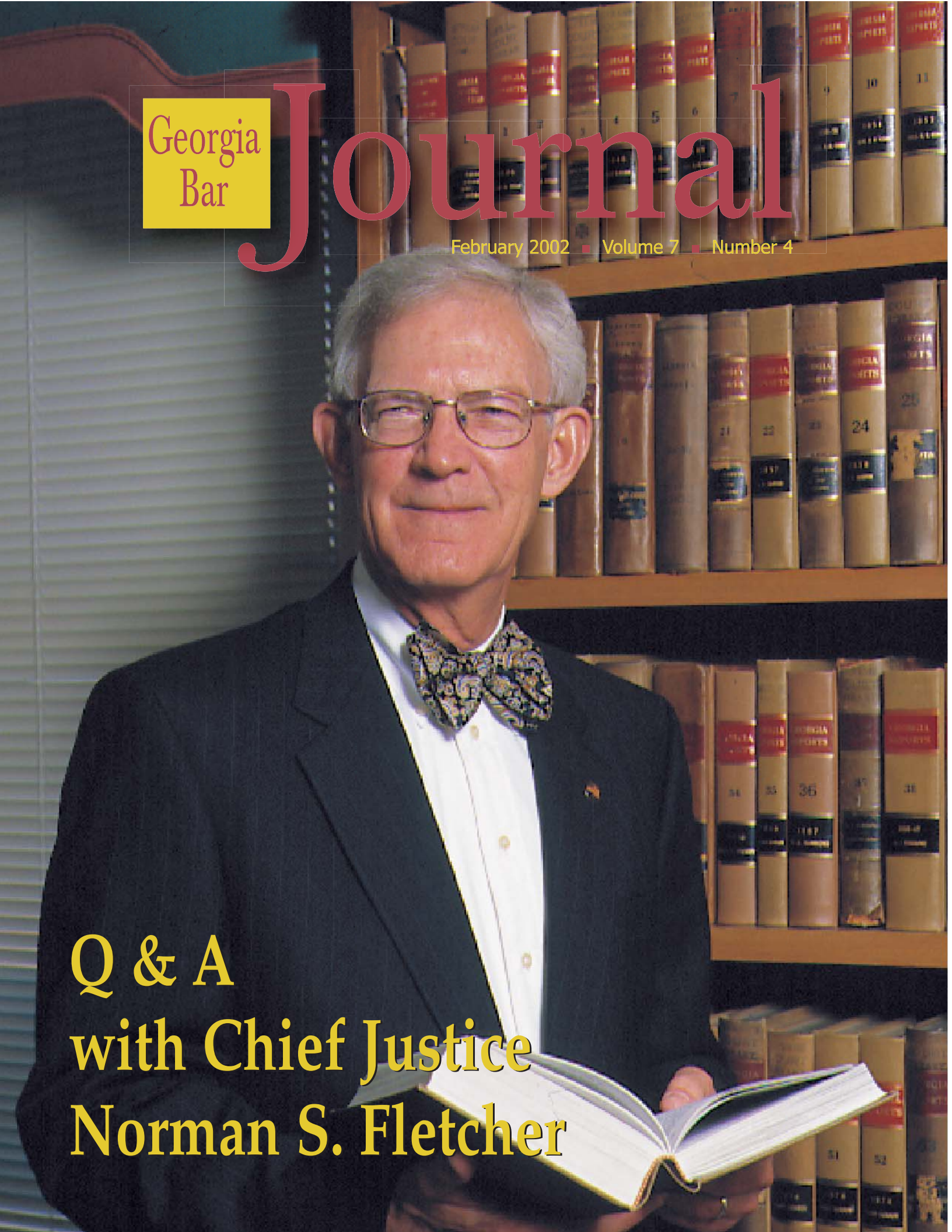


Georgia
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Journal

February 2002 ■ Volume 7 ■ Number 4

Q & A
with Chief Justice
Norman S. Fletcher



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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: Marisa Anne Pagnattaro, J.D., Ph.D., State Bar of Georgia, Communications Department, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Ga., 30303-2934. 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, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303-2934; phone: (404) 527-8736; joe@gabar.org.

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Headquarters

800 The Hurt Building, 50 Hurt Plaza
Atlanta, GA 30303-2934
(800) 334-6865 (404) 527-8700 FAX (404) 527-8717
www.gabar.org

South Georgia Office
244 E. Second St. (31794) P.O. Box 1390
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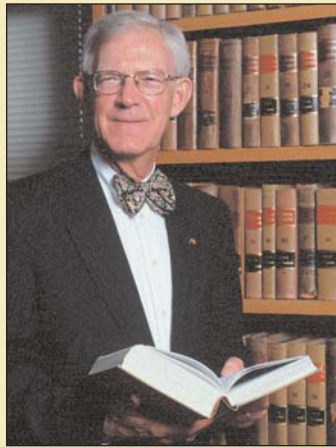
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On the Cover
Chief Justice Norman S. Fletcher talks with the *Georgia Bar Journal* about the Georgia Supreme Court's direction under his leadership.
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Publisher's Statement

The *Georgia Bar Journal* (ISSN-1085-1437) is published six times per year (bi-monthly) by the State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303-2934. © State Bar of Georgia 2002. One copy of each issue is furnished to members as part of their State Bar dues. Subscriptions: \$36 to non-members. Single copies: \$6. Periodicals postage paid in Atlanta, Georgia. Opinions and conclusions expressed in articles herein are those of the authors and not necessarily those of the Editorial Board, Communications Committee, Officers or Board of Governors of the State Bar of Georgia. Advertising rate card will be furnished upon request. Publishing of an advertisement does not imply endorsement of any product or service offered. POSTMASTER: Send address changes to same address.



An executive summary of the [Georgia MDP] report is on Page 36 of this *Bar Journal*. I encourage all members to read the report and give comments to their Board representatives so that a truly representative position can be taken.

By James B. Franklin

MDP & MJP: Where Are We Headed?

The Florida Bar recently held a board meeting in Atlanta, their first since 1986, thus providing an excellent opportunity for us to get acquainted with our neighbors. I found the meeting immensely valuable, both personally and professionally. Many of our issues are the same and, not surprisingly, many of our views are not! The Florida visit provided an outstanding forum for our bars to address the issues of multidisciplinary and multijurisdictional practice of law in a panel discussion.

As I am sure you're aware, there is a national, in fact international, discussion about the concepts of MDP and MJP and what constitutes fee sharing and the unauthorized practice of law. In Georgia, and across the country, bar associations and professional groups are wrestling with the notion of managing these concepts in a fashion that protects the core values of a profession deeply rooted in values and tradition.

Terry Russell, The Florida Bar president, and I engaged members from each of our states in a discussion of the pros and cons of MDP and MJP. The Florida Bar rejected multidisciplinary practice in 1999, at the same time as the American Bar Association (ABA). The Florida Bar did so for primarily the same reason as the ABA — that MPD would erode the core values of the profession. This position was ably presented by Florida Bar members Rich

Gilbert and Bill Kalish, both of whom have worked hard on these issues.

Linda Klein, past president of the State Bar of Georgia and chair of the Bar's MDP Committee, along with State Bar General Counsel Bill Smith, presented Georgia's approach on the issues.

The State Bar of Georgia has not yet taken an official position on MDP; however, the Bar's MDP Committee has completed its work and presented its findings for the full Board of Governors to consider. I expect the Board will address the issue at its Spring Meeting. An executive summary of the report is on Page 36 of this *Bar Journal*. I encourage all members to read the report and give comments to their Board representatives so that a truly representative position can be taken.

The bars also discussed the pros and cons of MJP in a similar tone. As with MDP, the State Bar of Georgia


has not taken an official position, but has appointed a commission on MJP, which is studying the issue and will release a report in the coming months. A status report from the Committee is on Page 39 of this *Bar Journal* and, again, I urge you to read the report and stay abreast of what is happening in Georgia and across the nation.

The ABA recently released its interim report on MJP and, as expected, it favors a safe harbor approach — one in which unauthorized practice of law is redefined to permit cross-jurisdictional practice in specific situations.

The discussions proved lively and, as one would expect, centered on the key question: Will MDP and MJP erode the core values of the profession and affect the public in a negative way? I suppose a definite answer is unknown, but I believe we can all agree that non-lawyers should not be allowed to practice law, and that the unauthorized practice must be stopped to protect the public.

What is striking to me, though, as I have watched our profession evolve in my years of practice, is that in many ways the issues we are debating are already in practice around us. Many lawyers represent

their clients in different states — states in which they are not licensed. In fact, many lawyers represent their clients internationally. And many lawyers go to work for firms other than law firms. Is the former the unauthorized practice of law? Is the latter a version of fee sharing?

Perhaps it would be more valuable to debate how best to handle these issues now that they are a part of our everyday lives, instead of arguing whether they should be permitted at all. Feel free to contact me and your board members to let us know what you think. 



Florida Bar representatives William Kalish (left) and Richard Gilbert (center), and Florida Bar President Terry Russell listen as State Bar Past President Linda Klein presents highlights of the State Bar of Georgia's MDP report.



State Bar of Georgia President Jimmy Franklin and Linda Klein share a laugh with members of The Florida Bar. Klein, dressed in black and red to demonstrate her true Georgia spirit, tamed the Gators with a quick joke before the discussions began.



Following the panel discussion, Georgia Bar General Counsel Bill Smith (left) President Jimmy Franklin (center) and Florida Bar President Terry Russell (right) agreed the forum proved a useful and enlightening exchange.



By Cliff Brashier

Bar's Legislative Program Promotes Positive Change

As lawyers, our primary role is to study, learn and interpret law. A largely unnoticed role of the State Bar of Georgia is in helping to shape new and existing laws to positively affect the administration of justice, and work against proposals that are to its detriment.

For many years, the State Bar of Georgia 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 Gerald Edenfield of Statesboro.

The Legislative Program is voluntary and is funded by contributions from State Bar members. Each member is encouraged to make a \$20 contribution each year. 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.

In most legislative years, the State Bar's agenda is second in size only to the governor's program, and its success rate has been outstanding. Last year, for example, the General Assembly passed State Bar endorsed bills revising Article IX of the Uniform Commercial Code and simplifying the Probate Court fee sched-

ule. The Senate passed a State Bar agenda bill revising the Limited Liability Company Act, and the House passed a Fiduciary Law Section bill clarifying the law relating to renunciation of succession.

In addition, State Bar initiatives, such as the Victims of Domestic Violence Program, the Court Appointed Special Advocates Program, the Indigent Defense Council and the Georgia Appellate and Educational Resource Center, received additional funding for fiscal year 2002. As of press time for this issue, another legislative session is underway with a large number of issues and successful results are expected once again.

The process works through the Bar's Standing Board Policy 100 that outlines how lobbying activities may be conducted. Basically, the policy says the Bar can only participate in issues that are germane to the purposes of the State Bar and only then when a two-thirds majority of the Board votes to take a position. Once


In most legislative years, the State Bar's agenda is second in size only to the governor's program, and its success rate has been outstanding.

the Board decides to pursue an issue, the Advisory Committee on Legislation, along with the Bar's legislative representatives, follows it through the process.

During each session, legislative updates are posted on the Bar's Web site at www.gabar.org. The Web also houses valuable information, including the full text of Standing Board Policy 100, the State Bar's legislative package, legislative session information, e-mail directories for the House and Senate and a quick reference for finding legislators.

The Bar's legislative efforts on behalf of the public have been tremendously successful for many reasons, not the least of which is the tireless determination of many State Bar members who participate in effective grass roots campaigns, and the sections they represent. It is important for all members to take an active role when critical issues arise and we owe a debt of thanks to the Advisory Committee for honoring our profession through their diligent stewardship of this important public service.

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). 

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From the Editor-in-Chief

I have the great pleasure of introducing and highlighting the look of the *Georgia Bar Journal*. As part of the ongoing effort to develop new and more efficient ways of communicating with members of the Bar, some significant changes have taken place at the *Georgia Bar Journal*, including:

- New design and layout, with more color;
- A combined department which incorporates the "Bench & Bar" and "Who's Where" departments; and
- Added emphasis on content relevant to members.


Credit for this new look goes to Joe Conte, Robin Dahlen and Sarah Bartleson, who all joined the State Bar Communications Department in 2001. We are very fortunate to have Joe Conte as the director of communications. Joe, who has worked in communications for over 15 years, was the communications director for the State Bar of New Mexico. He has also worked in communications for the Michigan House of Representatives and a California-based publishing company. Joe has a M.A. in advertising/public relations from Michigan State University and a B.A. in communications from Oakland University.

Robin Dahlen, assistant director of communications, is a graduate of Florida State University with a degree in communications. She has a strong background in magazines, including work as a managing editor for an Atlanta-based publishing company and as editor for *Florida CPA Today*. Her focus on the *Journal* is the coordination of submissions, overall content, news and feature writing and editing, as well as design and page layout.

Sarah Bartleson is a 2001 graduate of the University of Georgia with a B.A. in journalism. Her responsibilities include handling advertising, design layout and the "Bench & Bar" section.

Exercising great initiative and enthusiasm, Joe, Robin and Sarah decided to publish the *Journal* in house — a move that affords them greater control over the layout and substantial savings for the budget. We all hope that you find this issue more user friendly and more inviting to read. We want every issue of the *Georgia Bar Journal* to be as useful and readable as possible.

Look for more changes ahead during the first part of this year as the communications staff overhauls the State Bar Web site, www.gabar.org. Plans include bringing on-line efficiency and the newest technology to every member of the Bar. Standby for more news about those exciting changes.

If you have any suggestions about features, legal articles or book reviews, please let me know at (706) 583-0459 or pagnatta@terry.uga.edu. I would be delighted to hear from you. This is your publication and we want to know what you would like to read about in the *Georgia Bar Journal*. 

Marisa Anne Pagnattaro
Editor-in-Chief





Our best days
are ahead and
there is still
time to get
involved in the
many exciting
YLD projects
and trips.

By Pete Daugherty

The State of the YLD

In the United States, the president delivers his "State of the Union" address to the nation around this time every year. It's an opportunity to lay out what has been accomplished and what the immediate future holds for our nation. In that tradition, I am happy to report that the state of the YLD is strong.

Our committees are finding new and innovative ways to serve the public and the profession. The Minorities in the Profession Committee has applied for an American Bar Association sub-grant in order to develop a video to educate and recruit attorney volunteers for the Court Appointed Special Advocates program. Our Advocates for Special Needs Committee is also developing a video to distribute to schools for parents who face the daunting challenge of preparing a specialized education plan for their child in special education.

A new committee of the YLD, the Truancy Intervention Committee, had its training seminar for attorneys in October, and another training seminar is planned for the spring. Our Community Service Projects Committee sorted toys for children in December and collected suits in January at the Midyear Meeting to donate to local charities that clothe and train individuals for job interviews.

The YLD is able to accomplish great things through its committees

because young lawyers' interest in the work of the YLD is at an all-time high. The attendance at our meetings in New Orleans and Athens set new records. The business meeting at the Midyear Meeting and reception honoring the 30-year anniversary of Georgia Legal Services attracted dozens of new lawyers interested in the YLD. Interest in serving the YLD as an officer was evident as, for the first time in more than 12 years, three candidates sought the office of secretary of the YLD in the January elections.


Our best days are ahead and there is still time to get involved in the many exciting YLD projects and trips. The YLD Judicial Liaison CLE Seminar will be held on March 24, 2002. The YLD's next meeting will be in Savannah, Ga., April 5-7, 2002, at the Westin Harbor Resort.

Join us at that meeting and learn about the opportunities across the state to join in the YLD Great Day of Service on April 27, 2002.

Before coming to the Annual Meeting at Amelia Island Plantation, Amelia Island, Fla., June 13-16, 2002,

check out the spring issue of the *YLD Newsletter* for a listing of all the great committee events planned for March and April, or go online and access the newsletter at www.gabar.org/yldnewsletter.htm and consult the "Calendar of Events" section.

It is customary for the separate political parties to stand and applaud those portions of the president's "State of the Union" address that meet with their approval. Hopefully, everyone will find something to applaud in the work of the YLD this year.

Certainly, each of the committee members, committee chairpersons, and directors and officers of the YLD deserve a standing ovation for their hard work thus far this year, which keeps the state of the YLD strong. 



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PROTECTING AMERICA'S RESERVISTS:

Application of State and Federal Law to Reservists' Claims of Unfair Labor Practices

Thousands of Americans serve the United States in the military and military reserves. As the tragic events of Sept. 11, 2001, continue to unfold, many reservists are being required to put their domestic lives and jobs on hold as they are called to active duty. Naturally, as their military service draws to a close, reservists seeking to re-enter the workforce will be questioning their legal rights and responsibilities. One of the many questions is: "How and under what circumstances can I be re-employed in my old job?" While both state and federal law provide for re-employment rights, it is federal law that offers the most expansive protection to reservists. What follows is a summary of the re-employment rights for reservists under the Georgia and federal statutes. Because federal law is the more beneficial to the returning employee and the more likely to form the basis of a lawsuit, it is the main focus of this article.

GEORGIA STATE LAWS AND THE RETURNING RESERVIST

As a general rule, the laws of Georgia, insofar as employees are concerned, are less advantageous than federal civil rights statutes, particularly given the absence of a fair employment practice act applicable to private sector employees. With regard to reservists and other military personnel, however, Georgia offers a more generous safe harbor, albeit one that is less favorable than its federal counterpart. Specifically, the rights of re-employment are outlined in two provisions that can be found in Article 3, Part 4 of Title 38, concerning military affairs. The first addresses the rights of public officers and employees absent due to service as members of the militia or reserve forces¹ and the second specifies the rights to re-employment afforded to service men and women in private industry.²

With regard to public employees, defined as any person employed on a full-time basis with the state, a county, municipal corporation, or any other political subdivi-



sion or department,³ Georgia law provides for a leave of absence for: (a) “ordered military duty” (duty imposed without consent but also periods of 30 days imposed with consent); and (b) attendance at service schools (not to exceed six months in any four year period).⁴ During such leave, public employees are entitled to 18 days pay (30 days for governor declared emergencies) plus all benefits of pension or retirement systems with the exception of accidental disability retirement and accidental death benefits.⁵ Notably, these rights, including re-employment after service, are protected only to the extent that adverse employment actions are taken “by reason of such absence.”⁶ The significance of this language lies in the fact that a court is likely to require that any such action be based *solely* on the military service, which can be a difficult hurdle for plaintiffs. An even greater concern for public employees, however, is that the statute provides no

“... as their military service draws to a close, reservists seeking to re-enter the workforce will be questioning their legal rights and responsibilities.”

express remedial provisions associated with these rights.

Private sector employees fair somewhat better under Georgia law. As with public employees, state law also provides for re-employment after military service or after not more than six months attendance at a service school conducted by the armed forces of the United States, provided that the person is still qualified to perform

the duties of the position.⁷ As with public employees, however, these rights afford an opportunity of reinstatement for military personnel and reservists only where a discharge or suspension is “because of” their status.⁸ The point is that this language will not be viewed any different than the “by reason of” language quoted from the public employee statute. Accordingly, plaintiffs will likewise be required to show that any adverse employment action was taken *solely* on account of the military service. Should he or she prevail, the plaintiff will be entitled to full seniority but will only inure to those benefits that would otherwise be available to employees on furlough or leave of absence from work.⁹

The advantages Georgia law offers to private sector employees involve issues of benefits. Unlike public employees, private sector military personnel and reservists are afforded some statutorily defined remedial protection. For example, the statute provides some assurance against retaliation in the form of a prohibition against discharge without cause for a period of one year.¹⁰ It also affords a list of remedies that include back pay, the opportunity for representation by the State

Attorney General’s office, and a prohibition against assessment of fees and costs.¹¹ Noticeably absent, however, is any right to recover fees and costs or any opportunity for the assessment of punitive or bad faith damages. In addition, the Georgia statute offers only a bench trial by petition to the superior court of the county in which the private employer resides.¹² As a result of these limitations, the state’s military person-

nel and reservists will necessarily look to federal law in search of increased protection.

FEDERAL REMEDIES FOR RESERVISTS

Perhaps more advantageous than any Georgia law, at least insofar as the reservist is concerned, is federal protection provided by the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA” or the “Act”).¹³ USERRA’s stated purpose is to encourage noncareer service in the military, to minimize disruption in the lives of service men and women and their employers, and to prohibit discrimination.¹⁴ Specifically, Congress enacted USERRA in 1994 to provide “prompt reemployment,” to those who engage in “noncareer service in the uniformed services.”¹⁵ Prior to USERRA, military personnel had only the Veterans’ Reemployment Rights Act (“VRRA”) to assist them in addressing workplace discrimination. Unfortunately, however, this early legislation suffered from serious deficiencies. One such deficiency, the same one that currently hinders employment actions under Georgia state law, was that employee-reservists were only protected against discrimination, like discharge or demotion, to the extent that it was motivated *solely* by reserve status.¹⁶ In addition, the VRRA did not require employers to provide “special work-scheduling” accommodations to reservists.¹⁷

USERRA replaced the VRRA, to “clarify, simplify, and, where necessary, strengthen the existing veterans’ employment and reemployment rights provisions.”¹⁸ Consistent with that goal, Congress

intended for the case law developed under the VRRRA to aid in interpreting USERRA.¹⁹ Also, like the VRRRA, USERRA is to be liberally construed in favor of those who served their country.²⁰ Perhaps the most dramatic difference, however, is USERRA's substitution of the "because of" language used in the VRRRA for the more liberal "motivating factor" standard of proof.²¹ This, of course, avoids any requirement that adverse employment actions be solely based upon military service. Even so, the plaintiff will still bear the burden of proving that he or she is entitled to re-employment.²²

SPECIFIC PROVISIONS

Where absence from a position of employment is necessitated by reason of participation in the "uniformed services," USERRA allows for re-employment rights and benefits provided that: (1) the person has given advance written or verbal notice of such service to the employer; (2) the cumulative length of the absence and of all previous absences from military service does not exceed five years; and (3) the person reports to, or submits an application for re-employment to, the employer.²³ Although the focus is on "re-employment," USERRA also includes the right to initial employment, retention, promotion, and benefits, which includes "profit" (consider such things as retirement and profit sharing plans, including stock), pension and health benefits, vacations, and seniority work selection rights.²⁴ Importantly, USERRA further protects covered employees from retaliation for engaging in certain specified protected conduct.²⁵

Finally, USERRA reaches out to distinct groups of persons. For instance, the Act makes special provision for persons with disabilities incurred in or aggravated during service.²⁶ For example, persons who are ill or injured or who have illnesses or injuries that are aggravated by military service are provided a two-year recovery period that extends the limitations period for re-employment applications.²⁷ Furthermore, persons who are not qualified for their former position due to a disability incurred in or aggravated during military service must be re-employed in a position which is equivalent in seniority, status and pay or a position which is the nearest approximation to such equivalent job.²⁸ Additionally, covered employees also include "any other category of persons designated by the President in time of war or national emergency," which opens the door to other classes of persons who may be called into service.²⁹ For instance, this could be particularly significant in the rapidly evolving war on terrorism, which has already caused the creation of a new office – the Office of Homeland Security – which has broad powers.³⁰ Thus, it is not beyond the realm of possibility that special airport or border security forces could be designated as covered service personnel under USERRA.

A perusal of the statute and some of the cases outlined here, suggests that defenses to USERRA will most likely include such issues as: whether the employee is "qualified" for the position upon return from service (e.g. the limitation on service

While both state and federal law provide for re-employment rights, it is federal law that offers the most expansive protection to reservists.

of no more than five years with certain exceptions and an ability to show documentation of service such as lack of dishonorable discharge, etc.); whether the employer would suffer "undue hardship" in re-employing the employee; whether the employee actually re-applied for the position in the appropriate manner and within the appropriate time frame; whether the employee's classification was indeed "a motivating factor" in the decision; whether the employer would have taken the same action anyway; and whether the employee must be put back in the same position or in a position of like seniority, status and pay. Each of these can be formidable barriers to re-employment; however, with the possible exception of documented service, they share the distinction of being largely fact intensive issues that could preclude early resolution on a motion to dismiss should litigation ensue.



If a lawsuit is filed and successfully prosecuted, Congress specifically provided the following remedies: (1) the court may require the employer to comply with the Act; (2) the court may require the employer to compensate the employee for any loss of wages or benefits due to any failure to comply with the Act; (3) the court may require the employer to pay the person liquidated damages (double the lost wages/benefits), if the court determines that the employer's failure to comply was willful; and (4) the court may issue temporary or permanent injunctions, temporary restraining orders, and contempt orders.³¹ In addition, USERRA specifically forbids fees and court costs to be taxed against the plaintiff, yet allows the successful plaintiff to recover such fees and costs in addition to expert witness fees and other litigation expenses.³²

With these favorable remedial measures and a prohibition against the application of any state statute of limitations, USERRA is a powerful tool for the enforcement of reservists' rights to continued employment.³³ It should be made clear, however, that USERRA is no safety net given the number of defenses and no prohibition against nondiscriminatory reductions in force due to circumstances beyond the control of the employer.³⁴ Even so, the burden on the employer is a heavy one when it comes to re-employment, calling for placement in some position, either the exact one the reservist left or one that is equal in seniority, status and pay.³⁵

ISSUES AND SELECTED CASES

There have been relatively few cases involving USERRA but those that have been decided go a long

way to explaining some of its provisions as well as some of its limitations.³⁶ The following are selected cases, divided by category, that highlight certain key issues.³⁷

Sovereign Immunity

But for the recently amended provision of USERRA establishing jurisdiction over suits against a state employer solely in the state courts – see 38 U.S.C. § 4323(b) – USERRA actions against a state would be barred by virtue of the Eleventh Amendment.³⁸ This, however, does not discount the possibility of state immunity. On the other hand, in an unusual twist, USERRA specifically defines a “political subdivision of a state” for purposes of enforcement as a “private employer.”³⁹ This suggests that state immunity laws which might ordinarily shield a political subdivision from liability may not apply. In any event, this is an area that has yet to be fully litigated.

Years of Service Requirement

USERRA applies to persons who are or who have committed to “non-career service” in the military. There is a distinction in the cases between persons who desire a leave of absence from civilian employment and those who wish to make military service a career in and of itself. Where the employee is found to have abandoned any civilian career in favor of one in the military, he or she will have lost any rights under the Act.⁴⁰

Application Requirement

USERRA mandates that returning reservists re-apply for employment; however, the requirement of an actual application for re-employ-

ment is not a hard-and-fast rule.⁴¹ Indeed, the law has developed with the application of the VRRRA that, whereas the term “application” involves more than mere inquiry, the focus is on “the intent and reasonable expectations of both the former employee and employer, in light of all the circumstances.”⁴² For example, what determines the application requirement may depend upon the size of the employer, with large employers requiring more formalistic methods of application, such as notice to appropriate human resource personnel.⁴³

Benefits of Employment — Adverse Action

Among the many advantages to reservists is USERRA's broad definition of what is deemed adverse action or a loss in benefits of employment. For example, courts have been willing to find that a transfer, albeit without loss in pay, is sufficient to be a denial of a “benefit of employment” under the Act.⁴⁴ In addition, a “paper suspension” which was recorded in the employee's personnel file, but never served, has been held to be disciplinary and affect an employee's status or interest.⁴⁵ Likewise, such things as cleanliness and favorable work schedules are benefits of employment;⁴⁶ make-up exams for promotional opportunities have been required;⁴⁷ and even reimbursement for clothing expenditures are necessary where such allowances are offered to other, non-protected employees.⁴⁸

Generally, rights upon return from service are determined with regard to the “escalator principle” which requires that the employee be given any raises or benefits she would otherwise have received if

she had continued with the employer, regardless of her position or abilities, instead of taking leave. In order to determine those benefits, courts employ a two-prong analysis:

if a benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "pre-requisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within . . . coverage.⁴⁹

The point is simply that reservists are entitled to be placed in the same position that they reasonably would have occupied but for the military service.

Burdens of Proof and Evidence of Discrimination

The standard of proof in cases brought under USERRA is the "but-for" test and the evidentiary framework of proof is modeled after the procedures and allocation of burdens for actions under the National Labor Relations Act.⁵⁰ Accordingly, the employee bears the initial burden of showing, by a preponderance of the evidence, that the employee's military service was a substantial or motivating factor in the adverse employment action; then the employer has the opportunity to come forward and show, by a preponderance of the evidence, that it would have taken the same action anyway, for a valid reason.⁵¹

For those familiar with employment law, it will be apparent that this allocation is inconsistent with the allocation of burdens in discrimination cases brought under Title VII, although it resembles the burdens in mixed-motive cases and cases brought under the 1991 Civil Rights Act, specifically 42 U.S.C. 2000e-2(m). In fact, it presents employees with a substantial disadvantage and employers with an advantage in that the criteria outlined in *Reeves v. Sanderson Plumbing Prods., Inc.*,⁵² for avoiding summary judgment does not apply.⁵³ To explain, under USERRA, an employee will not automatically get to the jury and avoid summary judgment merely by showing that the employer's reason for the adverse action is not credible.⁵⁴

Discriminatory motivation may, however, be reasonably inferred from factors which include: (1) proximity of time between the military activity and the adverse action; (2) inconsistencies between the proffered reasons and other actions of the employer; (3) expressed hostility toward protected employees along with knowledge of the employee's military activity; and (4) disparate treatment of protected employees as compared to non-protected employees with similar work records or offenses.⁵⁵ Still, employers will get a "second bite at the apple" in arguing the "same

action anyway defense."⁵⁶ In other words, supposing that the employee is able to overcome any alleged defenses to not being re-employed or denied full benefits and show, by a preponderance of the evidence, that military service was a motivating factor in the action taken, the employer will, nonetheless, still have the additional opportunity to show that it would have taken the same action despite consideration of the military service.

Hostile Environment

As is the case in a Title VII discrimination claim, harassment on account of prior service, which is sufficiently severe or pervasive to alter conditions of employment and create an abusive working environment, is adverse action and a violation of USERRA.⁵⁷ On the other hand, isolated comments and pressure to leave the military will not be



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considered sufficiently severe or pervasive to amount to a hostile work environment.⁵⁸

Retaliation

As specifically set out in the statute, retaliation on account of service in the military reserves is prohibited.⁵⁹ An employee's military position and related obligations will be considered a "motivating factor" for purposes of a claim for retaliation under USERRA if the employer relied upon, took into account, considered, or conditioned its decision on an employee's military-related absence.⁶⁰ To avoid liability, the employer must show that its legitimate reason, standing alone, would have induced it to make the same decision.⁶¹ As with the broad interpretation given to "benefits of employment," retaliation is found in a variety of forms, including such actions as refusing to accommodate promotional exams that conflict with service in the reserves and initiating retaliatory investigations.⁶²

Disability Discrimination

Even though USERRA provides for certain accommodations to individuals disabled during military service, it is important to consider the possible distinction between a claim of disability discrimination, wherein an individual is disabled during military service and denied an employment opportunity solely on account of the disability, and a claim of discrimination on account of military service, where the disability is merely incidental but perhaps necessitating certain accommodations.⁶³ For example, a returning reservist who is denied re-employment on account of the fact that he is no longer able to walk and confined to a wheelchair, which would necessitate specific accommodations in the workplace,

would certainly be a claim of disability discrimination under the Americans with Disabilities Act ("ADA") but perhaps not a USERRA claim. The same reservist who is told that he or she no longer has the knowledge or skills to perform the job vacated would certainly have a USERRA claim but perhaps not an ADA claim. The point here is that both possibilities must be considered by counsel.

Waiver and Collective Bargaining Defenses

Any waiver of rights under USERRA must be clear and knowing; in other words, language to the effect that "I understand my right to re-employment under USERRA and I voluntarily waive that right" is necessary. Nonetheless, there is a serious question as to whether there can ever be a waiver of future rights of re-employment. In the context of a resignation to enlist, for instance, it is doubtful that the employer could insist upon a waiver of the employee's future rights under USERRA. These were the facts in *Wrigglesworth v. Brumbaugh*, where the employer, on the advice of counsel, had the employee sign a resignation letter prior to entering military service.⁶⁴ In that case, the court held that a resignation, prepared by the employer, insisted upon by the employer, and silent as to any rights to re-employment was invalid and non-binding. Moreover, the court further held that even a bona fide collective bargaining agreement seniority system could not contravene the purposes and remedies afforded by the statute.⁶⁵

Damages

Damages under USERRA are calculated as back wages and other benefits which the employee would have received had he or she been re-

employed, less actual earnings received from other employers during the same period, excepting only unemployment benefits. Overtime pay and vacation pay are also available. All of this can be doubled as punitive damages, provided the employer's failure to comply with the Act is found by the court to be willful.⁶⁶

Fees and Costs

Although USERRA provides for the recovery of fees and costs and prohibits costs taxed against the plaintiff, this does not preclude the taxation of costs for claims other than those established by pursuit of the USERRA claim.⁶⁷


Trial by Jury

Under the VRRRA a substantial number of cases held that plaintiffs were not entitled to a jury trial, the relief afforded being almost universally held to be equitable. USERRA, however, is different in that it allows for recovery of liquidated damages, which have been held to be a common law remedy and decidedly legal.⁶⁸ Furthermore, the award of liquidated damages hinges upon a finding of willfulness, a determination that falls within the province of the jury, irrespective of the fact that the statute vests the court with discretion as to the award of damages.⁶⁹

CONCLUSION

While "America's New War" — at least as it applies to Afghanistan — may be drawing to a close, there is a strong likelihood that many reservists will continue to receive calls to active duty both for service abroad as well as at home in keeping with homeland security needs. Of course, as abruptly as they leave, so too will they return, and when they do, both Georgia law and USERRA

mandate their acceptance back into the fold of the employed workforce.

No matter what their political views on the current conflict, attorneys for employees have a duty to these individuals to help them regain the benefits they stand to lose to the extent employers wish to shut down the escalator of advancement and deny re-employment or the benefits to which they would otherwise be entitled. Likewise, management-side counsel must be ready to advise their clients as to the requirements of both federal and state law. Important in this advice is an understanding that USERRA can be the more formidable statute insofar as the rights of reservists are concerned. For instance, USERRA allows for liability where reserve status is merely a "motivating factor" for an adverse employment action. It also provides expansive rights against retaliation, a liberal definition of benefits, the opportunity for liquidated damages, a right to attorneys' fees and costs, and access to a jury trial. Still, USERRA offers important defenses, which, among other things, should protect employers from hardship and allow for alternatives when re-employment to the exact position vacated is not possible. 



John F. Beasley Jr. is a partner and founding member of Hill, Lord & Beasley, LLP, in Athens, Ga. He primarily represents both public and private sector employees in cases involving civil rights, employment discrimination, wrongful termination, and other employment-related matters. He received his J.D. in 1988 from the Walter F. George School of Law at Mercer University and his B.A. from Vanderbilt University in 1984. He is a past president of the Georgia affiliate of the

National Employment Lawyers Association and is editor of the affiliate newsletter devoted to current issues and legal opinions on employment law.

ENDNOTES

1. See O.C.G.A. § 38-2-279 (2001).
2. See O.C.G.A. § 38-2-280 (2001).
3. O.C.G.A. § 38-2-279(a)(2).
4. O.C.G.A. § 38-2-279(a)(1) and (b) and (c).
5. O.C.G.A. § 38-2-279(f)(4). Note, however, that the amounts of required contributions are subject to deduction from any salary or compensation paid under this statute. O.C.G.A. § 38-2-279(f)(1) and (2). Furthermore, length of service under the pension and retirement systems are dependent upon continued employee contributions. O.C.G.A. § 38-2-279(f)(3).
6. O.C.G.A. § 38-2-279(d). See n. 8 *infra*.
7. O.C.G.A. § 38-2-280(a) and (b). The statute also mandates re-application within specific, and very short, periods of time.
8. O.C.G.A. § 38-2-280(c)[members of organized militia or a reserve component of the armed forces of the United States] and (d)[members of the Georgia National Guard]. The "because of" language is the same that was used in application of the VRRRA, which was found by the Supreme Court to prohibit discrimination solely on account of military status. See n. 16, *infra*.
9. O.C.G.A. § 38-2-280(e).
10. *Id.*
11. O.C.G.A. § 38-2-280(f).
12. *Id.*
13. 38 U.S.C. § 4301 *et seq.* (2001). USERRA is administered by the United States Department of Labor, through the Veterans' Employment and Training Service. Military personnel, including both active duty personnel and reservists may also find credit, housing, and insurance protection under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 App. U.S.C. § 501 *et seq.* (2001).
14. See 38 U.S.C. § 4301(a)(1)-(3).
15. 38 U.S.C. § 4301(a)(1) and (2).
16. *Monroe v. Standard Oil Co.*, 452 U.S. 459, 559 (1981). In fact, USERRA was enacted in a congressional response to the Supreme Court's decision in *Monroe* given the Court's holding that the VRRRA was enacted for the "significant but limited purpose of protecting the employee-reservist against discrimination . . . motivated solely by

reserve status." *Id.* at 559. The point was to broaden the statute by providing that a violation occurs when a person's service is a "motivating factor" in the discriminatory action, even if not the sole factor. See also *Sheehan v. Dept. of the Navy*, 240 F.3d 1009, 1012-13 (Fed.Cir. 2001).

17. *Monroe*, 452 U.S. at 561.
18. H.R.Rep. No. 65, 103d Cong., 2nd Sess. 18 (1994).
19. *Id.* at 21 ("[T]he Committee wishes to stress that the extensive body of case law that has evolved over that period, to the extent it is consistent with the provisions of this Act, remains in full force and effect in interpreting those provisions").
20. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).
21. 38 U.S.C. § 4311(c)(1) and (2).
22. See *Trulson v. Trane Co.*, 738 F.2d 770, 772-73 (7th Cir.1984).
23. 38 U.S.C. § 4312(a)(1-3). Note that both USERRA and the Georgia statute require application within specific, and in some cases very short, periods of time upon return from service.
24. 38 U.S.C. §§ 4303(2), 4311(a).
25. 38 U.S.C. § 4311(b).
26. 38 U.S.C. § 4312(e)(2)(A) and § 4313(a)(3) and (b)(2)(B).
27. See 38 U.S.C. § 4312(e)(2)(A).
28. See 38 U.S.C. § 4313(a)(3) and (b)(2)(B).
29. 38 U.S.C. § 4303(16).
30. See <http://www.white-house.gov/news/releases/2001/10/20011008-2.html>. Executive Order Establishing Office of Homeland Security (last visited October 8, 2001).
31. 38 U.S.C. § 4323(d)-(e). See, e.g., *Groom v. Department of Army*, 82 M.S.P.R. 221, 224 (M.S.P.B.1999) (holding that USERRA authorized remedies including reinstatement with like status and backpay).
32. 38 U.S.C. § 4323(h)(1)-(2).
33. See 38 U.S.C. § 4323(i)(prohibiting the application of any state statute of limitations). Given this provision, one would argue the applicability of the four year statute of limitations for civil actions arising under an Act of Congress enacted after December 1, 1990. See 28 U.S.C. § 1658 (providing that "a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues").
34. See *Preda v. Nissho Iwai America Corp.*, 128 F.3d 789 (2nd Cir. 1997)(referring to purposes of USERRA's predecessor the VRRRA);

- Novak v. Mackintosh, 919 F.Supp. 870 (D.S.D. 1996)(same).
35. See 38 U.S.C. § 4313(a)(1)-(2). As compared to the Georgia counterpart, USERRA is more restrictive in terms of an employer's ability to argue lack of qualification as a basis for the wholesale denial of re-employment.
 36. It should be noted that, in 1998, amendments were passed by Congress, which renumbered and rewrote certain provisions, including section 4323. Accordingly, cases decided in 1998 or years prior may not reference the appropriate section or may no longer be applicable.
 37. With the exception of sovereign immunity, I have not included cases addressing largely jurisdictional issues and concerns.
 38. Velasquez v. Frapwell, 165 F.3d 593 (7th Cir. 1999).
 39. See 38 U.S.C. § 4323(j); Miller v. City of Indianapolis, 2001 WL 406346 (S.D. Ind. 2001).
 40. Woodman v. Office of Personnel Management, 258 F.3d 1372 (Fed. Cir. 2001)(plaintiff had served continuously in the military for 14 years as a full-time Active Guard Reserve; he separated from his prior employer in 1981 and did not seek re-employment until 1995).
 41. See 38 U.S.C. § 4312(a)(3). This is not to say that application can be avoided all together. Indeed, as stated (n. 23, *supra*) USERRA mandates application, be it formal or informal, within certain specific time periods. Whether the plaintiff meets these deadlines will be an important consideration for defense counsel.
 42. Shadle v. Superwood Corp., 858 F.2d 437, 439 (8th Cir. 1988).
 43. See McGuire v. United Parcel Service, 152 F.3d 673 (7th Cir. 1998).
 44. Hill v. Michelin North America, Inc., 252 F.3d 307 (4th Cir. 2001).
 45. Johnson v. U.S. Postal Service, 85 M.S.P.R. 1 (M.S.P.B. 1999).
 46. *Id.*; see also Allen v. United States Postal Serv., 142 F.3d 1444 (Fed. Cir. 1998).
 47. Fink v. City of New York, 129 F.Supp.2d 511 (E.D.N.Y. 2001).
 48. Wrigglesworth v. Brumbaugh, 129 F.Supp.2d 1106 (W.D. Mich. 2001).
 49. Novak v. Mackintosh, 937 F.Supp. 873 (D.S.D. 1996).
 50. Sheehan v. Dept. of the Navy, 240 F.3d 1009 (Fed. Cir. 2001); see also NLRB v. Transportation Management Corp., 462 U.S. 393, 401 (1983)(modified by Director, Office of Workers Compensation v. Greenwich Collieries, 512 U.S. 267 (1994)).
 51. Sheehan v. Dept. of the Navy, 240 F.3d 1009 (Fed. Cir. 2001).
 52. 530 U.S. 133 (2000).
 53. See, e.g., Palmatier v. Michigan Dept. of State Police, 981 F.Supp. 529 (W.D. Mich. 1997), where the Court disallowed a USERRA claim based solely upon subjective qualities of plaintiff's comparator.
 54. Reeves, 530 U.S. at 148.
 55. Sheehan, 240 F.3d at 1014.
 56. See Curby v. Archon, 216 F.3d 549 (6th Cir. 2000)(employee bears the initial burden of showing, by a preponderance of the evidence, that the employee's military service was a substantial or motivating factor in the adverse employment action); Wrigglesworth v. Brumbaugh, 121 F.Supp.2d 1126, 1132-37 (W.D. Mich. 2000)(offers a different interpretation and a compelling analysis of the distinctions between a claim under § 4311 and a claim under § 4312, wherein the Court rationally outlines an argument against what it defines as *dicta* in Curby suggesting that proof of intent is required for a 4312 claim. Although also *dicta*, the Court concludes that re-employment is a statutory and unqualified right for which there is no necessity of proving intent); Gummo v. Village of Depew, 75 F.3d 98 (2nd Cir. 1996)(in order to prevail on USERRA claim, plaintiff must show that military status was a motivating factor); Brandsasse v. City of Suffolk, 72 F.Supp.2d 608 (E.D. Va. 1999)(same); Barreto v. ITT World Directories, Inc., 62 F.Supp.2d 387 (D.Puerto Rico 1999)(mere awareness of military status and negative comments about logistical details of sales event at military base were insufficient to create an inference of discrimination); Robinson v. Moris Moore Chevrolet-Buick, Inc., 974 F.Supp. 571 (E.D.Tax. 1997)(military position and related obligations were a motivating factor if employer relied upon, took into account, considered, or conditioned its decision on employee's military-related absence); Graham v. Hall-McMillen Co., Inc., 925 F.Supp. 437 (N.D.Miss. 1996)(employer breached VRRRA by requiring employee to use his vacation time for military leave of absence).
 57. Petersen v. Dept. of Interior, 71 M.S.P.R. 227 (M.S.P.B. 1996).
 58. Miller v. City of Indianapolis, 2001 WL 406346 (S.D. Ind. 2001).
 59. 38 U.S.C. § 4311(b).
 60. Robinson v. Morris Moore Chevrolet-Buick, Inc., 974 F.Supp. 571 (E.D.Tex. 1997).
 61. *Id.*; see also Graham v. Hall-McMillen Co., Inc., 925 F.Supp. 437 (N.D.Miss. 1996).
 62. Brandsasse v. City of Suffolk, 72 F.Supp.2d 608 (E.D. Va. 1999).
 63. See Ray v. Department of Veteran Affairs, 84 M.S.P.R. 108 (M.S.P.B. 1999)(agency discrimination based on military-connected disability was a claim of disability discrimination not a claim covered under USERRA); McBride v. U.S. Postal Service, 78 M.S.P.R. 411 (M.S.P.B. 1998)(same).
 64. 121 F.Supp.2d 1126 (W.D. Mich. 2000).
 65. See also Woodman v. Office of Personnel Management, 258 F.3d 1372 (Fed. Cir. 2001)(whether many years of service constituted waiver); Lapine v. Town of Wellesley, 970 F.Supp. 55 (D.Mass. 1997)(same).
 66. Satterfield v. Borough of Schuylkill Haven, 12 F.Supp.2d 423 (E.D. Penn. 1998)(liquidated damages under 38 U.S.C. § 4323(c)(1)(A)(iii) [now 4323(d)(1)(C)] allowed against state and local governments, analogizing to the ADEA's provision found at 29 U.S.C. § 626(b)); Novak v. Mackintosh, 937 F.Supp. 873 (D.S.D. 1996)(general outline of damages under VRRRA, USERRA predecessor); Graham v. Hall-McMillen Co., Inc., 925 F.Supp. 437 (N.D.Miss. 1996)(example of failure to mitigate and how denial of reinstatement after retaliatory discharge can impact backpay).
 67. Chance v. Dallas County Hospital District, 176 F.3d 294, 296-97 (5th Cir. 1999).
 68. See 38 U.S.C. 4323(d)(1)(C).
 69. Spratt v. Guardian Automotive Products, Inc., 997 F.Supp. 1138 (N.D.Ind. 1998).

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A Look at the Law

Defending America's Defenders:

Advocating on Behalf of Georgia's Military Veterans

By Harold Ronald Moroz

With some 769,000¹ veterans² residing in the state of Georgia, the prospect that your practice will encounter a veterans law issue is great. Fort Benning, Fort Stewart and Kings Bay Naval

Submarine Base are but a few of the military bases located throughout the state, and

Georgia also hosts a large veterans' support structure that includes Veterans' Administration hospitals, clinics and assistance centers. Based on this large military presence, Georgia attorneys have a good chance of being called upon to represent a client who has a claim based on his or her status as a veteran.



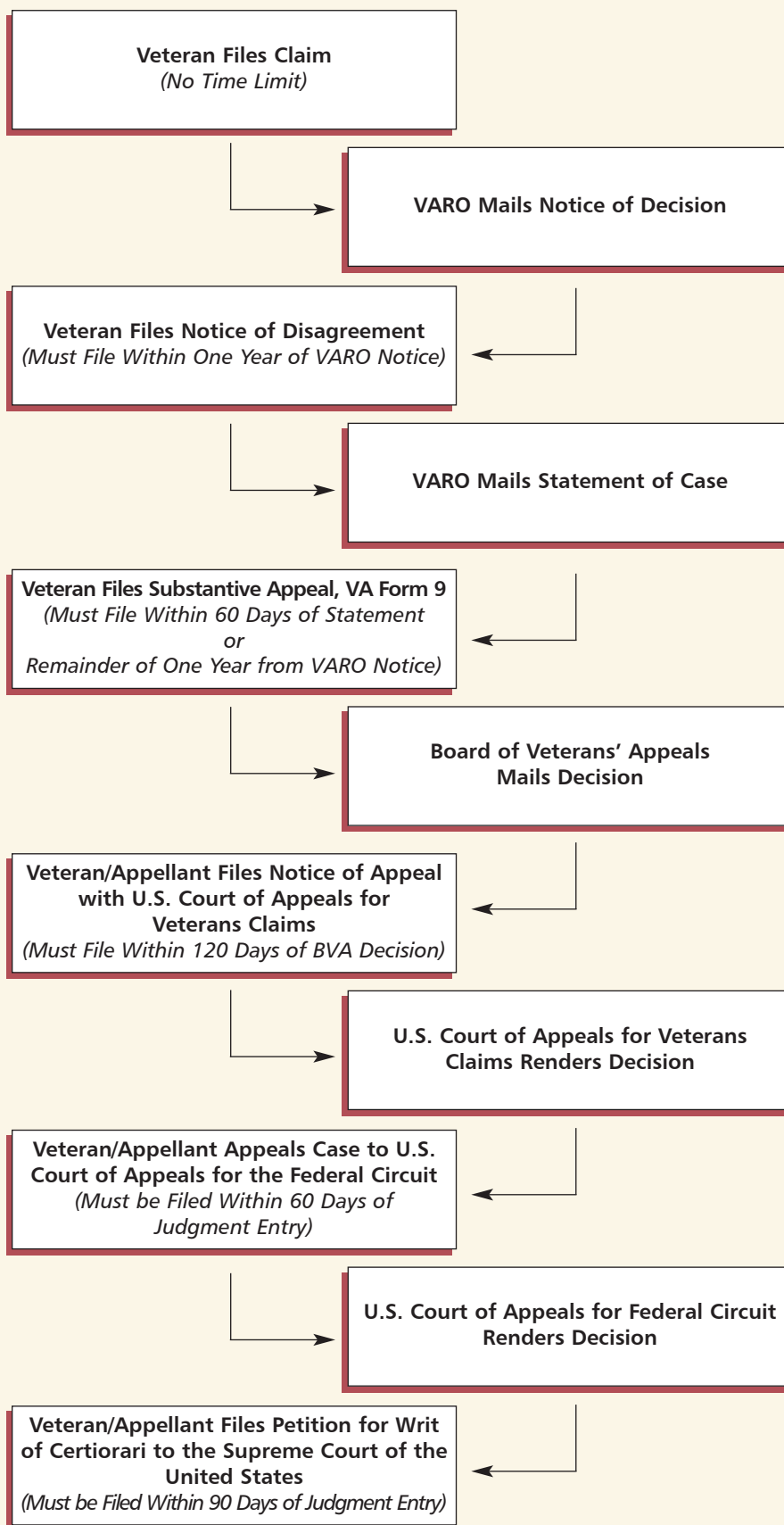
Veterans law issues manifest themselves in a myriad of ways. They may be embedded in a civil or criminal law matter, or arise as an ancillary issue in the form of a veteran's claim or a federal tort claim involving injury, death or damage to property. The underlying cause of the event that gives rise to the claim may be rooted in a known or unknown service-connected disability (e.g., post-traumatic stress disorder) or in a negligent act of an agent of the federal government. Regardless of how they arise, attorneys must be attuned to the unique issues and complex, time-sensitive procedures that veterans law issues bring in to play.

This article examines the procedures that need to be followed in pursuing two of the most common types of claims involving veterans: (a) a claim before the Department of Veterans Affairs (VA); and (b) a claim brought under the Federal Tort Claims Act.³ With regard to the first type of claim, this article presents an overview and analysis of both a typical claim before the VA and of an appeal to the U.S. Court of Appeals for Veterans Claims. The article then goes on to provide an overview and analysis of a claim prosecuted under the Federal Tort Claims Act.

ADJUDICATION OF A CLAIM BEFORE THE VA

A claim brought by a veteran before the VA traverses a myriad of gauntlets. (See chart at right titled *Veteran's Adjudication Process*.) After a claim is filed, the VA has a duty to assist the veteran in developing and establishing his or her claim,⁴ and the relationship is non-adversarial. In addition, the VA has a duty to

VETERAN'S ADJUDICATION PROCESS



infer issues or claims not expressly raised by the veteran.⁵ Recent legislation placed an even greater burden on the VA when it comes to assisting veterans at this juncture.⁶

Suffice it to say, the often long road traveled by a veteran's claim presented to the VA frequently begins rather innocently. A claim may be presented at any one of 58 VA Regional Offices (VARO) either informally⁷ or formally on a VA Form 21-526. A typical claim can involve a hearing loss originating from the firing of weapons during military service, wherein the veteran seeks hearing aids, medical attention and/or monthly monetary compensation based on the severity of the disability. Once the claim is received, a threshold review is conducted to verify that the claimant is an eligible veteran. Character and dates of service are of particular concern.

Following this review of the claim and gathering of information, the claim, in most cases, will be referred to a VARO rating board. The board usually consists of three members, one of whom is a medical specialist. The board makes a determination of the claim on a "Rating Decision" which is a judgment as to whether the disability is service-connected. If it is determined to be service-connected, the VA will address that particular disability, including such options as further medical evaluation, the authorization of medical treatment at government expense and/or monthly monetary compensation. The veteran then is notified of the determination through an Award Letter or a Denial Letter.⁸ When the latter is issued, the letter must include a statement of the reasons for the decision and a summary of the evidence considered by the VA.⁹

UNIQUE STANDARD OF PROOF: BENEFIT- OF-THE-DOUBT DOCTRINE

Peculiar to veterans law is the standard of proof used to decide a claim. When all material issues of record are considered and the evidence is in equipoise, the veteran will be given the benefit of the doubt. This Benefit-of-the-Doubt Doctrine, also called the Doctrine of Reasonable Doubt, has been codified.¹⁰ In construing this doctrine, the U.S. Court of Appeals for Veterans Claims held that the veteran "need only demonstrate that there is an 'approximate balance of positive and negative evidence' in order to prevail. . . [and] the preponderance of the evidence must be against the claim for benefits to be denied."¹¹ In other words, the veteran is given the benefit of the doubt.

Should the veteran's claim be denied at the VARO level, the veteran has the right to appeal that decision. An appeal is perfected by a Notice of Disagreement (NOD) to the VARO. This notice consists of "a written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination."¹² There is no formal language or particular VA form required in order to establish a NOD.

Once the NOD is received, the VARO must again review the file and either grant the claim or continue the denial. At this point, the VA may issue a decision in the form of a Statement of the Case, but it is has no statutory or regulatory deadline by which it must do so.¹³

Should the VARO continue the denial and issue a Statement of the Case, the veteran has the right to appeal the decision to the final arbiter of the administrative appellate process, the Board of Veterans' Appeals (BVA). Such an appeal is perfected on a VA Form 9, and must be filed by no later than 60 days from the mailing of the Statement of the Case or the end of the one-year period following the date of the mailing of the VA Letter of Denial, whichever is longer.¹⁴

Appeals to the BVA are considered *de novo*. The BVA will have the full record created by the VARO, and new documentary evidence and witnesses may be presented.¹⁵

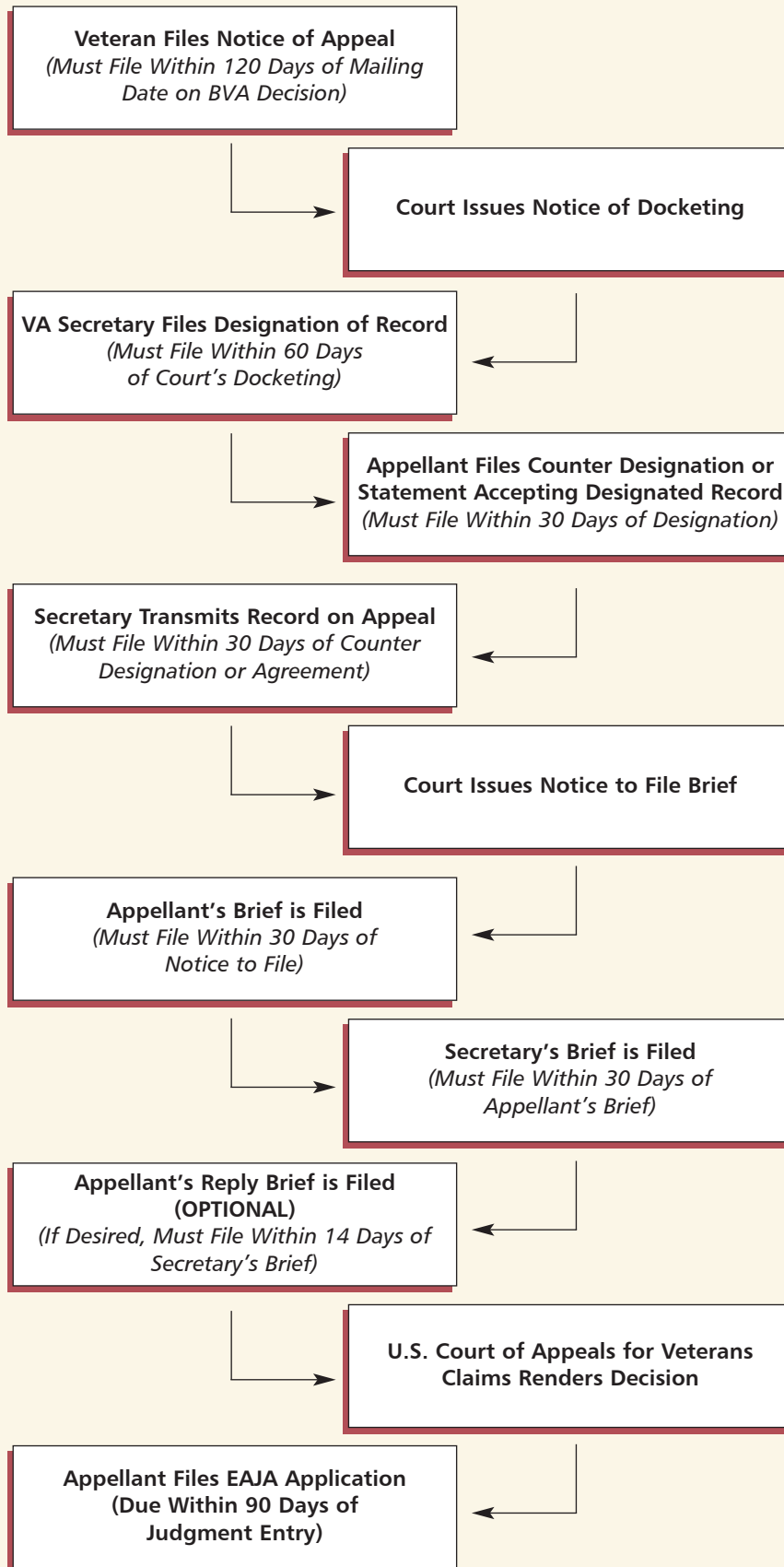
BVA decisions are required to contain "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record."¹⁶

ADJUDICATION OF THE CLAIM BEFORE THE U.S. COURT OF APPEALS FOR VETERANS CLAIMS

Should the claim still be denied by the BVA, the veteran has the right to judicial appeal before the U.S. Court of Appeals for Veterans Claims. This court was established in November, pursuant to the Veterans' Judicial Review Act (VJRA),¹⁷ and was previously called the U.S. Court of Veterans Appeals.¹⁸ The court is located in Washington, D.C., and has exclusive jurisdiction to review VA BVA decisions.¹⁹

The immediate impact of the establishment of this new court,

VETERAN'S COURT PROCESS*



* This is a simplified, ideal scenario of the process before the U.S. Court of Appeals for Veterans Claims and does not include the court-ordered teleconference following the Designation of Record.

championed by the Reagan administration, was twofold. First, it provided a legal remedy to the federal government's longstanding practice of barring the adjudication of claims beyond the VA level. Specifically, prior to the court's creation, if the VA decided to deny a veteran's claim, then the claim expired and the veteran had no judicial recourse.²⁰ Since the court's establishment, however, veterans have the right to appeal their claim beyond the VA level, and have their "day in court." Secondly, at the court-level, attorneys representing veterans before the U.S. Court of Appeals for Veterans Claims are entitled to reasonable fees and expenses.²¹ In contrast, in a proceeding regarding benefits brought before the VA, a fee may not be charged, allowed or paid for the services of agents and attorneys before the date on which the BVA first makes a final decision on the claim.²²

When a veteran files a Notice of Appeal with the court, the veteran, identified as the "appellant" by the court, effectively files suit against the federal government through the Secretary of Veterans Affairs, who is identified by the court as the "Secretary" or the "Appellee." Such appeals must be filed in a timely manner, that is, within 120 days following the mailing date of the BVA decision. (See chart at left titled *Veteran's Court Process*.)

Appeals to the court are argued primarily by legal brief, and the veteran and his or her counsel are not required to travel to Washington, D.C. Oral arguments are the exception to the rule, and are conducted by order of the court if requested by the appellant, or if the court deems such argument necessary. The court renders its ultimate decision based upon the record, the facts, the argu-

ments presented and the law. Attorneys representing veterans before the U.S. Court of Appeals for Veterans Claims are entitled to reasonable fees and expenses.²³

A veteran prevailing in an action before the court also may be entitled to attorney's fees and expenses from the government under the Equal Access to Justice Act (EAJA).²⁴ The EAJA provides:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, . . . incurred by that party in any civil action (other than a case sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.²⁵

To be awarded attorney fees and expenses under the EAJA, the appellant must file a complete, non-defective EAJA application that complies with the statutory guidelines of 28 U.S.C. § 2412, which, *inter alia*, require that the application be filed within 30 days of "final judgment" in the action. A U.S. Court of Appeals for Veterans Claims judgment becomes final, and is not appealable, 60 days after it is entered.²⁶ Accordingly, the EAJA application is due within 90 days after judgment is entered. However, if the Secretary of Veterans Affairs and the veteran/appellant agree to a joint remand, and it is approved by the court, then such an order is

considered an order of settlement that is "final and not appealable."²⁷ Therefore, in the case of an order approving a joint remand, the EAJA application is due within 30 days of the date on which that order is entered.

It is an absolute necessity that the EAJA Application be filed in a timely manner. The filing deadline is jurisdictional, and the consequence of a late filing is its dismissal from court, no exceptions.²⁸ Additional statutory requirements for the EAJA Application are as follows:

- a. The appellant must show prevailing party status. This is done by both asserting such status and demonstrating how such status was attained.²⁹
- b. The appellant must show that his or her net worth at the time the appeal was filed did not exceed \$2 million dollars.³⁰
- c. The appellant must allege that the government's position was not substantially justified.³¹
- d. The appellant must file an itemized statement of the fees and expenses sought.³²

Both the veteran/appellant and the VA can appeal a final decision by the U.S. Court of Appeals for Veterans Claims to the U.S. Court of Appeals for the Federal Circuit within 60 days after the former court's entry of judgment, provided that grounds for appeal exist.³³ The Federal Circuit has exclusive jurisdiction to review any challenge to the validity of any statute or regulation or any interpretation thereof, and to interpret constitutional and statutory provisions to the extent presented and necessary to a decision in the matter under consideration.³⁴ In turn, Federal Circuit decisions are appealable by either party to the Supreme Court of the United States by Writ of Certiorari. Petitions for Writ of Certiorari

must be filed within 90 days of the Federal Circuit's entry of judgment.³⁵

FEDERAL TORT CLAIMS ACT

Since the birth of our republic, and through most of our history, Americans could not sue the United States for property damage, personal injury or wrongful death caused by employees of the federal government. This was particularly true for veterans and retirees who historically maintained close proximity to government installations and availed themselves of government healthcare entitlements. Americans injured by the federal government relied exclusively on members of Congress to pass individual bills of relief to recover for injuries or property losses caused by federal employees. This procedure afforded most Americans inadequate remedies that resulted in little or no compensation at all for their losses.

Following several years of debate, most of which occurred during the Second World War, Congress passed the Federal Tort Claims Act (FTCA)³⁶ in 1946. The FTCA allows individuals³⁷ to recover from the United States for property damage, personal injury, and wrongful death caused by the negligence of a federal employee.³⁸ Since the enactment of the FTCA, veterans and fellow Americans of all walks have recovered millions of dollars annually from the United States for the negligent acts of its employees.³⁹

Under the FTCA, individuals may recover for numerous types of injuries, including, but not limited to, those suffered in traffic accidents, slips and falls in government facilities, medical treatment, etc.⁴⁰ In the area of medical treatment,

individuals may recover for injuries caused by surgical errors, failure to diagnose cancer, or any other negligent diagnosis or treatment.⁴¹

The FTCA is limited by a number of exceptions per which the government is not subject to suit, even if a private employer could be liable under the same circumstances. These exceptions include the Discretionary Function Exception, which bars a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."⁴² Another such exception involves purely constitutional issues. Specifically, an FTCA claim cannot be brought against the government based solely on conduct that violates the Constitution, because such conduct may have violated only federal law, not state law.⁴³

STATE SUBSTANTIVE LAW APPLIES

Federal law governs the procedure for processing claims against the United States;⁴⁴ however, the FTCA specifies that the liability of the United States is to be determined "in accordance with the law of the place where the [allegedly tortious] act or omission occurred."⁴⁵ In an action under the FTCA in the state of Georgia, a claim must be based on state substantive law, and the federal court must apply the law Georgia state courts would apply in the analogous tort action.⁴⁶

It is critical that claims be brought against the United States in a timely manner. Specifically, individuals must file their claim with the appropriate federal agency within two

years of discovery of the their injury.⁴⁷ The claim is a prerequisite to bringing a lawsuit against the United States, and its filing tolls the mandated two-year statute of limitations.⁴⁸ Accordingly, an individual who believes that he or she has been injured by the negligence of a federal employee⁴⁹ should not delay in making a claim against the federal agency.⁵⁰

PROCEDURAL REQUIREMENTS

The first step beyond an initial investigation into the facts and the law underlying a potential FTCA claim is the filing of that claim against the United States on a Standard Form 95, Claim for Damage, Injury or Death. This form can be obtained from any military base legal office, VA hospital or via the Internet from the Government Printing Office. The claim may be filed with the Office of General Counsel for any Veterans Administration hospital or the Judge Advocate General office on any U.S. military installation. The claim may be filed in person or through the mail. The claimant must demand a "sum certain" on the face of his or her claim, and the failure to

state an amount may result in the dismissal of the claim.⁵¹

A claimant cannot recover any sum in excess of the amount of the face of the administrative claim, unless "the increased amount is based on newly discovered evidence" or he alleges and proves "intervening facts."⁵² In *Reilly v. United States*,⁵³ the government appealed an FTCA damages award of \$11 million dollars on the grounds that the claimant's sum certain amount was listed as \$11 million dollars on the face of the Standard Form 95. The appellate court ruled all damages in excess of the \$10 million dollar claim were awarded in error because the claimant failed to state an amount in excess of \$10 million dollars on the original Standard Form 95.⁵⁴

Once the claim is filed, the government has six months to resolve the claim before a lawsuit can be filed. In the event the government does not deny the claim, the statute of limitations is indefinitely tolled.⁵⁵ The claimant, however, has the right to sue following the six-month period because the government's failure to act within this time period constitutes a denial.⁵⁶ If the government denies the claim, the claimant has a mandatory six

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Practice Limited to Civil Matters

months in which to file a civil action in the appropriate federal district court from the mailing of a written denial.⁵⁷

Other provisions unique to the FTCA include, but are not limited to, limitations on attorney fees, no punitive damages, no jury trials and the inability to collect interest prior to judgment.⁵⁸ Finally, with regard to attorney fees, the FTCA provides a maximum recovery of 20 percent of the sum certain amount in settlement and 25 percent once the case is in litigation.⁵⁹

CONCLUSION

The profound impact of the September 11th terrorist attacks and ensuing global conflicts may very well precipitate a vast expansion of the military establishment with a resulting increase in the veteran population. In such event, Georgia's already sizeable veteran population would no doubt experience a corresponding increase.

As a consequence of this high, and likely growing, veteran population, Georgia attorneys have a good chance of being called upon to advocate on behalf of former military personnel who have claims based on their status as veterans. As noted, veterans law issues and procedures are numerous, time-sensitive and complex. Accordingly, all Georgia attorneys should ensure that they are well-armed with a working knowledge of the veterans law issues and procedures described in this article if they are called upon to defend one of America's defenders. 



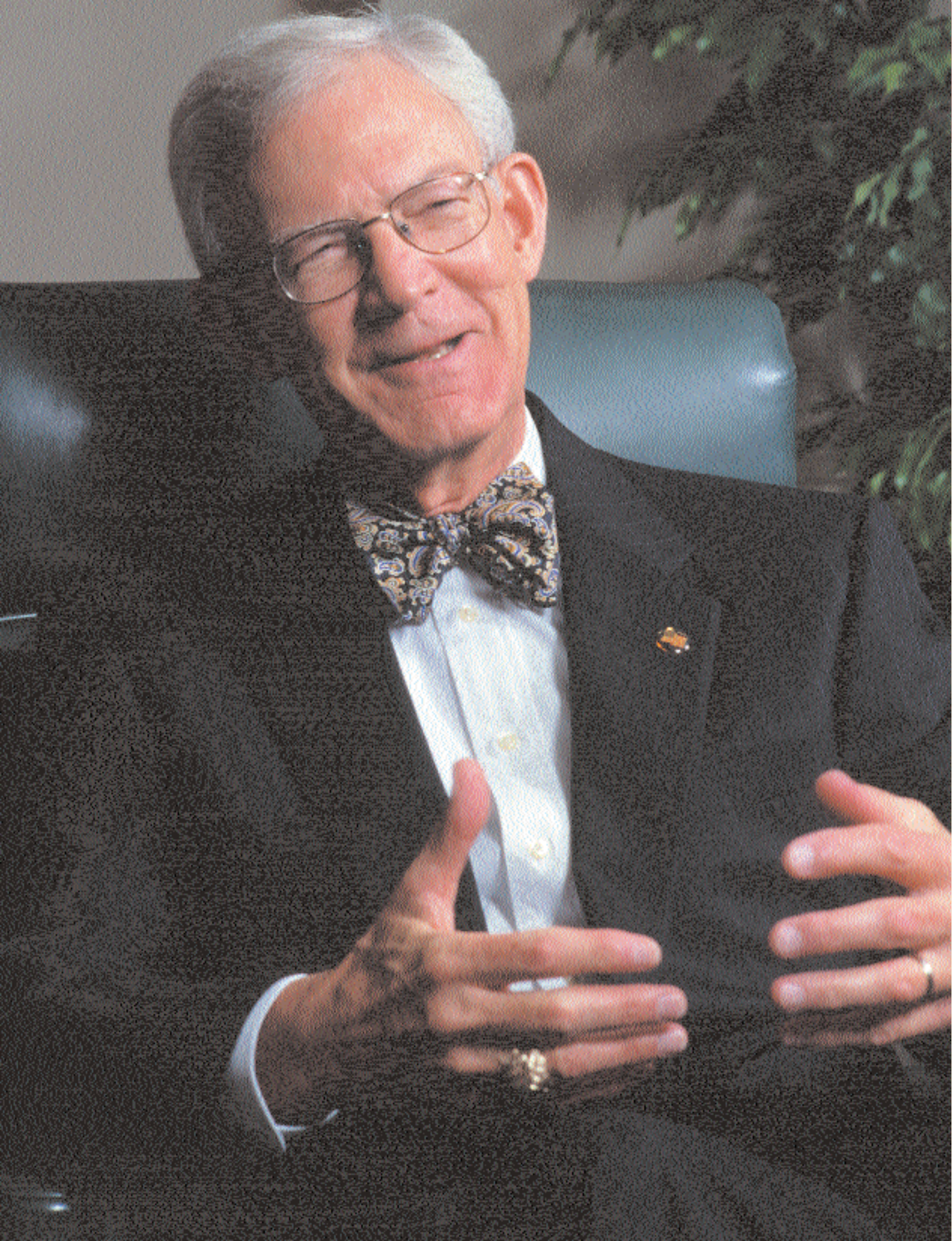
Harold (Hal) Ronald Moroz is judge of the Magistrate Court of Camden County, Ga., and a private practitioner who represents veterans

before the Supreme Court and the U.S. Court of Appeals for Veterans Claims in Washington, D.C. The latter lists him as one of only eight Georgia appellate attorneys for veterans appeals on its Public List of Practitioners. He received his J.D. from the District of Columbia School of Law and a graduate certificate in International Law and Diplomacy from St. John's University, New York. Moroz is a veteran, having served 20 years as a U.S. Army airborne infantry officer. He is also an adjunct professor at Florida Coastal School of Law, Jacksonville, Fla., and Brenau University, Gainesville, Ga.

ENDNOTES

1. U.S. DEP'T OF VETERANS AFFAIRS, VETERAN DATA & INFORMATION, VETPOP2000, SUPPLEMENTAL TABLES (September 30, 2000), *available at* <http://www.va.gov/vetdata/Demographics/VPwelcome.htm> (last visited Jan. 8, 2002).
2. A veteran is a "person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. § 101(2) (1994); 38 C.F.R. § 3.1(d) (2001).
3. 28 U.S.C. §§ 1346(b), 2671 - 2680 (1994).
4. 38 U.S.C. § 5107(a) (1994).
5. *Akles v. Derwinski*, 1 Vet.App. 118, 121 (1991).
6. For instance, the Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (2000) (codified at 38 U.S.C.A. §§ 5100 - 5103A, 5106 - 5107 (West Supp. 2001) (the "VCAA"), clarified the claimant's and VA's duties with respect to obtaining evidence in support of claims for veterans' benefits. Specifically, the Act requires the VA to obtain any relevant records in the VA's possession, or within the possession of any other federal agency, at no cost to the veteran. 38 U.S.C.A. §§ 5103A(b) & (c). The VCAA mandates that the VA Secretary make several efforts to obtain relevant evidence identified by the claimant and notify the claimant and his or her representative of those efforts. *Id.* at § 5103(a)(b)(2). The VA is also required to provide a medical examination if warranted. *Id.* at § 5103A(d). In addition, the VCAA
- eliminated the requirement that the claimant first submit a well-grounded claim before receiving assistance from the VA. *Compare* 38 U.S.C. § 5107(a) (1994) *with* 38 U.S.C.A. 5107(a) (West Supp. 2001).
7. 38 C.F.R. § 3.155 (2001).
8. 38 U.S.C. § 5104 (1994).
9. The VA is obligated under 38 U.S.C. § 7104(a) (1994) to base its decisions on the "entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."
10. 38 U.S.C. § 5107(b) (1994).
11. *Gilbert v. Derwinski*, 1 Vet.App. 49, 54 (1990).
12. 38 C.F.R. § 20.201 (1994).
13. 38 U.S.C. § 7105(d) (1994); 38 C.F.R. § 19.29 (2001).
14. 38 C.F.R. § 20.302(b) (2001).
15. 38 U.S.C. § 7104(a) (1994). *See also* *Litke v. Derwinski*, 1 Vet. App. 90, 93 (1990) (remand is appropriate where the BVA has based its decision upon an inadequate record); *Obert v. Brown*, 5 Vet.App. 30, 33 (1993) (remand ordered for additional development of the record).
16. 38 U.S.C. § 7104(d)(1) (1994).
17. Pub.L. No.100-687, 102 Stat. 4105 (1988) (codified at 38 U.S.C. § 7251 (1994)).
18. *Compare* 38 U.S.C. § 7252(a) (1994) *with* 38 U.S.C.A. § 7252(a) (West Supp. 2001).
19. 38 U.S.C.A. § 7252(a) (West Supp. 2001).
20. *See generally* *Spencer v. Brown*, 4 Vet.App. 283 (1993), *aff'd*, 17 F.3d 368 (Fed Cir.), *cert. denied*, 513 U.S. 810 (1994).
21. 28 U.S.C. § 2412(d)(1)(A) (1994).
22. 38 U.S.C. § 5904(c)(1) (1994).
23. *Id.* The limitation on fee for services rendered before the VA does not apply to services provided with respect to proceedings before a court.
24. 28 U.S.C. § 2412 (1994).
25. 28 U.S.C. § 2412(d)(1)(A) (1994).
26. U.S. CT. APP. VET. CL. R. 36.
27. U.S. CT. APP. VET. CL. R. 41(b).
28. *Grivois v. Brown*, 7 Vet.App. 100, 101 (1994).
29. 28 U.S.C. § 2412(d)(2)(B) (1994).
30. *Id.* at § 2412(d)(1)(C)(2)(B); *cf.* *Bazalo v. West*, 150 F.3d 1380 (Fed. Cir. 1998) (court held that veteran was permitted to amend his timely-filed EAJA application in order to show that he met the EAJA net worth requirements, provided that government was not prejudiced by the filing of amendment).
31. 28 U.S.C. at § 2412(d)(1)(B).
32. *Id.*
33. 38 U.S.C. § 7292 (West Supp. 2001); FED. R. APP. P. 4(a)(1)(B).

34. 38 U.S.C. § 7292(c) (1994); *see also* Collette v. Brown, 82 F.3d 389, 392 (Fed. Cir. 1996).
35. SUP. CT. R. 13.
36. Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 - 2680 (1994).
37. FTCA claims by military personnel are barred, but claims by family members and veterans injured at military hospitals are not. The Feres Doctrine, first articulated by the Court in *Feres v. United States*, acts as a bar to civil claims of medical malpractice by all military personnel incurred "incident to service." 340 U.S. 135, 147 (1950). However, the courts permit certain veterans' claims under the FTCA. For example, the Supreme Court in the case of *United States v. Brown* held that a claim brought by a veteran under the FTCA for medical malpractice at a veterans hospital is not barred. 348 U.S. 110, 111 (1954). In *Brown*, the Court considered a claim for malpractice where the veteran's original injury involved a wound incurred on active duty six years prior to the negligent treatment at the veterans' hospital. The Court concluded that although a veteran's access to a veteran's hospital was incident to service, the claim was not barred under *Feres*. 348 U.S. at 113. (last visited Jan. 8, 2002).
38. The FTCA provides a limited waiver of the federal government's sovereign immunity when its employees are negligent within the scope of their employment. Under the FTCA, the government can only be sued "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b) (1994). Thus, the FTCA does not apply to conduct that is uniquely governmental, that is, incapable of performance by a private individual. Note that 28 U.S.C. § 2680(h) (1994) provides that the government is not liable when any of its agents commits the torts of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. However, the statute also provides an exception: the government is liable if a law enforcement officer commits assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution, but not if he commits libel, slander, misrepresentation, deceit, or interferes with contract rights. *Id.*
39. ANDREW H. PRESS, CAROL H. DEFRANCES, U.S. DEP'T OF JUSTICE, FEDERAL TORT TRIALS AND VERDICTS, 1994-95, BJS SPECIAL REPORT, NCJ-165810 (December 1997), 4-5, *available at* <http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv95.pdf>.
40. *Id.* at 4, 7, 9.
41. *Id.*
42. 28 U.S.C. § 2680(a). In order to determine if conduct meets the Discretionary Function Exception, the courts must apply a two-part test established in *Berkovitz v. United States*. 486 U.S. 531, 536 (1988); *see also*, *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1025 (9th Cir.1989). First, the court must determine if the conduct involved "an element of judgment or choice." *United States v. Gaubert*, 499 U.S. 315, 322 (1991)(quoting *Berkovitz*, 486 U.S. at 536). This requirement is not satisfied if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536. Once the element of judgment is established, the next inquiry must be "whether that judgment is of the kind that the discretionary function exception was designed to shield" in that it involves considerations of "social, economic, and political policy." *Gaubert*, 499 U.S. at 322-23 (quoting *Berkovitz*, 486 U.S. at 536). Absent specific statutes or regulations, where the particular conduct is discretionary, the failure of the government properly to train its employees who engage in that conduct is also discretionary. *Flynn v. U.S.*, 902 F.2d 1524 (10th Cir. 1990) (failure of National Park Service to train its employees as to proper use of emergency equipment was covered by discretionary function exception to FTCA).
43. *FDIC v. Meyer*, 510 U.S. 471, 478 (1994)(a federal tort claim alleging only a deprivation of a federal constitutional right is not "cognizable" under the FTCA because the FTCA's reference to the "place of the law where the act or omission occurred" means the law of the state where it occurred, and, therefore, in the case of a claim alleging violation of a federal constitutional right, federal law, not state law, provides the source of liability for such a claim).
44. *United States v. Yellow Cab Co.*, 340 U.S. 543, 553 (1951); *Warden v. United States*, 861 F. Supp. 400, 402 (E.D.N.C. 1993), *aff'd*, 25 F.3d 1042 (4th Cir. 1994).
45. 28 U.S.C. § 1346(b) (1994).
46. *See Caban v. United States*, 728 F.2d 68, 72 (2d Cir. 1984); *see also* *Richards v. United States*, 369 U.S. 1, 11-13 (1962).
47. 28 U.S.C. § 2401(b) (1994). Although federal courts apply state law to substantive legal issues, it is important to recognize that the statute of limitations begins to run when the plaintiff learns of an injury's existence and cause, as opposed to when the plaintiff learns the injury was negligently inflicted. *See United States v. Kubrick*, 444 U.S. 111, 124-125 (1979) (the Court held that there was nothing in the language or legislative history of the FTCA that provided for an extension of the statute of limitations beyond the time the plaintiff learns of an injury's existence and cause).
48. 28 U.S.C. § 2675(a)(1994).
49. Under the FTCA, the United States is liable for the negligence of an independent contractor only if it can be shown that the government had authority to control the detailed physical performance of the contractor and exercised substantial supervision over its day-to-day activities. *See United States v. Orleans*, 425 U.S. 807, 814-15 (1976); *Letnes v. United States*, 820 F.2d 1517, 1519 (9th Cir.1987).
50. The substitution provision of the Federal Employees Liability Reform and Tort Compensation Act (FELRTCA) provides that "[u]pon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose . . . the United States shall be substituted as the party defendant." 28 U.S.C. § 2679(d)(1) (1994). The purpose of this amendment to the FTCA was to "remove the potential personal liability of Federal employees for common law torts committed within the scope of their employment, and . . . instead provide that the exclusive remedy for such torts is through an action against the United States under the FTCA." H.R. REP. NO. 700. (1988).
51. *Erxleben v. United States*, 668 F.2d 268, 271 (7th Cir. 1981).
52. *Id.* at 273 (quoting 28 U.S.C. § 2675(b) (1994)).
53. 863 F.2d. 149, 172-73 (1st Cir. 1988).
54. *Id.*
55. "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." 28 U.S.C. § 2675(a) (1994)
56. *Id.*
57. *Id.*
58. 28 U.S.C. § 2674 (1994).
59. 28 U.S.C. § 2678 (1994).



An Interview with Norman S. Fletcher Chief Justice, Supreme Court of Georgia

Justice Norman S. Fletcher became Chief Justice of the Supreme Court of Georgia in June 2001, serving as the 26th chief of the High Court since the role was established in 1845. In this special feature, Chief Justice Fletcher talks with the *Georgia Bar Journal* about his background, his ideas and ideals, and his mission for the Court.

GBJ: What initially attracted you to the profession? Have your views changed throughout your years as a lawyer and judge? What qualities does it take to be a good lawyer?

Justice Fletcher: I was ultimately attracted to the profession because of my admiration for two lawyers in my hometown of Fitzgerald, Ga. In grammar school, I enjoyed writing, and in high school, I

enjoyed the debate team and various activities that involved public speaking, but two lawyers really stand out in my decision to study law. First, there was Carlyle McDonald. He was mayor of Fitzgerald and a fine trial lawyer, and he taught Sunday school in the Methodist Church. Then there was Harvey Jay, who was district attorney. He lived around the corner from my family and was the Sunday school teacher at the Baptist church I attended. Later, in my high school years, I would go down and watch the two oppose each other in some of the criminal trials. Before I completed high school, I had decided this is what I wanted to do, although there had not been any lawyers on either side of the family. My dad was a salesman for Nabisco and traveled the southern counties of Georgia. I remember as a kid traveling with him some, barefoot in the summertime. He was with the company for 40 years or so.

I believe that through the years, one's views about what is important change. In my active practice, most of the time, I did not really

think much about the Constitution and the Bill of Rights, although occasionally I would in representing local government. But serving on the Court, you see how important it is to protect these rights. All good lawyers should have an open mind and see that changes are needed in society and the law. The practice has totally changed since I got out of law school in 1958 because of major statutory enactments, like the Civil Practice Act and the Uniform Commercial Code. You have to keep updating yourself and preparing yourself for changes. One of the great accomplishments of the profession and the Court is requiring continuing legal education; it's not only beneficial for attorneys, but it protects the public. I was attending continuing legal education programs before it was required, back in the 60s; not only was it helpful in my practice, but I also make many good friends that way.

The profession has struggled over the years with public perception, and we still have some problems. But as a whole, I think the profession is doing a pretty good

job. What we need to do is continue to make ourselves available to provide quality legal representation to all citizens, not just large corporations or big business.

One of the problems I see now is that we are making legal services unaffordable for middle-class citizens. Lawyers are out doing a lot of good. I see them working in communities and in their churches. Perhaps we should rethink our approach to the law and remember that law should be a calling, like the ministry is a calling. And, if we're going to do it, then we have to give back to the community and be community leaders. That is what I admired most about the gentlemen I mentioned from Fitzgerald. They gave back to their community and were highly respected for it. They were never rich people. They provided a comfortable living for their families while also exemplifying what being a lawyer should be about.

Today, we are going to have to face the fact that a lot of young lawyers are not getting satisfaction out of the practice of law anymore, perhaps because of the trend toward such large and less personal firms, quality of life issues, and the tremendous amount of debt associated with law school. I think quality of life issues are real. Lawyers, I believe, will have a greater sense of pride and joy if they can find other ways to enrich themselves personal-

ly, whether through church or civic work. I have seen that very often lawyers find greater satisfaction working in a smaller firm or in a small town. Seeing lawyers getting involved in things that are not necessarily law-related, like Habitat for Humanity, for example, and spending more time with family is important to our overall sense of personal fulfillment.

GBJ: You have been active in the profession and in the community for many years. What inspired you to take on leadership roles? What has it meant for you personally and professionally, and why would you encourage other lawyers to get actively involved in the profession?

Justice Fletcher: Admiration for my older brother and for my mother and father inspired me. They were very faithful to all that they undertook, both in their work and personal lives. My older brother was a good student, an Eagle Scout, and on the debate team. This inspired me to be my best. A little sibling rivalry didn't hurt either! I have had a great many mentors and leaders in my life — many lawyers and judges, and many outside of the legal profession. I admire the way people conduct themselves in the courtroom and in their personal lives. My advice to young lawyers is to surround themselves with good

people and then emulate them. I encourage others to get involved in the profession to give something back. They will get something from the experience; it will aid professional and personal growth.

I have always been a great supporter of the State Bar of Georgia and encourage members to get involved. My former partner, Irwin Stolz Jr., was one of the early presidents of the unified Bar. While I was never an officer in the Bar, I always enjoyed participating in various sections, including local government and general practice and trial. I served on the Disciplinary Board, which was a great privilege. It was a lot of work during those three years, but it gave me a chance to give something back and from it I got a lot of satisfaction. The State Bar does an excellent job of providing resources for our attorneys. The job it does in aiding with continuing legal education is great, and we've had some wonderful Bar leaders. I urge people to take the time to get involved in State Bar activities. This would help our perception with the public and provide personal satisfaction.

GBJ: Your term as Chief Justice began barely six months ago. In your observations, what is the state of the Court now and what goals have you set for your time as Chief Justice? How do you see Georgia in relation to the country in terms of the administration of justice?

Justice Fletcher: Generally, the Court, because of prior leaders, is in good shape. Naturally, there are areas in which we want to change focus and we have consultants looking at various court commissions and projects. We still have not come to any conclusions on what we're going to do, but there will be

"Seeing lawyers getting involved in things that are not necessarily law-related, like Habitat for Humanity, for example, and spending more time with family is important to our overall sense of personal fulfillment."

Dear Fellow Members of the Bar:

I am pleased to have this opportunity to tell you about the Georgia Law-Related Education (LRE) Consortium, and to invite you to consider joining it.

The Consortium is an association of institutions, agencies, organizations, and individuals who believe that law-related education is essential to the development of productive, law-abiding citizens. To that end, it:

- initiates, encourages, develops, and supports LRE programs in Georgia;
- promotes the inclusion of LRE in pre-K, K-12, post-secondary, and adult curricula;
- promotes public awareness concerning the benefits of a comprehensive law-related education program; and
- collects and disseminates information about state and national LRE programs and resources.

Members of the Consortium include primary and secondary school educators; those in higher education; the legal community; the judiciary; and those in government (including law enforcement), business, and community organizations.

Formally, the Consortium meets one time each year; however, most of its work is conducted through committees which meet more often. Annual projects include a newsletter, *The LRE Circuit*; promotion of LRE Week activities; a poster contest; awards for outstanding LRE teachers, supporters, and students; teacher training; curriculum development; and support of other LRE activities throughout the state.

As you can see, the Consortium is an active, multi-faceted organization with a worthy mission, and we need your help. Please consider joining us. I believe you will be greatly rewarded.



Anna B. Boling

Anna Durham Boling, Executive Director
Georgia LRE Consortium

Categories	Annual Dues		Entitlements	
Regular Member	\$10.00		10% discount on workshop registration fees	
Supporting Member	\$20.00		10% discount on workshop registration fees and Consortium materials	
Sustaining Member	\$35.00		15% discount on workshop registration fees and Consortium materials	
Silver Member	\$50.00		Same as Sustaining, with special recognition in the Consortium's newsletter	
Gold Member	\$100.00	•	Platinum Member	\$200 • Lifetime Member \$500
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changes that we think will be beneficial and allow us to better utilize our resources. In government, we often start a project without a sunset provision, but once the goal is accomplished we should move on to new things. Sometimes, it is necessary to reconsider goals, programs, needs and structure. That's what we're focusing on now, and I think we'll have a number of improvements within the next six months.

The role of the Administrative Office of the Courts is being strengthened and will be appreciated for doing many new things for the entire court system. We are really trying to strengthen the judicial branch and I think we can do this by having a strong Judicial Council. I am not so naïve as to think we're going to have a unified court system in Georgia anytime soon, although that is recommended by every study commission that has met in the last 40 years. I think it would be the proper way to go. Short of that, we can use the Judicial Council working together to bring about meaningful changes.

The new project on legislation — having study papers prepared on any new project that is to affect the system — I think, is really going to help tremendously because the judicial council can then support legislation that improves the system and oppose legislation that negatively affects the court system. We'll be

speaking with one voice and the legislature will understand that. We have had a great response from legislators already because, for the first time, we have a source of reference about legislation that affects the judicial branch. I definitely think this is a step in the right direction. We are also putting together a



budget committee made up of judges at all levels of the court to help the Judicial Council better plan its budget in the future. This will help everyone to feel they are a part of this process.

I am also very excited about the Chief Justice's Commission on

Indigent Defense that is now in place. We have funded an outside group to make studies in representative cross sections of Georgia counties to see what the needs are, what the problems are, and help the commission in its fact-finding process. I think the study will provide the data that is necessary to support any recommendations. But, there will not be any meaningful change in indigent defense unless we can get everyone involved in the process on the same wavelength. In other words, the recommendations are going to have to be supported by the trial judges, the district attorneys, the criminal defense bar, and by those many people who are strong advocates for improvements in the indigent defense arena. I believe we will be able to do this. It's going to be a give and take proposition. If we can get all of these people to come together and support the recommendations of the commission, we will have a much better chance of selling this across the street to the General Assembly and finding support for this important innovation.

The state has a constitutional duty to provide adequate defense for indigents. About 80 percent of those accused of a crime in Georgia qualify as indigents. We've just got to improve the system. There are some good systems out there that various counties are using, but we need to do a better job statewide. Maybe I am being a little too optimistic, but I believe and hope

this will come to pass in the next few years. That is one of the major reasons I intend to run for re-election. The job is not going to be complete on indigent defense at the end of my present term. The job will also not be completed with regard to strengthening the Judicial Council, but with a few more years these goals can be accomplished.

We've had good leadership in the past and I think that overall the state of Georgia is doing well. There are areas that could certainly stand improvement. The state of Florida, for example, had been treated exceedingly well by its legislature and has probably done a better job in indigent defense and in providing administrative help for the court system. But, after being in other states and meeting with other appellate judges, when you start comparing, overall we have a good system — we just want to make it better.

The professionalism movement here in Georgia is admired across the country and many states are basing their programs on the Georgia model. That speaks exceedingly well for the commission, the State Bar and for the members of the Supreme Court at the inception of the movement — Justices Harold Clarke, Charles Weltner and Tom Marshall (the founding fathers of the Georgia Professionalism movement). Not only have we received great press from the program, I think it has really improved the situation in Georgia.

The new Unauthorized Practice of Law Program is also a tremendous undertaking. It is worthwhile, and I understand why we need to take our time getting into it. It is a good thing because it will protect the public, especially with the influx into Georgia of people from other countries who are being taken

advantage of with regard to immigration and naturalization laws. I think the program will be well accepted by the public unless people see it as a way to protect the profession, so we need to be careful in how it is presented. The truth is we want to protect the public.

GBJ: What do you think are the major challenges facing the profession today? In your view, what does the profession as a whole need to be doing to meet these challenges?

Justice Fletcher: Again, one of the major challenges is in deciding how the profession delivers legal services. Is it going to be all in the national firm approach with 800 lawyers in one association or is it something more personal than that? The challenge is also in how we provide quality legal help to the vast majority of citizens in this country in an affordable way. A problem young lawyers face today is that very often there is no opportunity to have mentors the way I did when I got out of school. You're really not prepared to set up your own office and understand how to operate the administrative side of an office when you leave law school, so you need opportunities to work with other people. There is also the problem now of law school debt. It can be very difficult to pay current needs and repay those debts. Financial problems can also lead to disciplinary problems. There are some new proposals that sound good to me, including loan forgiveness programs for lawyers who elect to go into public service, as an assistant district attorney or in indigent defense or public defender programs, which would help in our indigent defense quest. This would

be good for the legal profession and society.

GBJ: In light of the events of Sept. 11, 2001, do you think the bench and bar has or should have a role in helping to heal the nation? How so?

Justice Fletcher: I feel very comfortable and am very proud of the fact that some of the finest lawyers in the Justice Department are from Georgia. Larry Thompson is the number two person. I know of no better lawyer or person of higher character and ethics. He is also a brilliant scholar. The country is well served with him at the top of the department. On the civil side is Robert McCallum, cut from the same mold as Thompson. Two outstanding attorneys who have given of themselves to the profession. They exemplify the high qualities we want in people who are heading up our Justice Department. With regard to some of the announced rules or changes in how we are to deal with terrorists, I know some people are concerned about that. I am not all that concerned. As much as I want to protect civil liberties, this is a time of war. I agree with the president, we are at war. We have had our own shores invaded, so how we approach these things may have to be different for a while. I think all of us would recognize that we may have to, at least temporarily, give up some of the liberties that we treasure so much in order to combat terrorism. I am certain that our courts and legal system are more than adequate to protect us during these times. Right now, though, I'd say we need to totally support our president, his advisors and our military, rather than being detractors. The Constitution is so powerful with 200 years of history, I

am confident it is going to survive and be in good shape when all of this is over.

GBJ: Who have been or still are your mentors? How have they helped you build such a distinguished career?

Justice Fletcher: I've mentioned lawyers who have helped shape my legal career. When I got to this court, I had new mentors that helped so much, too. It is wonderful to have people you respect to help guide you in your early times on an appellate court. I was so fortunate to have Charlie Weltner, Harold Clarke and Willis Hunt. They befriended me and guided me during my early years on the Court, as did the other justices. Throughout your legal career, I don't think you get too old to appreciate a new mentor along the way.

GBJ: What is the most memorable time of your legal career? After you've moved on from the profession, how would you like to be remembered?

Justice Fletcher: I've had so many highlights in my career, so many great times, and some difficult ones, too. But, in trying to think back, one of the highlights of my practice came out of a natural gas explosion in a hardware store across the street from my office. I represented the city of LaFayette. The city owned the natural gas system and, unfortunately, the store was completely destroyed and seven people were injured and one died. We had at least eight lawsuits against the city and very little insurance coverage. To be able to guide the city through the litigation and still stay within

the limits of the insurance policy was a real highlight in my career. I was concerned about the well being of that little town and how it could survive after such exposure. As a judge, I hope I can be remembered as one who was always concerned with the fairness required by due process, and as a person who tried not to let technicalities prevent justice from being done. I would hope people would see me as one who would not let form control over substance. I like to reach the merits of a case. In our country, we have created many legal fictions and, I sometimes think, don't hide behind legal fictions, just say it the way it is. But primarily I would just hope that people see in the long run that I cared very much about justice, fairness and protecting individual liberties.

I have been exceedingly fortunate that Dot and I have had a great marriage of 44 years, and have two wonderful daughters. I am very proud of both of them. We have five grandchildren who bring us great pleasure. I must say, and I think most everyone knows, that our church life has meant very much to us. The Presbyterian Church USA has been a very important force in our lives. One of the greatest pleasures we've had since we've been in Atlanta for the past 12 years has been the opportunity to be a part of Peachtree Presbyterian Church. Outside of the law, it really is our family. It's been a vital part of our lives.

GBJ: Finally, when asked about any perks that go with being the Chief, Justice Fletcher said . . .

Being the Chief, there are a lot more administrative duties than I realized! Any perks would be if we can

accomplish any of the things we are working on, the satisfaction in seeing significant improvements in the judicial branch, and meaningful change in our method of delivering indigent defense. Of course, there is a perk in having a security person who provides transportation most of the time. That is a great perk!

No doubt, however, the best perk is just having the privilege of being the Chief Justice of the highest court in your home state. I never dreamed of being the Chief Justice. When I was a kid, I dreamed I might be president of the United States, but never the Chief Justice of the Supreme Court of Georgia.

About Justice Fletcher

Prior to his appointment to the Supreme Court, Chief Justice Fletcher was engaged in the general practice of law. He began his law practice in 1958 as an associate in the law firm of Mathews, Maddox, Walton and Smith in Rome, Ga. In 1963, he moved to LaFayette, Ga., to form a partnership with Irwin W. Stolz Jr. and the late George P. Shaw. He served as LaFayette city attorney (1965-1989) and Walker County attorney (1973-1988). While in private practice, he represented the State of Georgia as a special assistant attorney general (1979-1989). He continued his general practice in LaFayette until his appointment to the Supreme Court.


Chief Justice Fletcher received his B.A. degree in 1956 and his LL.B. degree in 1958 from the University of Georgia. He also earned an LL.M. from the University of Virginia School of Law in May 1995. While a student at the University of Georgia, he was a member of Sphinx, Gridiron, Blue Key, ODK, Phi Delta Theta fraternity and Phi

Delta Phi. He also served as president of his junior and senior classes and of Phi Delta Theta fraternity.

Chief Justice Fletcher has a distinguished record of service to the legal profession and the community. He is a fellow of the American Bar Foundation and the Georgia Bar Foundation and is a master in the Joseph Henry Lumpkin Inn of Court. Prior to his appointment to the Supreme Court he served as a board member of the Attorney's Title Guaranty Fund (1971-75), president of Lookout Mountain Bar Association (1973-74), president of the University of Georgia Law School Association (1977), chair of Local Government Section of the

State Bar of Georgia (1977-78), president of the City Attorney's Section of the Georgia Municipal Association (1978-79), a member of the State Disciplinary Board (1984-1987) and chair of the Investigative Panel (1986-87). While residing in LaFayette, Chief Justice Fletcher served three terms on the board of the LaFayette Chamber of Commerce and is the former president of the LaFayette Rotary Club. In 1989, he served as co-chair of the State Bar's commission on lawyer disciplinary reform. He also served as a member of the Board of Visitors of the University of Georgia Law School (1989-95) and was its chairman (1994-95).

Chief Justice Fletcher is presently a member of Peachtree Presbyterian Church in Atlanta, where he serves as a ruling elder. He has served as an officer in the First Presbyterian Church of Rome, LaFayette Presbyterian Church and Cherokee Presbytery and as a commissioner to the Presbyterian Church USA General Assembly in 1984 and 1985.

Chief Justice Fletcher was born on July 10, 1934, the son of the late Frank Pickett Fletcher and Hattie Sears Fletcher. His brother is Frank P. Fletcher Jr. of Pawleys Island, S. C. Chief Justice Fletcher married the former Dorothy Johnson of Fitzgerald, Ga., in 1957. They have two daughters and five grandchildren. 

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Executive Summary Report: Multidisciplinary Practice Committee of the State Bar of Georgia

In November 1999, Rudolph Patterson, 1999-2000 president of the State Bar of Georgia appointed a special Multidisciplinary Practice Committee. Patterson charged the committee to study the concept of multidisciplinary practice, especially as it relates to legal practice and professional ethics in Georgia. Further, he directed the committee, upon completion of its study, to report its findings and recommendations to the State Bar. The committee was continued by the 2000-2001 president of the State Bar of Georgia, George E. Mundy. The Georgia Bar Foundation has supported the committee's work with a special grant. Having concluded its study, the committee submits this report of its findings and recommendations.

Linda A. Klein, Chair
State Bar of Georgia
Multidisciplinary Committee

Note: The complete MDP report can be found on the State Bar of Georgia's Web site at www.gabar.org.

Introduction and Recommendations

No issue in recent years has so fascinated and so divided lawyers

across the country as has multidisciplinary practice. Over the past two years the American Bar Association (ABA), and many state and local bar associations have debated what is meant by multidisciplinary practice (MDP) and whether it is the potential salvation or damnation of the legal profession. The State Bar of Georgia is one of several that have empanelled special committees to report on the issue.

MDP has generated a spectrum of professional opinion. Toward one end of the spectrum stand traditionalists who, generally speaking, resist MDP and oppose relaxing the ethical rules that currently preclude it. They believe that MDP necessarily and fatally undermines the core values of the legal profession and thus threatens its existence as a distinct profession. Some traditionalists view recent MDP proposals as little more than the accountants' predation: a Trojan horse at the legal profession's gates awaiting an invitation by the naive, if well intentioned, among us. The result, in the nightmares of some strident MDP opponents, would soon be to supplant the ABA and state bar associations with an "American MDP

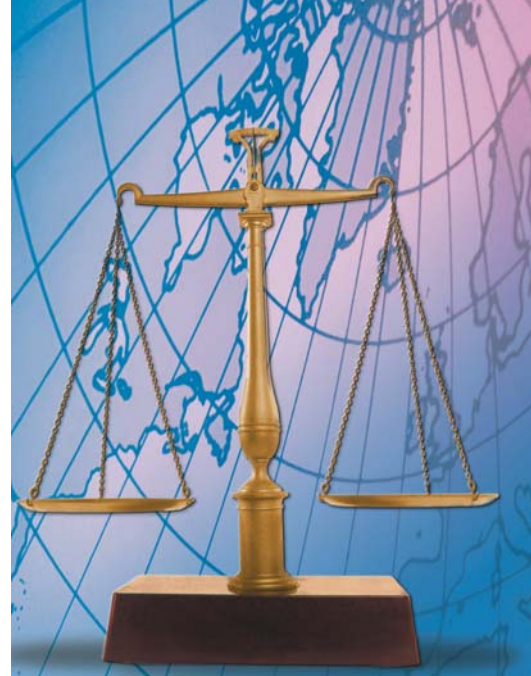
Association" and its state equivalents, overseen by accountancy or state legislators or newly constituted MDP boards, but not the judiciary. Traditionalists worry also about law firms including any nonlawyer partners — whether international, Big-Five accountants or local tow-truck drivers — whose ethical principles and professional goals may differ from ours. To allow MDPs would, in their view, impair our unique professional obligations to promote justice in general and to our clients in particular. They predict that MDP would exacerbate the modern tendency for professionalism to take a back seat to venal, business interests and would otherwise dilute professional ideals. Traditionalists find allies among some anti-trust experts who predict that blurring the boundaries of legal practice will invite anti-trust complaints and possible loss of professional oversight by the judiciary.

Toward the opposite end of the spectrum stand those who might be called pragmatists, even "futurists." They embrace MDP as the wave of the future, if not the wave of the present. Citing client demand, market forces, business

synergies and the insurgence, even dominance, of Big Five accountancy practice in global financial services, many futurists see MDP as a fait accompli, the inevitable consequence of globalization. Following the gurus of business modernization, they embrace a theory of professional Darwinism, the only question being whether lawyers will adapt, survive and prosper in a global age or will go the way of the dinosaur. In part, futurists find encouragement among consumer groups which, finding fault in the current delivery of legal services, hope that MDP and related changes in the profession may lead to lower costs and greater accessibility for legal services. They also find allies among some European profession-

als currently experimenting with MDP and analogous business arrangements. Anti-trust experts also support MDP as having potential for improving client choice, so long as the bar does not unduly constrain the operation and design of MDPs.

At the outset of our year of study and discussion, we members of the Georgia MDP Committee membership spanned this MDP spectrum, from traditionalist to futurist and most points in between. As we concluded our study and discussions, we could have remained poles apart in our recommendations, persisting in a variety of traditionalist or futurist positions. Indeed, MDP committees in some other states have persisted in polarized positions, unable



to find common ground. We are pleased to report that we have not only found common ground, we have fashioned a proposal that we think moves our profession forward

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while preserving the core principles that define it.

Over the past year, we have read and learned a great deal and heard from a great many. As can be seen in Appendix II to this Report (located at www.gabar.org), we have consulted interested persons from within and without the legal profession, including representatives of public interest groups, of large and small law firms, accountants, academia and the State Bar of Georgia. In so doing, we have come to understand traditionalist and futurist alike and to understand what each has to offer to the profession as it performs its public and private obligations. As do the traditionalists, we believe that preserving the core principles of our profession is essential to its existence, to the protection of client interests and to our system of justice. Likewise, we worry that approval of unbounded MDP will bring unintended consequences, most especially the erosion of client protections, client loyalty and client confidence. Nonetheless, as do the futurists, we believe that factors external to the profession challenge the status quo and call for professional change, some of which may be met by MDP of the sort we propose in this report.

We make our recommendation — to allow limited forms of MDP — not to jeopardize our profession but to revitalize it. With this innovation, we seek to improve upon and expand legal services as well as to protect the public interest. In the absence of our recommended changes, forces external to the profession will continue to dilute the quality of legal services, to short-change uninformed consumers and to appropriate to themselves entire branches of the legal profession. Such forces march to a cynical tune,

taking advantage of the public's increasing mistrust of lawyers and of misinformation about our profession. Unfortunately our disciplinary machinery currently lacks the resources, financial and legal, to police the unauthorized practice of law or to reach all that violate accepted standards of competence, ethics and public service. It must have both the resolve and the resources to reach all who would practice law, whether with or without a license. We must also summon the resolve and resources to educate the public about the dangers of unauthorized and shoddy practices as well as about the value added by competent and ethical legal services. Therefore, as we recommend innovation in our professional rules, we must also encourage enhancement of our disciplinary and educational resources. Finally, we could take a lesson from other professionals — most notably public accountants — in fashioning our own vision of the future.


The Committee has agreed unanimously on the following three premises:

1. The State Bar of Georgia's first priority is to seek to improve the legal profession, to strengthen our legal system and to provide legal services to all in need of them.¹³
2. Our profession should not stifle innovation in the service of clients and of the system of justice for its own convenience or self-protection. If the public would benefit from legal services MDP, then the bar should encourage MDP where it is possible to do so without jeopardizing the interests of the public or the core principles that define the profession.

3. Our profession should not cede to others ultimate responsibility for the quality and delivery of legal services through MDP or through any other form. MDP will yield salutary benefits only where lawyers control law firms and respect the principles essential to preserving the integrity and impartiality of the professional service, to the proper function of the legal system and to protecting client interests and rights.

Recommendations

The Georgia Rules of Professional Conduct should be amended to allow the association of lawyers and nonlawyer professionals in MDP to provide legal services, and to share fees, whether as partners, co-owners, members or shareholders, with the following limitations:

- A. Only licensed lawyers in the MDP may practice law.**
- B. Lawyers in the MDP shall remain vicariously liable for nonlawyers who assist in providing legal services, and all who assist lawyers in providing legal services through an MDP shall comply with the Georgia Rules of Professional Conduct.**
- C. All clients of the MDP shall be protected by the conflicts of interest rules that protect the clients of lawyers.**
- D. Protection of funds held by the MDP in "fiduciary capacity" shall include all funds held for clients of the MDP.**
- E. The MDP must not offer legal and attest (audit) services to the same client.**
- F. The MDP must be majority owned and controlled by licensed lawyers.**
- G. The MDP shall not have passive investors.** 

Sounding Off on Multijurisdictional Practice

By Patrick E. Longan

The practice of law in the 21st century frequently takes Georgia lawyers across state lines. Lawyers with lawsuits pending in Macon take depositions in Alabama. Lawyers with a client in Clayton may find that the client needs a lawsuit filed in North Carolina. A transaction may take other lawyers from Atlanta to New York, where they negotiate the sale of Georgia property or consummate the acquisition of goods in New York for their Georgia client.

In-house counsel residing in Georgia may find themselves traveling to, or at least conversing with, other employees who need legal advice in many far-flung jurisdictions. The U.S. economy is an international economy, and it should come as no surprise that the practice of law can cross state

boundaries. Yet, of course, lawyers are licensed by individual states and are bound not to “practice law” in states where they are not licensed.

The tension between the interstate scope of many lawyers’ practices and the state-by-state regulation of their activities has brought renewed attention to the question of multijurisdictional practice (MJP). The basic question is when and under what conditions lawyers should be permitted to represent their clients, on a temporary basis, in a jurisdiction where the lawyers are not licensed.

Many bar associations and other organizations are studying this issue. The American Bar Association’s (ABA) Ethics 2000 Commission has made its recommendations, and its proposals will be taken up before the ABA House of Delegates in either February at the Mid-Winter Meeting or next summer at the ABA’s Annual Meeting in Washington. The ABA’s Commission on Multijurisdictional Practice recently issued its interim report. The Commission plans to approve a final report this year in time for consideration by the House of Delegates next summer.

Meanwhile, state bar associations from New Jersey to

Washington and many points in between have issued reports and/or recommendations. Organizations such as the American Corporate Counsel Association, the National Association of Bar Counsel, the United States Chamber of Commerce, and the Association of Professional Responsibility Lawyers have also originated proposals of their own or formally endorsed those of other groups.

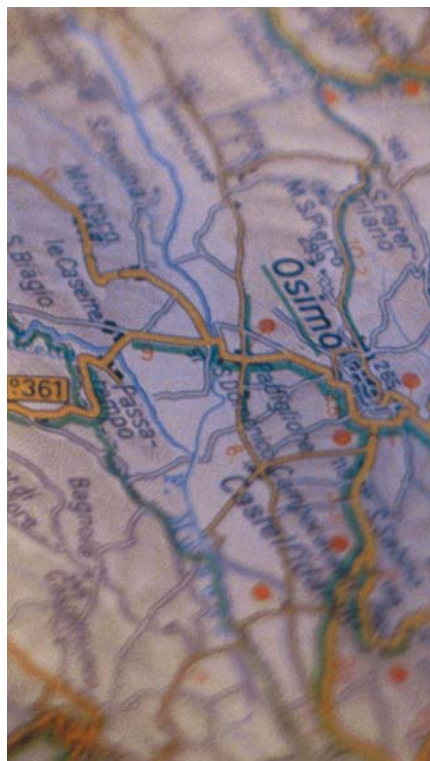
The State Bar of Georgia is also examining issues of MJP. The Committee on Multijurisdictional Practice is co-chaired by Dwight Davis and Christopher Townley, and its mission is to study issues of MJP and to report any recommendations to the Executive Committee and the Board of Governors of the State Bar. To fulfill its mission, the committee will be seeking the help of Georgia lawyers. The committee will be holding a series of open forums around the state in conjunction with local bar associations for the purpose of hearing from you about MJP. These forums will be scheduled to occur between now and next summer and will be held in northwest Georgia, as well as in Columbus, Augusta, Atlanta, Valdosta, Brunswick and Savannah. The committee would

welcome your attendance and your
comments.

At each of the forums, a presentation of various alternatives will be made on behalf of the committee. Although there are almost as many proposals as there are organizations that have made them, two basic types of changes have emerged. One is the "safe harbor" approach, in which a revised rule of professional conduct would define certain activities not to be the unauthorized practice of law. Both the ABA Ethics 2000 Commission and the interim report of the ABA Commission on Multijurisdictional Practice follow this approach. The Ethics 2000 Commission version of the safe harbor approach would define five activities not to be the unauthorized practice of law.

First, it would not be unauthorized practice to appear in the court of another state if the court has admitted the lawyer *pro hac vice*. Second, the Ethics 2000 proposal also would exempt litigation related activities, such as interviewing witnesses or meeting with clients in another state if the lawyer reasonably expects to be admitted *pro hac vice* in the case. Third, in-house counsel would be permitted to give advice in other states for their employer and the employer's affiliates. Fourth, a lawyer could act in another state with respect to matters that arise out of or otherwise reasonably relate to the lawyer's representation of the client in the lawyer's home state. Fifth, a lawyer would not engage in the unauthorized practice of law if the lawyer retained local counsel, and the local counsel participated actively in the representation.

These safe harbors in large measure merely permit lawyers to do things they already do. Litigators rarely think twice about appearing



in court in another state if the judge has admitted them pro hac vice, and activities to get ready to initiate such an action are also not considered troublesome. In-house counsel for large organizations does not seek admission to every jurisdiction where the company does business, nor do they restrict their activities or advice to their home state. Litigators feel free to take out-of-state depositions for use in Georgia cases, and transactional lawyers negotiate with out-of-state buyers and sellers for Georgia clients. Working with local counsel has long been viewed as granting immunity from any charge of unauthorized practice.

The safe harbor approach thus has the virtue of sanctifying practices that are already routine. In that sense, it is not revolutionary, yet it revises the rules of professional conduct to conform to accepted practice. There is merit in this mission: it is not healthy for lawyers routinely to engage in activities that may be “technical” violations of the rules against unauthorized practice.


The safe harbor approach, however, has its critics. It is a conservative approach that may tidy up the rules but does not give lawyers any more freedom to practice across state lines. Its critics also find the creation of the safe harbors for transactional work to be an empty gesture because there is no way to detect the presence of a lawyer from another state unless something goes wrong. We do not have border guards checking law licenses at the state line. Those who disfavor the safe harbor approach would forego pretending to regulate the type of activities that lawyers from other states can engage in, and instead focus on discipline of the out-of-state lawyers who cause problems.

The other type of proposal is more aggressive. The so-called “driver’s license” approach would grant a blanket right to lawyers in good standing in their home states to practice temporarily in another state, just as a drivers from one state are free to drive temporarily in another state while passing through. This proposal has found support from the National Association of Bar Counsel, the Association of Professional Responsibility Lawyers and the American Corporate Counsel Association.

The driver's license model has the virtue of simplicity. It does not distinguish between particular types of practice or particular activities. It also has the effect (which some would see as virtue and others as vice) of making interstate practice easier. Lawyers would not have to stop and think whether their actions in another state fit one or more permitted categories of MJP. They would simply make sure that they had their law license as readily accessible as their car registration and then go where their clients' needs take them.

Critics of the driver's license approach raise one concern above all others: that out-of-state lawyers will give inferior service because they would not be as familiar with local law as in-state lawyers would be. Bar exams cover individual state laws precisely because those laws differ. To protect unsophisticated clients, the argument goes, it is necessary to restrict the practice of law to lawyers who have demonstrated competence in local law.

These summaries are intended only to pique your interest. There are many details in them that merit discussion, and there are other proposals that should also be dis-

cussed. You can obtain more information on proposals to revise rules on interstate practice by contacting me at or by attending one of the committee's forums. The committee very much wants to hear from all the Georgia lawyers who have an opinion on this subject before the committee makes its report and recommendations to the Executive Committee and the Board of Governors. We look forward to seeing you at one of the forums or otherwise hearing your views on issues related to MJP. 

Patrick Longan is the William Augustus Bootle Professor of Ethics

and Professionalism in the Practice of Law at Mercer University's Walter F. George School of Law. Professor Longan serves as the reporter to the State Bar's Multijurisdictional Practice Committee.

ENDNOTES

1. A list of committee members is available on the State Bar of Georgia Web site at www.gabar.org.
2. The full text of the Ethics 2000 proposal and the draft comments can be found on the Internet at <http://www.abanet.org/cpr/e2k-rule55.html>. The proposal from the ABA Multijurisdictional Practice Commission is similar but somewhat more expansive. Its recommendations may be found on the Internet at <http://www.abanet.org/cpr/mjp-home.html>.

Russell's Better Brief Writing Guide

By David G. Russell

This guide assumes that counsel already has decided that professional standards and strategy warrant a motion and brief. The brief itself should contain a clear exposition of the critical facts, an analysis of controlling law and reasoned argument marshaled to lead the court to the conclusion your client wants. How to engage in legal analysis is beyond the scope of this guide.

Move and Move On

Unless applicable rules require a combined motion and brief, the motion should set forth clearly and concisely the action the movant seeks, without argument. It also should cite the procedural authority. For example: "Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Russell moves for dismissal of Counts 1 and 2 of the Complaint for failure to state a claim." Eliminate unnecessary and archaic phrases, like "comes now," "hereby" or "now, therefore." Sever those dead hands of the past. Just move and then move on to the brief.

Start with a Bang

The first sentence of the brief should state what you want the court to do and why. For example: "The court should dismiss Counts 1 and 2 of the Complaint under Rule 12(b)(6) because plaintiff Nitwit failed to plead the essential elements of libel and tortious interference." The introductory statement then should continue with a forceful, compact summary of the argument. In an opposition brief, don't start off by regurgitating the other side's brief. Do not waste space by stating the obvious — "Plaintiff Nitwit hereby submits its opposition to Defendant Russell's motion to dismiss" is redundant with the title and the act of filing the brief.

Write a Brief, Not a Trust Indenture

Write the brief to be read easily. Avoid the style of a trust indenture, whose sentences usually are interrupted by multiple definitions of terms and are lengthy and clumsy. Remember that the rules call it a "brief" for a reason. It is not a law review article. Edit and re-edit to the desired result: compact, forceful advocacy.

Know Your Audience

Read opinions from the judge who has your case to see how he or she reasons and writes. You don't

need to copy the judge's style, but you should be mindful of it.

Use the Active Voice

The active voice conveys more powerfully your thoughts and reduces the chances of ambiguity. Who wants to write or read a "passive" brief?

Avoid Run-On Sentences

Edit the brief to break down sentences that won't stop. If you don't, the judge may miss your point.

Use Subheadings and Topic Sentences

If factual statements or legal arguments take up more than several pages, consider the use of subheadings to keep the judge focused. Avoid overly wordy headings. Draft topic sentences to encompass the subject of the paragraph they introduce; ask whether a busy judge and law clerk reading only your topic sentences would grasp the essence of your argument.

State the Facts Clearly and Fairly

The most easily told story proceeds chronologically. Tell it from the standpoint of your client. Tell it clearly. Candidly reveal relevant, adverse facts. An obviously distorted or lop-sided statement of facts disservices you, your client and the system. Save most (but not necessarily all) of your argument for the section so entitled. If you must argue,

do it subtly, with understated advocacy. As elsewhere, distill to the essence. For example, if precise dates are not on the critical path to a decision, omit them. Try to use concrete, vivid language. For motions to dismiss, cite precisely to the complaint. (Complaint at ¶ 16(d)) For material facts developed through discovery, cite precisely to the record. (Clinton Depo. at 56; Bush Affid. at ¶ 5; Depo. Ex. 101 at p. 3) Don't base your argument on unsubstantiated facts. If appropriate, attach excerpts of the record you cite.

Avoid Unnecessary Words

Consider these alternatives: (1) "The court should dismiss Counts 1 and 2;" or (2) "It is respectfully submitted that the motion to dismiss Counts 1 and 2 should be granted



by the court." Why clutter a brief with expressions like, "it is well-established that . . .," or "the court should take note that . . ." Give your brief a haircut.

Be Strong But Reasonable

A convincing brief is understandable, reasonable, logical and based on controlling authority. Extremist phraseology or arguments discredit the advocate. Try not to mix together too much caffeine and alcohol before you set pen to paper; the intoxicating effect you desire will dissipate in the sober light of chambers. Don't be whiny, sarcastic, emotional, self-righteous or cocky.

Be Respectful

Show your respect for the system, the court and opposing counsel. Personal attacks on the other side weaken your brief. Talk about the facts and the other party's position, not its lawyers. The high road most often will lead you to where you

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should go. Vent your frustrations to your colleague and not in your brief.

Argue Good Law First

Base your argument first on relevant, binding precedent. Proceed if you must to non-binding precedent. If one or two solid cases support your position, stick to them; avoid string cites that do little but take up precious space. Provide the pinpoint cite, to the exact page or pages on which you want the court to focus. Add a short, parenthetical summary to your case cite, like (affirming summary judgment against plaintiff on ERISA three-year statute of limitations). This educates the court and serves a key role of the advocate: to help the court understand so that it can make the right decision. Don't fill your brief with footnotes; while they have their place, their over-use distracts from the main argument. If the point is truly important, why isn't it in the text? In editing your brief, try using this standard for each footnote: a rebuttal presumption of eliminating it.

Disclose Controlling Bad Law

Adhere to your ethical obligation to cite controlling, adverse precedent. Then use your good lawyering to convince the court not to follow it.

Be Creative

With the right touch, creative diction can be memorable and effective, so long as the point is clear, tasteful, and not subject to ambiguity. If appropriate, use analogy, metaphor, simile and colloquialism to add color — just don't end up with a rose garden. Minimize repetitive, time-worn phrases.

Quote Sparingly

Pithy quotations from exhibits, testimony or controlling authority definitely have their place in forceful advocacy. But be sparing. A lazy

lawyer oftentimes will quote at length when a little more work will produce a more concise and pointed paraphrase.

Say It Once or Twice

Make your point and move on to a different topic. Unnecessarily repetitive or cumulative arguments are no more welcome to the court than they are to you.

Be Brief on Summary Judgment

The length of the brief is inversely proportionate to the chances it will succeed.

Avoid the "Even If" Syndrome

Why does an advocate build a solid, cogent argument and then undermine it with "even if I'm wrong, I have this other, lesser argument?" Try to avoid this pitfall by making arguments on top of one another, rather than alternatively. You may lead in by, "an additional reason warrants dismissal," or "in any event, the court should dismiss because . . ."

Follow the Rules

Check FRAP, state court rules, local rules and judges' individual rules for length, font, margins, formatting, content, ordering, etc. Follow the rules. For citations, remember that your brief may be read first by a law clerk just out of school who has been taught that the Bluebook contains sacred stuff. For grammar and writing style, follow Strunk and White, *The Elements of Style*. For spelling and diction, there's this big book called the dictionary.

Eliminate Typos

They distract from your argument and evidence a sloppiness that may taint your credibility.

Don't Save It for the Conclusion

Don't save your punchline argu-

ments for the conclusion. Having put the force of your argument on the first page, conclude by stating: "The court should dismiss Counts 1 and 2."


Don't Allow Fire Drills

Write the brief well in advance. You then have the luxury of letting your prose cool off before you edit it. Get the ultimate or, if you must, the penultimate, version to the client with sufficient lead-time for the client to review and improve. In-house counsel, with their busy schedules, especially disdain receiving a brief on the eve of its filing deadline. Just remember that, in the court's and your client's view, timeliness is virtuous.

Strive for Pride

Have pride in your work. Unfortunate is the brief writer who disclaims that he or she does not have any pride of authorship or who says that "this is just a rough draft." As in other aspects of life, do that which will make you proud 20 years down the road.

Do Your Own Thing

This general guide draws from over 24 years of experience. Each advocate, however, must do that which is appropriate for the case at hand. Develop your own style accordingly. For an excellent source on effective written advocacy, see Godbold, *Twenty Pages and Twenty Minutes — Effective Advocacy on Appeal*, 30 SW. L.J. 801, 807-818 (1976). 



David G. Russell graduated with a degree in economics from Davidson College in 1972 and from Vanderbilt Law

School in 1977. He is a partner with Parker, Hudson, Rainer & Dobbs LLP in Atlanta, where he specializes in commercial and securities litigation.

Brasstown Valley Hosts Fall BOG Meeting

By Robin E. Dahlen

The north Georgia mountains played host to the Board of Governor's Fall Meeting, Nov. 2-4, 2001. State Bar President Jimmy Franklin set the meeting at the Brasstown Valley Resort in Young Harris, Ga., where attendees were treated to the fall foliage and cooler temperatures.

Board Meeting Highlights

- With regards to the new Bar Center, the Board unanimously decided to appeal the Decision and Order of the Tree Conservation Commission.
- The Board, by unanimous vote, approved the reappointment of Ben F. Easterlin IV to the Judicial Qualifications Commission for a four-year term.

- The Board, by unanimous vote, approved the reappointment of Ben F. Easterlin IV and Robert W. Chasteen Jr. for three-year terms to the Commission on Continuing Lawyer Competency.
- The Board received the following nominations for officers: George R. Reinhart Jr., Tifton, for treasurer; Robert D. Ingram, Marietta, for secretary; and William D. Barwick, Atlanta, for president-elect. The following were nominated as American Bar Association (ABA) delegates: Allan Jay Tanenbaum, Atlanta, Post 1; Cubbedge Snow Jr., Macon, Post 3; and Linda A. Klein, Atlanta, Post 7.
- Following a report by Thomas R. Burnside, Legislation Committee chair, the Board took the following action: tabled a direct appeal from the Appellate Practice Section; passed by unanimous vote the certification of Questions of Law to the Georgia Supreme Court; passed by unanimous vote non-partisan elections for district attorneys as requested

by the District Attorney's Association; passed by unanimous vote funding for victims of domestic violence at \$2.3 million for FY 2002-2003 as requested by the Women & Minorities in the Profession Committee; passed by unanimous vote a funding increase of \$403,000 for FY 2002-2003 as requested by the Georgia Court Appointed Special Advocates; passed by unanimous vote a funding increase of \$1,805,353 for FY 2002-2003 as requested by the Georgia Indigent Defense Council; and tabled juvenile discovery legislation.

- Young Lawyer's Division (YLD) President Peter J. Daugherty reported on the various activities of the YLD, including: the suit drive to be held at the Bar's Midyear Meeting; the 4th Annual LRE Golf Tournament raised \$12,500; a memorial fund in honor of Ross Adams was developed to help young lawyers attend ABA meetings; and the establishment of a truancy intervention project in Columbus, Ga.

- The Board received a copy of President Franklin's statement regarding the recent national crisis, which was also posted on the homepage of the Bar's Web site.
- The Board received a copy of the Chief Justice's Commission on Professionalism "2001 Law School Orientation on Professionalism" report.

- The Board received a copy of the working notes after the deliberations of the Committee on Research about the Future of the Legal Profession.

Place Your Bets!

The weekend wasn't all business, however. Recreational activities included golf, horseback riding, and

a pottery program for spouses and guests. On Friday evening, attendees gathered at the Brasstown Valley Mountain Pavilion for a barbecue feast, complete with a roaring campfire. On Saturday evening, attendees, dressed in their finest western wear, retreated indoors, where the spirit of the Old West was alive and well. Wild West



Active Bar volunteer Eunice Mixon of Tifton and Executive Committee member Bryan Cavan of Atlanta enjoy the warmth of the Friday evening campfire.



State Bar President Jimmy Franklin, his wife Fay Foy (right), and her mother, Fay Smith, enjoy the evening fun at the Wild West casino.

Board of Governors Adds Members

Pursuant to the new State Bar rule that establishes composition of the Bar's Board of Governors, the following new appointments have been made by President Jimmy Franklin and President-Elect James Durham.

ATLANTA CIRCUIT

Bryan M. Cavan Post 31 (exp. '04)
 Elizabeth Brannen Chandler Post 32 (exp. '03)
 S. Kendall Butterworth Post 33 (exp. '04)
 Allegra J. Lawrence Post 34 (exp. '03)
 Terrence Lee Croft Post 35 (exp. '04)
 Robin Frazer Clark Post 36 (exp. '03)
 Samuel M. Matchett Post 37 (exp. '04)

OUT-OF-STATE

C. Randall Nuckolls, Washington, DC, (exp. '04)

PRESIDENT-ELECT DIVERSITY APPOINTMENTS

Althea L. Buafo, Macon (exp. '03)
 Bettina Wing-Che Yip, Atlanta (exp. '03)
 Lester B. Johnson III, Savannah (exp. '04)


Board of Governors Upcoming Meetings

Spring 2002	April 5-7, Westin Harbor Resort, Savannah, Ga.
Annual	June 13-16, Amelia Island Plantation, Amelia Island, Fla.
Fall 2002	September 9-11, Holiday Inn, Athens, Ga.
Special	October 31, Dedication Ceremony, New Bar Center, Atlanta, Ga.

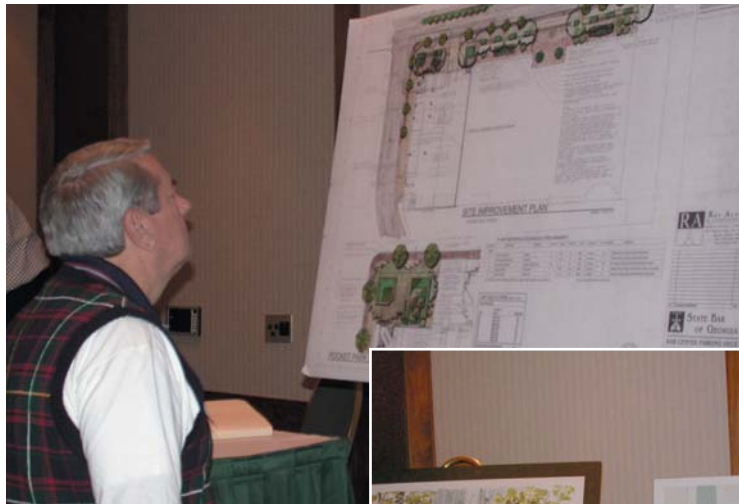


Out-of-state Board representative Mike Elsberry nominates William D. Barwick for State Bar President-Elect during the Board meeting. Elsberry's glowing nomination was seconded by William David Cunningham of Lafayette.

casino games were in full swing, as well as an impromptu paper airplane contest. The winning pilot was William C. Rumer, Columbus, who was rewarded handsomely with a one-night stay at the Swissôtel in Atlanta. Additional winners from the casino activities included Tami Lipscomb, guest of David S. Lipscomb, Duluth, who was given a two-night stay at the Westin Savannah Harbor Resort for having the lowest gambling amount. Barry Price, Douglasville, was given a two-night stay at Amelia Island Plantation, Amelia Island, Fla., for having the highest gambling amount.

The evening and recreational activities were made possible by the generosity of the Bar's corporate sponsors — LexisNexis, Insurance Specialists Inc., ANLIR and West Group. 

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



State Bar Past President Rudolph Patterson of Macon reviews plans for the new Bar Center during the Board meeting. Board members voted unanimously to appeal the decision of the Tree Commission, which has prevented construction of the parking deck portion of the Bar's new building.



Lawyers Foundation Awards Challenge Grants

By Sarah I. Bartleson

The Lawyers Foundation of Georgia has awarded its second annual Challenge Grants. This year, four grants were awarded in the amount of \$5,000 each. The recipient was required to raise an equal amount in order to receive the funds.

The Cobb County Bar Association received the first Challenge Grant for the Cobb Justice Foundation to assist legal aid in Cobb County.

A Business Commitment Committee (ABC) received the second challenge grant for the ABC Project, which allows business lawyers to provide pro bono legal services to groups and nonprofit organizations serving the needs of low-income Georgians.

The third Challenge Grant went to the Individual Rights Section and Access to Justice Committee for the Promoting Equal Justice Program. The grant will help these entities prepare materials to

implement the public education campaign for Georgia lawyers to raise awareness of and increase support for legal services for low-income Georgians.

The Georgia Association of Black Women Attorneys also received a Challenge Grant for their Civil Pro Bono Project, which provides direct legal services to incarcerated women with family issues that affect the relationship between the mother and her children.

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

The Foundation seeks to further these principles through the financial support of the charitable activities of local, state and voluntary bars of Georgia, including bar sections and other law related organizations, by supporting education designed to enhance the public's




Lauren Barrett (center), director of the Lawyers Foundation of Georgia, presents a Challenge Grant to Knox Dobbins (right), chair of the ABC Committee, and Guy Lescault (left), ABA Business Law Section Pro Bono Committee's ABC Liaison. ABC is a State Bar of Georgia committee that connects business lawyers to provide pro bono legal services to community organizations. ABC matches volunteer business lawyers with community based nonprofit organizations throughout Georgia.

understanding of the legal system and by supporting access to justice. Educating the public about the law and lawyers, attracting a high caliber of individual through the mock trial program and scholarships, encouraging pro bono representation and community

service by attorneys is just part of what the Lawyers Foundation of Georgia works to accomplish.

Members of the legal profession take pride in the services and funds that the foundation provides to the public as responsible citizens and true professionals. Through the Lawyers Foundation, legal professionals can build their collective capacity to do good.

Congratulations to all involved with the Challenge Grants for their hard work and dedication. The Challenge Grants are made possible through the generous gifts to the Lawyers Foundation of Georgia. For more information, please contact Lauren Larmer Barrett, 800 The Hurt

Building, 50 Hurt Plaza, Atlanta, GA 30303; (404) 526-8617; Fax (404) 527-8717; laurenb@gabar.org. 

Sarah I. Bartleson of the State Bar Communications Department is a contributing writer to the *Georgia Bar Journal*.

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WESTLAW

KUDOS

Two Georgia lawyers recently earned mention in the "President's Column" of the *ABA Journal* for their volunteer work in their communities. **Janice Wahl**, a retired lawyer, took the bar exam just so she could volunteer two days a week at the Elder Abuse Project. **Bill Kitchens**, managing partner at Arnall Golden Gregory, sets the bar for his firm's pro bono commitment by frequently taking on cases himself, appearing in court, and interviewing and counseling clients who cannot otherwise afford legal counsel.

William Linkous Jr. was presented with the **2001 Verner F. Chaffin Career Service Award** at the Fiduciary Law Institute held at St. Simons, Ga., in July. The award specifies that it is, "In recognition of a distinguished career of outstanding, unselfish and dedicated service to the Fiduciary Law Section of the State Bar of Georgia, its members and the citizens of Georgia."

Attorney **Barbara Mendel Mayden** of the Nashville, Tenn., office of **Bass Berry & Sims** was elected to serve as chair of the American Bar Association's Section of Business Law. She is only the third woman and third lawyer from the Southeast to be elected to this position in the 63-year history of the section.

Guerry R. Thornton Jr. was elected chair of the **Development Committee at the American Church** in Paris, France. He will spend six months per year in Paris working for the church and providing consulting work related to litigation and asset protection. He can be reached via his Web site at www.net-law.net or 750 Park Avenue, #18-South, Atlanta, GA 30326; (404) 467-1670.

King & Spalding announced that it created the position of chairman, to be held by **Walter W. Driver Jr.**, and named new managing partners, one for each of its national offices. **Mason W. Stephenson**, partner and former head of the real estate practice, was named managing partner of the Atlanta office.

The international law firm of **Jones, Day, Reavis & Pogue** announced the opening of a new office in Milan, Italy. The firm has also announced an agreement to merge with Tokyo's Showa Law Office effective Jan. 1, 2002, and to integrate the two firms' opera-

tions pursuant to Japanese laws and regulations. Jones Day has opened six new offices in two years.

The **Cobb County Bar Association** was recognized in a feature story in the *Marietta Daily Journal* for its development of the Community Service Fund. The fund, established to provide small grants of financial assistance to persons in crisis and for whom emergency aid is unavailable through traditional service providers, held its first-ever "Sleighbells on the Square 5K" in late November 2001. Approximately 250 runners participated and the fund hoped to raise \$4,000 through sponsorships and other donations.

ON THE MOVE

In Atlanta

King & Spalding announced that **W. Ray Persons** has joined the firm as partner in the Atlanta office. Persons will become a member of the business litigation practice group, focusing on complex litigation, product liability litigation and alternative dispute resolution. The Atlanta office is located at 191 Peachtree St., Atlanta, GA 30303-1763; (404) 572-4600.



Gunnin



Fagan

Constangy, Brooks & Smith, LLC, announced the addition of two new associates. **Carla J. Gunnin** will focus her practice on labor relations law and occupational safety and health. **Glen R. Fagan** will focus his practice on sexual harassment investigations and defense, and employment litigation in state and federal courts. The firm's office is located at Suite 2400, 230 Peachtree St., NW, Atlanta, GA 30303-1557; (404) 525-8622; Fax (404) 525-6955.

Tom Munger, former assistant general counsel at Delta Air Lines, and **Ben Stone**, former senior attorney at Delta Air Lines, announced the formation of **Munger & Stone, LLP**, specializing in employment law litigation and consulting. The firm is located at 2850 First Union Plaza, 999 Peachtree St., NE, Atlanta, GA 30309; (404) 815-1884; Fax (404) 815-4687; lawfirm@mungerandstone.com.

The Bench & Bar section recognizes happenings and accomplishments of Georgia Bar members. Submissions are subject to editing. Photos are encouraged.

Please submit announcements to:

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50 Hurt Plaza
Atlanta, GA 30303

Moskowitz & Carraway, P.C., announced that **Ervin H. Gerson** has become of counsel to the firm. Gerson will continue his focus on plaintiffs' serious injury, death and medical malpractice cases. The firm is located at 57 Executive Park South, Suite 390, Atlanta, GA 30329; (404) 321-4060; toll free (800) 859-4060; Fax (404) 982-9119.



Garcia

Stites & Harbison, PLLC, announced the addition of **Kelly J. H. Garcia** as an associate in the firm's Atlanta office. Garcia will be a member of the firm's business litigation service group. The firm's Atlanta office is located at 3350 Riverwood Parkway, Suite 1700, Atlanta, GA 30339; (770) 850-7000; Fax (770) 850-7070; www.stites.com.

Powell, Goldstein, Frazer & Murphy LLP hired **Mary Anne Walser** to serve as its firm-wide director of professional development. The Atlanta-based law firm, with offices in D.C. and in Geneva, Switzerland, is one of the first to have a professional development department dedicated solely to the recruiting, professional training, retention and professional satisfaction of associate attorneys, legislative analysts and paralegals. The firm is located at 16th Floor, 191 Peachtree St., Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999; www.pgfm.com.

The law firm of **Holt Ney Zatzcoff & Wasserman, LLP**, announced that **Andrew H. Prussack** has joined the firm as a partner. He will continue to practice in the areas of health care, business and corporate law. **Richard E. Dolder** and **Ellen W. Smith** have joined the firm as associates. Dolder's practice covers real estate law, and Smith's practice includes trial and appellate work and land use law. The firm is located at 100 Galleria Parkway, Suite 600, Atlanta, GA 30339; (404) 956-9600; Fax (770) 956-1490.

Cochran, Cherry, Givens, Smith & Sistrunk, P.C., announced that **Mickiel D. Pete** and **Anthony T. Pete** have become associated with the firm. The firm's office is located at 127 Peachtree St., NE, Atlanta, GA 30303; (404) 222-9922; Fax (404) 222-0170.

Love Willingham Peters Gilleland & Monyak LLP announced that **Lucas W. Andrews** and **Scott M. Patterson** are now

associates with the firm. The offices are located at Suite 2200, Bank of America Plaza, 600 Peachtree St., NE, Atlanta, GA 30308; (404) 607-0100; Fax (404) 607-0465.

In Dalton

The law firm of **Minor, Bell & Neal** announced that **James L. Catanzaro Jr.**, **Bradley S. Harris** and **Charles J. Moulton** have recently joined the firm's Dalton office. **Thomas D. Weldon Jr.** has joined the firm's LaFayette office. The Dalton office is located at 403 Holiday Drive, Suite B, P.O. Box 2586, Dalton, GA 30722-2586; (706) 259-2586; Fax (706) 278-3569. The LaFayette office is located at 106 E. Withers St., P.O. Box 1527, LaFayette, GA 30728-1527; (706) 638-5225; Fax (706) 638-8070.

In Macon

Russell M. Boston, P.C., **Brian J. Passante** and **David M. Cusson**, formerly partners with Sell & Melton, L.L.P., and **Lauren Logan Benedict**, formerly associated with Sell & Melon, L.L.P., announced the formation of **Boston Passante, LLP**. **Leonard D. Myers Jr.** and **Wendy Lee Sullivan** have also become associated with the firm. The office is located at 577 Mulberry St., Suite 830, P.O. Box 1777, Macon, GA 31202-1777; (478) 746-4422; Fax (478)-746-5599.


Jones Cork & Miller LLP announced that **William H. Noland** has become associated with the firm. Noland was a former clerk to the Honorable Whitfield R. Forester of the Cordele Judicial Circuit. The firm's offices are on the fifth floor of the SunTrust Bank Building, 435 Second St., Macon, GA 31201; (478) 745-2821; Fax (478) 743-9609.

In Savannah

Brennan, Harris & Rominger LLP recently added **Sandra V. Foster**, **Mark A. Bandy**, **Ingrid Nuss** and **Lisa K. L. Muller** as associate attorneys. The firm is located at 2 East Bryan St., Suite 1300, P.O. Box 2784, Savannah, GA 31402; (912) 233-3399; Fax (912) 236-4558.

The **Law Offices of Hugh M. Worsham Jr.** announced that **D. Campbell Bowman Jr.**, formerly of Gardner & Bowman, L.L.C., joined the firm in October. The firm is located at 400 Mall Boulevard, Suite D-1, Savannah, GA 31406; (912) 691-3726; Fax (912) 691-2097.

Savage, Turner, Pinson & Karsman announced that **Ashleigh R. Madison** has become associated with the firm, practicing in

the area of civil litigation. The firm is located at 304 East Bay St., Savannah, GA 31401; (912) 231-1140. 

Judge David Kahn Honored for 34 Years of Service

In a ceremony held this past November, Judge A. David Kahn was commended, on behalf of the Eleventh Circuit Judicial Counsel and the federal judiciary, for his dedicated service as a U.S. bankruptcy judge in the Northern District of Georgia. Judge Kahn was selected in 1967, at the age of 31, as the youngest bankruptcy judge and one of the youngest federal judicial officers ever appointed.

Under Judge Kahn's leadership, the Court handled an explosion of bankruptcy cases over the last 25 years — from 5,133 cases filed in 1976 to a high of over 32,000 cases filed in 1991. In addition, he was instrumental in getting legislation passed that added four additional judgeships, two in 1986 and two more in 1993.

In 1995, Judge Kahn stepped down as chief, after 19 years of service and leadership. During his tenure as chief judge, the Bankruptcy Court for the Northern District of Georgia handled over 275,000 cases, in which it is estimated that trustees and debtors-in-possession paid well over \$1 billion to creditors.

Several of Judge Kahn's colleagues and friends were on hand during the ceremony to pay tribute to his long-standing career. Robert E. Hicks, a family friend and colleague, noted that he came to "praise the judge, not only for his diligence, his years of steady service, his first class mind, attentive ear, and remarkable sense of humor and unfailing courtesy, but especially for his bedrock integrity and courage."



Judge A. David Kahn (left) is pictured with Judge Homer W. Drake as he is presented with the Atlanta Bar's Pollard Award for distinguished service to the Bankruptcy Bar.

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To Represent or Not to Represent?

Framer, Plumber, Electrician, Carpet Installer and Tile Supplier have all provided services to George General, the general contractor on a large commercial project. George is one month late in paying his subcontractors, and they want some advice regarding their legal rights. To save attorney's fees, they make an agreement to hire one lawyer and they all come to see you. Can you represent them?

It depends. Bar Rule 1.7 allows a lawyer to represent multiple clients as long as the representation of one client does not "materially and adversely" affect the lawyer's representation of any other client.¹ The comments to the rule make it clear that the real concern is loyalty — will your obligations to Framer impair your ability to represent Plumber, Electrician *et al.*?

Whether a potential conflict is "material and adverse" depends upon the circumstances. In this case, assume that George doesn't have enough money to satisfy all his debts. Some of your clients may not be able to recover 100 percent of what they are owed. If the clients understand the potential for conflict but can agree on a resolution — for instance, by deciding in advance what percentage of any recovery each client will take — the multiple representation likely complies with the rules.²



In real life, it's never that easy! What if Carpet Installer is on the verge of bankruptcy, but doesn't want the other plaintiffs to know? She is desperate to settle the claim against George General quickly so that she can use the

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settlement money to meet her payroll. She does not have any interest in seeing this matter proceed to a lawsuit or hearing.

Carpet Installer's problem may pose an actual conflict that makes it impossible for you to represent the other plaintiffs. Pursuant to Comment 4 of Rule 1.7, the lawyer must decide whether this conflict will "materially interfere with the lawyer's independent judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." If the other clients are willing to accommodate Carpet Installer's interest in proceeding quickly and without litigation, her dilemma may not be an insurmountable conflict.³


One of the caveats for representing the multiple clients in this hypothetical is that each must agree to share confidences and secrets with the others. If Carpet Installer forbids you from sharing information about her financial bind with the other plaintiffs, you will not be able to make the disclosure required to obtain informed consent from Framer, Plumber, Electrician and Tile Supplier.

Note that the lawyer undertaking multiple representation must first consult with the clients, give them the opportunity to get a second opinion and provide written information to the clients about the material risks of the representation. Georgia lawyers have always been required to disclose the material risks of the multiple representation to each client, but the new rules require the disclosure to be provided to the client in writing.

Finally, be aware that the lawyer with multiple clients must constantly check for developing conflicts. If an actual conflict arises during the

time you are involved in the case, you must withdraw from the multiple representation. Since Rule 1.9 (Former Client Conflicts) prohibits a lawyer from representing a client whose interests are materially adverse to the interests of a former client, you likely can't continue to represent any of the plaintiffs when an actual conflict arises.

There are no hard and fast rules for determining whether you have a conflict in any given case — each situation must be evaluated on its own facts. Despite the hurdles, multiple representation can be quite beneficial to both lawyers and clients.

Feel free to call the Bar's Ethics Hotline at (404) 527-8720 or 800-334-6865, ext. 720, to discuss with a lawyer in the General Counsel's Office how the conflicts rules might apply to your next multiple representation case. 

Endnotes

1. Rule 1.7 of the Georgia Rules of Professional Conduct is not based on the ABA Model Rules. The Georgia rule is based in large part on Section 121 of the ABA Restatement of the Law of Lawyering.
2. Even if you have not given advance consideration to this issue, Rule 1.8(g) requires a lawyer to obtain consent of all clients before making an aggregate settlement of their claims. The lawyer must consult with each client and disclose the nature of all claims involved as well as the participation of each person in the settlement.
3. Comment 7 to Rule 1.7 provides other examples of conflicts which cannot be waived: "An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question."

Legal Technology Shows Off!

By Natalie R. Thornwell

Whether it's tips, tricks or the latest inventions, you will find it all and more at legal technology tradeshow. I have had the pleasure of being asked to present at the country's leading shows — LegalTech Southeast and the upcoming American Bar Association Techshow. These venues, along with other state and local bar tech shows, bring legal technology to the laps of attorneys in a fun and educational format. I hope that after you have read this you too are able to take advantage of these highly educational shows.

Now, exactly what happens at these shows? Well, you begin with legal technology vendors exhibiting their wares. This allows attorneys to shop in one place from the industry's leading solution providers. The products and services are those that have stood the test of time and wear and tear in law firms around the world.

I am always very impressed with the vendors' desire to know what law firms want and their ability to respond with high-quality goods and services. In fact, I have learned about some of the most revolutionary products at tradeshow, like the time a Palm Pilot (the first one sold to be exact) was given to all of a particular show's attendees. The devices were pre-loaded with the conference's schedule and materials. Talk about exciting! Some of my best Giraffe scoring was done back then. (You



Palm users will know what I'm talking about.) In fact, I still carry around that same device for demonstration purposes and to keep up with my schedule away from the office. And, I learned all of this at a legal technology trade show!

At the shows you will also have the pleasure of sitting in on educational sessions that focus on every aspect of legal technology. If you want to know the kind of stuff you can learn, just take a look at the materials I presented at the LegalTech Southeast show this past November for a session entitled "60 Tips and Sites in 60 Minutes."

<http://intrack.com/intranet/index.shtml> – If you are thinking of starting an intranet for your firm, don't do it without referring to this site. It is a complete intranet resource.

www.geek.com – Geek.com provides interesting updates/reviews on some of the latest leading-edge technologies. Check out what's happening with hand-helds.

www.courts.net – Directory of courts nationwide.

<http://www.expertpages.com/> – Directory of expert witness and consultants.

Use a PDA and expandable keyboard instead of a laptop computer. It's a lot lighter and less time consuming at airport security checkpoints. Make sure your device has the juice it needs.

www.legalethics.com – All the rules for all of the states.

<http://www.xe.net/tec/> – Travel expense calculator.

www.lawmarketing.com – How to get serious legal business.

<http://www.slipups.com/> – Funny site that collects accounts of slips and falls.

<http://minder.netmind.com/> – Mind-It, the tracking service for Web site changes.

www.boogle.com – Google with a saying!

www.chumbo.com – No, not "gumbo." This is an online software retailer with release calendars for upcoming software.

www.howstuffworks.com – Batteries, pop-up turkey timers, bits and bytes! Everything you wanted to know and more about how stuff works.

www.refdesk.com – What'cha wanna know? Ultimate Internet reference site.

Visit bar association sites. Don't forget the power of state, local and specialty bar association sites. Links to sources for legal research, CLE information and rules make these sites very good. Because bars work hard to serve their members, you will find lots of useful material on these sites.

<http://www.ussearch.com/> – Another what'cha wanna know site, but this time it's about people. You, your clients, your spouse – all for about \$60.

www.optiview.com – Want to know if your Web site is slow loading and maybe even undesirable to visitors because of bloated graphics? This site evaluates your site and gives you stats on how to make your Web site more user-friendly!

<http://hoaxbusters.ciac.org/> – This site, provided by the U.S. Department of Energy and CIAC (Computer Incident Advisory Capability), describes hoaxes and chain letters found on the Internet and teaches users how to recognize and deal with hoaxes. It even discusses some of the history of hoaxes on the Internet.

<http://www.totallyabsurd.com/> – This site lists some amazingly funny patents and inventions. It includes items that carry actual patents from the United States and other countries! Example: The Tricycle Lawnmower?!

www.formsguru.com – Useful forms of all kinds, including a form letter for "incomplete washing instructions?!"

www.transformingpractices.com – Steven Keeva's site on how to find joy and satisfaction with a legal career.

www.ipl.org – When you want to do research, go to the library – The Internet Public Library. Interesting pathfinders section provided by the site's staff.

www.pastors.com – Not just for religious needs in these trying times. Check out the sermons section that might be helpful in the courtroom.

Always obtain a site analysis from legal technology vendors. This assessment of your current technological state may uncover things about your systems you didn't know. Make sure you maximize your existing technology and collaborate when and where you can. Don't buy something you already have!

LEARN THE FEATURES OF THE EQUIPMENT YOU USE! This is my most revered tip of all. If you know how to work with the tools you have, you are well on your way to a more efficient practice and balanced life.

Maybe you weren't aware of the Tricycle Lawnmower or a good place to find an expert witness, but you can learn this and more at legal technology shows.

Finally, you can meet friends for

life. Networking with people from all over the world is an added benefit to attending legal technology shows. And this benefit can be reaped in many different ways. For instance, I have heard stories of firms landing extremely lucrative accounts and developing their practices internationally as a result of speaking to and networking with fellow legal technology trade show attendees.

So when and where can you catch the next shows? Try these:

ABA Techshow -

www.techshow.com

March 14 - 16, 2002 - Sheraton Chicago Hotel & Towers, Chicago, Ill.

Held annually in Chicago, this year's show is being held March 14 -16. Georgia attorneys and their staff can receive \$100 off of the registration price of the show for each attendee because the State Bar of Georgia is a Program Partner for this event. Just make sure you mention this at the time of your registration.

Early registration is \$695 and late registration is \$795.

LegalTech -

www.legaltechshow.com

American Lawyer Media sponsors LegalTech and other shows around the country. Here are some of their upcoming events:

New York February 2002, Feb. 4-6, 2002, Hilton New York, New York, N.Y.

Litigation Summit and Exposition, April 11 -12, 2002, The Westin La Cantera Resort, San Antonio, Texas

Los Angeles May 2002, May 9-10, 2002, The Westin Bonaventure, Los Angeles, Calif.

San Francisco 2002, August 19-20, 2002, Hyatt Regency San Francisco, San Francisco, Calif.


New York September 2002, Sept. 19-20, 2002, Hilton New York, New York, N.Y.

LegalOpen, Oct. 24 - 26, 2002, Doral Resort and Spa, Miami, Fla.


Chicago 2002, Nov. 4-5, 2002, Sheraton Chicago Hotel & Towers, Chicago, Ill.

New Orleans 2002, Dec. 11-12, 2002, Hilton New Orleans Riverside, New Orleans, La.

If you need a more local show, please contact us directly at (404)

527-8770 or refer to upcoming events that can be found listed on the State Bar's Web site at www.gabar.org/lpm.htm. See you at the next legal technology show! 

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



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Free Report Shows Lawyers How to Get More Clients

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

"It's simple," says California attorney David M. Ward. "Successful lawyers know how to market their services."

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

developed six years ago.

"I went from dead broke and drowning in debt to earning \$300,000 a year, practically overnight," he says.

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

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

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

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

Local Bars Stay Active



The Satellite Office of the State Bar of Georgia recently hosted a seminar on malpractice prevention, which was presented by representatives from American National Lawyers Insurance Reciprocal. Bar members from several circuits attended the program.



Tifton Bar Association member Lynn Kelley recently visited his daughter, a missionary who resides in Botswana, Africa, and shared the experience with fellow bar members. Kelley has been instrumental in helping to build a radio station for the people of Botswana.



Lynn Kelley shared momentos of his trip to Africa with members of the Tifton Bar.

The South Georgia Office is Available to Assist Local Bars

If your bar association needs assistance with programs, contact the Satellite Office of the State Bar of Georgia at (800) 330-0446 and they will facilitate the program for you.



Justice Harris P. Hines (center) Atlanta, and his wife, Helen, were the guests of a recent Tifton Rotary Club meeting. Justice Hines shared with Rotary members the history of the Georgia Supreme Court and addressed important state related issues.



The Fayette County Bar Association recently held a luncheon/CLE opportunity for prospective new members.



The Valdosta Association of Criminal Defense Lawyers and the Valdosta Bar Association recently co-hosted the Fall CLE and Fellowship event. After the CLE, participants enjoyed a reception and visiting with old friends from the Southern Judicial Circuit.

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If it's not here, it's not legal!

The Macon Bar Association: A Tradition of Service

By Frank M. McKenney

From the founding of the city in 1823, Macon has always been rich in lawyers.

When the Macon Bar gathered together in the early 19th century, it did so at the call and under the leadership of the judge of Bibb Superior Court. Bar membership consisted simply of those lawyers participating in that court.

Records of bar activity from that era are rare. The first documented evidence of a Macon bar organization outside of the court structure dates from 1877, when prominent attorney John Rutherford signed as “president of the Macon Bar Association” a bar meeting notice published in the newspaper.

There were then 35 lawyers practicing in

Macon. Since that time, 86 men and women have served as bar president, some of them holding office for more than one term.

The current president of the Macon Bar Association is John P. Cole, who missed the first part of his term while serving as a peace-keeper in Bosnia with the Georgia National Guard. While in Bosnia, Cole became the founding president of the Balkan Bar Association, a “voluntary bar association” made up of American lawyers on duty with the army in Bosnia. One fifth of the membership of this group were Georgia lawyers.

Through the years, members of the Macon Bar Association have often provided leadership for the state’s legal profession. A Macon lawyer, Eugenius Nisbet, was one of three original judges appointed to the newly created Supreme Court of Georgia.

The Macon Bar once became the legal nursery of a future justice of the United States Supreme Court – Lucius Quintus Cincinnatus

Lamar (his friends called him Luch). Lamar read law in his cousin’s Macon office and when he was admitted to the Bar, started his practice there.

In 1883, L.N. Whittle, then a vice president of the American Bar Association, called a meeting in Macon of lawyers from across the state for the purpose of establishing

Macon Bar Association Immediate Past President Robert Norman Jr. (left) visits with Frank and Laura Hogue (center) and current President John P. Cole (right) during the annual holiday party.



the first state bar organization. The Georgia Bar Association grew out of this meeting and Whittle became its first president. Four of the first 10 presidents of the state association were from Macon. The most recent Macon president of the State Bar of Georgia was Rudolph Patterson, who held that position in 2000.

Headquarters for the Georgia Bar Association and for its successor, the State Bar of Georgia, were located in Macon from their inception until 1969, and all of the early editors of the original *Georgia Bar Journal* were Macon lawyers.

Washington Dessau, five time president of the Macon Bar, worked for years to establish a uniform bar exam for those candidates seeking admission to law practice in Georgia. When the State Board of Bar Examiners was finally created by the General Assembly, Dessau became the first chairman.

Of the approximately 600 licensed lawyers now in Bibb County, 450 belong to the Macon Bar Association. There are bimonthly luncheon meetings, with speakers on topics of interest to lawyers. The most recent speaker was Georgia Homeland Security Directory Robert Hightower.

The association promotes and rewards civic activity with its annual Lawyer of the Year and Liberty Bell awards, and with the Pro Bono Honor Roll. Each year, it also provides a panel of speakers for Law Day activities at schools and civic clubs, and conducts courthouse tours for students.

Members of the Macon Bar help finance and work with the local Teen Court, which is sponsored by the Bibb Juvenile Court. They have helped with high school moot court teams, and work with the Macon Office of Georgia Legal Services.

There is a long-standing close

relationship between the Macon Bar and Mercer University's Walter F. George School of Law, where many Macon lawyers received their legal education. Macon judges and lawyers have taught classes at the Mercer Law School since its for-

mation, and members of the school's faculty are active members of the association. Each year, the Macon Bar Association sponsors CLE programs in conjunction with the law school.


The association publishes a bimonthly newsletter, *The Docket*, which, in addition to reporting bar activities, reviews Bibb County State and Superior Court verdicts of note, and provides technical and information columns helpful to lawyers. There is also a Macon Bar Association Web site at www.redi.net/maconbar/.

Despite its growing size, the Macon Bar Association tries to preserve the same spirit of service and comradeship among its members as in the past. The association



(left to right): Macon Bar Association members Tom Herman, Amy Morton and Mary Donovan gather during the holiday party.

presents a robe to each new judge in the county and arranges Bibb Superior Court admission ceremonies for new lawyers. In addition, memorials are presented for deceased bar members. And, a new composite picture of the bar membership was recently released, continuing a practice dating back to 1898.

Of course, there are social gatherings throughout the year. The annual Fall Barbecue at Carl Westmoreland's farm and the Christmas party are always much anticipated and enjoyed. 

Frank M. McKenney currently practices law in Macon, Ga., and has been a member of the Macon Bar Association for over 50 years.

2001-2002 Macon Bar Association Officers

President:	John P. Cole
President-Elect:	Howard G. Sokol
Secretary:	Pamela White-Colbert
Treasurer:	Paula Kapiloff
Past President:	Robert C. Norman Jr.

The Lawyers Foundation Inc. of Georgia sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

Claude Smith Beck
Blairsville, Ga.
Admitted 1964
Died November 2001

Luhr G. Beckmann Jr.
Savannah, Ga.
Admitted 1949
Died August 2001

James Clayton Burke Jr.
Soperton, Ga.
Admitted 1942
Died January 2001

Jeffrey W. Cacioppo
Eastman, Ga.
Admitted 1998
Died November 2001

Robert Ewell Carlisle
Lawrenceville, Ga.
Admitted 1998
Died September 2001

Richard A. Chappell
Macon, Ga.
Admitted 1929
Died October 2001

Charles D. Clarke
Montgomery, Ala.
Admitted 1926
Died February 2001

Jefferson L. Davis Jr.
Cartersville, Ga.
Admitted 1970
Died October 2001

Guy F. Driver Jr.
Winston-Salem, N.C.
Admitted 1964
Died June 2001

Louis Geffen
Atlanta, Ga.
Admitted 1928
Died January 2001

Lawrence T. Girard
Decatur, Ga.
Admitted 1975
Died October 2001

Raymond Michael Grant
Winchester, Ky.
Admitted 1979
Died February 2001

Lori Ann Grindle
Gillsville, Ga.
Admitted 1990
Died October 2001

Richard W. Hanselman Jr.
Decatur, Ga.
Admitted 1978
Died November 2001

Jerrell Thomas Hendrix
Savannah, Ga.
Admitted 1964
Died March 2001

Tony H. Hight
Fairburn, Ga.
Admitted 1966
Died December 2001

Barrie L. Jones
Alma, Ga.
Admitted 1948
Died October 2001

David Aaron Kaufman
San Antonio, Texas
Admitted 1977
Died March 2001

Lovic M. S. Kierbow
Austell, Ga.
Admitted 1951
Died February 2001

Calhoun A. Long
Fayetteville, Ga.
Admitted 1949
Died August 2001

Thomas Lowe McKee Jr.
Brevard, N.C.
Admitted 1984
Died June 2001

Leonard Oliver McKibben Jr.
Cedartown, Ga.
Admitted 1963
Died June 2001

George J. L. Napier
Macon, Ga.
Admitted 1969
Died January 2001

C. Edward Nicholson
St. Simons Island, Ga.
Admitted 1973
Died November 2001

Daniel J. O'Connor Jr.
Atlanta, Ga.
Admitted 1962
Died December 2001

Wiley S. Obenshain III
Augusta, Ga.
Admitted 1970
Died November 2001

William Lance Smith III
Savannah, Ga.
Admitted 1963
Died January 2001

Anne K. Stevens
Kennesaw, Ga.
Admitted 1990
Died November 2001

Richard A. Stout
Atlanta, Ga.
Admitted 1947
Died October 2001

John S. Warchak
Macon, Ga.
Admitted 1950
Died July 2001



LAWYERS FOUNDATION OF GEORGIA

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

Memorial Gifts

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

Information

For information regarding the placement of a memorial, please contact the Lawyers Foundation of Georgia at (404) 526-8617 or 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303.

SERVICE JURIS: YOU CAN'T OBJECT TO THIS!

Legal Community Lends a Hand in Community Service

Founded in 1989, Hands On Atlanta is a non-profit organization that helps individuals, families and corporate and community groups find flexible volunteer opportunities at more than 400 community-based organizations and schools. Hands On Atlanta volunteers, now 25,000 strong, are at work every day of the year building community and meeting critical needs in schools, parks, senior homes, food banks, pet shelters, under-resourced neighborhoods and more. In addition to ongoing volunteer initiatives, HOA hosts several citywide service events each year, such as Hands On Atlanta Day, the Martin Luther King Jr. Service Summit and Green Day, to focus attention on volunteerism and galvanize community action.

For the third time, Atlanta's legal community will team up with Hands On Atlanta for a special day of service. In June 2002, volunteer teams from Atlanta law firms, law schools, courts and bar associations will help revitalize a neighborhood in need. The event was not only created in response to the desire of many practicing or associated with the law to participate in a hands-on volunteer experience, but also to highlight the many contributions already being made by Atlanta's legal community. Participants will receive a Service Juris T-shirt and enjoy networking and team building while giving back to their community.

Participants are encouraged to invite their law school friends, co-workers or legal association members to form a team. For more information, call 404-879-2738.

A Must-Read for Trial Lawyers

On Trial: Lessons from a Lifetime in the Courtroom

Henry G. Miller, Esq.,
ALM Publishing, September 2001
\$24.95, 192 pgs.

Reviewed By Frank C. Jones

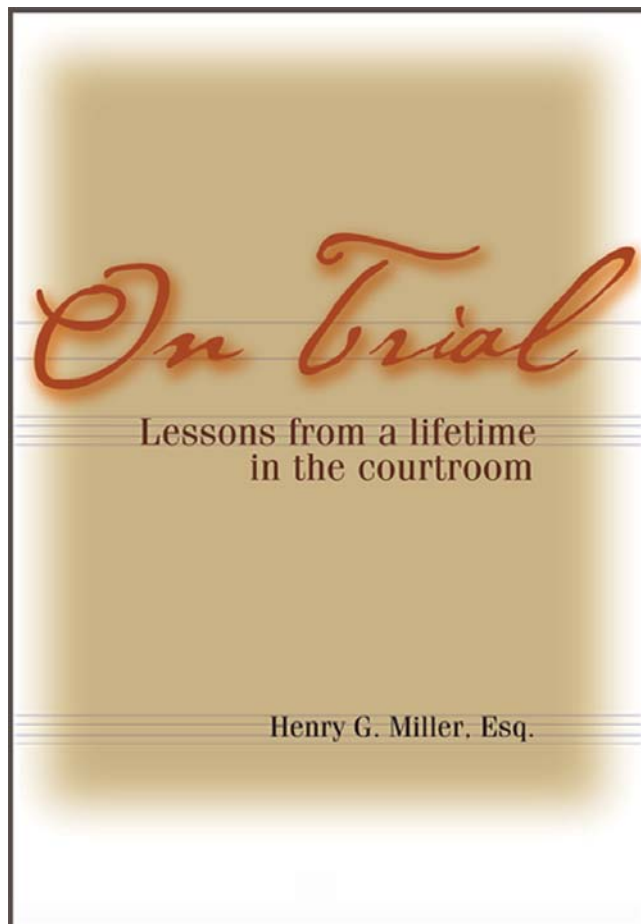
Have you wanted a book that tells you how to be a successful trial lawyer, steers clear of excessive generalities and pontifications, is witty and has a charming style, and is short and easy to read? Such a book is now available.

On Trial: Lessons from a Lifetime in the Courtroom was written by Henry G. Miller of the

New York law firm of Clark, Gagliardi & Miller, P.C. He has been actively trying cases for more than 40 years, usually representing plaintiffs, and is one of the preeminent trial lawyers in the nation. His book is equally valuable for the novice and the veteran trial lawyer.

There are 12 chapters with provocative titles:

- The Forty-Four Most Common Blunders of Jury Selection
- Opening — The Twenty-Seven Steps
- Direct Examination — Thirty-One Pertinent Pointers
- Fifteen Suggestions and Four Rules on How to Survive Cross-Examination
- Some Dos and Don'ts for Summation
- Settlement — Six Villains, Three Heroes, One Play, and Ten Commandments
- Living with Experts — Twenty Pungent Proverbs and Eighteen Little Gambits
- Nine Secrets for Living with Judges
- Living with Defeat
- Courage, or Trying a Case When the Judge and Jury Hate You
- The Ten Most Common Transgressions Against the Manners and Morals of Advocates



■ The Art of Survival — Sixteen Secrets

As the titles indicate, the author deals in specifics. There are a total of 214 specific suggestions as to what to do or not do, according to my count. Rather than being written in the oracular style typical of some works on trial tactics, his suggestions and advice are laced with humor (often self-deprecating) and humility.

To a large extent, this book is a compendium of articles that first appeared in the *New York Law Journal* where the author wrote a column on the subject of "Trials." He said that he wrote the articles "always striving for brevity" for the benefit both of the young lawyer embarking on a career in the courtroom, and also for those at the peak of their prowess. The book has been well received by noted trial lawyers

around the country, many describing it as a "must read" for every trial lawyer.


To add sparkle, Miller has included apt quotations from sources such as a French proverb ("Ask the young, they know everything."); Mark Twain ("The efficiency of our jury . . . system is only marred by the difficulty of finding 12 men every day who don't know anything and can't read."); Plato ("The beginning is half of the whole."); Lord Longdale ("All [questions on direct examination] must, to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness if he knew anything about nothing."); Emory Buckner ("More cross-examinations are suicidal than homicidal."); Nicholas Murray Butler ("An expert is one who knows more and more about less and less."); a Russian

proverb ("The thing to fear is not the law but the judge."); and Joseph Story ("If we but face our difficulties, they will fly before us."). But, the best lines are those of the author himself, such as, "Humility is still the trial lawyer's best friend," and "Laugh a lot, particularly at yourself." "Tell them it's your first case," he advises novice attorneys, while also warning that it's bad form to do this more than five times.

Miller has given generously of his time and talent to the profession, having served as president of the New York State Bar Association, as a regent of the American College of Trial Lawyers and as a director of the International Academy of Trial Lawyers and the New York State Trial Lawyers Association. He is also the author of *The Art of Advocacy: Settlements*, published by

Matthew Bender, which he continues to update.

This book is a gem. It is fun to read. It belongs in the personal library of every trial lawyer and should be referred to with regularity.

On Trial: Lessons from a Lifetime in the Courtroom is available from the publisher at www.law-catalog.com or 1-800-537-2128, ext. 9300, from select bookstores and from select online book retailers (Amazon, BN.com). 

Frank C. Jones is a partner with King & Spalding, Atlanta.



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DISBARMENTS AND VOLUNTARY SURRENDER OF LICENSE

Scott Fitz Randolph

Americus, Ga.

Scott Fitz Randolph (State Bar No. 594350) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 5, 2001. Randolph was hired by two clients to represent them in a joint bankruptcy. Randolph included material misrepresentations in his clients' bankruptcy petition and the installment application, and mishandled the filing fees check. In aggravation of punishment, the court took into consideration Randolph's lengthy disciplinary history and his repeated failure to timely comply with Bar rules regarding annual license fees and mandatory continuing legal education requirements.

Douglas Harry Pike

Atlanta, Ga.

Douglas Harry Pike (State Bar No. 002960) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 30, 2001. Pike failed to respond to the State Bar's formal complaint, although he was personally served. Pike accepted a deposit of \$2,100 to represent a client in a divorce action. Subsequent attempts by the client to reach Pike were unsuccessful. Eventually Pike, via voice mail, referred the client to another attorney with no explanation as to why he was unable to handle the case. Although Pike entered an appearance in the client's divorce case, he never did any work on the matter and never sought permission to withdraw from the case. Pike initially claimed to have earned the \$2,100 fee, but ultimately agreed to refund \$1,000 in five monthly installments. Pike only repaid \$400 and failed to respond to the client's demand for the rest of the money. In aggravation of punishment, the court took into consideration that this matter included multiple offenses and that Pike had a prior disciplinary history.

Michael W. Vogel

Atlanta, Ga.

Michael W. Vogel (State Bar No. 728734) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 30, 2001. In September 1999, Vogel accepted \$1,500 to represent a client in a divorce action. He filed the complaint on the client's behalf in October 1999, but thereafter failed to respond to any of her inquiries as to the status of the case. In January 2000, the client wrote a letter to terminate his services and directed him to return her papers and refund the retainer. Vogel failed to comply. The client hired another attorney and filed a grievance against Vogel. Vogel acknowledged service of the Notice of Investigation but never filed a response.

SUSPENSIONS

W. Barry Williams

Martinez, Ga.

W. Barry Williams (State Bar No. 764400) has been suspended indefinitely from the practice of law in Georgia by Supreme Court order dated Nov. 5, 2001. Williams filed a Petition for Voluntary Discipline in two cases. In the first case, he accepted a fee of \$2,500 in a declaratory judgment case, did not keep his client informed about the status of the case, failed to respond to a summary judgment motion or attend a hearing on the motion, and did not notify his client that summary judgment had been entered against him. In the second case, Williams accepted \$1,500 to represent a client in an estate dispute, failed to properly communicate with the client after he filed a complaint and did not notify the client when the case was dismissed. Although these offenses are punishable by disbarment, the court took into consideration the fact that Williams is currently undergoing treatment for depression and alcoholism. In order to resume the practice of law Williams must: (1) obtain a favorable determination from the Lawyer Assistance Program; (2) pay full restitution to each client and the fee arbitration award in the fee dispute; and (3) attend ethics school. Six months after reinstatement,


Williams must contact the Law Practice Management Program for an evaluation of his practice, pay for a full assessment and comply with the program's recommendations.

Kenneth L. Drucker
Duluth, Ga.

By Supreme Court order dated Nov. 30, 2001, Kenneth L. Drucker (State Bar No. 231050) has been suspended from the practice of law in Georgia for a period of six months. Drucker filed a Petition for Voluntary Discipline acknowledging his misconduct. Drucker was

retained by a client to collect on some past due accounts. Although he collected \$2,200 in payments over the next two years, he did not inform the client. Drucker failed to respond to the client's inquiries as to the status of the collections and subsequently failed to respond to a letter from the client informing him that the client was aware that he had collected fiduciary funds on its behalf. In mitigation, the court noted Drucker's cooperation, remorse and lack of prior disciplinary history.

INTERIM SUSPENSIONS

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Oct. 17, 2001, four lawyers have been suspended for violating this Rule. 

LAWYER ASSISTANCE PROGRAM

Alcohol/Drug Abuse and Mental Health Hotline

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

AREA	CONTACT	PHONE
Albany	H. Stewart Brown	(912) 432-1131
Athens	Ross McConnell	(706) 359-7760
Atlanta	Melissa McMorries	(404) 522-4700
Atlanta	Brad Marsh	(404) 888-6151
Atlanta/Decatur	Ed Furr	(404) 231-5991
Atlanta/Jonesboro	Charles Driebe	(404) 355-5488
Cornelia	Steven C. Adams	(706) 778-8600
Fayetteville	Glen Howell	(770) 460-5250
Florida	Patrick Reily	(850) 267-1192
Hilton Head	Henry Troutman	(843) 785-5464
Hazelhurst	Luman Earle	(912) 375-5620
Macon	Bob Daniel	(912) 741-0072
Macon	Bob Berlin	(912) 745-7931
Norcross	Phil McCurdy	(770) 662-0760
Savannah	Tom Edenfield	(912) 234-1568
Valdosta	John Bennett	(912) 242-0314
Waycross	Judge Ben Smith	(912) 285-8040
Waynesboro	Jerry Daniel	(706) 554-5522



CLE/Ethics/Professionalism/Trial Practice

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

February 2002

1
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8.8/0.0/0.5/0.0

2
LORMAN BUSINESS CENTER INC.
Using Approved Real Estate Forms in Georgia
Atlanta, Ga.
6.0/0.0/0.0/0.0

3
PRACTISING LAW INSTITUTE
Carryover for Workshop Series – Using Financial Information
Washington, D.C.
2.0/0.0/0.0/0.0

7
NATIONAL BUSINESS INSTITUTE
Eviction and Landlord/Tenant Law in Georgia
Atlanta, Ga.
6.0/0.0/0.5/0.0

7
LORMAN BUSINESS CENTER INC.
UCC Revised Article 9 in Georgia
Atlanta, Ga.
6.7/0.0/0.0/0.0

8
ICLE
11th Annual Caribbean Seminar
Puerto Vallarta, OS
12.0/3.0/1.0/1.0

12
PRACTISING LAW INSTITUTE
Handling Intellectual Property Issues in Business Transactions
Tyson Corner, Va.
12.0/0.0/0.0/0.0

13
NATIONAL BUSINESS INSTITUTE
Internet Basics for the Georgia Attorney
Atlanta, Ga.
3.0/0.0/0.0/0.0

13
LORMAN BUSINESS CENTER INC.
Florida Tax-Exempt Organization
Jacksonville, Fla.
6.7/0.0/0.0/0.0

14
CHATTANOOGA BAR ASSOCIATION
Employee Benefits Changes 2001
Chattanooga, Tenn.
4.0/0.0/0.0/0.0

16
LORMAN BUSINESS CENTER INC.
Elder Law in Florida
Jacksonville, Fla.
6.0/0.0/1.0/0.0

20
CHATTANOOGA BAR ASSOCIATION
Annual Winter Estate Planning Update
Chattanooga, Tenn.
3.3/0.0/0.0/0.0

March 2002

14
NATIONAL BUSINESS INSTITUTE
Limited Liability Companies in Georgia
Atlanta, Ga.
6.7/0.0/0.5/0.0

April 2002

18
CHATTANOOGA BAR ASSOCIATION
Annual Spring Employment Benefit Update
 Chattanooga, Tenn.
 4.0/0.0/0.0/0.0

26
AMERICAN HEALTH LAWYERS ASSN.
ADR Mediation Training Program – Mediation Essential
 Washington, D.C.
 13.8/0.0/1.0/0.0

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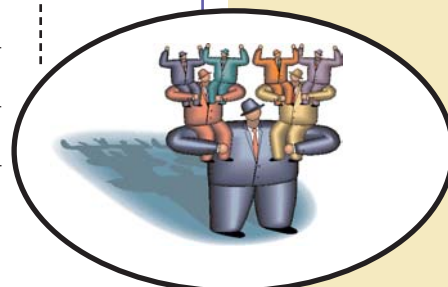
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National Medical-Legal Consulting. Health and Disability Insurance Psychiatric Claim Denial—Review, Research, and Reports. Supporting payment or litigation. Physician with extensive knowledge of National Medical Necessity Criteria and Quality Standards and managed care consulting experience. Board Certified: Psychiatry, Quality Assurance. W. D. Taylor, M.D., (803) 790-5099; nmlc@bellsouth.net.

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Training

Thinking of Mediation Training? Bob Berlin, J.D., president of Decision Management Associates, Inc. (DMA), is offering Civil and Domestic Mediation training courses throughout 2002 in Atlanta and Macon. Civil Mediation is scheduled for early January and Domestic Mediation in mid-February. Both mediation courses are approved for registration by the Georgia Office of Dispute Resolution and provide an excess of required CLEs, including Trial, Professionalism and Ethics. In addition to Mediation Training, DMA offers classes in Arbitration, Facilitation and a seminar: Law for Non-Lawyer Mediators. Call 770-458-7808 or 800-274-8150 for the dates and details. The email address is dma-adr@mindspring.com.

Corrections

The Web site is corrected in the following ad:
Vacation in France and Italy. Tuscany—18th C. house with views of San Gimignano on wine, olive estate, 6 bedrooms, 3 baths, weekly \$2,200—\$3,000. Representing owners of authentic, historic properties. For photos and details of this and other properties, visit www.lawofficeofkenlawson.com. Email: kelaw@lawofficeofkenlawson.com, (206) 632-1085, fax (206) 632-1086.

In the October 2001 *Georgia Bar Journal* under the heading "Trial Counsel Wanted, Atlanta Metro Area" and "Trial Counsel Wanted, South Georgia," the zip code should read 30347.

STATE BAR OF GEORGIA DELEGATION TO CHINA



Trip Postponed Until September 2002

Invitation to all Georgia Lawyers and Judges People to People Ambassador Program

Become a part of the State Bar of Georgia delegation to China, coordinated by the People to People Ambassador Program. The trip is now scheduled for Sept. 5-18, 2002.

The program is designed to promote international good will through professional, educational, and technical exchange. It provides an opportunity to meet and discuss common issues with legal professionals in China, and offers rare and unique social and cultural opportunities, including a trip to the Great Wall and Tienanmen Square. The delegation will be led by State Bar Immediate Past President George E. Mundy.

The program offers an entire year of CLE credit, including professionalism and ethics. In addition, expenses for the trip may qualify for an income tax deduction. The cost is estimated at \$4,500, including first class transportation, accommodations and meals.


The State Bar of Georgia legal delegation is open to all members in good standing. It is anticipated the delegation will consist of 25 to 40 members.

For further information, contact Gayle Baker, Membership Director, State Bar of Georgia, (404)527-8785 or gayle@gabar.org

Notice of and Proposed Opportunity for Comment on Proposed Amendments to Rules of the U.S. Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit.


A copy of the proposed amendments may be obtained on and after Feb. 4, 2002, from the Eleventh Circuit's Internet Web site at www.ca11.uscourts.gov. A copy may also be

obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, GA 30303; (404) 335-6100. Comments on the proposed amendments may be submitted in writing to the Clerk at the above street address by March 4, 2002. 

Notice of Public Meeting

Pursuant to Bar Rule 14-9.1, the Standing Committee on the Unlicensed Practice of Law has received a request for an advisory opinion as to whether certain activity constitutes the unlicensed practice of law. The request concerns nonlawyer debt collectors who file suit and appear *pro se* in contested cases. The particular situation presented is as follows:

Debtor incurs a debt with Dr. A, a sole proprietor. Dr. A transfers the account to Collector C by written "assignment." However, the purported assignment states that the transfer is "for the purpose of collection only." Collector C pays nothing for the account, but has an arrangement with Dr. A to receive a set fee or contingency fee upon collection. Collector C is not an attorney, but files suit on the account against Debtor as "Dr. A by his transferee/assignee Collector C vs. Debtor." In the event the case is contested, Collector C also attempts to present the case in court. Is collector C engaged in the unauthorized practice of law?

In accordance with Bar Rule 14-9.1(f), notice is hereby given that a public meeting concerning this matter will be held at 10:00 a.m. on March 15, 2002, at the Macon Holiday Inn and Conference Center, 3590 Riverside Drive, Macon, GA. Prior to the meeting, individuals are invited to submit any written comments regarding this issue to: UPL Advisory Opinions, State Bar of Georgia, Suite 800, 50 Hurt Plaza, Atlanta, GA 30303. 

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