Georgia Bar Journal

February 2003 ■ Volume 8 ■ Number 4

Supreme Court Issues Reciprocity Order

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

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On the Cover:
Reciprocity in Georgia

A Supreme Court order signed in December 2002 now permits for reciprocity in Georgia. Please see the President's Message on page 4 and a history and introduction to the new rule by E. R. Lanier on page 26.

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Publisher's Statement

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from the **President**

By James B. Durham

Nothing Eludes Change, Not Even Law

"Nothing endures but change."[1] Change is constant. We see it in our children, our surroundings and occasionally we recognize it in ourselves. The practice of law is no exception; it does not elude change.

On Dec. 12, 2002, the Supreme Court of Georgia passed a new rule concerning the admission of out-of-state attorneys to the State Bar of Georgia. These attorneys, who meet specific requirements set forth in the rule, may become members of the State Bar of Georgia without taking the bar exam if their states reciprocate for Georgia lawyers.

In order for an out-of-state attorney to be admitted on motion without taking the bar examination, he or she must meet the following criteria:

- hold a first professional degree in law from a law school approved by the American Bar Association at the time the graduate matriculated;
- been admitted by examination to membership in the bar of the highest court of another United States jurisdiction that has comity for bar admissions purposes with the state of Georgia;
- never been denied certification of fitness to practice law in Georgia or any other state;
- never taken and failed the Georgia bar examination;
- been primarily engaged in the act of practice of law for five of the seven years immediately preceding the date upon which the application is filed;
- at all times been in good professional standing in every jurisdiction in which the applicant has been licensed to practice law;
- never been the subject of private or public professional discipline of any nature, including formal letters of admonition, in any United States jurisdiction; and
- received a Certificate of Fitness to Practice Law in Georgia from the Board to determine fitness of bar applicants.

The rule ensures that attorneys admitted from out of state are experienced in the practice of law and pose no potential discipline problems or incompetency issues to the general public. The rule also allows law professors recruited to the

Attorneys who meet specific requirements set forth in the rule may become members of the State Bar of Georgia without taking the bar exam.

state, corporate counsel transferred to Georgia, and attorneys providing legal services to the poor more opportunities to practice in our state. Likewise, the rule allows Georgia lawyers the ability to meet the needs of their clients who have legal interests outside of Georgia.

This rule represents a significant change not only with regard to locations where Georgia lawyers can practice but also in the philosophy of how lawyers in Georgia wish to practice. Without question Georgia lawyers would have opposed this rule five to 10 years ago. In the past, lawyers have traditionally had less contact with attorneys out of state, less need to represent clients outside of the state, and greater uncertainty as to the ability of out-of-state attorneys to represent clients in Georgia pursuant to Georgia law. With the exception of perhaps very large Atlanta law firms, there was simply not a need to practice in other states. With rapid change in technology, with corporations attempting to consolidate legal services and thus reduce costs, and with law firms and attorneys attempting to meet the needs of their clients and resist becoming outdated, attorneys have changed their perceptions of how law should be practiced. Thus they support rules such as this one passed by the Supreme Court.

The change in lawyers' perceptions is reflected in the way the Board of Governors of the State Bar of Georgia reacted to this particular rule. Prior to the time the Supreme Court adopted the rule the Executive Committee of the State Bar sent a questionnaire to all members of the Board of Governors. The questionnaire asked specific questions as to whether the Board would favor motion by admission without taking a bar examination and, if so, whether the Board preferred reciprocity or comity. In their responses, the Board members overwhelmingly voted in favor of motion by admission with reciprocity. Five years ago the Board of Governors would not have voted in this manner and in all probability would have been against any rule allowing motion by admission with reciprocity. There are 155 attorneys elected to the Board of Governors, including the eight officers of the State Bar of Georgia. These attorneys are from all parts of the state and give an accurate reflection of what lawyers throughout Georgia are thinking. As I have traveled the circuits speaking to various bar associations, I have been surprised to see the support of such a rule and how lawyers' perceptions have changed in Georgia.

As change continues in the practice of law, we will undoubtedly experience growing pains. With more lawyers practicing law in Georgia and with different perspectives of law firms and lawyers from other states who may practice in Georgia, we will see changes in the manner attorneys practice law. We continue to witness changes in marketing strategies of attorneys, which are the result of more sophisticated technology combined with more and more attorneys. Attorney advertising continues to increase, and at times it has been very heavy in neighboring states. Often the general public and many attorneys find advertising offensive. Nonetheless, out-of-state firms are spending millions of dollars a year on television advertising, and they do it because it generates millions of dollars in revenues. Larger national law firms have engaged in very sophisticated advertising targeting their clientele base. Many of us recall beginning the practice of law and being told that it was important to be involved in community organizations, first, because lawyers should give back to their communities, and, second, because it was an excellent way to make contacts with potential clients. Although this involvement was a form of marketing, clients benefited by having more information from which to make choices.

As I have traveled the circuits speaking to various bar associations, I have been surprised to see the support of such a rule and how lawyers' perceptions have changed in Georgia.

Undoubtedly the continued change in technology, attorneys reaching for an extended client base, and more attorneys and law firms competing for that client base will continue to cause changes in the practice of law, which include changes in the way attorneys market themselves. The change in the rule by the Supreme Court allowing admission on motion without examination will lead to more choice for legal services for the general public, and it will also mean more competition for attorneys. It will cause growing pains. As lawyers, we must recognize change will continue in our practice, and we must strive to maintain our professional values.

"Change has a considerable psychological impact on the human mind. To the fearful it is threatening because it means that things may get worse. To the hopeful it is encouraging because things may get better. To the confident it is inspiring because the challenge exists to make things better."[2] We must recognize the practice of law is not the same as it was 50 years ago. The practice of law today is not what the practice of law will be 50 years from now. Two constants during this period of change must be our responsibility to serve our clients to the best of our abilities and our responsibility to act in a professional and courteous manner to all members of the bar. Maintaining our core values will allow us to embrace change in the practice of law as it occurs and to meet the challenges that come with it. GBJ

Endnotes

1. Diogenes *Laertius*, Heraclitus
2. Quote from King Whitnet, Jr.

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from the **Executive Director**

The Bar would like to extend a warm welcome to its newest tenant, The Georgia Indigent Defense Council. The GIDC made the Bar Center its new home in December 2002.

By Cliff Brashier

State Bar Member Services:

Helping You Find Value

The State Bar of Georgia recommends products and services of interest to lawyers when specific vendors offer price discounts or other benefits that the Bar believes will be of special value to its members.

As such, the Bar has just added LexisNexis as a recommended provider of online legal research. This member benefit program offers several pricing options that could reduce the operations cost while providing members with quick and easy legal research.

For the past six years, American National Lawyers Insurance Reciprocal (ANLIR) has been recommended by the Bar for professional liability coverage. The competition that ANLIR brought into Georgia has helped Georgia lawyers in their negotiations with all malpractice insurers. In addition, the Bar's Malpractice Insurance Committee has been pleased with ANLIR's customer service, claims handling and policy coverage. ANLIR also achieves a high retention rate of those it insures.

However, under the terms of the Bar's contract with ANLIR, we have given notice that our recommendation will terminate on May 1, 2003. AM Best has recently changed its rating of ANLIR to a B- with a positive outlook for the future. According to AM Best's rating scales, a B- rating means that in their opinion the company has an ability to meet its current obligations to policyholders, but is financially vulnerable to adverse changes in underwriting and economic conditions. A positive outlook is placed on a company's rating if its business trends are favorable, relative to its current rating level, and if they continue, the company has a good possibility of having its rating upgraded.

The Bar's action to discontinue its recommendation was based solely on this AM Best rating. At present, no replacement recommendation is being made. Due to market conditions not related to the Bar's decision regarding ANLIR, the industry forecast is for premium increases by many or most pro-

> "The GIDC is pleased to be a part of the Bar Center community."
> — GIDC Interim Executive Director Susan Teaster

fessional liability insurance providers.

On a similar note, high and increasing medical costs make affordable health insurance a priority for many members of the Bar. A subcommittee of the Bar's Executive Committee continues to search for a viable solution for affordable insurance for the membership, their employees and their families. The Bar's elected leaders know well how important this is to many members and they are trying hard to help in spite of a very adverse market.

In other news, the Supreme Court of Georgia's Indigent Defense Committee has issued a report recommending major revisions to the indigent defense system in Georgia. A look at the findings in the report can be found on page 34 in this issue of the *Journal*. The entire report can also be found online at www.georgiacourts.org.

Last, but certainly not least, the Bar would like to extend a warm welcome to its newest tenant, the Georgia Indigent Defense Council (GIDC). The GIDC made the Bar Center its new home in December 2002. According to GIDC Interim Executive Director Susan Teaster, "The GIDC is pleased to be a part of the Bar Center community. We are excited about our new location in the center of town. Being downtown affords us the opportunity to better assist attorneys and other agencies providing indigent defense representation and services across the state."

I once again want to invite all of you to tour "your" Bar Center. Please feel free to bring your family, friends, clients and colleagues with you when you visit.

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).

from the **YLD President**

By Derek J. White

Was It Worth It?

During my weekly Sunday brunch after church, I heard an elderly gentleman speaking with his granddaughter. The gentleman was telling his granddaughter about his career as a doctor. He happily went on and on about his career and how much enjoyment he had received over the years from helping others.

Whenever the granddaughter could get a word in, she would ask "Papa" why he stopped being a doctor or why he elected to be a doctor or why he was so happy he was a doctor. After a moment of silence, Papa started crying and said, "I love making people happy and when I can make someone that is sick feel better, I know I have made a difference in that person's life." At this point, the granddaughter asked Papa to stop crying because he always makes her happy. He responded, "I am not crying because I am sad, I am crying because I am happy I made a difference in this world and I know it was worth being a doctor in this world."

Being a witnesses to this conversation has made a lasting impression on me. I began to wonder if I will have the opportunity to tell my grandchildren about my career. More importantly, I wondered if I would be saying "it was worth it" at the end of my career.

What is it to say that you are an attorney? Is it successfully obtaining a large jury verdict or defense verdict for your client in a civil matter? Is it successfully obtaining an acquittal for your client or a guilty verdict for the government in a criminal case? Or is it just simply winning for your client regardless of the nature of the legal matter?

If being an attorney is a simple yes or no to the above questions or simply being successful, then I do not believe at the end of your career you will be able to wholeheartedly claim that your career as an attorney "was worth it." As one learned legal scholar and justice has profoundly proclaimed about success, "[f]ulfillment may fall short of expectation."[1]

Although success will be an integral part of the outcome of your career, it is not the most important factor that will make your career "worth it." I believe that "making a difference" in others' lives will be the most important factor in your career.

Making a difference can begin with becoming more involved with your community,[2] as well as becoming more involved with the State Bar of Georgia. The Bar has 41 standing and special committees

Although success will be an integral part of the outcome of your career, it is not the most important factor that will make your career "worth it."

ranging from Access to Justice to the Unauthorized Practice of Law. The Younger Lawyers Division of the Bar has 34 standing committees ranging from Advocates for Special Needs Children to the Youth Judicial Program. However, if for some reason your practice does not lend itself to you being involved with the Bar, be mindful of the purposes for the creation of the Bar:

The purposes of the State Bar of Georgia shall be:

- to foster among the members of the bar of this State the principles of duty and service to the public;
- to improve the administration of justice; and
- to advance the science of law.[3]

Additionally, be mindful of the Preamble to the Georgia Rules of Professional Conduct, "A Lawyer's Responsibilities:"

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. (Emphasis added).

If these two lofty suggestions are not enough, just remember what your parents told you, "Help those who can not help themselves."

Remember, it is our profession that protects the rights of the citizens of this state and of this great nation. This task in and of itself should make our careers "worth it." But when it does not, apply the practical propositions above to your career and you will be successful, you will have helped others and you will reminisce about your career and come to the conclusion that, "It was worth it."

ENDNOTES

1. Benjamin N. Cardozo, Walton Water Co. v. Village of Walton, 238 N.Y. 46, 50 (1924).
2. "Judge a man not by the words of his mother, but from the comments of his neighbors." Leo Rosten, Treasury of Jewish Quotations, 1972.
3. Organization of the State Bar & Admissions, Rule 1-103.

A Look at the Law

International Business Law:

A Top 10 List for Georgia Lawyers

By James C. Nobles Jr. and James B. Muhlbach

Today, virtually every sector of Georgia's economy is touched by international business. Even a Georgia general practitioner with a "local practice" may from time to time be confronted with client issues having an international component. As a result, Georgia lawyers, irrespective of whether they practice in the litigation, family law, real estate, or corporate area, may be called upon to address international legal issues.

This article outlines some of the very basic concepts, and most commonly encountered issues, involving international law with which every Georgia general practitioner ought to be familiar. The article is intended to serve as a resource for Georgia lawyers who may face international issues only on a sporadic basis and is not meant to be a comprehensive examination of any of the issues addressed. For example, while the article touches upon the mechanics of the U.S. withholding taxes levied on payments to foreign persons and entities, a full description of how the withholding tax system operates would be outside the scope of the article. Instead, the article introduces the concepts to provide the reader with some degree of familiarity, and advises Georgia attorneys faced with more complex issues to conduct careful research and analysis or otherwise seek competent advice.

1. How are U.S. taxpayers taxed on income earned outside of the United States?

The United States taxes its citizens and foreign persons who are U.S. income tax "residents" on a worldwide basis, irrespective of the source from which the income is derived.[1] There are only a couple of exceptions. The first is the foreign earned income exclusion, whereby a U.S. citizen or U.S. income tax resident can, under very limited circumstances, exclude from U.S. taxation up to $80,000 per year provided that the taxpayer earns such income outside of the U.S. and meets rigid foreign residency requirements.[2] The second exception involves a tax incentive to encourage U.S. taxpayers to export and allows the exclusion of a portion of a taxpayer's "Qualifying Foreign Trade Income," provided that the taxpayer strictly follows the statutory exclusion scheme.[3]

Because Georgia ties its income tax law for individuals to the Internal Revenue Code, a Georgia resident is also taxed on his or her worldwide income.[4] Therefore, if an individual client from south Georgia earns $1 million in a salt trading deal in Timbuktu, he or she will be required to report that income and pay over the appropriate tax to the Internal Revenue Service (and the state of Georgia).

Because U.S. taxpayers can also be subject to taxation in a foreign country, those engaging in international business may be subject to double or multiple taxation. To mitigate the effect of such multiple taxation, the U.S. tax code affords taxpayers either of two possible remedies. First, in calculating his or her U.S. taxable income, the U.S. taxpayer may, subject to some limitations, deduct the foreign taxes paid.[5] Second, under certain circumstances, the U.S. taxpayer may credit the foreign income taxes paid against his or her U.S. income taxes.[6]

2. When is a foreign person a U.S. resident?

Determining when a non-U.S. citizen is a "resident" of the United States is a very tricky issue. One must first ascertain for what purpose the determination of residency is being made.[7] Under U.S. law, there are different definitions of "residency," and the definitions are inherently contradictory. For example, a person may be a U.S. resident for income tax purposes, but may not be a resident (or more properly, a "domiciliary") for estate tax purposes, and he or she may be an "illegal resident" under U.S. immigration law. Accordingly, when one speaks of a foreign person as a "resident" of the United States, one must define whether such person is a "resident" for income tax purposes, estate tax purposes or immigration purposes.

For U.S. income tax purposes, a foreign citizen will be considered a U.S. income tax resident (and thus taxable on his or her worldwide income) if he or she meets one of two primary tests: (i) the "Substantial Presence Test" or (ii) the "Green Card Test."[8] The "Substantial Presence Test" is based upon the number of days a foreign citizen is physically present in the United States over a three-year period.[9] Additionally, if certain conditions are met, a foreign citizen can elect to be a resident of the United States for income tax purposes for the year prior to the year in which he or she otherwise meets the "Substantial Presence Test."[10] Under the "Green Card Test," a foreign citizen is considered to be a U.S. income tax resident if he or she has been issued a "green card" as a "lawful permanent resident of the United States."[11] It should also be noted that, for purposes of immigration law, one becomes a resident of the United States once he or she has been issued a green card.[12]

A different test applies for residency for purposes of U.S. estate and gift taxes. A foreign citizen will be subject to United States estate and gift taxation on his or her worldwide assets if he or she is domiciled in the United States.[13] A foreign citizen will acquire U.S. domicile for estate and gift tax purposes if he or she resides in the United States with no present intention of leaving the United States with the intention to reside in another country.[14]

3. Is U.S. government approval required to export?

There are federal limitations on what can be exported from the United States. Several U.S. federal government agencies have export control responsibilities; however, the following agencies have major responsibilities relating to export controls: the Department of Commerce (Bureau of Export Administration); the Department of State; and the Department of the Treasury (Office of Foreign Asset Control).[15] Federal law provides for both civil and criminal penalties for violations of U.S. export control laws.[16] A good source of information about the export controls over commercial property with links to other agencies is the Web site for the Department of Commerce, Bureau of Export Administration.[17]

Potentially every good or service that is exported may be required under federal law to have a government export license. It should be noted, however, that the vast majority of goods and services fall under the general license category. This means that the license is granted virtually automatically and the U.S. exporter is not required to obtain a specific license from the federal government to make the export. If the exporter can not readily determine whether he or she needs an export license, it is imperative that the exporter seek expert guidance on this issue.

4. Is U.S. government approval required to import?

Government approval is generally not required to import products and services; however, once a U.S. person does import goods or services, he or she is required to comply with a myriad of regulations. As a general rule, the imported product must meet U.S. legal requirements to be sold in the United States (e.g., product safety rules and labeling requirements). Failure to meet these requirements can result in U.S. Customs preventing the importation of the goods.

Under the U.S. Constitution, Congress has the authority to tax and regulate the importation of foreign goods.[18] Congress has exercised this power in a number of ways, including imposing import

duties on certain goods as provided in the Harmonized Tariff Schedule[19] and enacting laws that prohibit the importation of obscene materials into the United States, as well as goods manufactured with forced child labor.[20] Under U.S. law, one cannot import consumer products if they fail to comply with certain safety standards.[21] Likewise, foreign-made drugs that do not meet certain standards can be prevented from entering the United States under the federal Food, Drug and Cosmetic Act.[22] In addition to consumer protection laws, the importation of products from certain foreign countries (e.g., Iraq and Cuba) upon which the United States imposes sanctions is often banned.[23]

In addition to the collection of customs duties, the Customs Service has authority to enforce certain other U.S. laws concerning the importation of foreign products.[24] Federal law grants authority to the Customs Service to conduct searches and to seize goods that violate U.S. laws on imports.[25] Accordingly, if a client has decided to begin an import business, it is important to determine beforehand whether or not the goods conform to U.S. law and may be imported and distributed in the United States.

5. May a U.S. company do business with a foreign government?

A U.S. company may do business with a foreign government or a foreign government-controlled entity. However, because the sovereign immunity doctrine will make it difficult, if not impossible, to sue the foreign government or governmental entity in the event of a dispute, one should cautiously approach dealings with these governments and entities.

The United States has, under the doctrine of sovereign immunity, afforded foreign governments immunity against lawsuits brought against them in this country.[26] Sovereign immunity may extend, under certain circumstances, to entities and instrumentalities of foreign governments. There is an exception allowing a foreign government to be sued for "commercial activities" undertaken by the foreign government; however, the commercial activity exception will not apply unless there is a sufficient nexus between the commercial activities conducted in the United States and the activities giving rise to the lawsuit in which sovereign immunity is claimed.[27]

If a client proposes to enter into a contract with a foreign government or governmental entity, the client may have great difficulty enforcing the contract, not only in U.S. courts, but also in the courts of other countries (most countries have adopted the sovereign immunity doctrine in some fashion). Thus, the client must determine at the outset how his or her rights against the foreign government or governmental entity will be impacted by sovereign immunity and what steps, if any, he or she can take to preserve its legal rights.

Another issue to consider is whether one's activities in the United States on behalf of a foreign government will require one to register with the U.S. federal government as a "foreign agent." For example, if a U.S. person undertakes political activities or acts as public relations counsel on behalf of a foreign government in the United States, he or she must register or notify the Justice Department prior to undertaking the actions on behalf of the foreign government.[28]

6. Can a U.S. person make "facilitating" payments to obtain business in a foreign country?

The Foreign Corrupt Practices Act (FCPA)[29] prohibits U.S. persons from bribing foreign government officials in order to obtain or retain business. For purposes of the FCPA, U.S. "persons" include U.S. citizens, U.S. residents, and corporations, partnerships and other entities formed under U.S. law or that have their principal place of business in the United States.[30] This prohibition extends to payments made to third parties (e.g., consultants) who then act as conduits for the payment of bribes to foreign government officials.

The FCPA is very broad in that it can also apply to payments made to companies and instrumentalities of foreign governments.[31] Because governmental bribes and corruption are pervasive in business in much of the world, the effect of the FCPA is to place a significant part of world business off limits to most U.S. business people. Those U.S. companies that do conduct business in countries where corruption is widespread should do so only with the guidance of competent counsel on FCPA issues and by maintaining extensive FCPA compliance and certification programs.[32]

U.S. persons conducting business internationally must be highly vigilant about potential FCPA violations. For example, assume that a Georgia farm equipment manufacturer desires to sell its products to a state farm cooperative in a foreign country having a reputation for governmental corruption. Suppose further that the Georgia company

makes these sales by engaging a national from the foreign country to act as its representative. If that agent demands a commission rate that is many times higher than the commission rate the Georgia company pays its agents in other foreign countries, this high commission rate would raise a "red flag" indicating a potential violation of the FCPA, especially in view of the fact that corruption is rampant in the foreign country. If the foreign agent in fact pays a bribe to the foreign government for its business, the Georgia manufacturer could have liability under the FCPA if the Georgia company has the requisite level of knowledge under the FCPA that the foreign agent would pay a bribe to a governmental official in order to obtain the business with the governmental entity.

7. Are there any special requirements for foreign persons to own real estate in the United States?

There are no prohibitions on foreign persons or entities owning real estate in Georgia. However, a non-U.S. corporation (corporate entities formed under the laws of a foreign country) that acquires real estate in the state of Georgia must register with the Georgia Secretary of State's Office.[33]

In addition to the Georgia requirement, it is worthwhile to note the requirements of two federal statutes that may govern foreign persons acquiring real estate in the United States. The first is the Agricultural Foreign Investment Disclosure Act of 1978,[34] which requires that certain information reports be filed with the Department of Agriculture if a foreign person takes certain actions involving U.S. agricultural land. Such actions include the acquisition or transfer of U.S. agricultural land by a foreign person. The second is the International Investment and Trade in Services Survey Act,[35] which, although not applying solely to real estate, requires that information reports be filed with the Bureau of Economic Analysis of the Department of Commerce with regard to investment in U.S. businesses by foreign investors.

In addition to these reporting requirements, under the Foreign Investment in Real Property Tax Act (FIRPTA), foreign persons are subject to a special taxing regime on their investments in U.S. real property.[36] Under this regime, a foreign person's gains from U.S. real estate investments are subject to U.S. income taxation. The important point to remember is that this tax is collected through a special withholding mechanism. The burden is placed on the U.S. purchaser of a U.S. real property interest from a foreign person to withhold 10 percent of the amount realized on the disposition and to pay it over to the Internal Revenue Service.[37] If the U.S. payor fails to withhold the proper amount, he or she is liable for the tax. In addition, it is also important to note that in the case of a sale or transfer of Georgia real estate by a nonresident of Georgia, Georgia law requires a purchaser or transferee of Georgia real property to withhold a portion of the purchase price and remit it to the Georgia Department of Revenue.[38] As a result of the FIRPTA taxing regime and the Georgia withholding statute, it is imperative that foreign persons and entities seek tax advice on how to structure the real estate investment prior to actually making the investment.

8. Are there any restrictions on U.S. business people conducting business with foreign countries with which the United States has adverse relations?

Sanctions are increasingly being used by the United States and other developed countries as a means of forcing other, typically less developed countries to conform to certain norms of conduct. Under the typical sanctions approach, U.S. persons are prohibited from directly or indirectly engaging in the proscribed conduct. While the sanction rules vary from country to country, most prohibit U.S. citizens, U.S. residents and U.S. companies from importing goods and services to or exporting goods

and services from any person or business in the sanctioned country.

Today, the United States has a number of sanction regimes and has imposed sanctions against several different countries or organizations, including Cuba, Iran, Iraq, Libya, North Korea and the Taliban. Authority to impose sanctions comes from federal law, which usually authorizes the president to impose sanctions under certain circumstances. Sanctions can be imposed under the International Emergency Economic Powers Act[39] or the National Emergencies Act.[40]

In addition to sanctions against specific countries or terrorist groups, the federal government also uses sanctions against foreign narcotics traffickers. Under the Foreign Narcotics Kingpin Designation Act, U.S. persons are prohibited from entering into any transactions with foreign individuals designated as narcotics traffickers.[41] These sanctions carry significant civil and criminal penalties. In fact, sanctions have become so numerous and complex that it would be wise to conduct due diligence on the background of any foreign person or entity prior to engaging in a business relationship.[42]

9. Are there any special requirements for U.S. persons or entities making payments to foreigners?

U.S. taxpayers (both individuals and entities) who make payments to foreign persons or entities may be subject to special tax withholding requirements. In principle, these withholding requirements apply only to interest, dividends, royalties, wages and salaries, as well as other "annual" or periodic payments.[43] The withholding rate is generally 30 percent. If the U.S. taxpayer fails to withhold on payments subject to withholding taxes, the U.S. taxpayer will be liable for the withholding tax.[44]

The withholding tax of 30 percent may be reduced, and in some circumstances totally eliminated, if the foreign recipient of the payment is entitled to benefits under a bi-lateral income tax treaty. However, even if a treaty exception applies, the foreign recipient and the U.S. taxpayer may be required to file information returns with the Internal Revenue Service.

10. Can a U.S. taxpayer use an offshore company to avoid U.S. taxation?

There are no prohibitions on U.S. citizens or U.S. income tax residents owning foreign companies and other foreign entities, including "offshore" companies. However, the adviser for such citizens or residents must first determine the U.S. tax ramifications of owning foreign entities. The taxpayer must report the ownership of a non-U.S. entity to the Internal Revenue Service.[45] In addition, an "offshore" corporation may generally not be used by the taxpayer to avoid or defer U.S. income taxes. The Internal Revenue Code prevents such structure by providing several sophisticated and complex "look through" regimes, the purpose of which are to attribute the earnings of the foreign corporation owned by U.S. taxpayers back to such taxpayers, causing them to be subject to U.S. income taxation on a "current" basis.[46] Generally, the only exceptions to these look through rules are for those U.S. companies having legitimate, active operations in foreign countries.

Similarly, there is no prohibition on U.S. taxpayers maintaining foreign bank accounts; however, the existence of the bank account must be reported to the Internal Revenue Service.[47] Moreover, the U.S. taxpayer may not use such bank accounts to conceal financial assets outside of the U.S. taxing jurisdiction. To do so may subject the taxpayer to criminal fraud charges.

Due to the integration of the world's economy, Georgia lawyers are increasingly called upon to resolve international issues for their clients as part of their practice. This article attempts to provide the reader with a brief outline of some of the major concepts that every Georgia attorney should be aware of when confronted with an international issue. When faced with the challenges of these issues, it is imperative that the lawyer always conduct careful research and analysis of the client's problem before acting.

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ENDNOTES

1. Treas. Reg. § 1.1-1(b) (2002). For additional discussion, see Joel D. Kuntz & Robert J. Peroni, U.S. INTERNATIONAL TAXATION §B1.03 (1996).
2. I.R.C. § 911 (2002).
3. *Id.* at § 114, §§ 941-943. It should be noted that on August 20, 2001, the WTO ruled that these provisions relating to a tax incentive to export violate U.S. obligations under the WTO. Although the U.S. has filed an appeal, these provisions may be changed in the near future because the actions of the WTO.
4. Ga. Code Ann. § 48-7-27 (2002).
5. I.R.C. § 164.
6. *Id.* §§ 901-908.
7. For discussion of the residency issue, see Nobles & Fisher, *Tax Planning for Foreign Persons Coming to the United States*, GEORGIA BAR JOURNAL, May 1991.
8. I.R.C. § 7701(b).
9. *Id.* § 7701(b)(1)(A)(ii).
10. *Id.* § 7701(b)(1)(A)(iii).
11. *Id.* § 7701(b)(1)(A)(i).
12. 8 U.S.C. § 1101 (2002).
13. Treas. Reg. §§ 20.0-1(b), 25.2501-1(a) (2002).
14. *Id.* §§ 20.0-1(b), 25.2501-1(b).
15. The Department of Commerce has authority pursuant to Executive Order No. 13222, dated August 17, 2001 (issued under 50 U.S.C. § 1702) to review and grant or deny licenses for export sales. The Department of State regulates the export of items listed on the United States Munitions List. *See* 22 U.S.C. § 2778 (2002). Under various executive orders issued by the President under authority of 50 U.S.C. § 1701, the Office of Foreign Asset Control of the Department of the Treasury administers U.S. embargoes against certain foreign countries.
16. 50 U.S.C. § 1705 (2002); *see also* 22 U.S.C. § 2778 concerning export of defense related articles.
17. *See* http://www.bxa.doc.gov/.
18. U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 8, cl. 3.
19. 19 U.S.C. § 1202 (2002).
20. *Id.* § 1305, 1307.
21. 15 U.S.C. § 2066 (2002).
22. 21 U.S.C. § 331 (2002).
23. 50 U.S.C. § 1702 (2002); 19 C.F.R. § 161.2 (2002); *see also* Section 8 of this Article (discussing restrictions on doing business with countries with which the United States has adverse relations).
24. 19 C.F.R. § 161.2.
25. 19 U.S.C. § 1595, 1602 (2002).
26. See The Schooner Exchange v. McFadden, 11 U.S. 116 (1812). The sovereign immunity doctrine was codified in 1976 in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330, 1602-1611 (2002).
27. See Tublar Inspectors, Inc. v. Petroles Mexicanos, 977 F.2d 180 (5th Cir. 1992).
28. 18 U.S.C. § 951 (2002); 22 U.S.C. § 612 (2002).
29. 15 U.S.C. § 78dd-1, -2, -3 (2002).
30. *Id.* § 78dd-2(h)(1).
31. *See* Nobles and Maistrellis, The Foreign Corrupt Practices Act: A Systemic Solution for the U.S. Multinational, NAFTA: LAW AND BUSINESS REVIEW OF THE AMERICAS, Spring 1995, at p.5.
32. For additional information on government corruption, see http://www.transparency.org.
33. Ga. Code Ann. § 16-14-15 (2002).
34. 7 U.S.C. §§ 3501-3508 (2002).
35. 22 U.S.C. §§ 3101-3108 (2002).
36. I.R.C. § 897 (2002).
37. *Id.* at § 1445.
38. Ga. Code Ann. § 48-7-128 (2002).
39. 50 U.S.C. § 1701 (2002).
40. *Id.* at § 1601.
41. 21 U.S.C. §§ 1901-1908 (2002).
42. The U.S. Treasury, Office of Foreign Assets Control maintains a web site relating to sanctions at http://www.ustreas.gov/ofac/.
43. *See* I.R.C. §§ 871, 881 (2002) (imposing the tax); *id.* at §§ 1441-1442 (imposing the withholding obligation).
44. *Id.* at § 1461.
45. *Id.* at § 6038.
46. Under current law, six different sets of rules contained in the Internal Revenue Code could apply to foreign corporations owned by U.S. persons. These rules are designed to prevent U.S. persons from avoiding or deferring U.S. taxes on the income of the foreign corporation. The most important set of rules are the Controlled Foreign Corporation rules (I.R.C. §§ 951-964) and the Passive Foreign Investment Company rules (I.R.C. §§ 1291-1298).
47. *See* 31 U.S.C. 5314 (2002). Reporting is done on Department of the Treasury Form TD F 90-22.1, *Report of Foreign Bank and Financial Accounts*. See 31 U.S.C. § 5322 for criminal penalties.

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A Look at the Law

By Stephanie B. Casteel and Letitia A. McDonald

Making a Prima Facie Case for Solemn Form Probate after *Singelman v. Singelman*

For over 150 years, the Georgia Supreme Court consistently held that to make a prima facie case to probate a contested will in solemn form, all living witnesses to the will who are also subject to the jurisdiction of the court must be produced by the one offering the will as the valid will of the deceased testator, the propounder.[1] Because a will breaks the descent of property from the testator to the testator's next of kin, the will must be proven after the death of the testator to be the identical instrument intended by the testator to be his will.[2] The purpose of requiring the testimony of all living witnesses to the will was to ensure that all parties in interest — including those who attack the validity of the will at issue, the caveators — would have the privilege of cross-examination by providing for the oral examination of all witnesses.

Thus, for years it was common practice in Georgia that the propounder of a will could not merely rely on the witnesses' affidavit testimony to establish a prima facie case for the admission of the will to solemn form probate, but rather, the propounder had to call these witnesses at trial.[3] Recently, in *Singelman v. Singelman*,[4] however, the Georgia Supreme Court overruled this firmly established precedent by holding that a propounder of a will need not produce the witnesses at trial to make a prima facie case for admission of the will. This article reviews the history of solemn form probate in Georgia and provides practical advice to the fiduciary practitioner regarding the way in which he or she can establish a prima facie case of solemn form probate in a contested proceeding in light of the Supreme Court's holding in *Singelman*.

CASE LAW INVOLVING SOLEMN FORM PROBATE IN GEORGIA

In *Brown v. Anderson*,[5] the Georgia Supreme Court handed down the general rule requiring the production of witnesses to a will in a solemn form probate proceeding. There, the probate court ordered the will at issue to probate upon the written oaths of the subscribing witnesses. On appeal, the Georgia Supreme Court could not determine from the record whether the witnesses were present at the trial, but held that even had the witnesses been present, the fact that they were not sworn and examined was conclusive against the probate. The Court held that to probate a will in solemn form, it is necessary that all parties in interest be cited to witness the pro-

Will
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ceedings, that the will be produced in open court, that all witnesses be there examined, and that all parties in interest have the privilege of cross-examination.

The requirement of producing live witnesses to probate a will in solemn form was reaffirmed by the Court in dicta in 1895 in *Gillis v. Gillis*.[6] There, the propounder produced the two subscribing witnesses in life, although one of them had apparently later become incompetent. The propounder of the will did not produce a third witness who had predeceased the testator nor a fourth witness who had signed the will outside the presence of the testator and after its execution. In holding that the will had been properly probated, the Court stated that if a sufficient number of witnesses attested and subscribed properly at the time a will was executed, and the witnesses were at that time competent, the will remains valid, although death or supervening disability may render any or all of them incapable of testifying by the time the will is offered for probate. In other words, although the subscribing witnesses are indispensable parties to prove a will in solemn form, the will can be proved (or not) from other testimony or evidence, provided the attesting witnesses are among those who bear testimony or their absence is properly explained.

In *Bowen v. Neal*,[7] a 1911 action to prove a will in solemn form, one of the two witnesses who were still living was out of town. Because this witness's residence was within the Court's jurisdiction, the Court found that he should have been produced at trial.[8] The Court held that the propounders were not entitled to a verdict proving the will stating that a propounder "can only successfully carry the burden of proof and make out a prima facie case by introducing testimony of all the attesting witnesses in life and within the jurisdiction of the court."[9]

The Georgia Supreme Court addressed the proper way to prove a will in solemn form again in 1941 in *Bloodworth v. McCook*.[10] In this case, the will had been attested to by four witnesses, only three of whom testified at trial. The propounder did not produce the fourth witness nor explain his failure to do so, arguing that probate was proper because only three witnesses were required to properly execute a will under state law. The Court held that all of the witnesses to a will must be produced, if they are living and within the jurisdiction of the court, and accordingly, the propounder failed to prove the will.[11]

By this time, Georgia case law had well established that in a contested proceeding, to make out a prima facie case to propound a will, a propounder must introduce at the hearing all subscribing witnesses, if living and accessible, or proof of their signatures, if dead or inaccessible.[12] The witnesses must be introduced for examination even though some of them may have a lack of memory[13] or the propounder knows that their evidence will be unfavorable to him.[14]

GEORGIA'S STATUTORY LAW INVOLVING SOLEMN FORM PROBATE

The propounder's requirement to produce all witnesses in life and within the jurisdiction of the court to prove a will in solemn form also has been well established by Georgia's statutory law. As early as 1861, section 2393 of the Georgia Code provided that a will is proven "by all the witnesses in existence and within the jurisdiction of the court, or by proof of their signatures and that of the testator, the witnesses being dead."[15] Until 1996, the statute changed very little[16] and consistently stated the requirement of producing all witnesses in existence and within the court's jurisdiction.[17] In 1984, a separate subparagraph was added to section 113-602, renumbered as section 53-3-13(a), to address the case of a self-proved will or codicil.[18] Newly added subparagraph (c) of section 53-3-13 provided as follows: "[i]f a will or codicil is self-proved, compliance with signature requirements and other requirements of execution is presumed for such instrument subject to rebuttal without the necessity of the testimony of any witness upon filing the will or codicil and the affidavit and certificate annexed or attached thereto."[19]

In 1996, a major revision of the Georgia Probate Code, H.B. 1030, was enacted by the Georgia General Assembly and signed into law by Gov. Zell Miller.[20] The Fiduciary Law Section of the State Bar of Georgia instigated the revision of Title 53 in 1992 and commissioned a Probate Code Revision Committee[21] to study Georgia's Probate Code.[22] Section 53-3-13(a), renumbered as section 53-5-21(a), was revised to state: "[a] will may be proved in solemn form after due notice, upon the testimony of all the witnesses in life and within the jurisdiction of the court, *or by proof of their signatures and that of the testator as provided in Code Section 53-5-23* (emphasis added)." Section 53-

5-23, formerly section 53-3-21, of the Code states that witnesses may be examined in person or by written interrogatories answered in writing and under oath before a notary public or by depositions or other discovery procedures.

The addition of the underlined language in revised section 53-5-21 makes it appear that a propounder of a will for solemn form probate may either produce live witnesses *or* produce testimony by other discovery means.[23] But the comment to the amendment does not purport to change the law and indeed states that the new section is carrying forward the witnessing requirements of former Code section 53-3-13.[24] Furthermore, Professor Mary Radford, the reporter of the Probate Code Revision Committee, wrote in her article, "Georgia's New Probate Code," that in the Committee's amendments to this section, the Committee strove to preserve the procedure for the probate of a will in solemn form. Professor Radford wrote "[n]ew Code section 53-5-21(a) spells out the requirement for the testimony of one or more (or, in the case of a self-proved will, none) of the witnesses."[25]

As to the insertion of the reference to new Code section 53-5-23, the Committee's intent was merely to incorporate former code sections allowing the examination of witnesses in person or through any other discovery procedures used in civil cases, for purposes of clarity, and not to change existing law.[26] Indeed, the legislation that added former code section 53-3-21[27] specifically stated that the additional procedures for taking the testimony of witnesses to wills were applicable in proceedings for the probate of a will in solemn form only where all heirs at law assent to the admission of the will or where no caveat is filed. To the contrary, this legislation provided that for proceedings for the probate of a will in solemn form in which a caveat is filed, witnesses to wills may be examined by deposition testimony. The necessity for deposition testimony, whether written or oral, in a caveated case underscores the need for cross-examination and the imposition of a different standard.[28] Finally, in the cases cited by new code section 53-5-23, other discovery methods were used only when witnesses were unavailable, not as an alternative to producing live witnesses in a solemn form proceeding.[29] Notwithstanding the 1996 amendments to O.C.G.A. section 53-5-21, which arguably on their face change the standard for proving a prima facie case of solemn form probate, Georgia's statutory law has consistently required, and arguably continues to require, the production of all witnesses in life and within the jurisdiction of the court in the case of a contested solemn form probate. Thus Georgia law, both common and statutory, seemed clear on the issue of probating contested wills in solemn form.

A COMPLETE CHANGE IN THE CASE LAW

Despite the long line of case and statutory authority described above, the Georgia Supreme Court recently created controversy when it held that personal appearances of the witnesses are *not* required to probate a will in solemn form. In *Singelman*, in a contested will proceeding, the propounder produced only written interrogatories of the witnesses to probate a self-proving will in solemn form. Relying on O.C.G.A. § 53-4-24(c) and § 53-5-21(a), a unanimous Court held that if a will is self-proving, the self-proving affidavit itself creates a presumption that the propounder has made a prima facie case, and personal appearances by the attesting witnesses are not required to create this presumption at trial. This holding of the *Singelman* decision is not necessarily controversial because the former and current sections of the Code[30] clearly state that self-proved wills may be admitted to probate without the testimony of any subscribing witnesses[31] as a means of simplifying the evidentiary requirements of proving execution and attestation

of a will.[32] What makes the *Singelman* decision controversial is the Court's further statement that even in the case of a will that is not self-proved, witnesses to the will can be examined in person, by written interrogatories, or by other discovery procedures.[33]

The probate court in *Singelman* apparently relied on *Miller v. Miller*[34] for the proposition that unless the caveator admitted a prima facie case, the propounder must produce the witnesses in his affirmative case in chief. In *Miller v. Miller*,[35] the Georgia Court of Appeals held that producing all subscribing witnesses to probate a will in solemn form is so indispensable that not doing so makes the probate inconclusive, even for parties initially consenting to the probate. The court held that because the will's propounder had produced only the affidavits of two of the three witnesses to the will, where the law requires that all witnesses be called, a valid judgment probating a will could not be rendered and a probate would be de facto void. The court was not troubled by the fact that the caveator had not even attended the hearing on the probate. The court found that, because the purpose for the rule is to allow cross-examination, even had the caveator attended, there would have been no witnesses to cross-examine.[36] The *Singelman* Court found that the probate court's reliance on *Miller v. Miller* was misplaced, citing but without discussing *Norton v. Ga. Railroad Bank & Trust Co.*[37] Accordingly, the *Singelman* Court reversed the probate court's denial to probate the will because the caveators produced no evidence to rebut the propounder's prima facie case.

The *Singelman* Court's reliance on *Norton* has stirred up controversy in the probate bar. In *Norton*, the appellant caveators challenged an order of a superior court granting the appellee propounder's motion for summary judgment and admitting a will to probate in solemn form.[38] The caveators cited as error the fact that the available witnesses were not called to testify in the solemn form proceeding. The Georgia Supreme Court acknowledged its earlier decisions in which it held that the propounder is required to produce all subscribing witnesses within the jurisdiction of the court. But the Court found that these decisions preceded *Taylor v. Donaldson*,[39] in which the Georgia Supreme Court held that the summary judgment procedures of the 1966 Civil Practice Act are applicable to solemn form probate in superior court. The *Norton* Court stated that earlier courts based the conclusion that subscribing witnesses must be present upon an interpretation of the Georgia Code Annotated, which provided that "[P]robate in solemn form is the proving of a will . . . by all witnesses in life and within the jurisdiction of the court."[40] Following *Taylor*, however, a propounder is required only to prove a will in accordance with the Georgia Civil Practice Act, which does not of necessity require personal appearance. The *Norton* Court accordingly held that the trial court had not erred in admitting the will to probate in solemn form without the personal appearance and testimony of subscribing witnesses.

If the *Norton* Court first held that making a prima facie case to prove a will in solemn form no longer requires the personal appearance of subscribing witnesses, why is *Singelman* treated as the case reversing over 100 years of case law precedent? Judge Floyd Propst, former judge of the Fulton County Probate Court, explains in his article, "Big Change in Solemn Form Probate,"[41] that *Norton* involved the probate court's resolution of a motion for summary judgment, not a trial. Because affidavits are routinely used in motions for summary judgment, the use of affidavits in *Norton* did not necessarily establish a new standard for the probate of a will in solemn form at trial.[42] What is so important about *Singelman* is that the Supreme Court took a summary judgment standard and applied it to a trial context and, by doing so, reversed over 150 years of case and statutory law and common probate practice.

ADVICE FOR THE PROBATE LITIGATOR AFTER *SINGELMAN*

The Georgia Supreme Court has called into question the seemingly well-settled proposition that all available witnesses to a will offered for solemn form probate must be produced at trial. The original purpose of this requirement was to give the caveator an opportunity to

cross-examine these witnesses. Although propounders need not have these witnesses at trial after *Singelman*, counsel for propounders should consider whether, as a matter of trial strategy, they should produce these witnesses nevertheless or run the risk of leaving the unmistakable impression with the fact finder that the witnesses' testimony would be unfavorable on the issue of whether the will should be admitted to probate. As an alternative strategy, propounders can wait and force the caveators to find and then call these witnesses instead, and then propounders could examine them on cross.

From the caveators' perspective, caveators now may be required to find and to subpoena the subscribing witnesses to appear at trial if the propounder does not call them on direct. This raises the question as to whether these witnesses would be available for cross examination by counsel for the caveators or whether the counsel for caveators could have the witnesses on direct examination. As Judge Propst notes, the answer likely depends on whether the propounder has chosen to call the witnesses at trial; if so, then counsel for the caveators should be able to have these witnesses on cross-examination.[43] If not, then the caveators may be limited to calling the witnesses on direct.

A CHANGE IN THE BURDEN OF PROOF?

In light of this, one must query whether the effect of *Singelman* is to change the burden of proof in solemn form probate proceedings after the prima facie case has been made. Prior to *Singelman*, the burden was on the propounder to affirmatively prove the testator's capacity as part of the prima facie case. Under *Singelman*, a prima facie case is made much more easily, at which time, the burden of proof shifts to the caveator. It is then the caveator's, and not the propounder's, burden to *affirmatively* prove the testator's lack of capacity if that is the issue.

In *Singelman*, the caveator asserted that the testator lacked testamentary capacity. The propounder submitted only witnesses' affidavits that the testator was of sound mind. The Court noted that the propounder's proof of capacity is "more in the nature of ballast than cargo. It is just burden enough to sail with — no more."[44] At this time, it becomes the caveator's burden to prove his caveat. The Court did express confusion about whether the probate court's determination regarding capacity had been based on the successful rebuttal of the prima facie case by the caveator or the successful proof of the caveat. The Court stated that if the conclusion went to the merits of the caveat, then it was the caveator's and not the propounder's burden to affirmatively prove the testator's lack of capacity.

Judge Propst notes that the same shift of burden of proof would occur concerning undue influence, citing *Adams v. Cooper*,[45] but that if the issue were forgery, the burden of proof never shifts from the propounder to the caveator, citing *Heard v. Lovett*.[46] Judge Propst notes, however, that the *Singelman* case is more recent authority.

ADVICE FOR THE FIDUCIARY PRACTITIONER AFTER *SINGELMAN*

Fiduciary practitioners should consider advising their clients to execute self-proved wills to bolster the case for the admission of the will to probate. It is clear that following *Singelman* and the enactment of O.C.G.A. § 53-5-21(c), the self-proving affidavit itself creates a presumption that the propounder has made a prima facie case and personal appearances by the attesting witnesses are not required to create this presumption at trial. The propounder thus avoids having to prove the validity of the will. The burden is instead on the caveators to disprove the validity of the will. In short, self- proving wills will be further insulated from attack by caveators following the Supreme Court's holding in *Singelman*.

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ENDNOTES

1. To make out a prima facie case, the propounder must show that the will was duly executed and attested, the testator had testamentary capacity, and the testator executed the will freely and voluntarily. Redfearn, Wills, Ga., section 6-9 (6th ed.)
2. *Id.* at section 6-4. In Georgia, a will may be probated in common form or solemn form or both. Probate in solemn form requires the observance of more formalities than probate in common form. Although probate in common form is quick and efficient, it offers little protection to the executor, the person charged in the will with carrying out its terms. Because of the formalities necessary to probate a will in solemn form, the probate is conclusive on all the parties notified and on all the will beneficiaries, unless procured by fraud or collusion. *Id.* at sections 6-8 and 6-9.
3. This article addresses the production of witnesses to a will that has been offered for solemn form pro-

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bate and a caveat is filed thereto. It is common practice in uncontested cases to file affidavits of the witnesses to the will in lieu of obtaining live testimony.

4. 273 Ga. 894, 548 S.E.2d 343 (2001).
5. 13 Ga. 171 (1853).
6. 96 Ga. 1, 23 S.E. 107 (1895).
7. 136 Ga. 859, 72 S.E. 340 (1911).
8. The Court found that although that witness's presence in court might not have been compelled by subpoena, the propounders of the will should have had the witness answer written interrogatories.
9. *Id.* at 861, 72 S.E. at 340.
10. 193 Ga. 53, 17 S.E. 2d 73 (1941).
11. *See also* Thorton v. Hulme, 218 Ga. 480, 128 S.E. 2d 744 (1962) (of four subscribing witnesses to a will, three were present at the probate proceedings and testified and the fourth was out of state but her signature was proved by her mother; all four persons were therefore properly accounted for); Bowen v. Neal, 136 Ga. 859, 72 S.E. 340 (1911) (all witnesses in life and within the court's jurisdiction must be produced or accounted for, even though the will is witnessed by more than the minimum number required by the statute).
12. Spivey v. Spivey, 202 Ga. 644, 44 S.E. 2d 224 (1947); Redfearn, *supra* note 1, at section 6-9.
13. Whitfield v. Pitts, 205 Ga. 259, 53 S.E. 2d 549 (1949).
14. Spivey v. Spivey, 202 Ga. 644, 44 S.E. 2d 224 (1947).
15. Ga. Code 1867. It appears that the legislation authorizing the probate of wills may have occurred in 1838; the legislation was initially compiled in Georgia in 1859.
16. In 1975, Section 2393, renumbered as Section 113-602, was amended to provide that only one witness is required to prove the will for probate in solemn form if no caveat is filed. Ga. L. 1975, p. 764, section 1.
17. The exception of instead proving the signatures of the witnesses if they were dead was expanded to include if the witnesses were inaccessible (*See* Section 113-601 (1895 version)) and blind or incompetent (Section 113-602 (amendment made in 1958 version)).
18. Ga. L. 1984, p. 834, section 4. A will or codicil is self-proved if the testator and the attesting witnesses execute affidavits before a notary public that the document has been duly executed.
19. *Id. see also* section 53-4-24(c) enacted by Ga. L. 1996 p. 504, § 10.
20. *Id.*
21. William Linkous of Powell, Goldstein, Frazer & Murphy LLP served as the Committee's chairman and Professor Mary Radford of Georgia State University School of Law served as the Committee's Reporter.
22. For a complete discussion of the revised probate code, see Radford & Sugarman, GEORGIA'S NEW PROBATE CODE, 13 Ga. St. U. L. Rev. 605 (1997).
23. The *Singelman* court reads the statute in just this way. *See Singelman*, 273 Ga. at 896.
24. *See* Comment, O.C.G.A. §§ 53-5-21.
25. *Radford, supra* note 21, at 710.
26. *Id.* at 710-11.
27. Ga. L. 1961, p. 558, sections 1,3,4.
28. *Id.* at § 2. This language was removed from O.C.G.A. section 53-3-21, presumably because the enactment of the Civil Practice Act in 1966 made the language superfluous.
29. For example, in McFarland v. McFarland, 143 Ga. 598, 85 S.E. 758 (1915), proof of a witness's handwriting, or his testimony taken by commission, was allowed when one of the requisite number of witnesses necessary to prove a will in solemn form was inaccessible to the court on account of nonresidence in the state. *See also* Wells v. Thompson, 140 Ga. 119, 78 S.E. 823 (1913) (proof of due attestation by the requisite number of witnesses may be made by proving the handwriting of the witnesses who cannot be produced because they are outside the jurisdiction of the court).
30. O.C.G.A. §§ 53-2-40.1(c) (former) and 53-5-21(c) (current).
31. The Georgia Supreme Court reached the same conclusion in Westmoreland v. Tallent, 274 Ga. 172, 549 S.E. 2d 113 (2001), originally decided on the same date as *Singelman*.
32. *Redfearn, supra* note 1, at section 5-8. Since the *Singelman* case, a unanimous Georgia Supreme Court, in Duncan v. Moore, SO2A0949 (10/28/02), again held without discussion that because a self-proving affidavit was attached to the propounded will, it could be admitted to probate without the testimony of the subscribing witnesses or other proof that the formalities of execution were met. The *Duncan* opinion was written by Justice Benham; Justice Hines wrote the *Singelman* opinion. In fact, these decisions are consistent with the position of the Uniform Probate Code. *See* U.P.C. section 3-406(b). For wills that are not self-proved, the Uniform Probate Code requires the testimony of only one of the attesting witnesses, if within the state, competent, and able to testify, although due execution of an attested or unattested will may be proved by other evidence. U.P.C. section 3-406(a).
33. As noted above, the Court cited O.C.G.A. § 53-5-21(a), as amended in 1996, to support its decision regarding wills that are not self-proved.
34. 104 Ga. App. 224, 121 S.E. 2d 340 (1961).
35. *Id.*
36. *But see* Lane v. Beachamp, 106 Ga. App. 769, 128 S.E. 2d 372 (1962) (the propounder, as opposed to the caveator, is estopped from setting aside probate because all the witnesses had not been produced because he had the burden of proof of offering the witnesses at probate).
37. 248 Ga. 847, 285 S.E. 2d 910 (1982).
38. The parties were in superior court because they waived hearing before the probate court on the solemn form petition (the will had been probated in common form) and agreed to appeal to the superior court.
39. 227 Ga. 496, 181 S.E. 2d 340, *cert. denied*, 404 U.S. 805 (1971).
40. Norton v. Ga. Railroad Bank and Trust Co., 248 Ga. at 848.
41. Georgia Probate Notes, Vol. XIX, No. 1, July-Aug. 2001.
42. *Id.*
43. *Id.*
44. *Singelman*, 273 Ga. at 895 (citing Thompson v. Davitte, 59 Ga. 472 (1877)).
45. 148 Ga. 339 (1918).
46. 273 Ga. 111 (2000).

Georgia's New Reciprocity Admissions Rule:

A Short History and Brief Introduction

By E. R. Lanier

It is a pretty safe bet that a substantial majority of Georgia lawyers practicing today were not members of the Bar in late 1974 when the Supreme Court of Georgia amended its rules to eliminate the possibility for lawyers of other states to be admitted to the State Bar of Georgia on motion and without examination and, by the same token, eliminated such possibility for Georgia lawyers in most other jurisdictions in the United States.

For these younger attorneys, there never has been the same sense of lost opportunity or professional isolation which Georgia lawyers of an older generation have sometimes experienced as a consequence of the Court's action, almost 30 years ago now. Virtually gone from our collective memory is the fact that before 1974 the members of the State Bar of Georgia enjoyed widespread comity admission privileges throughout the United States and that, on the basis of reciprocity, lawyers from other U.S. jurisdictions (although never in overwhelming numbers) from time to time sought, and were routinely granted, the right to practice their profession within Georgia, this on motion and without the necessity of standing and passing yet another bar examination.[1]

All of this came to an end after Omer W. Franklin Jr., then General Counsel for the State Bar of Georgia, moved the Supreme Court of Georgia on Dec. 12, 1974, to rescind its rule permitting comity admissions in this state. The reasons for this action were complex, but undoubtedly centered on widespread concerns regarding the private and professional character of applicants for admission on motion at a time when, unlike today,[2] there was no permanent professional agency to inquire into and determine fitness of applicants. Other motivations behind the State Bar's 1974 motion included justifiable concerns about the competency of some applicants with respect to Georgia law and, in addition, reservations arising from the steadily increasing number of applications for admission on motion.[3]

On Dec. 17, 1974, the Court passed an Order amending its rules respecting admission to the Bar, determining with remarkable simplicity that "[n]o person may be admitted to the Bar or licensed as an attorney to practice law in this state without examination. There shall be no admission to the Bar of Georgia by comity."[4]

Interlude: 1974-1994

News of the Court's December 1974 decision to rescind the admission by comity rule spread rapidly and was received, in some quarters at least, with desultory resignation.[5] Some, however, launched early efforts to convince the Court to reverse its decision and return, in whole or in part, to the comity practice which had prevailed in the state before 1974. As early as 1978, Emory's Professor Frank Vandall approached the Court through a letter to Chief Justice H. E. Nichols asking action to restore admission to the Bar by motion for members of Georgia's law school faculties, arguing that the 1974 abolition of comity admission was harming the recruitment into Georgia of "outstanding law teachers." These, he asserted, could better use their time "in counseling students, researching and preparing for class," rather than in preparing for the bar examination. Besides, Vandall insisted, "the Court's rule displacing comity

was never intended to apply to law teachers. The removal of the law teachers provision is generally agreed to have been unintentional and a mistake."[6]

Other segments of the Bar also voiced concern over the 1974 action in eliminating comity admissions in Georgia. In 1981, the Younger Lawyers Section of the State Bar — a group understandably concerned over the loss of potential employment out-of-state because of Georgia's self-inflicted lack of reciprocal comity with other jurisdictions — proposed that the State Bar Board of Governors move the Court for a re-adoption of the comity rule; the Board of Governors, however, rejected the proposition. Some years later, in 1989, John F. Allgood moved the Board to consider a compromise position: experienced members of the bars of other states would be considered for admission to the State Bar of Georgia upon successful completion of an "attorneys' examination" consisting only of the essay portion of the Georgia Bar examination, relieving these lawyers of the necessity to take and successfully pass the Multistate Bar Examination. This proposal too failed to garner support among the members of the Board of Governors, and it was tabled at a meeting of the Board in Pine Mountain in the spring of 1989.[7] Yet another doomed effort to return Georgia to the ranks of states affording comity admission to its bar appeared in 1994 when the issue was revisited by the Corporate Counsel Section of the State Bar, a segment of the Bar keenly interested in interstate professional mobility, both in-bound and out-bound. Chief Justice Willis B. Hunt Jr., at the instance of the Section, referred the matter over to the Office of Bar Admissions for research and study but, at the end of the day, the Section determined not to press the matter any further before the Board of Governors of the State Bar.

At this point in time, nearly two decades had gone by since the State Bar of Georgia had entered the professional isolation which the "no comity" rule necessarily entailed, and no end appeared in sight.

But things were about to change.

The Return to Comity: 1994-2002

With the 20/20 vision that frequently accompanies hindsight, it now seems apparent that the 1994

initiative of the Corporate Counsel Section to revive interest in the possibility of admission to the State Bar of Georgia by motion — coming, as that effort did, from a particularly respected and influential segment of Georgia's lawyer population — struck a deeply resonant chord in the Supreme Court of Georgia, the body which would be the ultimate arbiter of the issue of return to comity relationship with the bars of sister states in the American union. In 1995, the year after the Corporate Counsel Section's expression of interest in the issue, the Court assigned Associate Justice George H. Carley the task of surveying both the State Bar and the Board of Bar Examiners respecting their views on comity admissions to membership in the bar; these, after the interlude of a year, reported back to him in 1996 that they were essentially neutral on the question, an implicit signal, perhaps, that the bar would concur in whatever decision might be made by the Court and a tacit assurance that no strong objection would be made through the official organs of the State Bar should the Court, after its own deliberation, make the move to bring comity admissions back to Georgia.

Harold G. Clarke, the widely-respected and influential former Chief Justice of the Supreme Court of Georgia whose name is closely linked with a variety of initiatives shaped to increase the professionalism of the State Bar of Georgia, was privy to the growing interest on the part of the members of the Court in the comity issue before he stepped down from that tribunal at the end of 1994. Soon after returning to private practice in Atlanta, he began applying his considerable organizational skills toward the marshaling of forces for an all-out assault on Georgia's "no-comity" rule.

A model of balance, persuasion, and precision, the letter stressed four central factors weighing in favor of a return to the former practice of admissions on motion to the State Bar of Georgia.

The result — and this may well prove to be the single most significant measure taken in Georgia in the long struggle to restore comity admissions in the state — was a carefully crafted letter to the Supreme Court of Georgia, sent out in late November, 1996, over the signatures of both the former Chief Justice and his colleague at Troutman Sanders, Trammell E. Vickery.[8] A model of balance, persuasion, and precision, the letter stressed four central factors weighing in favor of a return to the former practice of admissions on motion to the State Bar of Georgia:

- Professional isolation was not in keeping with "the mobility of modern society" or the demand for economic growth and development. "In other words," the letter asserted, "inclusion rather than exclusion is the trend of the times." The opening of the doors of the Bar to attorneys admitted in other states would eliminate the "artificial limits and unnecessary burdens on the right of qualified practitioners to serve their clients wherever their clients are located" and would serve to make Georgia more attractive as a site for new businesses.
- Anxieties regarding the fitness of applicants for admission on motion, current in 1974 when comity admission was abolished, had been relieved by the later creation of the Board to Determine Fitness of Bar Applicants; these concerns were no longer a reasonable basis on which to refuse admission by comity to qualified attorneys from other jurisdictions. In addition, Georgia's law schools would find themselves in an improved posture to compete for highly qualified faculty from other states if these could be assured of full recognition of their professional achievements once in Georgia.
- No "untoward economic or other problem for Georgia lawyers" would flow from the addition of attorneys admitted to the State Bar of Georgia on motion, and the exclusion of these through a "non-comity" posture in the rules regarding admission to the bar was drawing increasingly unfavorable comment in case law.
- Attorneys from other jurisdictions active in Georgia (as, for instance, corporate counsel admitted in other states and military judge advocates

admitted in states other than Georgia but practicing here) could, through admission to the State Bar of Georgia on motion, be brought within the disciplinary and regulatory framework of the State Bar of Georgia.

Attached to the letter and in support of its proposal for the restoration in Georgia of bar admission on motion were endorsements by several dozen leaders of Georgia's professional legal community, drawn from its various sectors in graphic demonstration of the broad support weighing in favor of the rule change. The array of corporate counsel amassed in support of the letter's proposal for comity admissions in Georgia read like a *Who's Who* of the Georgia business world: Scientific- Atlanta, Turner Broadcasting, UPS, Cox Communications, the Coca-Cola Company, Holiday Inn Worldwide, Georgia-Pacific, Bellsouth, Nationsbank, Delta Air Lines, Travelers Insurance Holdings, H. J. Russell & Company, the Siemens Corpor-ation, Cotton States Insurance, AT&T and others formed an impressive phalanx endorsing the reinstitution of comity admissions in the state. Nor was the academic world and its peculiar interests in the matter overlooked: Corneill A. Stephens, then the Associate Dean at Georgia State University and Anne Emanuel of that school's faculty urged the adoption of the rule proposed by the Clarke-Vickery letter; C. Ronald Ellington, former dean at Georgia and known throughout the Georgia Bar for his active participation in a variety of important and high-profile initiatives to improve the quality and professionalism of Georgia's lawyers, pitched in his support of the rule change as well, as did Howard O. Hunter, then dean at Emory. Mercer added its voice in support of comity admissions by the endorsements of Jack L. Sammons and Harold S. Lewis, both enjoying enviable reputations throughout the length and breadth

of Georgia for their work in the fields of professionalism and civil practice, respectively. Nor was the organized bar itself neglected. Although caution counseled that currently serving officers of the State Bar be reticent in the early endorsement of such a proposal, Evans J. Plowden Jr., of Albany — who had served as President of the State Bar in 1991 — signed on,[9] as did Rob Reinhardt, who had seen previous service as both an officer of the State Bar and as a member of the Board of Bar Examiners.[10]

The thrust of the 1996 Clarke-Vickery appeal to the Court for the reinstitution of comity admissions in Georgia was seconded just over a year later when the four deans of Georgia's ABA-approved law schools wrote the Chief Justice, then Robert O. Benham, underscoring the value of a comity rule "in attracting the very best talent to [law school] faculties and in having them actively involved in the important work of state and local bars." "Unfortunately," wrote the deans, "the current Bar Admissions Rules in Georgia are a disincentive, sometimes preventing us from recruiting outstanding talent and often discouraging faculty members and lawyers on our professional staffs from becoming involved in bar activities."[11] Just shy of two years after his first letter, Harold Clarke in September of 2001 once again wrote the Court, now under the leadership of Chief Justice Norman S. Fletcher, affirming the position taken in the 1996 initiative[12] and adding in support of the adoption of a comity admissions rule the voices of Steve Gottlieb, Executive Director of the Atlanta Legal Aid Society[13] and David E. Shipley, new dean at the University of Georgia.[14]

It was enough.

Just over a year later, on Dec. 12, 2002, the Court — after an informal poll had indicated the support of the State Bar Board of Governors by a margin of 81 percent for the measure — took action to adopt an amendment to its existing rules on admission to the State Bar of Georgia, one providing for, as its caption runs, "Admission on Motion without Examination."

The New Comity Rule: An Overview

There is an easy, and fortunately fairly accurate, way to think of the impact of the Court's December 2002 comity rule: it changes none of the earlier requirements for admission to the practice of law in Georgia; it relaxes no standards, nor does it increase them — it simply permits in substitution for the requirement of successful negotiation of Georgia's Bar examination the earlier successful negotiation of the bar examination of some other state of the United States.

The new rule is based almost verbatim — but by no means entirely — on the language of the American Bar Association Model Rule on Admission by Motion which in its final form was adopted by the ABA House of Delegates on Aug. 12, 2002.

The new rule is based almost verbatim — but by no means entirely — on the language of the American Bar Association Model Rule on Admission by Motion, which in its final form was adopted by the ABA House of Delegates on Aug. 12, 2002.[15] The affirmative requisites for admission on motion under the new Georgia rule include the following:

- The educational criteria for admission on motion are identical to those for admission by examination, including the requirement of graduation from an ABA-approved law school.[16]
- The applicant must have been admitted to the bar of another

U.S. jurisdiction after the successful completion of an examination in that state; in addition, the state of earlier admission must be one which "has comity for bar admissions purposes with the State of Georgia," i.e., it must admit on motion Georgia attorneys who seek admission in that jurisdiction without examination.[17]

- The applicant must have been engaged in the "active practice of law" for at least five of the seven years before the application for admission on motion.[18] Qualifying practice includes the usual representation of clients as an attorney[19]; legal service with governmental agencies, including the armed forces[20]; judicial service in a federal or state court,[21] including judicial law clerk duties[22]; or, finally, service as corporate counsel.[23] The performance of services which constituted the unauthorized practice of law in the jurisdiction where they occurred will not qualify toward the necessary five year total.[24] Moreover, the applicant must have remained in good standing everywhere admitted to the practice before application in Georgia for admission without examination.[25] Of critical importance given the significance of the issue as a factor in the 1974 abolition of comity admissions in Georgia, the applicant must receive a *Certification of Fitness to Practice Law in Georgia* from the Georgia Board to Determine Fitness of Bar Applicants.

Beyond these affirmative criteria, the applicant for admission without examination must establish the absence of certain disqualifying elements. These barriers to admission on motion include:

- prior denial of a certification of fitness to practice law in Georgia or in any other state[26];
- an earlier unsuccessful attempt to pass the Georgia Bar Examination[27]; and,
- any prior professional discipline (whether public or private) in any U.S. jurisdiction, including formal letters of admonition.[28]

Looking to the Future

The new comity admissions rule broke on the scene in Georgia with little fanfare and less public warning in late 2002, just as the world was slowing down a tad for the December holidays, but word of the Court's action spread quickly across the state and was received, generally it seems, with approval. The best bet at this early phase of the rule's effectiveness is that it will have minimal impact on the bar generally, but that in those sectors of the bar where professional mobility (whether into the state or out of it) is of special significance, the impact of the rule will be of enormous benefit since Georgia lawyers will now enjoy reciprocal admission privileges in 30 other states. Whether for better or for worse, however, one thing remains certain: history proves that the Supreme Court of Georgia is not slow to act when it perceives the welfare of the bar to be at stake, and one can take it as a given that should the new rule require overhaul, major or minor, to make it effective, the Georgia Court will act.

From **E. R. Lanier**, Professor of Law at Georgia State University: "I am grateful to Hulett H. ("Bucky") Askew, director of the Office of Bar Admissions, and to Cliff Brashier, executive director of the State Bar of Georgia, for access to the documentary resources regarding admission on motion to the State Bar of Georgia housed in their respective archives. My thanks go as well to Beth Adelman of the GSU law library and to Celeste Sauls Jenks, a third-year law student at GSU and member of my current "Seminar in Georgia Legal History," for their editorial and research assistance in the preparation of this article."

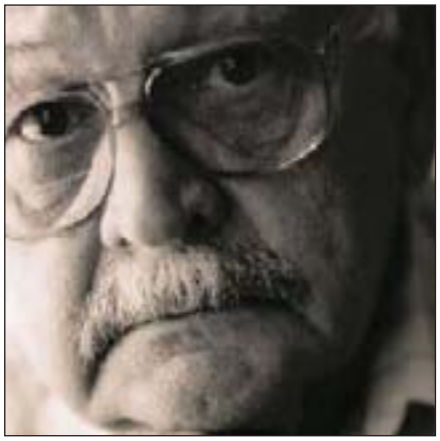
Endnotes

1. A string of earlier statutes had regulated the right of lawyers from other jurisdictions of the United States to be admitted to practice in Georgia on motion. *See, e.g.*, 1955 Ga. L., Vol. I, at 307 (Admissions to Bar by Comity); *see also* 1969 Ga. L., Vol. I, at 82 (Admission of Attorneys from Other States). These older statutes were fairly predictable in their requirements: generally, an attorney from another jurisdiction would be exempted from the bar examination requirement in Georgia on showing admission in the sister state; evidence of good standing in the other jurisdiction; educational credentials equal to those required of persons seeking admission by examination in Georgia; and proof of active practice of law for the statutorily stipulated period of five years. Georgia's early statutes on comity admission were conditioned on *reciprocity*: the attorney seeking admission without examination would be received if the statutory preconditions were satisfied and, in addition, the state where the attorney was previously admitted would extend the same privilege to a lawyer from Georgia seeking admission there.
2. This function is now performed, of course, by the Board to Determine

Fitness of Bar Applicants within the overall structure of the Office of Bar Admissions under the aegis of the Supreme Court of Georgia.

3. *See* the State Bar's Memorandum in Support of Motion in "In Re: State Bar of Georgia: Rules and Regulations For Its Organization and Government Regarding Admission of Attorneys From Other States to the Practice of Law in Georgia Without Examination," filed with its Motion of Dec.12, 1974, to abolish comity admission to membership in the State Bar of Georgia.
4. *See* Order, Supreme Court of Georgia, dated Dec. 17, 1974, amending Rule 2-101 of Chapter 1, Part II, of the Rules and Regulations for Organization and Government of the State Bar of Georgia, Relating to Admission to Practice Law Without Examination.
5. In the early and mid-1970s, I saw service as president of the Atlanta chapter of the Federal Bar Association and as a regional vice-president and member of the National Council of that organization. Those connections led me — together with Hugh H. Howell, Jr., a long-time advocate of federal lawyers generally and the FBA in particular — to become active in support of Bruce Granoff, a State Bar of Georgia candidate who had been denied comity admission based upon his membership in the Massachusetts Bar and his past practice as an attorney for the Federal Trade Commission and the Federal Environmental Protection Agency. Judge G. Ernest Tidwell, then on the Superior Court bench in Fulton County, had ordered the applicant admitted and, on appeal, the Georgia Court of Appeals, in an opinion by Chief Judge Bell in which Judges J. Kelley Quillian and H. Sol Clark concurred, affirmed on the basis of its ruling in *State Bar of Georgia v. Haas*, 133 Ga.App. 311, 211 S.E.2d 161 (service as a judge advocate outside state of bar admission qualifies as "practice of law" for purposes of comity admission rule). *State Bar of Georgia v. Granoff*, 133 Ga. App. 316, 211 S.E.2d 165 (1974). We had been expecting a petition for a writ of certiorari to be filed by the State Bar when news arrived of the State Bar's action seeking revocation of Georgia's provision for admission on motion (Ga. Code §§ 9-201 *et seq.*). Like Pyrrhus of old, we had prevailed in a battle and in the process had lost the war: as best anyone can tell, Bruce Granoff seems to have been among the last persons admitted to the State Bar of Georgia on motion in the twentieth century.
6. Letter of Dec. 12, 1978, from Professor Frank J. Vandall, Emory University School of Law, to Chief Justice H. E. Nichols. The issue of comity admission for law faculty members must have been a current one across the state, for Professor Vandall represented that his letter was sent with the support of the deans and faculty not only at Emory, but also at the law schools of Mercer and the University of Georgia. As an alternative to a general comity rule for legal educators Professor Vandall proposed a special exception to the "no comity" rule for those law teachers who were in Georgia at the time of the adoption of the new rule in 1974, arguing that these had come to Georgia, at least in part, in reliance on the old comity rule and that it would be unfair not to permit these to gain admission to the State Bar of Georgia on motion. No record has been discovered registering the Court's response to Professor Vandall's proposal, but it is clear that no formal action was taken to implement its terms.
7. See Minutes of a Meeting of the Board of Governors of the State Bar of Georgia, Pine Mountain (Callaway Gardens), Georgia, April 8, 1989, at 4. Despite this inauspicious start, the Supreme Court of Georgia nonetheless later adopted a rule providing for an attorneys' examination along the lines proposed earlier by John Allgood.
8. Letter of Harold G. Clarke and Trammell E. Vickery, dated November 20, 1996, to Hon. Sherie M. Welch, Clerk, Supreme Court of Georgia.
9. Letter of Evans J. Plowden, Jr., dated October 1, 1996, to Chief Justice Robert Benham.
10. Undated Letter of Bob Reinhardt, to Justices of the Supreme Court of Georgia.
11. Letter of February 17, 1998, to Chief Justice Robert O. Benham, signed by R. Lawrence Dessem as dean of the law school at Mercer University; by Janice C. Griffith, dean at Georgia State University by Howard O. Hunter on behalf of the Emory law school; and by Edward D. Spurgeon, dean at the University of Georgia. This letter touched on fundamentally the same themes as those of Professor Frank Vandall's communication to Chief Justice H. E. Nichols almost two decades earlier.
12. Letter of September 26, 2001, from Harold G. Clarke to Chief Justice Norman S. Fletcher. Significant, perhaps, is the fact that this letter was copied to John F. Allgood who more than ten years earlier had moved the State Bar Board of Governors to consider the adoption of an "attorney's examination" to facilitate interstate corporate counsel mobility.
13. Letter of September 6, 2001, from Steve Gottlieb to Harold G. Clarke. Gottlieb illustrated the negative impact of Georgia's "no comity" position by describing the frustrations it caused in the recruitment of Spanish-speaking attorneys for the Atlanta Legal Aid Society's Hispanic Outreach Program. The Georgia Legal Services Program, according to Gottlieb, had experienced similar difficulties.
14. Letter of September 8, 2001, from David E. Shipley, dean of the University of Georgia School of Law, to Harold G. Clarke. Dean Shipley made a special point of the problems stemming from the lack of bar comity in the context of the various clinical programs at the University of Georgia, emphasizing the powerful disincentive of the "no comity" rule in attempts to draw skilled clinicians to Athens from other parts of the nation.
15. *See* American Bar Association Center for Professional Responsibility, Client Representation in the 21st Century: Report of the Commission on Multijurisdictional Practice, August 12, 2002, at 49 (Recommendation 7, Admission on Motion).
16. "Admission on Motion without Examination," Section 2.a.
17. *Ibid*, Section 2.b.
18. *Ibid*, Section 2.e.
19. *Ibid*, Section 3.A.1.
20. *Ibid*, Section 3.A.2.
21. *Ibid*, Section 3.A.4.
22. *Ibid*, Section 3.A.5.
23. *Ibid*, Section 3.A.6.
24. *Ibid*, Section 3.B.
25. *Ibid*, Section 2.f.
26. *Ibid*, Section 2.c.
27. *Ibid*, Section 2.d.
28. *Ibid*, Section 2.g.

"and justice for all!"



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Chief Justice's Commission on Indigent Defense Issues Findings

On Dec. 12, 2002, the Chief Justice's Commission on Indigent Defense issued its full report to the Supreme Court of Georgia. The report calls on the state to assume responsibility for paying indigent defense services and to establish and enforce basic standards for indigent defense programs.

The Supreme Court established the Commission in December 2000 "to study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation." The 26-member Commission was chaired by Charles R. Morgan, executive vice president and general counsel, BellSouth Corporation. Paul M. Kurtz, associate dean, University of Georgia School of Law, served as reporter.

The Executive Summary of the *Report on the Status of Indigent Defense in Georgia* follows.

Justice Robert Benham (left) visits with State Bar Executive Committee members Bryan Cavan (center) and Gerald Edenfield.

The Commission and its Work

The Georgia Supreme Court issued an order on Dec. 27, 2000, establishing the Chief Justice's Commission on Indigent Defense, directing the group to "study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation." The Commission, reflecting a broad range of backgrounds and experiences, spent two years completing its tasks. During that time, the Commission conducted 17 public sessions at which it heard from 65 individuals who provided information and suggestions for improvement of Georgia's indigent defense system. These individuals included representatives from all parts of the criminal justice in Georgia, participants in indigent defense reform projects in other states and representatives of the civil rights community. In addition to hearing evidence from these individuals, the

Chief Justice Norman Fletcher presents a certificate of appreciation to C. Wilson DuBose for his work with indigent defense. DuBose serves as chair of the State Bar's Committee on Indigent Defense.

Commission conducted site visits to two of Georgia's judicial districts to observe court proceedings. The final component of data collection took the form of a study by The Spangenberg Group, a nationally and internationally recognized criminal justice research firm, which has conducted empirical research in criminal justice systems in each of the 50 states over the last 15 years. After four months of site work in 19 carefully selected Georgia counties (representing each of the state's 10 judicial districts, each of the various indigent defense delivery systems and approximately 45 percent of the state's population), the

Spangenberg Group produced a 100-page report, which included specific findings concerning the operation of indigent defense in Georgia. The Spangenberg Report can be found online at www.georgiacourts.org.

Constitutional Right to Counsel

Beginning in 1963 in its landmark decision in *Gideon v. Wainwright*, the Supreme Court of the United States has made it clear that the Sixth Amendment to the United States Constitution's right to counsel requires appointment of counsel to those who cannot afford to hire an attorney. Over the next 39 years, most recently in its decision in *Alabama v. Shelton* in May of this year, the Court has expanded this Sixth Amendment right to include: representation at many pretrial proceedings, representation in an appeal as of right and availability of expert witnesses in certain circumstances. In addition to the Sixth Amendment right to counsel, the Georgia Constitution provides that "[e]very person charged with an offense against the laws of this state shall have the privilege and benefit of counsel."

History of Indigent Defense in Georgia

Beginning with the Georgia Criminal Justice Act in 1968, which directed each of the state's 159 counties to establish local indigent defense programs, the state has attempted to respond to these constitutional mandates by providing counsel to indigent criminal defendants. In the Georgia Indigent Defense Act of 1979, the General Assembly created the Georgia

State Bar President Jim Durham (left) and President-Elect Bill Barwick discuss the commission's work following the presentation.

Commission Chairperson Charles R. Morgan, executive vice president and general counsel, BellSouth Corporation, delivered the report to the Supreme Court.

Paul M. Kurtz, associate dean, University of Georgia School of Law, served as reporter for the Commission. He delivered the report to a courtroom full of observers.

Indigent Defense Counsel as a separate agency within the judicial branch. The GIDC was set up to administer taxpayer funds to support local indigent defense programs and recommend to the Georgia Supreme Court guidelines to govern the operation of such programs. Since 1965, the State Bar has been involved in attempting to improve the quality of indigent defense services in Georgia. Additionally, in recent years both state and federal litigation asserting that the Georgia indigent defense system is inadequate and unconstitutional has been brought.

Georgia's current system of indigent defense is funded overwhelmingly by the county governments. The Spangenberg Report, in outlining the funding sources for indigent defense, asserts that approximately 11.6 percent of the total cost of indigent defense is underwritten by the state of Georgia, with the rest being spent by the individual counties. The tripartite committees, representing in each county the county governing body, the superior court and the local bar association, are charged by state law with the responsibility for operating the indigent defense program. Currently, three different types of delivery systems are utilized in Georgia's indigent defense systems. The most heavily utilized format is the panel system, which is used by 73 counties (of the 152 receiving state funds from the GIDC) as the primary mechanism for provision of legal services. Under this system, an attorney is appointed from a panel of attorneys. The second most common system for provision of legal services is the contract system, which is used in 59 counties as the primary system. Under this system, the attorney is hired on a flat-fee basis to represent all indigent criminal defendants or all indigents in a particular category, such as felony, juvenile, etc. Finally, 20 counties receiving GIDC funds utilize a public defender system as the primary source of indigent defense. Under this system, the public defender (and a staff of assistants in larger counties) is a full-time government employee who devotes all of his or her time to serving as an attorney for indigent criminal defendants.

The Commission's Findings

Based on the Commission's numerous public hearings, a review of the extensive documentation provided by witnesses and others, and a careful review of the Spangenberg Report, the Commission has concluded that the right to counsel guaranteed by the state and federal constitutions is not being provided for all of Georgia's citizens. This failure is attributable to:

THE STATE OF GEORGIA IS NOT PROVIDING ADEQUATE FUNDING TO FULFILL THE CONSTITUTIONAL MANDATE THAT ALL CITIZENS HAVE EFFECTIVE ASSISTANCE OF COUNSEL AVAILABLE WHEN CHARGED WITH A CRIME:

- The constitutional obligation to provide adequate legal services for indigents charged with violating state criminal law is imposed on the state of Georgia and this duty should be funded adequately by the state.
- There is not enough money currently allocated within Georgia to the provision of constitutionally mandated indigent criminal defense.
- While precise estimates are not available at this time, the United States Supreme Court's decision in *Alabama v. Shelton* has the potential for greatly expanding the burden on the already inadequate Georgia system for the provision of indigent criminal defense.

THE STATE OF GEORGIA LACKS A STATEWIDE SYSTEM OF ACCOUNTABILITY AND OVERSIGHT TO PROVIDE

CONSTITUTIONALLY ADEQUATE ASSISTANCE OF COUNSEL FOR INDIGENT DEFENDANTS:

- Georgia's current fragmented system of county-operated and largely county-financed indigent defense services is failing the state's mandate under the federal and state constitutions to protect the right of indigents accused of violation of the state criminal code.
- There is no effective statewide structure in placed designed to monitor and enforce compliance with existing Georgia Supreme Court rules governing the operation of local indigent defense programs.
- The criminal defense function must be independent. In order to fully establish the appropriate independence, defense counsel must have responsibility for case-by-case administration, without depriving judges of their inherent right and obligation to ensure that courtroom proceedings comply with the mandates imposed by fundamental law, statutes and the rules of professional responsibility. Similarly, independence from the executive function at the local level requires funding of indigent defense services at the state level.
- A public defender system is the delivery system most likely to afford effective representation to those entitled to it under legal and constitutional mandates.
- The quality of legal services provided to indigent defendants is significantly hampered by a failure of most systems to impose minimum eligibility requirements for the attorneys who represent indigent defendants.
- Funding for services such as expert witnesses, investigators and qualified interpreters is integral to a constitutionally acceptable level of indigent criminal defense. In many areas of the state, inadequate funding for such services results in unfair and often unconstitutional treatment of indigent criminal defendants.
- Georgia lacks an effective approach to identifying and assisting indigent defendants with mental disabilities.
- Georgia lacks an effective approach to providing counsel for juvenile defendants.

- There is no comprehensive system of data collection designed to provide accurate statistics regarding the provision of indigent criminal defense services in Georgia.
- Litigation designed to bring indigent criminal defense in various county systems into compliance with appropriate constitutional and legal standards has already been brought and, in some cases, yielded piecemeal reform by consent decree. Further litigation is being contemplated and likely will occur. Thorough, carefully considered reform of the Georgia system by the appropriate legislative and executive policy makers is far preferable to reform by litigation in the state and federal courts.

The Commission's Recommendations

In light of its findings, the Commission recommends the following steps be taken as quickly as is feasible:

- Adequate funding of indigent criminal defense in cases alleging a violation of state law should be provided by appropriations by the Georgia General Assembly.
- The delivery of indigent defense services should be reorganized to ensure accountability, uniformity of quality, enforceability of standards and constitutionally adequate representation. Such a system would: 1) deliver indigent legal services at the circuit level, rather than the county level; 2) presumptively deliver services through a full-time public defender with appropriate support staff; and 3) be operated by a statewide board charged with the responsibility and power to operate the entire system. This board should be given the power to hire and fire circuit public defenders, the power to define the guidelines under which public defender, panel and contract systems will operate and the responsibility to provide meaningful review of the operation of local systems and the responsibility to conduct training programs for attorneys involved in indigent defense.
- The state should adopt principles to govern the system of providing legal services to indigent criminal defendants.
- The state should adopt performance standards by which attorneys providing indigent defense should be evaluated.
- The state should develop a systematic, uniform and effective approach for identifying and assisting indigent defendants with mental disabilities.
- The state should develop a uniform, effective approach to providing counsel for juvenile defendants, including establishing uniform procedures for determining indigency.
- A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal defense services in Georgia should be established and implemented.
- Because of the significant extra funding and structural reform required to operate a constitutionally sufficient indigent system, a transition plan must be created to expeditiously create a new system to remedy current inadequacies.

Conclusion

After lengthy consideration of the operation of indigent defense in this state, the Commission has determined that significant improvement is necessary to ensure that our state has a constitutionally sufficient, fair criminal justice system. Significantly more money must be devoted to providing a defense to those without adequate resources to provide it for themselves. The Commission also concludes that an infusion of additional money, while absolutely necessary, is not sufficient to complete the awaiting task. In addition to more resources, a system that ensures quality, uniformity and accountability must be created by the state.

The Georgia Innocence Project:

Proving Innocence, Saving Lives

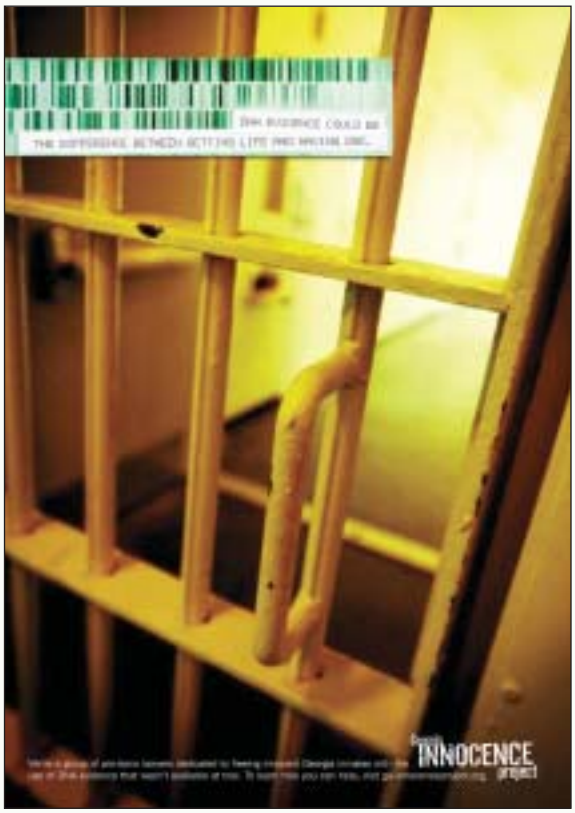
By Robin E. Dahlen

The use of forensic DNA testing has added a new level to the criminal justice system in the United States. Such testing is now routinely used to either convict or clear those awaiting trial and for one such convicted Georgian, this powerful tool gave way to a second chance at life.

In 1983, Calvin C. Johnson Jr. was sentenced to life in prison for a crime he did not commit. Today, Johnson is a free man with a job, a home and a family. Johnson's exoneration was no stroke of good luck, but rather the work of The Innocence Project at the Benjamin N. Cardozo School of Law in New York. The Project, which was created as a nonprofit legal clinic by well-known attorneys Barry C. Scheck and Peter J. Neufeld in 1992, handles cases where post-conviction DNA testing of evidence gathered at a crime scene can produce conclusive proof of innocence.

In 1996, Johnson was made aware of the Project by a friend and took the necessary steps to enlist its help with his case. After close to three years of assistance from the Project, new tests on the original DNA evidence proved that Johnson wasn't the man who raped and sodomized a College Park, Ga., woman in her home on March 8, 1983. In 1999, 16 years after he was wrongfully imprisoned, Johnson was granted a new trial and Clayton County prosecutors dismissed the case.

Johnson is just one of the 116 individuals who have been exonerated by the Project and thousands more await evaluation of their cases. As a result of this growing need to give each individual case its due, many states have developed separate versions of the Project, including Georgia.



The GIP will be using posters to bolster its public awareness campaign.

Georgia Project Pioneers

While students at Georgia State University (GSU) College of Law, Jill G. Polster and September Guy became interested in the idea after adjunct professor and Lawrenceville, Ga., attorney Randy Rich asked if a similar project was being developed in Georgia. Three years later, the Georgia Innocence Project (GIP) has secured funding, launched an informative Web site, established an office and is prepared to continue to build on the foundation laid by the national Project. But, the road to such an achievement has been paved with hard work and determination on the part of

Polster and Guy, who are now practicing attorneys in Atlanta.

As a result of their time, diligence and efforts in getting the project up and running, Polster and Guy were presented with a special award of recognition from the Young Lawyers Division of the State Bar of Georgia during the Bar's 2002 Annual Meeting.

"Jill and September always stood out as strong advocates for the rights of the criminal defendant," notes Rich. "Their arguments were so heartfelt that you could sense their emotions when they argued on behalf of a mock criminal client in class. The traits I see in Jill and September are so rare in law students and I know of no other lawyers who have put in time, energy and effort into making a real improvement for criminal defendants, even ones they have never met."

Pictured left to right: GIP President Jill Polster, GIP Vice President September Guy, GIP Board member Calvin Johnson Jr. and GIP Executive Director Aimee Maxwell.

Polster and Guy initially solicited sponsorship support for the GIP from the law schools at both GSU and the University of Georgia. While several law school faculty members were enthusiastic, administration at both schools was not and the schools passed on the project. Not ones to be easily deterred by this potential setback, the two decided to forge ahead and establish the project independently.

To better understand how the national Project works, Polster and Guy visited Cardozo, as well as Northwestern University's Center for Wrongful Conviction and the Death Penalty. They were even given the opportunity to meet with the national Project's co-founder, Scheck. On the state level, the two attended meetings of the Georgia Association of Criminal Defense Lawyers (GACDL) to drum up support for the project.

"We knew the development of a Georgia Innocence Project was an achievable goal," says Polster. "We just didn't realize that it would take as long as it did to pull everything together."

During one of the GACDL meetings, Polster and Guy met Aimee Maxwell, who, at the time, was serving as director of the Professional Educational Division of the Georgia Indigent Defense Council (GIDC). Soon after their fateful meeting, Maxwell left the GIDC and assumed the responsibility of executive director of the GIP. In her new role, Maxwell was instrumental in assembling a board that boasts some of the Georgia's finest legal professionals (see Board listing on page 40).

"The board really did come together for us so quickly," Maxwell recalls. "We had our wish list of potential members and when those individuals were contacted not a one of them turned us down. Our board numbers currently stand at 17, but we have plans to grow that number to our cap of 25 and branch out into securing more corporate executives and lawyers from civil firms."

The Search for Funding

As with the startup of any new project or business, fundraising became a focal point for Polster, Guy and Maxwell as they continued development of the GIP. Fortunately, the trio was successful in garnering the financial support needed to sustain the GIP in its infancy. The project is now supported in part by the Georgia Bar Foundation, the GACDL and the GIDC, and individual donations have been coming in, as well. In fact, anyone who gives $1,000 to the GIP is considered a "founding member" for life (see page 40 for list of founding members).

The Georgia Bar Foundation gave the GIP a matching challenge grant in the amount of $25,000. The award was granted after the GIP

The Georgia Innocence Project

Board of Directors
Aimee Maxwell, Executive Director
Jill G. Polster, President
September Guy, Vice President
Board Members
Jimmy Dodd Berry
Jim Bonner
Stephen C. Bright
Emmet J. Bondurant
Bobby Lee Cook
Brooks S. Franklin
Edward T.M. Garland
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Calvin Johnson Jr.
Christine A. Koehler
John R. Martin
Randolph G. Rich
Prof. Roy M. Sobelson
Dwight L. Thomas
Alex L. Zipperer
Legal Advisory Committee
Jim Bonner, Chairman
Anna Blitz
Carl Greenberg
Steve Phillips
Gerard Kleinrock

was successful in meeting the Foundation's requirement of raising $50,000 on its own, although that endeavor did take close to 12 months to accomplish.

Georgia Bar Foundation Executive Director Len Horton is thrilled that the Foundation chose to award a grant to the GIP last year. "The work of the Georgia Innocence Project is so important that I'm pleased the Board chose to provide funding," Horton says. "There's a screaming need to make sure there is no chance of a mistake where the death penalty is a possibility. The Georgia Innocence Project meets that need and meets it well."

Polster is extremely thankful for this level of support. "We truly felt our first bit of the project's legitimacy when we received the grant from the Foundation," she says.

Those behind the scenes at the GIP know that fundraising activities will never slow and plans are in the works to step up those efforts. Such plans include a raffle for a 2003 Toyota Camry and T-shirt sales.

"What we would like to see happen is for a civil firm to adopt the project," notes Guy. "We could really use this type of enthusiasm and support. We certainly have no problem with being someone's tax deduction."

In addition to the roughly $100,000 in contributions received by the GIP, the project has been given the use of free office space by ChoicePoint Cares, the philanthropic arm of ChoicePoint, a national

GIP Board of Directors members Randy Rich (right) and Calvin Johnson Jr. (left) enjoy a reception celebrating the GIP's new home. The GIP moved into its new facility in November 2002.

technology company based in Alpharetta, Ga. ChoicePoint owns Bode Technology Group, which is one of the largest private DNA laboratories in the country. ChoicePoint also donated computers, printers and office furniture to the project. The GIP has also been helped along by the support of Mindy Simon and Sven Zabka, of the Atlanta firm Smith, Gambrell & Russell, LLP, who have provided pro bono legal assistance.

Tapping Student Resources

The true backbone of the GIP is the investigative work conducted by law student interns and volunteers. Students begin the often times tedious process by sifting through letters sent by inmates and look for suitable cases. Now that the project has a home and is developing some roots, Polster believes the students will be able to effectively tackle the over 100 letters the GIP has received to date.

"We presently have 50 student volunteers working with us and we are hoping to have anywhere from six to 12 student interns per semester," says Polster.

Student interns and volunteers will be responsible for reading inmate mail, sending out informational packets to be completed by all inmates, reviewing information provided by inmates, conducting case investigation, contacting state officials and monitoring the progress of their individual caseload. After cases are determined to be suitable for review by the GIP's Legal Advisory Committee, each student will be assigned a specific number of cases to follow. During this stage, each student will be paired with an established criminal defense attorney.

"Our internship program presents students interested in criminal law with such a unique opportunity to aid in the innocence movement in Georgia," notes Guy.

GIP's Legal Advisory Committee is chaired by Jim Bonner, who is the director of the GIDC's Appellate Division. Bonner believes the GIP has pulled together a collection of experienced volunteer criminal lawyers who know how to review convictions critical-

Georgia Innocence Project Founding Members/Donors

GIP founding members have donated $1,000 or more to the project. Founding membership is limited to the first 100 donors.

Founding Members:
Frank and Laura Hogue
Brooks S. Franklin
J. Michael Cranford
B.J. Bernstein
Rodney S. Harris
Angela D. Duncan
Emmet J. Bondurant
Alex L. Zipperer
Page A. Pate
Gwinnett County Bar Association, Criminal Defense Section
Dwight L. Thomas
Jeffrey R. Sliz
L. David Wolfe
Carl P. Greenberg
Michael G. Kam
Jake Arbes
Robert R. McLendon IV
Levy & Adams
Charles T. Magarahan
Phyllis Miller
William C. Head
Walt M. Britt
Christine A. Koehler
Billy L. Spruell
Sandra Corry Gerald
Christopher A. Townley
G. Terry Jackson
Lee Sexton
Jeff Greenstein
C. Lane Graves
Wayne and Susan Rogers
Sam Dennis
Charles K. Edmondson Jr. Foundation
Charles and Eleanor Edmundson
Sean Black
Cynthia Roseberry

Donors:
Nancy Scott Rogers
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J. Thomas Salata
Karen E. Beyers
Cynthia Sheffield
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Chris McFadden
Herbert Adams Jr.
Angela D. Duncan
Allen and Susan Willingham
Alison S. Kubiak
James A. Yancey Jr.
Michelle G. Lundy
Duana R. Sanson
Caprice R. Jenerson
Carnesdale & Delan, LLC
Marian Parker Johnson
Thomas J. Thomas
Lenny and Barbara Greenstein

ly and who know something about criminal investigations.

"At least initially, we are going to focus on those cases involving particular claims of innocence that may be biologically (DNA) supported," says Bonner. "Once we get our footing there, however, it's probably inevitable that we would move into other types of innocence claims."

Bonner expects that the law student interns and volunteers will probably be able to screen out many cases on a "make a difference" basis from information the prisoner submits, from reported opinions on appeal and from the information provided on the inmate inquiry section of the Georgia Department of Corrections' Web site without much oversight from the committee.

"Basically, we will be depending on the students to do much of the initial screening largely on their own, but with access to individual committee members if necessary and to a collection of the committee if necessary after that," he says. "As a case moves from the investigatory phase into testing and then closer to formal litigation, the balance of the responsibility will probably tip from the student volunteers to the lawyer volunteers."

Preserving Evidence

Studies conducted by the national Project have determined that the cases of those exonerated by DNA testing reveal several common factors leading to wrongful convictions. These factors include mistaken eyewitness identification, police and prosecutorial misconduct, false confessions, poor defense lawyering, jailhouse snitches and the limits of conventional serology. As such, the proper preservation of DNA evidence collected at a crime scene becomes extremely vital.

Twenty-nine states have enacted statues addressing the preservation of DNA evidence and post-conviction DNA testing. Six additional states have legislation in the mill. Unfortunately, Georgia does not have a presence among these states. However, it is the hope of Maxwell and the GIP that such legislation will be introduced in the 2003 legislative session.

"DNA testing is a powerful and effective weapon in the fight to free those wrongfully accused," says Maxwell. "Our goal is to ensure that DNA evidence is readily available and properly preserved should testing need to be conducted. The GIP is hard at work crafting legislation that will hopefully meet these requirements."

Moving Forward

The GIP already has an extensive public relations campaign in place. In an ongoing effort to get the word out about the program's goals and objectives, Maxwell says they will continue to target the state's law schools and all local bar associations, and she hopes they will soon be a bright spot on the Supreme Court of Georgia's radar. In addition, Johnson, who also serves as a member of the GIP's Board of Directors, travels throughout the state to speak to various groups about his experience.

Surprisingly, Johnson holds no ill will toward the judicial system that kept him behind bars for so many years. In fact, he often admits that during his incarceration he was given the opportunity to reflect on his life and realize what was most important to him.

"The work of the Innocence Project gave me a second chance at life," says Johnson. "And I know the individuals involved with the Georgia project will strive to correct the flaws in the current system while making a big difference in the lives of other innocent people."

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

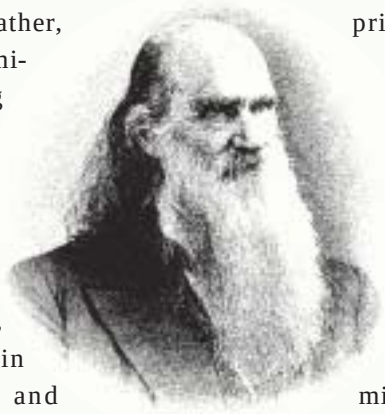
Justice Bleckley's Last Case

By John K. Larkins Jr.

Logan E. Bleckley is the colossus bestriding Georgia law. His stature in his day was such that The Georgia Bar Association in 1909 published an entire book as a memorial,[1] containing tributes, selections from his writings (legal, philosophical and poetic) and an article, "Wit and Wisdom of Chief Justice L.E. Bleckley in the Georgia Reports" that, when originally published, was admired by lawyers in both this country and Canada.[2] As a measure of the public respect afforded Bleckley, in 1912 the people of Georgia named a county for him — an extraordinary honor for a jurist.[3]

Bleckley's sayings are still quoted by Georgia courts, as well as by courts of other states. He is one of the few judges who has achieved the status of generally being cited by name (e.g., "*As stated by Chief Justice Bleckley*…"; "*This question was aptly addressed by Chief Justice Bleckley*…").[4] And it is the Bleckley aphorisms that usually are quoted, not the holdings of the cases from which they come.[5]

The esteem afforded Bleckley results almost entirely from his tenure on the Georgia Supreme Court. Remarkably, even in his day it was noted that his achievements as a judge were not marked by "landmark" opinions that decided some weighty constitutional issue or adopted some innovative cause of action.[6] Rather, his gift was to illuminate cases involving "common, everyday legal issues" with stunningly lucid explications of fundamental legal principles, often expressed in poetic metaphor, and always expressed with literary flair and wit. For example, once when dealing with a small case that the parties unnecessarily complicated, Bleckley wrote, in a now famous passage: "In the ornithology of litigation this case is a tomtit, furnished with a garb of feathers ample enough for a turkey."[7] Bleckley believed that a judicial opinion, ideally, should be "terse, crispy, graceful, animated and entertaining."[8]



But it is a mistake to view Bleckley as all quaint literary flourish. In fact, the Bleckley quotation I most admire is quite the opposite. Some years ago I represented a man accused of using opprobrious words to a policeman.[9] I advocated the position that constitutionally there can be no such thing as fighting words uttered to a law enforcement officer, because in the eyes of the law the officer is not permitted to be provoked. My research revealed *Burns v. State*,[10] an 1888 opinion by Justice Bleckley affirming the conviction of a policeman for assault and battery upon a prisoner. The opinion contained a marvelous explanation as to why "an officer of the peace cannot suffer himself to be overcome by opprobrious words or abusive language while he is acting as a minister of the law."[11]

Even more impressive, however, was the section that closed the Burns opinion:

> It was suggested in argument that a white man will not take insolence from a negro, and we suppose it was meant for us to note that virtue or infirmity (whichever it may be) in expounding and administering the law, or it would not have been mentioned. What we have to say on that subject is this: the duty of an officer to a colored prisoner is not different in any respect from his duty to a white prisoner. He must do right to a colored man as well as to a white man, and obey the law. Judges, including ourselves, must do right, — right to people of all colors; jurors ought to do it; and policemen shall do it, so far as it depends upon us to administer the rules of law to their conduct.[12]

Here is the literary genius of Bleckley differently employed. The force of the language and the resolve of the court are unmistakable. The words are plain and mostly monosyllabic. The guiding principles are compacted into the words "right" and "law," emphasized by repetition ("right, — right to people of all colors"). The phrase, "What we have to say on that subject is this," followed by the colon, also is designed purely for emphasis. The reference to judges and jurors, unnecessary to the narrow decision, elevates the principle by invoking all those associated with administering the law. And then there is the powerful mantra: "judges must do it, jurors ought to do it and policemen *shall* do it," followed by the emphatic "so far as it depends upon us to administer the rules of law to their conduct" (*i.e.*, "as long as we have anything to say about it").[13]

Logan Edwin Bleckley was born in Rabun County in 1827; he died in Clarkesville in 1907. His formal education was meager. Happily, his father was the clerk of several local courts, and young Bleckley fell in love with the law, in which he was largely self-taught.[14] He was admitted to the Bar in 1846, while still 18 years of age, and began practicing as the only lawyer in Rabun County.[15]

An episode occurred in those early days that afterwards frequently was recounted as an example of Bleckley's character. Shortly after his admission to the bar, he witnesses the imprisonment of a woman for a small debt. "He was always a foe to injustice and in this case the victim was a woman, poor and utterly defenseless."[16] Bleckley raised the money to secure her release.[17] But the episode so moved him that, despite having no political experience or influence (he was not even yet of voting age), he initiated and secured passage by the General Assembly of a bill preventing the imprisonment of women for debt — making him a "pioneer" in the eventual abolishment of imprisonment of debt in Georgia.[18]

In 1848, Bleckley "suspended" his unsuccessful legal practice to take a more lucrative job as a bookkeeper in a railroad office in Atlanta, a position he held for three years, followed by one year as a secretary to the Governor (then in Milledgeville).[19] He ventured back into the practice of law and before the Civil War attained "moderate prosperity" in private practice in Atlanta and as solicitor-general of the Coweta circuit (which then included Fulton County).[20]

Bleckley enlisted in the Confederate Army in 1861, "very reluctant but very determined to fight."[21] Ill health resulted in his honorable discharge before he ever fired a shot in anger, apparently to his great relief.[22] He returned to the practice of law and during the hard post-war years was briefly the reporter for the Georgia Supreme Court (1864-1867).[23]

Bleckley became an associate justice of the Georgia Supreme Court in 1875 and resigned in 1880. The reason for his resignation was the perennial appellate court problem: overwork (at that time there were only three judges on the Supreme Court, no law clerks and no Court of Appeals).[24] In Bleckley's case, he seems to have been forced to labor through doubts, obscurities and complications that the brilliance of his mind revealed.

> The labor of learning rapidly on a large scale, and the constant strain to shun mistakes in deciding cases, shattered my nerves and impaired my health. In its effect on the deciding faculty, the apprehension of ignorance counts for as much as ignorance itself. My mind is slow to embrace a firm faith in its sup-

posed knowledge. . . I seem not to have found the law out in a reliable way. I detect so many mistakes committed by others, and convict myself of error so often, that most of my conclusions on difficult questions are only provisional. I reconsider, revise, scrutinize, revise the scrutiny, and scrutinize the revision.[25]

In 1887, upon the death of the incumbent chief justice, Bleckley was persuaded to return to the Georgia Supreme Court as chief justice.[26] In 1894, he again resigned due to overwork — the work was simply too much for three judges (his resignation was said to have prompted an expansion of the Supreme Court to six members).[27] After resigning as chief justice, Bleckley moved to Clarkesville and announced his retirement from the active practice of law.[28]

In the *Memorial* volume is the statement that following his resignation as chief justice, Bleckley "ever afterwards was recognized by the people, by the Bar, by his successors on the bench, as Judge Emeritus, and even after his retirement, at the request of the Court, prepared the notable opinion in the Greene [sic] case, 97 Ga., 36."[29]

The case referenced is *Green v. Coast Line Railroad Co.*[30] The report of the case contains a preface by Chief Justice Simmons:

> At my request, concurred in by my associates, ex-Chief Justice Bleckley has assisted the court both in deciding this case and in preparing the opinion. After adoption by the full court, it now appears in his language. The same is true of the head-notes.[31]

Why was Bleckley asked to assist the court? No explanation is given, and an examination of the original case file at the State Archives reveals none. The case had been argued at the prior term, when Bleckley was still a member of the court, and due to the length of time for decision obviously had caused the court much difficulty. Having heard the argument, Bleckley likely would have conferred with his colleagues and reached a tentative decision before resigning. Did he want to complete an opinion on which he had labored without resolution before his departure from the bench? Did the court believe that because of the complexity of the case, he was "the best judge for the job?" The official record gives no answer.

Green presented a rather complicated and obscure issue involving the priority between creditors of a failed railroad company. Mrs. Green's husband and son were killed in 1890 by a Coast Line Railroad train as they walked along a sidewalk adjacent to the railway track.[32] In less than three months, Mrs. Green had won a judgment against the railroad company in the amount of $1750 for the tort.[33] Some months after the judgment, the holders of two pre-existing mortgages on the railroad property applied to the Superior Court for appointment of a receiver and foreclosure of the mortgages.[34] The receiver was appointed, operated the company for nearly two years and eventually sold the company's assets for far less than the mortgages.[35] The widow intervened in the receivership proceeding, seeking payment.[36] The lower court held that the mortgages had priority and the widow could recover nothing.[37] Since the railroad company was insolvent, the widow would never collect.

The first issue before the Supreme Court was, conceding priority of the mortgages as to the corpus, whether there was like priority as to income earned during the receivership.[38] It was this issue that was addressed in the body of the Bleckley opinion for the court.[39]

Green is not one of Bleckley's "terse" opinions; rather, the official report is 29 pages long, densely and argumentatively written. After reciting the facts, Bleckley first disposed of the issue of whether priority of creditors was established by the recording of the mortgages, holding that notice of a mortgage was irrelevant to an involuntary victim of the mortgagor's negligence.[40] Next, Bleckley noted that while out of possession, the mortgagee has no claim or lien on the income of the debtor, and when the property was placed into the hands of a receiver — as the mortgagee in *Green* voluntarily did, instead of taking possession — it came into the possession of the court.[41] And, "[u]ndoubtedly a court of equity may treat income made by itself through a receiver as legally its own, held in trust for the beneficiary best entitled to it."[42]

So the issue was framed: as between the two claimants to the income earned during the receivership, how would a court of equity view their relative priority? The mortgagee's appeal "to the heart of equity" was met with sarcasm worthy of a jury argument by a modern personal injury lawyer. If equity would aid the holder of the mortgage get paid, surely it might help collect "a judgment recovered by a wife and mother for homicidal negligence."[43] This was especially so since the chief beneficiary of the foreclosure was the president of the "derelict institution:"

> Would it be harsh to say to him in answer to his appeal: "Sir, if you had desired your bonds and coupons to have a

sweeping and unlimited preference over a judgment for damages occasioned by negligent homicide, you ought to have seen to it that the injury causing the damages was not inflicted. You were in control, whereas the wife and mother had no control, and nothing to do with the management. It would be far better to impute the negligence of the corporation to you, its president, than it would be to turn her away empty that your coffers may be made a little more full."[44]

Bleckley then proceeded to a lengthy analysis of the railroad's special obligations as a public franchisee to answer for damages to the public occasioned by the exercise of the franchise, noting that "[t]he safety of the people is the supreme law."[45] The mortgagee could not be permitted to allow the franchise to *operate* in the receivership and yet have it insulated from its responsibilities to the public for its negligence. According to Bleckley, with such a "quasi-public" corporation, there is a burden of public duty corresponding to the benefit afforded to those associated with the business. In Bleckley's view, the railroad business, despite its importance to the public at large, should not be elevated over the individual members of the public:

> There seems to be a theory that if mortgaged railroads can be kept "going concerns," it matters not what else may stop. That the public is decidedly the most important "going concern" in existence appears to be overlooked. As a part of the public, the husband and the son of Mrs. Green were "going concerns," and the going of the railroad was the cause of their ceasing to be such. …Public policy certainly favors keeping the franchise active, but it favors more the security of all who as a part of the public are liable to suffer by their activity. No policy is subserved by going wrong. Non-feasance is better than misfeasance; idleness is better than homicidal mischief resulting from a vicious or negligent activity.[46]

The widow was thus entitled to enforce her judgment against the income in the hands of the receiver.

In its day, *Green* met with a mixed reception by other courts and the by the bar. Indeed, only three years later, the United States District Court for the Northern District of Georgia, while noting "the high character of the court, and the eminence as lawyer and judge of the distinguished ex-chief justice who wrote the opinion, should give it great weight," declined to follow the decision.[47] The Fifth Circuit affirmed, although acknowledging the "glowing argument of the distinguished jurist who wrote the [*Green*] opinion."[48]

Bleckley admitted that his opinion was contrary to existing authority. In so doing, he penned a memorable, defiant statement that has since been quoted by other courts: "Every direct authority known to us is against us; nevertheless, we are right and these authorities are all wrong, as time and further judicial study of the subject will manifest."[49]

While it is perhaps sentimental, and is certainly speculation, one is tempted to see in this last judicial opinion of Justice Bleckley an analogue with the episode that occurred shortly after his admission to the bar, nearly 50 years earlier, involving the "poor and utterly defenseless" woman imprisoned for debt. In each case, Bleckley's humane view of the justice (and injustice) inhering in the two women's respective plights impelled his view of what the *law* should be. Perhaps the same passion that inflamed the young Bleckley accounts for this last judicial opinion from the "heart of equity."[50]

Bleckley's judicial opinions are noted for their wit, and *Green* is no exception. After describing the reasoning of the opinions that were contrary to the result reached in *Green*, Bleckley wrote that those courts could perhaps benefit by the recently discovered x-ray:

> Courts which thus reason and decide may possibly be reached by the late discovery of Professor Roentgen, and for their benefit and the benefit of the profession generally, we shall close this opinion with appropriate illustrations, based on the new process.[51]

He then closed the opinion with these "illustrations" that he some-

how created, making *Green* perhaps the only appellate decision where the court depicted its reasoning pictorially. The imaginary x-ray of the parties' respective hands outstretched for money

revealed that the mortgagee's was hollow, in contrast to the widow's, which was supported by the flesh and bone of the merit of her claim. It was classic Bleckley.

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Artwork reprinted with permission from *A Memorial of Logan Edwin Bleckley (1827-1907)*, Mercer University Press, '83.

Endnotes

1. *A Memorial of Logan Edwin Bleckley (1827-1907)* (Ga. Bar Ass'n, 1909) (hereinafter *Memorial*). This volume, first published in 1909, was reprinted by Mercer University Press in 1982, and is currently in print. The *Memorial* contains the official memorial proceedings in the Georgia Supreme Court, also found at 128 Ga. 849 (1907).
2. Albert H. Russell, "Wit & Wisdom of Chief Justice L.E. Bleckley in the Georgia Reports," in *Memorial*, *supra* note 1, at 249; *see also* "Sketch of Chief Justice Bleckley" (1908) in *Memorial*, at 13.
3. In 1939, the General Assembly named a mountain in Rabun County in honor of Justice Bleckley, "noted for high character and profound knowledge of the law and his great love of nature and truth," and also in honor of his son and namesake, "to whom the traits of the sire descended," who was the long-time clerk of the Supreme Court and Court of Appeals. 1939 Ga. Laws 244.
4. *E.g.*, Strassburger v. Johnson, 12 Pa. D&C. 366, 369 (Pa. Comm. Pl. 1928) ("We quote and adopt the language of that great jurist of Georgia, Chief Justice Bleckley, who has impressed himself upon the jurisprudence of this country…."); Atlantic Coast Line RR v. King, 135 So.2d 201, 203 (Fla. 1961) ("The best answer…may be gleaned from an address…by Chief Justice Bleckley, whom Georgia lawyers of his vintage generally agree to be the greatest judge who ever adorned the Georgia Supreme Court.").
5. Bleckley's appearance fit his status as a legal sage. He was described as having the appearance of a "prophet of old" – he was well over six feet tall, with long hair and beard, and deep-set dark eyes. "Sketch of Chief Justice Bleckley," *supra* note 2, at 15. On one occasion, in New York, a lawyer leaving a conference with Bleckley remarked, "You ought to see him! There's an old man in there who looks like Santa Claus, but talks like Blackstone." Benning M. Grice, "The Tallest of Them All," 4 Ga. St. B.J. 39, 53 (August 1967).
6. "Sketch of Chief Justice Bleckley," *supra* note 2, at 14.
7. Lukens v. Ford, 87 Ga. 541, 542, 13 S.E. 949 (1891).
8. L.E. Bleckley, "A Letter To Posterity (1892)," in *Memorial*, *supra* note 1, at 64.
9. Dinnan v. State, 253 Ga. 334, 320 S.E. 2d 180 (1984). The Supreme Court did not reach the issue, since the case was reversed on other grounds.
10. 80 Ga. 544, 7 S.E. 88 (1888).
11. *Id.* at 548, 7 S.E. at 90.
12. *Id.* at 548-549, 7 S.E. at 90.
13. Bleckley's style, as well as his view of the law, seems reminiscent of Edmund Burke. Thus, when decrying the lynching plague then plaguing the country (including Georgia), Bleckley spoke in language that Burke could have written about the French Revolution: "Children already born may live to see mobs mobbed; large mobs may execute smaller ones; mobs of one race may rise up against mobs of another race; mobs of bad men may become more numerous and more terrible than mobs of good men." L.E. Bleckley, "Emotional Justice" (1892), in *Memorial*, *supra* note 1, at 104.
14. "Letter To Posterity," *supra* note 7, at 66.
15. *Id.*
16. Thomas Walter Reed, History of the University of Georgia (unpublished manuscript ca. 1946), Ch. XVII (University of Georgia Library Archives). This work contains a most fulsome discussion of Bleckley, who enrolled in the University of Georgia after leaving the bench. He graduated in 4 days.
17. *Id.*
18. *Id.*; "Sketch of Chief Justice Bleckley," supra note 2, at 8.
19. "Letter To Posterity," *supra* note 7, at 68.
20. *Id.*
21. *Id.* at 69.
22. *Id.* at 68.
23. *Id.* at 69. Justice Bleckley's son, Logan Bleckley, became deputy clerk of the Georgia Supreme Court in 1888, and Clerk of the Georgia Court of Appeals in 1907. Justice Bleckley's granddaughter, Katherine, also served both courts, most notably as Clerk of the Supreme Court from 1934-1962.
24. *Id.* at 64. Upon his first retirement, he caused a "judicial poem," entitled "In The Matter of Rest" to be published in the Georgia Reports. 64 Ga. 452 (1880).
25. "Letter To Posterity," *supra* note 7, at 65.
26. *Id.*
27. Report of Committee, "Memorial of Hon. Logan E. Bleckley" (1909), in *Memorial*, *supra* note 1, at 27.
28. John W. Akin, "The Poet Bleckley," (1895), in *Memorial*, *supra* note 1, at 151.
29. "Sketch of Chief Justice Bleckley" (1908), in *Memorial*, *supra* note 1, at 10.
30. 97 Ga. 15, 24 S.E. 814 (1895).
31. *Id.* at 16, 24 S.E. at 814.
32. *Id.* at 18, 24 S.E. at 815.
33. *Id.*
34. *Id.*
35. *Id.* at 19, 24 S.E. at 815.
36. *Id.*
37. *Id.*
38. *Id.* at 20, 24 S.E. at 816
39. If the widow's judgment enjoyed priority, the second issue was whether the expenses of the receivership — which exceeded the amount of the judgment — took priority over the judgment. This issue was addressed only in the headnotes of the opinion.
40. *Id.* at 20-22, 24 S.E. at 816.
41. *Id.* at 22-23, 24 S.E. at 816-817.
42. *Id.* at 22-23, 24 S.E. at 817.
43. *Id.* at 26, 248 S.E. at 818.
44. *Id.* at 26-27, 24 S.E. at 818.
45. *Id.* at 34, 24 S.E. at 821.
46. *Id.* at 37, 24 S.E. at 822.
47. Cent. Trust Co. v. Chattanooga, R. & C.R.R., 89 F. 388, 392 (N.D. Ga. 1898)
48. Cent. Trust Co. v. Chattanooga, R. & C.R. Co., 94 F. 275 (5th Cir. 1899). *But see* McCullough v. Union Traction Co., 186 N.E. 300, 307 (Ind. 1933); Bartlett v. Cirero Light, Heat & Power Co., 52 N.E. 339, 341 (Ill. 1898).
49. *Green*, 97 Ga. at 36-37, 24 S.E. at 822.
50. By the close of his life, Bleckley had come to something of a classic natural law understanding of jurisprudence — *i.e.*, that law is not a matter of will, but is rather "found" by applying reason to the particular facts. L.E. Bleckley, "Revised Thoughts On Law" (1905), in *Memorial*, supra note 1, at 298-300.
51. *Green*, 97 Ga. at 42, 24 S.E. at 823.

Trial Tactics and Ethics

By Patrick G. Longhi J.D.

Criminal case loads in recent years appear to be overwhelming Georgia courts while raising ethical concerns for the practitioners appearing in them. Practitioners are concerned as to the course and conduct of their trial strategies and the consequent impact on the justice system itself, from the civility among the bench and bar to issues that strike at the heart of what brings confidence, stability and respect to the legal profession.

The focus of this article, therefore, will not only include the pervasive nature of conduct that falls below the standards of what is ethical for the legal profession, but also its insidious origins in a prosperous society now searching for a moral compass and national direction. At all times in this paper the authority cited and relied upon will be the *Georgia Rules of Professional Conduct* (hereinafter "Rule") effective by Order of the Supreme Court of Georgia on Jan. 1, 2002, although commentary by the author may rely on other sources stated herein below not to be construed as authority governing lawyer conduct in Georgia.

Truth Telling Becoming a Sport

You recall the famous question from the Roman governor of ancient Judea who openly pondered, "What is truth?" Our system of American justice provides for a time-honored process for verdicto or the search for truth. And yet, the guardians of that system, America's lawyers, are increasingly disposed to wreak havoc on the integrity and confidence in that process by both words and deeds. Whether it is television talking heads characterizing trial tactics as mere gamesmanship or a lawyer/president making limited admissions as to not being forthright in his grand jury testimony, images of truth telling becoming a sport are everywhere for the public to behold.

> "…as 1999 opened with new scrutiny aimed at the Atlanta Olympic bidding process, chief bidder Billy Payne [a lawyer by trade] insisted, 'We played by the rules.' "He wasn't speaking of the written rules. He was speaking of the practical rules, the way the game is played, rule notwithstanding. He called the written rules mere 'guidelines.'"[1]

At an American Bar Association panel discussion during its 1999 Annual Meeting in Atlanta, famed lawyer Johnnie L. Cochran Jr. remarked, "It is a sporting system of justice…Everyone wants to win…You judge lawyers by what happens at the end."[2]

Lawyer William H. Ginsburg, who defended Monica Lewinsky, added, "The truth is relative…using the media for espousing your view of the truth is fair game."[3]

What will the cost be to the justice system if it indeed becomes a sport? Moreover, should the Cochran end-justify-the-means analysis be the only test? And if rules can be bent or broken in the Olympics, which exemplify excellence in sports, is this the tip of the iceberg as to what lies ahead for ethics for the 21st century criminal law practitioner?

Zealous Advocate Versus the Hired Gun

Another ethics issue to be addressed by the legal profession and the public it serves is: what should the role of the lawyer be in the justice system? Is a lawyer simply an extension of the ill will and emotional pathos the client holds toward the opposing party? Is a lawyer there to simply reflect the wishes of the client no matter how ill conceived and detrimental to the outcome of the case and the justice system at large?

The problem may be that lawyers increasingly find themselves cloaked in the images of their television and film counter-

parts so that clients see their litigators as superb courtroom players with great flair for gamesmanship and less regard for the rules of the game. Perhaps the problem lies with the "win at all costs" mentality prevalent in the society that wells up from the client base where the marketplace is generally determined either by the profit motive or fear of lawsuits.

Unlike the world of business, the legal profession is an institution where, although profit may have its place, such monetary concerns are overridden by state codes of professional responsibility. A break of a lawyer's countervailing ethical obligations to his clients and the justice system could result in the loss of the license to practice law and, consequently, livelihood.

The Georgia Rules not only have ethical considerations on a lawyer's duty to a client and to the system of justice, but also on a duty to treat others in the legal process with consideration and avoid the infliction of needless harm.

Lawyers are counselors, not just advocates, to their clients. It is hoped they would serve as the good conscience for their clients and temper their advice with the qualities of reason, compassion and restraint where appropriate. As officers of the court, they also are the first line of defense for the system of American justice. Accordingly, their conduct, both individually and as a bar, can be either a public relations bonanza or nightmare, as the case may be. Public confidence in the system they serve erodes when the focus is one case with tactics devoid of any consideration of the ethical, financial or emotional carnage of all the parties, rather than a justice system where disputes can be resolved fairly and efficiently in a nonhostile manner.

Jury Nullification

In a motion for a new trial before a judge of the Fulton County State Court, a defense attorney argued that he should be permitted to urge the jury to "nullify" or disregard OCGA Section 16-12-80 "if they decide the law is unjust or outdated or simply shouldn't be enforced."[4]

The defendant in the criminal case was convicted on 18 misdemeanor obscenity charges involving the sale and distribution of devices designed to stimulate the sex organs. The jury returned the verdict along with an unusual statement that they found the law archaic.

Andrews v. State, 222 Ga. App. 129 (1996), discussed a "de facto power of nullification" based on the evidence, not the law that still required the jury to convict where the evidence warranted. The judge denied the motion, holding it would permit jurors to abandon their oaths.

Closing Arguments

Trial lawyers seem to take refuge more and more in their closing arguments that the jury should "send a message" to the community or the police or whomever. It is as if jury verdicts have been reduced to public missives on societal issues or concerns. Explicit in the former code, Rule 3.1 through 3.5 provide for a lawyer's duty to aid in preserving the integrity of the jury system by not alluding to any matter not relevant to the case or supported by admissible evidence.

Hence, the question arises as to whose responsibility is it to change the law. In a free society with a duly elected representative body of the people, certainly that body, whether a state legislature or the United States Congress, is charged therewith. If that body fails to discharge that responsibility in accordance with the will of the people as reflected by the changing times, then the people would need to elect new representatives. A jury can only act as judges of the facts in a case applying the existing law as directed by a court.

Pretrial Publicity

> "One of the reasons [Robert] Bennett charged $495 an hour was that he was known as a media-savvy attorney with Brooklyn street smarts who would defend his high profiles clients — Caspar Weinberger, Clark Clifford, Dan Rostenkowski — in the court of public opinion. Lately, however, his relations with reporters has gotten testy. He seemed defensive about the fact that he had been paid $892,000 in the Paula Jones case, only to lose nine-zip in the Supreme Court…"[5]

Will lawyers become more concerned with winning their cases in the court of public opinion, perhaps tainting potential jurors in their cases, than preserving the integrity in the system that everyone will be afforded a fair trial by an impartial jury? Will criminal defendants be required in the 21st century to hire media and fashion consultants to look pleasing to the cameras as they enter the courthouses and play to the viewers watching the 6 o'clock news?

DR 7-107 of the American Bar Association Model Code of Professional Responsibility limits lawyers in criminal cases to disseminating information that essentially can be found in the public record, requesting assistance from the public and denying the charges against a client. However, in Georgia, Rule 3.6 now allows lawyers to make statements to correct the record of another, but is limited to the mitigation of any damage caused by the recent adverse publicity. Similarly, the lawyer's partners and associates are to act accordingly. The question arises as to whether this recent change will go far enough in preventing cases from being tried in the media.

The maximum penalty of a public reprimand may await those who are found to violate the Rule in Georgia by deciding to try their cases in the media by appearing on television talk shows, granting interviews and even setting up photo opportunities for them and their clients. What might be their benefits to employ this strategy? Influencing the jury pool in their clients' favor has already been established hereinabove. In certain high-profile cases, public opinion could also influence a prosecutor from either pursuing a case in a certain direction or reducing the charges. Perhaps they believe, at least on a subconscious or subliminal level, public opinion can influence the judiciary who read newspapers and watch television. Thus, there should be a code of ethics for legal commentators in the 21st century.

Cameras in the Courtroom

Another related issue is the presence of cameras in the courtoon and how they affect or influence the conduct of the trial, the lawyers and the judge. Is there a natural tendency in a media-saturated age to play to the camera so that ordinary considered judgment and legal protocol are vanquished? Will a defendant be afforded a fair trial when the words "All rise" are substituted for "Lights, camera, action?"

Television talking heads will continue to muse over the constitutional implications and ramifications of the foregoing in light of the First and Sixth Amendments to the United States Constitution. The question remains as to cameras in the courtroom: does the informational value to the public outweigh the entertainment value akin to daytime television? Society and the legal profession must not lose sight that the concept of having one's day in court historically and today means in a court of law with rules that withstood the test of time to ensure fairness in the case and confidence in the system.

Professional Courtesy and Respect

The lack of civility that has been noted permeating the society at large is infecting the legal profession. Are lawyers highly trained, objective, professional counselors and advocates above the fray or a personification of the morass and pathos of their individual cases? Will the justice system endure if the latter engulfs the former?

Rule 3.5(c) relates to having counsel comply with known customs of courtesy and practice, which can have the effect of promoting harmony as to the conduct of the litigation reducing unnecessary and costly (to clients) sidebars and distractions.

When courtroom demeanor between opposing counsel becomes part of trial strategy it affects not only the conduct of the trial and causes communication problems, but leaves the laity believing members of the Bar are not professional, thus putting the system itself on trial.

Where, for example, counsel is commenting on the evidence during closing arguments no matter how vehemently, it is simply unacceptable for opposing counsel to object gaining tactical advantage by disrupting the flow of the argument. The ethical lawyer will believe in his or her own ability to equally argue his or her side with the same fervor acknowledging that in the end the case will be based on evidence, not just trial tactics.

Rule 4.4 would involve instilling respect for the court not only among the bar, but, by example, with the public. If the court is the embodiment of the law, then respect for the judge denotes respect for the law itself. If trial counsel engage in conduct from bickering with a judge over a court ruling to threatening opposing counsel with primitive forms of communication (i.e., fisticuffs), how can they expect the public to uphold the law if they are not? However, the Rule only disciplines the lawyer/offender with a public reprimand.

A disturbing pattern of lack of respect for judicial authority appears to be developing in the Fulton County court system. One case pits the Fulton County public defender against a superior court judge over a show cause order for contempt where an order to withdraw counsel was allegedly violated.[6]

Another superior court judge ordered the Fulton County district attorney to show cause why he should not be held in contempt for allegedly instructing two assistant district attorneys to disobey a judge's order, one of which had already been found in contempt and jailed for several hours.[7] That case was resolved only when the district attorney apologized avoiding a contempt finding and jail himself and the chief judge of the circuit commenting that the integrity of the judicial system was upheld.[8]

A third case culminated in a visiting senior judge ruling that a superior court judge had a right to hold another assistant district attorney in contempt after a December 1998 hearing. After finding the "assistant district attorney disobeyed a judge's order to try a two-year-old murder case as scheduled or dead-docket it," the senior judge then chastised him and ordered him jailed until he apologized to the judge he disobeyed.[9]

> "Without everyone working for the common good, the already tremendously overladen Fulton County Superior Court system would implode. The incarceration of an assistant district attorney most certainly would not enhance this relationship, much less promote the orderly dispensation of justice. However, on the other hand, a judge must act as captain of the judicial ship."[10]

Client Perjury Versus Telling Their Story

Rule 3.3 addressed the area of candor toward the tribunal and raises two sensitive issues for the criminal law practitioner involving potential client perjury and the plea proceeding wherein his or her client's immigration status is exposed for the purpose of informing the defendant on the record of possible consequences with the United States Immigration and Naturalization Service.

The author submits the operative work in paragraph (a) is "knowingly." The object of the trial is verdicto — to speak the truth. Hence, a trial is a truth seeking process and the players — judge, jury, prosecutor, defense lawyer, etc. — all have specifically defined roles in the search for that truth. Moreover, the expression of "having one's day in court" comes form the belief of either a civil litigant or criminal accused that their story would get out and be judged by a jury of one's peers.

Thus, to place a burden on defense counsel that he or she needs to judge his or her client's story as to whether it is truthful or false would obfuscate this time-honored process, placing the role of the jury as to evidence credibility into the hands of defense counsel who would prematurely judge it becoming an unseen 13th juror and relinquishing his or her rightful role as advocate for his or her client at trial.

If defense counsel truly did know what the facts of the case were all about by, for example, being at the scene of the crime, he or she would not be a defense lawyer in the case, but an actual witness. Another argument for the proper placement of the roles for those participating in a jury trial would be the empirical knowledge that defendants and even witnesses change their stories, recant their confessions and even decide to withdraw their guilty pleas stating their steadfast belief in their innocence.

Finally, comment number 14 under said rule states, "In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority [to refuse to offer testimony or other proof the lawyer believes is untrustworthy] by constitutional requirements governing the right to counsel."

Conversely, during a plea proceeding where the client is an illegal alien, Rule 3.3(a)(2) proscribes defense counsel from maintaining silence when the client is asked by

the court his or her immigration status in order to inform the defendant under the law possible consequences involving the United States Immigration and Naturalization Service upon the entry of a guilty plea. Client confidentiality has its limitations.

Communications

One issue in the area of communications for the criminal law practitioner is the duty to keep a client informed regarding the status of a case explaining matters reasonably necessary to effect same and promptly responding to requests for information pursuant to Rule 1.4.

Simply regular telephone conferences in bond cases and adapting form letters on word processors on questions that generally are asked by clients in the county jail or state prison system are less burdensome, efficient ways to achieve those goals. During proceeding before a tribunal, the record should be prefected by counsel with his or her client present that the clients has been fully informed and understands issues and rulings that may suddenly arise without the benefit of an earlier client / attorney consultation.

Rule 4.2 prohibits communications with any person, such as a witness known to be represented by an attorney without that attorney's consent or authorization of law. This rule now includes state and federal government attorneys and expands the earlier rule that prohibited said contact with parties in litigation. The maximum punishment has also been changed from public reprimand to disbarment.

Finally, Rule 3.8 charges prosecutors with special responsibilities as ministers of justice that include, but are not limited to, refraining from prosecuting a charge not supported by probable cause. Thus, it would behoove them in their communications with grand jury veniremen to present exculpatory evidence, where available, at the pre-indictment stage, paving the way for eventually having invited appearances of defense counsel to comment on said exculpatory evidence at some point during grand jury proceedings.

The Ethical Lawyer

In the 21st century, the question arises if the American justice system can indeed endure another century. Is there a sense in society that we, as a people, are somehow losing our way? Early warning signs of the decline of any civilization would be the loss of confidence in its institutions and the erosion of its moral fabric.

The professions have the duty and the responsibility in their positions of influence in society to provide leadership sounding the charge to reverse our course as a people. The legal profession, which holds the keys to access the courts for public redress, is uniquely qualified for this task as the guardians of constitutional principles.

The Rules provide affirmative duties that are charged to the ethical lawyer. Among them for the criminal defense practitioner are the duties to improve and advance the legal system and heed the call to public service to facilitate orderly changes. Duties also exist to uphold the integrity of the legal profession and encourage respect for law and the courts and to avoid even the appearance of professional impropriety.

In the final analysis, public confidence and faith in the American justice system and the concept that we are to be governed by the rule of law in the 21st century will require that the ethical lawyer conduct himself or herself with integrity in his or her personal and professional life while promoting respect for the justice system he or she serves.

Endnotes

1. *Fulton County Daily Report*, Oct. 11, 1999, at 12.
2. *Fulton County Daily Report*, Aug. 16, 1999, at 5.
3. *Id.*
4. *Fulton County Daily Report*, Aug. 4, 1998, at 5.
5. Howard Kurtz, *Spin Cycle*, 212 (1998).
6. *Fulton County Daily Report*, June 9, 1999, at 1.
7. *Fulton County Daily Report*, May 21, 1999, at 1.
8. *Fulton County Daily Report*, May 25, 1999, at 1, 5.
9. *Fulton County Daily Report*, Sept. 15, 1999, at 1, 2.
10. Order of Contempt, State of Georgia v. Antonio Evans, Fulton County Indictment No. Z91064, (Sept. 10, 1999).

Patrick G. Longhi J.D., of Atlanta, Ga., is engaged in a general trial practice and has been lead counsel in criminal trials in federal, superior and state courts. Formerly a Federal Defender Program Inc. panel attorney, he still serves on the Fulton County Indigent Defense Committee, where he was a charter member in the 1980s. During his second term as president of the Sandy Springs Bar Association, he directed, wrote and hosted "Lawyers and the Justice System," an award-winning film distributed to schools and libraries. He has been program chair and lecturer on ethics and criminal law at continuing legal education seminars for the past nine years and appears in the 10th and 12th editions of *Who's Who in American Law.*

Legal Organizations Receive Foundation Grants

By Robin E. Dahlen

The Lawyers Foundation of Georgia has recently awarded its third annual Challenge Grants. Four separate grants were given this year, for a total of $29,200 in award funding. Award recipients included the Western Circuit Bar Association, A Business Commitment (ABC) Committee, Georgia Legal Services and the Georgia Indigent Defense Council/Prosecuting Attorneys Council of Georgia. Each recipient is expected to raise an amount equal to their respective grant in order to receive the funds from the Foundation.

Award Recipients

The Western Circuit Bar Association was awarded a grant in the amount of $7,200 for the Adult Literacy Project of the Athens Justice Project (AJP). The AJP is the only program providing holistic indigent criminal defense and supportive social services in the Athens community. The purpose of the literacy program is to enhance AJP clients' self-esteem, improve AJP clients' employment skills and opportunities for productive living, and encourage legal professionals to help indigent people in their efforts to gain the education and skills needed to live productive, crime-free lives, thereby reducing recidivism.

Lawyers Foundation of Georgia Executive Director Lauren Larmer Barrett (left) presents a Challenge Grant to Georgia Legal Services Program (GLSP) Executive Director Phyllis J. Holmen. GLSP will use the grant to make legal information and self-help resources available via the Internet.

ABC, a State Bar of Georgia committee, received a grant in the amount of $8,500 for the ABC Project, which allows business lawyers to provide pro bono legal services to groups and nonprofit organizations serving the needs of low-income Georgians. With the grant money, ABC hopes to contract with an attorney to serve as a part-time staff member for the project while administering and maintaining the project's Web site.

Georgia Legal Services, an organization that strives to expand access to justice throughout the state of Georgia, was awarded a grant in the amount of $8,500 for the High-Tech Self-Help Office for rural southwest Georgia. The purpose of the pilot project is to utilize technology and the Internet to make legal information and self-help resources available to a very poor rural circuit. The project will focus on two specific areas, which include the legal needs of victims of disasters and aiding consumers in the completion of applications for United States Department of Agriculture Section 502 homeownership loans and Section 504 repair grants.

The Georgia Indigent Defense Council and the Prosecuting Attorneys Council of Georgia received a joint grant in the amount of $5,000. In a combined effort, the two entities will use the funding for the Public Interest

Lawyers Fund, which provides educational loan forgiveness for qualified lawyers entering public service as prosecuting attorneys, public defenders or attorneys working for the Georgia Department of Law. The Fund, which is the first of its kind in the state of Georgia, will help to reduce turnover among attorneys employed by public service organizations and thereby provide criminal defendants and the citizens of Georgia with qualified and experienced public service attorneys.

Building the Collective Good

The Foundation serves a vital and unique role in the legal community of Georgia. As the philanthropic arm of the State Bar of Georgia, the Foundation is the only statewide law-related nonprofit that funds such a wide variety of projects. It is also the only statewide nonprofit governed solely by attorneys from around the state. Its Board of Trustees is chosen, not by another entity, but by the lawyers who donate to the Foundation.

As the philanthropic arm of the State Bar of Georgia, the Foundation is the only statewide law-related nonprofit that funds such a wide variety of projects.

These same attorneys and the Board choose its projects. The purpose of the Foundation is to enhance the system of justice, and to support and assist the lawyers of Georgia and the communities they serve. The Foundation exists solely to serve the charitable activities of state, local and voluntary bars of Georgia, to support education designed to enhance the public's understanding of the legal system and to support the profession's efforts to increase access to justice.

Congratulations to all grant recipients. Challenge grants are made possible through generous gifts to the Foundation. For more information, please contact Lauren Larmer Barrett, 104 Marietta Street, NW, Suite 100, Atlanta, GA 30303; (404) 659-6867; Fax (404) 225-5041; lfg_lauren@bellsouth.net.

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

CORRECTIONS:

In the December 2002 issue of the *Georgia Bar Journal*, an incorrect caption was run with this photo from the article titled "East Meets West: Georgia Delegation Explores China." The caption incorrectly noted that the group is pictured in front of the Palace Museum in Taipei, whereas the photo was taken in front of the Palace Museum in Beijing.

In the December 2002 issue of the *Georgia Bar Journal*, an incorrect caption was run with this photo from "Section News." The individual pictured here is not William Needle, but rather Frank Landgraff, chairman of the Licensing Committee of the Intellectual Property Law Section.

KUDOS

McGuireWoods LLP announced that ***Corporate Legal Times*** ranked it as one of the leading law firms for merger and acquisition transactions in 2002. The list was published in the national legal publication's December 2002 issue.

The **Georgia Bar Foundation** was recently recognized by former **Gov. Roy E. Barnes** for being committed to providing quality, affordable and equitable legal services to all state citizens for nearly 20 years. The Georgia Bar Foundation has reached the milestone of receiving over $50 million cumulatively since its inception in 1983 from the Georgia Interest on Lawyer Trust Accounts program. The monies have supported many worthy projects including over $14 million to the state's indigent defense program, nearly $12 million to Georgia Legal Services, which provides legal representation to people who cannot afford an attorney, and almost $4 million to the Atlanta Legal Aid Society.

J. Pat Sadler of **Sadler & Hovdesven, P.C.**, in Atlanta, is the newly elected president of the **Public Investors Arbitration Bar Association**, a national bar association of attorneys representing the public investors in disputes with the securities industry.

Alisa Pittman, partner in the law firm of **Elarbee, Thompson, Sapp & Wilson, LLP**, has been selected as the **2003 Outstanding Young Alumni** for the University of Georgia's Terry College of Business. This annual award is presented to an alumna/alumnus under the age of 35 who has demonstrated outstanding success in his or her field, has a record of educational and professional achievement, and is also active in the community.

First Horizon/Real Estate Financial Services, Inc. (REFS) has awarded **Jackson and Hardwick** its **2002 Excellence in Partnership Award**. While this is the first time the award has been given, First Horizon/REFS has annually recognized Jackson and Hardwick for the past seven years for the firm's contributions to the real estate industry.

Thirty attorneys with the law firm of **Baker, Donelson, Bearman & Caldwell** were recently listed in the 2003-2004 edition of ***The Best Lawyers in America***, a U.S. legal referral guide. Several of the firm's attorneys were listed in more than one category. Only about 17,000 attorneys — or less than three percent of attorneys nationwide — were selected for this distinction.

Lewis E. Hassett, chair of the Insurance & Reinsurance Dispute Resolution Group at **Morris Manning & Martin, LLP**, has been appointed by former Gov. Roy E. Barnes to the Board of Commissioners of the Commission on Equal Opportunity. The Commission is responsible for promoting fair employment practices and diversity programs in government and will review the effectiveness of the state's program.

John K. Anderson of **Haynsworth Baldwin Johnson & Greaves, LLC**, was recently selected for inclusion in ***The Best Lawyers in America*** 2003-2004 edition. Haynsworth has been listed for 20 years in all 10 editions and is being specially honored in this year's anniversary edition.

John H. Holland has been appointed as the first state court judge of Turner County, and **Stephen L. Ivie** has been appointed as the solicitor general of the court. Holland and Ivie, both of Ashburn, were sworn in by former Gov. Roy E. Barnes in ceremonies held at the state capitol in October.

ON THE MOVE

In Atlanta

Brennan W. Bolt has joined **McGuireWoods LLP's** Atlanta office as an associate in the labor and employment department. He will focus his practice on employment discrimination and labor-management relations. The firm is located at 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30342; (404) 443-5500; Fax (404) 443-5599; www.mcguirewoods.com.

Two patent attorneys have joined the Atlanta office of intellectual property law firm **Merchant & Gould**. **Murrell Blackburn**, associate, practices general intellectual property law with an emphasis on patent prosecution in the electrical, computer and mechanical arts. **Jodi Hartman**, associate, practices general intellectual property law with an emphasis on preparing and prosecuting patent applications, as well as patentability searches and opinions. The firm is located at the Georgia-Pacific Center, 133 Peachtree St. NE, Suite 4900, Atlanta, GA 30303; (404) 954-5100; Fax (404) 954-5099; www.merchant-gould.com.

Bradley C. Skidmore recently joined the Atlanta office of **Stites & Harbison**, where he will continue his practice in business and complex commercial litigation, as well as environmental matters. Also, **Donald R. Andersen** and **John C. Porter Jr.**, have recently left other firms to join the Atlanta office. The firm's Atlanta office is located at 3350 Riverwood Parkway, Suite 1700, Atlanta, GA 30339; (770) 850-7000; Fax (770) 850-7070.

McGuireWoods LLP is one of the top 10 firms mentioned most often as outside counsel for litigation by the nation's largest 250 companies, according to a ***National Law Journal*** annual survey. McGuireWoods is one of three firms with offices in Atlanta to be on this "Top 10" list.

In Columbus

Sherry B. Goodrum and **Melissa R. McAllister** have become partners in **Miller & Lee, P.C.**, now known as Miller, Lee, Goodrum & McAllister, P.C. The firm practices in the areas of creditors rights, corporate and entity law, banking and commercial transactions, mergers and acquisitions, commercial litigation, estate and tax planning, guardianships, charitable planning, special needs trusts, and probate. The firm is located at 233 12th St., Suite 910, Columbus, GA 31902; (706) 322-4220; Fax (706) 322-9487.

The firm of **Hatcher, Stubbs, Land, Hollis & Rothschild, LLP**, announced that **Marjorie (Mollie) Morton Smith** has become an associate of the firm. The office is located at 233 12th St., Suite 500 Corporate Center, Columbus, GA 31901; (706) 324-0201; Fax (706) 322-7747.

Clyde L. Armour Jr. announced the opening of his sole law practice at his office of 40 years. The office is located at 900 Second Avenue, Post Office Box 1615, Columbus, GA 31902-1615; (706) 323-4358.

In Macon

Hall, Bloch, Garland & Meyer announced that **James C. Garner** and **James A. Garland** have become associated with the firm. The office is located at 1500 Fickling & Company Building, 577 Mulberry St., Macon, GA 31208; (478) 745-1625; Fax (478) 741-3544.

In Savannah

Ansley Bell Threlkeld has become associated with the law firm of **Ellis, Painter, Ratterree & Bart, LLP**, practicing in the area of civil litigation. **Amy Ray Henderson** has also become associated with the firm practicing in the areas of tax, estate planning and corporate law. The firm is located at First Union Bank Building, 10th Floor, 2 East Bryan St., Savannah, GA 31401-2602; (912) 233-9700; Fax (912) 233-2281; www.eprb-law.com.

THANKS TO EVERYONE FOR A GREAT DAY OF GOLF FOR A WORTHY CAUSE!

The 5th Annual Law-Related Education (LRE) Golf Tournament was held on Oct. 21, 2002, at The Oaks Course in Covington, Ga. Organized by the Law Related Education Committee of the State Bar of Georgia, the tournament raised $9,000 to support the Law-Related Education Consortium.

LRE is an interactive method of teaching young people and adults about the law and the fundamental principles on which it is based. LRE teaches people about their legal rights and responsibilities and encourages informed participation in our democratic form of government. National and state studies show that LRE deters delinquency and reduces disciplinary problems in young people because it fosters the development of decision-making, problem solving and conflict management skills. For both young people and adults, LRE helps to develop a sense of empowerment through learning that people count and individuals can make a difference.

The Georgia Law-Related Education Consortium, an association of institutions, agencies, organizations and individuals who believe LRE is an essential element in the development of people as productive, law-abiding citizens, is primarily a grant funded non-profit organization and has little, if any, carryover from year to year. Its mission is to promote the inclusion of LRE curriculum in schools and in community based programs all across the state. The Consortium adopts a "train the trainer" approach, conducting 10 to 12 teacher/trainer workshops on an annual basis. The Consortium also prepares materials for all grade/age levels. The Consortium's materials have also been used by several Young Lawyers Division committees that work with at-risk children, including the Kids and Justice Committee, the Aspiring Youth Committee and the Law-Related Education Committee.

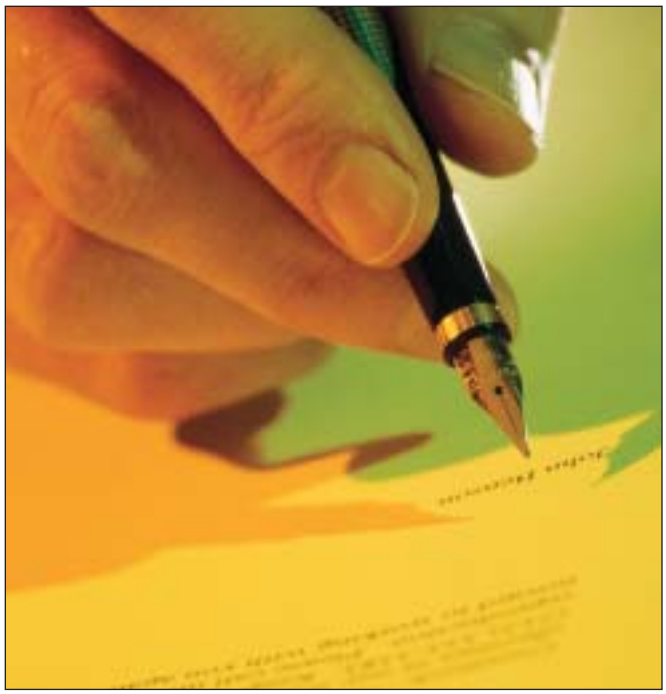
The Consortium is governed by an Executive Committee, including: Judge John Ruffin, Georgia Court of Appeals, chair; Mel Hill, Institute of Higher Learning, University of Georgia, vice-chair; Kendall Butterworth, BellSouth Corporation, treasurer; and Brenda Cornelius, Georgia Human Relations, secretary. The Consortium's day-to-day operations are handled by Anna Boling, executive director of the Georgia LRE Consortium.

The tournament is successful because of the generous sponsorship of several law firms, individuals and businesses who donate money, prizes and refreshments, and because of the players who come out every year to support the tournament and the efforts of the consortium. **The LRE Committee wishes to extend its heartfelt thanks to each and every one of you — and we hope to see you all again next October!**

The Lawyer as Executor

You've spent 20 minutes trying to explain to Mrs. Wright that you don't really want to serve as executor of the will you're preparing for her. "I'd be happy to help you find someone else," you conclude.

"But Reuben, I want *you*!" the client insists. "My children don't want to be bothered with all that paperwork, and I don't trust my brother. I don't want to have to worry about who will handle all those details after I'm gone."



After promising Mrs. Wright that you'll get back to her, you head off to do some research. You figure there's something in the law or in the ethics rules that will prevent you from doing as Mrs. Wright asks. After all, the rules certainly prohibit a lawyer from engaging in work where there is a personal conflict, and you'll earn a fee for serving as executor. Won't that look bad after you've already collected attorneys' fees for actually writing the will under which you serve? What if you (acting as executor) want to hire your own law firm to serve as counsel to the estate?

You find a couple of rules that seem related to your dilemma with Mrs. Wright. Rule 1.8(c), "Conflict of Interest: Prohibited Transactions," prohibits a lawyer from preparing an instrument giving the lawyer any substantial gift, including a testamentary gift, except where the client is related to the lawyer. Although it is not directly on point with your situation, the rule seems to reinforce the concept that a lawyer should avoid personal conflicts with clients.

Rule 1.7 contains the general prohibition on conflicts of interest. The rule provides in relevant part that a lawyer shall not represent a client where there is a significant risk that the lawyer's own interest will materially and adversely affect the representation of the client. The rule allows representation in the face of a potential conflict of interest if the lawyer obtains the client's informed consent.[1]

In even the most conservative application of the rule to your situation, your interest in serving as Mrs. Wright's executor shouldn't adversely affect your representation in drafting the will. Although you will be paid for both services, your fee won't be any higher than what Mrs. Wright would pay to any other person serving as executor. Besides, you

aren't particularly interested in serving as executor; Mrs. Wright is the one who is pushing the issue. Under these circumstances, it's hard to find there's a significant risk of a conflict between you and Mrs. Wright.

Your conclusion that the rules don't prohibit you from serving as executor is confirmed when you find Formal Advisory Opinion 91-1, "Ethical Propriety of Drafter of Will Serving as Executor." The opinion clarifies that it is not improper for a lawyer to be named as executor of a will he or she has prepared, so long as the lawyer does not influence the client in the decision. Although the opinion is couched in the language of the old Code of Professional Responsibility, the rationale and requirements the opinion imposes are in accord with the new Georgia Rules of Professional Conduct. For instance, the opinion requires the lawyer to obtain the client's consent and prohibits the lawyer from collecting excessive fees for the dual roles. It allows a lawyer serving as executor to hire his or her own firm to serve as counsel to the estate, so long as the fees charged are reasonable.

Formal Advisory Opinion 91-R1 even includes a form notification and consent letter that you may use to explain the potential conflict to Mrs. Wright. If you decide to accept Mrs. Wright's request that you serve as executor, you are well armed with the information you need to avoid future claims by any disgruntled heir who believes that you have acted improperly.

Endnotes

1. Rule 1.7(b) requires that the lawyer consult with the client before obtaining consent, and provide the client with "reasonable and adequate information about the risks of the representation" in writing. The lawyer must also allow the client time to consult with a disinterested lawyer about the advisability of waiving the conflict.

Discipline Notices

(Oct. 15, 2002 – Dec. 11, 2002)

By Connie P. Henry

DISBARMENTS AND VOLUNTARY SURRENDER OF LICENSE

James L. Eastham
Atlanta, Ga.

James L. Eastham (State Bar No. 237657) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 25, 2002. Eastham failed to timely respond to the disciplinary proceeding despite having been served properly. Eastham accepted a $5,000 retainer to represent a client in a criminal matter. Shortly thereafter, he met with the client and filed a successful motion for bond. After one subsequent contact, the client was unable to speak to him again despite numerous attempts. In April 2001, when the client tried to contact Eastham to advise that he had received notice that his case had been placed on a pretrial calendar, he learned that Eastham's telephone number had been disconnected. Eastham never notified the client that he was moving or changing his phone number. The client suffered worry and concern about the status of his case and had to find substitute counsel. Eastham never earned or returned the $5,000 retainer.

Chalana C. McFarland
Stone Mountain, Ga.

Chalana C. McFarland (State Bar No. 491241) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 25, 2002. McFarland signed an agreement to become an issuing agent for a title insurance company. Between Sept. 13, 2000, and Feb. 23, 2001, McFarland acted as an issuing agent for the title insurer in real estate transactions in which she issued title policies for the insurer and received funds designated for the payment of premiums on said policies. McFarland failed to comply with a request by the insurer for an accounting of the title insurance policies issued by her on the insurer's behalf, failed to remit the funds due the insurer that she had collected as premiums, failed to provide an accounting of funds that she had collected and converted funds designated for the payment of premiums on title policies by the insurer to her personal use. The Court found in aggravation of the level of discipline that McFarland converted the property of a client causing potential injury to that client, refused to acknowledge the wrongful nature of her conduct and exhibited indifference to making restitution.

J. Caleb Clarke III
Atlanta, Ga.

By order dated Nov. 25, 2002, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of J. Caleb III (State Bar No. 128700). While serving as the administrator of an estate, Clarke withdrew funds from the estate account for his own personal use (later paying it back), appropriated for his own personal use an automobile that was property of the estate even thought he told the heirs he had sold the vehicle and deposited the proceeds into the estate account, and failed to file proper income tax returns on behalf of the estate between 1996 and 1999.

SUSPENSIONS

Matthew W. Wallace
Savannah, Ga.

By order dated Oct. 15, 2002, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Matthew W. Wallace (State Bar No. 734180) and suspended him from the practice of law in Georgia for a period of two years. Wallace represented a corporation in two suits in the Superior Court of

Chatham County, Georgia. In each case the other parties in the litigation served written discovery on him, but he willfully disregarded the discovery requests causing the corporation's pleadings to be struck and a default judgment to be entered in each case. Wallace also misrepresented to the corporation's owner the status of the litigation, the necessity of responding to the discovery and the prior orders compelling answers or responses to the discovery requests. The corporation subsequently initiated a malpractice action against Wallace, which he settled by paying monetary damages. In mitigation of discipline, the Court noted that Wallace cooperated with disciplinary authorities, had no disciplinary record and was extremely remorseful for having violated the disciplinary rules.

William Y. Barnes
Marietta, Ga.

By order dated Nov. 25, 2002, the Supreme Court of Georgia accepted the Petition of William Y. Barnes (State Bar No. 039100) and suspended him for a period of three years, with conditions for reinstatement. Barnes paid a paralegal and the paralegal's business for the referral of cases and clients. The following conditions are imposed upon his reinstatement: (1) Must provide certification that he has passed the Multi-State Professional Responsibility Exam, for which he may sit no sooner than the end of the 33rd month after the effective date of his suspension; (2) Must file same certification with the State Disciplinary Board; and (3) Must file any request for readmission, showing his satisfaction of all conditions, with the Review Panel of the State Disciplinary Board, which will review the record including the request and the State Bar's response and file a report and recommendation with the Supreme Court.

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 Oct. 15, 2002, three lawyers have been suspended for violating this Rule and two have been reinstated. GBJ

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

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

"Tip of the Week" Keeps Practice Management Advice a Mouse Click Away

By Natalie R. Thornwell

The Law Practice Management Program put a "Tip of the Week" area on the State Bar of Georgia's Web site about a year ago, and today the area is getting some well-deserved mention as a resource tool for Bar members. The "Tip of the Week" is a listing of practice management tips provided by members of the Practice Management Advisors Committee of the American Bar Association's (ABA) Law Practice Management Section, of which we are a member. These helpful tips are available by simply clicking on www.gabar.org/lpmtips.asp or going to the Tip of the Week area at www.gabar.org/lpm.asp. The following are some of the tips you will find on the site.

Financial Matters

Tips on managing your client trust account. In addition to the account journal, you must create a ledger for each client on whose behalf you hold money. Also, create a ledger to record any administrative costs used to cover bank charges.

Never pay a client with cash; always have a check as a record. Do not use an ATM card to withdraw money and never use a deposit ticket to get "cash back." Even a wire transfer isn't a good idea.

Don't disburse a check until the deposited funds have cleared. Be diligent, but don't let a client rush you. After you have written the disbursement check(s), take a moment to add them up and compare against the client's balance in the trust account. Make sure there are funds available to cover the checks.

Reconcile monthly, no matter how much of a pain it is! Have a good audit trail. In addition to the account statement and any canceled checks, keep a monthly folder with the following: copies of all checks deposited to or written on the account and copies of all deposit slips (copies made by you — don't rely on the bank); a copy of all disbursement statements/agreements signed by your clients and fulfilled that month; and a copy of your account journal (or a screen print from your computer) showing the account transactions for that month.

Reread your local rules annually to make sure you are still in compliance. For additional help, check out *The ABA Guide to Lawyer Trust Accounts* by Jay Foonberg (www. abanet.org/lpm/catalog/511-0374.html) or contact the Bar's practice management advisor.

Birthday Practice Tip

This tip involves an innocuous little Web site with great potential for lawyers. The site, www.anybirthday.com, allows you to find the birth date of over 135 million Americans. While the site allows you to send birthday

gifts, etc., it can also come in handy to check or confirm birth dates for law-related activities. (Query: Would it be legal to look up the birth date of a job applicant?) It doesn't always find the person, but it does state that Ross L. Kodner was born July 27, 1961; Bruce Dorner was born Nov. 3, 1949; and Jennifer Rose was born...well, you get the point. Have fun!

Generating Cash Flow More Quickly

Having a cut-off date for your billing cycle a few days before the end of the month can generate quicker cash flow than sending your bills out after the first of the month when everyone has already "paid this month's bills."

Building Your Practice

The following are three ways to expand your networking efforts to increase your business:

1. Host a social gathering. Invite friends, colleagues and business acquaintances to periodic social gatherings. The party could be at your office or a local restaurant. You might even rent out a health club for an evening. One small firm in Minneapolis has a "beach" party each summer, inviting several hundred people in the legal and business community. Business is booming.
2. Call people in the news. When you read newspaper or magazine articles of interest to your practice, circle the names of the individuals who are quoted in the articles. Call the ones who you would like to get to know. Use their quote as an icebreaker. Then ask a follow-up question to keep the conversation moving. If things go well, add them to your contact list.
3. Volunteer to be the secretary or scribe. When you are newly active in an organization, it is sometimes hard to get to know other members. When you attend a function, volunteer to take notes of the meeting or write an article about the event for the organization's newsletter. You then have a good reason to call the other members and introduce yourself while preparing the minutes or article.

Lawyers' Professional Liability Insurance Coverage

If you do not have malpractice insurance or you are reviewing your present coverage, there is a new book available to help you make the right choice. The ABA Standing Committee on Lawyers' Professional Liability recently published a very helpful workbook titled *Selecting Legal Malpractice Insurance.* The book provides easy-to-understand information about malpractice insurance policies, a glossary of terms, insurance policy checklists, a pull-out comparison chart to help you choose a policy and a state-by-state listing of malpractice insurance carriers. A real deal at $15.00 plus $3.95 shipping. Available at www.abanet.org/legalservices/lplpubs.html or by calling the ABA at (800) 285-2221. There is also an on-line version that is available for free (also a real deal) at www.abanet.org/legalservices/pl/home.html.

Put it in Writing!

Remember that clients are often under considerable stress (from their legal problems) the first time they visit a lawyer. Your explanation of your fees and costs may be a model of clarity, but it may not sink in. Give your explanation in writing, as well as verbally. If a lot of money is at stake (in the eyes of the client), allow the client time to think it over before committing to your fees. Clients who "buy in" to a fee agreement are more likely to abide by it. Then take the initiative to periodically discuss the amount of fees throughout your representation. If at any given point the fee does not comport with the client's expectations, resolve the situation as soon as possible — don't let it fester until the attorney/client relationship is irreparably damaged.

Who Are You?

Learn how to meet and greet people and not turn them away by how you introduce yourself. If you immediately say, "I'm a labor lawyer," few people will ever think to themselves that they will need your services. At that point you may have lost the opportunity to market yourself for any other purpose. Create a five-second introduction to repeat when meeting new people (i.e., potential new clients). It should be natural and informative, such as, "I am a problem-solver for small businesses" or "I help families plan for their financial future."

Color Coding Your Files

Many lawyers use the same ivory-colored files for everything in their office — client files, research files, business files, financial files, etc. When you need to locate a file, the only way to differentiate between files is to look at the writing on the tab of each file. Even if you have a color-coded numbering system along the edge of the file, it's still not easy to find the one file you need among all the files on your desk or in your office.

So how can you quickly find the one file you need among the many? Color code your files. Use a different color file for each type of file. Client files can be one color or you can have a different color file for each substantive area of your practice (i.e., family law, T&E, etc.). The business files for your practice can be another color, research files another.

Think about how your practice works and which types of files would best be color coded. Don't try to do too many colors — three to five works best. Each time you go searching for a file look only at the files of that color. You'll save time and aggravation each time you need to find a file.

Emergencies and Your Law Firm

Have you ever been unable to get to your office in a snowstorm or other emergency? How can you contact your clients, opposing counsel or the court to postpone important events? Keep a list of all office and home phone numbers of clients and opposing counsel. Bring home an updated hard copy of the list — or e-mail it to yourself — every few months. In case of an emergency, such as sickness, injury, storm or damage to your office — and it happens way more than we think — you will have a way to contact clients and other attorneys to inform them of the situation. Be sure to keep your client list in a confidential and secure location.

The File Nobody Wants

Is there a file in the office that you just can't stand to look at? (It's often related to a client you really can't stand.) Has it been languishing on the corner of your desk or just out of sight on your credenza? Is a deadline approaching or recently passed? You know you've got to tackle it, but just can't seem to get started? These unwanted files are a major cause of grievance and malpractice complaints, and can cause the premature end of a lawyer's career. And almost every lawyer has one of these "dog" files. Sobering, yes, but how does one deal with the "dog" file? Here are several ways to get moving on it and extract yourself from a potentially dangerous problem:

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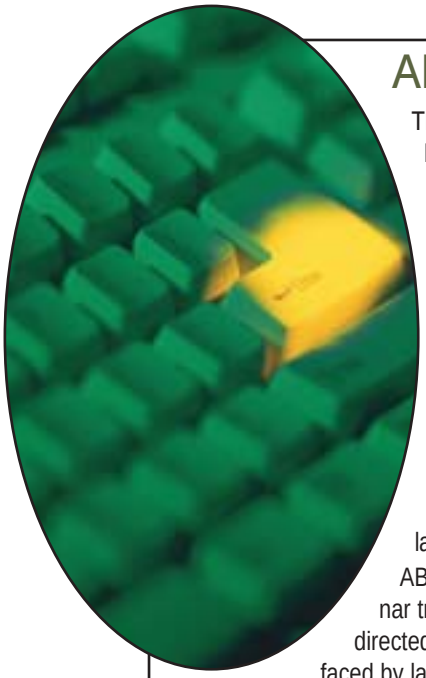
2. Call a valued colleague and ask him to lunch. Hypothetically explain the case. Ask him what he would do, where he would start and how he might proceed. If the advice is good, buy lunch.
3. Open the file and start working on it immediately. (And that means right now!) Sometimes our own procrastination is the real problem. Just open the file and start reading it and as ideas and tasks come to mind, write them down. Work on the file for a minimum of 30 minutes. If you can, work longer. When you can't work anymore, schedule time on your calendar to work on it again tomorrow. As you refamiliarize yourself with the file, it will become easier to work on.

For more information contact the State Bar's Law Practice Management Program at (404) 527-8770 or natalie@gabar.org.

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



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The Gainesville–Northeastern Circuit Bar:

A Tradition of Excellence

By E. Wycliffe Orr Sr.

Georgia is fortunate to have many excellent local bar associations, but none more storied that the Gainesville-Northeastern Judicial Circuit Bar Association. While its territory has been reduced with the creation of new circuits over time, its traditions have withstood the changes of time.

Originally, the Northeastern Judicial Circuit comprised nine counties, from Gainesville and Hall County in the south to Rabun County in the northeast corner of the state. Stories are still occasionally told of the circuit-riding days, where the judge, district attorney and others of the court's retinue would travel to various counties throughout the mountains for court week. Those days of lore illustrate the significance of court being held in counties in that era, such that *Life* magazine featured court week in Lumpkin County in a 1942 article.

Soon after World War II, the circuit was reduced to four counties (Dawson, Hall, Lumpkin and White), with the creation of the Mountain Judicial Circuit, which carved off the counties of Habersham, Rabun, Stephens, Towns and Union. In 1992, with the creation of the Enotah Judicial Circuit, Lumpkin and White counties were lost to the new circuit, leaving Dawson and Hall as the Northeastern Judicial Circuit.

The Northeastern Circuit from its earliest days has contributed much to the state of Georgia and its governance and traditions. Legendary State Supreme Court Justice Logan Bleckley was from Rabun County, then part of the circuit, and later, Thomas Candler went to the Supreme Court from Union County, as did William B. Gunter from Gainesville, and Homer Sutton, from Habersham County, to the State Court of Appeals. Hall County has sent U.S. District Judges W. Boyd Sloan and Sidney O. Smith Jr. and U.S. Bankruptcy Judge William L. Norton Jr. to the bench. This tradition of outstanding judges has continued to this day and presently includes U. S. Eleventh Circuit Court of Appeals Judge Stanley F. Birch Jr.,

Gainesville-Northeastern Circuit Bar
2002-2003 Officers

President: E. Wycliffe Orr Sr.
President-Elect: Kelly A. Miles
Secretary/Treasurer: E. Paul Stanley

Gainesville-Northeastern Circuit Bar Members at their August 2002 picnic on the shores of Lake Lanier.

U.S. District Judge Richard W. Story and State Court of Appeals Judge J. D. Smith, all formerly Gainesville lawyers.

The Circuit has long recognized its good fortune in having had such high quality judges and has honored those judges in various ways over the years, including placing portraits of Federal Judges Sloan and Smith in the Gainesville Division courtroom. The Circuit's judiciary has led the state in many respects, including early adoption of alternative dispute resolution in domestic and other cases, and in the recognition of the importance of adequate support of its juvenile courts, including a full-time juvenile judge since 1992. The Circuit's history also includes many outstanding trial judges, among them Superior Court Judge A. Richard Kenyon of Gainesville, who for a quarter of a century until 1987 served with great distinction and who gave early emphasis to a proper understanding and consideration of mental health issues where relevant in shaping just results. Judge Kenyon has served as a mentor for many other judges and has been recognized with the State Bar's Tradition of Excellence Award.

The Circuit also has an exceptional history of families with successive generations of lawyers. Notable in that history are the James A. Dunlap family, with four generations of lawyers, and the Johnny Smith family, with three generations of lawyers, preceded by a long-time Clerk of Superior Court, Bob Smith, who served the Court for some 38 years.

Northeastern Circuit lawyers have led various statewide institutions, including the University System of Georgia, which James A. (Bubba) Dunlap and later Sidney O. Smith Jr., served as chairmen of the Board of Regents and the State Bar of Georgia, which Doug Stewart of Gainesville served as president in 1982. One of the great prosecutors in Georgia history, Jeff Wayne, held office for more than 25 years, and his legendary skills as a cross-examiner led to his appointment as special prosecutor in the Lemuel Penn murder case in Madison County, Ga., in the early 1960s. Gainesville and Hall County have also provided lawyer-legislators to the U.S. Congress, including Rep. Frank Whelchel and current Rep. Nathan Deal.

The Circuit also led the way in the advance of women in the profession, with the election of Lydia Sartain as state court solicitor in 1986 — and later as the second female district attorney in Georgia history — and Kathlene Gosselin as state court judge, also in 1986, and her subsequent appointment to the Superior Court bench, later to be joined by Superior Court Judge

Butterfield
PU Dec page 42

Bonnie Chessher Oliver and Probate Judge Patti Cornett. The Circuit's penchant for being in the vanguard of the administration of justice is further reflected in the new Hall County Courthouse, which includes the latest technology in its courtrooms and other facilities.

The Circuit's bar association has mirrored these traditions of excellence. The Gainesville- Northeastern Circuit Bar Association represents the merger of the Gainesville Bar Association and the Northeastern Circuit Bar Association in 1963. A precursor of the association was the Newman Club, originally sponsored by U.S. District Judge William T. Newman in the early 1900s, which brought together lawyers for social gatherings at Dunlap Mill. From the earliest days, the association was active, encouraging camaraderie among its members. More than half a century ago, during the August term of Superior Court, a traditional watermelon cutting was enjoyed by the association's members, a celebration which continues to this day with the annual August summer bar picnic, where steak and shrimp have replaced melon as the traditional fare. Further emblematic of the association's fostering good will among its members is the tradition of recognizing its members at retirement and adopting resolutions in their memory upon death.

The association is reaching out to local schools to bring the American Bar Association's Dialogue on Freedom to local students, and to the public at large, through newspaper articles and radio station presentations.

Monthly meetings of the bar association draw some of the finest speakers on legal and related subjects in the state, from the judiciary, State Bar of Georgia and other centers of the administration of justice. Similarly, the bar association has for years held its winter bar party. The culmination of the bar year is Law Day, and the presentation of the Annual Liberty Bell Award to a local non-lawyer honoree who has contributed most to the administration of justice that year. The event is attended by numerous court officials and others in the community whose work and interests touch upon the rule of law and the liberty that law ensures. Despite having over two hundred lawyers within its ranks, the bar association prides itself on the fellowship its attorneys share and the professionalism they exhibit toward one another while zealously representing their clients.

This year's activities have included new initiatives, as well as renewal of those programs that have proven so successful over the decades. Work is underway to establish a regional Inn of Court, to establish inter-bar activities with the Enotah Judicial Circuit and the Mountain Judicial Circuit, whose roots are intertwined with those of the Northeastern Circuit. The association is reaching out to local schools to bring the American Bar Association's Dialogue on Freedom to local students, and to the public at large, through newspaper articles and radio station presentations. To ensure that the cohesiveness of the bar is even further strengthened, a local bar Web site and e-mail listserv are being established this year. The association is coordinating periodic social gatherings this year, hosted by local law firms, so that the increasing size of the association will not diminish the closeness and professionalism the association has traditionally enjoyed.

The Gainesville-Northeastern Circuit Bar Association is well aware of its historic heritage, and is committed to preserving that heritage while transmitting it intact for future generations of lawyers and citizens yet to come.

E. Wycliffe Orr Sr. is in private practice in Gainesville, Ga. He is a former member of the State Bar of Georgia Board of Governors and a former member of the Georgia House of Representatives.

Local and Voluntary Bar Spotlight!

Local and voluntary bars are encouraged to submit feature articles highlighting their activities to the *Georgia Bar Journal.*

Please contact Joe Conte, joe@gabar.org or (404) 527-8736, or Bonne Cella, bonne@gabar.org or (800) 330-0446, for submission information.

Appellate Practice Section

By Christopher J. McFadden, Chairman, and Kenneth A. Hindman, Section Member

Crumpler v. Henry County, *A02A0888, 2002 FCDR 2880, 2002 WL 31133074 (Ga. App., Sept. 27, 2002).* An important discussion of the right to request certiorari from superior court to inferior judicatories. The holding is that the General Assembly has not required county employees challenging unfavorable employment decisions to exhaust all available administrative remedies before petitioning for cert.

Fulton County v. Congregation of Anshein Chesed, *S02A0676, 2002 FCDR 2969, 2002 WL 31298879 (Ga., Oct. 15, 2002)* is another episode in the saga of zoning appeal procedures. In the past the Supreme Court has held that the discretionary-appeal procedure may not be circumvented by filing in the superior court an action, such as mandamus, from which a direct appeal to the appellate courts is authorized. Now the Supreme Court has extended that rule to cases where mandamus is the only remedy available in superior court.

The case is also interesting for the Supreme Court's treatment of the litigant it deemed to have followed the wrong procedure:

Accordingly, we dismiss the County's direct appeal, treat its appellate pleadings as if filed pursuant to an application for discretionary review, and grant the application to consider whether the trial court erred in granting mandamus relief to the Congregation.

Shorter v. Waters, *571 S.E.2d 373, 2002 FCDR 2978 (Ga., Oct. 15, 2002)* modifies the standard for ineffective assistance of appellate counsel where the alleged ineffectiveness was failure to raise an issue. The previous rule weighed the strength of the issues raised by appellate counsel against the strength of the issues passed over. The *Shorter* court recognized that rule to be inappropriate to cases where appellate counsel had raised only strong issues but had nevertheless omitted an issue no competent attorney would omit. The *Shorter* court reaffirmed that the controlling principle is whether appellate counsel's decision was a reasonable tactical move.

Curtis v. State, *571 S.E.2d 376, 2002 FCDR 2980 (Ga., Oct. 15, 2002)* resolves a split of authority within the Court of Appeals as to whether the issue of merger of criminal convictions is waived by failure to object in the trial court. The Court followed a line of Court of Appeals cases which reasoned that a conviction, which should have been merged is void, and therefore subject to the substantive bar against double jeopardy. The Supreme Court held that the merger issue was therefore not waived even if it was not timely raised at trial.

Keller v. State, *S02G0572, 2002 FCDR 3150, 2002 WL 31409340 (Ga., Oct. 28, 2002)* clarifies the final judgment rule for criminal cases. Keller was convicted on a multi-count indictment. The trial court delayed imposing sentence on one of the counts, and Keller did not file his notice of appeal until after that final sentence was imposed. Because this was more than thirty days after imposition of the other sentences, the Court of Appeals dismissed the appeal as untimely. Holding that a final judgment is not entered until sentence is imposed on every count, the Supreme Court reversed and remanded to the Court of Appeals for disposition on the merits of the appeal.

Capote v. Ray, *S02A1179, 2002 FCDR 3412, 2002 WL 31545300 (Ga., Nov. 15, 2002)* provides guidance to petitioners for habeas corpus in federal custody who are being held outside of Georgia. In such cases, venue is proper in the county where the petitioner was sentenced. The state of Georgia is the sole proper respondent. Naming the wrong respondent is an amendable defect. The petition is to be served on the district attorney for the county in which the petition is filed.

Because the pro se petitioner was not informed of the requirement that he petition for a certificate of probable cause, the Supreme Court forgave his failure to do so. Three justices dissented vigorously, contending that the Supreme Court lacked jurisdiction.

Of Rum, Slavery and Lawyers

By William D. deGolian

The following is reprinted with permission from the June 2002 issue of The Atlanta Lawyer.

At a dinner meeting I attended in April, I sat with a gentleman who is a military historian for the Georgia Department of Archives. We exchanged the usual pleasantries, in the course of which I told him I was a lawyer. We talked about history. He asked me if I knew the three things that James Oglethorpe banned when he founded the colony of Georgia in 1733. I had no clue. He proceeded to inform me: (1) rum; (2) slavery; and (3) lawyers.

When James Edward Oglethorpe and Trustees founded Georgia in 1733, they banned rum, slavery and the practice of law. Engraving by Simon Francois Ravenet.

I politely chuckled while thinking, "Is this some lawyer joke?" As we talked about it and as I have read further, the Trustees' primary goal in establishing the new colony of Georgia was social reform — to give debtors imprisoned in English jails and other "worthy poor" a new start where they could establish farms in a semi-tropical climate and grow and produce items for England not otherwise available there. To get the new colony up and running, Oglethorpe and the Trustees (none of which, other than Oglethorpe, ever went to Georgia) held tight control. Thus, there were no elected assemblies and little provision for government other than what was dictated by the absent Trustees. They did not want "litigators and agitators" in the new colony, so they banned the practice of law.[1] They prohibited rum drinking, as it was "a detriment to hard work and moral uplift."[2] They banned slavery, not out of a social consciousness of its evil, but because they had restricted land holding to 50 acres a family and did not want large plantations in Georgia such as already existed in South Carolina. The new colony was also to serve as a bulwark against Spanish colonial expansion from Florida.

Given the bad experiences that many of the early Georgia colonists undoubtedly had with lawyers in England, perhaps it is understandable that when men with legal knowledge came into the colony, "they were often spoken of in derogatory terms. A part of the

good opinion held of one man was that he was 'very honest, sober and has no attorney.'"[3]

In the May 13, 2002, issue of *Lawyers Weekly USA*, I read a report on the results of a recent survey commissioned by the American Bar Association Litigation Section: less than 20 percent of Americans have confidence in the legal profession. "Research behind the survey reveals that the lack of confidence boils down to a single word: character."[4]

It is striking that over the course of some 270 years, we lawyers have failed to rise one bit in the public's eye. There are many reasons for this. We have a complex system of law and justice that many members of the public do not understand. When individuals and/or institutions clash under our adversarial system, one or the other loses. The temptation is to blame our system of laws and justice, and the lawyers, judges and legislators that created it. Many of the survey respondents felt that lawyers are more interested in winning than seeing that justice is served, that they spend too much time finding technicalities to get criminals off and that they are more interested in making money than in serving their clients.[5] In short, that lawyers do what benefits them and not what is just for society at large.

The respondents were asked, "What can lawyers do to improve their image?" Their leading suggestions were: (1) educate the public about how to handle legal problems; and (2) do more public service/pro bono work.[6]

These responses help us set the course for our Bar Association for the coming year. There is much fine work that Atlanta lawyers have done over the years. I think of the Atlanta Legal Aid Society and the Atlanta Volunteer Lawyers Foundation, both started by the Atlanta Bar Association; the Truancy Intervention Project; the Police Scholarship Fund; the help offered to Cuban refugees detained in the Atlanta Penitentiary; and the good work of Wilson DuBose, Jeff Bramlett and others advocating for indigent criminal defense. Many Atlanta lawyers outside of our Bar Association are engaged in public service. I think of the "tough love" help for poor criminals offered by the Georgia Justice Project and of the "Lawyers Who Care" program offered by the trial lawyers in which attorneys nationwide, many from Atlanta, are providing free legal representation to victims and survivors of the 9/11 attacks.

Despite this fine work, there is a growing recognition that we lawyers need to do more. Incoming American Bar Association President A.P. Carlton has issued a challenge to America's lawyers to address the problem of legal services for people of modest means. The State Bar of Georgia's Access to Justice Committee has an ambitious program underway to coordinate and improve the delivery of legal services, both civil and criminal, to low and modest income citizens of Georgia.

So, for all the wonderful services and projects that lawyers of the Atlanta Bar Association have performed over its 114-year history, it is time now for us to step up again. There is a great need to improve access to justice for people of modest means. I don't mean the poor, or unemployed, or those that fall under the income eligibility guidelines of Atlanta Legal Aid and/or the Atlanta Volunteer Lawyers Foundation (although the legal needs of the poor are ongoing). I refer here to the huge segment of the public from which unquestionably much of the dissatisfaction with lawyers comes — those employed but earning low to modest levels of income, struggling to raise a family, pay the rent or mortgage, cover unanticipated and uninsured medical bills, and keep up with the many other financial challenges that come along daily. These are the people falling into the abyss of consumer debt, landlord/tenant disputes and divorce. They don't have wills and advanced healthcare directives and they do not understand how the legal system works. They are frustrated and bitter. We need to find a workable way to help them.

Some years ago, Hunt Brown made an admirable attempt, all on his own, at establishing a law firm for citizens of modest means. He called it "Justice for All." For a variety of reasons, Hunt ultimately had to shut it down. However, it was a noble try and one that we can build upon. Determining the right method of delivery of modest means legal services and implementing it in a practical way is a daunting task, one that will require much thought and deliberation. It may take more than one year, but we can at least make a start. I am pleased to advise that a task force headed by Bill Ragland will undertake work on this project soon. We are only a small piece of a larger societal network to improve the public's access to justice. But, we will step up and do our share. The Atlanta Bar Association always has and always will be committed to this.

I think back on an address that Emory University President Dr. James T. Laney, gave to the Lawyers Club of Atlanta in January

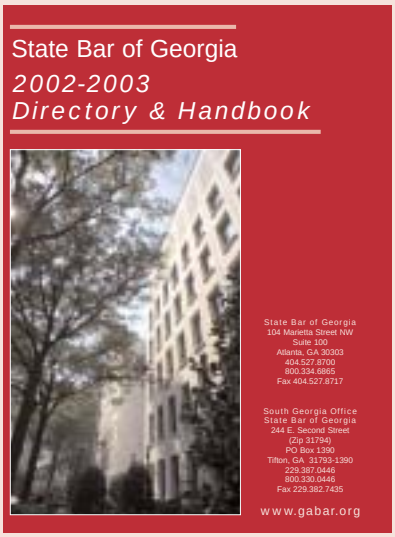
of 1985. Dr. Laney was discussing the importance of character to a professional because a professional enjoys a unique trust, both on a personal level from clients, and on the public level. Noting that the purpose of the profession of law is justice, he said, *"Greater than the personal trust is the larger public trust, which presupposes that the purpose of the profession itself...would not be subordinated to personal ends. These suggest that beyond character, beyond the virtues of integrity and honesty, lies some kind of commitment."*

As I assume the office of president of the Atlanta Bar Association, I am humbled to undertake the trust you have placed in me. I consider the Atlanta Bar to be one of the great institutions of our great city. In one year, there is only so much that one person or organization can do. I want to continue Seth Kirschenbaum's good leadership, particularly the Multi-Bar Leadership Council, and I know that my able successor Wade Malone, will build on current and new programs that we develop this year. I am honored to become the 95th president of the Atlanta Bar Association. It is the highlight of my professional career and already it has been a tremendously rewarding personal experience. I thank you. GBJ

William D. deGolian is the 2002-2003 president of the Atlanta Bar Association.

Endnotes

1. Taylor, *American Colonies, Penguin History of the United States,* Viking Press, 2001, page 241, 242.
2. Temple, Coleman, *Georgia Journeys,* University of Georgia Press, 1961, page 116, also Introduction.
3. Temple, Coleman, *Georgia Journeys, Id.*
4. *Lawyers Weekly USA*, May 13, 2002, page 15.
5. *Lawyers Weekly USA*, May 13, 2002, page 15.
6. *Lawyers Weekly USA*, Id.



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In Memoriam

The Lawyers Foundation Inc. of Georgia sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 104 Marietta St. NW, Suite 630, Atlanta, GA 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

David R. Aufdenspring
Atlanta, Ga.
Admitted 1966
Died December 2002

J. Max Davis
Atlanta, Ga.
Admitted 1969
Died November 2002

Kimberly M. Grant-Boldoe
Decatur, Ga.
Admitted 2000
Died May 2002

Elsie H. Griner
Nashville, Ga.
Admitted 1922
Died November 2002

Michael E. Ingram
Tallahassee, Fla.
Admitted 1988
Died November 2002

Howard W. Jones
Calhoun, Ga.
Admitted 1971
Died July 2002

Nathan Gene Knight Sr.
Newnan, Ga.
Admitted 1988
Died November 2002

Albert Mazo
Savannah, Ga.
Admitted 1937
Died October 2002

Natasha S. O. Quinn
Atlanta, Ga.
Admitted 2000
Died November 2002

Walter C. Scott
Savannah, Ga.
Admitted 1955
Died August 2002

Lewis R. Slaton
Atlanta, Ga.
Admitted 1947
Died November 2002

Lowrey S. Stone
Blakely, Ga.
Admitted 1947
Died November 2002

Richard A. Thibadeau
Atlanta, Ga.
Admitted 1949
Died December 2002

Sam L. Whitmire
Barnesville, Ga.
Admitted 1948
Died November 2002

W. E. Wiemer
Marietta, Ga.
Admitted 1971
Died August 2002

Richard Maury Young
Atlanta, Ga.
Admitted 1972
Died November 2002

Elsie H. Griner, oldest member of the State Bar of Georgia, died at the age of 106 on Nov. 30, 2002. Griner passed the Bar at the age of 25 on her first try, never having gone to college. She retired in 1990 after 68 years of practice. Her record for length of service at the Bar has not been surpassed.

A diminutive but high-spirited redhead who won a local beauty contest as a young woman, Griner was a forceful litigator. She will be remembered by her colleagues as an outstanding attorney who helped many in her small town law practice.

In addition to her devotion to the practice of law, Griner was a seasoned stage performer and recording artist, having sung high tenor with her family's gospel singing group, The Holy Notes.

Over the years, in addition to having served as president of the Alapaha Judicial Circuit Bar Association, she held membership in the American Bar Association, Georgia Trial Lawyers Association, Nashville's First Baptist Church and Circlestone Country Club.

Family members left to mourn her passing include her only granddaughter and longtime law partner, Galen A. Mirate; her grandson-in-law, Dr. Donald J. Mirate; and her great-grandson, Milo Mirate, all of Valdosta; one daughter, Annabel Alderman, of Nashville, and a virtual grandson, James Cleon Knight, also of Nashville. Her husband, George A. Griner, and a son, Geunie Griner, preceded her in death.

Lewis R. Slaton, 80, Atlanta, Ga., died Nov. 18, 2002. Admitted to the Bar in 1947, Slaton was the Fulton County district attorney from 1965 to 1996. Slaton prosecuted Wayne Williams to a conviction in connection with the missing and murdered children cases in 1982.

He is survived by his wife, Jacqueline Slaton; brother, Mr. and Mrs. James Slaton; niece, Mr. and Mrs. Danny (Bonnie) Spiva; great-nieces, Mr. and Mrs. Julie (Phillip) Cochran and Robin McBrayer; nephews, Mr. and Mrs. David (Julie) Thomas and Mr. and Mrs. Terry Slaton; and great nephews, Stephen Thomas and Scott Thomas.

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Notice of Public Meeting

Pursuant to Bar Rule 14-9.1, the Standing Committee on the Unlicensed Practice of Law (UPL) 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:

Is the preparation and execution of a deed of conveyance (including, but not limited to, a warranty deed, limited warranty deed, quitclaim deed, security deed and deed to secure debt) considered the unlicensed practice of law if someone other than a duly licensed Georgia attorney prepares or facilitates the execution of said deed(s) for the benefit of the seller, borrower and lender?

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 March 21, 2003, at the State Bar of Georgia, Third Floor, 104 Marietta Street, NW, Atlanta. 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. GBJ