885-3000; Fax (404) 885-3900.

**Paul A. Alexander, Joseph R. Delgado Jr., Ryan A. Kurtz** and **Carlton C. Pilger** were named partners at **Miller & Martin LLP**. Alexander focuses his practice in the areas of bankruptcy, creditor's rights and commercial litigation; Delgado practices in the corporate department with an emphasis on business transactions, securities, and federal, state and local tax law. Kurtz specializes in commercial, business and civil litigation and arbitration, and Pilger practices ERISA law with an emphasis on HIPAA compliance. Miller & Martin's Atlanta office is located at 1275 Peachtree St. NW, 7th Floor, Atlanta, GA 30309; (404) 962-6100; Fax (404) 962-6300.

**Jimmy Carr, Tommy Chason** and **John FitzGerald** announced the formation of a new firm, **Carr, Chason & FitzGerald**. The office is located at 6000 Lake Forrest Drive, Suite 440, Atlanta, GA 30328; (404) 843-3889; Fax (404) 847-9297.

**Schulten Ward & Turner, LLP**, announced that **Erin S. Stone** was named a partner. She will focus primarily on family law. In addition, **Dean R. Fuchs, Joseph L. Kelly** and **Thomas H. Castelli** have become associates in the litigation practice group. Their practice areas include commercial litigation, personal injury, insurance defense and employment law. The firm is located at 260 Peachtree St., Suite 2700, Atlanta, GA 30303; (404) 688-6800; Fax (404) 688-6840.



Freed



Piercy

**Chamberlain Hrdlicka** announced that **Gary S. Freed** has joined the firm's Atlanta office as a shareholder in the litigation practice, and **William J. Piercy** has

joined the business litigation practice. Freed brings experience including trade secret, restrictive covenant, real estate, insurance, employment and contract matters. He previously served as president and managing principal of Freed & Berman, P.C. Piercy was an associate with Freed & Berman, where he practiced business litigation for the past four years. Chamberlain Hrdlicka's Atlanta office is located at 191 Peachtree St. NE, Ninth Floor, Atlanta, GA 30303-1747; (404) 659-1410; Fax (404) 659-1852.

**Kilpatrick Stockton LLP** announced today that the firm's expanding London office has relocated to One Canada Square in Canary Wharf. With nearly 40 attorneys, Kilpatrick Stockton is now one of the 15 largest U.S. law firms in London. Kilpatrick Stockton is leasing the entire 39th floor of One Canada Square totaling over 28,000 square feet.

**Edwin J. Schklar, Robert U. Wright, Edward C. Henderson Jr.** and **William Brent Ney** announced the formation of **Schklar, Wright & Henderson, LLC**, a civil trial and appellate practice. The office is located at Suite 2250 Resurgens Plaza, 945 East Paces Ferry Road, Atlanta, GA 30326; (404) 888-0100; Fax (404) 842-7222.



**Kilpatrick Stockton LLP** announced the addition of **A. Elizabeth "Lizz" Patrick** as a partner in the firm's Atlanta office. She joins the construction law and public contracts practice group, where she will continue her

practice in assisting owners, developers, construction companies and others with planning and managing complex development and construction projects, design and construction contract preparation and negotiation, risk management, dispute resolution and litigation. Kilpatrick Stockton is located at Suite 2800, 1100 Peachtree St., Atlanta, GA 30309-4530; (404) 815-6500; Fax (404) 815-6555.



**Smith Moore LLP** announced that **Allen Buckley** was promoted to partner. Buckley's business practice emphasizes ERISA, tax, qualified and nonqualified deferred compensation and pension plans, employee benefits and executive compensation. He also has extensive experience in ERISA litigation and is a certified public accountant. The firm is located at One Atlantic Center, 1201 W. Peachtree St., Suite 3700, Atlanta, GA 30309; (404) 962-1000; Fax (404) 962-1200.

**Patterson, Thuente, Skaar & Christensen, P.A.**, an intellectual property firm based in Minneapolis, announced the opening of a new office in Atlanta. **Peter S. Dardi, Ph.D.**, will serve as head of the new office. His practice in patent law spans a wide range of technologies, and he has extensive experience representing medical device companies and companies on the cutting edge of nanotechnology. The firm's new office is located at 3490 Piedmont Road NE, Suite 400, Atlanta, GA 30305; (404) 949-5730; Fax (404) 949-5730.



**Mary Grace Diehl**, a bankruptcy attorney with **Troutman Sanders LLP**, was selected by the 11th Circuit U.S. Court of Appeals as the newest **U.S. Bankruptcy Court judge** for the Northern District of Georgia. She has chaired the bankruptcy sections of both the Atlanta Bar Association and the State Bar of Georgia, and she has been a fellow of the American College of Bankruptcy and a board member and president of the Southeastern Bankruptcy Law Institute. Her office is located at 1215 U.S. Courthouse, 75 Spring St., Atlanta, GA 30303; (404) 215-1202; Fax (404) 215-1238.

**Burr & Forman** announced that **Tim McDowell** has joined the firm as partner and will head the Atlanta office's new health care practice group. McDowell brings 15 years of experience in transactional and regulatory health care law. He earned a bachelor's degree from Davidson College in 1979 and a master's degree in social work from the University of Georgia in 1982; he obtained his juris doctorate from Emory University School of Law in 1987. Burr & Forman's Atlanta office is located at One Georgia Center, 600 West Peachtree St., Suite 1200, Atlanta, GA 30308; (404) 815-3000; Fax (404) 817-3244.



**Mallory E. Phillips III** was named **Executive Director of the Atlanta office of Counsel On Call**, which provides law firms and corporate clients with top-level legal talent on an as-needed basis. Phillips brings 24

years of labor and employment legal experience to the company. Prior to joining Counsel on Call, he was an equity partner in the Atlanta offices of Ford & Harrison, LLP. Counsel On Call's Atlanta office is located at 1230 Peachtree St. NE, Promenade II, Suite 1800, Atlanta, GA 30309; (404) 942-3525; Fax (404) 942-3780.

## In Cumming

Gov. Sonny Perdue appointed **Troy Russell McClelland III** to the **State Court in Forsyth County**. He is a partner at **Dreger, Coyle, McClelland, Bergman & Pieschel**, and he was the chief assistant district attorney for the Blue Ridge Judicial Circuit Court. The court is located at 100 Courthouse Square, Suite 150, Cumming, GA 30040; (770) 781-2130; Fax (770) 886-2834.

## In Marietta

**J. Lynn Rainey, P.C.**, and **Perry A. Phillips, L.L.C.**, announced the relocation of their offices. Rainey will continue to create and represent community improvement districts as well as serve clients in criminal court and personal injury litigation. Phillips will continue to represent clients in civil litigation, focusing on real estate, construction and commercial landlord/tenant matters. The new office is located at 358 Roswell St., Suite 1130, Marietta, GA 30060-8200; (770) 421-6040; Fax (770) 421-6041.

**Henry R. Thompson** and **John A. Pursley** have left the district attorney's office and opened their own firm, **Thompson & Pursley, P.C.**, specializing in criminal defense. The office is located at 305 Lawrence St., Marietta, GA 30060; (770) 795-8060; Fax (770) 795-9890.

## In Milledgeville

**Carl S. Cansino** announced the opening of his law office, **The Cansino Law Firm, LLC**. He maintains a civil practice focusing primarily on criminal law, family law, wills, estates and business law. Cansino formerly worked as an assistant district attorney in the Ocmulgee Judicial Circuit. His office is located at 118 S. Wilkinson St., Suite 4, Milledgeville, GA 31059-1062; (478) 451-3060; Fax (478) 451-3073.

## In Moultrie

**Andrew W. Pope** and **Robert D. Jewell** announced the formation of **Pope & Jewell P.C.** They will specialize in the areas of criminal law, family law, personal injury, worker's compensation, social security and civil litigation. The office is located at 35 North Main St., Moultrie, GA 31768; (229) 616-1011; Fax (229) 616-7766.

## In Mobile, Ala.

**Sonja Bivins**, a partner in the Atlanta office of **McGuireWoods**, has been appointed as a **federal magistrate judge** in Mobile, Ala., for an eight-year term. She will handle many different aspects of civil and criminal cases in federal court. Bivins' practice at McGuireWoods has focused on representing employers in a variety of employment-related actions filed under federal and state anti-discrimination laws. She is a member of both the Alabama and Georgia bars, and is the first minority to be appointed a U.S. magistrate judge in the Southern District of Alabama. The U.S. District Court is located at 113 Saint Joseph St., Mobile, AL 36602-3606; (251) 690-2371; Fax (251) 694-4238.

## New Case Management System

The United States District Court for the Northern District of Georgia is in the process of transitioning to a new case management system that will provide attorneys the opportunity to file court documents via the Internet 24 hours a day, 7 days a week. Entitled Case Management/Electronic Case Filing, the new system will allow attorneys to file and view documents from any location with Web access. The court envisions bringing the new system online sometime during the spring of 2004. Training on the system will be offered to interested members of the Bar.

Besides providing access at any time, the new system permits automatic notification of document filings via e-mail to participants in a case, the ability to download and print court documents from any location, and concurrent access to case files by multiple parties. Once filed, the documents are immediately available electronically. All divisions in the Northern District, including Atlanta, Gainesville, Newnan and Rome, will participate in this new system.

In order to use the new system, attorneys will be required to register with the court and receive a password. Users must also have access to a personal computer running a standard platform such as Windows or Macintosh, word processing software, Internet access and a browser, and software to convert documents into portable document format (PDF). Scanning equipment is optional but may be necessary for filing documents that are not in digital or electronic format. Information concerning both the court's "go-live" date, the availability of user training and other information concerning CM/ECF will be posted on the court's Web site at [www.gand.uscourts.gov](http://www.gand.uscourts.gov).



## What's in a Name?

By Paula Frederick

**A**fter five years in-house with an insurance company, you've decided to go out on your own.

You're going to open a practice with Linda Tindall, a law school classmate who wants to leave her large firm practice. You hope to handle plaintiff's personal injury work.

You meet Linda over drinks to begin planning.

"I've been thinking about firm names," she says. "I've got a list of possibilities."

First on the list is 'Spindle, Tindall and Associates.' "I like that one best," Linda explains. "It makes us sound like name partners in a firm with dozens of lawyers. Besides, 'Spindle & Tindall' sounds funny by itself."



Next on the list is 'The Plaintiff's Personal Injury Lawyers Group.' "I like this one," you say. "It tells people exactly what it is that we do, which should help us weed out the folks who are looking for a divorce lawyer."

Linda's next possibility is 'A Legal Services Group.' "This one is sheer genius," Linda explains. "If we can get the phone company to list us under the letter 'A,' we'll be first in the lawyer listings!"

Finally, Linda has included Tindall & Tindall, the name her father and uncle practiced under for decades before their retirement several years ago. "People in this town know the name Tindall & Tindall; I think there's a lot of goodwill associated with it," Linda claims. "We might get more business if people assume that Dad and Uncle Joe are still running things."

Although you are dubious about some of Linda's choices, you volunteer to run the list by the lawyers on the Bar's Ethics Hotline to be sure there aren't ethical problems with any of them. You share your findings with Linda the next day.

"There aren't a lot of Bar Rules that deal with firm names," you tell Linda. "Basically, the rules require that our firm name be true and not misleading.<sup>1</sup> The lawyer I spoke with on the Ethics Hotline shot down practically everything on your list."

"The problem with using 'and Associates' is that we don't really *have* any associates," you explain. "If we're trying to make people think we're a larger firm than we are, isn't that misleading?"

"There are problems with both of the trade names too," you add. "Rule 7.5(e) authorizes a lawyer to use a trade name, but it requires that the name include the name of at least one lawyer. That means that we would have to be 'Spindle & Tindall's Plaintiff's Personal Injury Lawyers Group,' or something like that."


"There are a couple of other problems with 'A Legal Services Group.' People might be confused into thinking we are affiliated with Georgia Legal Services, which isn't true. The hotline lawyer also warned me about "alpha jumping" – putting an "A" in front of our name to get to the

top of the phone book listings. She says that if we practice that way, we have to be consistent. Our letterhead, business cards, and firm sign should all say the same thing."

"What about Tindall & Tindall?" Linda asks. "They are real people, and they are both lawyers, so that one should be OK."

"The problem there is that *we* aren't Tindall & Tindall," you explain. "If we had practiced with them under that name, we could continue using it after their retirement. Since the firm has been out of business for years, the Bar and Rule 7.5(e)(1) consider that it's misleading for us to pick it up."

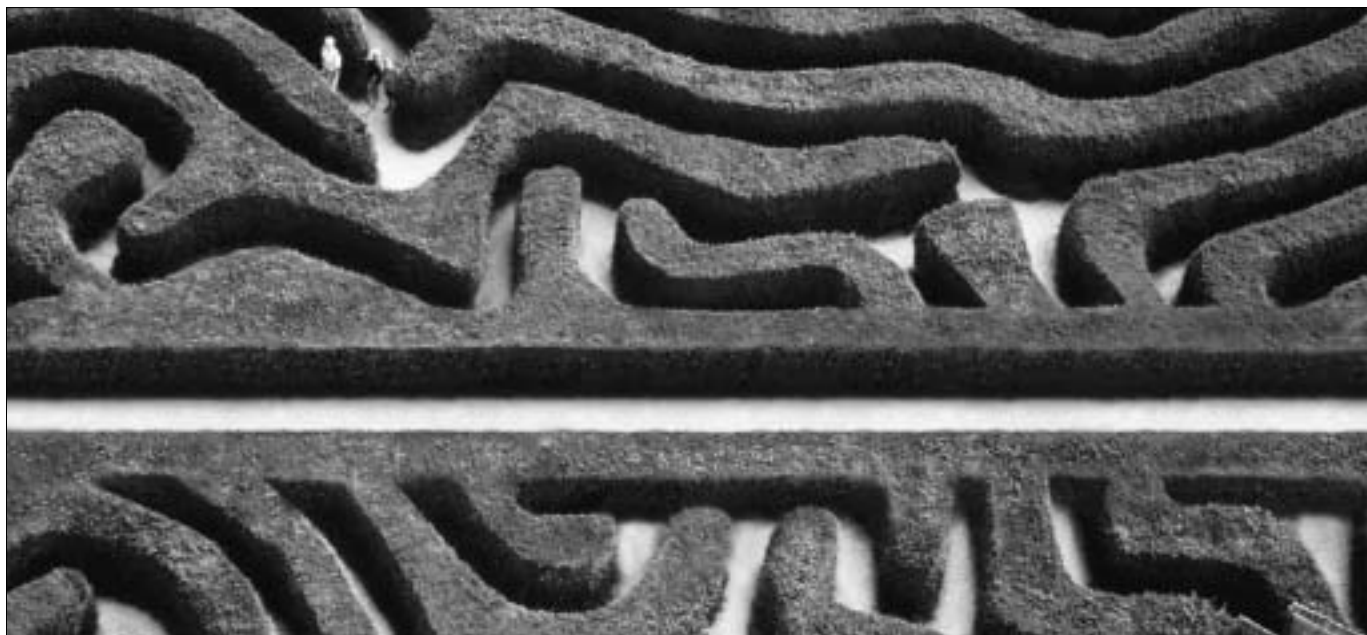
"Wow," Linda exclaims. "Spindle & Tindall is looking better all the time. I'm just glad we had this conversation before I ordered business cards!"

Call the Ethics Hotline at (404) 527-8720 with all of your ethics questions. 

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

## Endnotes

1. Rules 7.1 and 7.5 of the Georgia Rules of Professional Conduct apply to firm names and letterheads.



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# Discipline Notices

(Dec. 12, 2003 through Feb. 12, 2004)

By Connie P. Henry

## DISBARMENTS/VOLUNTARY SURRENDER

### Eddie Lee Denhardt

Conyers, Ga.

Eddie Lee Denhardt (State Bar No. 217717) has been disbarred from the practice of law in Georgia by Supreme Court order dated Jan. 12, 2004. Denhardt pled guilty in the Gwinnett County Superior Court on 38 counts of false statements and writings, which are felonies.

### Lloyd E. Thompson

Brunswick, Ga.

Lloyd E. Thompson (State Bar No. 708950) has been disbarred from the practice of law in Georgia by Supreme Court order dated Jan. 12, 2004. In 1997 Thompson agreed to defend a client on criminal charges. Thompson accepted a retainer of \$500. Although Thompson appeared at the arraignment, he failed to appear at the trial. The client appeared at trial and had to represent himself. After he was found guilty, the client demanded a return of the retainer, but Thompson refused to return the money. Thompson made representations that he had obtained a continuance of the client's trial and that he had so notified his client but these representations proved false. In aggravation of discipline, Thompson had received a public reprimand and an Investigative Panel reprimand and was recently suspended based on similar conduct.

### Sharel Lovia Payne

Atlanta, Ga.

On Jan. 12, 2004, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Sharel Lovia Payne (State Bar No. 568230). Payne was hired by an individual to represent his minor son in a

personal injury case. Payne settled the case for \$17,500, but failed to promptly notify her client of the receipt of the funds and misappropriated all of the settlement funds for her personal use.

### Richard A. Viti

Atlanta, Ga.

On Jan. 12, 2004, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Richard A. Viti (State Bar No. 628650), to be effective May 17, 1993. Viti was found guilty of two counts involving income tax evasion. The United States Court of Appeals for the 11th Circuit affirmed his conviction and the United States Supreme Court denied his petition for writ of certiorari.

## SUSPENSIONS

### William H. Norton

Marietta, Ga.

On Jan. 12, 2004, the Supreme Court of Georgia ordered that William H. Norton (State Bar No. 546850) be suspended indefinitely from the practice of law in Georgia. A client hired Norton to represent him in divorce proceedings and paid a \$5,000 fee. After the first hearing the client terminated Norton's services and asked for a refund of the unearned fees. Norton failed to comply. Norton shall remain suspended until he returns the client's file and refunds the unearned portion of the fees.

### Rose Eugenie Goff

Atlanta, Ga.

On Jan. 12, 2004, the Supreme Court of Georgia ordered that Rose Eugenie Goff (State Bar No. 299026) be suspended from the practice of law in Georgia for one year with conditions for reinstatement. Goff represented a client in an employment discrimination



case. Without informing her client, Goff agreed to the taking of her client's deposition by defendant's counsel; rescheduled the deposition twice; and then failed to appear. A magistrate judge granted a motion for sanctions for failure to prosecute and failure to appear for deposition and assessed costs against Goff personally. Later the magistrate judge dismissed the complaint with prejudice, but Goff failed to appeal the order or to inform her client of the dismissal. Goff had no prior disciplinary record. Goff's right to resume practice is conditioned upon a determination by the State Bar's Lawyer Assistance Program that she would not pose a threat of harm to clients or the public.

**Karen Edith Moore**  
Lithonia, Ga.

On Jan. 20, 2004, the Supreme Court of Georgia ordered that Karen Edith Moore (State Bar No. 520037) be suspended from the practice of law in Georgia for three years nunc pro tunc Jan. 1, 2002, the date on which she ceased practicing law. Moore represented a

lender in two real estate closings. Moore prepared the HUD-1 settlement statements and signed off that they were accurate and true. She distributed the seller's funds according to seller's instructions, without authorization from the lender. She did not list the distributions on the HUD-1 statement. In mitigation of discipline, Moore has not had prior discipline and she is deeply remorseful.


## **PUBLIC REPRIMAND**

**James Edward Albertelli**  
Jacksonville, Fla.

On Jan. 12, 2004, the Supreme Court of Georgia ordered that James Edward Albertelli (State Bar No. 007750) receive a public reprimand in open court by a judge of the superior court where Albertelli resides or where the disciplinary infraction occurred. Before entering private practice Albertelli worked as an assistant district attorney. He represented the state in a case, which resulted in a plea to the charge of aggravated stalking by an individual defendant. After he left prosecution he undertook to represent that former

defendant in a contempt action arising out of his alleged failure to pay child support. Albertelli issued a subpoena for documents and a deposition upon a former colleague in the district attorney's office seeking discovery, which was arguably irrelevant to the contempt action. He failed to advise opposing counsel of the issuance of the subpoena or of any hearings later held on the issue and he issued the subpoena without checking the status of the case, which had already been resolved.

## **INTERIM SUSPENSIONS**

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Dec. 12, 2003, three lawyers have been suspended for violating this Rule and one has been reinstated. 

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

## **Lawyers Foundation of Georgia Seeks Silent Auction Donations**

*The Lawyers Foundation, a 501(c)3 charity, is currently seeking items to be donated for a silent auction to take place at the Bar's Annual Meeting. The Silent Auction helps to secure the future of the Foundation and its programs. Donating an item to the auction is a great way to get involved in this outstanding program, and proceeds from the auction add to the funds available to support the Challenge Grant Program and increase the Foundation's endowment.*

*Auction items vary widely and range from fine dining and vacation getaways, to technological tools and sports memorabilia and events.*

*Deadline for donations is May 31. For more information about the Annual Silent Auction, or to obtain a contribution form, call 404-659-6867, or send an e-mail to: [lfg\\_lauren@bellsouth.net](mailto:lfg_lauren@bellsouth.net).*

# Back to Basics:

## Hot Technology Updates for 2004

By Natalie R. Thornwell

I originally wrote this article in 2001, but because the information is still relevant, I have made some updates and addressed some of the technological changes that have taken place since then. I am amazed at how much the landscape of technology has remained the same for law firms despite new tech trends. The Law Practice Management Program continues to receive more technology related calls on its Practice Management Help Line than for any other subject.

Basic legal computing requires a few things. I have found that while most firms have at a very minimum these systems in place, every now and then I encounter firms who still haven't bothered to catch up. So, here's my short list of the basic technology must-haves for today's lawyer.

### Networked computers

As scary as it sounds in 2004, there are still some law offices running multiple computers that are not networked. This is down right awful! With the rarest of exceptions, the benefits of networking computers far outweigh any reason for not linking your computers together. The ability to share file information and resources, like printers and copiers, is reason alone to hunt down a local computer person for an estimate on running the cables from one computer to the next. And depending on location, your building layout and security situation, you could even set up a wireless network that can link your office. If you are one of the "techno dinosaurs" that

remains, please contact our program for more information and a review of specific needs for networking computers in your office.

### Backups

Another scary thing is that lawyers are still storing all of their work on computers, but not performing any type of backup. Despite an increasing awareness of the threat of disaster in our times, attorneys still practice without backing up their systems. Whether you choose to copy files to a zip or tape drive, burn CDs or DVDs, man removable hard drives, or invest in an online data storage account you must have some formal backup procedure in place in your law office. You should back up every day or as frequently as you'd like to redo your work. You also must make sure that the procedure works by doing test restores regularly. Ultimately, ask yourself: If I am away from my office and there is a flood or fire, am I able to retrieve my work? Enough said. Backup, backup, backup. Store your backups off site and on or near your current office too. Make sure you can get data back in case of disaster. If you need help with developing these procedures for your firm don't hesitate to contact our program.

### Upgrades

Whether you have 386s (ouch!) and need to be on the latest and greatest system out there, or if you are on version 1.1 of some legal specific software package, upgrading is inevitable. Make sure you stay abreast of any upgrades that are available. While hardware does not require as much tweaking as software, generally speaking, keep your techno tools sharp and in good working order. Download the latest maintenance releases, service patches or bug fixes on a regular basis. What's the old saying about an ounce of prevention? Works for computers and software too.

## Virus Protection

You would think that lawyers who are highly skilled at protecting the interests of others would have no problem protecting themselves. However, many firms operate with no form of protection from computer viruses. Bottom line: there are a lot of bored computer criminals and they will continue to build destructive things that can harm other folks. These people make an enemy out of your inbox. Make sure you have downloaded or purchased a virus protection system for your office. Don't think that non-networked systems don't need it, too. In fact, using floppy disks and other transportable media may make the need even more pressing! You should investigate firewall protection for your office. There are several reasonably priced systems available.

## Training

A pet peeve that I have is being told that training is not necessary. Everyone has to learn how to use new systems. You can spend several weeks (read whenever I have time or the work in the office slows down) or a day or two in the process. You can teach yourself (didn't someone say something about "the blind leading the ...") or hire professionals. You can immediately begin to get a return on your investment or wait until later (okay, much later). No one can convince me that there is no benefit to proper training. I know it is absolutely necessary!

## Internet

In some form or another, we all need to be able to go online. For e-mail, legal research, visiting Web sites, participating in listservs, downloading information, and on



and on, we need to harness the power of the Internet in law offices. Many firms are making full use of the Internet as they market their firms and even collaborate with clients online. Many benefits lie in being able to communicate with others. If you need help getting there, call our program to discuss the benefits and the best way to get connected with the rest of us. Even if you are connected, you will need to learn how to better manage all of that information. So get in touch with us to get the latest ideas, tips and tricks.

## Practice/ Case Management

I used to have trouble explaining the benefits of case management software. There were just too many features to focus in on. It has gotten much easier. Now, I just ask the unbeliever, "How long does it take you to find a phone number for a particular judge on a particular case, and how long does it take to update a change to that number throughout the office?" With case management

software you have the ability to make much more money and save much more time. I can't think of one good reason why you would not have one of these programs. They are the only software programs that allow you to keep a virtual copy of your physical files on your computer. Contact our program for help in deciding which program will work best for you. You can't afford not to. For those who already have case management software, you will be glad to know I am still preaching this sermon, but the congregation is steadily growing. There are some believers.

## Automated Time Billing and Accounting

Recreating time entries for bills you make in the word processor and doing manual ledgers should be things of the past, but unfortunately, they are not. Today's time and billing and legal accounting software is the answer. Back office procedures are needed in all businesses, law offices included. I can tell you



that you need it and show you why if you contact our program. Trust me, you will capture more time, and hopefully make more money and better manage your firm's finances with these systems.

## Handheld Devices


If you are walking around with a paper calendar in your pocket or a bulky day planner, you need to consider getting a handheld PDA (personal data assistant). With many flavors to choose from, PDAs are still hot techno gadgets. These devices can replace your cell phone, hold your entire calendar, all of your contact records, and on some units all of your e-mail. From Blackberrys, to Palms, to Pocket PCs, you are able to take a very large part of your practice information with you. You can even buy expandable keyboards for PDAs and stop lugging around that heavy laptop. You can download

games and beam them to your friends, or today's newspaper or the latest legal research you've done. Newer units and the right software even let you create presentations and play them from the unit. If any of this sounds intriguing, and it should, you should look into purchasing a hand held device.

## Resources

If you do not know much about legal technology, then you should know this. There are many resources available to help you learn more. Whether it's an online venue like a listserv (the Technolawyer and Solosez are two great ones—expect a lot of email though) or Web sites like [www.webopedia.com](http://www.webopedia.com) or [www.learnthenet.com](http://www.learnthenet.com) that can help you learn about technology in general, you can look to the Internet for help. Legal technology shows also take place annually around the

country. Check out the American Bar Association's Annual Techshow, usually in Chicago, each year or the various LegalTech shows that may take place in a location near you. At these shows you can learn the latest things about hot legal technologies like ASPs, WiFi and collaboration tools. Some print publications to check are *Law Office Computing* and *Law Technology News*.

Finally, don't forget to contact the Law Practice Management Program. We will be glad to help with assessing your legal technology needs and give you a guided tour of our software library before you make any purchases. 

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

**We wish to express our sincerest appreciation to those who volunteered to serve as attorney coaches, regional coordinators, presiding judges and scoring evaluators during the 2004 mock trial season and to those financial sponsors who have already made pledges or contributed funds during the 2004 season, thus far:**

Georgia Bar Foundation  
Council of State Court Judges  
The Lawyers Foundation of Georgia  
The Young Lawyers Division of the State Bar of Georgia  
Criminal Law Section of the State Bar of Georgia  
General Practice and Trial Law Section of the State Bar of Georgia  
And many individual donors

**Thank you for your generous support!**

### **The 2004 Regional Champion Teams are:**

Central High School (Central GA - Macon); South Forsyth High School (Cherokee Co. - Canton); Ware County High School (Coastal GA - Brunswick); The Walker School (Cobb Co. - Marietta); Decatur High School (DeKalb Co. - Decatur); Grady High School (Fulton Co. - Atlanta); The Wesleyan School (Gwinnett Co. - Lawrenceville); The Paideia School (Metro Atlanta - Atlanta); Northwest Whitfield High School (North GA - Dalton); Clarke Central High School (Northeast GA - Athens); Cartersville High School (Northwest GA - Rome); Savannah Country Day School, regional champ and Sol C. Johnson High School, regional runner-up (Southeast GA - Savannah); Jonesboro High School (Southern Crescent - Jonesboro); Lee County High School (Southwest GA - Columbus); Chapel Hill High School (West GA - Douglasville)

The State Champion Team will be crowned March 14th and will represent Georgia at the National High School Mock Trial Championship in Orlando, Fla. May 5-9, 2004.

For sponsorship or donation information, please contact the mock trial office:  
(404) 527-8779 or toll free (800) 334-6865 ext. 779  
or email: [mocktrial@gabar.org](mailto:mocktrial@gabar.org)

# Bringing Justice Home

## Middle Georgia Lawyers Host Special Event for GLSP

By Jeanette Burroughs

**W**hen a small group of lawyers in Macon began planning for a fun way to bring lawyers together and encourage pro bono service, what resulted was “Bringing Justice Home,” the first special event of its kind ever initiated by Middle Georgia lawyers on behalf of GLSP.

Middle Georgia lawyers hosted “Bringing Justice Home” on Feb. 5 at the Georgia Music Hall of Fame. More than 80 individuals attended this historic occasion, including two Georgia Supreme Court justices. Other guests included local lawyers and judges, law school students and a host of other prominent supporters from Macon and surrounding areas. Justice Robert Benham started the program with an inspirational speech of encouragement to lawyers urging their increased participation in pro bono service.

“Bringing Justice Home” provided a wonderful opportunity for GLSP’s volunteers and donors in Middle Georgia to meet each other face-to-face and recognize those among them with a distinguished history of pro bono service or giving of financial resources to GLSP. In a recognition ceremony filled with many memorable moments, honorees were presented awards of appreciation. The Hon. Duross Fitzpatrick presented the GLSP Judy Davenport Pro Bono Partner award to Anthony Gerrard “A.G.” Knowles and the law firms of Akin, Webster & Matson, P.C., and Westmoreland, Patterson, Moseley &

Hinson, L.L.P., for their long-term commitment to pro bono service. The award was especially named for Pro Bono Involvement Coordinator Judy Davenport in appreciation of her longstanding work to engage the private bar in pro bono service on behalf of low-income Georgians. Last year, private attorneys in Middle Georgia handled 84 pro bono cases for GLSP.

The Hon. Hugh Thompson presented the GLSP State Bar of Georgia Campaign Benefactors’ award to Middle Georgia donors with outstanding giving histories of 15 years or more to the “And Justice for All” State Bar Campaign for GLSP. Honorees included John D. Comer, W.W. Hemingway, Robert E. Herndon, Sallie R. Jocoy, Walter E. Leggett Jr., Congressman Jim Marshall and Camille Hope, Jack L. Sammons, Kice H. Stone, Richard B. Thornton, Homer J. Walker III and Johnny W. Warren.

GLSP managing attorney Phil Bond presented the GLSP Sustaining Partner for Justice award to the Macon Bar Association in recognition of the association’s 32 years of support and service to the Macon Regional Office. Bond expressed appreciation for Macon lawyers who have historically been generous in giving of their professional skills in the representation of low-income Georgians, which represents a worthwhile and longstanding tradition of service to the community.

GLSP’s Macon Regional Office was established in 1971 with one lawyer serving two counties. The office now serves an eligible low-income population of 94,000 individuals in 23 counties, including Baldwin, Bibb, Bleckley, Butts, Crawford, Dodge, Hancock, Houston, Jasper, Johnson, Jones, Lamar, Laurens, Monroe, Montgomery, Peach,



Photo Courtesy of GLSP

(Left to right) Host Committee members Nancy Terrill, Elizabeth Flournoy Thompson, Pamela White-Colbert and Emmett L. Goodman Jr. (Not pictured are Thomas H. Hinson II, Donald James Jordan, Walter E. Leggett Jr. and Ann Elizabeth Parman.)

Pulaski, Putnam, Telfair, Treutlen, Twiggs, Wheeler and Wilkinson. In 1981, the office lost eight attorney positions and four paralegal positions of which none have been fully recovered because of static federal funding limitations that have not kept up with service demands. A staff of only five full-time lawyers, three paralegals and five administrative support staff closed 2,329 cases last year involving critical legal problems in the areas of family violence, consumer fraud, denial of health care, housing, public benefits, government errors and more. Approximately 58 percent of cases are family law related. Many cases that cannot be handled by the office are referred to the private bar on a reduced fee or pro bono basis. Last year, 1,281 clients were provided reduced fee referrals. An additional 1,000 referrals were made through the private lawyer referral line of the Macon Bar Association, which is administered by GLSP's Macon Regional Office. A total of 199 lawyers currently participate on the private lawyer referral panel.

With demand far outstripping supply, GLSP's lawyers and paralegals must choose carefully which problems to solve and which clients to accept. The critical work of GLSP to provide access to justice and opportunities out of poverty for low-income Georgians has real-life consequences for the people of our communities. GLSP's Macon Regional Office was the organization's first office. Now there are 12 GLSP regional offices in the state and a central administrative office in Atlanta. GLSP's 154-county service region is populated by more than one million impoverished Georgians.

"Bringing Justice Home" was made possible with the financial support of several individual lawyers and law firms in Macon. GLSP extends much gratitude and appreciation to the following event sponsors:

#### **Gold Sponsors**

- Adams, Jordan & Treadwell, P.C.
- Emmett L. Goodman Jr.
- Congressman Jim Marshall & Camille Hope

- Sell & Melton, L.L.P.
- Smith, Hawkins, Hollingsworth & Reeves, L.L.P.
- Nancy Terrill & Camp Bacon
- Westmoreland, Patterson, Moseley & Hinson, L.L.P.

#### **Silver Sponsor**


- Harris & James

#### **Bronze Sponsors**

- Knight & Fisher, L.L.P.
- Malcolm G. Lindley
- Ann Elizabeth Parman

The State Bar Pro Bono Project provided in-kind and financial support, for which GLSP is also very grateful.

Many thanks to the following lawyers in Macon who planned and hosted "Bringing Justice Home:" Nancy Terrill (chairperson), Emmett L. Goodman Jr., Thomas H. Hinson II, D. James Jordan, Walter E. Leggett Jr., Ann Elizabeth Parman, Elizabeth Flournoy Thompson and Pamela White-Colbert. GLSP extends its deepest appreciation to this powerful group who volunteered their time and talents to bring together GLSP's special friends, supporters and staff for an evening of music, food, fellowship and appreciation. "Bringing Justice Home" was a successful and memorable event that also demonstrates Middle Georgia's strong commitment to promoting equal access to the civil justice system for all people.

Donations to GLSP's Macon Regional Office are tax-deductible to the extent allowed by law and can be mailed to: Georgia Legal Services Program, Inc., P.O. Box 1057, Macon, GA 31201. 

**Jeanette Burroughs** is the director of development and communications for GLSP.



# Sections Heat Up the Year With Activity

By Johanna B. Merrill

**N**ineteen sections hosted events at the State Bar's 2004 Midyear Meeting, which was held Jan. 15-17 at the Sheraton Colony Square. This year's meeting was the largest in Bar history, and the well-attended section meetings contributed to the record attendance.

The meeting opened on Thursday, Jan. 15, with two section breakfasts. Rep. Tom Bordeaux, chairman of the House Judiciary Committee, was the guest speaker for the **Government Attorneys Section** breakfast. The **Creditors' Rights Section** hosted a one-hour CLE program during their breakfast meeting.

The **Labor & Employment Law Section** hosted a lunch meeting that covered the topic of recent developments in wage and hour law. Guest speaker Mary Kay Lynch, regional counsel and director of the Environmental Accountability Division of the Environmental Protection Agency, spoke at the **Environmental Law Section** lunch meeting. During that meeting, Section Chair Susan Richardson presented E. Peyton Nunez, immediate past chair, with a plaque commemorating her accomplishments as chair. The **Appellate Practice** and **Corporate Counsel** sections also held lunch meetings on Jan. 15.

The **Bankruptcy Law Section** held a well-attended luncheon on behalf of the recently retired Hon. Stacey W. Cotton, of the United



Photos by Daniel L. Maguire

**Rep. Pam Stephenson, member of the House Judiciary Committee and the Children and Youth committee, speaks to the Administrative Law Section during the Midyear Meeting.**

States Bankruptcy Court for the Northern District of Georgia, for his 42 years of service to the bankruptcy bar. Judge Cotton was appointed to the bench on May 1, 1985, and served as chief judge from June 1995 until his retirement in December 2003. While in practice from 1962 to 1985, Judge Cotton was a frequent speaker, moderator and panelist for many CLE programs and was an active member of the bankruptcy sections of both the State Bar and the Atlanta Bar Association, where he twice served as section chairman. He was also a founding member of the Southeastern Bankruptcy Law Institute. At

the start of the program, Section Chair Laura Woodson made announcements regarding section business before introducing several speakers who have worked with and known the judge over the years, including J. Michael Lamberth, James H. Bone, Judge Paul Bonapfel and C. David Butler. Bonapfel, a former law partner of the judge's, and Butler roasted Judge Cotton in a song set to the tune of "Davy Crockett." Following the remarks, Section Treasurer Nancy Whaley presented Lauren Larmer Barrett, executive director of the Lawyers Foundation of Georgia, the philanthropic arm of the Bar, with a \$1,000 donation in honor of Judge Cotton. At the conclusion of the luncheon, attendees adjourned to go to one of two simultaneous section-sponsored I.C.L.E. programs. The CLE programs were followed by a reception for all attendees.

Friday, Jan. 16, was a big day at the Midyear Meeting with nine section lunches and three section receptions.

The **Entertainment & Sports Law Section** hosted a lunchtime CLE event with speaker Bertis E. Downs IV, an entertainment law professor at the University of Georgia and counsel for the band R.E.M. Downs' presentation was titled "The Evolution of Music Business in Challenging Times: Business and Legal Realities c. 2004."

Rep. Pam Stephenson of the House Judiciary Committee and Children and Youth Committee spoke during the **Administrative Law Section's** luncheon. Capt. Loyd Florence, who flew Pan-American Clippers during World War II, was the guest speaker at the **Aviation Law Section's** lunch meeting.



**Bertis Downs, law professor at the University of Georgia and attorney for R.E.M., discusses the evolution of the music business in challenging times with the Entertainment & Sports Law Section during the Midyear Meeting.**

**General Practice & Trial** hosted Attorney General Thurbert Baker as a guest speaker at their luncheon. The **Criminal Law Section, Fiduciary Law Section, Heath Law Section** and **Individual Rights Section** also held lunchtime meetings.

The long day of lunches and meetings wrapped up with the **Family Law Section, Workers' Compensation Law Section** and **Taxation Law Section** holding receptions for their members.

Section members have also kept their calendars full with meetings and events outside the Bar. A prime example is the **Intellectual Property Law Section**, which has been very busy in 2004. On Feb. 4 the section co-sponsored a six-hour CLE program, "Filling Your Toolbox: Skills and Updates for the IP Lawyer" at the Bar Center in Atlanta. Speakers included Chair-Elect Michael Hobbs, Georgia State University Law Professor Michael

Landeau, A. Shane Nichols, Douglas Weinstein, J. Rodgers Lunsford III, as well as Brian K. Johnson, a communications specialist with Trapezium Communications Inc. in Minnesota. Johnson led a discussion regarding communications skills for litigators and transactional attorneys. Immediately following the seminar, the section's Trademark Committee hosted a happy hour at McCormick & Schmick's in CNN Center.

The end of February was Carnival season, and the **Intellectual Property Law Section** celebrated Mardi Gras with a party on Feb. 20 at Commune, which was organized by the section's Social Committee Chair Steve Wigmore. Early registrants were treated to complimentary drinks and dinner. On March 10 the section's Patent Committee, chaired by Wab Kadaba, held a patent roundtable

discussion on “The Dirty Dozen: Common Mistakes Made by Patent Practitioners” at the Bar Center, with lead speaker Arthur A. Gardner of Gardner Groff, PC.

The **Entertainment & Sports Law Section** has also seen a busy winter. On Feb. 6 the section co-sponsored the Entertainment Law Institute with I.C.L.E., which was held at the Emory University School of Law. On Feb. 16 the section co-sponsored a sports seminar in Athens, along with the University of Georgia Student Bar Association and the University of Georgia Sports and Entertainment Society. Jeffrey Gewirtz, counsel with the Coca-Cola Company, spoke on legal issues in sports marketing. The section also held a lunchtime CLE titled “Legal Issues in Theatre” on March 10 at One Midtown Kitchen in Atlanta. Mark Williamson, Lisa Kincheloe and Darryl Cohen covered topics such as actor agreements (equity and non-equity), negotiating venue agreements and nonprofit status.

The **Technology Law Section** held a quarterly meeting at Kilpatrick Stockton LLP on March 12 where Richard Kemp, of Kemp Little LLP, spoke about recent technology law developments in the European Union.

You may still be shaking off the chill of winter, but it is not too early to start thinking about the Bar’s Annual Meeting, June 17–20 in Orlando, Fla. at the Portofino Bay Hotel. Between the section-sponsored opening night celebration that kicks off the meeting, the General Practice & Trial Section’s annual awards breakfast and other events, you will be glad you came!

## NEWS FROM THE SECTIONS

### Appellate Practice Section

By Christopher McFadden

*Augusta-Richmond County v. Lee*, S03A1321, 2004 Fulton County D. Rep. 180, 2004 Ga. LEXIS 6 (Ga., January 12, 2004)

In *Augusta-Richmond County v. Lee* the Supreme Court revisited

the question of when a discretionary application is required. Chong Suk Lee petitioned for mandamus in order to appeal the county’s denial of her application for a license to sell beer and wine. From the superior court’s ruling, the county filed a direct appeal.

The Appellate Practice Act specifically authorizes direct appeals from grants of mandamus. Nevertheless the Supreme Court held that an application for discretionary appeal was required. An application was required because “the underlying subject matter” of the appeal falls within the scope of the discretionary-appeal statute. The statute requires that appeals of appeals be by application for discretionary appeal. OCGA § 5-6-35 (a) (1).

It may seem paradoxical for an application for discretionary appeal to be required where a direct appeal is specifically permitted, but the Appellate Practice Act also specifically authorizes direct appeals from final judgments. The discretionary-appeal statute is best understood to include a list of exceptions to the direct-appeal statute.

Nevertheless, reconsidering an earlier unpublished dismissal, the Supreme Court decided *Lee* on the merits. The Court did so because it had “previously accepted direct appeals involving the county and the same ordinance in three almost identical cases.” GBJ

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



Nancy Whaley (center), Bankruptcy Law Section treasurer, presents the Lawyers Foundation of Georgia, represented by executive director Lauren Barret, with a check on behalf of Judge Stacey W. Cotton (right).



**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.

**Betty G. Berman**  
Atlanta, Ga.  
Admitted 1977  
Died January 2004

**Dameron Black Jr.**  
Savannah, Ga.  
Admitted 1938  
Died December 2003

**Gilbert Cohen**  
Atlanta, Ga.  
Admitted 1947  
Died February 2004

**McChesney Hill "Mac" Jeffries**  
Atlanta, Ga.  
Admitted 1950  
Died February 2004

**Holcombe Tucker Marshall III**  
Decatur, Ga.  
Admitted 1974  
Died December 2003

**Norman Martin McGuffog**  
Atlanta, Ga.  
Admitted 1973  
Died January 2004

**Charles Van S. Mottola**  
Newnan, Ga.  
Admitted 1949  
Died December 2003

**Richard L. Roble**  
Savannah, Ga.  
Admitted 1971  
Died November 2003

**William E. Scott Jr.**  
Culowhee, N.C.  
Admitted 1946  
Died December 2003

**John G. Shumaker**  
Atlanta, Ga.  
Admitted 1973  
Died January 2004

**Thomas P. Stamps**  
Atlanta, Ga.  
Admitted 1979  
Died December 2003

**Phillip Daniel Ulan**  
Atlanta, Ga.  
Admitted 1996  
Died December 2003

**Samuel Franklin Vesser Jr.**  
Atlanta, Ga.  
Admitted 1976  
Died January 2004

**Jesse W. Walters**  
Albany, Ga.  
Admitted 1949  
Died December 2003

**William Warren**  
Greensboro, N.C.  
Admitted 1947  
Died January 2004




**McChesney Hill "Mac" Jeffries**, 82, of Atlanta, died Feb. 14, 2004. He played a key role in the creation of Georgia's mandatory CLE program. Jeffries graduated *cum laude* from both Davidson College and Harvard Law School, and he served as an infantry lieutenant during World War II. He was a partner in the firm of Hansell and Post (now Jones Day) and was the primary lawyer for First National Bank of Atlanta, now Wachovia, for most of his legal career. He served as chairman of the board for the Atlanta Speech School, and as chairman of the board for Presbyterian Homes, where he lived. He was a deacon, elder and clerk of the session at First Presbyterian Church of Atlanta. Jeffries also studied Civil War history and enjoyed visiting battlefields. He is survived by his wife, Alice Mitchell Jeffries; two

sons, Hill Jeffries and Lewis Mitchell Jeffries, both of Atlanta; a sister, Marianne Williams of Thomasville, Ga.; a brother, James Watt Jeffries of Olathe, Kan.; and two grandchildren.



**Thomas P. Stamps**, 51, of Atlanta, died Dec. 24, 2003, after a battle with cancer.

Stamps was a sole practitioner whose practice focused on corporate and bankruptcy work. He was quite active in the legal community, serving on the board of trustees of the Georgia Legal History Foundation and as associate editor of *The Journal of Southern Legal History*. Stamps was also a fellow of the Georgia Bar Foundation, and he served on the board of directors of the Atlanta Bar Association's litigation section. He was a member of the State Bar of Georgia Bench and Bar Committee and the Lawyers Club of Atlanta. Stamps earned his bachelor's degree from the University of Illinois and his juris doctorate from Wake Forest University School of Law. He is survived by his wife, Diana; three daughters, Katherine Camilla, Elizabeth Margaret and Carley Lynn Stamps, and two sons, George Belk and Walker Paty Stamps, all of Atlanta; parents Helen and George Stamps of Oxford, Ga.; and two brothers, Robert Fletcher Stamps of Arlington, Va., and John Belk Stamps of Oxford. 

**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.**

## April 2004

**1**

CHATTANOOGA BAR ASSOCIATION  
*Copyright & Trademark Law for the Non-Specialist*  
Chattanooga, Tenn.  
6 CLE

**1-3**

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

**2**

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

LORMAN BUSINESS CENTER, INC.  
*HIPAA for Employers*  
Athens, Ga.  
6.7 CLE

**6**

LORMAN BUSINESS CENTER, INC.  
*Immigration Compliance*  
Atlanta, Ga.  
6 CLE

**7**

NBI, INC.  
*Using a Real Estate Appraiser in Georgia*  
Atlanta, Ga.  
6 CLE (with 0.5 ethics)

**8**

CHATTANOOGA BAR ASSOCIATION  
*Annual Spring Employee Benefits Law and Practice Update*  
Chattanooga, Tenn.  
4 CLE

**14**

NBI, INC.  
*Trying the Automobile Injury Case in Georgia*  
Savannah, Ga.  
6 CLE (with 0.5 ethics and 6 trial hours)

**15**

NBI, INC.  
*Major Land Use Laws in Georgia*  
Various Locations  
6 CLE (with 0.5 ethics)

**16**

ICLE  
*Foreclosures*  
Atlanta, Ga.  
6 CLE

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

NORTH ATLANTA TAX COUNCIL  
*Getting the Most from Your Give Aways*  
Atlanta, Ga.  
1 CLE

LORMAN BUSINESS CENTER, INC.  
*Asset Protection*  
Atlanta, Ga.  
6.7 CLE (with 1 ethics)

**20**

LORMAN BUSINESS CENTER, INC.  
*Law of Easements: Legal Issues and Practical Consideration*  
Atlanta, Ga.  
6.0 CLE

**22**

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

LORMAN BUSINESS CENTER, INC.  
*Covenants Not To Compete*  
Atlanta, Ga.  
3.8 CLE

**23**

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

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

ICLE  
*GA Non-Profit Law*  
Atlanta, Ga.  
6 CLE

ICLE  
*How to Try an Animal Cruelty Case*  
Atlanta, Ga.  
6 CLE

27

NBI, INC.  
*Limited Liability Companies in Georgia*  
 Various Locations  
 6.7 CLE (with 1 ethics)

29

ICLE  
*Special Needs Trusts*  
 Atlanta, Ga.  
 6 CLE

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

NBI, INC.  
*Fundamentals of Bankruptcy Law and Procedure in Georgia*  
 Various Locations  
 6.0 (with 0.5 ethics)

CHATTANOOGA BAR ASSOCIATION  
*Health Plans, HIPAA, and COBRA Update, Under ERISA*  
 Chattanooga, Tenn.  
 4 CLE

30

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

## May 2004

6-8

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

7

NBI, INC.  
*Limited Liability Companies and Limited Liability Partnerships in Georgia*  
 Savannah, Ga.  
 5.5 CLE (with 0.5 ethics)

10

NBI, INC.  
*Fundamental Issues in Georgia Human Resources*  
 Savannah, Ga.  
 6 CLE

13

NBI, INC.  
*Essentials of Section 1031 Exchanges in Georgia*  
 Atlanta, Ga.  
 6.7 CLE (with 0.5 ethics)

14

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

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

ICLE  
*Medicine for Lawyers*  
 Atlanta, Ga.  
 6 CLE

NORTH ATLANTA TAX COUNCIL  
*Current Do's and Don'ts of Estate Planning*  
 Atlanta, Ga.  
 1 CLE

18

NBI, INC.  
*Property Tax Law in Georgia*  
 Atlanta, Ga.  
 6.7 CLE

20

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

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

21

ICLE  
*Annual Product Liability Institute*  
 Atlanta, Ga.  
 6 CLE

ICLE  
*Jury Trial*  
 Atlanta, Ga.  
 6 CLE

27-29

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

24-27

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

25-26

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



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

The second publication of this opinion appeared in the December 2003 issue of the *Georgia Bar Journal*, which was mailed to the members of the State Bar of Georgia on or about December 8, 2003. The opinion was filed with the Supreme Court of Georgia on December 15, 2003. No review was requested within the 20-day review period, and the Supreme Court of Georgia did not order review on its own motion. On January 6, 2004, the Formal Advisory Opinion Board issued Formal Advisory Opinion No. 03-3 pursuant to Rule 4-403(d). Following is the full text of the opinion issued by the Board.

**STATE BAR OF GEORGIA  
ISSUED BY THE FORMAL ADVISORY  
OPINION BOARD  
PURSUANT TO RULE 4-403 ON  
JANUARY 6, 2004  
FORMAL ADVISORY OPINION NO. 03-3  
(Proposed Formal Advisory Opinion  
Request No. 02-R4)**

## QUESTION PRESENTED:

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

## SUMMARY ANSWER:

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

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

## OPINION:

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

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

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

A lawyer may not allow related business

interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

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

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

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

2) The agreement cannot restrict the information the attorney can provide the client concerning a referral by

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

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

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

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

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

*The second publication of this opinion appeared in the December 2003 issue of the Georgia Bar Journal, which was mailed to the members of the State Bar of Georgia on December 8, 2003. The opinion was filed with the Supreme Court of Georgia on December 15, 2003. No review was requested within the 20-day review period, and the Supreme Court of Georgia has not ordered review on its own motion. In accordance with Rule 4-403(d), this opinion is binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.*

## 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 2004-2  
MOTION TO AMEND THE RULES AND REGULATIONS OF THE STATE BAR OF GEORGIA

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors in regular meetings held on November 8, 2003, and January 17, 2004, 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 Referral Services**

It is proposed that certain provisions of the Georgia Rules of Professional Conduct be amended as shown below to expressly permit bar-operated non-profit lawyer referral services to share a percentage of the fee with the lawyer to whom the service has referred a matter.

**a.) Proposed Amendments  
to Rule 5.4 of the Georgia Rules  
of Professional Conduct**

The State Bar of Georgia proposes amending Rule 5.4 of the Georgia Rules of Professional Conduct by inserting the phrases in italicized and underlined typeface as follows:

**RULE 5.4  
PROFESSIONAL INDEPENDENCE OF A LAWYER**

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

- (2) a lawyer or law firm who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price;
- (3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profitsharing arrangement;
- (4) a lawyer who undertakes to complete unfinished business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and,
- (5) a lawyer may pay a referral fee to a bar-operated non-profit lawyer referral service where such fee is calculated as a percentage of legal fees earned by the lawyer to whom the service has referred a matter pursuant to Rule 7.3. Direct Contact with Prospective Clients.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

- (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
- (2) a nonlawyer is a corporate director or officer thereof; or
- (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

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

**Comment**

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the



lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

**b.) Proposed Amendments  
to Rule 7.3 of the Georgia  
Rules of Professional Conduct**

The State Bar proposes that Rule 7.3 of the Georgia Rules of Professional Conduct be amended as shown below by inserting the phrases in italicized and underlined typeface.

**RULE 7.3  
DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not send, or knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, lawyer's partner, associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication to a prospective client for the purpose of obtaining professional employment if:

- (1) it has been made known to the lawyer that a person does not desire to receive communications from the lawyer;
- (2) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;
- (3) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; or
- (4) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(b) Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked "Advertisement" on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or

secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

- (1) A lawyer may pay the usual and reasonable fees or dues charged by a bona fide lawyer referral service operated by an organization authorized by law and qualified to do business in this state provided, however, such organization has filed with the State Disciplinary Board, at least annually, a report showing its terms, its subscription charges, agreements with counsel, the number of lawyers participating, and the names and addresses of lawyers participating in the service;

(2) A lawyer may pay the usual and reasonable fees or dues charged by a bar-operated, non-profit lawyer referral service, including a fee which is calculated as a percentage of the legal fees earned by the lawyer to whom the service has referred a matter, provided such bar-operated non-profit lawyer referral service meets the following criteria:

(i) the lawyer referral service shall be operated in the public interest for the purpose of referring prospective clients to lawyers, pro bono and public service legal programs, and government, consumer or other agencies who can provide the assistance the clients need. Such organization shall file annually with the State Disciplinary Board a report showing its rules and regulations, its subscription charges, agreements with counsel, the number of lawyers participating and the names and addresses of the lawyers participating in the service;

(ii) the sponsoring bar association for the lawyer referral service must be open to all lawyers licensed and eligible to practice in this state who maintain an office within the geographical area served, and who meet reasonable objectively determinable experience requirements established by the bar association;

(iii) The combined fees charged by a lawyer and the lawyer referral service to a client referred by such service shall not exceed the total charges which the client would have paid had no service been involved; and,

(iv) A lawyer who is a member of the qualified lawyer referral service must maintain in

force a policy of errors and omissions insurance in an amount no less than \$100,000 per occurrence and \$300,000 in the aggregate.

(3) A lawyer may pay the usual and reasonable fees to a qualified legal services plan or insurer providing legal services insurance as authorized by law to promote the use of the lawyer's services, the lawyer's partner or associates services so long as the communications of the organization are not false, fraudulent, deceptive or misleading;

(4) A lawyer may pay the usual and reasonable fees charged by a lay public relations or marketing organization provided the activities of such organization on behalf of the lawyer are otherwise in accordance with these Rules.

(5) A lawyer may pay for a law practice in accordance with *Rule 1.17: Sale of Law Practice*.

(d) A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.

(e) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks to employ the lawyer does so as a result of conduct by any person or organization prohibited under Rules 7.3(c)(1), 7.3(c)(2) or 7.3(d): *Direct Contact with Prospective Clients*.

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

#### Comment

##### *Direct Personal Contact*

[1] There is a potential for abuse inherent in solicitation through direct personal contact by a lawyer of prospective clients known to need legal services. It subjects the lay person to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services, and may have an impaired capacity for reason, judgment and protective self-interest. Furthermore, the lawyer seeking the retainer is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

[2] The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. The potential for abuse inherent in solicitation of

prospective clients through personal contact justifies its prohibition, particularly since the direct written contact permitted under paragraph (b) of this Rule offers an alternative means of communicating necessary information to those who may be in need of legal services. Also included in the prohibited types of personal contact are direct personal contact through an intermediary and live contact by telephone.

##### *Direct Mail Solicitation*

[3] Subject to the requirements of *Rule 7.1: Communications Concerning a Lawyer's Services* and paragraphs (b) and (c) of this *Rule 7.3: Direct Contact with Prospective Clients*, promotional communication by a lawyer through direct written contact is generally permissible. The public's need to receive information concerning their legal rights and the availability of legal services has been consistently recognized as a basis for permitting direct written communication since this type of communication may often be the best and most effective means of informing. So long as this stream of information flows cleanly, it will be permitted to flow freely.

[4] Certain narrowly-drawn restrictions on this type of communication are justified by a substantial state interest in facilitating the public's intelligent selection of counsel, including the restrictions of sub-paragraph (a)(3) & (4) which proscribe direct mailings to persons such as an injured and hospitalized accident victim or the bereaved family of a deceased.

[5] In order to make it clear that the communication is commercial in nature, paragraph (b) requires inclusion of an appropriate affirmative "advertisement" disclaimer. Again, the traditional exception for contact with close friends, relatives and former clients is recognized and permits elimination of the disclaimer in direct written contact with these persons.

[6] This Rule does not prohibit communications authorized by law, such as notice to members of a class in class action litigation.

##### *Paying Others to Recommend a Lawyer*

[7] A lawyer is allowed to pay for communications permitted by these Rules, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency, a prepaid legal services plan or prepaid legal insurance organization may pay to advertise legal serv-

ices provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs, provided the programs are in compliance with the registration requirements of sub-paragraph (c)(1) *or* (c)(2) of this Rule 7.3: *Direct Contact with Prospective Clients* and the communications and practices of the organization are not deceptive or misleading.

[8] A lawyer may not indirectly engage in promotional activities through a lay public relations or marketing firm if such activities would be prohibited by these Rules if engaged in directly by the lawyer.

## II.

### **Proposed Amendments to the Part VIII of the Rules Of the State Bar of Georgia**

It is proposed that Rule 8-104 of Part VIII of the Rules of the State Bar of Georgia be amended to delete the current requirements regarding trial experiences. The State Bar proposes amending Rule 8-104 by deleting the stricken portions of the Rule as set out below.

#### **Rule 8-104. Education Requirements and Exemptions.**

(A) Minimum Continuing Legal Education Requirement.

Each active member shall complete a minimum of twelve (12) hours of actual instruction in an approved continuing legal education activity during each year after January 1, 1984. If a member completes more than twelve (12) hours in a year after January 1, 1984, the excess credit may be carried forward and applied to the education requirement for the succeeding year only. Any continuing legal education activity completed between July 1, 1983, and December 31, 1983, shall be credited as if completed in 1984.

(B) Basic Legal Skills Requirement.

(1) Any newly admitted active member must attend the Bridge-the-Gap program of the Institute of Continuing Legal Education in the year of his or her admission, or in the next calendar year, and such attendance shall satisfy the mandatory continuing legal education requirements for such newly admitted member for both the year of admission and the next succeeding year.

(2) Each active member, except newly admitted members, shall complete a minimum of one (1) hour of continuing legal education during each year in the area of ethics. This hour is to be included in, and not in addition to, the twelve-hour (12) requirement. If a member completes

more than one (1) hour in ethics during the calendar year, the excess ethics credit may be carried forward up to a maximum of two (2) hours and applied to the ethics requirement for succeeding years.

(3) Each active member, except newly admitted members, shall complete a minimum of one (1) hour of continuing legal education during each year in an activity of any sponsor approved by the Chief Justice's Commission on Professionalism in the area of professionalism. This hour is to be included in, and not in addition to, the twelve-hour (12) requirement. If a member completes more than one (1) hour in professionalism during the calendar year, the excess professionalism credit may be carried forward up to a maximum of two (2) hours and applied to the professionalism requirement for succeeding years.

(4) Each active member, except newly admitted members, shall complete a one-time mandatory three (3) hours of continuing legal education in Alternative Dispute Resolution by March 31, 1996. Lawyers are deemed to have satisfied this requirement by attending any of the following: (1) a law school class primarily devoted to the study of ADR; (2) a training session to be a neutral that was approved for CLE credit or would now be eligible for CLE credit; or (3) an approved CLE seminar devoted to ADR. Lawyers admitted to the bar after July 31, 1995, may satisfy this requirement by attending the Bridge-the-Gap seminar conducted by the Institute of Continuing Legal Education in Georgia. The Georgia Commission of Dispute Resolution will review requests for exemption from the CLE requirement based on law school course work.

(C) Exemptions.

(1) An inactive member shall be exempt from the continuing legal education and the reporting requirements of this Rule.

(2) The Commission may exempt an active member from the continuing legal education, but not the reporting, requirements of this rule for a period of not more than one (1) year upon a finding by the Commission of special circumstances unique to that member constituting undue hardship.

(3) Any active member over the age of seventy (70) shall be exempt, upon written application to



the Commission, from the continuing legal education requirements of this rule, including the reporting requirements.

- (4) Any active member residing outside of Georgia who neither practices in Georgia nor represents Georgia clients shall be exempt, upon written application to the Commission, from the continuing legal education, but not the reporting, requirements of this rule during the year for which the written application is made. This application shall be filed with the annual reporting affidavit.
- (5) Any active member of the Board of Bar Examiners shall be exempt from the continuing legal education but not the reporting requirement of this Rule.

(D) Requirements for Participation in Litigation:

~~(1) Trial Experiences. Any member admitted to practice after January 1, 1988, may not appear as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case until after such member has obtained nine (9) litigation experiences and has filed an affidavit with the State Bar of Georgia demonstrating compliance with this Rule. The affidavit shall be accompanied by a fee in the amount set by the Commission to cover the cost of administering this Rule. A litigation experience is defined as:~~

~~(a) actual participation in a trial or hearing under the direct supervision of a member of the Bar; or~~

~~(b) observation of an entire trial or hearing; or~~

~~(c) observation of a State Bar of Georgia approved video tape of an entire trial or hearing under the direct supervision of a member of the Bar. Litigation experiences may be obtained by (a), (b), (c), or any combination thereof, but must include:~~

~~(i) In the Superior or State Courts of Georgia, three jury trials (at least one of which shall be criminal and at least one of which shall be civil), one non-jury civil trial or injunctive relief hearing, and three motion hearings; and~~

~~(ii) In a United States District Court, two jury trials (one to be criminal and one to be civil). Three of the litigation experiences may be obtained by satisfactory completion of an approved mock trial course. Up to six (6) of the nine (9) required trial~~

~~experiences may be obtained before admission to practice but only after completion of 60% of the credit hours required for law school graduation. The appearance of any member admitted to practice after January 1, 1988, as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case shall constitute a certification by such member to the court of compliance with the requirements of this Rule.~~

Trial MCLE. Each active member who appears as sole or lead counsel in the Superior or State Courts of Georgia in any contested civil case or in the trial of a criminal case in 1990 or in any subsequent calendar year, shall complete for such year a minimum of three (3) hours of continuing legal education activity in the area of trial practice. A trial practice CLE activity is one exclusively limited to one or more of the following subjects: evidence, civil practice and procedure, criminal practice and procedure, ethics and professionalism in litigation, or trial advocacy. These hours are to be included in, and not in addition to, the 12-hour (twelve) requirement. If a member completes more than three (3) trial practice hours, the excess trial practice credit may be carried forward and applied to the trial practice requirement for the succeeding year only.

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

Counsel for the State Bar of Georgia

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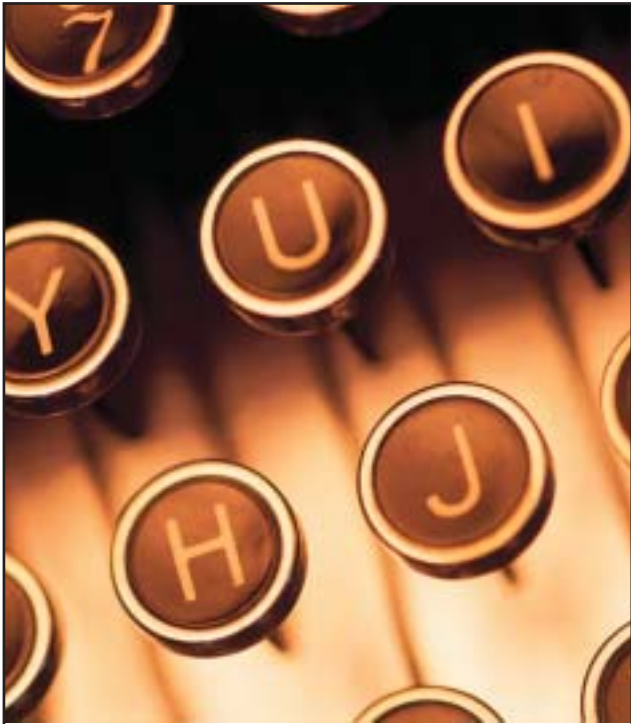
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	4f ccV_e=Z` Zcd+	5 VZVU=Z` Zcd+
	2__f Rj AcV` Z^ +	CVc` RteZV` cAcZ` c2Ted5 Rv+

2ee` c_ Vj Df cgY	CVJRZ_ e` 7Z^ 4` Ua` i@4/ @V` f_dJ iA/ARc` Vc iD'DJ` i6/6^ aJj WU2e` c_ Vj i:4/:_ UaV_UVe4`_aRte` c				
	=Zb` V2e` c_ Vj d3j ? R^ V i2aeRIYDARcRVDVMeZV VVdRj/	JVRc2U` ZeU e` 3Rc	JVRc;` Z` VU 7Z^	CVJRZ_ e` 7Z^ iFdRS` gVT Ua`	" EZ` VH` c`Z` X 7` c 7Z^ i@4 @_lj/

E9:D7@C> :D7@C 6DE:> 2E6 AF CA@D6D@? =J A]RdVReRIYR4` aj `WZ^ =VeVVRUR\_UR4` aj `VW` JZj 5VJ]RdRZ\_dARW  
iZVRZRSjVZ4` gVcRXV> Rj 3V3` f\_U@\_lj Fa` \_DfS^ ZHZ\_ 2\_U2TIVaR` TV` VR7f ] HVda` ce2aa]ZREZ`\_iHVda` ceZIR864`^`^ VCTZj 4`^` aR\_j Ž  
E` cVIVgVRWj Bf ZT\ Bf` eVa]VRdT` ^ a]VdLUVRiYR` Ucd` c\_ eYzicVf Vde` +  
:\_d` cR` TVdVIZRj Zed;\_ TŽ  
Ac` WHZ`\_Rj =ZSZj 5Varc` V\_e` f` A` Ž3` i` #) # (†?` cTc` dL82 S!`\*!#) # (†7R` %a) "%a!`\*`%  
`cT`\_dRte:D D2=6D5:C64E Re`i))! :Dl`\*`&` `c`%a) "%a!` #S#LM eŽ SS  
25:DA=BB2E32 2E32i` # S

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