



Georgia  
Bar

# Journal

August 2002 • Volume 8 • Number 1

**James B. Durham**  
**40th State Bar President**



## Quick Dial

Attorney Discipline	(800) 334-6865 ext. 720
	(404) 527-8720
Consumer Assistance Program	(404) 527-8759
Conference Room Reservations	(404) 527-8712
Fee Arbitration	(404) 527-8750
CLE Transcripts	(404) 527-8710
Diversity Program	(404) 527-8754
ETHICS Hotline	(800) 682-9806
	(404) 527-8741
Georgia Bar Foundation/IOLTA	(404) 588-2240
Georgia Bar Journal	(404) 527-8736
Lawyer Assistance Program	(770) 612-1122
	(800) 327-9631
Lawyers Foundation of Georgia	(404) 659-6867
Law Practice Management	(404) 527-8772
Membership Records	(404) 527-8777
Meetings Information	(404) 527-8790
Pro Bono Project	(404) 527-8763
Professionalism	(404) 225-5040
Sections	(404) 527-8774
Unauthorized Practice of Law	(404) 527-8743
Young Lawyers Division	(404) 527-8778

## Manuscript Submissions

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: Joe Conte, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; phone: (404) 527-8736; joe@gabar.org.

## Disabilities

If you have a disability which requires printed materials in alternate formats, please contact the ADA coordinator at (404) 527-8700 or (800) 334-6865.

## Headquarters

104 Marietta St. NW, Suite 100  
Atlanta, GA 30303  
(800) 334-6865 (404) 527-8700 FAX (404) 527-8717  
www.gabar.org

South Georgia Office  
244 E. Second St. (31794) P.O. Box 1390  
Tifton, GA 31793-1390  
(800) 330-0446 (912) 387-0446 FAX (912) 382-7435

# Georgia Bar Journal

August 2002 ■ Volume 8 ■ Number 1

## Editorial Board

Rebecca Ann Hoelting

### Editor-in-Chief

Scott Fain Bertschi	W. Fray McCormick
Elizabeth Lee Branch	E. Peyton Nunez
Erin Reynolds Chance	Erick H. Rock
Charles Madden Cork III	Cynthia B. Smith
Lynda Carney Crum	John I. Spangler III
John Michael Gross	Robert R. Stubbs
Michelle Wilkins Johnson	Jerre Bailey Swann Jr.
Sarah Howard Lamar	Kristin H. West
Marcus D. Liner	Pamela Y. White-Colbert

## Advisors

Theodore Harris Davis Jr.  
D. Scott Murray  
Marisa Anne Pagnattaro

## Editors Emeritus

Marisa Anne Pagnattaro, 01-02	L. Dale Owens, 87-89
D. Scott Murray, 00-01	Donna G. Barwick, 86-87
William Wall Sapp, 99-00	James C. Gaulden Jr., 85-86
Theodore H. Davis Jr., 97-99	Jarry B. Blackstock, 84-85
L. Brett Lockwood, 95-97	Steven M. Collins, 82-84
Stephanie B. Manis, 93-95	Walter M. Grant, 79-82
William L. Bost Jr., 91-93	Stephen E. Raville, 77-79
Charles R. Adams III, 89-91	Robert H. Walling, 75-77

## Officers of the State Bar of Georgia

James B. Durham	President
William D. Barwick	President-Elect
Robert D. Ingram	Secretary
George Robert Reinhardt Jr.	Treasurer
James B. Franklin	Immediate Past President
Derek J. White	YLD President
Andrew W. Jones	YLD President-Elect
Peter J. Daughtery	YLD Past President

## Communications Committee

William H. Dodson II	Chairperson
Aasia Mustakeem	Vice-Chairperson

## Communications Staff

Joe Conte	Director
Robin E. Dahlen	Assistant Director
Sarah I. Bartleson	Communications Coordinator





#### On the Cover

State Bar President James B. Durham was inaugurated June 16, 2002. He is pictured with his wife, Kathleen, and their daughters, Rebecca, 13, and Sarah, 5. The Durhams were photographed amid the historic Avenue of Oaks at The Lodge at Sea Island Golf Club on St. Simons Island, Ga., where the Durhams reside.

*Photography by:  
J. David Miller*

## Departments

- 4 Letter to the Editor
- 6 From the President
- 8 From the Executive Director
- 10 From the YLD President
- 74 Bench & Bar
- 77 Office of the General Counsel
- 79 Lawyer Discipline
- 81 Law Practice Management
- 84 Professionalism Office
- 85 Section News
- 89 In Memoriam
- 90 Book Review
- 91 CLE Calendar
- 94 Notices
- 96 Classified Resources

# Georgia Bar Journal

August 2002 ■ Volume 8 ■ Number 1

## Legals

- 12 Proving Disability in the Performance of Manual Tasks:  
The Supreme Court's Latest ADA Decision  
By Warren R. Hall Jr. and Emily S. Sanford
- 24 The Georgia Higher Education Savings Plan: Georgia's Qualified  
Tuition Program Offers Substantial Tax Benefits  
By Benjamin H. Pruett

## Features

- 38 The Sunshine State Welcomes the State Bar of Georgia  
By Robin E. Dahlen
- 45 Notice of Expiring BOG Terms; Election Schedule
- 46 Setting the Course  
By James B. Durham
- 51 Ending the Year as it Began...Proud to be a Georgia Lawyer  
By James B. Franklin
- 55 David H. Gambrell Receives Bar's Highest Honor  
By James B. Franklin
- 56 Spotlight Shines on Outstanding Leaders  
By Robin E. Dahlen
- 60 Medical Insurance Task Force Report  
By H. James Winkler
- 65 Charitable Solicitation Over the Internet  
By Leah M. Singleton and Rhonda R. Morgan
- 71 The Grand Old Courthouses of Georgia – The Elbert County  
Courthouse at Elberton  
By Wilber W. Caldwell

### Publisher's Statement

The *Georgia Bar Journal* (ISSN-1085-1437) is published six times per year (bi-monthly) by the State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. © State Bar of Georgia 2002. One copy of each issue is furnished to members as part of their State Bar dues. Subscriptions: \$36 to non-members. Single copies: \$6. Periodicals postage paid in Atlanta, GA. Opinions and conclusions expressed in articles herein are those of the authors and not necessarily those of the Editorial Board, Communications Committee, Officers or Board of Governors of the State Bar of Georgia. Advertising rate card will be furnished upon request. Publishing of an advertisement does not imply endorsement of any product or service offered. POSTMASTER: Send address changes to same address.

### Advertisers Index

AAA Attorney Referral Service. . . . .	57	Golden Lantern . . . . .	44
ABA Members Retirement Program	37	Gregory Connor . . . . .	15
ANLIR. . . . .	9	Insurance Specialists, Inc. . . . .	43
Arthur Anthony. . . . .	27	LexisNexis . . . . .	2
Best Law Firm Solutions. . . . .	19	Mainstreet . . . . .	67
DSI Technology . . . . .	39	Merchant & Gould. . . . .	23
Daniel Turner Builders . . . . .	59	Mitchell Kaye Valuation . . . . .	53
ELPDG, Inc. . . . .	72	Real Estate Exchange Services. . . . .	7
Embassy Suites . . . . .	72	SoftPro Corporation. . . . .	69
Enovin, Inc. . . . .	80	South Georgia ADR Service, LLC . . . . .	5
Georgia Lawyers Insurance Co. . . . .	IBC	West Group. . . . .	11, 49, 61, 96, BC
Gilsbar, Inc. . . . .	17		

# Lessons Learned in the Wake of Tragedy

*Following are excerpts from a March 2002 letter sent to State Bar of Georgia member Ben Shapiro by Frank Loomis, also a Bar member, following the September 11 terrorist attacks. Loomis' firm, Hill, Betts & Nash LLP, had offices in the World Trade Center.*

**M**y deepest apologies for being a no-show at last Saturday's 35th Emory Law School Reunion. I made the mistake of deciding to drive from Miami to Atlanta and had car trouble in central Georgia. I didn't arrive in Atlanta until past 10:30 p.m. on Saturday.

You have no doubt heard of countless tales of heroism on behalf of the New York City's uniformed services, as well as ordinary New Yorkers. As an attorney, however, there is a story about another attorney, Glen Winuk — a partner then at Haight, Gardner (later in Holland and Knight's New York office) — who was a volunteer fireman in a small New Jersey town. On Feb. 26, 1993, the date of the World Trade Center bombing, he donned a helmet and raced from his Broadway office one block from the Trade Center complex and assisted in the evacuation of the buildings. More than eight years later, on the morning of 9/11, he again raced to assist in the evacuation of the complex, but this time he perished.

At 8:46 a.m. on 9/11, when the first plane struck Tower One, I was arriving in Hoboken, N.J., to catch the Path train (subway) to the basement of the World Trade Center in downtown New York's Path terminal — the other Path train system's Manhattan terminal station is at Sixth Avenue and 32nd Street. Needless to say, the Path was immediately closed and I stood with hundreds of other commuters staring across the Hudson River at Tower One, with smoke billowing out of the north side of Tower One from a gaping hole around the 80th floor. I was fearful for those who would

be in our office, which was the 52nd floor of Tower One. Less than a half-hour later, a second aircraft, obviously aiming for Tower Two, crashed into the south side of Tower Two, and it was then that the commuter crowd realized that we were under attack.

To the best of my knowledge, no one in Tower One escaped above the point of impact of the first aircraft, including many on the 110th floor who were having a complimentary breakfast, which was offered daily by the World Trade Center Club. Only a very few escaped above the point of impact in Tower Two and of those few all were severely burned. A large number of people who perished worked in the bond and stock trading industry, as well as the insurance industry, because they customarily come to work early by New York standards. Had Mohammed Atta and his fellow terrorists known that New Yorkers generally work late, but also generally come to work late and planned the attack to occur shortly after 9:30 a.m., countless others would have perished.

By noon on 9/11, I was finally able to reach our small Newark office (the telephones were barely functioning) and learned that it appeared that no one from our office had perished. In point of fact, only seven people were in our office at 8:46 a.m. and they all escaped.

On 9/12, those of us who had access to transportation met in our Newark office. We were a pretty depressed group. We had lost our principal office, which we had occupied since March 1973. Most importantly, we had lost our files, some of which contained the only originals or copies of clients' documents. And then, it began to dawn on us that our glass was not half-empty, but rather overflowing since we all had escaped without serious physical injury, although many suffered emotional injury that lingers today.


The moral support and encouragement we received from here and abroad were fantas-

tic. We heard from old friends, classmates, new, old and former clients, attorneys we had worked with and against — and even ex-spouses! For almost a month after 9/11, we spent a good portion of our time responding to or talking with our well wishers. Within nine days, we found temporary, furnished space in midtown, although only 40 percent of the size of our old downtown office. By October 1, we were off and limping, if not running.

In the months following 9/11, we have seen the best in most people. People of all races in New York City have been closer than ever before. Astonishingly, New Yorkers have been by and large kinder, more

generous and even more polite to each other. Real estate agents didn't gouge because of the instant need for replacement Manhattan office space. Opposing law firms — even the bitterest enemies — assisted us. Contrary to the old adage that practicing law would be fun if we didn't have to deal with our clients, our clients were most accommodating, even though they were seriously inconvenienced. Surprisingly, we didn't lose a single client because of 9/11. Indeed, several clients voluntarily advanced substantial six-figure fees for work performed but not yet billed and on account of work to be performed in the future — and they wouldn't take no for an answer.

While we were inconvenienced and certainly stressed by 9/11 like many entities in the Trade Center Complex, unlike many we didn't actually suffer. The lesson for me as a lawyer is that a law firm does not mean a spacious, elegant office, a view of the New York Harbor, the Statute of Liberty and Ellis Island, a state-of-the-art computer system, antiques, memorabilia of 102 years, a spacious library and other amenities. A law firm is a group of people. Keep that group of people, take everything else away and you can go forth and prosper.

Sorry to have missed you and my classmates. 

Sincerely,  
Frank H. Loomis



By James B. Durham

## The Common Thread We Share

**D**uring my senior year of high school I was fortunate to have an excellent American government teacher who was fascinated by the historical effects of United States Supreme Court decisions on our nation. For two quarters we analyzed Supreme Court decisions. We learned about *Marbury v. Madison*, *Brown v. The Board of Education*, and *Gideon v. Wainwright*. We discussed and argued decisions based on the police powers, the interstate commerce clause and an individual's right to privacy. That course fascinated me, and I knew then that I wanted to be a lawyer.

At some point during our lives, each of us made the decision to become a lawyer. It is the common thread all of us share.

At some point during our lives, each of us made the decision to become a lawyer. We made our decisions in different manners, at different times and, perhaps, with different convictions. But, nonetheless, we all made the same decision. It is the common thread all of us share.

The State Bar of Georgia comprises more than 32,000 lawyers. Although our decision to practice law unites us, we are diverse in almost every other way. We come from different schools, different socio-economic backgrounds, different geographic locations, different races, different practices and

different-sized firms. We possess different interests, political philosophies and religious beliefs. The likelihood of all Georgia lawyers agreeing on any particular issue is unlikely. Our diversity, however, is one of our great strengths. We bring different perspectives, analysis and abilities to almost every issue we face. The diverse perspectives and abilities of the lawyers of Georgia give the State Bar the necessary resources to address issues facing our profession.

One of the critical issues lawyers face this year is the future of indigent defense in Georgia. The State




Bar of Georgia has sought increased financial support for indigent defense in our state for years. Unfortunately, there is hardly any constituency of support for indigent defense. Lawyers have carried the principal responsibility in providing indigent defense. Providing a competent defense for indigents accused of a crime is not only a lawyer's responsibility, but it is also society's responsibility.

A citizen's right to defend himself or herself when accused of a crime remains a cornerstone of freedom in our country. Without the appropriate resources we cannot provide this hallmark freedom intended by our forefathers. Now is the time for the state to accept this responsibility. With the expected decision of the Supreme Court Commission on Indigent Defense in September of this year, this could be the best opportunity since the 1960s that the State Bar has had to facilitate the change we have recommended. As this issue moves to the forefront, we need the input, the support and the energy of all the lawyers in Georgia to help bring about a long-awaited change in a system that defines our state and country.

We face other issues, as well. Multidisciplinary practice, referred to as MDP, has been and is being discussed in every bar in this country. MDP occurs whenever practitioners of two or more distinct disciplines or businesses join together to offer services to the public. Some argue that MDP attacks the core values of our profession, while others argue that MDPs, if controlled by attorneys and our ethical standards, could lead to lower overall costs of services and greater accessibility of legal services. This is an issue the lawyers of Georgia need to address.

In addition, bars across the country are addressing the issue of multijurisdictional practice (MJP). Many of the activities we have taken for granted for years, such as taking depositions out of state for a case pending in Georgia, meeting with clients out of state on matters pertaining to business transactions within Georgia, and others, have been called into question as to whether such activities constitute the unauthorized practice of law. Can a lawyer perform any legal activity in a state where he or she is not licensed, even if the principal representation occurs in his or her state? The Board of Governors is currently reviewing this matter and has been seeking input from lawyers across the state in a variety of practices.

I have mentioned only a few of the issues we will be addressing during this year. Each year new issues arise that we did not anticipate, but which we must be ready to address. Through the strength of our diversity and bound by our common interest in the practice of law, we should be able to make great progress with the issues that face us and those that may arise.

The same excitement and enthusiasm I felt more than 25 years ago in that American government class exist today as this Bar year begins. As we serve our clients and profession, I hope the memory of our initial enthusiasm for the law will motivate each of us to protect the core values of our profession and to seek improvement in the administration of justice in our state. 





By Cliff Brashier

## Mandatory By Design Voluntary By Nature

**Y**ou have to be a member, but you don't have to be involved. This is the reality of our organized, mandatory State Bar of Georgia. But each year at this time, I am reminded of just how devoted and dedicated a group of lawyers we have in Georgia.


At the Bar's annual meeting, awards are distributed to members who have given of themselves throughout the year. There are also countless awards given by other professional, law-related groups throughout the year and other varied functions. This year, the State Bar, as it does each year at the annual meeting, honored Georgia lawyers for their work in pro bono activities, in State Bar sections, in local and voluntary bars, and we instituted a new award for professionalism. This new award is given by the Bench and Bar Committee to one attorney member and one judicial member who "have and continue to demonstrate the highest professional conduct and paramount reputation for profession." Ed Tolley and Chief Judge E. Purnell Davis are certainly deserving of this charter award.

Of course, it is a difficult task selecting the recipients from among so many deserving members, but the Bar's committees and leadership do an excellent job of recognizing the truly deserving. There are so many groups and individuals worthy of recognition for all that they do and contribute. The annual meeting provides a good forum to honor people, but time constraints on the event keep the presentations brief. We should spend much more time throughout the year honoring our profession and those who vol-

unteer toward its betterment.

Within the Bar, there are thousands of active members who regularly give of their time and talents. Consider that the Bar now has 35 active sections and 50 active committees. We often fail to mention the considerable work of the Bar's Board of Governors and Executive Committee, and what a commitment it is for these 150+ individuals to serve their profession. These groups very quietly go about the business of the Bar and devote countless hours, at their own expense, to serve the lawyers of Georgia.

More complete coverage of this year's award recipients begins on page 55 of this *Bar Journal*. I urge all members to read through the information and congratulate the recipients for their work. And, if you aren't currently active in our Bar, please consider getting involved. I can almost guarantee that you will find a sense of professional and personal growth and development for taking part in your profession. And I can almost guarantee the profession will be better for having your input.

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

Within the Bar,  
there are  
thousands of  
active members  
who regularly  
give of their  
time and talents.





Most of us, if not all, feel like doing anything but laugh when our profession is the focus of these seeming jokes.

By Derek J. White

## **“Every Single Act Either Weakeneth or Improveth Our Credit With Other Men”<sup>1</sup>**

I am willing to wager that the last time you heard a joke about a career it concerned our noble profession. How did you feel? Did you feel somewhat uneasy? Or, did you feel down right angry? Did it make you wonder if the person telling the joke truly understands that our profession protects his right to tell the joke?

One frequently misconstrued quote that really gets me going is Shakespeare’s “kill all the lawyers.” Much of society believes Shakespeare was advocating for a society without lawyers, when actually he was profoundly expressing the true need for the protection from tyranny that only lawyers can and do provide.

Most of us, if not all, feel like doing anything but laugh when our profession is the focus of these seeming jokes. I can only surmise that the reason our profession remains in the forefront as the buttress for these remarks is due to society’s lack of knowledge of our collective good deeds — deeds that “improveth our credit” with others.

Most often, society’s only exposure to our profession and our contributions to our communities is molded by what is read in newspapers or seen on television shows. This skewed learning curve, resulting from the media’s tendency to sensationalize and dramatize the legal profession, perpetuates the negative opinion under which we currently labor.

Unfortunately, to “improveth our [profession’s] credit” in today’s world, we must now take the time to share our good deeds with the positive spin they deserve. Over the last couple of years, I have befriended many attorneys who are actively involved in their respective communities, yet they do not share their



good deeds with anyone. This is perfectly understandable, as none of us are involved for the sake of publicity or glory. In fact, we do it for the betterment and sake of our communities. However, we have been the target of negative publicity for too long. No one will actively promote our good name and our noble position in society, especially in the state of Georgia, for us. We are charged with doing it ourselves and the time to do it is now.

Each year the YLD has a long range planning retreat, wherein the theme for the upcoming year is generated and then implemented. Pete Daughtery, our immediate past president, focused on Georgia's children this past Bar year. The YLD's theme for this year is community involvement. Not only will we focus on community volunteerism, but we will emphasize improving society's perception of our profession by actively sharing the many contributions of the individual Bar members in their respective communities.


With this in mind, the YLD has created a new director's position — the community volunteerism director. We are grateful to Elena Kaplan and Chandra Tutt<sup>2</sup> for agreeing to be co-directors this year. They have a daunting task before them, but are most capable of handling the challenge ahead. Tutt and Kaplan are currently devising the means and methodology to best serve our objectives for the year. Please convey your community involvements and recognitions to them so that they may share them with the rest of the Bar and the public.

Additionally, I will provide you with the community involvement of each of our State Bar Board of Governors in future *Georgia Bar*

*Journal* articles. I envision utilizing one page solely for publicizing the community involvement of our leaders. While this article is being written prior to the 2002 Annual Meeting, I expect to report in my next column that the Board of Governors support this year's theme 100 percent and will each volunteer personal time during this Bar year to the community involvement of their choosing. Odds are, most Board of Governors members are already volunteering and will pledge to continue their many good deeds.

In keeping with the past, the YLD will continue to provide services to the profession and the public through its many committees and dedicated volunteers. The following people have volunteered to serve as YLD directors this year: James R. Doyle II; Leigh Martin; Daniel B. Snipes; Janne McKamey Lopes; Veronica Brinson; Marc E. D'Antonio; Malcolm L.H. Wells; Michelle Adams; Ali Marin; Jonathan A. Pope; Steve Lowery; Bryan D. Scott; Amanda A. Farahany; Laurel P. Landon; Tilman "Tripp" Self III; Zahra S. Karins h a k ; Chandra C. Tutt; and Elena Kaplan. With their leadership, this year is bound to be stellar.

Finally, I must state that I feel very privileged to

serve as your president this year. I was most fortunate to serve as president-elect under the tutelage and guidance of our Immediate Past President Pete Daughtery. As my close friend, he has taught me how to have fun. As a dedicated father to his daughter, Meg, he has taught me patience. And, as our president, he has taught me how to serve others. I am especially grateful for this last trait, as he has left very big shoes to fill. Please let me know how I can best serve you. 

## ENDNOTES

1. *The Complete Works of George Savile, First Marquess of Halifax*. (1789).
2. Tutt may be reached at [chandra.tutt@bellsouth.com](mailto:chandra.tutt@bellsouth.com) and Kaplan may be reached at [elena\\_kaplan@yahoo.com](mailto:elena_kaplan@yahoo.com).

By Warren R. Hall Jr.  
and Emily S. Sanford

# Proving Disability in the Performance of Manual Tasks:

## The Supreme Court's Latest ADA Decision

**B**esides the U.S. Tax Code, the Americans with Disabilities Act (ADA)<sup>1</sup> is one of the most logistically confusing, but widely applicable statutes. The ADA's ideal is simple enough: prohibit discrimination against disabled persons. Nevertheless, in practice, the ADA has been a seemingly unending source of ambiguity and uncertainty. Bit by bit, however, the Supreme Court has stemmed the tide of confusion. In January 2002, the Court issued a decision in *Toyota Motor Manufacturing, Kentucky v. Williams*, clarifying in part a previously muddled aspect of the ADA: defining disability on the basis of an impaired ability to perform manual tasks.<sup>2</sup>

A complete and accurate understanding of *Toyota*, including an appreciation for the limitations of its holdings, is essential to any attorney in Georgia (or elsewhere) practicing law under Title I of the ADA.<sup>3</sup> This is true for several key reasons. First, defining a disability is a threshold inquiry for virtually every ADA employment case. Before even tackling complex subjects like "essential functions," "reasonable accommodation" or "direct threat," practitioners must first evaluate whether there exists a "disability" in the first place. If not, the ADA inquiry is concluded.

Second, the number of potential ADA manual task cases in the workforce is staggering. In 1999, employees reported almost 28,000 injuries due to carpal tunnel syndrome alone.<sup>4</sup> Lawyers practicing in the field of ADA employment law who have not yet addressed a manual task issue are overdue.

Third, unlike traditionally understood major life activities such as walking, seeing or hearing, all manual tasks are not necessarily major life activities under the ADA. "Manual tasks" is simply a semantic categorization of activities performed by people with their hands. Some manual tasks may constitute a major life activity, while others may not.

The goal of this article is not to provide an in-depth analysis of the ADA as a whole, but rather to introduce the reader to *Toyota*, placing it in the context of the ever-changing landscape of the ADA, and to explore some of the practical implications of the decision for Georgia lawyers.

## SHAPING THE DEFINITION OF DISABILITY

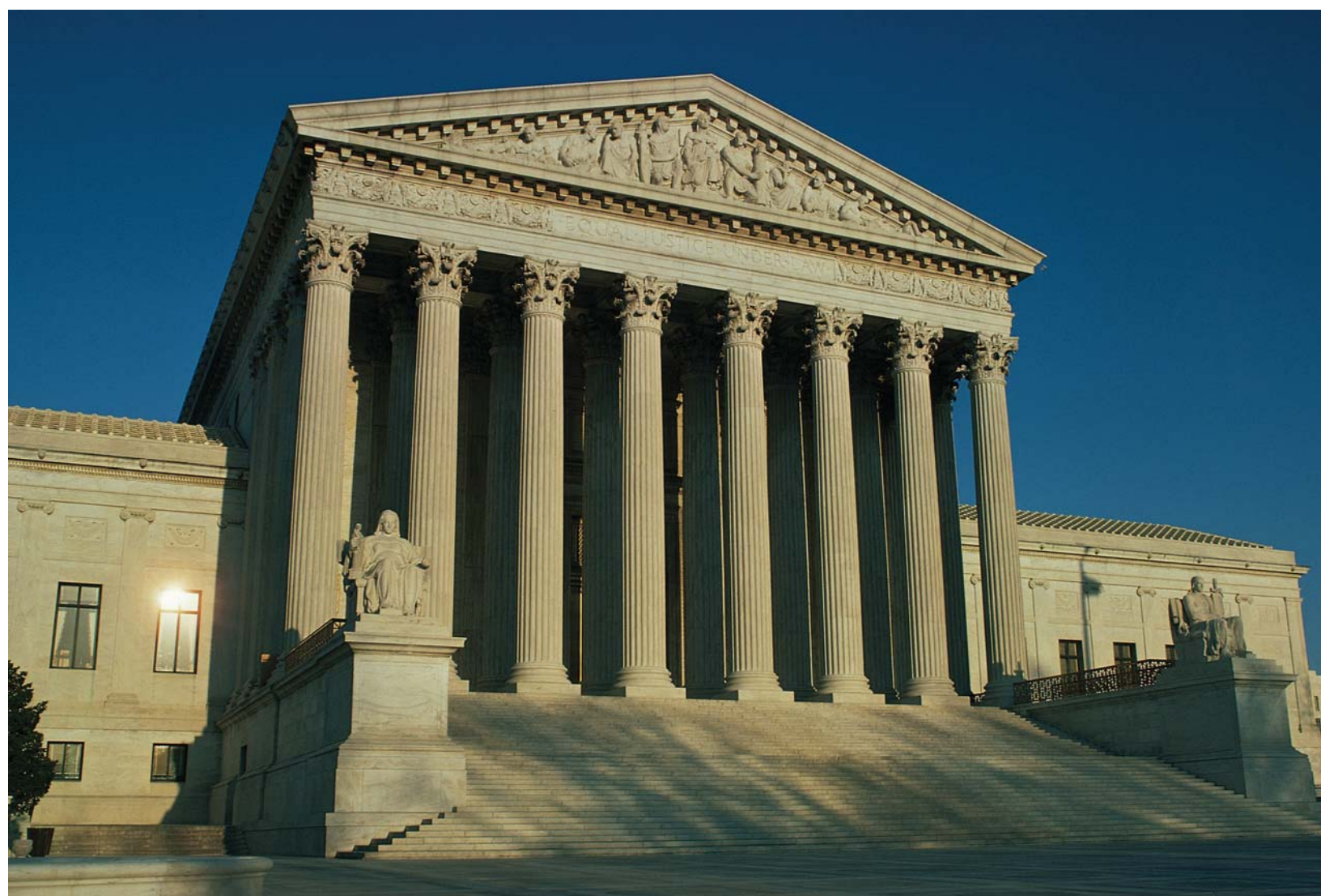
Since the ADA's enactment in 1990, the Supreme Court has shaped the contours of the definition of the term "disability," sometimes interpreting the Act broadly and sometimes narrowly.<sup>5</sup> In recent years, the Court has narrowed the scope of the ADA's coverage. In a 1999 trilogy of cases, the Court bucked the overwhelming weight of authority in the Courts of Appeals and the regulations of the Equal Employment Opportunity Commission (EEOC) by holding that mitigating, corrective meas-

ures must be considered in determining whether or not an employee is disabled under the ADA.<sup>6</sup> These decisions raised the bar — often to an unpassable level — for many ADA plaintiffs. It is no coincidence that in fiscal year 2000, the number of ADA charges received by the EEOC dropped to the lowest number since fiscal year 1993 — the first full year of EEOC enforcement.<sup>7</sup>

In *Toyota*, the Court again entered the disability definition fracas, this time addressing important and confusing questions surrounding whether and to what extent limitations in performing manual tasks can constitute a disability under the ADA. In keeping with its recent trend, the Court

once again restricted the scope of what is a disability under the ADA.

Before exploring the details of *Toyota*, one must first understand the concept of "disability" within the meaning of the ADA. The ADA offers protection in an employment context only to qualified individuals with disabilities. The threshold issue for evaluating any employment claim under the ADA is whether the subject individual suffers from a "disability" as defined under the ADA. The ADA defines "disability" as any one of the following: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; (B) a record of such an impairment; or





(C) being regarded as having such an impairment.”<sup>8</sup> In common parlance, a claimant must either have a disability, have a record of a disability, or be regarded as having a disability in order to state a claim for violation of Title I of the ADA.

The precise meaning of the terms that comprise the definition of “disability” under the ADA are themselves nowhere defined in the Act itself. The viability of every ADA employment case hinges first on whether the plaintiff has a physical or mental “impairment” that “substantially limits” a “major life activity.” Either unable or unwilling to reach agreement on the meaning of the three terms which form the cornerstone of the Act, Congress left these issues to be resolved by the courts.<sup>9</sup> Hence the confusion, and hence the steady trickle of ADA cases reaching the Supreme Court’s docket.

## **TOYOTA MOTOR MANUFACTURING, KENTUCKY V. WILLIAMS**

Williams, the plaintiff in *Toyota*, who had worked as an assembly line worker at one of Toyota’s manufacturing plants, developed carpal tunnel syndrome and requested an accommodation of her condition. Toyota placed Williams on a quality control inspection team and, for a couple of years, she rotated on a weekly basis between two tasks assigned to her team. In 1996, Toyota altered the quality control inspection job to require employees to rotate through all of the tasks associated with the quality control process. Her revised job required Williams to perform tasks holding her hands

and arms around shoulder height for several hours at a time while applying oil to cars at a rate of one car per minute. Shortly after this task was added to her rotations, Williams began experiencing pain in her neck and shoulders and was diagnosed with a form of tendinitis and carpal tunnel syndrome. Williams requested that Toyota accommodate her medical condition by allowing her to avoid the tasks which caused her difficulty. Toyota did not grant the request for accommodation and subsequently discharged Williams for poor attendance.<sup>10</sup>

Williams sued Toyota under the ADA, alleging, among other things, that the company failed to reasonably accommodate her disability and terminated her employment because of her disability. Williams based her disability claim on the ground that her physical impairments substantially limited her in the following activities, all of which she argued constitute major life activities under the Act: (1) manual tasks; (2) housework; (3) gardening; (4) playing with her children; (5) lifting; and (6) working.<sup>11</sup>

The district court granted summary judgment for Toyota, finding that Williams was not disabled under the Act. While she had suffered from a physical impairment, that impairment did not qualify as a disability because it had not substantially limited her ability to engage in any major life activity.<sup>12</sup> The court rejected Williams’s contention that gardening, doing housework and playing with children are major life activities. And, although the court agreed that performing manual tasks and working are major life activities, it found the evidence presented by Williams

insufficient to demonstrate that she was substantially limited in these activities.<sup>13</sup>

On appeal, the Sixth Circuit took a different view. It reversed the grant of summary judgment, finding that Williams was substantially limited in the major life activity of performing manual tasks because her condition prevented her from being able to perform a class of jobs that require the gripping of tools and repetitive work with her hands and arms extended above shoulder-level for extended periods of time (e.g., manual assembly-line jobs, manual product-handling jobs and manual building-trade jobs, such as painting, plumbing, roofing, etc.). In reaching this decision, the Sixth Circuit disregarded evidence that Williams could take care of her personal hygiene and engage in personal and household chores, stating that such evidence did not affect a determination that her medical condition substantially limited her ability to perform “the range of manual tasks associated with an assembly line job.”<sup>14</sup>

The United States Supreme Court granted a *writ of certiorari* to the Sixth Circuit to consider the proper standard for assessing whether an individual is substantially limited in performing manual tasks. The Supreme Court ultimately reversed the Sixth Circuit’s determination that Williams was disabled and held that she was not substantially limited in performing manual tasks at the time she requested an accommodation. In reaching this conclusion, the Court engaged in a two-fold analysis.<sup>15</sup> First, the Court examined the concept of what constitutes a major life activity. Second, the Court considered the degree to which an individual’s ability to engage in a

major life activity must be impaired in order to rise to the level of “substantially limited.”

**Defining the Major Life Activity of Performing Manual Tasks** — Interestingly, the *Toyota* Court took little time evaluating whether “manual tasks” can qualify as a major life activity. The Court instead focused its attention on the obvi-

ous inquiry into personal and household chores integral to everyday living, the Sixth Circuit was also incorrect in restricting its analysis to “occupation specific tasks.”<sup>19</sup> Using Williams’s claim as an example, “‘repetitive work with hands and arms extended at or above shoulder levels for extended periods of time’” is simply not an

tory of the ADA.<sup>24</sup> Accordingly, the Court zeroed in on a self-described “demanding standard” as follows:

*We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities*

**Williams sued Toyota under the ADA, alleging, among other things, that the company failed to reasonably accommodate her disability and terminated her employment because of her disability.**

ous fact that not all manual tasks rise to the level of major life activities: “In order for performing manual tasks to fit into [this] category [of major life activities] — a category that includes such basic abilities as walking, seeing, and hearing — the manual tasks in question must be central to daily life. If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so.”<sup>16</sup>

Applying this standard to the facts in *Toyota*, the Court found that the Sixth Circuit erred by defining the major life activity of performing manual tasks to require only a showing of impairment in a “‘class of manual activities’” affecting “‘the ability to perform tasks at work.’”<sup>17</sup> Not mincing words, the Court rejected this analysis, stating that “the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people’s daily lives, not whether the claimant is unable to perform tasks associated with her specific job.”<sup>18</sup> While the Sixth Circuit had flatly ignored the rele-

important part of most people’s daily lives.<sup>20</sup> Henceforth, the mere inability to perform manual tasks necessary for a particular job or class of jobs is insufficient to prove a limitation in the major life activity of performing manual tasks.

**Substantial Limitation** — Having outlined the major life activity of performing manual tasks, the *Toyota* Court addressed the next issue seriatim: to what extent must a claimant be limited in the performance of the activity or activities which are “of central importance to most people’s daily lives?” The superficial answer provided by the ADA is of little help: the limitation must be “substantial.”

Case law has made apparent that “substantial” under the ADA means different things depending on the context in which the issue arises.<sup>21</sup> Taking aim at the moving-target definition of “substantially limiting,” in *Toyota* the Court set its sights on determining “what a plaintiff must demonstrate to establish a substantial limitation in the specific major life activity of performing manual tasks.”<sup>22</sup> The Court drew insight from both the dictionary<sup>23</sup> and the legislative his-

*that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long-term.*<sup>25</sup>

Congress intended the existence of a disability to be determined on a case-by-case basis.<sup>26</sup> This standard cannot be met by mere evidence of a medical diagnosis of a condition that limits manual tasks in general.<sup>27</sup> “Instead, the ADA requires those ‘claiming the Act’s protection . . . to prove a disability by offering evidence that the extent of the limitation [caused by their impairment] in terms of *their own experience* . . . is substantial.”<sup>28</sup>

An individualized assessment is particularly necessary where the impairment is one whose symp-

toms vary widely from person to person, such as carpal tunnel syndrome.<sup>29</sup> For instance, some individuals suffering from carpal tunnel have severe symptoms such as “muscle atrophy and extreme sensory deficits,” whereas others have only mild symptoms like “numbness and tingling.”<sup>30</sup> Given this wide spectrum of severity and duration, an individual’s diagnosis of carpal tunnel, by itself, does not determine whether the individual is disabled under the ADA.<sup>31</sup> An individual claiming to be disabled must offer evidence that the symptoms actually suffered as a result of a particular medical condition (as opposed to symptoms that are commonly associated with such condition) are substantially limiting.<sup>32</sup>

In summary, to be substantially limited in the major life activity of performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. Having failed to adhere to this standard in the courts below, the Supreme Court reversed and remanded Williams’s case for evaluation of whether she could satisfy the newly elucidated manual task disability standard.

## PRACTICAL IMPLICATIONS OF TOYOTA FOR GEORGIA LAWYERS

*Toyota* answered many important questions that will assist practitioners in evaluating potential ADA claims. For example, it is now clear that only manual tasks which

are “of central importance to most people’s daily lives” constitute major life activities. In addition, in order to be substantially limited in the major life activity of performing manual tasks, a claimant must be either prevented or severely restricted from performing the manual tasks in question. The impairment must be either permanent or long-term. And, a mere diagnosis will not suffice to establish a substantial limitation; a claimant must show the extent of the limitation in his or her own life.

Despite *Toyota*’s clarifications, many crucial questions remain unanswered with respect to whether a potential claimant’s condition in fact substantially limits the major life activity of performing manual tasks.

**WHICH TASKS ARE CENTRALLY IMPORTANT TO PEOPLE’S DAILY LIVES?** — Assuming the threshold existence of a physical or mental impairment, the first issue that must be addressed is whether the impairment affects a major life activity. To constitute a major life activity, a manual task must be central to most people’s daily lives. As usual, the Supreme Court declined to provide an exhaustive list of manual tasks which are central to daily life. While the Court did identify a few tasks that fit the mold, including “household chores, bathing, and brushing one’s teeth,”<sup>33</sup> it offered few hints on how to evaluate the myriad of other manual tasks which fall much closer and just on either side of the line.

One clue is that “manual tasks unique to any particular job are not necessarily important parts of most people’s lives.”<sup>34</sup> What about manual tasks which are common to many jobs and are common activi-

ties in people’s non-work lives? Take computer usage as an example. Typing or moving a computer mouse certainly was not central to daily life 15 to 20 years ago. But, in an era in which more than half of all households have computers, might these activities have become central to daily life in the decade since the birth of the ADA? Conversely, has the emergence of computers relegated writing to a mere ancillary status?<sup>35</sup>

Moreover, could the activities central to daily life vary along cultural or geographic lines? For instance, driving a car requires the performance of manual tasks. Is it possible that the United States District Court for the Northern District of Georgia, Atlanta Division, would deem driving to be central to most peoples’ daily lives, whereas the Southern District of New York, Manhattan Division, might not?<sup>36</sup> Similarly, would the inability to shovel one’s driveway clear of snow be central to daily life in Albany, New York and Albany, Georgia?

Obviously, these are merely rhetorical questions that have yet to be answered. Nevertheless, these are examples of the type of questions that practitioners should ask themselves in assessing whether certain manual tasks will be deemed to be major life activities by a court. The real impact of *Toyota* remains to be seen in this regard, and lower courts no doubt will struggle with these concepts in years to come.

**HOW MANY MANUAL TASKS CENTRAL TO DAILY LIFE MUST BE LIMITED TO CONSTITUTE A DISABILITY?**— Having identified which manual tasks are affected by an impairment and having determined which of those tasks are central to daily life,



the question arises whether there is some threshold number of activities that must be affected to rise to the level of a disability. Not surprisingly, *Toyota* gives little guidance in this regard as well. The Court cryptically stated: "If each of the tasks included in the major life activity of performing manual tasks does not independently qualify as a major life activity, then together they must do so."<sup>37</sup> This sentence seems to suggest that, if any one particular task affected by an impairment does not, by itself, constitute a major life activity, then all of the tasks that are affected must be considered in the aggregate in determining whether a major life activity is involved. Yet, the *Toyota* Court

chastised the Sixth Circuit for adopting the "idea that a 'class' of manual activities must be implicated for an impairment to substantially limit the major life activity of performing manual tasks."<sup>38</sup> Despite this apparent contradiction, it seems clear that virtually every major-life-activity analysis of the manual tasks will involve consideration of an assortment of tasks.

So, the Supreme Court analysis begs the question: what is a sufficient number of tasks in such an assortment to qualify as a disability? As usual in the world of the ADA, there is no magic number. The Supreme Court is leaving it up to lower courts to make this determination. While it certainly is not

uncommon for the Supreme Court to leave the minutiae to be worked out by lower courts, it is important to realize that this issue is up for debate. Plaintiffs likely will argue that identifying one or two tasks is sufficient and that requiring anything further would be tantamount to the Sixth Circuit's "class" of manual tasks concept, which was discredited by the Supreme Court. Defendants, on the other hand, probably will focus on another passage of the Court's decision, which seems to set a higher standard: "the central inquiry must be whether the claimant is unable to perform *the variety of tasks* central to most people's daily lives."<sup>39</sup> This statement suggests that the entire vari-

ety of tasks must be impacted to amount to a disability. Georgia lawyers should keep an eye on the Courts of Appeals and, in the meantime, consider how to best make this argument for the benefit of their clients.

**HOW SEVERE MUST A LIMITATION BE TO QUALIFY AS A “SUBSTANTIAL LIMITATION”?** — Even having identified appropriate manual tasks and determined that they are limited in sufficient number, the analysis is not complete. In order to qualify for ADA protection, the physical or mental impairment must be “substantially limit[ing].” To what degree an impairment must limit one’s abilities is a question that has challenged practitioners and courts since the enactment of the ADA.

In an effort to define the term “substantially limits,” the EEOC adopted a regulation providing that an impairment substantially limits a major life activity if the person is either

*[u]nable to perform a major life activity that the average person in the general population can perform; or [s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.*<sup>40</sup>

Many, if not most, trial and appellate courts around the country have adopted the EEOC’s definition of disability. In *Toyota*, however, the Supreme Court avoided either endorsing or rejecting this regulation.<sup>41</sup> Further, the Court shed little light on the definition of the term “substantially limited,” beyond making it plain that, to be

substantially limited in the major life activity of performing manual tasks, the claimant must either be *prevented* altogether or *severely restricted* in the performance of the central daily tasks in question, on a *long-term* or *permanent* basis, as opposed to temporarily.

Still, one obvious lesson is apparent: physical limitations that are anything less than severe will not support a finding of substantial limitation of the major life activity of performing manual tasks. The *Toyota* plaintiff understandably adopted a shotgun approach, in which she alleged that she was unable to sweep and was limited in her ability to dress herself, drive, garden, and play with her children.<sup>42</sup> While these manual tasks might very well be central to daily life and thus collectively or individually amount to a major life activity, the Court nevertheless found that Williams was not disabled because the restrictions she alleged were insufficiently severe.<sup>43</sup>

The severity of an impairment is by no means the only level of analysis in the substantial limitation inquiry; rather, it is merely the starting point. Even severe medical conditions can fall short of establishing a disability if they do not severely restrict a major life activity. A recent Eleventh Circuit case illustrates this point. In *Cash v. Smith*,<sup>44</sup> the plaintiff suffered from a multiplicity of medical impairments, including a seizure disorder, diabetes, migraine headaches, high blood pressure, a brain tumor and depression. While acknowledging that these conditions “certainly have had an adverse impact on [the plaintiff’s] life, there is no evidence that they have limited her in a major life activity. The most telling evidence on this point is [the plain-

tiff’s] own deposition testimony, in which she stated that despite all her ailments, she considers herself an active person who walks, swims, fishes and had held a 40-hour-a-week job for the previous eight years.”<sup>45</sup> While the plaintiff’s condition was obviously “severe,” she failed to establish a substantially limited major life activity. Thus, she was not disabled under the ADA.

In light of the foregoing, ADA practitioners should not assume that even the most severe of conditions renders a claimant “disabled” within the meaning of the ADA. To qualify as a disability, a condition must not merely adversely affect an individual’s life generally but must severely restrict one or more specific major life activities. Likewise, even an indisputably severe condition can fall short of disability status under the ADA if identified major life activities are not substantially limited.

**WHAT TYPE OF EVIDENCE IS NECESSARY TO PROVE OR DISPROVE A SUBSTANTIAL LIMITATION IN PERFORMING MANUAL TASKS?** — The burden of demonstrating that an impairment substantially limits a major life activity, of course, belongs to the claimant. Yet, practitioners representing ADA claimants and defendants alike must consider what type of evidence is needed to successfully prosecute or defend against an ADA claim.

The claimant’s testimony is a good place to start. Obviously, both parties will want to know what activities a claimant is unable to perform or is restricted in performing because of an impairment. Additionally, it can be just as important to gather evidence regarding what activities the claimant is capable of doing. When

contesting that an impairment substantially limits a major life activity, ADA defendants should explore the full range of activities that a plaintiff is able to perform in addition to those activities that he or she is unable to perform. As in *Toyota*, in which the plaintiff admittedly could perform manual tasks such as tending to her personal hygiene and household chores,<sup>46</sup> courts rejecting disability claims often do so by focusing on the plaintiff's ability, as opposed to disability.<sup>47</sup>

While usually relevant and often important, the testimony of a claimant's treating physician cannot solely be relied upon to establish a manual task disability. To sustain his or her burden or proof, the claimant must present evidence establishing how his or her actual symptoms of a particular condition substantially limit a major life activity in his or her personal life.<sup>48</sup> A physician's testimony diagnosing a condition or describing the symptoms normally associated with a particular condition, alone, will not carry the day.<sup>49</sup>

Expert testimony may also be advantageous in certain cases; it may even be required in some cases, although the law in the Eleventh Circuit in this regard is in a state of confusion. Consider the Eleventh Circuit's startling 2000 decision in *Maynard v. Pneumatic Products Corp.*,<sup>50</sup> in which the court held that, in addition to evidence of his own limitations, a plaintiff must always provide comparative evidence of how well the average person in the general population performs the major life activity in question in order to establish a prima facie case of disability discrimination under the ADA.<sup>51</sup> While *Maynard* has since been vacated and superseded,<sup>52</sup> it is

gone but may not be forgotten.<sup>53</sup>

While it is clear from *Toyota* that, at a minimum, ADA claimants must provide evidence demonstrating how an impairment substantially limits their abilities in terms of their own experience, *Toyota* does not address whether comparative evidence is necessary.<sup>54</sup> In an abundance of caution, ADA claimants might consider advancing expert and/or statistical evidence to compare the claimant's limitations to the abilities of the average person in the general population. In the absence of such evidence, those defending against ADA claims may argue in favor of requiring comparative evidence.

## CONCLUSION

*Toyota* teaches us first that employers should not merely accept that a potential claimant with manual task limitations — even tasks central to daily life — is in fact actually disabled under the ADA. The limitations must also be of adequate quantity, of sufficient severity, and competently proven to warrant ADA protection. Second, *Toyota* demonstrates that, while establishing a manual task disability is by no means impossible, the battle lines have been drawn and plaintiffs must fight up hill.<sup>55</sup> While aggressive plaintiffs

will no doubt pursue manual task claims under the ADA, careful ones may hedge their bets. Nevertheless, many claimants limited in their ability to perform manual tasks also could be arguably limited in other, more easily identifiable, and more fully defined, major life activities.<sup>56</sup> Other established major life activities such as eating or caring for one's self may overlap substantially with manual task limitations. If this is so, a claimant pursuing a manual task claim also should assert claims based on other, related major life activities as well. Whatever the angle chosen, a complete and accurate understanding of *Toyota*, both in terms of what it says and does not say, and its place in the constantly evolving ADA framework, is essential for attorneys representing both plaintiffs and defendants in manual task cases.

## POST SCRIPT ON WORKING AS A MAJOR LIFE ACTIVITY


With *Toyota's* mandate that occupational manual tasks "unique to any particular job" are not material to evaluating a manual task disability claim,<sup>57</sup> many ADA plaintiffs



will justifiably incorporate into their cases a disability claim based on their inability to work. Once again, a cursory understanding of the Supreme Court's ADA caselaw could be dangerous. An often overlooked aspect of the Supreme Court's 1999 ADA decisions is the Court's refusal to concede that working is in fact a major life activity. In both *Sutton* and *Murphy*, the parties accepted the EEOC's regulation stating that "major life activities" includes working.<sup>58</sup> In both cases the Court avoided deciding whether the EEOC's determination is valid by concluding that the record did not support a "substantially limits" finding even under the EEOC's regulations. In *Sutton*, however, the Court noted,

*that there may be some conceptual difficulty in defining "major life activities" to include work, for it seems to argue in a circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of handicap.*<sup>59</sup>

In *Toyota*, the Court somewhat gratuitously reiterated this point: "[b]ecause of the conceptual difficulties inherent in the argument that working should be a major life activity, we have been hesitant to hold as much, but we need not decide this difficult question today."<sup>60</sup> To date, this open invitation to challenge the once widely accepted notion that working is a major life activity has been unanswered by the Courts of Appeals. For the moment, working should be deemed a major life activity by lawyers practicing in Georgia.<sup>61</sup> But, Georgia lawyers should

understand that a storm is brewing over the major life activity of working, and the Supreme Court has dropped conspicuous hints that it considers the proposition dubious, or at least disturbingly convoluted. 



**Warren R. Hall Jr.** is a partner in Alston & Bird's Labor & Employment Group. Hall received an A.B. in economics from

Princeton University and a J.D. from the University of Georgia Law School, where he was on the Georgia Law Review Editorial Board (1990-1991) and served as Notes editor (1991-1992). He served as law clerk for the Hon. G. Ernest Tidwell, United States District Court, Northern District of Georgia (1992-1994). Hall is also a member of the State Bar of Georgia, the District of Columbia Bar, the Atlanta Bar Association, as well as state and local labor and employment law sections.



**Emily S. Sanford** is an associate in Alston & Bird's Labor & Employment Group. Sanford received her B.A. from with honors

in Sociology from Northwestern University and her J.D., cum laude, from Georgia State University, where she was a member and editor of the Georgia State University Law Review. Before joining Alston & Bird, she was a law clerk for the Hon. Duross Fitzpatrick, United States District Court, Middle District of Georgia (1997-1999).

## ENDNOTES

1. Pub. L No. 101-336, 104 Stat. 327 (1990), 42 U.S.C. § 12101 *et. seq.*
2. 122 S. Ct. 681 (2002).
3. Title I of the ADA is the section dealing with discrimination in employment. Titles II and III per-

tain to public services and places of public accommodation, respectively.

4. United States Department of Labor, Bureau of Labor Statistics, Injuries, Illnesses, & Fatalities Tables for 1999, as published on website of Bureau of Labor Statistics, [www.bls.gov](http://www.bls.gov).
5. *Compare* Bragdon v. Abbott, 524 U.S. 624, 188 S. Ct. 2196 (1998) (holding that an individual's asymptomatic HIV infection substantially limited the major life activity of reproduction), *with* Sutton v. United Air Lines, 527 U.S. 471, 119 S. Ct. 2139 (1999) (holding that a physical or mental impairment must be considered with respect to any mitigating or corrective measures taken by an individual).
6. *Albertson's v. Kirkingburg*, 527 U.S. 555, 119 S. Ct. 2162 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 119 S. Ct. 2133 (1999); *Sutton*, 527 U.S. 471, 119 S. Ct. 2139.
7. United States Equal Employment Opportunity Commission website, [www.eeoc.gov](http://www.eeoc.gov), Total Charge Receipts & Resolutions, ADA Charges, FY 1992-FY 2001.
8. 42 U.S.C. § 12102(2).
9. According to the EEOC, major life activities include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).
10. *Toyota*, 122 S. Ct. at 686-87.
11. *Id.* at 687.
12. *Id.* at 687-88.
13. *Id.* at 688.
14. *Id.*
15. Adhering to proper form, the Court actually first considered whether Williams's condition constituted an "impairment." After noting that "the parties do not dispute that respondent's medical conditions, which include carpal tunnel syndrome, myotendinitis, and thoracic outlet compression, amount to physical impairments," the Court moved directly to the "relevant question . . . [regarding] whether the Sixth Circuit correctly analyzed whether these impairments substantially limited respondent in the major life activity of performing manual tasks." *Toyota*, 122 S. Ct. at 690-91. The regula-

- tions promulgated by the EEOC regarding the ADA define “physical impairment” as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting enumerated body systems such as the neurological, musculoskeletal, respiratory and reproductive systems, and “mental impairment” as any mental or psychological disorder such as mental retardation, learning disabilities and emotional or mental illnesses. 29 C.F.R. § 1630.2(h).
16. Toyota, 122 S. Ct. at 691.
  17. *Id.* at 692.
  18. *Id.* at 693.
  19. *Id.*
  20. *Id.*
  21. For example, where the allegedly impacted major life activity is work, “the statutory phrase ‘substantially limits’ requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs.” Sutton, 527 U.S. at 491, 119 S. Ct. at 2151. In the context of reproduction, “substantial limitation” occurs when “[c]onception and childbirth are not impossible . . . but, without doubt, are dangerous to the public health [due to the risk of contagious disease infection from childbirth or having sex].” Bragdon, 524 U.S. at 641, 118 S. Ct. at 2206.
  22. Toyota, 122 S. Ct. at 691.
  23. The dictionary definition of “substantial” “clearly precludes impairments that interfere in only a minor way with the performance of manual tasks from qualifying as disabilities.” Toyota, 122 S. Ct. at 691.
  24. “When it enacted the ADA in 1990, Congress found that ‘some 43,000,000 Americans have one or more physical or mental disabilities.’” Toyota, 122 S. Ct. at 691. Too loose a definition of “substantial limitation” would result in many more than 43 million disabled citizens. *Id.*
  25. *Id.*
  26. *Id.* at 692.
  27. *Id.*
  28. *Id.* at 691-92 (emphasis supplied).
  29. *Id.* at 692.
  30. *Id.*
  31. *Id.*
  32. Generally, short-term conditions are not “substantially limiting.” Thus, temporary, non- chronic impairments such as a broken leg are not impairments which substantially limit major life activities, primarily because the actual or expected duration or long term impact of the impairment is not significant. See 29 C.F.R. § 1630.2(j)(Appendix). See also Sanders v. Arneson Products, 91 F.3d 1351, 1354 (9th Cir. 1996) (psychological impairment that lasted for approximately three and one-half months was “not of sufficient duration to fall within the protections of the ADA as a disability”); McDonald v. Pennsylvania, 62 F.3d 92, 96 (3d Cir. 1995) (holding that since the plaintiff was unable to work for less than two months, “her inability to work was not permanent, nor for such an extended time as to be of the type contemplated by” the ADA); Peagle v. Department of Interior, 813 F. Supp. 61, 64-65 (D.D.C. 1993) (back impairment which lasted for nine months was not substantially limiting).
  33. Toyota, 122 S. Ct. at 693.
  34. *Id.*
  35. See Thornton v. McClatchy Newspapers, Inc., 261 F.3d 789 (9th Cir. 2001) (newspaper reporter whose repetitive stress disorder rendered her unable to type or write for extended periods of time, but did not prevent her from performing other manual tasks such as cooking, caring for herself, and light housework, was not substantially limited in the major life activity of performing manual tasks).
  36. Compare Dutcher v. Ingalls Shipbuilding, 53 F.3d 723, 726 (5th Cir. 1995) (factoring driving into a determination of whether a person cares for oneself), with Chenoweth v. Hillsborough County, 250 F.3d 1328, 1329-30 (11th Cir. 2001) (“We are an automobile society and an automobile economy, so that it is not entirely farfetched to promote driving to a major life activity; but millions of Americans do not drive, millions are passengers to work, and deprivation of being self-driven to work cannot be sensibly compared to inability to see or to learn.”).
  37. Toyota, 122 S. Ct. at 691.
  38. *Id.* at 692.
  39. *Id.* at 693 (emphasis supplied).
  40. 29 C.F.R. § 1630.2(j)(1)(i)-(ii).
  41. The Court remarked that “no agency has been given authority to issue regulations interpreting the term ‘disability’ in the ADA.” However, “because both parties accept the EEOC regulations as reasonable, we assume without deciding that they are, and we have no occasion to decide what level of deference, if any, they are due.” Toyota, 122 S. Ct. at 689.
  42. *Id.* at 694.
  43. *Id.*
  44. 231 F.3d 1301, 1305-06 (11th Cir. 2000).
  45. *Id.* at 1306. See also Rivera-Rodriguez v. Frito Lay Shacks Carribean, 265 F.3d 15 (1st Cir. 2001) (employee who suffered from chronic asthma and malignant lymphoma failed to establish a disability, where he presented no evidence showing that his medical conditions substantially limited any major life activity).
  46. Toyota, 122 S. Ct. at 694.
  47. In Chanda v. Engelhard/ICC, 234 F.3d 1219 (11th Cir. 2000), the plaintiff asserted that due to a tendinitis condition, he could no longer perform tasks such as “turning handles, grasping, holding or lifting objects, using a computer or writing with a pen.” *Id.* at 1222. In finding that the plaintiff was not substantially limited in a major life activity, the court focused on the plaintiff’s admitted ability “to assist his spouse with household activities, to dress and feed himself, . . . to drive an automobile[,] . . . to attend school and take four classes, all of which required taking of notes[,] . . . [and] that he could perform the functions of a quality control engineer, which included writing and computer use.” *Id.* See also Hilburn v. Murata Electronics North America, Inc., 181 F.3d 1220, 1228 (11th Cir. 1999) (mere “diminished activity tolerance for normal daily activities such as lifting, running and performing manual tasks” do not constitute a disability when plaintiff admitted she could walk, run, sit, stand, sleep, eat, bathe, dress, write, work around the house, and cook); Penny v. United Parcel Service, 128 F.3d 408 (6th Cir. 1997) (holding that plaintiff’s impairment did not rise to level of disability where plaintiff had a 14% “permanent partial impair-

ment” and could not “walk briskly” and had “some trouble climbing stairs”); *Kelly v. Drexel Univ.*, 94 F.3d 102 (3d Cir. 1996) (holding that plaintiff was not substantially limited in walking where he had “trouble climbing stairs, which requires him to move slowly and hold the handrail”); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723 (5th Cir. 1995) (arm injury that restricted heavy lifting and repetitive movements was not a disability when plaintiff could perform daily activities such as feeding herself, driving, washing dishes, and vacuuming).

48. *Toyota*, 122 S. Ct. at 691-92.

49. In *Chanda*, the Eleventh Circuit rejected a physician’s testimony that his patient’s tendinitis condition restricted a host of major life activities. 234 F.3d 1219. The court held that the physician’s conclusory statement, given “the absence of any specific facts which would substantiate [the doctor’s] conclusion[,] deprives this medical diagnosis of any probative value.” *Id.* at 1223. Similarly, in *Mellon v. Federal Express Corp.*, 239 F.3d 954 (8th Cir. 2001), the plaintiff’s expert vocational counselor stated by affidavit that the plaintiff’s wrist injury substantially impaired her major life activities of working, lifting and caring for herself. The Eighth Circuit rejected this evidence, based on the expert’s lack of “personal knowledge or expertise” to prove the required elements to support a finding of a disability under the ADA.

50. 233 F.3d 1344 (11th Cir. 2000) (“*Maynard I*”).

51. *Maynard I*, 233 F.3d at 1349. In *Maynard*, the plaintiff, an assembly line worker, alleged that a back condition significantly restricted his ability to walk more than 40 to 50 yards. The Eleventh Circuit did not

question the fact that the plaintiff had a physical impairment that affected a major life activity (walking); instead, the court found that the plaintiff failed to produce sufficient evidence demonstrating that he was substantially limited in such major life activity. *Id.* at 1348. Relying on the EEOC regulation defining “substantially limited” as being unable to perform or significantly restricted in the performance of a major life activity *as compared to the abilities of the average person in the general population* (29 C.F.R. § 1630.2(j)), the court held that the plaintiff must produce evidence comparing his abilities with those of the average person in the general population. *Maynard I*, 233 F.3d at 1349. Since the plaintiff had offered no proof as to how far the average person in the general population can walk, and since the court refused to presume or take judicial notice of how far the average person can walk, the plaintiff failed to establish that he was disabled. *Id.* at 1349. Although the court refused to delineate exactly what type of evidence would suffice, it envisioned that “expert testimony and/or statistical evidence commonly will be used to demonstrate abilities of the average person in the general population.” *Id.* at 1350 n.13.

52. See *Maynard v. Pneumatic Products Corp.*, 256 F.3d 1259 (11th Cir. 2001) (“*Maynard II*”). Nearly eight months after the court raised the ADA bar in *Maynard*, seemingly requiring virtually every plaintiff to present expert evidence just to establish a prima facie case of disability discrimination, the same panel *sua sponte* reconsidered and vacated its prior opinion. *Id.* In a *per curiam* two to one decision, the court resolved the case on entirely new grounds, without any mention

whatsoever of the evidentiary requirements of its earlier order. The court substituted its earlier opinion with an analysis of whether the plaintiff had timely filed his EEOC charge. *Id.*

53. Without speculating as to the reason behind the panel’s change of heart, for the moment the Eleventh Circuit has rescinded the blanket requirement that plaintiffs produce comparative evidence in virtually all ADA cases. Less clear is the surviving standard of proof in the Eleventh Circuit to demonstrate that a claimant is substantially limited in a major life activity.

54. *Toyota*, 122 S. Ct. at 691-92.

55. The determinative battles have yet to be fought. Employers taking too much comfort in their reading of *Toyota* should take heed of the fact that the Court’s decision was unanimous. Surely recent ADA case dissenters Justices Stevens and Breyer have not abandoned the cause of ADA plaintiffs.

56. See *Toyota*, 122 S. Ct. at 689.

Indeed, on remand, the plaintiff in *Toyota* still may be able to establish that she is substantially limited in the life activities of lifting and/or working. See *id.* (expressing no opinion on plaintiff’s claimed disabilities in regard to working or lifting since such grounds were not ruled upon below).

57. *Id.* at 693.

58. *Sutton*, 527 U.S. at 491-92, 119 S. Ct. at 2150-52; *Murphy*, 527 U.S. at 524, 119 S. Ct. at 2138-39.

59. *Sutton*, 527 U.S. at 492, 119 S. Ct. at 2151 (quoting Tr. of Oral Arg. in *School Board of Nassau County v. Airline*, O.T. 1986, No. 85-1277, p.15 (argument of Solicitor General)).

60. *Toyota*, 122 S. Ct. at 692.

61. *Mullins v. Crowell*, 228 F.3d 1305 (11th Cir. 2000).

www.gabar.org

Just a click away. The one site you need for top-notch legal information and State Bar resources.





# The Georgia Higher Education Savings Plan:

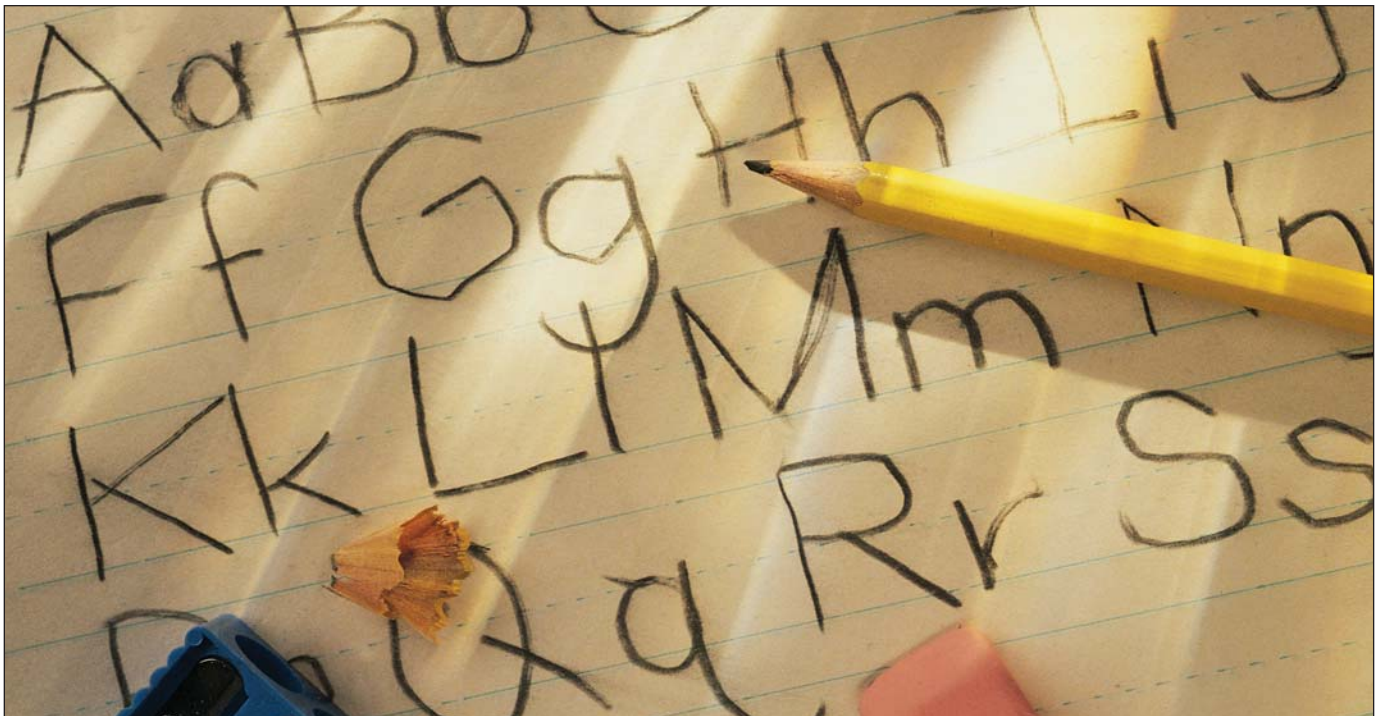
## Georgia's Qualified Tuition Program Offers Substantial Tax Benefits

By Benjamin H. Pruett

**N**ow anyone, including high-income families, can save for higher education and receive valuable tax benefits in the process. The Georgia Higher Education Savings Plan (the Program) is a tax-advantaged *Qualified Tuition Program* under Section 529 of the Internal Revenue Code,<sup>1</sup> offering a potentially powerful tool to plan for higher education funding, especially on behalf of high-income individuals whose incomes may render them ineligible for other tax-advantaged savings vehicles.

The Program offers significant income, gift, estate and generation-skipping transfer (GST)<sup>2</sup> tax advantages over other methods of saving for higher education expenses, but imposes no income based restrictions on eligibility (with one limited exception<sup>3</sup>), so even high-income families can take advantage of the tax benefits of such programs.

This article will set forth basic facts about the Program, explore its various tax advantages and compare the Program to the other education savings options that are available.



## BASIC INFORMATION

**Earlier State Sponsored Plans —** State-sponsored prepaid tuition plans have been around for many years, in one form or another, but such plans tended to offer meager returns, could be used only for very limited expenses or could only be used at selected colleges and universities within the state operating the program. Most importantly, though, the income tax benefits of such plans were not always firmly established. Section 529 permits states to establish Qualified Tuition Programs, which are investment savings accounts offering several tax and other advantages over any prepaid tuition programs previously available.<sup>4</sup> The tax benefits of Qualified Tuition Programs were significantly enhanced in 2001 by the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001 (also known as the 2001 Tax Relief Act or EGTRRA).<sup>5</sup> Almost all of the states have implemented Qualified Tuition Programs, or are in the process of doing so.<sup>6</sup>

**The Program —** The Program was established in 2001 by the Georgia Higher Education Savings Plan Act,<sup>7</sup> (the Act) and is administered by the Program's Board of Directors, with the assistance of TIAA-CREF Tuition Financing, Inc. (TFI)<sup>8</sup> which is the "Program Manager" appointed to assist the Board of Directors with the investment of Program assets and other administrative matters.

The Program is open to both Georgia residents and non-residents, and permits a *Contributor*<sup>9</sup> to make one or more *Contributions*<sup>10</sup> of cash to an *Account*<sup>11</sup> established and

maintained under the Program for the benefit of a named *Beneficiary*.<sup>12</sup> Distributions from an Account can be used to pay the Beneficiary's *Qualified Higher Education Expenses*,<sup>13</sup> such as tuition, fees, required books, supplies, equipment, and room and board at any *Eligible Educational Institution*,<sup>14</sup> which includes most in-state and out-of-state post secondary institutions, in the discretion of the *Owner* of the Account.<sup>15</sup> The Owner not only controls distributions to the Beneficiary but also has the power to change the Beneficiary or to distribute funds to another Beneficiary's Account, often without adverse tax consequences.

Thus, the Program is based upon cash Contributions, managed by a third party on behalf of the state, according to the Owner's selected investment strategy.

**Contributions —** Contributions to the Program may only be made in cash, so contributions of securities, real estate, business interests (such as family limited partnership interests), etc. are prohibited. There is no limit on Contributions to an Account until the aggregate value (principal and accumulated earnings) of all Accounts under the Program for the same Beneficiary reaches \$235,000, after which no further Contributions are permitted.<sup>16</sup> Furthermore, none of the assets in the Account may be pledged as security for a loan.<sup>17</sup>

Cash held by a custodian for a minor under the Georgia Transfers to Minors Act, the Georgia Gifts to Minors Act, any other state's version of the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act or any similar state law (collectively, UGMA/UTMA) may be contributed to an Account, provided that the Beneficiary is desig-

nated as the Owner upon reaching the age of majority (21 in Georgia).<sup>18</sup> In light of this, the Owner of an Account holding property *other than* UGMA/UTMA property who wishes to preserve the power to change the Beneficiary or to control the Account beyond the Beneficiary's 21st birthday should make sure that any UGMA/UTMA funds contributed are placed in a separate Account for the Beneficiary.

Cash held by a Trustee can be contributed to an Account to obtain the income tax benefits available under the Program so long as such an investment is not in conflict with the terms of the trust.<sup>19</sup> After all, in many cases, the education of trust beneficiaries is a primary purpose of the trust. Moreover, since a Contribution to an Account would be a distribution *from the trust* to the Beneficiary, the Contribution should not be a taxable gift, and therefore should not be subject to gift tax, even if the Contribution by the Trustee exceeds the gift tax annual exclusion.<sup>20</sup> Any Trustee contemplating such a Contribution should seek competent legal and tax counsel in advance because of the various fiduciary and tax law issues that may be implicated by such a use of fiduciary funds.<sup>21</sup>

**Investment Strategies —** While neither the Contributor, the Owner nor the Beneficiary may direct the investment of the Account, directly or indirectly,<sup>22</sup> the Owner may allocate Account assets among broad categories of investment *strategies*, and may change the strategies once per year.<sup>23</sup> TFI, the Program Manager, invests the funds in the Accounts based upon five (5) options for investment strategies.

The Owner chooses either: (1) the *Guaranteed Option*; (2) the *Balanced*

*Fund Option*; (3) the *Managed Allocation Option*; (4) the *Aggressive Managed Allocation Option*; or (5) the *100 Percent Equities Option*. Under the *Guaranteed Option*, funds are placed in a money market fund, which is not actually guaranteed, but is nevertheless very low risk.<sup>24</sup> The *Balanced Fund Option* invests in a mixture of money market funds, bonds and equity securities, in an effort to provide a stable investment with more opportunity for growth than the *Guaranteed Option*. The *Managed Allocation Option* is also a mixed portfolio, but the investment mix is “age based,” meaning that this option emphasizes equities for younger Beneficiaries to maximize growth during the early years, but the emphasis changes, over time, to more stable fixed income investments as the Beneficiary approaches college age. The *Aggressive Managed Allocation Option* concentrates funds in equities more than the *Managed Allocation Option*.<sup>25</sup> Finally, the *100 Percent Equities Option* which, as the name implies, invests only in equities, is the most aggressive investment strategy, but likewise carries the most risk.

Accordingly, the Program offers a broad range of investment options to meet each donor’s requirements and investment temperament, while leaving the actual investing in the professional hands of the Program Manager.

**Other Considerations** — The Program may impact a Beneficiary’s eligibility for financial aid, if an Account is considered an “available resource” of the Beneficiary. The Act provides that no assets in an Account will be considered an asset of the parent, guardian or student for the purpose

of determining the Beneficiary’s eligibility for need based grants, scholarships or work opportunities administered by any Georgia state agency, except as may be required by the funding source of such financial aid.<sup>26</sup> However, since most financial aid programs are administered according to federal guidelines, Account assets might be considered an available resource of the student or the parent.

Of course, the Program is not free. TFI will charge a management fee of .85 percent, but will not charge any other sales “loads” or other fees.<sup>27</sup> The Program is entitled under federal law to charge a separate fee for operating the program, but at this time does not plan to charge any such fee.<sup>28</sup> Any potential Contributor to the Program or to any other state’s program should carefully review all available prospectuses and other disclosure materials to determine all of the fees that will apply under each program.

Finally, the Program offers no guarantee that assets in an Account will be sufficient to meet any Beneficiary’s educational expenses, or that any Account will generate any investment return at all, or even hold its value, nor does the Program guaranty admission to, continued enrollment in, or graduation from any institution of higher learning.<sup>29</sup>

**Summary** — While the Program is subject to several unique rules and regulations, these are not particularly burdensome or complex, especially considering the substantial tax benefits offered by the Program.

## TAX ATTRIBUTES

Without a doubt, tax savings are the primary appeal of the Program. These tax savings come in several

categories as there are income, gift, GST and estate tax advantages to the Program, many of which are not available in any other savings or investment vehicle.

**Income Tax Attributes** — Income tax considerations under the Program include the tax treatment of Contributions, earnings, and distributions, both from the perspective of the federal income tax and Georgia income tax.

**Contributions** — While Contributions to an Account are not deductible by the Contributor for federal income tax purposes, a limited Georgia income tax deduction of up to \$2,000 per year is available to certain Contributor/Owners who meet the income limitations and other requirements set forth in the Act.<sup>30</sup> The amount deducted from income is subject to being “recaptured,” however, if Account assets are later transferred to another state’s program, or if there are distributions from the Account that do not qualify for the income tax exclusions discussed below. In any event, some families may enjoy income tax benefits as soon as an Account is opened.

**Earnings Prior to Distribution** — Higher income families will begin to reap the income tax advantages under the Program when the Account begins to accumulate earnings. Earnings on an Account are not includable in the gross income of the Owner or the Beneficiary prior to withdrawal or distribution which allows for more rapid and significant growth in the assets.<sup>31</sup>

**Distributions to the Beneficiary** — The greatest income tax benefit occurs upon distribution of funds from the Account.<sup>32</sup> Distributions to (or for the benefit of) the Beneficiary are excluded from both the



Beneficiary's and the Owner's federal taxable income to the extent that total distributions do not exceed the Beneficiary's Qualified Higher Education Expenses for the year.<sup>33</sup> Such distributions are also excluded from Georgia taxable income,<sup>34</sup> but only if the Account has been open for at least one year prior to the distribution.<sup>35</sup> Any distributions to the Beneficiary in excess of the Beneficiary's Qualified Higher Education Expenses will not qualify for the federal or Georgia exclusions.

**Transfers to Other Accounts** — Any distribution that is, within 60 days, re-contributed to *another* Account for the *same* Beneficiary or for a *different* Beneficiary who is a *Member of the Family*<sup>36</sup> of the prior Beneficiary will be excluded from federal and Georgia taxable income.<sup>37</sup>

**Beneficiary Changes** — Finally, any *change in the Beneficiary* of an existing Account to a new Beneficiary who is a Member of the Family of the prior Beneficiary is not considered a distribution to anyone,<sup>38</sup> but if the new Beneficiary is *not* a Member of the Family of the prior Beneficiary, the assets of the Account are deemed to be distributed to the *Owner*, and the earnings portion of the distribution will be included in the Owner's federal and Georgia taxable income.<sup>39</sup>

**"Non-Qualified" Distributions, Transfers and Beneficiary Changes** — Any distribution, transfer or change of beneficiary that does not qualify for one of the foregoing exclusions from taxable income is treated the same as an annuity payment under I.R.C. § 72, meaning that the distribution is considered a distribution of both principal and earnings (ordinary income and capital gains), and the earnings

portion of the distribution is taxable at ordinary income rates, *even if the earnings consist partially or totally of long term capital gains*.<sup>40</sup> The earnings portion of such a "non-qualified" distribution to or for the benefit of the Beneficiary is included in the *Beneficiary's* gross income for *federal* income tax purposes, but is included in the *Owners'* gross income for *Georgia* income tax purposes.<sup>41</sup> The earnings portion of any non-qualified distribution to anyone *other than* the Beneficiary is included in the *Owner's* gross income for both federal and Georgia income tax purposes.<sup>42</sup>

Additionally, any distribution, transfer or Beneficiary change that does not qualify for any of the foregoing exclusions is subject to a federal penalty in the amount of 10 percent of the earnings portion of the non-qualified distribution, except for any distribution to the Beneficiary's estate upon the Beneficiary's death, any distribution attributable to the Beneficiary's disability, or any distribution "on account of" certain scholarships, allowances or payments received by the Beneficiary.<sup>43</sup>

**Summary** — The bottom line for income tax benefits under the Program is that Contributions, while usually made with after-tax dollars, are allowed to grow tax-free and generally are not taxable

to the Beneficiary or the Owner, even upon distribution.

## GIFT (AND GST) TAX ATTRIBUTES

In addition to the income tax advantages, the Program offers significant and unique gift and GST tax advantages as well.

Contributions to an Account are considered gifts to the Beneficiary by the Contributor, so distributions from the Account to the Beneficiary are not taxable gifts.<sup>44</sup> More importantly, Contributions qualify for the \$11,000 per donee "annual exclusion" from gift tax, *without* any requirement that the Beneficiary have any withdrawal rights over the Contribution or any right to receive the property outright at the age of 21.<sup>45</sup> Moreover, if the Contributions during any given year exceed the Contributor's available annual exclusion, then the Contributor may elect to treat such Contributions, in an amount up to five (5) times the annual exclusion, as made ratably over the five (5) year period beginning with the year of the Contribution.<sup>46</sup> Married Contributors may elect to split the contribution between the Contributor and his or her spouse, both for single year annual exclusion gifts and for the five-year election.<sup>47</sup> Thus, a married couple



could contribute as much as \$110,000 to an Account in a single year, without incurring any gift tax. This ability to use the Contributor's annual exclusion prior to the year to which the exclusion applies is unique to Qualified Tuition Programs. Of course, any Contributor planning to take advantage of the five year election should be mindful of the fact that any gift by the Contributor to the Beneficiary during the following five years will not be eligible for the full annual exclusion, and will therefore be a taxable gift. Contributions in excess of the annual exclusion (or for which the five-year election is not made) are taxable gifts in the year of the Contribution.<sup>48</sup>

Grandparents will be glad to know that Contributions also qualify for the GST tax annual exclusion, including the five year election and gift splitting.<sup>49</sup> Typically, the only gifts which qualify for the GST annual exclusion are outright gifts to the grandchild or gifts to a trust which cannot be used for the benefit of anyone other than the one grandchild for whom the trust was created. By contrast, a gift to a Program Account qualifies for the exclusion, even though the assets in the Account can later be transferred to some other Beneficiary (such as another grandchild), often without any tax consequence whatsoever.

However, one should note that Contributions to an Account do *not* qualify for the gift and GST exclusion for direct tuition payments under I.R.C. § 2503(e),<sup>50</sup> but neither do they lessen the amount that can be given under that exclusion. Therefore, a Contributor could, in a single year, contribute five times the annual exclusion (if the five-

year election is chosen) *and* directly pay the Beneficiary's tuition for the same year, without incurring any gift tax. Thus, for example, if a Beneficiary attends a private high school, a grandparent could make the maximum Contribution to an Account for the Beneficiary *and* pay the Beneficiary's school tuition as well, without incurring any gift tax.

Gifts taxes are a consideration with any rollover or change in Beneficiary. A change in Beneficiary of an Account or a rollover to an Account for another Beneficiary will not be a taxable gift *if* the new Beneficiary is a Member of the Family of the prior Beneficiary *and* the new Beneficiary is assigned to the *same* generation or a *higher* generation as the prior Beneficiary.<sup>51</sup> However, if the new Beneficiary is assigned to a *lower* generation than the prior Beneficiary, then the change or transfer is deemed to be a taxable gift *by the prior Beneficiary*, irrespective of the relationship between the prior Beneficiary and the new Beneficiary.<sup>52</sup> Finally, if the new Beneficiary is assigned to a generation *two or more* generations below the prior Beneficiary, then the transfer is also deemed to be a taxable generation-skipping transfer. Fortunately, however, such deemed transfers from the prior Beneficiary qualify for the annual exclusion and the five-year election for both gift and GST tax purposes, so such a transfer should not present a tax difficulty for the Beneficiary unless the amount is quite large.<sup>53</sup> Nevertheless, any Owner considering a Beneficiary change or a rollover should always consider the potential gift tax liability that may be imposed on the Beneficiary.

In summary, the Program offers substantial gift and GST tax benefits not available under any other type of wealth transfer vehicle.

## ESTATE TAX ATTRIBUTES

The final category of tax advantages the Program offers is an estate tax advantage which is not available with any other wealth transfer technique.

The estate tax advantage of the Program is that the Contributor can reduce his or her gross estate by making a Contribution to an Account, but the Contributor does not have to relinquish control over the funds, because assets in an Account are not includable in either the Contributor's or the Owner's gross estate for estate tax purposes. This is in contrast to the general rule that to remove property from the gross estate of the donor for estate tax purposes, the donor must also give away all rights to an asset, including the power to choose the beneficiary, the power to determine the timing and amount of distributions, and the power to receive any personal benefit from the asset later on. With respect to an Account under the Program, however, the Owner retains complete control, including the foregoing powers, which would, under any other circumstance, cause the Account to be included in the Owner's taxable estate at his or her death.<sup>54</sup>

The only exception to this estate tax exclusion is that if a Contributor elects the five year option to qualify a large transfer for the annual exclusion and dies prior to the fifth year, the "unamortized" portion of the Contribution will be included in the Contributor's estate.<sup>55</sup>

One final wrinkle regarding the estate tax is that assets in an Account are included in the *Beneficiary's* gross estate, if the

Beneficiary dies before the Account is fully distributed.<sup>56</sup> Thus, if the Beneficiary is also the Owner, he or she will not enjoy the estate tax exclusion enjoyed by non-Beneficiary Owners.

The important point to remember, however, is that the Program allows the Contributor to remove significant assets from his or her taxable estate, without relinquishing control over those assets.

## USE FOR NON-EDUCATION PURPOSES

While the many tax advantages available through the Program present the temptation to use the Program as a wealth transfer or

investment device for purposes unrelated to education, the income tax treatment of non-qualified distributions will, in most cases, eliminate any perceived advantages to non-educational use of the Program. For example, one must remember that if the earnings are distributed for any non-qualified purpose, they are subject to state and federal income tax at *ordinary* income tax rates (which can be as high as 38.6 percent), even for the portion of the earnings attributable to long term capital gains (which typically does not exceed 20 percent), *plus* an additional 10 percent penalty tax. The result could be that the earnings for non-qualified distributions are taxed at a rate which is nearly 2.5 times the rate which otherwise would have applied.<sup>57</sup>

Moreover, since distributions from Program Accounts are taxed in the same manner as qualified retirement plans, there is no “step up” in tax basis at the death of the Beneficiary.

Moreover, from a gift tax perspective, the Program allows for tax-favored transfers on an accelerated basis, but does not ultimately allow for larger gifts than would otherwise be possible. Thus, the Contributor who makes the five-year election still must live for five years to get the full advantage of the annual exclusion.

Finally, from an estate tax perspective, while the Program allows the Contributor to retain greater control over the assets than might otherwise be possible, the cost of that retained control will be significant

ATTRIBUTE	UGMA/UTMA ACCOUNT	PROGRAM/§529 PLAN ACCOUNT
Assets That May Be Contributed	Almost any whole or fractional interest (including “discounted” interests) in any property, such as real estate, securities, cash, closely held stock, family partnership interests, etc.	Cash only
Income Tax on Earnings	All income and realized capital gains included in the minor beneficiary’s taxable income in the year earned, at the parents’ highest marginal rate (ordinary or capital gains) if the beneficiary is under age 14 <sup>58</sup>	<ul style="list-style-type: none"> <li>■ No income tax prior to distribution</li> <li>■ No income tax on distributions up to Beneficiary’s Qualified Higher Education Expenses</li> <li>■ Non qualified distributions subject to income tax, plus 10 percent penalty in most cases</li> <li>■ All earnings, including capital gains, taxed at ordinary income rates</li> </ul>
Use of Funds from Account	Can be used at any time for the benefit of beneficiary, whether or not related to education	Can be used only for Beneficiary’s Qualified Higher Education Expenses; otherwise subject to penalty
Mandatory Distribution to Beneficiary	All at age 21	Never; Assets can be held indefinitely and, within limits; can be rolled over to other Beneficiaries indefinitely
Owner’s Ability to Change Beneficiary or Retrieve Funds	None; Account is property of child; distribution to anyone else would be unlawful conversion	As long as property was not UGMA/UTMA property prior to contribution, Owner has full ability to retrieve assets or change Beneficiary, subject to potential taxes and penalties in some cases.
Estate Tax Attributes	Included in the donor’s estate if donor is also custodian, otherwise included in beneficiary’s estate <sup>59</sup>	Included in Beneficiary’s estate, unless included in Contributor’s estate under five-year election rules

indeed, given the income tax treatment of non-qualified distributions.

In summary, the income tax attributes of non-qualified distributions will, in most cases, more than eliminate any tax advantage gained from the Program, so advisors and clients should resist the urge to use the Program for non-educational purposes.

## COMPARISON TO OTHER EDUCATION SAVINGS OPTIONS

The Program compares favorably with most of the other common methods of saving for a child's higher education. The following tables compare Section 529 Plan Accounts to other popular savings vehicles, and summarize some of the key differences between Qualified Tuition Program Accounts and other available education funding options.

**UGMA/UTMA Accounts** — (see chart on page 29) UGMA/UTMA Accounts are a long-standing method of transferring property to

minor children, usually with the intent that the funds be used for education purposes.

**Coverdell Education Savings Accounts (Education IRAs)** — (see chart below) Coverdell Education Savings Accounts (formerly known as Education IRAs)<sup>60</sup> offer similar tax benefits of Qualified Tuition Programs, but are far more restrictive, from a non-tax perspective.

**Irrevocable Trust Designed to Exclude Assets from Grantor's Estate** — (see chart on page 31) One of the most traditional vehicles for funding education, particularly for high net worth individuals, is the establishment of trusts to which gifts are made over time under the annual exclusion, so that the assets can be removed from the donor's estate, but kept beyond the beneficiary's reach well beyond age 18 or 21.

In summary, with very few exceptions of limited application, Program Accounts compare favorably with other traditional methods of saving for higher education.

## CONCLUSION


The Program provides a broad array of investment options, and allows after-tax Contributions of cash to grow free of income tax, without incurring any taxes upon distribution to the Beneficiary for Qualified Higher Education Expenses. The Program also offers significant and unique gift, estate and GST tax advantages over other investment choices, while permitting the Owner to retain significant control over Account assets. As a result, one should consider the Program as an element of any educational savings plan or estate plan in which the education of others is a significant estate planning goal.

## FURTHER INFORMATION

Further information about the Program, including the Disclosure Booklet and application materials, is available at the Program's Web site, [www.gacollegesavings.com](http://www.gacollegesavings.com). In add-

ATTRIBUTE	COVERDELL EDUCATION SAVINGS ACCOUNT	PROGRAM/§529 PLAN ACCOUNT
Contribution Limit	\$2,000 per year, subject to income limitations <sup>61</sup>	No limits under Program until Account balance exceeds \$235,000
Contributor Income Limitations	\$95,000 (Single or Married Filing Separately); \$190,000 (Married Filing Jointly) <sup>62</sup>	None
Beneficiary Age Limitations	No contributions after age 18, except for certain "special needs" beneficiaries	None
Direction of Investments	Owner may direct investments	No investment direction other than choosing investment strategy
Mandatory Distribution	By beneficiary's 30th Birthday	None
Permitted Rollovers without Penalty	Member of Beneficiary's Family	Same
Use of Funds from Account	Qualified Education Expenses, <i>including</i> Elementary and High School <sup>63</sup>	Qualified <i>Higher</i> Education Expenses only (beyond high school)

ATTRIBUTE	IRREVOCABLE TRUST	§529 PLAN ACCOUNT
Transaction Cost	Can be substantial; Requires assistance of an attorney to prepare necessary documentation	Very low; Program provides all paperwork; some professional advice may be needed to understand tax attributes
Revocability of Transfer	Trust must be irrevocable; Grantor must have no ability to benefit from or control funds irrespective of hardship	Owner may retain power to revoke, get funds back, etc.
Power to Change Beneficiaries	Grantor cannot change Beneficiaries	Grantor can change Beneficiaries, transfer assets, etc.
Power to Determine Time and Manner of Enjoyment	Grantor must give up power	Owner retains full power
Income Tax on Earnings	Taxed to Grantor if a "Grantor Trust;" <sup>64</sup> otherwise distributions taxed to beneficiary up to amount of "distributable net income;" <sup>65</sup> Otherwise taxed at higher trust income tax rates; <sup>66</sup> Capital gains taxed at capital gains rates	No income tax prior to distribution; No income tax for qualified distributions; If distributions not qualified, tax imposed only on earnings portion of distribution <sup>67</sup> at ordinary income tax rates; Additional 10 percent penalty on most non qualified distributions
Gift Tax Annual Exclusion	Beneficiary must have the right to withdraw the gift, even if only for a limited time	No withdrawal right necessary to qualify for exclusion
"Spray" Powers Among Multiple Beneficiaries	Can give Trustee discretion to distribute among multiple beneficiaries, equally or unequally	Account may be for only one single Beneficiary, but can be transferred to others, often without adverse tax consequences

ition, for further information about Qualified Tuition Programs in general, see [www.savingforcollege.com](http://www.savingforcollege.com), which summarizes each state's program and includes links to sites describing each program. 



**Benjamin H. Pruett** is an attorney with King & Spalding and practices in the field of estate and wealth transfer tax planning.

Pruett serves on the Board of Directors of the Estate Planning and Probate Section of the Atlanta Bar Association and on the Legislation Committee of the Fiduciary Law Section of the State Bar of Georgia. He is also a member of the American Bar Association and the Atlanta Planning Council and is a frequent speaker at continuing legal education programs.

## ENDNOTES

1. Internal Revenue Code of 1986, as amended (hereinafter referred to as the "Code" or "I.R.C.").
2. The GST tax applies to transfers to grandchildren or later generations, is in addition to the gift tax, and is applied at the highest marginal gift tax rate. There is an exemption for the first \$1,100,000 of GST taxable gifts, which often must be used for gifts which qualify for the gift tax annual exclusion, but do not qualify for the GST tax annual exclusion.
3. There is a limited Georgia income tax deduction for Contributions that is subject to income limitations, as discussed in more detail below.
4. Section 529 was first added by The Small Business Job Protection Act of 1996, Pub. L. 104-188, and subsequently modified by The Taxpayer Relief Act of 1997, Pub. L. 105-34. Section 529 also provides for state operated plans under which participants purchase

tuition credits or certificates which entitle the Beneficiary to waiver or payment of certain education expenses. The savings type plan is the far more popular than the tuition credit type plan, however, and is currently the only type of Qualified Tuition Program offered in Georgia. Such programs were originally known as Qualified *State* Tuition Programs, because they could only be offered by state governments, and not by any private organization or institution. The word "State" was dropped when I.R.C. § 529 was amended in 2001 to permit private educational institutions to offer Qualified Tuition Programs. Private institutional programs are more restricted than state operated programs, and the tax advantages of private programs will not be available until 2004, so such programs are beyond the scope of this article.

5. Pub. L. 107-16. However, § 901 of EGTRRA provides that all changes to the Code under EGTRRA will cease to be effective for tax years



after 2010, unless Congress acts to make such changes permanent. The Section 529 enhancements are likely to be made permanent, however, even if other EGTRRA provisions do not survive, because the Section 529 changes are quite popular, but are not particularly expensive (in terms of revenue loss), in comparison with other EGTRRA provisions which are more controversial. The revenue loss attributable to the Section 529 changes is estimated at approximately \$1.3 Billion during the period from 2001 to 2011, as compared to the estimated revenue loss during the same period attributable to changes to Coverdell Education Savings Accounts (formerly known as "Education IRAs") (\$6.4 Billion), marriage penalty relief (\$63.3 Billion), estate tax relief (\$133.2 Billion) and income tax relief (\$875 Billion). See Joint Committee on Taxation, *Estimated Budget Effects of Conference Agreement for H.R. 1836*, JCX-5-01 (May 26, 2001). This article highlights the tax attributes which are specific to EGTRRA, so that the reader will know which tax benefits are "at risk."

6. The best source of information about other states' programs, particularly for comparison purposes, is [www.savingforcollege.com](http://www.savingforcollege.com), which summarizes each state's program and includes links to sites describing each program. This website may not be completely up-to-date for newer programs, however.
7. The Program was created in 2001 by the Georgia Higher Education Savings Plan Act (the "Act"), 2001 Ga. Laws 76, which is codified at O.C.G.A. §§ 20-3-630 to 20-3-642, 48-7-27(a)(11). The Act was amended during the 2002 legislative session by 2001 H.B. 1434, to improve the Program and to make other changes to account for the enhancements to Section 529 brought about by EGTRRA. In addition to the Internal Revenue Code and the Act, the Treasury Department has issued proposed regulations, published at 63 Fed. Reg. 45019 (August 24, 1998) (to be codified at 26 CFR Part 1). The proposed regulations do not take into account the EGTRRA changes, but final regulations which do

include the EGTRRA changes are expected soon. Finally, the Program has published the *Program Disclosure Booklet and Savings Trust Agreements for The Georgia Higher Education Savings Plan* ("Disclosure Booklet"). The version of the Disclosure Booklet reviewed for this article and referenced herein was released on April 24, 2002, and downloaded from the Program's website at [www.gacollegesavings.com](http://www.gacollegesavings.com). The most up-to-date version of the Disclosure Booklet, along with application materials and other information, may be obtained from the website or by calling TFI at 1-877 GA-4-HESP (1-800-424-4377), or by writing to "Program Manager, Georgia Higher Education Savings Plan, P.O. Box 105307, Atlanta, Georgia 30348-5307."

8. TIAA-CREF (Teachers Insurance and Annuity Association of America - College Retirement Equities Fund) has been in operation for more than 80 years, managing retirement and investment accounts for college and university employees, among others. TIAA-CREF Tuition Financing, Inc. currently administers twelve other states' Qualified Tuition Programs, which is more than any other single investment company.
9. The Act uses the term *Account Contributor*. O.C.G.A. § 20-3-632(1). The Contributor may be an individual (including the Beneficiary), corporation, charitable organization, trust or other entity. The Contributor will typically also be the Owner, but this is not necessarily so, because multiple persons can contribute to a single Account controlled by a single Owner. An individual Contributor need not be related to the Beneficiary, except with regard to the limited Georgia income tax deduction for Contributions, discussed below.
10. Prop. Reg. § 1.529-1(c).
11. *Id.* The Act uses the term *savings trust account*. O.C.G.A. § 20-3-632(13).
12. O.C.G.A. § 20-3-632(3). The Code and the Proposed Regulations use the term *designated beneficiary*. I.R.C. § 529(e)(1); Prop. Reg. § 1.529-1(c).
13. Prop. Reg. § 1.529-1(c). Room and board are included in Qualified

Higher Education Expenses if the Beneficiary is at least a half-time student. The amount permitted for room and board for students living on campus is the amount actually invoiced to the student by the institution. Prior to EGTRRA, room and board was limited to the minimum amount included by the institution in its estimated "cost of attendance" as reported for financial aid purposes, irrespective of the actual amount charged to the student. The proposed regulations limit room and board to \$2,500 per year for students living off campus, and reduces that amount to \$1,500 per year for a student living with a parent or guardian. Qualified Higher Education Expenses also include expenses for "special needs services" incurred by a "special needs" Beneficiary in connection with such enrollment or attendance. A Beneficiary's Qualified Higher Education Expenses for any year are reduced by certain scholarships and other assistance received by the Beneficiary, by distributions from Coverdell Education Savings Accounts and by the amount of any Hope Scholarship Credit or Lifetime Learning Credit claimed by any person under I.R.C. § 25A for amounts paid on behalf of the Beneficiary. I.R.C. § 529(c)(3)(B)(v) and (vi). The federal Hope Scholarship Credit is not related to the Georgia HOPE Scholarship program funded by the Georgia Lottery.

14. An Eligible Educational Institution is generally any accredited post secondary educational institution which offers credit toward an associate's degree, bachelor's degree, graduate or professional degree, or another recognized post secondary credential, and which is eligible to participate in U.S. Department of Education student aid programs. This includes almost all U.S. colleges and universities, graduate schools and other post secondary institutions, such as technical schools, and many foreign institutions as well. I.R.C. § 529(e)(5); Prop. Reg. § 1.529-1(c).
15. The Act uses the term *Account Owner*. O.C.G.A. § 20-3-632(2). The Owner is the person who has the authority to designate and change the Beneficiary, to choose the

- investment strategy, to determine the time, amount and recipient of any distributions, and to receive the assets if there is no other Beneficiary. Prop. Reg. § 1.529-1(c). Some states' programs place greater restrictions upon an Owner's authority over distributions from an Account than are required under Section 529, but the Program does not. Moreover, although the Owner may have the *power* to make distributions to persons other than the Beneficiary (such as to the Owner himself), such distributions may nevertheless have adverse income and transfer tax implications, as discussed below. The Owner will typically be the Contributor who first opens the Account, or a named contingent Owner, to become the new Owner at the prior Owner's death. The Owner may also be the Beneficiary of the Account. The Disclosure Booklet provides that if a contingent Owner is named, ownership of the Account will pass automatically and will not be part of the deceased Owner's probate estate, but if a contingent Owner is not designated, the ownership of the Account will pass to the deceased Owner's estate, to be disposed of with the rest of the deceased Owner's probate estate.
16. Section 529 requires that Contributions be limited to the amount reasonably necessary to provide for the Qualified Higher Education Expenses of the Beneficiary, as determined by each individual state. I.R.C. § 529(b). Prop. Reg. § 1.529-2. Georgia has determined that amount to be \$235,000. O.C.G.A. § 20-3-634(b)(1).
  17. I.R.C. § 529(b). Prop. Reg. § 1.529-2.
  18. O.C.G.A. § 20-3-635(e). Moreover, since UGMA/UTMA property is legally the property of the minor child, and not the Contributor or Owner, the Owner will not be at liberty to change the Beneficiary or make withdrawals for, or transfers to, anyone other than the Beneficiary.
  19. The Savings Trust Agreements for the Program include a specific representation by any Owner acting in a fiduciary or representative capacity that the Owner is legally authorized to make the Contribution.
  20. If, however, the trust is not completely exempt from GST tax, and the Beneficiary of the Account is two or more generations below the grantor of the trust, such a contribution from the trust may be a taxable generation-skipping transfer under I.R.C. § 2611.
  21. The Trustee should make sure that the inability to direct the investment of the Account will not be an impermissible delegation of the Trustee's fiduciary investment duty. If the trust is a "spray" trust for multiple beneficiaries, a Contribution to an Account would make the contributed assets unavailable to the trust beneficiaries other than the Account Beneficiary, although such an investment presumably would also reduce the burden (on the remaining trust assets) of educating the Beneficiary. In a typical spray trust, the Trustee can distribute income and principal to or for any of the beneficiaries, who may belong to multiple generations, without incurring any gift tax, particularly if the trust is GST exempt. Once the trust assets are contributed to an Account, however, any further transfer to another Account for a lower generation beneficiary could trigger gift and/or GST tax, if the annual exclusion does not shelter the transfer. Any GST exemption applicable to trust property will be lost when the Beneficiary becomes the "deemed transferor" of the property under I.R.C. § 2631(a). Therefore, a Trustee should be careful not to transfer more to the Account than is reasonably expected to be necessary for that Beneficiary's Qualified Higher Education Expenses, to minimize the likelihood that a later transfer or change of Beneficiary will be necessary.
  22. I.R.C. § 529(b). Prop. Reg. § 1.529-2.
  23. Prop. Reg. § 1.529-2(g). The proposed regulations originally prohibited any change to the investment strategy after the Account was established, but the IRS has now given notice that an Owner may change the investment strategy once per year. Notice 2001-55 (2001-39 I.R.B. 299 (9/24/2001)). An Owner of an Account under the Program is not constrained to choose only one strategy, but may allocate an Account among various strategies, and may change the Allocation. Moreover, the Owner may designate the option for each additional contribution, and may designate the option from which any distribution will be deducted. Disclosure Booklet at p. 10.
  24. The "Guaranteed Option" is not actually guaranteed by anyone, notwithstanding its name. TFI has applied to the Georgia Department of Insurance for regulatory approval to issue a guaranty of principal, plus a return of 3%, through its wholly owned subsidiary, TIAA-CREF Life Insurance Company, for the Guaranteed Option. If approval is granted, the guaranty will be from TIAA-CREF Life to the *Program*, and *not* to the individual Owners. Until such approval is granted, any "Guaranteed Option" funds will be placed in a money market fund.
  25. Disclosure Booklet at p. 14.
  26. O.C.G.A. § 20-3-641.
  27. Disclosure Booklet at p. 28.
  28. Disclosure Booklet at p. 29.
  29. O.C.G.A. §§ 20-3-639 and 20-3-640.
  30. The Georgia income tax deduction is available only to a parent or guardian of the Beneficiary (i.e., the deduction is not available to other relatives or friends) and is not available for Contributions to any other state's program. The parent must be the Owner, must itemize deductions on his or her federal income tax return and must claim the Beneficiary as a dependent on his or her Georgia income tax return. The full \$2,000 deduction is allowed for a parent whose federal adjusted gross income ("AGI") does not exceed \$100,000 (married filing jointly) or \$50,000 (single or married filing separately). The deduction decreases \$400 for each \$1,000 by which AGI exceeds the applicable limit, so no deduction is available for parents whose AGI exceeds \$105,000 (joint) or \$55,000 (separate). A deductible Contribution may be made for any given year until the deadline for filing the Contributor's income tax return for such year. O.C.G.A. § 48-7-27(a)(11). Note, however, that any amount for which a Georgia income tax deduction is claimed is subject to recapture in the event of any distribution other than a dis-

- tribution to the Beneficiary for Qualified Higher Education Expenses more than one year after the Account is opened. Moreover, a transfer to an Account under another state's program will also cause recapture, even if the transfer would not otherwise be a taxable distribution. The Georgia income tax deduction is the only benefit of the Program for which eligibility is subject to an income limitation or a requirement that a Contributor be related to the Beneficiary in any particular way.
31. I.R.C. § 529(c)(1). O.C.G.A. § 48-7-27(a).
  32. The Act uses the term "withdrawal" rather than distribution.
  33. Prior to EGTRRA, any earnings distributed to the Beneficiary were includable in the Beneficiary's federal taxable income, but at the Beneficiary's marginal income tax rate, which typically would be lower than that of the Contributor. EGTRRA eliminated the federal income tax on distributions for Qualified Higher Education Expenses. Moreover, prior to EGTRRA, each distribution was either qualified or non-qualified, based upon the actual use of the distribution, and the proposed regulations prescribed detailed rules for substantiating that distributions were used for Qualified Higher Education Expenses. EGTRRA seems to have eliminated the need to substantiate the use of each distribution, instead requiring only that the Beneficiary show that the Beneficiary's Qualified Higher Education Expenses for the year were at least as much as the total distributions (principal and earnings) from the Account to the Beneficiary. I.R.C. § 529(c)(3)(B). Therefore, Owners and Beneficiaries have a vested interest in making sure that the Beneficiary's Qualified Higher Education Expenses are fully documented and that such records are maintained.
  34. O.C.G.A. § 48-7-27(b)(10)(A) specifically excludes from Georgia taxable net income any "qualified withdrawals" from the Program, but the exclusion does not apply to any other state's Qualified Tuition Program. It is not clear, however, that distributions from any other state's plan would be included in Georgia taxable income anyway, because O.C.G.A. § 48-7-27(a) defines "Georgia taxable net income" in terms of the taxpayer's federal AGI, minus certain specific items set forth in O.C.G.A. § 48-7-27(a), plus certain other items set forth in O.C.G.A. § 48-7-27(b). Qualified withdrawals from other states' programs would be excluded from federal AGI and would not, therefore, be included in Georgia taxable net income, unless the withdrawals fit within one of the "add back" provisions of O.C.G.A. § 48-7-27(b). Nevertheless, the specific exclusion for Program withdrawals implies that qualified withdrawals from any other states' program may be subject to Georgia income tax.
  35. O.C.G.A. § 20-3-634(b)(3). The loss of the Georgia income tax exclusion will not be much of an issue for an Account that is less than one year old, since, by definition, the Account would have less than one year of accumulated earnings, and the federal income tax exclusion would continue to apply. On the other hand, in the case of a *transfer* of an Account with significant accumulated earnings from another state's program, the loss of the Georgia exclusion could be costly. If a distribution will be necessary within one year of such a transfer, the Owner should leave the amount that will be needed in the other state's program, and transfer only the amount that will not be needed for one year. The distribution for the current year can be made from the prior program. A premature distribution could also prove costly for any Owner who claimed an income tax deduction for the Contribution, and is forced to recapture the Contribution.
  36. The Members of the Family of the Beneficiary are the Beneficiary's: (a) spouse; (b) children and their descendants; (c) stepchildren, (d) siblings (by the whole blood or by the half blood) and their children; (e) stepsiblings; (f) parents and their ancestors; (g) parents' siblings; (h) the spouses of any of the foregoing persons; and (i) first cousins. Adopted children of any person are treated as children by the blood. I.R.C. § 529(e)(2); Prop. Reg. § 1.529-1(c). First cousins were added by EGTRRA.
  37. I.R.C. § 529(c)(3)(C)(i); O.C.G.A. § 20-3-632(12). The exclusion for a "rollover" transfer between two Accounts for the same Beneficiary does not apply to any transfer that occurs within twelve (12) months from any other transfer or Contribution to any Account (in Georgia or elsewhere) for the same Beneficiary. I.R.C. § 529(c)(3)(C)(iii). Prior to EGTRRA, a rollover between accounts would not qualify for the exclusion unless the Beneficiary of the recipient Account was different from the Beneficiary of the distributing Account. Note that if the Account to which the distribution is transferred is maintained under any other state's program, any Georgia income tax deduction previously claimed for a Contribution will be recaptured by the Owner. Disclosure Booklet at P. A-7.
  38. I.R.C. § 529(c)(3)(C)(ii); O.C.G.A. § 20-3-632(12). However, if any principal for which a Georgia income tax deduction was taken is transferred to another state's program, the Owner will be required to recapture that amount in his or her Georgia income in the year of the transfer. Disclosure Booklet at P. A-7.
  39. Prop. Reg. § 1.529-3(c)(1). O.C.G.A. § 48-7-27(b)(10)(B).
  40. I.R.C. § 529(c)(3)(A).
  41. I.R.C. § 529(c)(3)(A); Prop. Reg. § 1.529-1(c), O.C.G.A. § 48-7-27(b)(10).
  42. *Id.* Additionally, if the Owner claimed a Georgia income tax deduction for any Contribution to the Account, then the Owner will recapture any portion of the distribution consisting of principal for which he or she claimed a Georgia income tax deduction. Disclosure Booklet at P. A-7.
  43. I.R.C. § 529(c)(6), incorporating I.R.C. § 530(d)(4). Neither Section 529 nor the Act is clear about what "on account of" certain scholarships, etc. means, but the general consensus seems to be that if the Beneficiary is awarded a scholarship that pays any expense that otherwise would be a Qualified Higher Education Expense, then a distribution in that amount can be made to the Beneficiary without incurring a penalty, on the theory that the Beneficiary will not need the distribution to pay education



expenses, and should not be penalized for having earned a scholarship that rendered the distribution unnecessary. The Disclosure Booklet clearly permits distributions up to the amount of any such scholarship. Nevertheless, distributions excepted from the penalty are still subject to Georgia and federal income tax. Disclosure Booklet at p. A-3.

44. I.R.C. § 529(c)(5)(A).
45. I.R.C. § 529(c)(2)(A); Prop. Reg. § 1.529-5(b)(1). Most gifts in trust or gifts that are not outright gifts do not qualify for the \$11,000 per donee annual exclusion from gift tax under I.R.C. § 2503(b), unless the beneficiary has the immediate right to withdraw the gift from the trust, even if the right lapses (to the extent not exercised) within a short time. Gifts to UGMA/UTMA accounts or to "minor's trusts" created under I.R.C. § 2503(c) qualify for the annual exclusion without the beneficiary having any withdrawal rights, but both such arrangements require that the assets be turned over to the beneficiary when the beneficiary attains age 21. As discussed above, if the contributed assets are held in a UGMA/UTMA account *before* being contributed to an Account under the Program, then the Beneficiary of the Account must become the Owner at age 21.
46. I.R.C. § 529(c)(2)(B); Prop. Reg. § 1.529-5(b)(2)(i). The gift may not be amortized over any shorter period. If the amount of the annual exclusion increases during that five-year period, the Contributor may contribute an additional amount equal to the additional annual exclusion for the remainder of the five-year period. For example, a Contributor who contributed \$50,000 to an Account in 2001 (when the annual exclusion was \$10,000) and elected the five year treatment could make an additional Contribution in the amount of \$4,000 (\$1,000 for each of the four remaining years) in 2002, because the annual exclusion increased from \$10,000 to \$11,000 effective January 1, 2002. If the Contributor dies before the end of the five-year period, however, the amount allocable to any year beginning after the year of the Contributor's death will be included in the Contributor's gross estate

for estate tax purposes. Prop. Reg. § 1.529-5(b)(2)(iv).

47. Prop. Reg. § 1.529-5(b)(2)(ii). Spouses may elect under I.R.C. § 2513 to "split" all gifts made by either spouse during the year, so that each spouse will not have to give separate gifts to each donee to qualify for the exclusion. The election must be made by both spouses on timely filed gift tax returns, both of which must be signed by both spouses, and the returns must disclose *all* gifts for the year, including annual exclusion gifts that the couple would not otherwise have been required to report.
48. Prop. Reg. § 1.529-5(b)(2)(i). If the gift is taxable, the Contributor's effective lifetime exemption from gift tax will be reduced by the tax on the taxable portion of the gift, or, if the Contributor's effective exemption has been exhausted, the Contributor may have to pay a gift tax. Note that under EGTRRA, even when the effective exemption from *estate* tax increases to \$1,500,000 in 2004, the effective exemption from *gift* tax will remain at \$1,000,000.
49. I.R.C. § 529(c)(2)(A)(i); Prop. Reg. § 1.529-5(b)(1) and Prop. Reg. § 1.529-5(b)(3)(ii). A key advantage to the Program is the ability to make gifts for the benefit of grandchildren without using any of the grandparent's \$1,100,000 GST exemption.
50. I.R.C. § 529(c)(2)(A)(ii).
51. I.R.C. § 529(c)(5)(B); Prop. Reg. § 1.529-5(b)(3)(i). Generation assignments are determined by the rules set forth in I.R.C. § 2651.
52. I.R.C. § 529(c)(5)(B); Prop. Reg. § 1.529-5(b)(3)(ii). The relationship between the old Beneficiary and the new Beneficiary is irrelevant for *gift* tax purposes, but a distribution to someone who is not a Member of the Family of the prior Beneficiary will not be a qualified rollover, and will result in the Owner's recognition of the earnings portion of any such distribution, for both federal and Georgia *income* tax purposes.
53. Prop. Reg. § 1.529-5(b)(3)(ii).
54. But for the provisions of I.R.C. § 529, the Account would be included in the Owner's gross estate for federal estate tax purposes under I.R.C. § 2035 (because the Owner retains a general power of

## Hardest



## Working



## Site



## on the Web



[www.gabar.org](http://www.gabar.org)



- appointment over the property that lapses at the Owner's death), I.R.C. § 2036 (because the Owner retains the right to withdraw the income and to determine the beneficiary of any distributions), I.R.C. § 2037 (because the Owner retains reversionary rights over the Account), I.R.C. § 2038 (because the Owner effectively retains the right to revoke the transfer by withdrawing the assets for his or her own use), and I.R.C. § 2041 (because the power to withdraw the assets for the Owner's own use would constitute a "general power of appointment").
55. I.R.C. § 529(c)(4); Prop. Reg. § 1.529-5(d). The portion of the gift deemed given in the year of death is excluded from the estate, and the portion deemed given in any later year is included in the Contributor's gross estate.
  56. I.R.C. § 529(c)(4)(B).
  57. The top income tax rate for long term capital gains is 20%, but the top income tax rate for ordinary income is 38.6%, which increases to 48.6% when the 10% penalty tax is added. Therefore, income which, under normal circumstances, would be long term capital gain subject to a 20% tax rate would instead be subject to a 48.6% rate.
  58. I.R.C. § 1(g).
  59. Rev. Rul. 59-357. This rule only applies if the donor also acts as custodian, and does not apply if the donor's spouse acts as custodian.
  60. The name was changed from *Education IRA* to *Coverdell Education Savings Account*, after Georgia's late Senator Paul Coverdell, thus eliminating the phrase "individual retirement account" from the title of a savings plan that had nothing whatsoever to do with retirement savings. by Pub. L. 107-22.
  61. Prior to EGTRRA, the contribution limit was \$500 per year.
  62. Prior to EGTRRA, the income limitations were \$95,000 for single filers and \$150,000 for joint filers. Also, prior to EGTRRA, contributions could not be made to an Education IRA in the same year that Contributions were made to a Qualified State Tuition Program Account.
  63. I.R.C. § 530(b)(4). This definition is very similar to the definition of Qualified *Higher Education Expenses* in I.R.C. § 529, and specifically includes the purchase of a computer.
  64. A "grantor trust" is a trust which is deemed to be owned by the grantor for *income* tax purposes, even if not for *estate* tax purposes, due to the trust having certain attributes described in I.R.C. §§ 671 to 679.
  65. All distributions are deemed to come first from income, then from principal, so the entirety of the distribution is subject to income tax, until all distributable net income is exhausted. I.R.C. §§ 661 and 662. In contrast, even if the total non-qualified distributions from an Account during a year are less than the Account's earnings for the year, only a pro-rata portion of the distribution will be deemed to be taxable earnings.
  66. Income of a Trust is taxed at the highest marginal rate (38.6%) to the extent that trust income exceeds \$9,200, as compared to individuals, who do not reach the highest tax bracket until income exceeds \$307,050.
  67. All distributions are deemed to consist of a pro-rata share of principal and income, so only a portion of the distribution will be taxed as earnings, even if the total earnings in the Account for the year exceed the total distributions from the Account.



## LAWYERS FOUNDATION OF GEORGIA

The Lawyers Foundation of Georgia furnishes the *Georgia Bar Journal* with memorials to honor deceased members of the State Bar of Georgia. These memorials include information about the individual's career and accomplishments.

### *Memorial Gifts*

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

### *Information*

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



## The Sunshine State Welcomes the State Bar of Georgia

By Robin E. Dahlen

Over 1,000 attendees gathered in Amelia Island, Fla., June 13-16, 2002, for the 38th Annual Meeting of the State Bar of Georgia. The island paradise played host to a week of networking, educational opportunities, social events, recreational activities and lots of fun in the sun.

### The Bar's Bahamarama

The Annual Meeting officially opened Thursday evening with a

Bahama Islands-style reception. The event, which was sponsored by 19 Bar sections, featured the sights and sounds of the tropics, including island tunes, live parrots, crab races, limbo dancing and one very popular cigar roller. Bar members and guests donned their favorite tropical apparel and enjoyed the warm ocean breezes until the sun set by the Amelia Island Beach Club.

### A Full Day of Activities

For some attendees, Friday morning began with section breakfast meetings, while other attendees threw on their running gear and participated in the Lawyers

Foundation of Georgia (LFG)/Young Lawyers Division (YLD) 5K Fun Run on the beach. As the day progressed, attendees were exposed to CLE courses on topics ranging from patent and Internet law to family



Justice Leah Ward Sears and her husband, Haskell Sears Ward, enjoy the opening night activities.



Kids and adults alike enjoyed the many attractions at this year's opening night festival, including a limbo dance as pictured here.

law. During breaks between activities, meeting goers were given the opportunity to explore a packed legal exposition and network with colleagues.

Friday afternoon rounded out with the ever-popular YLD pool party and an informative multi-jurisdictional practice "Town Hall" meeting. Come the evening, attendees headed off to various committee and law school alumni receptions, while the kids ventured off for a wild west adventure.

### The Federal Judiciary

Following breakfast meetings, State Bar members attended the plenary session, which included the annual members' meeting, as well as the presentation of various awards and honors (see page 55). The Hon. J.L. Edmondson, chief judge of the Eleventh Circuit Court





The opening night reception, held at the Amelia Inn pool, was the perfect kick-off to an outstanding annual meeting. Attendees mingled and enjoyed the many special attractions.



Jeff Kuester, chair of the Intellectual Property Section, enjoys the island-themed activities with his wife, Pam, during the Thursday evening reception.



ANLIR representatives, (from left), Laura Neil, Jill Wells and Barbara Evans, take a break from their exhibit and visit with attendees.



of Appeals, was on hand during the session to share his thoughts on the federal judiciary. Chief Judge Edmondson started off his comments by stating that he feels that the current state of the federal judiciary is good and strong.

He then went on to outline the current caseload. In 2001, there were 6,900 civil cases filed in the federal district courts in Georgia and approximately 7,200 cases were terminated. Of those 7,200 terminated cases, 126 were terminated at trial. In the criminal arena, Chief Judge Edmondson noted that 3,700 cases were filed in 2001. In the bankruptcy courts of Georgia, more than 70,000 cases were filed in 2001. Chief Judge Edmondson also shared that in his court, the Court of Appeals, 1,600 appeals

arose from the federal district courts in Georgia.

Chief Judge Edmondson also reviewed the status of federal judicial vacancies in Georgia. At present, no federal judicial vacancies exist in Georgia and, according to Chief Judge Edmondson, "no legislation is pending that would

**THE GLOBAL LEADER IN INTELLECTUAL  
PROPERTY PROTECTION SERVICES**

*Offering 20 years experience in:*

- ▶ Software Escrow
- ▶ Technical Verification
- ▶ Trade Secret Protection
- ▶ SEC Title 17 Compliance
- ▶ Electronic Discovery

**800.962.0652**

**DSI TECHNOLOGY ESCROW SERVICES**  
An Iron Mountain Company

[www.dsiescrow.com](http://www.dsiescrow.com)

[www.ironmountain.com](http://www.ironmountain.com)





Christian Coleman (left) of the ABA Members Retirement Program, a State Bar corporate sponsor, talks with Ken Shigley of Atlanta, chair of the Bar's Member Benefits Committee.



Rudolph Patterson of Macon won the grand prize, a trip, from Insurance Specialists Inc., a State Bar corporate sponsor. He received the prize from ISI President William K. Bass Jr.

## Executive Committee

The Executive Committee is composed of officers and six members of the Board of Governors elected by the Board.

**President:** James B. Durham, Brunswick

**President-elect:** William D. Barwick, Atlanta

**Immediate Past President:** James B. Franklin, Statesboro

**Secretary:** Robert D. Ingram, Marietta

**Treasurer:** George Robert Reinhardt Jr., Tifton

**YLD President:** Derek J. White, Savannah

**YLD President-elect:** Andrew W. Jones, Marietta

**YLD Immediate Past President:** Peter J. Daughtery, Columbus

### Executive Committee At Large Members:

Bryan Michael Cavan, Atlanta

Gerald M. Edenfield, Statesboro

Phyllis J. Holmen, Atlanta

David S. Lipscomb, Duluth

Aasia Mustakeem, Atlanta

N. Harvey Weitz, Savannah

increase or create new federal district judgeships for the state of Georgia." He did note, however, that there is legislation pending that could create new U.S. Bankruptcy Court judgeships. With respect to the U.S. Court of Appeals for the Eleventh Circuit, there exists one vacancy, which is customarily filled by a citizen of Alabama. The vacancy was created by the retirement of Senior Judge Emmett Ripley Cox in January 2001, and the presidential nominee is United States Magistrate Judge William H. Steele, although a hearing date for his appointment has yet to be determined.

At the conclusion of his presentation, Chief Judge Edmondson said, "Our experience with Georgia lawyers has been that we receive prompt, thoughtful advice. We're grateful for the people giving it to us. I also think that the cooperation we receive from our people on the state bench is very good. And I hope that we're good neighbors, too, and that we're not too much trouble too often."

## The State Judiciary

Following Chief Judge Edmondson's remarks, Chief Justice Norman S. Fletcher of the Supreme Court of Georgia addressed those assembled. He noted that his address to the Georgia General Assembly in January 2002 regarding the state of the state judiciary is posted on the Supreme Court of Georgia's Web site at [www2.state.ga.us/Courts/Supreme/](http://www2.state.ga.us/Courts/Supreme/). He then focused his comments on Georgia-specific issues, including professionalism, alternative dispute resolution (ADR), high debt for law school graduates and indigent defense.

Chief Justice Fletcher said that Georgia has served as a strong role model for other states regarding professionalism and that he believes that Georgia has "improved civility among lawyers and in the courts." However, he also feels that Georgia attorneys should continue to build upon the progress that has already been made in this area.

Chief Justice Fletcher made note of the fact that "ADR provides the most efficient and effective way to resolve disputes for most of the citizens of Georgia." In fact, he stated that approximately 25,000 cases referred to ADR were resolved through settlement or mediation/arbitration. With this in mind, he urged continued support of this type of mediation, as well as the referral of more matters to the ADR program.

Chief Justice Fletcher also touched upon the exceedingly high amount of law school debt facing young attorneys. He made note of



State Bar President James B. Franklin and members of the Supreme Court of Georgia enjoyed a breakfast meeting with U.S. Associate Justice Clarence Thomas. Pictured from left: James B. Franklin, Justice Robert Benham, Justice Carol Hunstein, Justice Leah Sears, Justice Clarence Thomas, Chief Justice Norman Fletcher, Justice Harris Hines and Justice George Carley.

Fletcher. "It is a win situation for the law student who wants to go out and make their life of public service, and it is a win for the state if we provide these types of services.

I would urge all of you to look into this and if we need to broaden the program to support it with your legislators."

Chief Justice Fletcher also placed the spotlight on indigent defense and

noted that the Georgia Supreme Court Commission on Indigent Defense, as created by former Chief Justice Robert Benham, is moving forward apace. "We've got great momentum going at this time," he

said. "We've got the press behind it. We've got many legislators who understand the problem and they are agreeing it is past time that we improve the system in Georgia." Chief Justice Fletcher encouraged members of the State Bar to continue in their formulation of solutions to problems associated with indigent defense in the state.

## A Year to Remember

The plenary session concluded with the presentation of annual awards and the final address of 2001-2002 State Bar President James B. Franklin, who reviewed the highlights of his year at the helm (see page 51). Franklin made note of several important steps taken during his tenure, including uncovering health care options for Georgia lawyers, improving indigent defense, further examination of multijurisdictional practice, the start of the unauthorized practice of law pilot program and the activities surrounding the new Bar Center.



Aasia Mustakeem was elected to the State Bar Executive Committee at the Saturday Board meeting. She is pictured with her husband, Sharrieff.

a bill recently passed by the Georgia General Assembly that would forgive loans in certain areas of public service. "I think this is a win/win situation for all involved," said Chief Justice



Joel and Sybrina Wooten, of Columbus, enjoy the presidential inaugural dinner.

## Lawyers Foundation of Georgia

At a well-attended meeting on Friday afternoon, the LFG elected the following to its Board of Trustees: Teresa Roseborough; Paula Bevington; and Lisa Lacy White. The ex-officio members of the Board are: Cliff Brashier, executive director, State Bar of

Georgia; Jim Durham, president, State Bar of Georgia; David Gambrell, past president representative; Bill Barwick, president-elect, State Bar of Georgia; and Derek J. White, president, YLD. The officers of the foundation are: Harold T. Daniel Jr., chairman; Ben F. Easterlin IV, vice chair; William E. Cannon Jr., treasurer; and Linda A. Klein, secretary. In addition to elections, attendees were exposed to a recap of Foundation accomplishments and plans for the year ahead. It was also noted during the meeting that the Fellows Program is nearing capacity. At present, there are approximately 26,200 active members of the Bar, placing the membership cap of the Fellows Program at 786 members. There are currently 754 fellows; only 32 more may join.

On Friday evening, members of the Foundation attended the annu-

al Fellows Dinner. This year's Mardi Gras theme was thoroughly enjoyed by all. The Foundation extends a special thanks to Insurance Specialists Inc. and Bill and Nina Bass for their continued support of the foundation's events. During the dinner, the following individuals were honored for their efforts in obtaining Cy Pres funds for the Foundation: Judge John F. Nangle; Judge Thomas Thrash; David Bain; Emmet Bondurant; John Chandler; Martin Chitwood; Craig Harley; Wallace Harrell; Thomas C. James; and Paul Painter.

To round out LFG events, the Third Annual Silent Auction, which benefits the Challenge Grant Program, was a huge success. The foundation was able to raise \$6,000, and the trip to St. Andrews Bay, Scotland, fetched the highest bid. The item that drew the most bids was the Bobby Cox autographed baseball.

## The Changing of the Guard

On Saturday morning, the first Board of Governors meeting of the 2002-2003 term marked the beginning of a new Bar year. President James B. Durham presented his goals for the year (see page 46).

Prior to the meeting, U.S. Supreme Court Associate Justice Clarence Thomas met with members of the Supreme Court of Georgia and James B. Franklin, immediate past president of the

### State Bar Sections

Special thanks to the following sections for their support of the opening night event:

#### Platinum Level

Bankruptcy Law  
Business Law  
Corporate Counsel Law  
Criminal Law  
Labor Law  
Taxation Law  
Tort & Insurance Practice  
Workers' Compensation Law

#### Gold Level

Environmental Law  
Health Law  
Intellectual Property Law  
International Law  
Product Liability Law  
Real Property Law  
School and College Law  
Technology Law

#### Silver Level

Administrative Law  
Agricultural Law  
Creditor's Rights  
Elder Law  
Individual Rights Law

#### Copper Level

Appellate Practice  
Entertainment & Sports Law  
General Practice & Trial  
Military/Veterans Law  
Senior Lawyers

### Annual Meeting Corporate Sponsors

#### Five Gavel:

Insurance Specialists, Inc.  
LexisNexis

#### Four Gavel:

ANLIR

#### Three Gavel:

ABA Members Retirement Program  
West Group



State Bar, over breakfast to discuss the state and federal judiciary.

Additional highlights of the meeting include:

- The election of Asia Mustakeem to her first term on the State Bar of Georgia's Executive Committee, and the re-election of Executive Director Cliff Brashier for a one-year term.
- The approval of the reappointment of Susan Cole and the appointment of Zahra S. Karinshak for three-year terms to the Chief Justice's Commission on Professionalism.

- The approval of the reappointments of Harold T. Daniel Jr. and James A. Clark and the appointments of James W. Boswell III and Alan R. Rothschild for two-year terms to the Georgia Legal Services Board.

- Following a report by Judge Ben Studdard, the Board took the following action on proposed changes to the jury system: approved recommending that trial judges consider the allowance of a mini-opening statement prior to voir dire; approved recommending trial judges using a uniform pattern jury charge and jurors being allowed to take notes; approved recommending the consideration of providing the jury with written copies of preliminary instructions and the final charge, if technologically feasible; and approved the recommendation that trial



Chief Justice Norman S. Fletcher presents Associate Justice Clarence Thomas with an Amicus Curiae Award from the Supreme Court of Georgia.

judges consider striving to fully answer deliberating jurors' questions and meet their requests.

### Annual Meeting Exhibitors

ABA Members Retirement Program

ANLIR

Brown Reporting, Inc.

Communications,  
State Bar of Georgia

Esquire Deposition Services, LLC

Georgia Technology Authority  
Gilsbar, Inc.

The Harrison Company, Publishers  
Insurance Specialists, Inc.

KIDS' CHANCE, Inc.

Law Practice Management Program,  
State Bar of Georgia

Lawyers Foundation of Georgia  
LexisNexis

Little River Plantation

Loislaw, A Division of Aspen  
Publishers, Inc.

Pinkerton Consulting & Investigations

Pro Bono Project,  
State Bar of Georgia

Resolution Resources Corporation  
Sections, State Bar of Georgia

Stetson University College of Law  
Uniquely Nancy Jewelry,  
Accessories & Gifts

West Group

Zook, Moore and Associates, Inc.





**Carolyn McKnight accepts the Employee of the Year Award from Jimmy Franklin at the Inaugural Dinner.**

After the BOG meeting, attendees were free to enjoy the plantation's many amenities, including golf and tennis tournaments. On the court, Nancy Gary, of Marietta, took home the prize for best female performance, and Richard G. Milam, of Jackson, was the men's winner. Golf tournament results include: first place circuit team — Lookout Mountain Circuit (team of Larry Hill, Gary Andrews, Walt Moffitt and Donny Peppers); first place overall — Larry Hill, Gary Andrews, Walt Moffitt and Donny Peppers; second place — Jon Coogle, Richard Kessler, William McCracken and James Wiggins;

presented. The Distinguished Service Award was given to David H. Gambrell, of Atlanta, for his service to advancement of the legal profession in the state of Georgia. In addition, the State Bar of Georgia Employee of the Year Award was presented to State Bar Office Manager Carolyn McKnight for her exemplary work, positive attitude and service to the Bar.

The gavel was passed on by outgoing President James B. Franklin to incoming President James B. Durham. Chief Justice Norman Fletcher administered the oath of office.

third place — Joe Dent, John Salter and Robert Revell; closest to the hole — Bobby Bishop; and longest drive — Walt Moffitt.


## **The New Year Begins**

The Georgia Supreme Court Reception was held on Friday evening preceding the Presidential Inaugural Dinner. Following the dinner, two special awards were

Following the official duties of the evening, the crowd was treated to special guest and keynote speaker Associate Justice Clarence Thomas of the United States Supreme Court. As a Georgia native, Associate Justice Thomas noted how good it was "to be home." He proceeded to share with those in attendance his passion for the court and the law.

"I have said this each year I have been on the court — the longer I am there, the more idealistic I become," he said. "The longer I have the obligation to interpret our Constitution and our laws, the more I believe in our system and in our government. The more I believe in our Constitution, the more I believe in our framers, the more faith I have in the amendment and the more faith I have in our citizens."

Following his remarks, Associate Justice Thomas opened up the floor for an informative question and answer session, where the topics ranged from diversity in federal judicial clerkships to court appointments during the Bush administration.

As a token of appreciation and on behalf of the lawyers in Georgia, Associate Justice Thomas was presented with a Waterford crystal eagle, which was provided by Georgia Southern University. 

**Robin E. Dahlen** is the assistant director of communications for the State Bar of Georgia.

Special thanks to **Brown Reporting** ([www.brownreporting.com](http://www.brownreporting.com)) of Atlanta for their assistance in the production of this article.

## Notice of Expiring BOG Terms

Listed below are the members of the State Bar of Georgia Board of Governors whose terms will expire in June 2003. They will be candidates for the 2002-2003 State Bar of Georgia elections. Please refer to the elections schedule for important dates.

CIRCUIT	BOARD MEMBER	CIRCUIT	BOARD MEMBER
Alapaha Circuit Post 1	Hon. Carson Dane Perkins, Nashville	Dougherty Circuit Post 2	Hon. Gordon R. Zeese, Albany
Alcovy Circuit Post 1	Steven A. Hathorn, Covington	Dublin Circuit	Daniel M. King Jr., Dublin
Appalachian Circuit	Edwin Marger, Jasper	Eastern Circuit Post 2	William K. Broker, Savannah
Atlanta Circuit Post 1	Dow N. Kirkpatrick II, Atlanta	Eastern Circuit Post 4	N. Harvey Weitz, Savannah
Atlanta Circuit Post 3	H. Fielder Martin, Atlanta	Flint Circuit Post 1	Gregory A. Futch, Stockbridge
Atlanta Circuit Post 5	Thomas G. Sampson, Atlanta	Griffin Circuit Post 2	Roy B. Huff, Peachtree City
Atlanta Circuit Post 7	Aasia Mustakeem, Atlanta	Gwinnett Circuit Post 1	David S. Lipscomb, Duluth
Atlanta Circuit Post 9	James W. Hawkins, Atlanta	Gwinnett Circuit Post 3	Hon. Robert V. Rodatus, Lawrenceville
Atlanta Circuit Post 11	Dwight J. Davis, Atlanta	Lookout Mountain Circuit Post 2	Christopher A. Townley, Rossville
Atlanta Circuit Post 13	Pat McMahon, Atlanta	Macon Circuit Post 1	Lamar W. Sizemore Jr., Macon
Atlanta Circuit Post 15	Rachel K. Iverson, Atlanta	Macon Circuit Post 3	Robert R. Gunn II, Macon
Atlanta Circuit Post 17	Kenneth L. Shigley, East Point	Middle Circuit Post 2	William Steven Askew, Swainsboro
Atlanta Circuit Post 19	Robert L. Shannon Jr., Atlanta	Mountain Circuit	James T. Irvin, Toccoa
Atlanta Circuit Post 21	John A. Chandler, Atlanta	Northeastern Circuit Post 2	Hon. Robert W. Chambers III, Gainesville
Atlanta Circuit Post 23	Donna G. Barwick, Atlanta	Northern Circuit Post 1	C. Patrick Milford, Carnesville
Atlanta Circuit Post 25	Phyllis J. Holmen, Atlanta	Ocmulgee Circuit Post 2	Vacant
Atlanta Circuit Post 27	Nancy J. Whaley, Atlanta	Oconee Circuit Post 2	John P. Harrington, Eastman
Atlanta Circuit Post 29	Tina Shadix Roddenberry, Atlanta	Ogeechee Circuit Post 2	Gerald M. Edenfield, Statesboro
Atlanta Circuit Post 30	Karlise Y. Grier, Atlanta	Paulding Circuit	Vacant
Atlanta Circuit Post 32	Elizabeth Brannen Chandler, Atlanta	Pataula Circuit	C. Truitt Martin Jr., Dawson
Atlanta Circuit Post 34	Allegra J. Lawrence, Atlanta	Piedmont Circuit	John E. Stell Jr., Winder
Atlanta Circuit Post 36	Robin Frazer Clark, Atlanta	Rome Circuit Post 1	Paul Todd Carroll III, Rome
Atlantic Circuit Post 2	Joseph D. McGovern, Glennville	South Georgia Circuit Post 2	Gary O. Allen, Pelham
Augusta Circuit Post 1	J. Benjamin Kay III, Augusta	Southern Circuit Post 2	William C. McCalley, Moultrie
Augusta Circuit Post 3	Thomas R. Burnside Jr., Augusta	Southwestern Circuit	Hon. R. Rucker Smith, Americus
Blue Ridge Circuit Post 2	William Alan Jordan, Woodstock	Stone Mountain Circuit Post 2	Hon. Johnny W. Mason Jr., Atlanta/Decatur
Brunswick Circuit Post 1	J. Alvin Leaphart, Jesup	Stone Mountain Circuit Post 4	M.T. Simmons Jr., Decatur
Chattahoochee Circuit Post 2	William C. Rumer, Columbus	Stone Mountain Circuit Post 6	Alexander Thomas Stubbs, Decatur
Chattahoochee Circuit Post 4	Earle F. Lasseter, Columbus	Stone Mountain Circuit Post 8	Hon. Robert P. Mallis, Decatur
Cherokee Circuit Post 2	J. Lane Bearden, Calhoun	Tallapoosa Circuit Post 1	Jeffrey B. Talley, Dallas
Clayton Circuit Post 1	H. Emily George, Forest Park	Toombs Circuit	Dennis C. Sanders, Thomson
Clayton Circuit Post 3	Charles J. Driebe, Jonesboro	Towaliga Circuit	W. Ashley Hawkins, Forsyth
Cobb Circuit Post 2	Hon. Adele L. Grubbs, Marietta	Waycross Circuit Post 2	Huey W. Spearman, Waycross
Cobb Circuit Post 4	Patrick H. Head, Marietta	Western Circuit Post 1	Ernest De Pascale Jr., Athens
Cobb Circuit Post 6	John Kevin Moore, Marietta	Out-of-State Circuit	Michael V. Elsberry Orlando, Fla.
Conasauga Circuit Post 2	Henry C. Tharpe Jr., Dalton	Member at Large Post 1	Althea L. Buafo, Macon
Cordele Circuit	John N. Davis, Vienna	Member at Large Post 2	Bettina Wing-Che Yip, Atlanta
Coweta Circuit Post 2	Delia T. Crouch, Newnan		

### State Bar of Georgia 2002-2003 Proposed Election Schedule

<b>August</b>	Official election notice, August <i>Georgia Bar Journal</i>	<b>Nov. 15</b>	Deadline for receipt of nominating petitions by <u>new</u> Board of Governors Candidates (Article VII, Section 2) by 5:00 p.m.		will not receive a paper ballot, which should save on printing and postage costs
<b>Sept. 11</b>	Nominating petition package mailed to Board of Governors incumbents. (Nominating petitions packets for other candidates supplied upon request to membership department.)	<b>Nov. 29</b>	Deadline for write-in candidates for officer to file a written statement (not less than 10 days prior to mailing of ballots—Article VII, Section 2 (c))	<b>Dec. 13</b>	Ballots mailed (Article VII, Section 7 (c))
<b>Sept. 27-29</b>	Nomination of officers, Fall Board of Governors' Meeting	<b>Dec. 1-9</b>	Possible mass email to all active members to make aware that they can vote early by electronic vote; those who choose to do this	<b>2003</b>	
<b>Oct. 15</b>	Deadline for receipt of nominating petitions for incumbent Board Members (Article VII, Section 2)			<b>Jan. 9-11</b>	Midyear Meeting — Swissôtel, Atlanta
				<b>Jan. 20</b>	MLK Holiday (Bar Offices Closed)
				<b>Jan. 22</b>	12:00 noon deadline for ballots to be cast in order to be valid
				<b>Jan.24</b>	Election results available





The Durham family, hand-in-hand, at the Ocean Forest Golf Club on Sea Island, Ga., with Little St. Simons Island in the background.

*Photography by J. David Miller*



## Setting the Course

*The following is the speech delivered by incoming President James B. Durham to the Board of Governors on June 15, 2002. In it, he outlines some of his plans for the coming year.*

**A**s we approached this year and as I have moved closer to becoming president, several of our past presidents have approached me, not only to give advice, but also to tell me about some unique correspondence they had received during their year as president of the State Bar of Georgia.

I'm not sure whether this is good or bad, but I also received some unique correspondence before I became president. In fact, I received one letter from a member of the State Bar who had a particular and important issue to address. It is an issue we need to address during the year and it is an issue I will personally address with him. But the tone of the letter and the manner in which it was written was very unique. He was not happy. He was not happy with his local legislators, and he expressed that in his letter. He was not happy with the leaders of the State Bar, the Board of



Chief Justice Norman S. Fletcher delivers the oath of office to incoming State Bar President James B. Durham of St. Simons Island. Durham's wife, Kathleen, joins in the ceremony.

Governors or the Bar staff, and he was not happy with me.

He said in the letter, "I don't know you. I've never met you. But I know all about you. I know that to become president of the State Bar you have wound your way through various leadership positions in the bar hierarchy and that is a testament to your sorry leadership." And he also said that he has absolutely no expectations of me during my year as president. So I stand before you this morning much more confident because I know there is at least one lawyer in the state of Georgia whose expectations I can meet.

I'm looking forward to this Bar year. It presents great opportunity for all of us. We have some major

issues to face, and with that comes some risks and some difficult decisions. I want to talk to you about these issues. I think there are some very key things we need to focus on.

### The Bar Center

One of the things, of course, that will be paramount to this Bar year and one of our principal tasks is to set the appropriate course for the Bar Center. We have had many obstacles thrown in our way during the course of this year. But, all of the obstacles we have faced are short-term obstacles, and the Bar Center is a long-term goal.

I don't want to focus on the problems, but rather take a step back and refocus on the mission and the goals of the Bar Center.



The Bar Center is not simply an office building to house the Bar staff — that is not what it is all about. It is a professional gathering place for the lawyers of Georgia.

It exists to serve the lawyers of Georgia and to serve the public. It offers the opportunity for professional meetings and for legal and judicial conferences. It offers an opportunity for CLEs for lawyers, judges and legal staff. It offers a 40,000-square-foot conference center that can serve these purposes.

It's also not just a venue for these state conferences, but it's a venue for regional, national and international legal and judicial conferences. It is a place that will house legally related organizations, including the Prosecuting Attorneys' Council of Georgia, Georgia Legal Services, the Indigent Defense Council, the Lawyers Foundation, the Georgia Bar Foundation and the Chief Justice's Commission on Professionalism.

But, in addition to that, the Bar Center offers us an opportunity to serve and educate the public. The Bar Center sits in the heart of Atlanta's school district trip venues. There is Centennial Olympic Park. There is the CNN Center. There is the Georgia state capitol. There is the Martin Luther King Center and the Carter Library. More than 50,000 people a year come through this area. With this in mind, one of the long-term goals of the Bar Center is to have a mock trial courtroom, which would serve children of all ages, from elementary to high school. There would be age-appropriate scripted trials for children to learn about the legal profession. The purpose is to make a lasting impression of the importance of the rule of law in society.

Students would have the oppor-

tunity to participate as judges, lawyers, prosecutors, defendants, plaintiffs, bailiffs, jurors and witnesses. As you recall, Bill Cannon started the "Foundations of Freedom" program. And the purpose of the program was for lawyers to go out into communities and talk about the important role lawyers play in society. This program offers the opportunity for more than 50,000 people to come to us. We need to continue to talk about the importance of the administration of justice and the important role lawyers play in that administration.

The Bar Center is a tremendous opportunity for the lawyers in Georgia to serve the public. It will house the museum of law, which will feature famous Georgia trials and famous U.S. Supreme Court cases. It has Woodrow Wilson's original law office. All of this will be on display. It offers so much possibility for the public.

Why this building? Why this location? Well, I've talked to you about how many people come through this area, but this is a building that has 335,000 square feet and a replacement value in excess of \$50 million. For the amount of money we have in it and the amount of money we will put in it, there is no way this building can be duplicated in any other part of the state. So what the Bar Center offers is a tremendous opportunity for us to serve the public and a tremendous opportunity to serve the lawyers in the state of Georgia and we must not lose focus of these possibilities.

Now, we have had a lot of obstacles put in front of us this year — a lot. Probably more than we could have ever anticipated. First, we had the litigation over the trees next to

our parking deck. Second, we had an economy that went into a nose-dive. And then we had September 11th, which shook the nation and shook the economy even more, and had a profound effect on the commercial real estate market in Atlanta. And that real estate market is not in good shape. In addition, when we finally had access to the building and were able to put it out for bids, we found the overall cost of the project had increased by \$4 million.

Now, as I said at the outset, these are short-term obstacles. In regard to the litigation, we always felt we had a solid legal argument, a solid legal basis and that the Tree Commission had overstepped its bounds in its interpretation of the ordinance. We received an excellent opinion from Judge John Goger. We certainly hope we are at an end. We hope everybody, the other side, the people who were against us and the people of downtown Atlanta can put this behind them and move on. But we are prepared to meet the appeal if necessary.

The other two obstacles deal with one thing — money. The commercial real estate market in Atlanta has been good in the past and will be good in the future. But for right now, it is not and we have to deal with the present. That, coupled with the additional \$4 million, means that we need more money. We need more money to sustain ourselves to move forward with the project. We estimate we will need \$5 million. Now let me tell you what we have done and what we are doing.

Jimmy Franklin and I met with the Georgia Bar Foundation and Len Horton. The Georgia Bar Foundation has graciously agreed to give us \$750,000 to proceed with the project. Cliff Brashier and I met

with the Lawyers Foundation and the Foundation has graciously agreed to give us \$250,000. In addition, when we purchased the building back in 1997, the Board of Governors voted to move \$500,000 over from the surplus to the Bar budget and that has never been done. We have never moved that money. But, since that time, we have operated the budget and the surplus well and efficiently and that \$500,000 is still there.

In addition, Jimmy Franklin and I, along with Cliff Brashier and Frank Jones, have met with individuals at the Bar Center who have influence over funds that go to public entities and these meetings have been very positive. We are

now extremely hopeful that we will have access to some additional funds. We are also speaking with foundations that are interested in public entities in Georgia and particularly entities that work in the downtown Atlanta area. We are also hopeful to have success in this area as well. So, we are no longer talking about what we need to do, but we are actually in the process of trying to accomplish these goals.

In addition, Cliff Brashier and I have met with some of the friends of the Bar, because part of this issue deals with leasing. We must secure some tenants. I'm excited to tell you that the friends of the Bar are still committed to this project. I believe that between January 1 of

this coming year to the mid-portion of next summer we will have Georgia Legal Services, the Indigent Defense Council and the Georgia Prosecuting Attorneys Association in the building.

So, as we continue, what we are looking to do is know something in the fall of this year as to where we stand in our attempt to raise the money, and we are very optimistic. If we raise the money we are talking about, we need to proceed with the project. We may have to proceed in stages and the first stage of that project is to build the parking deck. Without the deck, we will not be able to attract commercial tenants. And I believe that the Bar Center is a long-term goal and it

offers so much opportunity for the State Bar of Georgia. Long-term, the finances look wonderful. It is the short-term that is a difficult. This is the part we have to get through and I believe that working together this year we can get through this period. I also believe that the Bar Center will be a viable project and something that Georgia lawyers will be proud of for a long time in the future.

## Indigent Defense

There are other issues that face the State Bar of Georgia. Indigent defense is of primary importance to the lawyers of Georgia. We continue to face this issue and will continue to do so. I met with the Supreme Court Commission on Indigent Defense in May, along with Doug Stewart, Mike Mears, Wyc Orr and David Gambrell, and we presented the proposal the Board of Governors had passed to the commission. And, as you heard from the Chief Justice, we hope to have some type of decision from the commission in the fall. But, we can't simply wait for that decision. Outside the legal community, the constituency support for indigent defense is non-existent. We need to educate the public, and we need to educate the media about the importance of adequately funding indigent defense and making sure there is competent representation for indigent defendants throughout the state of Georgia. This is an important aspect of the process. If we wait until January 1, it will be too late. So, by working with Jeff Bramlett, chair of the Bar's Advisory Committee on Legislation and Tom Boller, the Bar's legislative consultant, we intend on coming up with a plan as to how we address the public and

how we go to the media. And part of that plan is going to involve all of you. We need to have influence on our legislators. We will prepare a plan that will itemize what we need to do, but we will ask for your assistance so that you can go out from a grassroots standpoint and talk to the legislators. It is an important issue and we can have an impact on it this year.

## State Bar Programs

We also need to stay focused on our State Bar programs. As we create and maintain programs, we need to be certain they are efficient. Cliff Brashier is very fond of saying we are very good about putting new clothes in the closet, but we are very bad about taking old clothes out of the closet. The fact we have or start a program doesn't mean that the program doesn't need to be changed. And it doesn't mean that the program lives forever.

During the course of this year, I think you're going to see several programs continue to expand. The Unauthorized Practice of Law program (UPL) is doing well and it is something that this Board of Governors fought for for many years and we have the program in place. It is in place in three judicial districts right now — the first, second and fourth judicial districts. The first and second districts cover south Georgia. The fourth covers DeKalb County. Since the program's inception, the first and second districts have had 11 complaints and the fourth district, DeKalb County, has had 45. As we expand UPL in the metro Atlanta area, we can expect far more complaints and the need for far more resources. So, for the next several years, we will see this having an impact on the budget and you need to be aware of it.

In addition, we need to look at the "Standards of the Profession" program, our mentoring program for new lawyers. It is time we determine what will be done with this pilot program, and we can expect a presentation from John Marshall at an upcoming meeting. This program is going to involve mandatory mentoring for new lawyers, which can have a big impact on lawyers, firms and new and old lawyers throughout the state. It has great possibilities, but we going to need to study and analyze its possibilities.

In addition, we will address multidisciplinary practice (MDP) and multijurisdictional practice (MJP), issues that Bars throughout the country must face. With both of these issues, it is important we stay objective, keep an open mind and use all of our best thinking to determine how the State Bar of Georgia should proceed.

## Conclusion

We face a lot of challenging issues this year and we will face challenging issues in the future. The lawyers of Georgia are made up of a diverse population. We need to encourage all lawyers in Georgia to participate in the activities of the State Bar of Georgia — at the committee level, at the Board of Governors level, at the Executive Committee level and also as officers. This is the way that in the future we can make the best decisions for the lawyers of Georgia and the public. I'm looking forward to this year. It is going to be an exciting year. There are problems we will face, but these are problems we can solve.

Thank you. 

## Ending the Year as it Began . . . Proud to be a Georgia Lawyer

*The bylaws of the State Bar of Georgia specify the duties of the president. One of the responsibilities is to "deliver a report at the Annual Meeting of the members of the activities of the State Bar during his or her term of office and furnish a copy of the report to the Supreme Court of Georgia." Following is the report from President James B. Franklin on his year, 2001-2002, delivered on Friday, June 14, 2002, at the State Bar's Annual Meeting.*



Outgoing President James B. Franklin receives a standing ovation from his peers during the Friday plenary session.

I end my year as your Bar president just as I began it last June, by thanking you and all Georgia lawyers for the opportunity to serve as the 39th president of the State Bar of Georgia. Having served as your president is truly the greatest professional honor I have ever received. I will always remember and cherish this year, the good times and the not-so-good times alike. The phrase "can't see the forest for the trees" will have a renewed meaning to me for the rest of my life! Little did I realize that the legacy of my year would leave me with the nickname of "Chainsaw Franklin."

I asked for your prayers, advice and counsel last June, and have been blessed to receive them so many times. I began my year calling for a truly united Bar and active participation from all members. I challenged us to all be Georgia lawyers and rally around what unites us, not around what makes us different. I promised to work on important issues that affect everyday lives of lawyers, including health insurance coverage, the unauthorized practice of law and multijurisdictional practice. We tackled the tough issue of indigent defense and have weathered, hopefully, the storm that has delayed our new Bar Center.

As a society, we were thrust into a new war against terrorism and a new era following the events of September 11. The horrific events

of that day will forever be burned into our memories. Let us always remember how united and steadfast we stand, as lawyers and as Americans, in the face of the terrorists who seek to tear our society apart and the challenges this war brings to our society. "United We Stand" also holds new meaning for me now and always will.

It has been a remarkable year, and through it all, I leave this office a better lawyer and a better person for having worked for the betterment of our profession and for having the privilege of working with such fine individuals as Past President George Mundy, our President-Elect Jim Durham, Cliff Brashier, Bill Smith, Sharon Bryant, Sue Harvey, Carolyn McNight, Michelle Priester, Joe Conte and every other staff mem-



ber — what talent and dedication! What a job they are doing with this meeting! I hope you share my appreciation for the job they do. I also want to recognize the Supreme Court as a whole and particularly Chief Justice Norman Fletcher and Bar Liaison Justice George Carley for their support and guidance. I could not have asked for a better relationship with the Court and with the Court of Appeals through Chief Alan Blackburn. I will always be extremely grateful for the support and encouragement of the Board of Governors, the Executive Committee, members from throughout the state and talented Bar staff.

I stopped counting the miles I traveled as president after just about a month into this office. It has been a lot of time away from my family and my practice, and I am so grateful to Fay Foy and my partners and our staff for indulging and encouraging me. I've had the unique opportunity to visit and work with lawyers all over our great state representing you and our profession. To the extent that one person can represent a group of more than 32,000, I hope I have served you well and I know we can all be proud to call ourselves Georgia lawyers.

The activities of the past year are too numerous to recount here, but I would like to focus briefly on a few key areas.

## Health Care Coverage

This issue continues to be a pressing one for Georgia lawyers. Securing affordable, adequate health care coverage is a challenge

for most of us. To address this problem and investigate what the organized Bar could do to help, a



James B. Franklin and his family (from left), daughter, Rebecca, wife, Fay Foy, and daughter, Julie.

task force was formed and was chaired this past year by Jim Winkler. Working with a consultant, Jim and the task force uncovered some of the mysteries of health care and while they have not, at this point, discovered a “one-size-fits-all” plan to recommend to the Bar for endorsement, Jim in an upcoming issue of the Georgia Bar Journal will present the findings and recommendations of the Task Force. As a continuing effort to assist the lawyers of Georgia with this problem, Jim Durham has agreed to appoint to sub-committee of the Executive Committee with the mission of monitoring the market and continuing to look for a product or products that the Bar can recommend.

## Indigent Defense

It's said that nothing significant has happened with the issue of indigent defense since *Gideon v. Wainwright* in the 1960s. But, thanks to the extraordinary efforts of Wilson DuBose many hours of deliberation by the Executive Committee and the full Board and

the Bar's Indigent Defense Committee, guaranteeing the rights set forth in the Sixth Amendment to the U.S. Constitution and recognized by the U.S. Supreme Court has been addressed by the State Bar of Georgia this past year. Effectively providing representation to indigents charged with crimes in Georgia, and most other states, has been a difficult and tortured journey. Yet, Georgia lawyers have come together, and by the

recent action of the Board of Governors, agreed upon six aspirational principles, which have been passed on to the Chief Justices' Commission on Indigent Defense for consideration as it moves toward the conclusion of its study and formulation of its recommendations.

The process by which we arrived at the consensus is what I believe to be most impressive. It is proof that our system of governance within the Bar works. After a year of meetings, dialogue and debate, hopefully all of the various individuals and elements of the Bar involved in the process were left with a feeling that their concerns were heard and there was ample opportunity to participate in the process. This is not to say that every Georgia lawyer is satisfied with every part of the final recommendation, but I believe all lawyers feel their voice was heard in the deliberations.

## Multijurisdictional Practice

The issue of multijurisdictional practice (MJP) is one that, like mul-

disciplinary practice, has to be addressed. To fulfill its mission, the committee, chaired by Chris Townley and Dwight Davis, is seeking the help of Georgia lawyers. The committee is holding open forums around the state in conjunction with local bar associations for the purpose of hearing from you about MJP. A Town Hall type meeting is scheduled for this afternoon at 2 p.m. in Cumberland C room. These forums provide an excellent opportunity for your views to be heard on the issue of MJP and I hope you will make it a point to attend one.

## Unauthorized Practice of Law

Last year, a pilot program was initiated within the Bar to assist with the issue of unauthorized practice of law (UPL). I am pleased to report that the program is reporting positive results in three judicial districts: the First District, which covers the southeast part of the state; the Second District, which covers the southwest part of the state; and the Fourth District, which covers DeKalb and Rockdale counties. The program is operational at the local level in these districts, and the UPL Standing Committee is in place statewide. The program now covers about one-third of Georgia.

## Member Outreach/Technology

This year, we employed e-mail communication as a method of reaching members on issues of importance to the entire Bar membership. I vowed to use mass e-mail only for purposes supported by our overall goals and, by and large, I have received positive feedback. E-mail communications were

used to address members about the Bar Center, after the events of September 11 and to encourage participation at the annual meeting. If used prudently, I believe this communication method will continue to be well received by members and prove to be a most valuable, cost-effective approach, especially as our membership steadily increases at about 1,000 lawyers per year. In addition, I am pleased and proud that the Bar's flagship publication, the Georgia Bar Journal, underwent a complete makeover this year and has a refreshing new format that is produced in-house — a move that provides significant cost savings. In addition, the Bar's Web site continues to receive increased traffic and will soon unveil a fresh, new look. New to the site this year is an online career center, which is available free to members.

## Bar Center

Perhaps the greatest challenge of this year has been the seemingly endless saga regarding the Bar Center and the removal of nine trees to make way for a new parking structure. The Bar and lawyers from across the state took it on the chin in the print media at times. But, as our system of justice proves time and time again, justice did prevail, and the Bar Center project was put back on track May 21 with a Fulton County Superior Court ruling in our favor. We are now waiting for the appeal time to run and the advice of our lawyers, Norman Underwood and Teresa Roseborough, before proceeding further. Those of you who have visited the building since the Bar staff moved in, I believe, are convinced that we should make every effort to save the project. However, there remains

the obstacle of financing the project and we continue to work on making the numbers work. Earlier, I mentioned the great works of the staff. Nothing exemplifies this hard work and dedication more than the move of Bar headquarters. It all seemed smooth and seamless to those of us observing, but it all happened so efficiently because of the cooperation of the entire staff under the outstanding organizational skills and leadership of Carolyn McNight. Please, if you have not done so, drop by for a visit and tour. I know that you will be impressed.

## Legislative Activity

Under the able leadership of Gerald Edenfield and the hardworking Advisory Committee on Legislation, we continue our strong

and successful legislative program and initiated our legislative grassroots program, to prepare our profession to react timely and appropriately to any legislative concern.

## Discipline

The Investigative Panel (IP), Review Panel (RP), Formal Advisory Opinion Board (FAOB) and Office of the General Counsel (OGC) continue to enhance the disciplinary function of the Bar, and for the past year report the following:

- 4,152 grievance forms were mailed (4,117 in the previous year);
- 2,490 grievance forms were filed (2,316 in the previous year);
- 2,126 grievances were dismissed for lack of jurisdiction;
- 393 grievances were referred to the IP members for investigation (452 in the previous year);
- Each IP member averaged 20 cases;
- 274 grievances were dismissed after IP investigation (82 of those included a letter of instruction);
- 36 cases were placed on inactive status because of disbarment in a different case;
- 155 cases met probable cause (156 in the previous year);
- 195 cases are pending before the IP (211 in the previous year);
- 50 interim suspensions were issued for failure to respond;
- The Lawyer Helpline averaged 20 informal ethics opinions per day; and
- OGC lawyers made 60 CLE ethics presentations.

In addition, confidential discipline was ordered for 42 lawyers in the form of reprimands and letters of formal instruction. Public discipline was ordered for 58 lawyers as follows: 19 disbarments; 32 suspensions; four public reprimands; two

panel reprimands; and one IP reprimand.

The Formal Advisory Opinion Board's activity included: six new requests for formal advisory opinions. There are currently no opinions pending before the Supreme Court. Three proposed opinions are pending before the board.

The Overdraft Notification Program received 162 notices from financial institutions approved as depositories for attorney trust accounts. Of these, 99 files were dismissed, seven were referred to Law Practice Management, and two were forwarded to the Investigative Panel of the State Disciplinary Board. (Several attorney files contained more than one overdraft notice.)

## Fee Arbitration

This year marked the fee arbitration program's 22nd year. Requests for information came from 1,571 parties, with referrals by the consumer assistance program accounting for 51 percent, inquiries from the public accounting for 46 percent and referrals from the Office of General Counsel accounting for three percent of the inquiries. There are 450 cases in process today. Approximately 131 new disputes over attorney fees are reported to the program each month. The Fee Arbitration Committee, its staff and the parties involved are able to resolve a majority of these; however, hearings and awards to conclude the disputes are required in about 10 cases per month.

## Consumer Assistance

The Consumer Assistance Program (CAP) has dealt with over 125,000 inquiries (calls, letters, walk-ins) since it began in 1995. In the past year, the program has

received inquiries totaling about 20,000. CAP is resourceful in identifying problems and resolving them before they become serious disciplinary problems. Through CAP, an average of two out of three cases are resolved quickly and informally.

## Conclusion

Again, I thank you for this past year. I am extremely proud of this organization and Georgia lawyers. The leadership of the State Bar of Georgia is now in the capable hands of Jim Durham and a very talented group of individuals on the Executive Committee who are committed to improving the profession and the lot of Georgia lawyers. Let us not forget we are being watched very closely by those outside the profession. To a large degree they judge us as professionals on how we treat each other, our clients and the court.

I would close with a reminder and request that I made one year ago that each of you in your daily practice not forget the admonition of Justice Robert Benham:

"While serving as advocates for their clients, lawyers are not required to abandon notions of civility. Quite the contrary, civility, which incorporates respect, courtesy, politeness, graciousness and basic good manners, is an essential part of effective advocacy. Professionalism's main building block is civility. It sets the truly accomplished lawyer apart from the ordinary lawyer."

Let us judge our every effort, word and action by what will make us not just an "ordinary lawyer" but an "extraordinary lawyer."

Thanks again for a great ride. You have honored Fay Foy and me far beyond anything I deserve. I will be forever grateful for your

## David H. Gambrell Receives Bar's Highest Honor

*Following are remarks delivered by James B. Franklin at the State Bar of Georgia's 2002 Annual Meeting. Franklin presented this year's Distinguished Service Award to David H. Gambrell of Atlanta.*

I am honored to be presenting tonight's Distinguished Service Award. This award is "the highest honor bestowed by the State Bar of Georgia for conspicuous service to the cause of jurisprudence and to the advancement of the legal profession in the state of Georgia."

The recipient is a truly remarkable lawyer — and a remarkable person. For half a century, tonight's recipient has exemplified the qualities celebrated by the State Bar of Georgia's Distinguished Service Award.

In the early years of the organized Bar in Georgia, our recipient was an invaluable leader, instrumental in setting the Bar on a course that has helped the Bar flourish over time. For five decades, he has contributed in countless ways to our profession and to our Bar. He is a past president of the State Bar of Georgia. In his inaugural address, some 20-plus years ago, our recipient told annual meeting attendees this:

"Your many accomplishments during this year prove without

doubt the vigor of the incorporated Bar in Georgia, and the willingness of our members to put forth boundless energies in keeping our profession abreast of rapidly changing times. I have confidence in the future of our profession as a master of, and not a slave to, the constant changes in our society."

These words well describe the very person who spoke them in August 1968. His accomplishments and boundless energies have moved the profession forward in significant ways and his vision is one that we work to maintain today.

Tonight's recipient received his B.S. from Davidson College in 1949, and his Juris Doctor degree from Harvard Law School in 1952. He was a member of Omicron Delta Kappa and a teaching fellow at Harvard Law School.

Our recipient was appointed by then Gov. Jimmy Carter to serve as United States senator to succeed the late Richard B. Rusolle.


A member of the Atlanta and American Bar Associations for more than 40 years, our recipient is past president of both the Atlanta Bar and the State Bar of Georgia. He is the youngest person ever elected to each of these positions. His many other activities and contributions to the profession and community are too numerous to enumerate tonight, but our honoree is truly a great Georgian.



**Sen. Gambrell accepts the Distinguished Service Award from James B. Franklin.**

In the same speech from which I cited previously, tonight's recipient likened his address as Bar president with that of a convicted criminal sentenced to hang, who, when allowed a final statement, says, "Yes sir, judge, this hanging sure is going to be a lesson to me!"

He says his time as Bar president was a lesson to him, and I submit to you tonight that Sen. David Gambrell's legacy in the Georgia legal profession should be a lesson to us all — a lesson in civility and professionalism, a lesson in determination and dedication, a lesson in what being a lawyer ought really be about.

On behalf of more than 32,000 Georgia lawyers, I am greatly honored to present this year's State Bar of Georgia Distinguished Service Award to David H. Gambrell. 



## Spotlight Shines on Outstanding Leaders

By Robin E. Dahlen

**J**udges, lawyers, voluntary bars and sections were among those recognized for their outstanding service and accomplishments in the legal field at the 2002 State Bar of Georgia Annual Meeting. All but one of the awards were presented during the Plenary Session on Friday, June 14. The Distinguished Service Award was given at the Inaugural Dinner on Saturday evening.



Judge Alvin T. Wong (left) receives the Local Bar Activity Excellence in Bar Leadership Award from President James B. Franklin.

### Distinguished Service

This, the State Bar's highest honor, was presented to **David H. Gambrell**, Atlanta, in recognition of the combination of a professional career with outstanding service and dedication to the community through voluntary participation in community organizations, government-sponsored activities and humanitarian work. (See article on page 55).

### Bench & Bar Committee Professionalism Awards

This is the first year the **Professionalism Awards** were given by the Bench & Bar Committee of the State Bar of Georgia. The awards honor one lawyer and one judge who have and continue to demonstrate the highest professional conduct and paramount reputation for pro-



State Bar President James B. Franklin (center) presented the Bench and Bar Committee's first Professionalism Awards to Edward Donald Tolley (left) and Chief Judge E. Purnell Davis (right).

fessionalism. This year's awards were presented to: **Edward Donald Tolley**, Athens, and **Chief Judge E. Purnell Davis**, Warrenton.

### Voluntary Bars

This year's **Excellence in Bar Leadership Award** recipient was **Judge Alvin T. Wong**, Decatur, of the Georgia Asian Pacific American Bar Association. This award honors an individual for a lifetime of commitment to the legal profession and the justice system in Georgia through dedicated service to a voluntary bar, practice bar, specialty bar or area of practice section.

The **Award of Merit** is presented to voluntary bar associations for

their dedication to improving relations among local lawyers and devoting endless hours to serving their communities. This year's winners were:

101 to 250 members:

**North Fulton Bar Association**

251 to 500 members:

**Gwinnett County Bar Association**

501 members or more:

**Cobb County Bar Association**

The **Law Day Award of Achievement** recognizes Law Day activities of voluntary bar associations in their respective communities. This year's winners were:

51 to 100 members:

**Blue Ridge Bar Association**

101 to 250 members:

**North Fulton Bar Association**

251 to 500 members:

**Columbus Bar Association, Inc.**

501 members or more:

**Cobb County Bar Association**

The **Best Newsletter Award** is presented to voluntary bars that provide the best informational source to their membership. This year's winners were:

51 to 100 members:

**Douglas County Bar Association**

101 to 250 members:

**Western Judicial Bar Association**

251 to 500 members:

**Gwinnett County Bar Association**

501 members or more:

**Georgia Association for Women Lawyers**

The **Best New Entry Award**, which recognizes the excellent efforts of those voluntary bar associations that have entered the Law Day or Award of Merit competition for the first time in four years. This year's winner was:

251 to 500 members:

**Columbus Bar Association, Inc.**

The travelling **President's Cup** is presented annually to the voluntary bar with the best overall program. This year's winner was the **Cobb County Bar Association**.

## Section Awards

The Section Awards, which are presented to outstanding sections for their dedication and service to their areas of practice, were:

**Section of the Year: Family Law Section**, Elizabeth Green Lindsey, chair. **Section Awards of Achievement** were presented to: **Appellate Practice Section**, Christopher J. McFadden, chair; **Corporate Counsel Law Section**, Randall J. Cadenhead, chair; **Health Law Section**, Jonathan Lee Rue, chair; and **Intellectual Property Law Section**, W. Scott Petty, chair.

**General Practice and Trial Section Tradition of Excellence Awards:** Judicial Category: **Justice Robert H. Benham**; Defense Category: **Jerry B. Blackstock**; Plaintiff Category: **James E. Butler Jr.**; General Practice Category: **Griffin B. Bell**. **Workers' Compensation Distinguished Service Award:** Claimant's Bar: **John Sweet**; Defense Bar: **John M. Williams**.

## Pro Bono Awards

The **H. Sol Clark Award** is presented by the Access to Justice Committee of the State Bar of Georgia and the Pro Bono Project to a lawyer who demonstrates a com-



President Franklin presents Hon. Susan Forsling, of the North Fulton Bar Association, the Best Newsletter Award.

mitment to the provision of legal services to the poor either through significant pro bono activity or involvement in the development of service programs. **Justice Robert H. Benham** is the recipient of the 2002 award for his having demonstrated professionalism and a long-term commitment to, and support for, the delivery of civil legal services to the poor. During his term as Chief Justice of the Supreme Court of Georgia, state funding for civil legal services programs was institutionalized. In addition, professionalism, community service and diversity were promoted and fostered within the legal profession.



William L. Lundy (left) presents Derek White an Award of Appreciation from the Investigative Panel.



Elizabeth Baer (left) of the Georgia Association for Women Lawyers, and Margaret Washburn (center) and Patricia Kelley (right) of the Gwinnett Bar Association accept local bar awards at the Annual Meeting.



Jeffrey N. Plowman (left) of Nelson, Mullins, Riley & Scarbrough accepts the ABC Pro Bono Award from President James B. Franklin.

The **William B. Spann Jr. Award** recognizes a program that addresses previously unmet legal needs of the poor through innovative means and which demonstrates collaboration among lawyers, law firms, the community and associations. The recipient of the 2002 award was the **Columbus Bar Association**, with special recognition of Alan Rothschild Jr. and Judge William J. Smith, for its commitment to legal services for the poor through the association's 2001-2002 Pro Bono Campaign and Call to Service initiative, adoption of the Truancy Intervention Project model pro bono program and the long-term commitment to the Columbus Regional Office of the Georgia Legal Services Program.

The **Dan Bradley Award** honors the commitment to the delivery of quality legal services of a lawyer of the Georgia Legal Services Program or the Atlanta Legal Aid Society. The recipient of the 2002 award was **Jacqueline L. Payne** of the Atlanta Legal Aid Society for her dedication and exemplary service.

The **ABC Pro Bono Award** is presented by the "A Business Commitment" Committee of the State Bar to a lawyer, law

firm or corporate counsel program that demonstrates a commitment to the development and delivery of legal services to the poor in a business context through pro bono business law service to emerging or existing nonprofits or microenterprise efforts in the low-income community. The recipient of the 2002 award was the law firm of **Nelson, Mullins, Riley & Scarbrough, LLP**.

## Georgia Indigent Defense Council

**Harold G. Clarke Equal Justice Award:** The award is named after Harold G. Clarke, former Chief Justice of the Supreme Court of Georgia. It is presented to an individual in recognition of his or her long-term commitment and dedication to the cause of insuring equal justice for all of Georgia's citizens. The 2002 award recipient was **David Lipscomb**, chairperson of the Gwinnett County Tripartite Committee.

**Chairperson's Award:** The award is presented to a member of the community in recognition of his or her untiring commitment to indigent defense in Georgia. The award recognizes that efforts to improve indigent defense require dedication, determination and persistence. The recipient of the 2002 award was **Thomas B. Murphy**, speaker, Georgia House of Representatives.

**Gideon's Trumpet Award:** The award is given to one or more individuals, program or groups who have worked to improve indigent defense in Georgia, and whose work has made a significant difference in bringing to life the dream of *Gideon v. Wainwright* — that every citizen be assured the representation of counsel no matter what their economic circum-




stances. The 2002 award recipient was Georgia **Sen. Greg Hecht** (D-Morrow).

**Commitment to Excellence Award:** The award is given to an indigent defense program and/or individual that demonstrates outstanding excellence in providing indigent defense services. The award recognizes innovative approaches in ensuring that Georgia's poorest citizens are provided with effective representation in criminal and juvenile cases. The recipients of the 2002 award were **C. Wilson DuBose**, chairperson of the State Bar of Georgia's Indigent Defense Committee, and **Gary Pairan**, Cobb Circuit Defender's Office.

**Spotlight on Indigent Defense:** The award is given to a member of the media that has demonstrated an outstanding commitment in spotlighting the need for quality indigent defense services in Georgia. The award recognizes the efforts to publicize the plight of, and to advance the cause of, indigent defendants through accurate and informative media participation and coverage. The 2002 award recipient was **Cynthia Tucker** of the *Atlanta Journal-Constitution* Editorial Board.

## Georgia Association of Criminal Defense Lawyers

**2002 Indigent Defense Award:** The award recognizes an individual(s) who has made an outstanding contribution in the area of indigent defense. The 2002 award recipients include **C. Wilson DuBose**, who brought the State Bar Indigent Defense Committee to consensus on indigent defense principles and successfully convinced the State Bar to take a proactive stance for quality indigent defense, and **Terry Everett**, who has successfully lobbied the Houston County Commission for equipment and adequate salaries for her staff, as well as staved off repeated attempts to close her office. 

**Robin E. Dahlen** is the assistant director of communications for the State Bar of Georgia.



Jacqueline L. Payne (left) of the Atlanta Legal Aid Society received the the Pro Bono Dan Bradley Award.

C. Wilson DuBose (right) received the Georgia Indigent Defense Council's Spotlight on Indigent Defense Award and the Georgia Association of Criminal Defense Lawyer's 2002 Indigent Defense Award.



Hon. Alan Jordan and Hon. Ellen McElyea accept the local bar's Law Day Award of Achievement on behalf of the Blue Ridge Bar Association for Award.

## Congratulations to the Jonesboro High School Mock Trial Team

**T**he 2002 Georgia State Champion Mock Trial team from Jonesboro High School in Jonesboro traveled to St. Paul, Minn., in May to compete in the 19th Annual National High School Mock Trial Tournament. The team placed 10th out of a field of 44 teams. This is the best finish Georgia has had since the national championship in 1999. The team was recognized at the awards banquet and team member Aaron Sohacki was also recognized as the "Most Effective Attorney" during the tournament.



## Medical Insurance Task Force Report<sup>1</sup>

By H. James Winkler

If you are a solo practitioner or member of a small law firm and have just about given up on finding affordable medical insurance, read on because there is hope. This article has some answers for you and a four-step process to check out the medical insurance market in your area of the state and evaluate your options for coverage.

The best way to use this article is to read through these pages to get the overview and then follow the four-step process shown in the text box on the next page. The details of the information are too voluminous to print here, so we have posted them on the State Bar's Web site ([www.gabar.org](http://www.gabar.org)) and have provid-

ed a summary of the highlights on the following pages. You can use your computer to view the rate quotes and coverage options shown on the Small Group Medical Plan Survey, which has been organized into a chart listing the name of the insurance company or HMO, a link to its Web site, a brief description of the plan(s) offered and the premium rates in each area of the State where coverage is available.

### Buyer's Guide

The map of Georgia on the next page shows six cities with zip codes used in our survey. Find the zip code that most closely corresponds to your location. You will use that zip code column in the Survey chart on page 63 when you check the rate quotes and coverage options in the Survey on the State Bar Web site. Go to the Survey on the State Bar Web site and select the law firm size that is closest to yours. Then look for the medical

plans offered in your area of the state by checking to see if there are any rate quotes in the column for "your" zip code.

After you review the Survey results, contact a local insurance agent and/or sales rep for some of the insurance companies or HMO plans that provide coverage in your location. Provide them with census data for your covered employees and their dependents, if you choose to provide dependent coverage. Go to their Web sites and check out their provider networks for your area of the state to see if they are acceptable to you. With the information provided by the Survey, you will have an overview of the medical insurance alternatives available where you live and you will be a more informed insurance consumer as you compare rates and plans to find the medical insurance coverage that best suits your firm's needs. Do not terminate your current medical insurance coverage until the final underwriting and rating is completed and confirmed in writing for your new coverage.

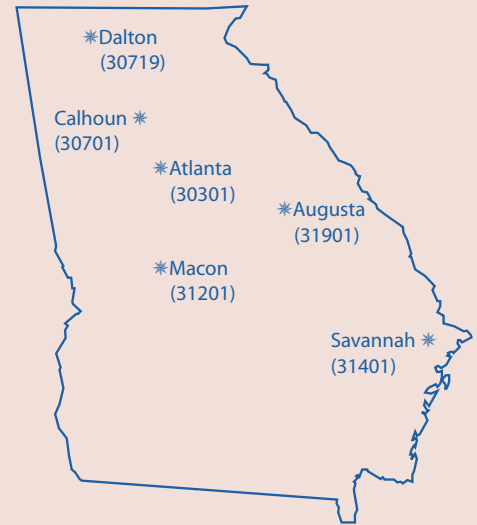
In addition to this four-step approach to finding your medical insurance alternatives, a medical insurance primer is also provided. It will provide you with types of

**Editor's Note:** This article from the State Bar of Georgia's Medical Insurance Task Force helps address the problem of securing affordable, adequate health care coverage for Georgia lawyers. This issue continues to be of paramount importance and is to be further studied by a sub-committee of the Bar's Executive Committee appointed by State Bar President James B. Durham. The mission of this sub-committee is to monitor the market and continue to look for a product or products that the Bar can recommend to the membership.

## 4-Step Process to Find Insurance

Here's the four-step process you should follow to check out the medical insurance market in your area of the state:

1. Pick your area of the state from the map of Georgia and note the zip code printed therein for use as your reference point in the survey data.
2. Go to the State Bar Web site at [www.gabar.org](http://www.gabar.org) and select the Medical Insurance Task Force Report. Then select the State Bar Survey Quotes. The survey quotes will appear very small on your screen. You can either adjust the size on your screen via the applications pull-down menus under "Views," or you can print out the survey quotes and they will be full-sized version on paper.
3. Looking at the survey quotes, find the law firm size that is closest to yours.
4. Evaluate the rate quotes and coverage options listed in the zip code column for your area of the state.



plans, medical insurance terminology and basic coverage options.

## Medical Insurance Primer

Most health care plans in Georgia are HMOs or PPOs. They feature a medical network of hospitals, doctors and ancillary medical professionals who have contracted with an insurance company to provide services. If you choose a medical provider in the approved network, the insurer will pay a set percentage of the cost of service plus, in some plans, you may pay a small co-pay charge (\$10 to \$20) for each visit to the doctor or other service. These plans come close to old-fashioned group insurance, if you play by the rules; step out of the box, however, and you will be penalized with higher out-of-pocket costs, reduced reimbursement rates and limited or no coverage at all.

HMOs require you to select a primary care physician and you must obtain a referral from him/her to see a specialist or be admitted to the hospital. PPOs do not require selection of a primary care physician, but they require pre-certification for hospital admission, utilization review to obtain approval for certain treatments, plus case management in the event of a serious medical condition or extended hospitalization. Typical small group plans require a deductible, which can range from \$250 to \$2,500 per person per calendar year. The most commonly selected deductible is \$500 and most plans feature family deductible maximums that equal three times the individual amount. The amount of the deductible can greatly influence the cost of your insurance. Other factors that play a role in the cost are the types of medical benefits that are included or excluded from

coverage and the extent of pharmacy benefits selected.

Since the cost of prescription drugs is rising faster than any other medical expense, insurance carriers provide options to control costs, such as higher prescription co-payments, deductibles and the use of formularies. Formularies are a list of drugs that are approved by the insurance company. Drugs not on this list may not be covered or may require higher co-payments or deductibles. Most pharmacy benefits are tiered with generic drugs offered at the lowest co-payment level and brand name drugs requiring a higher co-payment. Prescriptions can be filled at a local pharmacy for a 30-day supply and some plans feature a mail order pharmacy benefit that permits a 90-day supply of certain maintenance drugs, such as insulin.

Georgia law requires group insurance to be purchased through a licensed insurance agent. Many agents represent more than one company and many insurance agencies that sell commercial insurance also sell group medical plans. Only a few managed care plans have agents that sell direct to the public. Kaiser Permanente HMO is the only one that responded to our survey. In recent years, banks have added insurance agencies to their financial services and many community banks now offer group insurance services to their commercial customers.

To get a quote, select an agent and provide him/her with a census listing your employees' gender, age, dependent or current coverage status and information regarding the ongoing health conditions of current employees and their dependents. If you have an existing medical insurance plan, the agent

will expect to receive the schedule of benefits and a copy of the monthly billing statement. The agent will obtain quotes and present proposals from the insurance company or companies, perhaps comparing alternatives in a spreadsheet.

The scope of benefits and the deductible will most strongly affect the price, but you should be sure to check the doctors and hospitals listed in the medical provider network to be sure that the ones listed are acceptable to you. Most importantly, under no circumstances should you terminate your current coverage until replacement coverage and pricing have been confirmed in writing.

## The Survey Process

The Medical Insurance Task Force retained an Atlanta based employee benefit consulting firm, Benefit Resources Inc., to conduct a survey of group insurance carriers and managed health care plans. The survey focused on carriers and HMOs that offer small group medical benefit plans. Individual and supplemental plans were not reviewed. Some of the medical carriers listed in the survey also offer individual plans, but there is no typical rate that can be reported in this article since each policy is underwritten specifically for the individual insured. The survey goal was to obtain typical rate quotes for three sizes of law firms in six locations in Georgia. The three law firm sizes are: (1) three covered insureds; (2) nine covered insureds; and (3) 22 covered insureds. The six locations correspond to six geographic areas of the state.

The survey was conducted in three steps. First, licensed insurance companies and HMOs were sent a

## SURVEY SUMMARIES — TYPICAL MEDICAL INSURANCE PLAN FEATURES AND THE HIGH, LOW AND AVERAGE RATES FOR THREE FIRMS IN SIX LOCATIONS

### Pricing Summary: Law Firm 1

Three covered employees (two single and one employee and family)

Typical Indemnity/PPO plan quoted:

\$500 calendar year deductible  
80 percent in network/60 percent out of network  
\$15 office visit co-pay  
\$10 pharmacy co-pay generic drugs  
\$20 pharmacy co-pay brand drugs  
\$40 mail order pharmacy co-pay

Total monthly premiums:

Location/Zip:	<b>30301</b>	<b>30701</b>	<b>31201</b>	<b>31401</b>	<b>30719</b>	<b>30901</b>
Lowest Cost:	\$929.38	\$1030.30	\$1030.30	\$1030.30	\$1030.30	\$1030.30
Average Cost:	\$1479.13	\$1646.47	\$1641.94	\$1673.08	\$1713.34	\$1660.87
Highest Cost:	\$2140.71	\$2465.00	\$2445.00	\$2193.00	\$2448.00	\$2140.71

Typical HMO plan quoted:

\$15 primary care office visit co-pay  
\$10 pharmacy co-pay generic drugs  
\$20 pharmacy co-pay brand drugs  
\$40 mail order pharmacy co-pay

Location/Zip:	<b>30301</b>	<b>30701</b>	<b>31201</b>	<b>31401</b>	<b>30719</b>	<b>30901</b>
Lowest Cost:	\$891.89	\$1352.69	\$1557.50	\$1489.60	N/A	\$1408.45
Average Cost:	\$1068.15	\$1455.10	\$1557.50	\$1489.60	N/A	\$1408.45
Highest Cost:	\$1354.19	\$1557.50	\$1557.50	\$1489.60	N/A	\$1408.45

### Pricing Summary: Law Firm 2

Eight covered employees (two single and six employee and family)

Typical Indemnity/PPO plan quoted:

\$500 calendar year deductible  
80 percent in network/60 percent out of network  
\$15 office visit co-pay  
\$10 pharmacy co-pay generic drugs  
\$20 pharmacy co-pay brand drugs  
\$40 mail order pharmacy co-pay

Total monthly premiums:

Location/Zip:	<b>30301</b>	<b>30701</b>	<b>31201</b>	<b>31401</b>	<b>30719</b>	<b>30901</b>
Lowest Cost:	\$2934.28	\$2934.28	\$2934.28	\$2934.28	\$2934.28	2934.28
Average Cost:	\$4948.32	\$5589.30	\$5583.56	\$5704.48	\$5711.88	5614.33
Highest Cost:	\$7608.66	\$8792.00	\$8712.00	\$7822.00	\$8738.00	7607.00

Typical HMO plan quoted:

\$15 primary care office visit co-pay  
\$10 pharmacy co-pay generic drugs  
\$20 pharmacy co-pay brand drugs  
\$40 mail order pharmacy co-pay

Location/Zip:	<b>30301</b>	<b>30701</b>	<b>31201</b>	<b>31401</b>	<b>30719</b>	<b>30901</b>
Lowest Cost:	\$3594.99	\$5798.14	\$4435.59	N/A	\$5242.66	5040.86
Average Cost:	\$4494.38	\$5798.14	\$4990.07	N/A	\$5242.66	5040.86
Highest Cost:	\$5798.14	\$5798.14	\$5544.54	N/A	\$5242.66	5040.86

### Pricing Summary: Law Firm 3

22 covered employees (15 single, three employee and spouse and four employee and family)

Typical Indemnity/PPO plan quoted:

\$500 calendar year deductible  
80 percent in network/60 percent out of network  
\$15 office visit co-pay  
\$10 pharmacy co-pay generic drugs  
\$20 pharmacy co-pay brand drugs  
\$40 mail order pharmacy co-pay

Total monthly premiums:

Location/Zip:	<b>30301</b>	<b>30701</b>	<b>31201</b>	<b>31401</b>	<b>30719</b>	<b>30901</b>
Lowest Cost:	\$5577.66	\$7173.54	\$7173.54	\$7173.54	\$7173.54	\$7173.54
Average Cost:	\$8706.08	\$9707.52	\$9557.53	\$9778.89	\$9847.98	\$9677.34
Highest Cost:	\$11219.48	\$14243.10	\$14116.46	\$12674.36	\$14142.96	\$12324.12

Typical HMO plan quoted:

\$15 primary care office visit co-pay  
\$10 pharmacy co-pay generic drugs  
\$20 pharmacy co-pay brand drugs  
\$40 mail order pharmacy co-pay

Location/Zip:	<b>30301</b>	<b>30701</b>	<b>31201</b>	<b>31401</b>	<b>30719</b>	<b>30901</b>
Lowest Cost:	\$5352.67	\$8471.69	\$8471.69	\$8190.86	N/A	\$7870.50
Average Cost:	\$6566.63	\$8471.69	\$8471.69	\$8190.86	N/A	\$7870.50
Highest Cost:	\$7722.40	\$8471.69	\$8471.69	\$8190.86	N/A	\$7870.50



preliminary market letter requesting their participation in the survey and many follow-up requests were sent to the potential participants to obtain broad participation in the survey from as many carriers and health plans as possible.

Second, a survey package was sent to all insurance carriers and health plans that responded positively to the market letter. The survey package included employee and family census data obtained from three actual Georgia law firms and a survey questionnaire, which sought rates and underwriting information, coverage options, provider networks, geographic service territories, billing formats, processing standards and other information.


Rate quotes were compiled as if each law firm was located in six geographic locations in Georgia, including metro Atlanta (30301), Calhoun (30701), Macon (31201), Savannah (31401) and Augusta (30901).

## The Survey Highlights

Most of the insurance companies offered medical plans statewide, but the HMOs seemed to concentrate in the metropolitan Atlanta area. Only Blue Cross/Blue Shield of Georgia offered HMO plans in other large Georgia cities. All respondents market their plans through insurance agents or brokers and very few market over the Internet, although that is the best place to find their approved provider network of doctors and hospitals in your area of the state. The survey on the State Bar Web site has links to the insurance companies listed so you can find each insurance company's most current provider network of doctors and hospitals for your location.

It appears that all respondents except ISI/New York Life apply a rate load or an underwriting restriction to law firms, but that does not automatically translate into the lowest premium rates in every category. All respondents apply rate loads to groups that have individuals with on-going health conditions. Rates are generally guaranteed for 12 months, except ISI/New York Life, which guarantees rates for only six months.

Most respondents require 75 percent of all eligible employees to participate in the plan. In some cases, employees covered by another plan (such as being covered as a dependent under a spouse's plan) may not count toward the 75 percent requirement. Furthermore, most respondents require the employer to pay at least 50 percent of the cost of coverage (including the employees and dependents), and while some variation is possible, the employer must pay the majority of the single employee cost. To verify the employer/employee relationship, most respondents require a copy of the firm's DOL-4 (Georgia Department of Labor Quarterly Tax and Wage Report).

Only Blue Cross/Blue Shield and Kaiser Permanente provide claim adjudication services from an office located in Georgia. All other respondents provide claim services from their home office location or regional service centers in other states, but all respondents provide toll-free telephone numbers for claims. 



**H. James Winkler** is the managing member of Winkler DuBose & Davis, LLC, located in Madison, Ga. Winkler received

his law degree from the University of Kansas School of Law in 1972 and served on the Board of Governors of the State Bar of Georgia from 1992-2002.

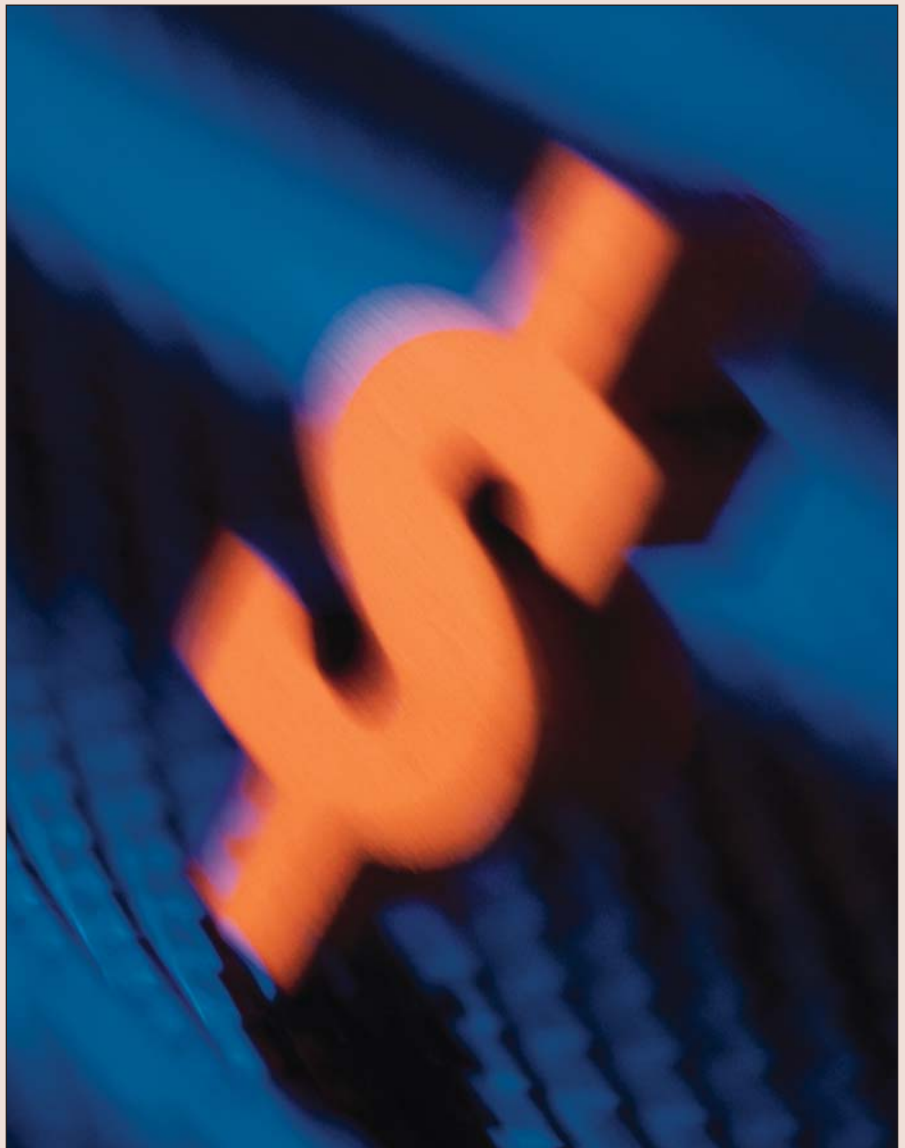
## Endnotes

1. In June of 2001, State Bar of Georgia President James B. Franklin established the Medical Insurance Task Force and charged the task force to examine the available options for medical insurance in Georgia for solo practitioners and members of small law firms (less than 50 eligible insureds). H. James Winkler of Winkler, DuBose and Davis, LLC, Madison, Georgia served as chair of the Task Force. The Task Force members shared their own experiences in buying medical insurance, conducted preliminary surveys of the market, and received several insurance company presentations. It readily became apparent that analysis and selection of group health insurance plans has become a very complex task. No single health insurance plan or insurance company can satisfy the needs of all our members. Consequently, the Task Force retained an Atlanta-based employee benefit consulting firm, Benefit Resources Inc., to conduct a survey of group insurance carriers and managed care plans focusing on carriers and HMOs that specialize in small group medical benefit plans. The Task Force furnished the consultant with employee census data from three actual law firms: (1) three covered employees; (2) eight covered employees; and (3) 22 covered employees. The results of that survey are reflected in the *Small Group Medical Plan Survey* on the State Bar Web site.

# Charitable Solicitation Over the Internet

By Leah M. Singleton and  
Rhonda R. Morgan

In the last few years, Internet usage has exploded. By some estimates, approximately half of all Americans, including individuals and companies, currently use the Internet. Exempt organizations are no exception. These groups are using the Internet to carry out their charitable purposes “in a more efficient and effective manner.”<sup>1</sup> For example, in June of 1999, the American Red Cross raised over \$1 million for Balkan relief through online gifts. The Princeton Alumni Department devotes 25 percent of its time to its interactive Web site,



Tigernet.<sup>2</sup> One Internet solicitation proponent has even remarked that “when we think about what the Internet is bringing to fund-raising...perhaps we are thinking too small.”<sup>3</sup>

Although Internet charitable solicitations are common, laws regulating such solicitations are not. As a result, new laws are needed to decrease the potential for fraud and abuse. These laws must be consistent with the First Amendment and should protect the tax-exempt status for qualified charities.

## Recent Events in Charitable Solicitation

Sept. 11, 2001, is a day that will be remembered throughout history. In what has been called “the worst terrorist attacks on U.S. soil,” hijacked planes crashed into the World Trade Center in New York and The Pentagon in Washington, D.C. — buildings that symbolized our nation’s strength.<sup>4</sup> As a result, thousands of lives were lost while millions of lives watched and were changed forever. America responded with a renewed sense of patriotism, as well as a generous spirit.

To help with the tragedy, an overwhelming number of Americans vigorously donated money to major charities, such as The American Red Cross and the United Way, as well as through local schools, firefighters, little leagues, workplaces, supermarkets and places of worship.<sup>5</sup> Nine days after the attacks, ABC news reported that “Americans have donated \$200 million to major charities since last week’s terror.”<sup>6</sup> President Bush proudly remarked at the time that “Americans’ love for America was channeled through our nation’s great charities.”<sup>7</sup>

The Internet proved to be a pivotal player in the fund-raising effort. In fact, the American Red Cross reported that nearly 40 percent of their donations since the attacks had come through cyberspace.<sup>8</sup> In a speech given on Sept. 18, 2001, President Bush encouraged Internet donations, stating that “[I]nternet portals provide an interesting opportunity for people to contribute and provide their help. Many of the charities themselves welcome donations through their Web sites. So I urge my fellow Americans to continue contributing through Web sites.”<sup>9</sup>

Despite the success of requests by legitimate charities, the attacks also fueled hundreds of fraudulent fund-raising solicitations.<sup>10</sup> After the attacks, the Associated Press reported that, “[t]he twin tower tragedy has become a magnet for ghoulis mischief and deceit by people posing as investigators, fund-raisers and volunteers.”<sup>11</sup> The Better Business Bureau warned donors to be skeptical through reports of scam artists who were preying on America’s heart since the attacks.<sup>12</sup> Likewise, the American Red Cross received reports of solicitations illegally and fraudulently using the Red Cross name.<sup>13</sup> Sen. Chuck Grassley, a leader of the Finance Committee, “asked the General Accounting Office to investigate deceitful charities that pocket donations instead of devoting them to charitable acts and receive undeserved tax breaks.”<sup>14</sup> In addition to the antics of private individuals who abuse online charitable solicitation, there is at least one charity suspected of directly funding terrorists. After Sept. 11, 2001, an Islamic relief agency posted an urgent appeal on its Web site: “Please help us to help

the victims.”<sup>15</sup> However, “intelligence reports indicated that the relief agency had provided funds to affiliated groups in Africa that employed people with suspected ties to terrorist groups, including Osama bin Laden’s al Qaeda network.”<sup>16</sup> Such events cause us to question the current state of our laws regarding online charitable solicitation.

## State Laws

States are now the primary regulators of a tax-exempt organization’s solicitation activities. Currently, “38 states and the District of Columbia require charities to register in-state and file financial and other information prior to soliciting in those states.”<sup>17</sup> Although they vary, the laws in the different states share three main themes: 1) registration and licensing requirements with mandatory financial and operational disclosures; 2) laws punishing unlawful, fraudulent solicitation activities; and 3) laws controlling costs of solicitation.<sup>18</sup>

Georgia’s laws generally follow this scheme. The Georgia Charitable Solicitations Act regulates soliciting organizations, paid solicitors and the content of the solicitation.<sup>19</sup> Georgia requires any paid solicitor who solicits contributions on behalf of a tax-exempt organization within or from the state of Georgia to register annually, including a filing cost of \$250 and an annual filing fee of \$100.<sup>20</sup> The paid solicitor must also post a \$10,000 bond with the Secretary of State’s office.<sup>21</sup> In addition to the paid solicitor’s registration and bond, the tax-exempt organization must file the Georgia Form C-100 to legally solicit funds or accept contributions in Georgia.



(Forms can be found at [www.sos.state.ga.us/corporations](http://www.sos.state.ga.us/corporations)). There is an annual fee of \$25 for the tax-exempt organization's registration with a \$10 annual renewal fee.<sup>22</sup>

Georgia also regulates the content of the solicitation. Every solicitation to the public must include, "at the point of solicitation," the name and location of the solicitor and charity and, if applicable, disclosures that the solicitation is being made by a paid person rather than a volunteer.<sup>23</sup> In addition, a description of the charity's programs and financial statement must be made available upon request.<sup>24</sup> There are severe penalties if these solicitation laws are not followed correctly. It is a felony for a solicitor to mislead or misrepresent a charity.<sup>25</sup> In addition, the

violation can incur civil penalties by the victim of \$2,500 for each single violation or \$25,000 for multiple violations.<sup>26</sup> Georgia also explicitly prohibits any person to use a name or symbol closely associated with a charitable organization for the purpose of solicitation.<sup>27</sup> Unlike other state law schemes, there are not any significant Georgia laws controlling the fundraising costs retained by the paid solicitor and the funds actually received by the charity. The only Georgia regulation on cost of solicitation requires that a written agreement from the commercial coventurer be made available upon request.<sup>28</sup>

## Federal Laws

Despite congressional proposals to regulate charitable fundraising, "the federal government's efforts

toward regulating charitable institutions remain limited to those reflected in the Internal Revenue Code."<sup>29</sup> The main sections of the IRS Code applicable to charitable solicitation are sections 6113, 6115 and 170(f)(8). The pertinent Internal Revenue Code Sections regarding charitable solicitation require certain disclosures to donors. Any failure to disclose may result in a change in the tax-exempt status.<sup>30</sup> Section 6113 requires organizations that are ineligible to receive tax-deductible charitable contributions to disclose to donors that contributions are not deductible.<sup>31</sup> Similarly, Section 6115 requires organizations that are eligible to receive tax-deductible charitable contributions to disclose to donors, who contribute more than \$75 and receive a

quid pro quo, that portions of their contribution is not tax-deductible.<sup>32</sup> Section 170(f)(8) requires organizations that are eligible to receive tax-deductible charitable contributions to provide written acknowledgment of a contribution of \$250 or more to the donor by the time they file their tax returns.<sup>33</sup>

## Constitutional Requirements

In addition to the federal government's regulation through the IRS Code, case law holds that state charitable solicitation statutes must withstand constitutional challenge. In *Village of Schaumburg v. Citizens for a Better Environment*, Justice White of the United States Supreme Court stated, "prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment."<sup>34</sup> Laws cannot force tax-exempt organizations to make statements in the course of soliciting funds that they would not otherwise have made. "The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."<sup>35</sup>

## Effect of the Internet on Solicitation

The Internet provides charitable organizations a new medium to reach the public. Some advantages of using the Internet for charity solicitation include "the ability to access more people than most organizations have historically

been able to reach, the relatively low expense required to hang up your shingle in this particular public place, and the (perhaps) higher disposable income demographic reached in comparison with most marketing methods."<sup>36</sup> Online donations began making a presence in the mid 1990s and will continue to grow in the new millennium. It is estimated that of the \$135 billion donated to charities in 1998, approximately \$192 million was contributed electronically through online giving.<sup>37</sup> In 1999, over 600,000 organizations reported that they accept credit card donations through the Internet.<sup>38</sup> Recently, "a new Chronicle [of Philanthropy Fundraising] survey shows that 126 large charities raised more than \$96 million online during the 2001 fiscal year" with electronic gifts doubling from 2000 to 2001 for over one-third of the groups in the survey.<sup>39</sup> According to the Foundation Center, there was a total of \$1.5 billion of donations in response to September 11, with \$215 million donated online by individuals.<sup>40</sup>

## State Laws on Internet Solicitation

Most solicitation laws are promulgated and enforced/handled at the state level under the state's police powers, which can cause jurisdictional problems to arise when analyzing cyberspace activities. Since the Internet is available in all states at any given moment, the question becomes in what state must that organization register. "State charity officials and those who solicit contributions using the Internet should note that in actions to enforce state laws against deceptive charitable solicitations, including fraud and misuse of charitable

funds, jurisdiction typically exists over some organizations not required to register in the state."<sup>41</sup>

In other words, if an organization solicits funding over the Internet, that organization is presumably within the jurisdiction of every state since solicitation over the Internet would be actually occurring in every state. This is problematic and costly for charitable organizations since this requires registering in all 38 states that have solicitation laws, paying each state's filing fee, and keeping up to date on each state's laws for legal compliance with every state solicitation law. Such a feat may be impossible given the variation in each state's charitable solicitation laws. The National Association of State Charity Officials (NASCO) has recognized these problems and has proposed "The Charleston Principles," which offers a model act concerning charitable organizations and the Internet, to serve as a guide for state officials in developing new charity laws.<sup>42</sup> "The Charleston Principles," if followed, would indeed unify the individual states' approach to charitable solicitation over the Internet and would provide the necessary predictability across jurisdictions for the nonprofit sector, much like the Uniform Commercial Code did for commercial businesses many years ago.<sup>43</sup> Although states are reluctant to modify existing laws, several national charities adhere to "The Charleston Principles" when conducting solicitation for lack of better guidance.<sup>44</sup>

## Federal Laws on Internet Solicitation

In October of 2000, the IRS published Ann. 2000-84 (2000-42 IRB 385, (2000)), which stated that the IRS is "considering the necessity of

issuing guidance that would clarify the application of the IRS Code to the use of the Internet by exempt organizations.”<sup>45</sup> The notice seeks guidance in the area of solicitation of charitable contribution solicitation and fundraising cost disclosures by charities of cyberspace, among other Internet issues. Such a notice reflects that the IRS is also considering the very issues in which the tax-exempt organizations are struggling.

### **Constitutional Requirements in Internet Solicitation**

There is very little legal authority of regarding the application of the First Amendment to Internet charitable solicitation of funding; however, many of the same issues

of facing traditional charitable solicitation and Internet regulations are present. House Republican majority leader Dick Armey, the House Republican majority leader representing Texas, has said the “idea of turning the tax man into a Net cop would have a chilling effect on the Internet...we will be watching what they do, and we will not tolerate any backdoor attempt to regulate the Internet.”<sup>46</sup>


Currently, there is no case law or other constitutional authority that explicitly limits or guides charitable solicitation over the Internet. However, the prior case law regarding the First Amendment right to free speech as it applies to solicitation disclosures will certainly be applicable.<sup>47</sup>

### **Conclusion**

Thus, the question becomes whether we can regulate Internet charitable solicitation so as to reduce the number of fraudulent charities and abuses. Such a solution must minimize the fraud while at the same time preserve the organization’s right to free speech under the First Amendment of the U.S. Constitution. For this is effectively occur, regulation must be reached at the federal level or through a unified state effort.

The recent terrorists attacks have been devastating to our country. These events should cause America to create new laws that will eradicate our weaknesses before others are able to act on our vulnerabili-



ties. Charitable solicitation over the Internet is an area in need of change. As we unify to rebuild our country, let us also unify to strengthen our law. 



**Leah M. Singleton** is a recent cum laude graduate of Mercer University School of Law, Macon, Ga. She holds a bachelor's

degree in mathematics from the State University of West Georgia and was employed by Hewitt Associates LLC prior to beginning law school. Singleton plans to specialize in ERISA and Employee Benefits and will begin her career with Troutman Sanders LLP in the fall.



**Rhonda R. Morgan** is a professor of business administration at Gordon College, Barnesville, Ga. She holds a doctorate from the University of Georgia.

## Endnotes

1. Robert A. Wexler and Alice M. Anderson, *Internet Guidance Should Reconcile Old Law with a New Medium*, 12 J. TAX'N EXEMPT ORGS. 187, 189 (Mar./Apr. 2001).
2. Adam Corson-Finnerty, *E-Fundraising*, at <http://www.fund-online.com/musings/efundraising2.html>, (visited May 22, 2002).
3. *Id.*
4. Geraldine Sealey *et al.*, *Acts of Terror: Nation in Shock as World Trade Center Towers Leveled, Pentagon Hit*, at [http://abcnews.go.com/sections/us/DailyNews/WTC\\_MAIN010911.html](http://abcnews.go.com/sections/us/DailyNews/WTC_MAIN010911.html), (visited May 22, 2002).
5. Derek Thomson, *Giving to Charity: Americans Give More Than \$200 Million to Relief Efforts*, at [http://abcnews.go.com/sections/us/DailyNews/WTC\\_charities\\_010918.html](http://abcnews.go.com/sections/us/DailyNews/WTC_charities_010918.html), (visited May 22, 2002).
6. *Id.*
7. *Id.*
8. *Id.*
9. President George W. Bush, *Remarks in the White House Rose Garden* (Sept. 18, 2001), available in LEXIS, Nexis Library, AP File.
10. Tom Hays, *Mischief, Deceit Operate Amid Heroism* (Sept. 16, 2001), available in LEXIS, Nexis Library, AP File.
11. *Id.*
12. *Be on the Lookout for Charity Scams*, YAHOO! NEWS, September 18, 2001.
13. Karen Matusic, *Internet Scam Artists See a Profit in Attacks*, Reuters, September 19, 2001.
14. Senator Charles E. Grassley, *Grassley Letter to GAO Asking for Charities Audit*, 2001 Ex. Organ. Text 29-54, 2001.
15. Woodward T. Pound and Lisa Griffin, *A Charity's Odd Ties: An Islamic organization in Missouri says it aids the needy*; U.S. officials question links to terrorists, U.S. NEWS AND WORLD REPORT, November 2, 2001.
16. *Id.*
17. Melissa G. Liazos, Comment, *Can States Impose Registration Requirements on Online Charitable Solicitors?* 67 U. CHI. L. REV. 1379, 1379 (2000).
18. Elaine Waterhouse Wilson, *State Regulation of Charitable Solicitation*, 12 PROB. & PROP. 48, 48 (July-Aug. 1998).
19. O.C.G.A. § 43-17-1 et seq.
20. O.C.G.A. § 43-17-3 (1988).
21. O.C.G.A. § 43-17-4 (1988).
22. O.C.G.A. § 43-17-5(c), see also Georgia Form C-100.
23. O.C.G.A. § 43-17-8 (1988).
24. O.C.G.A. § 43-17-8(3)(B) (1988).
25. O.C.G.A. § 43-17-12(c) and 43-17-23 (1988).
26. O.C.G.A. § 43-17-13(a)(2)(A) and 43-17-12(d) and 43-17-23(b) (1988).
27. O.C.G.A. § 43-17-12(c) (1988).
28. O.C.G.A. § 43-17-6(a) (1988).
29. Liazos, *supra* note 9, at 1390.
30. Failure to Disclose, 25 Fed. Tax Coord. 2d 2701-2; Organizations not tax-exempt, 7 Fed. Tax Coord. 2d 4113.
31. I.R.C. Section 6113(a) (1986).
32. I.R.C. Section 6115 (1986).
33. I.R.C. Section 170(f)(8) (1986).
34. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 631 (1980).
35. Riley v. National Federation of the Blind of N.C., 487 U.S. 781, 782 (1988).
36. Eric Mercer, *How Can We Use the Internet for Fundraising?*, at <http://www.nonprofit-info.org/misc/981027em.html>, (visited May 22, 2002).
37. Beth Kanter, *Exploring Online Fundraising for Nonprofit Arts Organization*, at <http://www.idealists.org>.
38. John Blaber, *What to Look for in an Online Donation Service*, at <http://www.nonprofits.org>.
39. Nicole Wallace, *Forging Links Online*, THE CHRONICLE OF PHILANTHROPY FUNDRAISING, June 13, 2002.
40. Loren Renz, The Foundation Center, *Giving in the Aftermath of 9/11: Foundations and Corporations Respond*, 2002.
41. *Charleston Principles*, at [http://www.nasconet.org/stories/storyReader\\$10](http://www.nasconet.org/stories/storyReader$10), (visited May 22, 2002).
42. National Association of State Charity Officials, *Charleston Principles, Section 1*, at <http://www.nasconet.org>.
43. *Id.*
44. *Id.*
45. Wexler *et al.*, *supra* note 15, at 187.
46. *Id.*
47. Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

## The Grand Old Courthouses of Georgia – The Elbert County Courthouse at Elberton

By Wilber W. Caldwell

**C**hattanooga architect Reuben Harrison Hunt was born in Elbert County, Ga., in 1862. In 1866, he left with his family and, 10 years later, he began his career as a builder, studying architecture informally on the side. In these early years, it is unlikely that he ever dared to dream that he would one day return to his native Elbert County to design one of Georgia's most spectacular court buildings of the era.

Arriving in Chattanooga in 1883, Hunt "went to work for day wages as a carpenter." He began his architectural practice in 1885. In a career that spanned six decades, Reuben Hunt designed churches, courthouses and schools all across the south and in many other states. His work is that of an accom-



Built in 1894, Reuben H. Hunt, architect.

plished designer, reflecting many styles including Gothic Revival, Romanesque Revival, the Beaux-Arts Style, Georgian Revival and later Art Deco modes. Like this fine court building in Elberton, many of his early courthouses were

influenced by the work of the American master, Henry Hobson Richardson.

When Hunt left Elbert County, Elberton was a very remote place. Its history was similar to many of the older counties in the upcountry


Piedmont. Cut from Wilkes County in 1790, Elbert County established its county seat at the tiny hamlet first called Elbertville and later simply called "Elbert Courthouse." When the town was incorporated with the name Elberton in 1803, a log courthouse stood on the square. The early record of courthouse construction in Elbert County is sketchy, but we know that a substantial brick court building was finally built around 1853. By the early 1890s, Elberton lay at the junction of two railroads and progress was on the wind. The old courthouse was in disrepair. It was demolished in 1893 to make way for a grand new symbol for Elberton's aspirations.

The year 1893 was a watershed for American architecture. After the death of the great H. H. Richardson only seven years before, the Richardsonian Romanesque had briefly dominated American's architectural imagination. But other

forces were at work. A flowery American Queen Anne Style was emerging and a second Renaissance Revival was gaining momentum. With the overwhelming success of the "Florentine Renaissance," excesses of the buildings of the Columbian Exposition at the 1893 Chicago World's Fair, the Picturesque would soon be in disarray, and a return to order would become the architectural voice of American economic progress in the coming century. As the great Chicago Fair opened, Reuben Hunt was selected from a field of six architects who presented plans for Elbert County's new courthouse.

When Hunt returned to the county of his birth, he had already designed many buildings in the Richardsonian mode. The influence of the American master's Romanesque designs is clear here at Elberton. The brick and stone polychromy, the grand arch of an entrance, the characteristic fenestration and the bold corner pavilions with their steep rooflines all recall Richardson's Allegheny County Courthouse in Pittsburgh, completed only five years before. Equally clear, however, are evolving classical elements. Most notable is Hunt's careful symmetry and his eclectic use of Renaissance ornament.

It is also notable that in the early 1890s, two domestic works of another great American architect, Richard Morris Hunt, were rising to further incorporate elements of the French Renaissance into the bubbling American architectural mix. R. M. Hunt's Ochre Court at Newport, R.I., was completed in 1891, and the construction of his grand Biltmore House at Asheville, N.C., was begun in that same year. It is quite possible that in Elberton, Reuben Hunt drew inspiration from these grand homes.

This was to be Reuben Hunt's only courthouse in Georgia, but its influence cannot be understated. In the last years of the old century and the first years of the new, this symmetrical design with its corner pavilions and central tower would become popular with many of Atlanta's best architects, and soon similar buildings would decorate many of the state's courthouse squares. Notable in this regard are Bruce and Morgan's grand Monroe County Courthouse at Forsyth (1898) and a number of designs by James Golucke, including courthouses in Emanuel (1895), Clayton (1898), Fannin (1901), Habersham (1898), Madison (1901) and Ware (1903) counties. 

Excerpted by the author from **Wilber W. Caldwell, *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.



*“and justice for all!”*



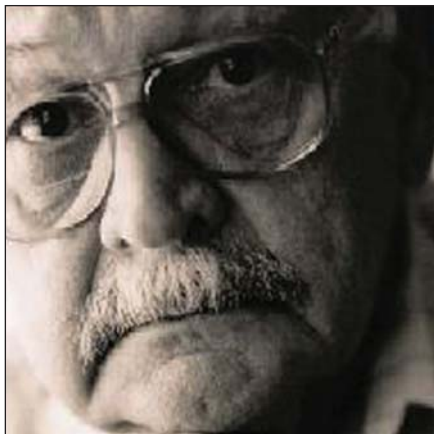
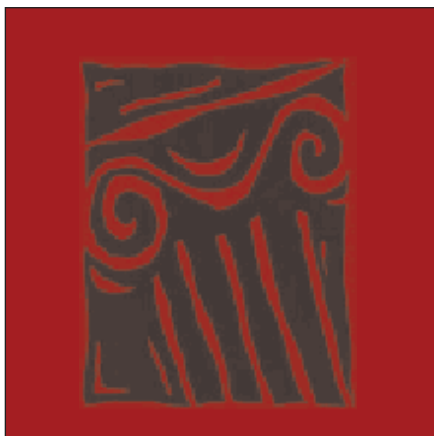
## 2002 State Bar Campaign Georgia Legal Services Program

The Georgia Legal Services Program (GLSP) offers hope and help to those who would otherwise go without.

Legal assistance at the right time can help families and individuals out of poverty and change their lives forever.

GLSP provides free legal assistance to impoverished families and individuals in 154 counties outside the metro Atlanta area.

The State Bar of Georgia and GLSP are partners in the campaign to achieve “Justice For All.” It’s our responsibility as lawyers to help assure this promise means something. Please give generously.



### State Bar Campaign for the Georgia Legal Services Program *Every gift counts in our access to justice cause!*

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

Please include me in the following giving circle:

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

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

#### Donor Information:

Name \_\_\_\_\_

Business Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Please check one:

- ☐ Personal gift      ☐ Firm gift

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

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

**Thank you for your generosity.**



## KUDOS

The **Georgia Indigent Defense Council** announced the election of its officers for fiscal year 2003: chairperson – **Hon. John E. Morse Jr.**, Savannah; vice-chairperson/chairperson-elect – **Bruce H. Morris**, Atlanta; secretary – **Gerald P. Word**, Carrollton; and treasurer – **Robert E. Minnear**, Atlanta. The Council also extended its appreciation to **Flora Devine**, of Kennesaw, who served as the council's chairperson for the last three years. Devine will continue her service as a council member.

**Gene Mac Winburn** of **Winburn, Lewis, Barrow and Stolz**, Athens, has been named president of the **International Society of Barristers**, an honor society with a membership limited to 600 outstanding trial lawyers from the United States and Commonwealth countries. He has been a member of the society since 1989 and served as a member of the board of governors, secretary-treasurer, second vice-president, first vice-president and president-elect.

Over 50 persons attended the **State Bar Access to Justice Committee's Access to Justice Convocation** in May to discuss improving access to justice for the poor, especially for isolated and hard-to-reach populations in the state, such as immigrants, the rural poor, "unpopular" clients and prisoners with civil legal issues.

The **American Red Cross** awarded **Nolan Leake, King & Spalding**, with the Atlanta Chapter's **Volunteer Fundraiser of the Year**. The award is given annually to an individual who best exemplifies the spirit of philanthropy within the metro Atlanta community for the American Red Cross.

**Robert S. Giolito**, formerly a partner in the labor law firm of **Stanford, Fagan & Giolito** in Atlanta, has been appointed general counsel of the **Directors Guild of America (DGA)** in Los Angeles. The DGA represents all motion picture, television and theater directors in the United States. Giolito is the former chair of the State Bar's Labor and Employment Law Section, and the Atlanta Bar's Labor and Employment Section.

**Kilpatrick Stockton** partner and trademark attorney **Ted Davis**, Atlanta, was recently awarded the prestigious **Ladas Memorial Award** for his article, "Directing Traffix: A Comment on the Construction and Application of Utility Patent Claims in Trade Dress Litigation," which appeared earlier this year in the *Florida Law Review*. The award, given by the Brand Names Education Foundation, was announced at the 2002 International Trademark Association's annual meeting in Washington, D.C.

The **Georgia Association for Women Lawyers** awarded its **2002 Kathleen Kessler Award** to **Paula Frederick**. The award is given annually to a female attorney who has exhibited a long-term commitment to the legal profession and commu-

nity. Prior awardees include Cathy Cox, Mary Ann Oakley and the Hon. Phylliss Kravitch.

**Beau Hays**, of **Hays & Potter, P.C.**, located in Atlanta, was elected chair-elect of the **Southern Region Members' Association of the Commercial Law League of America (CLLA)**. In addition, **Douglas L. Brooks**, of **Douglas L. Brooks, P.C.**, located in Atlanta, has been admitted membership in the CLLA. The CLLA is an organization of bankruptcy and commercial law attorneys and other business professionals.



In its 15th year of awarding scholarships to aspiring young law students, the **DeKalb Lawyers Association** recently honored one of the

nation's most esteemed legal advocates with the naming of its annual scholarship in honor of **Donald Lee Hollowell**. The organization announced the "Donald Lee Hollowell Legacy Scholarship Award" at its Annual Scholarship Breakfast in June at the Stone Mountain Park Evergreen Conference Resort.



**Magnolia Manor** honored retired Georgia Supreme Court **Chief Justice Thomas O. Marshall Jr.** at the recent meeting of the South Georgia Annual Conference of the

United Methodist Church in Albany, Ga. Justice Marshall was named the first recipient of the **Thomas O. Marshall Jr. Good Samaritan award**.



The **Court of Federal Claims Bar Association** recently announced the establishment of the **Randolph W. Thrower Award** in honor one of its founders and first president, **Randolph W. Thrower**, Atlanta. The award will recognize exceptional individual efforts to advance and promote the goals of the bar association and will be presented annually beginning this year at the court's 20th Anniversary Celebration, to be held October 4-5 in Washington, D.C.

**Lamberth, Bonapfel, Cifelli & Stokes, P.A.**, announced its former member, **Paul W. Bonapfel**, was appointed as the **United States bankruptcy judge** for the northern district of Georgia. The firm will continue its practice as **Lamberth, Cifelli, Stokes & Stout, P.A.**

**Hunter Maclean**, Savannah, announced that partner **T. Mills Fleming** was elected president of the **Georgia Academy of Healthcare Attorneys**

(GAHA) at its annual meeting in Atlanta. The GAHA provides a forum for examining health care issues and their impact on hospitals, health systems and other organizations.

**Thomas C. Arthur**, interim vice provost for international affairs at Emory University, has been named dean of the **Emory University School of Law**.

The **Department of Housing and Urban Development** announced that **Steven J. Edelstein**, managing attorney in the civil rights, employment and ethics law division of the Atlanta Regional Office, was selected as the **Outstanding Professional Employee for the Year 2002** by the Atlanta Federal Executive Board.

**King & Spalding**, Atlanta, received the **S. Phillip Heiner Award** from the **Atlanta Volunteer Lawyers Foundation** at the Atlanta Bar Association's Annual Meeting held in May. The firm received the award for its pro bono commitment to low-income individuals in Atlanta, and in particular, for leading the Eviction Defense Project and initiating the Emergency Services Personnel Will Project.

The **Pennsylvania Bar Association** presented Harrisburg, Pa., attorney **Robert H. Davis Jr.** with its **Award of Merit**. Davis was presented the award at the Leadership Recognition Awards breakfast by Bar President H. Reginald Belden Jr. and President-Elect Timothy J. Carson.

**Needle & Rosenberg, P.C.**, Atlanta, announced the celebration of its **19th anniversary**. On June 1, 1983, **Bill Needle** opened the doors to his own law firm in downtown Atlanta.

## ON THE MOVE In Athens

**Brenda J. Renick**, formerly of Scott & Wells, P.C., in Athens, announced the formation of the **Law Offices of Brenda J. Renick**, a general practice and personal injury firm. The address is P.O. Box 48012, Athens, GA 30604-8012; (706) 543-7400; Fax (706) 353-7754; formrteki@yahoo.com.

## In Atlanta

The national law firm of **Alston & Bird LLP** announced that **Jonathan D. Crumly Sr.** has joined the firm as counsel in its Atlanta office, working in the construction group. The office is located at One Atlantic Center, 1201 West Peachtree St., Atlanta, GA 30309-3423; (404) 881-7000; Fax (404) 881-7777.



**Erik Fortner** has departed the City of Atlanta Office of Solicitor General in order to form his own firm, **Erik Fortner, LLC**. The firm will have an initial emphasis on criminal defense work. However, the firm is available to handle all legal matters. The office is located at 1401 Peachtree St., Suite M-100, Atlanta, GA 30309; (404) 881-6010.



Baltz



Goheen



Hensel



Moore



Reichman



Rothermel



Woo

**King & Spalding** announced the following new partners, effective Jan. 1, 2003. In the Atlanta office, the new partners are: **Raymond E. Baltz** — mergers & acquisitions; **Barry Goheen** — business and class action litigation; **Donald P. Hensel** — tax; **Rebecca Cole Moore** — labor & employment; **Courtland L. Reichman** — intellectual property and franchise & distribution; **Anthony W. Rothermel** — corporate finance, mergers & acquisitions and private equity; and **Robert K. Woo Jr.** — business, product liability and environmental tort litigation. In the New York office, the new partner is: **Mark E. Thompson** — corporate finance, mergers & acquisitions, private equity and telecommunications. The Atlanta office is located at 191 Peachtree St. NE, Atlanta, GA 30303-1763; (404) 572-4600; Fax: (404) 572-5100. The Washington, D.C., office is located at 1730 Pennsylvania Ave., NW, Washington, D.C. 20006-4706; (202) 737-0500; Fax (202) 626-3737.



**Weissman, Nowack, Curry & Wilco, P.C.**, announced that **Frank O. Brown Jr.**, formerly of Holland & Knight LLP, has joined the firm as of counsel. Frank's specialized areas of practice include real estate litigation and construction litigation. The main office is located at Two Midtown Plaza, 1349 West Peachtree St., Suite 1500, Atlanta, GA 30309; (404) 885-9215; Fax (404) 885-9214.

**Jackson and Hardwick** has hired **Frederick G. Boynton** as of counsel. The office is located at 7000 Central Parkway, Suite 300, Atlanta, GA 30328; (770) 392-0500; Fax (770) 392-0479.

**Alton Hornsby III** has joined the Atlanta office of **Merchant & Gould**. Hornsby will concentrate on assisting clients by preparing and prosecuting patents in the electrical, computer and software fields. The Atlanta office is located at Georgia-Pacific Center, 133 Peachtree St. NE, Suite 4900, Atlanta, GA 30303; (404) 954-5100; Fax (404) 954-5099.

The law firms of **McKenna & Cuneo L.L.P.** and **Long Aldridge & Norman LLP** announced that they will merge effective June 1, 2002, to form **McKenna Long & Aldridge LLP**. The combined firm offers clients access to more areas of expertise and experience, more geographic diversity, and more depth and capacity. The new firm will have

approximately 400 lawyers and public policy advisors with a total staff of 750. The combined firm will have eight offices: Atlanta, Denver, Los Angeles, Philadelphia, San Diego, San Francisco, Washington, D.C., and Brussels. The Atlanta office is located at 303 Peachtree St. NE, Suite 5300, Atlanta GA 30308; (404) 527-4000; Fax (404) 527-4198.

**Gambrell & Stolz, L.L.P.**, announced that **Patrick M. Connolly** and **Maria Maistrellis** have joined the firm as partners. The office is located at 303 Peachtree St., Suite 4300, Atlanta, GA 30308; (404) 577-6000; Fax (404) 221-6501.

**Sutherland Asbill & Brennan LLP** announced the expansion of its patent prosecution practice with the addition of partner **Malvern (Griff) U. Griffin III** and associates **Russell A. Korn** and **Kathryn Harrison Wade, Ph.D.**, to the firm's Atlanta office. The office is located at 999 Peachtree St. NE, Atlanta, GA 30309; (404) 853-8000; Fax (404) 853-8806.

**Elarbee, Thompson, Sapp & Wilson, LLP**, announced that **Lee Creasman**, former vice president of human resources and senior counsel of Rollins Inc., is a new partner of the firm. The office is located at 800 International Tower, 229 Peachtree St. NE, Atlanta, GA 30303; (404) 659-6700; Fax (404) 222-9718.

**Lauren H. Levin** joined the Atlanta office of **Fragoman, Del Rey, Bernsen & Loewy** as an associate attorney specializing in business immigration law. The office is located at 1175 Peachtree St. NE, 100 Colony Square, Suite 700, Atlanta, GA 30361; (404) 249-9300; Fax (404) 249-9291.

**Alston & Bird LLP** announced that **Betsy P. Collins** has joined the firm as counsel, resident in the Atlanta office. Her practice will focus on securities litigation, consumer class actions and complex commercial litigation. The office is located at One Atlantic Center, 1201 West Peachtree St., Atlanta, GA 30309-3423; (404) 881-7000; Fax (404) 881-7777.

**Powell, Goldstein, Frazer & Murphy LLP** has hired **Brad Baldwin** as counsel for the bankruptcy and corporate reorganization practice group. Baldwin concentrates his practice on corporate reorganizations in Chapter 11 cases and out-of-court workouts. The office is located at 191 Peachtree Street, NE, Sixteenth Floor, Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999.

## In Brunswick

**Fisher & Zucker, LLC**, a commercial transactions and litigation law firm, recently announced that **J. Samuel Choate Jr.** has joined the firm as a partner to open the new Brunswick office, where he will resume his litigation and government affairs practice. The office is located at 777 Gloucester St., Suite 411, Brunswick, GA 31520; (912) 264-4211; Fax (912) 264-0453.

## In Douglas

**Cottingham & Porter, P.C.**, announced that **Jeffrey H. Kight** has become associated with the firm. Kight formerly practiced with Rothschild & Morgan, P.C., in Columbus, Ga., and joins partners Sid Cottingham, Bob Porter and Will Thompson at the firm's office located at 319 East Ashley St., Douglas, GA 31533-3810; (912) 384-1616; Fax (912) 384-1775; [cnp@alltel.net](mailto:cnp@alltel.net).

## In Macon

**J.B. Marshall, Malcolm G. Lindley, J.A. Powell Jr. and J. Brent Marshall** announced the formation of **Marshall, Lindley & Powell**, with offices at 4601 Arkwright Road, Macon, GA 31210; (478) 471-8787; Fax (478) 474-4332.

## In Madison

**Charles W. Merritt Jr., Attorney at Law, PC**, announced that **Christian G. Henry**, formerly of Hawkins & Parnell LLP, has become associated with the firm. The office is located at 155 South Main St., Madison, GA 30650; (706) 342-9668; Fax (706) 342-9843.


## In Chattanooga, Tenn.



**Husch & Eppenberger, LLC**, announced that **Martin L. Pierce** has joined the firm as a member. Pierce practices in the firm's tax & estate planning and employee benefits practice groups. The office is located at 736 Cherry St., Chattanooga, TN 37402; (423) 266-5500; Fax (423) 266-5499.

## Of Note

The **Georgia Indigent Defense Council** announced the recipients of its fiscal year **2003 Improvement Grants**. The Improvement Grant program is in its third year, and distributes funding for start-up programs in seven categories. The recipients in each category are as follows:

**Early Intervention:** Coffee County; **Caseload Reduction:** Mountain Judicial Circuit (Habersham, Rabun and Stephens Counties); Newton County; and Troup County; **Public Defender Office Creation or Enhancement:** Coweta County; Newton County; Northern Judicial Circuit (Elbert, Franklin, Hart, Madison and Oglethorpe Counties); Rockdale County; and Troup County; **Mental Health:** DeKalb County, Southern Judicial Circuit (Brooks, Colquitt, Echols, Lowndes and Thomas Counties); Toombs Judicial Circuit (Glascok, Lincoln, McDuffie, Taliaferro, Warren and Wilkes Counties); **Juvenile:** Barrow County; Fulton County; and Pickens County; **Technology:** Carroll County; Coffee County; Glynn County; Jasper County; Mountain Judicial Circuit (Habersham, Rabun and Stephens Counties); and Tattnall County; **Unspecified New Idea:** No funds awarded in this category. 



## You Talkin' to Me?

**L**ooking at the stacks of discovery documents littering your conference table, you know how David must have felt the first time he laid eyes on Goliath. You've taken on BigCo Inc., a mammoth conglomerate that is Georgia's largest employer. Your client, Little Guy, was in the parking lot at a BigCo Warehouse Store when he was flattened by a BigCo truck making a delivery.

Little Guy's injuries would have been worse, but one of the BigCo employees at the scene had some nursing training and was able to provide on-site medical attention. As she treated Little Guy at the scene, the employee told Guy she often complained to BigCo executives that delivery trucks should not be routed by the store's main entrance.

Your discovery request has yielded some good information and you've got the names of the employees who Little Guy has mentioned. There's Due Gooder, the employee who provided first aid to Guy. Gooder is store manager and was recently named vice-president for human resources of BigCo Inc. Lousy Driver, the employee who was driving the truck that hit Guy, was fired by BigCo shortly after the incident. BigCo has provided you with Lousy's home address and telephone number. Finally, there's Ima Witness, a part-time employee who was rounding up shopping carts in the parking lot when the accident occurred.

You want to hear what these folks have to say. You ask your associate to interview them and let you know which ones need to be scheduled for deposition.

Your associate grows thoughtful upon hearing her assignment. "Hold on," she says. "BigCo's lawyer will never let us talk informally to these folks. You may as well just go ahead and schedule the depositions now."

"I don't need BigCo's permission to interview these witnesses," you say uncertainly. "At least I don't THINK I do...."

All lawyers know they can't talk to an adverse party unless they have the permission of that party's lawyer.<sup>1</sup> When the opposing party is an enormous conglomerate, can corporate counsel forbid the lawyer on the other side from talking to every employee?

Two Formal Advisory Opinions answer the question for Georgia lawyers. Formal Advisory Opinion 87-6 prohibits a lawyer from interviewing certain employees of a corporate entity that is the opposing party in pending litigation. If the employee is an officer, director or other employee with authority to bind the corporation, or if the interviewee is the employee whose acts or omissions may be imputed to the company in relation to the subject matter of the case, the lawyer





must get consent of corporate counsel to any interview that is not otherwise “authorized by law.” Other employees may be treated as witnesses and interviewed without prior consent from the corporation or its lawyers.

So, in this instance, you can definitely talk to Ima Witness. She’s not an officer, director, or employee with the authority to bind BigCo in the case, nor is she at fault in the incident which injured Little Guy.

You should, however, not talk to Due Gooder without consent of the BigCo attorney. Gooder is a vice president in the BigCo corporate structure, so she is off-limits.

What about Lousy Driver? He’s the tortfeasor or “the employee whose acts or omissions may be imputed to the corporation in relation to the subject matter of the case,” as described in the formal advisory opinion. Normally, he would be off-limits, but there’s

something unfair about allowing the company to bar access to him when it has fired him.

That’s where the second Georgia advisory opinion comes in. Formal Advisory Opinion 94-3 clarifies that a lawyer may contact and interview former employees of an organization that is represented by counsel to obtain non-privileged information relevant to the organization. The rationale for the opinion is that since a former employee cannot bind the organization by words or action, the restrictions of Rule 4.2 and the earlier advisory opinion do not apply.

There are two caveats. First, in your conversation with Lousy Driver, you must be clear about who you represent. Finally, the opinion requires that the former employee consent to the interview. Lousy may have no reason to agree to talk to you, particularly if he’s facing some individual liability for the accident.

The system works better when a lawyer has access to the information she needs to evaluate a case. Rule 4.2 and both formal advisory opinions attempt to find a balance between the need for open exchange of information and the equally important goal of respecting the sanctity of the client/lawyer relationship. GBJ

## Endnotes

1. Rule 4.2 of the Georgia Rules of Professional Conduct provides, “a lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by constitutional law or statute.”

## LAWYER ASSISTANCE PROGRAM

### Alcohol/Drug Abuse and Mental Health Hotline

If you are a lawyer and have a personal problem that is causing you significant concern, the Lawyer Assistance Program (LAP) can help. Please feel free to call the LAP directly at (800) 327-9631 or one of the volunteer lawyers listed below. All calls are confidential — we simply want to assist you.

AREA	CONTACT	PHONE
Albany	H. Stewart Brown	(229) 420-4144
Athens	Ross McConnell	(706) 369-7760
Atlanta	Melissa McMorries	(404) 815-2192
Atlanta	Brad Marsh	(404) 874-8800
Atlanta/Decatur	Ed Furr	(404) 284-7110
Atlanta/Jonesboro	Charles Driebe	(770) 478-8894
Cornelia	Steven C. Adams	(706) 778-8600
Fayetteville	Glen Howell	(770) 460-5250
Florida	Patrick Reily	(850) 267-1192
Hilton Head	Henry Troutman	(843) 785-5464
Hazelhurst	Luman Earle	(478) 275-1518
Macon	Bob Daniel	(912) 741-0072
Macon	Bob Berlin	(478) 745-7931
Norcross	Phil McCurdy	(770) 662-0760
Savannah	Tom Edenfield	(912) 234-1568
Valdosta	John Bennett	(229) 242-0314
Waycross	Judge Ben Smith	(912) 285-8040
Waynesboro	Jerry Daniel	(706) 554-5522



# Discipline Notices

(April 19, 2002 – June 21, 2002)

By Connie P. Henry

## DISBARMENTS AND VOLUNTARY SURRENDER OF LICENSE

### **Darryl Evans**

Atlanta, Ga.

On April 29, 2002, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Darryl Evans (State Bar No. 251753). On Nov. 18, 2001, in the U.S. District Court for the Northern District of Georgia, Evans pled guilty to the felony offenses of mail fraud and false statement on his 1997 tax return.

### **William Keith Davidson**

Lawrenceville, Ga.

On May 13, 2002, the Supreme Court accepted the Petition for Voluntary Surrender of License of William Keith Davidson (State Bar No. 207113). Davidson pled guilty to a single count of the felony offense of forgery in the first degree.

### **Jimmy Kelly Reeves**

Milledgeville, Ga.

On May 28, 2002, the Supreme Court accepted the Petition for Voluntary Surrender of License of Jimmy Kelly Reeves (State Bar No. 598398). In December 2000, Reeves was retained to represent a church in Putnam County in a real estate matter. Reeves received a retainer of \$3,500 for such representation but failed to perform the agreed upon representation.

### **Richard L. Dickson**

Athens, Ga.

On June 10, 2002, the Supreme Court entered an Order disbaring Attorney Richard L. Dickson (State Bar No. 221380).

The State Bar filed three Notices of Discipline for disbarment against Dickson. In State Disciplinary Board Docket No. 4059, Dickson was retained to represent a client in a divorce case. Dickson failed to communicate with the client and the client was unable to determine the status of his case. After the client received a letter from his employer notifying him that \$173.08 was deducted from his paycheck for temporary alimony payments, the client learned that Dickson missed a court date.

In Docket No. 4071, Dickson was retained to represent a client in post-conviction matters and \$2,000 was paid to Dickson on the client's behalf. Dickson failed to communicate with the client or to do any work on the case, and failed to refund the \$2,000.

In Docket No. 4203, Dickson was paid \$1,500 to represent a client in post-conviction matters. Dickson initially worked on the case but then became inaccessible, and failed to return the \$1,500. The client has been unable to hire another attorney because he paid the \$1,500 to Dickson.

The Court considered the following factors in aggravation of discipline: Dickson's failure to timely respond to the Notice of Investigation in each case; the fact that he had been a member of the State Bar of Georgia since 1986; and that these three cases considered together suggest a pattern of abandonment and neglect.

### **James William Quinlan**

Alpharetta, Ga.

On June 10, 2002, the Supreme Court entered an Order disbaring Attorney James William Quinlan (State Bar No. 591365). Quinlan accepted a \$575 retainer to represent a company in a bankruptcy proceeding, but failed to complete any portion of the repre-

sentation. Quinlan also instructed an officer of the company to give him a \$25,000 check from a real estate closing, with the understanding that Quinlan would deposit it in his trust account and issue her a new check. The check Quinlan issued was dishonored for insufficient funds and he failed to provide an accounting to the company or its officers or to return any portion of the funds.

In aggravation of discipline Quinlan was under suspension in two prior disciplinary cases; he failed to respond to disciplinary authorities; he refused to acknowledge the wrongful nature of his conduct; and he has been a member of the State Bar of Georgia since 1982.

## SUSPENSIONS

**Tyrone Nathaniel Haugabrook**  
Valdosta, Ga.

The Supreme Court, by order dated May 13, 2002, has accepted Thomas Nathaniel Haugabrook's (State Bar No. 337070) petition for voluntary suspension of his license pending an appeal of his criminal conviction in federal court.

**Thomas Eugene Stewart**  
Stockbridge, Ga.

The Supreme Court, by order dated May 13, 2002, suspended Thomas Eugene Stewart (State Bar No. 681875) from the practice of law in Georgia for a period of 18 months commencing May 11, 2001, the date the trial court suspended Stewart's license. Stewart agreed to represent a client in a divorce action in exchange for sexual favors. He was arrested and pled guilty to a misdemeanor charge of solicitation of sodomy and his license was suspended upon the entry of his guilty plea. The client and Stewart never engaged in sexual activity and Stewart never represented the client in her divorce. The Court took into consideration that no sexual activity occurred, that Stewart participated in counseling, acknowledged the wrongfulness of his conduct and showed remorse. Prior to this incident, Stewart had an excellent reputation in the legal community and had no prior discipline.

**Joseph Andrew Maniscalco**  
Atlanta, Ga.

The Supreme Court by order dated May 28, 2002, accepted the petition for voluntary discipline of Joseph Andrew Maniscalco (State Bar No. 468571) and suspended him from the practice of law in Georgia for a period of 12 months. Maniscalco entered into an agreement with the operator of a business that referred clients to Maniscalco for a fee during the years 1997 and 1998. Maniscalco asserted that he was initially unaware that the operator was using runners. When he discovered that the operator was not a lawyer,


he refused to pay a percentage of his fees to the operator but did pay a marketing fee. In mitigation, the Court took into consideration that Maniscalco has been a member of the State Bar of Georgia since 1989; he ceased his relationship with the operator prior to the disciplinary investigation; he ceased engaging in the prohibited conduct; he cooperated fully in the disciplinary proceedings; and no member of the public was harmed.

## SUSPENSIONS LIFTED

**Eric Vann Ross**  
Redan, Ga.

On March 25, 2002, the Supreme Court suspended Eric Vann Ross (State Bar No. 615128) pending his reimbursement of certain funds to a former client. Subsequently, Ross reimbursed the funds to his client. The Court's order of March 25, 2002, suspending Ross was lifted by Supreme Court order dated June 7, 2002.

## INTERIM SUSPENSIONS

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since April 18, 2002, two lawyers have been suspended for violating this Rule and two have been reinstated. 

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

# LPM's Guide to Mobile Lawyering Devices – Part II

By Natalie R. Thornwell

In this part of our "Guide to Mobile Lawyering Devices," we will discuss your best options for laptop computers, portable printers/scanners/copiers (digital senders) and dictation devices. As in Part I, we will explore the best brands available in each of the categories, information on where and how to buy the devices, and tips for using the devices most effectively.

## Laptops

One of the most recognizable portable devices this century is the laptop computer. While the PDA and hand-held PC markets are strong right now, one can say with certainty that the laptop computer has not yet been replaced by its smaller "competitors." Some attorneys are even carrying both! How's that for "mobile lawyering?"

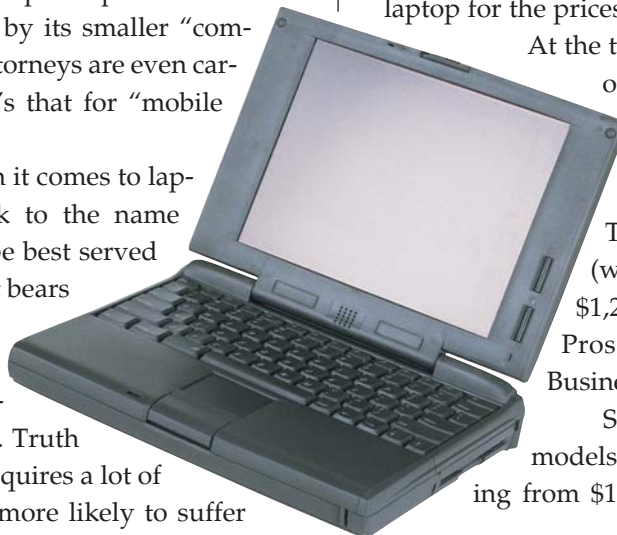
**Brands** — When it comes to laptops, we say stick to the name brands. You will be best served by your laptop if it bears Dell, Toshiba, IBM, Sony or Gateway somewhere on its body. Truth be told, a laptop requires a lot of care. Laptops are more likely to suffer

from some form of hardware failure or display problem than any other computing device. So, if you expect to get quick, quality care when these problems occur (usually within one and one-half to two years of purchase), you should know that you are more likely to get such care from the name brand vendors than your local computer shops and consultants.

How much should you expect to pay? You can expect to shell out from \$950 to \$2,300 for a laptop computer these days. Of course, you can find even cheaper models, but they are likely to be older, slower and clunkier. Using the \$950 range, you can usually find a lower-end model from the name brands we have mentioned. What's the trade off? You may not have a floppy disk drive, a larger amount of memory on board or anything more than a standard CD-ROM drive. However, by deciding carefully what features your machine must have, you can get a very good laptop for the prices we indicate here.

At the time of this writing, Dell offered its Inspiron and Latitude machines with starting prices from \$999 to \$1,799.

Toshiba carries Satellites (with prices starting from \$1,299 to \$1,699); Satellite Pros (from \$1,726); Small Business Series (consisting of Satellite and Satellite Pro models and with prices starting from \$1,489 to \$2,139); Protégé





(from \$1823 to 2,139); and the Tecra (from \$2,407 to \$2,889). IBM lists its ThinkPad Series as follows: A Series from \$1,599; T Series from \$2,199; R Series from \$1,099; and X Series from \$2,049. Sony laptops include: the FXA Series from \$1,699.99; GRX Series from \$1,849.99; NV Series from \$2,099.99; R505 SlimPro from \$1,699.99; VX Series from \$1,999.99; SR Series from \$1,699.99; and the PictureBook from \$1,899.99. Gateway notebooks consist of: the Solo 1450s (from \$999 to \$1,399 after rebate); Gateway 450s (\$1,499 to \$1,799 after rebate); Gateway 600s (\$1,700 to \$2,799 after rebate); Gateway 200s (\$1,999 after rebate); and the Gateway Solo 3450s (\$1,899 after rebate).

**Where and How to Purchase —** As with PDAs and hand-helds, the best place to shop for laptops is online. Using portal sites like [www.zdnet.com](http://www.zdnet.com) and [www.cnet.com](http://www.cnet.com), you can find some of the best deals on the latest, name-brand model laptops. These sites' shopping guides are just what the doctor ordered when you have to know: What should I look for?; What must I have?; and How much should it cost?

The minimum specs for a laptop today would be a Pentium III or higher chip set (Celeron chips would be a second choice in our book.), at least 256 MB of RAM, a 600Mhz processor speed, DVD/CD-ROM combination drive, floppy disk drive and 20Gb hard disk space. The display should be at least 14.1 inches and you need to have an internal 56K modem. Of course, shopping for the best deals and getting the most features for your money should be your goal.

**Tips on Effective Use —** You can't use the laptop if the battery is

dead and you don't have access to an electrical outlet. So be very mindful of the battery life of your machine. Ask yourself: Can the battery last if you travel across the country or internationally?

Once you have purchased your laptop, keep it in tip-top shape by investing in a sturdy, yet functional carrying case. We like to use [www.targus.com](http://www.targus.com) to get some of the best carrying accessories for laptops. Also, make sure that you organize all of the cords and cables for easy access. You can purchase gallon-sized zip lock bags to store particular cords and even use colored labels or stickers on the bags to keep up with the ever-growing bundle of cables.

Laptop security could warrant another article, but here we will only ask you to check out <http://www.computersecurity.com/theft/laptop.htm> for more information on tracking software, steel cable kits, and complete systems for protecting your notebook investment and the confidential information it might carry. IT personnel should appreciate the article on laptop security at <http://www.labmice.net/articles/laptopsecurity.htm>.

## Portable Printers/Scanners/Copiers (Digital Senders)

Why do we lump all of these mobile devices together? Well, for all intents and purposes, we want to discuss what allows easy access to documents when we are away from the office. So if we need to capture the image of a document, fax or print out a document, these devices can help. The most important consideration regarding these devices is whether or not you actually need them so regularly that

you can justify their purchase for "mobile lawyering." For those who answer yes, you can find out a little more about them here.

**Brands —** Portable printers, scanners and copiers come in various flavors and sometimes even in combinations. As with laptops, and because of their delicate make-ups, you should also stick to name brands. HP/Compaq and Pentax are the two major vendors for portable printers. Prices range from \$249 to \$350 for these lightweight printers, which are no larger than the paper on which you are printing. Scanners can be obtained from Visioneer and HP/Compaq. Prices for these devices range from \$79 to \$999. The lower-end priced models are most portable, so you can reasonably expect to pay between \$79 to \$300 for one of these units. The digital senders (a fax like machine that uses digital technology instead of analog to capture text images) or copiers are available mainly through HP/Compaq, and the prices are similar to those for scanners. The HP CapShare was a very unique handheld scanner that was extremely mobile and function. Hopefully, HP will bring the CapShare back with updated features in the near future.

**Where and How to Purchase —** Shopping online and direct from the vendors is the best way to shop for portable printers, scanners and copiers. Don't, however, overlook your local computer and office supply stores, as you can sometimes find these machines at rock-bottom prices.

**Tips on Effective Use —** Make sure that if you invest in portable office machines like these that you protect them from wear and tear as best you can. The cost for repairing such machines often outweighs

your initial investment in them. So use a little "TLC" when handling and transporting these devices.

## Dictation Devices

**Brands** — Dictating is one of the traditional "mobile lawyering" tasks. Because lawyers wanted to be productive while away from the office, they found that using a recorder to capture their thoughts and then forwarding or giving the recorded tapes to their staff for transcription was an efficient way to work. Sanyo, Philips, Olympus and Sony are some of the major vendors in this category. Dictation includes not only the recorder, but also entails the device used for transcribing recordings (you've probably seen the foot pedals and headsets in action with these), and in some cases involves software applications or suites. Digital recorders happen to be the current rave. These units store the spoken voice as a digital wave file. This makes recordings more portable from the electronic standpoint. So, you can dictate into a digital recorder and have the files sent back to your office over the Internet. One company that uses this as an approach to dictation is DynamicVoice. You might want to look at some software models like WAVPedal and SmartType. (Note: we are not covering voice recognition in this particular article.)

Prices for recorders range from \$39.99 to \$349.99. Transcriber units range from \$220 to \$389.

**Where and How to Purchase** — Start shopping for dictation equipment locally first. You can usually

find reliable units in computer and general office supply or electronics stores. The Internet, of course, is the other place to look for the latest in dictation equipment for both dictation and transcription.


Two specific sites to check are:

Dictation and Transcription Superstore at [www.theprogrammers.com](http://www.theprogrammers.com) and Dictation Office Products Company at [www.dopco.net](http://www.dopco.net).

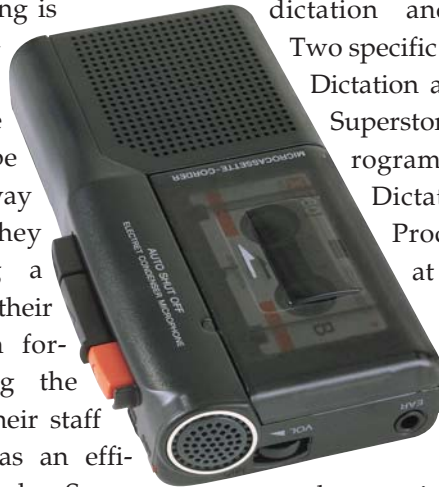
When shopping for dictation systems, check for ease of use and the

smooth operation of the devices. Is it easier for you to directly type the documents than to dictate? Also check each device's storage capacity.

**Tips on Effective Use** - One of the main concerns of dictating is making sure that your recorder remains powered up. Make sure you carry extra batteries. Microphones can be finicky, too, so be sure to handle your recorders with extra special care so as not to damage your recorder and make your recordings undecipherable to your transcribers.

As the needs of mobile lawyers change, we hope to track the most effective devices for working efficiently while away from the office in this guide and make it available to all of Georgia's "road warriors." For more up-to-date information on mobile computing or "lawyering," contact the Law Practice Management Program at (404) 527-8770. 

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



## Looking for a new position?

## Looking for a qualified professional?

Look no further than the State Bar of Georgia's **Online Career Center**

[www.gabar.org](http://www.gabar.org)

Post jobs

Post resumes

Search jobs

Search resumes

Powered by the Legal Career Center Network



# Exemplary Stewards of the Law

By Justice P. Harris Hines



Justice Harris Hines delivers the Attorney's Oath on the capitol steps as part of this year's Law Day activities.

Many of us have heard, tongue-in-cheek from our friends and, at times, cynically from those who look with disfavor upon our profession, the phrase from Act IV, Scene II of King Henry the VI by William Shakespeare: "The first thing we do, let's kill all the lawyers."

But, what is not often told, is who was the speaker, and to whom were the words spoken. The speaker was Dick the Butcher. And the words were spoken to the anarchist, Jack Cade. Thus, the words are an acknowledgment that lawyers are essential to a free and just society.

For us to continue this essential role, we must constantly earn the trust and respect of all citizens. How do we do this? We must be diligent and energetic advocates for our clients; we must be exemplary stewards of the law; we must be courteous, kind and helpful to all members of society; and we must conduct our lives with honor and dignity.


We must uphold our oaths as attorneys with the same completeness that a great Georgia golfer, sportsman and lawyer upheld the rules of golf. Please permit me to quote from an April 2002 article in the *Georgia Bar Journal* by attorney Dick Kessler.

*In the opinion of most knowledgeable people, Robert "Bobby" Tyre Jones Jr., of Atlanta, was the greatest golfer who ever lived prior to 1960. He was an amateur golfer and a man of honor. He never became a professional golfer. Instead, he entered the legal profession — he was a lawyer.*

*Each year, from 1923 to 1930, Jones won at least one national golf title. He capped his competitive golfing career in 1930 at the age of 28 with the Grand Slam. He did this, as has been reported, with honor. "Jones would have won the 1925 U.S. Open had he not been so determined to uphold the rules and be so considerate of his opponents. Jones called a penalty on himself in that tournament for a rules infraction that no one but he witnessed. The one-stroke penalty made the difference because he finished the tournament proper in a tie with Willie MacFarlane and lost the 36-hole playoff by one stroke the next day. Final tallies through the 108 holes of the 1925 U.S. Open: MacFarlane, 438; Jones 439. O. B. Keeler later reported that when Jones was praised for his honesty, the amateur golfer replied, 'You'd as well praise me for not breaking into banks. There is only one way to play this game.'"*

*And now, let each of us reaffirm that we know only one way to practice law, by taking the new Attorney's Oath, which was approved by the Georgia Supreme Court on April 20, 2002, at the instance of Superior Court Judge Perry Brannen, the State Bar of Georgia and the Board of Bar Examiners.*

## Attorney's Oath

I, \_\_\_\_\_, swear that I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God. 



## Sections Shine Throughout Year

**A**s the Bar year ends, sections have been busy electing officers, presenting annual reports, completing activities for the year, participating in the State Bar 2002 Annual Meeting and planning for the new Bar year.

### Section Awards

State Bar sections presented many awards during the Bar's Annual Meeting, and five sections received awards from the Bar.

These include:

**Section of the Year**, presented to the **Family Law Section** — Elizabeth Green Lindsey, chair;

**Section Achievement Award Winners:** **Appellate Practice Section**, Christopher J. McFadden, chair;

**Corporate Counsel Law Section**, Randall J. Cadenhead, chair;

**Health Law Section**, Jonathan Lee Rue, chair;

**Intellectual Property Law Section**, W. Scott Petty, chair.

In addition, the General Practice and Trial Section held the annual Tradition of Excellence Breakfast during the Annual Meeting where the Tradition of Excellence Awards were presented.



Richard Litwin, 2001-2002 chair of the Taxation Law Section, shares a moment during the Opening Night Reception with his daughters Kara (left) and Meryl (right).

### Sections Sponsor Opening Night and Festive Booth

Twenty-six of the State Bar's 35 sections sponsored the Opening Night Reception at the Annual Meeting in Amelia Island. Lots of fun was had by all at the event.

Sections showed much flair and creativity during the legal exposition held at the Annual Meeting with a festive and inviting booth. Prizes, free section memberships and the now famous "section cookies" were given out during the meeting.

Many thanks to all section volunteers. This has truly been a successful year. Visit the State Bar's Web site to view 35 section Web pages, sample newsletters, section calendars and member rosters. Don't forget to rejoin for the new Bar year. Instructions are on the State Bar's Web site at [www.gabar.org](http://www.gabar.org).

### Section Meetings

Many sections have held their annual meetings recently, and the Creditor's Rights Section chose the State Bar's new headquarters for theirs on June 20. The section is co-chaired by Harriet Isenberg, Atlanta, and Janis L. Rosser, Roswell. The Entertainment & Sports Law Section held a luncheon seminar at the Grand Hyatt in Atlanta on May 22, 2002 where Section Chair, Alan S. Clarke, was appointed to a second two-year term. The guest speaker for this event was Hadley Engelhard Esq. of So So Def Sports.



Emily Bair (left) and Elizabeth Green Lindsey (center) accept the Section of the Year Award for the Family Law Section, along with Section Liaison Lesley Smith.



Christopher J. McFadden, left, Appellate Practice Section chair, and Jonathan Lee Rue, right, Health Law Section chair, accept Section Achievement Awards.





S. Lester Tate III, chairman of the General Practice and Trial Section, presents the Tradition of Excellence Awards to: (pictured left to right) James E. Butler Jr., Griffin B. Bell, Justice Robert Behnam and Jerry Blackstock.



State Bar Sections hosted a festive booth during the legal exposition.



Pictured left to right: Bedelia Hargrove, officer and editor of the Entertainment and Sports Law Section newsletter; Hadley Engelhard, So So Def Sports; Alan S. Clarke, section chair; and Bill Preston, So So Def Sports.

## NEWS FROM THE SECTIONS

### Appellate Practice Section

By Christopher J. McFadden, Chair, and Kenneth A. Hindman, Section Member  
**MANDAMUS/ DISCRETIONARY APPEAL**

*Ferguson v. Composite State Board of Medical Examiners*, Ga. S.E.2d, S02A0002, 2002 FCDR 1640, 2002 WL 1270173 (June 10, 2002).

Reversing its own recent decision in *Sprayberry v. Dougherty County*, 273 Ga. 503, 543 S.E.2d 29 (2001), the Court held that where a mandamus action amounts to an appeal from an administrative decision, the discretionary appeal procedure must be followed. Justice Carley, the author of *Sprayberry*, dissented, pointing out that a party which could not participate in an underlying administrative proceeding could still attack that decision by mandamus, and should be able to appeal directly.

#### ATTORNEYS FEES/APPEAL

*Evans County Board of Commissioners v. Claxton Enterprise*, Ga. App. S.E.2d, A02A0884, 2002 FCDR 1663, 2002 WL 1225233 (June 6, 2002).

Holds that attorneys fees incurred during appeals may be awarded under Open Meetings Act, where an agency's actions

lacked substantial justification. The amount of fees is to be determined by the trial court. This appears to be the first case in which the appellate courts have authorized an award of attorney's fees for work on appeals, other than the 10 percent award authorized by O.C.G.A. section 5-6-6, and the \$1,000.00 award authorized by appellate court rules.

#### CERTIFICATE OF IMMEDIATE REVIEW/ABSENCE OF TRIAL JUDGE

*Thorpe v. Russell*, 274 Ga. 781, 559 S.E.2d 432 (2002).

Presiding judge had no duty to sign a certificate of immediate review, where trial judge had left the country. Held that under *Tingle v. Harvill*, 125 Ga. App. 312, 187 S.E.2d 536 (1972), presiding judge could do so if he found that circumstances constituted an emergency.

Unanimous Supreme Court left panicked lawyer a remedy where trial judge left without signing certificate; suggested that losing party could have requested reconsideration of trial judge's underlying order, and then sought a certificate of immediate review if reconsideration was denied.

#### SUPERSEDEAS/CIRCUMVENTION BY TRIAL COURT

*In the Interest of B.A.S.*, 254 Ga. App. 430, 563 S.E.2d 141 (2002).

Court of Appeals had entered a supersedeas order under which visitation was allowed. Reproached trial court for extend-

ing visitation period, where the effect of that was to circumvent the supersedeas order.

#### CONTEMPT/SUPERSEDEAS

*Blake v. Spears*, 254 Ga. App. 21, 561 S.E.2d 1731 (2002).

Trial court ordered Blake incarcerated for contempt following series of conferences and show cause hearing at which Blake still refused to turn over financial records as ordered. Court refused to accept application for supersedeas, telling counsel "Court is adjourned....Come in tomorrow."

Affirmed on narrow ground that Blake did not file written notice of appeal along with application for supersedeas. Court of Appeals criticized trial judge for not giving counsel opportunity to file necessary documents, and not explaining basis for ruling, while sympathizing with trial court's frustration at having orders repeatedly ignored.

#### DISCRETIONARY APPEAL/PROCEDURE FOLLOWING REMAND

*Davidson v. Callaway*, 274 Ga. App. 813, 559 S.E.2d 728 (2002).

Supreme Court granted wife's application for discretionary appeal and simultaneously remanded for trial court to explain basis for granting attorneys fees in domestic relations case. Following trial court order of clarification, wife filed direct appeal, which Supreme Court dismissed. Held that Supreme Court had lost jurisdic-

tion after case was returned to trial court, and therefore the rules requiring discretionary appeals in domestic relations cases applied.

Court of Appeals subsequently applied *Davidson* ruling where it granted a discretionary appeal and remanded, but did not order that case could be returned to Court of Appeals by filing a notice of appeal. Discretionary appeal procedure therefore had to be followed, notwithstanding the fact that, in both cases, appellate court had already accepted the case and remanded to clear up specific issues.

## Environmental Law Section

By Jeff Dehner, Treasurer, and Anne Hicks, Chair

On June 21, 2002, the Environmental Law Section hosted a brown bag luncheon at the Atlanta offices of Alston & Bird, LLP. Approximately 25 section members enjoyed an informative panel discussion on environmental criminal enforcement. Simon Miller, regional criminal enforcement counsel, United States Environmental Protection Agency (EPA) Region 4; Robin Hedden, special agent, Criminal Investigation Division, EPA Region 4; and Doug Arnold, Alston & Bird, LLP, participated in the panel, which highlighted the functions of EPA's criminal investigators and counsel in building and prosecuting suspected environmental crimes. The discussion included practical tips for defense lawyers in understanding the complex issues that may arise in a criminal environmental enforcement matter, including the roles and powers of state and local law enforcement officials, EPA, local U.S. attorneys and the Department of Justice's Environmental Crimes Division. The panel fielded many questions from the audience, including several based on recent U.S. Supreme Court and 11th Circuit opinions.

The Environmental Law Section's annual Summer Seminar

was held August 2-3, 2002, at the Hilton Sandestin. The seminar earned attorneys 8.5 CLE credits and covered a broad range of environmental law issues in the areas of air, water and hazardous waste, presented by both private practitioners and a number of regulators from both EPA and the Georgia Environmental Protection Division.

In November, the Environmental Law Section plans to host a one-day seminar focusing on water law issues. The state currently faces many critical issues involving water quality and water supply, including the much publicized "water wars" between Georgia, Alabama and Florida. Given the anticipated attention that water law issues should receive in the 2003 General Assembly, this seminar should be very timely and informative.

## Family Law Section

By Emily S. Bair, Chair

In 2002, the State Bar awarded the Section of the Year Award to the Family Law Section. Elizabeth Green Lindsey, of Atlanta, accepted the award at the Annual meeting in June 2002.

In 2002, the Family Law Section held another successful Family Law Institute at Destin, Fla., organized by Emily S. "Sandy" Bair. More than 360 section members attended. The event was a tremendous success.

The Family Law Section now has a Web site. The Web site contains useful resources for family lawyers and a link to potential legislation relating to family law and the General Assembly, together with a listing of all of the members and other information.

The next important section event will be the Nuts and Bolts of Family Law, held on Aug. 23, 2002, at the Hyatt Regency Hotel in Savannah, and on Sept. 6, 2002, at the Swissôtel in Atlanta. On Nov. 15, 2002, the Nuts and Bolts of Family Law Seminar will be broadcast live at over 25 locations in Georgia and online.

## Technology Law Section

By David Keating, Section Member

There have been a number of significant recent developments in the area of technology law in Georgia and across the country. First, in our home state, Gov. Barnes, in May, signed into law a measure that, among other things, strictly regulates the manner in which companies, including non-profit concerns, can discard records containing "personal information" about customers. The law, which took effect on July 1, 2002, prohibits a company from discarding such records unless it:

- Shreds the records before discarding them;
- Erases the personal information contained in the records before discarding them;
- Modifies the records to make the personal information unreadable before discarding them; or
- Takes reasonable measures to ensure that no third parties will gain unauthorized access to the records between the time the company provides the records to a record destruction firm and the actual destruction.

The policy underlying the new law is important to interpreting its scope. The law is not a mere privacy measure, but rather is focused at curbing identity theft. Accordingly, for example, the law does not apply to all customer records that contain information such as customer names and addresses. Rather, it focuses through the definition of "personal information" on elements such as fingerprints, personal images, social security numbers, drivers license numbers, passport numbers and personal identification card numbers that are tied to non-public medical information, account information (such as balance, account number and credit information), loan or credit application information, and tax return information. If a company has any records (which include any tangi-

ble media containing information in any form) that contain personal information, then it may discard the records only in accordance with the statute.

Violation of the statute may result in an administrative fine of \$500 per customer record discarded improperly, up to a maximum fine of \$10,000.

On the national scene, the Federal Trade Commission (FTC) recently commented publicly in relation to Internet search engines that yield results based on the amount they receive in payment from the subject Web sites, in contrast to relevance of the Web site to a search query. A search engine is a coordinated set of programs utilized by Internet sites that enable persons to search for sites on the World Wide Web that are focused on particular topics or that contain certain content. For example, an Internet user can use a search engine to comb the Internet for travel-related Web sites. Search results that are ranked based upon whether the relevant Web sites have paid the search engine are also known as "sponsored links."

The FTC issued a Staff Letter on June 27, 2002, to an advocacy group named Commercial Alert in response to a complaint the group filed last summer concerning sponsored links. The FTC declined to take formal action, but indicated that it would send letters to search engine companies such as AltaVista, AOL, Looskmart and Lycos "outlining the need for [the search engines to post] clear and conspicuous disclosures of paid placement [of search results]." The failure to do so could in the future, the FTC noted, result in enforcement proceedings under the FTC Act.

In addition, the section recently held a luncheon seminar at Arnall, Golden & Gregory in Atlanta on May 23, 2002. The speaker for the event was Jerry B. Blackstock of Hunton & Williams. The luncheon topic was "Where Are People Filing IP Cases These Days & Why?"

The following is a list of upcoming

Section events. For more information about these events, please visit the Technology Law Section's Web page, [www.computerbar.org](http://www.computerbar.org).

- Section Meeting: August 2002  
(Date To Be Announced)
- Annual Technology Law Institute: Oct. 3-4, 2002
- Tech Corps Georgia Volunteer Day: Nov. 3, 2002

## Workers' Compensation Section

By Thomas W. Herman, Chair


A special commission has been appointed, by Carolyn C. Hall, chairman of the State Board of Workers' Compensation, to study the issue of Medicare "set-asides" in workers' compensation settlements. The goal of the commission is to try to set up a viable protocol for determining when a set aside trust is needed in a workers' compensation settlement and how to expedite the process with Medicare in those cases where one is needed. The members of the commission appointed by Hall include: Roslyn Ramsey, head of the Settlement Section of the State Board; and attorneys Mark S. Gannon, Thomas W. Herman, Julie Y. John and Alex Wallach. Consideration is being given by Chairman Hall to adding additional representatives to the commission from the State Board, as well as representatives from CMS/Healthcare Financing Administration.

The section is in the process of publishing a history of the workers' compensation system in Georgia. The book will provide a comprehensive history of the system from its inception through the end of the 20<sup>th</sup> century. The purpose of the book is to preserve the legacy of the past and provide inspiration for future generations of lawyers who practice workers' compensation. Proceeds from the sale of the book will be used to provide funds for the Kids' Chance Scholarship Fund.

The section held its Annual Award Luncheon on June 14, 2002, in conjunction with the State Bar's

Annual Meeting at Amelia Island Plantation. At the luncheon, the section's Distinguished Service Awards for 2002 were presented. The section's Distinguished Service Awards were created to recognize those individuals who have made significant contributions, not only to the practice of workers' compensation, but the practice of law in Georgia. John F. Sweet of Clements & Sweet, claimant's attorney, and John M. Williams, of Savell & Williams, LLP, defense attorney, were the recipients of this year's awards. In addition to presenting this year's recipients with their individual awards, the section presented Chairman Hall with a permanent award to be displayed at the State Board's headquarters in Atlanta, which will list previous recipients.

Additionally, the section continued its strong support of the Kids' Chance Inc. Scholarship Program by recognizing the Program's 272<sup>nd</sup> scholarship recipient. Conceived by Valdosta attorney Bob Clyatt and developed by the Workers' Compensation Section of the State Bar of Georgia, in association with insurers, employers, attorneys, labor, medical and rehabilitation groups, Kids' Chance Inc. provides financial scholarships for children of permanently or catastrophically injured or deceased workers to complete their education.

Supreme Court Justice Robert Benham presented Shaye Crews with the 272<sup>nd</sup> Kids' Chance Scholarship during this year's luncheon. Shaye is the daughter of Eugene Crews, a former insurance collection/sales representative, who was catastrophically injured when Shaye was only 11 years old. Shaye graduated from Camden County High School in May 2002 in the top five percentile of her class with a 94.4 GPA. With the help of the Kids' Chance Scholarship, Shaye will be attending Valdosta State University this fall with the goal of earning a degree in journalism/pre-law. 



# In Memoriam

**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.

**Kenneth J. Andreozzi**  
Atlanta, Ga.  
Admitted 1979  
Died April 2002

**John M. Ball**  
Jekyll Island, Ga.  
Admitted 1947  
Died March 2002

**Daniel Madison Byrd Jr.**  
Madison, Ga.  
Admitted 1950  
Died April 2002

**William Ross Capps**  
Atlanta, Ga.  
Admitted 1987  
Died May 2002

**J. Walter Cowart**  
Savannah, Ga.  
Admitted 1956  
Died September 2001

**Sidney F. Davis**  
Atlanta, Ga.  
Admitted 1968  
Died October 2001

**Grover Clyde Dekle Jr.**  
Millen, Ga.  
Admitted 1931  
Died March 2002

**Jack Tillery Elrod**  
Lawrenceville, Ga.  
Admitted 1950  
Died November 2001

**Charles M. Evert**  
Columbus, Ga.  
Admitted 1950  
Died August 2001

**Michael Ross Finke**  
Lawrenceville, Ga.  
Admitted 1988  
Died April 2002

**Frank K. Haley**  
Norcross, Ga.  
Admitted 1975  
Died May 2002

**Roy Hampton**  
Atlanta, Ga.  
Admitted 1951  
Died April 2002

**Francis J. Heazel Jr.**  
Atlanta, Ga.  
Admitted 1956  
Died April 2002

**Patrick F. Henry Sr.**  
Atlanta, Ga.  
Admitted 1950  
Died January 2002

**H. Lowell Hopkins**  
Atlanta, Ga.  
Admitted 1953  
Died May 2002

**Paul D. Horton**  
Marietta, Ga.  
Admitted 1983  
Died November 2001

**Gordon Lee Jackson Jr.**  
Roswell, Ga.  
Admitted 1967  
Died April 2002

**Steven William Kreitzer**  
Rossville, Ga.  
Admitted 1989  
Died August 2001

**William T. Maddox**  
Rome, Ga.  
Admitted 1937  
Died November 2001

**Rosser Adams Malone Sr.**  
Albany, Ga.  
Admitted 1929  
Died April 2002

**Joseph B. Newton**  
Waycross, Ga.  
Admitted 1970  
Died January 2002

**David E. Odom**  
Atlanta, Ga.  
Admitted 1975  
Died December 2001

**Samuel Walter Ramsey Jr.**  
Fayetteville, Ga.  
Admitted 1939  
Died March 2002

**David M. Rychlik**  
Marietta, Ga.  
Admitted 1988  
Died May 2002

**Alfreda Scobey**  
Atlanta, Ga.  
Admitted 1945  
Died December 2001

**Robert E. Sigal**  
Jerusalem, Israel  
Admitted 1974  
Died April 2002

**R. Jackson B. Smith Jr.**  
Murrells Inlet, S.C.  
Admitted 1965  
Died May 2002

**Robert L. Stevens**  
Thomson, Ga.  
Admitted 1939  
Died May 2002

**Reese E. Theus**  
Atlanta, Ga.  
Admitted 1949  
Died March 2002

**Karen Natacha Wardlaw**  
Fayetteville, Ga.  
Admitted 1978  
Died July 2001

**Elwin Harland White Sr.**  
Dublin, Ga.  
Admitted 1974  
Died March 2002

**Mary E. Wright**  
Birmingham, Ala.  
Admitted 1946  
Died January 2002

**John B. Zellars**  
Atlanta, Ga.  
Admitted 1950  
Died January 2002

## Correction:

The June issue of the *Bar Journal* accurately listed attorney **William H. Alexander** as deceased; however, Mr. Alexander was not a member of the State Bar of Georgia. For clarification, **Judge William H. Alexander**, of Atlanta, continues to be an active member of the State Bar of Georgia.



# An Authoritative Guide to the Field of American Law

Kermit L. Hall, ed.

**The Oxford Companion to American Law**  
Oxford University Press, 912 pages, \$65.00

Reviewed by John J. Richard

**T**he Oxford Companion to American Law, third in a line of significant contributions to the Oxford series by Editor Kermit Hall, encompasses not only the broad areas which frame any discussion of American law, but provides specific portraits of causes and individuals that put a human face on our endeavor.


This volume follows Hall's highly successful Oxford Companion to the Supreme Court of the United States and The Oxford Guide to United States Supreme Court Decisions. The format remains largely unchanged. Hall has assembled over 300 of the nation's preeminent legal scholars and thinkers to contribute articles on all aspects of law and its place in American life. I have long relied on Hall's previous Oxford volumes to supply substantive overviews of broad areas, as well as to provide specific coverage of obscure legal facts. Hall's latest Oxford Companion broadens the scope of its coverage considerably.

The Oxford Companion to American Law begins with the premise that law and society are intrinsically linked and that to understand the law it must be viewed within the full spectrum of social and political history. Written both for laymen and lawyers, the companion offers an A-to-Z guide to everything from the bar examination to the O.J. Simpson trial and the Bush v. Gore decision. Broad entries on such topics as literature and law, American jurisprudence, and property rights are balanced with specific articles on famous jurists,

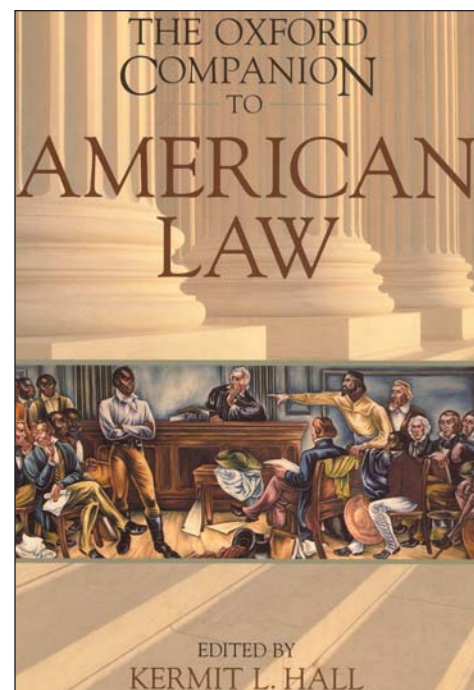
cases and events that have shaped the course of American law.

As Congress currently debates the establishment of a cabinet level executive agency to protect America's homeland, the entries on executive power, terrorism, wire-tapping and electronic eavesdropping, and the FBI are particularly informative. Entries by scholars within Georgia include legal systems, business organizations, Clarence Darrow and the Scopes trial.

Hall takes the view that despite the common criticisms leveled at the legal profession, "lawyers have been an essential and often defining part of the legal culture." Entries discussing the public perception of lawyers and popular culture illustrate the dichotomy between society's views on the legal system and on lawyers in particular.

The volume also contains an expansive essay on the history of law. Comprised of five sub-essays, this entry presents a detailed discussion of the roots and development of American law and legal institutions. Designed for use by lawyers, judges, students and the interested observer, this volume has something for everyone and is destined to take its place as an authority on American law. 

**John J. Richard** practices corporate and securities litigation with Powell, Goldstein, Frazer & Murphy in Atlanta. He graduated from the University of Florida Levin College of Law.



## CLE/Ethics/Professionalism/Trial Practice

Note: To verify a course that is not listed, please call the CLE Department at (404) 527-8710. Also, ICLE seminars only list total CLE hours.

For a breakdown, call (800) 422-0893

<b>August 2002</b>	<p><b>22</b> ICLE <i>High School Mock Trial Training</i> Atlanta, Ga. 6 CLE</p>
<p><b>13</b> NATIONAL BUSINESS INSTITUTE <i>Real Estate Title Examination in Georgia</i> Atlanta, Ga. 3 CLE</p>	<p><b>22</b> LORMAN BUSINESS CENTER <i>Documentation: Discipline, Discharge, and Post-Discharge Procedures</i> Atlanta, Ga. 6.7 CLE</p>
<p><b>13</b> LORMAN BUSINESS CENTER INC. <i>Trucking Litigation and D.O.T. Regulations in Georgia</i> Atlanta, Ga. 6.0 with 3 trial</p>	<p><b>23</b> ICLE <i>Nuts &amp; Bolts of Family Law</i> Savannah, Ga. 6 CLE</p>
<p><b>14-15</b> ICLE <i>Real Property Law Institute (Video Replay)</i> Atlanta, Ga. 12 CLE</p>	<p><b>23</b> ICLE <i>Georgia Law of Contracts</i> Atlanta, Ga. 6 CLE</p>
<p><b>16</b> PROFESSIONAL EDUCATION SYSTEMS INC. <i>The Law of Tax Exempt Organization</i> Duluth, Ga. 6.7 CLE</p>	<p><b>23</b> ICLE <i>License Revocation and Suspension</i> Atlanta, Ga. 6 CLE</p>
<p><b>20</b> NATIONAL BUSINESS INSTITUTE <i>The Probate Process From Start to Finish in Georgia</i> Atlanta, Ga. 6.7 CLE with 0.5 ethics</p>	<p><b>23</b> LORMAN BUSINESS CENTER INC. <i>ADA, FMLA and Workers' Compensation in Georgia</i> Savannah, Ga. 6 CLE</p>
<p><b>21</b> LORMAN BUSINESS CENTER <i>Payroll and Qualified Plan Management in Georgia</i> Savannah, Ga. 6.7 CLE</p>	<p><b>27</b> LORMAN BUSINESS CENTER INC. <i>Tax Aspects of Mergers and Acquisitions</i> Atlanta, Ga. 6.7 CLE</p>
<p><b>22-23</b> ICLE <i>Selected Video Replays</i> Atlanta, Ga. 6 and 12 CLE</p>	<p><b>27</b> LORMAN BUSINESS CENTER INC. <i>Real Estate Law for Legal Staff in Georgia</i> Atlanta, Ga. 6.5 CLE with 1 ethics</p>

**28**  
LORMAN BUSINESS CENTER INC.  
*Taking and Defending Effective  
Depositions in Florida*  
Jacksonville, Fla.  
6.0 CLE with 0.8 ethics and 5 trial

**30**  
ICLE  
*Loan Documentation for Lawyers*  
Atlanta, Ga.  
6 CLE

**30-31**  
ICLE  
*Urgent Legal Matters*  
Sea Island, Ga.  
12 CLE

## September 2002

**4**  
ICLE  
*Bridge the Gap*  
Atlanta, Ga.  
6 CLE

**5**  
ICLE  
*Workouts, Turnarounds and Restructurings*  
Atlanta, Ga.  
6 CLE

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

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

**10**  
LORMAN BUSINESS CENTER INC.  
*Insurance Bad Faith Claims in Florida*  
Jacksonville, Fla.  
6 CLE

**12**  
ICLE  
*Emerging Tax Issues for the  
Non-Tax Practitioner*  
Atlanta, Ga.  
6 CLE

**12**  
ICLE  
*Business Immigration Law*  
Atlanta, Ga.  
6 CLE

**12**  
LORMAN BUSINESS CENTER INC.  
*Partnerships, LLCs and LLPs*  
Atlanta, Ga.  
6.7 CLE

**13**  
ICLE  
*Advanced Health Care Law*  
Atlanta, Ga.  
6 CLE

**13**  
CUMBERLAND SCHOOL OF LAW  
*Developments and Trends in  
Health Care Law 2002*  
Birmingham, Ala.  
6 CLE

**13**  
NATIONAL BUSINESS INSTITUTE  
*The Basics of Cross Examination in Tennessee*  
Nashville, Tenn.  
3 CLE

**13**  
LORMAN BUSINESS CENTER INC.  
*Construction Issues in Georgia*  
Savannah, Ga.  
6.7 CLE

**17**  
NATIONAL BUSINESS INSTITUTE.  
*Exempt Organizations and  
Charitable Activities in Georgia*  
Atlanta, Ga.  
6.7 CLE with 0.5 ethics

**18**  
LORMAN BUSINESS CENTER INC.  
*Like Kind Real Estate Exchanges*  
Atlanta, Ga.  
6.7 CLE



<p><b>19-21</b> ICLE <i>City &amp; County Attorneys Institute</i> Athens, Ga. 12 CLE</p>	<p><b>24</b> NATIONAL BUSINESS INSTITUTE. <i>Construction Payment Remedies in Georgia</i> Atlanta, Ga. 11.7 CLE</p>
<p><b>19</b> NORTHWESTERN UNIVERSITY SCHOOL OF LAW <i>4<sup>th</sup> Annual Estate Planning Seminar</i> Chicago, Ill. 14.5 CLE with 0.5 ethics</p>	<p><b>26-28</b> ICLE <i>Insurance Law Institute</i> St. Simons Island, Ga. 12 CLE</p>
<p><b>19</b> AMERICAN SOCIETY OF LAW AND MEDICINE <i>Patent Cooperation Treaty</i> Atlanta, Ga. 10 CLE</p>	<p><b>26</b> ICLE <i>Employers' Duties and Problems</i> Atlanta, Ga. 6 CLE</p>
<p><b>19</b> LORMAN BUSINESS CENTER INC. <i>Form 5500: What You Need to Know to File</i> Atlanta, Ga. 6.7 CLE</p>	<p><b>26</b> CHATTANOOGA BAR ASSOCIATION <i>Drafting Corporate Agreements</i> Chattanooga, Tenn. 6 CLE</p>
<p><b>20</b> ICLE <i>Mental Health Professionals</i> Atlanta, Ga. 6 CLE</p>	<p><b>27</b> ICLE <i>Buying and Selling Private Businesses</i> Atlanta, Ga. 6 CLE</p>
<p><b>20</b> ICLE <i>Adult Guardianship</i> Atlanta, Ga. 6 CLE</p>	<p><b>27</b> ICLE <i>Eight Steps to Effective Trials</i> Atlanta, Ga. 6 CLE</p>
<p><b>20</b> LORMAN BUSINESS CENTER INC. <i>HIPAA Compliance</i> Macon, Ga. 6 CLE</p>	<p><b>Get Published and earn CLE Credit at the same time!</b> Did you know that Georgia lawyers can earn up to 6 CLE credits for authoring legal articles and having them published? Contact <a href="mailto:journal@gabar.org">journal@gabar.org</a> or <a href="http://www.gabar.org/gbjsub.htm">www.gabar.org/gbjsub.htm</a> for more information. <b>Submit your legal articles to the Georgia Bar Journal.</b></p>
<p><b>20</b> LORMAN BUSINESS CENTER INC. <i>Cafeteria Plans 125/COBRA in Georgia</i> Atlanta, Ga. 6.7 CLE</p>	
<p><b>23</b> CLE INTERNATIONAL INC. <i>Construction Law</i> Atlanta, Ga. 12 CLE with 1 ethics</p>	

## Supreme Court Amends Bar's Government

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

It is ordered that Rule 4-223 of the Rules and Regulations for the Organization and Government of the State Bar be amended, effective July 1, 2002, to read as follows:

### **Rule 4-223. Advisory Opinions**

(a) Any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person. Formal Advisory Opinions which have been approved or modified by the Supreme Court pursuant to Rule 4-403 shall also be binding in subsequent disciplinary proceedings which do not involve the person who requested the opinion.

(b) It shall be considered as mitigation to any grievance under these rules that the respondent has acted in accordance with and in reasonable reliance upon a written Informal Advisory Opinion requested by the respondent pursuant to Rule 4-401 or a Formal Advisory Opinion issued pursuant to Rule 4-403, but not reviewed by the Supreme Court of Georgia.

It is further ordered that Rule 4-401 be amended to read as follows:

### **Rule 4-401. Informal Advisory Opinions**

The Office of the General Counsel of the State Bar of Georgia shall be authorized to render Informal Advisory Opinions concerning the Office of the General Counsel's interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts. The Informal Advisory Opinion should address prospective conduct and may be issued in oral or written form. An Informal Advisory Opinion is the personal opinion of the issuing attorney of the Office of the General Counsel and is neither a defense to any complaint nor binding on the State Disciplinary Board, the Supreme Court of Georgia, or the State Bar of Georgia. If the person requesting an Informal Advisory Opinion desires, the Office of the General Counsel will transmit the Informal Advisory Opinion to the Formal Advisory Opinion Board for discretionary consideration of the drafting of a Proposed Formal Advisory Opinion.

It is further ordered that Rule 4-403 (a), (d), and (e) be amended to read as follows:

(a) The Formal Advisory Opinion Board shall be authorized to draft Proposed Formal Advisory Opinions concerning a proper interpretation of the Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts. The Proposed Formal Advisory Opinion should address

prospective conduct and may respond to a request for a review of an Informal Advisory Opinion or respond to a direct request for a Formal Advisory Opinion.

(d) After the Formal Advisory Opinion Board makes a final determination that the Proposed Formal Advisory Opinion should be drafted and filed, the Formal Advisory Opinion shall then be filed with the Supreme Court of Georgia and republished in an official publication of the State Bar of Georgia. Unless the Supreme Court grants review as provided hereinafter, the opinion shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. Within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia. The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

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

It is further ordered that Rule 14-9.1(g) (2), (3), and (4) be amended to read as follows:

(2) In the case of any proposed advisory

opinion in which the Standing Committee concludes that the conduct in question constitutes or would constitute the unlicensed practice of law, the Committee shall file a copy of the opinion and all materials considered by the Committee in adopting the opinion with the clerk of the Court. The advisory opinion, together with notice of the filing thereof, shall be furnished by certified mail to the petitioner. Unless the Court grants review as provided hereinafter, the opinion shall be binding only on the Committee, the State Bar of Georgia, and the petitioner, and not on the Supreme Court, which shall treat the opinion as persuasive authority only.

(3) Within 20 days of the filing of the Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, the State Bar of Georgia or the petitioner may file a petition for discretionary review thereof with the Court, copies of which shall be served on the Committee. The peti-

tion shall designate the Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Committee. The State Bar of Georgia and the petitioner shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. The Committee may file a responsive brief, and any other interested person may seek leave of the Court to file and serve a brief, whether in support of or in opposition to the opinion. Oral argument will be allowed at the Court's discretion. The Rules of the Supreme Court of Georgia shall otherwise govern the methods of filing, service, and argument. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Advisory Opinion is approved, modi-

fied, or disapproved, or shall provide for such other final disposition as is appropriate.

(4) If the Court declines to review the Advisory Opinion, it shall be binding only on the Committee, the State Bar of Georgia, and the petitioner, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Court approves or modifies the opinion, it shall constitute binding precedent and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court. There shall be no further review of the opinion except as granted by the Supreme Court in its discretion, upon petition to the Supreme Court.

## Notice of and Opportunity for Comment on Proposed Amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit

**P**ursuant to 28 U.S.C. § 2071(b), notice is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit.

A copy of the proposed amendments may be obtained on and after

Aug. 5, 2002, from the Eleventh Circuit's Internet Web site at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov). A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, GA 30303;

phone: (404) 335-6100. Comments on the proposed amendments may be submitted in writing to the Clerk at the above street address by Sept. 5, 2002.

## Notice of Public Meetings

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

Does a lawyer licensed in a state other than Georgia engage in the unlicensed practice of law when he physically enters into Georgia and represents an individual at a securities arbitration proceeding?


In accordance with Bar Rule 14-9.1(f), notice is hereby given that a public meeting concerning this matter will be held at 10:00 a.m. on Sept. 20, 2002, at the State Bar of Georgia, Third Floor, 104 Marietta Street, NW,

Atlanta, GA. Prior to the meeting, individuals are invited to submit any written comments regarding this issue to UPL Advisory Opinions, State Bar of Georgia, Suite 100, 104 Marietta Street, NW, Atlanta, GA 30303.

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

Attorney representing the creditor on an account files a lawsuit against the debtor. The attorney then receives a letter and agency power of

attorney from a company stating that it has been authorized to act as the agent for the debtor in settlement negotiations. Is the company engaged in the unlicensed practice of law? Is the individual directing the company engaged in the unlicensed practice of law?

In accordance with Bar Rule 14-9.1(f), notice is hereby given that a public meeting concerning this matter will be held at 11:00 a.m. on Sept. 20, 2002, at the State Bar of Georgia, Third Floor, 104 Marietta Street, NW, Atlanta, GA. Prior to the meeting, individuals are invited to submit any written comments regarding this issue to UPL Advisory Opinions, State Bar of Georgia, Suite 100, 104 Marietta Street, NW, Atlanta, GA 30303. 

## Books/Office Furniture & Equipment

**The Lawbook Exchange, Ltd.** Buys, sells and appraises all major lawbook sets. Also antiquarian, scholarly. Reprints of legal classics. Catalogues issued in print and online. Mastercard, Visa, AmEx. (800) 422-6686; fax: (908) 686-3098; [www.lawbookexchange.com](http://www.lawbookexchange.com).

## Position Wanted

Established AV Rated Defense law firm is recruiting for experienced **associates** and **paralegals**. Ideal candidates must possess the following qualifications. **ASSOCIATE:** 2-3 years previous law firm experience; strong academic background from nationally recognized law school; bar certification preferred; proven ability to operate independently with limited supervision; organized with initiative to accept responsibility to move cases forward; and research & written/oral communication skills a must. **PARALEGAL:** 4-5 years experience; paralegal certificate or equivalent level of legal training preferred; excellent organizational & communication skills; detail oriented with proven ability to maximize efficiency; and highly motivated team player willing to take initiative. Mid-sized firm environment with excellent benefits. Salary commensurate with experience. Reply with resume to Administrator, P. O. Box 1477, Augusta, GA 30903 or fax to (706) 722-5127.

**Craver Hagood & Kerr, PA.** Small Charleston law firm seeks an associate with 2-3 years of business/transaction experience for their busy practice in a beautiful coastal setting. Ideal position for a balanced lifestyle. Fax cover letter and resume to Katherine McKillip at (843) 577-0811 or e-mail to [kmckillip@chkpa.com](mailto:kmckillip@chkpa.com).

## Practice Assistance

**Georgia Brief Writer & Researcher** All Georgia Courts: Appellate briefs, Notices of Appeal, Enumeration of Errors, Motions: Trial briefs, Motion briefs, etc. Reasonable rates. Over 30 years experience. Curtis R. Richardson, Attorney at Law. Admitted in 1964. (404) 377-7760. [curtir1660@earthlink.net](mailto:curtir1660@earthlink.net). References upon request.

**Mining Engineering Experts:** Extensive expert witness experience in all areas of mining - surface and underground mines, quarries etc. Accident investigation, injuries, wrongful death, mine construction, haulage/trucking/rail, agreement disputes, product liability, mineral property management, asset and mineral appraisals for estate and tax purposes. Joyce Associates (540) 989-5727.

**Handwriting Expert/Forensic Document Examiner** Certified by the American Board of Forensic Document Examiners. Former Chief, Questioned Documents, U.S. Army Crime Laboratory. Member, American Society of Questioned Document Examiners and American Academy of Forensic Sciences. **Farrell Shiver, Shiver & Nelson Document Investigation Laboratory**, 1903 Lilac Ridge Drive, Woodstock, GA 30189, (770) 517-6008.

**Access Trial Consulting.** Access offers professional videography and photography services for legal professionals. Video depositions, DVT's/AVT's

(Digital Video/Audio Transcripts) for Trial Director and Sanctions trial presentation software, digital imaging, video conversion (CD, DVD-ROM/DVD-Video, VCR to CD/ DVD, etc), consulting and electronic courtroom presentation training by a Certified Trial Director Instructor. Please visit our Web site at: <http://www.ccu.cc> or call (678) 358-4888 (Atlanta).

**Need Help With an Important Opening Statement?** LegalSpeeches provides professional assistance with opening statements for significant trials. Attorney and speech writer Seth Hopkins has drafted openings for cases around the country ranging from major commercial litigation claims to capital murder trials. Very reasonable rates. <http://OpeningStatement.com>.

**Must sue or defend in Chicago?** Emory '76 litigator is available to act as local counsel in state, district, and bankruptcy courts. Contact John Graettinger, 53 West Jackson Boulevard, Suite 1025, Chicago, Illinois 60604. (312) 408-0320.

## Seminars/Conferences

**Entertainment Litigation, Contract Negotiations & the Latest Trends in Entertainment Law.** 10th Annual Cutting Edge Entertainment Law Seminar. August 22-24, 2002. Hotel InterContinental, New Orleans, LA. For registration, contact: Music Business Institute; phone (504) 945-1800; Fax (504) 945-1873; [www.jass.com/cuttingedge/](http://www.jass.com/cuttingedge/).

## Real Estate/Office Space

**Beautiful Offices(s) in Northeast Atlanta.** Share office with 4 attorneys in very attractive surroundings. Secretarial/word processing and overflow work are available. Easy access to I-85 and I-285. Contact Mr. Dean at (770) 458-5828.