

Georgia
Bar

Journal

June 2003 ■ Volume 8 ■ Number 6

Testament
(and)
Testament
(of)



Tax Apportionment
Problems Under the
Georgia Probate Code

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

The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: 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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Georgia Bar Journal

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Publisher's Statement

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Spoliation Article Omits Critical Issue

Dear Editor:

I read with interest the spoliation article by Ms. Wallace. However, the article omits a critical issue in spoliation: what happens when a defendant (or a third party) has the evidence that the plaintiff must obtain to prove his or her case?


The sole possible remedy is an ex parte spoliation order. While such orders are not uncommon in other states, they are rare to unheard of in Georgia. In three recent attempts to obtain one (using a form published in the *Texas Bar Journal*), Superior Court Judge Jefferson Davis granted such motion ex parte (defendant had plaintiff's computer and internal records), Superior Court Judge Doris Downs denied the motion ex parte in another case (defendant had photographs of the construction development for which plaintiff had not been paid), and Judge Cindy Morris granted the motion ex parte in a third case (defendant's counsel's computer records could confirm by date of document creation the manual back-dating by defendant of critical documents), then vacated the order on a claim by opposing counsel that it was "unethical."

I then sought an opinion from the Formal Advisory Opinion Board of the State Bar of Georgia on the ethics of seeking an ex parte spoliation order at the commencement of a case; they declined to issue an opinion on the issue.

On Nov. 7, 2001, The American Corporate Counsel Association sponsored a roundtable discussion (published by law.com) discussing this issue and the case of *Linnen, et al. v. A.H. Robins Company, Inc., et al.*, No. 97-2307 (Middlesex Super. Ct. June 15, 1999).

Counsel for Linnen was Alex H. MacDonald who stated, in that roundtable discussion: "In the Linnen case, we filed an ex parte order the day that we filed the com-

plaint, so that all documents, electronically stored or otherwise, would be preserved. We followed with a request for production of documents. If a defendant — in our case, a corporation — is reasonably on notice that litigation has begun or is imminent, it would be a profound tactical mistake to destroy documents."

While the issue in Linnen — and the issue in each of the three cases before the Georgia judges above — involved proposed ex parte spoliation orders against defendants or their counsel, there is no reason why an ex parte spoliation order should be (a) limited to parties or their counsel, or (b) be considered an onerous order or an unethical effort. I would hope that in this era of electronically stored (and erased) documents, that ex parte spoliation orders should be no more unusual than requests for in camera inspections of sensitive documents. 

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LETTERS TO THE EDITOR

The *Georgia Bar Journal* encourages letters to the Editor from its readers on any substantive topic of general interest or concern to the members of the State Bar of Georgia, however, first consideration will be given to letters written in response to material appearing in the *Journal*.

The Board reserves the right to edit letters for content or clarity and to limit the number of letters on a given topic, as well as the number of letters from any individual correspondent. Letters also may not be published if space does not permit.

All letters should be e-mailed to joe@gabar.org or addressed to: Editor, *Georgia Bar Journal*, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303.



Serving as president of the State Bar of Georgia has been a true honor and privilege. I have thoroughly enjoyed meeting with lawyers throughout the state.

By James B. Durham

Significant Issues Dominate Year

Year in Review

When I began my year as president of the State Bar of Georgia, I wrote in my first column that the diversity of Georgia lawyers is perhaps one of our greatest strengths. I end my year with the same belief, and I would like to use my final column in the *Georgia Bar Journal* to review the major events of this past year and how they have unfolded for all Georgia lawyers.

As I re-read my first column recently, I was struck by one sentence in which I said the likelihood of all Georgia lawyers agreeing on any particular issue is not likely. I lamented that, while our decision to practice law unites us, our reasons for doing so are varied.

One year ago, I couldn't have known just how true my words would prove to be. In this past year, we have struggled with many issues, including indigent defense reform, the Bar Center, and legislation concerning tort reform. On all of these topics, Georgia lawyers have been vocal about their positions, whether pro or con, and I think the Bar leadership has acted responsively and appropriately in addressing these issues.

Indigent Defense

The Bar's success in working to pass a new Indigent Defense Act will undoubtedly be the greatest success of this year. In December of 2002, the Chief Justice's Commission on Indigent Defense issued its report and recommendations to improve the fairness of the Georgia courts for indigent defendants in criminal cases. The report called on the state to assume responsibility for paying for indigent defense services and to establish and enforce basic standards for indigent defense programs. To this end, legislation was introduced, Senate Bill 102, which was intended to implement many of the components of the Commission's report. This legislation passed the Senate with some revisions. A new version of the legislation was introduced in the House. After numerous public hearings, committee meetings, and long discussions, the legislation passed the House and was placed in conference committee. The conference committee reached a compromise and a new Indigent Defense Act was enacted. The legislation will create a framework for building a viable, constitutional and fair way for the State to provide legal counsel to poor defendants who are accused of crimes.

Many people have dedicated countless hours to achieving a framework that will ensure all Georgians are treated fairly by the judicial system. Although there are far too many people to thank, I

would be remiss if I did not thank Chief Justice Norman Fletcher, Justice Robert Benham and all the Justices of the Supreme Court of Georgia. They have shown their dedication in making Georgia's judicial system second to none. Also I must thank Wilson DuBose and the entire Indigent Defense Committee of the State Bar of Georgia, who were instrumental from the beginning to the conclusion of the process. The passage of this legislation is a landmark step in ensuring that legal services are delivered appropriately to poor defendants accused of crimes. This assurance is a principle on which our country was founded. Nonetheless, the work is not yet done; we must strive to guarantee that the system is appropriately funded to accomplish its goals.

Bar Center

Last June, the Bar Center project was on hold, pending litigation over the removal of the nine trees necessary to begin construction of the new parking deck. Additional and well-configured parking was vital to the overall mission of the Bar Center. As many of you will recall, this lengthy process caused delays of more than one year. The fate of the Bar Center was determined in August of 2002 when the Georgia Court of Appeals refused to hear an appeal from the plaintiffs, thus rendering the decision of the Fulton County Superior Court in our final favor. The trees were removed beginning on Aug. 16, 2002, and the project was back on track. That being said, however, the ground work for beginning had to start over. The construction bids had to be re-secured, new permits obtained and financing re-bid. Also, we spent much time and

effort in raising \$4 million in new contributions from foundations, cy pres awards and other entities. I am pleased to report that construction has indeed started and the new deck should be operating in about 13 months.

The next and final step is the completion of the Bar Center's third-floor conference center. This area will be utilized for continuing legal education, judicial education, mock trials, public education concerning the legal system and countless meetings for lawyers. We expect to re-bid this project prior to the Spring of 2004. At the Spring 2004 Board of Governors meeting, the Executive Committee will make recommendations as to how we can complete the project. We hope to begin construction on the conference center shortly thereafter. In the meantime, the third-floor meeting space is being used by many law-related organizations and State Bar committees and sections.

Leasing to legal/judicial-related entities continues. The Georgia Indigent Defense Council, Georgia Prosecuting Attorneys Council, Chief Justice's Commission on Professionalism, Georgia Bar Foundation and Lawyers Foundation of Georgia already call the Bar Center their home. Lease negotiations with three other important entities are underway, and the new construction is creating new inquiries each week. In a difficult rental market, we are doing better than expected.

Although the Bar Center has produced challenging obstacles in the short term, the long-term future of the Bar Center is bright. We have been successful in hurdling many of the obstacles and remain firmly convinced that the lawyers of Georgia will benefit from and be

proud of their Bar Center for years to come.

Tort Reform

At the beginning of the year I said we would be confronted with issues that we might not expect. Although we were aware there were discussions concerning tort reform, we had no idea as to whether legislation would in fact be introduced or what that legislation might say. In an already hectic year, the issue of tort reform became volcanic. This issue created tremendous emotional response on both sides of the legislation. There were well-reasoned beliefs and opinions on both sides of the issue of tort reform. The leadership of the State Bar knew we had an obligation to hear from interested parties and to analyze the legislation carefully because it would have a direct impact on the civil justice system.

Senate Bill 133 was introduced 14 days into the legislative session. Because legislation was initially introduced when full board consideration was not practical, the issue fell to the Executive Committee in accordance with Standing Board Policy 100. After hearing from supporters and opponents, the Executive Committee opposed Senate Bill 133. I testified before the Senate Judiciary Committee to express the Bar's concerns and presented a detailed position paper and presented specific objections. I made it clear the Bar would support changes to tort laws which improved justice. The Executive Committee's opposition was limited to the specific provisions of SB 133, not to whether there should or should not be any reform to the tort system. At its Spring 2003 meeting, the Board reaffirmed the position taken by the Executive Committee by a substantial majority vote. The Senate Judiciary Committee passed a revised version of SB 133, and ultimately legislation did pass during the final hours of the session. The final tort reform package reflected many of the suggestions made by the State Bar. The package included class action reform, forum non-conveniens language to make it more difficult for out-of-state plaintiffs to maintain a suit in Georgia and a dismissal rule change that reduces the number of times a plaintiff can dismiss a lawsuit.

We realized that this issue would result in heated debate within the Bar. I firmly believe that through debate and differing opinions we ultimately reached the best result. The concerns addressed by tort reform supporters are legitimate. It is important to recognize, however, that this is a multi-

faceted problem that should be studied comprehensively. The answers do not lie in emotional anecdotes on either side. We must always do our part to make the civil justice system better, while not infringing on an individual's right to have access to the system.


ANLIR

In 1997 the State Bar of Georgia endorsed ANLIR as a professional liability carrier in Georgia. Over the years Georgia lawyers who were insured with ANLIR had expressed satisfaction with dealings they had with ANLIR. Unfortunately, at the beginning of this calendar year, ANLIR's primary re-insurer went into receivership in the state of Virginia, leading ANLIR to go into receivership in the state of Tennessee. Many Georgia lawyers, including my law firm, were affected by ANLIR going into receivership. The Board of Governors' decision six years ago to endorse ANLIR was extensively debated and great effort went into review of the company as it existed. Nonetheless, the ultimate result makes it clear that the State Bar of Georgia or any other entity or person cannot accurately predict how future markets may affect an individual company. By endorsing, the State Bar of Georgia can never guarantee nor does it guarantee the economic viability of a particular company. The fact remains, however, that such an endorsement may lead some attorneys to have a greater comfort level than they might otherwise have if they were analyzing the company on their own. As a result, it is my personal belief that the State Bar of Georgia should not endorse insurance carriers of any type in the future.

MULTIJURISDICTIONAL PRACTICE

Twelve months ago, I wrote that the issue of multijurisdictional practice would be an issue the Board of Governors would need to address. The Board of Governors did address this issue and passed comprehensive multijurisdictional practice rules. Part of multijurisdictional practice included the Supreme Court's decision to adopt a reciprocity rule allowing non-Georgia lawyers to become members of the State Bar of Georgia without taking the bar exam under certain conditions. Georgia has become one of the leaders in the country in endorsing implementation of multijurisdictional practice rules.

CONCLUSION

Serving as president of the State Bar of Georgia has been a true honor and privilege. I have thoroughly enjoyed meeting with lawyers throughout the state. Neither I nor the State Bar of Georgia staff ever envisioned the number of issues we would face this year. I was extremely fortunate to work with an outstanding group of officers, members of the Executive Committee and State Bar staff. I appreciate the support I have received from the Board of Governors of the State Bar as well as many attorneys throughout the state. As I prepare to return to the full-time practice of law, I am grateful for the opportunity to work with so many of you and to serve as your president. 

The Bar's programs and departments receive countless calls and inquiries each day and do an outstanding job of working with and being responsive to members and the public.



By Cliff Brashier

Your State Bar

What We Do, Who We Are

The mission for the staff at the State Bar of Georgia is to “consistently strive to give accurate information and courteous assistance to help our members be better lawyers and judges. We also seek to provide expert assistance and valuable benefits to the public served by the legal profession.” As such, the Bar’s programs and departments receive countless calls and inquiries each day and do an outstanding job of working with and being responsive to members and the public. Listed below are descriptions of the Bar’s departments and programs that directly serve members, along with a name and contact information for the appropriate person in each area. I encourage you to keep this article for reference in contacting the State Bar. We truly do look forward to serving you.

Bar Center

The mission statement of the Bar Center says that it is the home of the lawyers and judges of Georgia. It is their professional gathering place. As such, it is dedicated to serve all members of the State Bar of Georgia and the public through the administration of justice in the highest traditions of the legal pro-

fession. All Georgia lawyers are welcome to enjoy their new home today and for many decades to come.

The State Bar of Georgia has been in its new headquarters for just over a year and the project continues to move forward. Construction of a new parking structure has begun and leasing efforts continue. All members are invited to visit the bar center when work or leisure brings them to Atlanta. Contact Cliff Brashier, (404) 527-8775 or cliff@gabar.org.

BASICS

Bar Association Support to Improve Correctional Services — BASICS — is a successful and effective program that provides a 30-hour course of instruction for soon-to-be-released prison inmates. BASICS also provides after-care and post-release assistance to BASICS program participants. Contact Ed Meniffee, (404) 691-9993.

Communications

The Bar’s publications, media relations and Web site are coordinated by this department. Publications include the bi-monthly *Georgia Bar Journal*, the annual *Directory & Handbook*; and the Consumer Pamphlet Series. The department also coordinates membership certificates for Bar members and the annual awards programs. Contact Joe Conte, (404) 527-8791 or joe@gabar.org.

Consumer Assistance Program

This program is designed to improve communication between lawyers and their clients by seeking to informally resolve minor problems that do not rise to the level of a serious ethical violation. The program also enforces Bar Rule 1-209 which allows the State Bar to suspend an attorney who willfully fails to timely pay child support obligations, and refers cases to the Judicial District Professionalism Program. Contact Robert Brown, (404) 527-8759 or fax (404) 526-8629.

Continuing Legal Education

This program operates the mandatory CLE program under the guidelines of the Commission on Continuing Lawyer Competency. It is designed to enhance its members' professional competence as lawyers. Active lawyers are required to keep current on the law by attending a minimum of 12 hours of education each year. Of these, at least one must be in ethics, one must be in professionalism, and for trial attorneys, three must be in litigation. The CLE department assists attorneys with keeping track of their CLE hours throughout the year. Contact DeeDee Worley, (404) 527-8710 or cle@gabar.org.

Diversity Program

The Bar's Diversity Program represents a major commitment to increase opportunities for ethnic minority attorneys in the assignment of corporate and governmental legal work. Participating corporations and government entities seek to forge a lasting working

partnership with minority lawyers throughout Georgia. This program is open to all minority- and majority-owned law firms as well as corporations and governmental agencies in Georgia. Contact Michelle Staes, (404) 527-8700.

Fee Arbitration

The Fee Arbitration Program provides a convenient mechanism for resolving fee disputes between attorneys and clients. It also provides for the resolution of fee disputes between lawyers resulting from a partnership dissolution, sharing of fees or the withdrawal of a lawyer from a partnership. Petitions are available through the Fee Arbitration office. Contact Rita Payne, (404) 527-8750 or rita@gabar.org.

Georgia Mock Trial Competition

Regional, state and national high school mock trial competitions are coordinated annually by the YLD High School Mock Trial Committee to expose high school students to the legal system and encourage them to be better informed citizens. It involves hundreds of volunteer lawyers and judges as team coaches, round judges and planners. This program also sponsors a law academy, a court artist contest and a journalism contest. Contact Stacy Rieke, (404) 527-8779 or mocktrial@gabar.org.

Judicial District Professionalism Program

The purpose of the JDPP is to promote professionalism within the legal profession through increased communication, education and the informal use of local peer influence.

The JDPP is comprised of committees of Board of Governors members from each of Georgia's Judicial Districts. These committees are called Judicial District Professionalism Committees. The JDPC seeks to use local peer influence on an informal, voluntary basis to open channels of communication. No judge or lawyer is required to cooperate or counsel with the JDPC or any of its representatives. If the party against whom the inquiry is addressed refuses to cooperate by voluntarily meeting with JDPC representatives, the JDPC shall take no further action regarding the inquiry. Contact Sharon Bryant, (404) 527-8776 or sharon@gabar.org.

Law Practice Management

This program provides assistance to firms and solo practitioners in everything from what type of office equipment to buy to what type of billing process is best for their firms. The department maintains a law office management and technology library with resource personnel who are available for consultations in the lawyers' offices or by telephone regarding management issues. The department's resources and materials are available to all Bar members, particularly those who do not have professional office management personnel. Contact Natalie Thornwell, (404) 527-8770 or natalie@gabar.org.

Lawyer Assistance Program

This program provides confidential assistance to Bar members whose personal problems may be interfering with their ability to

practice law. Such problems include addictions, addictive behavior or mental health problems. Contact the helpline, (800) 327-9631 for more information.

Legislative Program

For many years, the State Bar has worked aggressively, through its Legislative Program, to enact and enhance legislation. The program is directed by the Bar's Advisory Committee on Legislation, chaired by Jeff Bramlett of Atlanta.

The Legislative Program is voluntary and is funded by contributions from State Bar members. Through the research and study of the Board of Governors, Sections, the Advisory Committee on Legislation and the Bar's legislative representatives, an impressive success rate is achieved every year. Contact the Bar's legislative representative, Tom Boller, (404) 872-0335.

Meetings

The State Bar Board of Governors holds four meetings each year including the Annual and Midyear Meetings. These quarterly meetings offer CLE seminars, speakers and issue updates to keep lawyers informed of their ever-changing profession. Contact Michelle Priester, (404) 527-8790 or michelle@gabar.org.

Membership

This department creates and keeps up-to-date records for all Bar members. It also prepares annual dues notices, furnishes labels and demographics, prepares the membership portions of the *State Bar Directory & Handbook*, and prepares letters of good standing, bar cards and photo ID cards. The department also furnishes membership enrollment packets to all new attorneys, sends out

notices of judicial vacancies and administers State Bar elections. Contact Gayle Baker, (404) 527-8777 or membership@gabar.org.

Office of the General Counsel

This office acts as in-house counsel for the State Bar of Georgia and is involved in lawyer compliance with the ethics rules adopted by the Supreme Court of Georgia. In addition to maintaining a helpline for members, staff attorneys are available to discuss the functions of the office with local and circuit bars on request. Attorneys from this office act as staff for the Clients' Security Fund. Created in 1968, this fund provides financial relief for members of the public who have sustained a financial loss as the result of a Georgia lawyer's dishonest conduct. Contact (404) 527-8720 or (800) 682-9806. For the Ethics Helpline, call (404) 527-8741.

Sections

Thirty-five sections provide service to the legal profession and public. As a conduit for information in particular areas of law, sections provide newsletters, Web resources, programs and the chance to exchange ideas with other practitioners. Contact Johanna Merrill, (404) 527-8774 or johanna@gabar.org.

South Georgia Office

The Tifton branch of the State Bar of Georgia is designed to give South Georgia lawyers greater access to the Bar. The office may be used for CLE seminars, ADR trainings, local bar meetings, etc. The State Bar's speakers bureau is administered through the South Georgia Office as well as the Local Bar Activities Committee. Contact


Bonne Cella, (229) 387-0446 or bonne@gabar.org.

Unauthorized Practice of Law (UPL)

The UPL Department is responsible for the investigation and prosecution of UPL in the state of Georgia as set forth in the rules issued by the Supreme Court. Contact Steve Kaczowski, (404) 527-8743 or steve@gabar.org.

Young Lawyers Division

The Young Lawyers Division is responsible for aiding and promoting the advancement of the younger members of the State Bar by providing a program of activities and projects to serve the profession and the public. All members who have not yet reached their 36th birthday or who have been admitted to their first bar less than five years are automatically members. Contact Deidra Sanderson, (404) 527-8778 or deidra@gabar.org.

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). 



I will treasure the
blessings bestowed
upon me as your
president to the
end of my legal
journey. Thank you
all for your
support.

By Derek White

Life's Journey

The Values of Going on the Journey vs. Getting to the End of the Journey

C.P. Cavafy wrote the following poem titled Ithaca concerning Odysseus' travels.

When you start on your journey to Ithaca,
Then pray that the road is long,
full of adventure, full of knowledge,
Do not fear the Lestrygonians
and the Cyclopes and the angry Poseidon.
You will never meet such as these on your path,
if your thoughts remain lofty, if a fine
emotion touches your body and your spirit.
You will never meet the Lestrygonians,
the Cyclopes, and the fierce Poseidon,
if you do not carry them within your soul,
if your soul does not raise them up before you.

Then pray that the road is long.
That the summer mornings are many,
that you will enter ports seen for the first time
with such pleasure, with such joy!
Stop at Phoenician markets,
and purchase fine merchandise,
mother-of-pearl and corals, amber, and ebony,
and pleasurable perfumes of all kinds,
buy as many pleasurable perfumes as you can,
visit hosts of Egyptian cities,
to learn and learn from those who have knowledge.

Always keep Ithaca fixed in your mind.
To arrive there is your ultimate goal.
But do not hurry the voyage at all.
It is better to let it last for long years;
and even to anchor at the isle when you are old,
rich with all that you have gained on the way,
not expecting that Ithaca will offer you riches.

Ithaca has given you the beautiful voyage.
Without her you would never have taken the road.
But she has nothing more to give you.

And if you find her poor, Ithaca has not defrauded you.
With the great wisdom you have gained, with so much experience,
you must surely have understood by then what Ithacas mean.

In place of the word "Ithaca," enter the words "public service" and you should immediately realize how the poem veraciously echoes the demand of the proper soul needed for the legal and public service.

In place of the word "Ithaca," enter the words "being an attorney" or "representing others" and you should immediately realize how the poem can be applied to describe our legal travels as members of one of the noblest professions known to mankind. You should realize how aptly the poem captures the daily tolls of our dedication to our fellow citizens. Likewise, you should realize how the poem befittingly describes the rewards of assisting those who are unable to assist themselves in legal matters.

In place of the word "Ithaca," enter the words "making a difference in the lives of others" and you should immediately realize how the

poem can be utilized as an analogy to describe our professional and regal endeavors. You should realize how the poem accurately reflects the wisdom and experience to be gained from our professional endeavors, individually as well as collectively.

In place of the word "Ithaca," enter the words "public service" and you should immediately realize how the poem veraciously echoes the demand of the proper soul needed for the legal and public service. You should realize how the poem beckons one to face the demons legal and public service will present.

All in all, our legal journeys to our individual legal ends (our individ-

ual legal Ithacas) should be traveled with one goal in mind, the same goal espoused above in the poem. That goal should not concern riches; it should not concern glory; and, it should not concern recognition. That goal should concern ethical representation of others, honest representation of others, just representation of others, and a perseverance to see the lengthy journey completed. These concerns are the true calling of our profession as dictated in the Attorney's Oath. These concerns will lead to an enriched journey's end, a glorious journey's end, and a well recognized journey's end.

If you represent others pursuant to our Oath and when you reach

your journey's end, "you must surely have understood by then what Ithacas mean." The following officers, directors and chairpersons of the YLD do understand the meaning of Ithaca and should be thanked for their selfless contributions and willingness to service the Bar and the citizens of the State of Georgia.

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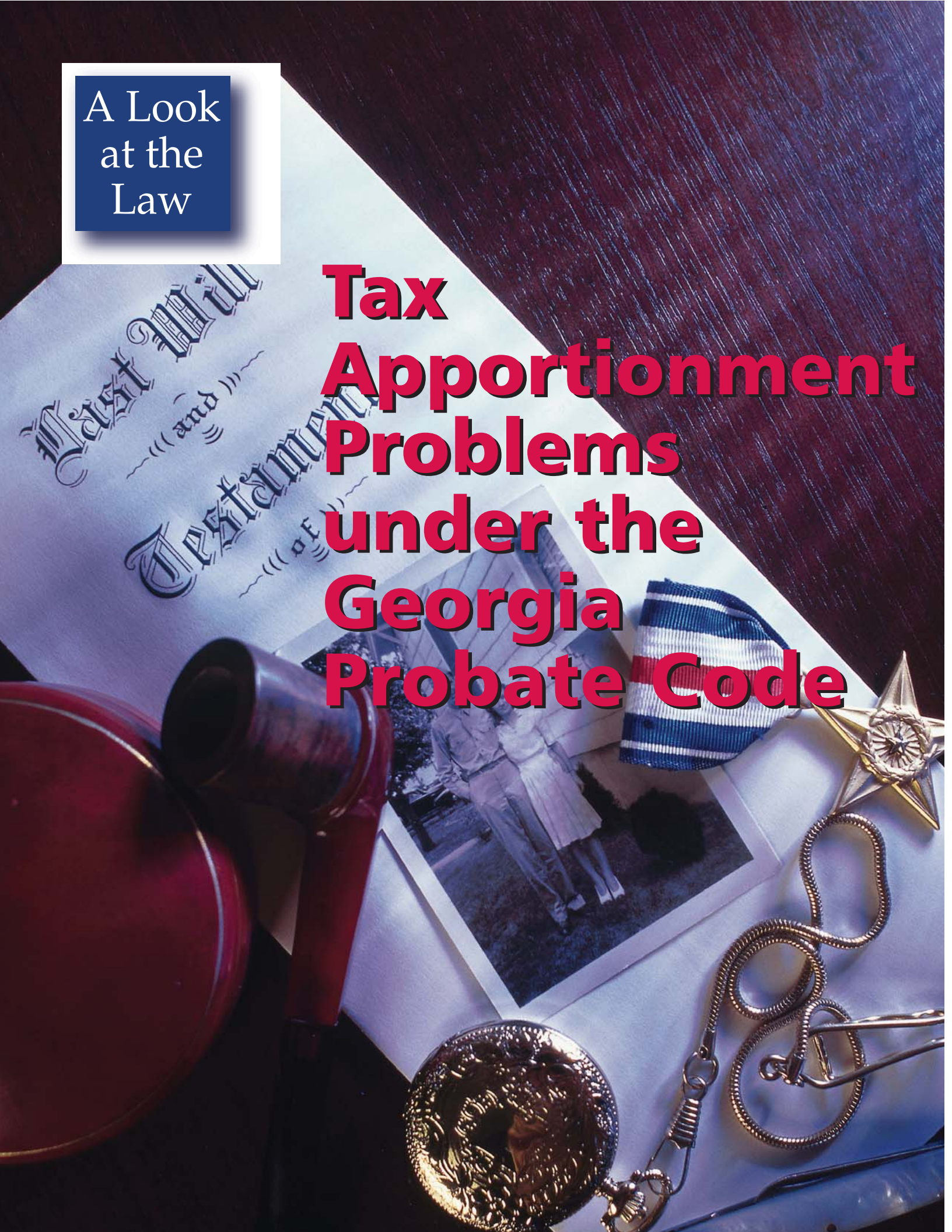
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Due to the combined effort of these noble persons, my serving you was made easy. I will treasure the blessings bestowed upon me as your president to the end of my legal journey. Thank you all for your support. 

A Look
at the
Law

Tax Apportionment Problems under the Georgia Probate Code



By James R. Robinson

In the Anglo-Saxon common law tradition, the archetypal means of transferring property at death is by will. However, in modern society, significant wealth often is transferred by non-testamentary means. The disposition of many forms of wealth is controlled not by the terms of a will, but by contractual arrangement or by operation of law. For example, life insurance or employee benefits typically pass directly to one or more beneficiaries designated by the insured or the employee. Property held in joint tenancy with right of survivorship passes to the surviving joint tenant(s) by operation of law; an attempted disposition by will of an undivided interest in such property is ineffective. These assets sometimes are referred to as “non-probate” assets and do not comprise a decedent’s “estate,” that is the property owned by the decedent and subject to the probate code, which establishes the rules for disposing of property by will.

Federal estate tax typically makes no such distinctions. The gross estate for federal estate tax purposes includes all property in

which the decedent had an interest, in whatever form, to the extent of his or her interest therein.² Various Internal Revenue Code Sections ensure the includibility of virtually all non-probate assets, including life insurance,² joint tenancy with right of survivorship³ and employee benefits.⁴ These assets generate tax liability in the same manner as those that pass under the decedent’s will.

The question of who bears the burden of the taxes attributable to these assets can be a significant one, especially when the beneficiaries of one asset or disposition and another are not the same. Unfortunately, current Georgia law does not provide an answer that is even remotely adequate. Georgia is one of a minority of states that still follow the common-law “burden on the residue” rule. Unless the decedent’s will directs otherwise, all taxes and other expenses of administration are paid out of the residuary estate — that is, that part of the *probate* estate remaining after all specific testamentary dispositions have been deducted. A will that is silent on the payment of taxes is subject to this rule, the operation of which can produce significant (and perhaps unexpected) inequities. An attorney must consider how to address the issue of the tax burden, especially when drafting a will for a client with significant non-probate assets. However, for the Georgia practitioner there is a further and potentially more serious difficulty. It is unclear whether under Georgia law a direction in a will to charge taxes or other expenses against non-probate assets is effective or enforceable, at least in the absence of a specific federal statute granting a right of recovery to the per-

sonal representative of the probate estate.

The Uniform Estate Tax Apportionment Act (the “Act”)⁵, adopted by roughly half of the states, addresses these concerns. In contrast to the common-law rule, the “default” rule under the Act is one of full apportionment of taxes: that is, taxes are paid pro rata from all assets that generate tax liability, whether part of the probate estate or not. The question posed by this Article is, which should be the default rule: the common-law burden on the residue rule, still followed in Georgia and in a handful of other states, or the rule of apportionment as contained in the Act? Given the sometimes dramatic (and potentially unintentional) inequities that can arise by virtue of the common-law rule, I argue that apportionment is the preferable rule, and should be adopted in Georgia. The Act provides a ready-made solution at hand, one that can easily be incorporated into Georgia’s Probate Code.⁶

OVERVIEW OF APPORTIONMENT

As its name suggests, the term “apportionment” refers to the allocation of the liabilities and expenses of an estate, most significantly federal estate taxes, against the various assets of the estate. It is to be contrasted with the common-law “burden on the residue” rule, which in the absence of a specific direction in the will to the contrary, charges all taxes and expenses of administration against the residue of the probate estate, that is, what is left over after all specific testamentary dispositions are made.

A simple example will suffice to illustrate the basic concept.

Suppose that T dies owning a residence worth \$500,000, savings bonds also worth \$500,000, and securities in a brokerage account worth \$1,000,000. T's will devises the residence to T's child A, bequeaths the savings bonds to T's child B, and leaves the residue of the estate to T's children C and D. For simplicity's sake, assume that T's estate of \$2,000,000 generates \$435,000 in estate taxes, and make the further assumption that there are no other expenses associated with the administration of T's estate. T's will is silent on the payment of taxes. Under the burden on the residue rule, A and B would receive the property devised or bequeathed to them undiminished by taxes, which would be paid from the residue of the estate. Thus, C and D would each receive \$282,500 after the payment of taxes, while their siblings each would receive property worth \$500,000. By contrast, if apportionment is directed either by statute or by the will, each child's share would bear a pro rata portion of the total tax liability. All other things being equal, each child would receive a net amount of \$391,250.⁷ Whether one result or another comports with T's intention is a question only T can answer, but this example serves to illustrate the dramatic difference between the common-law rule and an apportionment scheme. The question is, what should be the "default" rule? Assuming that T wanted to treat all four children equally, the answer is that apportionment is the only way to achieve this, at least in the absence of specifically tailored language to the contrary. In Georgia, though, even such language is not guaranteed to be effective, no matter how carefully drafted; as dis-

cussed below, it is unclear whether a testamentary direction to apportion taxes to non-probate assets is effective under Georgia law.

Three other related concepts require definition. The first two of these are "inside" and "outside" apportionment. "Inside" apportionment refers to apportionment among probate assets, that is, assets whose disposition is controlled by the terms of the decedent's will. In general, these are assets that the decedent owned outright in his or her own name and not jointly, and whose disposition at death is not specifically controlled by some form of contractual arrangement. In the example above, all three of T's assets — the residence, the bonds and the brokerage account — are probate assets, and apportionment of the tax burden among them is an example of strictly inside apportionment. "Outside" apportionment, necessarily, refers to apportionment among non-probate assets. For example, if T owned a policy of insurance on his or her life and named B and C as beneficiaries, any apportionment of the tax burden to the insurance proceeds would be outside apportionment.

The third concept is "equitable" apportionment. Under an equitable apportionment scheme, only those assets or dispositions that generate tax are liable for a portion of the tax. If we change the initial example so that B is T's spouse instead of T's child, and the bequest of the savings bonds qualified for the estate tax marital deduction (and thus had not been taxable), no part of the tax burden would be charged against the savings bonds; B would receive the full \$500,000; and the tax burden (which would be reduced as a result of the deduc-

tion of the bonds from the gross estate) would be apportioned pro rata to the property passing to A, C and D. Equitable apportionment is an important consideration, not only because it ensures that taxes are fairly apportioned among the parts of the estate actually incurring tax, but also because it avoids a potential tax problem that occurs if taxes are paid from assets that otherwise qualify for a deduction, principally the marital deduction.⁸

Thus, a full apportionment scheme would be one that provided for both inside and outside equitable apportionment. Whether such a scheme is appropriate in any given case must necessarily be answered in light of the circumstances, but our question here should be: what would the average testator want as a rule in the event his or her will does not address the issue directly (or adequately)? As may be seen from the foregoing discussion, a full apportionment scheme seeks to distribute the tax burden equitably among all parts of the estate that generate tax liability. It is submitted that this should be the rule that operates in the absence of specific direction to the contrary, in order to avoid potential inequities such as that produced by the operation of the common-law rule in the example above.

FEDERAL LAW

Although federal law imposes the lion's share of the tax burden in the form of the federal estate tax, apportionment, like most property laws, is a creature of state law.⁹ Thus, it is inaccurate to refer to a federal "apportionment" rule. However, federal law does provide for a right of recovery in the decedent's personal representative —

who is liable for payment of the tax¹⁰ — for certain types of property or dispositions. Section 2206 of the Internal Revenue Code allows a right of recovery for taxes generated by the inclusion of life insurance proceeds in the decedent's gross estate; Section 2207 of the Code gives a right of recovery for taxes generated by property included by virtue of the decedent's having possessed a power of appointment; Section 2207A grants a similar right for the tax attributable to so-called "QTIP" assets (i.e., assets held in a trust that qualifies for the marital deduction under Section 2056(b)(7) of the Code); and Section 2207B provides a right of recovery for taxes attributable to property included in the estate under Section 2036 (property transferred to trust with a retained income interest).

However, these provisions all can be waived by will. Careful attention must be paid to whether such a waiver is appropriate and, if so, how it is accomplished (the different Code sections impose different requirements for effective waiver). Further, and much more to the point of this article, one right of recovery is conspicuous by its absence: the Code currently provides no right of recovery for federal estate taxes generated by the inclusion of assets under Code Section 2039, which typically is the provision that makes employee benefits subject to federal estate taxes.¹¹ Efforts to enact such a provision have been ongoing for more than a decade, but so far have produced no results, possibly because the U.S. Treasury Department's position follows that of the U.S. Supreme Court: the question of apportionment principally is one

of state law, and is not a federal priority.¹²

Whatever the reason, what is clear is that if federal law is silent on the issue, state law supplies the answer. Thus, in the absence of a specific federal right of recovery for taxes attributable, for example, to employee benefits, those taxes may be recovered from that property only if state law allows such a recovery. Unfortunately, Georgia law is unclear and inadequate in this regard.

GEORGIA LAW

Despite an otherwise almost complete overhaul and modernization of the probate code in 1997, the common-law rule was carried over virtually unchanged from the old probate code¹³, resulting in Georgia being one of the few states that still follow the common-law "burden on the residue" rule.¹⁴

Thus, unless the will directs otherwise, all federal estate taxes are payable from the residue of the probate estate, as in the initial example above. It is clear that if a will does not waive the federal rights of recovery discussed above, the personal representative of an estate may exercise those rights and collect tax from the assets subject to the right of recovery in accordance with federal law. What is troubling for the practitioner is that it is not at all clear that a testamentary direction to apportion taxes to a non-probate asset is effective under Georgia law when there is no federal right of recovery. The probate code makes no specific reference to the effectiveness of a will provision in this regard, and the case law indicates that the Georgia courts will not reach out to find a right of recovery where none is granted by fed-

eral law, particularly if the will contains any discernible evidence of an intent to follow the common-law rule.¹⁵

The consequences of the current law can be disastrous, and in many cases unlikely to be consistent with the testator's wishes. For example, suppose that T has assets that include a residence worth \$250,000, a brokerage account worth \$600,000, a trust (includible in T's estate under Code Section 2038 by virtue of a retained power of disposition) that owns assets worth \$700,000, and a 401(k) plan account also worth \$700,000, for a total estate (for federal tax purposes) of \$2,250,000. Note that there is no federal right of recovery for taxes attributable to either the trust or the 401(k). T's will (which is silent on payment of taxes) devises the residence to T's spouse and bequeaths all of the residue of T's estate to A, who is T's child by T's first marriage. The beneficiaries of the trust and 401(k) plan are B and C, who are T's children by T's second marriage. Assuming that the devise of the residence qualifies for the marital deduction, T's taxable estate is \$2,000,000, which produces a federal estate tax liability of \$435,000. The entire tax liability is borne by A, who nets \$165,000 (which amount likely will be further reduced by the expenses of administering T's estate).

Thus, by operation of the common-law rule, A's share is almost completely wiped out, while the property passing to B and C is untouched.¹⁶ This result, which on its face appears inequitable and was probably not what T had in mind, is driven by the operation of three factors: first, the silence of T's will on the subject of payment of tax; second, the lack of a specific

federal right of recovery for the non-probate assets (i.e., the trust and the 401(k)); and third, the operation of the common-law (Georgia) rule of burden on the residue. Even if a federal right of recovery existed for either the trust or the 401(k), the inclusion of boilerplate language directing payment of taxes from the residue would almost certainly have produced the same result.¹⁷ This example points out the importance of including the proper tax payment provision, in the will based on the testator's assets and provides a warning against the unthinking inclusion of standard pay-from-residue language. More to the point, it raises the question whether the common-law rule is the most desirable one to operate as the "default" rule. An apportionment regime, in particular one that provided for both inside and outside apportionment, would operate in the facts of the example to spread the tax burden equally among all of the property passing to the children (but not, assuming equitable apportion were the rule, to the spouse, as that asset generated no tax liability). Were such a rule the "background" or "default" rule, the drafter of T's will would have had to have made a conscious decision to mandate a different result by directing payment from the residue of T's estate, a result that might well have been strongly rejected by T if its consequences were explained.

As the *Emmertz* case in particular illustrates, the practice of including boilerplate language directing payment from the residue — a not uncommon approach in a jurisdiction that follows that rule — can produce a result that is on its face inequitable and in all likelihood not what the testator would have

wanted had the question been presented to him or her. Arguably, the problem in *Emmertz* was as much a problem of federal law, which in the case of insurance proceeds requires only that the decedent "direct otherwise" in his or her will to waive the federal right of recovery, as of state law. Nevertheless, it may be fairly questioned whether the drafter of the will at issue in the case would have included language directing payment of taxes out of the residue if the default rule in Georgia had been one of full apportionment.

THE REVISED UNIFORM ESTATE TAX APPORTIONMENT ACT

The Uniform Estate Tax Apportionment Act, promulgated originally in 1958 and revised in 1964, addresses many of the issues raised in the foregoing discussion. First, it mandates apportionment as the "default" rule.¹⁸ Moreover, it directs both inside and outside apportionment, first by defining the "estate" as the gross estate for federal estate tax purposes,¹⁹ and second by requiring apportionment among "all persons interested in the estate."²⁰ Equitable apportionment is achieved by directing that exemptions, deductions, and credits against the estate tax inure to the benefit of the persons receiving the property that generates the exemption, deduction or credit.²¹ Thus, in the previous example, no part of the tax burden would be apportioned to the residence passing to T's spouse, as that property qualified for the mar-

ital deduction and thus was not taxable. The Act also sets forth procedures for judicial determination of the apportionment of tax²² and for the withholding by the fiduciary of property sufficient to pay the tax liability and for recovery by the fiduciary of the tax attributable to assets in possession of other interested persons.²³ As of the year 2000, a total of 24 states had adopted either the 1958 or the 1964 version of the Act.²⁴

The Act does contain at least one oddity: it directs that all taxes attributable to a "temporary" interest in property — for example, a life estate — are payable from principal.²⁵ Thus, if T devises real property to T's child A, with the remainder to T's grandchildren, the remainder interest is liable for all taxes attributable to the real property. The drafters of the Act recog-

nized this oddity; their explanation was simply that there was no other practical solution.²⁶ Whether this is in fact the case is debatable; temporal interests must be valued at their present value for estate tax purposes, and presumably the tax burden could be apportioned on that basis.

Apart from the oddity regarding the apportionment to temporal interests, the Act contains at least one potentially significant difficulty. The Act provides that its application may be altered by will, without requiring anything by way of specific reference to the Act or any of its provisions.²⁷ While provision for waiver in general is not only desirable but necessary — there are certainly instances in which payment of taxes from the residue is perfectly appropriate — one might wish that the Act imposed more rigorous, or at least specific,

requirements for waiver or alteration of the Act's provisions. As it stands, careless drafting might cause unintended consequences.

For example, suppose that T's probate estate consists of a residence, cash, stocks and an automobile collection. T also owns a 401(k) plan account, which accounts for approximately half of T's net worth. T wishes to bequeath the automobile collection to child A, and does not want the collection to be liquidated to pay taxes. Therefore, T's will specifically bequeaths the collection to A, and the residue of the estate also goes to A. The beneficiary of the 401(k) account is T's other child, B. T's will specifies that "all estate taxes shall be paid from the residue of my estate." Does this mean that all taxes (including those attributable to the 401(k) account) are to be paid

from the residue? Or only that the taxes attributable to the probate property are to be so paid? Assuming that T's principal wish was to treat T's children equally, one would suppose that the latter result was the one T had in mind. Arguably, though, the language quoted opts out of apportionment of taxes entirely. A more exacting waiver requirement — for example, one requiring that the testator refer specifically to the relevant section of the Act, or requiring specific reference to assets passing under, or outside of, the will — might avoid such interpretive difficulties, at the very least by obliging the drafter of T's will to focus on exactly what is intended.

Moreover, the operation of the Act may be avoided only by will, and not by any inter vivos instrument (such as a revocable or irrevocable trust). While this normally will not be of great concern — typically, even clients who own the majority of their assets in a revocable trust will have in place a “pour-over” will that directs the disposition of the probate estate to the trust, which contains the dispositive provisions — it does place the

onus on the drafter to ensure that waiver or alteration (if desirable) is made in the proper instrument.

For example, suppose that T has a sizeable inter vivos revocable trust, which is administered by a corporate trustee and holds the majority of T's wealth, principally marketable securities. T also owns several parcels of real property of significant value, which for various reasons are owned by T individually and not by the trust. T does not want any taxes apportioned to the real estate, because T does not want to require any of the parcels (which have been in T's family for several generations) to be liquidated to pay estate taxes. Therefore, T wants the trust, which contains liquid assets, to bear the liability. Under the Act, T must direct by will that no taxes be apportioned to the real property, regardless of whether the property is probate property or not. A provision in the trust is not sufficient.

While this rule may not be a problem in itself, it does raise the question (again) what should be the “default” rule, that is, the rule to apply in the absence of a carefully-drafted alternative. Suppose, for

example, that T owns the real property with T's children as joint tenants with right of survivorship. Does it make sense to require that the desired result be accomplished by a will, which, under these facts, would dispose of little or no property? At the very least, any legislature considering adoption of the Act should give some thought to easing somewhat the rule that full apportionment may be avoided only by will.

Despite these flaws — if they are indeed flaws — the Act represents a significant improvement over the common-law rule. It implements a full apportionment regime, with both inside and outside apportionment, and allows for equitable apportionment by providing that tax benefits follow the property that generates those benefits. Consider again the examples raised in this article. Is it reasonable to assume that the average person — who is, at least in theory, the person to whom a statute is to apply — would want the apparently inequitable outcomes postulated in these examples? If the answer to this question is “no” — and it seems obvious that, in the typical

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case, it would be — then serious consideration should be given to abandoning the common-law rule in favor of the apportionment scheme set forth in the Act.

A PROPOSED SOLUTION

Individuals often own substantial assets that can cause significant tax liability, but whose disposition is not controlled by will. Current Georgia law, with its adherence to the common-law burden on the residue rule and its lack of clear authority regarding the effectiveness of a testamentary direction to apportion taxes attributable to non-probate property, is inadequate to address the planning needs of today's clients. A full apportionment scheme, one that operates by default to distribute tax liability among all parts of a decedent's estate (in the federal estate tax sense of that word) that generate tax liability, not only addresses modern forms of property ownership, but also avoids potentially unintentional inequities in the disposition of property caused by the common-law rule. At the very least, it obliges practitioners to address the payment of taxes in a way that the current rule does not, by requiring an affirmative opting out of a scheme that by default requires all of the parts of the taxable estate to bear their proportionate part of the total liability. The Uniform Estate Tax Apportionment Act provides a ready-made apportionment regime that easily can be adopted into Georgia law. Attention should be given to the manner in which the Act addresses both apportionment to temporal interests and waiver or alteration of its operation.

Nevertheless, the Act represents a significant improvement over the current state of the law, and should be incorporated into the Georgia Probate Code at the earliest opportunity. 



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ENDNOTES

1. I.R.C. § 2033.
2. *Id.* § 2042.
3. *Id.* § 2040.
4. *Id.* § 2039.
5. The Uniform Estate Tax Apportionment Act is currently being revised by the Drafting Committee to Revise Uniform Estate Apportionment Act and Section 3-916 of the Uniform Probate Code, under the auspices of the National Conference of Commissioners on Uniform State Laws.
6. O.C.G.A. §§ 53-1-1 to -11-10.
7. Even this simple example points out potential complexities. For example, it is assumed either that the residence can be liquidated for its full fair market value, or that A has other funds with which to pay the pro rata portion of the tax liability. Nevertheless, it serves to point out that of the two rules, only apportionment operates to achieve a sort of rough justice among the various testamentary dispositions and beneficiaries.
8. If taxes are payable from property that qualifies for the marital deduction, the payment of taxes from this property reduces the amount passing to the surviving spouse, which in turn reduces the deduction, which in turn increases taxes, which must be paid from the marital property. The resulting circular or "whirlpool" calculation can increase the tax liability significantly — by approximately 50%. Presumably, most clients would

prefer to avoid such a result.

9. *Riggs v. Del Drago*, 317 U.S. 95 (1942).
10. I.R.C. § 2002.
11. The significance of this omission can best be appreciated if one considers the vast amounts of wealth currently held in deferred compensation arrangements such as 401(k) plans. At the end of 2001, an estimated \$1.75 trillion was held in 401(k) plans. See http://www.ici.org/about-funds/401k_faqs.htm.
12. Jeffrey N. Pennell, *Tax Payment Provisions and Equitable Apportionment*, C109 ALI-ABA 991, 1029-30 (1995).
13. The modern trend is away from the common-law rule toward a rule of apportionment. Indeed, only a small minority of states still follow the common-law rule. See Jeffrey N. Pennell & Robert T. Danforth, 834 Tax Mgmt.(BNA), *Transfer Tax Payment and Apportionment*, at A-23 (hereinafter "Pennell & Danforth").
14. O.C.G.A. § 53-4-63.
15. See *Emmertz v. Cherry*, 271 Ga. 458, 520 S.E.2d 219 (1999) (boilerplate language sufficient to waive right of recovery for taxes attributable to insurance proceeds); *Collier v. First Nat'l Bank*, 262 Ga. 338, 417 S.E.2d 653 (1992) (assets taxable as part of revocable trust not liable for portion of tax).
16. If apportionment were the rule, each child's share would be liable for a pro rata portion of the tax. A would net \$469,500, while B and C would net \$547,750 each — a dramatically different outcome for A in particular.
17. *Emmertz*, 271 Ga. at 460, 520 S.E.2d at 221.
18. Revised Uniform Estate Tax Apportionment Act § 2, 8A ULA 336 (1993).
19. *Id.* § 1(a), 8A ULA 334.
20. *Id.* § 2, 8A ULA 336.
21. *Id.* § 5, 8A ULA 341.
22. *Id.* § 3, 8A ULA 338.
23. *Id.*
24. Pennell and Danforth, at A-24 n. 146.
25. Revised Uniform Estate Tax Apportionment Act § 6, 8A ULA 360.
26. *Id.* cmt.
27. *Id.* § 2, 8A ULA 352; see also Pennell and Danforth, at A-25.

Professionalism in the Principle-Centered Law Practice

By Chief Judge G. Alan Blackburn

Whatever happened to ethics?

In a recent address, Bernie Marcus, the founder of Home Depot, raised the above question in response to an inquiry about Enron and other corporate business practices. In the context of his address, Marcus was referring to the personal ethics and moral principles by which corporate leaders are guided, not those rules and regulations which govern commercial practices. Unlike the practice of law, business is generally limited only by a determination of what is legal, not what is ethical or moral.

Marcus related that for years he was bombarded by accountants and business consultants with Enron-type accounting procedures and

schemes which were guaranteed to greatly improve the financial picture of Home Depot. He was assured that the schemes were perfectly legal, and that they were employed by many major companies.

In analyzing these proposals, Marcus looked not only to opinions of their legality, but he looked to his own moral compass for direction. He did not understand how you could improve the financial appearance of Home Depot when your scheme did not increase its revenues, reduce its costs, or improve the efficiency of its work force. In his own words, "it didn't pass the smell test." Marcus rejected the suggested schemes based on the application of his own principles, not the limited rules that control corporate practices. He is a man of principle, who, before his retirement, ran a principle-centered business.

Ethics, Professionalism and the Practice of Law

Unlike big business, the conduct of lawyers is not limited to the statutorily legal. Lawyers also have a code of ethics by which they are

bound. Our code of ethics often requires lawyers, within certain bounds, to place a client's interest above their own. Indeed, these distinctions are what separate the professions from other commercial endeavors.

Ethics are what the law requires of lawyers in the conduct of the practice of law. Lawyers are subject to sanctions, including disbarment, for violations of the Georgia Rules of Professional Conduct.

Unchecked ethical violations, by good and decent lawyers, occur routinely. Have you ever come across controlling case law which is harmful to your case, of which your opponent is clearly unaware? Have you awaited a hearing or trial hoping your opponent does not discover the controlling case? Have you then argued your position to the court, orally or by brief, while your opponent failed to raise the controlling authority of which you were aware? If so, you have violated Rule 3.3, *Candor Toward The Tribunal*, which provides in paragraph (a) (3), "[A]n advocate has a duty to disclose directly adverse authority in the controlling juris-

diction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

Another provision of the Georgia Rules of Professional Conduct which is often misunderstood, is Rule 1.2, *Scope of Representation*. While a lawyer shall generally abide by a client's decisions concerning the objectives of representation, that Rule is subject to exceptions as outlined in subparagraphs:

- (c) A lawyer may limit the objectives of the representation of the client, if the client consents after consultation;
- (d) A lawyer shall not counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent, nor knowingly assist a client in such conduct, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law; and,
- (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

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

Many lawyers do not seem to understand that their obligation to represent their client is subject to the Georgia Rules of Professional Conduct. For example, a client is not entitled to advice of counsel in the planning, carrying out, or cov-

ering up of any crime or other illegal activity, including fraud, and any attorney who becomes so involved, is not practicing law, but, rather, is a co-conspirator in the criminal or fraudulent activity, and is just as guilty of violating the law as is the client. The Georgia Rules of Professional Conduct are published in the *State Bar of Georgia Directory and Handbook*, and are reasonably specific on given issues. I recommend a periodic review of these rules by all lawyers.

Professionalism, on the other hand, refers to that heightened level of civility, courtesy, accommodation and good faith that lawyers expect from each other in the handling of legal matters in our adversary system of justice. Professionalism relates to that standard which we, as lawyers, have set for each other in the conduct of the business of our clients.

In its simplest terms, professionalism is nothing more than business morality. My former colleague, Presiding Judge Birdsong, once described professionalism in another way. He said that the golden rule says it all. He was right, and it is such a simple rule to follow.

Our Supreme Court has adopted a *Lawyers' Creed*, an *Aspirational Statement on Professionalism*, certain *General Aspirational Ideals*, and certain *Specific Aspirational Ideals*. I have included these materials for your review, as Appendices "A," "B," "C" and "D", respectively.

The Principle-Centered Law Practice

What is the public perception of lawyers? Do you think that we are generally viewed as Atticus Finch, the lawyer in *To Kill a Mockingbird*? Or does Samuel Taylor Coleridge's perception more accurately repre-

sent the public attitude? Coleridge, wrote of the devil, who upon seeing a lawyer killing a viper, smiled, for it put him in mind of Cain and Abel.

We are collectively responsible for our public perception. None of us practice in isolation. We each contribute to the reputation of the other, and we rise or fall as a group, in the collective eye of the public. The presence or absence of professionalism by those lawyers with whom they come in contact, is, in large measure, determinative of the public's perception of us as lawyers.

I encourage lawyers to take the time to consider and adopt underlying principles upon which they will conduct their business. By doing this, they will have a basic foundation to which they can refer in determining their actions. These principles give the lawyer guidance at a time when other pressures may be present. The adoption of the attached aspirational goals of professionalism as the basic principles of operation of the law practice would be a sound beginning. Those who do not do so are like rudderless ships floating on a sea of self-interest and greed, responding to those pressures, without regard to the morality or correctness of the decision.

Helpful Hints for the Principle-Centered Lawyer

Initial Employment

It is during the initial employment discussions that the lawyer should come to a complete understanding with the client as to all important elements in the handling of the case. This agreement should be reduced to writing and signed

by the parties. In addition to addressing such matters as fees and costs, the agreement should outline communications between attorney and client (and any charges therefor), decisions on routine matters during the conduct of the litigation (continuances, extensions, stipulations, etc.), a recognition that the lawyer is bound by ethical standards and that the litigation will be conducted as required by such standards and the highest level of professionalism. The lawyer should explain generally what this means and why it is ultimately in the best interest of the client for the litigation to be conducted in this manner.

Settlement

In evaluating settlement versus trial, trial should generally be the least preferred option. When a case is tried, that means there has been a failure in the case. Either the plaintiff's lawyer has failed to convince the defendant of the justness of the claim, the amount of the damages, or that there is a greater risk to

defendant in trying the case than in settling it; or the defendant's lawyer has failed to either apprise his client of the risks of trial, or convince the client of such potential. If the parties are able to settle the case, then they have kept the decision-making process within the control of the parties. It is generally true that parties are far more likely to voluntarily abide by a resolution to which they have agreed than one which is dictated by a judge or jury.

Someone once said that "a reasonable settlement is one in which each of the parties is equally dissatisfied." It is a rare case in which a party is totally successful in obtaining all of the relief sought through settlement. There is little benefit to a defendant in such a settlement, as a jury would do no worse at trial and the defendant just might win. Plaintiffs' personal injury lawyers should also keep in mind that while they will have many future trials in the event of a loss, a plaintiff who loses at trial after having turned down a settlement offer,

will never have another opportunity to recover for that claim.

Counseling the Client

Remember, lawyers are also counselors to their clients and owe to them a duty to be straightforward in discussing the strengths and weaknesses of their position. It is unprofessional to exaggerate the potential value of a claim in order to obtain employment, and such exaggeration likely will come back to haunt you, as it will make a reasonable pre-trial settlement difficult. It also assures an unhappy client even if a reasonable verdict is obtained, as the award will generally be far less than you have led the client to believe that it would be.

Rather, it is far better to explain to the client that the recovery at trial will be the result of a number of unknown factors, such as: the makeup of the jury, the testimony and credibility of the fact witnesses, and the expert witnesses, the jury's evaluation of any comparative negligence evidence, the natural sympathies of the case and the jury's attitude toward the parties, their lawyers and witnesses (do they like them or dislike them?). Juries tend not to make meaningful awards to plaintiffs they don't like, or to award large sums against defendants that they do like and vice versa. It is easy to predict where the natural sympathies would lie if a lawyer/plaintiff sued an elderly, gray-haired grandmother in a fender-bender involving minor damage.

The lawyer should anticipate matters unique to the client's representation, and be sure that the client understands and agrees to the manner in which the case will be handled. This is the time for the lawyer to prevent future misunderstandings and problems.

APPENDIX A: A LAWYER'S CREED

To my clients, I offer faithfulness, competence, diligence, and good judgment. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

Communications

A lawyer should counsel with the client at the time of employment concerning communications during the handling of the case. The lawyer's policy concerning telephone calls and any charges therefor should be fully discussed. The advantage to the client of communicating through staff should be fully explained. The benefits of such communication could be cost, speed of response and efficiency. It is a good idea to routinely copy the client with copies of pleadings and correspondence, with information and instruction forms attached, i.e. forward a copy of interrogatories received with a cover sheet telling the client what to do. It is good policy to review all cases on an appropriate time basis and to communicate with the clients, so they will know they have not been forgotten.

Controlling the Case and Decision-Making

The client has sought your representation because of your knowledge, experience and skill, talents the client generally does not possess. It is for this reason, that decisions concerning the conduct of the case should generally be made by the lawyer. The client is not familiar with, or bound by the lawyer's canons of ethics or basic standards of professional conduct. Too often, clients are so emotionally involved in their case that they seek only to cause misery for the other side. We have all dealt with such clients, who seem to resent their attorney even being civil to the other side or their attorney.

Clearly, such people are not the ones who should decide those matters which routinely arise during the conduct of litigation, such as: the granting of extensions, stipula-

APPENDIX B: ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we would act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Many of the aspirational ideals of our community are contained within our Ethical Considerations. The Ethical Considerations contain the objectives towards which every member of the profession should strive. Our Ethical Considerations, however, also contain specific regulatory provisions, interpretative guidance for our Directory Rules, and other matters that are not aspirational. This combining of different purposes makes the Ethical Considerations difficult to use as a statement of aspirational ideals. Some of our aspirational ideals are also found in "Duties of Attorneys," OCGA § 15-19-4, but most of those ideals are limited to the role of attorney as an officer of the court. Our Directory Rules and Standards of Conduct set forth minimum standards. They are not intended as aspiration statements.

Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar's efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community. It is the Court's hope that Georgia's lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications of the practice of law in our society and to consider the implications of those justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.

tions of law and fact, and dealing with your opponent's tardiness at a calendar call. It is for this reason that decisions concerning procedural matters should be made by the lawyer, with the consent of the client. It is you, the lawyer, who can best evaluate what action is required by professional standards of conduct and what is ultimately in the best interest of the client.

Appeal and Post-Trial Evaluation

The only appropriate *legal basis* for an appeal is that there has been a reversible error committed by the trial court which has harmed your client. It is unprofessional to appeal a case where no such bona fide claim exists.

Attempting to gain leverage for negotiation is not an appropriate

APPENDIX C: GENERAL ASPIRATIONAL IDEALS

As a lawyer, I will aspire:

- (a) To put fidelity to clients and, through clients, to the common good, before selfish interests.
- (b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.
- (c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.
- (d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.
- (e) To make the law, the legal system, and other dispute resolution processes available to all.
- (f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.
- (g) To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.
- (h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.
- (i) To practice law not as a business, but as a calling in the spirit of public service.

basis for appeal. The fact that your client has suffered a major award against it is not a basis for appeal absent reversible error. Neither is the fact that a defendant's verdict was returned in the plaintiff's "million-dollar" case a basis for appeal, absent reversible error. It is unethical and unprofessional to appeal an adverse result absent reversible error, and may expose the appellant to sanctions under the rules of the appellate courts.

Handling Client's Money

Failure to keep a client's money in a separate account may result in disciplinary action by the State Bar, since commingling is a violation of Rule 1.15 of the mandatory State Bar Standards of Conduct. In addition, keep a complete record of all funds disbursed to or received from a client.

Stay Out of Business with Your Client

This is particularly true in situations where your clients are relying on you, as their lawyer, to protect or oversee their interest, so that you are both business partner and lawyer. Although the Bar standards do not absolutely prohibit this under all circumstances, it is better to avoid such situations altogether.


Avoid Conflicts of Interest

Rules 1.8 and 1.9 in the *State Bar of Georgia Handbook* deal directly with defining what conflicts of interest to avoid. Generally, if it feels bad, it is bad, and should be avoided. If you are caught in a "grey area," seek advice from one who is experienced and knowledgeable. And remember, the mere fact that you are concerned that a conflict of interest exists may be a sufficient indication that you should stay out of a particular matter.

Do Not Make False Representations

Even if it is to ease the pain of unpleasant news, the outcome of such dishonesty could be devastating to your career as an attorney. Rule 2.1 strictly prohibits false representations, and the penalty for violating this standard may be disbarment. In fact, a review of recent disbarment cases shows that lying about the progress of a case is surprisingly common cause of disbarments and voluntary surrenders of licenses. See also Rule 1.3.

Handle or Limit Your Workload

There is no doubt that case load management is the cause of many client complaints. The lawyer becomes overburdened with work and fails to communicate with the client. Too often lawyers do not meet their obligation to properly handle those cases they accept. Organize to handle the cases you accept, or accept fewer cases. 



G. Alan Blackburn is the presiding judge in the Georgia Court of Appeals. After serving four years on active duty in the United States Air Force, Judge Blackburn returned to Atlanta and entered John Marshall Law School. He received his LLB in 1968. He received his Masters of Law Degree from the University of Virginia Law School in 2001.

APPENDIX D: SPECIFIC ASPIRATIONAL IDEALS

As to clients, I will aspire:

- (a) To expeditious and economical achievement of all client objectives.
- (b) To fully informed client decision-making. As a professional, I should:

- (1) Counsel clients about all forms of dispute resolution;
- (2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
- (3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
- (4) Communicate promptly and clearly with clients; and,
- (5) Reach clear agreements with clients concerning the nature of the representation.

- (c) To fair and equitable fee agreements. As a professional, I should:

- (1) Discuss alternative methods of charging fees with all clients;
- (2) Offer fee arrangements that reflect the true value of the services rendered;
- (3) Reach agreements with clients as early in the relationship as possible;
- (4) Determine the amount of fees by consideration of many factors and not just time spent by the attorney;
- (5) Provide written agreements as to all fee arrangements; and
- (6) Resolve all fee disputes through the arbitration methods provided by the State Bar of Georgia.

- (d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

As to opposing parties and their counsel, I will aspire:

- (a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties. As a professional, I should:
 - (1) Notify opposing counsel in a timely fashion of any canceled appearance;
 - (2) Grant reasonable requests for extensions or scheduling changes; and,
 - (3) Consult with opposing counsel in the scheduling of appearances, meeting, and depositions.

- (b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. As a professional, I should:

- (1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response;
- (2) Be courteous and civil in all communications;
- (3) Respond promptly to all requests by opposing counsel;
- (4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
- (5) Prepare documents that accurately reflect the agreement of all parties; and
- (6) Clearly identify all changes made in documents submitted by opposing counsel for review.

As to the courts, other tribunals, and to those who assist them, I will aspire:

- (a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice. As a professional, I should:

- (1) Avoid non-essential litigation and non-essential pleading in litigation;
- (3) Explore the possibilities of settlement of all litigated matters;
- (3) Seek non-coerced agreement between the parties on procedural and discovery matters;
- (4) Avoid all delays not dictated by a competent presentation of a client's claims;
- (5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual; and
- (6) Advise clients about the obligations of civility, courtesy, fairness, cooperation, and other proper behavior expected of those who use our systems of justice.

- (b) To model for others the respect due to our courts. As a professional I should:

- (1) Act with complete honesty;
- (2) Know court rules and procedures;
- (3) Give appropriate deference to court rulings;
- (4) Avoid undue familiarity with members of the judiciary;
- (5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary;
- (6) Show respect by attire and demeanor;
- (7) Assist the judiciary in determining the applicable law; and,
- (8) Seek to understand the judiciary's obligations of informed and impartial decision-making.

As to my colleagues in the practice of law, I will aspire:

- (a) To recognize and to develop our interdependence;
- (b) To respect the needs of others, especially the need to develop as a whole person; and,
- (c) To assist my colleagues become better people in the practice of law and to accept their assistance offered to me.

As to our profession, I will aspire:

- (a) To improve the practice of law. As a professional, I should:
 - (1) Assist in continuing legal education efforts;
 - (2) Assist in organized bar activities; and,
 - (3) Assist law schools in the education of our future lawyers.
- (b) To protect the public from incompetent or other wrongful lawyering. As a professional, I should:
 - (1) Assist in bar admissions activities;
 - (2) Report violations of ethical regulations by fellow lawyers; and,
 - (3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.

As to the public and our systems of justice, I will aspire:

- (a) To counsel clients about the moral and social consequences of their conduct.
- (b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.
- (c) To provide the pro bono representation that is necessary to make our system of justice available to all.
- (d) To support organizations that provide pro bono representation to indigent clients.
- (e) To improve our laws and legal system by, for example:
 - (1) Serving as a public official;
 - (2) Assisting in the education of the public concerning our laws and legal system;
 - (3) Commenting publicly upon our laws; and,
 - (4) Using other appropriate methods of effecting positive change in our laws and legal system.

Lawyers: Guardians of Freedom

By Anthony Lewis

Editor's Note: Pulitzer Prize journalist Anthony Lewis spoke at the 21st Annual American Law Institute/State Bar Judicial Procedure & Administration Committee Breakfast on March 20, 2003, in the Sanders Dining Room, courtesy of Troutman Sanders. The event was co-chaired by Tommy Malone, chair of the State Bar Committee, and Senior Judge Dorothy Toth Beasley, member of the American Law Institute. The Committee serves as liaison between the Georgia bench & bar and the ALI. Lewis' remarks, entitled "Civil Liberties After 9/11," are reprinted here. Lewis was awarded the ALI's prestigious Henry Friendly medal last year for his pioneering work at The New York Times in reporting on the Supreme Court of the United States.

I believe that lawyers have a special responsibility in American society. They are the guardians of our freedom. For that view, I have been accused of being a romantic about the legal profession. Perhaps so. But the founders of this country put their faith in a novel conception: a written Constitution that binds rulers and the ruled alike as law. That puts an inescapable obligation on lawyers and judges.

The role of freedom's guardian is profoundly important today.

Terrorism and the war that our government has declared against it have put the Constitution under stress. Rights we have long taken for granted are under threat. A striking example: President Bush has asserted the right — the power — to arrest any American citizen and detain him or her indefinitely in solitary confinement, without charges, without a trial, without a lawyer. As the basis for that detention, all the president need do is designate the person an "enemy combatant." The prisoner cannot effectively challenge that designation in any court. He or she may not talk to a lawyer or to family members. That is the government's claim of power.

That idea may strike you as extraordinary, impossible. How could such a thing happen in the United States? But it *is* happening.

The Bush Administration has done exactly that to two American citizens. Jose Padilla was born in Chicago in 1971, became a gang member, was arrested half a dozen times and served several jail sentences. He became a Muslim and took the name Abdullah al-Muhajir. He traveled to Egypt, Saudi Arabia, Afghanistan, Pakistan.

On May 8 of last year Padilla flew into Chicago from abroad. Federal agents took him into custody at O'Hare Airport. He was flown to a jail in New York where the Justice Department went before a federal judge and got a warrant for Padilla's arrest and detention as a material witness for a grand jury sitting there to investigate the Sept. 11 attacks. On May 15 he was brought before a judge, who appointed a lawyer, Donna R.

Newman, to represent him. The judge set June 11 for a hearing on Padilla's case.

But on June 9, two days before the scheduled hearing, the Justice Department informed the judge that Padilla had been designated an enemy combatant and flown to a Navy brig in South Carolina. The next day, June 10, Attorney General John Ashcroft made a statement about Padilla. Ashcroft happened to be in Moscow, and his statement was broadcast on television to the United States. "We have captured a known terrorist," Ashcroft said. "While in Afghanistan and Pakistan, al-Muhajir trained with the enemy.... In apprehending him, we have disrupted an unfolding terrorist plot to attack the United States by exploding a radioactive 'dirty bomb.'" Whether that is actually so we cannot tell, because there has been no way for Padilla to contest the dramatic Ashcroft statement or for the press to test the case against him. It was a conviction by government announcement.

A second American citizen is being held in similar conditions in a Navy brig in Norfolk, Virginia. He is Yaser Hamdi, who was seized in Afghanistan, taken to Guantanamo Bay as one of the prisoners we are holding there and then moved to Richmond when he turned out to be an American citizen. He, too, was designated an enemy combatant by President Bush. The exact circumstances of his seizure in Afghanistan are not known.

Both Padilla and Hamdi have been the subject of court decisions, though they were not able to take part in the cases. For all we know, they may not even be aware of the decisions. Government lawyers told Padilla's appointed lawyer, Donna

Newman, that she could write to Padilla — but he might not get the letter. She went ahead and challenged his detention in a lawsuit.

The Government argued in both cases that in wartime, courts have to pay great deference to the president, with his constitutional power as commander in chief of the military. A court could not re-examine his finding that someone was an enemy combatant, the Justice Department argued, if the government showed "some evidence" for the designation. Some evidence, not a preponderance, and with no chance to challenge what the government alleged because there should be no evidentiary hearing. On the issue of the right to see a lawyer, the Justice Department objected that lawyers could carry out messages to other terrorists.

In the Hamdi case a federal district judge, Robert Doumar, was skeptical of the government's argument. It produced a nine-paragraph statement by a Defense Department official, Michael H. Mobbs, saying that Hamdi was an enemy combatant. But Judge Doumar said more than that was required for due process of law. "Isn't that what we're fighting for?" he asked.

But Judge Doumar was overruled by the U.S. Court of Appeals for the Fourth Circuit. It entirely accepted the government's argument about the need for deference to the president in wartime. It held that the Mobbs declaration about Hamdi was enough evidence to satisfy any case for a check on the presidential finding. And it held that the president had power to hold enemy combatants in detention indefinitely, because such a wartime detention was not a criminal case subject to the protections

in the Bill of Rights, such as the right to counsel.

Jose Padilla's case has been decided by a federal trial judge, Michael Mukasey in New York; it gave Padilla narrow victory: extremely narrow. Like the Fourth Circuit, Judge Mukasey said the president had the power to hold enemy combatants without a trial. But he gave Padilla a limited right to consult his lawyer in order to give her any facts bearing on his designation as an enemy combatant.

Judge Mukasey dismissed as "gossamer speculation" the government's contention that a lawyer might, wittingly or unwittingly, transmit advice from Padilla to terrorists. He said interference with the process of interrogating Padilla — the other government objection to his meeting counsel — would be "minimal or non-existent." The government responded to that point with an extraordinary motion for reconsideration of Judge Mukasey's decision.

The motion included an affidavit from Vice Admiral Lowell E. Jacoby, director of the Defense Intelligence Agency. He said that successful interrogation "is largely dependent upon creating an atmosphere of dependency and trust between the subject and interrogator. Developing the relationship...necessary for effective interrogation can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or even years, after the interrogation process began."

Admiral Jacoby said that "even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship.... Any

insertion of counsel," he said, "even if only for a limited duration or for a specific purpose, can undo months of work and may permanently shut down the interrogation process."

There was a certain irony in Admiral Jacoby's affidavit and the government motion based on it. The very fact that extended interrogation in isolated circumstances may break a subject's will is one reason that the right to counsel is guaranteed in the criminal law. It is the basis of the *Miranda* rule.

The Washington Post hailed the Mukasey decision as a victory for civil liberties. The judge understood, it said, "that without access to a lawyer and at least some ability to contest the government's claim in court, nobody's rights are safe." But how safe would the decision really make us? The fact remains that an American is in prison for what could be the rest of his life on the say-so of government officials, with no check except the rather slim possibility of a judge finding that the government did not have any evidence for its claim.

A long history has shown us that accusations by the state against individuals, even when made in good faith, can be wrong. That is why the English common law developed means such as cross-examination to test charges, and why those protections were put into the first ten amendments to our Constitution in 1791.

But we do not need to go back to the 18th century to know that any assertion by the state against an individual must be tested by the time-honored means of the law. Anyone who has seen a courtroom drama knows that the most convincing story can explode under the hammer of the legal process. In fact, one case brought by the Bush

Administration after Sept. 11 makes the point dramatically.

An Egyptian student, Abdallah Higazy, spent the night of Sept. 10-11 at the Millennium Hilton Hotel in downtown New York. After the terrorist attack a security guard in the hotel said he had found an aviation radio in the room Higazy had occupied. Higazy denied that it was his. He was given a lie-detector test and was told that he had failed it. He then confessed to owning the radio. After weeks of detention in solitary confinement he was indicted on a charge of lying when he said the radio was not his. But then a pilot came forward and said the radio was his — he had left it in another room at the hotel. The security guard admitted that he had made up the tale of Higazy owning the radio. Higazy was released. So a prosecution that looked ironclad turned out to be based on falsehood.

The Economist magazine, which has kept a sharp eye on the state of American liberties since Sept. 11, wrote of the Padilla case: "It is hard to imagine that America would look kindly on a foreign government that demanded the right to hold some of its own citizens in prison, incommunicado, denying them access to legal assistance as long as it thought necessary, without ever charging them with a crime."

The claim of power made by President Bush and his lawyers in the enemy combatant cases is the most radical assertion of executive authority in memory. The claim is said to be based on military necessity. But we must remember one thing. Previous assertions that national security would be at risk if courts applied the Constitution have repeatedly turned out to be wrong.

In 1971 *The New York Times* began publishing the secret history of the Vietnam War known as the Pentagon Papers. The Nixon Administration asked the courts to stop publication. Its lawyers said that the national security would be gravely injured if the stories kept coming out. On the fourth day of publication the counsel for *The New York Times*, Professor Alexander Bickel, observed dryly to the judge: "The Republic still stands." The Supreme Court allowed publication to go ahead, and there was no impact whatsoever on national security. So we should be skeptical, I think, of the argument that, if the government were forced to give the courts first-hand evidence to support its designation of someone as an "enemy combatant," it could "significantly hamper the nation's defense."

I have begun with what I think has been the most menacing attack on our civil liberties since Sept. 11, 2001. But the unilateral detention of American citizens without charge or counsel is by no means the only repressive measure taken by President Bush since Sept. 11. One other area must be mentioned at least briefly. That is the treatment of aliens.

In the months after the Sept. 11 attacks the Justice Department detained hundreds of aliens in secret, refusing to disclose their names or places of detention. (The number was over 1,100 when the department stopped releasing the figure.) They were held for weeks or months before eventually being deported or charged with minor visa violations such as not taking enough courses as a student visitor.

Little was known about how these detained aliens were treated, and interrogated, until *The New York*

Times published a story by David Rohde on Jan. 20, 2003. It was dated Karachi, Pakistan. Rohde had interviewed five Pakistani men deported from the United States after being detained in Ashcroft's round-up. One, Anser Mehmood, said he was held for four months in solitary confinement in a windowless cell in a federal detention center in Brooklyn, N.Y. Two overhead fluorescent lights were on all the time. "No one from the F.B.I. and I.N.S. came to interview me," Mehmood said. The other four men said they had been asked only cursory questions, such as "Do you like Osama bin Laden? Do you pray five times a day?" If detainees were asked only such inane questions, or none, interrogation could not have been the purpose of their detention. What was it, then: to give the American public the impression of anti-terrorist activity?

At Attorney General Ashcroft's order, deportation cases were held in secret in cases designated by the government. Another Ashcroft order required visitors from 25 countries, all predominantly Muslim except North Korea, to be fingerprinted upon entry and to report back to the Immigration Service after 40 days.

A prominent Pakistani editor, Ejaz Haider, ran afoul of the Ashcroft order for visitors from Muslim countries, under menacing circumstances. Invited to Washington by the State Department, he was walking into the Brookings Institution in late January to attend a conference when two armed men in plain-clothes stopped him. They told him they were agents of the Immigration Service and took him to a jail in Virginia. He had appar-

ently failed to report back to the INS after 40 days; Haider said the State Department had told him he did not have to.

But he was lucky. Stephen Cohen, the director of Brookings' South Asia program, saw him seized and acted at once to get him out of jail. The Foreign Minister of Pakistan, who happened to be in Washington that day and was a friend of Haider's, took the matter up with Attorney General Ashcroft and Secretary of State Colin Powell; Haider was released. Others, without those high contacts, would have stayed in detention indefinitely, in secret, and been deported. Stephen Cohen of Brookings said, "I never thought I'd see this in my own country: people grabbed on the street and taken away."

Now it is not unusual for civil liberties to be crimped in this coun-



try in time of war or national stress. It has happened again and again. Right at the beginning, in 1798, Congress passed a Sedition Act that made it a crime to criticize the president. The country was gripped by fear: fear that the Jacobin revolutionaries of France would export their terror to the new United States.

Though the French terror was the stated reason for the Sedition Act, it was in fact a political statute designed to suppress supporters of Thomas Jefferson in his anticipated run against President Adams in 1800. A number of Jeffersonian editors were prosecuted and convicted of abusing the president. So was a pro-Jefferson Congressman, Matthew Lyon of Vermont. He had published a letter to the editor saying that Adams was engaged in “a continual grasp for power, in an unbounded thirst for ridiculous pomp, foolish adulation and selfish avarice.” For that, Lyon was convicted and sentenced to four months in prison and a fine of \$1,000: an enormous sum and one that Lyon could not pay. He remained in prison.

When Jefferson won the election and took office in 1801, he pardoned all those convicted under the Sedition Act. In a letter to Abigail Adams, he said he “considered that law to be a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image.”

Isn't it wonderful, by the way, that the two of them corresponded despite their political differences? For Mrs. Adams agreed with her husband when he signed the Sedition Act into law, and she called Jefferson's supporters “the French party.”

In the experience of 1798 to 1801 you can see how this country, for

all its commitment to freedom, can react to a perceived threat — phantom threat, in that case — with repression. Soon afterward nearly everyone repented of the Sedition Act. It was wisdom after the fact: a pattern that would be repeated.

In World War I, Congress passed another Sedition Act at President Wilson's behest. It prohibited all kinds of speech that might be thought to inhibit government policy.

A. Mitchell Palmer, Wilson's attorney general, rounded up several thousand supposedly radical aliens for deportation — the most sweeping action of its kind until John Ashcroft's roundup after Sept. 11. There were numerous federal and state prosecutions. A group of anarchists and socialists who threw leaflets from the tops of buildings in New York criticizing President Wilson's dispatch of troops to Russia after the Bolshevik Revolution were convicted in federal court and sentenced to 20 years in prison — that for criticizing a president's policy.

The Supreme Court upheld conviction after conviction. But judicial dissent began, in the eloquent opinions of Justice Oliver Wendell Holmes Jr. and Louis D. Brandeis. The Constitution commits us to free trade in ideas, Holmes wrote. “It is an experiment, as all life is an experiment.... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death.”

We have repented, as a nation, for the repressive prosecutions of political dissidents in those years. The Supreme Court has adopted the views of Holmes and Brandeis,

making speech in this country freer, I believe, than anywhere else in the world.

But of course there have been further episodes of repression and repentance. The one most familiar to us, I suppose, was Franklin Roosevelt's World War II order to move 100,000 Japanese-Americans from their houses on the West Coast and detain them in desert prison camps. We salved our national conscience for that, eventually, by paying the survivors modest compensation.

To glance at the episodes of repression in our history is to realize that there is something different about the threat to civil liberties today. This time a claim of executive power to override constitutional rights is being made in a war whose end we cannot predict or even define. The terrorists are not going to board the battleship Missouri and sign a surrender. That indefiniteness makes the threat to our liberty more profound. And it should lead us to examine with care the legal propositions being advanced by President Bush, Attorney General Ashcroft and the rest.

It is those propositions, those claims of power, that raise the present danger. The Bush administration has not arrested a high-profile dissident. But under cover of cases involving obscure, suspicious-sounding persons, it is asserting legal claims that, if sustained, would haunt us for the indefinite future.

All this is happening with not much attention from the American public. I suppose it is natural for people not to notice, or not to care, when those whose liberties are being taken away are different from us — when they are aliens, Muslims accused of a connection with terror-

ism. We may not identify our interests with theirs. But freedom for the comfortable depends on freedom for the uncomfortable. It is a great mistake to assume that repression of someone different from you will stop there. Remember what Pastor Niemoller said about not caring when the Nazis came for the Jews and the Communists — not caring until they came for him.

Where can we look for hope of maintaining freedom during a war without end? The natural American answer would be: Look to the courts. But through much of our history courts have bent to claims of presidential power in time of war. So they did, notably, when the Supreme Court upheld Roosevelt's detention of the Japanese-Americans in World War II. The opinion was written by that great libertarian justice, Hugo L. Black. The Court must accept, he suggested, the judgment of "the properly constituted military authorities."

Four years ago, when no war was on the horizon, Chief Justice William Rehnquist published a book about courts and civil liberties in wartime. After looking over the record, he concluded that judges are reluctant to enforce constitutional guarantees against the government's wishes "on an issue of national security in wartime." He hardly mentioned the suffering endured by victims of repression, like the Japanese-Americans in World War II.

A very different approach has been urged by the president of the Supreme Court of Israel, Aharon Barak, a judge much admired around the world. In an article in the *Harvard Law Review* last November he discussed the challenge of terrorism for constitutional

courts. "Terrorism does not justify the neglect of accepted legal norms," he said. "This is how we distinguish ourselves from the terrorists themselves. They act against the law, by violating and trampling it, while in its war against terrorism, a democratic state acts within the framework of the law.... It is, therefore, not merely a war of the State against enemies; it is also a war of the Law against its enemies."

When courts defer to the executive's claim of military necessity, there is a particular danger that was identified by Justice Robert H. Jackson when he dissented from the 1944 Supreme Court decision upholding the removal of the Japanese-Americans from their homes. A judicial decision upholding the president's order, he said, "is a far more subtle blow to liberty" than the order itself. He continued:


"A military order, however unconstitutional, is not apt to last longer than the military emergency.... But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.... A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that incident becomes the doctrine of the Constitution."

Will our judges, in the end the justices of the Supreme Court, speak in the spirit of Robert Jackson

and Aharon Barak to the claim that unbridled executive power is needed to deal with terrorism? We cannot predict. But judges are not immune from the sense of vulnerability, of fear, instilled in all of us by Sept. 11, 2001.

During the agitation over French terror and the Sedition Act of 1798, James Madison wrote Vice President Jefferson: "Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad." How farsighted the framers of our Constitution and Bill of Rights were. What Madison perceived proved true again and again over the next two centuries. But perhaps we should take some satisfaction from that record. For the fact is that, for all the dark episodes in our history, and all the harm to individuals, the United States two centuries after its birth was an astonishingly free country.

The question is whether our commitment to freedom will prove as resilient in an endless conflict with terrorism. Much depends on the answer. America's extraordinary strength has been produced by an open society. American power in the world has been as much the power of its ideals — of freedom — as of its weapons. If terrorism leads us to close down the society, then the terrorists will have won.

"Freedom and fear are at war," President Bush said in an address to Congress on Sept. 20, 2001. In a sense different from what he meant, so they are. 

State Bar Navigates Legislature's 'Perfect Storm'

By Mark Middleton

Amid a legislative session described by some as a political "Perfect Storm," the State Bar achieved important, and even historic, legislative success. Of the eight State Bar agenda bills that passed both the House and Senate, the major accomplishment is the creation of a statewide indigent defense system modeled on recommendations advocated by the State Bar. The State Bar also successfully defended the right of access to justice, and passed important legislative agenda items originating in the State Bar's Appellate, Business Law and Real Property sections.

This year's historic General Election produced a unique environment for all involved in the legislative effort. First, the legislative session got off to a predictably slow start as new leaders settled

into key positions within the executive and legislative branches. The first Republican Governor of Georgia since Reconstruction entered office with an entirely new staff. That first legislative day also ushered in new leadership in the House of Representatives and in the State Senate, newly controlled by a Republican majority. Also, approximately one-third of the 2003 General Assembly consisted of freshman representatives and senators representing newly drawn districts. As these new leaders and members attempted to settle into their roles, they found themselves facing extremely difficult issues such as the state flag, predatory lending, education reform, ethics, water resource management and the worst budget crisis in more than half a century.

Despite these uncertainties, the State Bar once again effectively advanced the Board of Governors' legislative proposals and funding initiatives as several State Bar bills were passed and await the governor's signature. In addition to indigent defense reform, the General Assembly passed bills clarifying the corporate code's merger provisions, expanding the potential of the Georgia Supreme Court to

accept certified questions of law from Federal District Courts and adding additional exemptions to the real estate transfer tax.

The State Bar also supported successful efforts to create a right of discovery in juvenile court matters, and a technical bill to provide authority to the Office of Bar Admissions to continue background checks on Bar applicants. The Bar also provided leadership and considerable scholarship in opposing several controversial tort reform initiatives.

As always, the State Bar worked diligently to support state funding for various judicial programs. For example, at various stages in the legislative process, funding for important programs such as the Appellate Resource Center, BASICS, and Indigent Defense grants were completely gutted. The State Bar's legislative representatives worked to restore funding for each of these programs.

2003 Board of Governor's Agenda

HB 770: Indigent Defense Reform — At the urging of the State Bar, the General Assembly created a state-wide system organized by the 49 judicial circuits.

The State Bar's current leadership, as well as the many individual members who participated in this historic effort, are to be commended for this great achievement.

Under the bill, a state board will set standards and provide accountability to the local systems. The legislation addressed local concerns by providing a narrow opt-out provision and a local committee to select the circuit public defender. "This is a landmark achievement for the state of Georgia," said Jim Durham, president of the State Bar. "I am proud that the State Bar took a courageous stand in support of this process." State Senator Chuck Clay, R-Marietta, concurred: "Without the State Bar's effective advocacy of the issue, the bill would not have passed. We're standing up and giving meaning to the Constitution."

Many legislators played significant roles in the passage of this bill. Senator Chuck Clay gave the issue its early momentum as his Senate bill was passed almost immediately. At about the same time, the governor endorsed the passage of indigent defense legislation, and on several occasions reminded the legislature of his commitment to indigent defense reform. In the House, the effort was sustained by Speaker Terry Coleman, D-Eastman, who, despite the demands of his new role as speaker, took a personal interest in the matter, and saw it through to conclusion. Speaker Pro Tem Dubose Porter, D-Dublin; Senate Judiciary Chairman Charlie Tanksley, R-Marietta; House Judiciary Chairman Tom Bordeaux, D-Savannah; Senate Minority Leader Michael Meyer

Von Bremen, D-Albany; Rep. Stephanie Stuckey Benfield, D-Decatur; and Senator Chuck Clay served on the Conference Committee that negotiated the bill in the final hours of the session. "This effort benefited from the State Bar's historically bipartisan approach to legislation," stated State Bar President-Elect Bill Barwick. "We are grateful to the leadership of the Senate and the House for their support of the bill."

The passage of this bill follows the recommendations of the Chief Justice's Indigent Defense Commission, which was supported by resolution by the State Bar's Board of Governors last year. "This is a landmark piece of legislation," said Speaker Pro Tem Dubose Porter. The State Bar's current leadership, as well as the many individual members who participated in this historic effort, are to be commended for this great achievement. State Supreme Court Chief Justice Norman Fletcher applauded the effort. "You've done a great thing for Georgia and taken a giant step forward toward ensuring equal justice for all."

Other Bills Awaiting Governor's Signature

HR 68 and HB 164: Certification of Questions of Law to the Georgia Supreme Court — This Appellate Section proposal allows Federal District Courts to certify questions of Georgia law to the Supreme Court of Georgia. H.R. 68

allows for a referendum for an amendment to the Georgia Constitution during the 2004 General Election. Rep. Tom Campbell, R-Roswell, authored the resolution and the companion bill. Senator Preston Smith, R-Rome, provided leadership in the Senate.

SB 97: Additional Exemptions from Transfer Tax — This Real Property Section proposal expands the exemptions from transfer taxes for conveyances from individuals to entities that they control. This bill had a tortured existence as it was amended several times in the closing days of the session. The State Bar owes a special thanks to the bill's author, Senator Bill Hamrick, R-Carrollton, and Rep. Larry Walker who amended the bill on the floor of the House to reinsert the State Bar's language on the exemptions.

SB 211: Corporate Code Revisions — This Business Law Section initiative conforms Georgia's merger provisions to the Delaware model act. Two of the legislature's rising stars worked diligently to ensure passage of this important legislation. Senator David Adelman, D-Decatur, authored the bill, and Rep. Jim Stokes, D-Covington, shepherded the measure through the House. "We are grateful to all of our friends in the legislature," said Jeff Bramlett, chair of the Advisory Committee on Legislation.

HB 90: Bar Admissions Fingerprints — This bill by Rep. Mike Boggs, D-Waycross, was requested by the Office of Bar Admissions. New FBI policy requires them to have statutory permission in order to continue their longstanding practice of sending fingerprints to the FBI for background checks.

SB 116: Juvenile Discovery —

This bill initiated by the Indigent Defense Committee provides for discovery in juvenile court proceedings. The bill was authored by Sen. Bill Hamrick, an emerging Senate leader. Rep. Stephanie Stuckey Benfield, a recognized legislative expert on children's issues, handled the bill in the House.

Appropriations —

Fortunately, the judiciary suffered less pain than other state programs. Indigent Defense received approximately \$2 million in new funding. All other State Bar endorsed funding programs such as CASA, Appellate Resource Center, and Victims of Domestic Violence were spared budgetary cuts beyond the "across the board" cuts received by all agencies. The State Bar provided assistance on returning funds to the BASICS and the Appellate Resource Center, which had been totally eliminated by the Senate.

**Bills Opposed
by the State Bar**

SB 133: Tort Reform — Senate Bill 133 contained numerous tort reform measures that were supported by the medical and business communities. In opposing the bill as originally filed, the State Bar focused on the rights of Georgians to have access to our judicial system. This position was very similar to the State Bar's position in 1986, the last major tort reform effort. This year, the State Bar produced a comprehensive paper addressing each of the issues raised by SB 133. Many of the State Bar's guidelines and suggestions in that paper were followed by the legislature as they passed an 11th hour modified tort reform package. The final package included class action reform as supported by the State Bar, forum non conveniens language that will make it more difficult for an out of state plaintiff to maintain a suit in Georgia, a dis-

missal rule change that reduces the number of times a plaintiff can dismiss a lawsuit, and language allowing for structured settlement. "This compromise tort reform package addresses many of the concerns expressed by the business and medical communities, and does so without limiting a citizen's constitutional right of access to the courts...and that's the key," said Jim Durham.

SB 195, HB 810, 811: Clerk's Authority Fee — Once again, the Superior Clerk's Authority sought an elimination or extension of the sunset provision affecting the \$5 real estate transfer fee that funds the deed indexing project. The State Bar has effectively maintained that the sunset provision provides accountability for the use of the funds, which are designed for the indexing project.

HB 91: Arbitration Appeals — HB 91 amends the arbitration code to provide for an appeal if the arbitrator 'manifestly disregards' the

law in making a decision. This legislation addresses a Georgia Supreme Court ruling in *Progressive Data v. Jefferson Randolph Corp.*, 275 Ga. 420 (2002). The bill was held by the Senate leadership in the closing hours of the session, but the bill's author, a member of the tort reform conference committee, worked effectively to have the language added to the tort reform package.

State Bar Bills Carrying Over to 2004 Session

Progress was made on the following State Bar bills, which will be taken up again in the 2004 session.

HB 229: Guardianship Code Revision — The Fiduciary Section's bill reorganizes and updates the Guardianship Code. The bill ran into delays in the House, where some members wanted to hear more from fiduciary practitioners on the bill. The legislative representatives anticipate a busy summer discussing the merits of this bill with members of the legislature. "Legislation of this magnitude is rarely accomplished in one year," stated legislative representative Rusty Sewell.

HB 322: Appellate Code Revision — This bill, authored by Rep. Nick Moraitakis, D-Atlanta, would cross-reference all statutory rights of appeal, and provide a safe harbor for interlocutory appeals that are mischaracterized by practitioners. The bill passed the House of Representatives and will be considered again next year.

HB 654: Recordation of Notices of Foreclosure of Right to Redeem — This Real Property Section proposal would require a public notice that the third party right to redeem has been exercised. This bill

authored by Rep. Mack Crawford, R-Pike County, received favorable consideration from the House Ways and Means Committee, but was held because of concerns that the bill will receive unfriendly amendment relating to the sale of tax FIFAs. Despite Rep. Crawford's procedural skill in adding the language to a related Senate Bill, the measure did not pass before the end of the session.

Bar Section Program


The Bar continues to rely on its Bar Section Legislative Tracking Program in which Bar Section members monitor bills of importance to the Bar during the legislative session. Bar members tracked bills through the Georgia General Assembly Web site, and numerous bills were sent out to the sections for review and comment. Our thanks goes out to all Bar members who provided timely responses to the legislative representatives regarding issues affecting the practice of law. "The participation of the various Sections is vital to the success of the State Bar legislative program," said Tom Boller. "Their expertise gives us tremendous credibility as we present the State Bar's views to the legislature."

Conclusion

Despite the unpredictable session, this has been an extraordinarily productive and successful legislative session for the State Bar. The State Bar is grateful to Gov. Sonny Perdue for his support of indigent defense reform and other State Bar initiatives. Also, many individual legislators played significant roles in support of the State Bar. The State Bar thanks Speaker Terry Coleman, Speaker Pro Tem Dubose Porter, and the Republican

leaders Lynn Westmoreland, R-Sharpsburg, and Jerry Keen, R-St. Simons. We also owe special debts of gratitude to old friends like the chairmen of the House and Senate Judiciary Committees, Rep. Tom Bordeaux and Sen. Charlie Tanksley, and Special Judiciary Committee Chairs, Sen. Rene Kemp, D-Hinesville, and Rep. Curtis Jenkins, D-Forsyth.

Also, several new lawyers in the Capitol supported the State Bar as well. Freshman legislators such as Rep. Nick Moraitakis, Senator Preston Smith and Senator David Adelman quickly came to the aid of the State Bar. In the Governor's office, Executive Counsel, Harold Melton, a former Assistant Attorney General, and Deputy Executive Counsel Robert Highsmith, a former member of the State Ethics Commission, stepped forward at critical times to support the State Bar.

Clearly, this session will be remembered by many as a frustrating and confusing session. However, for the State Bar, 2003 will stand as a year of extraordinary accomplishment. With a continued commitment to our bipartisan approach and with the ongoing support of the many participating lawyers, the State Bar looks to build upon this success in the future. 

The State Bar legislative representatives are Tom Boller, Rusty Sewell, Wanda Segars and Mark Middleton. Please contact them at (404) 872-2373 for further legislative information, or visit the State Bar's Web site at www.gabar.org.

BOG Meets in Masters Territory for Spring Meeting

By Daniel L. Maguire

It wasn't quite the Master's tournament, but members of the Board of Governors came close at their 190th meeting in Augusta. President James B. Durham oversaw a successful weekend, where attendees enjoyed the celebratory meals of past tournament winners at the "Feast on the Fairway" at Augusta Golf and Gardens. Although the members didn't make it to Augusta National, they did manage to play a round at the River Golf Club and examine a collection of Southern artwork at the Morris Museum of Art.

During the BOG meeting, President Durham recognized William Zachary Sr. in memoriam, as well as the past presidents of the State Bar, members of the judiciary, and other special guests in attendance. Other highlights of the meeting include:

Treasurer's Report and Finance Committee

After a discussion on the 2003-04 Bar dues and the concept of dues indexing, the Board approved



BOG member Sam Matchett takes a practice swing during the Friday evening Feast on the Fairway.

assessments for the Bar Facility and Clients' Security Fund for new members, a \$20 legislative check off, solicitation for Georgia Legal Services Program charitable giving with a suggested contribution of \$125 and sections dues ranging from \$10 to \$25.

The Board set dues for 2003-04 at \$190 with indexing annually thereafter at 4.5 percent, subject to ratification by the Board each year.

Multijurisdictional Practice

Following a report by Dwight Davis and Chris Townley, the Board approved the committee's final report and recommendations.

The complete report is available on the Bar's Web site at www.gabar.org.

Elections Committee

Following Deputy General Counsel Bob McCormack's report, the Board unanimously approved the following amendments to Article VII, Nominations and Elections:

Sections 2 (a), 7, and 9 removed the set dates for nominations, incumbent petitions, ballots, and reporting results in anticipation of the protocol set by new Section 14.

Section 14 was added, determining that the Elections Committee should publish a schedule with deadlines for nominations, election



President-Elect Bill Barwick visits with BOG member Leland Malchow.



President Jim Durham and his wife, Kathleen, take a leisurely stroll to the Friday event.



BOG member Gary Allen and his wife, Mary Lynn, enjoy the Augusta Golf and Gardens.



President Durham presents a check to Georgia Legal Services Program Executive Director Phyllis Holman.

notices, etc., at least 15 days prior to the Executive Committee meeting immediately preceding the Fall board meeting.

Real Property Law

Aasia Mustakeem gave a report on revising title standards, and the Board granted unanimous approval to the proposed changes to Georgia Title Standards, Chapters 9, 10, 12, 13 and 15.

Young Lawyers Division

Derek White reported on the YLD's activities, including its new YLD Director, Deidra Sanderson, and Operation Enduring Lamp, a pro bono project providing legal assistance to military families.

Advisory Committee on Legislation

Following a report by Jeffrey O. Bramlett on proposed legislation, the Board approved three legislative proposals:


- Endorsement of Executive Committee's Response in Opposition to Tort Reform (S.B. 133)
- Frivolous Litigation (S.B. 225)
- Class Action reform (H.B. 792)
- The Board also voted to oppose H.B. 91, a bill that would allow for appeal from arbitration on the basis of a "manifest disregard" of the law. For a legislative summary for this session, see the article on page 37.

Standards of the Profession Committee

Chair John Marshall reported on the mentor program proposed by the Bar's Standards of the Profession committee; the proposal recommends the establishment of a mandatory "Transition into Law Practice Program" for beginning

lawyers in Georgia. The program would provide professional guidance and counsel for attorneys who are practicing law in Georgia for the first time and will be considered by the BOG at its Fall meeting.

Georgia Legal Services Program

President Durham presented Georgia Legal Services Executive Director Phyllis Holmen with a check for \$307,000 representing contributions received for the Georgia Legal Services Program's Justice Campaign. 

Daniel L. Maguire is the administrative assistant for the Bar's communications department and a contributing writer to the *Georgia Bar Journal*.

From left: Tommy Burnside, George Mundy, Jeff Bramlett and Gerald Edenfield discuss the Advisory Committee on Legislation.



Kathleen Durham, left, and Fay Foy Franklin talk about their husbands' respective years as president of the State Bar.



Diversity CLE and Luncheon Bring Issues to Light

By Sarah I. Bartleson

Georgia legal professionals interested in diversity gathered at the Hyatt in Atlanta on March 27, 2003, for a CLE conference and luncheon held by the State Bar of Georgia Diversity Program. The CLE included a presentation titled, "A Candid Conversation with the Bench." The panelists included judges J. Antonio DelCampo, Susan B. Forsling, M. Yvette Miller, Linda T. Walker and Alvin T. Wong.

The panel of judges spent the morning discussing important diversity issues. They pointed out that Atlanta has changed over the years, and expressed their beliefs that those changes need to be reflected in the jury panel. Initially, the panel discussed the importance of a diverse jury pool, diverse counsel and a diverse judiciary. With so many minorities that come before the bench, the panel believes it's important to bring these issues to light and make an effort to improve the current state.

Diversity in the judiciary was a topic that caused the judges to have a heartfelt discussion. "In DeKalb County, 50 percent of the popula-



Pictured left to right: The panelists included Judge Alvin T. Wong, Chrisna Jones Walker (moderator), Judge Susan B. Forsling, Judge Linda T. Walker, Judge M. Yvette Miller and Judge J. Antonio DelCampo.

tion is African-American, and we don't have an African-American state court judge here," said Judge Wong, the first Asian-American to be elected judge in the Southeastern United States. "I got to the bench by running, which has its pluses and minuses," he said. "You might be a very good politician, but not a very good lawyer. How do we change that? If you have a desire to be a judge, build your network, get involved in the Bar and volunteer in your community. Then, if you decide to run, you have a community base to run on."


Judge Miller, the first African-American woman to serve on the Georgia Court of Appeals, added

that "We need to hear from all segments of the population. Not just in terms of gender and race, but also life experiences. Diversity increases the dialogue and helps you get to a more thoughtful decision. The way to increase the trust and confidence in the public is to make the bench diverse."

The importance of having a jury of peers was also discussed at length. Panelists agreed that when you are in a courtroom, it is comforting to see a face that looks like yours in the jury. "I believe there is a fundamental lack of using *Batson*. It's sensitive. No one wants to stand in front of their judge, and other lawyers, and raise a *Batson*

charge,” said Judge Forsling, State Court of Fulton County. “I am a judge that is not afraid of *Batson*. The most you will see in *Batson* is replacing a few jurors. It needs to be utilized more, with sensitivity.”

The second half of the program included a luncheon and discussion of “The Role of Race and Other Factors in University Admissions,” by keynote speaker Ted Spencer, the director of undergraduate admissions at University of Michigan.

An awards presentation was also part of the luncheon, and the following Diversity Program awards were given: the Distinguished Service Award to Brent L. Wilson; the Exceptional Service Award to Constangy, Brooks & Smith, LLC; and the Corporate Service Award to Equifax Inc. 

Sarah I. Bartleson is the assistant director of communications for the State Bar of Georgia.



Pictured left to right: Tim L. Williams, Michelle Staes (Diversity Director) and Ted Spencer, who was introduced by Williams before his presentation.



State Bar Past President Charles T. Lester Jr. and BOG member Judge Patrise Perkins-Hooker were among the many attendees at the CLE conference and luncheon.

IOLTA Wins Monumental Victory

By Len Horton

Almost half a decade after IOLTA's 5-4 loss in the *Phillips* decision by the U.S. Supreme Court, Interest On Lawyer Trust Account programs in every state in the union won their most impressive and significant victory. This time, the U.S. Supreme Court decided in a 5-4 vote that IOLTA was not an unconstitutional taking of client property. The victory was made possible by convincing Justice Sandra Day O'Connor. She had previously voted against IOLTA in the *Phillips* case.

The *Phillips* case taught us that IOLTA is very difficult to understand. IOLTA's opponents did a better job of attacking IOLTA before the *Phillips* decision than IOLTA programs did of explaining and justifying IOLTA. This time the IOLTA community decided it would be better explainers of IOLTA than ever before. The world might not agree with us, but it was going to understand us. Steve Melton, president of Columbus Bank & Trust Company and the Georgia Bar Foundation, explained it clearly for everyone in an editorial in *The Atlanta Journal-Constitution*.

"I feel guilty," he wrote, "when I think about the table scraps we throw away that could feed people less fortunate. If only there were a way to collect all the scraps from

all the dinner tables in America, no one would ever go hungry."

"A little known charity actually has figured out how to save what I call legal table scraps to help thousands of poor people throughout the nation. It's called IOLTA, which stands for Interest On Lawyer Trust Accounts. Here's how it works. You need to see a lawyer because you have a legal problem. After talking with him, he asks you for money to pay filing fees and other future expenses of representing you. You write him a check."

"By law he is required to do one of two things with your money. If it is a lot of money that can be invested long enough to earn net interest, the lawyer will open a separate bank account for you. If it is a small sum, say \$1,000, and the legal work should be finished quickly, say within one month, investing that \$1,000 at one percent (current rates) for one year would bring \$10, or 83 cents for one month."

"You probably want your 83 cents. Unfortunately, bank fees on the account probably will be much more than that, and doing

the work to set up a separate account to pay net interest to you costs your attorney money. Maybe \$20 or more after employee time is charged. Would you want that 83 cents interest if you had to pay more than \$20 for it? I don't, and I bet you don't either."

"More importantly, when your \$1,000 is combined in an IOLTA account with scores of other small amounts from other clients handled by that same attorney, the sum may generate enough interest to pay for account costs and still have money left over. That leftover money is then sent to a legal charity to help provide legal assistance to the poor, to fight child abuse, to educate our children about government, etc."





As a full-time banker, Steve went on to say, "Lawyer clients cannot be helped by killing IOLTA. In that event we bankers will just keep more money. Before IOLTA we kept that money, and, if IOLTA dies, we will keep it again."

The charity in Georgia that receives IOLTA account interest is the Georgia Bar Foundation. Thanks to efforts of many IOLTA supporters all over the country, including Melton's article in the *AJC*, IOLTA was beginning to be understood. Would you as a lawyer's client insist on getting your 83 cents if you had to pay more than \$20 for it? Not even a lawyer for the Washington Legal Foundation would want to do that.

What apparently carried the victory was the realization by Justice O'Connor and four other justices that a client had to lose something that could be calculated to be greater than zero. Since a client's loss from IOLTA is never greater than zero, no compensation was due. If no compensation is due a client, then there is no way for IOLTA to violate the Fifth Amendment of the United States Constitution.

If client money is mistakenly put in the lawyer's IOLTA account when it could have been profitably invested for the client, IOLTA programs will refund the interest. No interest that could have gone to the client is kept for IOLTA.

In a dissent both brief and fore-

boding, Justice Kennedy encouraged a future attack on IOLTA using the First Amendment, even though he thought the Fifth Amendment assault should have succeeded. Basking in the spring sunshine of a favorable IOLTA decision, our supporters realize that the legal war may continue. As of mid April, the Washington Legal Foundation has not said whether it intends to pursue any First Amendment claim.

In Georgia, the news of victory spread like dogwood blossoms in an Easter wind. I talked individually with many of the Bar leaders who supported IOLTA from its inception and who did the hoeing and tilling necessary to make it grow. I interrupted John Chandler from a meeting to tell him the news. "This had better be good," he said. He forgave me and was almost as excited as I was.

Bob Brinson, who let me use "A Painless Way To Give" as our marketing slogan during the voluntary days, was ecstatic. He was with me every step of the way during the rocky start-up time when limited bank branching made our first revenues pitiful. He never gave me anything other than encouragement.

Former Chief Justice Tom Marshall, who signed the letters that went to every Georgia attorney as part of the kickoff of voluntary IOLTA, was as happy as any-

one. His willingness to put himself on the line got the program started. And he continues to be active today as a member of the Board of Trustees of the Georgia Bar Foundation.

When I presented the facts about what could happen to IOLTA revenues if Georgia's program were mandatory, several Bar leaders pitched in. They had learned that, if voluntary IOLTA revenues can be represented as 1X, then opt-out IOLTA could be 3X and mandatory IOLTA 8X. In other words, the \$50,000 per month in voluntary IOLTA could become \$400,000 per month in a mandatory program. Even with ridiculously low interest rates on IOLTA accounts in 2003, we currently are averaging more than \$400,000 per month.

Jim Elliot made it his personal mission to sell the world on mandatory IOLTA, and he succeeded. Cubbedge Snow did the behind-the-scenes negotiating that created the basic understanding that still exists today. His efforts, combined with those of Foy Devine, were the basis for work by Chief Justice Harold Clark to reach an agreement with Speaker of the House Tom Murphy and the Georgia legislature to send 40 percent of net IOLTA revenues to the Georgia Indigent Defense Council. In 2002 that amounted to about \$2 million. To this day, many lawyers and certainly many legislators do not know that, in addition to their time, Georgia lawyers through IOLTA have contributed more than \$17 million to criminal indigent defense through their IOLTA accounts.

Leading the way in educating the legislature about IOLTA, former Superior Court Judge Beth Glazebrook played a vital role in

making IOLTA's future in Georgia secure.

As part of the agreement facilitated by Cubbedge and Foy and negotiated by Chief Justice Clark, 10 percent goes to the Georgia Civil Justice Foundation. GCJF, under the able leadership of Fred Smith, funds the Layman's Lawyer television program and the People's Law School.

Almost forgotten are the contributions of scores of Bar leaders who participated in meetings devoted to IOLTA and whether and how it should be developed. As early as the late 1970s and continuing until the Supreme Court of Georgia ordered the creation of voluntary IOLTA in 1983, regular discussions were held about how to implement IOLTA. Frank Love, John Graham, Bo Bradley, Jule Felton, Hon. Duross Fitzpatrick, Lit Glover, David Gambrell, Kirk McAlpin, Evans Plowden, Hon. Adele Grubbs and Bob Reinhardt, to name a few, gave freely of their time.

Doug Stewart was omnipresent and always the advocate for IOLTA. He assumed leadership roles everywhere he served, and he served everywhere, including helping IOLTA nationally.

Many people do not realize the important role played by Gene MacWinburn. During oral argument to consider whether to convert IOLTA in Georgia to mandatory, he provided valuable reassurance to the Supreme Court of Georgia as it wrestled with arguments both for and against.


The Supreme Court of Georgia did much more than issue the orders creating and expanding IOLTA. It debated and discussed and held a public hearing about IOLTA. It sincerely listened to

lawyer concerns and created innovative ways of dealing with those concerns. Out of the feedback it received came the IOLTA exemptions that made mandatory IOLTA acceptable to most Georgia lawyers.

One person who assisted our Court and facilitated the meetings and collated the materials and provided other invaluable support was Nanci Caldwell, who has assisted both Chief Justice Thomas O. Marshall and Chief Justice Norman S. Fletcher. Both chiefs provided critical leadership at critical points in IOLTA's growth. Chief Justice Marshall was instrumental during the beginning phase, and Chief Justice Fletcher along with Justices Sears, Benham, Hunstein, Carley, Thompson and

Hines came to IOLTA's defense when many lawyers favored shutting down IOLTA immediately after the *Phillips* decision by the U.S. Supreme Court.

Always ready to help no matter what the challenge du jour, Charlie Lester and the resources of Sutherland Asbill & Brennan are awesome support for IOLTA and the Georgia Bar Foundation.

Thank you to every Georgia lawyer who has or has ever had an IOLTA account. And thank you to Georgia's bankers who have helped IOLTA grow. To you this is a major victory. To the thousands of people helped by IOLTA it is a monumental victory. 

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

Lawyers Foundation to Award Challenge Grants

By Lauren Larmer Barrett

The Lawyers Foundation of Georgia will award its 4th Challenge Grants this year. These grants have been awarded to a variety of organizations around the state over the past three years. 15 grants have been awarded, totaling more than \$90,000. In addition, these grants have been used to generate at least \$90,000 more in contributions to the organizations which received the grants.

These grants have served to inspire and motivate many lawyers around the state to reach out to their community and their profession, resulting in direct and indirect benefits to everyone involved. Each of the projects described below illustrates a need in the community met by the lawyers of Georgia. The following is a summary of these grants, their recipients and their results.

Georgia Legal Services

Georgia Legal Services Program was founded in 1971 to provide free legal assistance to low-income persons in the 154 counties outside the Atlanta metro area. GLSP staff

have provided free legal assistance to more than 350,000 low-income clients throughout rural Georgia. Twelve offices across the state serve clients in 154 counties, excluding only the five-county metro Atlanta area.

Each GLSP office provides legal services to clients living at or below 125 percent of the poverty level. GLSP attorneys provide legal representation, advice and counsel, and educational programs to clients on legal issues involving family, housing, employment, consumer and health care problems. Many of those clients are members of working families. Two-thirds of GLSP clients are women, many of them mothers.

GLSP is the only source of legal assistance to low-income clients and organizations serving low-income clients in many areas outside metro Atlanta. With a 29-year history of service to low-income communities, GLSP possesses unparalleled access to and familiarity with rural Georgia.

2000 & 2001 – The Individual Rights Section and Access to Justice Committee received challenge grants for the public awareness campaign, Promoting Equal Justice Program of Georgia Legal Services. The grants were used to prepare materials to implement the campaign to raise awareness of and

increase support for legal services for low-income Georgians. This project took many hours of effort from the staff and volunteers of Georgia Legal Services. The project is now being rolled out across the state, resulting in many more low-income Georgians learning about how they have the support of Georgia Legal Services for their unmet legal needs.

2002 – 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 legal 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.

A Business Commitment Committee

In collaboration with the State Bar of Georgia, GLSP's Pro Bono Project recruits volunteer attorneys

to represent low-income clients on a variety of poverty law issues. With the assistance of the State Bar, they currently serve more than 25 community-based organizations engaged in affordable housing development, micro-enterprise, job creation and training activities, development of community recreation and service facilities, and other ventures. One of the Pro Bono Project's programs is A Business Commitment Project.

2001 & 2002 – The ABC committee allows business lawyers to provide pro bono legal services to groups and non-profit organizations serving the needs of low-income Georgians. One of the many projects they have completed is tax appeal training for attorneys, allowing the volunteer attorneys to help many groups with their tax issues.

Athens Justice Project

The Athens Justice Project helps indigent persons charged with crimes in their commitment to lead crime-free lives as self-supporting, productive citizens. It combines legal representation and social support for its clients. The AJP staff works with each client to address the causes of their involvement with the system, including substance abuse and the need for vocational training. It has strong support from the Athens community, including the University of Georgia's Schools of Law, School of Social Work and the Western Circuit Bar Association.

2002 – The Western Circuit Bar Association was awarded a grant in the amount of \$7,200 for the Adult Literacy Project of the 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.

Western Circuit Bar Association

2000 – The Western Circuit Bar Association Student Literacy Project provided each child in Gaines Elementary School with a book for his or her birthday, and will enlist judges and attorneys to read to the students twice a week.

Cobb Justice Foundation for Legal Aid

The Cobb Justice Foundation provides legal representation for low income individuals in Cobb County.

2001 – The Cobb County Bar Association received a grant for the Cobb Justice Foundation for Legal Aid. Legal Aid has represented Cobb's poor in civil legal cases for decades. Their work helps their clients deal with some of life's most basic needs – a safe home, enough food to eat, a decent education, protection against fraud and personal safety. The grant from the Lawyers Foundation of Georgia enabled them to continue this valuable work and helped to strengthen the relationship between the Bar and Cobb Legal Aid.

Civil Pro Bono Project

The Georgia Association of Black Women Attorneys is a bar association formed in 1982 to serve the

needs and interests of black women attorneys. The Civil Pro Bono Project is a joint effort by GABWA and the Georgia Access to Justice Project to assist imprisoned mothers with civil legal matters involving their children. GABWA and GAJP have received funding from the Georgia Bar Foundation for this initiative. Through the Civil Pro Bono Project, GABWA and GAJP seek to: (1) link women to information on their parental rights and to attorneys for legal representation; (2) train lawyers to represent mothers in family law matters; (3) help clients make informed decisions and choices about their parental rights and responsibilities; and (4) disseminate information about the project so that others can learn from their efforts. To implement these goals, the Civil Pro Bono Project hopes to collaborate with other local bar associations, and other organizations throughout the state.

2001 – GABWA received a challenge grant for their Civil Pro Bono Project to provide direct legal services to incarcerated women with family issues that effect the relationship between the mother and her children.

Georgia Diversity Program

The State Bar of Georgia Diversity Program represents a major commitment to increase opportunities for ethnic minority attorneys in the assignment of corporate and governmental legal work. Participating corporations and government entities seek to forge a lasting working partnership with minority lawyers throughout Georgia. This program is open to all minority- and majority-owned law firms as well as corporations

and governmental agencies in Georgia.

2000 – The State Bar of Georgia Diversity Program Small Practice Development Center assists new attorneys in their efforts to start a small practice through start-up loans, mentoring and business planning.

Augusta Conference of African-American Attorneys

The Augusta Conference of African-American Attorneys is a 37-year-old organization composed primarily of lawyers of color who are located in Augusta and its surrounding areas. Through its members, ACAA is active in a wide array of political, civic and religious activities, and is strongly committed to the youth of the community.

2000 – The Augusta Conference of African-American Attorneys Scholarship Competition provides law school scholarships to those in need, in addition to promoting an understanding of the history of the legal principles and judicial rationale behind equal access to education.

High School Mock Trial Instructional Video

The High School Mock Trial Program is a national program in which attorneys, as coaches, work with high school students and their teachers. The students are taught how to conduct a trial, and high schools compete against one another at the state, regional and national level. The students who participate learn through experience how the legal system actually works and how they fit into the system. Law becomes real; the legal system is demystified. They also exercise

their leadership skills and learn to think on their feet and to think analytically.

2000 – The High School Mock Trial Program received a grant which it used to produce two videos: a one-hour training video and a 27-minute motivational video. The training video is a teaching tool to assist in preparation for team mock trial competitions, and the shorter tape is used to encourage participation by students, teachers and attorney coaches. It shows the general public how a competition of this nature works, and provides information on how to become active in the program. The video was submitted to the New York Film Festival competition, and was one of four finalists. It also captured an Award of Distinction at the Communicators Awards Ceremony in Arlington, Texas.

Public Interest Lawyers Fund

Last year, the Georgia Legislature created the Public Interest Lawyers Fund, which will provide educational loan forgiveness for attorneys entering public service in a variety of areas. However, funding has not yet been established by the state.

2002 – 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 either 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.

Douglas County Bar Association

2000 – The Douglas County Bar Association Community Action Project purchased law related materials for elementary, middle and high schools to expand opportunities for children to learn about the legal system, and to promote respect for the law and knowledge of career opportunities in the legal field.

The materials distributed were prepared by the Georgia Law Related Education Consortium, an association of institutions, agencies, organizations and individuals with a belief that law-related education is an essential element in helping Georgia's youth to develop into productive and law-abiding citizens. The purposes of the Georgia LRE Consortium include initiating, encouraging, developing and supporting LRE programs in Georgia and promoting and implementing the inclusion of LRE in pre-school, kindergarten through twelfth grade, post-secondary and adult curricula.

A majority of the members represent primary and secondary school education, both public and private; higher education; the legal community; the judiciary; government (including law enforcement); business; and community organizations. Other members are individuals who head state LRE programs or have an active commitment to LRE.

The Consortium was officially organized March 1990. It meets

twice a year with its activities conducted through committees and task forces. Participation on these is not limited to voting Consortium members. Projects include a statewide newsletter, *The LRE Circuit*; a state conference; promotion of LRE Week activities; a poster contest; awards to outstanding LRE teachers, supporters and students; the Georgia LRE Resource Directory; minority-directed workshops and materials; teacher training; youth at risk program training and materials; and support of LRE activities throughout the state.

Atlanta Volunteer Lawyers Foundation

The Atlanta Volunteer Lawyers Foundation, Inc., was created through the joint efforts of the Atlanta Council of Younger Lawyers, the Gate City Bar Association and the Atlanta Legal Aid Society in 1979 to offer lawyers an opportunity to provide civil legal representation for the poor. Since then, AVLAF has provided representation for indigent clients through the efforts of volunteer private attorneys, its student clini-

cal program and various outreach programs.


2002 – In response to the tragedy of Sept. 11, Atlanta Volunteer Lawyers Foundation created a project by which all emergency services personnel in Atlanta could have wills and advance directives completed for them and their spouse or partner at no cost. This project is available for duplication by other bar associations through the Lawyers Foundation of Georgia.

These projects touched many, many lives throughout the state of Georgia, and most can be duplicated by other groups. If your local or voluntary bar is interested in replicating any of these projects, please contact the Lawyers Foundation.

Every local and voluntary bar is encouraged to apply for a Lawyers Foundation Challenge Grant. These grants can help attorneys accomplish a great deal in their communities.

The Lawyers Foundation of Georgia serves a vital and unique role in the legal community of Georgia. As the philanthropic arm of the State Bar of Georgia, it is the only statewide law-related non-profit that can fund such a wide

variety of projects. It is also the only statewide non-profit 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. These same attorneys and the Board of Trustees choose its projects. Its purpose is to enhance the system of justice, and to support and assist the lawyers of Georgia and the communities they serve. Without the Lawyers Foundation, the attorneys of Georgia would have no organization that 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.

For more information, contact Lauren Larmer Barrett at the Lawyers Foundation of Georgia, 104 Marietta St. NW, Suite 630, Atlanta, GA 30303; (404) 659-6867; Fax (404) 225-5041; e-mail lfg_lauren@bellsouth.net; web www.gabar.org/lfg.asp. 

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



2003 CHALLENGE GRANT ANNOUNCEMENT

The Lawyers Foundation is pleased to announce that it will again award Challenge Grants. The challenge grant program will match, dollar for dollar, **up to an amount to be designated at a future date**, funds raised by **State, local and voluntary bars of Georgia, including bar sections and other law related organizations** for projects that meet the criteria of the Foundation.

There will be **at least three such grants**, and the recipients will be identified by **November 15, 2003**. **\$2500 of the Challenge Grant would be paid out at the time of the award notice**. The balance of the grants will be paid out *shortly after* the recipients meet the challenge and raise the required funds. **25 percent of the challenge must be met by January 1, 2004, and the entire amount of the challenge must be raised within 1 year of receipt of the award notice.**

The challenge funds:

- ❖ Must be derived from sources other than the project grantee
- ❖ Must be raised and dedicated specifically for the project in question
- ❖ Must be applied only to the Foundation grant.

Deadlines

The deadline for submitting the completed grant application is **September 30, 2003**

Guidelines

The Foundation shall, in decisions as among otherwise qualifying and meritorious applications for grants or loans, give preferential weight to: matters affecting residents of the State of Georgia and activities which would ameliorate widespread or recurrent serious conditions.

In making grants or loans, the Board of Trustees shall consider, *inter alia*, as factors entitled to weight:

- ❖ whether the funds would be used to fulfill the purposes of the Foundation
- ❖ whether the project duplicates other existing programs,
- ❖ whether the project offers a multiplier effect for the Foundation's financial contributions; and
- ❖ whether the proposed activity, if continuing in nature, might subsequently be supported by other funds.

The Foundation also considers funding for new and innovative programs which may be of an experimental nature and that need assistance in the form of "seed money."

No grant or loan shall be made to any organization of which any member of the Board of Trustees is an employee or contractor; provided, however, that service by a member of the Board of Trustees as a voluntary attorney with an organization shall not be deemed employment by that organization.

The Foundation is dedicated to the principles of duty and service to the public, improving the administration of justice and advancing the science of law. The Foundation seeks to enhance the system of justice, to support the lawyers who serve it and assist the community served by it. All grants must further one or more of these principles.

The Foundation will provide the Board of Governors of the State Bar of Georgia with an annual report containing a breakdown of each loan or grant made, its purposes, its amount, and the name and address of the recipient organization.

The Grants Criteria are valid and applicable for the 2003 Challenge Grants. If any changes are made to the grant making criteria, all applicants will be given an opportunity to amend their application to comply with the changes.

For More Information

For more information and grant applications, please contact: Lauren Larmer Barrett,
Lawyers Foundation of Georgia, 104 Marietta St., NW, Suite 630, Atlanta, GA 30303
(404) 659-6867; Fax (404) 225-5041; lfg_lauren@bellsouth.net



"And Justice for All"

State Bar Campaign for the Georgia Legal Services Program

Your campaign gift helps low-income families and children find hope for a better life. GLSP provides critical legal assistance to low-income Georgians in 154 counties outside the metro Atlanta area.

The State Bar of Georgia and GLSP are partners in this campaign to achieve "Justice for All." Give because you care! Check-off the GLSP donation box on your State Bar Association Dues Notice, or use the campaign coupon below to mail your gift today!

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

Please include me in the following giving circle:

- | | |
|--|--|
| <input type="checkbox"/> Benefactor's Circle \$2,500 or more | <input type="checkbox"/> Sustainer's Circle \$250-\$499 |
| <input type="checkbox"/> President's Circle \$1,500-\$2,499 | <input type="checkbox"/> Donor's Circle \$125-\$249 |
| <input type="checkbox"/> Executive's Circle \$750-\$1,499 | <input type="checkbox"/> or, I'd like to be billed on (date) _____ |
| <input type="checkbox"/> Leadership Circle \$500-\$749 | for a pledge of \$_____ |

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

Donor Information:

Name _____

Business Address _____

City _____ State _____ Zip _____

Please check one:

- ☐ Personal gift ☐ Firm gift

GLSP is a non-profit law firm recognized as a 501(c) (3) by the IRS.

Please mail your check to:

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

Thank you for your generosity.

Volunteerism in the Profession

By Sarah I. Bartleson

In his 2002 State of the Union address, President George W. Bush called on all Americans to make a lifetime commitment and devote the equivalent of at least two years of their lives — 4,000 hours — to service and volunteerism.

In the Georgia Rules of Professional Conduct, Rule 6.1, Voluntary Pro Bono Publico Service, states:

A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial portion of the 50 hours of legal services without fee or expectation of fee to:

(1) persons of limited means; or
(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means.

Although there is no disciplinary penalty for a violation of this rule, all Georgia attorneys should consider the rule and take it to heart, as many of their colleagues do each and every day.

Attorneys in Georgia are involved in many different volunteer endeavors. There are a number of ways to get involved and volunteer within the Bar. There are

opportunities through State Bar Sections, the Young Lawyers Division and the Pro Bono Project, along with many others.

Sections

The State Bar has 35 sections specializing in particular areas of law. Section membership facilitates the exchange of ideas, affords networking opportunities, provides community involvement opportunities and social activities. The extent to which sections are active is completely at the discretion of its leadership and membership.

"The work of the organized Bar, including its sections, depends on volunteers," said Laurie Webb Daniel. "I, along with other leaders of the Appellate Practice Section, have helped advance the goals of this section by meeting with appellate judges to find out their views on how our section can be of service to the courts, by implementing projects based on those discussions, and by putting together quality CLE programs."

Through being a member of a section and volunteering on special projects, there are opportunities to



Marc D'Antonio, a YLD volunteer, and daughter, Kate, help paint a room for the community services project that was part of the YLD's Spring Meeting activities last year.

do community service, become better acquainted with your area of law and build professional relationships. Of the more than 27,000 active members of the bar, more than 15,000 belong to a section.

"I have been impressed by the number of other attorneys who volunteer so much of their time

and talent,” said Thomas F. Allgood Jr., chair of the Family Law Section. “Volunteers in our section leadership, without exception, seem to consist of the best lawyers from throughout the state in the area of family law. Frankly, it is fun to mingle with the best and the brightest!”

When asked why he volunteers his time in the Intellectual Property Section, Jeff Kuester, chair, replied, “Networking with other attorneys in my practice area helps me build professional relationships with other attorneys who may potentially oppose me on a client matter, which ultimately helps my clients. In addition, recent cases and changes to our practice are often discussed at any section event, which also helps my clients.”

Alan Clarke, chair of the Entertainment & Sports Law Section, agrees with Kuester. “In addition to being a selfless act, volunteerism with the Bar enables the volunteer to reap tangible rewards in his or her own practice,” he said. “The friendships I have made with other attorneys through section events have eased my negotiations with these lawyers when they are on the opposing side in a case or transaction. This has occurred countless times.”

YLD

The YLD’s moto is, “Working for the Profession and the Public.” When the Georgia Bar Association was organized in 1883, there was no section or division devoted to the interests of young lawyers because there were no young lawyers practicing in the state of Georgia. Prior to 1946, the Constitution of Georgia and the State Bar rules prohibited anyone under the age of 40 from practicing

law. After World War II, however, a change in attitude occurred.

The Younger Lawyers Section was created on May 31, 1947, at the State Bar’s Annual Meeting. When the YLS was first enacted, all members of the State Bar who had not reached their 36th birthday were automatically members of the YLS. It was later added that attorneys, regardless of age, who had been admitted to their first bar less than three years were also considered members of the YLS. The basic structure and purpose of the organization remain the same today, however, in June of 1998 the section was renamed the Young Lawyers Division.

The YLD has 31 hard-working committees that provide service to the public and the Bar through an array of projects and programs. Through the years, the YLD has also gained national recognition by winning several American Bar Association awards for its projects and publications.

“Through my volunteer experience I have met people from very diverse and different backgrounds,” said Marc D’Antonio, YLD member and co-chair of the Great Day of Service. “I am reminded that deep down, we all are more alike than different. My experience has been that most people I have worked with, regardless of ethnic background or social-economic class, want to ‘do good’ and help others.”

Douglas R. Kertscher, a YLD volunteer on the Aspiring Youth Program committee, was asked what he has learned through his volunteer experience and replied, “This is hard to quantify, and it may sound like a cliché, but I have learned the little things like the office won’t collapse if I leave for a

What is your most memorable section volunteer experience?

My most memorable experience was as chair of the Creditor’s Rights Section when it received a Section Award of Achievement for the year 2000-01. Considering the section is made up of small firms and sole practitioners, recognition of the work that the section did was not only surprising but gratifying.

– Jan Rosser

My greatest memory is when an award was established in my honor in 1992 by the Family Law Section of Georgia.

– Jack P. Turner

My most memorable section volunteer experience was gliding through the rain forests of Costa Rica on the “Canopy Tour” with Justice Carol Hunstein, after she and I led a panel on ethical issues for entertainment lawyers. I think she still laughs remembering how pale I was following behind her, while she boldly rose to the occasion, bravely leaping from tree to tree on a rope several hundred feet in the air.

– Alan Clarke

The IPL Section provided me the first opportunity to prepare and present a discussion at a CLE seminar, and as a young patent practitioner, that opportunity meant a great deal to me and will always be a memorable experience.

– Jeff Kuester

What is your most memorable YLD Volunteer experience?

Perhaps the most memorable YLD volunteer experience I have had was working with my then 5-year-old daughter, Kate, at the community services project that was part of the YLD's Spring Meeting activities last year. We had fun painting a room at a community center in Savannah. This was also an opportunity to emphasize to Kate the importance of helping others and that doing so is often a pleasant experience.

– **Marc D'Antonio**

It would be a mix of watching the students and parents bubble with pride and excitement at the first aspiring youth awards ceremony in 1997; the shared sense of purpose and accomplishment among the 20 or so strangers at the YLD Great Day of Service in 2000 and 2001; and then Chief Justice Benham's visit to the aspiring youth program in 2000.

– **Douglas R. Kertscher**

The zoo days with Fulton County DFACs foster kids have by far been my favorite volunteer times. The kids and the attorneys all have a ball at Zoo Atlanta. The most memorable was one of the children saying during a past zoo day, "Hey, I didn't know lawyers were this cool!"

– **Michelle Adams**

I have most enjoyed working with my committee this year to put on our first CLE seminar.

– **Sherry Neal**

One Saturday, I volunteered to help paint a room at Oak Hill Homes. Oak Hill Homes is a residential facility for kids in the Fulton County foster care system. One of the children that lives in the facility helped me with my painting. His excitement and enthusiasm about helping me was amazing. It was great fun showing him how to paint and to see how much he enjoyed learning something new.

– **Leigh Martin**

Helping paint a room in a historic school in Savannah has been my most memorable experience. It is my understanding that Justice Clarence Thomas attended that school so I thought it was a really worthwhile project. Some of the children came out to watch and help and they were totally pleased with our work. It felt good to work on such an important historical building and to do so with members of the generation who are currently reaping benefits from being in the building.

– **Tonya Boga**

few hours, or I really have more time to give than I thought I did. And I've learned big things like I get every bit as much out of the community service as I give."

There are so many reasons to volunteer, said Michelle Adams, a YLD executive council member. "I've always been involved in volunteer efforts. But I've found as a lawyer, it is a particularly good idea to get away from my desk and see there is a world out there other than nameless and faceless documents. Getting some hands on time is a great way to stay sane!"

Pro Bono

The State Bar of Georgia's Pro Bono Project is also another great way to volunteer your time. The Pro Bono Project, created by the State Bar in 1982 in conjunction with the Georgia Legal Services Program, is a project which assists local bar associations, individual private attorneys and communities in developing pro bono private attorney/bar involvement programs in their areas for the delivery of legal services to the poor. The project also receives support from the Chief Justice's Commission of Professionalism and the Georgia Bar Foundation.

Lawyers unable to provide direct legal services to the poor are urged to consider alternatives, including the provision of legal services at a reduced fee. Importantly, in recognition of the vital role legal services programs play in ensuring access to the courts, all lawyers are encouraged to contribute financially to legal services programs serving the poor whether or not they are able to volunteer.

There are about one million poor people in Georgia, with about 70 percent of the poor living in small cities and rural areas outside

Atlanta. Over 70 percent of Georgia's lawyers work in the metro Atlanta area, where only 30 percent of the poor reside. The great majority of those living in poverty in Georgia are women and children. Considering that a full time minimum wage worker earns only \$11,960 per year to cover rent, transportation, food and clothing, there isn't much left to retain a lawyer. When faced with choosing between paying the rent or medical bills and hiring a lawyer, the poor pay their bills and go unrepresented in court unless they are eligible for a legal services program. The Pro Bono Project focuses on providing services to those most vulnerable, including abused women and children, families about to lose their home or income source, and people with very special vulnerabilities such as the elderly, persons with disabilities and people in institutions.

In a Pro Bono/Private Attorney Involvement Program, lawyers volunteer their time to represent individuals who cannot afford to pay for legal services. A variety of different activities are considered Pro Bono/PAI contributions, including:

- Lawyers representing individuals who cannot afford representation;
- Lawyers providing advice at specific locations or to certain groups on a regular basis;
- Lawyers counseling the elderly at Senior Citizens Centers;
- Lawyers addressing low-income groups on legal topics; and
- Lawyers offering training in legal or quasi-legal matters.

Big firms in Atlanta have taken the initiative and are doing their part for pro bono too. Two years ago, Kilpatrick Stockton felt there was a need to dedicate one partner

Want to get involved? Here's a place to start!

Sections
Visit any of the 35 section web pages for a variety of useful content at www.gabar.org/sections.asp. Or contact Johanna Merrill, section liason, at (404) 527-8774 or johanna@gabar.org.

YLD
Lawyers can join a committee of the YLD by completing a form on the Bar's Web site at www.gabar.org/yldcom.asp or learn how to volunteer by contacting Deidra Sanderson, YLD director, at (404) 527-8778 or deidra@gabar.org.

Pro Bono
You can learn more about Georgia pro bono programs and by visiting the Web site at www.gabar.org/GeneralLinks.asp?Header=ProBono. To learn more about the various programs throughout Georgia you can click on www.legalaid-ga.org and look under "Directory of Legal Programs." Or call Mike Monahan, the director of the State Bar Pro Bono Project, at (404) 527-8763 or mike@gabar.org.


to the coordination of its pro bono activities. Debbie Segal accepted the position. When asked how many hours per year Kilpatrick Stockton attorneys volunteer, she replied, "We expect every attorney to do 50 hours of pro bono work each year. We're not quite there yet. Out of some 450 attorneys, the preliminary totals were around 37 hours on the average last year."

"Volunteers get the benefit of the knowledge that they are using their legal skills to help someone who, without their help, could suffer a great loss. They could lose custody of their kids, their home or their jobs," said Segal. "Knowing that you have a skill and you can help someone, and if you don't nobody else will, is a tremendous feeling of satisfaction. Even if you don't win, you will have given that person faith in the system."

Conclusion

Whether you choose to volunteer and spend your time in a section,

with a YLD project or helping to represent the poor through the Pro Bono Project, the benefits you receive will greatly outweigh the hours of time you dedicate to helping others. President Bush has asked every American to give up 4,000 hours of time, and the Bar has asked for 50 hours a year. With a profession as important as the law, every attorney should want to help out in some way.

"I volunteer my time because it was a learned trait," said Jan Rosser, a director for the Creditor's Rights Section. "Volunteerism is often a concept that is taught at home or by an employer. Once done, you are hooked on the benefits!" 

Sarah I. Bartleson is the assistant director of communications for the State Bar of Georgia.

Pro Bono Honor Roll

The Pro Bono Project of the State Bar of Georgia salutes the following attorneys, who demonstrated their commitment to equal access to justice by volunteering their time to represent the indigent in civil pro bono programs during 2002.

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The Devil Came Down

By Brad Elbein

I was not completely surprised when the Devil showed up in my office on a hot Georgia afternoon. After all, clients from the corporate group got lost and wandered into my office all the time. And since it was August, the weather was certainly appropriate for him to make an appearance. To top it off, at that moment I was on the phone, engaged in a hell of an argument with a client who didn't want to pay her bill.

There was no puff of smoke or clap of thunder or anything supernatural. Suddenly, there he was. Just as suddenly, I knew who he was.

I hung up in the middle of a sentence and sat down heavily. "Oh my God," I said.

"Not quite," he said with a chuckle, reaching out across the desk to offer his hand.

Without thinking I took it. The hand was gentle and soft, maybe a little warmer than you'd normally expect a hand to be. I wondered if he had horns hidden under his carefully coiffed hair. Whether his tasseled loafers hid cloven hoofs.

Whether he had a tail hidden under the suit that fit him like snakeskin.

The Devil sat in one of my client chairs. "So," he began, "let's get down to business." His voice was as gentle and as warm as his hand and completely without accent. He sounded just like a news anchorman. His breath smelled sweetly of cinnamon spice as he continued. "You come highly recommended by my clients." His cologne was subtle: Aramis, perhaps; certainly not anything sulfurous.

"Wait a minute," I protested. I was damned if I would take this lying down. "I'm a God-fearing man! Twice a week I go—"

He waved my protest aside. "I know, I know, twice a week you go to church. Or is it the Mosque? Temple?" He touched his temple and waved his hand like a movie producer who can't remember a name. "I keep forgetting the little details. But details aside, I think we can do business, don't you? I mean, you know all about me," he grinned, "and I certainly know all about you."

A lawyer's stock and trade — contrary to Lincoln's belief — is his reputation. I'd worked hard to build a reputation. Now I wasn't entirely happy that I was so widely known.

Like a thunderbolt, terror seized me. If the Devil knew me . . . I slumped down in my chair. Sweat trickled down my shirt. The sour



taste of fear rose in the back of my throat. My voice trembled as I said: "You're here to take my soul."

The Devil laughed. It was a glorious, melodic sound that made you want to laugh along with him. "Oh, please — not that. Those old myths die hard, don't they? We don't do things like that. Not any more. Business is so much more complex and subtle nowadays. As you know."

I waited for him to explain. Intuition warned me that it doesn't pay to get out in front of the devil. Besides, he hadn't actually said that he wasn't after my soul. I wasn't inclined to be cordial until we got that out of the way.

The Devil continued, as clients will when the lawyer falls silent. "I find myself in the odd position of needing a lawyer." When I didn't say anything, he continued. "I want to sue someone. For libel. Or slander." He waved the distinction into irrelevance. "I can never keep it straight."

The idea struck me as humorous, even hysterical. "Someone defamed . . . you?" I spluttered. How could you possibly defame the Devil Himself? How could you hold the King of Hell up to ridicule? What could you say to damage the reputation of Evil Incarnate? I started to chuckle and I am afraid the sound rose quickly to uncontrolled laughter.

The Devil frowned and raised his voice. "Someone wrote something about me —"

"A book?" I asked. A chill came over me. Tell me, I prayed, tell me please that he doesn't want to sue God over the Bible!

"A song," he sniffed, looking out the window. "It contains a damnable lie about me, if you will pardon my language. I want the perpetrator punished."

A song about the devil? I could think of a whole bunch of phrases from a whole bunch of songs, but nothing I'd advise suing over. There was A Friend of the Devil is a Friend of Mine and The Silver-tongued Devil and Got a Black Magic Woman and —

"The Devil Went Down to Georgia!" I said, sitting up and snapping my fingers.

He cringed at the sound. "Don't do that!" It was the first cross thing I'd heard him say. His eyes flashed as he spat: "Damn Charlie Daniels! I want to make Charlie Daniels pay!"

When the Devil says he wants to make someone pay, you wouldn't normally think in terms of civil damages. But that was apparently exactly what the Devil wanted. "Sue Charlie Daniels," I said, flabbergasted.

"That's right. For slander. Libel. Whatever."

I knew the song, of course. There was only one line that seemed

defamatory to me. "Because the song says that you were looking for a soul to steal?" I'm afraid my incredulity was not well hidden.

"Hell no," he snapped. "Back then — before the high-tech bubble — that was how we operated. No, it's because of the other thing." His faced turned inscrutable, his eyes darkened. He made an obvious effort to control himself and after a time said, "It's the thing about me losing."

Apparently the outrage was too much and his control faltered. He sprang to his feet and towered over me, a hundred feet tall. "The thing about the Devil losing a fiddle contest," he hissed. "It's outrageous!" He leaned toward me over the desk. "The Devil," he confided in a whisper, "never loses. Never. Ever."

"Never ever loses a fiddle contest?" I asked from where I'd shrunk back into the depths of my chair.

"Never loses anything." He blew out his breath. "Particularly not a fiddle contest with a cracker." He spun on his heel and walked two angry steps away, then turned back. "You know I taught Toscanini?"

"I heard that," I admitted cautiously. Clients love to name-drop; usually once the name was out there, they shrugged it off like the famous person was just one of the guys. Sure enough, the Devil dis-

Annual Fiction Writing Competition

The Editorial Board of the Georgia Bar Journal is proud to present "The Devil Came Down," by Brad Elbein of Dallas, Texas, as the winner of the Journal's 12th Annual Fiction Writing Competition.

The purposes of the competition are to enhance interest in the Journal, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. As in years past, this year's entries reflected a wide range of topics and literary styles. In accordance with the competition's rules, the Editorial Board selected the winning story through a process of reading each story without knowledge of the author's identity and then ranking each entry. The story with the highest cumulative ranking was selected as the winner. The Editorial Board congratulates Elbein and all of the other entrants for their participation and excellent writing.

missed the great violinist with a wave. "He had some talent, of course. It was I who gave him fire!" He moved his fingers rapidly through the air as though they were flying satanically up and down violin strings.

Then he went back to the issue at hand. "I certainly wouldn't lose a fiddle contest to an uneducated country boy," he sniffed. "To imply that I would is outrageous. Ridiculous. And you should note," he enunciated slowly as he stalked toward my desk, "that Mister Daniels doesn't say who the boy was. He doesn't even give me a chance to confront my accuser!"

I thought about college and about my class in Milton and about the Devil losing once. Losing big. But here was the Devil himself looming over me. It seemed impolitic to mention what was, after all, just one side of the story. So I swallowed hard and didn't say anything at all.

He glared at me for a minute or two, simmering. Then he seemed to shake himself and pull himself together, as I have often seen clients do after a blow-up. He sat, crossed his legs and waited for me to speak.

I've been in practice for quite a while. I've been fired by my share of clients and I've fired my share. Now that I knew what he wanted — now that I knew that we were playing in my ballpark, not his — I knew just how to handle it. These things need to be done with a certain finesse. It has to be obvious to the client that the representation won't work out.

So I asked him a question to set him up. "You want me to sue Charlie Daniels for defamation because his song says that some unidentified country boy beat you in a music contest."

"Correct."

"I'm sorry to say that I don't do that kind of work," I said with my best sorry-I-can't-help-you expression.

The Devil met my smile with one just as calm and twice as nice. "In fact you do!" he said happily. "Didn't you handle that National Enquirer case?"

The smile melted from my face. Just how much did this guy know about me? Indeed, ten years ago I'd handled a case against the Enquirer, a case my partners still ribbed me about. The paper falsely claimed that my client was a hooker. She was really an actress who specialized in playing hookers, in a series of adult movies. I didn't expect the Devil to know that and I'd practically forgotten about the case, myself. So now I forced myself to breathe deeply and to think carefully. "That was a long time ago," I tried. "I haven't done that kind of work in years."

"Oh, please. No false humility. You know, too much humility can be a sin, too." He must have seen the horror on my face, because he held up his hand in apology. "Sorry. Not my business. However, didn't you just yesterday tell someone that you never lose a case? You remember, I'm sure. You were just out of the shower at the gym, telling that gentleman at the next locker all about your nearly unbeaten record in trial."

I felt the blood drain from my face. My arms and legs felt dead, my body empty and weightless. The Devil had overheard my conversation? The Devil had seen me naked?

"Okay," I said, thinking fast. "I admit I think I'm pretty good. But I don't think my law firm would want me to take this kind of case."

He dismissed this objection with a laugh, a man totally at ease.

"Don't worry. The managing partner and I have a complete understanding. In fact, the whole management committee and I are like this." He held up his hand to show me his intertwined fingers. "Which has been, I believe, your contention since you became a partner here." He patted his sport coat pockets. "That reminds me. Here's your retainer." The Devil pulled a thick wad of cash out of his pocket.

Now, there are certain styles in the way clients pay their bills. Construction clients, for example, will tell you to bill them and then file the invoice with all the other invoices they don't intend to pay. Criminal defendants will cry and whine and pay as little as possible because guilty or innocent, they don't really think they owe you anything. Drug dealers will throw the money on your desk with disgust, like they're throwing slop to the pigs.

The Devil placed the money on the polished mahogany surface gently, exactly between my ornamental scales of justice and my daily billing log.

"I haven't told you what my retainer is," I stammered.

"Don't worry about it. Whatever your retainer is, it'll be there." He winked at me. "There are advantages to being the Devil: one of them is that I'm a wizard with money. By the way, that client you were talking to when I walked in? She's just paid her bill in full. In fact, all of your clients will be bringing their accounts up to date. Your collections will be so good this month, you won't have to do anything creative with your time sheets."

"Look," I pleaded, desperate for a way out, "isn't this really a criminal matter? Why don't you go down and see the DA?"

After a pause he confessed: "Actually, I tried to get in to see the DA. He wouldn't see me. Something about 'getting behind him.'" He brightened. "What a difference with you!" He beamed a smile at me that I did not find comforting.

I was running out of objections. The truth was simple and since I'd run out of excuses, I thought I'd try it out on him. "I hope my being honest with you doesn't offend you," I said with what I hoped was a disarming frown. "The truth is that I don't really want to represent someone of your character."

His face fell. He did not glower, or scowl, or sneer. His expression became perfectly blank, his body perfectly still. "Is that a fact?" he asked quietly. Suddenly along with the hint of cinnamon and the smell of Aramis, a wave of profound cold wafted over the desk.

"So," I said, clearing my throat and standing. I thought he was taking it well, all things considered. I held out my arm to usher him toward the door. "Thank you for coming by." I was wondering whether, when my colleagues saw the Devil leaving my office, they'd be impressed. I'd walked two steps toward the door before he spoke again. He sat still in the client chair behind me.

"If I remember correctly," he mused, "didn't you represent those gentleman from the American Nazi Party? The ones who wanted to march down to the synagogue on Holocaust Memorial Day?"

"Yes," I said slowly, not sure of his point.

He remained in my client chair, legs crossed, arms resting comfortably on the armrests. Only his head was turned as he stared at me in silence. A slight smile played at the corner of his lips. The Devil smiled more than almost anybody I had

ever met: more than a plaintiff's lawyer in front of an Alabama jury.

I said, "Everyone deserves representation. It's the way our system works."

The Devil remained silent.

Restless, I added: "I don't endorse the cause of every client I represent. I provide my clients with advice and representation, not . . . not . . . approval." My voice trailed off, but it echoed hollowly in the office. This was what I always said when people asked me how I could represent criminals. Something told me that it wasn't quite the right argument here. But the Devil didn't give me time to think about it.

"Didn't you represent that officer in that corporation — what was its name?" The Devil tapped his forehead, trying to remember. "You remember, the audit committee chairman, the one who sold her

stock just before the corporation went — what's your phrase, 'belly up'? — and ruined all those shareholders." He tsked.

I shook my head, unable to speak. The Devil knew his business. That was my case, all right.

"Then I seem to remember a couple of HMOs you represented. The ones that denied care to cancer patients, you remember? The survivors sued your clients. As I recall, you tore the poor survivors up on witness stand." He shook his head in admiration.

"It was a simple matter of contract law," I croaked out, looking away.

"Then there were the drug dealers who sold crack to the children in that suburban school. I think you got them probation. And that man who would have killed his wife if the gun had been loaded. Probation

again." The Devil slapped his hands on his knees and grinned. "I could name a whole list of cases just like those. In every one, there you were." He made an *atta-boy* gesture with his fist. "Right in the thick of the fight. Fighting for justice."

"Fighting for my clients," I muttered.

Suddenly the Devil's voice grew sharp. "Yet you would represent all those fine upstanding characters—"

I flinched at his tone. "Even obnoxious clients are entitled—" I stopped, recognizing the trap too late.

"Whereas I?" He patted himself on the chest with spread-eagled fingers. His nails were carefully shaped and lightly polished. "I am not entitled to the same consideration. How is my character worse than theirs?"

"You're the Devil! Everybody knows—"

Calmly he interrupted. "Surely you are not judging me purely by reputation, counselor. I believe that's inadmissible."

Silence sizzled heavily around us. I sought desperately for a way out. After too long a pause, I said: "Fine. You're entitled to representation. I can refer you to someone." I crossed quickly to my desk and started fanning through the Rolodex. Who did I know that deserved this referral?

"I don't want someone," the Devil snapped. "I want the best. I want you." The Devil gestured to the stack of money. "I've already paid your fee, whatever it is. You can't refuse to represent me."

"I do refuse," I said with the stubbornness born of desperation.

"It would not be ethical for you to refuse."

"It has nothing to do with ethics and I refuse!"

The Devil stood. He held out his hand, palm up, toward the bookshelf. The volume entitled *Rules of Professional Conduct* flew across the room and landed, open, in his palm. By themselves the pages turned as if an unseen thumb were riffling them. He handed the book to me, open to Rule 1.3. "According to your own Code of Ethics you must represent me."

I scanned the rule quickly, concealing a grin. Nobody knew the *Rules of Professional Conduct* better than I. Nobody used them more effectively in litigation. If we were going to argue the code of ethics, I had him. I answered quickly: "This rule doesn't require me to represent you. It only says that if I represent a client, I have to do it with diligence. That's subjunctive: *if*. Meaning 'on the condition that.' And that's a condition that isn't going to happen."

The devil smiled — that damn smile was wearing on me — and waved a finger at me. "You will undoubtedly not be surprised, sir, that I am a master of grammar in general and the subjunctive mood in the particular. You should take a look at comment one."

I read it aloud as I read it to myself. "'A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience.'" He started to speak but I interrupted. "That only means that if I were to represent you I'd have to do it with diligence. But since I'm not—"

He waved the objection away. "As you are no doubt aware, counselor, the use of the word 'should' indicates a positive injunction. That rule says that you should represent a client, as long as he doesn't ask you to do anything unethical." As he spoke I looked down at the rule.

You could read it that way, it was true.

Something seemed wrong with his argument, but ... I wished I'd paid more attention to grammar in sixth grade.

The Devil continued calmly. "I haven't asked you to do anything unethical. Nor would I." Butter wouldn't melt in his mouth. "I haven't given you a single one of the reasons mentioned there" — indicating the book — "for you to decline my representation."

"But—"

"You yourself told me that every client is entitled to his day in court. If you would willingly represent your Nazi, your drug dealer, your white-collar thief, but not me, it would be an indication of the most naked prejudice on your part. Would it not? That rule in your hand says that you are supposed to act 'despite personal inconvenience,' never mind prejudice. It would be unethical for you to refuse to represent me based on your personal convenience or worse, because of your prejudice."

I stared at him. There was something wrong with his reasoning. I knew that. I knew that you couldn't trust the Devil. But just what it was that was wrong I couldn't quite tell. The code of ethics floated in front of me — the rule was clear, right there in black and white — and there was a lot more stuff about access to justice and zealous advocacy and the right to representation that we hadn't even gotten to yet. For the first time in all my years of litigation the *Rules of Professional Conduct* failed me.

"I can just refuse to represent you," I insisted stubbornly. "Just because I don't want to." Even to me my voice sounded thin and weak. I was grasping at straws. I certainly couldn't cite any legal

authority for that proposition. I wasn't entirely sure I was correct.

The pages of the book turned in his outstretched hand as he shook his head in disagreement. "According to Rule 1.16 you can't just refuse." He returned to his seat. The book hung in the air.

Not really wanting to look, unable to resist, I turned my eyes toward the text. Despite the fact that the Devil himself was standing in my office and that the pages of the book were moving magically, the text of the rule wasn't written in fire and brimstone. In plain black and white I read words I knew well: "A lawyer shall not represent a client... if the representation will result in a violation of the law or the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client or the client is discharged."

"I could be wrong," the Devil said, "but I don't think that any of those excuses apply to you."

"No," I conceded, hanging my head. My mental condition wasn't benefiting from the Devil's cross-examination, but none of the rule's exemptions applied to me. Then a thought occurred to me. I blurted it out in desperation. "There's no precedent for the Devil to have standing to sue!"

The Devil smiled and the pages riffled in a whisper. "There is no precedent yet. Our case would be a case of first impression. Rule 3.1," he said helpfully. "Part B."

I read it with a chill. "'A lawyer shall not . . . knowingly advance a claim under existing law, except that the lawyer may advance such a claim ... if it can be supported by good faith argument . . .'"

"But look," I objected, "a litigant has to be a 'natural person.' I'm not sure you are. I don't even know if it can be done!"

"The law," the Devil said in a voice that made it clear he was quoting, "is not always clear." I looked down at the rulebook and as if by magic the words were highlighted as he spoke them. It was comment one to Rule 3.1. "Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and the potential for change.' The law doesn't explicitly prohibit the Devil from suing, does it?"

I shook my head weakly.

"Well, then," he said, a note of triumph sneaking into his voice. "That settles it." He clapped his hands together like a man who's won his argument. He had won, too: I couldn't see how I could refuse to represent him. Not under the rules. I was thinking wildly, but no other answer occurred to me.

The Devil laughed lightly. "I'm glad we had this little chat. I find it really helps to clear the air at the beginning of a professional relationship. Don't you?" He took a couple of quick steps toward me and clapped me on the back. "I'll be in touch," he said. And then he disappeared. The book hung in the air, rocking a little in his Aramis-and-cinnamon flavored wake. I physically caught it and returned it to its place in the dust between Legal Ethics and Persuading Juries.


That was how I came to represent the Devil. He isn't a bad client, all things considered. He pays all of his bills on time, as do my other clients now. He answers all of my questions promptly. He speaks the same language as the firm's management committee. He gets along really well with judges, with whom he seems to share a peculiar understanding. All in all, it hasn't been any more difficult a professional relationship than most.

I have to confess that, early on, I suffered some doubts. On the day that I headed down to the courthouse to file that very first suit, I felt... well, itchy. I couldn't shake a nagging feeling. A nagging feeling that the Devil had, after all, gotten a piece of my soul. I just couldn't figure out how. I mean, I hadn't done anything that violated the Code of Professional Responsibility — either the Georgia Code or the Model Code.

And now that I handle so much of the Devil's legal work, I just don't worry about it anymore.

Author's Note

The characters in this story bear no intentional resemblance to any individuals, beings, or entities, either living, dead or transcendent. No reflection is intended on any of those lawyers with whom I've worked. In fact, I should note that since I have never practiced in private practice in Georgia, this story must be entirely fictional. Of course, the narrator's comments about trial judges are strictly the opinions of the Devil and not the public views of the author, the State Bar of Georgia or this publication.

Finally, I am obligated to confess that the first line of this story was created by my son, a young writer of great promise. I promised him that I would not steal this line, but obviously I have used it prominently. I can offer no excuse for my conduct, except to say that I've been a trial lawyer for more than 20 years and a writer for longer. Perhaps the Devil made me do it. 

Brad Elbein is director of the Federal Trade Commission's Southwest Region. He has published several law review articles, including articles in the *San Diego Law Review* and the *South Carolina Law Review*. He is a graduate of the University of Texas School of Law.

KUDOS



The **Office of the Fulton County District Attorney** was recently honored by the **Atlanta City Council** for its Community Prosecution Program. The council proclaimed Feb. 17, 2003, as "Community Prosecution Day." The program, implemented in 2000, has focused on closing down and seizing crack houses, targeting "open-air" drug markets and securing serious jail time for repeat offenders.

Martin L. Pierce of **Husch & Eppenger, LLC**, became the 18th attorney in Tennessee to be certified as an estate planning law specialist by the Tennessee Commission on Continuing Legal Education and Specialization. His areas of practice include estate and trust taxation, estate planning, business succession planning, wealth preservation planning and ERISA.



Fulton County recently dedicated the **Judge Romae T. Powell Juvenile Justice Center**. The late Judge Powell served as a Fulton County juvenile court judge from 1973-90. She was the first African-American to be appointed to a court of record in Georgia, and the first to serve as president of the National Council of Family and Juvenile Court Judges. The five-story justice center also houses the Mechanicsville Branch Library.

Kilpatrick Stockton LLP is the 2002 winner of the prestigious **Logan Cup Award**. The cup is awarded to the Atlanta law firm that demonstrates the highest generosity of spirit and civic commitment in their annual United Way campaign. Kilpatrick Stockton increased their contributions by 49 percent this year.

Smith, Gambrell & Russell, LLP, was named to *American Banker's* list of **Top Lead Legal Advisors** for bank and thrift merger deals in 2002. The firm handled several client transactions listed in the magazine's 2002 recap of the "top bank and thrift merger bids," "line-of-business deals" and "top bank and thrift mergers." SGR represents its financial institution clients in all aspects of their business.

Marc D. Glenn of **Powell, Goldstein, Frazer and Murphy LLP** was named **Honorary Vice Consul of Iceland**. He will assist the Atlanta office of the Icelandic Consulate General in cultural and educational exchanges and provide support for Icelandic nationals living in the southeastern United States.

Smith Moore LLP introduced the **Smith Moore LLP Scholarship**, a minority scholarship program. The firm will award two \$5,000-per-year law school scholarships to outstanding minority students with Georgia or North Carolina ties who are entering law school in fall 2003 and who anticipate practicing law in the Southeast after graduation.



Dara Mann of **Faegre & Benson** was named the winner of the annual **Themis Award** by the DuPont Women Lawyers Network at the organization's Fifth Annual Conference on Women and the Practice of Law. The annual award recognizes a woman in the DuPont legal network who creates opportunities for women lawyers to grow in leadership skills.

Needle & Rosenberg, P.C., was this year's second place recipient of two **"Your Honor" Awards** for Web Site and Identity Launch. The winners of Legal Marketing Association awards are chosen for their innovative approaches to marketing and for the example they set in the legal community.

Chamberlain Hrdlicka's first-ever advertising campaign garnered one of the top awards at the **2003 Addy Awards**, presented by the Houston Advertising Federation. In the category of Campaign: Black & White, the law firm's overall "Chamberlain Hrdlicka Campaign" received a gold Addy.

Both **Atlanta Legal Aid Society** and **Georgia Legal Services Program** are in the finals for TechBridge's Advancing Community Through Technology Award for their joint Web site, **LegalAid-GA.org**, and for the Georgia Technology Exchange Program. LegalAid-GA.org provides over 700 resources to help Georgians represent themselves.



Alston & Bird LLP is the first law firm in Atlanta to join **LifeBoard**, a program of the American Red Cross' Southern Region that manages blood collections at metro Atlanta's largest companies. Partner **J. Vaughan Curtis** was named the **LifeBoard Corporate Champion** for the firm. The LifeBoard program is designed to help ensure the adequacy of the region's blood supply through a well-planned blood collection system that works with recognized corporate leaders. Its 14 members each sponsor four to six blood drives in their companies every year.

McGuireWoods LLP was ranked as one of the nation's leading corporate law firms for 2002 by *The American Lawyer*. The list was published in the magazine's April 2003 issue.

Ford & Harrison was ranked among the leading labor and employment firms in the country by the *Chambers USA Guide to America's Leading Business Lawyers*. The firm was listed first in Florida under the "Employment: Defendant" category, and it shared third place in Georgia and second in Tennessee in the same category.

ON THE MOVE

In Atlanta

Smith & Carson, Inc., has acquired **Barnes & Associates**, an investigation services company based in Los Angeles, Calif. The combined enterprise will continue to specialize in providing investigation services to corporate, governmental and legal entities in North America. The firm's office is located at 375 Northridge Road, Atlanta, GA 30350; (770)350-2550; Fax (770) 399-2770.



Zacks



Grout

Leslie B. Zacks and **Bradley W. Grout** have joined the law firm of **Hunton & Williams** as associates in the Atlanta office on the Litigation, Intellectual Property and Antitrust team.

Zacks' practice focuses primarily on intellectual property litigation including patent, trademark and trade secret matters. Grout's practice concentrates on intellectual property litigation and commercial litigation. The firm's Atlanta office is located at Bank of America Plaza, Suite 4100, 600 Peachtree St. NE, Atlanta, GA 30308-2216; (404) 888-4000; Fax (404) 888-4190.

Chamberlain Hrdlicka announced that **Mark D. Halverson** has joined the law firm to help expand its labor and employment department. Halverson's former practice involved representing management in labor and employment disputes. The firm's Atlanta office is located at 191 Peachtree St. NE, 9th Floor, Atlanta, GA 30303-1747; (404) 659-1410; Fax (404) 659-1852.

Thomas, Kayden, Horstemeyer & Risley, LLP, announced the hiring of **Todd Deveau** as a partner. Deveau brings chemical and biotechnology experience to TKHR's intellectual property practice. TKHR's Atlanta office is located at 100 Galleria Parkway NW, Suite 1750, Atlanta, GA 30339; (770) 933-9500; Fax (770) 951-0933.

Macey, Wilensky, Cohen, Wittner & Kessler, LLP, announced that **Todd E. Hennings** and **Louis G. McBryan** have become partners, and **Andrew S. Ree** has become of counsel. **Lee M. Mendelson** has also become associated with the firm, which practices in the areas of bankruptcy, real estate, collections, financial institutions and family law. The office is located at Suite 600 Marquis Two Tower, 285 Peachtree Center Ave. NE, Atlanta, GA 30303-1229; (404) 584-1200; Fax (404) 681-4355.

James D. Comerford has been appointed senior vice president of **McGuireWoods Consulting**. He will lead the Atlanta office, which provides clients with a full range of state, local and federal government relations and public affairs services. Comerford will also be a partner in McGuireWoods LLP's Atlanta law office. The offices are located at 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30309; (404) 443-5500; Fax (404) 443-5599.

Powell, Goldstein, Frazer & Murphy LLP elected **Robert C. MacKichan Jr.** as counsel. MacKichan's practice focuses on federal real estate; he often teams with the firm's government relations group to assist clients in navigating the real estate acquisition process of the federal government. The firm is located at 191 Peachtree St. NE, Sixteenth Floor, Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999.

Jeffrey W. Melcher has joined **Buker, Jones & Haley, P.C.**, as a member. The firm is located at South Terraces, Suite 170, 115 Perimeter Center Place, Atlanta, GA 30346-1238; (770) 804-0500; Fax (770) 804-0509.

Alston & Bird LLP announced that **Luis A. Aguilar** has joined the firm's Atlanta office as a partner in the International and Financial Services Groups. He will focus on corporate governance, mergers and acquisitions, and various aspects of federal and state securities laws and regulations. The firm's Atlanta office is located at One Atlantic Center, 1201 West Peachtree St., Atlanta, GA 30309-3424; (404) 881-7396; Fax (404) 253-8465.

Michael L. Mason has joined the Legal Services Group of the **Federal Home Loan Bank of Atlanta**. The office is at 1475 Peachtree St. NE, Atlanta, GA 30309; (404) 888-5338; Fax (404) 888-5304.

Levine & Smith, LLC, announced that **Jon W. Hedgepeth** has become associated with the firm. The office is located at One Securities Centre, 3490 Piedmont Road NE, Suite 1150, Atlanta, GA 30305; (404) 237-5700; Fax (404) 237-5757.

In Columbus

Page, Scrantom, Sprouse, Tucker & Ford, P.C., announced that **J. Ronald Mullins Jr.** has become a partner. Mullins will continue his practice in civil litigation, local government law, and estate and probate law. The firm is located at 1043 Third Ave., Columbus, GA 31901; (706) 324-0251; Fax (706) 323-7519.

In Decatur



Glen D. Rubin has joined the Decatur firm of **McCurdy & Candler, LLC**, as a partner practicing in the areas of creditors' rights, bankruptcy and foreclosures. The office is located at 250 E. Ponce De Leon Ave., Decatur, GA 30030; (404) 373-1612;

Fax (404) 370-7237.

In Marietta

Philip A. Holloway, formerly with the Cobb County District Attorney's Office, announced that he has entered the private practice of law. He will focus on general civil, criminal and domestic litigation. His office is located at 399 Washington Ave. NE, Marietta, GA 30060; (770) 428-3433.

In Thomasville

Stephanie B. Tillman was promoted to vice president and associate general counsel of **Flowers Foods**. The company has also expanded its legal team to include **A. Ryals McMullian Jr.** as associate general counsel and **Holland C. Kirbo** as associate counsel. The company's corporate offices are located at 1919 Flowers Circle, Thomasville, GA 31757; (229) 226-9110.



From left: Jones Day attorneys Cathy Eastwood, Doug Towns and Theresia Moser.

Not-for-Profit Organizations: What You Don't Know CAN Hurt You

The Bar's A Business Commitment Committee, in association with the Atlanta Volunteer Lawyers Foundation, Atlanta Neighborhood Development Partnership, and the Georgia Law Center for Homelessness, recently sponsored a seminar on the legal pitfalls not commonly encountered by not-for-profit organizations. The event was held at the State Bar of Georgia's headquarters in downtown Atlanta. Jones Day co-sponsored the event; partner Doug Towns moderated the seminar, and several of the firm's attorneys spoke on a range of topics.

Sterling Spainhour addressed the crowd on different corporate and fiduciary issues, including cutting-edge changes to company by-laws and articles of incorporation to protect organizations. Sheldon Blumling lectured on the latest tax and benefit issues, covering protection of 501(c) (3) status and compliance with ERISA obligations.

Relevant employment law issues, including applicable state and federal discrimination laws, were reviewed by Theresia Mosier, and Anne Johnson spoke about litigation topics such as the need for a registered agent for service of process, protecting trademarks, and general liability issues.

High School Mock Trial



The Jonesboro team is pictured with attorney coaches Judge John Carbo, Bonnie Smith and Tasha Mosley, along with teacher coaches Matt Ford, Crystal Wessinger and Katie Powers (GSU student assistant).

Jonesboro High Wins State Title for 2nd Year in a Row!

The Jonesboro Mock Trial team is the 2003 Georgia State Champion. The two finalists in the competition were Jonesboro High School (Jonesboro) and Clarke Central High School (Athens). The four semi-finals were Jonesboro HS, Lee County HS (Leesburg), Jenkins HS (Savannah) and Clarke Central HS. Jonesboro will now represent the state of Georgia at the National High School Mock Trial Championship to be held May 6-11, 2003, in New Orleans.

For information on how your bar association, firm or legal organization can help the new Georgia champion defray competition expenses, contact the Mock Trial office at 404/527-8779, 800/334-6865 (ext. 779) or mocktrial@gabar.org

Special thanks to those who donated during our Annual Fund Drive, including:

Young Lawyers Division
Council of State Court Judges
Criminal Law Section
General Practice and Trial Law Section
School & College Law Section
Bankruptcy Law Section
Labor & Employment Law Section

A full list of donors will be published in our 2003 Annual Report, Fall, 2003.

JOIN THE MOCK TRIAL COMMITTEE

visit our Web site www.gabar.org/mocktrial.asp or contact the mock trial office for a registration form (404) 527-8779 or mocktrial@gabar.org
 Make an impact in your community!

Is it Really a Contingency Fee Agreement?

Your newest client, Angel Lansdale, is convinced that her soon-to-be ex-husband is hiding assets from the divorce court. "I know his company gives out huge bonuses every fall," she tells you. "Somehow they classify it so it doesn't look like income to Uncle Sam, but it's cash money. I also think he owns property in the mountains," she adds. "He bought a couple of undeveloped plots last year so he could build his retirement home."

"I'll do some more digging, but we may need to hire a private investigator to track down exactly what Charlie is hiding," you advise Ms. Lansdale. "I've got just the guy. He'll find whatever is out there — but he doesn't come cheap."

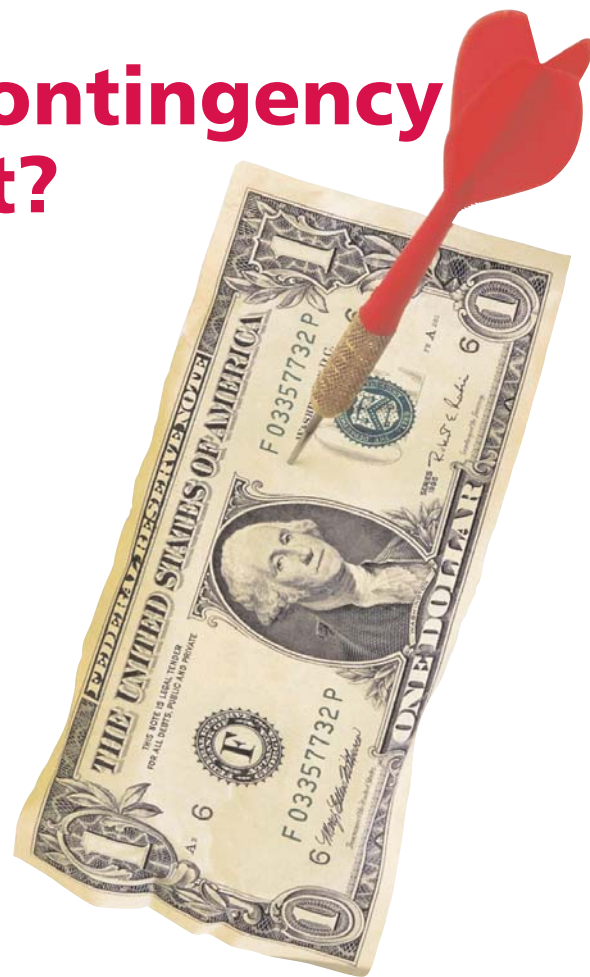
"Oh goodness! I don't know how I'm going to pay you as it is," Ms. Lansdale exclaims. "Charlie has everything titled in his name. If you can't prove how rich he is, the court isn't going to award me anything!"

"Don't worry," you assure Ms. Lansdale. "It may be that the Court will make Charlie pay your legal expenses. At this point I can advance you the money for the investigator until the case is over¹. You can pay my fee

from the property we recover from Charlie. I'll tell you what...if we don't uncover any additional assets, you don't have to pay me. If we do find something, you can give me a one-quarter interest in it as my fee."

"Sounds suspiciously like a contingency fee agreement," your paralegal comments when you ask her to draw up a new fee agreement for Ms. Lansdale. "I didn't think you could do those in domestic cases."

"I'm sure I've heard about other lawyers getting paid this way," you reply. "And anyway, it's not a contingency fee! She's paying my hourly rate for the work I've done up until now."



Who is right?

Rule 1.5 of the Georgia Rules of Professional Conduct deals with issues related to fees. The rule provides in part:

(d) A lawyer shall not enter into an arrangement for, charge or collect:


(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof.

Your proposal to waive your fee if you do not recover any property from Charlie Lansdale is a contingency agreement — whether or not you recover a fee and how much the fee is depends upon what Angel recovers in her property settlement. The fee is “contingent on the outcome of the matter for which the service is rendered²” —

in this case, upon finding hidden assets for the property settlement.

Georgia Formal Advisory Opinion 36³ presented the question of whether it is ethically proper for an attorney to enter into a contingency-fee agreement in a divorce case. Citing the historical rationale forbidding these arrangements for public policy reasons⁴, the Formal Advisory Opinion Board found such agreements improper⁵.

So what are your options? You can charge Ms. Lansdale a flat fee or an hourly rate for handling the case, but your plan to charge based upon the assets you find will not pass muster.

Don't forget to call the Office of the General Counsel's Ethics Helpline Monday through Friday with your ethics questions. You can reach us at (404) 527-8720 or (800) 334-6865. 

Endnotes

1. Georgia Rule of Professional Conduct 1.8(e)(1) allows a lawyer to advance court costs and expenses of litigation for a client. The private investigator's fee is a litigation expense.
2. Georgia Rule of Professional Conduct 1.5(c)(1).
3. Formal Advisory Opinion 36 may be found at p.H-79 of the State Bar of Georgia 2002-2003 Directory and Handbook. It is also available on the Bar's Web site, www.gabar.org.
4. The ABA Annotated Model Rules of Professional Conduct state the prohibition as reflecting “public policy concerns promoting reconciliation and protecting against overreaching in highly emotional situations.” ABA Annotated Model Rules of Professional Conduct, 4th Edition, 1999. p.61.
5. Note that Advisory Opinion 47 allows contingency fees to collect past due alimony or child support.

Lawyer Assistance Program

This free program provides confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems and mental or emotional impairment. The program also serves the families of Bar members, law firm personnel and law students.

If you have a personal problem that is causing you significant concern, the Lawyer Assistance Program can help. Please feel free to call one of the volunteer lawyers listed below. All calls are confidential. We simply want to help you.



Area	Committee Contact	Phone
Albany	H. Stewart Brown	(229) 420-4144
Athens	Ross McConnell	(706) 369-7760
Atlanta	Melissa McMorries	(404) 688-5000
Atlanta	Brad Marsh	(404) 874-8800
Atlanta/Decatur	Ed Furr	(404) 284-7110
Atlanta/Jonesboro	Charles Driebe	(770) 478-8894
Cornelia	Steve Adams	(770) 778-8600
Fayetteville	Wiley Glen Howell	(770) 460-5250
Hazelhurst	Luman Earle	(478) 275-1518
Macon	Bob Berlin	(478) 477-3317
Macon	Bob Daniel	(912) 741-0072
Norcross	Phil McCurdy	(770) 662-0760
Savannah	Tom Edenfield	(912) 234-1568
Valdosta	John Bennett	(229) 333-0860
Waycross	Judge Ben Smith	(912) 449-3911
Waynesboro	Jerry Daniel	(706) 554-5522

Hotline: (800) 327-9631. All Calls are Confidential.

Discipline Notices

(February 10, 2003 through April 21, 2003)

By Connie P. Henry

DISBARMENTS/ VOLUNTARY SURRENDER

Patrick T. Beall

Athens, Ga.

Patrick T. Beall (State Bar No. 043950) has been disbarred from the practice of law in Georgia by Supreme Court order dated Feb. 10, 2003. The State Bar of Georgia filed a Notice of Discipline seeking the disbarment of Patrick T. Beall. Beall was served by publication. The facts deemed admitted by Beall's failure to reject the Notice of Discipline show that a client retained Beall in November 2000 to represent her in a divorce matter and paid him \$1,700 in installments. At the time Beall agreed to represent the client, he was suspended from the practice of law due to his failure to respond to a Notice of Investigation in another disciplinary matter. Beall never filed the client's divorce action, did not return any of her phone calls, and did not respond to letters inquiring about the status of the case. In April 2001, the client sent Beall a certified letter terminating his services and requesting a refund of the fee paid and her file. Beall neither responded to the letter nor returned the file. After receiving a copy of the grievance filed with the State Bar, Beall refunded the fees paid by his client. Over the past several years Beall has been the subject of several disciplinary actions, including two interim suspensions for failing to respond to disciplinary authorities. One case resulted in the imposition of a Review Panel Reprimand. The Review Panel Reprimand was preceded by a suspension from the practice of law for twice having failed to appear for the administration of the reprimand.

Carolyn E. Craig

Surfside Beach, S.C.

Carolyn E. Craig (State Bar No. 192834) has been disbarred from the practice of law in

Georgia by Supreme Court order dated Feb. 10, 2003. The State Bar of Georgia filed a Notice of Discipline seeking disbarment of Carolyn E. Craig for her violation of Rule 9.4 of the Georgia Rules of Professional Conduct. Rule 9.4 provides for reciprocal discipline when another jurisdiction disbars or suspends a lawyer. Craig was disbarred in South Carolina for multiple offenses. Craig admitted that she misappropriated client funds; that she failed to communicate with clients; that she failed to obey a court order; and that she did not cooperate with disciplinary authorities. Craig did not respond to the Notice of Discipline seeking her disbarment in Georgia.

Luther McDaniel

Augusta, Ga.

Luther McDaniel (State Bar No. 488125) has been disbarred from the practice of law in Georgia by Supreme Court order dated Feb. 10, 2003. The State Bar of Georgia filed several Notices of Discipline seeking to disbar Luther McDaniel. McDaniel was served by publication. McDaniel did not reject the Notices of Discipline in accordance with Bar Rules.

In Supreme Court Docket No. SO3Y0319 the facts as deemed admitted show that a client hired McDaniel to represent him in a dispute with a former employer; that a \$15,000 settlement was reached and McDaniel deposited the check in his escrow account and issued a \$13,500 check to the client (taking the agreed upon \$1,500 fee); that the check was returned for insufficient funds; that McDaniel commingled the funds with his own and used them for his own benefit; that McDaniel agreed to pay his client \$20,000 in compensation but paid only \$3,000, and that McDaniel disconnected his telephone service and vacated his office without a forwarding address.

SO3Y0320 – A client filed a grievance against McDaniel because, after she hired

McDaniel to represent her in a legal matter, he did not return her phone calls. He negotiated a settlement but did not inform the client he had received a check, which he deposited in his escrow account, commingled with his personal funds, and used for his own benefit.

SO3Y0321 – McDaniel represented a client in a criminal case. The client pled guilty on McDaniel's advice and asked for his file and for McDaniel to file a petition for sentence review. McDaniel did not respond to his client's requests and, although he personally acknowledged service of a Notice of Investigation filed in this matter, McDaniel was suspended from the practice of law in Georgia for failing to respond to it.

SO3Y0322 – McDaniel was hired by a client in an employment discrimination matter for which the client paid him a \$3,500 retainer that McDaniel assured her would cover all fees and expenses. McDaniel assigned the case to an associate who later had to withdraw for health reasons leaving McDaniel to take sole responsibility for the case. McDaniel did not inform his client that he had received discovery requests and repeatedly canceled meetings scheduled with the client to discuss discovery and her deposition. The court ultimately granted defendant's motion to dismiss the case, due to McDaniel's failure to respond adequately to discovery. McDaniel did not inform his client of the dismissal and, upon termination by the client, failed to refund the unearned fees or return her file.

SO3Y0323 – A client hired McDaniel in connection with an employment discrimination case for which the client gave McDaniel a \$3,500 retainer. McDaniel repeatedly

assured his client that he was pursuing her claim, but he did nothing to pursue the claim. The client subsequently terminated McDaniel's services and asked for a refund of unearned fees. McDaniel failed to return the client's calls, failed to appear at scheduled meetings, and never refunded her money.

SO3Y0324 – McDaniel agreed to defend a client in a criminal case but the client, who was incarcerated, never was able to reach McDaniel. McDaniel effectively withdrew from representing the client. McDaniel did not respond to the Notice of Investigation in this matter.

Lynn J. Barrett

Fort Lauderdale, Fla.

Lynn J. Barrett (State Bar No. 039700) has been disbarred from the practice of law in Georgia by Supreme Court order dated Feb. 24, 2003. The State Bar of Georgia filed a Notice of Discipline seeking to disbar Lynn J. Barrett. Barrett was served by publication. She did not reject the Notice of Discipline in accordance with Bar Rules. On or about Aug. 31, 2001, Barrett submitted a Petition for Disciplinary Resignation to the Supreme Court of Florida, resigning her membership in the State Bar of Florida for "ethical misconduct." Barrett was convicted on three charges of grand theft and one charge of carrying a concealed firearm in Palm Beach and Broward Counties, Florida, in June and September 2001. Barrett's Petition for Voluntary Resignation was accepted and an order entered Sept. 26, 2001. Barrett's resignation was tantamount to disbarment. In aggravation of discipline to be imposed in Georgia, the Supreme Court of Georgia noted that Barrett had a lengthy history of prior disci-

plinary offenses in Florida, that she was currently under suspension in Georgia in a prior matter, and that she failed to respond to disciplinary authorities.

B. Renee' Edwards Snead

Macon, Ga.

B. Renee' Edwards Snead (State Bar No. 240124) has been disbarred from the practice of law in Georgia by Supreme Court order dated Feb. 24, 2003. The State Bar of Georgia filed a Notice of Discipline seeking to disbar B. Renee' Edwards Snead. Snead was served by publication. She did not reject the Notice of Discipline in accordance with Bar Rules. Snead closed a real estate transaction in which she received fiduciary funds to pay off the seller's first mortgage. The check Snead issued to pay off seller's first mortgage was returned for insufficient funds. Despite numerous attempts by the seller and his counsel to contact Snead, she failed to respond to the inquiries or account for the funds. Snead removed the funds from her account, commingled them with her personal funds, and converted them for her own use.

Thomas L. Burton

Brunswick, Ga.

Thomas L. Burton (State Bar No. 097950) has been disbarred from the practice of law in Georgia by Supreme Court order dated March 10, 2003. Burton represented a client in December 2000 in the client's defense against criminal charges in the State Court of Cobb County. The Court conducted calendar calls on Jan. 8, Feb. 19, and April 2, 2001, at which neither Burton nor his client appeared. Although Burton's license to practice law was suspended for 36 months on Feb. 16, 2001, he

did not inform the Court that his license had been suspended and did not withdraw from representing the client. In May 2001, the Investigative Panel initiated a grievance against Burton. Although he was personally served with the grievance, he failed to file an adequate response and on Oct. 31, 2001, the Court suspended Burton.

Woodson Terry Drumheller
Richmond, Va.

Woodson Terry Drumheller (State Bar No. 231110) has been disbarred from the practice of law in Georgia by Supreme Court order dated March 27, 2003. Drumheller surrendered his license to practice law in Virginia on Dec. 15, 2000, in the face of disciplinary charges involving multiple incidents of client neglect and failure to communicate. He failed to respond to the State Bar of Georgia's Notice of Discipline which resulted in his reciprocal disbarment.

SUSPENSIONS

William Henry Toler, III
Atlanta, Ga.

William Henry Toler, III (State Bar No. 714238) has been suspended from the practice of law in Georgia for one year by Supreme Court order dated Feb. 10, 2003. Respondent was supposed to appear before a State Court judge to represent clients in two criminal cases. He had previously submitted a conflict letter to the court that inaccurately stated that he was a sole practitioner. Another attorney, who identified himself as Respondent's associate, appeared for the State Court matters. Respondent's associate was incapable of proceeding in the matters without supervision and asked the

judge to hold the criminal cases pending Respondent's arrival. In the meantime, Respondent's receptionist submitted a second conflict letter to the judge claiming Respondent was to appear in municipal court that morning. Respondent did not know his receptionist had submitted the second conflict letter and did not appear in municipal court as claimed. When Respondent finally arrived at the State Court, the judge conducted a hearing and held Respondent in contempt. In mitigation of discipline, the Supreme Court took into account that Respondent had no prior disciplinary record, that he cooperated with disciplinary authorities, that he was subject to the imposition of other penalties and that he was remorseful for his actions.

R. Scott Cunningham
Dalton, Ga.


R. Scott Cunningham (State Bar No. 202225) has been suspended from the practice of law in Georgia for one year by Supreme Court order dated March 27, 2003. Cunningham filed a Petition for Voluntary Discipline admitting that from November 2000 to June 2001, while holding \$2,000 belonging to a client in his attorney trust account, he commingled client funds with his personal funds and allowed the account to fall below \$2,000. Cunningham cooperated fully with disciplinary authorities, although he previously received a public reprimand in 1993.

REVIEW PANEL REPRIMAND

Shannon Williams
Macon, Ga.

On Feb. 24, 2003, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Shannon Williams (State Bar No. 764130) for a Review Panel Reprimand. A client hired Williams in a child support action and paid the requested fee. Williams filed the complaint, attaching a verification to which he signed the client's name and also signed as the notary public. The Court noted in mitigation of discipline that Williams had no prior disciplinary record, he had no selfish or dishonest motive, he made a timely good faith effort to rectify his action, he made full disclosure to disciplinary authorities, and showed a cooperative attitude.

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 Feb. 9, 2003, one lawyer has been suspended for violating this Rule. 

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

10 Cool Summer Time-Saving Tips

By Natalie R. Thornwell

With summer upon us, now's the time to see if we are on track with our New Year's resolutions. Remember those? But wait, you say, there's only so much time these days. How can you get it all done in your busy law office? Well, here are some pretty cool tips for what just might be a very hot summer!

Do Time Management

Understand that everyone has the same amount of time every day — 24 hours! Pay attention to the times that you are most productive and plan to make the best use of that time when faced with completing big projects and the like. Force yourself to include the things you don't like to do too! Get that "dog file" back on track by calendaring it for review or making a call on the matter. And don't forget to do a time entry for your work! Determine whether or not tracking each and every little expense is wasting too much of your and your staff's time and charge a flat expense fee instead.

Perfect Your Policies and Procedures

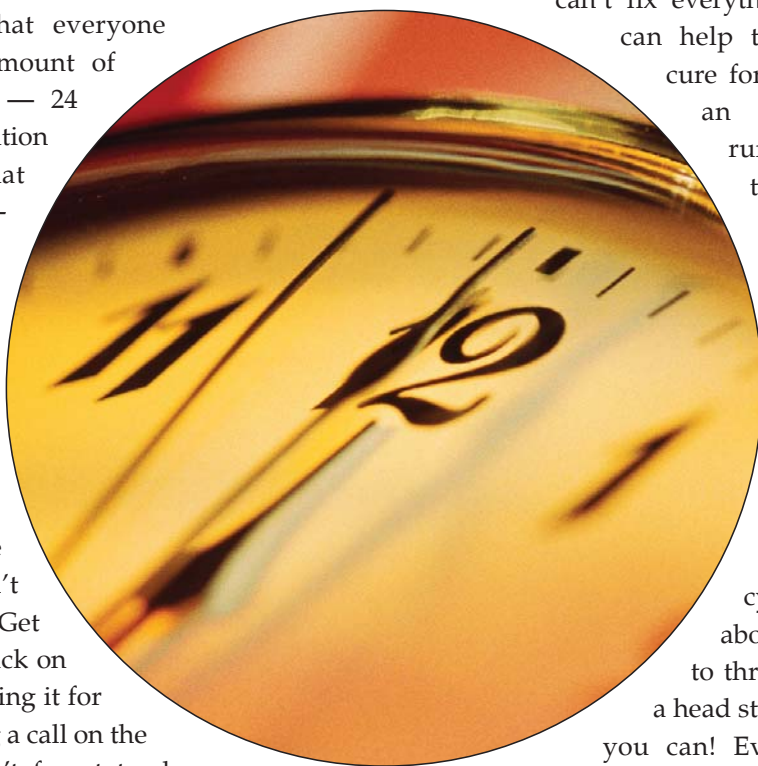
From how much vacation your secretary can have to your policy on office use of the copier, you should have all of your office policies and procedures in writing. If you don't have a written policies and procedures manual or it's in your top assistant's head, then give our department a call to get a sample manual to help develop your own, and yes, it's even on disk. Remember to keep your policies and procedures realistic for your firm.

Automate Your Practice

Contrary to popular belief, automation can't fix everything. But, it can help to begin the cure for most ills of an inefficiently run law practice. Make sure computers are networked. Upgrade right before it's necessary. Realize that upgrade life cycle is now at about every two to three years. Get a head start whenever you can! Evaluate your hardware and your software.

Get "Gadgety" With It

Save your valuable time by getting a PDA (personal digital assistant), smart phone or



some other convergent device. Track your time and expenses on client matters and even look up contact information from anywhere with these palm-held devices. The latest devices allow you to take digital pictures, dictate, scan and more!

Streamline Telephone Communications

Keep phone tag and emergency client calls at bay with a new phone call policy. Make your office the center for all client telephone communications — not your cell or home phone! Define an emergency to your clients in the policy, and introduce your staffers who will provide clients with basic, non-legal information over the telephone. Let clients know you WILL return their phone calls in a timely manner and at set times of the day with emergencies and special cases excepted of course.

Use Practice/Case Management, Time Billing and Accounting Software

Completely automate your front and back office systems and do everything you have been trying to do manually for years! Make more money and save valuable time in the process. Get training on these systems from a certified consultant and maximize your productivity and profitability almost immediately. Don't buy it? How much time do you and your staff waste looking for a correct phone number or address? Looking for a file and then returning a phone call on that file? Doing the billing in your word processor? To remedy some of your main office inefficiencies, run out today and get these programs.

You will then have more time for billing and/or relaxing!

Control E-mail

"Take Back Your Inbox" is a session I've seen put on at the ABA Techshow. Be proactive when reading and responding to e-mail. Incorporate your practice/case management system's task or to do lists and calendars to make sure you get things done. Filter out spam or use a popular spam killing utility. Have a policy that outlines what will, can and can't be done with your e-mail system. Save important e-mails and get rid of all others as you read them. Have a set time for reading and responding too!

Market Smart


Take business cards with you wherever you go. Write newspaper and magazine articles. Design a useful and attractive Web site. Do client-focused seminars. Deliver client newsletters. Develop a firm brochure. Keep all your marketing ideas fresh and up-to-date with an annual overhaul of your marketing efforts. Don't forget to track and evaluate how much time you spend on business development and the return you've gotten on your time investment.

Manage Your Stress

Eat well-balanced, healthy meals and exercise. Take real vacations with out being "connected" in any way to your office. Take breaks throughout the day to rest your eyes, neck, wrists and back. Stretch and walk. Laugh (a lot), play (a little), and SMILE!

Fall In Love All Over Again (With Your Practice)

Think back to why you chose to go to law school, and why you chose the practice area(s) in which you practice. Would you trade your practice in to do something else? The practice of law is very challenging and very rewarding. Participate in CLE programs and other events that complement the work you do. Join and work hard in local and specialty bar associations that can appreciate your practice. Tell a complete stranger what you do and why you love it so much! Dig out those client thank you cards and notes, and realize you are helping!

Have a happy and safe summer! 

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

The Georgia Asian Pacific American Bar Association

By Tara Adyanthaya

The Georgia Asian Pacific American Bar Association was born 10 years ago in Atlanta, the brainchild of several local attorneys, including the Honorable Alvin T. Wong, now a judge in the State Court of DeKalb County; Professor Natsu Saito Jenga, of Georgia

State University; and Attorney Linda Klein, past president of the State Bar of Georgia (there were actually 10 founding members, and Judge Wong and Professor Jenga pored over the Georgia Bar directory to find Asian names).

As the current president of GAPABA, I am struck by the diversity of our organization. According to the United States census, an Asian Pacific American is described as a person of one of the following ethnicities:



GAPABA Board Members (from left to right). Standing: Sam Choy, John Wu and Li Wang. Seated: Naho Kobayashi, Tara Adyanthaya, Judy Kim and Han Choi.

Chinese, Filipino, Asian Indian, Japanese, Korean, Vietnamese, or Pacific Islander (which includes Guamanians, Hawaiians and Samoans). Asian Americans have come to the United States from over 20 countries, represent more than 60 different ethnicities, and speak a multitude of languages. Our organization brings together lawyers of extremely different backgrounds. I myself am half-Indian and half-Irish. As there is not, to my knowledge, an Irish American Bar Association or an Irish-Indian American Bar Association, I am pleased to be a part of an organization that embraces at least part of my heritage.

Which brings me to an important point about our organization: you do not need to be of Asian descent to be a member. All that is required for membership is that you are a member of the Bar and share Asian American interests. In fact, you do not even have to be a member to attend our events. I invite everyone who reads this article to our upcoming 10th Anniversary Banquet, which will take place on Thursday, June 26, at 7 p.m. We are in the process of securing a location and a speaker, but I can promise tasty food and interesting conversation to all who attend. Please contact me if you are interested in attending, and I will provide you with more specific information when we have it.

One of the main focuses of our organization is to promote networking opportunities and cultural/political/legal education for our membership. We hold bi-monthly happy hours and have functions that include student members of APALSA, the Asian Pacific

American Law Students' Association. Recently, our member Judith Kim was active in organizing a showing of the documentary "Who Killed Vincent Chin" at Emory University, a film that examined the racially motivated slaying of a Chinese American in Detroit during the American Automobile industry crisis of the 1980s. After the movie, we participated in a discussion led by an Assistant United States Attorney in the hate crimes unit and an attorney from the Lambda Legal Defense Foundation. We have hosted dinners at Chinese and Korean restaurants on Buford Highway and Indian Restaurants in Doraville. We also have sponsored a number of lectures and educational programs to assist our membership in developing their professional skills.

GAPABA members have volunteered their talent and language skills to organizations that provide pro bono legal services. Our members have worked with Catholic

Social Services in providing assistance to minors who were victims of human trafficking who arrived in the U.S. without documents and unable to speak English. We also are working with the Center for Pan-Asian Community Services to develop a legal hotline to provide referrals for Asian immigrants or Asian Americans who need legal advice. The project will provide referrals to bilingual attorneys and will provide access to pro bono attorneys or affordable attorneys based on the party's resources. Since 1999, together with CPACS, we have sponsored classes for Asians and Asian Americans on topics such as Criminal Law, Constitutional Law and Civil Justice, Immigration, Business Law, Torts, Labor and Employment Law, Real Estate, Wills, and Family Law. The People's Law School recruits legal practitioners, both Asians and non-Asians, to teach in English, while an interpreter translates it into the classes' native language for those who do not speak English. GAPABA members also have volunteered to assist Asian immigrants in applying for citizenship and to assist Asian Americans in registering to vote.

In November of 2002, GAPABA hosted the Fourteenth Annual Convention for our national umbrella organization, NAPABA (the National Asian Pacific American Bar Association). Hosted for the first time in Atlanta, the Convention was held at the Swissotel in Buckhead and chaired by our very own Lisa Chang (Jones Day), the 2001-2002 NAPABA President. Deputy Attorney General Larry D. Thompson (formerly of King & Spalding) addressed over 300 attendees as

GAPABA's 2003 Board of Directors:

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the keynote speaker at the annual gala banquet. In another convention highlight, Robert K. Woo (King & Spalding) received the NAPABA Trailblazer Award for Outstanding APA Attorney for the Southeast Region.


The participation of key GAPABA members also actively ensured the success of our convention. Han Choi (Nelson, Mullins, Riley & Scarborough) served as Fundraising Chair and organized the annual golf tournament (one that did not inspire any protests!). Corporate sponsors included such Fortune 100 companies as Mercedes-Benz USA, Federal Express, Anheuser-Busch, Coca-Cola and Wal-Mart. Han was so successful in garnering sponsorship that GAPABA received significant funds from convention proceeds to assist us in our future community projects.

I organized the Annual Thomas Tang National Moot Court Competition, hosted at my firm, Morris Manning & Martin. Begun in 1993, the competition honors the late Judge Thomas Tang, who served on the U.S. Court of Appeals, 9th Circuit from 1977-95. He was one of the highest ranking APA jurists at the time the competition was formed. Over 64 attorneys from various firms and governmental agencies volunteered as judges. Law students from all over the country argued a problem modeled after the recent University of Michigan case involving the school's discretion in promoting diversity in its admissions practices.

Other GAPABA convention leaders included: Chong Kim (Solo practitioner and Fulton County magistrate judge), organizer of the Trailblazer Reception at the High

Museum; Judge Alvin T. Wong (DeKalb State Court), Partner's Dinner coordinator; Jeannie Lin (Georgia Lottery), Convention Treasurer; Jessy Lall (Office of State Admin, Hearings), Publications; Diane LaRoss (Powell Goldstein Frazer & Murphy), Exhibit and the Job Fair coordinator; Robert Woo, CLE programs coordinator; and Bonnie Youn (Dixit & Youn), Registration & volunteer coordinator. Crucial to the event was the support of dozens of local attorneys and students, too numerous to name.

In a separate effort to provide improved services to our membership and the community at large, GAPABA is revamping its Web site (www.gapaba.org). The new Web site will serve as a portal to the legal community, where attorneys and laypersons may exchange information. The new Web site is scheduled to go online in summer, and users will be able to search for bilingual attorneys. The new Web site will also provide information in different Asian languages.

Though GAPABA is a relatively new local bar organization, we have accomplished much in our brief tenure. We look forward to many more years of serving the community. Please feel free to contact me if you would like more information about our organization or would like to participate in any of our upcoming activities. 

Tara Adyanthaya is an attorney in the litigation group at Morris Manning & Martin, LLP. For more information concerning GAPABA events, she can be reached at tla@mmmlaw.com. Li Wang (Arnall Golden & Gregory) and Bonnie Youn assisted in drafting this article.

Officers of the Court

By Paul W. Bonapfel

Editor's note: This is the second part in a three part series.

There are two things that stand out in my mind from my law school career. One is my first day of law school when property law professor Roger Groot walked in and, with no introduction or other comment, stated, "Judgment only has one 'e.'" Isn't it strange that I remember that more than the Rule in Shelley's Case, the rule against perpetuities, or the intricacies of cross-alternative contingent remainders?

The second is the last day of my Federal Courts class taught by Professor Ray Forrester. I can't give you a biography on Professor Forrester or tell you whether he was or was not a "giant" in the law, although he did write our Federal Jurisdiction casebook, which qualified him in my mind as a renowned scholar that we were lucky to have at Georgia.

In any event, on the last day of our class, which consisted mostly of third-years in their final quarter of law school, he wished us well and exhorted us, whatever we did, to practice law in the "grand style." I thought I wanted to do that — to practice law in the "grand style." I didn't know what the "grand style" was, maybe still don't, and I'm not sure that I've done that, but that was what I wanted to do.

As I have reflected on that exhortation, I have thought that maybe Professor Forrester was really talking about "professionalism."

My son is now applying to law school and hopes to become a lawyer. Will someone encourage him to practice law in the grand

style? Is it possible to practice in the grand style today? Will it be possible to practice in the grand style 25 years from now?

The concept of what is "professional" conduct in terms of ethical standards has certainly changed in 25 years. I turned to my law school casebook on legal ethics and found some things that many will now find curious.

In the early 60s, a lawyer in Wisconsin shared office space with his non-lawyer spouse who had a tax-preparing business. I imagine this setting as being a two-story walk-up of some sort in a small town with windows facing Main Street. On one window is a sign for the spouse's office that states "Income Tax Returns Prepared" and on the other is a neon sign with the lawyer's name.

Is there an ethical issue here? Well, we might think that a lawyer's shingle should be something other than in neon lights, although that is apparently no problem for accountants, at least in Los Angeles, where there are two skyscrapers with the names of accounting firms at the top.

The neon light sign was a problem, but not the only one. The other problem was the "Income Tax Returns Prepared" sign. This sign was for the non-lawyer spouse's income tax preparation service, but the problem was that the spouses shared office space and so it was possible that the public might think the sign related to the lawyer's practice. Putting up such a sign by a lawyer was a no-no under prevailing standards. The ethics committee complained that, given the shared space, the lawyer violated ethics rules by permitting the spouse to put up the sign because it amounted to solicitation of business by a lawyer.

The Supreme Court of Wisconsin found both of these things to be unprofessional conduct.¹ This is what the court said:

"Solicitation of business by a lawyer is unprofessional conduct."

Let me repeat that. "*Solicitation of business by a lawyer is unprofessional conduct.*"

The court then went on (emphasis added):

With very narrow exceptions, largely limited to simple identification of the lawyer's office, proper use of professional cards and letterheads, and proper listing in directories, advertising *in any form* is deemed solicitation of business, and unprofessional conduct.

There was nothing unusual about that statement 25 years ago. Although some were beginning to challenge enforcement of the rule on free speech, due process and right to counsel on constitutional grounds, that was the prevailing view.

As another example from the 60s, there was the New York firm that permitted itself to be interviewed for a *Life* magazine article about the practice of law by a firm in Manhattan. The article actually had flattering things to say about the lawyers, their practices, what they did and how they helped their clients. The article was even accompanied by *photographs* of some of the lawyers.

The New York ethics gendarmes found a bar violation and this is what the court said (emphasis added):²

Where, as here, there has been a deliberate encouraging or fostering by attorneys of self-interest publicity to be afforded by a news medium or magazine article, and the personal and laudatory aspects of the article have a tendency to promote their private interests, there is *unquestionably* a violation of Canon 27.

Canon 27 was one of the ethical canons promulgated by the

American Bar Association then in effect and it prohibited "advertising."³

The first line of Canon 27 was as follows:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations.

Canon 27 thus prohibited advertising, but it went even further (emphasis added):

Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are *reprehensible*; but the customary use of simple professional cards is not improper.

What would the authors of these statements think about billboard advertising by lawyers? Ads on television? Newspaper advertisements? At a different level, "sponsorships" of public radio or television programs or Atlanta Symphony concerts by law firms whose name is prominently displayed or announced? "Beauty contests" and "requests for proposals" as a means for clients to choose counsel? Web sites with descriptions of firms, their lawyers, their practices, their experience, their other clients and even the dreaded photographs?

Twenty-five years ago, a court ruled that "indirect advertising"

like the *Life* magazine article offended the traditions and lowered the tone of our profession and was reprehensible. Today, law firms have "marketing departments" that may employ as many people as the "big" firms had as attorneys 25 years ago.⁴ They turn out things like a 16-page supplement to the Fulton County Daily Report published in January by a national Atlanta law firm and Big Five accounting firm, complete with photographs and complimentary material about the firms.

Think for a moment about how those activities would have been seen under Canon 27.

Now take a look at Rule 7.2 of the Georgia Rules of Professional Conduct (2001), which expressly permits advertising through public media such as a newspaper or periodical, outdoor advertising, radio or television, or other written, electronic, or recorded communication.⁵

There is an article in a recent edition of the *ABA Journal* entitled "Law at the Crossroads."⁶ The author examines trends and developments in the practice in a much broader and more authoritative manner than I have done here. The article notes the growth in the size of law firms and makes this observation:

Probably the most significant change accompanying the huge growth [in the size of national law firms] has been the evolution from law as a profession to law as a business. Profits per partner and revenues are the new measures of success.

I mentioned this to a partner in a large national firm headquartered in Atlanta who thought this assessment is correct. "Profits per partner and revenues" are measures for a lawyer's success?

The ABA article contains an even more stunning observation (emphasis added):

One observer, Russell G. Pearce of Fordham University School of Law in New York, says he believes the emphasis on money was inevitable. He says the focus had to change *once the legal profession finally jettisoned the vestiges of the 19th century ideal of lawyers as a governing class who practiced law but also were concerned with the public good.*⁷

Have we jettisoned the 19th century ideal of lawyers as a “governing class” who practiced law but also were “concerned with the public good?”

Our Georgia Rules of Professional Conduct certainly don’t think so. Here is a portion of the preamble to these rules:

A lawyer is a representative of clients, an officer of the legal system and a citizen having special responsibility for the quality of justice.⁸

In 1969, in a case challenging the relatively new requirement that all attorneys in Georgia be members of the State Bar of Georgia, Georgia’s Supreme Court expressed a lawyer’s position and responsibilities in this way (emphasis added):⁹

An attorney does not hold an office or public trust, in the constitutional or statutory sense of that term, but is an *officer of the court*. He is, however, in a sense an officer of the state, with an obligation to the courts *and to the public* no less significant than his obligation to his clients. The office of attorney is indispensable to the administration of justice and is intimate and peculiar in its relation to, and vital to the well-being of, the court.

Lawyers are *officers of the court*. Lawyers have an obligation *to the public* that is *no less significant* than their obligation to our clients.

Lawyers are *indispensable* to the administration of justice and *vital* to the well-being of the court.

We throw this concept of attorneys as “officers of the court” around a lot, but do we ever stop and really think about it? What does it mean to be an “officer of the court?” We spend so much time in and around courts that we overlook the miracles that happen there everyday. A dispute is presented, a judge makes a decision and enters an order on a piece of paper — or through a combination of electrical impulses, perhaps, in the digital world we’re in — *and we expect that order to be followed.*

We take it for granted in our country that when a court makes a decision, it will be obeyed — whether the issue is who shall be the president of the United States or whether a creditor must return a repossessed car to a Chapter 13 debtor. In a very real sense, our legal system is at the core of our freedom, and it is our impartial and independent judiciary that is at the foundation of that legal system. This is what gives us, as is often said, the rule of law and not of men.

It is our courts that protect our liberties and our property. Other regimes have set up governments on paper that promised freedom for the people. History has shown that those protections are meaningless without the institution of an independent, impartial judiciary that can protect the rights of citizens.

And lawyers are officers of that institution. Officers. Officers carry out the mission of the body that appoints them. Officers are the agents through whom an appointing body does its work. Officers protect and defend the appointing body.

This special status as lawyers, this position as officers of the court, imposes on us a commitment to the courts in which we practice to assist them in their work in the administration of justice.

It is from this commitment, this duty as officers of the court, that our responsibility to comport ourselves as professionals arises. We do things in certain ways not merely because we are required to do them in that way, not merely because there are punishments if we do not, not merely because we or our clients will benefit.

We do things in certain ways — we act as professionals — because our society, our civilization, our freedom, in the final, ultimate, analysis, depends on how we function as attorneys.

Do I exaggerate the importance of attorneys? Are lawyers, as the Georgia Supreme Court has stated, “indispensable to the administration of justice?”

Shakespeare certainly thought so. We are all familiar with the line “The first thing we do, let’s kill all the lawyers.” Our detractors quote this line to prove how frustrating and unproductive lawyers are, how lawyers get in the way, and how the world would be better off without them.

Yet this phrase was not uttered by a citizen tired of dealing with lawyers or who thought them unproductive. Rather, the proposal is made by a potential despot dedicated to subjugating the people and depriving them of their liberties. His plan is that, if there are no lawyers, the people will have no one to assert their rights and protect them in the courts; he and his cohorts will be able to rule without challenge. He wanted to eliminate lawyers, certainly, not because lawyers are evil, but because they protect the people.


John Adams thought lawyers were indispensable, too. Our second president wrote in one of his letters: “No civilized society can do without lawyers.”¹⁰

This hasn’t changed. Courts can’t protect the innocent, convict the guilty, enforce due process and

equal protection of the law, in short, *do justice*, without the assistance of lawyers. Lawyers bring the issues to the courts, advocate the rights of their clients, explain the law to their clients and counsel them about the court's decisions. In reality, the courts can only be as good as the lawyers practicing before them.

I don't mean to suggest that our freedom hangs in the balance because of a lawyer's unprofessional or unethical behavior. Surely, it's a stretch to think that the preservation of our liberties depends on one lawyer being courteous to another or that our republic is threatened by the submission of a sloppy brief.

At the same time, however, the strength of our judiciary is built, bit by bit, piece by piece, on the confidence that our citizens have in it and the respect they have for it. Citizens gain confidence in the legal system through their daily interactions with lawyers like you and me. Confidence and respect are reinforced when there is fair litigation on the merits according to the rules and an impartial and independent judge makes a fair and impartial decision after listening to both sides. Confidence and respect are denigrated when the rules are broken or abused, when the adversary or opposing counsel is maligned, when the court is not independent or impartial or appears biased or prejudiced.

It is the lawyers, in their dealings with each other, their clients, and the courts, who are responsible, as much as anyone else, for the quality of justice in our society. It is the lawyers who will, piece by piece, strengthen or weaken our judicial system. 

Endnotes

1. *State v. Willenson*, 20 Wis.2d 519, 123 N.W.2d 452 (1963).

2. *In re Connelly*, 18 App. Div.2d 466, 240 N.Y.S.2d 127 (1963).
3. Canon 27 of the American Bar Association Canons of Professional Ethics (1966) provided as follows: It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper. Publication in reputable law lists in a manner consistent with the standards of conduct imposed by these canons of brief biographical and informative data is permissible. Such data must not be misleading and may include only a statement of the lawyer's name and the names of his professional associates; addresses, telephone numbers, cable addresses, branches of the profession practiced; date and place of birth and admission to the Bar; schools attended, with dates of graduation, degrees and honor; legal authorships; legal teaching positions; memberships and offices in bar associations and committees thereof, in legal and scientific societies and legal fraternities; the fact of listings in other reputable law lists; the names and addresses of references; and, with their written consent, the names of clients regularly represented. A certificate of compliance with the Rules and Standards issued by the Special Committee on Law Lists may be treated as evidence that such list is reputable. It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office to use the designation 'patent attorney' or 'patent lawyer' or 'trademark attorney' or 'trademark lawyer' or any combination of those terms.

4. See T. Carter, *Law at the Crossroads*, 88 ABA Journal 29, 34 (January 2002). The author writes: Back in the late 1970s, when specialized legal affairs reporting became a mainstay, reporters had to chase after lawyers to get stories. Now they run from them. A lot of lawyers suddenly realized that press is good. It gave them name recognition, even made some of them famous. It brought them clients. It wasn't long before lawyers and law firms were hiring people solely to answer reporters' questions, get the word out about their cases, and control the spin when things went awry. In 1985 the Legal Marketing Association was created. Today it has 1,250 members. According to the association, three-fourths of the largest 250 law firms in the country now employ LMA members.
5. Rule 7.2, GEORGIA RULES OF PROFESSIONAL CONDUCT provides as follows: (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through: (1) public media, such as a telephone directory, legal directory, newspaper or other periodical; (2) outdoor advertising; (3) radio or television; (4) written, electronic, or recorded communication. (b) A copy or recording of an advertisement or communication shall be kept for two years after its last dissemination along with a record of when and where it was used.
6. T. Carter, *Law at the Crossroads*, 88 ABA JOURNAL 29, 30 (January 2002).
7. *Id.* at 31.
8. Preamble to Georgia Rules of Professional Conduct.
9. *Sams v. Olah*, 225 Ga. 497, 504, 169 S.E.2d 790 (1969).
10. See D. McCullough, JOHN ADAMS 591 (2001)

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The Orientations on Professionalism conducted by the State Bar Committee on Professionalism and the Chief Justice's Commission on Professionalism at each of the state's law schools have become a permanent part of the orientation process for entering law students. The Committee is now seeking lawyers and judges to volunteer from across the state to return to your alma maters or to any of the schools to help give back part of what the profession has given you by dedicating a half day of your time this August.

- ▶ Purpose of the program: To introduce the concept of professionalism to first-year students
- ▶ Minimal preparation is necessary for the leaders
- ▶ Review the hypos and arrive at the school 15 minutes prior to the program
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- ▶ Pair up with a friend or classmate to co-lead a group (Please note, if you are both recent graduates we will pair you with a more experienced co-leader)

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

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Georgia State	August 12, 2003 (Tues.)	3:00 p.m. - 5:00 p.m.	5:00 - 6:00 p.m.	Judge C.J. Becker
John Marshall	August 23, 2003 (Sat.)	9:00 a.m. - 11:30 a.m.	8:30 - 9:00 a.m.	Judge Tonny S. Beavers
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L. Clifford Adams Jr.

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Admitted 1960
Died April 2003

Jimmy J. Boatright

Alma, Ga.
Admitted 1973
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Knox Bynum

Clayton, Ga.
Admitted 1951
Died March 2003

Rebecca Helene Cruse

Stone Mountain, Ga.
Admitted 1993
Died April 2003

Thomas J. Dickey Jr.

Brunswick, Ga.
Admitted 1938
Died February 2003

Nancy W. George

Alexandria, Va.
Admitted 1979
Died February 2003

Charles Gowen

Brunswick, Ga.
Admitted 1925
Died March 2003

H. Darrell Greene

Marietta, Ga.
Admitted 1965
Died March 2003

Gerry E. Holmes

Cedartown, Ga.
Admitted 1975
Died April 2003

John J. Howard

Columbus, Ga.
Admitted 1995
Died April 2003

George D. Lawrence Sr.

Eatonton, Ga.
Admitted 1964
Died February 2003

John W. Minor Jr.

Hilton Head, S.C.
Admitted 1970
Died February 2003

Emma A. Monroe

Smyrna, Ga.
Admitted 1945
Died February 2003

F. Robert Raley

Macon, Ga.
Admitted 1960
Died February 2003

Hughes Spalding Jr.

Atlanta, Ga.
Admitted 1941
Died April 2003

Charlie Thurmond

Gainesville, Ga.
Admitted 1935
Died April 2003

Robert H. Walling

Decatur, Ga.
Admitted 1956
Died February 2003

Eva J. Wilson

Atlanta, Ga.
Admitted 1984
Died February 2003



**Geraldine
"Gerry"
Edmonds
Holmes**, 55, of
Cedartown, Ga.,
died on April 9,

2003. She was a practicing attorney in the Cedartown area since 1974, serving with the James M. Parker Law Firm, the Mundy and Gammage Law Firm and the Holmes Law Firm. Holmes was appointed to serve as the new district attorney for the Tallapoosa Judicial Circuit in July 2002.

Holmes was preceded in death by her father, Joseph L. Edmonds. She is survived by her husband, Calloway "Cal" Holmes of Cedartown; mother, Clara Taylor Edmonds; son, Joseph Calloway Holmes III; daughter and son-in-law,

America Cade and Christopher Gaines Dempsey; and daughter, Mary G. Holmes.



**Charles Latimer
Gowen**, 99, of
Atlanta and St.
Simons Island,
Ga., died on
March 31, 2003.

He served as president of the State Bar of Georgia for the 1945-46 term. Gowen practiced law in Brunswick for 36 years and also served in the state legislature from 1939 through 1961. He was a senior partner in the law firm of King & Spalding since 1962 and, according to their history, the first politician invited to join the firm. Gowen's notable courtroom appearances included his successful argument before the United States Supreme Court in 1968 representing the Presbyterian Church in the United States in a precedent-setting case involving church-state conflict and his successful defense in 1972 of the Coca-Cola Company in an anti-trust jury trial.

He is survived by two daughters, Anne Spalding of Atlanta and St. Simon's Island and Mary Evelyn Wood of St. Simons Island; a sister, Gladys Fendig of St. Simons Island; a stepsister, Jean Smith of Fort Lauderdale, Fla.; three stepbrothers, Erroll Gowen of Pompano Beach, Fla., Richard Gowen of Jacksonville and James Gowen of Cane Hill, Ark.; 8 grandchildren; and 15 great-grandchildren.

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June 2003

3

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Collection Law for the Health Care Industry in Georgia
Athens, Ga.
6.5 CLE

9

NATIONAL BUSINESS INSTITUTE
Getting Successful Results in Georgia Eminent Domain Actions
Atlanta, Ga.
6 CLE with 0.5 ethics and 6 trial

16

NATIONAL BUSINESS INSTITUTE
Adoption Law in Georgia
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UPL Advisory Opinion No. 2003-2

Issued by the Standing Committee on the Unlicensed Practice of Law on April 22, 2003. Note: This opinion is only an interpretation of the law, and does not constitute final action by the Supreme Court of Georgia. Unless the Court grants review under Bar Rule 14-9.1(g), this opinion shall be binding only on the Standing Committee on the Unlicensed Practice of Law, the State Bar of Georgia, and the petitioner, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

QUESTION PRESENTED

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?

SUMMARY ANSWER

Yes. Under Georgia law, the preparation of a document that serves to secure a legal right is considered the practice of law. The execution of a deed of conveyance, because it is an integral part of the real estate closing process, is also the practice of law. As a general rule it would, therefore, be the unlicensed practice of law for a nonlawyer to prepare or facilitate the execution of such deeds.

OPINION

In answering the above question, the Committee looks to the law as set out "by statute, court rule, and case law of the State of Georgia." Bar Rule 14-2.1(a). "Conveyancing," "[t]he preparation of legal instruments of all kinds whereby a legal right is secured," "[t]he rendering of opinions as to the validity or invalidity of titles to real or personal property," "[t]he giving of any legal advice" and "[a]ny action taken for others in any matter connected with the law" is considered the practice of law in Georgia. O.C.G.A. §15-19-50. Moreover, it is illegal for a nonlawyer "[t]o render or furnish legal services or advice." O.C.G.A. §15-19-51.

There are certain exceptions to these statutory provisions. For example, "no bank shall be prohibited from giving any advice to its

customers in matters incidental to banks or banking...." O.C.G.A. §15-19-52. A title insurance company "may prepare such papers as it thinks proper or necessary in connection with a title which it proposes to insure, in order, in its opinion, for it to be willing to insure the title, where no charge is made by it for the papers." *Id.* Nonlawyers may examine records of title to real property, prepare abstracts of title, and issue related insurance. O.C.G.A. §15-19-53. O.C.G.A. §15-19-54 allows nonlawyers to provide attorneys with paralegal and clerical services, so long as "at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received."

In addition to the acts of the Georgia legislature, the Supreme Court of Georgia has made it clear that the preparation of deeds constitutes the practice of law, and is to be undertaken on behalf of another only by a duly qualified and licensed Georgia attorney. For example, the Court has issued the Rules Governing Admission to the Practice of Law in Georgia. Under Part E of those rules, an individual can be licensed as a "foreign law consultant," and thereby be authorized to "render legal services and give professional legal advice on, and only on, the law of the foreign country in which the foreign law consultant is admitted to practice...." Since such an individual has not been regularly admitted to the State Bar of Georgia, the Court prohibits foreign law consultants from providing any other legal services to the public. For purposes of this discussion, it is noteworthy that Part E, §2(b) states that a foreign law consultant may not "prepare any deed, mortgage, assignment, discharge, lease, trust instrument, or any other instrument affecting title to real estate located in the United States of America."

The Committee concludes that, with the limited exception of those activities expressly permitted by the Georgia legislature or courts, the preparation of deeds of conveyance on behalf of another within the state of Georgia by anyone other than a duly licensed attorney constitutes the unlicensed practice of law.

The Committee turns its attention to the execution of deeds of conveyance. *Pro se* handling of one's own legal affairs is, of course, entirely permissible, and there is nothing in Georgia law to "prevent any corporation, voluntary association, or individ-

ual from doing any act or acts set out in Code Section 15-19-50 to which the persons are a party....” O.C.G.A. §15-19-52. The Committee instead focuses on “notary closers,” “signing agents,” and others who are not a party to the real estate closing, but nonetheless inject themselves into the closing process and conduct, for example, a “witness only closing.” A “witness only closing” is one in which an individual presides over the execution of deeds of conveyance and other closing documents, but purports to do so merely as a witness and notary, not as someone who is practicing law.

The Supreme Court of Georgia periodically issues advisory opinions relating to attorney conduct. Under Court rule, such opinions have “the same precedential authority given to the regularly published judicial opinions of the Court.” Bar Rule 4-403(e). It would be proper, then, for the Committee to turn to any relevant advisory opinions for guidance.

In Formal Advisory Opinion 86-5, the Supreme Court of Georgia interpreted the word “conveyancing” as set out in O.C.G.A. §15-19-50, and considered what the term meant in relation to the closing of a real estate transaction. The Court viewed a real estate closing “as the entire series of events through which title to the land is conveyed from one party to another party....” That being the case, the Court concluded “it would be ethically improper for a lawyer to aid nonlawyers to ‘close’ real estate transactions,” or for a lawyer to “delegate to a nonlawyer the responsibility to ‘close’ the real estate transaction without the participation of an attorney.”

In Formal Advisory Opinion 00-3, the Court restated its view that the real estate closing is a continuous, interconnected series of events. The Court made it clear that, in order for an attorney to avoid possible disciplinary sanctions for aiding a nonlawyer in the unauthorized practice of law,

“[t]he lawyer must be in control of the closing process from beginning to end. The supervision of the paralegal must be direct and constant.” The Court held that “[e]ven though the paralegal may state that they are not a lawyer and is not there for the purpose of giving legal advice, circumstances may arise where one involved in this process as a purchaser, seller or lender would look to the paralegal for advice and/or explanations normally provided by a lawyer. This is not permissible.” A lawyer who aids a nonlawyer in the unauthorized practice of law can be disbarred. Georgia Rule of Professional Conduct 5.5.

The Committee finds that those who conduct witness only closings or otherwise facilitate the execution of deeds of conveyance on behalf of others are engaged in the practice of law. As noted above, “conveyancing” is deemed to be the practice of law, and the very purpose of a deed is to effectuate a conveyance of real property. In reviewing the foregoing opinions of the Supreme Court of Georgia, the Committee concludes that the execution of a deed of conveyance is so intimately interwoven with the other elements of the closing process so as to be inseparable from the closing as a whole. It is one of “the entire series of events through which title to the land is conveyed from one party to another party.” To view the execution of a deed of conveyance as something separate and distinct from the other phases of the closing process—and thus as something other than the practice of law—would not only be forced and artificial, it would run counter to the opinions of the Court. Such an interpretation would mean that a nonlawyer could lawfully preside over the execution of deeds of conveyance, yet an attorney who allowed an unsupervised paralegal to engage in precisely the same activity could be disbarred. An interpretation of Court opinions that leads to such an incongruous result cannot be proper. Rather, the

view consistent with those opinions is that one who facilitates the execution of deeds of conveyance is practicing law.

Accordingly, the Committee concludes that, subject to any relevant exceptions set out by the Georgia legislature or courts, one who facilitates the execution of a deed of conveyance on behalf of another within the state of Georgia is engaged in the practice of law. One does not become licensed to practice law simply by procuring a notary seal. A Georgia lawyer who conducts a witness only closing does not, of course, engage in the unlicensed practice of law. There may well exist, however, professional liability or disciplinary concerns that fall outside the scope of this opinion.

Refinance closings, second mortgages, home equity loans, construction loans and other secured real estate loan transactions may differ in certain particulars from purchase transactions. Nevertheless, the centerpiece of these transactions is the conveyance of real property. Such transactions are, therefore, subject to the same analysis as set out above.

UPL Advisory Opinion No. 2003-1

Issued by the Standing Committee on the Unlicensed Practice of Law on March 21, 2003. Note: This opinion is only an interpretation of the law, and does not constitute final action by the Supreme Court of Georgia. Unless the Court grants review under Bar Rule 14-9.1(g), this opinion shall be binding only on the Standing Committee on the Unlicensed Practice of Law, the State Bar of Georgia, and the petitioner, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

QUESTION PRESENTED

Attorney representing the creditor on an account files a lawsuit against the debtor. The attorney receives a letter and agency power

of attorney from a company stating that it has been authorized to act as the agent for the debtor in settlement negotiations. Is the company engaged in the unlicensed practice of law? Is the individual directing the company engaged in the unlicensed practice of law?

SUMMARY ANSWER

Yes. Under the circumstances set out above, the company is representing one of the parties to a lawsuit in settlement negotiations. Since such representation can only be lawfully undertaken by an individual who is duly licensed to practice law, and cannot legitimately arise out of an agency power of attorney, the company and its personnel are engaged in the unlicensed practice of law.


OPINION

The Committee held a public hearing concerning the question set out above. It heard testimony from the owner of one such company, who described his business operations. The company routinely obtains from Georgia court dockets the names and addresses of debtors against whom suit has been filed. The amount of the alleged indebtedness typically ranges from \$500-\$8,000. The company contacts the debtors by means of a direct mail solicitation, which contains the following introductory language: "Dear ____: I may have some good news concerning your civil case. You will soon be served with a Court Summons [emphasis in original] and time is very important. Please contact me as soon as possible...." When the debtor responds to the solicitation, he is informed that the company, if retained, will contact the plaintiff and attempt to negotiate a settlement of the outstanding indebtedness. If the debtor agrees to the representation, he executes a power of attorney in favor of the company, appointing it as the debtor's "attorney-in-fact," with the stated authority "[t]o mediate creditor's claim(s) and to

effect a reasonable settlement with" the plaintiff. Once the company obtains the power of attorney, its employee contacts the plaintiff or, if represented by counsel, the plaintiff's attorney. The company's employee provides a copy of the power of attorney to the plaintiff, then attempts to settle the lawsuit through negotiation. The company sometimes charges the debtor a fee for its negotiation services, while at other times provides its services free of charge. The decision as to whether to charge a fee is a matter of discretion, to be determined by the financial plight of the debtor. The company makes it clear to all involved that it is not a law firm, and that none of its employees are licensed Georgia attorneys. Because the company's employees are non-lawyers, they are not bound by the Georgia Rules of Professional Conduct or otherwise subject to disciplinary regulation by the State Bar of Georgia.

A company operating in the manner described above is engaging in the unlicensed practice of law. The company's activity necessarily involves the delivery of legal services, because it is advocating the legal position of another relative to a pending lawsuit. O.C.G.A. §10-6-5 states that "[w]hatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act...." The Committee finds that negotiating a settlement to a lawsuit on behalf of another involves precisely the "special confidence" and "skill, discretion, or judgment" that can only be lawfully exercised by a duly licensed attorney. An individual cannot confer upon another the right to practice law simply by entering into a private agreement that purports to allow the representation. Such agreements, if they had force and effect, would allow literally anyone to represent another in a legal matter, thereby circumventing the rigorous

attorney licensing procedures established by the Supreme Court of Georgia. The potential for public harm under such circumstances is clear, and those inclined to enter into such agreements should keep in mind that "[n]o rights shall arise to either party out of an agency created for an illegal purpose." O.C.G.A. §10-6-20.

In addition to any unlicensed practice of law issues, the Committee notes, without further comment, that O.C.G.A. §18-5-1 et seq. generally prohibits "the business of debt adjusting." 

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