GEORGIA BAR
Journal
FEBRUARY 2001 • VOL. 6 NO. 4

LEARNING TO BE A LAWYER

MISDIRECTED E-MAIL • STOPPING OUTRAGEOUS OPPONENTS

GEORGIA BAR Journal

February 2001 • Vol. 6 No. 4

On the Cover: *Recognizing that many practical skills and knowledge are acquired after law school, the Bar has introduced the Transition into Practice Pilot Project, page 8.*

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Visit us on the Internet at *www.gabar.org*

South Georgia Office

244 E. Second St. (31794) • P.O. Box 1390 • Tifton, GA 31793-1390
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A VISION UNFOLDS

By George E. Mundy

As most of you know, the State Bar will occupy a new Bar center during 2001. The acquisition of the Federal Reserve Bank Building will constitute the reality of a dream shared by many of us since the concept of obtaining such a facility was first presented. Our new facility will allow our bar association to serve its membership in ways unimagined just a few years ago.

However, it concerns me that there are a number of our members, especially outside the metropolitan area, who fail to appreciate the magnificent opportunity the new facility provides for all Georgia lawyers. I recently spoke to a local bar association and when I pointed out the State Bar had already been offered twice what we originally paid for the Federal Reserve Building, someone in the audience spontaneously called out, "Sell it." There is some perception that the new building will establish nothing more than a Taj Mahal for blue stocking Atlanta lawyers. Nothing could be further from the truth.

When Hal Daniel first proposed the concept of a Bar center, I, along with a number of others, was skeptical. The demographics of our bar association, with 65 percent of our practicing attorneys in the metropolitan area—coupled with the location of the appellate courts and state capitol—dictated that a State Bar building would need to be located in the metropolitan area. The obstacles to obtaining and/or building a center with real potential for our bar association and membership seemed insurmountable. Only later did I realize I had witnessed the vision of one individual leading to a major accomplishment that would not have occurred otherwise.

Hal focused on the problem: the totally inadequate and extremely expensive space in the Hurt Building for our Bar headquarters. To maintain the status quo of 25,000 square feet of usable space would be to subject our bar association to increasing rental rates with no potential for expansion. This would eventually lead to frequent dues increases just to stay where we were. Other problems included no capacity for CLE, no adequate parking, and the inability to hold any particular meeting with more than 30 in attendance.

With characteristic energy Hal formed a Bar Center Committee under the able leadership of Frank Jones. The committee worked diligently to explore every option available to us in terms of obtaining or building a home which would be worthy of our bar association's future. The initial data collected confirmed the obstacles we had anticipated, in that estimates to either build or buy an adequate property were prohibitive. At this point Bobby Chastain could easily have dropped the entire concept but he chose to continue the Bar Center Committee's work to ensure every option was fully explored. Then one day Ben Easterlin reported he had read where the Federal Reserve Building would be for sale.

With all of the background investigation concluded, the Bar Center Committee explored the possibility of obtaining the Federal Reserve Building on Marietta Street. Suddenly, everything fell into focus. The Federal Reserve Building was a beautifully maintained marble facade building with 330,000 square feet of usable space with 400 parking spaces in an area of Atlanta that was becoming extremely desirable adjacent to Centennial Olympic Park. Amazingly the building was offered at a very affordable price.

Ben convened a special meeting of the Board of Governors at the Federal Reserve Building for a complete inspection and a thorough analysis of cost and utilization. I remember David Gambrell stating, "This turkey is within our sites and it's time to pull the trigger." After a lively debate, the Board voted overwhelmingly to acquire the Federal Reserve Building. There is no doubt in my mind if this proposal had been submitted to the entire Bar membership, it would have been overwhelmingly approved as long as each voting member was provided the same information given to our Board of Governors. In my opinion the failure to take advantage of this opportunity would have been irresponsible.

Our new facility will not only be a beautiful and impressive symbol of our bar association but will provide our Bar headquarters with sufficient space for the next 50 to 75 years. There will be a complete CLE facility in-house. There will be more than 140,000 square feet of space that can be rented to other legal-related organizations, bringing many of these organizations under one roof. The new facility will provide free parking for our members not only to attend Bar functions but also to attend area attractions such as Phillips Arena. Eventually, revenues from rental income will greatly support the overall

A 2001 HOPE FOR LOCAL BAR MEETINGS

By Cliff Brashier

As a brand new lawyer, I was sitting at my desk one day when a senior partner stuck his head in and said, "It's time to go." I quickly joined him and saw that every lawyer in the firm was going as a group to lunch. It turned out to be the monthly meeting of our local bar association. I learned that under our firm's policy attendance was mandatory.

Every lawyer I knew and many that I did not know were there. All the local judges of every court were also there. Later I learned that lawyers counted on seeing co-counsel and opposing counsel at these lunches. If you needed to discuss a case, a business transaction, or some other matter, it was always easy to accomplish that before or after lunch.

New lawyers had the chance to meet established lawyers and judges. Many friendships, case referrals, and career opportunities began with the networking opportunities at local bar meetings and volunteer committee work. For this reason I always advise new lawyers to be active in the sections, committees, younger lawyer groups, meetings, and other bar gatherings. Local bars, specialty bars, and the State Bar all offer these opportunities in abundance.

Many friendships, case referrals, and career opportunities began with the networking opportunities at local bar meetings and volunteer committee work. For this reason I always advise new lawyers to be active in the sections, committees, younger lawyer groups, meetings, and other bar gatherings.

I regret to report, however, that participation in local bar meetings has declined significantly. In most cases the attendance has dropped from near 100 percent to 50 percent or 25 percent or even less. No longer do many judges have the time to attend. E-mail, faxes, and voice mail have replaced the personal conversations in too many cases. The unfortunate result is a more impersonal practice of law with civility, professionalism, and professional quality of life being the victims.

There are many ways we, as individual attorneys, can reverse this trend. I believe a great start would be a personal resolution in the new millennium to attend every local bar lunch. It would be especially helpful if our judicial members would so resolve because local lawyers respect them and will follow their example. My hope is that we will all make this effort and that the declining trend will not continue into 2001. Our honored profession and our career satisfaction will be better served by this effort.

The year 2001 also brings greatly revised Georgia Rules of Professional Conduct and new CLE credit for online, CD-ROM, teleconference, audiotape, and videotape distance learning. You may get more information on these changes and other important legal information at www.gabar.org.

Your comments regarding my column are welcome. If you have suggestions or information to share, please call me. Also, the State Bar of Georgia serves you and the public. Your ideas about how we can enhance that service are always appreciated. 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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budget providing us with additional relief from future dues increases.

It appears we will take possession of our new facility in the fall of 2001. After renovation we should move into the facility in the spring of 2002. I anticipate a grand opening with dignitaries including a United States Supreme Court Justice. I urge you all to attend because if you do you will not only be impressed but you will have every reason to be extremely proud of being a Georgia lawyer. If you attend you may see Hal Daniel and you might want to take a minute to thank him for the vision that led to the best deal we ever made.

LEARNING TO BE A LAWYER:

Transition into Practice Pilot Project

By Sally Evans Winkler, C. Ronald Ellington and John T. Marshall

"A law student, upon graduation, is not a finished product," a respected law school dean observed. A practicing lawyer might add: "A lawyer, upon passage of the Bar examination, is not a finished product." To determine ways new lawyers can be helped in moving up the steep learning curve that separates law students from competent professionals, the State Bar of Georgia, through its Committee on the Standards of the Profession, is conducting a Transition into Practice Pilot Project.

The purpose of the project is to test the feasibility of a program of professional guidance for beginning lawyers through continuing legal education. That education is focused on developing practical skills and knowledge through mentoring by experienced lawyers during the first two years after admission to practice. Combining a prescribed CLE curriculum with individual mentoring is the unique feature of the project that has caught the attention of the American Bar Association as well as state supreme courts and bar organizations around the country as they explore various formats for education and training to assist in the transition from law school to law practice.

Law schools do a superlative job today of fulfilling their distinctive mission: teaching law students to think like lawyers, to understand and think critically about legal concepts and processes, to separate relevant from irrelevant facts, and to apply the law to a given set of facts. What they do less well is teaching law students how to *act* like lawyers, to *be* lawyers. And in fairness to the schools, they are limited in their ability to teach how to act like a lawyer because students must actually experience the reality of law practice before they can begin to make their own moral and ethical judgments about what it means to be a lawyer.

"The central feature of this program is to help beginning lawyers. That means translating classroom exposure into problems of actual law practice by addressing issues such as relationships with clients, the judiciary, and colleagues."

Historically, young lawyers were trained in the skills and values of their profession in a slow, patient way by more senior lawyers for whom they worked or with whom they came in contact in their communities. In the last generation, the legal profession has changed fundamentally, as has the way junior lawyers learn its values.

Many new lawyers today have missed out on the mentoring process—the relationship that a junior lawyer forms with one or more veteran lawyers who can give feedback, guidance, and advice. Through a mentor, the younger lawyer sees in the veteran lawyer how to behave in a host of relationships—with clients, opponents, judges, peers, and support staff—how to act like a lawyer, how to be a lawyer.

This time-tested system of one-on-one training has been foundering due to the economic pressures of modern law practice. Some have said that what we have now is the *sink or swim* approach to training new lawyers: Throw them in the water and see if they make it to shore. This is not a responsible way to treat new lawyers or the public we serve. Losing the lessons once taught by good mentoring has arguably contributed to a decline in civility and a rise in questionable conduct among members of the Bar.

For some time, we have recognized the need to revive mentoring for the long-term health of the legal profession. Just as in a family, our profession's values are passed down from generation to generation by the more senior members to the juniors. Critics would say that the profession's values have changed, with emphasis on competition and short-term profits rather than long-term values and goals of service and problem solving. To respond to this criticism, we need to send the right messages to our newly admitted lawyers about the professional and ethical values that mark the best traditions of our legal profession, to "bend the new twigs in the right direction," as former Chief Justice Harold Clarke says.

This statewide project is the result of a year-long study and nearly two years of planning and development by the Standards of the Profession Committee of the State Bar, appointed in 1996 by then-Bar President Ben Easterlin. The Committee, composed of lawyers from across the state, as well as the deans of the four ABA-accredited Georgia law schools, was charged with investigating whether the State Bar should require a period of internship or other supervised work prior to admission to membership in the State Bar and to report to the Board of Governors with the Committee's recommendations. The Committee studied internship, apprenticeship, and courses for newly admitted lawyers in other states. Attempting to use the most effective features of these and to avoid the attendant problems, the Committee found a middle ground by recommending a program that combines a

curriculum focused on the skills and values of the profession with mentoring by experienced lawyers. The report recognizes that law schools cannot carry out the entire responsibility of preparing lawyers for the practice of law and states that the State Bar and its individual members have a professional obligation to assist beginnning lawyers in acquiring the practical skills, seasoned judgment, and sensitivity to ethical and professional values necessary to practice law in a highly competent manner.

"The program provides a means for me to gain benefits of experience without suffering through trial and error." — Project Participant

Implementing the Pilot Program

The Standards Committee made its report to the Board of Governors in June 1997, and the Board responded by passing a unanimous resolution authorizing the Pilot Project recommended in the Committee's report. It is significant that the Executive Council of the State Bar's Young Lawyers Division also voted unanimously to approve the report and project. The Supreme Court of Georgia authorized the project, and at the suggestion of Chief Justice Benham, the Committee decided to extend the entire project over four years. The first two years would be devoted to securing funding and resolving preliminary issues, and the remaining two years would be spent conducting the actual CLE curriculum and mentoring components of the program.

Early on, the Committee realized that prior to assigning mentors and mentees, it would have to address a host of issues, including securing funding, clarifying the impact of the program on law school curricula, resolving the issue of potential mentor liability for the acts of beginning lawyers, and seeking the support of bar groups and judicial organizations. To deal with these issues, the members of the Committee divided into the following subcommittees: Finance, Mentor Recruitment and Selection, Mentors' Work, Mentee Recruitment and Selection, Curriculum, Evaluation, and Special Issues.

Funding for the Pilot Project is provided by grants from the State Bar, the Georgia Bar Foundation, the Institute of Continuing Legal Education in Georgia, the Chief Justice's Commission on Professionalism, and the Open Society Institute.[1]

As envisioned by the Pilot Project, beginning lawyers would be admitted to the State Bar upon passing the Bar examination. The law license would allow the holder to practice law as now, without restriction. The beginning lawyer, however, would complete the mentoring and curriculum components of the Pilot Project within the first two years of admission to practice.

The Pilot Project is based on the recognition that, despite the addition of clinical experience as a regular feature of legal education, law schools cannot carry the entire responsibility of preparing lawyers for the practice of law and that a young lawyer's ethical standards are likely to be shaped far more by on-the-job experience in the early years of practice than by the limited practice setting available in law school.

For the past three years, members of the Standards Committee have been giving updates on the Pilot Project periodically to bar and judicial groups. State and federal judges and members of the Bar are expressing overwhelming support for the Pilot Project. A number of them, as well as members of the Young Lawyers Division, have commented that they wish such a program had been in place when they were admitted to the Bar.

Key Features of the Plan of the Pilot Project are:

Mentorship

- The project provides a beginning lawyer with access to meaningful counsel and professional guidance from an experienced lawyer during the first two years after admission to the Bar.
- To link CLE with the mentoring component, a Schedule of Activities and Experiences was developed as a guide for the mentors and beginning lawyers.

Curriculum

- The two-year curriculum focuses on teaching practical skills, professional values, and the mechanics of exercising sound professional judgment in the beginning lawyer's relationships with the client, the court, other lawyers, the legal system, and the public.
- This two-year curriculum takes the place of the current Bridge-the-Gap Program for participants in the Pilot Project.
- CLE lays a foundation of topics and information to enable the mentors to extend training and practical guidance in one-on-one or small group discussions.

The First Year Curriculum for beginning lawyers consists of 18 hours of instruction delivered in 3 units of 6 hours each. The three day-long seminars in the Pilot Project were spaced over calendar year 2000. Instruction in the first-year seminars focused on laying a base of practical skills and judgments in dealing with the client,

acting for the client, and negotiating for the client:

Session I *Dealing with Your Client: The Lawyer as Counselor*

Session II *Acting for Your Client: The Lawyer as Advocate and Architect of Future Conduct*

Session III *Negotiating for Your Client: The Lawyer as Negotiator*

Advisory Groups composed of practicing lawyers and law faculty created the First Year Curriculum, and a number of experienced lawyers from around the state participated as discussion group leaders in presenting these three programs. Professors Marjorie Girth and Doug Yarn of Georgia State University, Professor Jack Sammons of Mercer, and Professor Alex Scherr of the University of Georgia made significant contributions to the development and presentation of the First Year Curriculum.

The Second Year Curriculum gives beginning lawyers the opportunity to address specific practice areas through an elective curriculum of 12 hours. The elective curriculum will feature certain programs from the Institute of Continuing Legal Education's (ICLE) regular offerings during 2001. Beginning lawyers have been asked to choose two electives for a total of 12 CLE hours during 2001 from one or more of the following subject areas: Civil Litigation, Criminal Litigation, Corporate and Transaction, General Practice, Law Practice Management, and Legal Writing. Electives were designated for the Pilot Project because of their content and quality and their expected usefulness to beginning lawyers. The Pilot Project and the chairs of each designated ICLE program will work together to identify questions about ethics and professionalism endemic to each subject area where possible. The lists of topical questions will be offered to beginning lawyers and mentors for future discussion between them after the program.

Mentors

Mentors in the Pilot Project represent a broad cross section of the Bar, diverse in geography, size and area of practice, gender, race, and ethnicity. The mentors were selected for participation in the Pilot based on their standing at the Bar and their reputation for character and professionalism. A Mentor Orientation was held on November 5, 1999, with a live repeat of this program on January 12, 2000. A total of 84 mentors attended these sessions, which gave an overview of the Pilot Project, previewed the upcoming first year CLE programs for beginning lawyers, and offered tips on good mentoring.

Beginning Lawyers

Selected law school graduates from the class of 1999 who passed the July 1999 Bar examination were invited to serve as beginning lawyers in the Pilot. Beginning lawyers

were chosen to represent a cross section of the Bar, diverse in geography, size and area of practice, gender, race, and ethnicity. The lawyers were selected for participation by their law schools or by their employers. The Standards Committee worked with the State Bar Membership Department and the law schools to reach a percentage of mentorships in each state judicial district which approximated the percentage of State Bar members in each district.

In January 2000, the Pilot Project was launched with 100 mentors and 100 beginning lawyers, most matched one-on-one. (Some mentors have two beginning lawyers.)

Back in 1996 when this project was conceived, the Standards Committee was particularly concerned about devising a program that would provide mentors to those new lawyers who were opening practices with no one to guide them. By the time the Pilot Project was implemented, the Standards Committee found that the pool of new lawyers going out on their own had grown very small. This means that in the Pilot Project, most of the participants have "in firm" mentorships; i.e., the mentor and mentee work for the same firm. Fifteen of the mentorships, however, are composed of beginning lawyers who have "hung out their own shingles." These mentors and beginning lawyers have no employment relationship.

Assessing the Program's Success

The Pilot Project will run for two years, until January 2002, with periodic evaluations. A final report and recommendations will be made to the Board of Governors of the State Bar and the Georgia Supreme Court in mid-2002.

The Standards Committee recognized from the outset the importance of a thorough, careful, and continuing evaluation of the Pilot Project. The Standards Committee engaged a professional research firm to perform a baseline survey of

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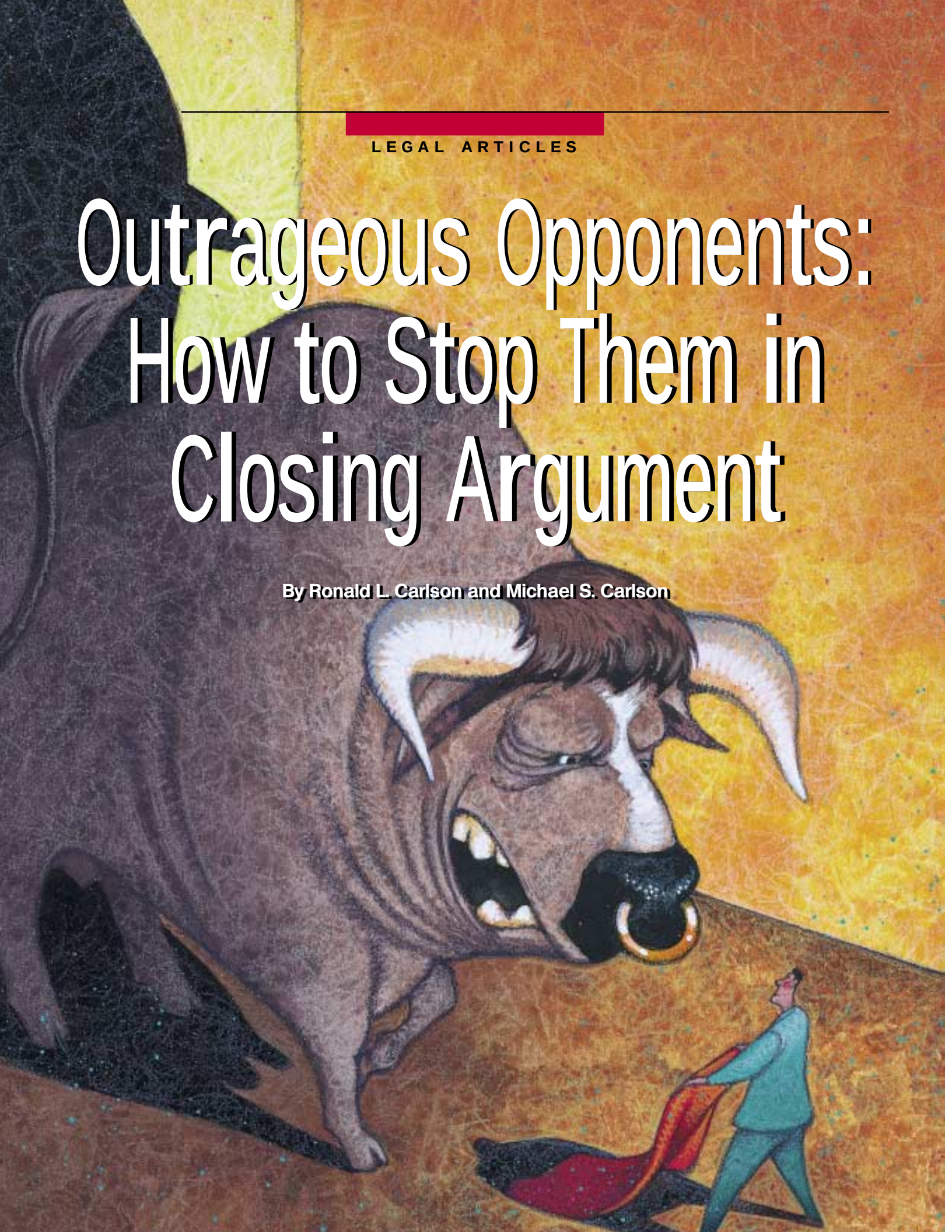
Outrageous Opponents: How to Stop Them in Closing Argument

By Ronald L. Carlson and Michael S. Carlson



Most attorneys try to sum up their cases in a fashion that comports with accepted law and local practice. All too frequently, however, one has the misfortune of running into Rambo, the over-the-top opponent. Before his peroration is concluded, Rambo has trampled on the law of trial practice by making half a dozen improper arguments. He urges evidence that never came up at trial. He injects hearsay into the proceedings. He adds his own opinions about which witnesses were lying and the legal fault of your client. And, this is just the beginning. Adding insult to injury, the unjust tactics often inure to Rambo's benefit. He wins the case.

Applying antidotes to this sort of poison requires a checklist of argument "do's" and "don'ts." Unless counsel has the rules and perhaps some citations readily at hand, it is impossible to forge an effective objection strategy. Yet, only such a strategy has the potential to break an opponent's stream of improprieties. In addition to interrupting the outrageous opponent in a legally appropriate way, there is another advantage: The well-placed contemporaneous objection usually provides the single avenue for a successful appeal.

This article supplies the tools for the foregoing job. Common objections have been isolated for treatment and analysis. It is hoped that their inclusion will provide the needed ammunition the next time an overly dramatic opponent resorts to an improper tactic.

Objection Responsibilities

Before an attorney can complain about an improper argument, countless Georgia cases underline the need for the lawyer to make an objection and obtain a ruling from the trial court.[1] A similar rule applies in Georgia's federal courts. Many arguments are subject to being stricken upon challenge by opposing counsel. A highly practical question centers on the role and the obligation of the complaining attorney. Is a timely objection necessary to ensure protection? Will the judge police the proceedings on her own by interrupting or stopping the offending counsel?

A 1993 case answers these questions. In *Neal v. Toyota Motor Corp.*,[2] counsel for the injured plaintiffs in a products liability action used his closing argument to render what the court viewed as a "send the message" argument. The court found the argument to be improper in the context of the case, citing what it described as counsel's effort "to incite the jury into a xenophobic rage."[3] However, defense counsel lodged no objection to that part of the summation at trial. Defendant's lawyers explained that they did not want to object and risk raising the ire of the jury. The court held that this inaction was fatal, preventing the trial court from granting the defense motion for a new trial.

While a few arguments will indelibly taint a verdict even in the absence of an objection, they are rare. A timely objection to the closing argument is necessary, and this rule applies even when the argument is inflammatory and prejudicial. The United States District Court for the Northern District of Georgia provided a helpful formula when it suggested that the prudent course of action for the complaining counsel "would have been for Defendant to object at the first mention of improper argument and again raise the objection after [plaintiff's counsel] finished his closing if he continued utilizing his improper remarks, as he did here."[4]

The case of *Haygood v. Auto-Owners Insurance Co*.[5] further underlines the need for an objection. The defense complained that the plaintiff's summation improperly suggested misconduct by the insurer, and urged reversible error. The United States Court of Appeals for the Eleventh Circuit ruled that it was misleading for the plaintiff's attorney to suggest that Auto-Owners was hiding something. However, "at no time during or after the closing arguments did Auto-Owners object on this ground, nor did it ask for a limiting instruction, so the objection to the closing argument is waived."[6]

The bottom line is clear: When an opponent errs in his manner of argument and it injures your case, object. Object vigorously.[7] Spotting the objectionable argument is what the rest of this article is about.

Personal Beliefs of Counsel

What if counsel discredits opposing witnesses by telling the jury his belief that they lied when they testified? It might come out something like this: "Ladies and gentlemen, don't follow the path laid out by plaintiff's expert on damages. I have investigated this case, and I know things about him. He is a prostitute for hire. I believe that this 'expert' was lying when he swore there were permanent injuries here." Such an argument merits objection on more than a single ground, but certainly one of them should be: "Objection, improper opinion by counsel."

While a few "I believe" statements mark the arguments of most attorneys, they become inappropriate when they refer to the guilt or fault of an opposing party or the credibility of witnesses, as illustrated in the foregoing paragraph. A prosecutor can neither announce to the jury that she believes in the truthfulness of a specific prosecution witness in the case and not the defendant[8] nor proclaim her belief that the accused is guilty.[9] However, in

order to make out a violation of the personal opinion rule, objecting counsel needs to establish that there was a clear expression of personal belief by one's opponent on a prohibited topic.[10] This generally requires a showing that one's adversary referenced the guilt or fault of the objecting party, or slandered the credibility of a witness by offering counsel's personal expression of disbelief.

Vouching

This impropriety is a variant of the "no personal opinion" rule. An objection can be made when counsel improperly bolsters her own witness by personally vouching for the witness' truthfulness. The Supreme Court of Georgia has made it clear that a prosecutor may not vouch for the character of a witness.[11] Promising or assuring the jury that counsel knows that a witness testified truthfully does this, and abridges the rule. However, it is again the case that some fine line-drawing occurs. To be improper, the endorsement of a witness' truthfulness must be clearly evident. More modest statements of witness support simply fall into the category of appropriately arguing inferences from the evidence.[12]

Argument Outside the Record

In closing argument, counsel is allowed to draw reasonable inferences from the testimony. In doing so, the attorney may enrich the argument with references and illustrations regarding matters of common public knowledge. It is here that verbal techniques such as quotations from the Bible[13] or lines from well-known literary works play a role. While care must be exercised in employing Biblical passages,[14] appellate courts have approved such references.[15] One federal court even adjudicated the propriety of quoting columnist Ann Landers: "There is nothing improper in a civil case with a lawyer's citing widely recognized authorities during a closing statement (though Shakespeare and the Bible come more readily to mind than Ann Landers); on the contrary, this is sometimes an effective, and certainly a time-honored method of argument."[16] The concurring opinion added: "[C]ounsel should be given wide latitude in closing argument and should be able to use allegory or resort to metaphor borrowed from literature, current events and the like."[17]

Georgia courts give lawyers wide latitude in their closing arguments and allow them to draw upon well-established historical and commonly known facts to illustrate points. When counsel takes the limited license to embellish an argument to extremes, however, an objection based upon "matters outside the record" should be sustained.[18] Prohibited are references to factual data never produced at trial or argument of excluded matter that was stricken by the court. Reversal is required where the prejudicial statements of an attorney reflect a studied purpose to deflect the jury's attention from the issues. Where an argument is not supported by the evidence, such an argument can inject a false issue into the case and amount to reversible error.[19]

Golden Rule Arguments

When a trial lawyer invites the jury to step into the shoes of the party she represents, the lawyer may have violated the "Golden Rule" prohibition.[20] In a products liability or personal injury case, a plaintiff's attorney might tell the jury: "Remember my client's pain as he sits next to me. Award a substantial money verdict in this case. Please do unto my client as you would have him do unto you, if you were in his chair as the plaintiff and he were in yours, sitting in judgment." Similarly, a defense attorney might tell the jury to "imagine if you were in the defendant's position. Would you want to be bankrupted by a big judgment, like the one the plaintiff has requested? Don't do to the defendant what you would not want done to yourself!"

Encouraging juror self-identification with one of the parties has drawn appellate court criticism. Most decisions condemn such arguments as improper distractions from the jury's sworn duty to decide cases based on logic and reason rather than emotion. A 1996 Georgia case defines as prohibited Golden Rule rhetoric any argument that "urges the jurors to place themselves in the position of plaintiff or to allow such recovery as they would wish if in the same position. It is improper because it asks the jurors to consider the case, not objectively as fair and impartial

jurors, but rather from the biased, subjective standpoint of a litigant."[21]

Golden Rule objections are not within the exclusive province of civil cases. In criminal practice, another 1996 Georgia case adverts to the principle that prosecution arguments inviting the jury to identify with the complaining witness will be carefully scrutinized.[22] A summation that importunes the jury to place itself in the position of the victim can violate the Golden Rule prohibition.

Perhaps the major exception to the Golden Rule restriction occurs when a defense attorney in a criminal assault case is defending on self-defense grounds. An instruction frequently allows the jury in such cases to assess whether the accused reasonably defended himself against injury when the situation is viewed from the defendant's standpoint at the time.[23]

As with many forms of objectionable argument, counsel for the party against whom the Golden Rule argument is used must object. In most cases, the right to effectively complain that opposing counsel made a Golden Rule argument is all but lost if an objection is not made.[24]

Name Calling

Trial counsel might be jarred in her chair when an opponent starts his closing something like this: "Members of the jury, the defendant is a liar and his lawyer is nothing but his mouthpiece." In all segments of society, use of caustic personal canards seems to be on the rise. As incivility at trial increases, so does the incidence of personal attacks.

An objection that counsel's argument partakes of name-calling will sometimes lie when unduly colorful characterizations are employed. However, this is a field where fine lines divide the proper from the improper. In one closing argument, counsel remarked that the opposing party was "a cheapskate, a scheming low-down pup, cheating and swindling, stealing and waiting like a snake in the grass."[25] While reversal may be required when appellations become overzealous, the court held that the line was not crossed in this case. Nor was reversible error found in another case where a prosecutor described the defendant as an "animal" and "snake," although the court found the characterizations to be undesirable.[26]

When it is not the accused but an ordinary witness in a civil or criminal case who is the target of remarks, inflammatory descriptions are to be avoided. On the other hand, it is legitimate to discuss the character of a witness and to characterize his testimony.

What if it is not a witness upon whom the calumny is heaped, but rather opposing counsel? Georgia courts have ruled that a personal reference during closing argument is particularly objectionable if it refers to the opponent's lawyer. Again, however, while unflattering characterizations are often disapproved, it is rare that such a situation rises to the level of reversible error.[27]

Ethnic References

It has long been the rule in Georgia and other jurisdictions that appeals to racial or religious prejudice in closing arguments will be condemned.[28] The Supreme Court of Michigan reviewed an appeal wherein a prosecutor and a witness had repeatedly commented regarding a party's ethnic heritage. At trial, several references were made to Arab ethnicity, the first occurring during the prosecutor's opening statement.[29] The court was asked to decide whether use of the terms "Arab" and "Iraqi" at a trial conducted during the Persian Gulf War deprived defendant of a fair trial.

After remarking that it abhorred the injection of racial or ethnic remarks into any trial because it may arouse prejudice, the court pointed out that not all references fall into this category.[30] "In the instant case, most of the comments were improper and possibly irrelevant. Nonetheless, we find the comments, viewed in context, to be innocuous, unintended, and not of a degree that prejudiced defendant's right to a fair trial."[31] Thus, no intent to inflame was found. The court, however, sounded an alarm for future cases wherein prejudicial intent is manifest, stating that "[w]hen an attempt is made to arouse ethnic prejudices, the rule of reversal appears universal."[32]

Wealth of Party

Comments upon the wealth of a party are often disapproved.[33] When a plaintiff suggests to the jury that the defendant can afford to pay and this alone justifies a verdict against him, the argument can be stopped by objection. Conversely, a corporate or other plaintiff with resources cannot be denied recovery on a just claim on the ground that "they don't need the money, so why give them an award."

There are exceptions. Punitive damage cases often provide an

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Whoops! You've Got Mail!

By Robert C. Port

With a click of the mouse, your opponent has inadvertently e-mailed to you a memo outlining case strategy, a summary of the weaknesses in his case, or other highly sensitive privileged and confidential information. Or perhaps you are the unlucky sender of such information to your opponent. As the sender or recipient of such obviously misdirected e-mail, what are your professional and ethical obligations?

Both the unintended recipient, as well as the attorney responsible for the disclosure, face a number of competing professional and ethical goals and obligations in determining the course of action that should be taken once it has been discovered that confidential information inadvertently has been disclosed. The sender has breached his duty to preserve and protect his client's secrets and for doing so, he may face a professional liability claim from his client. The attorney who received the misdirected e-mail now has information which might be very useful in zealously representing his client, but which he might not be able to use because of his professional and ethical obligations.

Although research has failed to uncover Georgia cases directly addressing inadvertently misdirected e-mail, a number of cases and ethics opinions from Georgia and other jurisdictions have dealt with counsel's responsibility when mail, faxes, and other privileged communications are misdirected to opposing counsel. These authorities provide useful analytical models for determining appropriate courses of action for the sender and recipient of inadvertent e-mail disclosures.

This article initially considers whether e-mail is an appropriate method for transmitting privileged information. It then examines the various professional considerations and ethical obligations that the sender and the recipient of an inadvertent e-mail disclosure must evaluate in determining what course of action to take following the inadvertent disclosure. This article also discusses the manner in which courts and state bar associations have addressed the question of whether an inadvertent disclosure of confidential and privileged information constitutes a waiver of the attorney-client privilege, thus permitting the disclosed information to be used by the recipient. Finally, consideration also is given to the precautions an attorney should consider taking when using e-mail, and the possible exposure to malpractice liability for inadvertent disclosure.

Should Attorneys Communicate by E-mail?

An attorney's ethical and professional obligations require special consideration of whether e-mail is an appropriate method to communicate with clients, co-counsel, experts and others on matters that are subject to the attorney-client privilege. The ability to communicate and send documents and other attachments instantaneously and with minimal cost has made e-mail an essential part of law practice, but as with many new technologies, e-mail is not without risk, including potential malpractice risk. Both an attorney's duty of confidentiality and the attorney-client privilege require counsel to exercise reasonable care to avoid disclosure of a client's secrets and confidences. Is e-mail a sufficiently secure means of communication to fulfill these ethical and professional obligations?

Although some of the initial commentary on the issue of e-mail security concluded that e-mail was an inappropriate means of communication of privileged communication,[1] current analysis does not find fault, per se, with an attorney's use of e-mail for this purpose.[2] The American Bar Association (ABA) specifically concluded in its Formal Opinion 99-413 that "a lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint."[3] The ABA concluded that e-mail posed no greater risk of interception or inadvertent disclosure than other types of communication, such as mail and telephone, in which the parties have a reasonable expectation of privacy for the communications transmitted.[4] This conclusion is consistent with numerous state bar association opinions.[5]

The State Bar of Georgia has not formally addressed the issue of the use of unencrypted e-mail, but, the Formal Advisory Opinion Board of the State Bar of Georgia responded to a request from its Computer Law Section for the issuance of an opinion as to "whether unencrypted electronic mail may be used to communicate with clients regarding client matters."[6] The Formal Advisory Opinion Board declined to issue a formal opinion**,** but stated unofficially in a September 1999 letter to the Computer Law Section that "in view of the criminal consequences for intercepting electronic mail correspondence of others, a lawyer would clearly be justified in concluding that correspondence with a client by electronic mail would be confidential and that the use of such electronic mail in communicating with a client would not have disciplinary consequences."[7]

Overview of Competing Ethical and Professional Obligations to be Considered In the Event of an Inadvertent Disclosure

Both the attorney who accidentally sends a confidential e-mail to his opponent, as well as the receiving attorney, are immediately faced with competing ethical and professional obligations. Attorneys are required to "maintain in confidence all information gained in the professional relationship . . . including information the client has requested to be held inviolate or disclosure of which would be embarrassing or would likely be detrimental to the client."[8] Indeed, counsel has a statutory obligation not to disclose confidential communications.[9] This is the fundamental principle in the client-lawyer relationship[10] that requires an attorney to protect his communications with his own client. By sending the misdirected e-mail, counsel has arguably breached this requirement of confidentiality.

Both the sending and receiving attorney must "zealously assert" his client's position.[11] By misdirecting confidential e-mail, the sender arguably has failed to zealously protect his client's interests. In contrast, the attorney receiving the misdirected e-mail, also having a duty to zealously assert his client's position, may now have access to information that can be used to further his client's interests. Some authorities argue that in carrying out the obligation of zealous representation of a client, counsel should be entitled to take advantage of any error or mistake by an opponent.[12] In a case of inadvertent disclosure, it is the disclosing attorney who arguably has breached his obligation to preserve the confidences and secrets of his client, and perhaps he ought to suffer the consequences of doing so.[13]

The unintended recipient of an email must also consider prohibitions against conflicts of interest.[14] If an attorney is placed in the position of trying to cure his opponent's mistake or to protect his opponent's inadvertent disclosure of privileged communications, then he may be faced with the possibility of taking action that may be in direct conflict with the interests of his client. Such a conflict raises additional professional and ethical dilemmas, since the attorney's response to his opponent's inadvertent disclosure may create a conflict with his duty of loyalty[15] to his client and possibly require his withdrawal from representation of that client.[16] Nevertheless, if the recipient attempts to use such inadvertently disclosed information he may cause the disclosing attorney to move to exclude the evidence[17] or to disqualify receiving counsel,[18] which, if successful, may cause harm to the recipient's client.

On the other hand, the unintended e-mail recipient must insure that he executes his duty of zealous representation concurrently with those duties imposed upon him as "an officer of the legal system and a citizen having special responsibility for the quality of justice."[19] As such, he is expected to act in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession. Indeed, the Georgia Code of Professional Responsibility's Canons of Ethics exhorted attorneys "to conduct [themselves] so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of . . . clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."[20] The new Georgia Rules of Professional Conduct, which replaced the Canons of Ethics on January 1, 2001 include similar aspirational directives.[21]

ABA Pronouncements Concerning the Obligations of a Recipient of An Inadvertent Disclosure

In 1992, the ABA recognized that advances in technology had made it "more likely that through inadvertence, privileged or confidential materials will be produced to opposing counsel by no more than the push of the wrong speed dial number on a facsimile machine."[22] In Formal Opinion 92-368, the ABA considered such inadvertent disclosures and opined that "[a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide the instructions of the lawyer who sent them."[23] More recently, the ABA Ethics Commission on Evaluation of the Rules of Professional Conduct (known as "Ethics 2000 Commission") has proposed a modification to Rule 4.4 of the Model Rules of Professional Conduct in order to address the obligations of an attorney who has received an inadvertent disclosure of confidential documents. Proposed Rule 4.4(c) provides that "a lawyer who receives a document and has reason to believe that the document was inadvertently sent shall promptly notify the sender," but it omits the requirement of Formal Opinion 92-368 that the receiving lawyer abide by the instructions of the sender, thus leaving it to the attorney who made the mistaken disclosure to take whatever protective measures he deems appropriate.[24] In its commentary to Proposed Rule 4.4, the ABA Ethics Commission 2000 further observed that other questions raised by the disclosure, such as whether the original documents must be returned

to the sender, or whether the privilege has been waived by the disclosure, are questions of law beyond the scope of the proposed Rule.[25] The Commission Reporter's explanation of the proposed changes to the rule further comments that a lawyer who voluntarily returns a document unread "commits no act of disloyalty by choosing to act in accordance with professional courtesy."[26]

Court and State Bar Ethics Rulings

The courts and bars of the various states have reached differing conclusions when considering the issue of whether an inadvertent disclosure should be treated as a waiver of the attorney-client privilege, thereby permitting the recipient to make use of the information disclosed. Initially, it appears that the majority of courts require the receiving lawyer to notify the sending lawyer that documents which appear to be confidential have been disclosed.[27]

In considering the issues, some courts have followed ABA Formal Opinion 92-368, or reached conclusions that are consistent with that Opinion. These courts generally have evaluated the mistaken disclosure under a subjective analysis to determine whether there was an intention to waive the attorney-client privilege.[28] The United States District Court for the Southern District of New York observed that there is a "twofold rationale" behind this view.[29] "First, . . . the privilege belongs to the client, so an act of the attorney cannot effect the waiver, . . . [, and] [s]econd, a 'waiver' is by definition the intentional relinquishment of a known right, and the concept of a 'inadvertent waiver' is therefore inherently contradictory."[30]

Other courts, however, have taken a strict objective approach in determining whether an inadvertent disclosure constitutes a waiver. Those courts have held that any inadvertent disclosure of privileged documents is a waiver of the attorney-client privilege, notwithstanding the client's subjective intent.[31] Still other courts, and perhaps the majority,[32] have undertaken a balancing analysis, considering a number of factors to determine whether the inadvertent disclosure waives the privilege.[33] Such factors include (1) the reasonableness of the precautions taken to prevent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.[34]

Ethics opinions from state bars are similarly divided. The ethics committees of most state bars agree that an attorney who receives inadvertently disclosed confidential information must notify the other lawyer.[35] However, the various state bars have conflicting thoughts on the duties of the receiving attorney thereafter. For example, the Legal Ethics Committee of the District of Columbia Bar held that it would not be improper to retain and use confidential documents inadvertently sent by opposing counsel, if it was not facially obvious that the documents were confidential, and the recipient had to read the documents before determining that they were not intended for him.[36] Nevertheless, if the recipient knows of the inadvertent disclosure before the materials are examined, then he must return them unread, and may commit an ethical violation if he reads or uses them.[37] The State Bar of Maine's Professional Ethics Commission, on the other hand, concluded that a lawyer receiving an inadvertently produced confidential document may use the document and the information contained in it to the extent permitted by the rules of procedure and evidence.[38] The State Bar of Kentucky has stated that although it agreed with the view set forth in ABA Formal Opinion 92-368, and the use of inadvertently disclosed information is "discouraged," nevertheless, an attorney who retains and uses privileged documents inadvertently sent to him will not be disciplined if a good faith argument can be made that any privileged or protection that would otherwise would have been obtained has been waived.[39] However, the State Bar of Kentucky went on to note that there was no controlling Kentucky case law on the issue of "inadvertent waiver" and cautioned that this concept had been rejected by courts in some states, and therefore any argument to retain and use such documents is made at the risk of having the documents excluded from evidence and possibly being disqualified from further representation in

Both the sending and receiving attorney must "zealously assert" his client's position.[11] By misdirecting confidential e-mail, the sender arguably has failed to zealously protect his client's interests. In contrast, the attorney receiving the misdirected e-mail...may now have access to information that can be used to further his client's interests.

the matter.[40] As for the sending attorney, the Ethics Committee of the State Bar of Illinois specified that the lawyer who inadvertently sent the material "has a duty to advise a client that confidential information was inadvertently transmitted to and read by opposing counsel."[41]

Georgia Law

Unfortunately for the Georgia practitioner, neither the former Code of Professional Responsibility, nor the newly adopted Georgia Rules of Professional Conduct, directly address the issue of inadvertent disclosure of confidential, privileged e-mail communications. Additionally, there are no formal advisory opinions considering this issue,[42] and research has failed to uncover any Georgia appellate cases directly on point.

Despite the absence of a state court case or advisory opinion directly on point respecting e-mail, Georgia case law does provide some insight as to how Georgia courts might address the question of whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege. The Georgia Court of Appeals has observed that "[t]hough the attorney/client privilege has rarely been discussed at length by our courts, it is generally accepted that '[t]he privilege in question is for the protection and benefit of the client, not of the attorney, so that the client's disclosures may not be used against him in controversies with third persons, and so it is designed to secure the client's confidence in the secrecy of his communication, and to promote greater freedom of consultation between clients and their legal advisers, its object being to secure freedom in communications between attorney and client in order that the former may act with full understanding of the matters in which he is employed.'"[43] Under Georgia law, "it is axiomatic that the privilege belongs to the client, not the attorney";[44] only the client may waive the privilege.[45] In *Revera v. State*,[46] the Court of Appeals, relying on O.C.G.A. § 24-9-24[47] and *McKie v. State*,[48] stated that "[t]he privileged nature of a confidential communication is not lost or waived even if the attorney should voluntarily or inadvertently produce a transcript of the communication."[49] In *Revera*, the court held it error for the State to use a confidential communication to refresh a witness' recollection.[50]

If the rationale of these cases is followed, then counsel's inadvertent production of confidential email should not automatically be deemed a waiver of the attorney-client privilege. Instead, each case should be tested on its individual facts to determine whether counsel's disclosure should be imputed to the client as either an intentional or careless waiver of privilege. In making such a determination, presumably, courts would undertake the type of balancing test adopted by other jurisdictions.

Although federal districts courts in Georgia have addressed the issue of whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege, these courts have not employed the same approach in arriving at their decisions. In *Briggs & Stratton Corp. v. Concrete Sales & Services*,[51] Judge Owens of the Middle District of Georgia adopted the balancing analysis, and stated that the "case by case approach is the better approach" for resolving these issues.[52] Subsequently, in *In re: Polypropylene Carpet Antitrust Litigation*,[53] a Northern District of Georgia case involving application of the law enforcement investigatory privilege, Judge Murphy employed the balancing test set forth in *Briggs & Stratton*, and ordered the return of a box of Department of Justice investigatory documents inadvertently disclosed during the course of litigation.[54] Judge Murphy also discussed the issue of inadvertent waiver of the attorney-client privilege in the context of a motion to disqualify receiving counsel. In denying the motion, he cited the unsettled state of the law in the 11th Circuit with respect to an attorney's obligations upon inadvertent receipt of documents that appear to be privileged and whether such inadvertent disclosure constitutes a waiver of the attorney-client privilege.[55] The Court further held that "a party has a professional obligation to notify the court and its adversaries if it comes into possession of such documents."[56]

Judge O'Kelly of the Northern District of Georgia, however, used a subjective test to determine that an inadvertently produced letter from plaintiff to his counsel was "confidentially made to counsel for the purpose of securing legal advice and assistance and therefore is protected by the attorney-client privilege under Georgia law."[57] In a strongly worded opinion, Judge O'Kelly also found under the facts of the case before him that the improper use of the letter by receiving counsel could expose that attorney to a referral to the State Bar.[58] In contrast, Judge Carnes of the Northern District adopted a strict, objective rule, finding that the "inadvertent disclosure of privileged documents waives the privilege."[59]

Considerations for the Practitioner

Although there is no professional or ethical prohibition, *per se*, on a Georgia attorney's use of e-mail for communicating privileged or confidential information to a client, counsel must nonetheless remain vigilant in protecting confidential information from inadvertent disclosure. A number of state bar associations have issued opinions that suggest that the attorney obtain the client's consent to use e-mail for confidential communications, after disclosure of

possible risks.[60] For certain highly sensitive communications, encrypted e-mail or other secure transmission may be appropriate. As ABA Formal Opinion No. 99-413 observed, "when the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted. The lawyer then must follow the client's instructions as to the mode of transmission."[61]

If an inadvertent disclosure of e-mail occurs, one of the factors considered in determining whether a waiver of the privilege has occurred is the reasonableness of the precautions taken by counsel to avoid such errors.[62] Although research failed to uncover a case in which inadvertent disclosure of e-mail was the basis for a malpractice claim, it is not difficult to imagine a set of circumstances in which a client suffers damages due to counsel's negligent transmission of a confidential e-mail to the wrong recipient.[63] Factors such as whether the client's consent was obtained to use e-mail; the client's disclosure of and counsel's understanding of who has access to the e-mail address to which communications are sent; the attention given to assuring that e-mail addresses are accurate; the care given to maintaining accurate e-mail "address books"; and "distribution lists",[64] the instructions given to staff regarding use of e-mail; any notices of confidentiality placed on the e-mail,[65] and the availability and use of encryption might all be material considerations in determining whether counsel's use of e-mail breached the requisite duty of care to preserving inviolate a client's confidences. As technological advances render e-mail encryption more affordable, effective, and presumably more widespread, the failure to use such technology to prevent an inadvertent disclosure of confidential e-mail might more readily found to be negligent.[66]

If an inadvertent disclosure of e-mail occurs, one of the factors considered in determining whether a waiver of the privilege has occurred is the reasonableness of the precautions taken by counsel to avoid such errors.[62]

Conclusion

Until the State Bar of Georgia, Georgia appellate courts, or its Georgia federal district courts specifically address the is issue of inadvertently disclosed e-mail, counsel receiving such e-mail must proceed thoughtfully and with caution. At a minimum, the receiving attorney should promptly notify opposing counsel that he has received the materials. Such notification is particularly important if the recipient intends to use such information during discovery or at trial, in order to avoid further discovery disputes or charges of sandbagging. A recipient who desires to use the information must also consider the risks of disqualification or other pre-trial motions that may be filed in an attempt to minimize the damage done by the disclosure. In fashioning their arguments for and against a determination that the attorney-client privilege has been waived by the disclosure, both receiving and sending counsel should consider the various circumstances related to the disclosure, including the precautions, if any, taken by the opponent to avoid disclosure; the extent of the disclosure; the type of information disclosed; and the measures taken by the opponent to try to rectify the disclosure. Finally, throughout the process of determining the effect of an inadvertent disclosure, counsel always must proceed in a fashion that zealously represents their respective client's interests, while remaining mindful of their professional and ethical obligations to the court and the public.

Robert C. Port is a partner with Hassett Cohen Goldstein & Port, LLP, Atlanta, Georgia, 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 Association. He received his J.D., with Honors, from the University of North Carolina in 1983. An earlier version of this article originally appeared in Computer Law of the Georgia Bar Newsletter (April-June 2000).

Endnotes

1. *See* S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 94-27 (1995). That Committee, citing the fact that the very nature of on-line services made it possible for system operators to access communications transmitted through them, stated that unless there is certainty that the electronic attorney-client communications will remain confidential,

communication with a client via on-line electronic media may violate South Carolina ethics rules, absent an express waiver by the client. This opinion was subsequently overruled by S.C. Bar Ethics Advisory Comm. Ethics Advisory Op. 97-08 (1997) in which the Committee stated the use of e-mail to communicate client confidences does not violate South Carolina ethics rules since an attorney has a reasonable expectation of privacy in the e-mail transmission system. *See also*, Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Formal Op. 96-01(1996)(advising attorneys that sensitive material should not be transmitted by e-mail [whether through the Internet, a non-secure intranet or other types of proprietary networks] without client consent, encryption, or an equivalent security system), *amended by* Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct, Formal Op. 97-01 (1997)(deleting Board determination of minimally proper e-mail security, but retaining client consent requirement); N.C. State Bar Ethics Comm., Final Op. RPC-215 (1995)(advising attorneys to use the mode of communication that best maintains confidential information and cautioning them against the use of e-mail without appropriate disclosure and precautions).

2. *See generally* Joan C. Rogers, *Ethical & Malpractice Concerns Cloud Email On-Line Advice*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT CURRENT REPORTS, March 6, 1996 <http://www.bna.com/prodhome/bus/mopc_adnew2.html>.
3. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999)(discussing the protection of confidentiality of unencrypted e-mail).
4. *Id.* The ABA's Committee on Ethics & Professional Responsibility cited two main factors in support of its conclusion that e-mail users have a legitimate expectation of privacy in their e-mail communications. First, the Electronic Communications Privacy Act of 1986 ("ECPA"), 18 U.S.C.A. §§ 2510 – 2522, 2701 – 2710, 3117, & 3121 – 3126 (West 2000), prohibits the unauthorized interception, disclosure, and use of the contents of electronic and wire communications. Unauthorized disclosure of e-mail by an "Internet Service Provider" (ISP) is also a felony. 18 U.S.C.A. § 2702 (West 2000). Additionally, the ABA pointed to the "practical constraints" on the ability of third parties and ISPs to intercept a particular message from the tens of millions of messages passing through the Internet. *Cf.* O.C.GA. § 16-11-62 (4)(unlawful for "[a]ny person intentionally and secretly to intercept by the use of any device, instrument, or apparatus the contents of a message sent by telephone, telegraph, letter, or by any other means of private communication"). Presumably this prohibition would apply to the intentional interception of e-mail.
5. *See, e.g.*, Alaska Bar Ass'n Ethics Comm., Ethics Op. 98-2 (1998); D.C. Bar Legal Ethics Comm., Ethics Op. 281 (1998); Ky. Bar Ass'n Comm. on Ethics, Advisory Op. E-403 (1998); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 709 (1998); Ill. State Bar Ass'n, Advisory Op. on Prof'l Conduct 96-10 (1997); N.D. State Bar Ass'n Ethics Comm., Op. 97-09 (1997); S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 97-08 (1997); Bd. of Professional Responsibility of the Sup. Ct. of Tenn., Advisory Ethics Op. 98-A-650(a) (1998)(overruling Advisory Ethics Op. 98-A-650 [1996] which prohibited the use of e-mail to transmit client confidences and secrets unless client consent was obtained or encryption or non-internet service provider was used); Vt. Bar Ass'n Comm. on Prof'l Responsibility, Advisory Ethics Op. 97-5 (1997).
6. *NetEthics Comm. Report*, COMPUTER LAW SECTION NEWSLETTER, (State Bar of Georgia, Computer Law Section), (Oct., Nov., Dec. 1999), at 22.
7. *Id.* at 28. As a result of this determination, the Board concluded "that [the] request did not present issues that merit the drafting of a formal advisory opinion." *Id.* The chairman of the Computer Law Section further advised that to provide additional guidance in this area, efforts would be made to draft a Comment to the Disciplinary Rules on this issue. *Id.*
8. GA. RULES OF PROF'L CONDUCT Rule. 1.6 (2001). The maximum penalty for a violation of this Rule is disbarment. *Id.*
9. O.C.G.A. § 24-9-24 (2000) provides as follows: "Communications to any attorney or to his employee to be transmitted to the attorney pending his employment or in anticipation thereof shall never be heard by the court. The attorney shall not disclose the advice or counsel he may give to his client, nor produce or deliver up title deeds or other papers, except evidences of debt left in his possession by his client. This Code section shall not exclude the attorney as a witness to any facts which may transpire in connection with his employment."
10. GA. RULES OF PROF'L CONDUCT Rule. 1.6 cmt. 4 (2001).
11. GA. RULES OF PROF'L CONDUCT Preamble ¶ 2 (2001).
12. *See, e.g.*, Monroe Freedman, *The Errant Fax*, LEGAL TIMES, Jan. 23, 1995, at 26, 45.
13. *Id.* at 45.
14. *See generally* GA. RULES OF PROF'L CONDUCT Rule. 1.7 (2001).
15. *Id.* at cmt. 4 ("Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action to the client because of the lawyer's other competing responsibilities or interests.")
16. *See* GA. RULES OF PROF'L CONDUCT Rule. 1.16(a)(1) (2001) (concerning declining or terminating representation of a client).
17. *See, e.g.*, Lazar v. Mauney, 192 F.R.D. 324 (N.D. Ga. 2000)(party making the inadvertent disclosure moved for a protective order).
18. *See, e.g.*, Abamar Hous. & Dev., Inc., v. Lisa Daly Lady Decor, Inc, 724 So. 2d 572 (Fla. Dist. Ct. App. 1998). Although the court held that its ruling was "not to be construed as creating an automatic disqualification rule for inadvertent disclosure," *id.* at 574 n.2, it nonetheless stated that "[t]he receipt of privileged documents is grounds for disqualification of the attorney receiving the documents based on the unfair tactical advantage such disclosure provides." *Id.* at 573.
19. GA. CODE OF PROF'L CONDUCT Preamble ¶ 1 (2001).
20. GA. CODE OF PROF'L RESPONSIBILITY EC 9-6. (2000)(superceded by the Georgia Rules of Prof'l Conduct effective Jan. 1, 2001).
21. "A lawyer should demonstrate respect for the law, the legal system and for those who serve it, including judges, other lawyers, and public officials." GA. RULES OF PROF'L CONDUCT Preamble ¶ 4 (2001).
22. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992)(discussing inadvertent disclosure of confidential materials).
23. *Id.*
24. ABA Ethics Comm'n 2000, Proposed R. 4.4 (1999)(public

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Georgia's Constitutional Scheme for State Appellate Jurisdiction

By Simon J. Weinstein

Editor's Note: For a paper on the Appellate Courts presented to the Bar in 1885 by John T. Clarke, see page 31

The Georgia Constitution establishes the respective jurisdiction of the Georgia Supreme Court and Georgia Court of Appeals. The Supreme Court is given exclusive appellate jurisdiction in the following cases:

1. All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and

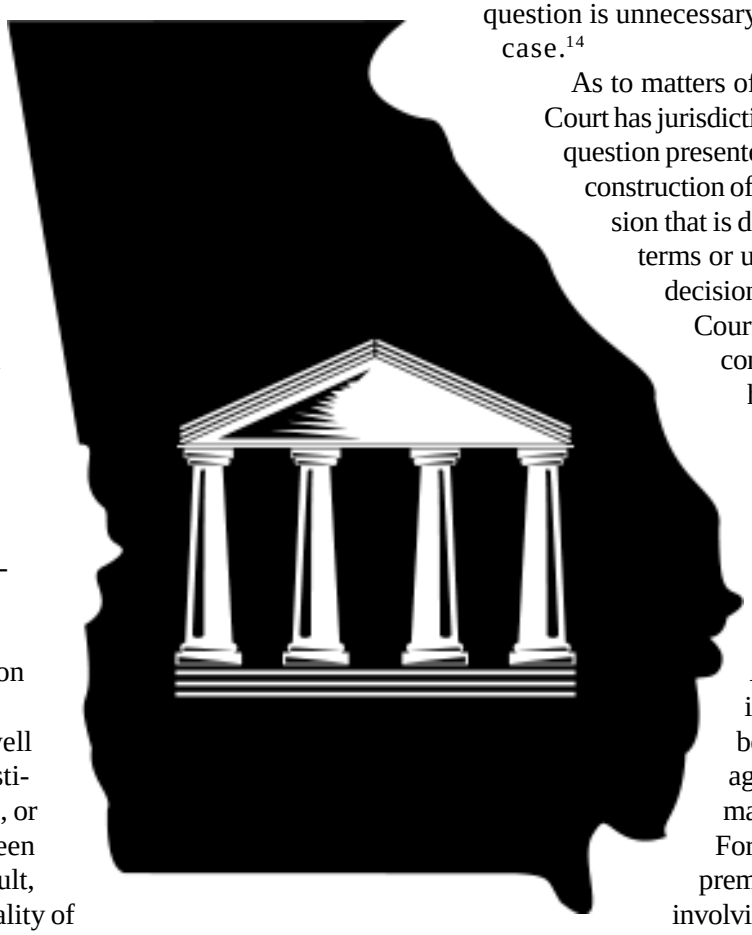
2. All cases of election contest.[1]

Unless otherwise provided by law, the Supreme Court is vested with general appellate jurisdiction in all equity and *habeas corpus* cases; in cases involving title to land, wills, extraordinary remedies, divorce and alimony; and in cases in which a death sentence was or could be imposed, as well as all cases certified to it by the Court of Appeals.[2] The Supreme Court also has constitutional jurisdiction to answer any question of law from any state or federal appellate court.[3] The Court of Appeals exercises appellate jurisdiction in all cases not reserved to the Supreme Court or conferred on other courts of law.[4] This article reviews Georgia Supreme Court decisions interpreting these jurisdictional provisions.

Cases Over Which Georgia Supreme Court Has Exclusive Jurisdiction

Constitutional questions

Prior to enactment of the Georgia Constitution of 1983, the Supreme Court was given jurisdiction in all cases involving the construction of the state or federal constitutions or of treaties, and "in all cases in which the constitutionality of any law of the State of Georgia or of the United States" was drawn in question.[5] Therefore, cases involving the constitutionality of a law of another state were not within the Supreme Court's jurisdiction,[6] nor were cases involving the constitutionality of a local ordinance.[7]



Under the Georgia Constitution of 1983, a constitutional question is within the jurisdiction of the Supreme Court if it involves construction of a federal or state constitutional provision or treaty as well as all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn into question. As a result, challenges to the constitutionality of local ordinances are now within the Supreme Court's jurisdiction,[8] as well as issues of constitutionality involving a law of another state. State laws are, however, limited to legislative enactments and do not encompass judicial decisions.[9]

Numerous circumstances bar adjudication of a constitutional issue on procedural grounds. To be preserved for appellate review, the constitutional issue must have been raised (in the pleadings, by objection to evidence, or in some other appropriate way pending the trial) and ruled upon by the trial court[10] . The constitutionality of a law cannot be drawn into question for the first time in a motion for new trial.[11] The party challenging the constitutionality of a statute must clearly specify the statute and the provision of the constitution alleged to have been violated, and must show wherein the statute violates the constitutional provision.[12] To have standing, the party making the constitutional challenge must show that the alleged unconstitutional feature injures him and deprives him of a constitutional right which he possesses.[13] Nevertheless, the Supreme Court will exercise jurisdiction over an appeal whenever a question as to the constitutionality of a statute is properly presented, even if the Court determines that a decision upon the constitutional question is unnecessary to the resolution of the case.[14]

As to matters of substance, the Supreme Court has jurisdiction if the constitutional question presented in the appeal involves construction of some constitutional provision that is doubtful either under its own terms or under the Court's own decisions or those of the Supreme Court of the United States.[15] In contrast, the Court of Appeals has jurisdiction to decide questions of law that involve the application, in a general sense, of unquestioned and unambiguous provisions of the Constitution to a given set of facts.[16] The Court of Appeals thus has jurisdiction if the law previously has been held constitutional against the same attack being made in the case before it.[17] For these reasons, the Supreme Court's transfer of a case involving a constitutional issue to the Court of Appeals does not constitute a determination that the issue lacks merit.[18]

Election contests

Article 13 of the Georgia Election Code[19] defines procedures governing election contests. The following primaries and elections are subject to contest under this statute:

> (1) the nomination of any person who is declared nominated at a primary as a candidate for any federal, state, county, or municipal office; (2) the election of any person who is declared elected to any such office (except when otherwise prescribed by the federal Constitution or the Constitution of Georgia); (3) the eligibility of any person declared eligible to seek any such nomination or office in a run-off primary or election; or (4) the

approval or disapproval of any question submitted to electors at an election.[20]

The Election Code recognizes the need to expedite an election contest on appeal, and appeals involving primary election contests are dismissed as moot if the general election has already taken place.[21]

Cases In Which Supreme Court Exercises Jurisdiction Unless Otherwise Provided By Law

Cases Involving Title to Land

Prior to enactment of the Georgia Constitution of 1983, the Supreme Court enjoyed jurisdiction over all cases "respecting title to land."[22] Correspondingly, there is a venue provision of the Georgia Constitution requiring such cases to be tried in the county where the land lies.[23] *Royston v. Royston*[24] was a suit by an administratrix to obtain a decree for the sale of real property. One of the defendants asserted that the testator did not have any title or interest in the property. The Supreme Court found the venue provision of the Georgia Constitution inapplicable, holding "while it is true to some extent, that the title is involved; still it is incidental only to the main controversy, and the Constitution manifestly refers to cases brought for the purpose of trying the title."[25] The Court thus established a guideline that "respecting title" meant having title to land as the central and critical issue.

In *Elkins v. Merritt*,[26] the Court held that the jurisdictional provision of the Georgia Constitution should be construed in the same manner as was the venue provision in *Royston*. *Elkins* was a statutory processioning proceeding, the object of which is to mark anew existing land lines. In such cases, the question of title is not tried. *Elkins* thus held that the Court did not have jurisdiction, as the issue of title was not central to the case. *Elkins* identified actions involving cancellation of deeds, specific performance of contracts for the sale of land, and injunctions against trespasses on realty as examples of other cases in which title is not directly in issue but, at most, only incidentally involved. In contrast, a statutory partition action that can bestow title on both parties and divest both parties of title is a case respecting title to land.[27]

In the 1951 case of *Bond v. Ray*,[28] the Supreme Court engrafted a limitation onto its jurisdiction over cases respecting title to land absent from the constitutional text by specifying the status of the parties. In *Bond*, the Court held that, as used in the Constitution, "cases respecting title to land" "refer to and mean actions at law, such as ejectment and statutory substitutes, in which the plaintiff asserts a presently enforceable legal title against the possession of the defendant for the purpose of recovering the land." *Bond* was a declaratory judgment action by a person in possession of real estate against one of the grantors of the deed under which the plaintiff held possession. The defendant claimed that the plaintiff did not have title to the property because the defendant was insane when the deed was executed. Although the case was brought for the purpose of trying title, the Court held that it did not have jurisdiction of the appeal because the defendant was not in possession of the realty.

The Georgia Constitution of 1983 gave the Supreme Court jurisdiction over cases "involving" title to land rather than "respecting" title to land. As the Court of Appeals has stated, "It would not seem that the word changes reflect an intention to change meaning."[29]

All Equity Cases

The overwhelming majority of courts in this country, including the Georgia Supreme Court, classify a case as legal or equitable for trial purposes based on whether there is asserted a claim for legal or equitable relief.[30] If claims for both legal and equitable relief are present,[31] the proceeding is generally characterized as sounding in both law and equity.[32] Historically, the Georgia Supreme Court has held that if a case contained a prayer for equitable relief, and such relief was either granted or denied, the case was in equity for appellate jurisdictional purposes unless all issues relating to equitable relief had been eliminated at the trial level and the appeal presented questions for decision relating only to the grant of legal relief.[33]

Classification of declaratory judgment actions proved problematic. Although such proceedings are considered equitable in a number of jurisdictions,[34] the Supreme Court in *Felton v. Chandler*[35] characterized actions for declaratory judgment as legal because they are authorized by statute. The *Felton* court recognized that equitable (e.g., permanent injunctive) relief may be requested in a declaratory judgment action.[36] According to *Felton*, a declaratory judgment action is an equity case if there is a prayer for equitable relief.[37]

Contrary to *Felton* and its progeny, the Court in *Savannah TV Cable Co. v. City of Savannah*[38] and *Baranan v. Georgia. State Board. of Nursing Home Administrators*[39] held that the grant of injunctive relief "ancillary to" issuance of a declaratory judgment does not vest jurisdiction of the appeal in the Court. In *Baranan*, plaintiffs sought to have certain administrative regulations declared unconstitutional and their enforcement enjoined. The Court transferred the appeal to the Court of Appeals on that the ground "that the injunction issue is one of mere form and that the substantive question on appeal is a legal

question over which the Court of Appeals has appellate jurisdiction"[40] Perhaps because *Baranan* articulated an entirely new test for determining appellate jurisdiction over equity cases without explanation or analysis, the Court continued to render decisions in certain declaratory judgment actions in which the grant or denial of permanent injunctive relief hinged solely on the resolution of issues of law in declaratory judgment actions.[41]

But in *Beauchamp v. Knight*,[42] the seeds planted in *Baranan* found fruition, and the Court purported to establish some clarity. *Beauchamp,* by way of *dicta,* articulated the following set of three guidelines for determining appellate jurisdiction in equity cases:

> [1] Whether an action is an equity case for the purpose of determining jurisdiction on appeal depends upon the issue raised on appeal, not upon how the case is styled nor upon the kinds of relief which may be sought by the complaint. [2] That is, "equity cases" are those in which a substantive issue on appeal involves the legality or propriety of equitable relief sought in the superior court - whether that relief was granted or denied. [3] Cases in which the grant or denial of such relief was merely ancillary to underlying issues of law, or would have been a matter of routine once the underlying issues of law were resolved, are not 'equity cases.'[43]

The Georgia Constitution of 1983 gave the Supreme Court jurisdiction over cases "involving" title to land rather than "respecting" title to land. As the Court of Appeals has stated, "It would not seem that the word changes reflect an intention to change meaning."

On their face, *Beauchamp*'s first two guidelines effect no real change in the law. But the third guideline, in line with *Baranan,* bases the determination of appellate equity jurisdiction on whether the issue or issues underlying the decision to grant or deny equitable relief involve application of general rules of law or principles established by courts of equity. That this was the intended effect of *Beauchamp* is illustrated by later cases such as *Pittman v. Harbin Clinic Professional Ass'n*,[44] and *Lee v. Green Land Co*.[45] In *Pittman,* the superior court entered orders granting and denying injunctive relief based on its determination that certain restrictive covenants in employment contracts imposed reasonable restraints on trade whereas others did not. The *Pittman* court concluded that the case involved the legal issue of contract construction, and that appellate jurisdiction was not with the Supreme Court. In *Lee,* the superior court denied specific performance of a document purporting be to a contract for the purchase of land, ruling that the document did not create a binding contractual agreement. This also was a legal issue.

The decisions in *Baranan* and *Beauchamp* create a mechanism that limits the Supreme Court's equity jurisdiction in a way that is difficult to reconcile with underlying principles of equity jurisprudence. In this regard, the first maxim of equity is the rule that equity follows the law.[46] Equally fundamental is the maxim that equity takes jurisdiction of a case where the law provides an inadequate remedy.[47] Thus, the defining characteristic of an equity case is the remedy sought or granted and not the underlying basis for the grant or denial of equitable relief. The Georgia Constitution gives the Supreme Court jurisdiction over "equity cases." There appears no assignment to the Court of Appeals of those cases in which the grant or denial of equitable relief turns on the application of rules of law.

Following *Beauchamp,* innumerable appeals docketed in the Supreme Court as equity cases have been transferred to the Court of Appeals. *Redfearn v. Huntcliff Homes Ass'n*.[48] was, however, an appeal that seemingly constituted an equity case within the meaning of the guidelines promulgated in *Beauchamp*. In *Redfearn,* the trial court granted a homeowners' association's request for a mandatory injunction to force homeowners to raze a retaining wall constructed in violation of the subdivision's restrictive covenants and an agreement of the parties, and the homeowners claimed both at the trial level and on appeal that the equitable defense of laches barred the grant of equitable relief. Consequently, *Redfearn* was a case in which the legality or propriety of equitable relief was a substantive issue on appeal (the question being whether plaintiff's laches barred the grant of injunctive relief), and the grant of equitable relief was not merely ancillary to underlying issues of law (the principle of laches being the subject of one of equity's maxims).[49]

Nonetheless, a majority of the Supreme Court, over a vigorous dissent, held that the case was not in equity. The Court based its decision essentially on two grounds. First,

the majority reasoned that because *Beauchamp* states that whether an action is an equity case on appeal does not depend upon the kinds of relief sought in the complaint, defenses asserted in the answer cannot be used as a basis for determining appellate jurisdiction either.[50] Second, the Court concluded that there is no longer anything particularly equitable about the defense of laches, because it is now applied in legal actions.[51] It would seem, however, that a principle which originated in equity retains its character as an equitable principle, as distinguished from a rule of law, so long as it continues to be applied in equitable actions. And the Supreme Court's refusal to predicate appellate equity jurisdiction on an equitable defense, when the trial court's rejection of such defense and resultant grant of equitable relief are challenged on appeal, constitutes a conceptual renunciation of *Beauchamp*.

However, the Supreme Court has continued to exercise equity jurisdiction over cases such as *Goode v. Mountain Lake Investors*,[52] *Electronic Data Systems Corp. v. Heinemann*,[53] and *Glynn County v. Waters*.[54] The Supreme Court in *Goode* began its opinion by announcing that the case before it was an equity case without making any further comment.[55] In *Electronic Data Systems* and *Waters*, the Court concluded that it had jurisdiction because the grant or denial of injunctive relief was not merely ancillary to an underlying legal issue.[56] This conclusion is, however, debatable.

...the Georgia Child Custody Intrastate Jurisdiction Act, which states that "[t]he use of a complaint in the nature of habeas corpus seeking a change of child custody is hereby prohibited."

In *Electronic Data Systems*, the plaintiff sued its former employees for misappropriating trade secrets by selling computer software programs developed by the plaintiff with the assistance of the defendants while they were in the plaintiff's employ. Although the jury found that the defendants had misappropriated the trade secrets, it also determined that they had not been unjustly enriched. The trial court declined to enter an injunction prohibiting the defendants from selling the programs but required them to pay the plaintiff a temporary royalty. The questions on appeal were whether a prohibitive injunction was required by the jury's finding on the misappropriation of trade secrets issue and by the Georgia Trade Secrets Act.[57]

In *Waters*, a county employee sued the county for wrongful discharge by the county commission, claiming that a county ordinance vested the exclusive authority for terminating his employment in the county administrator. The trial court agreed with the plaintiff and granted an injunction requiring the county to reinstate the plaintiff in a comparable position. On appeal, the questions were whether the trial court correctly had interpreted the county ordinance and whether the availability of a writ of certiorari barred the grant of injunctive relief.

In *Goode*, the plaintiffs owned property located downhill from a tract purchased by the defendant. By developing its tract, the defendant increased the flow of surface water and sediments onto the plaintiffs' property. The trial court issued a permanent injunction which required the defendant to eliminate the sediment discharge, but only reduce the water flow. The questions on appeal were whether, as a matter of law, the trial court had to require the defendant to bring the water flow back to pre-development levels and whether the trial court erred in finding that there were no reasonable means that could be taken to further limit the flow of the surface water. It seems that these three cases differ from others which the Supreme Court has transferred to the Court of Appeals in the following respects. *Goode* and *Electronic Data Systems* each presented a question of whether, under the facts of the case, the trial court abused its discretion in fashioning the equitable remedy. *Waters* presented a question of whether the availability of a legal remedy barred the grant of equitable relief. Given the analytical inconsistencies and uncertainties in *Beauchamp* and its progeny, the circumstances under which the Supreme Court will accept jurisdiction of appeals as equity cases remain unpredictable.

All Cases Involving Wills

Prior to 1983, the Georgia Constitution conferred upon the Supreme Court jurisdiction over "all cases which involve the validity of, or the construction of wills."[58] The 1983 Constitution gives jurisdiction to the Supreme Court "in all cases involving wills."[59] In the 1991 case *In re Estate of Lott*,[60] the Supreme Court held that the new language did not broaden its jurisdiction and that "all cases involving wills" means those cases in which the will's validity or meaning is in question.

Consequently, where the testator bequeathed part of his estate to his children and others, and the question in the case was whether Hammonds was entitled to a deceased child's share by virtue of adoption, jurisdiction of the appeal was in the Court of Appeals.[61] The underlying issue was not

interpretation of the will, but an issue of the validity of adoption. Similarly, in *Sheridan v. Sheridan*,[62] the question of the case was whether Boyd Everett Scheridan also known as Boyd Everett Merrifield, or Boyd E. Scherden also known as Boyd E. Scheridan, was the "Boyd E. Scheridan" named as executor and sole beneficiary of testator's will. The Court held that this issue of identity did not concern the validity or construction of the will.

Reece v. McCrary[63] began a line of cases in which the Court held that this provision of the Georgia Constitution confers jurisdiction on the Court only if the purpose of the proceeding is to obtain a construction of a will, and not where the construction of a will is involved only incident to some other proceeding.[64] This rule was last applied by the Supreme Court in its 1979 decision in *Bell v. Grant*.[65]

All Habeas Corpus Cases

Habeas corpus proceedings are governed by Chapter 14 of Title 9 of the Georgia Code. Chapter 14 consists of Article 1 (containing the general habeas corpus provisions)[66] and Article 2 (establishing habeas corpus procedures for persons under sentence of a state court of record).[67]

Article 1[68] sets forth three classes of persons who may seek the writ of habeas corpus to inquire into the legality of their restraint: (a) any person restrained of his liberty under any pretext whatsoever; (b) an applicant alleging that another person in whom he is interested is kept illegally from the custody of the applicant; and (c) any person restrained of his liberty as a result of a sentence imposed by any state court of record. In Georgia, habeas corpus has been used primarily by prisoners challenging the legality of their convictions and by parents embroiled in child custody disputes.

In 1978, however, the General Assembly enacted the Georgia Child Custody Intrastate Jurisdiction Act,[69] which states that "[t]he use of a complaint in the nature of habeas corpus seeking a change of child custody is hereby prohibited."[70] Consequently, in *Munday v. Munday*[71] the Supreme Court held that it no longer has jurisdiction over appeals involving post-divorce child custody modification actions. In *Ashburn v. Baker*,[72] the Court extended *Munday* by eschewing jurisdiction over actions to hold a party in contempt of the child-custody provisions of a divorce decree. Outside the context of proceedings seeking child custody modifications, the Supreme Court continues to exercise jurisdiction over habeas corpus actions involving child custody, as where a mother brought suit alleging that her child was being illegally detained by a party who claimed the right to custody as the child's adoptive parent,[73] and where a non-custodial parent refused to return the child following visitation.[74]

On the one hand, if the habeas proceeding involves a person under sentence of a state court of record and the final order of the superior court is adverse to the petitioner, the petitioner must file a written application for a certificate of probable cause to appeal with the Supreme Court.[75] If, on the other hand, the trial court finds in favor of the petitioner, the respondent may appeal without obtaining a certificate of probable cause.[76]

Even if the petitioner is not incarcerated, the writ may be used if there are other, significant restraints on the petitioner's liberty such as revocation of a driver's license.[77] Moreover, if venue is proper, the courts will treat a petition as one for habeas corpus if it seeks relief cognizable in habeas corpus proceedings even though it is not styled as a habeas petition.[78]

Cases Involving Extraordinary Remedies

This provision "refers only to such extraordinary legal remedies as mandamus, prohibition, quo warranto, and the like."[79] A declaratory judgment is not an extraordinary remedy.[80] A proceeding to hold one in contempt for violation of an extraordinary remedy is so connected with the remedy that it is treated as a case involving an extraordinary remedy.[81]

Divorce and Alimony Cases

A divorce case is an action in which one spouse seeks to effect a legal separation from the other through a court judgment.[82] Therefore, where the maintainability of a wrongful death action turned on the validity of a divorce decree, it was held not to be a divorce case.[83]

An alimony case is one in which one spouse seeks a temporary or permanent allowance out of the estate of the other spouse, made for the support of the former when living separately from the latter.[84] Because alimony relates to an allowance by a judgment or decree of court, a suit by one spouse against another based solely upon a private support agreement is not an alimony case.[85] If the private agreement is incorporated into a divorce decree, however, an action to hold a party in contempt for noncompliance is a divorce and alimony case.[86] A proceeding for modification of an alimony judgment is also an alimony case under the Georgia Constitution.[87] But a suit to domesticate an alimony decree of a sister state is simply a suit on a foreign judgment,[88] and an action to enforce the decree is a suit on a debt of record.[89] In contrast, an application for contempt to enforce either alimony or nonalimony provisions of a Georgia divorce decree is ancillary to, and an incident of, the divorce action, and jurisdiction to hear an appeal of this nature is in the Supreme Court.[90]

Although alimony includes child support,[91] a child-support enforcement action initiated under the Uniform

Reciprocal Enforcement of Support Act (URESA)[92] is not a "divorce and alimony" case.[93] URESA was used to enforce child support awards where the obligor and obligee resided in different states or in different counties in this state.[94] In 1997, the General Assembly passed the Uniform Interstate Family Support Act (UIFSA)[95] to replace URESA.[96] UIFSA has not yet been construed.

Cases Certified to Supreme Court by Court of Appeals

Because this jurisdictional grant is patterned after federal procedures for certifying questions from lower federal courts to the United States Supreme Court, the Georgia Supreme Court has applied and followed the practice of the United States Supreme Court in considering certified questions by the Court of Appeals.[97]

The certified question must involve an issue which has been preserved for appellate review,[98] and the answer to the question must be necessary to resolution of the appeal.[99] The Supreme Court

> will not answer a question of objectionable generality, or such as contains a number of contingencies dependent upon evidence. A question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances, and a different answer under another. Each question certified must be a direct question or proposition of law clearly stated, so that it could be definitely answered without regard to other issues of law or of fact in the case.[100]

"A question must not contain inferences drawn either from the pleadings or from the evidence."[101] Applying these rules, the Supreme Court in *Willis v. Georgia Power Co.*[102] declined to answer a question turning on a variety of evidentiary contingencies: would the jury be authorized to find the defendant negligent where the evidence was insufficient to authorize a finding that the defendant was guilty of the negligence alleged in the petition but did not demand a finding that the defendant exercised the requisite degree of care? In contrast, in *Smith v. State*,[103] the question of whether a timely filed appeal from a judgment of conviction is a prescribed means to challenge a guilty plea, was certified and answered.

Cases in Which a Sentence of Death Was or Could be Imposed

Prior to enactment of the Georgia Constitution of 1983, the Georgia Supreme Court had jurisdiction "in all cases of conviction of a capital felony."[104] In *Caesar v. State*,[105] the Court held that, as used in this context, the term "capital felony" was merely descriptive of the class of felonies to which the death penalty could be given as punishment, as distinguished from that class of felonies in which under no circumstances a sentence of death could ever be imposed. Consequently, the Court exercised jurisdiction over all cases in which there had been a conviction of murder, rape, armed robbery, and kidnapping with bodily injury.[106]

After the United States Supreme Court in *Gregg v. Georgia* [107] sustained the constitutionality of Georgia's statutory death penalty procedure in cases of murder, it held in *Coker v. Georgia* [108] that the federal Constitution forbids imposition of the death penalty in a case involving the rape of an adult woman who was not killed. In *Collins v. State*,[109] the Georgia Supreme Court later interpreted the United States Supreme Court decision in *Eberheart v. Georgia* [110] as meaning that imposition of the death penalty for kidnapping and armed robbery is unconstitutional where the victim survives. Consequently, *Collins* held that under Georgia statutory law convictions of rape, kidnapping, and armed robbery are no longer convictions of capital felonies for appellate jurisdictional purposes and that jurisdiction of these appeals lies in the Court of Appeals.[111]

The Georgia Constitution of 1983 gives the Georgia Supreme Court jurisdiction in the following "classes of cases: . . . [a]ll cases in which a sentence of death was imposed or could be imposed." Under the current statutory law of Georgia, the death penalty may be imposed for treason, aircraft hijacking, and for those murder

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Georgia's Appellate Courts, Circa 1885

Editor's Note: The following paper was read before the Georgia Bar Association on August 5, 1885 by the author.

By John T. Clarke

IN CIVIL CASES, THE primary and direct object of judicial proceedings is to dispense justice in disputes. Their secondary, but equally important service, is to prevent violence and disorder, by inducing disputants to submit their controversies to legal and peaceable methods of determination. Criminal Courts are for the punishment and consequent prevention of crime. Through such influences, is promoted the protection of public and private rights; and men are persuaded to respect and love the Government.

In advancement of each and all of these objects, Courts are valuable instructors and guides of the people. The citizens not only experience judicial proceedings, but witness the action and hear the opinions of the Court, upon the cases of others. Thus they learn the law. They are taught how to regulate their mutual intercourse according to established rules of right. They are shown what claims they may lawfully make, and how to maintain them. They are instructed in their duties, and shown the policy and necessity of faithfully discharging them. Crimes are pointed out and condemned, and the people are warned to avoid them. The superiority of judicial procedure for ascertaining disputed facts, and for bringing into exercise disinterested, impartial, deliberate and enlightened judgment, according to the fixed standard of prescribed laws, commends itself to men; and persuades and constrains them to suppress their passions, to curb their violence and treachery, and to invoke upon their controversies the voice of the Courts.

For all these designs of judicial proceedings, they should be well shaped and wisely conducted, that a single trial may not fail to reach a just result, and that the loser may not seem to be too hastily condemned.

Second hearing are commonly allowed. Such reviews take various forms. Rehearings before the same forum or before another; new trials *de novo*, and reviews of the record only, are in use.

No human right, perhaps, is more universally and highly prized, than the right to be fully and fairly heard. No matter what the law, or the judgment is, the losing party always feels wronged, if he does not realize that he has been allowed a free and patient hearing. When conscious of a calm and fair audience, and a due consideration of all his facts and arguments, almost any man will bow, however reluctantly, to the justice which condemns him.

The foregoing considerations may seem general; but they are fundamental to our subject, and all that I shall say rises out of them. In view of them, the rules of law administered in the Courts ought to be uniform throughout the State. To meet a different standard of rights and duties, or a different construction of the law, upon entering a county separated from one's own by a mere imaginary line, or upon each appearance before a new Judge, confounds all judgment by the people, as to the effect of their conduct and mutual engagements; disconcerts reasonable expectations, encourages bad faith, excites disrespect for government, drives the timid to deceit and the bold to violence, and tends to the destruction of society.

But the minds of Judges differ, by nature and by education. Legislatures are continually making new statutes. In the ever restless whirl of the inventive world, new contingencies and conditions arise. No two men, looking from the same official plane, but under varying circumstances, can be expected to see the paths of justice always alike. When a large State must be subdivided into various judicial districts, presided over by a score, or more, of Judges, of like jurisdiction, great diversities of rulings will prevail.

To remedy this evil, the higher class of Appellate Courts is established. One tribunal for the correction of the errors of all lower ones, is expected to bring all the districts and counties as near to uniformity as possible.

Learning, ability and integrity are seldom wanting upon so exalted a Bench. But these important qualifications must be exercised rightly, and so as to be generally recognized. Else such a Court will fall far short of its greatest attainable usefulness. We shall briefly suggest some of the particulars from which such a failure may result.

It is the glory of all free

Courts to hear with patience. Without respectful attention to the arguments of counsel, the Circuit Judge will soon earn the reputation of superciliousness, which is nigh of kin to injustice, and will hurry into many blunders of law. Even those members of the Bar who are deficient in reputation and those who lack ability to handle a matter wisely, are entitled to a fair and kindly audience. It ought to be made certain to them and to their clients, that their views are fully understood by the Court. By such a course only can the Judge acquire and maintain the people's confidence in his desire to do justice. By such patience and attention to argument, his rulings will be more deliberate and wise.

But what, in this respect, is true of Circuit Judges, applies, with increased force, to the Justices of the highest Appellate Court. This Court undertakes to review the haste and consequent errors of other involved, and to be able to shed valuable light on their respective claims. Every mind, too, has its own method of traversing and presenting a subject. As a rule, so general as to be almost universal, the Court ought not to interrupt the counsel, or seek to force upon him a mode of analysis not natural to himself.

Oftener than otherwise, time itself will be saved by permitting the advocate to work out his brief in his own way. Of course, extreme and persistent irrelevancy, or unmerciful and intolerable repetition, must be checked. But such emergencies are not very common. It is impossible that any man, however learned and acute, can be ready to catch up, upon a hasty reading of the record, all the questions involved. Counsel ought to be , and commonly is, more familiar with the facts and the law of his side of the case, than anybody else. True, it is often very tiresome to the Judges. They are men, and sometimes need mercy at the hands of pertinacious counsel. But, nevertheless, a lack of patience to hear is a reproach which cannot but depreciate a Court in the estimation of the public, and greatly diminish its usefulness.

One tribunal for the correction of the errors of all lower ones, is expected to bring all the districts and counties as near to uniformity as possible.

The preparation of the opinions of the highest Appellate Court is an affair of very great importance. Every opinion published should clearly and distinctly present the grounds on which it rests. Its consistency with antecedent rulings of the same Court is an important aspect to be presented. How the holding grows out of, or upon what distinctions it departs from, known precedents, ought to be distinctly stated. Unnecessary prolixity of style is censurable anywhere. To avoid inconvenient accumulation of law literature, it is especially demanded, that succinct statement and a concise style should characterize judicial opinions. But in this matter, brevity is not all, nor the chief of virtues. Should it become the habit of any tribunal in the last resort, to announce all its judgments unsupported by explanations; or to publish opinions hasty in argument, or without due citation of authorities and proper comment thereon, it would, indeed, determine the controversies before it. It would, of necessity, be resorted to for this purpose. But its decisions would be regarded as hasty and unscientific. They would fail to command the respect of counsel. The Courts, the Bar and enlightened citizens, would cease to look thither for light upon the science of law. Such opinions would be esteemed extemporaneous, and subject to review. Neither the people, the Bar, nor subordinate Courts could feel that vexed questions of law were thereby permanently settled. Conscientious occupants of the Appellate Bench would, themselves, be restless under the doctrine of *stare decisis*, as applied to such hasty adjudications. The very Court which issued such opinions, would be afterwards found apparently trying to evade the force of its own previous rulings, by an undue emphasis, upon some insignificant difference of fact, or by other indirections. Such a Court would be called a "case Court." Its decisions would not be regarded a home, or abroad, as learned statements of law, or skillful interpretations of statutes, ascertaining principles of extended application. They would be of little efficacy in preventing litigation, by making the law plain.

Another practice, which to some extent has crept into the course of some Appellate Courts, tends with great force to the like degradation of the authority of such tribunals – as expounders of the law; as instructors of the Bar, the Courts and the people; as promoters of uniformity in the standard of legal rights; as preventive of litigation; and as assuring the public mind of a fair and enlightened administration of justice. This practice has been

sufficiently common in some Courts to have originated a technical phrase for its designation. It is called "the assignment of cases."

For learning and efficiency, the highest judicial tribunal in a State is, by constitutional requirement, composed of three, five or more Judges. The suitor, whose case has been tried by one Judge on the circuit, is taught to appeal to the combined wisdom of a full Bench above. But when his cause is reached on the docket, for the convenience of the Judges, it is assigned to one of them, to investigate and decide. Of course, there is never an absolute agreement that the others will concur in every legal absurdity into which one may fall. The other Judges do not absolutely renounce all responsibility about the decision to be made. In cases of conspicuous importance, and upon questions on which the public mind is agitated, a more general participation is had by all the Judges, in the labors and powers of the Bench. But speaking generally, and not universally, there seems, under this practice, to be a measure of conscious relief to all the rest, from the painful duty of ascertaining the complicated facts in the record. There seems to be a disposition to concur in the opinion of the "assignee," (if the term is allowed); at least, so long as it does not shock the moral sense. If, after the argument, distinctions have to be traced out through the books, and stated and argued in the opinion, the work is the work of one man, instead of three or five. Provided the case passes off of the docket, with the practical result approved by all, little particularity is often exercised about the legal reasons given for the judgment. In such a practice, the law is not formulated by the Court. One such opinion is no satisfactory assurance what the Court would hold, in a similar case, as to the legal questions, which the author regarded as controlling.

Whatever apology of convenience, or necessity, may be offered for this practice, it is subject to several serious complaints: First, Whereas, the Constitution guarantees to parties litigant a fair and careful review, by a number of learned Justices, consulting freely together, and each aiding every other on all disputed points: this practice gives them as a fulfillment of that guaranty, practically, one reviewing Judge; second, as all the Judges have not looked carefully into each case, and fully and squarely committed themselves to the opinion, all but the "assignee" feel free, afterwards, to anticipated

by the Bar and the people, who regard no propositions as well and finally ascertained, but continue to dispute and litigate about the same questions; fourth, the decisions of such a Court are likely to become of little weight as authority, before the courts of other governments having like laws and institutions.

So far as our Supreme Court is concerned, we have a provision of the Code, which is designed to secure the co-operation of all the Judges in each decision. In §4270, it is enacted, that "No decision shall be published in the reports until the said decision shall have been revised by each of the Judges presiding in the case." This clearly refers to the opinions; and to assure its enforcement, seems to demand, that each opinion, after being written, should be so far considered in counsel, as to ascertain, that every part of it is satisfactory to all, who profess to concur. The practice of regular consultation days would seem to be indispensable.

Another point of some importance in the practice of Appellate Courts, is the manner of preparing the syllabus, or head-notes. In some courts, these are written by the same Judge who writes the opinion; and are as much a part of what is agreed in by all the Judges. In such cases, they are the carefully formulated propositions of law, which having been controverted in the case, have been ascertained by the Court. Then, they are a most important part of a decision. True, they are to be received in the light of the opinions by which they are illustrated at large and supported.

In other courts, the head-notes are the work of the reporter.

Some weighty things can be said for and against each of these practices. However, if it could only be made sure that the opinions themselves are entirely the joint opinions of all the concurring Justices, prepared according to the principles suggested above, it would be an affair of comparatively little concern how the head-notes were prepared; provided only, that there should be an announced and uniform practice in regard to it. If the syllabus is to be treated as the abstract formulation of the law called in question and adjucated in the case, it ought to be prepared as carefully as the opinion and by the same mind. It should be the subject of the same free consultation and express concurrence. But if it is to be left to the reporter, that fact ought to be distinctly announced by a formal rule of the Court. In such an announcement, it would be ascertained that the syllabus is no part of the decision, and sheds no light on the case or questions decided; but that it is a mere index or reference, pointing to the opinions as the only authoritative statement of the law. The Court and the Bar ought to so understand it. Then none would be mislead by the head-notes.

When, for lack of uniformity in the practice in this matter, or for want of assured information from the Court, as to the rank of the head-notes, uncertainty is allowed to rest upon this matter, much evil results.

Under the practice of head-notes by the reporter, some very awkward things appear. Sometimes, they are alike unjust to counsel, to the Court below and the Appellate Court. Propositions are distinctly and solemnly announced in the syllabus, and published to the world as the points decided in the case, when such propositions are the merest truisms of the law, which, for generations, no lawyer or judge has questioned. Yet the Court below is said to be "reversed" or implied, in the opinion, as fundamental principles from which are derived inferences and deductions as to the questions which are disputed. Nothing is fit to appear as a syllabus except some proposition, which was questioned in the case, and judicially ascertained by the Court. In order to guard against such absurdities, and to aid in securing a proper use of the decisions, we confess to a preference for head-notes, prepared by the writer of the opinion, and carefully considered and concurred in by the Court. But, if the other practice is to prevail, we insist that a rule of the Court ought formally to announce that fact, and that the head-notes are no part of the decision.

As a slight consideration on this subject, I will merely state, that all over the country it is common for the Bar and the public to judge of the style of composition and thought of each Judge delivering an opinion by the head-notes published in the newspapers and advance pamphlets. If such head-

The preparation of the opinions of the highest Appellate Court is an affair of very great importance. Every opinion published should clearly and distinctly present the grounds on which it rests.

notes are not his work, he is misjudged.

Again, looking from the practice of Appellate Courts in general, to that of the Supreme Court of Georgia, we observe that our Code (§4270) seems to require that the head-notes should be prepared by the Judge who prepares the opinion. That Section says: "No decision shall be *delivered ore tenus*; but the same shall be *announced by a written synopsis* of the points decide." What is here required is a "synopsis of the points *decided*." Clearly, what was not in dispute is not *decided*. No other head-notes can be needful, but this "synopsis." In *announcing* the decision, the Judge, not the *reporter, does so announce it by such "synopsis*." The reporter's business is to publish *decided* that only. It is authoritative as law, and ought to be as carefully studied and accurately expressed into abstract formulation, and as much the fruit of deliberate consultation, as any matter emanating from the Bench.

The foregoing views, except where expressly applied to the Supreme Court of this State, are strictly general, fitted to no particular locality or tribunal. In our subsequent practical suggestions we shall look more to the relief and improvement of our own highly esteemed and venerable Appellate Court.

Whenever any of these objectionable practices prevail, its prevalence is mainly due to the fact that the Judges are overburdened with work, and seem to themselves obliged to adopt labor-saving methods. They have not time to listen patiently to argument. They lack time to investigate thoroughly each of the cases, great and small, which crowd upon them. To consult fully, and to write accurate and scientific opinions, in so many cases, is, especially, too great a burden.

For remedy of an overburdened Court, different measures may be suggested. First, five Judges can more easily and better prepare the opinions than three. Second, it might be enacted that no opinion need be prepared, and no report published in book form, except in the following cases, to-wit: 1st. Where a new trial is granted (for the guidance of the Court below;) 2d. Where a former decision is reviewed and reversed; 3d, Where a majority of the Judges in council will resolve that a new question is involved, or that the cause, by reason of its uncommon importance, demands a written opinion. In all other cases, let a mere judgement be rendered.

The result of this last practice would be a great lessening of the writing labor of the oppressed Judges. True, those cases only in which opinions were written and published, would be commonly regarded as authority. This would be no evil, as applied to a tribunal so old as our Supreme Court. Considering our seventy-two large volumes of opinions already in print, and an average of about two per year constantly coming; it could not be matter of complaint against the plan proposed, that precedents would not be manufactured sufficiently fast. We have certainly reached a period and a state of law ascertainment, when most of the cases decided by our Court involve no questions, but such as a candid lawyer and intelligent, not blinded by fees, would pronounce to be already *res adjudicata*. Opinions issued under this plan would be more scientifically prepared, and rank higher as authority.

To effect such a change in the practice of our Supreme Court, it would be necessary to repeal some provisions of the Code. The Section already quoted requires the "written synopsis" described in *every* case; and Section 4271 declares: "The Court shall decide *all questions* presented in the record of each case carried up to it for review."

Instead of these rules, I propose, with the three exceptional classes of cases above described, a mere announcement of the judgment, which shall be permanently preserved in the minutes of the Court, and sent down by the usual Remittitur.

As a third measure of relief to the Supreme Court of Georgia, disallow exceptions in *certioraris* and appeal from Justice's Courts, except where a constitutional question is involved. Such cases receive, in the Superior Court, a degree of attention equal to their magnitude. There, is furnished rehearing, and careful review of the first trial, and of the second or third. Why not let that be to them the end of litigation?

By such measures, or some better, the Supreme Court of Georgia needs to be unburdened. The learned and venerable men, who now and commonly occupy that Bench, ought to be thus facilitated in giving to the public the full benefit of their wisdom and talents. Add to these measures the allowance of adequate compensation by which they will be both aided and stimulated to the most faithful exertions, and by which that Bench may be always able to command the services of the best and most enlightened men.

In concluding this unsystematic sketch of a subject, very unattractive to the writer, and, I fear, uninteresting to my hearers, permit me to give a brief outline of the practice of the Supreme Court of the United State, with respect to some of the points above presented.

Before argument, no case is assigned to either Justice. All feel

equally bound to attend to all the questions. Each is furnished with a printed brief and a printed copy of the record. Each is expected to examine the record, and form his own opinion of the questions before any formal consultation. Every Saturday a conference is held. Every case is taken up in the order in which it was argued, and is freely discussed among the Justices. If either Justice desires further time for consideration, the case is postponed. When all are ready to pronounce, a vote is taken. The case is decided by not less than a majority of a quorum. The vote is recorded. Commonly, on the night following the consultation day, the Chief Justice designates the Justices who are to write out the respective opinions. Subsequently, each opinion is read in full before a consultation meeting, and criticized and amended until satisfactory to all, who concur in the judgment. In cases of great difficulty, the author of the opinion is sometimes requested to have it printed and distributed among his colleagues. After that, it is again discussed and perfected, in full counsel. The reporter only is responsible for the head-notes. But every proposition set out and maintained in the opinion is the mind of the Court, and can be so trusted by all.

This course of practice, as to decisions and opinions, is the simple and natural one, and it seems to us to be the only fair and wise one.

It is true that business seems to accumulate on the dockets of that Court. But its jurisdiction is so extensive—we have so vast a country, and so complicated interests, enterprises and relations entitled to review before that tribunal—that none need be surprised at not receiving an early hearing there. Perhaps some remedy for the delay may yet be devised. But for ourselves, we confess to a higher admiration for thorough and scientific work, even if necessarily slow. We would seek remedy for delay by any other means than such as would love the standard of judicial work.

Begging indulgence for the crudities and dullness of this paper, I submit it in obedience to your appointment, trusting that it may, at least, serve the purpose of getting the subject assigned to me before this enlightened Association, and of eliciting from others something more valuable. ▣

AN OPPORTUNITY TO "PARTICIPATE IN PRO BONO"

By S. Kendall Butterworth

Pro bono representation has origins in ancient Rome and is one of the professional obligations of being a lawyer. The commitment to pro bono work is in the code of ethics that has governed members of the legal profession for nearly 100 years, and the American Bar Association urges lawyers to perform at least 50 hours of pro bono work each year. Yet, a 1999 survey by *American Lawyer* magazine shows that lawyers at the nation's 100 highest grossing firms spent an average of 36 hours a year on pro bono representation, down significantly from 56 hours in 1992 when the magazine began tracking the firms' volunteer hours.[1] With lawyers under added pressure to bill more hours to cover rising overhead costs in law firms, less time is available to devote to pro bono cases.

Lawyers in Georgia receive a Voluntary Pro Bono Reporting form each May along with the State Bar Membership Dues statement. In 1999, only 5.6 percent of the Bar's active membership returned the form and reported doing some form of pro bono, reduced fee, or community service work.[2] Perhaps our Georgia lawyers are simply shy about taking credit for their charitable pro bono efforts. Whatever the situation, the YLD invites all Georgia lawyers to "Participate in Pro Bono" on Saturday, May 19.

On this day, lawyers can volunteer a few hours of their time to provide some much needed pro bono legal advice on civil matters to low-income individuals at one of the 10 offices of the Georgia Legal Services Program (GLSP) located throughout the state. For those of you unfamiliar with GLSP, it provides free legal assistance to impoverished Georgians on civil matters involving family, consumer, public benefits, housing, health, education, and employment problems.

"Participate in Pro Bono" gives lawyers an opportunity to join together and make a significant pro bono contribution without requiring a substantial time commitment from each attorney.

"Participate in Pro Bono" is designed as a half-day project where lawyers may offer proactive advice on a variety of basic legal topics that hopefully will minimize the client's potential to become involved in litigation. Participants will not be accepting representation of a GLSP client in a litigated matter through this project. The YLD recognizes that many lawyers have a sincere desire to perform pro bono work but simply do not have the time to handle a matter that has resulted in litigation. "Participate in Pro Bono" gives lawyers an opportunity to join together and make a significant pro bono contribution without requiring a substantial time commitment from each attorney. Of course, any individuals who "Participate in Pro Bono" and who also want to assume pro bono representation of a GLSP client who is involved in litigation are welcome to do so.

If you want to "Participate in Pro Bono," please contact Tracey Roberts at (404) 873-8782. I hope you will join the YLD on May 19, and I hope you'll return the 2001 Voluntary Pro Bono Reporting Form so that Georgia lawyers can be recognized for their commitment to pro bono representation.

Endnotes

1. Greg Winter, *Legal Firms Cutting Back on Free Services for Poor*, N.Y. Times, August 17, 2000.
2. State Bar of Georgia Pro Bono Project, 1999 Pro Bono and Community Service Statistics.

Summary of Recently Published Trials

Bibb State Ct.....Auto Accident - Traffic on Highway - Rear-End.....$60,000
Chatham Superior Ct.....Wrongful Death - Lung Cancer - Diagnosis.....Defense Verdict
Chatham Superior Ct.....Hospital Negligence - Falldown - Fractured Hip.....Defense Verdict
Clarke Superior Ct.....Fraud - Sale of Automobile - Odometer Reading.....$17,300
Clayton State Ct.....False Arrest - Malicious Prosecution - Bad Check.....$9,000
Clayton State Ct.....Contract - Building Rental - Counterclaim.....$646,000 on Counterclaim
Cobb State Ct.....Auto Accident - Intersection - Right-of-Way.....$125,000
DeKalb State Ct.....Marriage Contract - Unjust Enrichment.....$24,153 on Counterclaim
DeKalb State Ct.....Falldown - Travel Agency - Rug on Floor.....Defense Verdict
DeKalb State Ct.....Auto Accident - Head-On - Intoxicated Motorist.....$45,000
Fulton State Ct.....Auto Accident - Turning - Liability Admitted.....$128,000
Fulton State Ct.....Products Liability - Restraint - Wrongful Death.....$11,000,000
Fulton State Ct.....Falldown - Grocery Store - Grape on Floor.....$14,000
Fulton State Ct.....Dental Malpractice - Tooth Extraction - Osteomyelitis.....$844,567
Fulton State Ct.....Premises Liability - Office Building Security.....$1,000,000
Fulton Superior Ct.....Discrimination - Accommodation - Hospital Employee.....$17,200
Fulton Superior Ct.....Employment - Termination - Emotional Distress.....$2,160,000
Fulton Superior Ct.....Landlord/Tenant - Breach of Quiet Enjoyment.....Defense Verdict
Fulton U.S. District Ct.....Insurance - Bad Faith - Stolen Vehicle.....Defense Verdict
Fulton U.S. District Ct.....Employment - Sex Discrimination $12,000
Fulton U.S. District Ct.....Civil Rights - Prisoner - Excessive Force.....$70,000
Fulton U.S. District Ct.....Products Liability - Ford Explorer - Wrongful Death.....$9,000,000
Fulton U.S. District Ct.....Civil Rights - Prisoner - Use Of Force.....Defense Verdict
Fulton U.S. District Ct.....Products Liability - Chevrolet Truck - Seatbelt.....Defense Verdict
Fulton U.S. District Ct.....Fair Labor Standards Act - Salaried Employee - Overtime..... $1,500
Fulton U.S. District Ct.....Truck Loading Accident - Forklift Falls.....Defense Verdict
Glynn U.S. District Ct.....Employment - Race Discrimination - Termination.....Defense Verdict
Gwinnett State Ct.....Collection - Counterclaim - Business Tort.....$11,418
Gwinnett Superior Ct.....Auto Accident - Turning - Liability Admitted.....$40,500
Gwinnett Superior Ct.....Auto Accident - Rear-End - Liability Admitted.....$45,000

Head-on Motor Vehicle Collision in a Curve on a Two-Lane Road Results in a $250,000 Verdict on a Counterclaim for a Severe Tendon Injury

Plaintiff lost his suit for injuries in a hotly disputed liability case and the defendant prevailed on causation relating to crossing the center line. *(Lemmons v. Pearce; Dekalb County State Court)*

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Exotic Dancer is Excluded from Miss Nude World Contest and Wins $2,435,000 in Defamation Case

Plaintiff was an exotic dancer who was prevented from competing in the Miss Nude World Contest on grounds that she had violated the rules. She obtained a verdict against multiple defendants. *(Inman v. Galardi; Fulton County Superior Court)*

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Motorcycle Operator Settles with Motorcycle Passenger for $101,500 after Passenger is Thrown From Cycle

Plaintiff motorcycle passenger was thrown from the bike which defendant was operating and sustained multiple abrasions and permanent scars in a one vehicle accident. *(Jackson v. Miller; Cobb County State Court)*

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Two Female Plaintiffs Obtain $1,750,000 Verdict Against Georgia Department of Corrections for Sexual Harassment

Plaintiffs were employees of defendant at the Macon Diversion Center who claimed two years of sexual comments and overtures by the male director. Allegedly, supervisors were aware of the situation and did nothing. *(Tucker v. Georgia Department of Corrections; United States District Court)*

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Automatic Door Malfunctions at Kmart and Customer Recovers $650,000 for Hip Injury

Plaintiff was an elderly woman with a hip prosthetic device who was attempting to enter defendant's store when an automatic door opened in the wrong direction and knocked plaintiff down, aggravating a prior hip replacement. *(Morris v. Kmart; Gwinnett County State Court)*

ALSTON & BIRD LLP, A leading full-service law firm with the largest Intellectual Property practice in the Southeast, has announced that it has been named to *Fortune* magazine's **"Top 100 Best Companies to Work For in America"** for the second year running. The firm jumped 12 positions to No. 24 out of the 100 finalists by The Great Place to Work Institute and *Fortune*.

Ruthann P. Lacey has been certified as an **Elder Law Attorney** by the **National Elder Law Foundation**. Her practice specializes in Elder and Special Needs Law, a general practice focused on the particular needs of older and disabled persons. Her office is located 2296 Henderson Mill Road, Atlanta; www.elderlaw-lacey.com.

The **French government** has honored **Robert Banta**, managing partner of the Atlanta office of the law firm of Fragomen, Del Rey, Bernsen Loewy, with the **insignia of the Knight of the National Order of Merit**. Banta received this honor in recognition of his more than 10 years of distinguished service to the development of business and trade relations between Georgia and France. Jean-Paul Monchau, France's Consul General for the southeastern United States, conferred the insignia during a ceremony at his residence in Atlanta.

Jason Robert Watkins of Meacham, Earley & Jones PC in Columbus has been admitted to membership in the **Commercial Law League of America**. The Commercial Law League, founded in 1895, is North America's premier organization of bankruptcy and commercial law professionals.

Ben F. Johnson III, managing partner in the Atlanta law firm of Alston & Bird, was elected chairman of **Emory University's board of trustees** following the retirement of Bradley Currey after six years as chairman. Prior to his appointment as chairman, Johnson was elevated from alumni to term trustee.

James Hyder Honored by Queen Elizabeth

James D. Hyder Jr., a partner with Hunter Maclean Exley & Dunn, has been invested into a royal order of chivalry by Queen Elizabeth II.

The honor was bestowed by the queen based upon a record of public service and a commitment to charitable work. Upon acceptance of the honor, the new member must pledge to support the work of the Order, as well as continuing his own service and charitable responsibilities.

Hyder has served in a number of offices in the State Bar of Georgia including President of the Young Lawyers Division, which was selected by the American Bar Association to receive a national public service award for the year during which he was President. The Georgia YLD won top honors from among all YLD's in the nation that year. Hyder suspects that he may have been suggested for the honor by other members of the Order in the legal profession.

The Order of St. John dates from circa 1100 when Knights of the Order fought in the crusades and operated a hospital in Jerusalem for other knights and for pilgrims making their way to the Holy Places. Today, members of the Order support the continued operation of a hospital in Jerusalem—this one for the care of indigent patients in need of ophthalmic care.

"We are always pleased when one of our attorneys is honored," said John Tatum, managing partner for Hunter Maclean. "But this is special in that it puts an emphasis on charitable work and public service, something all of us here at Hunter Maclean strive to make a priority in our lives."

ABA Selects Law Day Speech Award Winners

The American Bar Association Standing Committee on Public Education has announced the three winners of its 2000 Judge Edward R. Finch Law Day Speech Awards.

The awards, which will be presented at the ABA's Midyear Meeting in San Diego in February 2001, focused on the Law Day theme for 2000: Celebrate Your Freedom—Speak Up for Democracy and Diversity.

The first place winner is F.T. Davis Jr. of Georgia. Davis's speech, titled "Law is Too Important to Leave to Lawyers & the Rule of Law & Freedom is Too Important to Leave to the Other Guy," focused on reducing the complexity, cost, and time spent on legal matters. Davis told a Law Day meeting of the Rotary Club of Atlanta that the solution rests with three rules: Develop a plan or blueprint, be proactive instead of leaving legal matters to the so-called experts, and insist on individual responsibility.

Judges From Ghana and Brazil Marvel at Georgia's Justice System

Judges from Brazil and Ghana met with several Supreme Court Justices in the new Judicial Conference Room in December. Chief Justice Robert Benham, Presiding Justice Norman Fletcher, Justice Carol W. Hunstein, and Justice P. Harris Hines greeted the 15 guests, which included two Supreme Court Justices, two family court judges, and several judges from the civil and tax courts.

Chief Justice Benham offered an overview of the operation of our judicial system: "Stability, certainty, and predictability are necessary for government to run properly and for citizens to respect the law. However, we will not sacrifice fundamental fairness for stability, certainty, and predictability. Many of the significant social changes that have occurred in this country have been through judicial decision.

"Therefore it is important that our judges are level-headed, open-minded, even-handed, sure-footed, and firmly anchored in good moral values."

Presiding Justice Fletcher provided an excellent history of the judicial system and the courts. Justice Hunstein offered brilliant insight gained from her experience on the Supreme Court and as a trial judge.

The visit was part of the Institute of Continuing Legal Education's (ICLE) 14-day International Judicial Training Program on Effective Judicial Administration. The 12 foreign judges, Co-directors Maria Eugenia Hernandez and Richard Reaves, and a Portugese interpreter toured sites in Atlanta and Athens to learn about many phases of our system.

The Brazilian legal system is huge and complex. Current judges are trying to make an archaic and regulation-heavy system more accessible to the average citizen. The judicial system of Ghana is influenced by the English system of jurisprudence. Ghanaian courts include People's Courts, District Courts, Circuit Courts, the High Court of Justice, the Court of Appeals, and the Supreme Court.

The visiting judges were particularly interested in the Supreme Court's sophisticated technical equipment.

In Atlanta

KING & SPALDING HAS announced that the following attorneys have been elected counsel in the Atlanta office: **Elizabeth T. Baer**—litigation; **Peggy J. Caldwell**—construction and procurement; **Curtis L. Doster**—intellectual property and technology; **Laura C. Hall**—real estate; **Diane M. Janulis**—tort litigation; **Amelia S. Magee**—environmental. The firm's Atlanta office is located at 191 Peachtree Street, Atlanta, GA 30303-1763; (404) 572-4600; www.kslaw.com.

Hunton & Williams is pleased to announce that **Oscar Marquis**, former vice president and general counsel of Trans Union, has joined the firm as counsel practicing in the Technology, E-commerce, and Privacy Practice Group. Trans Union is one of the three leading national consumer credit reporting agencies. Mr. Marquis joined Trans Union in 1976 and served as vice president and general counsel for the past 15 years.

Kurt A. Kegel has become a shareholder with **Davis, Matthews & Quigley PC.** Also, **David N. Marple** and **Jon W. Hedgepeth** have been associated with the firm. The firm is located at 3400 Peachtree Road, N.E., Suite 1400, Atlanta, GA 30326; (404) 261-3900; Fax (404) 261-0159.

Powell, Goldstein, Frazer & Murphy LLP announces that **Ronald D. Stallings** has joined Reliance Trust Company as the company's senior vice president, general counsel and corporate secretary. However, he will continue his relationship with Powell, Goldstein, Frazer & Murphy LLP with an office at the firm, where he will establish an independent practice and serve as co-counsel to the firm on a number of continuing matters and clients. Reliance is a non-depository bank and trust company based in Atlanta, engaged in the fiduciary, financial advisory, and financial services business.

Ragsdale, Beals, Hooper & Seigler LLP Attorneys and Counselors at Law is pleased to announce that **Herbert C. Broadfoot II** and **Herbert H. Gray III** formerly of counsel, and **James R. Schulz** formerly assistant U.S. attorney for the northern district of Georgia have joined the firm. Also, **Lisa F. Stuckey** has become associated with the firm. The firm is located at 229 Peachtree Street, N.E., Atlanta, GA 30303-1629; (404) 588-0500; Fax (404) 523-6714.

Robert G. Pennington, partner at **King & Spalding**, has been named vice president for alumni affairs and special development projects at Emory University. Pennington, a four-time alumnus of Emory, will oversee the Alumni Office, the Parent Program, the Annual Fund, the Career Network Service, and Planned Giving.

Barry L. Zimmerman and **Keith F. Brandon** of **Zimmerman & Associates** announce that the firm has relocated to 8100-B Roswell Road, Suite 420, Atlanta, GA 30350; (770) 350-0100; Fax (770) 350-0106; blz@zimmermanattys.com or kfb@zimmermanattys.com.

Kilpatrick Stockton has opened a new satellite office staffed with specialty business consultants and attorneys specializing in intellectual property and business transactions. The new office will be located at the Monarch Tower in Buckhead, and spearheads Kilpatrick Stockton's technology practice, which is already the largest in the Southeast. This group of professionals, which will be led by **Martin Tilson**, will create a new cultural environment, with products and models that are supported by Kilpatrick Stockton's 500+ lawyers and extensive consultant pool to deliver the enhanced offering of legal and business services that clients and strategic partners now require.

In Augusta

Phillip Scott Hibbard announces the formation of **Phillip Scott Hibbard PC** with offices at 237 Davis Road, Suite D, Augusta, GA 30907; (706) 854-1564; Fax (706) 854-8861; hibbardp@bellsouth.net.

In Columbus

Hatcher, Stubbs, Land, Hollis & Rothschild announces that **Clayton E. Cartwright Jr.** and **J. Matthew Loudermilk** have become associates of the firm. The office is located at 233 12th Street, Suite 00 Corporate Center, Columbus, GA 31901; (706) 324-0201; mailman@hatcherstubbs.com.

Continued on next page

Lawyers Gather to Celebrate and Work

TIFTON CIRCUIT BAR Association Member Ben Gratz (aka Saint Nicholas) was on hand for the Tift County Rotary Club's Breakfast with Santa. **Photo 1**: Santa Ben listened to hundreds of wishes from area children and had so much fun that he is in line for next year's program.

ANLIR's (American National Lawyers Insurance Reciprocal) three-hour malpractice prevention seminars were well attended throughout the state. **Photo 3:** Here, participants are shown during the presentation at the State Bar's Satellite Office in Tifton.

Almost 300 people came out to hear area attorneys roast retiring Superior Court Judge John D. Crosby of the Tifton Judicial Circuit. **Photo 2:** Before the roasting and argy-bargy, guests enjoyed a seafood buffet. Being an avid angler and Zane Gray fan, Judge Crosby was wished *Happy Trails and Tight Lines* when presented with a fishing boat.

A standing room only crowd came to see the swearing in of Harvey J. Davis, Superior Court Judge of the Tifton Judicial Circuit. **Photo 4:** Judge Davis of Ocilla is the first judge elected to the post who did not live in Tifton. After the ceremony, law partner and friend Emory Walters hosted lunch at his home.


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In Decatur

John W. Spears Jr. and **Malane Toft Spears** announce the formation of **Spears & Spears PC**. The firm, with practice areas of probate, trusts, guardianships, and estate planning, will be located at 315 W. Ponce de Leon Avenue, Suite 970, Decatur, GA 30030; (404) 377-5822; Fax (404) 377-5812; jspears@spearsandspears.com or mspears@spearsandspears.com.

In Monroe

Benton and Preston PC announces that **R. Michael Malcom** has become a partner. The firm will now be known as **Benton, Preston and Malcom PC**.

VOLUNTARY BARS

Spotlight on the Cochran Bar Association

By Bonnie D. Cella

You Know You're In a Small Town When:

- You don't use your signals because everyone knows where you are going.
- You speak to each dog you pass by name, and he wags at you.
- You can't walk for exercise because every car that passes offers you a ride.
- You miss a Sunday at church and receive a get well card.[1]
- You don't need to have a local bar association meeting because you see the membership every day.

It's Cochran, Georgia—*plain and simple*—and they want to keep it that way, thank you very much.

When the State Bar of Georgia's Local Bar Activities Committee sent out notices to local bar association presidents asking for updated information and offering "any help it can to your bar" Cochran's repartee went something like this:

Dear Ms. Cole: Thank you for yours of May 18. The Cochran Bar consists of six members…We haven't had a meeting as such in 15 years, I suppose. I cannot see any reason for your committee to paper us, or us to paper you. We really don't exist as an organized group and do not engage in any group activities. Thanks, though.

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1. Bleckley County Courthouse. 2. " Where do you eat lunch around here?" "Why, at home mostly—but sometimes we go to Sugarberrys Cafe down the street." 3. Mr. Newell A. Nesmith with the other founding members of the Cochran Bar. Left to Right: Mr. Hezzie McWhorter, The Colonel and Mr. J.F. Floyd. 4. The Cochran Bar: Left to Right, First Row: Alvin Arnold, Newell Nesmith, Dennis Mullis. Back Row: Lonnie Barlow, Nicholas White and brothers John and Leo Phillips. 5. The Colonel Lucian A. Whipple Sr. 1878-1979.

The current seven members of the bar are still in agreement. Gathering in the office of Juvenile Court Judge Dennis Mullis on Cherry Street, about 10 steps from the Bleckley County Courthouse, the members greet each other with pats and smiles. "You know, the people in this room know the difference between right and wrong...I don't suppose we have ever had anyone from here to go before the disciplinary board. We have complete confidence in the integrity and honesty of each other. If someone here tells you something, you can believe it. If anyone here needs help they only have to ask. We share wonderful friendships," said one member.

The infectious good feelings follow us over to the courthouse. Mr. Newell Nesmith, a youthful 80, remembers back to 1949 when he first began practicing law. "There were only four of us then: Mr. H. McWhorter, Mr. J. F. Floyd, Mr. L. A. Whipple, and me. I was the baby."

Mr. Whipple, Georgia's longest practicing attorney graduated from the University of Georgia in 1898 and Harvard Law School in 1901. Active in the practice of law until the age of 98, Lucian A. Whipple Sr. died in 1979 at the age of 101. He is remembered today with pride and gratitude throughout the community.

Cochran Bar's Lonnie Barlow recounts the time when Mr. Whipple was asked by a Court of Appeals Judge how long he had been practicing law. Mr. Whipple's reply came in a question. "How long has this Court been around?" he said. "Well, since 1904," said the judge. "Well, I've been around since 1901," Mr. Whipple said with his ineffable charm.

When Barlow and Napier Murphy of Macon went before the Supreme Court of the United States in 1993 in the case Holder v. Hall [2], Barlow took out a Bible that had been inscribed by Mr. Whipple and A. Newell Nesmith. There were business cards that had been Mr. McWhorter's and Mr.Floyd's among the pages. "I wanted the presence in court with me that day of these friends and fellow attorneys who had worked in Cochran for so many years before I became an attorney," Barlow said.

Attorney Jonathan Alderman of Macon, grandson of Whipple, tells of a young lawyer that was mentored by his grandfather. It seems the young man's footsteps were visible in the asphalt from his many trips between his office and the Colonel's. That young lawyer is now Federal Judge Duross Fitzpatrick who also served as President of the State Bar of Georgia in 1985. Alderman adds, "I am a lawyer because of the examples in the Cochran Bar."

"Simplicity is the peak of civilization."[3] So remain *plain and simple* Cochran Bar. It works.

Endnotes

1. Copied, author unknown
2. A writ of certiorari had been issued to Bleckley County to hear argument and decide whether a single county commissioner form of government in Georgia violated the United States Voting Rights Act. When the final decision came nine months later, the court found in favor of Bleckley County that a single representative in a single member district is constitutional.
3. Jessie Sampler.

IN MEMORIAM

The Lawyers Foundation of Georgia Inc. sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 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 L. Allen Jacksonville, FL	Admitted 1964 Died October 2000
Thomas F. Allgood Augusta, GA	Admitted 1964 Died August 2000
Robert W. Beynart Atlanta, GA	Admitted 1966 Died December 2000
Jesse Ewell Brannen Jr. Acworth, GA	Admitted 1966 Died November 2000
John S. Candler II Atlanta, GA	Admitted 1964 Died June 2000
George H. Chamlee Savannah, Georgia	Admitted 1964 Died August 2000
A. Gus Cleveland Atlanta, GA	Admitted January 1964 Died December 2000
William Eckhardt Albany, GA	Admitted 1971 Died December 2000
Melvin Ray Evans Powder Spring, GA	Admitted 1987 Died November 2000
Britton Lawrence Fowler Cleveland, GA	Admitted 1965 Died December 2000
Tom E. Lewis Griffin, GA	Admitted 1964 Died December 2000
Larry S. McReynolds McDonough, GA	Admitted 1971 Died December 2000
Frank Joseph Petrella Tucker, GA	Admitted 1975 Died November 2000
R. Wayne Pressley Atlanta, GA	Admitted 1964 Died October 2000
Mildred W. Rosser Atlanta, GA	Admitted 1964 Died December 2000
Gary W. Sawyer Lakeland, FL	Admitted 1975 Died January 2000
Weldon Willard Shows Decatur, GA	Admitted 1947 Died November 2000
Raiford Stanley Jr. Decatur, GA	Admitted 1975 Died December 2000
William H. Titus Milledgeville, GA	Admitted 1964 Died May 1994
Carmen L. Toussignant Columbus, GA	Admitted 1980 Died November 2000

***Journal* Memorials**

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

Memorial Gifts

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

Information

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

LAWYERS FOUNDATION OF GEORGIA

F. Marshall Connally, 56, of Atlanta, died on July 7, 2000. Born in Miami, Florida, she graduated from the University of Georgia with a BFA in Interior Design. She earned her JD from Emory University School of Law. She was not affiliated with a law firm but was a real estate broker and owned a financial services company, South Plan Corporation. She is survived by her sister, Caroline Connally, of Marion, North Carolina.

William Harllee Branch Jr., 94, of Atlanta, died August 16, 2000. Born in Atlanta, he graduated from Davidson College and Emory University School of Law. He was admitted to the State Bar of Georgia in 1931. He practiced with Troutman, Macdougald and Arkwright and later with MacDougald, Troutman, Sams and Branch. He was a member of the Atlanta Bar Association and the Legal Aid Society. He served in the United States Navy during World War II. He is survived by his wife, Katherine Hunter Branch, his daughter Mrs. Harold McKenzie Jr., his sons William Harllee Branch III, David S. Branch, and Barrington H. Branch, 12 grandchildren, and 4 great grandchildren.

Thomas F. Allgood Sr., 71, of Augusta, died August 4, 2000. Born in Augusta, he graduated from Augusta College in 1949. He earned his JD from Emory University School of Law in 1952, and was admitted to the State Bar of Georgia in 1964. Mr. Allgood practiced with Allgood, Mehrhof & Millians which is now Allgood, Childs & Mehrhof. He was a member of the State Bar of South Carolina, American Judicative Society, American Bar Association, Woodlawn United Methodist Church, the Augusta Country Club, the Cherokee Town and Country Club, and the Augusta Bar Association. He was a member of the Georgia State Senate, the Board of Regents of the University System of Georgia, and was chairman of MCG Health, Inc. He served with the United States Army during World War II. He and his wife of 33 years, Thelma R. Allgood, perished together in a plane crash. He is survived by his sons Thomas F. Allgood Jr., Robert L. Allgood, Brian C. Allgood, and Michael L. Allgood, and 8 grandchildren.

A Day in the Life of LPM: Meeting Day-to-Day Challenges

By Natalie Thornwell

IN 1995, THE STATE BAR OF Georgia's Law Practice Management Program was developed from the efforts of the Solo and Small Firm Task Force. Since that time, the program has grown and continues to provide services that help Georgia law firms properly set up and run their law offices. In an effort to introduce some to and re-acquaint others with the popular work of this program and its low-cost services for Bar members, I have decided to discuss some of the most popular resources available from the program.

While it is not likely that our program will ever experience a day like the one outlined below, I must tell you that we have on certain occasions come close.

8:30 a.m.

Phone rings. Third-year law student is looking for information on starting his own practice. He asks what do I need to get started? Do I have to have a business license? What about a trust account and malpractice insurance? LPM responds by sending him an Office Startup Kit. This kit developed by LPM and updated with funding from ANLIR (American National Lawyers' Insurance Reciprocal), the Bar's endorsed malpractice insurance carrier, is mailed to the young lawyer-to-be.

8:35 a.m.

Phone rings again. A second-year associate indicates he is about to go solo. Is there some way we can help? Sure there is. He is directed to the resources of the checkout library and a publication called *Flying Solo*. An Office Startup Kit is thrown in too to help him get his office started.

9:00 a.m.

Lawyer stops by the LPM department to take a look at the resources we have in the checkout library. After perusing the 500+ items, she decides she wants to check out two items. LPM informs her she is only allowed to check out one item at a time for two weeks, but after she is done with the first item, she can mail it back and then be mailed her second choice in return. She doesn't have to fight traffic and find parking again. Attorney smiles and checks out volume.

LPM gives her full list of materials to take with her.

9:25 a.m.

Attorney faxes over quotes from three vendors who are bidding to network his computers. LPM compares the quotes to industry standards for the attorney's location and faxes back its analysis of which company would probably be best to work with on the networking project.

9:45 a.m.

Local bar association member calls to ask if LPM will participate in a meeting of her bar association by presenting on *Financial Management for Small Law Firms*. LPM agrees and sends outline for presentation to member. LPM will discuss general and trust accounting, time and billing techniques, and alternative billing methods.

10:00 a.m.

LPM receives e-mail of library checkout request. It seems a lawyer visiting the State Bar's Web site found the LPM page at www.gabar.org/lpm, and discovered sample forms and the list of library materials. Seeing how easy it was to get a book on the list, the lawyer submitted a check out request. He also noticed past articles, a list of software library items on the site as well. Upon moving on, he also saw an announcement of future discussion boards and departmental newsletters for the site.

10:15 a.m.

Phone rings. Lawyer looking for used law books wants to know if LPM can help. LPM gives list of companies and their contact information.

10:30 a.m.

LPM meets with General Practice and Trial Section to set schedule for the next wave of Law Staff seminars to be held around the state. It was decided that the seminars would be re-evaluated. The seminar series (based on popular

demand) that had been given in the past were on these topics: Law Office Confidentiality and Ethics; General Administrative Systems for Law Offices; Time and Billing and Accounting; How to Deal with Difficult Clients, Bosses, and Co-Workers (with panels of local lawyers); and Organization and Stress Management.

10:50 a.m.

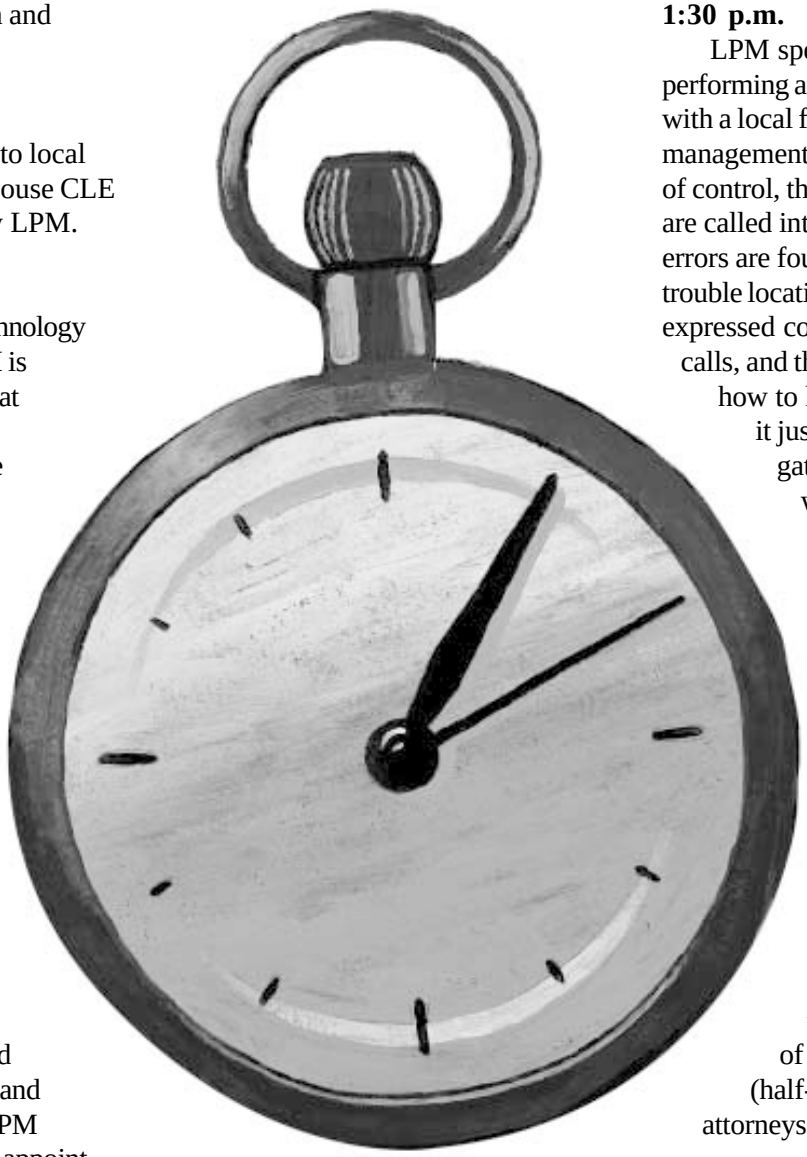
LPM submits material to local law firm for upcoming in-house CLE program to be delivered by LPM.

11:00 a.m.

Attorney looking for technology solutions calls to ask if LPM is familiar with any systems that might help his non-techie practice. LPM discusses the following topics with the attorney: networking her computers; the current systems in place in her office; the case management systems that are most popular and the number of features in these programs that could help in her practice; automating her time and billing and accounting procedures; adding in litigation support; and an implementation plan for getting the programs installed in her office and having her and her staff properly trained. LPM invites the attorney to set an appointment to come by the LPM software library to compare the software packages she seemed most interested in before purchasing. (Follow up to this story: The attorney visited the library and chose an appropriate package. She ordered the software at a discount through LPM and requested they come to her office and implement the program.)

11:30 a.m.

New attorney visits with LPM to go over business and marketing plans for her new firm. LPM advises on techniques that can help grow her new practice.



11:55 a.m.

Phone rings. Lawyer wants to know if LPM has a sample partnership agreement. LPM faxes several samples, lets lawyer know that there are several good ABA publications that may help him with drafting his own agreement, and tells him these books are available for checkout from the resource library.

Noon: Lunch

1:00 p.m.

LPM visits nearby law school to present short program to students on *How to Start and Build a Successful Law Practice*.

1:30 p.m.

LPM spends the rest of the day performing an on-site consulting visit with a local firm having several management issues. The staff is out of control, the accounting procedures are called into question after account errors are found, the firm is having trouble locating files, clients have expressed concerns over unreturned calls, and the firm does not know how to handle the 12 new cases it just acquired. LPM investigates the issues by meeting with the partners to map out a plan of action for the visit. LPM then interviews all of the attorneys and the staff asking questions about the systems and procedures used in the firm. LPM informs the firm that recommendations will be put in writing and sent to them. The firm pays a low consulting fee based on the amount of time spent in the firm (half-day) and the number of attorneys in the firm.

5:30 p.m.

LPM goes home to rest and looks forward to another day to help Bar members with their management needs.

Discipline Notices (October 26 - December 13, 2000)

DISBARMENTS

Wayne P. Thigpen
Augusta, Georgia

Wayne P. Thigpen (State Bar No. 704525) has been disbarred from the practice of law in the State of Georgia by Supreme Court order dated October 30, 2000. The State Bar filed four Notices of Discipline against Thigpen. Thigpen failed to respond to the Notices in a timely manner.

In one case Thigpen was hired in 1998 to handle a domestic relations matter. Although the client paid Thigpen $750, Thigpen never did any work on the case, lied to the client and said he was working on the case, failed to return the file upon request, and falsely represented to the Investigative Panel that he had returned the file and refunded the fee. Thigpen subsequently returned the fee in July 2000.

In another case Thigpen was appointed in 1999 by the Columbia County Superior Court to represent a client in a criminal case. Thigpen informed the client that he could not do any work for him without a fee. Although the client paid the fee, Thigpen never worked on the case, lied to the client and said he was working on the case, failed to return the file upon request, and falsely represented to the Investigative Panel that he had returned the file and refunded the fee. Thigpen subsequently returned the fee in July 2000.

In the third case Thigpen was hired to handle a collection matter for a client regarding the sale of her former business. The client paid Thigpen's fee, but Thigpen never did any work on the case, lied to the client and said he was working on the case, and failed to return the file or refund the fee upon request. Thigpen subsequently attempted to return the fee in July 2000 but did not receive a response from the client as to the amount due.

In the fourth case a client hired Thigpen to handle a criminal case for her son in 1999. After the client paid the $1,500 fee, Thigpen never did any work on the case, lied to the client and her son and said he was working on the case, and failed to return the file upon request. Thigpen also falsely represented to the Investigative Panel that he had returned the file and refunded the fee. Thigpen subsequently returned the fee in July 2000.

Charles T. Erion
Warner Robins, Georgia

By Supreme Court order dated October 30, 2000, Charles T. Erion (State Bar No. 249900) has been disbarred from the practice of law in the State of Georgia. Erion was hired to represent a client in a litigation matter and was paid an initial retainer of $750. He later requested an additional $2,000 fee, which the client paid by check. After giving Erion the additional fee, the client was unable to contact him and placed a hold on the check. Erion subsequently failed to represent the client in the litigation matter or to refund the $750 fee. Erion caused the client to suffer needless worry and concern and the client risked the loss of legal rights and remedies available.

Frank Turner Bell
Colquitt, Georgia

Frank Turner Bell (State Bar No. 047790) has been disbarred from the practice of law in the State of Georgia by Supreme Court order dated November 30, 2000. Bell was the closing attorney for the sale of real estate located in Miller County, Georgia. The prospective purchaser gave Bell a check for $5,000 to serve as "earnest money." Although the contract provided that Bell was not to cash the check until closing, Bell negotiated the earnest money check. The sale never occurred. Subsequently on June 18, 1999, Bell issued a check from his attorney escrow account in the amount of $5,000 to the prospective purchaser as a "contract refund." This check was returned for insufficient funds. Thereafter, Bell failed and refused to account for the original $5,000 earnest money check; failed and refused to account for any of the proceeds derived from the original check; and failed and refused to return the $5,000. Bell converted the $5,000 derived from the earnest money check to his personal use.

James Gerald Lipscomb
Marietta, Georgia

James Gerald Lipscomb (State Bar No. 453651) has been disbarred from the practice of law in the State of Georgia by Supreme Court order dated November 30, 2000. Lipscomb agreed to represent a client in March 1996, and the client's parents paid him $500 for expenses. In March 1997 the client's parents paid him an additional $200. In March 1998 Lipscomb

filed a lawsuit and in September 1998 the Gwinnett County Sheriff's Department unsuccessfully tried to serve the defendant with a copy of the lawsuit. Although Lipscomb was notified that the defendant could not be located, Lipscomb failed to make further efforts to perfect service. The client and his parents repeatedly called Lipscomb to check on the status of the case. Lipscomb rarely returned those calls, but when he did he stated that he was working on the case. In January 1999 the Court dismissed the lawsuit for failure to perfect service. Lipscomb failed to inform the client and when the client wrote him in March 1999 inquiring about the status of the case, he failed to respond. Lipscomb also failed to respond to disciplinary authorities.

Chijioke Iwuogo
Norcross, Georgia

Blaise Chijioke Iwuogo (State Bar No. 385580) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Iwuogo's surrender by order dated November 30, 2000. Iwuogo pled guilty to one count of conspiracy to commit mail fraud and was disbarred based on this felony conviction.

James M. Corbeil
Warner Robins, Georgia

James M. Corbeil (State Bar No. 187362) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Corbeil's surrender by order dated November 30, 2000. Following his suspension from the practice of law by order on May 10, 1999, in another disciplinary matter, Corbeil failed to provide an accounting of funds and other assets belonging to clients he represented at the time of his suspension despite their requests that he do so.

SUSPENSION

Ronald C. Carter
Atlanta, Georgia

Ronald C. Carter (State Bar No. 114585) petitioned the Supreme Court for Voluntary Discipline. On November 30, 2000, the Supreme Court suspended Ronald C. Carter (State Bar No. 114585) from the practice of law for one year. Carter must receive certificate from the State Bar's Lawyer Assistance Program that he is fit to resume practice prior to reinstatement. After settling a case for a client, Carter received the settlement funds in a fiduciary capacity and told the client that he would pay $1,200 on her behalf to Humana/Employers Health as reimbursement for medical bills. Carter failed to pay the medical bills in a timely fashion and converted the funds to his own use.

PUBLIC REPRIMANDS

David H. Buchanan
Stone Mountain, Georgia

Attorney David H. Buchanan (State Bar No. 092165) has been ordered to receive a Public Reprimand by order of the Supreme Court dated October 26, 2000. Buchanan agreed to represent clients who were injured in an automobile accident. He filed suit on their behalf, but when the Fulton County Superior Court ordered the action transferred to another county, Buchanan failed to advise his clients to pay the venue transfer fee and failed to pay it himself. The Court dismissed the case in December 1997, but Buchanan did not inform his clients until February 1999.

David B. Pittman
Vidalia, Georgia

By order dated November 20, 2000, Attorney David B. Pittman (State Bar No. 581040) has been ordered to receive a Public Reprimand and to submit to a consultation with the Law Practice Management Program of the State Bar within 60 days of November 20, 2000. Pittman acted as closing attorney for loans that were provided by Vidalia Federal Savings and Loan. In 1992 and 1993 Pittman failed to give documents from 12 transactions to Vidalia Federal despite repeated requests from a bank officer. The missing documents included final title opinions, security deeds, and a final title insurance policy. In 1995 Pittman provided most of the missing loan documents after the bank officer filed a grievance with the State Bar. Pittman disregarded legal matters by taking from 18 to 30 months to produce closing documents to the bank, and the bank was harmed through the cost of its efforts to secure documents and its potential financial exposure.

REVIEW PANEL REPRIMANDS

Edward Francis Danowitz
Atlanta, Georgia

Attorney Edward Francis Danowitz (State Bar No. 003180) has been ordered to receive a Review Panel reprimand by order of the Supreme Court dated October 26, 2000. Danowitz filed a Chapter 7 bankruptcy case for a client. The client subsequently converted her bankruptcy case from a Chapter 7 to Chapter 13. Prior to the conversion, the client deposited $5,000 into Danowitz's trust account from income earned while under Chapter 7. When she converted to Chapter 13, the client filed schedules that failed to disclose the funds she had placed in Danowitz's trust account which were not property of the bankruptcy estate,

Continued on page 52

LAWYER ASSISTANCE PROGRAM

Alcohol/Drug Abuse and Mental Health Hotline

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

Area	Committee Contact	Phone
Albany	H. Stewart Brown	(912) 432-1131
Athens	Ross McConnell	(706) 359-7760
Atlanta	Melissa McMorries	(404) 522-4700
Florida	Patrick Reily	(850) 267-1192
Atlanta	Henry Troutman	(770) 980-0690
Atlanta	Brad Marsh	(404) 876-2700
Atlanta/Decatur	Ed Furr	(404) 231-5991
Atlanta/Jonesboro	Charles Driebe	(404) 355-5488
Cornelia	Steven C. Adams	(706) 778-8600
Fayetteville	Glen Howell	(770) 460-5250
Hazelhurst	Luman Earle	(912) 375-5620
Macon	Bob Daniel	(912) 741-0072
Macon	Bob Berlin	(912) 745-7931
Norcross	Phil McCurdy	(770) 662-0760
Rome	Bob Henry	(706) 234-9442
Savannah	Tom Edenfield	(912) 234-1568
Valdosta	John Bennett	(912) 242-0314
Waycross	Judge Ben Smith	(912) 285-8040
Waynesboro	Jerry Daniel	(706) 554-5522

Continued from page 51

but which, after conversion to Chapter 13, became property of the bankruptcy estate. Danowitz filed the client's Chapter 13 schedules and admitted that the deposited funds were not properly reported to the bankruptcy court.

Ann Porges-Dodson
Macon, Georgia

Attorney Ann Porges-Dodson (State Bar No. 584633) filed a Petition for Voluntary Discipline after a Formal Complaint was filed. Porges-Dodson withdrew from employment without taking reasonable steps to avoid foreseeable prejudice to the rights of her client and failed to respond to the State Bar's Notice of Investigation. The Supreme Court accepted the Petition on November 30, 2000, and ordered Porges-Dodson to receive a Review Panel reprimand, attend Ethics School, and immediately return all papers and property which belong to the aggrieved client.

INVESTIGATIVE PANEL REPRIMANDS

James Luther Lester
Augusta, Georgia

Attorney James Luther Lester (State Bar No. 447300) has been ordered to receive an Investigative Panel reprimand by order of the Supreme Court dated November 30, 2000. Lester represented the mortgage company seeking to foreclose on the home of a former client. Lester had represented the client in a divorce, pursuant to which final decree the client was awarded the home.

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 October 26, 2000, three lawyers have been suspended for violating this Rule.

REINTSTATEMENT

Jean Carleen Marcantonio
Albany, Georgia

The Supreme Court of Georgia suspended Jean Carleen Marcantonio (State Bar No. 469966) from the practice of law for 30 months for a violation of Standard 65. Marcantonio complied with the conditions for readmission and was reinstated by the Court on November 13, 2000.

MEMOIR OF A DISTINGUISHED LIFE IN GEORGIA LAW

Braswell D. Deen, Jr., *Trial by Combat!*, Deen Books, 258 pp. $29.95

Reviewed by Michelle W. Johnson

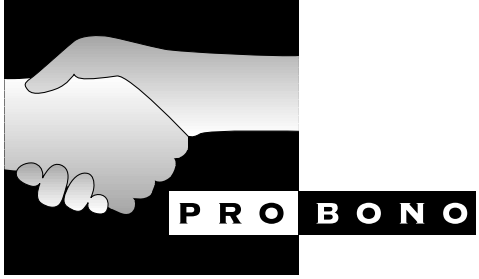
THE PUBLICATION OF *TRIAL BY COMBAT!* BY retired Georgia Court of Appeals Judge Braswell D. Deen, Jr., is the latest accomplishment in 50 years of service to the Georgia Bar. The book is a compilation of Judge Deen's personal history, his scholarship, and his views on various legal and cultural issues including the First Amendment, the debate over evolutionism versus creationism, and societal factors that lead to criminal behavior.

In order to fully appreciate *Trial by Combat!*, it is helpful to read it in the context of Judge Deen's remarkable life. Braswell Deen, Jr. was born in Telfair County, Georgia, in 1925. He grew up in Alma and joined the United States Marines at age 19. He fought in World War II, receiving the Purple Heart for combat wounds suffered in Okinawa, Japan. He graduated from the University of Georgia in 1950, where he was President of Pi Kappa Alpha fraternity and Vice President of Delta Theta Pi legal fraternity. Judge Deen returned to Alma, where he practiced law for many years and spent eight years in the Georgia Legislature. In 1953 he authored Georgia's Women Jurors Bill which allowed Georgia women, for the first time, to serve on juries in trial courts. In 1965, Governor Carl E. Sanders appointed him to the Georgia Court of Appeals. During his 25 years on the bench, he wrote more than 4,000 published opinions and substantially contributed to the body of case law that Georgia lawyers follow today. He has taught law, religion, philosophy, and chess (he is a Designated Chess Expert) at Emory and Oglethorpe Universities, as well as classes at two evening law schools in Atlanta. He was married to Jean Buie Deen for 47 years until her death in 2000 and has two sons, Braswell III, a doctor, and Sanders, a lawyer. He remains active as a mediator and arbitrator in private practice.

Judge Deen draws upon these various experiences in his book. Part I deals with "The Law." Chapter 1 summarizes more than 50 famous trials that helped shape our legal system beginning with the Biblical stories of Cain andAbel, Solomon, Job, and Jesus Christ; continuing through Captain Kidd and Mary Queen of Scots in Britain; and ending with American cases including the Scopes Monkey Trial, Lizzie Borden, Loeb and Leopold, the Yazoo land fraud, and Leo Frank. Chapters 2 and 3 discuss "Colorful Case Cites and Comments" with citations to Georgia appellate decisions as diverse as *Stanfield v. State*, 1 Ga. App. 532 (1907) ("Singing blackguard songs, tearing planks off house, ribaldry and lecherous conduct—did not constitute riot") and *Harrell v. Carlton*, 141 Ga. App. 41, 42 (1977) ("Release, can't settle for hub caps and sue for fenders").

Part II, entitled "Law, Science, Education & Philosophy," is a potpourri of essays on evolution, crime, the First Amendment, and more personal topics such as Judge Deen's family genealogy and his favorite books, works of art, operas, golfers, basketball players, and limericks. The concluding chapters tell the harrowing story of his military service in Peleliu, Japan, where he was one of only nine Marines from his platoon to escape injury or death, and in Okinawa, where he was injured by mortar fire before being

Continued on page 54



Is This Any of Your Business?

By Mike Monahan

THERE ARE ABOUT A MILLION PEOPLE IN Georgia living at or below the federal poverty guidelines, most living not in the shadows of Atlanta's skyscrapers but in our smaller cities and towns. They have their share of landlord/tenant and consumer problems. Domestic violence remains entrenched. The aim of civil legal services and coordinated pro bono programs are to meet these most critical personal legal needs of low-income Georgians. Until recently, the pro bono community has overlooked another pressing need: community economic development. Business lawyers can help build communities by volunteering to be lawyers for the poor—handling legal matters associated with economic development and microenterprise efforts.

Georgia's nonprofit sector is healthy and growing. According to the Georgia Nonprofit Resource Center, Georgia is home to 14,155 active charitable organizations.[1] Georgia's nonprofit community is comprised of arts organizations, and child-care, health, and education programs—the full range of community-centered activities. The top one-third in terms of organization budget is distributed over 138 of Georgia's 159 counties with more than half located in metro Atlanta alone.[2] Thus, rural areas of Georgia lag behind the rest of the state in nonprofit activity that draws outside capital, improves the community, and increases work and entrepreneurial opportunities. Lawyers in rural Georgia and in Atlanta can, however, make a difference and correct that situation.

In 1997, the State Bar of Georgia created A Business Commitment Committee. The goal of this committee is to encourage business lawyers to volunteer their time by handling legal matters for emerging or existing nonprofit businesses serving the poor, or for microenterprise efforts within the low-income community. The committee works hand-in-hand with Georgia Legal Services in an effort called the "ABC Project," which matches volunteer lawyers and community-based groups.

Numerous community-based organizations have emerged recently in response to state and federal welfare reform initiatives. Many of these groups will seek nonprofit organizational status, but because of their nature, many existing Georgia nonprofit organizations and emerging organizations lack the resources to obtain necessary legal counsel. Many more are unaware that they may have a legal issue. Many nonprofit organizations, rushed into creation, need legal audits and advice on corporate restructuring. Volunteer lawyers handle such matters as incorporation, tax exemption, real property issues, contracts, as well as just about any legal issue arising in the business context.

The Georgia ABC Project is a model pilot project of the American Bar Association Section on Business Law and uses all volunteer lawyers, from solo practitioners to lawyers from small, medium, and large firms. Through a structured, coordinated pro bono program like the ABC Project, business lawyers can provide assistance to individuals that otherwise may not be able to afford legal counsel. To volunteer, please contact the State Bar Pro Bono Project at 1-800-334-6865, or by e-mail at mike@gabar.org.

Mike Monahan is director of the State Bar of Georgia Pro Bono Project.

Endnotes

1. *Snapshots: Georgia Nonprofits*, NONPROFIT GEORGIA (Nonprofit Resource Center, Atlanta, GA) Winter 2000, at 6.
2. *Id.* at 8.

Continued from page 53

rescued by one of his comrades. Judge Deen writes, "During the past 50 years hardly a day passes that I don't recall something about the three islands of Pavuva, Peleliu and Okinawa. My most pleasant memories are recalling the friendships, the old buddies we played volleyball with, playing hearts and pinochle on the ships, eating, training, fighting, and digging foxholes, bleeding and suffering together for a common cause in simple obedience to duty."

Judge Deen's book offers a wealth of information regarding Georgia history and jurisprudence, as well as a unique perspective on the life and work of one of Georgia's most respected lawyers.

Michelle Wilkins Johnson is of counsel at Nelson Mullins Riley & Scarborough LLP in Atlanta, Georgia. She practices in the areas of employment law and business litigation.

Proposed Formal Advisory Opinion Request No. 00-R3

QUESTION PRESENTED:

Is it ethically permissible for an attorney, with or without notice to a client, to charge for a standard time unit without regard to how much time is actually expended?

SUMMARY ANSWER:

A lawyer may charge for standard time units so long as this does not result in a fee that is unreasonable, and so long as the lawyer communicates to the client the method of billing the lawyer is using so that the client can understand the basis for the fee.

OPINION:

Given the proper resources, equipment, and effort, time can be measured with infinitesimal precision. As a practical matter, however, clients routinely require only sufficient precision in attorney billings to determine reasonableness and fairness, and this would not normally necessitate a level of precision in recording the time expended by an attorney that would require hair-splitting accuracy. It is the practice of many attorneys to bill on a time-expended basis, and to bill for time expended by rounding to standard units of from 6 to 15 minutes. This gives rise to the possibility that a lawyer could spend 1 minute on a client matter, and bill the client for 15 minutes. While "rounding up" is permissible, see, e.g., ABA Formal Opinion 93-379 (December 6, 1993), repeatedly rounding up from 1 minute to 15 minutes is questionable at best and would raise substantial issues as to whether the fee was reasonable under Rule 1.5(a), Georgia Rules of Professional Conduct. *See also* Rule 1.5(a) ABA Model Rules of Professional Conduct. A lawyer could avoid a challenge to rounded up fees as excessive by using a smaller minimum unit (a 6 minute unit is preferable), and only rounding up if more than half that time was actually expended. See Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (Carolina Academic Press: 1996), p. 169.

It must be noted that even this practice, billing in 6 minute units but only billing a unit if more than 3 minutes was expended, results in the attorney billing for time not actually expended on the client matter. Rule 1.5(b), Georgia Rules of Professional Conduct, provides:

When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

In order to comply with Rule 1.5(b), the lawyer must take care to clarify to the client the basis for the billing. To simply inform a client that the lawyer would bill on a time expended basis, without explaining any standard unit billing practice, would not be a clear communication of the basis for the fee.

In addition, we note that Rule 7.1(a)(1), Georgia Rules of Professional Conduct, governs "Communications Concerning a Lawyer's Services" and provides:

> [A] communication is false, fraudulent, deceptive or misleading if it:
>
> (1) ...omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment 1 to Rule 7.1 provides that Rule 7.1 applies to "all communications about a lawyer's services...."

To simply inform a client that the lawyer would bill on a time expended basis, without explaining any standard unit billing practice, would omit a fact necessary to make the statement as a whole not materially misleading, and would violate Rule 7.1 (a).

To insure a clear understanding between the attorney and the client, the attorney should provide the client with an explanation in writing of the basis for the fee. Rule 1.5(b), Georgia Rules of Professional Conduct. *See also* Rule 1.5(b) ABA Model Rules of Professional Conduct. In order to comply with Rule 1.5(b), the attorney must communicate the basis for the fee to the client, and in order to comply with Rule 7.1(a), the communication must include an explanation of any standard unit billing practice.

Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court

Second Publication of Proposed Formal Advisory Opinion Request No. 00-R3

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has made a final determination that the following Proposed Formal Advisory Opinion should be issued. *(This proposed opinion, as it appeared for first publication in the August 2000 issue of the* Georgia Bar Journal, *referenced Standards of Conduct. As it appears below, the proposed opinion now references the Georgia Rules of Professional Conduct, which became effective on January 1, 2001. No substantive changes have been made to this proposed opinion since the first publication.)* Pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, this proposed opinion will be filed with the Supreme Court of Georgia on or after **February 19, 2001.** Any objection or comment to this Proposed Formal Advisory Opinion must be filed with the Supreme Court within twenty (20) days of the filing of the Proposed Formal Advisory Opinion and should make reference to the request number of the proposed opinions. Please provide a courtesy copy of any objections or comments filed with the Supreme Court of Georgia to John J. Shiptenko, Assistant General Counsel, State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303.

Reappointment of Incumbent Bankruptcy Judge

The current 14-year term of office of The Honorable Joyce Bihary, United States Bankruptcy Judge for the Northern District of Georgia at Atlanta, is due to expire September 16, 2001. The United States Court of Appeals for the Eleventh Circuit is presently considering whether to reappoint Judge Bihary to a new 14-year term of office.

Upon reappointment, the incumbent would continue to exercise the jurisdiction of a bankruptcy judge as specified in Title 28, United States Code; Title 11, United States Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101-122, 98 Stat. 333-346. In bankruptcy cases and proceedings referred by the district court, the incumbent would continue to perform the duties of a bankruptcy judge that may include holding status conferences, conducting hearings and trials, making final determinations, entering orders and judgments, and submitting proposed findings of fact and conclusions of law to the district court.

Inasmuch as Judge Bihary is seeking reappointment to this position, members of the bar and the public are invited to file written comments with the court of appeals for its consideration. Such comments as to whether the incumbent judge should be reappointed should be forwarded to Norman E. Zoller, Circuit Executive, Eleventh Circuit Court of Appeals, 56 Forsyth Street, N.W., Atlanta, Georgia 30303. All comments will be kept confidential unless otherwise directed.

Comments must be received not later than March 1, 2001.

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mentors' and beginning lawyers' attitudes on professionalism, assessments of lawyering skills, and perceptions of the Pilot Project. These surveys will be repeated in the middle of the project and at the end to gauge the results of the project. These evaluations will be important when the Standards Committee makes final recommendations.

Evaluation is also important because the lawyer-world seems to be watching this Pilot Project. The Committee has made several presentations to the ABA and to the National Conference of Bar Presidents. In July 2000 at the ABA Annual Meeting in New York, the Standards Committee Reporter, Professor Ron Ellington, former dean of the law school at the University of Georgia, made a presentation to the ABA Committee on Legal Education and Admissions to the Bar. His talk generated numerous requests from all over the country for information and copies of materials.

From the evaluations turned in by beginning lawyers at the CLE programs, the Committee gained valuable information about how to improve programs for future beginning lawyers. These are representative of comments on the CLE programs:

- "This small group session was excellent. Our moderator did not focus solely on the problems or the facts but rather discussed many areas involved with dealing with clients and opposing attorneys."
- "This training was very useful. The topics covered today were right on target."
- "The role-playing and debriefing were very valuable."
- "This was a wonderful session—good mix of activity and video involvement/large group discussion. Remaining 'engaged' was therefore easy."

Beginning lawyers identified some of the most important things they learned from these programs:

- "How to deal with difficult and uncooperative opposing counsel better."
- "Maintain professionalism and civility for the good of the profession, not just because you may cross paths with opposing counsel again."
- "Be assertive, but not obnoxious because it can hurt your client in the courtroom."
- "My own struggle with many of the issues is common, and an approach is available to tackle the issue."
- "Be honest about your competency and be civilized."
- "Ways to solve problems for clients before litigation starts"
- "Look at long-term relationship goals instead of short-term."
- "Learn to 'expand the pie'—look at lots of options."
- "Keep lines of communication open, ask questions."

"This small group session was excellent. Our moderator did not focus solely on the problems or the facts but rather discussed many areas involved with dealing with clients and opposing attorneys." —Project Participant

To assist in the evaluation of the Pilot Project, quarterly Interim Reports from the mentors and beginning lawyers were required the first year. Each Interim Report consisted of three parts:

- Schedule of activities and experiences
- Narrative evaluation by the beginning lawyer
- Narrative evaluation by the mentor

One mentor wrote: "The schedule forces us to discuss specific areas, so that nothing 'falls through the gaps.'" A beginning lawyer said, "I like having someone who is experienced to call with questions. I know lots of new lawyers; however, I am more comfortable speaking with my mentor on these issues."

The Committee is learning that beginning lawyers in mid-size and larger firms find that the program allows them to ask questions that they otherwise might not ask because of embarrassment, or not wanting to impose on the mentor's time. Typical was this comment: "The questionnaires force the mentees to seek answers to questions that normally would not arise until a problem occurred. It is better that the program asks the mentee to be proactive, rather than reactive, to learning the 'practice' of law."

At this midpoint of the Pilot Project, a beginning lawyer gave a concise expression of how it helps new lawyers and protects the public: "The program provides a means for me to gain benefits of experience without suffering through trial and error."

For a list of participants in the Transition into Practice Pilot Project, see pages 60-62.

The Pilot Project seeks to improve in a fundamental way the transition process from law student to competent practitioner. It focuses on the most formative period, the first two years of practice, and calls on experienced lawyers to play indispensable roles in the education of young professionals—to offer counsel and guidance to beginning lawyers as they acquire practical skills, make judgments with lasting consequences, and first confront ethical and professional

challenges in the practice of law. This is an ambitious undertaking. The Standards Committee has sought to formulate a proposed plan of action that meets three tests:

- Will it work?
- Is it sustainable over time?
- Will it do more than nibble at the margins, that is, will it make a significant difference over time in the level of competence and professionalism among members of the Bar?

At this point in the Pilot Project, the Standards Committee remains optimistic that the program will meet all three of these goals and, as a salutary by-product, make the practice of law more civil, humane, and satisfying to beginning lawyers as well as experienced lawyers who serve as mentors. If successful, this project could lead to a systematic professionalism experience that will reach all newly admitted lawyers in Georgia. All involved in this program's development believe that it holds great potential to shape the legal culture in Georgia in ways that make real our professional ideals.

Sally Evans Winkler is Executive Director, Chief Justice's Commission on Professionalism.

C. Ronald Ellington is the A. Gus Cleveland Professor of Legal Ethics and Professionalism at the University of Georgia School of Law and Reporter for the Committee on the Standards of the Profession of the State Bar of Georgia.

John T. Marshall is a partner at Powell Goldstein and has served as chair of the Standards of the Profession Committee since its creation in 1996.

Endnotes

1. The Open Society Institute is a charitable foundation created by financier George Soros to improve the administration of justice.

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example. In a case, or during the phase of a case, wherein information regarding the defendant's resources is relevant to a judgment that will adequately punish and deter, counsel may appropriately refer to those resources in closing.[34]

War on Crime

Sometimes a lawyer urges the jury to make war on some societal ill by holding it against a party in the instant case. In a federal criminal case in Georgia, the prosecutor urged the jury to view the defendants as enemies in the war on drugs.[35] In part, the argument observed that the community was involved in a war that is fought in the streets, in the schools, "and it has been fought in this Courtroom for the past week."[36] The prosecutor urged that: "unless we win the war, we will all be doomed. These people, as well as everyone listed in that indictment, are the enemy and they are the enemies of every man, woman, and child in this country because they don't care what they do. They don't care [sic] the pain and the misery and the hurt and the death that they cause because they only want one thing, and that's money for themselves."[37]

The United States Court of Appeals for the Eleventh Circuit did not condone the argument. In a note to the opinion, the court found that "the remarks at issue here clearly were intended to make the jury angry at [defendants] Boyd and Clowers. Prosecutors have a responsibility not only to prosecute cases diligently, but also to refrain from improper methods in doing so."[38] In the end, however, the court employed a harmless error analysis to prevent the argument from overturning the convictions.

Send a Message

Courts around the country have debated the propriety of "send a message" arguments. The rhetoric might come out like this, in a case involving a slip and fall on a stairway: "Members of the jury, send a message to the landlords of this city that steps and stairs for tenants cannot be maintained in the slipshod fashion that Joe Defendant maintained the stairway in this case."

In Georgia, "send a message" arguments are not warmly received in civil cases.[39] Recent case law suggests, however, that criminal cases are different. In 1997, the Georgia Supreme Court held that "[I]t is not improper for a prosecutor to appeal to a jury to convict in order to 'send a message' to the community."[40] The Georgia Court of Appeals has followed suit.[41]

Other Objections

The foregoing nonexhaustive list highlights numerous practical objections. There are others: Addressing jurors by name,[42] improper references to insurance,[43] inflammatory appeals,[44] and inspiring apprehension on the part of the jury in a noncapital criminal case by describing the dangerous nature of the defendant are all improper.[45] These tactics can be resisted by prompt objections. While a few argument violations are so serious that they will be reviewed in the absence of a timely challenge, appellate relief from an alleged argument error almost invariably requires that an objection appear in the record. Other remedies can also be considered depending upon the violation, like a jury instruction to disregard counsel's remark or a request for a mistrial.

Checklist of Objections

The foregoing sections have pinpointed numerous objections to improper summations. A list of relevant objections to final argument may be helpful at this point.

- Addressing jurors by name
- Appeal to prejudice
- Arguing matter outside the record
- Comment on defendant's failure to testify in a criminal case
- Disparaging party in a prejudicial manner
- Evidence misstated
- Excluded matter argued
- Golden Rule
- Insurance
- Misstating the law
- Name calling
- Personal attack on counsel, party or witness
- Personal opinion on merits of case
- Racial, religious, ethnic or regional bias
- Vouching personally for witness
- Wealth of party pilloried[46]

Conclusion

The network of guidelines surrounding closing argument provide objections capable of controlling the overzealous courtroom orator. The list of these must be readily at hand at the end of a case. Swiftness and accuracy must be the hallmarks of counsel's challenges to improper argument.[47]

Continued on next page

Continued from previous page

Ronald L. Carlson is the Fuller E. Callaway Professor of Law at the University of Georgia, and the author of thirteen books on evidence and trial practice.

Michael S. Carlson is an Assistant District Attorney in the Augusta Judicial Circuit.

Endnotes

1. Billups v. State, 272 Ga. 15, 17, 523 S.E.2d 873, 874 (1999) (Benham, C.J., concurring); Robbins v. State, 243 Ga.App. 21, 25, 532 S.E.2d 127, 130 (2000); Johnson v. State, 226 Ga. 511, 175 S.E.2d 840 (1970); Saxon v. Toland, 114 Ga. App. 805, 152 S.E.2d 702 (1966).
2. 823 F. Supp. 939 (N.D. Ga. 1993).
3. *Id.* at 943.
4. *Id.* at 945.
5. 995 F.2d 1512 (11th Cir. 1993).
6. *Id.* at 1517. Waiver also was imposed against a party who failed to timely object in Mullins v. State, 270 Ga. 450, 511 S.E.2d 165 (1999). A good description of how to invoke a reviewable ruling by the trial court on the issue of improper closing argument is discussed in Garner v. Victory Express, Inc., 264 Ga. 171, 442 S.E.2d 455 (1994). Be wary of unduly vague objections. *See* Jefferson Ins. Co. v. Dunn, 224 Ga. App. 732, 744, 482 S.E.2d 383, 393 (1997) (objections were deemed "too vague and general to invoke a proper ruling by the trial court"), *rev'd on other grounds*, 269 Ga. 213, 496 S.E.2d 696 (1998).
7. Counsel also may wish to request appropriate action in addition to his objection, including an instruction to disregard, rebuke by the court of opposing counsel, or if the impropriety is of grave character, a mistrial. Without such requests, if the trial court sustains the objection but fails to take other curative steps, the objecting attorney may not be able to complain on appeal about the trial court's refusal to take additional "available action." Garner, 264 Ga. at 171, 442 S.E.2d at 456 (civil cases); Hall v. State, 180 Ga. App. 881, 350 S.E.2d 801 (1986) (criminal cases).
8. *See* Burton v. State, 225 Ga. App. 217, 483 S.E.2d 658 (1997).
9. Smith v. State, 186 Ga. App. 303, 312, 367 S.E.2d 573, 580 (1988) (referring to O.C.G.A. § 17-8-75); Castell v. State, 250 Ga. 776, 301 S.E.2d 234 (1983).
10. Brooks v. State, 243 Ga. 246, 252, 532 S.E.2d 763, 768 (2000); McClain v. State, 267 Ga. 378, 477 S.E.2d 814 (1996) (deciding that such clear expression of personal belief was not shown).
11. Bolden v. State, 272 Ga. 1, 2, 525 S.E.2d 690, 691 (2000) ("[C]ounsel may not state to the jury his or her personal belief about the veracity of a witness.").
12. Brooks, 243 Ga. App. 246, 532 S.E.2d 763; Crews v. State, 226 Ga. App. 232, 486 S.E.2d 61 (1997); *See* Greene v. State, 266 Ga. 439, 469 S.E.2d 129 (1996), *rev'd on other grounds*, 519 U.S. 145, 117 S.Ct. 578 (1996).
13. *See, e.g.*, Greene, 266 Ga. at 449-50, 569 S.E.2d at 140-41.
14. Carruthers v. State, 272 Ga. 306, 528 S.E.2d 217 (2000) (reversing death sentence because prosecutor directly quoted religious authority as mandating sentence). *But see* Ferrell v. State, 149 Ga. App. 405, 254 S.E.2d 404 (1979) (finding no error in quoting from Bible).
15. Brooks, 243 Ga. App. 246, 532 S.E.2d 763; Crews, 226 Ga. App. at 236, 486 S.E.2d at 65 (1997); *see* Pace v. State, 271 Ga. 829, 524 S.E.2d 490 (1999) (prosecutor's religious reference permitted where prosecutor did not argue that divine law called for death sentence), *cert. denied*, —U.S. —, 121 S.Ct. 101 (2000); Greene, 266 Ga. at 236, 469 S.E.2d at 65; Elizabeth A. Brooks, *Note, Thou Shalt Not Quote the Bible: Determining the Propriety of Attorney Use of Religious Philosophy and Themes in Oral Arguments*, 33 GA. L. REV. 1113 (1999).
16. Harris v. Pacific Floor Mach. Mfg. Co., 856 F.2d 64, 68 (8th Cir. 1988) (affirming trial court's overruling of objection because Ann Landers article was only a general observation on human behavior and not a comment on the particular facts of this products liability case).
17. *Id.* at 69.
18. Williams v. Piggly Wiggly S., Inc., 209 Ga. App. 490, 433 S.E.2d 676 (1993); Kornegay v. State, 174 Ga. App. 279, 281, 329 S.E.2d 601, 604 (1985).
19. O.C.G.A. § 17-8-75 (1997). This statute provides that if counsel makes a prejudicial statement that is not in evidence, then upon objection, the court shall rebuke counsel and instruct the jury in a manner which removes the improper impression from their minds or shall grant a mistrial.
20. Ronald L. Carlson, *Argument to the Jury: Passion, Persuasion, and Legal Controls*, 33 ST. LOUIS UNIV. L.J. 787, 803 (1989).
21. Myrick v. Stephanos, 220 Ga. App. 520, 523, 472 S.E.2d 431, 435 (1996) (citation omitted).
22. McClain, 267 Ga. at 383, 477 S.E.2d at 821 (1996).
23. The area most policed by the Golden Rule prohibition is the argument of damages in civil cases, when plaintiff's counsel pleads with jurors to put themselves in the plaintiff's position. *See* Naimat v. Shelbyville Bottling Co., 240 Ga. App. 693, 524 S.E.2d 749 (1999) (deciding that certain remarks not directed at damages in civil case are not considered impermissible under the Golden Rule prohibition).
24. Pace, 271 Ga. at 844, 524 S.E.2d at 506 (inviting jurors to imagine themselves in the victim's place violates the Golden Rule prohibition, but the time to object to improper closing argument is when the impropriety occurs at trial).
25. Dudar v. Lewis, 158 Ga. App. 724, 727, 282 S.E.2d 194, 196 (1981).
26. *See* Billups, 272 Ga. at 17, 523 S.E.2d at 874 (Benham, C.J., concurring) (noting that prosecutor apparently stated that when the devil is on trial, you have to go to hell to get witnesses); Pace, 271 Ga. at 841, 524 S.E.2d at 504 (finding no reversible error when prosecutor referred to defendant as "Satan's lap dog"); Miller v State, 226 Ga. 730, 177 S.E.2d 253 (1970), (brute, beast, animal, mad dog), *vacated in part on other grounds*, 408 U.S. 938, 92 S.Ct. 2867, *on remand*, 229 Ga. 731, 194 S.E.2d 410 (1972); *cf.* Hammond v. State, 264 Ga. 879, 452 S.E.2d 745 (1995) (concluding that prosecution could refer to defendant during closing argument as "Demon," as this was shown to be defendant's nickname).
27. Geoffrion v. State, 224 Ga. App. 775, 482 S.E.2d 450 (1997), *overruled on other grounds*, Mullins v. State, 270 Ga. 450, 511 S.E.2d 165 (1999).
28. Brown v. State, 110 Ga. App. 401, 138 S.E.2d 741 (1964); Atlanta Coca-Cola Bottling Co. v. Shipp, 170 Ga. 817, 154 S.E. 243 (1930); *see* Kornegay, 174 Ga. App. at 281, 329 S.E.2d at 604 (1985); *see also* Seaboard Coast Line R.R. v. Towns, 156 Ga. App. 24, 24, 274 S.E.2d 74, 76 (1980) (finding that trial court properly instructed jury to disregard any reference to

racial or religious prejudice in counsel's closing).

29. People v. Bahoda, 448 Mich. 261, 531 N.W.2d 659 (1995).
30. *See* Nguyen v. State, 271 Ga. 475, 520 S.E.2d 907 (1999) (stating that in rare instances the particular ethnicity, religion or culture of a party may be relevant); Garcia v. State, 267 Ga. 257, 477 S.E.2d 112 (1996).
31. Bahoda, 448 Mich. at 272, 531 N.W.2d at 665 (footnote omitted).
32. *Id.* at 267 n.6, 531 N.W.2d at 663 n.6.
33 Alexander Underwriters Gen. Agency, Inc. v. Lovett, 182 Ga. App. 769, 357 S.E.2d 258 (1987) (finding that corrective action by trial court can be sufficient).
34. Other courts apply similar rules. *See, e.g.,* Rodgers v. Fisher Body Div., Gen. Motors Corp., 739 F.2d 1102, 1105 (6th Cir. 1984).
35. United States v. Boyd, 131 F.3d 951 (11th Cir. 1997).
36. *Id.* at 955.
37. *Id*.
38. *Id.* at n.4.
39. *See* Alexander Underwriters Gen. Agency, 182 Ga. App. at 775, 357 S.E.2d at 264 (during closing argument counsel said jury should send an appropriate message to the insurer, trial court directed the jury to erase comment from their mind). For a federal case on the same point, *see* Neal , 823 F. Supp. at 943. Sometimes the essence of a "send-a-message" argument appears in a different form. *See, e.g.,* Carlin v. Fuller, 196 Ga. App. 54, 55, 395 S.E.2d 247249 (1990) (arguing that party "'needs to be punished and penalized so that she won't ever think about doing it again'").
40. Carr v. State, 267 Ga. 547, 556, 480 S.E.2d 583, 592 (1997).
41. Green v. State, 244 Ga. App. 697, — S.E.2d — (2000). See the reference to the local community in Scott v. State, 240 Ga. App. 50, 522 S.E.2d 535 (1999) (allowing prosecutor to appeal to jury to enforce the law and stamp out drug abuse).
42. Atlanta Stove Works, Inc. v. Hollon, 112 Ga. App. 862, 873, 146 S.E.2d 358, 366 (1965) ("It has been held in other jurisdictions that it is improper to single out a particular juror, address him by name, and personally appeal to him," and Georgia disapproves of such a practice).
43. Loman v. Reville, 215 Ga. App. 356, 450 S.E.2d 707 (1994); RONALD L. CARLSON, TRIAL HANDBOOK FOR GEORGIA LAWYERS 619 (2d ed. 1993).
44. Bell v. State, 263 Ga. 776, 439 S.E.2d 480 (1994).
45. Sterling v. State, 267 Ga. 209, 477 S.E.2d 807 (1996); *see also* Wyatt v. State, 267 Ga. 860, 485 S.E.2d 470 (1997) (appellant complained that during the guilt-innocence phase of a malice murder trial the prosecutor argued that if the jury returned a verdict of not guilty the appellant could get his gun back and ride down the elevator with the jury as they leave the courthouse; held, prosecutor's statements to the jury were improper as raising the specter of future dangerousness); CARLSON, *supra* note 43, at 621-22.
46. Carlson, *supra* note 20, at 809.
47. *Id.* at 820.

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cases in which statutory aggravating circumstances have been proven.[112] Because the full text of the constitutional provision gives the Georgia Supreme Court jurisdiction in those "classes of cases" in which the death penalty "may be imposed," it would seem that the Supreme Court retains jurisdiction over all cases of murder, treason, and aircraft hijacking. In its 1984 decision in *State v. Thornton*,[113] however, the Supreme Court held that because the death penalty could not have been imposed in the murder case under review, as the State did not give timely notice of its intent to seek the death penalty,[114] the Court did not have jurisdiction of the case. But, as a matter of policy, the Court held that it would continue to review all murder cases "at the present time." This continues to be the view of six of the Justices on the Supreme Court.[115]

It should also be noted that the 1983 Georgia Constitution differs from its forebears by eliminating the requirement that there be a conviction of the crime. Prior to enactment of the 1983 Constitution, interlocutory appeals in capital felony prosecutions were thus decided by the Court of Appeals.[116] Pre-conviction appeals in murder cases are now decided by the Supreme Court.[117]

Jurisdiction Of Supreme Court To Answer Certified Questions From Out-of-State Courts

Under the authority of O.C.G.A. § 15-2-9 (a), the Supreme Court has provided in its Rule 46:

> When it shall appear to the Supreme Court of the United States, to any Circuit Court of Appeals of the United States, or to the Court of Appeals of the District of Columbia that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such federal appellate court may certify such questions or propositions of the laws of Georgia to this Court for instructions.

In certification orders, it is customarily noted that phrasing of the certified question does not restrict the Supreme Court's consideration of the problems involved and issues raised as perceived by the Court in its analysis of the case record.[118] Federal courts utilize this procedure when applying the substantive law of Georgia in diversity actions.[119]

Conclusion

The state constitutional scheme for determining state appellate court jurisdiction was originally enacted in the early part of the twentieth century and remains virtually unchanged. The obvious intent of the Constitution is to vest the Supreme Court with jurisdiction over those cases with heightened gravity and importance. It seems that a different jurisdictional scheme would better accomplish this objective as we enter the twenty-first century.

Simon Weinstein is employed as senior staff attorney for Judge Herbert Phipps on the Georgia Court of Appeals. He got his B.A. degree from Emory University in 1976. He got his J. D. degree, cum laude, from the University of Georgia School of Law in 1976.

Endnotes

1. GA. CONST. art. VI, § VI, ¶ II (1983).The Florida Supreme Court recently exercised jurisdiction in highly publicized election contest proceedings arising from the Bush-Gore Presidential race. The Florida Constitution does not give the Florida Supreme Court jurisdiction over election contests as such. See FLA. CONST. art. V, § 3(b). In the Presidential election contest proceedings, the Florida Supreme Court exercised jurisdiction under a provision of the Florida Constitution giving that court discretionary authority to review "any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court." *See Gore v. Harris*,. No. SC00-2431, at p.1 (S. Ct. Fla, Dec. 8, 2000) (*citing* FLA. CONST. art. V, § 3(b)(5)).
2. GA. CONST. art. VI, § VI, ¶ III (1983).
3. GA. CONST. art. VI, § VI, ¶ IV (1983).
4. GA. CONST. art. VI, § V, ¶ III (1983).
5. GA. CONST. art. VI, § II, ¶ IV (1976).
6. Perkins v. Hattiesburg Brick Work, 212 Ga. 804, 96 S.E.2d 361 (1957).
7. Ledbetter v. Roberts, 213 Ga. 47, 96 S.E.2d 614 (1957).
8. Kariuki v. DeKalb County, 253 Ga. 713, 324 S.E.2d 450 (1985).
9. Spires v. Kim, 203 Ga. App. 302, 303, 416 S.E.2d 780, 782 (1992).
10. Senase v. State, 258 Ga. 592, 372 S.E.2d 813 (1988); Perkins v. Hattiesburg Brick Work, 212 Ga. 804, 96 S.E.2d 361 (1957).
11. Senase v. State, 258 Ga. 592, 372 S,E,2d 813 (1988). *See* Perkins v. Hattiesburg Brick Work, 212 Ga. 804, 804, 96 S.E.2d 361, 361 (1957).
12. Prince v. Thompson, 215 Ga. 860, 861, 113 S.E.2d 772, 723 (1960).
13. City of Chamblee v. Village of North Atlanta, 217 Ga. 517, 520, 123 S.E.2d 663 (1962).

14. Wright v. State, 216 Ga. 228, 115 S.E.2d 331 (1960).
15. Pollard v. State, 229 Ga. 698, 194 S.E.2d 107 (1972).
16. *See id*. at 698, 194 S.E.2d at 107.
17. Blackwell v. State, 180 Ga. App. 253, 254, 349 S.E.2d 13, 14 (1986).
18. Atlanta Independent School Sys. v. Lane, 266 Ga. 657, 658, 469 S.E.2d 22, 24 (1996).
19. O.C.G.A. §§ 21-2-250 *et seq.*
20. *Id*. § 21-2-521.
21. *See* Payne v. Chatman, 267 Ga. 873, 875, 485 S.E.2d 723, 725 (1997).
22. *See* GA. CONST. art. VI, § II, ¶ IV (1976), and its predecessors.
23. GA. CONST. art. VI, § II, ¶ II (1983).
24. 21 Ga. 161 (1857).
25. *Id*. at 174.
26. 146 Ga. 647, 92 S.E. 51 (1917).
27. Southall v. Carter, 229 Ga. 240, 190 S.E.2d 517 (1972) (overruling prior cases).
28. 207 Ga. 559, 561, 63 S.E.2d 399 (1951).
29. Minton v. Raytheon Co., 222 Ga. App. 85, 88, 473 S.E.2d 177, 179 (1996) (Beasley, C. J., concurring specially), *citing* Cole v. Cole, 205 Ga. App. 332, 422 S.E.2d 230 (1992).
30. *See* Dairy Queen v. Wood, 369 U.S. 469 (1962); Bernstein v. Fagelson, 166 Ga. 281, 287, 142 S.E. 862 (1928); 1 DOBBS LAW OF REMEDIES, § 2.6 (3) (2d ed. 1993).
31. *See* O.C.G.A. § 9-11-18 (a).
32. *See* Dairy Queen v. Wood, 369 U.S. 469 (1962).
33. *See, e.g.*. Miller v. Ray, 208 Ga. 27, 64 S.E.2d 449 (1951); Overstreet v. Schulman, 203 Ga. 284, 46 S.E.2d 344 (1948).
34. 22A AM JUR 2D, *Declaratory Judgments*, § 2 at 671 (1988).
35. 201 Ga. 347, 39 S.E.2d 654 (1946).
36. *Id*. at 348, 39 S.E.2d at 655.
37. Nevertheless, issuance of a restraining order as provided for under the Declaratory Judgment Act to maintain the status quo pending adjudication of the case does not constitute equitable relief. United States Cas. Co. v. Ga. So. & Fla. Ry. Co., 212 Ga. 569, 94 S.E.2d 422 (1956).
38. 225 Ga. 821, 171 S.E.2d 498 (1969).
39. 239 Ga. 122, 236 S.E.2d 71 (1977).
40. Id. at 123, 236 S.E.2d at 71.
41. Galloway v. Board. of Comm'rs., 246 Ga. 472, 271 S.E.2d 784 (1980); American Century Mtg. Investors v. BankAmerica Realty Investors, 246 Ga. 39, 268 S.E.2d 609 (1980); Uni-Worth Enters. v. Wilson, 244 Ga. 636, 261 S.E.2d 572 (1979). In other cases, the Court transferred the case to the Court of Appeals. *See Pace Constr. Co. v. Houdaille & Indus.*, 245 Ga. 696, 266 S.E.2d 504 (1980); *Bowery Sav. Bank v. DeKalb County*, 239 Ga. 398, 236 S.E.2d 757 (1977).
42. 261 Ga. 608, 409 S.E.2d 208 (1991).
43. *Id.* at 609, 409 S.E.2d at 209.
44. 263 Ga. 66, 428 S.E.2d 328 (1993).
45. 272 Ga. 107, 527 S.E.2d 204 (2000).
46. Lewis v. Board. of Educ., 183 Ga. 687, 690, 189 S.E. 233, 234 (1936) (citing predecessor to O.C.G.A. § 13-1-6).
47. *See* O.C.G.A. § 23-1-4.
48. 271 Ga. 745, 524 S.E.2d 464 (1999).
49. O.C.G.A. § 23-1-25.
50. Redfearn v. Huntcliff Homes Ass'n, 271 Ga. 745, 748, 524 S.E.2d 464, 468 (1999).
51. *Id*. at 749-50, 524 S.E.2d at 468.
52. 271 Ga. 722, 524 S.E.2d 229 (1999).
53. 268 Ga. 755, 493 S.E.2d 132 (1997).
54. 268 Ga. 500, 491 S.E.2d 370 (1997).
55. 271 Ga. at 722.
56. 268 Ga. at 755-756; 268 Ga. at 501-502.
57. O.C.GA. § 10-1-762.
58. GA. CONST. art. VI, § II, ¶ IV (1976), and predecessors; In re Estate of Lott, 251 Ga. 461, 306 S.E.2d 920 (1983).
59. GA. CONST. art. VI, § VI, ¶ III (1983); In re Estate of Lott, 251 Ga. 461, 306 S.E.2d 920 (1983).
60. 251 Ga. 461, 306 S.E.2d 920 (1983).
61. *See* Goodman v. Hammonds, 224 Ga. App. 387, 480 S.E.2d 397 (1997).
62. 231 Ga. 729, 204 S.E.2d 293 (1974).
63. 179 Ga. 812, 177 S.E. 741 (1934).
64. *See id.* at 816, 177 S.E. at 743.
65. 244 Ga. 665, 261 S.E.2d 616 (1979).
66. O.C.G.A. §§ 9-14-1 through -23.
67. *Id.* §§ 9-14-40 through -53.
68. *Id.* § 9-14-1 (a), (b), and (c).
69. *Id.* §§ 19-9-20 *et seq*.
70. *Id.* § 19-2-23 (d).
71. 243 Ga. 863, 257 S.E.2d 282 (1979).
72. 256 Ga. 507, 508, 350 S.E.2d 437, 438 (1986).
73. *See* Johnson v. Smith, 251 Ga. 1, 302 S.E.2d 542 (1983).
74. *See* Lewis v. Winzenreid, 263 Ga. 459, 435 S.E.2d 602 (1993).
75. O.C.GA. § 9-14-52 (b).
76. *Id.* § 9-14-52 (c).
77. Farris v. State, 262 Ga. 713, 425 S.E.2d 291 (1993).
78. State v. McCrary, 193 Ga. App. 11, 387 S.E.2d 10 (1989).
79. Spence v. Miller, 176 Ga. 96, 99, 167 S.E. 188, 189 (1932).
80. Felton v. Chandler, 201 Ga. 347, 39 S.E.2d 654 (1946).
81. *See* Settle v. McWhorter, 203 Ga. 93, 95, 45 S.E.2d 210, 211 (1947).
82. BLACK'S LAW DICTIONARY, 566 (4th ed.).
83. *See* Thompson v. Central of Ga. Ry. Co., 214 Ga. 130, 103 S.E.2d 555 (1958).
84. O.C.GA. § 19-6-1 (a).
85. *See* Hayes v. Hayes, 191 Ga. 237, 240, 11 S.E.2d 764, 766 (1940).
86. *See* Jost v. Jost, 179 Ga. App. 1, 345 S.E.2d 115 (1986).
87. *See* Perry v. Perry, 213 Ga. 847, 849, 102 S.E.2d 534, 536 (1958).
88. *See* Lewis v. Robinson, 254 Ga. 378, 329 S.E.2d 498 (1985).
89. *See* Henderson v. Henderson, 209 Ga. 148, 71 S.E.2d 210 (1952).
90. Iannicelli v. Iannicelli, 169 Ga. App. 155, 311 S.E.2d 850 (1983), (*citing* Griffin v. Griffin, 243 Ga. 149, 253 S.E.2d 80 (1979)).
91. Griffin v. Griffin, 243 Ga. 149, 151, 253 S.E.2d 80, 81 (1979).
92. O.C.G.A. §§ 19-11-40 *et seq*.
93. *See* O'Quinn v. O'Quinn, 217 Ga. 431, 122 S.E.2d 925 (1961).
94. O.C.GA §§ 19-11-43, 19-11-47.
95. *Id.* §§ 19-11-100 *et seq*.
96. O.C.GA. § 19-11-40.1.
97. Gormley v. Slicer, 177 Ga. 430, 433, 170 S.E. 224, 225 (1933).
98. *See* Lawrence v. State, 268 Ga. 420, 489 S.E.2d 850 (1997).
99. Collins v. Lombard Corp., 270 Ga. 120, 121, 508 S.E.2d 653, 654 (1998).
100. *See* Willis v. Georgia Power Co., 178 Ga. 878, 174 S.E. 625 (1934).
101. Gormley v. Slicer, 177 Ga. 430, 433, 170 S.E. 224, 225 (1933).
102. 178 Ga. 878, 174 S.E. 625 (1934).
103. 253 Ga. 169, 316 S.E.2d 757 (1984).
104. GA. CONST. art. VI, § II, ¶ IV (1976), and predecessors.
105. 127 Ga. 710, 712, 57 S.E. 66 (1906).
106. *See, e.g.*, Lindsey v. State, 234 Ga. 874, 218 S.E.2d 585

(1975) (murder); Hammock v. State, 233 Ga. 733, 213 S.E.2d 618 (1975) (rape); Smith v. State, 236 Ga. 5, 222 S.E.2d 357 (1976) (armed robbery); James v. State, 232 Ga. 834, 209 S.E.2d 176 (1974) (kidnapping with bodily injury).

107. 428 U.S. 153 (1976).
108. 433 U.S. 584 (1977).
109. 239 Ga. 400, 402, 236 S.E.2d 759 (1977).To effectuate the legislative intent of a statute held unconstitutional, *Collins* ordered the Court of Appeals to transfer appeals in the following types of cases to the Supreme Court: (1) cases involving the revenues of the state, (2) election contests, and (3) cases in which the constitutionality of any municipal or county ordinance or other legislative enactment was drawn into question. *Id*. at 403 (3). The 1983 Constitution gives the Supreme Court jurisdiction over the second and third case categories but not the first. Consequently, the Supreme Court no longer exercises jurisdiction over cases involving state revenues. *See Collins v. American Tel. &c. Co*., 265 Ga. 37, 456 S.E.2d 50 (1995).
110. 433 U.S. 917 (1977).
111. Collins, 239 Ga. at 402-03, 236 S.E.2d at 761.
112. Godfrey v. Francis, 251 Ga. 652, 672, 308 S.E.2d 806, 822 (1983) (Gregory, J., dissenting).
113. 253 Ga. 524, 322 S.E.2d 711 (1984).
114. UNIFORM SUP. CT. R. 34 (II) (A) (Unified Appeal Procedure).
115. *See* Weatherbed v. State, 271 Ga. 736, 524 S.E.2d 452 (1999) (Benham, C. J., concurring specially).
116. *See* Phillips v. State, 133 Ga. App. 461, 462, 211 S.E.2d 411, 413 (1974).
117. *See* State v. Thornton, 253 Ga. 524, 322 S.E.2d 711 (1984).
118. *See* Union Camp Corp. v. Helmy, 258 Ga. 263, 264, 367 S.E.2d 796, 797 (1988).
119. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

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discussion draft)<http://www.abanet.org/cpr/rule44draft.html>.

25. *Id*. at cmt. 3.
26. ABA Ethics Comm'n 2000, *Proposed R. 4.4 - Reporter's Explanation of Changes* (1999) <http://www.abanet.org/cpr/rule44memo.html>.
27. *See, e.g.*, Transport Equip. Sales Corp. v. BMY Wheeled Vehicles, 930 F. Supp. 1187, 1187 - 88 (N.D. Ohio 1996); Resolution Trust Corp. v. First of Am. Bank, 868 F.Supp. 217, 219-20 (W.D. Mich. 1994); State Comp. Ins. Fund v. WPS, Inc., 70 Cal. App. 4th 644, 655, 82 Cal. Rptr. 2d 799, 807 – 08 (1994).
28. *See, e.g.*, Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 954-55 (N.D. Ill. 1982)(in discussing circumstances in which an attorney may have been negligent in failing to remove privileged letters from files before disclosing the files to his opponent, the court stated that "if we are serious about the attorney-client privilege and its relation to the client's welfare, we should require more than such negligence by counsel before the client can be deemed to have given up the privilege"); Helman v. Murry's Steaks, Inc., 728 F. Supp. 1099, 1104 (D. Del. 1990); Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 20-21 (D. Neb. 1983).
29. Bank Brussels Lambert v. Credit Lyonnais (Suisse), S.A., 160 F.R.D.437, 442 (S.D.N.Y. 1995)(citations omitted), *mot. to compel produc. of docs. granted, mot. for protective order denied*, 1995 U.S. Dist. LEXIS 14808 (S.D.N.Y. 1995).
30. *Id.* At least one legislature has also weighed in on the issue. California law provides that "[a] communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer." Cal Evid. Code § 952 (2000).
31. *See, e.g.*, Wichita Land & Cattle Co. v. Am. Fed. Bank, *F.S.B.* 148 F.R.D.456, 457 (D.D.C. 1992); Ares-Serono, Inc. v. Organon Int'l B.V., 160 F.R.D. 1, 4 (D. Mass. 1994); Int'l Digital Sys. Corp. v. Digital Equip. Corp., 120 F.R.D. 445, 449-50 (D. Mass. 1988).
32. Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 329 (N.D. Cal. 1985).
33. This approach seems particularly to have taken hold in the federal courts. *See, e.g*; O'Leary v. Parcell Co., 108 F.R.D. 641, 644 (M.D. N.C. 1985); Suburban Sew N Sweep, Inc., v. Swiss-Bernina, Inc. 91 F.R.D. 254, 260 (E.D. Ill. 1981).
34. *See, e.g.*, Alldread v. City of Grenada, 988 F.2d 1425, 1433 (5th Cir. 1993) (the court upheld the lower court's application of the five factor test and the conclusion drawn therefrom that although defendant had not taken reasonable precautions to protect privileged materials from disclosure, defendant could reasonably have discovered any privileged materials, and plaintiff had become aware of full contents of privileged materials, nevertheless, inadvertent disclosure did not waive privilege because defendant immediately asserted privilege upon learning of disclosure, and considerations of fairness counseled in favor of ordering materials returned); Harmony Gold U.S.A, Inc. v. FASA Corp., 169 F.R.D. 113, 116 (N.D. Ill. 1996).
35. *See, e.g.*, Fla. Bar Ass'n Prof'l Ethics Comm., Ethics Op. 93-3 (1994); Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar of Maine, Advisory Op. 146 (1994); Ohio Bd. of Comm'rs on Grievances & Discipline, Advisory Op. 93-11 (1993); Utah State Bar Ethics Advisory Op. Comm, Ethics Op. 99-01 (1999); N.C. Bar Ass'n, Final Op. RPC-252 (1997); Colo. Bar Ass'n Ethics Comm., Formal Ethics Op. 108 (2000).
36. D.C. Bar Legal Ethics Comm., Ethics Op. 256 (1995).
37. *Id. Cf.* Aerojet-General Corp. v. Transp. Indem. Ins., 18 Cal. App. 4th 996, 22 Cal. Rptr. 2d 862 (1993)(court vacated sanctions which trial court had imposed upon law firm for failure to timely disclose innocent receipt of privileged communications).
38. Prof'l Ethics Comm'n of the Bd. of Overseers of the Bar of Maine, Advisory Op. 146 (1994).
39. Ky. Bar Ass'n Comm. on Ethics, Advisory Op. E-374 (1995).
40. *Id*.
41. Ill. State Bar Ass'n, Advisory Op. on Professional Conduct 98-04 (1999).
42. As noted above, however, the Formal Advisory Opinion Board of the State Bar of Georgia has informally approved the use of e-mail as a means of communication with a client.

43. Marriott Corp. v. American Acad. of Psychotherapists, Inc., 157 Ga. App. 497, 501-02, 277 S.E.2d 785, 789 (1981)(quoting 97 C.J.S. *Witnesses* § 276).
44. Peterson v. Baumwell, 202 Ga. App. 283, 285, 414 S.E.2d 278, 280, (1991), *cert. denied*, 1992 Ga. LEXIS 1995 (Ga. Sup. Ct. 1992); *see also*, Osborn v. Georgia, 233 Ga. App. 257, 260, 504 S.E.2d 74, 77 (1998); Moclaire v. Georgia, 215 Ga. App. 360, 363, 451 S.E.2d 68, 72 (1994), *cert. denied in related proceeding*, Morrill v. State, 1995 Ga. LEXIS 482 (Ga. Sup. Ct. 1995).
45. *See* Nationsbank, N.A. v. Southtrust Bank of Georgia, N.A., 226 Ga. App. 888, 896, 487 S.E.2d 701, 708 (1997) ("the lawyer has no power to waive" the attorney-client privilege).
46. 223 Ga. App. 450, 477 S.E.2d 849 (1996).
47. *See supra* note 5 and text.
48. 165 Ga. 210, 140 S.E. 625 (1927).
49. 223 Ga. App. at 452, 477 S.E.2d at 851.
50. *Id. See also* Moclaire v. Georgia, 215 Ga. App. 360, 363, 451 S.E.2d 68, 72, (Ga. App. 1994) (the court held that there is no waiver of the attorney-client privilege without evidence that client made a disclosure to attorney for the purpose of having attorney impart the information to others or otherwise authorized disclosure of attorney-client privileged communications to third persons); Marriott Corp v. American Acad. of Psychotherapists, 157 Ga. App. 497, 277 S.E.2d 785 (1981) (no waiver of privilege found merely because plaintiff, without explanation, had obtained a copy of a privileged communication).
51. 176 F.R.D 695 (M.D. Ga. 1997).
52. *Id*. at 699.
53. 181 F.R.D. 680 (N.D. Ga. 1998).
54. *Id*. at 688 - 89.
55. *Id*. at 697 – 99.
56. *Id*. at 700.
57. Lazar v. Mauney, 192 F.R.D. 324, 328 (N.D. Ga. 2000)
58. *Id.* at 330. In *Lazar*, a caustic letter from the plaintiff to his counsel was inadvertently produced during a voluminous document production. Plaintiff's counsel discovered the error soon after the disclosure, and requested that it be returned. Defendant's counsel did so, but unknown to plaintiff's counsel, defendant's counsel retained a copy. That copy was later used as an attachment to papers opposing plaintiff's motion to compel, claiming that the attorney-client privilege had been waived. Judge O'Kelly rejected the assertion that the privilege had been waived. He further found that found that defense counsel's actions in secretly retaining the copy and not letting the producing attorney know that he disputed any claim of privilege, and in asserting without any basis that the privilege had been waived constituted ethical violations, and directed that a copy of the Court's Order be forwarded to the State Bar.
59. BellSouth Adver. & Publ'g Corp. v. American Bus.-List, Inc., 1992 U.S. Dist. LEXIS 17679 (N.D. Ga.1992).
60. Pa. Bar Ass'n Comm. of Legal Ethics & Prof'l Responsibility, Op. 97-130 (1997); State Bar of Arizona, Advisory Op. 97-04 (1996).
61. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).
62. *See supra*. text accompanying note 34.
63. To establish legal malpractice, a plaintiff must establish three elements: "(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff." Allen v. Lefkoff, Duncan, Grimes & Dermer P.C., 265 Ga. 374, 375, 453 S.E.2d 719, 720 (1995)(quoting Rogers v. Norvell, 174 Ga. App. 453, 457, 330 S.E.2d 392, 395 [1985]). With respect to the "ordinary care, skill and diligence" element, "the law imposes upon [persons performing professional services] the duty to exercise a reasonable degree of skill and care, as determined by the degree of skill and care ordinarily employed by their respective professions under similar conditions and like surrounding circumstances." 259 Ga. 435, 436, 383 S.E.2d 867, 868 (1989)(case discusses architectural malpractice).
64. The author has experienced one instance where his e-mail address was apparently placed on his opponent's internal e-mail distribution list for a case, and as a result, an e-mail communication between the opposing partner and his associate was inadvertently sent to the author.
65. Many attorneys now include a notice on all e-mails advising the recipient that the e-mail may contain confidential information, and providing instructions as to the course of action to take if the e-mail has been sent erroneously. An example of such a disclosure follows:

    NOTICE: This e-mail may contain information that is privileged or otherwise confidential. It is intended solely for the holder of the e-mail address to which it has been directed, and should not be disseminated, distributed, copied or forwarded to any other persons. It is not intended for transmission to, or receipt by, any other person. If you have received this e-mail in error, please delete it without copying or forwarding it, and notify us of the error by reply e-mail or by calling Robert C. Port, Esq., (770) 393-0990, so that our address records can be corrected.
66. *See, e.g.*, Jones, Robert, *Client Confidentiality: A Lawyer's Duties with Regard to Internet E-Mail*, STATE BAR OF GEORGIA COMPUTER LAW SECTION NETETHICS READINGS <http://www.computerbar.org/netethics/bjones.htm>. In evaluating whether an inadvertent disclosure of email rises to the level of actionable negligence, some commentators have suggested that the analysis follow the formulation set forth by Learned Hand in United States v. Carroll Towing, 159 F.2d 169 (2d Cir. 1947). Under the "Hand Formula," a risk is unreasonable when the foreseeable probability of the resulting harm times the gravity of the harm outweighs the burden to the defendant of taking actions which would have prevented harm. Thus, if encryption is easily accomplished at nominal cost, the fact that attorneys do not currently routinely use encryption might not be a defense to a malpractice claim. *See also* N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Ethics Op. 709 (1998)(an attorney using e-mail "must also stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost.")

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