

Georgia
Bar

Journal

June 2002 ■ Volume 7 ■ Number 6



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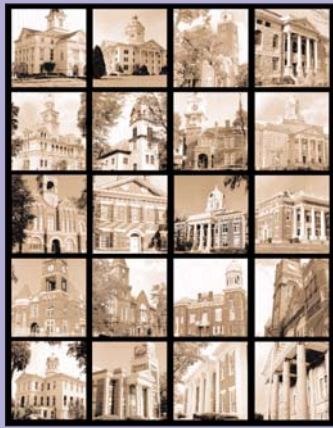
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On the Cover

The Courthouse and the Depot is reviewed on page 74 of this *Bar Journal* by Justice Harold Clarke. Courthouse photographs from the book appear on the cover.

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

A Defense of the 12-Person Jury

In March 1999, the Supreme Court of Georgia, by order of former Chief Justice Benham, appointed a commission of distinguished citizens to prepare a report with recommendations for the improvement of the judiciary in the state of Georgia. A report entitled "Georgia Courts in the 21st Century: The Report of the Supreme Court of Georgia Blue Ribbon Commission on the Judiciary" was prepared and published in the fall 2001 issue of the Mercer Law Review. The report, in my opinion, made many excellent recommendations and I commend the commission for the report. There is, however, one recommendation that I find troubling, and the purpose of this letter is to give my reason for opposing it.

The recommendation is that "all civil juries be composed of six persons rather than 12." Before I give my reasons for being opposed to six-person juries, I must say in all candor that since I am a federal judge, I am somewhat uneasy giving my opinion on a report that deals exclusively with the courts of the state of Georgia. I believe in federalism, and it might seem to some fair-minded people that what the courts of Georgia propose regarding jury trials is no business of a federal judge. That is a perfectly reasonable position, but I am also a resident of the state of Georgia and for 20 years before I became a judge I tried cases almost exclusively in the state courts of Georgia. I feel that I have a legitimate interest in the matter.

I must also point out that the basis for the constitutionality of less than 12 jurors originated with a local rule of court in the federal court. A local rule in the District of Montana authorized six-person juries and when challenged on constitutional grounds finally reached the United States Supreme Court in 1973. The name of the case was *Colegrove v. Battin*, 93 S.Ct. 2448 (1973), and the respondent was the federal judge who authorized the rule (Justice Marshall's dissent is a classic!). Having stated my justification for entering the fray, I will now give my reasons.

In my opinion, 12-person juries are much more preferable to juries of six. Although I have done no formal study of the matter, I have been a trial court judge for more than 16 years and have formed a strong opinion that during a trial the search for truth would suf-

fer if the jury were smaller. My hope for each trial of which I am a part is that the verdict will be reasonable under the facts and the law and that common sense will be present in the jury room. The report in Section VI points out that, since the Supreme Court of the United States says that a six-person jury "does not prevent the jury from fulfilling its purpose" and that "there is nothing in the Constitution that requires a jury of 12," we should go to six-person juries because they are legal and probably save time and money. If there ever was a time when the law and the courts needed good public relations, it is now. The law, and in particular the jury system, has been under attack by various constituencies for the past 25 or 30 years, but I don't recall the need of smaller juries as being the basis of criticism by any representative sampling of the public. Whatever problems we have, smaller juries would not solve them. Shouldn't we aspire to a more lofty goal than "a jury of six does not prevent the jury from fulfilling its function?" This is a backdoor endorsement if there ever was one.

There are many reasons why 12 people make a better jury than six, but some of the most important are as follows. A 12-person jury is, to use a word now in vogue, more diverse. A 12-person jury in the Middle District of Georgia typically has jurors who are black and white, male and female, young and old, blue collar and white collar, and with different educational backgrounds. We have jurors that cover the waterfront — from plant managers to janitors, and from college professors to college students. I believe that when the 12 of them put their heads together, they usually come up with a verdict that is reasonable under the law.

Over the years I would estimate that I have disagreed with jury verdicts less than 10 percent of the time. I doubt if that would be the case with juries of six (or even eight). The 12-person jury also teaches twice as many people about our system of justice as does a six-person jury, and I believe, based on interviews I have had with jurors, that a great majority of them find the experience to be worthwhile and even inspiring. They seem to understand the way our laws work much better after having served on a jury. I also feel that with 12

people rather than six it is much more difficult for a domineering juror to dictate to the others or for a lawyer to get a "ringer" on the jury and depend on him to sway the others. In my opinion, the deliberative process of the jury is helped when there are 12 and harmed when there are fewer than 12.

I am constantly amazed at how a random collection of citizens from all walks of life can put aside their own opinions (and they do!) and rise to the duty demanded of them when called for jury duty. It almost seems that some "force" (for lack of a better word) is created in the jury room that is greater than the sum of all their experiences allowing the jury to come up with a verdict that would not have been possible without this additional power. I can't explain it. I can't even understand it, but I believe that it exists. I have never been involved in a trial with six jurors, but I doubt that so small a group can generate this force that 12 people can. This opin-

ion is supported by a paper prepared by the Administrative Office of the U.S. Courts in 1994, which I quote as follows:

In recent years, several studies have suggested arguments for returning to 12-member juries. These studies point out significant differences between six and 12-member juries. For instance, smaller juries are less likely to provide minority group representation and to share majority-held attitudes of the community. Also, with smaller juries it may be easier to exclude a prospective juror on grounds of race or sex . . .

There is literature that examines the sociology and psychology of group decisions between six and 12-member juries and concluded that the smaller juries are (1) less likely to promote effective group deliberations, (2) less likely to overcome the biases of its

members, and (3) less likely as a group to recall the evidence. There are research findings that indicate wide variability in awards between the two groups and a greater risk of a smaller jury reaching the wrong verdict. The studies have also noted a greater risk for smaller jury deliberations to be dominated by a single aggressive juror.

As I said earlier, all of my experience as a judge has been in the federal court system, but our goal is the same: to empanel a jury that will bring in a verdict that speaks the truth. I submit that the time-tested "12 good men (and women) and true" that has served us for hundreds of years can achieve this goal better than a jury of six. ☪

Yours very truly,

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By James B. Franklin

Indigent Defense: Coming Together as Georgia Lawyers

As my year as State Bar of Georgia president began, I encouraged all members of the profession, regardless of their gender or ethnic background, geographic location or whether they were practitioners, judges, prosecutors or public defenders to approach the issues facing the profession, not just from their individual perspectives as a member of some sub-group of lawyers, but rather to search for solutions on the important issues as Georgia lawyers. Regardless of the personal situations that might at times cause disagreement on specific issues, it was my goal to seek an atmosphere in which we could come together for the common cause and common good of lawyers and the public.

Hopefully, during this year, the concept of a mandatory bar being united in support of the overall best interests of the profession has been strengthened.

Hopefully, during this year, the concept of a mandatory bar being united in support of the overall best interests of the profession has been strengthened.

Two events are striking. First, of course, is the way in which Georgians, indeed all Americans, have responded to the events of Sept. 11. Certainly, as a people, we could not have been more united in our horror or in our resolve to confront the new enemy of terrorism. Georgia lawyers, not surprisingly, have done their part in a way that makes us proud.

Second, the issue of indigent defense and guaranteeing the rights

set forth in the Sixth Amendment to the U.S. Constitution and recognized by the U.S. Supreme Court has been addressed by the State Bar of Georgia. Effectively providing representation to indigents charged with crimes in Georgia, and most other states, has been a difficult and tortured journey. Recognition of this fact should not be considered as a criticism of any segment of the profession or individuals. The truth of the matter is that indigent defense has a very narrow constituency and probably does not enjoy much political support among the nonlawyer electorate. Yet, in this past year, Georgia

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

The process by which we arrived at the consensus is proof that our system of governance within the Bar works. After a year of meetings, dialogue and debate, hopefully all of the various individuals and elements of the Bar involved in the process were left with a feeling that their concerns were heard and there was ample opportunity to participate in the process. This is not to say that every Georgia lawyer is satisfied with every part of the final recommendation. There are some members who are not pleased with all six principles. For example, the recommendation for a commission at the state level to make decisions regarding the adequacy of systems within the respective circuits causes much concern — a concern that I personally share. No doubt we have many circuits, which have worked hard and have successfully created effective indigent defense systems and these systems should not be arbitrarily dismantled.

For those who have not followed the issue over the past year, I offer the following brief recap.

■ The Bar's Indigent Defense Committee, capably chaired by Wilson DuBose, presented 12 recommendations to the Bar's Executive Committee in May 2001. The Executive Committee referred the proposal to the Advisory Committee on Legislation, which embraced the 12 principles without some

accompanying commentary that was initially included by the Indigent Defense Committee.

■ The Executive Committee then sought input from all entities with an interest in indigent defense. These groups included: the Council of Superior Court Judges; the Georgia Indigent Defense Council; the Prosecuting Attorney's Council; the Georgia Association of Criminal Defense Attorneys; Public Defenders; the Court of Appeals; and the Supreme Court. At the Midyear Meeting in January 2002, breakout sessions were held by the Board of Governors with representatives from the above groups in attendance. Following that meeting, the Executive Committee reached consensus on the principles outlined in the proposal approved by the Board of Governors at its Spring Meeting in April. It is important to note that the Council of Superior Court Judges, the Indigent Defense Committee, the Association of Criminal Defense Attorneys and the Prosecuting Attorney's Council were all afforded the opportunity to make presentations to the Board prior to the floor debate and vote.

The end product is a tribute to the ability and willingness of lawyers to work together toward a common cause. It sends a strong statement to the Supreme Court's Commission on Indigent Defense that the lawyers of Georgia have clearly spoken out in support of a system of indigent defense supported financially by state funds, to be operated subject to uniform statewide standards. The debate and any disagreements during the process were not over the ultimate goal of an effective and efficient

indigent defense system, but over the path to be taken in reaching that goal, including the most effective delivery system and the source of funding. The debate over these issues should and will continue, both within the Blue Ribbon Commission and in the General Assembly, which will ultimately have the say as to how the system may be revamped.

As I move toward the end of my year as president, I am appreciative of my fellow lawyers for the support they have given me throughout the year. This experience has strengthened my faith in the ability of members of the Bar to work together, compromise and finally come together and act for the benefit of the profession and society as a whole. ☐

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By Cliff Brashier

Unauthorized Practice of Law Pilot Program Bringing Results

The unauthorized practice of law (UPL) presents a growing risk to the public with special potential for harm to our citizens who are using the judicial system for the first time. In the past, the State Bar of Georgia's authority to protect the public has been limited to encouraging local solicitors to enforce Georgia's misdemeanor statute prohibiting UPL.

Last year, a pilot program was initiated within the Bar to assist in the identification and enforcement of UPL and I am pleased to report that the program is well underway and is reporting positive results in curtailing UPL.

The Supreme Court issued the UPL Rules in February of 2001. The pilot program then began in three judicial districts: the First District, which covers the southeast part of the state; the Second District, which covers the southwest part of the state; and the Fourth District, which covers DeKalb and Rockdale counties. The program is now operational at the local level in these districts, and the UPL Standing Committee is in place statewide. In terms of geography, about one-third of Georgia is now covered by the program.

We've all heard the stories of people practicing law without the benefit of law school and, as we might expect, the majority of complaints have to do with the following:

- Disbarred lawyers who won't stop practicing law;
- Individuals falsely claiming that they are lawyers;
- Individuals wrongly assuming the identity of actual Georgia lawyers;
- Individuals preparing divorce petitions and other documents for third parties (sometimes the recipient of the papers is charged a fee and sometimes not, such as when the preparer is simply trying to help out a friend);
- Nonlawyers closing real estate transactions in exchange for a fee;
- Nonlawyers negotiating the settlement of insurance claims on

The program is now operational at the local level in these districts, and the UPL Standing Committee is in place statewide.

behalf of third parties in exchange for a contingent fee, often under the guise of being a "mediator," or by virtue of having a power of attorney that purportedly allows the nonlawyer to represent the claimant relative to a specific matter; and

- Out-of-state entities that offer legal services over the Internet.

Aimed at bringing these activities to an end, the program had its kick-off meeting in Macon on Sept. 6, 2001, with an orientation for committee members. Since then, complaints have been handled by each of the district committees. In total, 56 complaints have been received. Of those, 16 have been closed, five have been referred to the Standing Committee, and 35 are being investigated and/or are awaiting a Committee vote.

An area that has drawn considerable attention is that of notaries public acting as lawyers and preying on Georgia's increasing Latino population. In many Latin American countries, notaries are prestigious lawyers and many unsuspecting Latinos here are paying what they believe to be attorney fees to get help staying in the country. To combat this issue, Rep. Barbara Mobley (D-Decatur), a member of the UPL District 4 Committee, sponsored legislation, which was supported by the Bar, to require notaries who are not attorneys to publish the following notice in advertisements:

"I am not an attorney licensed to practice in the state of Georgia, and I may not give legal advice or accept fees for legal advice."

In addition, the legislation requires notaries to list their fees and stiffens penalties for notaries who act as attorneys by subjecting

them to prosecution for deceptive trade practices.

In the areas of Georgia where a district committee has not been appointed, the Bar continues to investigate and process cases in accordance with the practices that were in place prior to the UPL Pilot Project. In the two-thirds of Georgia not covered since September, 103 complaints have been filed. Of these, 74 have been closed and 29 are being investigated. These statistics indicate that the vast majority of complaints are generated in metro Atlanta.

As the pilot program continues, the Supreme Court and the Bar will monitor its effectiveness and viability as a statewide program. This new approach is a partnership between the entities involved. The Bar provides: staffing; local lawyers throughout the state to

serve on the district and standing committees; nonlawyer public members to serve on the district and standing committees; the Superior Courts of Georgia to hear cases for injunctive relief; and the Supreme Court of Georgia to rule on formal advisory opinions and serve its normal appellate function on injunctive relief.

As one member of the public summarized the pilot program, it works because all interested parties get their say, nonlawyers are represented in the process and it is ultimately up to the court to decide the issue.

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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By Pete Daughtery

YLD Year in Review

The Young Lawyers Division (YLD) just recently put the finishing touches on another successful year. Due to the hard work of its committee chairs, officers, and directors, the YLD was able to once again complete a stellar year of service to the public and to the profession.

A year ago, the officers and directors conducted a long-range planning session and decided to place the emphasis this year on service to children and youth. Those efforts got off to a quick start when the Law Related Education Committee, chaired by Melissa Anderson and Beth Ellen Dotson, had its most successful golf tournament ever to raise money to support law-related curriculum in Georgia schools. The Community Service Projects Committee, chaired by Michelle Adams and Jennifer Gourley, also had several projects designed to serve children and youth. That committee sponsored a night at an Atlanta Hawks game in conjunction with Department of Family and Children Services, a toy sort in December to support a local Atlanta agency and, this spring, again sponsored a day at the Atlanta Zoo for disadvantaged children. At the YLD Spring Meeting in Savannah, the YLD took an entire Saturday afternoon to paint the recreational room at a local youth community center.

The YLD also sponsored competitions to introduce children and youth to the practice of law. The High School Mock Trial Committee, chaired by Christie Barker, Candace Byrd and Rob McDonald, conducted their excellent mock trial program for high school students, both in regional competitions across the state and a state competition in Atlanta, with Jonesboro High School emerging as the winner and, thus, moving on to the national competition. Brad Folsom, chair of the Youth Judicial Program Committee, recruited young lawyers to serve as judges and conduct the annual Moot Court Program held in conjunction with the YMCA's Annual State Judicial Program. The Kids and Justice Program Committee, co-chaired by Mike McCleary and Malcolm Wells, continued to work with fifth graders to increase their knowledge of the criminal justice system through the use of law-related education lesson plans. Chuck Hodges, who chairs the Business Law Committee, has members of his

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committee volunteering to speak to students (K-12) about business and the law.

The YLD's efforts to emphasize its services to youth and children are special every year because of two outstanding programs, which continued their efforts this Bar year. The Aspiring Youth Program Committee held its program this spring at Walden Middle School and young lawyers once again served as positive role models while developing mentoring relationships with the students, and hopefully increasing their aspiration to graduate from high school and college by demonstrating the importance of education, hard work and commitment. The YLD is particularly grateful to Malcolm Wells, Vicki Wiley and Zahra Karinshak, who have made this very special program a success for several years. In addition, the Juvenile Law Committee will sponsor its Celebration of Excellence to recognize children who grew up in foster care and who graduated from high school, a GED program, vocational school or college in a moving ceremony held each year in June at the Fox Theatre in Atlanta.

One entirely new committee of the YLD set out to make a difference in the lives of children and youth in Georgia is the Truancy Intervention Project chaired by Kevin Snyder. Snyder's committee conducted training seminars in Atlanta and Columbus to recruit and train volunteers to work with and for children suffering truancy problems in our juvenile court system in Georgia. The committee was able to expand the program to Columbus and will hopefully expand to Albany in the very near future. A long standing committee of the YLD, the Minorities in the

Profession Committee, was energized this year by the hard work of co-chairs Brad Gardner and Elvin Sutton. Gardner and Sutton also submitted a grant application to the American Bar Association and their committee was awarded a grant to work with the Court Appointed Special Advocates Program (CASA) to develop and distribute a video to recruit and train volunteers to work with children and youth through CASA.

The YLD did not limit its public service work to children and youth in Georgia, but continued to plan and participate in a wide variety of public service projects. One of the biggest public service projects every year is the Great Day of Service, which was chaired this year by YLD Secretary Damon Elmore. Elmore's committee was responsible for planning and executing service projects in over 16 different communities in Georgia on April 27, 2002. The YLD's Pro Bono Committee, chaired by Tracey Roberts, in an effort to promote and develop pro bono service on a statewide basis, developed a pro bono Web site, which contains comprehensive information on pro bono services in Georgia, and the committee's Associate Campaign for Legal Services (The Greedy for the Needy) is once again scheduled for the summer. Another new committee of the YLD is the Disability Issues Committee, chaired by Tom Mazziotti, which has focused on providing legal services to the mentally ill in conjunction with the National Alliance for the Mentally Ill.

The YLD also continued its long history of providing support to young lawyers to aid in their professional development. The Appellate Admissions Committee, chaired by Nathan Wheat, organized and conducted a mass swear-

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ing in for young lawyers eager to practice in Georgia's appellate courts. Two separate Bridge The Gap seminars were planned and conducted by Ben Finley and Tim Buckley, to whom the YLD owes a special thanks for chairing these programs for several years. The Business Law Committee, chaired by Chuck Hodges, once again conducted its "Nuts And Bolts Of

No organization can be successful unless all the officers work together as a team, and the YLD was blessed this year with a group of hard working and dedicated team of officers.

Business Law Seminar," which is one of the best-attended seminars in the state. The Women in the Profession Committee met more frequently than ever before to discuss issues affecting women in our profession, and the YLD is indebted to Sherry Neal and Amy Loggins for their efforts in making sure that committee remained strong and active.

Every January, young lawyers are given the opportunity to meet with Georgia's legislative and executive branch leaders at the Legislative Affairs Annual Breakfast at the start of the legislative session, and Steve Lowry and Mike Watson again did an excellent job of arranging for an impressive panel of speakers, including Secretary of State Cathy Cox, who was the keynote speaker. The YLD's Ethics and Professionalism Committee, chaired by Melissa Bodnar, has written articles for the YLD Newsletter to educate young lawyers about the effects of

departing attorneys on potential client conflicts.

The YLD also provides services to young lawyers who are still in law school. Every year the YLD conducts several successful competitions for law students, and this year was no exception. The Intrastate Mock Trial Competition for the four law schools in Georgia was completed in March, and the

competition was a success thanks to the work of Chris Kellner and his committee. The National Moot Court Competi-

tion for law students in Region V successfully conducted its competition in the fall thanks to the work of Jason Saliba and his committee. Very shortly after this article goes to print, the William W. Daniel Invitational Mock Trial Committee, under the direction of Jeremy Citron, will once again host its mock trial competition in Atlanta for each of the four Georgia law schools, as well as student teams from all over the country.

The Committee chairs identified above are to be congratulated for all their hard work, along with the YLD directors. One of the largest groups of directors ever came together to support the YLD in all phases of its work. The 2001-2002 directors group of Christy Barker, Marc D'Antonio, Jay Doyle, Amanda Farahany, David Gruskin, Elena Kaplan, Zahra Karinshak, John Kennedy, Leigh Martin, Janne McKamey-Lopes, Jonathan Pope, Tracey Roberts, Bryan Scott, Tripp Self, Dan Snipes,

Chandra Tutt and Malcolm Wells are to be congratulated on all their hard work this year.

No organization can be successful unless all the officers work together as a team, and the YLD was blessed this year with a group of hard working and dedicated team of officers. Derek White, president-elect; Andrew Jones, treasurer; and Damon Elmore, secretary; as well as Kendall Butterworth, immediate past president; and Laurel P. Landon, newsletter editor. These leaders offered the type of support that made the hard work and pressures of the Bar year a breeze. The YLD is in excellent hands for the future, and will no doubt continue to break new ground in its efforts to be the public service arm of the Bar with this dedicated group of officers. Everyone in the YLD owes a huge debt to our excellent director of the YLD, Jackie Indek, who has done a wonderful job, especially considering the president she was forced to work with this Bar year.

Finally, it would not be the YLD unless we were also having a great time. Our meetings this year were some of the best attended ever. From the inaugural bus ride "stops" on the return from Charleston at the annual meeting in Kiawah, to bead throwing in New Orleans from the porch of the hospitality suite, to the last second loss in Athens at the fall meeting, and to late night card games in too many cities to mention, the YLD continued its tradition of working hard for the public and profession and playing even harder. I am indebted to all of the persons who have worked, and played, so hard all year to make this year a successful one for the YLD. 🍷

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By Robert C. Port

Common Fact Patterns of Stockbroker Fraud and Misconduct

Until recently, it seemed as though everyone had heard of a “friend of a friend” who made a “killing” in the stock market. The late 1990s were especially good to investors, with double digit returns seemingly the norm. Financial newspapers and magazines offering investment advice were everywhere, and Internet bulletin boards and chat rooms were filled with people claiming to have identified the next Microsoft, Yahoo or Cisco.

In this environment, investors easily fell prey to dishonest stockbrokers, investment advisors, financial planners, insurance agents and others claiming to have the knowledge and experience to offer investment advice. Certainly, no one has a crystal ball, and not every loss results from actionable activity by a broker. Even supposedly “rock-solid” blue-chip stocks experience significant declines from time to time. However, in many instances, the actions of a broker or investment advisor can form the factual basis for a variety of legal claims.

Federal and state securities statutes and state common-law typically govern civil liabilities arising out of the purchase and sale of securities.¹ This article first reviews the duties a broker owes to his client, and then provides an overview of reoccurring fact patterns and circumstances often found when an investment advisor has engaged in actionable activity.

STOCKBROKER AND BROKERAGE FIRM DUTIES TO THE CUSTOMER

Pursuant to Sections 15A and 19 of the Securities Exchange Act of 1934², Congress has authorized the establishment of “self-regulatory organizations” (SROs) such as the New York Stock Exchange (NYSE), the American Stock Exchange (AMEX) and the National Association of Securities Dealers (NASD). Each of these SROs have promulgated rules which are, inter alia, “designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. . . .”³ Rules promulgated by the various SROs are sent to the Securities and Exchange Commission for review and approval, following publication and an opportunity for public comment.⁴

mend investments suitable in light of those circumstances.¹¹ Violation of these rules is a violation of the Georgia Securities Act.¹²

The Duty of Good Faith, Fair Dealing and Loyalty. Various SRO and state regulatory pronouncements require brokers and brokerage firms to act with the utmost good faith, fair dealing and loyalty toward their customers.¹³ These obligations mirror those imposed by Georgia common-law and statute upon parties to a contract.¹⁴

The Duty to Supervise Brokers. Brokerage firms have a statutory obligation, under both federal and state law,¹⁵ to supervise their brokers to prevent violations of the securities laws. The SROs have

of the risks involved in purchasing or selling a particular security; (4) the duty to refrain from self-dealing; (5) the duty not to misrepresent any material fact to the transaction; and (6) the duty to transact business only after receiving approval from the customer.¹⁹

COMMON PATTERNS OF MISCONDUCT

Although each case presents a different set of facts and circumstances, there are a number of common themes and fact patterns giving rise to claims against stockbrokers, brokerage firms and investment advisors. Most of these claims

such that the client follows almost every recommendation the broker makes. Churning can be a violation of Section 10(b) of the Securities Act of 1934²¹ and Rule 10b-5 promulgated thereunder.²² It also is a violation of the Georgia Securities Act.²³ Churning may also provide a basis for claims based upon breach of fiduciary duty,²⁴ breach of contract,²⁵ negligence,²⁶ and respondent superior liability.²⁷

Several objectively measurable factors may suggest that an account has been churned. One widely-accepted indicator is the turnover ratio. "Turnover rate is the ratio of the total cost of purchases made for the account during a given period of time to the amount invested."²⁸ The courts generally recognize an annual turnover rate in an investment account of 6, or a ratio of purchases to the amount invested of 6:1, excessive as a matter of law.²⁹ Whether a particular turnover rate is excessive depends upon the investment objectives of the customer. In long-term accounts with conservative objectives, a lower turnover ratio may be deemed excessive.³⁰ In trading accounts and accounts with options transactions, a higher turnover ratio is expected.³¹

Another factor to consider is the "account maintenance cost," also known as the "equity maintenance factor" or the "cost/equity ratio." This is the rate of return the customer must earn on the account to pay the commissions and other trading fees (such as margin interest). It is calculated by adding all fees and commissions and expressing the total as a percentage of average annual equity. A high account maintenance cost is indicative of an account that has been traded not for the customer's benefit, but for the benefit of the broker.

Under Georgia law, a confidential, fiduciary relationship exists between a broker and a client. As a fiduciary, the broker has a legal obligation to act in the "utmost good faith."

imposed similar obligations by rule-making.¹⁶

Brokers Owe Their Customers a Fiduciary Duty. Under Georgia law, a confidential, fiduciary relationship exists between a broker and a client.¹⁷ As a fiduciary, the broker has a legal obligation to act in the "utmost good faith."¹⁸

As set forth by the 11th Circuit, the fiduciary duties of an investment broker include: (1) the duty to recommend investments only after studying it sufficiently to become informed as to its nature, price and financial prognosis; (2) the duty to perform the customer's orders promptly in a manner best suited to serve the customer's interests; (3) the duty to inform the customer

arise from the inherent conflicts created when a broker's income is commission based, and thus directly tied to the volume of transactions generated. Among the more common improper activities are the following:

Churning/Excessive Trading. Churning "occurs when a securities broker buys and sells securities for a customer's account, without regard to the customer's investment interests, and for the purpose of generating commissions."²⁰ The broker churns an account by exercising control over it, either as a result of having been given express discretionary authority to trade, or by developing a relationship of trust and confidence with the client

Also considered is the period of time a security is held from purchase date to sale date. Short holding periods, with the proceeds immediately reinvested in other positions, may be indicative of churning.³² Another indicator of churning is a comparison of the total commissions generated by the account as compared to total commissions earned by the broker and/or the branch.³³

Fraud and Misrepresentation. A broker may induce a customer to buy or sell a stock by making statements or representations of material fact that are known by the broker to be untrue, or that are made with a reckless disregard for the truth, and that are relied upon by the customer following the broker's recommendation. Also, a broker can commit fraud by an "omission" — failing to reveal material facts that would have been important to the customer in making the investment decision. This conduct is prohibited by Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder³⁴, as well as the Georgia Securities Act.³⁵ Such conduct also can serve as the basis for a claim of common-law fraud.³⁶

Unsuitable Recommendations. A broker must only recommend investments that are appropriate for the customer's particular circumstances, in light of the customer's financial condition, level of sophistication, investment objectives, and risk tolerance. This is known as "suitability" or "knowing your customer."³⁷ A common fact pattern is the broker's recommendation to purchase excessive concentrations of low priced "penny" stocks³⁸ or other volatile shares, suggesting that a small price rise for each share will mean significant profits. Churning is also

evidence of unsuitable activity, as is over concentration of the portfolio in one stock, group of stocks, or industry, recommendations to use excessive margin to purchase additional shares, and recommendations to purchase unregistered private placements. The broker's failure to recommend suitable investments may violate Section 10b of the Securities Exchange Act and Rule 10b-5,³⁹ the Georgia Securities Act,⁴⁰ as well as conduct rules promulgated by the SROs.⁴¹ Unsuitable recommendations may also give rise to state law based causes of action under theories of breach of contract,⁴² breach of fiduciary duty,⁴³ and negligence.⁴⁴

Unauthorized Trading. A broker is prohibited from executing a trade in an account unless the client has approved and authorized the trade, before the trade has been made, either by written discretionary authority given to the broker (such as a Power of Attorney), or by oral "time and place" discretion granted to the broker.⁴⁵ Often, a disreputable broker will initiate trades in the account without the prior authorization of the client. Among other claims, unauthorized trading in an account may violate Section 10b of the Securities Exchange Act and Rule 10b-5⁴⁶, and is a violation of the Georgia Securities Act.⁴⁷

Overconcentration/Failure to Diversify. It is generally accepted that risk can be reduced by diversifying investments among a number of different investments (such as investments in auto stocks, technology stocks, retail stocks), or by diversifying in different types of investments (such as stocks, bonds and mutual funds).⁴⁸ A broker who recommends that a client place all or substantial all of his investments in one or just a few securities may not only be ignoring sound investment theory, but may also be violating a number of legal and regulatory obligations owed to his customer. Indeed, as a fiduciary, the broker may be obligated to recommend a diversity of investments to his client.⁴⁹

Excessive Margin. "Margin" refers to the situation where a customer borrows from the brokerage firm to purchase additional securities, using those securities (and perhaps others in the account) as collateral.⁵⁰ The Federal Reserve sets the initial ratio of margin debt to stock value at the time of purchase.⁵¹ A broker cannot engage in margin trading in a customer's account unless the customer authorizes it in writing, and is provided with certain credit disclosures.⁵² While many account opening agreements contain a provision authorizing and allowing margin

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trading, sometimes an account is improperly traded on margin without any prior agreement or authorization from the customer.

Even if a customer has authorized trades on margin, a broker may improperly induce the customer to carry an unreasonably large margin debt. Often, a dishonest broker will recommend that a customer borrow heavily to purchase low-priced, risky securities. Sometimes, the broker fails to clearly explain margin borrowing, including the fact that the margin balance cannot exceed a certain percentage of the account. The broker might also fail to explain that if the value of the account falls below the required percentage, a "margin call" will be made requiring the customer to place additional money in the account or risk liquidation of the account to satisfy the margin debt. As the SEC has observed:

Trading on margin increases the risk of loss to a customer for two reasons. First, the customer is at risk to lose more than the amount invested if the value of the security depreciates sufficiently, giving rise to a margin call in the account. Second, the client is required to pay interest on the margin loan, adding to the investor's cost of maintaining the account and increasing the amount by which his investment must appreciate before the customer realizes a net gain. At the same time, using margin permit[s] the customers to purchase greater amounts of securities thereby generating increased commissions for [the salesperson].⁵³

Failure or Refusal to Execute an Order. A broker also has an obligation to execute sell orders if given.

An unscrupulous broker or firm sometimes refuses to do so, because a sale might push down the price of a security they are promoting.

Switching of Mutual Funds. Although mutual funds are often viewed as an appropriate investment option, a broker looking to improperly increase his commission may recommend that his customer sell a mutual fund they own, and purchase a fund offered by a different mutual fund company. Switching can generate significant commissions and sales charges benefiting the broker. Switching may not, however, place the investor in a better mutual fund, and may in fact place the investor in a lesser known, lower-quality fund.

Selling Away. "Selling Away" describes instances where a broker sells securities outside of the firm with which he or she is associated.⁵⁴ As described by the NASD,

"[these] transactions present serious regulatory concerns because securities may be sold to public investors without the benefits of any supervision or oversight by a member firm and perhaps without adequate attention to various regulatory protections such as due diligence investigations and suitability determinations. In some cases, investors may be misled into believing that the associated person's firm has analyzed the security being offered and "stands behind" the product and transaction when in fact the firm may be totally unaware of the person's participation in the transaction."⁵⁵

NASD Conduct Rules 3030 and 3040 prohibit, respectively, unapproved outside business activities and private securities transactions.

The ability of a broker to engage in "selling away" may be indicative of the brokerage firm's failure to adequately supervise its brokers.

"Cold Calls." A cold call is a telephone call from a broker the customer has never met, trying to solicit business. The brokers making these calls are often very convincing, and portray the stock they are touting as no-risk opportunities for big profits. The stock is described as a "phenomenal opportunity," "the next Microsoft," or "a once in a lifetime opportunity." Often, such brokers claim they have "inside" information, claim they have made lots of money for other people, or claim that they are out to help the small investor, unlike the "big boys" on Wall Street. Sometimes, brokers will claim (usually falsely) that they believe in the investment so much, they sold some to their mother or other relatives. The NASD's Telemarketing Rule⁵⁶ limits the calling time to between 8 a.m. and 9 p.m. Brokers calling must identify themselves by providing their name, firm name, address or phone number.

The "Bait and Switch." The initial recommendations of a dishonest broker may be for the purchase of well known, widely traded blue chip stocks, or other securities consistent with the customer's investment objectives. After the customer has invested in such companies, the broker will then suggest that such companies have little growth potential, and pressure the customer to sell the blue chip stocks and invest in small, unknown companies, which the broker claims will bring spectacular profits.

Improper Marking of Confirmations as "Unsolicited" Orders. The broker may inaccurately state that purchases recom-


mended by the broker were “unsolicited.” Mismarking order tickets is a violation of the Securities Exchange Act⁵⁷ and rules promulgated by the SROs.⁵⁸

Blaming Errors on “Back Room” or “Administrative” Problems. Unauthorized transactions, improperly marked confirmations, and other difficulties a customer is having with a broker will often be dismissed by the broker as a problem with the “back room,” the administrative and clerical support.

The Manager Who Promises to “Make it Right.” Often, a customer who has lost substantial money as a result of a rogue broker gets a call from the “manager” of the firm, offering to make things right if the customer will let the “manager” handle the account. Frequently, the customer will be asked to send more money, “so we can have something to work with.” The “manager” might claim that the other broker was young and inexperienced, or claim that the other broker has been fired. This “manager” is often not the manager of the office, but someone working in tandem with the first broker. More often than not, this “manager” will lose any new funds sent in, as well as what was left in the account.

CONCLUSION

Unscrupulous investment advisors are always devising new and innovative methods to part investors from their hard earned money. Many of the patterns of illicit activity summarized in this article are motivated by the economic incentives under which brokers operate: commissions based on trading activity. When presented with a possible claim of inappropriate or perhaps fraudulent

investment activity, the practitioner should carefully review the facts not only in light of the legal and regulatory obligations imposed upon those in the brokerage community, but also to understand the economic motivations that encouraged and facilitated the broker to breach the legal and regulatory duties owed to the customer. 



Robert C. Port is a partner with Hassett Cohen Goldstein Port & Gottlieb, LLP, Atlanta, Ga., where he practices commercial

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

ENDNOTES

1. A number of theories of liability are available to a plaintiff, including claims based upon the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; the anti-fraud provisions of the Georgia Securities Act of 1973, O.C.G.A. § 10-5-14; common law fraud; breach of fiduciary duty; breach of contract; negligence; control person liability under the Securities Exchange Act, 15 U.S.C. § 78t(a) or the Georgia Securities Act of 1973, O.C.G.A. § 10-5-14(c); respondent superior liability; agency; and the Georgia Racketeer Influenced and Corrupt Organizations Act (“RICO”), O.C.G.A. § 16-14-4. Other federal statutes, such as the Employee Retirement Income Security Act (“ERISA”) may come into play. Self-regulatory organization rules, such as the NASD rules or NYSE rules, also are relevant to the question of whether the broker has breached a duty owed to a customer.
2. 15 U.S.C. § 78o-3 and § 78s.
3. 15 U.S.C. § 78o-3(b)(6).

4. 15 U.S.C. § 78s(b)(1), (b)(2).
5. *Spicer v. Chicago Bd. of Options Exch., Inc.*, 977 F.2d 255 (7th Cir. 1992); *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 200 (3d Cir. 1990); *Shahmirzadi v. Smith Barney, Harris Upham & Co.*, 636 F. Supp. 49 (D. D.C. 1985); *Thompson v. Smith Barney, Harris Upham & Co.*, 709 F.2d 1413 (11th Cir. 1983); *Jablon v. Dean Witter & Co.*, 614 F.2d 677 (9th Cir. 1980); *Shull v. Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 160 (8th Cir. 1977).
6. *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 333 (5th Cir. 1981) (industry rules are “excellent tools against which to assess in part the reasonableness or excessiveness of a broker’s handling of an investor’s account”); *Lang v. H. Hentz & Co.*, 418 F. Supp. 1376, 1383-84 (N.D. Tex. 1976) (NASD Rules provide evidence of the standard of care a member should have); *Kirkland v. E.F. Hutton & Co.*, 564 F. Supp. 427 (E.D. Mich. 1983). *See also*, *Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C.*, 265 Ga. 374, 453 S.E.2d 719 (1995) (violation of a Bar Rule is not determinative of the standard of care applicable in a legal malpractice action, but it may be circumstance that can be considered, along with other facts and circumstances, in determining negligence.)
7. *See* NASD Conduct Rule 2310(b); NYSE Rule 405(1); AMEX Rule 411. NASD Conduct Rule 2310(b) provides as follows: Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning: (1) the customer’s financial status; (2) the customer’s tax status; (3) the customer’s investment objectives; and (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.
8. NASD Conduct Rule 2310(a). This Rule provides as follows: In recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs.

9. NASD Notice To Members 96-60 (Sept. 1996) (emphasis added).
10. NYSE Supplementary Material to Rule 472, Communications With The Public No. 90-5.
11. Ga. Comp. R. & Regs. r. 590-4-2-.14 (1)(a)(3) of the Georgia Securities Commission, entitled *Dishonest or Unethical Business Practices*, authorizes the Securities Commissioner to take action against brokers who: recommend[] to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the dealer, limited dealer, salesman, or limited salesman.
12. O.C.G.A. §§ 10-5-12(a)(1).
13. See, e.g., NASD Conduct Rule 2110 (Members "shall observe high standards of commercial honor and just and equitable principles of trade."); NYSE Rule 401 ("Every member, allied member and member organization shall at all times adhere to the principals of good business practice in the conduct of his or its business affairs."); Rule 590-4-2.14(1) of the Georgia Securities Commission ("Every dealer, limited dealer, salesman and limited salesman shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of business").
14. O.C.G.A. 11-1-203; Jackson Elec. Membership Corp. v. Ga. Power Co., 257 Ga. 772, 364 S.E.2d 556 (1988); see also Restatement (Second) Contracts, § 231 (1986 App.) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). But see, Lake Tightsqueeze, Inc. v. Chrysler First Fin. Servs. Corp., 210 Ga. App. 178, 435 S.E.2d 486 (1993) ("the failure to act in good faith in the performance of contracts or duties under the Uniform Commercial Code does not state an independent claim for which relief may be granted.")
15. Rule 590-4-2-.08 of the Georgia Securities Commission, entitled *Supervision of Salesmen, Limited Salesmen, and Employees*, provides that "(1) Every dealer and limited dealer registered or required to be registered under the Act shall exercise diligent supervision over the securities activities of all of its salesmen and employees." The Rule sets forth various procedures by which proper supervision can be accomplished.
16. NASD Conduct Rule 3010 provides:
 - (a) Supervisory System. Each member shall establish and maintain a system to supervise the activities of each registered representative and associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with the Rules of this Association. Final responsibility for proper supervision shall rest with the member.

...
 - (b) Written Procedures. Each member shall establish, maintain, and enforce written procedures to supervise the types of business in which it engages and to supervise the activities of registered representatives and associated persons that are reasonably designed to achieve compliance with applicable securities laws and regulations, and with the applicable Rules of this Association. NYSE Rule 405(2) provides: Every NYSE member shall "super-vise diligently all accounts handled by registered representatives of the organization."
17. E. F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 445, 304 S.E.2d 420, 422 (1983) ("The broker's duty to account to its customer is fiduciary in nature, resulting in an obligation to exercise the utmost good faith."); Gochnauer v. A. G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987) ("The law is clear that a broker owes a fiduciary duty of care and loyalty to a securities investor."); accord RESTATEMENT (SECOND) OF AGENCY § 425 (1957) (agents who are employed to make, manage, or advise on investments have fiduciary obligations).
18. O.C.G.A. § 23-2-58.
19. Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987) (quoting Lieb v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978) *aff'd*, 647 F.2d 165 (6th Cir. 1981)).
20. Thompson v. Smith Barney, Harris Upham & Co., 709 F. 2d 1413, 1416 (11th Cir. 1983); Costello v. Oppenheimer & Co., 711 F.2d 1361 (7th Cir. 1983).
21. Section 10(b) of the Securities Act of 1934, 15 U.S.C. § 78j(b), provides, in pertinent part that:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange...

 - (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.
22. See Hecht v. Harris, Upham & Co., 430 F.2d 1202, 1206-07 (9th Cir. 1970); Armstrong v. McAlpin, 699 F.2d 79 (2d Cir. 1983)(churning may be a deceptive and manipulative action under 10b-5). Rule 10b-5, promulgated by the Securities and Exchange Commission pursuant to the authority granted to it by Section 10b of the Securities Exchange Act, provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

 - (a) To employ any device, scheme, or artifice to defraud,
 - (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
 - (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.
23. Rule 590-4-2-.14(1)(a)(2) of the Georgia Securities Commission, entitled *Dishonest or Unethical Business Practices*, authorizes the Securities Commissioner to take action against brokers who "induc[e] trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account." Violation of the Rule is a violation of the Georgia Securities Act, § 10-5-12(a)(1).
24. See nn. 19-21, *supra*
25. Most customer agreements and trade confirmations incorporate industry rules and regulations into the contract with the customer. For

example, a Bear Stearns Customer Agreement provides:
APPLICABLE LAW, RULES AND REGULATIONS. All transactions shall be subject to the applicable laws, rules and regulations of all federal state and self-regulatory authorities, including, but not limited to, the rules and regulations of the Board of Governors of the Federal Reserve System and the constitution, rules and customs of the exchange or market (and clearing house) where such transactions are executed.

Violations of industry rules and regulations by a broker/dealer or registered representative give rise to breach of contract claims if damages result.

26. A broker's violation of regulatory duties, while generally recognized to not give rise to a private right of action, may provide evidence in evaluating whether the broker/dealer properly exercised the required degree of care in dealings with a customer. *See, e.g., Allen v. Lefkoff, Duncan, Grimes & Dermer P.C.*, 265 Ga. 374, 453 S.E.2d 719 (1995)(violation of a Bar Rule is not determinative of the standard of care applicable in a legal malpractice action, but it may be circumstance that can be considered, along with other facts and circumstances, in determining negligence.). A number of courts have held that a violation of regulatory rules may be the basis of a claim sounding in negligence. *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 333 (5th Cir. 1981) (industry rules are "excellent tools against which to assess in part the reasonableness or excessiveness of a broker's handling of an investor's account"); *Lang v. H. Hentz & Co.*, 418 F. Supp. 1376, 1383-84 (N.D. Tex. 1976) (NASD Rules provide evidence of the standard of care a member should have); *Kirkland v. E.F. Hutton & Co.*, 564 F. Supp. 427 (E.D. Mich. 1983). *See also*, NASD Conduct Rule 2120 ("No member shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance.")
27. Under common law agency principles, the principal (the broker/dealer) is liable for the torts of its agents (its registered representatives) done within the scope of the principals business. O.C.G.A. § 51-2-2. Further, under both federal and state law, "control persons" may be held liable for the

acts and omissions of those over whom they hold the ability to discipline or influence. *See*, Section 20(a) of the Securities and Exchange Act, 15 U.S.C. § 78t(a); *Harrison v. Dean Witter Reynolds, Inc.*, 79 F.3d 609 (7th Cir. 1996); *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (en banc)(control found where primary violator was a registered representative of the firm and had some direct means of discipline or influence over them). The Georgia Securities Act similarly provides for liability of "control persons," subject to a "good faith" defense. O.C.G.A. § 10-5-14(c).

28. *Levin v. Shearson Lehman/American Express, Inc.*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,080 (S.D.N.Y. June 14, 1985). To calculate the annual rate of turnover in an account, divide the total purchases in the account by the average amount invested in the account. Then divide that figure by the number of months in the time period the account has been open to determine the monthly rate of turnover. Multiply that figure by twelve (12) to determine the annual turnover.
29. *Freundt-Alberti v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 134 F.3d 1031, 1032 (11th Cir. 1998)(referring to benchmark annual turnover ratio of six); *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 490 (6th Cir. 1990); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 767 F.2d 1498, 1502 (11th Cir. 1985); *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9th Cir. 1980); *Moran v. Kidder Peabody & Co.*, 609 F. Supp. 661 (S.D.N.Y. 1985), *aff'd*, 788 F.2d 3 (2d Cir. 1986).
30. *See In re Thomson McKinnon Sec., Inc.*, 191 B.R. 976 (Bankr. S.D.N.Y. 1996)(turnover rate of 2.2 creates question of fact for jury to decide if activity was excessive).
31. *See Thompson v. Smith Barney, Harris, Upham & Co.*, 539 F. Supp. 859 (N.D. Ga. 1982), *aff'd*, 709 F.2d 1413 (11th Cir. 1983) (plaintiff who knew his account was being constantly traded, who had financial acumen to determine his own best interests and who desired frequent trading, could not establish excessive trading).
32. *See Mihara v. Dean Witter & Co.*, 619 F.2d 814, 819 (9th Cir. 1980) (excessive trading established where 50% of securities held for less than 15 days).
33. *See, e.g., Smith v. Petrou*, 705 F. Supp. 183 (S.D.N.Y. 1989)(commissions generated by account was substantial portion of broker's income). *Accord, Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836 (E.D. Va. 1968); *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202 (9th Cir. 1970).
34. The elements of a securities fraud action under of the 1934 Act are: (1) false representation or omission of a material fact; (2) made with scienter - a mental state embracing an attempt to deceive, manipulate or defraud; (3) in connection with the purchase or sale of a security; (4) upon which the claimant reasonably relied; (5) that proximately causes damage. *See Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1046-47 (11th Cir. 1987); *Thompson v. Smith Barney, Harris Upham & Co.*, 709 F.2d 1413 (11th Cir. 1983); *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983). The standard for determining materiality is whether "there is a substantial likelihood that a reasonable shareholder would consider it important" or "a substantial likelihood that the disclosure...would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *TCS Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, (11th Cir. 1982) (The test for determining materiality is whether a reasonable man would attach importance to the fact misrepresented or omitted in determining his course of action).
35. Georgia Code Section 10-5-14 provides a cause of action against a seller of securities for violating Section 10-5-12 for making an untrue statement of a material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading. Liability will not be found however, if (1) the purchaser knew of the untrue statement of a material fact or omission of a statement of a material fact; or (2) the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission. O.C.G.A. § 10-5-14. There is very little case law interpreting the Georgia Securities Act. Its civil liability provisions are analogous to the federal statutes. Although the language

- of the Georgia statute does not appear to require scienter, courts have construed the section in accordance with 10b-5 as requiring proof of scienter. *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984), *GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs., Inc.*, 245 Ga. App. 460, 464, 537 S.E.2d 677 (2000). Georgia blue sky law does not require proof of reliance. One advantage of a claimant proceeding under the Georgia Act is the provision for recovery of attorney's fees, interest, and court costs. O.C.G.A. § 10-5-14(a).
36. Elements of fraud in Georgia are: (1) false representation of an existing fact or past event; (2) scienter, (3) intention to induce plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff and (5) damage to plaintiff. *See, e.g., Fuller v. Perry*, 223 Ga. App. 129, 476 S.E.2d 793, 795 (1996). Nondisclosure may provide the basis for constructive fraud where a party is under an obligation to communicate. O.C.G.A. § 23-2-53. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case. *See also* O.C.G.A. § 23-2-51(b). Under Georgia law, a confidential relationship imposes a greater duty on the parties to reveal what should be revealed, and a lessened duty to discover independently what could have been discovered through the exercise of ordinary care. *Hunter, Maclean, Exley & Dunn, P.C. v. Frame*, 269 Ga. 844, 847-48, 507 S.E.2d 411 (1998).
37. *See nn. 8-11 supra.*, "[T]he making of recommendations for the purchase of a security implies that the dealer has a reasonable basis for such recommendations, which in turn, requires that, as a prerequisite, he shall have made a reasonable investigation." *Distribution By Broker-Dealers of Unregistered Securities*, Exchange Act Release No. 4445, 1962 WL 69442 (Feb. 2, 1962).
38. "Penny" stocks are generally considered to be those whose market price is less than \$5.00.
39. *See nn. 23-24, supra.*
40. *See n. 25, supra.*
41. *See n.28, supra.*
42. *See n. 27, supra.*
43. *See nn. 19-21, supra.* As set forth by the Eleventh Circuit, the fiduciary duties of an investment broker include "the duty to recommend [investments] only after studying it sufficiently to become informed as to its nature, price, and financial prognosis." *Gochnauer v. A.G. Edwards & Sons, Inc.*, 810 F.2d 1042, 1049 (11th Cir. 1987) (quoting *Lieb v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich. 1978) *aff'd*, 647 F.2d 165 (6th Cir. 1981)).
44. *See n. 7, supra.*
45. *See, e.g.,* NYSE Rule 408; NASD Conduct Rule 2510, IM 2310-2(4)(iii). *Glisson v. Freeman*, 243 Ga. App. 92, 99 532 S.E.2d 442, 449 (2000) ("With respect to a nondiscretionary account, . . . the broker owes a number of duties to the client, including the duty to transact business only after receiving prior authorization from the client. . . ."). At least one court has held that basic principles of agency law required the broker to inform the customer of his right to reject unauthorized purchases. *Merrill Lynch Pierce Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124, 1128 (D.C. Cir. 1990).
46. *See n. 23, supra. See, e.g., Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 906 F.2d 1206, 1212 (8th Cir. 1990).
47. Rule 590-4-2-.14(1)(a)(4) of the Georgia Securities Commission, *Dishonest or Unethical Business practices*, authorizes the Securities Commissioner to take action against brokers who "executing a transaction on behalf of a customer without authorization to do so." Ga. Comp. R. & Regs. r. 590-4-2-14. Violation of the Rule is a violation of the Georgia Securities Act, § 10-5-12(a)(1).
48. *See, e.g.,* Richard A. Booth, *The Suitability Rule, Investor Diversification, and Using Spread to Measure Risk*, 54 BUS. LAW. 1599 (1999) "One of the time-honored investment maxims is that risk can be reduced by diversification." *Burton Malkiel & William Baumol, Redundant Regulation of Foreign Security Trading and U.S. Competitiveness*, in MODERNIZING U.S. SECURITIES REGULATION, 39, 45 (Kenneth Lehn & Robert W. Kamphuis, Jr. eds., 1992). "The single most important step most investors can take to immediately improve the long range performance of their portfolios . . . is to properly diversify their common stock investments." Norman G. Fosback, *STOCK MARKET LOGIC: A SOPHISTICATED APPROACH TO PROFITS ON WALL STREET* 252 (1985). There is general agreement that it takes at least 10, and usually 15-20, non-correlated stocks to achieve adequate diversification and thereby reduce nonsystematic risk. *See* Edwin J. Elton & Martin J. Gruber, *MODERN PORTFOLIO THEORY AND INVESTMENT ANALYSIS* 31 (3d ed., 1987).
49. "Diversification is a uniformly recognized characteristic of prudent investment." *Robertson v. Cent. Jersey Bank & Trust Co.*, 47 F.3d 1268, 1275 n. 4 (3d Cir. 1995), citing *RESTATEMENT (THIRD) OF TRUSTS* § 229(d) (1992).
50. As explained by the court in *Walch v. Am. Stock Exch., Inc.*, 687 F.2d 778, 780 (3d Cir. 1982), "[t]he margin device permits a broker to extend credit to his customer to finance the customer's transactions, with the broker holding a security interest in the securities purchased as collateral for the loan. The customer pays an agreed percentage of the purchase price by depositing cash or other securities, and the broker holds the stock purchased as collateral for the balance. The broker in turn often finances the purchase by using the securities purchased as collateral for a bank loan."
51. Regulation T of the Federal Reserve Board, 12 C.F.R. § 220.1-18. A customer purchasing stock on margin generally must advance a minimum of 50% of the purchase price in cash or in securities. In addition, the NASD, NYSE, and brokerage firms set their own "margin maintenance" requirements, and in some instances, do not permit certain securities to be used as collateral for margin borrowing. Currently, NASD and stock exchange rules require 25 percent margin maintenance, and many firms require 30 percent to 35 percent maintenance.
52. 17 C.F.R. § 240.17a-3(a)(9)(iii); 17 C.F.R. § 240.10b
53. In the Matter of Laurie Jones Canady, Exchange Act Release No. 41250, (Apr. 5, 1999).
54. *See, e.g.,* *Martin v. Shearson Lehman Hutton, Inc.*, 986 F.2d 242 (8th Cir. 1993).
55. NASD Notice to Members 85-21.
56. NASD Conduct Rule 2211.
57. Securities Exchange Act, Sec. 17(a) and Rule 17a-3(a)(6).
58. NYSE Rule 440.

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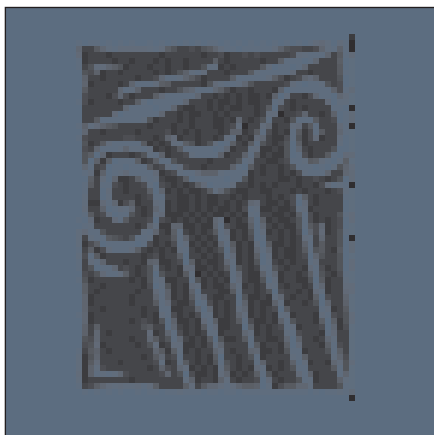
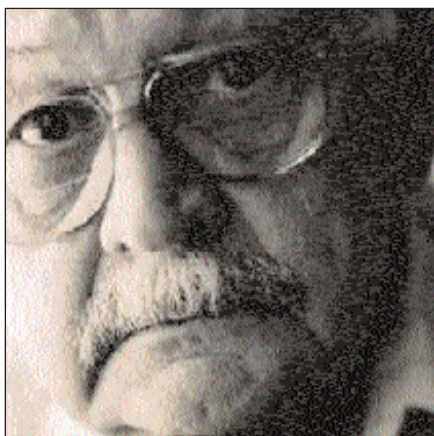
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2002 Legislative Session Highlights Top Legal Issues

By Mark Middleton

The longest General Assembly since 1885 provided the State Bar of Georgia with another year of legislative success as many items of the legislative package received favorable consideration. The session also previewed significant issues such as indigent defense and domestic appeals, which will require future State Bar attention and involvement.

This legislature will be remembered for having to deal with the crematorium tragedy in Walker County and for the seemingly never-ending redrawing of the legislative maps. The legislature also passed important bills relating to predatory lending, natural gas and domestic terrorism.

The State Bar once again advanced the Board of Governors'

legislative proposals and funding initiatives as an unprecedented eight bills were passed and await the governor's signature. The General Assembly passed various State Bar endorsed bills clarifying the Limited Liability Company Act, conforming the foreign Service of Process to the federal rule, allowing trustees to delegate financial management functions, recognizing renunciation of succession rights and revising Article Five of the Uniform Commercial Code.

The General Assembly also passed other initiatives endorsed and supported by the State Bar, including a loan forgiveness program for public interest attorneys, and an important bill regarding notaries engaged in the unauthorized practice of law.

Also, the State Bar worked diligently to support state funding for various judicial programs. This was an extremely tight budget year in which the governor required each agency to propose 10-percent reductions in their annual requests. In this environment, the State Bar was very fortunate that none of its initiatives were cut. In fact, the

Council for Indigent Defense received a significant increase of \$900,000 in the supplemental and FY 2003 budgets.

Bills Awaiting Governor's Signature

SB 253, LLC Revision: This bill, which revises Section 601.1 of the Limited Liability Company Code, passed the House by Committee Substitute. The measure clarifies the current law by explicitly stating that an LLC member cannot withdraw without authority from the LLC operating agreement. Chuck Beudrot, Michael Wasserman and the other members of the Partnership Sub-Committee of the Business Law Section deserve credit for their two-year effort to achieve the passage of this bill. Sen. Greg Hecht (D-Morrow) and Sen. Mike Boggs (D-Waycross) handled the bill in their respective chambers.

SB 346, International Service of Process: This Tort & Insurance Practice Section proposal conforms the state statute to the federal rule that allows for international service by mail. Section Chair Ken Shigley was particularly effective in testify-

ing on behalf of this and other bills. Sen. Seth Harp (R-Columbus) and Sen. Jim Stokes (D-Covington) presented the bill to their colleagues.

SB 465, Loan Forgiveness Program: This program initiated by the state's prosecutors, and sponsored by the governor, provides loan repayment assistance to certain public interest attorneys. Albany District Attorney Ken Hodges chaired the task force that recommended this program to the governor.

HB 639, Delegation of Trustee Powers: This Fiduciary Law Section proposal allows trustees to appoint agents to handle certain management and investment functions. It is designed to assist small banks and individuals that serve as trustees. Jack Sawyer, Mark Williamson and Bill Linkous of the Fiduciary Law Section worked diligently to revise and improve this proposal as it worked its way through the legislative process. We owe a special thanks to Rep. Tom Campbell (R-Roswell), Rep. Wendell Willard (R-Dunwoody) and Sen. Harp for their extraordinary efforts in passing this bill.

HB 646, Renunciation of Interests: This Fiduciary Law Section bill states that a renunciation of future interests can vest during the lifetime of the renouncing life estate holder. This bill addressed an appellate court decision to the contrary. This bill had passed the House last year, and the Senate acted this session.

HB 1253, UCC Article 5: The Business Law Section followed their 2001 success with Article Nine with this proposal, which revises Article 5 of the UCC relating to letters of credit. The revised Article 5 will promote improved international trade by providing uniformity with other states and by recognizing standard practices not contemplated under the old Article 5. This was another huge effort by

friend, Rep. Robert Reichert (D-Macon), and Sen. Michael Meyer Von Bremen (D-Albany) championed this cause for us.

HB 1256, Prohibition of Notaries Practicing Law: This bill addresses a problem in the international community where notaries are thought to have broad powers. The bill explicitly prohibits notaries from the practice of law, and requires them to provide notices

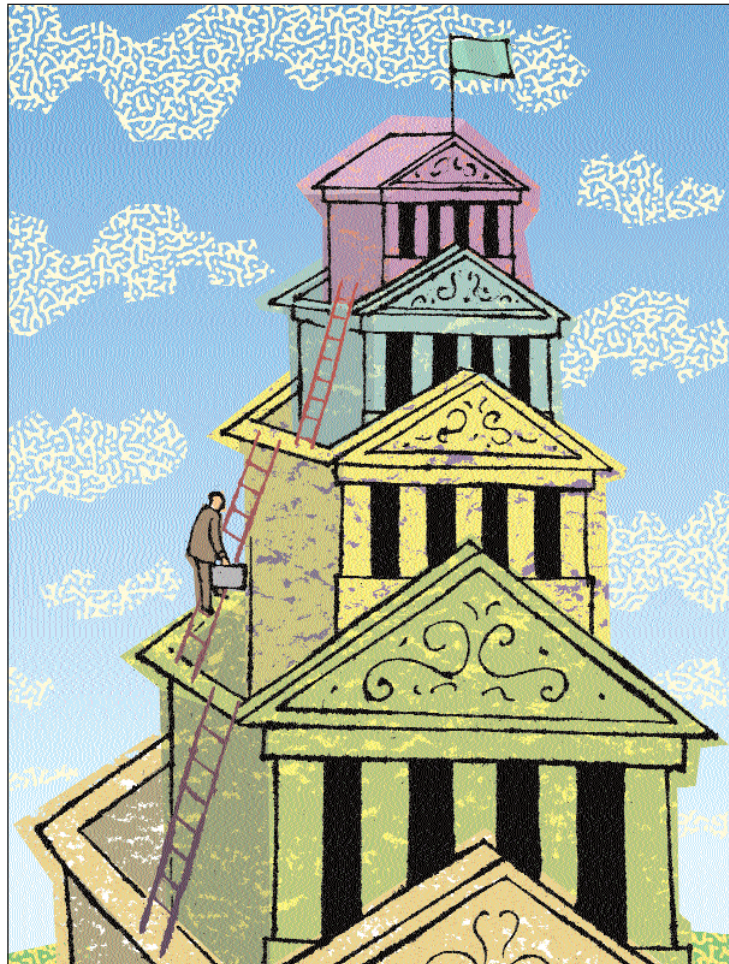
that explain their functions do not include the practice of law. Rep. Barbara Mobley (D-Decatur) is to be commended for expertly shepherding this bill through the legislative process.

HB 1582, Functions of Clerk's Authority: The Real Property Section's original proposal to limit the use of the \$5.00 real estate filing fee by the Superior Court's Clerk's Authority was addressed by this bill, which codifies the functions of the Authority. The compromises in this bill allow the Clerk's Authority extended temporary funding while providing some assurances that the funding will be used

for the indexing and images projects that benefit practicing real estate attorneys.

State Bar Bills That Did Not Pass

Ironically, the session's extraordinary length only worsened the usual last minute crush of legislation. Many meaningful bills, including



Dana Kull, Roger Martin and the Business Law Section. These bills seeking uniformity are generally more difficult to pass because the strength of uniformity is only enjoyed if the bill passes without significant amendment. For the second year in a row, the State Bar fought sustained efforts to amend its UCC initiatives. Our long-time

the following State Bar bills, died in the closing days of the session.

HB 1238, Identification of Bills for Treatment of Injury or Disease: This Tort & Insurance Practice Section proposal conforms the law relating to the identification of medical bills with the current evidentiary statute relating to the identification of medical narratives. The bill has passed the House and Senate Judiciary without controversy, but did not receive further action.

SB 393, Appellate Procedure Revision: This is the appellate procedure legislation recommended by our Appellate Practice Section and Chief Judge Blackburn of the Georgia Court of Appeals. The bill explicitly lists all known direct appeals in 5-6-34, amends O.C.G.A. 5-6-35 to include interlocutory appeals. The bill received a controversial amendment on the House floor and agreement between the various parties could not be reached in time for passage.

SR 600, Certification of Questions of Law to the Georgia Supreme Court: This proposed amendment to the Georgia Constitution would allow federal district courts to certify questions to the Georgia Supreme Court. The resolution was not placed on the House Debate Calendar by the House Rules Committee.

SB 383, Motor Vehicle Report Disclosure: The Tort & Insurance Practice Section withdrew this proposal to require local law enforcement to provide unredacted accident reports when law enforcement raised concerns about federal requirements to protect social security numbers. The issue will be studied further in anticipation of the next legislative session.

Major Issues on the Horizon

Two issues are looming on the horizon to be dealt with by the legislature and courts.

First, indigent defense is expected to be an important issue next year. The legislature must address the source of funding and the mechanism for delivery of services. This year, Speaker Murphy weighed into the debate with HB 1505 that would have dedicated 25 percent of local fines and forfeitures to indigent defense costs. The chief justice has a commission that is expected to make recommendations this summer.

Direct appeals in domestic cases are another issue that surfaced this year. The House tacked on floor amendments to at least two bills. The chief justice has promised to review the issue and make recommendations in time for next year's session. "The State Bar will be extremely active this year in anticipation of a monumental legislative session next year," said State Bar President Jimmy Franklin.

Appropriation Agenda Items

Judicial programs important to the Bar were spared the budget ax. The Georgia Indigent Defense Council received a total increase of \$900,000 in the FY 2002 and FY 2003 budgets. This brings the total FY 2003 spending to some \$6.2 million.

The State funding for the Georgia Court Appointed Special Advocates remained at \$1,095,000, the spending on Domestic Violence representation at \$2.2 million and the Appellate Resource Center held steady at \$800,000 for FY 2003. "We are grateful that the governor and

the legislature looked favorably upon our judicial programs in this very difficult budget process," said ACL Chairman Tommy Burnside.

Other Bills of Interest to the State Bar

In addition to implementing the State Bar agenda, the legislative representatives also tracked numerous bills relating to the practice of law. Several bills of interest passed, and now await the governor's signature. For example, House Judiciary Chairman Tom Bordeaux (D-Savannah) authored a bill that waives sovereign immunity of local government entities for injuries arising out of the negligent use of motor vehicles. Another interesting bill is HB 917 by Rep. Willard, which allows terminally ill parents to appoint a temporary "Stand-by Guardian" for their children. Senate Judiciary Chairman Rene Kemp (D-Hinesville) authored SB 517, which restricts the discretionary powers of a trustee who is also a beneficiary of the trust.

Bar Section Program

The Bar continues to rely on its Bar Section Legislative Tracking Program in which Bar section members monitor bills of importance to the Bar during the legislative session. Bar members tracked bills through the GeorgiaNet Web site, and numerous bills were sent out to the sections for review and comment. Our thanks goes out to all Bar members who provided timely responses to the legislative representatives regarding issues affecting the practice of law. "The participation of the various Sections is vital to the success of the State Bar legislative program," said Tom

Boller, legislative representative. "Their expertise gives us tremendous credibility as we present the State Bar's views to the legislature."

Conclusion

This has been another productive and successful legislative session for the State Bar. The State Bar thanks Speaker Tom Murphy and Lt. Gov. Mark Taylor, two lawyers who were once again supportive of the State Bar's legislative efforts. We also owe special debts of gratitude to the chairmen of the House and Senate Judiciary Committees, Rep. Tom Bordeaux (D-Savannah) and Sen. Rene Kemp (D-Hinesville), and Special Judiciary Committee chairs, Sen. Charles Tanksley (R-Marietta) and Rep. Curtis Jenkins (D-Forsyth).

The coming year promises to be a year of great challenges as simmering issues, such as indigent defense and domestic appeals, are debated. Changes will undoubtedly occur as the election year produces new members to the House and Senate. We encourage every State Bar member to participate in the State Bar's legislative activities by supporting candidates, making donations or even offering themselves as candidates. With the continued interest and participation of our members, we look forward to another successful year. 🍷

The State Bar of Georgia legislative representatives are **Tom Boller, Rusty Sewell, Wanda Segers and Mark Middleton**. Please contact them at (404) 872-2373 or (770) 825-0808 for further legislative information or visit the Bar's Web site at www.gabar.org. Bar members can track bills through the GeorgiaNet Web site at www.ganet.org/services/leg.



Session Notables

The following bills of interest passed in the 2002 session and await signature by the governor:

- SB 320: The Homeland Defense Act, authored by Minority Leader Eric Johnson (R-Savannah) enhances the penalties for domestic terrorism.
- SB 330: The Transportation Security Act, authored by Sen. Greg Hecht, creates state sanctions for crimes relating to airport security.
- SB 517: This bill, authored by Chairman Kemp, limits the powers of trustees that are also the beneficiaries of the trust.
- SR 520: This Resolution created a committee to study the public funding of judicial elections. An amendment to the resolution was passed, which places the State Bar president on the committee.
- HB 84: The Uniform Fraudulent Transfers Act passed the House last year and awaits the governor's signature after passage in the Senate. The bill modernizes the law relating to fraudulent transfers.
- HB 130: This bill would allow parties in litigation to disinter the bodies of decedents for DNA testing. The bill passed the House and Senate and awaits the governor's signature.
- HB 337: This bill dramatically impacts the process of private sales of tax liens.
- HB 1104: This bill, proposed by the Superior Court Clerks, extends by two years the sunset provision relating to the \$5 fee currently collected on real property filings.
- HB 1116: This measure allows the judge discretion in adding additional witnesses after a pretrial order has been entered. The substance of the bill was added as an amendment to SB 346.
- HB 1128: This bill, authored by House Judiciary Chairman Tom Bordeaux, addresses sovereign immunity issues related to municipal motor vehicles.
- HB 1320: This bill strengthens the continuance laws for legislators during the period that they are in legislative session.
- HB 1575: This bill would require juries of 12 when the damages claim is greater than \$25,000.

Historic Savannah Hosts the 2002 Spring BOG Meeting

By Joe Conte

Mixing business with pleasure isn't tough to do in beautiful Savannah, the site of the 185th meeting of the Board of Governors of the State Bar of Georgia. President James B. Franklin presided over a productive board meeting, which included action on the long-standing issue of indigent defense. In addition, attendees enjoyed the traditional Friday evening welcoming reception and a "Taste of the South" dinner event Saturday evening. The mild Savannah weather allowed for plenty of recreational activities to complete the weekend.

Sections

Highlights of the Board meeting included the approval of new logos for the Eminent Domain, Environmental Law and Family Law Sections, and a revision to the

bylaws for the Military/Veterans Law Section. A new Government Attorneys Section was formed in recognition of the significant number of attorneys engaged in government service. The purpose of this section is to provide a forum for government attorneys and to promote their interest before and participation in the State Bar of Georgia. Dues were set at \$10.

New Members/Appointments

The Board welcomed three new members. Tom Stubbs replaces Bryan Cavan as the Stone Mountain Post 6 representative. Cavan resigned that post to accept an appointment to Atlanta Post 31. For Brunswick Post 2, Alexander Johnson replaces Jim Benefield, who resigned as the representative. Judge Robert Mallis is the new representative to Stone Mountain Post 8, replacing Michael Sheffield. The Board unanimously approved the appointment of Rudolph N. Patterson to the Institute for Continuing Judicial Education



State Bar Past President Bill Cannon (left) and current President Jimmy Franklin visit during the "Taste of the South" dinner event Saturday evening.

Board of Trustees. He will serve a three-year term.

Rule/Bylaw Changes

Following a report by Aasia Mustakeem on the organization of the Bar, the Board approved two amendments affecting Bar elections. First, an amendment to Rule 1-304 requires a write-in candidate for the Board to declare his or her intent to run at least 10 days before the deadline to declare. An amendment to Bylaws Article VII, to conform the rules for electronic voting, was approved with one revision.

Indigent Defense

The Board, at the start of the Board meeting, adopted by majority voice vote a proposed special

order outlining the debate format of this topic. Following reports by C. Wilson DuBose and Terry Jackson, and subsequent floor debate, the Board voted to support the State Bar of Georgia Proposal in support of the Supreme Court Commission on Indigent Defense. The full text appears on page 31 of this *Bar Journal*.

Court Futures Committee

Judge Ben Studdard provided a report of the Court Futures Committee of the State Bar. The Committee concluded its Jury Initiative Pilot Project. The Project consists of eight initiatives. Judges were asked to implement the initia-

tives in all civil jury trials, then gather feedback from the participants at trial, particularly jurors. The purpose was to seek ways to improve juror satisfaction and improve the delivery of justice to litigants.

Following are the eight initiatives. The initiatives and a full digest of the feedback received on each is available on the State Bar's Web site at www.gabar.org.

1. Have counsel give a mini-opening statement prior to voir dire.
2. Allow use of juror notes during deliberations.
3. Provide the jury with written copies of preliminary instructions and the final charge.
4. Give the final charge to the jury prior to closing argument.

5. Strive to fully answer deliberating jurors' questions and meet their requests.
6. Encourage the parties in civil cases to consent to use six-person juries.
7. Upon prior consent of counsel, allow alternate jurors to participate in jury deliberations, but not to vote.
8. Upon prior agreement of counsel, allow civil juries to proceed with less than a full panel when one member is disqualified.

Multijurisdictional Practice Committee

Dwight J. Davis provided a report on the activities of the MJP Committee, including its Town



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Hall Meeting held April 5, 2002, in Savannah. Another Town Hall meeting is planned for 2 p.m. on June 14, as part of the Bar's Annual Meeting in Amelia Island, Fla.



Incoming State Bar President-Elect Bill Barwick and Judge Louisa Abbot mingle at the Friday evening welcoming reception.

Bar Center and Treasurer's Report

James B. Franklin provided an update on the Bar Center and tree appeal. Bar staff has moved into the building; however, leasing and renovations have been halted until the matter is resolved.



State Bar Deputy General Counsel Paula Frederick (left), BOG member Joseph Roseborough (center) and Cliff Holt, of Insurance Specialists Inc., share a laugh during the Saturday evening dinner.

George R. Reinhardt Jr. provided an update on the State Bar Building budget and provided the Income Statement by department for the seven months ending Jan. 31, 2002.

YLD Report

Peter J. Daughtery reported on the various activities of the YLD including two American Bar Association (ABA) grants recently awarded to its Advocates for Special Needs Children and Minorities in the Profession Committees, the Aspiring Youth Program Committee's after-school programs, the community service project in conjunction with the Spring meeting, and the Great Day of Service.

Advisory Committee on Legislation

Thomas R. Burnside Jr. provided an update on the Bar's legislative agenda. A recap of this year's session is on page 24 of this *Bar Journal*.

2002 Annual Meeting

James B. Franklin highlighted the activities scheduled for the 2002 Annual Meeting, June 13-16, at Amelia Island Plantation, Amelia Island, Fla.

ABA Update

J. Douglas Stewart provided a report on the legislative and



BOG member Dennis O'Brien (center) with his wife, Hedwig (left), and Bonne Cella (right), from the State Bar's Tifton office, pose during the meeting.

governmental priorities adopted at the February 2002 ABA Board of Governors meeting. In addition, he reported that Paula Frederick of the State Bar of Georgia Office of General Counsel has been nominated to the 37-member Board of Governors of the ABA. She will be elected at the August meeting in the woman-at-large position. Stewart is the Board nominee from Georgia's district and will become one of the 18 district representatives. He will also be elected at the August meeting.

Lawyers Foundation of Georgia

Lauren Barrett provided a report on the activities of the Lawyers Foundation of Georgia, including a grant to the Atlanta Voluntary Lawyers Foundation for firefighters and police and the annual Service Juris project for which volunteers are still needed. Contact Lauren Barrett for more information at (404) 659-6867 or via e-mail at lfg_lauren@bellsouth.net.

Joe Conte is the director of communications for the State Bar of Georgia.

Board Approves Indigent Defense Proposal

Following is the full text of the indigent defense proposal passed by the Board:

STATE BAR OF GEORGIA PROPOSAL IN SUPPORT OF SUPREME COURT COMMISSION ON INDIGENT DEFENSE

WHEREAS, the Georgia Supreme Court's Commission on Indigent Defense was created for the purpose of evaluating Georgia's indigent defense system and recommending needed improvements to that system; and,

WHEREAS, the Commission is presently conducting the fact finding phase of its evaluation and has invited interested persons and organizations from throughout the state to present their respective views on the reform of Georgia's indigent defense system prior to the Commission's preparation of its final report and recommendations; and

WHEREAS, the State Bar of Georgia endorsed the creation of the Commission as the proper method for evaluating Georgia's indigent defense system; and

WHEREAS, the Board of Governors and various committees of the State Bar have held discussions and meetings regarding the work of the Commission and proposals for reforming Georgia's current indigent defense system; and

WHEREAS, the State Bar of Georgia, through its Board of Governors, should provide leadership and guidance in matters affecting Georgia's criminal justice system, especially when the protection of important constitutional rights, such as the right to effective assistance of counsel and the right to a fair trial, are at stake.

NOW, THEREFORE, the State Bar of Georgia, through its Board of Governors, expresses its strong support for the work of the Supreme Court's Commission on Indigent Defense, and respectfully

requests the Commission to consider the following conclusions and recommendations as part of its evaluation of Georgia's indigent defense system:


Indigent defense is a constitutionally mandated public responsibility.

Indigent defense is a state responsibility, and should be fully funded by the state at a level that adequately protects the constitutional right to effective assistance of counsel in criminal proceedings.

In order to ensure a uniform quality of representation throughout the state, Georgia should adopt a public defender system, organized by judicial circuits, that relies upon appointed counsel for conflict and overflow work and is subject to discernable professional standards administered uniformly on a statewide basis by an independent oversight commission. The commission should be authorized to permit judicial circuits to implement alternative delivery systems if the commission determines that the alternative system is designed to meet or exceed the quality of indigent defense representation provided by public defender systems and that the alternative system complies with all applicable uniform state standards relating to indigent defense representation.

The process for selecting and compensating indigent defense counsel should assure that indigent defense counsel and prosecutors are comparably compensated and that indigent defense counsel are accorded the same degree of professional independence as that of privately retained criminal defense counsel.

Indigent defense counsel should be provided investigators, paralegals and expert witnesses necessary to make an independent assessment of the case and to assure fairness and due process throughout each stage of the proceeding.

Georgia should provide indigent defense counsel in capital post conviction proceedings and in other post conviction proceedings that involve a sentence of life or other substantial period of imprisonment. 

An Annual Rendezvous for a Fifth of a Century:

The American Law Institute and the State Bar of Georgia

By Dorothy Toth Beasley

On Feb. 26, 2002, the 20th Annual Breakfast, co-sponsored by the American Law Institute (ALI) and the State Bar Judicial Procedure and Administration Committee, was held at the Commerce Club in Atlanta. Highlighting the event was Michael Traynor, president of the ALI, who is a partner in the San Francisco law firm Cooley Godward LLP, where he specializes in intellectual property, business and First Amendment litigation. Traynor also serves as a mediator in the federal court in San Francisco and has served as adviser on a number of ALI restatement projects. Among many other contributions to the development and practice of the law, Traynor teaches periodically at the School of Law (Boult Hall) at U.C. Berkeley.



Pictured (left to right): Dorothy Toth Beasley, senior judge, State of Georgia; Michael Traynor, president, The American Law Institute; Janice Griffin, dean, Georgia State University College of Law; R. Lawrence Dessem, Walter F. George School of Law, Mercer University; and Thomas W. Malone, chair, State Bar of Georgia Judicial Procedure and Administration Committee.

The evening before the breakfast, Traynor was entertained at an elegant dinner in his honor at the home of Debbie and Tommy Malone, with judges, lawyers, law professors and spouses in attendance. Malone is chair of the State Bar of Georgia co-sponsoring committee. Earlier that day, Traynor spoke to the contracts class of Professor Marjorie Girth at

the Georgia State University College of Law, had lunch with Dean Janice Griffin and others from the law school, and enjoyed a tour of the new Federal Reserve Bank of Atlanta, arranged by Senior Vice President and General Counsel Richard A. Jones and conducted by Jess Palazzolo, public information director.

President Traynor's intriguing topic at the breakfast was "That's Debatable: The ALI as a Public Policy Forum." He reviewed several historic ALI debates and considered issues involving the ALI as a public policy forum. His starting point was "the working formula" for the ALI, as penned by former Director Herbert Wechsler: "We should feel obliged in our deliberations to give due weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."

Director Wechsler's statement "made it clear that the ALI, like the courts, need not be bound by a mere preponderance of precedent in restating the law," said Traynor. Accordingly, for example, in the Restatement Second of Torts, the ALI approved the minority principle of strict liability to persons other than users and consumers for defective products. Case law developed along this line, leading to the adoption of the principle in the Restatement Third. Although efforts to reform product liability law were made in Congress, they repeatedly failed. The ALI became "the vital national forum for the

resolution of various issues of products liability," Traynor noted.

Perhaps the work of the ALI bears on the development of public policy in part because of the public roles, which many of its members undertake. Traynor pointed out

The ALI became "the vital national forum for the resolution of various issues of products liability," Traynor noted.


that in 1978, for example, those elected to the ALI Council were Ruth Bader Ginsburg, Louis H. Pollak, Patricia M. Wald and William H. Webster.

The restatements, Traynor said, "now reflect significant and substantial statutory material as building blocks in the evolution of the common law." He gave as an example the Restatement Third, Unfair Competition, which integrates both strands of law. He explained that the precedents, whether judicial or statutory, are

part of the raw material the ALI tried to synthesize.

Other examples of debates, which drew in public policy, were presented, such as the wait-and-see approach to the vesting requirement of the Rule against Perpetuities, and public nuisance in the law of torts for private redress and not just in the public criminal law. These, and the 1959 debate concerning the roles of judge and jury in the law of capital punishment, illustrated what Traynor concluded with: "A precious resource of the Institute is its ability to apply deliberative processes to the central object of clarifying and simplifying the law and adapting it to

social needs." (An annotated version of the speech may be found at www.ali.org.)

A report on the meeting would not be complete without acknowledging the expert facilitation of arrangements by Michelle Priester, State Bar of Georgia director of meetings, and Helene Cohen and Jane Giacinto of the ALI in Philadelphia. 

Dorothy Toth Beasley is a senior judge for the State of Georgia.



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Equitable Division

By Stephen L. Berry

Denise Hardigan stared at her husband and came to the same conclusion she'd arrived at months before.

He would make a handsome corpse.

Frank was six foot one, with a pair of warm green eyes she'd admired from the first day they met, eight years ago. They reminded her of her father's, that indifferent soul who'd cared far more about the weather for weekend fishing than he did for his three daughters. Her husband's tawny

mane was also a lot like her long-dead daddy's, the tips flecked with gray, the strands now curling in the moist sea air.

His face was striking, the features seemingly chiseled into a canvas of deeply tanned skin. His expression always conveyed a solemn sense of authoritativeness, one she'd immediately liked. Edgar Reubens, owner and operator of Reubens & Sons Funeral Home, Cobb County Georgia's largest mortuary, was going to have an easy time preparing the body. There'd be no wounds to mask with make-up. No teeth to replace. No bones to reset. She was intent on him looking quite proper framed out by an expensive bronze casket. She'd spend three thousand dollars. No. Four would be better.

She'd wear the black Donna Karan dress bought at Saks Fifth Avenue last summer when they'd spent four days in New York. A lace veil would shield her face and she'd force herself to cry uncontrollably. For effect she'd toss herself on the coffin as old Edgar hinged the lid closed and she'd cry out in desperation on the trials and tribulations that the blessed Lord had unwittingly forced upon her.

In short, she'd do everything a bereaved widow was expected to do.

Everything the people of Georgia would want to see from Mrs. Frank Hardigan, the wife of a justice to the Supreme Court of Georgia. The press loved a lively funeral and she'd make sure her dear departed husband's was one to remember. It was the least she

ANNUAL FICTION WRITING COMPETITION

The Editorial Board of the *Georgia Bar Journal* is proud to present "Equitable Division," by Stephen L. Berry of St. Marys, Ga., as the winner of the *Journal's* 11th Annual Fiction Writing Competition. In addition, the *Journal* would like to recognize the contest's runner-up, "Mrs. Palsgraf's Dream Team – A Play in One Act," by Henry W. Kimmel of Decatur, Ga.

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

could do for him. But she was getting ahead of herself.

First things first.

She turned toward Frank and said, "Darling, could you help me with my air tank?"

Before Frank could respond to her plea, one of the chocolate-brown deck crew shot over, lifted the steel cylinder, and slid the coarse black straps over her shoulders.

"Thank you, son. Careful now, my shoulders are a little red."

The boy gently settled the backpack down on the dive cozumel T-shirt that sheathed her thin frame. She adjusted the waist belt and turned to her husband. "You need to move faster."

Frank smiled back and she caught a glimpse of his pearly white teeth in the bright moonlight. They glowed with an almost fluorescent shine, like the wax ones kids wore at Halloween. "Those boys just know what it takes to garner a good tip. If I received a dollar every time sometime shouted my name, I'd hustle too."

She turned to her young helper. "Son, could you put those bags somewhere for me so they won't get wet?"

"Yes, ma'am. They'll be in the forward cabin when we get back to shore."

The boy grabbed the green plastic shopping bags and scampered toward the front of the boat. Before they'd left the dock, while waiting for darkness, she'd done a little shopping in San Miguel, particularly enjoying the Ralph Lauren store where she filled three sacks with Polo clothes for herself and Frank.

Frank drew close, adjusting the straps to his own tank. "He'll want more than a couple of dollars when we get back to the dock."

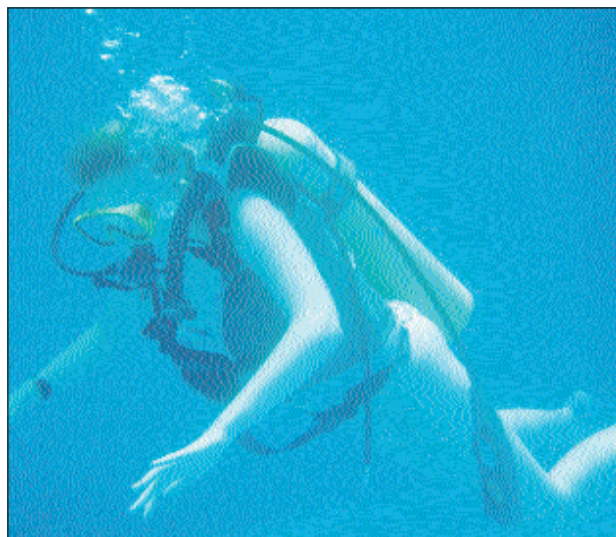
"And you'll give them to him. After all, what are loving husbands for?" She planted a soft peck on his two-day stubble. One of the luxuries of a vacation, Frank liked to say, was not having to shave. Supreme Court Justices were expected always to look their best, but being nearly two thousand miles from home came with certain intangible privileges.

She grabbed her mask and fins from the bench and again surveyed the boat. Her best estimate was that the vessel stretched forty feet. Its open decks and benches were specially outfitted to accommodate divers and their bulky equipment. Three crew members and a dive master rounded out the boat's complement, and she watched as everyone busily prepared themselves for night diving.

"While you suit up, let me go over the routine," the dive master said from the stern.

He was a burly, oversized American with thick, sun-burnished blond hair. He looked about forty and doled out his words in a heavy Dixie drawl. She wondered if the accent was real or part of an act to make the tourists feel at home.

"Ya'll are in for a treat. Usually May here in Mexico is full of storms, but its gorgeous tonight. We're about two hundred yards off the southwestern tip of Cozumel. The bottom is sixty feet down. I'll go first. After everybody gets in the water, I'll count heads, then we'll move out. At tonight's depth you've got about forty minutes of bottom time without having to



worry about a decompression stop on the way up. Be conscious of your time. Start for the surface after thirty-five minutes. I'll remind you by flashing my blue light at the half hour mark. Any questions?"

"What about the terrain?" asked a middle-age man in pink bathing trunks.

"We're anchored over one of the most beautiful spots in the world. The locals call this section of the reef Santa Rosa. Big mounds of coral everywhere. Lots of caverns and tunnels full of stuff. Don't be bashful. If you find a big opening, swim in and have a look."

The dive master continued his orientation. While he spoke, she again studied the assortment of people on board. She'd listened intently to the chitchat on the cruise out. Several of tonight's participants had accompanied them the past two days, apparently also booking the four-days-and-three-nights-dive-Cozumel-tour through their own travel agents. Four hundred and fifty dollars, including air fare and two meals a day. Not bad. A real bargain if recreation and relaxation was what a person sought.

There was an Illinois doctor, perhaps a surgeon from what little she'd overheard, who was at least

She stopped and shined her light inside. It was a tunnel. Thirty to forty feet long, her light fading into blackness on the far side.

sixty, along with his trophy wife. A car salesman traveling alone from Pennsylvania or New Jersey, she could never learn for sure. A group of young, bearded Canadians who chatted incessantly, mostly in French. A couple from Alabama, on their first trip out of the country and not enjoying Mexican hospitality. And six college kids from Minnesota who definitely were savoring the tropical heat. One in particular caught her eye. His washboard tummy was flat and hard and his genitals bulged through a skimpy piece of black nylon, the kind she'd seen in the mall that came in clear plastic cylinders and could easily be mistaken for a head band.

"See you on the bottom," the dive master said as he finished his spiel.

Frank stepped close, mask and fins in hand. "Should be fun."

She smiled at him. "You keep an eye on me, okay?"

He wrapped an arm around her waist and hugged her. She nestled her head into his shoulder and savored the feel of his warm body. She watched as the dive master stepped onto the platform and jumped from the stern. A light suddenly appeared, then faded in the dark transparent water. One by one others followed.

At their turn, she and Frank eagerly stepped off.

She started her descent and remembered what she learned three days ago about the strong underwater currents. As streams blew in from the open Caribbean a steady flow of warm water

followed, so her changing depth had no effect on temperature. Fifty feet felt the same as ten. And the clarity was unsurpassed. A trans-



parent, tepid aquarium, available for viewing to anyone with four hundred and fifty dollars, air fare and two-meals-a-day included.

On the bottom the dive master counted heads and signaled if each person was okay. She and Frank carried a main light and backup, all provided by the tour. The moon added an additional degree of comfort, along with an easy point of reference. She took a moment and glanced up. A pockmarked lunar disk rippled over the surface.

Movement out of the corner of her eye caught her attention. The dive master was leading the way into black ink. Frank kicked his fins and followed and she fell in behind. Their combined lights slowly brought the spectacle into focus and she saw they were in a valley between two gigantic coral mounds, each rising at least thirty feet, a miniature Grand Canyon at the bottom of the Cozumel Straight. She checked her depth gauge. Sixty feet and dropping. Her compass indicated they were moving west, away from shore, toward the open channel.

After a short swim the dive master stopped and indicated this was the designated area. He signaled for the group to fan out and explore.

Frank needed no further prodding and immediately led the way. She liked that about him. He was a take-charge-kind-of-guy. A local cracker, born and bred in Bainbridge, Georgia. Well respected. A major player in the State Bar of Georgia. A close friend of the Governor. An Associate Justice for the past twelve years and leading candidate to become chief justice next year.

They negotiated a narrow passage between two coral walls. She traced the escarpment upward and calculated the precipice reached half way to the surface. Its face was a rutted mass of coral polyps. Purplish sea fans dotted the sides and swayed in the current like leaves bending in a breeze. A few of the other divers approached from behind, their lights setting the scene ablaze. Tropical fish smeared in scarlet, sapphire, and gold drifted in every direction, some feeding, others suspended trance-like, apparent-

ly out for the night. Crabs hustled like roaches and Frank's light caught a glimpse of an octopus sweeping across the sandy bottom, its color constantly changing in camouflage.

Frank kicked in pursuit.

She followed and deliberately slowed her progress, giving the others time to swim ahead. She then thrust her fins forward against the canyon wall and stared a moment longer at the rainbow of coral feasting on a steady stream of microorganisms brought by the warm current, the colorful hues starkly illuminated against a caliginous sea. The whole thing had the look and feel of an Impressionist painting, surely calming and comforting, and hopefully distracting.

She continued to drift along the wall and, as the dive master predicted, periodically there were openings. Some were small — no more than a foot or two across — mere crevices and indentations. But some were larger. Suddenly, she came upon a huge one.

She stopped and shined her light inside. It was a tunnel. Thirty to forty feet long, her light fading into blackness on the far side. She judged the diameter at eight to ten feet, the inside teeming with crabs and fish. Swaying sea anemones made the walls look alive. She tested the bottom. The silt should not cloud visibility. She turned toward Frank and motioned with her light. His gaze locked on hers and she pointed, asking if they should swim through.

He nodded.

She knew him well.

She fell back and let him take his familiar place in the lead. She took the opportunity to glance behind. The lights of the other divers drifted in the distance, the distinctive blue tint of the dive master's nowhere nearby.

They were alone.

Finally.

She kicked her fins and followed her husband inside.

Frank floated weightless in the crystal clear water. He purged air from his buoyancy vest and slowly descended, landing on bare knees, a cloud of silt rising then drifting away. He traced the path of another octopus with his light and she used the distraction to move close, careful to blend her light with his so nothing betrayed her movements. She settled on the soft sand, fixing her eyes on his head, then gently grabbed the black knob that opened and closed his air tank. She twisted the narrow threads clockwise, closing the valve. She'd practiced with a similar knob for weeks and knew eight turns would be required to fully close.

Conscious of that fact, she halted her effort at six.

Frank's body swayed in the gentle current, and he seemed totally unaware of any contact. She timed her movements well since, just as she withdrew her grip, Frank swam forward into the heart of the tunnel. She took the opportunity to glance back one last time, blackness outside confirming they were still alone.

A hiss vibrated the water as Frank added air to his buoyancy vest. She refocused on him and watched as he flattened his body and floated up, his light fixed ahead on a group of feeding crabs. She maneuvered back into position and, as Frank concentrated on the spectacle, reached again for the valve.

But just as she made contact, he lurched forward with a suddenness that startled her.

Frank's body swayed in the gentle current, and he seemed totally unaware of any contact.

She jerked her arm away, wondering what he was doing. His air valve was open. His breathing was, as yet, unobstructed. A second later she realized that her unsuspecting husband had merely swum farther into the tunnel, a little closer to the fleeing crabs who continued to hold his undivided attention.

She propelled herself back into position behind and slightly above him. This time, without delay, her hand moved to the knob.

Three seconds and the final two turns were made.

She immediately pushed on the water and propelled herself back, listening as he sucked his last breath. Bubbles rumbled out the side ports of his regulator and percolated to the tunnel's roof.

He then tried to take another breath and instantly rolled over when nothing was there. He frantically slashed his right index finger across his neck, the universal signal that his air was gone. All of the training taught four years earlier when she became a certified diver

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required her to spring to his aid and share a regulator. They would each take repeated breaths and slowly make their way to the surface, one arm intertwined around the other forming a single unit of cooperation. The buddy system at its most prodigious self. The kind of hero story dive magazines liked to proclaim while at the same time hocking ads for overpriced equipment and four-hundred-and-fifty-dollar dive packages, meals and air fare included.

But she did nothing.

Instead, she simply sought comfort within the warm blanket of water that enveloped her. Yet a chill suddenly swept past, one that made her spine shiver. Was that Frank's fear rushing by as he finally realized his fate?

He kicked toward her and she pushed herself back. She pointed her light toward him. He shielded his eyes from the bright glare and tried again to signal that his air was gone. The confines of the tunnel provided little room to maneuver. Frank was a trained diver and a good swimmer — he'd been in the Navy — and if this was open water he might have made it to the surface. But the element of surprise and the choice of location gave her all the advantage.

A few seconds later his movements stopped.

She waited. He had to be dead. No chance for revival. No CPR by that damn Illinois doctor. No heroics from the dive master. Just a corpse Edgar Reubens could dress and decorate for fools to gawk at.

After nearly a minute, and before the current moved the body toward the tunnel's exit, she swam close and shined her light into his mask. A wild look of terror stared back from his open eyes. For an instant she thought him alive, but there was no blinking, no pupil contraction, nothing. Strangely, the horrified gaze did not frighten her, and all she could recall was how those eyes once viewed her with love.

She rolled his body over and reopened the air valve. She then reached up to remove the regulator from his mouth, but stopped. Instead, she purged the mouthpiece by simply pressing the button in front. A burst of bubbles exploded from the exhale ports and out the sides of Frank's mouth, the air having nowhere to go in his lifeless throat and lungs.

She savored one last look inside the mask. No remorse. No guilt. Just a sense of relief.

Marriage number two was over.

The private investigator she'd hired three months back had proven invaluable. His discreet reports made clear that this would have been her last trip as Mrs. Frank Hardigan. Her husband had already retained a lawyer and was preparing to file for divorce. Though their marriage produced no children, the seven-year union had generated some valuable real estate purchases, a substantial stock portfolio, a respectable amount of jewelry, and most sacred, two tickets to the Masters. Nearly six million dollars in assets, all held jointly with rights of survivorship.

She'd made sure of that.

Being a lawyer herself helped. A divorce lawyer actually. A partner in a respectable downtown Atlanta firm.

Unfortunately, Frank had been uncharacteristically diligent. He'd hired his own private investigator and learned about her several affairs.

That would have been a problem at trial.

Unfortunately, too, Frank had also remained monogamous. The irritating bastard had not strayed once.

That too would have been a problem.

Georgia has never subscribed to a community property theory regarding assets acquired during a marriage. Our principles are governed by equitable division. The trier of fact is free to divide assets and liabilities as appropriate to the conduct and contribution of the parties.

Frank himself laid out that legal principle in *Ruffin v. Yates*, a case which involved another second marriage and another cheating wife.

She knew the decision well. That wife received little in the way of equitable division.

One other principle of Georgia law, though, was clear. If two parties own something jointly with a right of survivorship, at the death of one the other would own the property entirely. No questions asked. No legal challenges. Just sole ownership.

She stared again at Frank.

A joint owner no longer.

He'd agreed to the Cozumel trip without much debate. Surely a way for him to physically enjoy her one last time. After all, sex had never been a problem for them. She'd encouraged the excursion as some quality time between the high

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court's sessions where they both could unwind. Just a long weekend in Mexico — scuba diving and sex — who could resist?

When they returned to Atlanta there would have been the inevitable meeting. Probably his lawyer coming to her office and discreetly informing her of the information they possessed and suggesting an amicable divorce. Because of Frank's position on the Supreme Court, and her partnership in a firm always sensitive to image, the best course was the quiet course. A small cash payment would be offered to satisfy her immediate needs, but she'd be expected to support herself on her six-figure salary. Forget about the millions in assets, most of which she accumulated since Frank was financially challenged simply by the balancing of his checkbook. Don't concern yourself with alimony or any type of substantive property settlement, the publicity wasn't worth it. Watch the Masters on television, CBS does a great job with their telecast.

In short — no equitable division.

Just a simple, uncontested divorce accompanied by a press release that the parties 'are saddened by the dissolution of their marriage but are intent on remaining friends.' The type of words expected when a public official — especially a justice of the state's highest court — was involved. Enough information to dispel unseemly rumors.

But none of that carefully choreographed staging was to be. Her marriage was over, the equitable division one hundred percent.

To her.

She nearly smiled, but caught herself. There'd be time enough later for accolades.

So she waived goodbye to Frank.

A casual flip of her hand to a man that had proven a great disappointment. A tiny part of her would miss him. Weak men were easy to control. Weak men who thought themselves smart were even simpler to dominate. And weak men who believed themselves clever were the frailest of all.

None of them ever realized their vulnerability.

Like tonight.

She swam through the tunnel into open water. The dive master's blue light was off in the distance. Frantically, she waved her light in the darkness and attracted the attention of other divers.

Lights started heading toward her.

Good.

Frank needed help. 



Stephen L. Berry is a 1980 graduate of Mercer University School of Law. Prior to attending law school, Berry attend-

ed Valdosta State College, where he earned a bachelor's degree in political science. Since 1980, Berry has been in private practice in St. Marys, Ga. He also served on the Camden County Board of Education and is presently chairman of the Camden County Board of Commissioners. Berry has been writing since 1990 and has recently sold two novels to be published by Ballantine. Berry was also the winner of the *Journal's* 10th Annual Fiction Writing Competition for his story, "The House."

**PostScript Picture
West Group Ad p39.EPS**

Mrs. Palsgraf's Dream Team – A Play in One Act

By Henry W. Kimmel

(A store-front law office. Long Island, New York. A cold autumn day, 1924. A MIDDLE-AGED WOMAN sits beside a desk. A YOUNG LAWYER paces.)

LAWYER And then you said a scale tipped over and hit you on top of the head?

PALSGRAF That's right.

LAWYER A scale?

PALSGRAF Uh huh.

LAWYER One of those big scales that you weigh yourself with?

PALSGRAF A penny scale.

LAWYER At the East New York train station?

PALSGRAF On the platform.

LAWYER It tipped over and hit you on top of the head?

PALSGRAF You don't believe me?

LAWYER It's not that I don't believe you. It's just that the whole thing seems...

PALSGRAF Far-fetched?

LAWYER Let me get this straight: You're waiting for a train at the East New York station.

PALSGRAF Yes.

LAWYER A Sunday.

PALSGRAF The holiest day of the week.

LAWYER Two men are running to make another train.

PALSGRAF Italians.

LAWYER The doors to that train are about to close, so the conductor pushes these men onto the train. As the conductor pushes, he knocks a package from one

of the men. The package falls on the track. It apparently...

PALSGRAF ...Not apparently, it...

LAWYER ...contains fireworks. When the train goes, it runs over the package, causing an explosion and a stampede of people that tips over a scale at the point of the platform where you and your daughter are waiting to go to the beach.

PALSGRAF Yes, that's exactly what happened!!

LAWYER It certainly wasn't intentional, and I'm not sure you can say it was negligent. The explosion would seem to be the proximate cause of your injuries, but you were outside the orbit of danger, and I'm not sure that a judge would say that the railroad had a duty to you.

PALSGRAF I don't know what you just said.

LAWYER I feel bad that you're hurt, but...

PALSGRAF What?

LAWYER I'm not sure I can help you.

PALSGRAF Is it because I'm a cleaning lady?

LAWYER No.

PALSGRAF Then why not?

LAWYER I don't know if I have the resources to help you.

PALSGRAF "Resources"?

LAWYER This morning I had to take two paper clips from the bank — not that I don't intend to replace them, it's just that payments are slow coming in, and I've got to make sure I don't over-extend myself.

PALSGRAF In other words, you don't think you could win.

LAWYER We're talking about a tenuous chain of events.

PALSGRAF Not too "tenuous" or it wouldn't have happened.

LAWYER Still...

PALSGRAF (interrupting)
The conductor was the one who pushed the men who dropped the fireworks that caused the stampede that knocked over

the scale that hit me on top of the head and prevents me from "consorting" with my husband.

LAWYER "Consorting" with your husband?

PALSGRAF It means...

LAWYER ...I know what it means.

PALSGRAF Then why can't you do something about it?

LAWYER You would think I could, wouldn't you?

PALSGRAF You strike me as a very intelligent boy.

LAWYER I'm not as intelligent as you think.

PALSGRAF You're a lawyer, aren't you?

LAWYER Yes, but not all lawyers are smart. In fact, some of them are pretty dumb.

PALSGRAF Then it's a good thing I came to you.

LAWYER Mrs....

PALSGRAF Palsgraf.

LAWYER I think you'll be better off going to one of those big firms up the street.

PALSGRAF I don't want one of those big firms; I want you.

LAWYER That's very flattering, but there's a firm up the street that does personal injury cases — (writing it down) Gumbert, Handfinger & Kaplan. They're well-dressed, they golf with a lot of judges, and they all went to good schools. Here's their address. And here's my name and number. When you get



there, you might say I referred you to them. They may not know who I am, but you can tell them I'm the young lawyer with the store-front office on the boardwalk. One block over from the train. And please remind them that I'm specializing in residential house closings — nothing that'll conflict with their general practice.

PALSGRAF You're kicking me out?

LAWYER I really need to get on with the business of things.

PALSGRAF Business?

LAWYER You see that woman standing outside my window? She wants to come in, but she thinks I'm busy.

PALSGRAF You're going to help her but not me?

LAWYER (to the woman outside the window)
Ma'am. It's okay. You can come in. I'm not busy.

(The woman, unseen to the audience, walks away.)

LAWYER Nuts. They always walk away when I approach. Maybe it was a mistake to get an office on the boardwalk. All I seem to attract are curiosity seekers who want to see a lawyer in action — as if there's a lot to see. Maybe I should get a shade — or an office in a high-rise facing the ocean. Or maybe I should

hook up with another lawyer. A secretary. A paralegal. A clerk. Anyone who'd realize that in 30 years this place is going to be one big subdivision.

PALSGRAF I don't think it helps that you're located between the Ferris Wheel and a Palm Reader. The first time I went by, I thought you were with the carnival.

LAWYER Mrs.....

PALSGRAF Palsgraf.

LAWYER I don't mean to be rude, but could you leave?

PALSGRAF Leave?

LAWYER I need people to think I'm free. It's nothing personal — in fact, it may be good for people to see me talking to a prospective client — but the 4:15 is about to arrive from the city and maybe, with good fortune, I can hook in one of the passengers....Here's your coat. I appreciate the chance nevertheless.

PALSGRAF I'm not leaving.

LAWYER Excuse me.

PALSGRAF I'm not leaving until I'm convinced you can't help me.

LAWYER I said...

PALSGRAF I don't care what you said. You're a lawyer, aren't you?

LAWYER Specializing in house closings.

PALSGRAF Bah!

LAWYER It pays the bills.

PALSGRAF So does mopping the floor.

LAWYER I don't have to take any case I don't want — especially if someone up the street can do a better job.

PALSGRAF Who says they can do a better job?

LAWYER Just walk into their office and tell me you're not impressed. They have an autographed picture of Judge Cardozo — and Judge Stevens.

PALSGRAF That means absolutely nothing to me.

LAWYER Once they get involved in your case, it will.

PALSGRAF And how can you be so sure they'll want me?

LAWYER Mrs...

PALSGRAF Palsgraf. Helen Palsgraf. Why can't you remember my name?!

LAWYER You see that couple outside my window? It would be good if I could go out to greet them. Because, let's face it, a lot of lawyers do house closings, and I need to do everything I can to get business.

PALSGRAF Fine. Invite them in. I don't care.

LAWYER You're just going to sit there?

PALSGRAF Yes.

LAWYER For how long?

PALSGRAF For as long as it takes.

LAWYER What?

PALSGRAF A satisfying response.

LAWYER Hey, I'm not saying don't come to me when it's time to buy a house.

PALSGRAF All right. Fine. I'll leave. (She takes her coat.) But I'm going to sit on that bench and tell anyone who comes up to your window what I think about you — which isn't very much.

LAWYER Excuse me.

PALSGRAF I'll tell them to go up the street. To a better lawyer.

LAWYER Wait a minute. You're gonna sit in front of my office and tell people to go away?

PALSGRAF Yes.

LAWYER I'll report you to the police.

PALSGRAF What for?

LAWYER Defamation.

PALSGRAF I'll be telling the truth.

LAWYER Trespassing.

PALSGRAF The sidewalk is on public property.

LAWYER Then I'll report you for being a public nuisance.

PALSGRAF Fine. Report me to the police. But I'll make such a fuss that everyone will know you're not a very good lawyer.

LAWYER Don't open that door.

PALSGRAF Then you're ready to talk about my case?

LAWYER Sit.

PALSGRAF You mean it this time?

LAWYER Mrs. Palsgraf. If I can show you that I am not the right lawyer for this job — or, conversely, that your case is without merit — will you then leave without saying anything to anyone outside my door?

PALSGRAF All right. Fine. It's not exactly what I'm looking for, but at least I'm starting to get someone's attention.

(She sits.)

LAWYER Coffee?

PALSGRAF Only if it's strong.

LAWYER I can't promise you anything — but if you don't like it, you don't have to drink it.

PALSGRAF Is the mug clean?

LAWYER Yes, Mrs. Palsgraf.

PALSGRAF It doesn't look clean.

LAWYER Then I'll put it into this glass — and don't say the glass isn't clean because I'm borrowing it from the diner.

PALSGRAF Isn't that theft?

LAWYER Do you want cream and sugar?

PALSGRAF I want it black.

LAWYER Yes, Mrs. Palsgraf.

PALSGRAF And make sure it's hot, but not too hot.

LAWYER I think I can handle a cup of coffee.

PALSGRAF You don't strike me as the most confident person in the world.

LAWYER It's a big thing to sue the Long Island Railroad — especially at a time when the government is doing everything possible to help trains.

PALSGRAF To me, that would be more of a reason to go after them. To show them that they can't take our safety for granted.

LAWYER You think it's their fault you got trampled?

PALSGRAF When you put too many people on a train, bad things are going to happen.

LAWYER Bad, but not foreseeable.

PALSGRAF And what's that supposed to mean?

LAWYER You can't expect the railroad to be responsible for everything that might happen.

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PALSGRAF We're not talking about a hurricane.
LAWYER Only something less likely.
PALSGRAF Less likely, but within their control.
LAWYER Debatable.
PALSGRAF But arguable.
LAWYER Assuming you've got the resources.
PALSGRAF Why don't you just say money?
LAWYER Because I'm not talking about money. I'm talking about litigating a case against a company that has a full-time legal staff consisting of the best graduates of the best schools.
PALSGRAF And you don't think you're up to that?
LAWYER I'm not sure I can afford to work on a contingency.
PALSGRAF How do you expect to go anywhere if you're not willing to take a chance?
LAWYER I've got a wife and a child. A mortgage. Vacuum cleaner payments.
PALSGRAF I've got three children and a husband out of work. I use a broom. It doesn't prevent me from standing up for my dignity.
LAWYER This is my first time making coffee. I hope it's okay for you.
PALSGRAF It needs to be stronger.
LAWYER You haven't even tasted it.
PALSGRAF I can tell.
LAWYER Mrs. Palsgraf.
PALSGRAF You're not listening to me.
LAWYER I'm afraid this is the best I can do.
PALSGRAF And I'm afraid that it isn't.
LAWYER I told you I'm specializing in house closings.
PALSGRAF Something safe?
LAWYER I'm not ashamed to admit it.
PALSGRAF You don't want to work for your money?
LAWYER I don't see you offering to pay me anything.
PALSGRAF I'll give you 50 percent of whatever I get.
LAWYER That's still not much of a guarantee.

(PALSGRAF pulls out a pack of cigarettes.)

PALSGRAF I'll give you 60, 70 percent, I don't care. Because this isn't about money — it's about pride. Although money is an issue. I've already lost three jobs.
LAWYER Three jobs?

PALSGRAF Because of my dizziness.
LAWYER Dizziness?
PALSGRAF I keep losing my balance and dropping things.
LAWYER What kind of things?
PALSGRAF Last week, when I was cleaning house for Mrs. Socolof, I broke three glasses she saved from the Titanic.
LAWYER And you think the Long Island Railroad is responsible for that?
PALSGRAF The sinking of The Titanic?
LAWYER Maybe if they had better trains, people wouldn't take boats.
PALSGRAF At least now you're thinking.
LAWYER And how do we know your dizziness is related to the "incident"?
PALSGRAF Are you calling me a liar?
LAWYER I'm not — but someone will.
PALSGRAF And you'd just accept that?
LAWYER I just want to help people move into their first homes.
PALSGRAF So your reputation means nothing to you?
LAWYER I intend to do a good job.
PALSGRAF As long as it's not too hard?
LAWYER Closing a real estate deal is very hard — especially if you've never done it before.
PALSGRAF You?
LAWYER I'm talking about my clients.
PALSGRAF Where?
LAWYER They're waiting to come in.
PALSGRAF They're not going to come in until you have a reputation. And you're not going to have a reputation until you help me.

(She pulls cigarette from the pack.)

LAWYER Mrs. Palsgraf, I don't mean to be insensitive, but there's no smoking in here.
PALSGRAF Then why do you have two ashtrays?
LAWYER Those are decorative.
PALSGRAF For the wealthier clientele?
LAWYER I'm going to ask you to put out that cigarette.
PALSGRAF I'm afraid that I can't.
LAWYER What do you mean you can't?
PALSGRAF You've never smoked, have you?
LAWYER I generally try not to do things that are bad for me.

PALSGRAF Who says smoking is bad?

LAWYER It's nothing personal, Mrs. Palsgraf. But I don't want my clients coming into a smoky office.

PALSGRAF Clients?

LAWYER Yes.

PALSGRAF Where?

LAWYER (pointing to his files) Here.

PALSGRAF Let's see.

(She grabs the files on his desk. Starts thumbing through them.)

LAWYER Don't touch my files....Mrs. Palsgraf
...The names are confidential.

PALSGRAF These are all blank. Empty.

LAWYER Amazing, isn't it? I get the biggest sign on the boardwalk, but I can't get anyone to come in.

PALSGRAF So I'm your first customer?

LAWYER Not if you don't put out your cigarette.

PALSGRAF I said I can't help it.

LAWYER Then maybe I can help you.

(He tries to grab her package of cigarettes, but before he can, she pushes him hard into a nearly empty book shelf. Books and diploma hit **LAWYER** on the head.)

PALSGRAF I'm sorry. But I don't think you realize how embarrassing it is to walk down the street in my neighborhood and have everyone stare. Sure, they express concern to my face, but when my back is turned, they can't wait to tell their friends that they know the woman who got bopped on the head by the Long Island Railroad. And how do you think I feel when all the kids on the block come up to me and say, "A penny for your thoughts"? Which is not as bad as I felt when I was told by Gumbert, Handfinger & Kaplan that the best they could do was get me free passes for the train. As if I want to ride the train ever

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again. I'll walk first. In fact, I walked eight miles to your office, and I'll walk eight miles home. But before I do, I'm going to make sure I find someone who believes in my cause.

LAWYER You went to G, H & K?

PALSGRAF I hate to say it, but you're the only lawyer within walking distance who'll even talk to me.

LAWYER You tried other firms?

PALSGRAF Yes.

LAWYER What did they say?

PALSGRAF They either work for the railroad or said my case was not "feasible." One lawyer thought I could win except for the fact that I wasn't a "sympathetic plaintiff."

LAWYER What do you mean you're not a sympathetic plaintiff?

PALSGRAF I'm old. I smoke. I'm pushy.

LAWYER Those could be good things.

PALSGRAF Then why won't you take my case?

LAWYER I'm just out of a law school — not a very good law school — and I was nowhere near the top of my class. In fact, I was at the bottom.

PALSGRAF I don't care about your lousy credentials. I just need someone to represent me.

LAWYER You did assume the risk.

PALSGRAF You think I wanted to get bopped on the head?!

LAWYER I'm trying to be realistic.

PALSGRAF You know what your problem is? You have no imagination. You only want to do things that have already been done.

LAWYER Here. This is as strong as I can make it.

(He moves toward her, holding a mug of coffee. He hands her the mug. The mug is hot, hot, hot. So hot that she spills the coffee all over herself.)

PALSGRAF Ahhhhh...Ohhhhhhhhhhh....
Ahhhhhhhhhhhhhh.

LAWYER (overlapping her lines) Mrs. Palsgraf. Mrs. Palsgraf. Are you all right?
HELEN!!!

PALSGRAF I'm scalded. Burnt.

LAWYER Can I get you something cold?

PALSGRAF Don't touch me.

LAWYER What can I do for you?

PALSGRAF Hot, scalding coffee. All over my new dress.

LAWYER I'll pay for the dry cleaning.

PALSGRAF Aahhhhhh.

LAWYER Mrs. Palsgraf. Come on.

PALSGRAF You shouldn't have served something so hot into a glass.

LAWYER You're the one who wanted it hot.

PALSGRAF Hot, but not too hot. There's a difference. A big difference. A difference that those lawyers down the street — your competition — might be willing to explore to the fullest extent of the law.

LAWYER A ridiculous claim.

PALSGRAF Maybe to you. But your life hasn't been treated with utter contempt.

LAWYER Wait.

PALSGRAF Anything from this point on should probably be directed to my attorney.

LAWYER I am your attorney.

PALSGRAF Excuse me.

LAWYER I am your attorney.

PALSGRAF Are you?

LAWYER Do you think I can sue myself?

PALSGRAF No. But how about the Long Island Railroad?

LAWYER It's a long shot, but it may be worth a try.

PALSGRAF You think so?

LAWYER Sit, Mrs. Palsgraf.

PALSGRAF And what about those people outside your window?

LAWYER They'll have to wait.

(She sits. He pulls out a file.)

PALSGRAF Any problem if I smoke?

LAWYER I'm afraid we'll have to save that for another day.

PALSGRAF My husband thinks I can't stop. Of course I can stop. I will stop. Tomorrow!!!

LAWYER (starting to perform) So you were standing on the platform of the East New York train station — a platform that was crowded with hundreds of people — with really no clear way to get out?

PALSGRAF That's right.

LAWYER On the platform there was a scale. A big, heavy steel scale. Secured by nothing, but clearly meant to entice passengers of the Long Island Railroad?


PALSGRAF Exactly.

LAWYER And when the conductor saw the man drop the package, he still had a chance to stop the train, pick up the package and prevent the explosion that caused the commotion that led to severe injuries to your head?

PALSGRAF You would think so.

LAWYER (gaining speed, as a train) And if there was no explosion, there would have been no stampede, and if there was no stampede, the scale wouldn't have fallen on your head, and if the scale didn't fall on your head, you wouldn't have been dizzy, and if you hadn't been dizzy, you would be able to consort with your husband, and if you could consort with your husband, well, maybe then we could say the Long Island Railroad wasn't negligent.

PALSGRAF I think you're beginning to get this.

(He has opened a file and has started taking notes. She lights her cigarette. Lights fade to blackout.) 



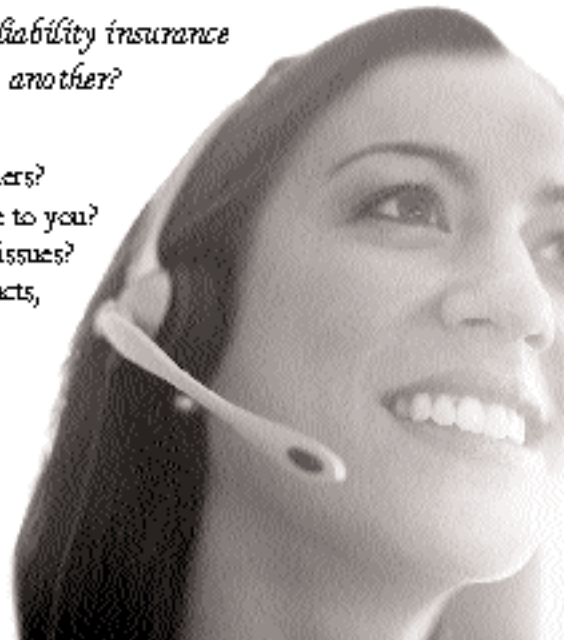
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 Richard Rice
 William M. Rich
 Eric A. Richardson
 Melody Richardson
 Hayley B. Riddle
 Coral A. Robinson
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Brian Rogers
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 Pumpian Ryan
 Stephen Schaezel
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 Carolyn A. Seabolt
 Debbie Segal
 Sean Sennely
 Shelley Senterfitt
 Stanley A. Seymour
 Rita A. Sheffey
 Julie Simmermon
 Jeven R. Sloan
 Randall R. Smith
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 Roger Weitkamp
 Linwood Neal Wheeler
 Charmaine Williams
 Karen Brown Williams
 John Williams Jr.
 Chassidy A. Winestock
 W. Swain Wood
 Laura Woodson
 Teresa Wynn
 Roseborough
 Bettina Yip
 Peter York
 Leslie Zacks
 Alana B. Zielinski
 Jeffery Zitron
 Buford
 Samantha Cardwell
 Clarkston
 Tamara Rorie
 Columbus
 Sally Haskins
 Decatur
 Mereda Johnson
 Diana McDonald
 Uma Nagaraj
 Katrina V. Shoemaker
 Angelyn M. Wright
 Jonesboro
 Richard Genirberg
 Dorothea McCleon
 Kennesaw
 Orrin Walker
 Lawrenceville
 David Genirberg
 Roswell

Lauren G. Alexander
 Linda Borsky
 Janis L. Rosser
 Eileen Thomas
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 Forest Park
 Emily George
 Sylvia Goldman
 Rosalind Watkins
 Charles Vrono
 Jonesboro
 Emmett J. Arnold IV
 Allen W. Bodiford
 James Bradley
 Barbara Briley
 George Brown
 Johnny Castaneda
 Lynette Clark
 Billy J. Dixon
 Charles (Chuck) Driebe
 Fred Eady
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 Monroe Ferguson
 Pam Ferguson
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 Arlene LeBrew-Sanders
 Joel Montgomery
 Bryon Morgan
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 Margot Roberts
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 Avery T. Salter Jr.
 Lee Sexton
 Kevin W. Sparger
 Janet M. Taylor
 Leslie Miller-Tenry
 Louise Thomas
 Joseph M. Todd
 David Joseph Walker
 Harold Watts
 Jan Watts
 Stephen White
 C. Keith Wood
 Fred Zimmerman
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 Arthur Marateck
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 Michael B. Syrop
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 Dean C. Bucci
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 Frank Bradford
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 Michael J. Brewster
 Lawrence E. Burke
 David A. Canale
 David J. Casey
 Kenneth Clark
 Kelli Cross
 Kenneth R. Croy
 David P. Darden
 C. Lee Davis
 Joan P. Davis
 Jeffrey A. Daxe
 Robert I. Donovan
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Alec Galloway
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 James D. Hogan
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 Robert N. Katz
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 Gregory R. Miller
 Sidney L. Moore Jr.
 Paige C. Norwood
 Kathy Jarman Puls
 Meredith Ragains
 Randie H. Siegel
 Theodore A. Speaker
 Michael Standish
 Richard T. Taylor
 Wendell K. Willard
 Kay Y. Young
 Anthony Zezima
 Avondale Estates
 Rachel Susan Kezh
 Joe A. Weeks
 Chamblee
 Chris Palazzola
 Samuel N. Werbin

Conyers
Felita Weldon

Decatur
John O. Adams Jr.
L. Katherine Adams

Thomas Affleck III
Susan Rebecca Bailey
Prince A. Brunfield Jr.
Mark G. Burnette
Kenneth W. Carpenter
JoAnn D. Collins
C. Glenn Cook Jr.
John P. Cross, II
Mary Powell Evatt
Henry D. Frantz Jr.
Michael M. Gabel
M. Ayres Gardner
Ross M. Goddard Jr.
Edward R. Golden
C. Benjamin Guile III
William V. Hall Jr.
Alan C. Harvey
Adella D. Hill
Donald Hillman
William T. Hudson Jr.
Deborah Johnson
Mereda Davis Johnson
David L. G. King Jr.
Cary Langston
Calvin Leipold
Gregory J. Lohmeier
Johnny N. Panos
Lisa A. Patrick
Bette Elaine Rosenzweig
John Wesley Spears
Allen F. Townsend
Harvey M. Whiteman
Mary Walton Whiteman
Joseph Eugene Williams
William G. Wither Jr.

Doraville
Lou Ella B. Jenkins
Hugh Richardson Powell
Jr.
Tom Pye

Dunwoody
Stephen J. Sasine

Lilburn
David L. Holbrook

Lithonia
E. Noreen Banks-Ware
Teri E. Brown

Norcross
Sabrina A. Parker

Roswell
Chandler R. Bridges
Robert Michael Sheffield

Scottdale
Gerard D. Hegstrom

Stone Mountain
Mark Gaffney
N. Wallace Kelleman

Tucker
William H. Arroyo
G. Phillip Bramlett
David Courtney
James Russell Gray
Cynthia L. Horton
Tahira P. Piraino
Mark J. Siskin
William L. Skinner
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Stephen Drahos
Steve Dubner
Kendre Eades
John Eaton
Peggy Eisenhower
Beryl Farris
Manolo Galinanes
William (Bill) Gignilliat
Walt Hamberg
Jennifer Hardy
Shannon Jackson
Jennifer Jenkins
Jennifer Johnson
Lorraine Johnson
Carl Johnston
Baxter Jones
Wad Kadabva

Scott Kinily
Hank Kimmel
Lisa Kincheloe
Stephanie Lindsey
Peter Pawlak
Mark Plotkin
Evan Pontz
Kurt Powell
Kim Prior
John Renaud
Lisa Samuels
Michael Schroder
Candace Thurmond
Nikki Weisburd
Frank White
Mark Williamson
Amanda Whit
Robert (Bob) Woodland
Tim Wooten
Charles (Chuck) Young

Decatur
Andrew Coffman

Dunwoody
Justin Deasy

Jonesboro
Amy Abrams

Lawrenceville
Dennis (Trip) Collins
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Kathryn M. Schrader
Michelle Vereen

Lawrenceville
Christopher T. Adams
Bruce Bennett
Barbara Bishop
Tom Cain
Jerry A. Daniels
Larry Duttweiler
Joseph M. McLaughlin
Mark Merritt
Phyllis Miller
Kip Shepherd
Macklyn A. Smith, Sr.
Tony A. Taylor
Jessica R. Towne
Nelson H. Turner

Lilburn
Anne Marie Lugo
Mack E. Layng

Lithonia
Robert L. Mack Jr.

Loganville
Chester A. Dettlinger

Norcross
Richard Campbell
Glenn E. Cooper
The Deming Law Firm
Fred Stokes
Larry Tatum

Shellville
Douglas Daum
Charles P. Giallanza
Clint Rhodes
Carole M. Wright

Stone Mountain
Steven Ashby
Robert W. Hughes Jr.

KUDOS

Judge Thomas B. Wells, who practiced law in Atlanta and Vidalia, Ga., until he was appointed to the bench in 1986, has been reelected as **chief judge of the United States Tax Court** to serve a two-year term beginning June 1, 2002.

Kilpatrick Stockton LLP attorney, **W. Randy Eaddy**, was appointed to the U.S. House of Representative's Oversight and Investigations Subcommittee Chairman James C. Greenwood's Business Advisory Group. The group, comprised of business leaders from around the country, has been asked to develop accounting, auditing and financial practice reforms for Congress to review and consider.

The international law firm of **Jones, Day, Reavis & Pogue** has been ranked No. 1 among legal advisors by **Thomson Financial** in the category of worldwide merge and acquisition deals completed in 2001. In addition, the firm was ranked No. 8 among all firms for aggregate value of completed worldwide deals.

The following attorneys have been named a **Life Fellow** of the **American Bar Foundation**: **Linda A. Klein**, Atlanta; **V. Nathaniel Hansford**, Dahlonega; **William J. Linkous Jr.**, Atlanta; and **A. Stephens Clay**, Atlanta. The Fellows is an honorary organization of practicing attorneys, judges and law teachers whose professional, public and private careers have demonstrated outstanding dedication to the welfare of their communities and the highest principles of the legal profession.

Several Georgia attorneys were recently named to hold positions in a new state alumni association for their law school alma mater, the **Thomas M. Cooley Law School**. **Vaughn Fisher** (Steere Class, 1995) of the Atlanta firm of Weizenecker, Rose, et al. P.C., was elected president; **Karen D. Fultz** (McDonald Class, 1998) of Lackland & Associates, L.L.C., Atlanta was elected the vice president; **Michelle Pollok** (Flannigan Class, 1999) of Pollok & Associates P.C., in Conyers was elected the secretary; and **Steven G. Weizenecker** (Steere Class, 1995) also with Weizenecker, Rose, et al. was elected treasurer.



Highsmith

Gov. Roy Barnes announced that he has appointed **Robert S. Highsmith**, Atlanta, to the **State Board of Ethics** and **F. Sheffield Hale**, Atlanta, to the **Judicial Nominating Committee**. Both Highsmith and Hale were sworn in by Barnes in ceremonies held at the state capitol in February.

Kilpatrick Stockton attorney **Debbie Segal**, the first pro bono counsel ever hired by a Georgia law

firm, has been recognized by *Atlanta* magazine in its annual **"Women Making a Mark"** awards issue. Segal was the only attorney selected for the award, which honors 12 other notable Atlanta women including Mayor Shirley Franklin and WSB-TV's Monica Kaufman.

Intellectual Property Today ranked **Kilpatrick Stockton LLP** 54 out of 371 top trademark firms across the nation. The rankings for *Intellectual Property Today's* "Top Trademark Firms" list are determined by the number of U.S. trademark registrations issued in 2001.

King & Spalding announced the creation of two new positions in the firm: **director of knowledge management** and **director of professional development**. The director of knowledge management position was created to assure systematic access to and use of the firm's intellectual capital to support the firm's strategic marketing objectives and improve its operational effectiveness. The director of professional development position grew out of the firm's long-term commitment to substantive attorney training. **Bradley D. Robbins** will serve as director of knowledge management and **Derek J. Hardesty** will serve as director of professional development.

The **Year 2001 Awards for Outstanding Public Service in Child Advocacy** in Georgia honors bestowed by the State Bar of Georgia Younger Lawyer Division Juvenile Law Committee were presented in April to honor the legal community's commitment and obligation to improving juvenile law's on children. This year's awards are presented to: **The Truancy Intervention Project**; **Judge Nina Hickson**; **Judge Duncan Wheale**; **Joseph Ferguson**; **Doris Walker**; **Orlando Martinez**; **Allyson Anderson**; **Mike Randolph**; and **Cynthia Tucker**.

ON THE MOVE

In Atlanta

Hunton & Williams announced that **Jerry B. Blackstock** has become a partner with the firm. The office is located at Bank of America Plaza, Suite 4100, 600 Peachtree St., NE, Atlanta, GA 30308-2216; (404) 888-4298; Fax (404) 888-4190.

The law firm of **Ford & Harrison LLP** announced that **Andrew D. McClintock** and **Jeffrey D. Mototoff** have become partners of the firm; **John F. Allgood** has become of counsel with the firm; and **Kimberly D. Degonia**, **Amy J. Karch**, **Thomas L. McDaniel Jr.** and **Sean R. Mikula** have become associated with the firm. The Atlanta office is located at 1275 Peachtree St., NE, Suite 600, Atlanta, GA 30309; (404) 888-3800; Fax (404) 888-3863.

George H. Connell announced the relocation of his office to 5881 Glenridge Drive, Plaza 400, Suite 160, Atlanta, GA 30328; (404) 943-9700; Fax (770) 394-8840.

Powell, Goldstein, Frazer & Murphy LLP hired **Leslie K. Bender Jutzi** as a senior associate for the environmental practice group. The office is located at 191 Peachtree St., 16th Floor, Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999; www.pgfm.com.

AFC Enterprises Inc., announced the promotion of **Harold M. (Sonny) Cohen** to AFC's newly created position of deputy general counsel. The office is located at Six Concourse Parkway, Suite 1700, Atlanta, GA 30328-5352; (866) 551-AFCE.



The Atlanta offices of **Jones, Day, Reavis & Pogue** announced the admission of **Douglas M. Towns** to the partnership. The office is located at 3500 Suntrust Plaza, 303 Peachtree St., Atlanta, GA 30308-3242; (404) 521-3939; Fax (404) 581-8330.

Duane Morris LLP announced that it has expanded its office in Atlanta, Ga., with the addition of 10 lawyers, including **Joseph D. Wargo**, **Michael D. Kabat** and **Michael S. French**, who have joined the firm as partners. **Christen C. Carey** and **J. Scott Carr** have joined the firm as special counsel and **C. Celeste Creswell**, **Jeanine L. Gibbs**, **Joseph W. Ozmer II**, **David M. Pernini** and **Jeremy E. White** have become associated with the firm. The office is located at 945 East Paces Ferry Road, Suite 2440, Atlanta, GA 30326-1378; (404) 495-4900; Fax (404) 495-4901.

Kenneth M. Neighbors, **J. Martin Lett** and **Donna L. Johnson**, each formerly of Holland & Knight LLP, announced the formation of **Neighbors, Lett & Johnson, LLC**, a corporate and business law firm. The firm is located at The Candler Building, Suite 555, 127 Peachtree St., Atlanta, GA 30303; (404) 653-0881; Fax (404) 653-1171.



Arbery



Johnston



Taylor

Hunton & Williams elected three attorneys to partnership in their Atlanta office: **W. Christopher Arbery**; **Derek C. Johnston**; and **Eric Jon Taylor**. The firm is located at Bank of America Plaza, Suite 4100, 600 Peachtree St., NE, Atlanta, GA 30308-2216; (404) 888-4000; Fax (404) 888-4190.

Hudnall, Cohn & Abrams, P.C., announced the opening of four new offices in the metropolitan Atlanta area over the past year: **Cobb County**, Suite 350, Building 3, 1827 Powers Ferry Road, Atlanta, GA 30339, Roy Ames, attorney, (770) 859-0560; **Tucker**, Suite 350, 4550 Hugh Howell Road, Tucker, GA 30084, Elvira Malenky, attorney, (770) 939-3664; **Cumming**, Suite 300, 104 Pilgram Village Drive, Cumming, GA 30040, Lori Jolliff, attorney, (770) 889-6262; **Peachtree City**, Suite 210, 500 Westpark Drive, Peachtree City, GA 30269, Kimberly Hicks, attorney (770) 631-6620. The Peachtree City office is in association with William A. Wehunt & Associates, P.C., and will be operating under the name of Hudnall Wehunt, LLC.

Lord, Bissell & Brook announced the following new additions to their Atlanta office: **Brian T. Casey**, partner; **Patrick J. Hatfield**, of counsel; **Allison Wade**, of counsel; **Jim Comerford**, of counsel; **Scott Wharton**, of counsel; **Edeï Pippin Ledet**, associate; and **Marianne Boston**, associate. The Atlanta office is located at 1170 Peachtree St., Suite 1900, Atlanta, GA 30309; (404) 870-4600; Fax (404) 872-5547; www.lordbissell.com.

The Law Firm of **Fine and Block** announced that **Lisa Steinmetz Morchower**, former city of Atlanta senior assistant city attorney, has become a member of the firm. The office is located at 2060 Mt. Paran Road, NW, Atlanta, GA 30327; (404) 261-6800; Fax (404) 261-6960; mail@fineandblock.com.

In Dalton

L. Hugh Kemp, **F. Gregory Melton Jr.**, **H. Greely Joiner Jr.** and **John Davis** announced the formation of **Davis, Kreitzer, Kemp, Joiner & Melton** with offices at 100 N. Selvidge, Dalton, GA 30720; (706) 277-4000; Fax (706) 275-6566.

In Rossville

John Davis, senior member of the firm **Davis & Kreitzer**, announced the formation of **Davis, Kreitzer, Kemp, Joiner & Melton**. The office is located at 898 Chickamauga Ave., Rossville, GA 30741; (706) 866-7977; Fax (706) 861-6188.

In Savannah



Harvey Weitz was recently reappointed to the **State Bar of Georgia Commission on Continuing Lawyer Competency** and elected to serve as its chair. The 16-person Commission administers the continuing legal education requirement for Georgia lawyers, which mandates a minimum of 12 hours of instruction in approved activities each calendar year. Weitz is one of six Supreme Court appointees. Weitz, a partner in the firm of **Weiner, Shearouse, Weitz, Greenberg & Shawe, LLP**, is also a member of the State Bar of Georgia Executive Committee and Board of Governors.

Ellis, Painter, Ratterree & Bart LLP announced that **Paul D. Meyer** became a partner with the firm in January. The firm is located at 2 East Bryan St., 10th Floor, Savannah, GA 31401-2802; (912) 233-9700.

The law firm of **Savage, Turner, Pinson & Karsman** announced that **R. Scott Kraeuter** has become a partner with the firm. The office is located at 304 East Bay St., P.O. Box 10600, Savannah, GA 31412; (912) 231-1140; Fax (912) 231-0133.

In Washington, D.C.



Smith, Gambrell & Russell, LLP, announced the election of **Dennis O. Doherty**, a partner formerly resident in the Atlanta office, to the position of managing partner of the firm's Washington, D.C., office. The Washington, D.C., office is located at 1850 M St., NW, Suite 800, Washington, D.C., 20036; (202) 263-4300; Fax (202) 263-4329.

In Jacksonville, Fla.

Wood, Atter & Associates, P.A., announced that **Robert L. Cowles** has become of counsel with the firm. The office is located at 333-I East Monroe St., Jacksonville, FL 32202; (904) 355-8888; Fax (904) 358-3061.

In Miami, Fla.



Spencer Eig, former assistant U.S. attorney, announced the formation of **Law Offices of Spencer Eig, P.A.** The firm is located at 407 Lincoln Road, Suite 708, Miami Beach, FL 33139; (305) 672-2770; www.florida-lawyers.net.

In Charlotte, N.C.

Todd W. Cline announced the opening of his general law practice. **Todd W. Cline, P.A.**, is located at 1800 Camden Road, Suite 104, Charlotte, NC 28203; (704) 334-7779; Fax (704) 373-1206; www.carolinaattorney.com.

In Chattanooga, Tenn.

The partners of **Foster, Allen, Durrence & Ward, P.C.**, announced the move to their new location at 555 River St., Chattanooga, TN 37405; (423) 266-1141.

In Lake Junaluska, N.C.



William E. Cannon Jr., formerly with Cannon & Meyer von Bremen, LLP, of Albany, is now vice-president for development with the **Foundation for Evangelism**, an affiliate of the United Methodist Church, P.O. Box 985, Lake Junaluska, NC 28745.



Law Related Education Day at the Capitol

On Jan. 29, 2002, the LRE Consortium organized a LRE Day at the Capitol. Pictured with Gov. Barnes and Executive Committee members of the LRE are mock trial team representatives from 12 schools.

CORRECTIONS

In the April 2002 issue of the *Georgia Bar Journal*, State Bar of Georgia Board of Governors member Althea L. Buafo's undergraduate education was inaccurately noted. Buafo received her B.A. from Eckerd College in 1983. The *Journal* apologizes for any confusion this may have caused.



In the April 2002 issue of the *Georgia Bar Journal*, a photo of the late Col. Robert P. Jones was inadvertently run with a feature story about the late professional golfer Bobby Jones. The photo above should have accompanied the article. The *Journal* apologizes for any confusion this may have caused.

The Advisor is In

Dear Ethics Advisor,

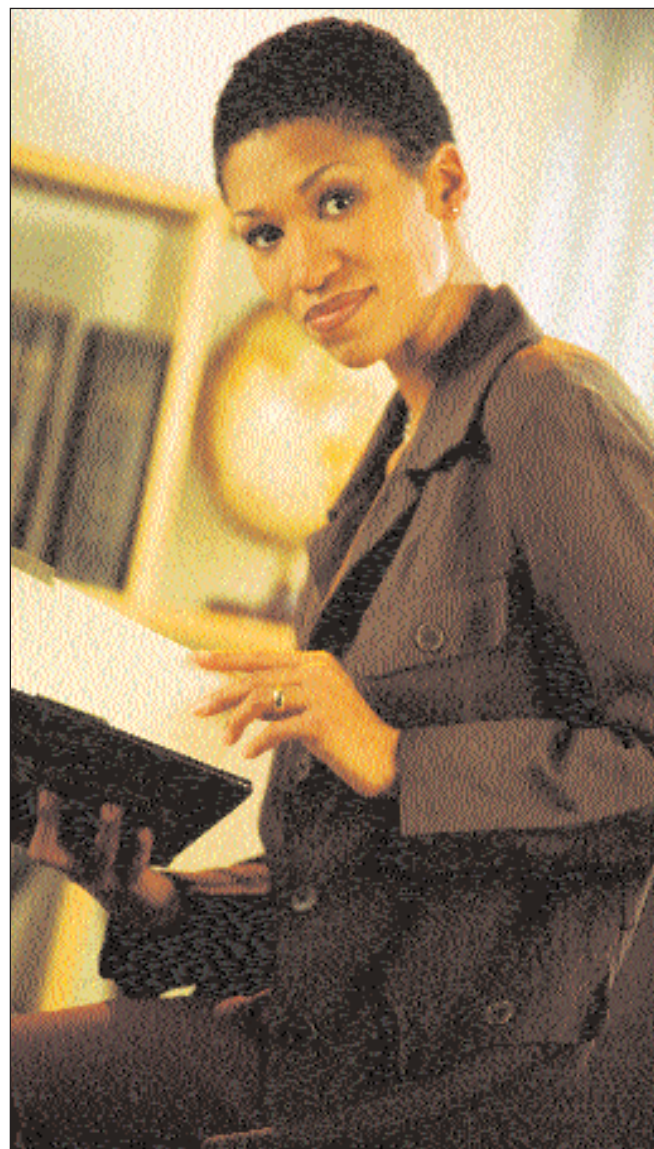
I am a solo practitioner with a general practice. I have worked with Angie, my trusted paralegal, for 12 years. She probably knows more about certain areas of law than I do. In fact, before she became a paralegal she worked as an adjuster for a large insurance company.

I got word yesterday that my grandmother is very ill. As I write, I am en route to Provence to be with her. I expect to be gone for two weeks. I am confident that Angie is capable of handling most anything that comes up in my absence, but I don't want to run afoul of the rules governing the Unauthorized Practice of Law. Please answer the following questions about what I may delegate to Angie while I'm gone.

1. I have dictated letters to clients and adverse counsel for several of my cases. Is it appropriate for Angie to review the letters and sign them for me?
2. In one PI case, I have been waiting for the defendant insurance company to respond to my offer of settlement. I doubt they will accept my offer, and expect them to come back with a counter-offer. I'd like to have Angie convey the counter offer to the client and keep the negotiations going while I'm gone.
3. There's an arraignment next week that I hate to have postponed. Can I send Angie to court, just to enter the "not guilty" plea? The appearance should not involve anything substantive.
4. I handle a few residential real estate matters, and I have a closing on Friday. Angie typically prepares all of the documents in advance and sits through any closings that

I do so that she can juggle the paperwork. I am sure that she could handle the closing without me. If that's not allowed under the UPL rules, I could be available by telephone in case she has any questions.

**Thanks in advance for your help,
Frantic in France**



Dear Frantic,

Lucky for you, the Rules of Professional Conduct permit broad delegation of responsibility to paralegals and other nonlawyer assistants. Generally, a lawyer may delegate to a paralegal tasks such as interviewing clients, conducting legal research, drafting pleadings and correspondence, and routine communication with opposing counsel.¹ On the other hand, Bar Rules strictly prohibit a lawyer from “assisting a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law.”² As a rule of thumb, do not put Angie in a situation where she has to exercise independent professional judgment. Always be sure her role is that of a legal assistant.

To determine where to draw the line, look first at Georgia’s Unauthorized Practice of Law (UPL) statute, O.C.G.A. §15-19-50ff. The law is premised upon the concept that only a licensed attorney can lawfully provide legal advice or render an opinion about the law. Therefore, the statute and Rule 5.5 prohibit a lawyer from delegating to a paralegal any task that requires the paralegal to make her own decisions about how the law should be applied to a particular client’s situation.

The Bar’s most recent discussion of these issues appears in Formal Advisory Opinion 00-2, issued by the Supreme Court of Georgia on Feb. 11, 2000.³ The opinion clarifies that a lawyer aids in UPL when he or she allows a paralegal to “prepare and sign” correspondence that threatens legal action or provides legal advice.

So, it’s fine to have Angie review your dictated correspondence and send it out under your signature in

your absence. Even if the letters contain legal advice, presumably it’s YOUR legal advice and not Angie’s. It’s probably wise to add a notation at the bottom of each letter such as “dictated but not read,” or something similar to let the recipient know that you formulated the content of the letter. When she is signing your name, Angie should indicate that it is with your knowledge and permission. She should include her initials after the signature to avoid misleading the recipient.

The Ethics Advisor is more concerned about your second question. While it’s fine to have Angie serve as the conduit of information during settlement negotiations, she can’t actually negotiate or make a legal judgment about the advisability of accepting an offer. She should make it clear in her communication with adverse parties that she is simply conveying information and isn’t making decisions herself. She should not counsel with the client about the potential legal ramifications of any offer or otherwise give the client legal advice. Most importantly, you must maintain strict supervision of Angie’s verbal dealings with others to be sure she understands and complies with the rules.

Whatever you do, don’t sent Angie to the arraignment! Any appearance in court by a paralegal, no matter how non-substantive, is a violation of the UPL statute.⁴

Angie can’t handle the real estate closing either. While it is fine to have her prepare the documents (under your supervision, of course), she cannot conduct a closing on her own. Formal Advisory Opinions 86-5 and 00-35 clarify that the closing of a real estate transaction constitutes the practice of law. Since the rules require that a

lawyer provide “direct and constant” supervision of nonlawyer staff, Opinion 00-3 finds that the lawyer must be physically present to ensure proper supervision.

Real estate closings aside, the wonders of modern communication make it possible for you to provide supervision to Angie while you are away. With your help, she can provide valuable information to clients and keep the office running smoothly in your absence while still complying with the UPL statute.

Sincerely,
The Ethics Advisor 

ENDNOTES

1. Formal Advisory Opinion 21 includes a laundry list of tasks, which may be delegated to a paralegal. The Opinion can be found at page H-74 of the *State Bar of Georgia 2001-2002 Directory & Handbook*.
2. Rule 5.5(b) of the Georgia Rules of Professional Conduct.
3. Opinion 00-2 can be found at page H-110 of the *State Bar of Georgia 2001-2002 Directory & Handbook*.
4. The exception is those tribunals which specifically allow non-lawyer representation, as may be the case with state and federal administrative tribunals.
5. Found at pages H-87 and H-112 of the *State Bar of Georgia 2001-2002 Directory & Handbook*.

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Discipline Notices

(Feb. 16, 2002 – April 18, 2002)

By Connie P. Henry

SUSPENSIONS

Harold Michael Harvey

Atlanta, Ga.

The Supreme Court, by order dated Feb. 21, 2002, has suspended Harold Michael Harvey (State Bar No. 335425) from the practice of law in Georgia for two years. Prior to reinstatement, Harvey must complete a session of the State Bar's ethics school and must undergo a law practice management review program within six months of reinstatement.

The Court had seven matters to consider against Harvey. In Docket No. 3857, Harvey accepted \$300 to represent a client in a housing discrimination matter. He corresponded with the Georgia Commission on Equal Opportunity and obtained the client's file, but did nothing further in the representation. Harvey admitted he "dropped the ball," but did not return the file until much later.

In Docket No. 3858, Harvey agreed to represent a client in a personal injury case against her residence, the Clairmont Lodge. The client moved from the Clairmont Lodge and gave Harvey her new address. He sent a letter to the Clairmont Lodge attempting to settle the matter, but did nothing further on the case for two years. The client was unable to reach Harvey to discuss her case and the statute of limitation expired.

In Docket No. 3912, Harvey agreed to represent a client in a personal injury case and a discrimination case. He filed an appearance in federal court in the discrimination case but despite receiving the opposing party's motion for summary judgment, he failed to file a response and the case was dismissed. Harvey filed the personal injury action but never served the defendant, although he provided a copy of the lawsuit to the insurance company, whose attorney attempted unsuccessfully to acknowledge service on behalf of the defendant. The attorney filed a motion to dismiss due to Harvey's failure to serve the

defendant. Harvey failed to respond and the case was dismissed.

In Docket No. 3913, a client paid Harvey \$760 to represent her in a discrimination case. The client obtained a right-to-sue letter and Harvey told her he would file the action within the requisite 90 days. Harvey's legal assistant worked on the case until she left his employ. She updated Harvey on the case before she left, but Harvey failed to take any further action and the filing deadline passed.

In Docket No. 3947, Harvey agreed to represent a client in an employment discrimination case, for which he received \$2500 in fees plus \$100 for filing fees. Harvey filed a lawsuit on the client's behalf. Although the client's employer expressed a willingness to resolve the case, Harvey never solicited an offer from the employer. The employer filed a motion for summary judgment to which Harvey did not respond, so the court granted the motion.

In Docket No. 3949, Harvey represented a client in a personal injury case. Harvey's legal assistant prepared a claim form for the client to pursue her claim through the Claims Advisory Board of the State Tort Claims Act. The client refused to sign the form. When she failed to return the form, Harvey sent her a letter requesting that she do so, but the client did not respond to that letter or to a subsequent one in which he advised her that if she did not return the form he would close the case.

In the last matter, Docket No. 4027, Harvey agreed to review documents for a client concerning a discrimination matter and give her advice about a possible telephone interview. The client gave him a \$2,000 retainer. She sent him voluminous documents but became concerned when he did not contact her and would not return her phone calls. The client sent Harvey a certified letter and terminated his services and requested the return of her files and retainer. Harvey never claimed the letter and despite his assertion that he

reviewed the files, when she retrieved the files, she found them in the same order as when she left them.

Franklin H. Davidson

Macon, Ga.

On March 25, 2002, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Franklin H. Davidson (State Bar No. 206575). Davidson violated his duties as a fiduciary, commingled client funds with his own, and failed to account for funds he held in a fiduciary capacity. Davidson represented a client in a personal injury lawsuit arising from an automobile accident. The court awarded his client damages and ordered that the funds be placed in a trust for his client. Davidson wrote checks from his client's trust for his personal use and failed to make an accounting to the client of the funds held in a fiduciary capacity. Davidson eventually resigned as trustee of the trust, closed his law office and enrolled in an in-patient drug treatment program. He claimed he tendered full restitution to the trust in the amount of \$47,926 which included the principal amount misappropriated together with interest at the rate of 12 percent through the date of tender, but that tender was not accepted by the trust representatives. Davidson contended that he has continued, through counsel, to tender said amount as of the date of his petition.

Eric Vann Ross

Redan, Ga.

The Supreme Court, by order dated March 25, 2002, has suspended Eric Vann Ross (State Bar No. 615218) from the practice of law in Georgia. Ross was suspended for 12 months by Supreme Court order dated March 30, 2000. According to the Court's order, Ross was obligated to make restitution within six

months of his reinstatement. Ross did not do so, and the Court again suspended Ross on March 25, 2002, until he pays restitution.

Cheryl S. Champion

Atlanta, Ga.

The Supreme Court, by order dated April 15, 2002, has suspended Cheryl S. Champion (State Bar No. 120101) from the practice of law in Georgia. Champion was suspended for 12 months with conditions for reinstatement. Champion agreed to represent a client in a personal injury case. The case was settled for \$8,000. Champion received the settlement funds and deposited them into her escrow account in August 2000. Champion withdrew those funds for her own use and did not remit the funds to her client or her client's medical care providers until January 2001. Champion did not admit that she used client funds for her own use until she was asked by the disciplinary counsel to produce her trust account records. She has since repaid the funds and sought rehabilitation. Prior to reinstatement, Champion must attend Ethics School and within 120 days of reinstatement submit to an evaluation by the Law Practice Management Program or by an independent consultant selected by the Law Practice Management Program. Within 120 days of reinstatement, she must present satisfactory proof of her continued counseling and the results from her present therapist/counselor or a psychologist approved by the State Bar's Lawyer's Assistance Program.

REVIEW PANEL REPRIMAND

John R. Shaw Jr.

Loganville, Ga.

On March 25, 2002, the Supreme Court accepted the Petition for Voluntary Discipline of John R.

Shaw, Jr., (State Bar No. 638600) and ordered him to receive a Review Panel reprimand. A client hired Shaw to handle a legal matter involving settling the estate of her husband and paid him a fee of \$750. Shaw would not return the client's telephone calls and did not work on the case. After the client terminated the attorney/client relationship with Shaw, Shaw would not return the funds or the client's documents.


DISMISSAL

Eric B. Reuss

Mobile, Ala.

In an earlier matter, Eric B. Reuss (State Bar No. 601300) was suspended by the Supreme Court of Georgia in 2001 for a period of two years for obtaining fees from a bankruptcy without following bankruptcy court procedures. The court determined that the alleged violation of Standard 64 in this matter grew out of the same fact situation that formed the basis of the prior discipline. Accordingly, the Supreme Court held that no further disciplinary action was warranted in this matter.

INTERIM SUSPENSIONS

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Feb. 16, 2002, four lawyers have been suspended for violating this Rule. 

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

LPM's Guide to Mobile Lawyering Devices – Part I

By Natalie R. Thornwell

It's a fact. We are a mobile society. The need for us to constantly be in touch is prevalent in each of our everyday lives.

I only know a handful of people who don't use a cell phone or a pager for keeping in touch. For lawyers, it's the need of their clients to be in touch, and their need to be able to get work done while away from the office that has created "mobile lawyering."

To become an effective "mobile lawyer," you will need certain tools in your "take-along toolbox." What devices can you effectively use while away from the office? How does one procure such items? What is the best way to use these devices? Below is a guide to help you on your way to becoming a legal "road warrior."

Let's begin by sorting out the tools a mobile lawyer might use. Categories for mobile devices include:

- Handhelds/PDAs
- Cell Phones/smart phones/pagers
- Laptop computers
- Portable printers/scanners/copiers (digital senders)
- Dictation devices

Below is a listing of some of the key brands available in each of the mobile device categories. You will also find information on where and how to purchase these devices, and practical tips for their effective use.

Remember that communications technology evolves and changes at a rapid pace. At the time of your reading, the features and pricing of these devices might be different.

Handheld/PDAs

Brands — Handhelds or PDAs (personal digital assistants) are becoming a staple among lawyers. The basic contact and calendaring features, along with more wireless connectivity options for browsing the Web and checking and sending e-mail, make these small, "carry it all in your pocket" devices some of the most interesting and useful devices for mobile lawyering. The most common brands of handheld PDAs are the Palms (those manufactured by Palm Inc. and/or running on the Palm operating system [OS]) and Pocket PCs (those devices that typically utilize the Windows CE operating system instead of the Palm OS). Handheld PCs don't really fall into this category because they attempt to include more applications and have an interface that places them more on the level of "mini-computers." You can, however, also include some wireless devices like the Blackberry by RIM (Research in Motion) in this category. The main difference between the Blackberry and other Palm or Pocket PC units is that the Blackberry boasts a wireless connection that delivers e-mail to your unit wherever coverage is available (usually in most major cities and metropolitan areas). Some of the second-generation Palms and Pocket PCs have added this functionality, too.

Palms are currently sold in the following flavors: i705 for \$449; m500 for \$299; color m515

for \$399; m125 for \$199; color m130 for \$279; and the m105 for \$149.

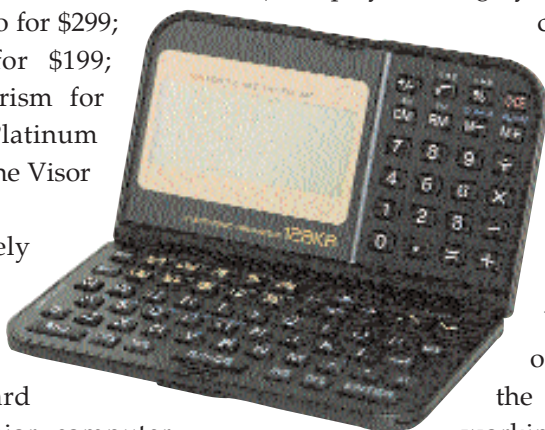
Another Palm OS solution is the Visor line by Handspring. Visors are available in these flavors: Visor Pro for \$299; Visor Edge for \$199; color Visor Prism for \$299; Visor Platinum for \$169; and the Visor Neo for \$169.

Some widely used Pocket PCs are made by Compaq, Hewlett-Packard and other major computer vendors. Compaq's iPaq units include the iPaq 3865 (color) for \$599; iPaq 3765 (color) for \$499; and the iPaq H3135 for \$399.99. Hewlett-Packard offers the Jornada 548; Jornada 565 (color) for \$449.99; and the Jornada 568 (color) for \$599.99.

Where and How to Purchase — As you might have guessed, the best place to pick up a Palm or other Pocket PC device is online. Portal sites like ZDNet.com and cnet.com (using mysimon.com) each have shopping sites within their pages that lead to the best deals and vendors for purchasing these units online. You can also purchase handhelds at local computer and electronics stores.

When shopping for a handheld, play close attention to how much space or memory the unit has. This is key to being able to store as much information as possible on the device. You will also want to notice whether or not expansion cards/sticks can be used with the device to increase the amount of storage space on the unit. Handspring became popular for its many modules that transforms the Visor unit into a cell phone, digital

camera, MP3 player or other type unit. Will you need to be able to download digital camera photos on your device? Look at the unit's display. Is it gray scale or is it



color? Does this matter to you? Find out if the unit is rechargeable or if you will need to stock up on batteries in order to keep the unit in good working order.

Finally, if you want a wireless connection to send and receive e-mails on the fly, find out how much the monthly fee for this additional service will cost. To learn even more, check out www.palmtops.about.com/.

Tips on Effective Use — Shop for additional software applications and peripheral or add-on products for your Palm or Pocket PC. Go to www.handango.com and www.palmgear.com to get started. You can find useful tools for enhancing your device usage. One of my favorites is Vindigo. This \$25 downloadable application will enable your Palm to locate the nearest restaurants, movie theaters, museums and even draw out maps to get there.

Secondly, be sure to keep additional batteries with you at all times if your unit is found not to be rechargeable. This practice can save critical information that always seems to be in danger of loss at the most inopportune times. If you are using a rechargeable device, don't forget to actually put the device in the cradle to recharge.

Finally, make sure that you regularly synch your device with any

attached database or address book. This ensures that you will not miss any important deadlines or events, and that you keep your internal information up to date.

Cell Phones/Smart Phones/Pagers

Brands — The major national vendors of cellular phones, smart phones and pagers are AT&T Wireless, Voicestream, Nextel, Sprint PCS, Cingular Wireless and Worldcom Wireless. Because the pricing for the devices and the service plans that accompany them are so varied, this article will not cover them.

Should you purchase a cell phone? That is becoming more of the question these days. In fact, many folks have opted to drop their home telephone service in lieu of the "always with me" cell phone that might have "free long distance." This can be beneficial in some circumstances. However, for mobile lawyers, this may not be a very viable option if you frequently travel to locations that have "spotty" or no service at all.

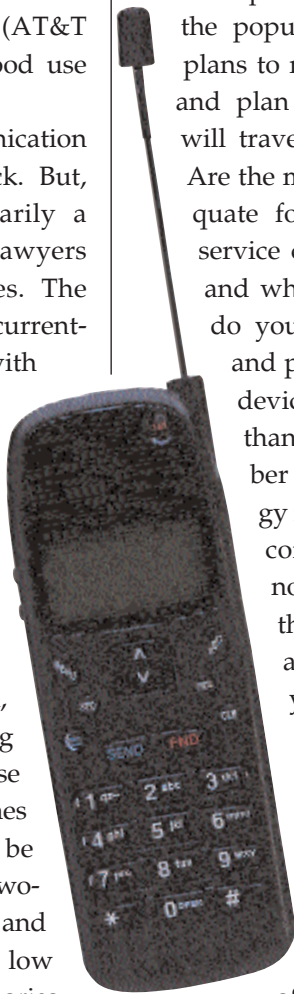
Another phenomena that has occurred with the advent of the cell phone and these other devices is "toolbelt overload." You carry a cell phone, a pager, a PDA and anything else that looks cool. The marketplace's answer to this "uncool" look is the smart phone. The smart phone is a device that operates as both a cell phone and PDA. Some of the most popular units are the Kyocera QCP6035 (Sprint PCS); the Handspring Treo 180 PDA phone; and the Samsung SPH - I300 (Sprint PCS). The folks at RIM decided to upgrade the Blackberry to make it phone enabled, and for \$500 the 5810 wireless phone/handheld can do

most of what smart phones do. Another sort of hybrid unit is the Motorola V60T Phone (AT&T Wireless), which makes good use of two-way text messaging.

Two-way radio communication is also making a comeback. But, again, this is not necessarily a viable option for those lawyers who travel great distances. The ranges of two-way units is currently very limited, and even with the hope of free "long distance" radio connections, the service will probably continue to be very "spotty." This option is probably not the best one for mobile lawyers.

Paging is another area that deserves some attention, even though traveling lawyers are more likely to use cell phone and smart phones these days. Paging can be numeric, alphanumeric or two-way. The prices for the units and the service are relatively low compared to the other categories. Service can be had for \$14 per month and you can purchase a two-way unit for less than \$150.

Where and How to Purchase — Unlike the PDA/handhelds category, you should look to the local market for some of the best deals on cell phones, smart phones and pagers. Local vendors can assist you with finding the units and service plans that will work for your individual needs. If you seek help online, one of my favorite places to check for cell phones is www.point.com. This comprehensive site allows you to search for local service plans and devices to get the best deal. Also, don't forget to look at price comparison sites like www.mysimon.com to get the most for your money.



When shopping for cell phones, smart phones or pagers, look for the popular units and service plans to match. Does your unit and plan cover the areas you will travel to most frequently? Are the minutes of airtime adequate for your usage? What service contracts are involved and what penalty or price to do you pay to switch units and plans? Will one type of device work better for you than the others? Remember that wireless technology is a burgeoning area of communications right now, and just when you thought it couldn't get any smaller or smarter, you're proved wrong.

Tips on Effective Use — To get the most out of your cell or smart phone make sure that you drive safely in the process. Don't think of getting one of these


units without the "cool" hands-free sets that accompany them. Many units are voice activated. You can call phone numbers and use speaker phone to carry on conversations while keeping your eyes on the road. This "hands-off phone" approach will make our roads much safer.

If you decide to use any of these devices, make sure that you set and follow some etiquette rules. Turn these devices off or set them to vibrate in public places or meetings. If you do forget, and receive a call or page, then leave the room or area as fast as you can so as not to disturb others.

If you are the victim of "spotty" service, then make sure that you indicate at the beginning of calls

that you are on a cell phone and that the service may drop the call. Giving a simple warning will help folks on the other end understand that you did not intentionally disconnect their call, if and when a call is dropped.

Charging batteries or keeping spares is necessary for keeping these devices going, so don't forget your charger units and batteries when packing for your next "mobile lawyering" adventure.

In Part II, our focus will turn to laptop computers, portable printers/scanners/copiers (digital senders) and dictation devices. 

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



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Jonesboro High Wins State Title

The **Jonesboro Mock Trial** team is the 2002 Georgia State Champion. The two finalists in the competition were **Jonesboro High and North Forsyth High**.

The four semi-finals were **Jonesboro, North Forsyth, Jenkins and Norcross**. Jonesboro will now represent the state of Georgia at the National High School Mock Trial Championship in St. Paul, Minnesota. The results will be published in the August issue of the *Bar Journal*. The following teams were named regional champions:

Central High School, Macon (Central GA) — Melisa Bodnar, coordinator
North Forsyth High School, Cumming (Cherokee Co.) — Meredith Ditchen, coordinator
Ware Magnet School, Waycross (Coastal GA) — Donna Crossland, coordinator
Decatur High School, Decatur (DeKalb Co.) — Katie Hung, coordinator
Grady High School, Atlanta (Fulton Co.) — Claire Dorchak, coordinator
Norcross High School, Norcross (Gwinnett Co.) — William M. Coolidge, III, coordinator
Paideia School, Atlanta (Metro Atlanta) — Faison Middleton & Jim Manley, coordinators
Northwest Whitfield High School, Tunnel Hill (North GA) — Rick Brown, coordinator
Clarke Central High School, Athens (Northeast GA) — Roy Manoll, coordinator
Trion High School, Trion (Northwest GA) — Mark Webb, coordinator
Jenkins High School, Savannah (Southeast GA) — Christy Barker, Leslie Pickett, Stephen Lowry coordinators
Jonesboro High School, Jonesboro (Southern Crescent) — Shawn Story, Brian Dempsey, Bridget Palmer coordinators
The Walker School, Marietta (West GA) — Jeff Richards & Linda Spievack, coordinators

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

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

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a full list of donors will be published in our 2002 Annual Report, Fall, 2002

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visit our Web site www.gabar.org/mocktrial.htm
or contact the mock trial office for a registration form
(404) 527-8779 or mocktrial@gabar.org

Make an impact in your community!



The State Bar of Georgia's Investigative Panel recently hosted a reception at the historic Tift House in Tifton, Ga. Panel member Joseph Carter and his wife, Rebecca, dressed in attire from the 1880s, were on hand to greet guests. Panel members met the following day at the Bar's Satellite Office in Tifton.



During the reception at the Tift House, Superior Court Judge Harvey Davis was encouraged to try his hand at the guitar. Music at the reception was reminiscent of the late 19th century.

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.

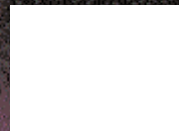
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Lookout Mountain Bar Association:

Striving to Make a Difference During the Second 50 Years

By Clifton M. Patty

On Jan. 26, 1950, the Lookout Mountain Judicial Circuit was created. The circuit was formed by taking Walker and Chattooga counties from the Rome Judicial Circuit and joining these counties with Catoosa and Dade counties from the Cherokee Judicial Circuit, thus creating the new circuit. These four counties, located at the southern end of the Appalachian Mountain chain, are wedged in a triangle created by the south line of the state of Tennessee and the east line of the state of Alabama. Breathtakingly beautiful Dade County is located in the apex of the triangle with its county seat, Trenton, nestled in the valley formed between Lookout Mountain on the east and Sand Mountain on the west.

Catoosa County, the only county in the circuit that does not have the physical presence of Lookout Mountain within its borders, has Ringgold, the site of the Civil War battle of Ringgold, as its county seat. Catoosa County is bounded on the north in part by Chattanooga, Tenn., and is the first county in Georgia on the Interstate 75 corridor, giving rise to its nickname, "Gateway to Georgia."

Walker County sports the west brow of the northern most part of Lookout Mountain providing spectacular views of Chattanooga Valley. Walker County also has Pigeon Mountain, the very first state land preservation property acquired by the state of Georgia. The county seat of Walker County is the picturesque town of Lafayette. Chattooga County, the southern most county in the Lookout Mountain Circuit is dissected by Lookout Mountain and Taylor's Ridge. Its

Lookout Mountain Bar Association Officers

President:	Melissa Gifford
Vice President:	Thomas Weldon
Treasurer:	Don Thompson
Secretary:	September Guy

county seat of Summerville has the oldest courthouse in the circuit, which was built in 1909. The landscape of the Lookout Mountain Judicial Circuit is mountainous, rugged and hard and not unlike the practice of law used to be in the Circuit. One of the Circuit's most famous lawyers, Bobby Lee Cook, once said if you could practice law in the Lookout Mountain Circuit, you could practice anywhere. One may presume that Bobby Lee would know, but the circuit has mellowed with its growth over the years.

The Lookout Mountain Judicial Circuit was reputedly birthed the controversy created when H. E. Nichols, a former court reporter, was appointed judge of the superior courts in the Rome Judicial Circuit. The story goes that some well positioned, but disappointed, lawyers from Walker County objected to a court reporter judge and caused the Lookout Circuit to be formed from two counties of the Rome Circuit and two counties of the Cherokee Circuit. The Lookout Mountain Bar Association was formed shortly after the circuit was established in 1950 for the fellowship and education of the estimated 22 lawyers, all of whom were male, practicing in the circuit.

H. E. Nichols later became a justice of the Supreme Court and if he held a grudge regarding the formation of Lookout Mountain Circuit it was never evident. Justice Nichols became a regular fixture at the meetings of the Lookout Mountain Bar Association. The circuit is proud that presiding Justice Norman Fletcher of the Supreme Court and Court of Appeals Judge Gary B. Andrews came to the state bench directly from the Lookout Mountain Circuit and still hold memberships in the Lookout

Mountain Bar Association. Grady Head, a former mayor of Ringgold, also became a justice of the Supreme Court of Georgia.

The annual meetings of the Lookout Mountain Bar Association were held on the last Saturday in May of each year until the 1980s. At that time, the annual meeting was traditionally hosted by the late Robert Coker, a superior court judge, at his farm in Walker County. Judge Coker was a gifted and enthusiastic gardener and his farm was a show place of blooms and vegetables when the late May meeting of the association was held each year. Younger lawyers were expected to appear at the farm on Friday evening with lawn mowers and rakes to help Judge Coker spruce up the grounds and cook bar-be-que on an open pit all night before the meeting on Saturday. Copious liquid refreshments for the meeting arrived early Friday evening to be guarded by the assisting young lawyers and complaints of involuntary servitude were few. When Judge Coker's health prevented him from hosting the meeting it moved to the more civilized and



Lookout Mountain Bar Association President Melissa Gifford and Judge Jon B. Wood take a break from the action during Casino Night activities.

refined environ of Superior Court Judge Jon Boling Wood's house on City Lake in LaFayette and the meal became catered.

By 2000, the membership of the association had grown and the leadership then considered a reorganization that would facilitate educational and fellowship goals of the founders of the association. The leadership also wanted to revitalize the association to give back to the community and serve the people of the circuit. One of the goals was to improve the image of the circuit's attorneys. In 2001, Mike Giglio, the president of the association, proposed an executive committee to be appointed by the president elect to

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Robert L. Stultz deals Blackjack to Walker County State Court Solicitor Charles Clements at the Lookout Mountain Bar Association's Casino Night.



Judge Jon B. Wood deals Blackjack to Ringgold attorney Kevin Silvey and his wife.



Ringgold attorney John Wiggins oversees the Craps table.


meet monthly to plan quarterly meetings and the annual meeting of the association. Melissa Gifford, the 2002 president of the association, appointed the members of the first executive committee at the first meeting following her election. Gifford followed up with a questionnaire to members of the associ-

ation to solicit their views regarding the direction that the association should take. These acts generated new interest in the association becoming a community leader in the circuit. The first of the quarterly meetings was held in February 2002 and was well attended by association membership.

The association agreed to sponsor Casino Night, a fund raiser for the Children's Advocacy Center of the Lookout Mountain Judicial Circuit and Four Points Inc., a nonprofit that assists abused women and children. On Feb. 22, 2002, the event was held at the brand new Catoosa County Civic Center and featured gaming tables to earn chips that could be used to purchase goods donated by sponsors. The association paid the expenses of the event and provided the dealers to man the blackjack tables, the roulette wheel and the craps table. Notable among those serving were Judge Wood and Walker County Juvenile Court Judge Bryant Henry on the blackjack tables, while Mike Giglio ran the roulette. John Wiggins, substituting for a conflicted Bobby Lee Cook (who also knows a lot about

craps), did a sterling job on the craps table. While the turnout was less than expected, the event raised \$1,800 for the two charities. The event did garner media coverage and hopefully next year even more citizens will turn out for this fund raiser to raise need funds for these worthwhile programs. In addition,

The Lookout Mountain Bar Association gives a Liberty Bell Award each year in each county of the circuit.

The Lookout Mountain Bar Association is coming together in its second 50 years to continue the fellowship and spirit that began when it was created. With new leadership and goals, the association will do even more to help the community and promote government of laws in its second 50 years of service. 

Skip Patty practices law with Chad Young in Ringgold, Ga. He is a past president of the Lookout Mountain Bar Association and a life-long resident of Catoosa County. Patty has been a member of the Lookout Mountain Bar Association for 28 years.



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2002 Law School Orientations Seek Assistance

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

- Purpose of the program: To introduce the concept of professionalism to first-year students.
- Minimal preparation is necessary for the leaders.
- Review the hypos and arrive at the school 15 minutes prior to the program.
- Committee will provide leaders with a list of the hypos including annotations and suggested questions.
- Two (2.0) hours of CLE credit will be offered, including 1.0 hour of Ethics and 1.0 hour of Professionalism.
- Pair up with a friend or classmate to co-lead a group. (Please note, if you are both recent graduates, we will pair you with a more experienced co-leader.)

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

ATTORNEY VOLUNTEER FORM 2002 LAW SCHOOL ORIENTATIONS ON PROFESSIONALISM

Full Name (Mr./Ms.): _____
 Nickname: _____
 Address: _____
 Telephone: _____
 Fax: _____
 Area(s) of Practice: _____
 Year Admitted to the Georgia Bar: _____
 Bar Number: _____
 Reason for Volunteering: _____

Please circle your choice:

Law School	Date	Time	Reception/Lunch Speaker
*Emory	8/23/02	10 a.m. - 12 noon	12 noon - 1 p.m. Judge Herbert E. Phipps
Georgia State	8/13/02	3:30 - 5:30 p.m.	5:30 - 6:30 p.m. Judge John H. Ruffin Jr.
John Marshall	8/24/02 (Sat.)	9 a.m. - 11:30 a.m.	8:30 - 9:00 a.m. Jimmy D. Berry, Esq.
Mercer	8/16/02	2 - 4 p.m.	4 - 5 p.m. Justice Hugh P. Thompson
UGA	8/19/02	To Be Announced	To Be Announced Chief Justice Norman S. Fletcher

**No additional volunteers are needed for the Emory Orientation sessions - Thank you.*

Please return to:

State Bar Committee on Professionalism, Attn: Mary McAfee
 Suite 620 • 104 Marietta Street, N.W. • Atlanta, Georgia 30303
 ph: (404) 225-5040, fax: (404) 225-5041.

Thank You!

Appellate Practice Section

Recent developments in the law.

Consideration of Evidence Outside Record:

Poetter v. State, 244 Ga. App. 675, 536 S.E. 2d 576 (2000).

Poetter appealed from the transfer of his probation to Douglas County. Attorney General as "friend of the Court" attached to its brief a copy of an order in Poetter's separate habeas corpus case, finding that the transfer had already occurred, and suggested that the appeal was moot.

The Court of Appeals considered this "evidence," stating that: (1) "an appellate court may hear and consider evidence outside the record that an appeal has become moot"; and (2) the appeal would be dismissed if the appellant either admitted that the appeal was moot, or failed to deny the "existence of the fact of mootness."

Time for Objection to Closing Argument.

Butler v. State, 237 Ga. 380, 541 S.E. 2d 653 (2001); *Mullins v. Thompson*, 274 Ga. 366, 553 S.E. 2d 154 (2001).

In a criminal case (*Butler*) and a civil case (*Mullins*), Court stated in dicta that objection to closing argument had to be made during argument (not after the argument was completed) or it was waived. Dissent in *Mullins* argued forcefully that Court gave no basis for overturning cases allowing objections after argument, and stressing the difficulty of objecting during argument, and a court's ability to address the problem by curative instructions.

Circumventing Appeal Procedure.

Smith & Wesson Corp. v. City of Atlanta, 237 Ga. 431, 543 S.E. 2d 16 (2001).

City sued firearms manufacturers, who defended on the ground that state law precluded such suits. State Court refused to dismiss case or to certify ruling on dismissal for interlocutory appeal. Manufacturers sought declaratory judgment, and writs of mandamus and prohibition to force State Court to dismiss case.

Supreme Court held that such writs could not be used to seek review of trial court rulings, including claims that trial court had misapplied the law.

Attorneys' Fees for Defending Appeal.

Kent v. David G. Brown P.E., Inc., 248 Ga. App. 447, 545 S.E. 2d 598 (2001), *aff'd* by *David G. Brown P.E., Inc. v. Kent*, 2002, WL

373080 (Ga. 2002). Brown won a jury verdict, including attorneys' fees for stubborn litigiousness; following Kent's unsuccessful appeal, court held a second hearing, at which jury awarded additional attorneys' fees to Brown for defending appeal.

Court of Appeals held that attorneys' fees under O.C.G.A. §13-6-11 were not available for defending an appeal: (1) appellate courts have their own penalties for filing frivolous appeals; and (2) might result in appellate court denying attorneys' fees for an appeal, but trial court granting them.

Showing Judicial Bias by Inflection or Tone of Voice.

Hines v. State, 248 Ga. App. 752, 548 S.E. 642 (2001).

Criminal defendant argued that judge's "use of voice tone, inflection and pauses" during jury charge constituted an expression of opinion and comment on the evidence; appellant submitted court reporter's audio tape of the jury charge as evidence.

Court of Appeals held that the tape was a permissible means of satisfying the requirement that the appellant create a record of the judge's conduct, even though that was usually done by the testimony of people who were in the courtroom regarding the judge's demeanor.

Corporate Counsel Section

From Enron to the economy and the impact of Sept. 11, this has been an eventful year for Corporate Counsel. The section has focused on these and other matters of interest to its members and provided education, support and a forum for discussion of these and other issues affecting its members.

At the Annual Corporate Counsel Institute, held in December 2001, CLE speakers focused on these very topics, discussing the most recent accounting developments and providing economic forecasting for the Georgia and national economies. A large portion of the program was dedicated to the impact of Sept. 11 on corporate concerns, ranging from contract provisions to insurance and employment. Theodore Jackson, an FBI Special Agent in charge of the Atlanta office, also provided unique insights on terrorism concerns and their handling in Atlanta and the state.

"Ethics for Corporate Counsel" was also the subject of a CLE program on Sept. 14, 2001, and was sponsored by the section.

During "Corporate Counsel in the Hotseat," speakers devoted a full day to ethical issues unique to in-house attorneys. These ranged from attorney/client privilege questions, such as when an in-house attorney may have business-related roles, to provisions of Georgia's new Rules of Professional Conduct as they affect corporate counsel.

Alternate dispute resolution issues have been the subject of several important recent Supreme Court decisions and the section sponsored a special CLE program on this topic in May. This update ranged from the impact of these decisions on employment arbitration to international arbitration practices.

Multijurisdictional practice (MJP) is now an important issue for lawyers across the country, particularly among corporate counsel who represent clients in matters across the country. The section presented testimony to the American Bar Association's (ABA) MJP committee in support of MJP rights for in-house counsel earlier in the year. The ABA committee has recommended that the ABA support a "safe harbor" for in-house counsel admitted in one state, but representing a corporation based or operating in another. The ABA is expected to act on this and other recommendations in August. A number of states have already taken steps of one type or another to open the door to MJP in response to the ABA's raising of the issue.

Several states have initiated business courts for the handling of complex business litigation in recent years. As a result of the experience by one section member before one such court, the section is undertaking a study of the concept for consideration in Georgia. The results of the work will be reported to the members and used for future discussion of the concept in this state.

The next chair of the Corporate Counsel Section will be Kent Alexander, who is general counsel

for Emory University. He has planned programs ranging from the next Corporate Counsel Institute, to be held on Dec. 12-13, 2002, to the Annual Holiday Reception, scheduled for Dec. 18, 2002.

Creditor's Rights Section

Georgia became the 41st state to adopt the Uniform Fraudulent Transfer Act during the 2002 General Assembly. This was the third appearance of the act in the legislature and this time a home run was hit. By writing, emailing, phoning and personally visiting legislators, members of the section were instrumental in securing the bill's passage. Section Chair-Elect Frank B. Wilensky was present when the Senate Subcommittee on Banking and Finance considered it. Roger Martin and Morris W. Macey, uniform laws commissioners of Georgia were also present. Macey had been chairman of the committee, which drafted the act. Jim Martin, now commissioner of the Department of Human Resources, steered the act through the House when he was former chairman of the House Judiciary Committee. Robert Reichert, a member of the House Judiciary Committee, presented the bill to the Senate Banking and Finance Committee, which was chaired by Donald Cheeks. The act was supported by the Georgia Bankers Association and many Georgia lawyers. The act will become effective on July 1, 2002.

The present O.C.G.A. § 18-2-22 entitled "Conveyances by Debtors Deemed Fraudulent" consists of 18 lines divided into three sections. It is followed by 32 pages of annotations, which evidence the inadequacy of the section. The Creditors Rights Section believes that the clarity of the act will greatly reduce litigation.

The act has addressed with unambiguous language definitions of key words. Insolvency will exist when the sum of the debtor's debts is greater than its assets at fair valuation, and a presumption of insolvency will arise when a debtor is generally not paying debts as they become due. A transfer may be fraudulent when made even before a creditor's claim arises. There are 11 badges of fraud which describe circumstances, which could result in avoidance of a transfer. Transfer by a debtor to an insider to pay an antecedent debt is fraudulent if the insider had reasonable cause to know of the insolvency but such action must be brought within one year of the transfer. The act lays out when a transfer is made and when an obligation is incurred. Remedies and defenses are described. The statute of limitations is clearly established to be four years from the date of the transfer except for the one-year statute to an insider for an antecedent debt.

The act parallels closely §§ 547(b) and 548(a) of the Bankruptcy Code. Now these causes of action are available without initiation of bankruptcy proceedings against a debtor. The act makes clear to both

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a debtor and a creditor the consequences of their behavior.

Elder Law Section

The Elder Law Section of the State Bar of Georgia was created in 2002. At present, the section has 332 members. The section promotes the development of substantive skills of attorneys working with older clients by offering continuing education programs. Through a newsletter, the section reports on legislation, case law and regulations related to elder law, as well as providing information about local bar and elder law sections.

During the 2001-2002 Bar year, the section has co-sponsored three ICLE programs: Adult Guardianship — A View from the Bench; Basic Elder Law; and Advanced Elder Law. The section partnered with the Georgia Advocacy Office in November 2001 to provide a continuing legal education program in Albany, Ga., regarding adult guardianship.

The section was a co-sponsor of the Annual Meeting in June 2001 and will be a co-sponsor again for the 2002 Annual Meeting at Amelia Island.

The section also monitors legislation affecting older adults. Among the many bills passed during the 2002 General Assembly, HB 1585 was passed, which expands the crime of cruelty to a person 65 and older to include the will deprivation of health care or shelter to the existing willful deprivation of necessary sustenance by a guardian or other person supervising the welfare of a person who is 65 or older. Some exemptions are included in the statute. In addition, HB 1361 (the governor's bill to prohibit predatory lending practices) was passed. Predatory lenders have targeted older homeowners because of the equity in their homes. HB 1413 provides for criminal records checks for all personal care home (assisted living facility) employment applicants who would handle resident funds or provide personal services.

Environment Law Section

The Environmental Law Section's summer CLE program will be held at the Hilton San Destin, Aug. 2-3, 2002.

The section conducted two very well attended brown bag luncheons this spring. The March program, hosted by Troutman Sanders, featured John Palmer, the new regional administrator for the United States Environmental Protection Agency, Region 4, Atlanta. Section members met again in April at Kilpatrick Stockton to hear panelists from the Georgia Environmental Protection Division, the environmental community and industry discuss the latest developments concerning the "General NPDES Permit for Stormwater Discharges Associated with Construction Activity" and the new state stream buffer variance rules.

Health Law Section

One of the major trends in health care law over the last several years has been an intense focus by state and federal governmental agencies on health care fraud. There have been many large scale fraud investigations of health care providers (doctors and hospitals), health care suppliers, health care companies, and pharmaceutical companies. Often, these actions are pursued under the Federal Civil False Claims Act, either by the government itself or by the government in cooperation with an individual whistleblower (known as a qui tam relator) who brings allegations of fraud to the government's attention. In part because of the substantial potential liability faced by health care providers in connection with these matters, they often result in large settlements pursuant to which the provider agrees to pay back millions of dollars to the state or federal government.

The health care industry also faces potential criminal liability in connection with health care fraud

investigations. The industry has complained loudly that legitimate providers are facing criminal exposure for noncompliance with health care regulations which are often complex, contradictory, and confusing. Health care-related criminal actions have resulted in jail time for providers and very substantial monetary settlements. For example, in 2001, TAP Pharmaceutical Products, Inc. entered into a record-breaking \$875 million settlement with the United States government to end an investigation relating to the company's sales and marketing of a prostate cancer drug. Over \$200 million of the total settlement amount consisted of criminal fines. Approximately \$600 million was paid to settle Federal Civil False Claims Act allegations that the company had filed false and fraudulent claims with the Medicare and Medicaid programs. Several individual physicians were criminally charged in connection with the investigation.

Very recently, health care providers were given some comfort and guidance with respect to the circumstances under which they might face criminal liability in connection with a health care fraud matter. That guidance came in the form of an Eleventh Circuit Court of Appeals decision in *United States of America v. Robert Whiteside et al.*, Case Nos. 99-15197, 00-12759, Slip Op., March 22, 2002.

In *Whiteside*, two health care facility executives challenged their criminal convictions for making false statements in Medicare/Medicaid reimbursement cost reports. The Eleventh Circuit reversed the defendants' convictions, holding that the government failed to prove that the alleged false statements were, in fact, knowingly and willfully false. The defendants argued that the government failed to prove beyond a reasonable doubt that the cost reports were not true under a reasonable interpretation of the law. The court held that the

government did not meet its burden because it failed to prove that Medicare regulations, administrative rulings, or judicial decisions clearly required the expenses at issue to be claimed as the government alleged. Indeed, the court noted that one of the government's witnesses had testified that the regulations at issue in the case "can be interpreted different ways."

The Whiteside decision constitutes a major victory for health care providers and for common sense. Providers have long contended that they should not be subject to sanctions because they misinterpreted Medicare and Medicaid regulations that are complex and often subject to varying interpretations. The Whiteside case should prove helpful to providers as they seek to comply with the complex rules and regulations which govern them and avoid civil or criminal liability for health care fraud.

The State Bar of Georgia Health Law Section recently co-sponsored the Fifth Annual Health Care Fraud Institute. The TAP Pharmaceuticals settlement and the Whiteside case discussed above were just two of the major developments in health care fraud which were addressed and analyzed by an experienced, knowledgeable group of speakers. The program was well attended and useful to participants who practice in the area of health care fraud and abuse matters.

Military/Veterans Law Section

The Military/Veterans Law Section of the State Bar of Georgia is currently planning a seminar for the summer. Several renowned speakers will update section members on recent case law pertaining to both military and veterans law and regulations, and information on beginning and maintaining an active military/veterans practice.

With the adoption of the Veterans Claims Assistant Act of 2000, (Pub. L. #No.106-475, 114

Stat. 6) (Nov. 9, 2000) it is the hope of the section that veterans will be more versed in the claims process. Since the adoption of the act, veterans have received letters notifying them about their rights in the VA claims process. In these letters, the veterans were asked the following: what evidence is necessary to establish entitlement to the benefit wanted and what information or evidence will the VA obtain for the veteran?; what information or evidence does the VA need from the veteran?; what can the veteran do to help with the claim?; and who can the veteran call if he or she has any questions or needs assistance? It is the VA's duty to make reasonable efforts to help the veteran in obtaining the evidence necessary to support the claim. It is the veteran's responsibility to provide the VA enough information about necessary records so that the VA can request them from the agency or person. It remains the veteran's responsibility to support his or her claim with appropriate evidence. Veterans are able to visit the VA's Web site at www.va.gov for more information about benefits.

The section encourages suggestions and new ideas from current members and is actively recruiting new members to jump-start this new section.

The School and College Law Section

Are you a school or college/university attorney? Have you been asked to represent parents in an education lawsuit? Are you interested in education law? If so, you may want to consider joining the School and College Law Section of the State Bar of Georgia. The School and College Law Section provides members with opportunities to interact with those actively engaged in the practice of school and college law. More information on the section, including a roster of members, can be found at www.gabar.org/sclaw.htm. Section officers are: Pat McKee of

Atlanta, chair; Peggy Brockington of Atlanta, vice-chair; and Mel Hill Jr. of Athens, editor of the section newsletter.

Mark your calendars for the 33rd Annual Conference on Higher Education and the Law, scheduled for July 15-16, 2002, at the Georgia Center for Continuing Education in Athens. This conference is designed to serve the needs of college and university presidents and vice-presidents, deans, faculty, student affairs administrators, consulting attorneys and other individuals concerned with the legal aspects of student, faculty and administrative behavior. CLE credits are offered for this program, including ethics/professionalism hours this year as well. Sponsored by the Institute of Higher Education of the University of Georgia, and supported by the School and College Law Section, this year's conference focuses on "Preventative Law in Action." Confirmed speakers to date include: Parker Young, Institute of Higher Education, "Current Issues in Student Life and Academic Affairs;" Gary Pavela, University of Maryland, "Law and Policy Quiz;" the Honorable Harold Clarke, former chief justice, Georgia Supreme Court and Professor Anne Proffitt Dupre, University of Georgia Law School, "Professionalism, Ethics and Civility in Higher Education;" Mary Anne Connell, University of Mississippi, "Affirmative Action, Minority Hiring, and Race-based Preferences in Admissions and

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Financial Aid;" and Kim Novak, Texas A&M, "The Aftermath of the Texas A&M Bonfire — Reducing Institutional Liability through the Development of a Proactive Risk Management Plan." For more information, contact Mel Hill at mbhill@arches.uga.edu or (706) 583-0048; Nancy Breme at (706) 542-1272; or Anne Jarvis at ajarvis@arches.uga.edu or (706) 542-0579.

Technology Law Section

There have been some interesting developments in the area of technology law in recent months. In Georgia, Senate Bill 214 (the "Database Bill") failed to come to a vote before the Georgia House of Representatives and, as a result, appears to have little if any chance of becoming law. The Database Bill would have elevated the protection available under law for "databases" as defined in the proposed law. Proponents asserted that the Bill would encourage economic development through investment in certain types of information processing and storage operations in the State, while opponents argued that the law was overbroad and therefore created uncertainty that would not be conducive to commerce. The Senate passed the Bill in March of last year, but the Bill sat in the House. The House Subcommittee reviewing the Database Bill even considered a formal Do Not Pass motion but instead settled on holding the bill for the remainder of the session. The members of the Subcommittee indicated that there would be no further hearings on the Bill and that it would not come up for a vote, this signaling its demise.

In a legal proceeding of potentially broad impact, British Telecommunications PLC continues to prosecute a patent infringement action against Prodigy Communications Corporation based on British Telecom's claim to have patented the hypertext link-

ing technology commonly used on the Internet. British Telecom previously submitted demands to Internet Service Providers such as Prodigy and America Online for royalties arising from use of hypertext links. Following a cold reception to these demands, British Telecom appears to have settled on Prodigy, the oldest commercial ISP, as the subject of a test case to gauge the strength of its claims. If the case is successful, it is expected that British Telecom will pursue royalty claims against other ISPs and other companies utilizing links on the Internet.

The U.S. District Court issued a preliminary ruling on March 13, 2002, that construed many of British Telecom's key patent claims narrowly. One view is that this decision, called a Markham ruling, may ultimately prove fatal to an attempt by British Telecom to apply its patent to the Internet as a whole by reason of the Court's construction of the scope of the underlying patent claims. The Court ordered the parties to file motions for summary judgment by April 12, 2002, and the case may go to trial as early as September of this year.

The Technology Law Section of the State Bar of Georgia is an association of attorneys from sole practitioners to members of the largest firms in the State, and from startups to multi-national corporations. Members hail from across Georgia and from across the country. The Section has an active agenda of meetings, seminars, and functions throughout the year at which members can network, receive information about cutting-edge issues facing attorneys and their clients in this area of practice, and engage in community service activities.

The following is a list of upcoming Section events. For more information about these events, please visit the Technology Law Section's Web page at <http://www.computerbar.org>.

- Tech Corps Georgia Volunteer Day: Aug. 3, 2002

- Section Meeting: August 2002 (Date To Be Announced)
- Annual Technology Law Institute: Oct. 3-4, 2002


In Other News

As the Bar year comes to a close, sections will be submitting annual reports of activity to the Board of Governors for their June meeting. At present, over 13,103 Bar members are members of the various sections.

Achievement Awards will be presented to four outstanding sections. These awards will be presented during the Plenary Session at the 2002 Annual Meeting at Amelia Island Plantation. Keep an eye out for future Georgia Bar Journal articles to see the winners.

At the Spring Board of Governors' meeting in Savannah, the Bar's 35th section was approved. The new section is the Government Attorneys Section. The purpose of this section is to "provide a forum for governmental attorneys and to promote their interests before and after participation in the State Bar of Georgia." A section chair will be appointed soon.

It's that time of year again – time to join a section. The benefits are endless. Section communications, such as newsletters and e-mails, inform members. Section planned events provide opportunities to network and seminars offer interesting speakers on cutting-edge topics. Many sections also participate in community projects. For an overview of the 35 sections, visit the Bar's Web site at www.gabar.org.

Last, but not least, the Bar's sections will have a fun exhibit booth at the Annual Meeting. Be sure to stop by, as many prizes will be awarded. Also, don't miss the opening night reception during the meeting, which is sponsored by 26 of the Bar's sections. This event will provide another opportunity to win prizes, as well as provide the opportunity to meet fellow members and their families. 

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

William H. Alexander
Atlanta, Ga.
Admitted 1957
Died February 2002

Luther A. Alverson
Atlanta, Ga.
Admitted 1941
Died March 2002

Mildred B. Bell
Columbus, N.C.
Admitted 1969
Died January 2002

Ernestine B. Brown
Atlanta, Ga.
Admitted 1976
Died February 2002

L. Paul Cobb Jr.
Atlanta, Ga.
Admitted 1963
Died October 2001

Donald Carmen Feniello
Flushing, N.Y.
Admitted 1993
Died March 2002

Sam H. Flint
St. Simons Island, Ga.
Admitted 1952
Died April 2002

Josiah Martin Flournoy
Columbus, Ga.
Admitted 1939
Died November 2001

Lucien George Folsom
Atlanta, Ga.
Admitted 1947
Died February 2002

Jeana Girard
Atlanta, Ga.
Admitted 1995
Died April 2002

Jackson B. Harris
Rome, Ga.
Admitted 1948
Died August 2001

Richard G. Harwell Sr.
Decatur, Ga.
Admitted 1981
Died February 2002

James S. Hurt
Marietta, Ga.
Admitted 1977
Died March 2002

William P. Johnson
Carrollton, Ga.
Admitted 1957
Died February 2002

Armand David Kahn
Atlanta, Ga.
Admitted 1959
Died March 2002

Marjorie King
Atlanta, Ga.
Admitted 1950
Died February 2002

John G. Kopp
Waycross, Ga.
Admitted 1949
Died November 2001

Jason Derek Long
Macon, Ga.
Admitted 1998
Died August 2001

James A. Moore
Houston, Texas
Admitted 1947
Died January 2002

Toni Marie Rodgers
Smyrna, Ga.
Admitted 1990
Died February 2002

Edwin A. Sawyer
Decatur, Ga.
Admitted 1951
Died March 2002

Jack M. Smith
Marietta, Ga.
Admitted 1950
Died April 2002

Donald Grier Stephenson
Covington, Ga.
Admitted 1935
Died February 2002

Herman E. Talmadge
Hampton, Ga.
Admitted 1936
Died March 2002

V. Jack Yarbrough
Atlanta, Ga.
Admitted 1948
Died March 2002

Memorial Gifts

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

Information

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

The Architecture of Hope

The Courthouse and the Depot

Reviewed by Harold Clarke

Wilber W. Caldwell has written three books in one. His *The Courthouse and The Depot* (Mercer University Press, 2001) has all the good qualities of a coffee table book, a seriously researched historical reference book and a fascinating book telling what underlies the development of Georgia for much of the 19th and 20th centuries.

As a coffee table book, this volume can boast a handsome cover, interesting photographs and easy reading.

As an historical reference work, the book includes architectural details of virtually every courthouse and depot built in Georgia between 1833 and 1910.

As a narrative of the development of Georgia during the era involved, the book contains many narratives; some dealing in human interest and others dealing in the detailed efforts of Georgia people to change the face of their state.

In addition to reflecting at least three faces of its own, *The Courthouse and the Depot* should appeal to a wide variety of the segments of the population of Georgia. Lawyers will find it particularly interesting for the obvious reason that courthouses are to lawyers what hospitals are to doctors — they are a major workplace for most lawyers. Most lawyers also possess an interest in history, if for no other reason law and dispute

resolution lean so heavily on what has happened in the past.

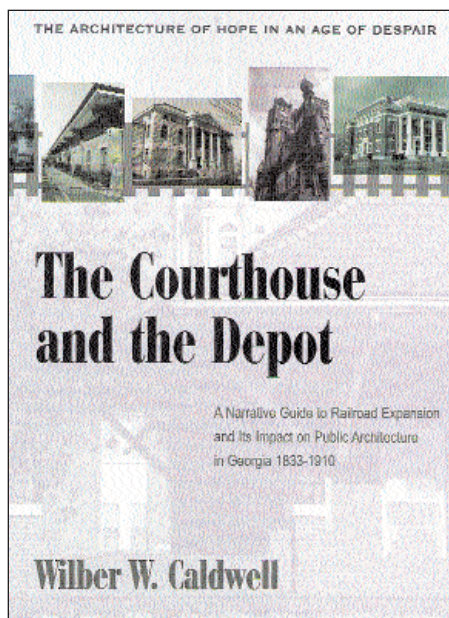
Lawyers of my generation will find the story of the history of depots fun to read. There was a time when Georgia lawyers could be roughly divided into two categories: those who represent railroads and those who sue railroads. This book goes beyond the

mere physical description of depots and the rail lines. It presents an accurate narrative of the impact of these things on the communities they served. It also tells of the successes, failures and sometimes hardships in accomplishing the development of an effective rail system.

There was a time when no town or city could hope to be successful as a society of people or as a business community unless they had both a court-

house and a depot. The courthouses provided a focal point (a courthouse square), which attracted the businesses of the towns. From time to time, it became a social center as a meeting place and specifically during “court week.”

During court week, great masses of people gathered under the trees on the courthouse square awaiting service as jurors, witnesses or perhaps parties to legal proceedings. They ate their lunches on the public benches. They chewed their tobacco and spit the juice on the lawn, and they spent hours discussing public



issues. America has lost something when all of that expired.

Depots held a similar place. The depot offered something more than the movements of freight in those days. I have personal recollections that remain clear with me regarding the depot in Forsyth, Ga. Many passenger trains passed over the rails of the Central Georgia Railroad.


They came right through Forsyth. As a youngster, I took great pleasure in watching the trains go through, but the greatest pleasure came a couple of times a day when the "fast trains" sped through Forsyth on their way from Chicago to Miami or other such important points. I looked at the well-dressed and distinguished-looking people as they headed toward their exotic destinations. The imagination of a young boy can run wild just doing this. That does not mean that freight trains did not hold an important place in society. They provided economic life's blood to remote villages by bringing in goods for sale and shipping out raw materials to be processed somewhere else. There was another sad used for freight trains during my young days. I would walk down to the railroad and watch the trains go by with untold numbers of hoboes clinging to the cars of a train in hopes of getting to another place where they could find a better life.

For those of us who lived in small Georgia towns at that time, the train offered a convenient and cheap way to get to other places. We frequently rode the trains to Atlanta, Macon

and other destinations. The description of the depot and the Windsor Hotel in Americus held a particular interest for me. Almost 60 years ago, I, along with the other members of the Mary Persons High School football team, traveled by train to Americus to play the team from that town. Our coach rented two large rooms in the Windsor Hotel for us to rest while we waited for game time. After being soundly defeated, we straggled back to the depot in Americus, where the train was late, but got us back to Forsyth before the October sunrise.

Most Georgians and readers of the *Georgia Bar Journal* will not have personal recollections of much of what I have mentioned, but I am convinced that most will find the book more than interesting. After all, the best way to know where we are now and where we are going is to understand where we came from and how we got here. *The Courthouse and the Depot* provides many of the answers. Those who do not read it will miss an important experience.

This is not a book to be read and put away to gather dust. This book puts in context the events of the past and helps apply them to the

present and to the future. I suggest you read it and then keep it handy for periodical reference. It is the kind of book that Georgians ought to have in their library. 



Justice Harold Clarke has served of counsel to Troutman Sanders LLP since retiring from the Supreme Court of Georgia

bench in 1994. He is a former State Bar of Georgia president, 1976-1977, and was a member of the Georgia General Assembly from 1961-1971. Justice Clarke is also an adjunct professor of law at the University of Georgia School of Law, where he received his J.D. degree in 1950.

The Courthouse and the Depot, The Architecture of Hope in an Age of Despair, A Narrative Guide to Railroad Expansion and its Impact on Public Architecture in Georgia, 1833-1910, (Macon: Mercer University Press, 2001). Hardback, 624 pages, 300 photos, 33 maps, three appendices, complete index. This book is available for \$50 from book sellers or for \$40 from the Mercer University Press at www.mupress.org or call the Mercer Press at (800) 342-0841 inside Georgia or (800) 637-2378 outside Georgia.

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<h3>June 2002</h3>	<p>6-9 ICLE <i>Georgia Trial Skills Clinic</i> UGA School of Law, Athens, Ga. 24 CLE with 2 Professionalism, 2 Ethics and 6 Trial Practice</p>
<p>3 ABA <i>Banking Law Basics – A Primer on Banking Law</i> San Francisco, Calif. 17.3 CLE with 0.5 ethics</p>	<p>6 LORMAN BUSINESS CENTER INC. <i>Insurance Bad Faith Claims in Georgia Litigation</i> Atlanta, Ga. 6.0 CLE</p>
<p>3 PRACTISING LAW INSTITUTE <i>Acquiring or Selling the Privately Held Company</i> Various Dates and Locations 11.8 CLE with 0.8 ethics</p>	<p>7 NATIONAL BUSINESS INSTITUTE <i>Land Use Law Update in Georgia</i> Atlanta, Ga. 6.0 CLE with 0.5 ethics</p>
<p>5 ABA <i>16th Annual National Institute on ERISA Basics</i> New York, N.Y. 18.6 CLE with 1.0 ethics</p>	<p>13 ICLE <i>Estate Planning Under the New Tax Laws (Video Replay)</i> Annual Meeting, Amelia Island, Fla. 3 CLE</p>
<p>5 NATIONAL INSTITUTE OF TRIAL ADVOCACY <i>Midwest Deposition</i> Chicago, Ill. 16.8 CLE with 1.3 ethics</p>	<p>13 ICLE <i>Child Custody, Visitation and Termination of Parental Rights</i> Annual Meeting, Amelia Island, Fla. 3 CLE with 1 Professionalism (self-report)</p>
<p>5 VIRGINIA LAW FOUNDATION <i>Police Liability in Georgia</i> Atlanta, Ga. 6.0 CLE and 1.3 ethics</p>	<p>13 ICLE <i>Preventing Legal Malpractice Claims and Ethical Complaints</i> Annual Meeting, Amelia Island, Fla. 3 CLE with 1 Ethics</p>
<p>5 NATIONAL BUSINESS INSTITUTE <i>Basic Residential Real Estate Transactions in Georgia</i> Atlanta, Ga. 6.0 CLE and 0.5 ethics</p>	<p>13 ICLE <i>Third Annual Bench and Bar Committee Sem.</i> Annual Meeting, Amelia Island, Fla. 3 CLE with 1 Professionalism (self-report) and 3 Trial Practice</p>
<p>5 LORMAN BUSINESS CENTER INC. <i>Construction Claims in California</i> Santa Monica, Calif. 6.7 CLE</p>	<p>13 NATIONAL EMPLOYMENT LAW INSTITUTE <i>Employment Law Litigation</i> San Francisco, Calif. 11.5 CLE with 1 Ethics hour</p>

<p>13 CHATTANOOGA BAR ASSOCIATION <i>Annual Spring Estate Planning Practice Update</i> Chattanooga, Tenn. 3.3 CLE</p>	<p>21 ICLE <i>Defense of Drinking Drivers</i> Atlanta, Ga. 6 CLE</p>
<p>14 ICLE <i>A General Practitioner's Guide to Trademark, Copyright, Patent and Internet Law</i> Annual Meeting, Amelia Island, Fla. 3 CLE with 1 Ethics</p>	<p>21-22 ICLE <i>Southeastern Admiralty Law Institute</i> Point Clear, Ala. 9 CLE</p>
<p>14 ICLE <i>Legal Technology and Management Solutions: Tools of the 21st Century Lawyer</i> Annual Meeting, Amelia Island, Fla. 3 CLE with 1 Ethics</p>	<p>21 LORMAN BUSINESS CENTER INC. <i>Auto Insurance Law and Accident Litigation in Georgia</i> Atlanta, Ga. 6 CLE</p>
<p>14 LORMAN BUSINESS CENTER INC. <i>Workers Compensation in Georgia</i> Athens, Ga. 6 CLE</p>	<p>25 NATIONAL BUSINESS INSTITUTE <i>Limited Liability Companies and Limited Liability Partnerships in Georgia</i> Atlanta, Ga. 6.7 CLE with 0.5 ethics</p>
<p>18 NATIONAL BUSINESS INSTITUTE <i>Insurance Law: Third Party Coverage in Georgia</i> Atlanta, Ga. 6 CLE with 0.5 ethics</p>	<p>26 LORMAN BUSINESS CENTER INC. <i>Florida Construction Law</i> Jacksonville, Fla. 6 CLE</p>
<p>18 LORMAN BUSINESS CENTER INC. <i>Judgment Enforcement in Florida</i> Jacksonville, Fla. 6.7 CLE with 1 ethics</p>	<p>27 LORMAN BUSINESS CENTER INC. <i>Collection Law for the Healthcare Industry</i> Athens, Ga. 6.7 CLE</p>
<p>19 NATIONAL BUSINESS INSTITUTE <i>Advanced Issues in Georgia Elder Law</i> Atlanta, Ga. 6 CLE with 0.5 ethics</p>	<p>July 2002</p>
<p>20 CHATTANOOGA BAR ASSOCIATION <i>Intellectual Property Issues in Structuring Deals and Drafting Agreement</i> Chattanooga, Tenn. 4 CLE</p>	<p>1 ICLE <i>Bridge the Gap (Video Replay)</i> Atlanta, Ga. 6 CLE</p>
<p>20 LORMAN BUSINESS CENTER INC. <i>LLCs Advising Small Business Start-Ups and Larger Companies in Georgia</i> Atlanta, Ga. 6.7 CLE with 1 ethics</p>	<p>10 NATIONAL BUSINESS INSTITUTE <i>Advanced Issues in Employee Benefits Law in Georgia</i> Atlanta, Ga. 6 CLE with 0.5 ethics</p>

11
NATIONAL BUSINESS INSTITUTE
Bondary Law in Georgia
Atlanta, Ga.
5.5 CLE with 0.5 ethics

11
LORMAN BUSINESS CENTER INC.
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Build in Florida
Jacksonville, Fla.
6 CLE

12
LORMAN BUSINESS CENTER INC.
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Techniques in Georgia
Atlanta, Ga.
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17
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18
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12 CLE

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23
NATIONAL BUSINESS INSTITUTE
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Atlanta, Ga.
6 CLE with 0.5 ethics

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48th Annual Rocky Mountain
Mineral Law Institute
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August 2002

2-3
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Environmental Law Summer Seminar
Destin, Fla.
8 CLE

14-15
ICLE
Real Property Law Institute (Video Replay)
Atlanta, Ga.
12 CLE

<p>20 NATIONAL BUSINESS INSTITUTE <i>The Probate Process from Start to Finish in Georgia</i> Atlanta, Ga. 6.7 CLE with 0.5 ethics</p>	<p>23 ICLE <i>Georgia Law of Torts</i> Atlanta, Ga. 6 CLE</p>
<p>20-21 ICLE <i>Selected Video Replays</i> Atlanta, Ga. 6 and 12 CLE</p>	<p>28 LORMAN BUSINESS CENTER INC. <i>Taking and Defending Effective Depositions in Florida</i> Jacksonville, Fla. 6.0 CLE with 1.0 ethics and 5 trial</p>
<p>23 ICLE <i>Nuts and Bolts of Family Law</i> Savannah, Ga. 12 CLE</p>	<p>August 31 – September 1 ICLE <i>Urgent Legal Matters</i> Sea Island, Ga. 12 CLE</p>

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Notice of Motion to Amend the Rules and Regulations of the State Bar of Georgia

No earlier than 30 days after the publication of this notice, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, 2001-2002 *State Bar of Georgia Directory and Handbook*, p. H-6 (hereinafter referred to as "Handbook").

I hereby certify that the following is the verbatim text of the proposed amendments as approved by the Board of Governors of the State Bar of Georgia. Any member of the State Bar of Georgia who desires to object to the proposed amendments to the Rules is reminded that he or she may only do so in the manner provided by Rule 5-102, *Handbook*, p. H-6.

This Notice, and the following verbatim text, are intended to comply with the notice requirements of Rule 5-101, *Handbook*, p. H-6.

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT STATE OF GEORGIA

IN RE: STATE BAR OF GEORGIA
Rules and Regulations for its
Organization and Government

MOTION TO AMEND 02-2

MOTION TO AMEND THE RULES AND REGULATIONS OF THE STATE BAR OF GEORGIA

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors in a regular meeting held on April 6, 2002, and upon the concurrence of its Executive Committee, presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated

December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, 2001-2002 *State Bar of Georgia Directory and Handbook*, pp. 1-H, *et seq.*, and respectfully moves that the Rules and Regulations of the State Bar of Georgia be amended in the following respects:

I.

Proposed Amendment to State Bar of Georgia Rule 1-304, Election of Members of Board of Governors

It is proposed that Part I (Creation and Organization), Rule 1-304 be amended as shown below by deleting the stricken portions of the rule and inserting the phrases in bold and italicized typeface as follows:

Rule 1-304. Election of Members of Board of Governors.

The State Bar of Georgia shall, in its bylaws, establish the term of office and the method of election of the members of the Board of Governors representing judicial circuits and nonresident members. Such method of election shall ensure that:

(a) the election will be by secret written *or secure electronic* ballot;

(b) each active member of the State Bar of Georgia, in conjunction with a specified number of other active members, will have the right, upon compliance with reasonable conditions, to nominate a candidate from his judicial circuit (or candidates in circuits electing more than one member of the Board of Governors in such election) whose name will be ~~printed~~ **placed** on the ballot for his circuit;

(c) each active member of the State Bar of Georgia residing outside of the State, in conjunction with a specified number of other active nonresident members, will have the right, upon compliance with reasonable conditions, to nominate a candidate from the active members of the State Bar of Georgia residing outside of the State;

(d) any nominating petition shall

bear or be accompanied by a statement signed by the nominee indicating his willingness to serve if elected;

(e) a ballot for his judicial circuit will be mailed to each active resident member and a ballot will be mailed to each active nonresident member in the case of election of nonresident board member, having printed thereon the names of all qualified nominees for such circuit or nonresident post and space for a write-in vote in ample time for the member to cast the ballot before the time fixed for the election. *In lieu of a written ballot, a secure electronic ballot, which meets the requirements above, may be provided to members.*

(f) each nominee shall be entitled to have at least one observer present at the counting of the *written* ballots from his judicial circuit; and

(g) any change in the geographical limits of a judicial circuit or circuits shall automatically terminate the terms of all members elected to the Board of Governors, accordingly in such manners as the bylaws may provide. In the event the geographical limits of a circuit are changed after the notices of election have been distributed to the members of the State Bar of Georgia, then and in that event, the terms of the members of the Board of Governors from such circuits will remain as they were before the change in geographical limits until the election of the Board of Governors to be held the following year.

Should the proposed amendment be adopted, State Bar Rule 1-304 would read as follows:

Rule 1-304. Election of Members of Board of Governors.

The State Bar of Georgia shall, in its bylaws, establish the

term of office and the method of election of the members of the Board of Governors representing judicial circuits and nonresident members. Such method of election shall ensure that:

(a) the election will be by secret written or secure electronic ballot;

(b) each active member of the State Bar of Georgia, in conjunction with a specified number of other active members, will have the right, upon compliance with reasonable conditions, to nominate a candidate from his judicial circuit (or candidates in circuits electing more than one member of the Board of Governors in such election) whose name will be placed on the ballot for his circuit;


(c) each active member of the State Bar of Georgia residing outside of the State, in conjunction with a specified number of other active nonresident members, will have the right, upon compliance with reasonable conditions, to nominate a candidate from the active members of the State Bar of Georgia residing outside of the State.

(d) any nominating petition shall bear or be accompanied by a statement signed by the nominee indicating his willingness to serve if elected;

(e) a ballot for his judicial circuit will be mailed to each active resident member and a ballot will be mailed to each active nonresident member in the case of election of nonresident board member, having printed thereon the names of all qualified nominees for such circuit or nonresident post and space for a write-in vote in ample time for the member to cast the ballot before the time fixed for the election. In lieu of a written ballot, a secure

electronic ballot, which meets the requirements above, may be provided to members;

(f) each nominee shall be entitled to have at least one observer present at the counting of the written ballots from his judicial circuit; and

(g) any change in the geographical limits of a judicial circuit or circuits shall automatically terminate the terms of all members elected to the Board of Governors, accordingly in such manners as the bylaws may provide. In the event the geographical limits of a circuit are changed after the notices of election have been distributed to the members of the State Bar of Georgia, then and in that event, the terms of the members of the Board of Governors from such circuits will remain as they were before the change in geographical limits until the election of the Board of Governors to be held the following year. 

SO MOVED, this _____ day of _____, 2002

Counsel for the
State Bar of Georgia

William P. Smith, III
General Counsel
State Bar No. 665000

Robert E. McCormack
Deputy General Counsel
State Bar No. 485375

OFFICE OF THE
GENERAL COUNSEL
State Bar of Georgia
104 Marietta Street, NW, Suite 100
Atlanta, Georgia 30303
(404) 527-8720

First Publication of Redrafted Proposed Formal Advisory Opinion No. 98-R7 (For Reconsideration)

Pursuant to Rule 4-403 (c) of the Rules and Regulations of the State Bar of Georgia, the Formal Advisory Opinion Board has made a preliminary determination that the following redrafted proposed opinion should be issued. Proposed Formal Advisory Opinion No. 98-R7 was previously published in the February and June 2000 issues of the *Georgia Bar Journal*. State Bar members are invited to reconsider this proposed opinion and file comments with the Office of General Counsel of the State Bar of Georgia at the following address:

Office of General Counsel
State Bar of Georgia
104 Marietta Street, Suite 100
Atlanta, Georgia 30303
Attention: John J. Shiptenko

An original and eighteen copies of any comment to the proposed opinion must be filed with the Office of General Counsel by July 7, 2002, in order for the comment to be considered by the Formal Advisory Opinion Board. Any comment to a proposed opinion should make reference to the request number of the proposed opinion. After consideration of comments, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that the opinion should be issued, the opinion will be published and filed with the Supreme Court of Georgia.

QUESTION PRESENTED:

May a Georgia attorney contract with a client for a non-refundable special retainer?

SUMMARY ANSWER:

A Georgia attorney may contract with a client for a non-refundable special retainer so long as: 1) the contract is not a contract to violate the attorney's obligation under Rule 1.16(d) to refund "any advance payment of fee that has not been earned" upon termination of the representation by the attorney or by the client; and 2) the contracted for fee, as well as any resulting fee upon termination, does not violate Rule 1.5(a)'s requirement of reasonableness.

OPINION:

This issue is governed primarily by Rule of Professional Conduct 1.16(d) which provides: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests such as . . . refunding any advance payment of fee that has not been earned."

A special retainer is a contract for representation obligating a client to pay fees in advance for specified services to be provided by an attorney. This definition applies regardless of the manner of determining the amount of the fee or the terminology used to designate the fee, *e.g.*, hourly fee, percentage fee, flat fee, fixed fees, or minimum fees. Generally, fees paid in advance under a special retainer are earned as the specified services

are provided. Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed¹. The portion of the fee reasonably allocated to these services are, therefore, earned immediately. These fees, and any other fees that have been earned by providing specified services to the client, need not be refunded to the client. In this sense, a special retainer can be made non-refundable.

In FORMAL ADVISORY OPINION 91-2 (FAO 91-2), we said:

"Terminology as to the various types of fee arrangements does not alter the fact that the lawyer is a fiduciary. Therefore, the lawyer's duties as to fees should be uniform and governed by the same rules regardless of the particular fee arrangement. Those duties are . . . : 1) To have a clear understanding with the client as to the details of the fee arrangement prior to undertaking the representation, preferably in writing. 2) To return to the client any unearned portion of a fee. 3) To accept the client's dismissal of him or her (with or without cause) without imposing any penalty on the client for the dismissal. 4) To comply with the provisions of Standard 31 as to reasonableness of the fee."

The same Formal Advisory Opinion citing *In the Matter of Collins*, 246 Ga. 325 (1980), states:

"The law is well settled that a client can dismiss a lawyer for any

reason or for no reason, and the lawyer has a duty to return any unearned portion of the fee.”²

Contracts to violate the ethical requirements upon which FAO 91-2 was based are not permitted, because those requirements are now expressed in Rule 1.16(d) and Rule 1.5(a). Moreover, attorneys should take care to avoid misrepresentation concerning their obligation to return unearned fees upon termination.

The ethical obligation to refund unearned fees, however, does not prohibit an attorney from designating by contract points in a representation at which specific advance fees payments under a special retainer will have been earned, so long as this is done in good faith and not as an attempt to penalize a client for termination of the representation by refusing to refund unearned fees or otherwise avoid the requirements of Rule 1.16(d),

and the resulting fee is reasonable. Nor does this obligation call in to question the use of flat fees, minimum fees, or any other form of advance fee payment so long as such fees when unearned are refunded to the client upon termination of the representation by the client or by the attorney. It also does not require that fees be determined on an hourly basis. Nor need an attorney place any fees into a trust account absent special circumstances necessary to protect the interest of the client. See Georgia Formal Advisory Opinion 91-2. Additionally, this obligation does not restrict the non-refundability of fees for any reason other than whether they have been earned upon termination. Finally, there is nothing in this obligation that prohibits an attorney from contracting for large fees for excellent work done quickly. When the contracted for work is done, however quickly

it may have been done, the fees have been earned and there is no issue as to their non-refundability. Of course, such fees, like all fee agreements, are subject to Rule 1.5, which provides that the reasonableness of a fee shall be determined by the following factors:

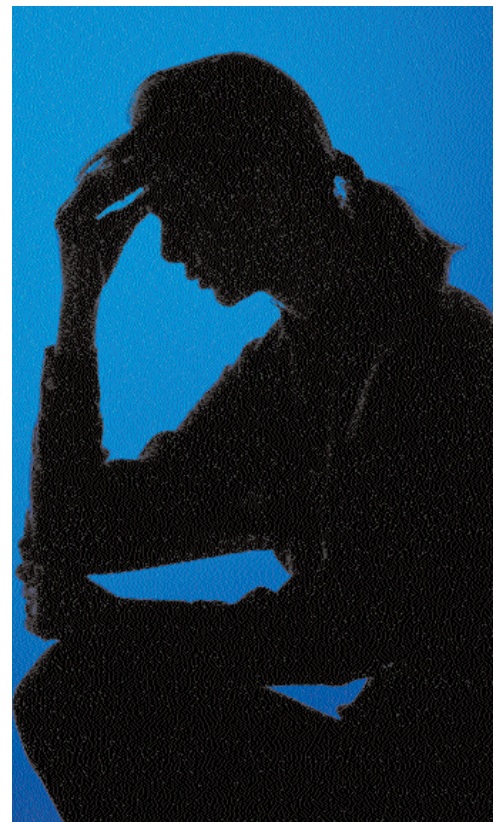
- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;


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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
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Macon	Bob Daniel	(912) 741-0072
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Norcross	Phil McCurdy	(770) 662-0760
Savannah	Tom Edenfield	(912) 234-1568
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Waynesboro	Jerry Daniel	(706) 554-5522



- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) Whether the fee is fixed or contingent. 

ENDNOTES

1. The “likelihood that the acceptance of the particular employment will preclude other employment by the lawyer” is a factor the attorney must consider in determining the reasonableness of a fee under Rule 1.5.

- This preclusion, therefore, should be considered part of the service the attorney is providing to the client by agreeing to enter into the representation.
2. Georgia Formal Advisory Opinion 91-2.

UNIFORM SUPERIOR COURT RULES AND PROTECTIVE ORDER FORMS


At its business meeting on Jan. 22, 2002, the Council of Superior Court Judges tentatively approved five form orders for use in conjunction with Georgia’s Protective Order Registry. The new forms, if they receive final approval, will be promulgated as mandated in the Family Violence and Stalking Protective Order Registry Act, 2001 Georgia Laws, p. 101.

The forms are: (1) Order for Continuance of Hearing and Ex Parte Protective Order; (2) Order to

Modify Protective Order; (3) Permanent Family Violence Protective Order; (4) Stalking Permanent Protective Order; and (5) Stalking Permanent Protective Order Pursuant to Criminal Conviction.

The use of standardized provisions for protective orders is considered essential to the operation of the new registry to be maintained by the Georgia Bureau of Investigation. Judges are empowered to tailor the forms to address the facts of each petition and provide necessary relief. It is the hope

of the Superior Court and its judges that members of the State Bar of Georgia and victims’ advocates will support and assist the court in the implementation and development of the registry in order to better protect Georgians subjected to stalking or domestic violence.

Information regarding these new forms can be obtained from the Georgia Commission on Family Violence at (404) 657-3412 or www.georgiacourts.org/agencies/familyviolence. 

STATE BAR OF GEORGIA DELEGATION TO CHINA

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 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 Tiananmen 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





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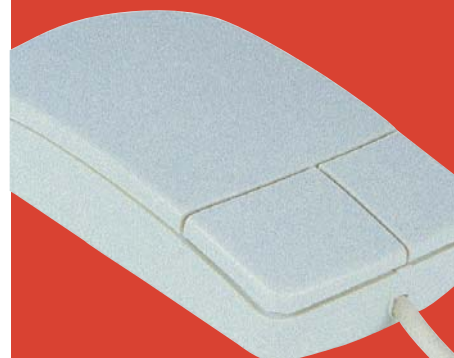
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