A hand holding a wooden gavel over a wooden block, with a spotlight effect. The background is dark with a warm, orange-red glow from the spotlight.

GEORGIA BAR Journal

OCTOBER 1999 • VOL. 5 NO. 2

TRIAL TECHNIQUES

PREMISES LIABILITY • COMPULSORY CROSS-CLAIMS • SUMMER MEETING

West (redefining citation)-
new- 4C full

GEORGIA BAR Journal

OCTOBER 1999 • VOL. 5 No. 2

EDITORIAL BOARD

WILLIAM WALL SAPP, *Editor-in-Chief*

JENNIFER M. DAVIS, *Managing Editor*

LYN K. ARMSTRONG	DIANE BETH MELKIN
ERIKA C. BIRG	D. SCOTT MURRAY
CHARLES M. CORK III	MARISA ANNE PAGNATTARO
O. WAYNE ELLERBEE	AMELIA TOY RUDOLPH
GEORGE W. FRYHOFFER III	JOHN M. SIKES JR.
MICHAEL JABLONSKI	JOHN SPANGLER III
ANNE R. JACOBS	JERRE B. SWANN JR.
MICHELLE W. JOHNSON	PAMELA Y. WHITE-COLBERT
SARAJANE N. LOVE	J. MICHAEL WIGGINS
W. FRAY MCCORMICK	

CHARLES R. ADAMS III, *ADVISOR*

THEODORE HARRIS DAVIS JR., *ADVISOR*

OFFICERS OF THE STATE BAR OF GEORGIA (EX OFFICIO MEMBERS)

RUDOLPH N. PATTERSON, MACON
President

GEORGE E. MUNDY, CEDARTOWN
President-elect

JAMES B. FRANKLIN, STATESBORO
Secretary

JAMES B. DURHAM, BRUNSWICK
Treasurer

WILLIAM E. CANNON JR., ALBANY
Immediate Past President

JOSEPH W. DENT, ALBANY
YLD President

KENDALL S. BUTTERWORTH, ATLANTA
YLD President-elect

ROSS J. ADAMS, ATLANTA
YLD Immediate Past President

EDITORS EMERITUS • (EX OFFICIO MEMBERS)

THEODORE H. DAVIS JR., 1997-1999

L. BRETT LOCKWOOD, 1995-1997

STEPHANIE B. MANIS, 1993-1995

WILLIAM L. BOST JR., 1991-1993

CHARLES R. ADAMS III, 1989-1991

L. DALE OWENS, 1987-1989

DONNA G. BARWICK, 1986-1987

JAMES C. GAULDEN JR., 1985-1986

JERRY B. BLACKSTOCK, 1984-1985

STEVEN M. COLLINS, 1982-1984

WALTER M. GRANT, 1979-1982

STEPHEN E. RAVILLE, 1977-1979

ROBERT H. WALLING, 1975-1977

COMMUNICATIONS COMMITTEE

WILLIAM E. CANNON JR., ALBANY
Chairperson

DENNIS C. O'BRIEN, MARIETTA
Vice-Chairperson

STAFF

JENNIFER M. DAVIS
Director of Communications

NIKKI HETTINGER
Communications Coordinator

CAROLINE SIRMON
Internet Coordinator

AMY MORLEY
Administrative Assistant

On the Cover: *This issue takes a look at litigation, offering techniques to aid your performance in the courtroom. Photo by Richard T. Bryant.*

QUICK DIAL

Attorney Discipline	(800) 334-6865 ext. 720	(404) 527-8720
Consumer Assistance Program		(404) 527-8759
Conference Room Reservations		(404) 527-8712
Fee Arbitration		(404) 527-8750
Continuing Legal Education Transcripts		(404) 527-8710
Diversity Program		(404) 527-8754
ETHICS Hotline	(800) 682-9806	(404) 527-8741
Georgia Bar Foundation/IOLTA		(404) 527-8766
Georgia Bar Journal		(404) 527-8736
Lawyer Assistance Program	(770) 612-1122	(800) 327-9631
Law Practice Management		(404) 527-8773
Membership Records		(404) 527-8777
Meetings Information		(404) 527-8790
Pro Bono Project		(404) 527-8763
Professionalism		(404) 527-8793
Sections		(404) 527-8774
Unauthorized Practice of Law		(404) 527-8743
Young Lawyers Division		(404) 527-8778

HEADQUARTERS

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

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
(800) 330-0446 (912) 387-0446
FAX (912) 382-7435

MANUSCRIPT SUBMISSIONS

The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (16th ed. 1996). Please address unsolicited manuscripts to: William Wall Sapp, Editor-in-Chief, Alston & Bird, One Atlantic Center, 1201 W. Peachtree St, Atlanta, GA 30309-3424. Authors will be notified of the Editorial Board's decision following its next meeting.

The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Jennifer M. Davis, Managing Editor, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303; phone: (404) 527-8736.

Layout and Design by Lenz Design & Communications, Inc. 119 E. Court Sq. #201, Decatur, Georgia

PUBLISHER'S STATEMENT

The *Georgia Bar Journal* (SSN-0016-8416) is published six times per year (bi-monthly) by the State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303-2934. © State Bar of Georgia 1999. One copy of each issue is furnished to members as part of their State Bar dues. Subscriptions: \$36 to non-members. Single copies: \$6. Periodicals postage paid in Atlanta, Georgia. Opinions and conclusions expressed in articles herein are those of the authors and not necessarily those of the Editorial Board, Communications Committee, Officers or Board of Governors of the State Bar of Georgia. Advertising rate card will be furnished upon request. Publishing of an advertisement does not imply endorsement of any product or service offered. **POSTMASTER:** Send address changes to same address.

DISABILITIES

If you have a disability which requires printed materials in alternate formats, please contact the ADA coordinator at (404) 527-8700 or (800) 334-6865.

Lexis Nexis (It's all
about..) new 4C

GEORGIA BAR Journal

OCTOBER 1999 VOL. 5 NO. 2

T A B L E O F C O N T E N T S

LITIGATION

**Beginning and Ending: Build a Solid
Opening and Closing**

By Carrie L. Christie
9

Cross-Examining Witnesses

By S. Lester Tate III
16

**Chronology: A Thinking Tool for
Trial Success**

By Greg Krehel
22

**Computer Animation: The Litigator's
Legal Ally**

By Carole Cox-Korn
28

**Contempt of Court: A Lynching that
Sparked a Century of Federalism
in the U.S. Courts**

By Mark Curriden and Leroy Phillips
32

LEGAL ARTICLES

**The Defense Attorney's Ethical Response
to Ineffective Assistance of Counsel Claims**

By Michael Mears
40

Compulsory Cross-Claims?

By Luke A. Kill
48

**Premises Liability for Criminal Attacks:
Same Crimes, New Law**

By Gilbert H. Deitch
54



FEATURES

**Board of Governors Convenes in Amelia
Island for Summer Meeting**

By Jennifer M. Davis
60

**ABA Honors Georgians During 1999
Annual Meeting in Atlanta**

64

**NCCUSL Adopts Uniform Computer
Information Transaction Act**

67

DEPARTMENTS

From The President

What Have You Done for You Lately?

By Rudolph N. Patterson
6

From The Director

The Winds of Change Continue to Blow

By Cliff Brashier
7

From the YLD President

Another Chance For YLD to Take a Bow

By Joseph W. Dent
68

Section News

69

Who's Where

70

From the Attorney General

71

Book Reviews

The Trial Lawyer's Art

Reviewed by Robyn Ice Sosebee
72

Professionalism

GSU Holds Professionalism Orientation

By Nikki Hettinger
74

In Memoriam

76

Georgia Trial Reporter

77

Bench & Bar

78

Law School News

79

Lawyer Discipline

80

Law Practice Management

Still Not Networked? Why Not?

By Terri Olson
82

Lawyer Assistance Program

83

Notices

Motion to Amend State Bar Rules

Proposed Superior Court Rules Changes

Proposed Formal Advisory Opinions

Board of Governors Meeting Attendance

Financial Institutions Approved as
Depositories for Attorney Trust Accounts

84

CLE Calendar

95

Classifieds

98

WHAT HAVE YOU DONE FOR YOU LATELY?



By Rudolph N. Patterson

"Remember that my boy," he rested his hand on my shoulder. "The wood with which we work has strength, it has beauty, it has resilience! If it is treated well, it will last many, many years! If you build, build well. No job must be slackly done, no good material used badly. There is beauty in building, but build to last, so that generations yet to come will see the pride with which you worked."

— Louis L'Amour, *Rivers West*

Louis L'Amour, one of the most prolific writers of the 20th century, wove wisdom into every western he created. Life lessons we can all learn from. In the excerpt above, he explains the importance of using your gifts to build a better, stronger world around you. We are all living a temporal existence. We are only as good as the impact we make on the lives of others in our short time here. As America's storyteller exhorts, we must "build to last."

Many of you have risen to this challenge and are involved in the daily service of others. In the last issue, you read about a number of the lawyers who received awards for their commitment to improving our communities locally and nationally. Reading about and watching these exceptional lawyers collect their accolades at the State Bar Annual Meeting was truly inspirational. However, this was only

the "tip of the iceberg."

Following that experience, I was invited to attend the Georgia Indigent Defense Council's (GIDC) annual awards ceremony that honored three outstanding individuals. Supreme Court Justice Norman Fletcher was presented the Harold G. Clarke Equal Justice Award, in recognition of his long-term commitment to the ensuring equal justice for all Georgians. Judge Glenda Hatchett, who recently retired as Chief Judge of the Fulton County Juvenile Court, received the Gideon's Trumpet Award for being a strong and vocal advocate of juvenile justice-recognizing the need for early intervention to steer young offenders onto a constructive course. Finally, the Legal Aid Clinic of Athens and its Director, Russell Gabriel, were honored for their innovative approach to giving Georgia's poorest citizens effective representation in criminal and juvenile cases.

Only a couple of months after the GIDC ceremony, the American Bar Association descended on Atlanta for its Annual Meeting in August. What unfolded in the course of the convention was a testament to the good work lawyers are doing throughout America, and no more so than here in Georgia.

For when the ABA finally adjourned, 15 lawyers, judges and law firms from our great state had received awards applauding their extraordinary talents and leadership. In fact, there were so many who garnered awards, that it is too much information to include in my column — so we've devoted an article on page 64 to detail their accomplishments.

Among those honored was Supreme Court Justice Carol Hunstein

who received the Margaret Brent Award in recognition of her triumph over tremendous personal obstacles to become a leader and visionary for women in the profession. She is a perfect example for all of us as to how we can take our own talents and use them to rise above our hardships or perceived station in life. Also Judge Phyllis Kravitch and Judge Dorothy Beasley were honored with separate awards applauding their accomplishments and the trails they have blazed for women in the justice system throughout their exemplary careers.

As I have traveled and spoken at various meetings in the last three months, the silence about what lawyers are doing for their communities is almost deafening. The local news media of all types is either not aware of or chooses not to acknowledge the tremendous amount of time and energy Georgia lawyers are giving to their local communities. The other great thing about our actions is that it is not limited to "areas of practice." Lawyers in every field of law — whether they are in private practice, corporate, government or inactive — are working daily for their communities free of charge. The next time you volunteer to help someone or do something in your community, check and see what other professions are represented.

Even with so many Georgia lawyers being praised for their work by the State Bar and ABA, there are thousands more unsung heroes who are working every day to build an improved tomorrow for future generations. Each of us should follow their example, and discover the "beauty in building."

One thing is for sure. William A. Bennett was not thinking of Georgia lawyers when he wrote in *The Book of Virtues: A Treasury of Great Moral Stories*: "The world would sleep if things were run ... By men (women) who say, 'It can't be done.'" ■

THE WINDS OF CHANGE CONTINUE TO BLOW



By Cliff Brashier

Among my earliest memories of the medical profession are house calls by our family doctor when I was sick. I especially recall being on the patient side of ether when I had my tonsils removed at age 5. I would guess that any of you who ever had ether will understand why it was memorable. In those days my parents, who had a very modest income and no medical insurance, could actually pay the doctor and the hospital for their services. If my doctor were alive today, he would no doubt be amazed with the changes in his practice and his profession. Some, like the demise of ether, are wonderful, but some, like the independence he enjoyed, he would find most disturbing.

If YLD President Joe Dent reads the foregoing paragraph, he will probably reject my pending application for membership in the Young Lawyers Division. But the reason for admitting those memories that are not shared by any young lawyer is to suggest that the legal profession may now be going down the same path doctors did in the past few decades. Now many doctors wonder how they got to where they are today.

Similarly, lawyers are facing potential changes to the profession. Multidisciplinary practice (MDP) is a

fee sharing partnership or business arrangement between lawyers and non-lawyers to provide legal or other professional services and perhaps products to the public.

It exists today as a sanctioned practice in Europe and most other countries worldwide. But it also exists today in the United States in an unsanctioned way in the form of business consulting services that

Multidisciplinary Practice Committee

Linda A. Klein, Chair
Anthony B. Askew, Vice Chair

Members & Advisors

Walter A. Brill	Mary Celeste Pickron
Raymond P. Carpenter	Bryndis W. Roberts
Bruce P. Cohen	Huey W. Spearman
Allison P. Coplein	Kathleen V. Spencer
Roxanne Douglas	W. Brooks Stillwell III
Paula J. Frederick	John Michael Tanzine III
Janice C. Griffith	Lizanne Thomas
Ben F. Johnson III	George R. Reinhardt Jr.
Joia M. Johnson	Hon. Kathy Ashe
Ralph B. Levy	Hon. Carol W.
Morris W. Macey	Hunstein
Patrise M. Perkins-Hooker	William P. Smith III

cover many areas of the practice of law — except perhaps the formal appearance as counsel of record in most litigation. National and regional accounting firms are the largest employers of recent law school graduates and they are being hired not as auditors but as business consultants.

During the 1999 Annual Meeting of the American Bar Association which was held in Atlanta, MDP was by far the most discussed issue. State Bars in all 50 states are so concerned

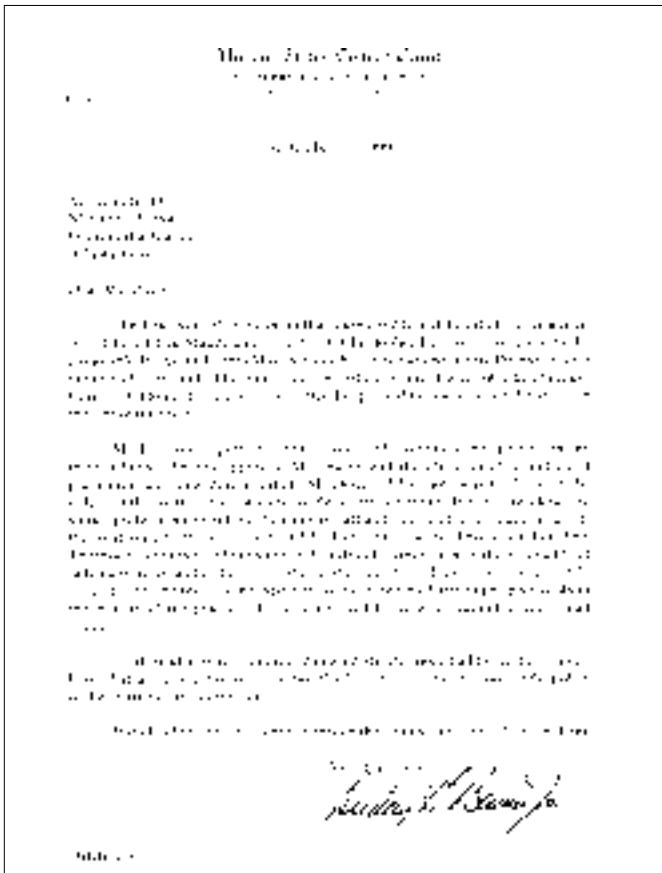
that many of their presidents consider it to be the most important issue they have encountered during their careers as lawyers.

Within the State Bar of Georgia, the Board of Governors is receiving extensive information on MDP and will make the final decisions on our Bar's answer to this critically important issue. The Board will be greatly assisted by the study and recommendations of the Multidisciplinary Practice Committee whose members are listed in the box at left.

Any expertise and advice you may have are welcome. Please contact the members of this committee and your representatives on the Board of Governors with any counsel you may wish to share.

I have thought much about what the practice of law will be like when our newest lawyers reach retirement age. Will they be partners in traditional firms that offer only law services? Or will they be employees in professional services providers that offer one stop shopping for accounting, architecture, construction, finance, insurance, health care, personnel, litigation and legal advice, and virtually any other services that are marketable? Will the current rules against fee sharing with non-lawyers, conflicts of interest, and attorney/client confidentiality be gone?

I'm afraid that hindsight is easier than foresight. I do not know the answer to any of these questions. I even doubt the final answers will be fully known during my lifetime. But I do strongly feel the winds of change. ☐



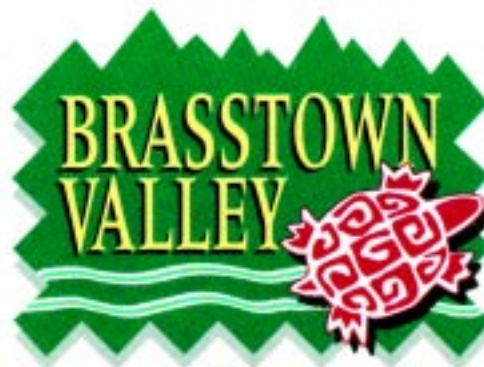
20 Years of Service



Sharon L. Bryant, second from right, Chief Operating Officer of the State Bar, was recognized for 20 years of service to the Bar. Pictured with her are (l-r) Bar President Rudolph Patterson, Past President Linda Klein and Executive Director Cliff Brashier.

DON'T MISS

THE FALL MEETING



Georgia's Mountain Resort

November 12-14, 1999

Mark your calendar now to attend the 1999 Fall Meeting. Join your colleagues at this spectacular mountain resort for fun and an array of activities. Make your reservations by calling Brasstown Valley Resort directly at (800) 201-3205. Be sure to say you are attending the Fall Meeting. The room rate is \$135 single/double occupancy. To register for the meeting, contact Eddie Potter at (404) 527-8790.

BUILD A SOLID OPENING STATEMENT AND CLOSING ARGUMENT

Beginning and Ending

By Carrie L. Christie

Most attorneys agree that the opening statement and closing argument are essential to the success of your case. The former sets the tone for your case — previewing for the jury what you will seek to prove in the course of trial. The closing argument summarizes the key points and is the last chance to convince the jury to render a verdict favorable to your client.

I. Opening Statement: Get Off on the Right Foot

A. What You Need to Accomplish

Voir dire is the first opportunity for an attorney to present herself, her client and her case to the jury; opening statement is the second opportunity. Attorneys should use opening statements to engage members of the jury and persuade them that the client has been treated unfairly and, therefore, deserves a favorable verdict. Attorneys

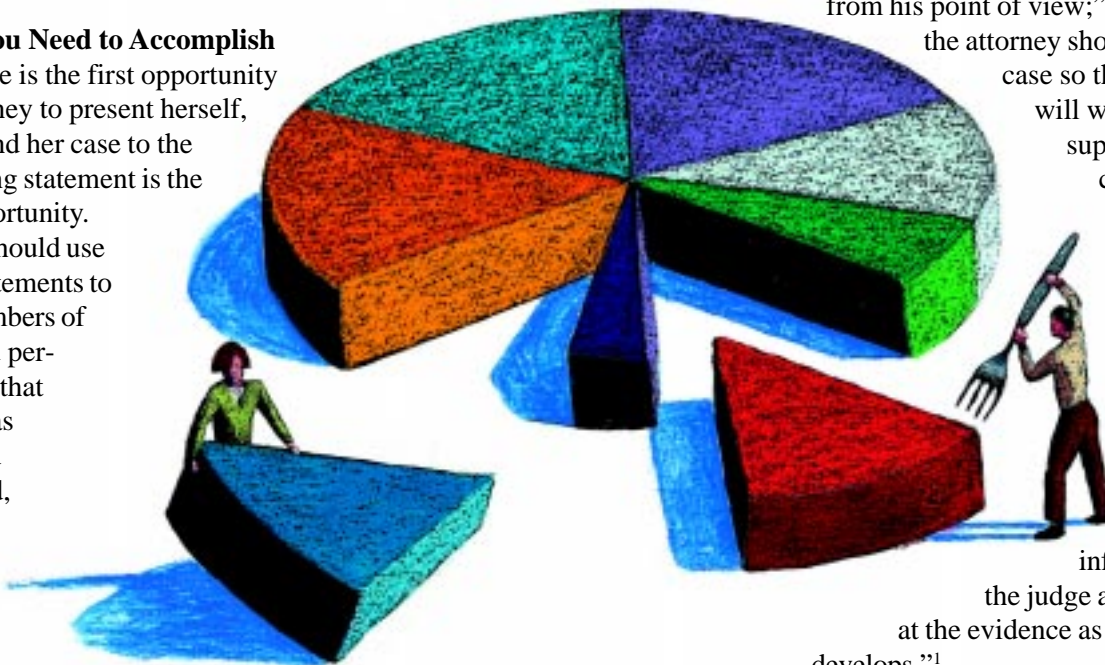
should educate the jury about the facts of the case and the applicable law, explaining that, when the two are combined, a favorable verdict is required. Most importantly, attorneys should use opening statements to repeatedly state their theory of the case.

James W. McElhaney established a set of goals for opening statements; (1) comprehension: “the jury should understand what the case is all about;” (2) credibility: the attorney must show that she is a “credible source of information and ideas and is worthy of being trusted and followed;” (3) identification: the jury should “identify with the client, so they will look at the issues

from his point of view;” (4) support: the attorney should present the case so that the jury will want the facts to support her client’s case;

(5) impact: “the opening statement should make a strong enough impression that it will

influence how the judge and jury look at the evidence as the case develops.”¹



Research shows that jurors decide who should win a case during the opening statements. Therefore, presenting a credible, persuasive opening statement is essential to a successful case.

B. Preparation

Preparation is the key to an effective opening statement. Prior to preparing the statement, an attorney must determine her theory of the case, as well as what evidence is needed to support that theory. Otherwise, the opening statement will sound like a rambling, non-cohesive series of facts and allegations, and the jury will have a difficult time following the case throughout the trial.

When preparing for an opening statement as well as for a trial in general, the attorney must foresee all of the potential weaknesses in her case, since she can be sure opposing counsel will point them out during his opening statement. Furthermore, the attorney must anticipate all of her opponents' possible theories and arguments. As will be discussed later, sometimes it is beneficial to address and discount the opposing party's defenses in opening statements.

While it is important to rehearse an opening statement before trial, it is better not to rely on a written script. Scripts are boring for the jury and may lead them to think the attorney doesn't know her case very well. It is best to reduce the opening statement to outline format for easy reference. Then, the attorney can be sure no important points are omitted.

The following excerpt from an "Opening Statement Planning Worksheet" is a good checklist of things to consider when preparing an opening statement.²

- Case Theory
- Theme Words of Case
- Significant Issues
- Structure
- Introduction
- Significant Story Facts
- Event/Circumstances
- What/How/Why It Happened
- Parties/Witnesses
- References To the Law
- Visual Aids/Exhibits
- Requests For Verdict
- Conclusion
- Possible Objections Adversary May Make

C. Procedure

A party may waive its right to make an opening statement, but few do. Generally, the party with the burden of proof, most often the plaintiff or prosecutor, delivers the first

opening statement. When multiple parties are involved, the judge will determine the order of the opening statements.

The length of an opening statement will depend on the circumstances of the case. An opening statement should be long enough to explain the facts, but short enough to maintain the attention of the jury.

D. Content

Most attorneys agree that the best way to capture and maintain the jury's attention is to tell a compelling story. It should include three parts: the introduction, which grabs the jury's attention and immediately presents the theory of the case; the body, which tells the story, presents the evidence, and references the applicable law; and the conclusion, which states why the jury should reach a certain verdict.

When telling the story, the attorney should address her client in a manner that will personalize and humanize the latter, because it is important to establish a sympathetic jury from the very beginning. For example, the attorney should always refer to her client by name. An attorney should describe people and events in such a way that her client appears credible, while the opposing party does not. The attorney should also introduce any witnesses who will be testifying, then bolster or tear down their credibility as well.

The attorney must make several tactical decisions. For example, she may want to address the potential defenses of the opposing party, so that she can explain why that position is erroneous. Or, she might choose to present the weaknesses in her own case, in order to preempt and lessen the impact of opposing counsel's arguments.

E. Presentation

First and foremost, the attorney must appear confident and in control. She should maintain eye contact with members of the jury in order to hold their attention and also to convey to them her belief in the case. Body language is also of utmost importance. Slouching in a chair or leaning on the podium may jeopardize the attorney's credibility, and may imply she either isn't sure of what she is doing or just doesn't care.

The attorney should be aware of her voice patterns, avoiding monotonous tones. A varied speech pattern that includes rhythms, pauses, and inflection is preferable, and the narration should express emotions, but always in a controlled manner.

The attorney may want to include visual aids such as anatomical images, enlarged photographs, diagrams, charts, and three-dimensional objects in her opening statement. Items of this type may make it easier for the jury to understand a complex issue or visualize events that

are revealed during trial. Visuals can also help keep the jury alert during lengthy sessions, not to mention their reference value to the attorney, who can refer to the visual aids throughout the trial, then present them again during closing arguments to tie the evidence together.

F. Mistakes to Avoid

Although the attorney should present information she anticipates will be introduced during the trial, she should not refer to improper evidence in her opening. Improper evidence includes any evidence that will not be presented at trial, and any evidence that is not admissible at trial. If the jury is told certain evidence will be presented and it is not, the attorney will lose credibility. The attorney will also lose credibility if opposing counsel objects during her opening statement because she referred to inadmissible evidence — avoid this and plan accordingly. Never “promise” to present a particular piece of evidence, because if it is not tendered later on, for whatever reason, jurors may question the lawyer’s standing.

The attorney may not make arguments during opening statement. Opening statement is merely an opportunity to present the case and evidence that supports the case. Arguments should be reserved for the end of the trial.

Furthermore, the attorney should not make statements regarding her personal beliefs or opinions of the case or parties, avoiding such phrases as “I think,” “I believe,” “it seems to me,” and “in my opinion.” Legal jargon is another thing to avoid. Instead, the attorney should use everyday language and common-sense terms to explain the applicable law.

An attorney should never place jurors in the position of the parties. For example, an attorney should not say, “How would you feel if your child had just been murdered?” And, the attorney should not speculate regarding the opposing party’s case. The defense has no obligation to prove anything, so it is improper to speculate about what its case may involve. In fact, this kind of behavior is usually considered argumentative and, therefore, improper. Finally, the attorney should avoid making disparaging remarks about the opposing party or opposing counsel, as this will only cause the attorney to appear petty and demeaning.

II. The Importance of Closing

While the opening statement is critical to set the jury on the path toward a decision for your side, the closing argument is your last chance to convince them. Despite instructions by the court and our beliefs about the justice system, jurors often decide which party should win in the

early stages of a trial. There are many trials, however, where jurors can be persuaded toward our client’s case in closing. Due to the fact that an attorney will not know which case is “his,” he must enter into every closing argument as if it were his last chance to convince a still-undecided jury that his side should prevail.

A good attorney will subtly “argue” during voir dire, during opening statements, and during witness examinations. The first opportunity to openly argue your case, however, is during closing arguments. The primary purpose of the closing argument is to present all of the evidence supporting your case in a compelling and convincing manner to the jury. Closing arguments also draw reasonable inferences and conclusions from the evidence and explain the law. Most importantly, you must convince the jury that a verdict in favor of your client is fair and just.

A. Procedure

The party with the burden of proof usually has the right to open and close the final arguments. Most often, the plaintiff/prosecutor presents the first closing argument and has the option of rebuttal. There is a distinct advantage to having the first *and* last word — most attorneys agree that a jury more easily accepts the first argument presented and will most likely remember the last argument heard before deliberations begin.

A rebuttal should attack some, but not all, of the arguments of the defense. Attorneys should always check the local rules of the court, because not all jurisdictions allow rebuttal. Although closing is limited to one hour under the Superior Court Rules, many judges will attempt to limit counsel’s closing. Above all, determine the length of your argument by weighing the demands of the evidence against the attention span of the jurors.

The court has discretion to determine the length of the arguments, but frequently, the trial itself sets the time limits. For example, the closing argument for a complicated patent case will most likely take longer than the closing argument for a shoplifting trial. Length will sometimes depend on the number of witnesses and the amount of documentary evidence. Other factors which influence the length of a closing argument are the amount of money involved, or the gravity of the conduct or offense. Always keep in mind that jurors serving on a prolonged trial are usually tired and may lose interest during a lengthy closing argument.

When multiple parties are involved, the court has the discretion to determine the order of closing arguments. If several attorneys are representing one party, the trial court has the authority to limit the number of attorneys who participate in closing arguments. When a case involves distinct, complex issues, it may be wise for the attorney

concentrating in that area to deliver part of the closing. Using more than one attorney, however, should be the exception rather than the rule, since this technique will lengthen the duration of the argument and lessen each attorney's opportunity to establish a rapport with the jury. Attorneys should also behave courteously and professionally, objecting only when absolutely necessary. But while objections during closing arguments should be limited, remember that issues are waived on appeal, if a timely objection is not made.

B. Content

Think about your closing argument when you first review a new case. Your initial gut reaction will often be the same as that of the jury. Good closing arguments will also come to you while you review discovery responses and attend depositions. Take notes and jot down ideas in a trial notebook when they occur to you. Take notes throughout the trial process, and your closing argument will almost write itself. Additionally, pay attention to jurors during the trial. Their reactions to testimony will provide valuable insight and may tell you what the focus of the closing argument should be.

The manner in which you present evidence and arguments during closing is a matter of personal style. Below are some elements lawyers find helpful in the preparation of a closing argument:

1. Believable Story

- a. Identify reasons why your client's version of the facts ought to be believed.
- b. Use personal analogies or common-sense explanations to support the facts.
- c. Rely on favorable jury instructions.

2. Credibility of Witness

- a. Describe both the favorable and unfavorable demeanor of a witness.
- b. Refer to critical exhibits introduced through witnesses.
- c. Rely on corroborating testimony or exhibits.
- d. Use jury instructions that support the credibility of the witness.

3. Reasonable Inferences

- a. Summarize favorable testimony.
- b. Identify supportive physical and documentary evidence, and lay and expert opinions.
- c. Rely on favorable jury instructions.
- d. Employ a supporting analogy or anecdote.

4. Application of Law to Facts

- a. Reasonably interpret the law.
- b. Specifically apply elements of the legal standard to the evidence.

You should consider the emotional aspects of your case. Identify the weaknesses of the opposing side and review the testimony of the opposing side's witnesses, looking for inaccuracies and bias. Determine whether the opposing party has met its burden of proof and whether it failed to prove certain facts or failed to keep promises made during opening statements. Additionally, identify what facts are

disputed versus those that are undisputed. Finally, determine what verdict you intend to request and whether the evidence presented supports that verdict.

Simplify the case as much as possible and remove extraneous evidence from the closing. Rewrite, rewrite, and rewrite your closing. Juries want easy answers, so make the issues appear uncomplicated.

Appeal to the jury's intellect, emotion, common sense, and human nature by making your case appear reasonable and probable.

Although some attorneys begin their closing arguments by thanking the jury for their time and patience and stressing the importance of jury duty and the justice system, remember that the jurors are tired and sometimes bored, so the opening lines should set a dramatic tone and grab the jury's attention. Consider beginning with a powerful statement regarding your theory of the case or the main issue involved.

Generally, your closing should be organized chronologically — by witnesses, by issues, or by claims or defenses. While it is important to summarize the evidence presented, remember that the jurors have heard all of the evidence and do not want you to review the entire trial. Present the primary source of favorable evidence, then list all of the corroborating evidence. You can also take the sting out of your opponent's argument by discussing evidence that undermines her case.

Tell the jury what issues it must decide and set parameters for the verdict. For example, plaintiffs' attorneys may want to give the jury an amount that the plaintiff is seeking, but should not ask for too much or they will jeopardize their credibility. They should justify what they are asking for by detailing the specific amount for each damage sought and the basis for any calculations. All attorneys should show that the verdict and damages sought

A jury is usually made up of 12 very different people, and compromise is usually an important part of their deliberations, so it is paramount to give the jury options.

are reasonable and fair to the other side. Both sides should give the jury choices. A jury is usually made up of 12 very different people, and compromise is usually an important part of their deliberations, so it is paramount to give the jury options.

C. Presentation

First and foremost, *relax*—it will help you appear confident and in control. Maintain eye contact with the jury in order to hold their attention and impart upon them your belief in your case and your client.

Be aware of your body language in relation to the particular jury you have chosen. Slouching in a chair or leaning on the podium may indicate a lack of respect for the jury or their opinion. On the other hand, uptight or formal behavior may make you appear detached. Treat the jury as you would a respected member of your family . . . close, but not chummy.

Rehearse your closing so that you are familiar with the issues you will be arguing, and keep succinct notes to reference in the event you become distracted. Avoid scripts or reading your closing — it is boring for the jury.

Use visual aids such as anatomical images, enlarged photographs, diagrams, charts and three-dimensional objects. Visuals may help the jury understand a complex issue or visualize the events referenced during trial. These aids can also act as an outline and can tie together the evidence that has been presented to the jury. *Always* review your visual aids before closing, making sure that all the information contained was, in fact, *admitted into evidence*. As a practical matter, make sure the visual aids are large enough for easy viewing by the jury. Also, avoid writing on boards, as this can be cumbersome and distracting to the jury. Your visual aids don't need to be "slick," just eye-catching, for example:

- ♦ an enlarged photo of the damage, or lack thereof, to a vehicle;
- ♦ blowup of contradictory deposition testimony;
- ♦ overlays of expert testimony and physical evidence;
- ♦ models of cars, human skeletons, construction and product defects, etc.;
- ♦ a breakdown of lost wages, future medical expenses, loss of profits, etc.

Be yourself . . . with some restraint. If you feel comfortable telling a personal story, joke, or quote, do so. Avoid sarcasm, though, and condescension. Wear what you feel comfortable in, but be careful not to overdress or underdress for a particular venue.

D. Common Mistakes

Be careful to exclude objectionable material in the closing argument, primarily because it may be grounds for

a new trial. Objections by opposing counsel to such material will interrupt the flow of the closing argument, will distract the jury, and will cause the jury to lose confidence in you. Avoid the following:

Arguing new matters. Do not refer to facts that have not been presented by witness testimony or documentary evidence, and do not refer to evidence that the judge ruled inadmissible.

Misstating evidence. Watch for evidence that was admitted for a limited purpose, and ensure that you comply with the judge's rulings.

Improper legal argument. Do not refer to laws which are not involved, and accurately explain the laws that are involved.

Improper personal argument. Do not openly express your personal opinions regarding the credibility of witnesses or the strength of the opponent's case. This simply means that you should not use the words "I believe" or "I think."

Golden rule. Do not ask jurors to put themselves in the position of one of the litigants or victims, or to grant a party the recovery they would want if they were in the same position. This is called the Golden Rule because attorneys are not permitted to ask the jury to "do unto the parties as you would want done unto you."

Final Thoughts

An opening statement is really the jury's first opportunity to form a preliminary opinion about a verdict, while the closing argument is your last chance to convince the jury that a verdict in your client's favor is not only appropriate, but also required. A wise attorney will prepare thoroughly for both to ensure that her case is conveyed in a thought-provoking and positive manner. The beginning and ending of the trial must, above all, be interesting, clear, easy to follow, and memorable. ☒

Carrie L. Christie is a partner with the law firm of Christie, Toreno & Hatcher LLP in Atlanta. She received her law degree from Georgia State College of Law in 1989, and was an associate editor of the Georgia State Law Review. She has been a frequent lecturer at CLE seminars sponsored by the Bar's General Practice & Trial Section.

Endnotes

1. JAMES W. McELHANEY, McELHANEY'S TRIAL NOTEBOOK 22-25 (1994).
2. ROGER HAYDOCK AND JOHN SONSTENG, TRIAL: THEORIES, TACTICS, AND TECHNIQUES 19-21 (1991).

West (Introducing New) new BW

Nextel new BW

FINDING THE BOTTOM OF THE BOTTOMLESS PIT

Cross-Examining

Witnesses

The great legal scholar John Wigmore wrote in his treatise On Evidence that ‘cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth. A lawyer can do anything with a cross-examination . . . He may, it is true, do more than he ought to do; he may make the truth appear like falsehood.’ The truth?’ Facher said, smiling, one day after court. “The truth is at the bottom of a bottomless pit.”

— A Civil Action, Jonathan Harr, p. 340.

It is the privilege of Counsel, and the duty of the Courts, to strip reluctant witnesses of these miserable subterfuges to conceal the truth.

— Kelly v. State, 19 Ga. 425,426 (1856).

By S. Lester Tate III

Time was running out for Susanna in Babylon 500 years before the Christian era. Susanna, the wife of Joacim, was “a very beautiful and devout woman.” But she found herself in a bit of trouble. Two elders, attracted by her great beauty, made advances on her. She rebuffed their attention and, in retaliation, they accused her of adultery, a crime punishable by death. “As we were walking alone in the garden,” they said, “this woman came in with two maids. She shut the garden doors, and dismissed her maids. Then a young man, who had been hiding, came and lay down with her.” The elders testified that they saw this while they “stood in the corner of the garden.”

Susanna, obviously, needed a hero. Faced with the testimony of two allegedly upright and honest men, she would surely be put to death. And what better hero to come to her rescue than Daniel. Daniel, you will remember, had quite a bit of experience fending off lions, but how would he deal with these unscrupulous liars?

First, Daniel ordered that the two elders be separated, so that he might examine each individually and apart from each other. Then, to the first elder he put the question, “Now then, if you saw this woman, tell us under what tree did you see them together?” The elder answered “under a clove tree.” Daniel then called his second witness, the other elder. To him he put the same question. This witness answered “under a yen tree.”

Hearing this, those assembled were incensed and “they turned on the two elders, for out of their own mouths Daniel had convicted them of false evidence, they dealt with them according to the law of Moses and put them to death, as they in their wickedness had tried to do to their neighbor and so an innocent life was saved that day.”¹

The story of Daniel and Susanna is illustrative of how cross-examination can be used to expose the truth. As lawyers, we know that this is not the only use of cross-examination. Some of us, at times, have felt like the English barrister, Mr. Furnival, in Anthony Trollope’s *Orley Farm*.

And yet, as he sat down, he knew she had been guilty! That those witnesses had spoken truth he also knew, and yet, he had been able to hold them up to the execration of all around them, as though they had committed the worst of crimes from the foulest of motives! And more than this, stranger than this, worse than this, when the legal world knew — as the legal world soon did know — that all this had been so, the legal world found no fault with Mr. Furnival, conceiving that he had done his duty by his client in a manner becoming an English barrister and an English gentleman.²

I. Preparation of Cross-Examination

It has long been debated whether cross-examination is an art or a science. If it is an art, the implication is that some people are naturally talented and excel at it, while others who lack such talent are deficient. If it is a science, then we assume that any reasonably intelligent person applying the given formulas can obtain a good result, despite the fact that they have no natural talent in this area. In truth, cross-examination is probably a mixture of the two. Accordingly, preparation for cross-examination takes two forms.

First, let us consider the artistic side of cross-examination. To be sure, some people are born with a natural talent, which enables them to be better cross-examiners. On the other hand, even those who have no natural-born talent can develop the ability to cross-examine witnesses effectively through repeated practice of the art. For this reason, much of the preparation for cross-examination in a case is general, rather than specific. It consists of taking every opportunity to practice and exercise your cross-examination skills in any case. If you practice the art over time, then you will learn for yourself many things which books and formulas can never teach. Accordingly, the axiom that “practice makes perfect” applies itself very well to the skill of cross-examination.

The “science” side of cross-examination is more methodical and specific to the case. It requires a thorough knowledge of the case, the development of a theory of the case, and the laborious task of obtaining

and reviewing depositions and documents before the case is tried. It also involves the preparation which occurs in the moment before cross-examination begins, namely listening precisely to what the witness says on direct examination.

A. Pretrial Preparation of Cross-Examination.

At this pretrial stage, the lawyer should concentrate on gathering and reviewing all documents that may provide fodder for cross-examination. These usually take the form of statements made by the witness or witnesses in one of the following forms:

1. Conversations or discussions with other individuals;
2. Letters or memoranda prepared by the witness or others;
3. Pleadings in the case (particularly if the pleadings are verified); and
4. Deposition or similar sworn statements obtained at the pretrial stage.

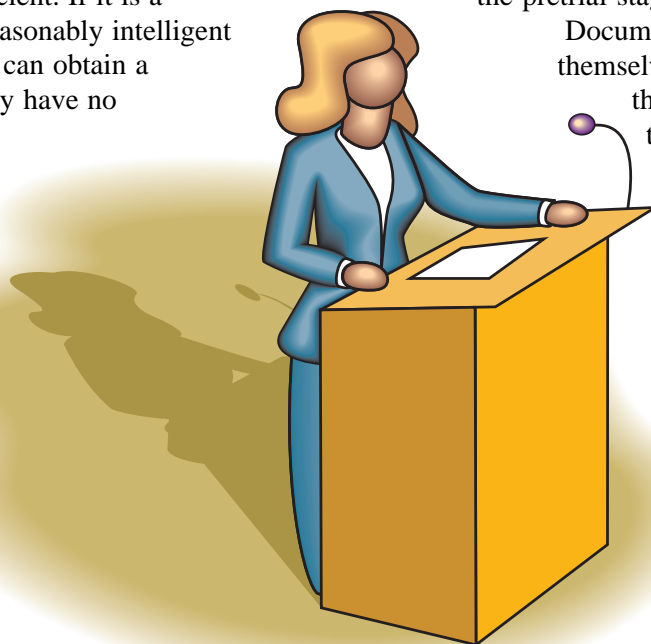
Documents usually “speak for themselves” and do not require that the lawyer do anything other than obtain them and review them. Depositions and witness interviews, however, require greater care by the lawyer and, on these two issues, I would offer the following suggestions:

a. *Depositions.*

Today, lawyers often seem to think it worthwhile to be hostile and combative in depositions. They rant and rave at both the witness and the lawyers for the other side. Not only is this type of acrimonious behavior unpleasant, I have also found it is unproductive. Witnesses who feel like they are being cross-examined are much less likely to reveal what they actually know about the case. My own approach has always been to be as kind and low key as possible in a deposition, so that the witness will tell me more. Indeed, at times, witnesses have even seemed to make concessions solely in return for my civility toward them.

b. *Interviews.*

Witness interviews can also be a very valuable tool. My suggestion in this area is that you follow the same tact as that suggested for depositions. Also, always



be sure to have a third person present during the interview who can testify as to what the witness actually said. This makes it very difficult for the witness to credibly change his story at trial.

B. Preparation for Cross-Examination at Trial

Preparation for cross-examination does not end until the witness finishes his direct testimony. Indeed, some of the most important information is gathered during direct examination. The effective cross-examiner will do three things during the witness' direct testimony: (1) listen carefully to everything the witness has to say; (2) note briefly everything the witness says that is beneficial to his case; and (3) note everything the witness says that is contrary to other witnesses, documents, or depositions. When the witness testifies before a jury, he or she is writing the story on a clean slate. The jury does not know what this witness said during a four-hour deposition two years ago. Virtually everything said by a witness will fall into one of three categories. It either helps the case, hurts the case, or is largely irrelevant to the case. By categorizing the testimony during direct, you can be prepared to accentuate the positive, attack the negative, and ignore the irrelevant.

II. Method of Cross-Examination

By the time the witness completes direct examination, the cross-examiner should basically have three things before him. First, he should have a summary of what the witness has said prior to trial, either in other documents or depositions. This summary should contain quick and ready references to relevant statements that the witness has made. To do this, I usually take the witness' deposition (if he has given one) and a legal pad and read through the deposition, making notes as to what the witness has said, and on what page and line of the deposition the statement appears. Some lawyers prefer to have a legal assistant prepare these summaries. Either way, the lawyer has the opportunity to quickly lay hands on the source of any contradictory statement the witness has made. This is important, because you won't actually know what the witness is going to say until he is on the stand.

Second, the lawyer should have before him a list of all the things the witness has said on direct examination that are helpful to his case. I suggest the notes be as close to

verbatim as possible, so they can be read back to the witness on cross-examination. "Mr. Witness," you may say, "on direct examination I wrote down that you said . . . is that correct?" This has two effects. It gives the jury a second chance to hear the testimony, and it emphasizes the importance of the testimony to the jury.

Third, the lawyer should have a list of any contradictory statements that the witness has made on direct examination. Using the deposition or document summaries, the lawyer can then note beside the direct examination where the witness has contradicted himself in prior documents. Be sure,

however, that in preparing any of these lists, you don't become so consumed with note taking that you forget to hear what the witness is saying. Jurors will almost always empathize more with a witness than with the lawyer. After all, they can more readily envision themselves being summoned into court to testify than being required to try a case.

Accordingly, I believe it is of the utmost importance to at least begin your cross-examination in a courteous manner. I always start by saying, "Mr. Witness, my name is Lester Tate, we met before at your deposition and, as you know, I represent the plaintiff . . ." This appears courteous to the jury and, if you have been courteous to the witness during the deposition, it leads him to believe that this will simply be more of the same.

Following this brief exchange of pleasantries, it is usually best to begin by getting the witness to repeat whatever favorable admissions he has made on direct examination. There may be other favorable admissions, which he made in a deposition, or prior document that he did not testify to on direct examination. If so, then these should be brought out at this time, too.

After you have extracted all of the favorable material from the witness, it is then time to present any contradictions in the testimony. This can usually be very effectively done by first getting the witness to repeat the statement he or she made on direct, closing off all avenues of retreat, and then presenting the prior inconsistent statements. Try to utilize the principles of "primacy" and "recency" by both beginning with an important contradiction and stopping after one which is equally damning.

Aside from this general outline, the following tips may be helpful:

1. If there are no inconsistencies between direct examination and the plaintiff's pretrial testimony, then

Jurors will almost always empathize more with a witness than with the lawyer. After all, they can more readily envision themselves being summoned into court to testify than being required to try a case.

don't be afraid to "feel around" for inconsistencies by getting the witness to repeat non-damaging testimony. Sometimes, when the witness repeats his testimony, he will become confused and display a crack in his armor. The caveat to this is that many cross-examiners get the witness to repeat the damaging testimony, and this does absolutely no good at all. Indeed, it is counter-productive because it re-emphasizes the damaging testimony in the jury's mind.

2. Try to avoid beginning questions with the phrase "Isn't it true . . ." Certainly most, if not all, questions asked on cross-examination should be leading questions. But I have always found the question "isn't it true" to be very confusing — does "yes" mean "yes, it is not true" or "yes, it is true." It is often better to simply make a statement, then follow it with a short declarative question, such as "is that correct?" For example, "You admit that you ran the red light. Is that correct?"

3. When you present the witness with prior inconsistent statements, make the witness, himself, utter the prior statement. For example, "Mr. Witness, you will recall that on line 2 of page 35 of your deposition, which you now have before you, I asked you the question 'have you ever been arrested?', and what was your answer?" By making the witness read the prior inconsistent statement himself, the jury hears two different answers from the witness'

own mouth and it is generally believed to be more effective. The caveat here is that you should always ask the witness on deposition whether or not they can read. If they can't, this is likely to be awkward.

4. When there is no satisfactory explanation for inconsistencies in the witness' testimony, don't be afraid to ask the question, "Why?" To be sure, this question can sometimes lead to an explanation that you don't want to hear. But, more times than not, if you have planned your cross-examination correctly, it has the effect of leaving the witness sitting on the witness stand, staring off into space with no plausible explanation. For example, "Officer, you interviewed the alleged victim and the defendant, but you didn't record my client's statement, why?"

5. When confronting a witness with impeachment material, take a little time to try to cut off all the avenues of retreat before presenting the witness with the document that shows him to be incorrect. This is commonly referred to as building a "box" around the witness. An excellent example of this is contained in Gerald M. Stern's book, *The Buffalo Creek Disaster*, where he describes the Mississippi voting rights trial in which a white man and his wife provided identical answers to a question asking for a statement of the duties and obligations of citizenship. The purpose of the cross-examination was to try to show that

West 1/2 page pickup 8/99 p73
4C

the whites were assisted in answering such questions, while African-Americans were not. Stern described the cross-examination by John Doar as follows:

John asked if he and his wife knew what the questions on the application form were going to be before they went to the registrar's office. "Of course not," he shot back, even though there was nothing wrong with knowing what was on the application.

"Well, did you and your wife ever discuss any of the possible questions which might be on the form before you went to the office?"

"Of course not."

"When you got to the office, did you and your wife stand near each other when you filled out the forms?"

"Of course not, we were more than ten feet apart from each other."

"Did you talk to each other at any time during the time when you were filling out the form?"

"Of course not."

"Have you and your wife talked about the answers you gave on the form since you filled out the form?"

"Of course not."

"Did you receive any help while you were filling out your form?"

"No."

"Did your wife receive any help?"

"No."

"Sir, let me now show you the application form which you filled out that day. Would you please read to the judges the answer you gave for the duties and obligations of citizenship."

The witness looked to his lawyers and then turned to the judges. It was too late now to try to explain. He couldn't say, "I learned about the duties and obligations of citizenship as a Boy Scout leader, and my wife helped me with the boys, so it is not surprising we gave identical answers." That wouldn't work now. John had boxed him in. So, with almost pained expression, the witness pleaded with the judges, "Must I read my answer?"

The judges said, "Yes, you must."

He then read the answer in a halting voice, no longer the bold, brave, arrogant witness. After he had read his statement, John applied the finishing touches. He asked him to read his wife's statement of the duties and obligations of citizenship. Again, "Must I?" The judges said he must. In a voice drained of all strength, the bluster all gone, the witness quietly and slowly read his wife's statement, a verbatim statement of his own. That was the end of the questioning.³

6. Remember that, sometimes, there are exceptions to the old rule that you should never ask a question on cross-examination you don't already know the answer to. For example, I once tried a murder case in which a rather unsavory-looking individual — a potential suspect — had been at the scene where the body was found. During cross-examination the witness, surprisingly, admitted to being a reformed drug addict, a fact that I did not previously know. From his appearance and demeanor, I strongly suspected he had also had some run-ins with the law, but I had no knowledge of prior convictions and certainly no certified copy of those convictions. Consequently, I asked him a question that could only help me, but not hurt me. The question was "You say you were a drug addict. What kind of problems did that cause you in your life?" If he answered none, I hardly thought the jury would believe it. Instead, and much to my delight, he answered, "Well, I spent a lot of time in jail."

7. When confronted with a witness you believe to be lying, try jumping him around in his story. Start him in the middle of it, then ask about something that happened at the beginning. Also, keep the questions coming at a rather rapid pace. This will prevent the witness from fabricating material to fill in the gaps and may well trip him up on his own story.

Conclusion

There is no rigid formula for cross-examination. To excel, one needs to practice the art on a regular basis. A good cross-examiner will always collect and thoroughly review all documents, statements, and depositions on which the witness has spoken, and listen carefully to the witness' testimony on direct examination. The cross-examiner can then seek to highlight all favorable testimony and inferences, and attack the witness with prior inconsistencies. ☒

S. Lester Tate III is a partner with Akin & Tate P.C. in Cartersville, Ga. He received his B.S. from Georgia Tech in 1982, and his J.D. from the University of South Carolina in 1987, where he was a member of the law review. Previously, he served as press secretary to then-U.S. Congressman Buddy Darden. Tate has been a member of the State Bar's Board of Governors since 1996, and currently serves as secretary/treasurer of the General Practice & Trial Section.



Endnotes

1. *The History of Susanna* 61 (from the Apocrypha).
2. THE QUOTABLE LAWYER, (David Shrager and Elizabeth Frost, eds.) 74 (1986) (quoting Anthony Trollope, ORLEY FARM, (1862)).
3. GERALD M. STERN, THE BUFFALO CREEK DISASTER, 133-34 (1977).

ANLIR_{new} BW

PUT IT ON PAPER TO CLARIFY FACTS, ORGANIZE CASE

Chronology: A Thinking Tool for Trial Success

By Greg Krehel

Chronologies help win cases. From the starting gate to the finish line, assembling case facts in an accessible format can put you on track to courtroom victory.

The advantages are numerous. Chronologies are thinking tools. The very act of getting facts down on paper or in your computer clarifies thinking and makes the story of the case clear. Chronologies help ensure complete discovery. Which facts are disputed? Which still need sources that will be acceptable in court? And a chronology is a communication aid. A good chronology makes it easy for everyone on the trial team to share case knowledge.

Chronologies can also be used in a myriad of concrete ways. Use them when preparing for depositions, when developing motions for summary judgment and pretrial motions, in settlement conferences, and during trial.

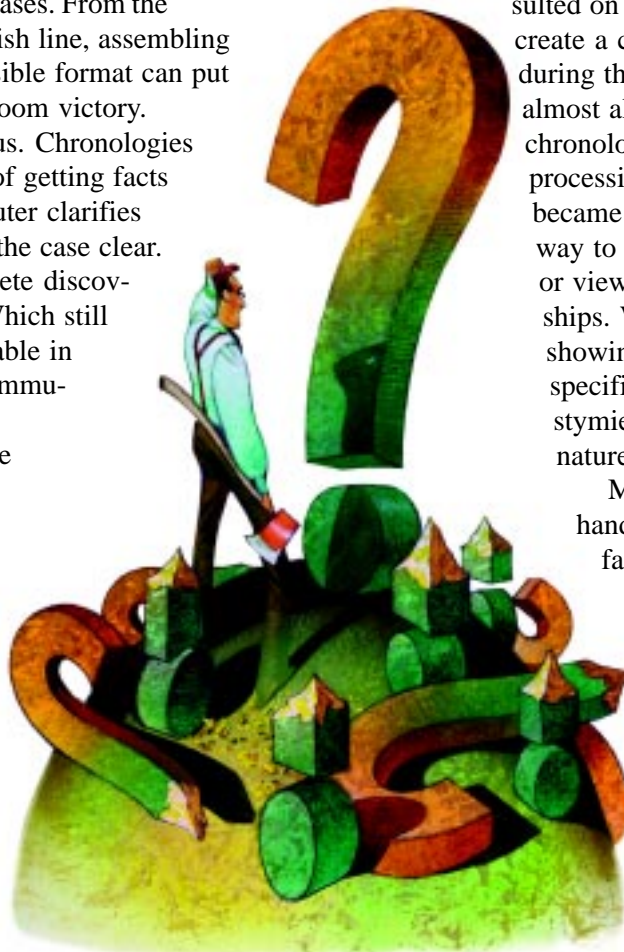
Despite such benefits, during 15 years of jury research work, I've con-

sulted on many cases where the effort to create a case chronology was abandoned during the discovery process. Why? In almost all these instances, work on the chronology ceased because the word-processing document containing it became an unwieldy epic. There was no way to isolate facts of particular interest or view them in meaningful relationships. When litigators needed reports showing just the facts relating to specific issues, for example, they were stymied because of the all or nothing nature of word-processing software.

Many litigators throw up their hands and attempt to memorize the facts or to jot them on legal pads.

But this strategy invites disaster.

Even the simplest of cases contains more facts than an attorney can keep in mind or organize meaningfully on paper. It's unrealistic to expect anyone to track notes scattered across many legal pads, much less to memorize 100 critical facts from each of 20 cases.



When an opponent is using modern technology to organize and explore case information, the litigator with a paper system is operating under a dangerous handicap.

Unfortunately, those litigators who do stick with the task of creating a chronology often end up with unsatisfactory results. Many times, they end up with a list of case documents, sorted by date. Well, a document index is certainly useful when you need to get a piece of paper pronto. But it's hardly a chronology of case facts. Still other trial teams focus on facts, not documents, but create chronologies that contain just two or three columns: date, fact, and (sometimes) source. These layouts are a start, but they fail to capture critical information about the facts, information that can make the chronology far more valuable.

What's the solution? In the course of conducting jury research work on more than 300 civil and criminal cases, I've had the chance to work with and compare hundreds of case chronologies. Based on this experience, I have developed the following set of chronology best practices.

Don't Wait

Start a chronology as soon as you hear from a client.

From your first conversation with a prospective client, you're gaining critical knowledge about the problem that led the individual or corporation to seek counsel. As such, you should begin to create the case chronology immediately upon returning from your first client meeting.

No matter how early you are in the case, and no matter how "small" the case may seem, as soon as your client has given you an overview of the dispute, you have been told more facts that you can easily memorize and manipulate in your head. And why even try? Your mind should be reserved for thinking, not memorization. Memorization is a job for your software.

If you start your chronology immediately, it can be used to good effect very early in the case. Take copies of the initial chronology to your second client meeting, and use them to clear up any misconceptions. Do the facts listed accurately reflect your client's understanding of the case? Can your client supply any missing dates? Can your client indicate which potential witnesses and what documents might be sources for these facts? Use the chronology also to focus your client on potential sins of omission. Is your client aware of any particularly favorable or unfavorable facts that don't appear in the chronology?

DB, Not WP

Use database software, not word-processing software to create your chronology.

In contrast to word-processing software, database software makes it easy to create and maintain your chronology. If you employ a multi-user database, several trial team members can simultaneously enter, edit, and explore the facts. Database software automatically sorts your facts into proper date order. It can automatically provide the day of the week for each date you enter, and allows you to enter information using "pick lists," saving input time and eliminating the inevitable misspellings that occur with manual entry. And a database package can also automatically stamp each fact with the name of the individual entering it and the date and time when the fact was entered.

While the data-entry advantages of database software are significant, its most important benefit is to make exploring your chronology far easier. When you print your word-processing chronology, your choices are essentially all or nothing. You print the entire chronology or you don't print it at all. Thus, as your word-processing chronology grows, it becomes increasingly unwieldy and diminishes in value.

In contrast, database software makes it easy to filter chronologies down to any subset of interest. Rather than printing a chronology that lists every case fact, print ones that contain just those facts that are particularly important, that bear on a particular case issue, that mention a particular witness, that are particularly good or bad, that come from a particular source document, or that others entered into the chronology while you were in trial on another matter.

List Facts, Not Documents

A document index doesn't pass muster as a fact chronology.

Many of the "chronologies" I've seen are really document indexes sorted by the date. While a document index is a great tool for managing documents, it is a poor substitute for a chronology of case facts.

Documents can be the subjects of facts (*e.g.*, "The contract was signed on 5/10/99."). And they can be sources of facts (*e.g.*, Internal Memo #2 is the source of fact "Construction of Hyde Memorial Hospital began on 08/02/99.") But documents are not facts in and of themselves. Therefore a document index, a listing of documents, does not pass muster as a fact chronology.

A document index organizes knowledge by document rather than by fact. This approach ends up concealing

facts rather than achieving the primary goal of a chronology — making case facts explicit. Documents, especially the important ones, are frequently the source of multiple facts. If the document chronology lists the name of the document, its author, recipients, etc., the facts it contains are never made clear. Including a summary of each document in the document index is not much of an improvement. Facts that may have occurred over a span of years are trapped in a single summary. It's up to you to read all the summaries and somehow pull the facts described in them into the proper chronological order.

Here's the solution: Read each document and cull the critical facts from it. Enter these facts as a series of discrete items in your chronology. For each fact sourced from a document, enter the document's name or starting Bates # in the chronology's Source(s) column. Consider entering a page and line reference also.

When you take this approach, the facts found in each document will be listed at the proper point in the overall story of the case, rather than being trapped within a document summary. And anytime you want to get a summary of the facts found in a particular document, you can quickly filter the chronology down to facts coming from that source.

Define Fact Broadly

Include prospective facts and disputed facts in your chronology.

Some chronologies exclude facts for which a court-acceptable source has yet to be developed. Others exclude facts that are disputed. Both tactics are a mistake.

If you don't enter a fact into your chronology because it's disputed or because you have yet to develop a court-acceptable source for it, what's the result? First, you're turning yourself from a thinker of immeasurable value into a \$100 disk drive. You end up having to memorize all of these prospective facts. Second, you're losing an important benefit of your chronology — helping focus your discovery efforts. Facts without court-acceptable sources are opportunities. Capture these potential facts in your chronology, and brainstorm about the witnesses and documents that might prove to be sources. List the probable sources in your chronology's Source(s) column. Then put your chronology to work. For example, when you prepare for a witness's deposition, filter the chronology down to those facts you were hoping to source from this individual, and develop a line of questioning that will elicit the facts in response.

Limiting the type of facts that are entered in a chronology is a vestige of using word-processing software to create chrons. With a word processor, once a disputed fact

or a fact without a source has been entered, there's no convenient way to get it out of your report when you want a pristine list of undisputed facts for use with motions for summary judgment and pre-trial motions. However, if you're following my advice to create your chronology using database software, limiting your report to just undisputed facts or just facts that have sources is simply a matter of filtering your chronology using these criteria.

Here's another type of fact you should be sure to get into your chron: facts for which dates are inappropriate (*e.g.*, the statement "smoking causes cancer" is a fact — though a disputed one — for which a date value is inappropriate). The term "chronology" suggests one should include only those facts that have associated dates. Don't let semantics restrict your thinking. A good chronology is much more than a diary of events. It is really a knowledge base of facts. All critical facts, including those for which dates are not applicable, should be included. (When you list facts for which a date value is inappropriate, considering entering "Not Applicable" or "N/A" as the value in the Date column. Thus, when you sort the chronology, all facts for which a date is inappropriate will be grouped together.)

Get Stupid

Move everything you know about a fact and its implications from your head into the chronology.

When you enter a fact into your chronology, make sure you get stupid about it. In other words, empty your head of all knowledge regarding it. Your chronology should be a memory replacement, not a memory jogger. If you don't get the complete fact into the chronology, you fail to clear your head of the minutiae so that you can focus on thinking. And you derail the communication benefits chronologies offer. If a critical part of the meaning of the fact is still hidden in your head, others on the trial team won't know about it when they read the chronology.

Every time you enter a fact into your chronology, pause and read it before you continue. Put yourself in the shoes of someone who doesn't know the case — say a new member of the trial team reading the chronology for the first time. Does what you've written represent your total knowledge regarding the fact? If not, edit the fact. While you're at it, ask yourself, "So what?" Does what you've written make the implications of the fact clear? If not, edit the fact. Further, if there isn't much of an answer to the So What question, give the fact a good once over, and make sure it belongs in the chronology in the first place.

Obsolete Deposition Summaries

Use your chronology in lieu of separate deposition summaries.

When you create a deposition summary, you're digesting the deposition down to its critical elements, *i.e.*, to the critical facts found in it. If you follow the traditional path of creating a series of separate deposition summaries, the result is unsatisfactory. You end up with a separate story for each witness, rather than one complete story interlacing the facts found in various depositions and in other sources.

Stop creating deposition summaries, and use your chronology instead. Enter into your chronology the critical facts you develop from reading a deposition. In the chronology's Source(s) column, list the deposition's name, as well as the volume, page and line number where the fact was found. Anytime you want a summary of a particular witness's deposition, filter the chronology down to just those facts that were sourced from a particular deposition.

Even if you use transcript search software, you should still enter in your chronology the key facts that occur to you as you read the deposition online. Transcript search software makes it easy to find the needles in the haystack of deposition transcripts and document OCR-text files. However, once you find a needle, doesn't it make sense to get it the out of the haystack?

You may have other documents besides deposition summaries where you're storing facts. Consider replacing all of these separate containers with your one master chronology. Instead of searching multiple places for critical case knowledge, you will always have the case facts at your fingertips.

Avoid the AKA Headache

Refer to one person, organization, or document by one name.

Want to filter your chronology down to just those facts about a particular witness, organization or document? Even if you're using a database program to develop your chronology, you've got a big problem if the same thing is referenced by different names. You first have to identify all of the different name permutations. Then you have to create a compound query that will find any fact that contains one of these possibilities. What should be accomplished in an instant becomes an hour-long chore.

It's easy to end up with inconsistent naming. Suppose you're working up a medical malpractice case that involves Hyde Memorial Hospital. Unless you're careful, you're likely to have facts that refer to Hyde, Hyde Memorial, HMH, HM Hospital, and Hyde Memorial

Hospital, among other possible variations.

The solution: develop a cast of characters list and establish a single alias or nickname to be used for each key player in the case. Typically, it makes sense to pick something short (*e.g.*, for Hyde Memorial Hospital, HMH is probably the best choice). If you do, you save key-strokes in addition to gaining consistency.

Distribute the cast of characters report to the trial team. Ask that everyone working on the chronology use this dictionary if they are unsure of the proper name to use for a particular person, organization, or document. Naming consistency requires a little more work up front, but it quickly delivers a handsome return.

Use Fuzzy Dates

If possible, substitute question marks for portions of a date of which you're unsure.

As you build a chronology, you'll find yourself with many facts for which you have incomplete date information. For example, you may know that a meeting took place in March of 1999, but have no idea as to the day within March. Or you may know that a contract was signed sometime in 1998, but have no idea of the month or day. And you may know the accident took place in the 7 o'clock hour, but not know the minute or second.

What's the best way to deal with this problem when entering dates? Make it your practice to substitute a question mark for the portion of the date or time of which you're unsure. Using this simple tactic: March of 1999 becomes 3/?/99, sometime in 1998 becomes ?/?/98, and sometime in the 7 o'clock hour becomes 7:??.

We call this practice "fuzzy dating." Fuzzy dating allows you to capture what you do know about a date and makes what you don't know explicit. Fuzzy dating makes it easy to identify facts needing date research. When you obtain better information, you can return to the fact and update its date and time value.

Fuzzy dating is effective if you're working up your chronology in a word-processor or with some litigation-specific database packages. However, many database packages do not permit you to enter any date value other than a complete one.

Off-the-shelf database products are designed for generalized use and not with the realities of litigation in mind. These products attempt to help you by validating your date entry. Unfortunately, these validation routines backfire when you don't know the complete date. Enter 3/?/99 into a date field in Microsoft Access, and it will give you an error message every time. If the database software you're using only supports complete dates, you have at least a couple of alternatives: (1) When you don't have complete date informa-

tion, you can leave the date cell blank and (2) You can assign an approximate complete date (*e.g.*, the fact we know happened sometime in March could be dated 3/1/99). Both solutions have obvious downsides. The lesser of evils depends on your circumstances.

Indicate Disputed Status

Each fact should be flagged as being disputed or undisputed.

I've already argued that your chronology should include disputed facts. If your chronology contains a mixture of disputed and undisputed items, it makes good sense to create a column which indicates whether a given fact is undisputed or disputed, and if so, by which party. Consider titling your column Disputed Status and using these values: Disputed by Opposition, Disputed by Us, Undisputed, Unsure. (If you're working on a case with more than two parties, revise the options to whatever you deem appropriate, however, you will probably find that having an option for all possible permutations is overkill.)

Once you've marked facts as being disputed or undisputed, your chronology becomes a tremendous aid in the preparation of motions for summary judgment and pre-trial motions. For example, instead of creating a last-minute list of facts to which you are willing to stipulate, you simply filter your chronology down to the undisputed items and print. If you've begun your chronology early in case preparation, you can use this information to organize your examination of adverse witnesses. Filter the chronology down to those items that you expect to be disputed and see if you can obtain admissions regarding them during depositions or find sources for them in documents.

Show Issue Relationships

To create a great chronology, you need issues as well as facts.

The vast majority of cases involve multiple issues. Assessing the strength or weakness of your case is really an exercise in assessing your strength or weakness in relation to each of the issues in it. Here again, your chronology should be an important aid.

Develop a list of case issues (perhaps with the aid of a brainstorming session if you're one member of a trial team). Don't limit your thinking to those issues tied directly to some legal claim. Include any topic that might influence juror thinking. For example, if you are working for the defense in a products case, you might want to include this issue: The Plaintiff Is Motivated by Greed, Not a Desire for Justice. Even though you would never make such an argument explicitly, it would be interesting

to see what facts point to plaintiff greed, allowing jurors to reach such a conclusion on their own.

Now add another column to your chronology: Related Issues. In this column, name the issue or issues on which each fact bears. You can capture issue relationships as you first enter the facts. Another alternative is to forego entering this information initially and ripple through the chronology at a later point focusing on issue analysis.

Establishing relationships between facts and issues is also a logical place to parse work among members of the trial team. Junior members of the team can cull facts from documents and depositions. Senior members of the team can make links between facts and issues.

Creating links between facts and issues makes it easy to print chronologies of just those facts that relate to a particular issue — a capability that has great value when you analyze your case and develop strategy.

Take An Issue-Driven Approach

Use your issue list to ensure you have a complete chronology and to generate a fact "wish list."

As you develop your chronology, consider taking a "top-down" or "issue-driven" approach to your case. As case preparation begins, and one or two times a year thereafter, conduct a brainstorming session in which you think about your facts on an issue-by-issue basis.

Prepare by printing for each issue a mini-chronology of the facts that bear on it. Begin the brainstorming session by reviewing the chronology of facts related to the first issue in your issue list. Then set the list of facts aside, and think about other facts of which you're aware that bear on this issue. Enter these additional items into your chron. Next, think about the facts you wish you had for this issue. If you think there's any chance of developing such a fact, enter it in the chronology and list any potential sources that come to mind. Repeat this process for each issue in the case.

In the early days of a case, this issue-driven brainstorming process can be an invaluable aid in organizing discovery. As the case matures, it becomes a great way to reflect on case strengths and weaknesses and develop strategies in light of them.

Evaluate Each Fact

Separate the sheep facts from the goat facts.

Not all facts are created equal. Some are critical; others are trivial. Some are great; and, unfortunately, others stink. To get the most out of your chronology, you should rate each fact in terms of criticality and goodness/badness. Once this is done, you can filter the chronology

down from all facts to just those facts that are critical or just those facts that are particularly good or bad.

One solution is to use two columns to capture evaluation information: one for criticality and another for goodness v. badness. A simpler method is to fuse both criticality and goodness/badness criteria into a single scale. For example, if you're using database software, you could create a pick list with the following values: Heavily For Us, For Us, Neutral, Against Us, Heavily Against Us. When you evaluate something as being heavily for you or heavily against you, you are indicating that it is critical. (The downside of the single scale solution is that it makes it difficult to evaluate those facts that are critical but are neutral in terms of goodness/badness. However, the reduced work of the single column probably outweighs this shortcoming.)

If multiple litigators are collaborating on a case, consider creating an evaluation column for each. Each individual can make their own assessment, and your software can isolate those facts where evaluations vary widely.

If you want, you can skip evaluating facts when you're first entering them into the chronology. Later, at an appropriate point, ripple through the chronology and evaluate the facts in one sweep. Here is another place where the work of maintaining the chronology can be distributed to various members of the trial team. Junior members of the team can enter the facts. Senior members of the team can evaluate them.

Put Your Chronology to Work

Use your case chronology in practical ways.

Your chronology should be far more than a thinking tool. It should be a practical aid in communicating about your case with your client, the opposition, and the trier of fact.

Use your chronology to communicate with your client. Send your client the chronology on a regular basis, perhaps quarterly. If you are using database software that stamps each fact with the date when it's entered into the chronology, have the software mark with an icon each fact that was entered since you last sent your client the chronology. By tagging new facts in this way, the report will give your client the complete story of the case, but it will be easy for them to focus on the new evidence.

Use your chronology at settlement conferences. Show opposition counsel and their client why the facts back your view of the case. Show them that you're organized and will be a formidable opponent if they choose to be unreasonable. (Obviously, before you print your chronology for use during a settlement conference, you'll hide columns such as Evaluation.)

Use your chronology to make a powerful case to judge and jury. Chronologies are great tools for educating the jury during opening statement and for illustrating your arguments during closing.

You can even use chronologies to expedite the development of your new associates' case analysis skills. The day they arrive at the firm, assign each new associate to one or more cases, and make them responsible for developing a chronology for each. At set intervals (once a month?), have each associate submit a chronology that contains just the new facts they have entered. Critique the verbiage used to describe each fact, their determination of whether the fact is disputed or undisputed, their evaluation, and their analysis of the issues on which the fact bears.

Conclusion

In summary, a chronology has the potential to be a tremendous aid as you organize and explore case knowledge. If you adopt the practices outlined above, I believe you'll realize this potential in full. ☒

Greg Krehel is CEO of DecisionQuest's CaseSoft division (www.casesoft.com). CaseSoft is the developer of CaseMap – a software tool that trial teams use to organize and explore the facts, the cast of characters, and the issues in any case. In addition to his background in software development, Krehel has over 15 years of trial consulting experience.

Garrett Group pickup
8/99 p71

SEEING IS BELIEVING

Computer Animation:

The Litigator's Legal Ally

By Carole Cox-Korn

A baby girl was born with a malfunction of her brain stem. The defect prevented her from breathing properly at night. To remedy the problem, doctors put the child on a home ventilator.

But, something went wrong. The little girl was only 15 months old, when she suffered a debilitating stroke.

Her family hired an Illinois attorney who sued the home health care firm, the hospital, and her doctor. Computer animation played a big role in the plaintiff's multi-million dollar verdict.

The animation simply, but dramatically, showed how the child's respiratory and circulatory system worked. The animation was only five minutes long. But, it was the feature attraction in the courtroom for a day and a half. It was replayed, slowed down, paused, and replayed again, while the plaintiff's medical expert testified.

After the trial, plaintiff's attorney Edward J. Walsh Jr. said this of the animation: "As far as allowing the jury to understand the physiology of how the damage took place to the brain, it was probably one of the most important pieces of demonstrative evidence we had. Without the computer graphics, I don't know if I could have done it."¹

The cases you're working on may not be worth millions. But, the litigation may still warrant a strong visual presentation.

In the usual case, the animation is used to make complex, technical issues understandable. In most cases, the animation is used to support the opinion and testimony of expert witnesses.

Lay witnesses can also substantiate your animation. For example, in a car accident case, the plaintiff (or defendant) can testify that the animation accurately represents what happened.

First, though, you need to talk to your client about the power of graphic evidence. How much do your clients know about animation? And, what are they entitled to know? The State Bar of Georgia *Canons of Ethics and Code of Professional Responsibility* answer that question. Directory Rule 3-107 states: "A lawyer should represent a client zealously within the bounds of the law." Further, Ethical Consideration 7-8 says:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. . . . A lawyer should advise his client of the possible effect of each legal alternative. . . . In final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself.

You may think that the client won't pay. But he may be more than willing to do so, if you educate him about the potential impact of computer animation.

The Objections

But I don't know anything about computers. I can barely use e-mail.

It's easy to understand the basics of computer animation. And it's easy to explain the pros and cons to your clients.

Right now, the most you may know about computer animation is from seeing movies like *Antz*, *Jurassic Park*, or playing Nintendo with your kids. The technology is improving by the minute. You may not know that the cost is coming down, too. And it's gained almost universal acceptance in the courts.

You don't have to represent the plaintiffs in a multi-million dollar lawsuit to "justify" the investment. If you do products liability, criminal law, anti-trust, medical malpractice, personal injury, or intellectual property, you should be thinking about computer animation. Even in the "average" case.

It's too expensive. My clients can't afford it!

What is your client willing to pay? And when? A good computer animation prepared early in the case could save thousands in litigation costs.

Use your animation as a settlement tool. Be aggressive up front. Once your opponent sees it, he may decide to cut his losses before months, or years, of litigation drags on.

A basic animation starts at about \$2,500. Remember, the animation itself is likely to be relatively short. The cost is determined by the amount of detail, and complexity of movement.

For example, a multiple shooting, with several different people, weapons, and action is more expensive than a simple car accident in which one car rear-ends another. An animation of medium complexity will run about \$5,000.

Most animations are anywhere from 10 seconds to one minute. Your animation firm will spend many tedious hours constructing the animation. You need to make sure you give your animators several weeks advance notice, so the job can be completed and any changes made before you need to use it.

It's just a "little" case.

Have you consulted your client on this one? To the client, it is very likely the biggest and perhaps only case he

will ever have! Whether the client is paying the expenses up front, or whether it's a contingency case, the expense may be well justified.

Attorneys are accustomed to spending thousands on depositions and other discovery costs. An animation can put your client in such a strong bargaining position, that you actually cut your litigation costs. If you're a plaintiff's attorney, that settlement check may come in much quicker with a powerful visual representation.

This case will never go to trial.

That's the point, isn't it? You want to resolve the case long before you get on any court calendars. You could always "save" your animation for court. But it's my opinion that your bargaining power is greatly increased by showing your opponent how serious you are early on.

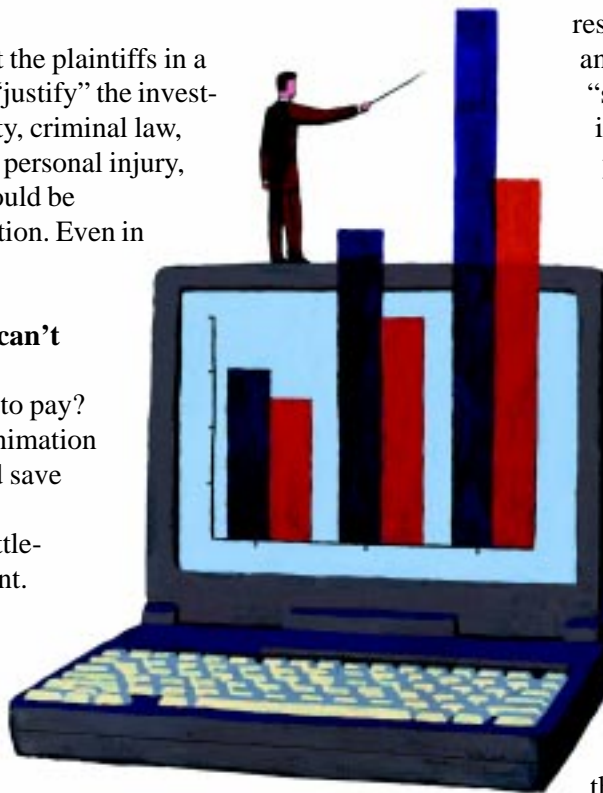
Let them know what they're up against. Put on a dynamite presentation at mediation or arbitration. If the case doesn't settle, at least you've taken an aggressive position. Your client will see that you are fighting hard for him. And, the other side will be forced to spend more money to counter your attack. You're armed with your animation, if you ever get to trial.

Can't I get by without it?

Your client should know about the power of visual persuasion. Here are a few statistics.

- ◆ Post-trial interviews with jurors show that jurors are appreciative of technology that simplifies complex issues and makes their jobs easier.²
- ◆ Jurors remember 85 percent of what they see as opposed to only 15% of what they hear.³
- ◆ Animations are not only more persuasive than stills of the same event, but animation is more likely to be accepted as fact.⁴
- ◆ More than 80 percent of what we know we learned visually, and only 10 percent was learned through hearing.⁵
- ◆ The attention span of the average juror is seven minutes.⁶

Finally, don't underestimate the subliminal power of the TV screen. Most animations are transferred to videotape, so you can show them on a TV monitor. A California



criminal defense attorney told me about a case in which the jury was *transfixed* on a still picture on video of the murder weapon (a knife), even though the actual weapon was sitting on a table in front of them in the courtroom!

When is Computer Animation Most Useful?

- ♦ You want to re-create what did happen (car accident).
- ♦ You want to show what would have happened under varying circumstances (witnesses have different versions of events).
- ♦ Real-time of the event is a crucial factor (criminal case: alibi or self-defense).
- ♦ The depicted event is highly technical, and therefore, impossible to understand through an oral description alone (products liability, medical procedure, patent, intellectual property).

Computer Animation and the Law

The Leading Case Law

The law and the issues of admissibility of computer animation are relatively uncomplicated. The leading case on admissibility is *People v. McHugh*.⁷ In that case, the defendant was charged with drunk driving, and 4 counts of second degree manslaughter. The defense theory, for which they used a computer simulation was this: The Defendant was neither drunk, nor speeding. The accident happened because weather conditions caused the car to leave the roadway, and hit an open, ground level electric box—which in turn caused a tire to rupture, sending the car spinning into a concrete abutment.

The prosecution called for a *Frye* hearing to determine if the computer program incorporated scientific and mathematical formulas, which were generally accepted as reliable in the scientific community.⁸ The Court denied the prosecutor's request for the hearing.

The Court allowed the tape into evidence, stating: "The evidence sought to be introduced here is more akin to a chart or diagram than a scientific device A computer is not a gimmick and the court should not be shy about its use. . . . Computers are simply mechanical tools — receiving information and acting on instructions at lightning speed."⁹

Similarly, Georgia courts are approving the admissibility of such evidence. "When video or computer graphics are used merely to illustrate a witness's testimony, it is admissible if it is a fair and accurate representation of the scene sought to be depicted."¹⁰

Likewise, in a leading products liability case, the court also upheld the animation. In *Datskow v. Teledyne Conti-*

mental Motors, the defendant engine manufacturer was found to be liable under products liability law for a fatal airplane crash.¹¹ The defendant moved for a new trial alleging that, among other things, the plaintiff's use of computer-generated animation was unfairly prejudicial.

The court rejected this argument, noting that the animation was merely meant to illustrate the expert's opinion as to the cause of the crash, and the jury was so instructed. The judge stated: "The mere fact that this was an animated video with moving images does not mean that the jury would have been likely to give it more weight than it would have otherwise deserved."¹²

The Rules of Evidence

The key to admitting computer animation is to treat the video as any other piece of demonstrative evidence. The evidence must be relevant to a material issue, accurately portray the testimony it illustrates, and aid the jury's understanding of the issue.¹³

Under the test of relevancy, the probative value of the evidence must substantially outweigh the danger of unfair prejudice.

1. Federal Rule of Evidence 702

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence, or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

2. Federal Rule of Evidence 403

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

3. Federal Rule of Evidence 807

A statement not specifically covered by Rule 803 or 804, but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Five Easy Steps to Admissibility

1. Engage a good expert. Make sure your expert

participates in the planning and review of the animation. He needs a credible basis to vouch for the animation as an accurate representation of his opinion.

2. Give adequate pre-trial notice. Give proper notice to your opponent so that you don't meet an objection of surprise or unfair prejudice.

3. Make adequate disclosure. The attorney using the animation must turn over virtually every facet of the animation. Identify the expert, the producer of the animation, the hardware and software used to create it, and all data used to create the animation.

4. Lay the foundation. Qualify the expert, the computer hardware, software, data, and the expert's assumptions.

5. Be prepared for all objections. Federal Rule of Evidence 901(b)(9) addresses issues of foundation. Be prepared for the hearsay objections.

Creating Your Computer Animation

The animation process is tedious for the animators who create it. You should allow several weeks advance notice to complete the project. Computer animation is basically a five-step process.

1. The Design Process.

This is the first stage of creating computer animation. It's the most important, but least expensive, aspect of creating the animation. During the design process, you and the animators identify the legal issues to be animated. The animation firm will discuss the various means of illustration with you. If you fix any problems at this stage, you can do it at virtually no cost. However, if you change your mind about how the animation should look, once the process begins, it could cost you thousands more to fix later.

2. The Modeling Process.

The modeling process is the most tedious aspect of computer animation. It involves creation of the device, procedure, or scene at issue within the computer. That is, a computer animator must, using the computer, hand-draw all of the objects that are to be the subject of the animation. This is the most expensive part of the animation.

3. The Animation Process.

Animation involves manipulating the computer models to recreate the event. The animation process is less time consuming than the modeling process, but quality animation involves extensive artistic skill. This is especially true if human movement is recreated.

4. The Rendering Process.

Rendering is the process where the computer, standing alone, draws each frame of the animation. Now that the models have been drawn, animated, and the lighting and

backgrounds created, the computer must determine what each frame of the animation looks like. When complete, these frames are played in rapid succession, to achieve the appearance of smooth motion.

5. The Presentation.

The presentation in court, at arbitration, or at the insurance adjuster's office should be no more complicated than necessary. Unfortunately, the more technology you use to show your animation, the more likely a last-minute technical glitch will occur. Most animations are transferred to videotape for easy use in your presentation. Other options are transferring the animation to CD or laser disk.

Finally, choose an animation firm that can understand your legal objectives and strategy, as well as the technical aspects of the project.

A final note — whatever you think of the high-priced O.J. Simpson defense, think about this trial fact.

The O.J. jurors took a bus field trip that cost \$114,617 to visit the various trial locations. For much less, a virtual reality environment could have been produced to create an effective and accurate trial exhibit that could have been replayed, and revisited, as often as necessary.

Almost anything that is the subject of litigation can be recreated through the animation process. Your animation firm will work with you to keep the cost within your litigation budget. ■

Carole Cox-Korn is owner of Cox-Korn LLC, an animation and trial exhibit



firm (www.coxkorn.com). She also works as a part-time assistant solicitor for Solicitor Gerald N. Blaney in Gwinnett County. She has 12 years experience as a civil and criminal litigator. Ms. Korn also developed media expertise as a legal correspondent for WCSC-TV in Charleston, SC, where she received the Peabody Award for the station's coverage of Hurricane Hugo, and the National Headliner Award for Overall Excellence.

Endnotes

1. Wesley R. Iversen, *Animation Takes the Stand*, COMPUTER GRAPHICS WORLD, Nov. 1991. Cann v. Life Prods., Inc., No. 84 L 3074 (Cook County, Ill. Cir. Ct.)
2. David Island & Ursula Connolly, *Technology in the Courtroom: Reaching Jurors, Winning Cases*, N.Y.L.J., Aug. 5, 1997, at 5.
3. Kristin L. Fulcher, *The Jury as Witness: Forensic Computer Animation Transports Jurors to the Scene of a Crime or Automobile Accident*, 22 U. Dayton L. Rev. 55 (1996).
4. Wesley C. King, M. Marie Dent & Edwards W. Miles, *The Persuasive Effects of Graphics in Computer-Mediated*

CONTINUED ON PAGE 98

Contempt of Court

A Lynching that Sparked a Century of Federalism in the U.S. Courts

By Mark Curriden and Leroy Phillips

Noah Walter Parden had never before been to Washington, D.C. As a lawyer, he dreamed of visiting the U.S. Supreme Court and maybe even listening to cases being argued. But now, here he was, staring up at the majesty of the Capitol's dome. In minutes, he would be inside making history.

The date was March 17, 1906, and Parden was a black lawyer from the old Confederacy there to plead for his client's life.

Back home in Chattanooga, his client was facing almost certain death. Less than two months earlier, Ed Johnson, a young black man, was arrested for the rape of a white woman. A lynch mob had tried three times to raid the Chattanooga jail to kill him.

The three-day trial afforded to Johnson had been a sham. Two of the three white lawyers appointed to defend him didn't want the case, had no prior experience in criminal law, and publicly made statements claiming they also believed their client was guilty. The judge refused to consider defense motions to delay the trial or change the venue due to the hostilities in the community. During the trial, a juror had actually tried to attack Johnson. But no mistrial was declared.

Despite a dozen alibi witnesses testifying that Johnson could not have committed the crime because he was miles away playing pool at a saloon, an all-white male jury found him guilty and sentenced him to die. His court-appointed lawyers abandoned Johnson at the end, convinced the defendant to waive his right to appeal and die with dignity. If Johnson appealed, his lawyers told him, a lynch mob would go after his family and friends next time.

The judge and sheriff authorities believed they were rid of Ed Johnson and the turmoil his case had caused. The officials were proud of their accomplishments. They had followed the law by giving the defendant a procedurally correct trial as required by the Constitution and the statutes of Tennessee. But they also had shown the people of Chattanooga who thirsted for vengeance that justice through the courts could be swift and punishment severe.

But what happened next was totally unexpected. Ed Johnson's father, known as Skinbone, secretly hired Parden and Styles Hutchins to try to get his son's conviction reversed. Even more shocking was the success achieved by the two black lawyers.

With less than 48 hours remaining until Johnson was set to be executed, Parden stood before Supreme Court Justice John Marshal Harlan. For 10 minutes in the court's private chambers, Parden argued his case. The black lawyer said his client was an innocent man pursued by a politically motivated southern sheriff and captured in a state court system refusing to provide justice equally. Parden said the Supreme Court needed to intervene to protect the innocent, to thwart mob rule and to declare that the influence of politics on jurisprudence was unacceptable.

Justice Harlan, known as the first great dissenter, was moved. That night, he issued a stay of execution, demanding that the sheriff delay any attempts to end Johnson's life and to protect the defendant from efforts to lynch him. Harlan also met with members of the Court, who agreed that a travesty of justice has taken place. The justices agreed they would review the matter quickly.

But even as Parden and his law partner, Styles Linton Hutchins, celebrated, their victory was short-lived. The next day, a frenzied mob, assisted by the sheriff and his deputies, dragged Johnson from his jail cell, took him to the county bridge and lynched him.

Fortunately, the story doesn't end there. Led by Justice Harlan, outraged members of the Supreme Court privately met the following day at the home of the chief justice. They wanted action. Their mandate and their authority had been impugned by the mob's actions.

After lengthy consultation with the U.S. Attorney General and President Roosevelt, the Court, for the first and only time in history, brought criminal contempt of court charges against the sheriff, his deputies and members of the mob. Then, in an occurrence that had never happened before or since, the justices decided they would hear the criminal trial themselves.

While the means by which Johnson's life abruptly ended was not unusual for his time in the South, the case remains of supreme importance to this day. Buried deep in the court files in Chattanooga, Tennessee, is a fascinating tale of law, justice, race relations, perseverance, and the unequivocal requirement that the rule of law be enforced.

Leroy Phillips and I spent the past two decades researching this case. The more we researched, the more fascinating the story became. In between trials, Leroy could be found digging through old history records at the courthouse and the public library. When I wasn't working on an article for *The Atlanta Constitution* and now *The Dallas Morning News*, I could be found rummaging through the personal papers of Justice Harlan and the other members of the Supreme Court in 1906.

The question, of course, is why did we spend so much time on this case? The answer is found in the remarkable case we unearthed.

The story of Ed Johnson presents the rare opportunity to bring to life a Supreme Court case that moves both the heart and the mind — to demonstrate that the liberties and prerogatives we so frequently take for granted were etched in flesh and blood. Furthermore, the case of the *State of Tennessee v. Ed Johnson* and its subsequent companion case, *U.S. v. Shipp*, are not well known

among students of American history or even practicing lawyers.

Yet many legal scholars say it signaled a change in the nation's entire criminal justice system. At a time when lynch law and mob rule were quickly becoming the reality of the day, the Supreme Court showed great courage in intervening.

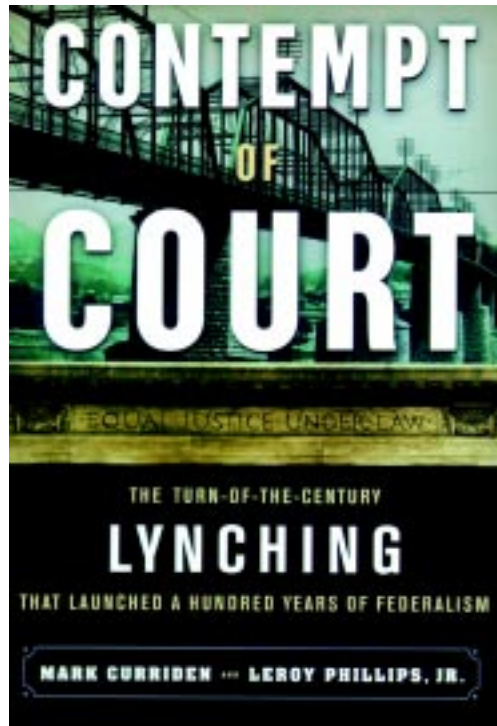
Even in agreeing to accept the case for argument, the Supreme Court made history. It was one of only a couple of times since the Civil War that the justices had agreed to review the state court conviction of a black man. But the grounds on which the Court decided to accept the case are what make it so fascinating.

The justices believed Ed Johnson might be innocent.

As simple as that may seem, the Supreme Court has never reversed convictions based on evidence of innocence. The justices review and reverse convictions based on fundamental and procedural flaws in a trial that violates a defendant's constitutional rights. The justices agreed to stay Johnson's scheduled execution. They reviewed his case because the evidence of his innocence was overwhelming, and because there was glaring evidence that many of his constitutional rights had been violated.

Furthermore, the justices' own writings indicate they were concerned that Johnson had not received a fair trial. While reversing a conviction today because a defendant does not get a fair or impartial trial may seem routine, it was the extreme exception in 1906. In fact, the justices had ruled that the U.S. Constitution's Sixth Amendment right to a fair trial did not apply in state court cases. Such a ruling did not come until decades later. Yet, the justices may have been on the brink of making exactly that decision in the Johnson case. Sadly, we will never know what decision — how far-reaching or narrow — the Court would have made on this case. Because of the lynching of Johnson, the justices never decided the case on its merits. The issues were rendered moot by brute violence.

"This would have been a wonderful case for the Supreme Court to take up on its merits," says Eugene Wilkes, a law professor at the University of Georgia and an expert on federal death penalty appeals. "The factual



arguments in the Johnson case were so compelling in favor of the defendant. The facts were so egregious that I believe they would have re-evaluated their entire concept of due process under the U.S. Constitution. This case touched on so many important legal issues that would not be debated for another 50 years. It dealt with ineffective assistance of counsel. It focused on a defendant's right to a fair and impartial trial. The poisonous attitude of the community and how it impacted the jury pool was an issue. The right to appeal a conviction."

"What is incredible in the Johnson case is that the Court knew something was wrong here, they knew an injustice was being committed, and they took action to correct it," he says.

Professor Wilkes and many other legal experts agree that the Johnson case was an important "seed of federalism" that grew over the next 60 years. In authorizing the Attorney General to bring contempt charges against Sheriff Shipp and others, the justices ruled that the U.S. Supreme Court — and the U.S. Supreme Court alone — has the authority to decide what cases it would take jurisdiction over and which cases it would not. State court criminal cases where there was a violation of the federal rights of a defendant were clearly within their scope, they ruled.

"Very few people understand the import of the Shipp trial," the late U.S. Supreme Court Justice Thurgood Marshall told me during an interview in 1991 following the American Bar Association meeting in Atlanta. "Its significance has never been fully explained."

"Shipp was perhaps the first instance in which the Court demonstrated that the 14th Amendment and the equal protection clause have any substantive meaning to people of the African-American race," Marshall said. "The Shipp case served as a foundation for many cases to come."

Other legal experts familiar with the Shipp case agree.

"In countries all over the world, the United States is helping develop legal systems similar to ours. But the one thing that has been most difficult to teach is respect for the law," says Thomas Baker, an expert on the Supreme Court and a professor of law at Texas Technical

University. "We had to learn it the hard way. There is no better example, there is no clearer symbolic precedent of establishing and enforcing the rule of law than this case."

"In the Johnson and Sheriff Shipp cases, we have the dignity of the Supreme Court being impugned by a rogue sheriff, thugs and a sympathetic state court system," says Professor Baker. "This is the only instance in our nation's history where the Supreme Court enforced its own ruling.

It could easily be argued that we have the respect for the law today because of this case. What if the Court had not punished the sheriff? What if cities and counties and states realized they didn't have to obey federal court orders or the U.S. Constitution? This case is the clearest example of the Supreme Court preserving its place in history and the integrity of the law."

"This case has had a ripple effect throughout legal history," says Professor Baker.

The Johnson case marks the beginning of federalism in criminal prosecutions and the first glimpse of the federal court system exercising its power to protect individual's rights from wayward state authorities. Now, nearly a century later, there are efforts to curtail these rights. Congress is trying to limit the federal court's authority in overseeing how states treat or mistreat their prisoners. Politicians want to make it easier to get rid of federal judges who make rulings that are not politically popular. And even the U.S. Supreme Court itself has taken steps to limit the federal court's authority over state court criminal cases. The story of Ed Johnson and Sheriff Shipp reminds us why this federal intervention was needed and established in the beginning.

The legacy left by the Johnson and Shipp cases is multi-faceted. While the

set of events being discussed grew out of one incident, two separate cases were being litigated. Each case has its own important, historic developments. They both have individual lessons.

The Johnson case, for example, demonstrates how politically and racially biased the state courts were in 1906. Many people would argue they are equally political today, and racial prejudice within the legal system has not been eliminated. But in this instance, Sheriff Shipp and the



S. L. Hutchins



Noah W. Parden

court officials were in a conflict over the very essence of the criminal justice system. Was the primary purpose of the court system to punish people for wrongdoing, reducing criminal activity and thus making society a safer place to live? Or was the criminal justice system designed to protect people's rights, to keep law enforcement honest and within the boundaries of the law, and to make sure innocent people were not punished for crimes they did not commit?

The dilemma plays out in the case as the sheriff, prosecutor and judge give every public appearance of following the law and providing Ed Johnson with a legitimate trial. Yet, these officials tilted the court rules and the law to such a degree against the criminal defendant that the outcome was predetermined to their liking. The announced intention was to publicly follow the written law and appropriate procedure against black Americans in cases where white people were victims. In essence, the legal process became nothing more than a phony demonstration that they were a law-abiding community.

But this case, like all great stories, has true heroes. And both are from Georgia. Noah Parden and Styles Hutchins took up Ed Johnson's appeal when his white lawyers abandoned him. They faced incredible racism and hatred in seeking judicial relief in the U.S. Supreme Court.

Born in 1865 in Floyd County, Georgia, Parden was used to overcoming long odds. His mother was a former slave who struggled to exist in the aftermath of the Civil War. She cooked and kept house for two neighboring families. He knew nothing of his father, though people said his dad was white. When Parden was six, his mother died and neighbors took him to a nearby orphanage run by missionaries. There, he excelled at reading and history, but hated math and science. Baseball was his favorite pastime.

In 1890, Parden accepted a partial scholarship to study law at Central Tennessee College in Nashville, where he also worked clipping hair. Three years later, he graduated at the top of his class. Many job offers followed — teaching school, editing a newspaper, and pastoring a church. The newspaper proposal interested him tremendously because he loved writing and he believed knowledge through information was the single most powerful tool in undermining racism. In the end,

though, he decided to move to Chattanooga to practice law.

Parden was also fervent in his religious beliefs. He never missed Sunday morning worship at his church. He prayed before every meal, and he spent several minutes on his knees every night before bed. He refused to drink alcohol, use tobacco products or eat pork. "The body is the temple of the Holy Spirit," he once wrote in a newspaper column.

By age 41, Parden had built himself a profitable law practice. He was certainly the most successful black attorney in Chattanooga. He and his partner, Styles Linton Hutchins, represented nearly two-thirds of the black people who got into trouble for stealing, fighting, assaulting

and loitering. They also defended a few murder suspects. They handled the lion's share of the civil cases filed by black people, represented several of the smaller black-owned businesses in town, and executed most of the real estate transactions within the black community. As lawyers, their prestige within the black community was rivaled only by certain preachers.

As businessmen, however, they faced a significant problem: Most of their clients had no money to pay them. Poor black clients seemed to expect the lawyers to represent them for free. The black people who did have money would frequently go to a white lawyer if they got into trouble. While Parden was certainly respected as an attorney in the black community, the general perception was that white lawyers were afforded more respect by white judges and white jurors. When payment for services did come, it was more likely to be an invitation to a home-cooked dinner at a client's house. Black clients with money were so scarce that one black lawyer actually postponed his wedding when a client ready to pay cash showed up unannounced on the morning of the wedding seeking advice.

Styles Linton Hutchins was Parden's alter ego. As quiet and patient and unassuming as Parden's personality was, Hutchins was the exact opposite. His speeches were filled with blistering attacks on the "lily whites" who denied rights to black people. He was a follower of W.E.B. DuBois, who believed in developing the intellect of the black man, not just encouraging him to get a vocation training.

"What is incredible in the Johnson case is that the Court knew something was wrong here, they knew an injustice was being committed, and they took action to correct it."
— Eugene Wilkes, UGA Law Professor

In a society dominated by the Ku Klux Klan, lynch mobs and Jim Crow laws, Hutchins believed that the means of achieving equal rights under the law was through agitation and protest. He filed unsuccessful lawsuits fighting the segregation of the train and trolley systems. He sued the city for refusing to allow young black children to participate in summer athletic programs. And he encouraged other black leaders to speak out and fight against the injustices they incurred.

"The Constitution says the Negro has all the rights of the white man," Hutchins once wrote in a newspaper editorial. "Yet, we are afforded none of the white man's protections. The Constitution says the Negroes are a free people. Yet, we enjoy none of the white man's privileges. The Constitution says the Negro is equal. Yet, we cannot ride on the white man's train. We cannot sit as a juror in the white man's court. We cannot send our children to the white man's schools.

"The Negro is not equal," he said. "The Negro is not even free. The Negro is simply a dark body who is spit upon without any opportunity for recourse."

At age 53, Hutchins was a veteran lawyer and politician who had lived the atypical life for a southern

black man. He was born in Lawrenceville, Georgia. His father was a wealthy artist who paid for his son to get a college education at Atlanta University. After teaching school for several years, Hutchins enrolled in the law program at the University of South Carolina. In 1875, he became one of the first black students to graduate from the state college.

That year, Hutchins moved back to Atlanta, where he opened a law practice. Judges and lawyers in Georgia had never before encountered a black attorney and tried to find ways to stop Hutchins from practicing. As a result, the Georgia Legislature took immediate action, passing a law that required lawyers who received their law degrees in other states to undergo an examination by the county's presiding judge. The law was specifically designed to discourage black lawyers from moving from northern states to Georgia.

But Hutchins was not deterred. After six months of constant fighting, he convinced an Atlanta judge to admit him to practice in the state court system. In doing so, Hutchins became the first black person to be admitted to the Georgia bar. But the effort took a great personal toll on him and, in 1881, he moved to Chattanooga, where he perceived the racial attitudes to be more accommodating. He enjoyed immediate success, becoming one of Chattanooga's prominent and respected lawyers. In 1886, the Republicans asked Hutchins to run for a state legislative seat against a very popular Democrat, who was white. In a political shocker, Hutchins won by eight votes.

In 1888, Hutchins left politics to focus on his law practice and to become an ordained minister. He loved preaching, and his hell-fire-and-brimstone manner was a favorite throughout southeast Tennessee and northwest Georgia. He felt no shame in using the pulpit to sermonize against those in government who exhibited racist or segregationist views. By the time the Johnson case arrived, he was one of the oldest black lawyers in the South.

Parden and Hutchins were devastated when their client was lynched. In fear for their lives, the pair moved their families several times over the next decade. As history would have it, Ed Johnson was their last client. Neither ever represented another person in court again. ☒

National Legal Research
pickup 8/99
p38



Mark Curriden, left, is the legal affairs writer for The Dallas Morning News. He lives in Dallas, TX. Leroy Phillips Jr. is a prominent trial attorney. He lives in Chattanooga, TN.



Lexis Nexis (sharper focus...) pickup 8/99 p65 4C

Lexis Nexis (I want to
live...) 2-page 4C new

The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Claims

By Michael Mears

In this State, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of this State and of the Republic, of which it is a member, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and motives of the members of our profession are such as to permit approval of all just men.¹



Introduction

The preamble to our Canon of Ethics, quoted on the opposite page, is weighty, no doubt, but these are the responsibilities that all lawyers assume. Criminal defense lawyers bear their fair share of professional and ethical responsibility to maintain the public's confidence in the criminal

justice system. Sadly, the general public lacks confidence in the criminal justice system. An insufficient commitment by the criminal defense bar to the duties and responsibilities set forth in the rules, standards, and canons of ethics that govern the conduct of criminal defense lawyers contributes to the public's attitude. This lack of commitment can be seen most dramatically, and publicly, when the criminal defense lawyer is called upon to respond to

allegations that he or she has rendered ineffective assistance of counsel to a person who has been convicted of a crime.

An ethical response to an ineffective assistance allegation is a vital aspect of the defense attorney's obligation to protect the client's rights and interests to the fullest extent that the law and the standards of professional conduct permit. No professional endeavor could be more demanding or rewarding. This article suggests guidelines for criminal defense lawyers who are faced with questions about the effectiveness of the legal representation of a client. These guidelines are based upon the United States Supreme Court's interpretations of a defendant's Sixth Amendment rights with regard to effective representation in criminal cases.

The Benchmark for Ineffectiveness

In 1984, the United States Supreme Court set the standards by which ineffective assistance claims are judged in the companion cases of *Strickland v. Washington*² and *United States v. Cronin*.³ Recognizing that the Sixth Amendment entitles an accused person "to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair,"⁴ the Court held that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."⁵

Strickland created a two-pronged approach to reviewing ineffective assistance claims. To secure relief for ineffective assistance, the former client must prove that his attorney's performance "fell below an objective standard of reasonableness."⁶ He must also demonstrate that "there is a reasonable probability that, but for counsel's [ineffectiveness], the result of the proceeding would have been different."⁷

Although the Supreme Court in *Strickland* discussed the "performance" prong before the "prejudice" prong, a court addressing the ineffective assistance issue is not required to approach the inquiry in that order. Nor is it even necessary to address both components if the defendant has made an insufficient showing on one.⁸ As the Court held in *Strickland*:

A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *The object of an ineffectiveness claim is not to grade counsel's performance.* If it is easier to dispose of an effectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.⁹

The Defense Attorney's Ethical Response to Ineffective Assistance of Counsel Allegations

Every lawyer who participates regularly in the defense of criminal cases will probably have to deal with the allegation that he or she failed to provide effective assistance of counsel. Commonly, lawyers against whom such allegations are raised react with disappointment, outrage, and anger. When these feelings subside, the next usual response is to develop a strategy to defend the allegations. Unfortunately, from that point on, many attorneys facing a claim of ineffective assistance tend to distance themselves from the former clients and even to create an adversarial relationship between themselves and their former clients.

This is an improper response. The defense lawyer's dual commitment to the criminal justice system and the individual client must not falter when a client questions his or her conduct or advice. Our system of equal justice and the accompanying rights of due process and equal protection depend, in substantial part, upon the personal and professional commitment of the criminal defense lawyer to the role that he or she plays in our justice system. More than any other area in the practice of law, criminal defense requires a deep and abiding commitment to equal justice and to the adversarial system. Our criminal justice system is based upon these concepts. Furthermore, constitutional protections are not self-actuating! The rights and privileges guaranteed by the federal and the state constitution must be asserted and aggressively defended. This includes the constitutional guarantee of the Sixth Amendment.

Ineffective Assistance of Counsel Versus Malpractice

Many attorneys equate ineffective assistance of counsel claims and malpractice claims; however, they are very different. One difference between the two is that, while the latter creates an adversarial relationship, the former does not. Generally, the issues raised in an ineffective assistance claim are closely analogous to the claims that defense counsel raise routinely in motions for new trials and on appeal that arise from the conduct of the trial judge, prosecutors, and law enforcement personnel. In fact, the mistakes of the trial judge or the misconduct of the prosecutors in some cases may justify claims of constructive ineffectiveness, *i.e.*, defense counsel's ineffectiveness was caused, not by any failings of his or her own, but by the behavior of others involved in the trial process. The ineffectiveness of assistance claim seeks to answer whether the mistakes of counsel prejudiced the rights of the defendant sufficiently to require another trial. This should not pit the client against his or her former attorney!

Malpractice claims are vastly different because the former client and the defense counsel are, in fact, in an adversarial relationship. In malpractice cases the former client attempts to prove that he should be compensated for mistakes made by the defense attorney.

A second difference between the two types of claims is that raising an ineffectiveness of assistance claim is quite often the only way a convicted client can raise many constitutional issues. "Many claims of ineffectiveness relate to systemic problems: poor appointment systems, weak and under-financed public defender and defense support systems, a weak defense bar, and undertrained attorneys. . . . [E]ven skilled counsel may be made ineffective by a lack of time or money."¹⁰ Malpractice claims, in contrast, rarely involve constitutional issues.

A third difference is found in the relief available for each type of claim. The Pennsylvania Supreme Court explained this difference in the following:

If a person is convicted of a crime because of the inadequacy of counsel's representation, justice is satisfied by the grant of a new trial. However, if an *innocent person* is wrongfully convicted due to the attorney's dereliction, justice requires that he be compensated for the wrong which has occurred.¹¹

A fourth difference between malpractice and ineffective assistance claims is the burden that the convicted defendant bears under each. While an ineffectiveness claim generally does not relate to guilt or innocence issues, in malpractice situations, guilt or innocence issues are very relevant. Many courts, including those in Georgia, require a malpractice plaintiff to allege and prove actual innocence before prevailing in a malpractice claim based upon defense counsel's conduct. In order to establish legal malpractice, a former criminal defense client must show that he would have prevailed in the underlying litigation if the former defense attorney had not been negligent.¹²

Potential Ethical Violations

A defense attorney confronting an ineffective assistance claim needs to remember several key things before proceeding. Below are the most important ones.

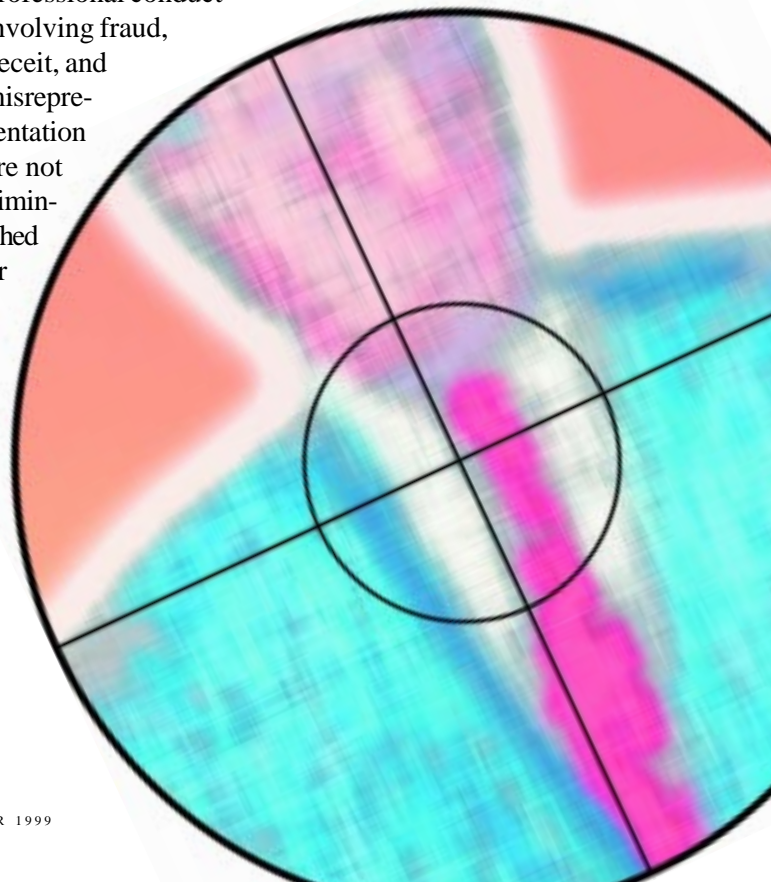
A. Do Not Make any Misrepresentations

The American Bar Association's Standards for Criminal Justice, which are used by many courts as guides, impose upon the defense counsel, "in common with all members of the bar, [the] standards of conduct stated in statutes, rules, decisions of courts, codes, canons, or other standards of professional conduct."¹³ Further, the Stan-

dards specifically admonish that "[d]efense counsel should not intentionally misrepresent matters of fact or law to the court."¹⁴ This requirement applies to defense counsel's response to questions about how he or she conducted the client's defense. If the defense lawyer is aware of his or her own failure or ineffectiveness in any area, such shortcoming must be represented truthfully to the reviewing court. An ineffectiveness claim against defense counsel does not justify *post hoc* rationalization.

The State Bar of Georgia's disciplinary rules, formulated as part of the Code of Professional Responsibility, provide substantive guidance for the criminal defense attorney in this area. As part of a lawyer's general duty to assist in maintaining the integrity and competence of the legal profession,¹⁵ Directory Rule 1-102(A) states that it is unacceptable for a lawyer to "engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation," or to "engage in professional conduct that is prejudicial to the administration of justice."¹⁶

The admonition against misrepresentation applies as forcefully when appearing as a witness in an ineffective assistance claim hearing as it does in all other contacts with the court. The defense lawyer should not misrepresent the quality or extent of his or her legal representation in a criminal case. If witnesses were not contacted, the attorney should admit that they were not contacted. If only two hours of research was performed to prepare a motion or request to charge, the defense lawyer should not inflate that two hours into ten hours. The rules against engaging in professional conduct involving fraud, deceit, and misrepresentation are not diminished or



abrogated when an attorney's conduct has been called into question by a former client or because he or she is appearing in court as a witness rather than as an advocate. If ineffective representation resulted in the denial of a fair trial, then there has been prejudice to the administration of justice.

B. Treat Client Confidence with Care

Another ethical duty that is often implicated in an ineffective assistance claim involves the attorney's duty to preserve a client's confidences.¹⁷ The American Bar Association Standards for Criminal Justice provide that "[d]efense counsel should not reveal information relating to representation of a client unless the client consents after consultation"¹⁸ The Georgia Code of Professional Responsibility also prohibits a lawyer from knowingly revealing a confidence or secret of the client, or from using a confidence or secret for the disadvantage of a client, except in very limited circumstances.¹⁹ One of the exceptions permits a lawyer to reveal "confidences or secrets *necessary* . . . to defend himself or his employees or associates against an accusation of *wrongful conduct*."²⁰ The Ethical Considerations provide that the information acquired in representing a client should not be used to the disadvantage of the client and that the lawyer's obligation to preserve client secrets "continues after the termination of his employment."²¹

The ethical principles of the Georgia Bar are reaffirmed by O.C.G.A. section 24-9-25, which provides that an attorney cannot be compelled "to testify for or against his client to any matter or thing, the knowledge of which he may have acquired from his client by virtue of his employment as attorney."

After a defendant raises a claim of ineffective assistance of counsel, the district attorney or an assistant attorney general will usually prepare to refute the allegations of ineffectiveness. A representative of the prosecutor, therefore, may contact the defense lawyer against whom the claim has been made to discuss the ineffective assistance claim. The prosecutor may cast himself as a defender of the reputation and professional abilities of the criminal defense lawyer. The defense attorney who does not heed his or her ethical and professional responsibilities may be cajoled into treating the former client as an adversary.

The defense attorney must avoid being drawn into an adversarial relationship with the former client. The rules of

conduct for the criminal defense lawyer prohibit him or her from becoming, at any stage, an arm of the prosecutor's office. A commitment to equal protection, individual liberties, and due process rights must remain in force at all stages. Ethical defense lawyers cannot ever lose sight of the client's absolute right to raise claims of ineffectiveness of assistance of counsel. The defense attorney must resist the temptation to become a witness against his or her former client and in so doing improperly reveal client confidences.

In Georgia, *Daughtry v. Cobb*²² is thought to establish that a criminal defense lawyer is available as a witness for the prosecution in a hearing to determine whether counsel's assistance was ineffective.

If the defense lawyer is aware of his or her own failure or ineffectiveness in any area, such shortcoming must be represented truthfully to the reviewing court.

Whenever the disclosure of a communication, otherwise privileged, becomes necessary to the protection of the attorney's own rights, he is released from those obligations of secrecy which the law places upon him. . . . Thus, the

rule as to privilege has no application where the client, in an action against the attorney, charges negligence or malpractice, or fraud, or other professional misconduct. In such cases it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney.²³

Daughtry, however, was a civil fraud case arising from an estate dispute and did not deal with the special aspects of the relationship between a criminal defense lawyer and an individual facing loss of liberty and, in a death penalty case, the loss of life. Great caution must be exercised by the defense attorney, therefore, when he or she is subpoenaed by the prosecution to testify in response to ineffective assistance claims. *Daughtry* and its progeny should be read within the context of the Georgia Canons of Ethics and Disciplinary Rules set forth above which limit disclosure of privileged matters to those matters "*necessary* . . . to defend [the defense lawyer] against an accusation of *wrongful conduct*."²⁴ The defense lawyer facing an ineffective assistance of counsel claim should not regard the claim as a waiver of any privileges or obligations related to the former client.

The United States Supreme Court has explained that the attorney client privilege exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."²⁵ The Georgia Courts have called the law of lawyer-client confidentiality

“salutary” because the “relationship [of lawyer and client] makes it imperative that the client rely implicitly upon the acts and words of his attorney, and he is entitled to the protection of law in reposing this confidence.”²⁶ One court aptly described the extensive discussions that must take place in an effective attorney-client relationship as follows:

[T]he attorney-client relationship . . . involves not just the casual assistance of a member of the bar, but an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney. This is particularly essential, of course, when the attorney is defending the client’s life or liberty.²⁷

So important is this confidential relationship that one “essential component of the Sixth Amendment [is the] basic trust between counsel and client, which is the cornerstone of the adversary system”²⁸ Basic trust can only be protected by rigorous adherence to the attorney-client relationship.

C. Be Careful with the Work Product Privilege

Another issue involves the attorney work-product privilege when a defendant in a criminal case raises an ineffective assistance of counsel claim. The Georgia Supreme Court justified the privilege as follows:

In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways.²⁹

It is important again to distinguish between the ineffective assistance of counsel claim and attorney malpractice cases. Recently, the Utah Supreme Court established a clear distinction between a waiver of the attorney work product privilege in malpractice cases and a waiver of the privilege in ineffective assistance of counsel claims. Holding that a criminal defendant’s claim that his trial lawyer provided ineffective assistance of counsel does not automatically lift the attorney work-product protection of the defense lawyer’s files from discovery in a post-conviction proceeding, the Utah Supreme Court said:

In the malpractice case, reliance on work product immunity would directly undermine the client’s interest, contrary to the policy that justifies the immunity in the first place. . . . There is a sense in which the mental impressions, conclusions, and opinions constitute “the facts” of the case and therefore may be discoverable. In [ineffective assistance of counsel claims], however, there is no adversary relationship between the client and counsel. *It is not the client seeking access to the files — it is the client’s adversary, the State.* Furthermore, at issue is the performance of counsel during preparation and trial, not solely counsel’s internal processes in compiling the file. Finally, ineffective assistance of counsel is in significant part a question of behavior observable from the record and ascertainable from counsel’s testimony. The contents of counsel’s files may or may not have a bearing on the specific claims of ineffectiveness made in this case.³⁰

If the former client is represented by counsel, the new attorney may ask to talk to the former attorney about the allegations of ineffective assistance. The new attorney will also ask for the client’s file. This file must be produced and turned over to the client or the client’s new attorney. The client’s file belongs to the client. Failure to return a client’s file, upon request, is a breach of an attorney’s ethical duties.³¹ It is appropriate for the defense lawyer to keep a copy of the file, if he or she wishes to do so, but under no circumstances should the attorney refuse to cooperate with the new attorney’s request for the client’s file. The defense lawyer should never destroy or remove anything from the client’s file before it is produced to the new attorney. The ownership of the file and the privileges attached to it are not destroyed or waived when the former client claims ineffective assistance of counsel. The file should never be produced or its contents divulged to the prosecutor without the express written consent of the former client or the new attorney.

Conclusion

Justice O’Connor, in *Strickland*, observed that the “purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”³² If an attorney fails, for whatever reason, to provide the constitutionally guaranteed effective assistance of counsel, there are negative implications for the justice system itself. Raising an ineffective assistance of counsel claim is a protected right designed to assure that not only the individual defendant, but our society, has a justice system that accords

every individual a fair trial.

The defense lawyer facing a claim of ineffective assistance of counsel has a duty to be honest and candid with the court, as well as a continuing duty not to injure the client. The defense attorney's response to assertions of ineffective assistance claims must reflect those duties. Any other response on the part of a defense attorney would demean the integrity demanded by our system of justice. ■

Michael Mears is the Multi-County Public Defender for the State of Georgia. The Multi-County Public Defender's Office is a state-wide defense agency created by the legislature to provide assistance in the defense of death penalty cases throughout the state. He received his B.S. and Master of Arts degrees from Mississippi State University and his J.D. degree from the University of Georgia School of Law. He has been a member of the State Bar of Georgia since 1977.



Henning
Mediation
pickup 8/99
p43

Endnotes

1. STATE BAR OF GEORGIA, CANONS OF ETHICS, PREAMBLE.
2. 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
3. 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).
4. *Strickland*, 466 U.S. at 685.
5. *Id.* at 686.
6. *Id.* at 688.
7. *Id.* at 694.
8. *Shelton v. State*, 220 Ga. App. 163, 164, 469 S.E.2d 298 (1996).
9. *Strickland*, 466 U.S. at 697.
10. Gary Goodpaster, The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases, 14 N.Y.U. REV. L. & SOC. CHANGE, 59, 66, 75 (1986).
11. *Bailey v. Tucker*, 621 A.2d 108, 113 (Pa. 1993).
12. *Gomez v. Peters*, 221 Ga. App. 57, 59, 470 S.E.2d 692 (1996). *See also* *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976) (holding that where the underlying action is a criminal trial, the plaintiff is precluded from asserting a malpractice claim if he has pled guilty); *Hockett v. Breunig*, 526 N.E.2d 995 (Ind. App. 1988); *Carmel v. Lunney*, 518 N.Y.S.2d 605 (Ct. App. 1987) (holding that where the underlying action is a criminal trial, the plaintiff is precluded from showing that he would have prevailed if he has pled guilty).
13. AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.2(e) (3d ed. 1993).
14. *Id.* Standard 4-1.2(f).
15. STATE BAR OF GEORGIA, CANONS OF ETHICS, *supra* note 1, Canon 1.
16. *Id.* Directory Rule 1-102(A) (4), (5).
17. *Id.* Canon 4.
18. AMERICAN BAR ASSOCIATION, *supra* note 15, Standard 4-3.7(d).
19. STATE BAR OF GEORGIA, CANONS OF ETHICS, *supra* note 1, Directory Rule 4-101(B).
20. *Id.* Directory Rule 4-101(C)(4) (emphasis added).
21. *Id.* Ethical Considerations 4-5, 4-6.
22. 189 Ga. 113, 5 S.E.2d 352 (1939).
23. *Id.* at 118 (citation omitted).
24. Directory Rule 4-101(C)(4).
25. *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981).
26. *Lowe v. Presley*, 86 Ga. App. 328, 332, 71 S.E.2d 730, 733 (1952) (citation omitted).
27. *Smith v. Superior Court of Los Angeles County*, 440 P.2d 65, 74 (Cal. 1968) (en banc). *See also* *Harling v. United States*, 387 A.2d 1101, 1106 (D.C. App. 1978); *English v. State*, 259 A.2d 822, 826 (Md. 1969); *Harris v. Superior Court of Alameda County*, 567 P.2d 750 (Cal. 1977).
28. *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981).
29. *McKinnon v. Smock*, 264 Ga. 375, 377, 445 S.E.2d 526 (1994) (quoting *Hickman v. Taylor*, 329 U.S. 495, 510-511, 67 S. Ct. 385, 91 L. Ed. 451 (1947)).
30. *Salt Lake Legal Defender Association v. Uno*, 309 Utah Adv. Rep. 1, 932 P.2d 589, 590-91 (1997) (emphasis added).
31. *See In the Matter of Kenneth Allen Duke*, 268 Ga. 397, 490 S.E.2d 85 (1997) (attorney disbarred for multiple ethical breaches, including the failure to return files upon request).
32. *Strickland*, 466 U.S. at 689.

Avis new BW

LEGAL ARTICLES

Compulsory Cross-Claims?

By Luke A. Kill



There are two types of counterclaims, right? Right. A compulsory counterclaim *must* be raised in the initial action or it is later barred by res judicata, although a permissive counterclaim *may* be raised in the original action or in a subsequent proceeding at the defendant's election, right? Right.¹

Similarly, cross-claims under Rule 13 of the Georgia Civil Practice Act are always permissive in that they, like permissive counterclaims, *may* be raised in the original action or pursued in a later case, right? Wrong. Despite the permissive language of section 13(g) of the Civil Practice Act,² which states that a party "may" raise a cross-claim, as a defendant "may" assert a permissive counterclaim under section 13(b),³ the Georgia Supreme Court has held that principles of res judicata bar the assertion of an omitted cross-claim in a later civil action.⁴

This is treacherous territory because three concepts suggest that cross-claims are not compulsory. First, the language of the statute is expressly permissive, not compulsory. Second, under federal practice and procedure, cross-claims are permissive, not compulsory. Finally, forcing often friendly co-parties to litigate now or waive any remotely possible claim is counter-intuitive to efficient litigation management. This article discusses the origin of Georgia's law on compulsory cross-claims and then examines each of these three issues in detail.

The Georgia Cases on "Compulsory" Cross-claims

Georgia law on compulsory cross-claims arises from two unusual and fractious Supreme Court decisions, *Citizens Exchange Bank v. Kirkland*⁵ and *Fowler v. Vineyard*.⁶ Both cases included sharp dissents. Moreover, individual justices adopted seemingly contradictory views of the cross-claim issue over the five years between the cases. Uncertainty and a potential malpractice trap result from the collision of the text of the Civil Practice Act and the codified principles of res judicata.⁷

Georgia appellate courts, like federal courts, apply the principles of res judicata to enforce the compulsory nature of appropriate counterclaims. A counterclaim is compulsory in the first place because its later assertion outside the main action will, in all likelihood, be precluded by the application of res judicata. On the other hand, permissive counterclaims are not precluded by res judicata, thereby making their assertion in the main claim entirely optional for the pleader. It is precisely this application of our res judicata statute in the cross-claim arena that results in the existing cross-claim dilemma.

The unexpected consequence of an omitted cross-claim first appeared in *Kirkland*. In prior litigation, a widow sought declaratory relief against both the executrix of the deceased husband's estate and the issuing bank concerning the ownership of a certificate of deposit ("CD") held by the estate. The bank answered, declaring itself a neutral party, while the executrix failed to offer a responsive pleading and, obviously, raised no cross-claim against the bank. After judgment on the pleadings for the widow in the original case, the executrix sued the bank and alleged that the bank's negligent advice resulted in the loss of the CD.⁸

Then Presiding Justice Clarke applied the principles of res judicata to the claim because the executrix "could have raised the issue of her co-defendant's negligence by way of cross-claim in the previous action."⁹ Although the executrix argued that O.C.G.A. § 9-11-13(g) makes a cross-claim against a co-party permissive only, the majority analysis did not squarely address that point. Understandably, dissent surfaced challenging the application of res judicata to the omitted cross-claim.

The dissent, authored by Justice Bell, cited the express language of O.C.G.A. § 9-11-13(g) and relied upon federal practice and procedure in concluding that the majority misconstrued the cross-claim statute. Because cross-claims are permissive only, the dissent concluded that it was *axiomatic* that neither res judicata, nor waiver, nor estoppel would preclude a subsequent attempt to assert the claim.¹⁰ At that time, none of the other Court members agreed with Justice Bell.

Five years later an even more divided Court handed down the second "compulsory" cross-claim opinion. *Fowler* sprang from multi-party personal injury litigation in which one defendant raised a cross-claim against another for contribution and indemnification. Upon settling the first case, the cross-claimant dismissed his cross-claims with prejudice, even though the cross-claimant held an unasserted personal injury claim against the same co-defendant. After he attempted to raise the injury claim, the Supreme Court had to decide whether res judicata barred the later asserted personal injury claim.¹¹

Despite his ringing dissent in *Kirkland*, Justice Bell wrote in *Fowler* that res judicata barred the former cross-claimant's personal injury action.¹² In dismissing the argument that the bar of res judicata to this claim would result in an unrecognized "compulsory" cross-claim, Justice Bell simply cited and relied upon *Kirkland*.¹³

Apparently due to his seemingly inconsistent views of the permissive versus compulsory nature of cross-claims, Justice Bell offered a reconciliation of the two cases in a footnote.¹⁴ He believed that he was "constrained to follow" *Kirkland* even though he dissented to the majority

decision. Nevertheless, he expressed his view that *Fowler* would still have the same outcome even if the Court originally adopted his view in *Kirkland* because, in *Fowler*, the cross-claimant actually raised a cross-claim for contribution and indemnification although omitting the cross-claim for personal injury.¹⁵ In *Kirkland*, by contrast, the plaintiff raised no cross-claim at all in the original dispute.¹⁶ Justice Bell then conclusively applied res judicata principles and ruled that if the defendant asserts one cross-claim, he must assert all cross-claims in order to avoid later claim preclusion.¹⁷

The irony continues. Although then Presiding Justice Clarke authored *Kirkland*, in *Fowler* Chief Justice Clarke joined Presiding Justice Smith in dissenting from the application of res judicata to an omitted cross-claim.¹⁸ The Smith-Clarke dissent criticizes the majority for applying res judicata too broadly.¹⁹ The dissent makes the following observations that serve to illuminate the wear and tear stemming from the res judicata/cross-claim jumble:

This Court has not yet worked out the full application of res judicata in this area; we are attempting to do so today . . . [R]es judicata . . . does not fit an action brought solely for indemnity or contribution. At least one member of this Court has stated that cross-claims are permissive only and that it is “axiomatic” that a party bringing a cross-claim will not be barred by res judicata, as would be the case with a compulsory counterclaim.²⁰

Approximately a month after *Fowler*, the Georgia Court of Appeals decided a similar case touching on the “compulsory” cross-claim issue, *Tenneco Oil Co. v. Templin*.²¹ In *Templin*, a contribution claim arose from an earlier multi-party personal injury action. The parties in *Templin*, two of which were co-defendants in the first case, chose to omit any cross-claims in the original action.²²

Addressing the argument raised by the cross-claim defendant that res judicata barred the earlier omitted cross-claim for contribution, Judge Pope recognized that the claim could have been raised as a cross-claim in the original action.²³ Nevertheless, he effortlessly observed that the language of O.C.G.A. § 9-11-13 is permissive “and in no way makes a cross-claim arising out of the same transaction or occurrence as the main claim compulsory.”²⁴ The Court of Appeals’ untroubled recognition that

cross-claims are permissive, not compulsory, was made without reference to *Kirkland* or *Fowler*.

Disharmony in this area of the law continued when two years later, the Court of Appeals decided *Majestic Homes, Inc. v. Sierra Development Corp.*²⁵ Instead of easily dismissing the bar of res judicata to a later asserted cross-claim, the court followed *Kirkland* and *Fowler* and barred the cross-claim. Ironically, the Court repeated the seemingly self contradictory phrase that res judicata bars a party “who foregoes an opportunity to file a *permissive* cross-claim from bringing the claim in a subsequent action.”²⁶

The author respectfully submits that *Fowler*, *Kirkland*, *Templin*, and *Majestic Homes* cannot be reconciled on any logical basis with each other or with the language of O.C.G.A. § 9-11-13(g). Although perhaps fine or contorted distinctions could be drawn between the nature of contribution, indemnification and substantive claims

under applications of res judicata, such distinctions would still run counter to the express language of O.C.G.A. § 9-11-13, federal practice, and intuition.

Compulsory Cross-claims are Counter-Intuitive

The requirement to assert a compulsory counterclaim arises directly from the Civil Practice Act. “A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim”²⁷ This requirement is in accord with the principles of res judicata.²⁸

Although no surprises should result from application of res judicata where a party omits a compulsory counterclaim, the omission of a “compulsory” cross-claim may be problematic. The cross-claim rule, like the permissive counterclaim rule, states that a party *may* assert the cross-claim.²⁹

Res judicata should not be employed to make cross-claims compulsory. One of the primary purposes for the application of res judicata is to terminate disputes forever and finally and to avoid the unnecessary prolongation of litigation.³⁰ Just as plaintiffs and defendants are classic

Res judicata should not be employed to make cross-claims compulsory. One of the primary purposes for the application of res judicata is to terminate disputes forever and finally and to avoid the unnecessary prolongation of litigation.

adversaries, co-parties (usually co-defendants) are not. Co-parties may be only technical adversaries or may become true adversaries only if the main claims conclude in a particular fashion. Thus, forcing co-parties to litigate any and every claim that can be anticipated may often result in the prolongation of litigation that would not occur in the absence of the "compulsory" cross-claim.

Compulsory Cross-claims Contradict Norms of Statutory Construction

Statutes in pari materia relate to the same subject matter or have a common purpose.³¹ All statutes on the same subject must be given proper consideration and harmonized in order to ascertain the true legislative intent.³² The permissive/compulsory nature of counter/cross-claims in O.C.G.A. § 9-11-13 and the res judicata statute address the same subject: claim preclusion. The statutes should be construed together and reconciled.

Permissive counterclaims "may"³³ be raised in the same way in which cross-claims "may"³⁴ be raised. Construing the provisions in pari materia requires treating them in an identical fashion. Not only should the word "may" as used in cross-claim and permissive counterclaim rules be considered together, but it should also be contrasted with the word "shall" when the rule addresses compulsory counterclaims.³⁵

The terms "may" and "shall" have specific statutory meaning. The Georgia Code instructs that "may," except in very limited circumstances, "denotes permission and not command."³⁶ The use of "shall" ordinarily denotes command and not permission.³⁷ Thus, construing all statutory language together, one must ignore the permissive language of the cross-claim statute and apply the res judicata statute to preclude a later assertion of an omitted cross-claim. This elevates one statute over the other.³⁸

Cross-claims are not Compulsory in Federal Practice

In addition to rules of statutory construction, consideration of federal procedure also weighs on the side of the permissive, rather than compulsory cross-claim. As previously noted by Justice Bell in his *Kirkland* dissent, the federal view of cross-claims is that they are permissive by nature.³⁹ Federal law interpreting the Federal Rules of Civil Procedure, when the rule is substantially equivalent to its counterpart in the Civil Practice Act, although not absolutely binding, "must of necessity be looked to as highly respectable and persuasive authority."⁴⁰

Conclusion

Although Georgia law presently holds that res judicata may apply to omitted cross-claims, there have been competing views within the Court of Appeals and the Supreme Court. Further attempts to reconcile the principles of res judicata and the permissive nature of cross-claims will result in more surprise and confusion. Until the Supreme Court restores the permissive quality of cross-claims, as apparently intended by the General Assembly, these issues will continue as a trap for Georgia lawyers construing the relevant statutes in pari materia, applying their knowledge of federal procedure and using common sense.

Clarity in this area may occur in a return to Justice Bell's first pronouncement that it is self-evident that all cross-claims are indeed permissive only.⁴¹ This, however, would not allow for splitting a cause of action or splitting a claim. Once a cross-claim is raised it must be pursued to the fullest extent and include all damages arising from that claim. Any other unasserted claims should not suffer the bar of res judicata. ☒



Luke A. Kill is a member of Scoggins & Goodman, P.C. where he has a commercial, construction and tort litigation practice. He received his A.B. degree from Georgetown University and his J.D. degree from Case Western Reserve University.

Endnotes

1. *Kitchens v. Lowe*, 139 Ga. App. 526, 228 S.E.2d 923 (1976).
2. O.C.G.A. § 9-11-13(g) (1993).
3. *Id.* § 9-11-13(b).
4. *Fowler v. Vineyard*, 261 Ga. 454, 405 S.E.2d 678 (1991); *Citizens Exch. Bank v. Kirkland*, 256 Ga. 71, 344 S.E.2d 409 (1986).
5. 256 Ga. 71, 344 S.E.2d 409.
6. 261 Ga. 454, 405 S.E.2d 678.
7. O.C.G.A. § 9-12-40 (1993).
8. *Kirkland*, 256 Ga. at 71, 344 S.E.2d at 410.
9. *Id. Quære*: Under similar reasoning, would res judicata preclude a claim that was omitted as a permissive counterclaim in a previous case because it "could have been raised" in the previous case between the same parties?
10. *Id.* at 72, 344 S.E.2d at 411 (quoting CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 1431, at 164 (1971)).
11. *Fowler*, 261 Ga. at 454-55, 405 S.E.2d at 680.
12. *Id.* at 459-60, 405 S.E.2d at 681-82.

13. *Id.* at 459, 405 S.E.2d at 683.
14. *Id.* at 459-460 n.4, 405 S.E.2d at 683 n.4.
15. *Id.*
16. *Kirkland*, 256 Ga. at 71, 344 S.E.2d at 410.
17. *Fowler*, 261 Ga. at 460, 405 S.E.2d at 682-83. The cross-claim in *Fowler* significantly distinguished the case from *Kirkland*. In Justice Bell's res judicata analysis, a key issue was whether the assertion of cross-claims for contribution and indemnity placed the defendants in an adversary relationship. Justice Bell determined that such "liability over" claims created an adversarial relationship because they seek affirmative relief, although he did not explain why such claims sought "affirmative relief." *Id.* at 454, 405 S.E.2d at 681. The court relied upon RESTATEMENT (SECOND) OF JUDGMENTS §38 (1982), which provides that "claims or defenses" in the pleadings that put the parties in an adversarial relation to each other sufficiently establish the adversarial relationship for purposes of res judicata even though they are raised by parties aligned against another party. *Id.* cmt. a. According to this view, the mere defense that the co-party is primarily responsible for the liability to the plaintiff would create an adversarial relationship. The dissenters in *Fowler* would define a claim for "affirmative relief" to be a claim for something more than indemnity or contribution. 261 Ga. at 462, 405 S.E.2d at 684. The shifting status of parties and their ability to raise co-party claims in multi-claim litigation is thoroughly examined in Arthur F. Greenbaum, *Jacks or Better to Open: Procedural Limitations on Co-Party and Third-Party Claims*, 74 MINN. L. REV. 507 (1990).
18. *Fowler*, 261 Ga. at 460-64, 405 S.E.2d at 683-86.
19. *Id.* at 460, 405 S.E.2d at 683.
20. *Id.* at 463-64, 405 S.E.2d at 685-86.
21. 201 Ga. App. 30, 410 S.E.2d 154 (1991).
22. *Id.* at 30, 410 S.E.2d at 155.
23. *Id.* at 34, 410 S.E.2d at 158.
24. *Id.*
25. 211 Ga. App. 223, 438 S.E.2d 686 (1993).
26. *Id.* at 225, 438 S.E.2d at 688 (emphasis added).
27. O.C.G.A. § 9-11-13(a) (1993) (emphasis added).
28. *Id.* § 9-12-40; *Lawson v. Watkins*, 261 Ga. 147, 148, 401 S.E.2d 719, 721 (1991); *Norman v. Farm Fans, Inc.*, 203 Ga. App. 97, 98-99, 416 S.E.2d 374, 375 (1992).
29. O.C.G.A. § 9-11-13(b), (g).
30. *Bowman v. Bowman*, 215 Ga. 560, 561-62, 111 S.E.2d 226, 227-28 (1959); *Lankford v. Holton*, 196 Ga. 631, 633, 27 S.E.2d 310, 312 (1943).
31. *Pafford v. Biomet*, 264 Ga. 540, 542, 448 S.E.2d 347, 349 (1994); *DeKalb County v. J & A Pipeline Co.*, 263 Ga. 645, 437 S.E.2d 327 (1993); *Ryan v. Commissioners of Chatham County*, 203 Ga. 730, 48 S.E.2d 86 (1948).
32. *Weldon v. Board of Comm'rs*, 212 Ga. App. 885, 887, 443 S.E.2d 513, 515 (1994).
33. O.C.G.A. § 9-11-13(b).
34. *Id.* § 9-11-13(g).
35. *Id.* § 9-11-13(a).
36. O.C.G.A. § 1-3-3(10) (1990). The exception to construing "may" as permissive only is when the word as used concerns the public interest or the sake of justice or affects the rights of third persons. *See also Mohammed v. State*, 226 Ga. App. 387, 388, 486 S.E.2d 652, 654 (1997).
37. *Ring v. Williams*, 192 Ga. App. 329, 330, 384 S.E.2d 914, 916 (1989).
38. The *Kirkland* and *Fowler* view of res judicata and "adversarial" co-parties has recently been extended by the Court of Appeals in *Fedeli v. UAP/Ga. Ag. Chem., Inc.*, 237 Ga. App. 337, 514 S.E.2d 684 (1999), cert. denied (Ga. June 11, 1999). Not only are cross-claims now compulsory, but a similar fate has been determined for seemingly permissive additional claims occurring in third-party practice. "The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Code Section 9-11-12 and his counterclaims and cross-claims as provided in Code Section 9-11-13." O.C.G.A. § 9-11-14(a) (1993). Despite the seemingly permissive language pertaining to additional claims in third-party practice, *Fedeli* applied the res judicata analysis of *Fowler* and found that a plaintiff and the third-party defendant were in adversarial positions. Because of this, omitted claims would later be subject to the bar of res judicata. While *Fedeli* is a logical extension of this particular view of claim preclusion, the analysis continues to be problematic because, like its application to cross-claims, it overlooks the permissive language relating to raising additional claims in Rule 14.
39. *See supra* note 11 and accompanying text.
40. *Custom One-Hour Photo of Ga., Inc. v. Citizens & S. Bank*, 179 Ga. App. 70, 70-71, 345 S.E.2d 147, 148 (1986); *see also G.H. Bass & Co. v. Fulton County Bd. of Tax Assessors*, 268 Ga. 327, 327, 486 S.E.2d 810, 811 (1997).
41. *See supra* note 11 and accompanying text.

Arthur Anthony
pickup 8/99p72

West (In Finance) new BW

Premises Liability for Criminal Attacks: Same Crimes, New Law

By Gilbert H. Deitch

Recently, Georgia's courts have made some dramatic changes to the law surrounding the duty of property owners to protect invitees from third-party criminal attacks. These decisions continue to demonstrate the inherent difficulty of assigning responsibility to property owners for third-party actions, especially in the criminal-attack context. This article examines these decisions and, in so doing, serves as an update for this *Journal's* 1996 article: "Premises Liability for Criminal Attacks: Is a Growl as Good as a Bite?"

The article begins by discussing the "duty of protection" shared by property owners. The article then discusses how a property owner can breach that duty if a crime was "foreseeable." Next, the article explains that even if a crime was foreseeable, the plaintiff must still demonstrate that the property owner's failure to increase security was the proximate cause of the injury. Finally, the article discusses the types of damages a plaintiff can receive in a premises liability case.



Property Owners' Duty to Protect Invitees

Under O.C.G.A. § 51-3-1 (1982), property owners have a duty to invitees “to exercise ordinary care in keeping the premises and approaches [of their property] safe.” This duty extends to third-party criminal attacks. The Georgia Supreme Court made this clear in *Lau’s Corp. v. Haskins*, where it held: “[i]f the proprietor has reason to

anticipate a criminal act, he or she then has a ‘duty to exercise ordinary care to guard against injury from dangerous characters.’”¹

Before discussing what constitutes a breach of this duty, which is the topic of the next section, it is important to recognize that a property owner who is not in possession of his property is not liable for injuries suffered on the property unless the landlord defectively constructed the premises, or failed to make proper repair.²

An example of a case applying this principle in the third-party criminal attack context is *Fallon v. Metropolitan Life Insurance Co.*³ In this case, the plaintiff was attacked while working in a store leased from the owner of a shopping center. The Court of Appeals held that because the store was no longer in the possession of the shopping center owner, the owner had no duty to provide security to the store beyond the security it provided to the common areas around the store.⁴

The Role of Foreseeability in Determining Breach of Duty

The essential element in determining whether a property owner has breached his or her duty to protect invitees is the foreseeability of the criminal attack. This foreseeability can be based on prior “substantially similar” criminal acts on the property or “other factors.”

A. The Substantially Similar Test

Before the Georgia Supreme Court’s 1997 decision, *Sturbridge Partners, Ltd. v. Walker*,⁵ the rule, as expressed in *Savannah College of Art & Design Inc. v. Roe*, appeared to be clear — prior crimes involving only property do not make criminal attacks foreseeable.⁶ The concept was that property crimes and criminal attacks are not substantially similar; and thus, the former does not provide forewarning of the latter. Since *Sturbridge*, this is no longer the case.

In *Sturbridge*, a woman was brutally raped in her apartment. Prior to the rape, two or three burglaries of unoccupied apartments had occurred at the apartment complex. The Court overruled *Savannah* and held that the prior crimes, to be sufficient to constitute notice, had to be substantially similar, but this did not mean identical; whether the prior crime was sufficiently similar was generally for a jury’s determination rather than summary adjudication. In referring to the *Savannah* property/criminal attack distinction, the Court stated, “[s]uch a restrictive and inflexible approach does not square with common sense or tort law, and represents a significant departure from precedent of this Court.”⁷

In its next premises liability case, *Doe v. Prudential-Bache A. E. Spanos Realty Partners, L.P.*,⁸ the Georgia Supreme Court explained that prior crimes involving strictly property, not persons, did not necessarily render

personal attacks foreseeable. In that case, the Court explained that thefts from automobiles in a parking deck were quite different from the *Sturbridge* burglaries, and did not foreshadow the criminal attack that occurred in the parking deck.⁹ Whether *Prudential-Bache* signals the Court’s desire to head back in the direction of *Savannah* waits to be seen.

In *McNeal v. Days Inn of America, Inc.*, the Court of Appeals reversed a trial court’s grant of summary judgment and held that the trial court’s own speculation, that the proprietor could not “expect” the plaintiff’s parking lot attack to occur, was error.¹⁰ The Court noted that there was evidence of prior incidents in the hotel parking lot where the plaintiff was attacked, and reasoned that the “mere numbers or severity of prior criminal acts” were not definitive.¹¹ What mattered was whether the potential for a criminal act was foreseeable under the particular circum-

stances. The court further stated that “ordinary care” requirements for the proprietor, as well as the plaintiff, had to be tailored to the particular circumstances of the situation.¹²

Closely related to the question of whether prior criminal activity is sufficient to support

foreseeability are the types of criminal activity that are admissible on the foreseeability issue. In *Woodall v. Rivermont Apartments Ltd. Partnership*, the Court of Appeals addressed such issues raised in motions in limine; the court reasoned that questions of admissibility were within the sound discretion of the trial court, but noted that Georgia favors admission of any relevant evidence, no matter how slight its probative value.¹³ The Court concluded that a trial court should not apply any rigid, formalistic analysis, but rather should consider whether the prior crimes tended to attract the landlord’s attention to dangerous conditions.

In *Woodall*, the plaintiff had been shot during a robbery at defendants’ apartment complex. The Court found that under all the circumstances of the case, prior burglaries and auto theft were serious crimes that could alert the landlord to danger at its premises. While prior purely property crimes such as mail box and auto break-ins may not, in and of themselves, suggest a danger, they may be relevant to show the extent of crime, that crime is escalating, or may give rise to expert testimony that violent crime in a “high crime” area is likely to increase on the premises. On the other hand, the Court held that prior

The essential element in determining whether a property owner has breached his or her duty to protect invitees is the foreseeability of the criminal attack.

incidents of merely “suspicious” persons were not relevant to the foreseeability question.¹⁴

B. The Role of “Other Factors” in Determining Foreseeability

In addition to prior crimes, courts sometimes make foreseeability determinations based on factors such as those discussed below.

1. The Nature of the Property’s Use

The nature of a property’s use, such as “the unique opportunity for criminal activity presented by ATMs,” has been held to be a source of foreseeability.¹⁵ The Court of Appeals held that a robbery at a night bank depository was foreseeable due to the nature of the facility, but that the plaintiff had equal knowledge of this information.¹⁶ On the other hand, the Court of Appeals has also held that a shopping center¹⁷ and a parking deck were not uses more likely than others to attract crime.¹⁸

2. Negligent Misrepresentation

In *Killebrew v. Sun Trust Banks, Inc.*, the Court of Appeals held that a claim for negligent misrepresentation may arise if a proprietor negligently conveys false information and thereby causes physical harm to another who reasonably relies on that false information.¹⁹ In *Killebrew*, a bank posted a security guard at an ATM site after-hours. The bank contended that the guard was to protect its property, not its customers, but the Court held that the customer reasonably thought otherwise.²⁰

3. Intervention in Impending Assaults or Ongoing Circumstances

There have been a number of recent decisions regarding the duty to intervene. These cases indicate that a proprietor’s notice of a specific wrongdoer’s actions against a patron or tenant may cause the danger to the victim to be foreseeable.²¹ Thus, an innkeeper could be held responsible for the sexual abuse of a child guest, where there was evidence of the perpetrator’s (another guest) prior acts to others and notice to the innkeeper’s employees. However, a landlord’s employees’ mere observation of the perpetrator which does not alert them to any threat, does not raise a duty.²²

In another case, the Court of Appeals held that a fast food manager’s husband’s attack upon a customer was not foreseeable, and there was no duty to intervene, because there was no evidence that the proprietor had any knowledge of the husband’s proclivity prior to the attack.²³ The evidence showed only that he had made previous verbal threats to his wife; this could not indicate a likelihood that he would attack a third party.

In *Borders v. Board of Trustees, Veterans of Foreign Wars Club 2875, Inc.*, a four to three decision, the Court of Appeals held that the proprietor of a bar could have constructive knowledge that a drunk patron was a hazard, even if there was no evidence of actual knowledge.²⁴ In that case, the inebriated patron stumbled into the plaintiff and hurt her; the Court held that the proprietor was liable.

To Prevail, Plaintiff Must Show a Causal Connection Between Lack of Security and Injury

Even if a plaintiff can prove that his attack was foreseeable, he must demonstrate that it was caused by the property owner’s failure to provide adequate security. In *Hillcrest Foods, Inc. v. Kiritsy*, the Court of Appeals concluded that summary judgment for the property owner was appropriate because prior crimes on the premises of a Waffle House failed to show how the property owner could prevent the drive-by shooting of a patron.²⁵ In short, it was simply unreasonable to expect the property owner to protect patrons from drive-by shootings.

In *Post Properties, Inc. v. Doe*, the plaintiff was raped inside her apartment, but acknowledged that the sliding door was unlocked and that there were no signs of forced entry.²⁶ Also, the evidence showed that the sliding glass door had been equipped with a charlie bar and lock. The Court held that the expert’s opinion of the various ways the perpetrator could have entered, and the expert’s itemization of negligence, were merely speculative. The record was simply silent as to how entry was obtained, and thus, the plaintiff could not demonstrate that additional security would have prevented the attack.²⁷

Similarly, in *Fallon*, discussed above, which involved the rape at the store in the shopping center, the Court of Appeals found that there was no evidence that the shopping center’s security practices in the common areas had any causal effect upon the attack in a tenant’s shop. The Court held that the plaintiff’s expert’s conclusory opinions were not sufficient to demonstrate foreseeability or a duty.²⁸

Plaintiff’s Conduct or Knowledge May Bar His or Her Claim

Recent decisions have also addressed the issue of a business invitee’s duty to exercise care for his or her own safety. In *Whitmore v. First Federal Savings Bank*, discussed briefly above, the plaintiff was shot and robbed while making a night deposit at a bank.²⁹ The Court of Appeals held that ATMs and night depositories are recog-

nized as a danger and this was foreseeable to the bank. However, because plaintiff, as a member of the public, had equal knowledge of this danger, there was no duty to the plaintiff.³⁰ In contrast, the Court of Appeals held that the rape of an apartment tenant was foreseeable to her landlord based on one prior robbery and assault involving the plaintiff herself.³¹ A divided en banc Court held that her claim was not barred by the doctrine of equal knowledge because the equal knowledge doctrine applies only if plaintiff could have avoided the consequences of the defendant's negligence. In this case, there was evidence that plaintiff did take some steps to protect herself, and no indication that she could have avoided the attack.³² Not surprisingly, where a plaintiff tried to break up a fight and was stabbed, he was held to be an active participant, and there was no landlord liability.³³

In *Robinson v. Kroger Co.*, a slip and fall case, the Georgia Supreme Court recently reevaluated the two fundamental prongs of premises cases: (1) the defendant's knowledge and exercise of care; and (2) the plaintiff's knowledge of the hazard and exercise of care for self.³⁴ *Robinson* clarified the holding in *Lau's Corp. v. Haskins*,³⁵ the criminal attack case which set forth the standard for summary judgment.

The oft-cited *Lau* decision held that at the summary judgment stage, where the respondent (plaintiff) will bear the ultimate burden of proof, the movant bears no burden to negate issues or to pierce plaintiff's pleadings with evidence. The movant need only address the deficiency of the plaintiff's case, and then the burden of producing evidence shifts to the plaintiff.³⁶

Robinson addressed the first prong of this analysis. The Court noted that in premises cases, courts had required a plaintiff to produce evidence of his own lack of knowledge or negligence. In *Robinson*, the Court held that the burden is upon defendant to adduce evidence of plaintiff's own negligence or knowledge, and only then would the plaintiff have a burden of producing evidence on this issue. The Court further stated:

we remind members of the judiciary that the "routine" issues of premises liability, *i.e.*, the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety are generally not susceptible of summary adjudication, and that summary judgment is granted only when the evidence is plain, palpable, and undisputed.³⁷

Since *Robinson*, the Court of Appeals has applied the summary judgment standard in *Jackson v. Post Properties, Inc.*, a criminal attack case.³⁸ The Court reversed the trial court's entry of summary judgment, which was based upon

the contention that the apartment tenant plaintiff had equal knowledge with the landlord that prior criminal attacks had occurred at the complex. The Court of Appeals found that there were issues of fact as to whether, given plaintiff's knowledge, she exercised ordinary care to avoid the consequences of the landlord's negligence. Furthermore, there were issues of fact as to whether plaintiff objectively knew that the window locks were "flimsy." The court discounted the apartment's argument that plaintiff's own negligence was demonstrated because she had moved to a ground floor apartment knowing of prior criminal attacks, as this suggests that the apartments were defectively designed for even *having* first floor apartments, and residents assumed that risk.³⁹

Damages in Premises Liability Cases

A. No Recovery for Psychological or Emotional Injury Absent Physical Injury

In a premises liability case, the "impact rule" applies. Thus, a plaintiff cannot recover for psychological or emotional harm absent some physical injury. In *Jordan v. Atlanta Affordable Housing Fund, Ltd.*, intruders bashed in an apartment door, terrorized a mother and her children, grabbed the mother's hair and threatened her with a gun.⁴⁰ The court held that damages were recoverable and summary judgment must be denied as to the mother, as she suffered injury to her scalp and this physical injury allowed recovery for emotional injury. But summary judgment was granted against the children (who suffered serious emotional harm) as they suffered no physical contact or impact.

The court noted that there is an exception to the general rule if a defendant acted toward a plaintiff with specific intent, or reckless and wanton disregard. The court held that there was evidence of such intent by the intruders, but not by the defendant landlord's agents. The court stated that another possible exception, where emotional injury led to physical impairment, was very narrow, if not entirely abrogated.⁴¹

B. Defendants Can Be Assessed Punitive Damages

O.C.G.A. § 51-12-5.1(b) (Supp. 1999) provides that: "Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Where there is some evidence to support conscious indifference to the consequences, the courts have clearly held that the issue of punitive damages is for the jury.⁴²

In one case, an apartment tenant was raped; she had

been the victim of a prior robbery and assault. The Court of Appeals held this constituted notice to defendant, and the issue of punitive damages could proceed to a jury as the landlord had taken no action after notice of the prior attack.⁴³ In another decision, K-Mart had knowledge of prior crimes at a shopping center and provided security to K-Mart employees, but not to its tenant Cub Foods and its customers. The Court of Appeals held that K-Mart's actions could be found to show conscious indifference to the consequences.⁴⁴

In *Roberts v. Forte Hotels, Inc.*, a woman was brutally attacked at a hotel lobby entrance. The Court of Appeals held there was insufficient evidence to support punitive damages as the innkeeper provided security on weekends, when there were the most problems, and had taken other actions to address crime, even though it had no security during the week.⁴⁵

Conclusion

In the last few years, Georgia's courts have rendered a number of significant decisions addressing the tort responsibility of property owners for criminal attacks upon tenants and patrons. The careful analysis of prior substantially similar incidents remains pivotal in these cases, and the courts have provided notable guidance on this and other issues. ■



Gilbert H. Deitch is a partner with the law firm of Bauer & Deitch P.C. where he has a practice concentrating in civil litigation involving premises liability and personal injury. He received his J.D. degree from the University of Tennessee and his B.A. from the University of Georgia.

Endnotes

- 261 Ga. 491, 492, 405 S.E.2d 474, 476 (1991).
- O.C.G.A. § 44-7-14 (1991); *see also* Colquitt v. Rowland, 265 Ga. 905, 463 S.E.2d 491 (1995); Martin v. Johnson-Lemon, 271 Ga. 120, 516 S.E.2d 66 (1999).
- 238 Ga. App. 156, ___ S.E.2d ___ (1999).
- Id.* at 157, ___ S.E.2d at ___.
- 267 Ga. 785, 482 S.E.2d 339 (1997).
- 261 Ga. 764, 409 S.E.2d 848 (1991).
- Sturbridge*, 267 Ga. at 786, 482 S.E.2d at 340; *see also* Doe v. Briargate Apartments, Inc., 227 Ga. App. 408, 489 S.E.2d 170 (1997) (a single prior attack upon a tenant, although not sexual in nature, gave notice of a subsequent sexual attack).
- 268 Ga. 604, 606, 492 S.E.2d 865, 867 (1997).
- Id.*
- 230 Ga. App. 786, 498 S.E.2d 294 (1998).
- Id.* at 789, 498 S.E.2d at 297.
- Id.* at 788, 498 S.E.2d at 296.
- No. A99A0274, 1999 WL 463024 (Ga. Ct. App. July 9, 1999).
- Id.*
- Sun Trust Banks, Inc. v. Killebrew, 266 Ga. 109, 113, 464 S.E.2d 207, 208 (1995).
- Whitmore v. First Fed. Sav. Bank, 225 Ga. App. 768, 484 S.E.2d 708 (1997).
- Carlock v. Kmart Corp., 227 Ga. App. 356, 489 S.E.2d 99 (1997).
- Doe v. Prudential-Bache A. G. Spanos Realty Partners, 222 Ga. App. 169, 474 S.E.2d 31 (1996), *aff'd*, 268 Ga. 604, 492 S.E.2d 865 (1997).
- 221 Ga. App. 679, 681, 472 S.E.2d 504, 506 (1996).
- Id.*
- Millan v. Residence Inn by Marriott, Inc., 226 Ga. App. 826, 487 S.E.2d 431 (1997).
- Gale v. North Meadow Associates Joint Venture, 219 Ga. App. 801, 466 S.E.2d 648 (1995).
- Ableman v. Taco Bell Corp., 231 Ga. App. 761, 501 S.E.2d 26 (1998).
- 231 Ga. App. 880, 500 S.E.2d 362 (1998), *cert. denied* (Ga. Sept. 11, 1998).
- 227 Ga. App. 554, 489 S.E.2d 547 (1997).
- 230 Ga. App. 34, 495 S.E.2d 573 (1997), *cert. denied* (Ga. Mar. 6, 1998).
- Id.* at 35, 495 S.E.2d at 575.
- Fallon v. Metropolitan Life Ins. Co., 238 Ga. App. 156, 157, ___ S.E.2d ___, ___ (1999).
- 225 Ga. App. 768, 768, 484 S.E.2d 708, 710 (1997).
- Id.* at 768, 484 S.E.2d at 710.
- Doe v. Briargate Apartments, Inc., 227 Ga. App. 408, 489 S.E.2d 170 (1997).
- Id.* at 409, 489 S.E.2d at 172.
- Hanson v. Etheridge, 232 Ga. App. 408, 501 S.E.2d 517 (1998), *cert. denied* (Ga. Sept. 18 1998).
- 268 Ga. 735, 493 S.E.2d 403 (1997).
- 261 Ga. 491, 405 S.E.2d 474 (1991).
- Id.* at 492, 405 S.E.2d at 476.
- Robinson*, 268 Ga. at 748, 493 S.E.2d at 414.
- 236 Ga. App. 701, 513 S.E.2d 259 (1999).
- Id.* at 704, 513 S.E.2d at 264.
- 230 Ga. App. 734, 498 S.E.2d 104 (1998).
- Id.* at 739, 498 S.E.2d at 108.
- Read v. Benedict, 200 Ga. App. 4, 7, 406 S.E.2d 488, 491 (1991).
- Briargate Apartments*, 227 Ga. App. at 409, 489 S.E.2d at 173.
- Carlock*, 227 Ga. App. at 357, 489 S.E.2d at 101.
- 227 Ga. App. 471, 489 S.E.2d 540 (1997).

Board of Governors Convenes in Amelia Island for Summer Meeting

By Jennifer M. Davis

DESPITE THE THREAT OF Hurricane Dennis bearing down on the eastern seaboard, the Summer Meeting of the Board of Governors unfolded under sapphire skies in Amelia Island, Fla., August 26-28.

The weekend convention began on Friday evening with an opening reception at the Amelia Island Inn and Beach Club. The Board convened for its 170th meeting early on Saturday, while spouses and guests enjoyed a morning of spa treatments. The 140-member Board of Governors considered a number of significant issues from Bar governance to the new Bar Center to monitoring renegade lawyers.

Election Changes

First, the Board discussed a bylaw change that addresses the timing for filling vacancies on the Board of Governors. The amendments to Bylaw Article III Section 8, which passed unanimously, provide the following: 1) If a new post is created due to either an increase in circuit population or if the legislature creates a new judicial circuit, the President will appoint an active member to hold office until the next election. As President Rudolph Patterson explained, "This gives Bar constituents an opportunity to be represented as soon as possible." 2) If a post is ever eliminated, the repre-

sentative serving in the eliminated post will serve the remainder of the term for which (s)he was elected. 3) If the geographical boundaries of a circuit shift and a Board member is no longer located within the geographic boundaries of the post to which (s)he was elected, the President will appoint that representative to the circuit in which the member is located—if there is a vacancy. If not, the member will serve out the remainder of his or her term.

The Board also approved a bylaw change to clarify the procedure for electing at-large members to the Executive Committee. (The Executive Committee is composed of the officers and six at-large members elected by and from the Board.) The at-large members are elected at the Annual Meeting by a majority of the members present and voting. If more candidates receive the majority of votes than there are vacancies to be filled, the candidates receiving the greatest number of votes will be deemed elected.

JDPP Rules Pass

The Board of Governors unanimously passed both rules and internal operating procedures to govern the Judicial District Professionalism Program (JDPP). The program seeks to informally address unprofessional and uncivil conduct of lawyers and judges at the local level by relying on peer influence. JDPP is not intended to

handle lawyer/client disputes, lawyer/employee disputes, lawyer/vendor disputes, or violations of the Code of Judicial Conduct or Part IV (Discipline) of the Rules and Regulations of the State Bar of Georgia. The proposed JDPP program would become Part XIII of the aforementioned Bar Rules. The proposed rules are published herein on page 84 for member comment, then they will be sent to the Supreme Court of Georgia for consideration. Look for a more in-depth article about JDPP in a future *Journal* as the program unfolds.

Member Discounts

Next, Board member Myles Eastwood reported on behalf of the Membership Services Committee he chairs. He explained that his committee is not only researching services that will offer discounts to members, but also exploring ways of tying such endorsements into royalties for the Bar. The goal is to increase non-dues revenue sources as part of the Bar's ongoing effort to maintain the lowest license fees in the country. Eastwood reported the committee has reached a non-exclusive agreement with Hertz rental car agency to offer members a discount of approximately eight percent. To receive your discount, you simply have to identify yourself as a member of the State Bar of Georgia.

The numerous committees, Board of Governors, officers, Executive



1. (l-r) Board members Fielder Martin and Larry Fowler visit with Past President Kirk McAlpin at the opening reception. 2. Board member Phyllis Holmen (left) picks up a door prize from President Rudolph Patterson and Caroline Brashier, daughter of Executive Director Cliff Brashier. 3. Board member Judge Hugh Sosebee, representing the newly-created Towaliga Circuit, studies the agenda. He previously served as the Flint Circuit representative, stepping down in 1997. At the time, he was the longest serving member of the Board of Governors having been on it even before the Bar was unified in 1964. 4. Board Member Bobby Shannon reviews the agenda during the Saturday meeting. 5. Frank Jones, chair of the Bar Center Committee, provides an update about the new headquarters. 6. Sandra Taylor and her son, Heath, hit the dance floor on Saturday night. 7. Forrest Champion (right) makes a point at the Board meeting, while fellow member Earle Lasseter looks on. 8. Board member Leland Malchow (second from right) and his family take a break during the luau: (l-r) Marshall, Janna, Lee and Georgianna. 9. Saturday evening's festivities featured authentic Polynesian dances. 10. It was a beautiful day for golf lovers following the Board meeting.



Committee and staff constantly strive to ensure fiscal prudence. The work of the Membership Services Committee is just one example of the ways the Bar researches to keep our dues structure where it is today. Another example of the hard work effectuated by these hundreds of volunteers is a budget surplus of \$127,204.00 realized during the past fiscal year.

Board Apportionment

As reported in the last issue of the *Journal*, the Board of Governors is studying its composition through a committee led by Gerald Edenfield of Statesboro and John Chandler of Atlanta. Edenfield gave a preliminary report of the committee's projected path in exploring this topic. First, they are surveying other bar associations to learn their board's size and makeup. In addition, a subcommittee will also study the method of electing Board members.

Bar Center Update

Frank Jones, Bar Center Committee chair, presented an extensive update on the State Bar of Georgia's new home. The Bar purchased the Federal Reserve Bank Building on Marietta Street in downtown Atlanta in February 1997.

Anticipated Move-in. Thus far, the Federal Reserve has exercised its option to extend its lease through Sept. 30, 2001; and they have the right to extend through March of 2002. As such, Jones reported the Bar expects to possess the building on Oct. 1, 2001. Anticipating six months for construction, the committee projects the State Bar of Georgia will move its headquarters on April 1, 2002.

Leasable Space. Because the building has 220,000 sq. ft. of usable space above ground — and the Bar will occupy about 80,000 of that area—we have approximately

140,000 sq. ft. of leasable space left over. Jones explained, "Since it would be more prudent for the State Bar to use the expertise of professional leasing and management advisors for the building, we interviewed and ultimately selected Cushman & Wakefield to handle this." Cushman is looking at what our lease expectations are and what the market rate will be. Jones added, "Our conviction remains that we should have every possible related legal organization housed in the building." As such, he said the space would first be offered to legal and judicial entities.

Use of the Bar Center. The committee is already considering a strategic plan for use of the building by lawyers. The first draft was based on a survey of how other states are using their facilities. "The building will be owned by all of us, and we hope it will be a gathering place for lawyers," said Jones. He added, "We want it to be user-friendly — more so than any other bar center. We're looking at how to configure it to be of most use to all of us." Some of the ideas the committee is considering include: first-floor receptionist/greeter; third-floor concierge to relay messages/faxes to lawyers attending CLE seminars; lawyer lounge; plenty of meeting rooms for ADR, depositions, etc.; computer technology training center; mock courtroom; and a museum of law. The Bar Center may even be available for dinners, parties, wedding receptions, etc. Jones added that lawyers visiting the Bar Center would enjoy free parking. In fact, the committee is studying tearing down the existing parking deck and constructing a larger, more accessible structure.

Area Growth. Executive Director Cliff Brashier gave a slide presentation showing the tremendous growth in the area, including: the new Hawks/Thrashers arena, loft condo-

miniums, new hotels and grocery stores, etc. The Bar plans to approach both the Embassy Suites and Holiday Inn that border Centennial Park to discuss hotel discounts for Bar members — especially those attending CLE. Jones concluded the neighborhood overview saying, "Given the urban expansion, we certainly made a wise financial decision for the lawyers of Georgia."

ABA Report

Doug Stewart, delegate to the American Bar Association and State Bar Past President, gave an overview of the ABA Annual Meeting held in Atlanta in August. A number of Georgians were honored as part of the convention, further proving that many of the country's finest lawyers practice in the Peach State (see article on page 64).

Stewart reported that the initial denial of provisional accreditation for John Marshall Law School by the ABA had been withdrawn. As a result, the ABA will reconsider the issue at a later date.

He also discussed multidisciplinary practice (MDP), which President Patterson called, "the biggest issue to confront us in our careers." In June, the ABA Commission of Multidisciplinary Practice had recommended that lawyers be allowed to partner with professionals from other disciplines.

However, the ABA House of Delegates, at its meeting on August 10, declined to change professional ethics rules to allow lawyers to provide legal services in multidisciplinary practices until further study demonstrates that such practices would further the public interest without sacrificing independence and loyalty.

The State Bar of Georgia will continue to monitor MDP through a

special committee chaired by Past President Linda Klein.

Unauthorized Practice of Law

On the heels of the discussion of lawyers partnering with non-lawyers, General Counsel Bill Smith discussed the state of UPL enforcement in Georgia. He reported that a Supreme Court committee led by Justice Carol Hunstein is reviewing the UPL rules proposed to them by the State Bar in 1995. Smith reported that his office has three investigators and one attorney dedicated to this issue. These individuals work with solicitors around the state to protect the public from harm by non-lawyers unfamiliar with the legal system. Of the 226 complaints filed this year, 221 have

been settled, with most of the UPL activity occurring in the metro Atlanta area. Fourteen people have been arrested since last August, 11 restraining orders have been issued by superior court judges, and two lawyers were halted from practicing while suspended.

Aloha!

After the Board of Governors adjourned, participants were free to enjoy golf, tennis or sunning on the beach. That evening, everyone gathered for a fresh seafood luau featuring an authentic Polynesian revue. Prince Pele, a direct descendent of a royal Samoan family, opened the evening with the traditional blowing of the conch shell. The authentically costumed group per-

formed traditional songs and dances from Polynesia, from hula dancing to fire eating. It was a wonderful ending for the oceanside meeting — just ask any one of the children who had their parents dancing the macarena by the end of the night. ☒

AAA -
new

Mainstreet pickup 6/99 p83

ABA Honors Georgians During 1999 Annual Meeting in Atlanta

About 13,000 people representing the American Bar Association (ABA) and its affiliates visited Atlanta in August to attend the association's 121st Annual Meeting. More than 2,200 conferences and other events took place as part of the week-long gathering, and a bevy of awards recognizing and honoring distinguished persons and accomplishments was presented. As the distinguished names were called, time and time again Georgia lawyers and judges rose to claim the awards. Here we pay tribute to those among us whose exemplary work was nationally recognized.

A Job, A Life Well Done

"There are few in Georgia's legal community who have done as much to promote women in the profession and to ensure equality for women in all aspects of the court system," said former first lady Rosalynn Carter. She was referring to



Justice Hunstein

Carol W. Hunstein, Associate Justice of the Supreme Court of Georgia, and one of five recipients of this year's **Margaret Brent Women Lawyers of Achievement Award** from the American Bar Association Commission on Women in the Profession. The Margaret Brent Awards are named after the first woman lawyer in America; they honor outstanding women attorneys who have achieved professional excellence in their area of specialty and have actively paved the way for other women lawyers.

The road to success was not a smooth one for Justice Hunstein. Stricken first with polio before her second birthday, then with cancer before the age of five, she quickly learned about overcoming adversity.

By the time she was 12 she had lost her mother, at age 18 she married, and by age 22, Justice Hunstein was a single parent with a four-year-old son and no financial resources. A second bout with cancer soon followed and, as a result, her left leg was amputated.

Undaunted, Justice Hunstein researched her options for a college education and, with financial support from a state rehabilitation program, which instilled in her an interest in public service, she became a lawyer.

In 1984, she was elected the first woman judge of DeKalb County Superior Court, and she was later elected the first woman president of the Georgia Council of Superior Court Judges. Justice Hunstein became a justice of the Supreme Court of Georgia in 1992, and has served as an adjunct professor at Emory University School of Law in Atlanta since 1991. Said Georgia

Supreme Court Chief Justice Robert Benham, "During her tenure on the court, Justice Hunstein has vigilantly watched over Supreme Court appointments to boards and commissions, making sure that women and minorities are fairly represented."

"Because of her many accomplishments, I asked her to serve on the advisory board of the Georgia Campaign for Adolescent Pregnancy Prevention," wrote Jane Fonda in supporting Justice Hunstein's award nomination. "She has been an enthusiastic proponent of our work. In fact, she began a program to bring court hearings into schools so that young people could see first hand the ramifications of early pregnancy, drug usage, etc."

Two Giant Steps for Womankind

Judge Dorothy Toth Beasley, the first woman ever appointed to serve on the Georgia Court of Appeals, was this year's recipient of the **President's Centennial Award of Excellence** from the National Association of Women Lawyers (NAWL).

After clerking for three circuit court judges in Arlington County, Virginia, Judge Beasley practiced law first in Arlington and later in Atlanta,



Judge Beasley

where she served as Assistant Attorney General of Georgia and as Assistant U.S. Attorney. She was appointed to the State Court of Fulton County in 1977 and to the Court of Appeals in 1984, where she served for 14 years (as Chief Judge from 1995-96). Currently, she is executive director for International Programs for the National Center for State Courts, which serves as a clearinghouse of state court information and best practices. Judge Beasley previously served as a member of the Board of Directors of the National Center and the American Judicature Society.

The **Arabella Babb Mansfield Award** recognizes outstanding individuals for their professional successes, positive influences, and valuable contributions to women in the law and in society. It is presented by the NAWL, the ABA Commission on Women in the Profession, and the National Conference of Women's Bar Associations. The recipient of the 1999 award is **Judge Phyllis A. Kravitch**, the first woman to be appointed federal judge in the southeast and the third woman in the country to be appointed U.S. Circuit Judge.



Judge Kravitch

A graduate of the University of Pennsylvania Law School, Judge Kravitch worked as a trial lawyer in

Savannah, where she represented indigent people in criminal cases and civil rights suits. As a member of the Chatham County Board of Education from 1945-1955, she was instrumental in eliminating sex- and salary-based discrepancies, and eradicating the use of substandard buildings for minority schools.

Judge Kravitch served as president of the Savannah Bar Association during 1975 and was elected superior court judge one year later. She helped establish the Savannah Area Family Emergency Shelter for Battered Women and the Savannah Rape Crisis Center, and she also assisted the Georgia Legislature in revising family, juvenile, and child abuse laws and statutes that were previously not gender-neutral.

Flying Solo, Flying High

During the ABA's Solo & Small Firm Day '99 awards luncheon, **Kirk M. McAlpin**, a sole practitioner in Atlanta, was presented the **Donald C. Rikli Solo Lifetime Achievement Award** for his

commitment to sole practitioners and solo practice. McAlpin is past recipient of the Tradition of Excellence Award from the General Practice & Trial Section of the State Bar of Georgia (1986), the Distinguished Service Scroll from the University of Georgia Law School Association (1982), and the American Bar Association Award of Merit for Senior Bars (1980). He is also past president of the Atlanta Legal Aid Society, the State Bar of Georgia, the American Bar Association Young Lawyers Division, and the Georgia Society for Prevention of Blindness.

McAlpin continues to be an



Kirk M. McAlpin

inspiration to all lawyers — especially those in solo practice or just starting out. In a recent interview for the ABA YLD magazine, McAlpin offered the following mantra that has shaped his career: "Be available to the public; continue good comradeship and close friends throughout; never give up in spite of disability or adversity; never lose zest to contribute. If you learn to say today is a great day, there is no limit to what you can do — that is the spirit of great lawyers."

The ABA General Practice, Solo and Small Firm Section provides information and assistance to lawyers in general practice, solo and small firm settings. It is the only ABA section created specifically to help these lawyers succeed and prosper. Section members celebrated a special evening on August 5, enjoying a four-course dinner at the Governor's Mansion with **Governor and Marie Barnes**. The governor was presented a biography of photographer Walker Evans by Section member and Georgia lawyer, Chuck Driebe.

Kudos for Defenders of Kids' Rights

Robert Cullen, Martha Miller, Linda Pace, Deborah Peppers, and Terence Walsh, all from Georgia, were among those selected by the Juvenile Justice Center of the American Bar Association Criminal Justice Section as winners of the 14th annual **Livingston Hall Juvenile Justice Award**. Said Wallace Mlyniec, co-chair of the Juvenile Justice Committee, "These lawyers continue to skillfully advocate for children during one of the most dramatic periods of change in the history of the juvenile court, while maintaining their commitment and compassion for children."

Peppers is the president and founding member of "Voices of the

Children,” a political action committee for children. She, Cullen, and Miller were instrumental in bringing a class action challenging the conditions of confinement at the Georgia Regional Youth Detention Center in Dalton, Georgia. Cullen and Miller have protected the rights of children through their practice for over 20 years. Pace, of the DeKalb County Juvenile Public Defender’s Office, has also been a defender of children in court for 20 years and is an active participant in training and continuing legal education programs for juvenile court attorneys. Walsh, of the law firm Alston & Bird, has been an active juvenile court volunteer for several years and, as president of the Atlanta Bar Association, was the vision behind the creation of the Truancy Intervention Project — which trains probation officers and volunteer attorneys to serve as mentors to truant children.

A Firm Standing

Two Atlanta law firms, **King & Spalding** and **Arnall Golden & Gregory**, were among several firms and organizations recognized by the ABA Standing Committee on Legal Aid and Indigent Defendants for their participation in a year-long program to donate computers to legal assistance organizations. Surveys have shown that many legal service providers have low-grade or no computer equipment. To date, the project has provided almost 650 computers and 400 copies of WordPerfect software to 85 legal aid programs nationally.

A+ Education Efforts

The **Institute of Continuing Judicial Education of Georgia (ICJE)** in Athens is the winner of the **1999 Judicial Education Award**,



Pictured at the Livingston Award Ceremony (l-r): Terence Walsh, Linda Pace, Martha Barrett, Lisa Greer, Martha Miller, Bob Cullen and Debby Peppers.

presented annually by the American Bar Association Judicial Division National Conference of Special Court Judges. The award, which recognizes individuals or institutions that have provided high-quality judicial education and training to judges of limited or special court jurisdiction, was established to encourage states to address the needs of particular jurists, and to reward states that do so in superior fashion.

ICJE was formed in 1976 as a joint venture of the Georgia Supreme Court, the Judicial Council of Georgia, and the University of Georgia School of Law. It serves as the primary source of professional development through basic and continuing education for judges and other personnel of the judicial branch.

Emory University School of Law was one of the recipients of this year’s **E. Smythe Gambrell Professionalism Award**. Law schools, bar associations, law firms, and not-for-profit, law-related organizations are all eligible for the award, which acknowledges projects that enhance professionalism among lawyers.

Emory Law School was recognized for the redesign and expansion of its first-year law student orientation program on professionalism. At orientation, first-year students meet in small groups with volunteer lawyers and members of the law school faculty to discuss hypothetical situations that highlight ethical dilemmas law students might face in the future. Materials for the program were designed in collaboration with the Chief Justice’s Commission on Professionalism. The Commission also recruited lawyer participants,

who received CLE professionalism credit for their efforts (see article on page 68).

“This year’s award recipients,” said the Rev. Robert F. Drinan, chair of the ABA Standing Committee on Professionalism, “demonstrate creative, energetic approaches to raising issues of professionalism to lawyers at many different stages of their careers. It is the vitality of efforts like these that offer the greatest promise of strengthening and maintaining the commitment of the legal profession to integrity and dedication to the public good.”

ABA Handbook Lists Atlanta Programs

This past year, the Atlanta offices of **Holland & Knight** and **Alston & Bird** organized mock trial sessions at Inman Middle School. The sessions, which focused on a drunk driving accident, allowed students to act as defense lawyers, prosecutors, bailiffs, and judges, while the “real lawyers” coached from behind the scenes. A new publication by the ABA’s Section of Individual Rights and Responsibilities cites the Atlanta program as a model for lawyers who want to become involved in improving the quality of education in public schools.

The 32-page handbook, titled *Tools for Schools*, highlights a number of existing model programs from around the country and offers concrete steps toward adopting similar programs locally. It is available for \$5 (to cover shipping and handling costs) through the Section office, (202) 662-1030, or the ABA Service Center, (800) 285-2221. The product code number for the publication is PC# 5177001. ☒

— *Nikki Hettinger,*
Communications Coordinator

NCCUSL Adopts Uniform Computer Information Transactions Act

ON JULY 29, 1999 THE NATIONAL Conference of Commissioners on Uniform State Laws adopted the Uniform Computer Information Transactions Act (UCITA). NCCUSL's adoption of UCITA capped an almost decade-long struggle to create a new uniform statutory framework for computer software license transactions. NCCUSL's adoption of UCITA begins a new round in the battle to stake a claim in this growing area of the law, as the NCCUSL will recommend UCITA for adoption by state legislatures in the coming months and years.

UCITA began in 1991 when NCCUSL addressed an ABA study group with a view towards modifying Article 2 of the Uniform Commercial Code to better accommodate computer software licensing transactions.

After four years of trying, in 1995, the American Law Institute and NCCUSL agreed that the changes to the law were so sweeping that they could not be accomplished within the confines of existing Article 2 of the UCC. The ALI and NCCUSL would spend from 1995 until 1999 trying to pull together the various new statutory elements in a new Article 2B.

That effort ran aground in February, 1999 when the ALI refused to endorse the final draft of Article 2B. Reasons for this refusal ran in several directions. Entertainment and publishing groups opposed Article 2B on the theory that it created too great

of a change in existing law. Other groups opposed Article 2B on the grounds that it was biased in favor of vendors and against users.

After the ALI pulled out of the Article 2B drafting process in February, NCCUSL indicated it would re-name Article 2B as UCITA and would go forward to consider the uniform act at its summer meeting. Opposition groups had little time to organize a defense and the pending endorsement by NCCUSL received

relatively little attention in the press.

With the drafting process over, it remains to be seen whether UCITA will be adopted by the states and, if so, how it will affect the growing law of electronic transactions and software licensing. ☒

An article in an upcoming edition of the Journal by Jonathan Wilson, an attorney with King & Spalding in Atlanta, will highlight some of the changes in the law that UCITA would accomplish.

Golden Lantern pick
up 8/99 p49
“Advertisement” at
top

ANOTHER CHANCE FOR YLD TO TAKE A BOW



By Joseph W. Dent

Once again, the American Bar Association (ABA) has recognized the Young Lawyers Division (YLD) of the State Bar of Georgia as a top-notch institution. We were 1998-1999 Awards of Achievement winners in several categories.

The Kids and Justice Program, chaired by Alla Shaw, won first place in the Public Service category. The committee's purpose is to introduce fifth graders to the criminal justice system while increasing their knowledge of their own rights and responsibilities as citizens. Committee volunteers teach students about criminal laws, the necessity of enforcing laws, and how the law applies to the everyday lives of juveniles. Students visit their local jail, observe a live court proceeding, and perform their own mock trial. This year, two schools in Atlanta, one in Savannah and one in Augusta will participate in this growing program, which needs ongoing community support, particularly in the form of volunteers.

The MCLE/Trial Credit Assistance Program received the second place award in the Service to the Bar category. This committee, chaired by Nicole Wade, helps new Bar admittees find courts in which they

can obtain their required trial credits. Those of us who are not too far removed from that first year of practice can appreciate the need for this service. Through such programs, the YLD strives to provide valuable assistance to members of the Bar, and particularly to new admittees.

The YLD also received first place in the Comprehensive category. First place means the ABA recognizes all of the many great programs dedicated to serving the public and the Bar. My hat goes off to Ross Adams, YLD

I hope to carry on the tradition established by my predecessors of leading an award-winning division.

Immediate Past President, and to the many committee chairs who volunteered their time to make 1998-1999 an award-winning year. Special recognition also goes to David Gruskin, the Awards of Achievement chair, and DeAnna Byler, director of the YLD. David and DeAnna were responsible for putting together the Awards of Achievement application, which presented the fine programs of the Georgia YLD to the panel of judges for their consideration. It goes without saying that a well-prepared application is necessary to effectively communicate the excellent work of the committees of the YLD.

For the sixth consecutive year, our newsletter was a first-place

winner. Most everyone in the Bar receives the four issues of our newsletter, and we are proud to bring home the first-place award once again. DeAnna Byler and Ron Weiner, the newsletter editors for 1998-1999, deserve a pat on the back for following in the footsteps of our past editors by continuing to produce one of the finest newsletters in the country.

As my presidential term gets underway, I can only hope to carry on the tradition established by my predecessors of leading an award-winning division. We have many dedicated committee chairs who are working diligently to continue the mission of the YLD — to provide service to the community and the Bar.

I must also take this opportunity to highlight a new program of our Litigation Committee, which demonstrates how YLD volunteers continue to develop service-oriented projects which reinforce the belief that lawyers are, indeed, dedicated to serving their communities. The Litigation Committee, under the leadership of Chairperson James Doyle, will be conducting a Shadowing Program this year. This program is designed to allow high school students to tag along with a lawyer for a day, providing the lawyer an opportunity to introduce the student to the justice system through practical experience. What a great way to promote our profession!

In order for the Shadowing Program and the many other YLD community activities to be successful, we need volunteers. Our accomplishments thus far are due to the tireless efforts of the many people who have generously committed their time to participate in our programs. Please check us out, and become a part of an award-winning organization. ☐

Section leaders, pictured at right, came together for a luncheon meeting at Bar Headquarters on September 1. This casual get-together was a success, and those in attendance decided to meet quarterly. Among topics discussed were the sections' new and improved Web pages, seminar planning, and section representation on the ICLE Board of Trustees. The next meeting will be held in November.

Visit the New Section Web Pages. Go to www.gabar.org, select "site map" then "sections" and click on the section of your choice. The State Bar's Web site will provide a forum on the Discussion Board that can be used to share ideas, discuss important topics, or broadcast messages to other section members. Section members are now listed under each Web page. Important information on joining a section is available.

The **Administrative Law Section** will host a reception at 6:00 p.m. on November 17 at the Lynne Farris Gallery in the Hurt Building in downtown Atlanta. Secretary of State Cathy Cox will speak during this event.

The **Entertainment & Sports Law Section** held a luncheon at Fusebox in Atlanta. La Ronda Sutton, General Manager of Hitco Music Publishing, and Jonathan E. Leonard, a partner with Atlanta's Ware & Leonard LLC, discussed their work with producers and songwriters like Luther Vandross, Jermaine Dupri, Gap Band, and Anita Baker. Ivory T. Brown is chair of the Section.

The **Intellectual Property Law Section** sponsored a luncheon on

September 9 at the Ritz Carlton, Atlanta. Their guest speaker was Q. Todd Dickinson, Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks. One hundred people attended this event and received an update on developments at the Patent Office (pictured at right). ☒

— Lesley T. Smith, Section Liaison



Section leaders, above. Pictured at the IP luncheon below, (l-r): Gregory J. Kirsch, chair-elect; Todd Dickinson, keynote speaker; and Jason A. Bernstein, current chair.



GEORGIA MOCK TRIAL COMPETITION

Attorney coaches are needed for high school teams throughout Georgia

Serve as a mentor to youth in your local schools

For more information, contact the Mock Trial Office
(404) 527-8779 ♦ (800) 334-6865 ♦ mocktrial@gabar.org
or visit our Web Site on the Internet:
http://www.gabar.org/ga_bar/mocktrial.html



WHO'S WHERE

In Athens

The state and local tax practice of **KPMG LLP** has retained **Walter Hellerstein**, a professor of law with the University of Georgia, to serve as counsel. KPMG LLP is the U.S. member firm of KPMG International. Visit www.us.kpmg.com.

In Atlanta

Andre, Blaustein & Green LLP announces that **S. Wade Malone** and **Brendan J. McCarthy** have joined the firm as partners. The office is located at 127 Peachtree St., N.E., Suite 700, Atlanta GA 30303-1800; (404) 653-0300.

Lori Melton has joined the Atlanta office of **Fragomen, Del Rey, Bernsen & Loewy** as an associate concentrating in business immigration law. The office is located at 1175 Peachtree St., N.E., 100 Colony Square, Suite 700, Atlanta, GA 30361; (404) 249-9300.

Schnader Harrison Segal & Lewis LLP announces that **Lisa Y. Washington** has joined the firm's Atlanta office as an associate in the real estate department. Also, **Mary Anne Hall** has been named as counsel from associate in the Atlanta office, and **Donald B. Mitchell** joins the firm in Atlanta as counsel resident. Visit the firm's Web site at www.schnader.com.

Former U.S. Bankruptcy Judge **Hugh Robinson** has joined **Greene, Buckley, Jones & McQueen** in an of counsel position. Founded in 1920, the Atlanta-based firm is located at Suite 1400, Marquis II Tower, 285 Peachtree Center Ave., Atlanta GA 30303; (404) 522-3541.

W. Ray Persons has joined the

Atlanta office of **Hunton & Williams** as a partner. **Julie Haffke** has also joined the firm, which is located at NationsBank Plaza, Suite 4100, 600 Peachtree St., N.E., Atlanta GA 30308-2216; (404) 888-4000.

The 11 lawyers at **Roberts, Isaf & Summers** have joined the Atlanta office of **McGuire, Woods, Battle & Boothe LLP**, boosting the number of attorneys at McGuire Woods to more than 20. The office of the newly-expanded group is located at 285 Peachtree Center Ave., N.E., Marquis Tower Two, Suite 2200, Atlanta GA 30303.

Ralph B. Levy will step down as managing partner of **King & Spalding** at the conclusion of his current term in office at the end of this year. The Atlanta location is at 191 Peachtree St., Atlanta, GA 30303; (404) 572-4600.

Paul, Hastings, Janofsky & Walker has appointed **J. Allen Maines** of Atlanta as one of two vice-chairs of the firm's 154-lawyer nationwide litigation department. He concentrates his practice in complex corporate counseling, governance and securities litigation. Also, **Walter E. Jospin**, previously with Troutman Sanders LLP, has joined the firm as partner in the Atlanta office. The firm's Atlanta office is located at 600 Peachtree St., NE, Suite 2400, Atlanta, GA 30308-2222; (404) 815-2400.

In Cairo

Dan R. Williams, former Regional Inspector General, and Division Director for the Office of Investigation of the Inspector General at the U.S. Department of Health and Human Services, has opened a law office at 321 Bell St., P.O. Box 193, Cairo, GA 31728; (912) 378-8001.

In Covington

W. Dan Greer and **Frank B. Turner Jr.** have formed the law firm of **Greer & Turner LLP**. The office is located at 1104 Monticello St., Covington, GA; (770) 786-4390.

In Dallas

M. Elizabeth Lanier has joined the **Law Offices of George Pennebaker** as an associate. Ms. Lanier is a nurse attorney. The firm concentrates in medical malpractice and personal injury cases. The office is located at 41 Courthouse Square (P.O. Box 232), Dallas, GA 30132; (770) 445-6677.

In Decatur

Michael M. Sheffield, formerly with the DeKalb County Public Defenders Office, has moved into private practice. Sheffield is located at One Decatur Town Center, #250, 150 E. Ponce de Leon Ave., Decatur, GA 3003-2538; (404) 377-9254 fax (404) 377-5776.

In Dalton

Kinney, Kemp, Sponcler, Joiner & Tharpe is pleased to announce that it has added **J. Tracy Ward** as of counsel and named **Robert A. Cowan** as partner. The office is located at 225 W. King St., P.O. Box 398, Dalton GA 30722-0398; (706) 278-5211.

In Macon

Chambless, Higdon & Carson, LLP announces that **Dennis L. Duncan** has joined the firm as of

counsel. The office is located at Suite 200, Ambrose Baber Bldg., 577 Walnut St., Macon, GA 31201.

In Marietta

After 32 years, **Richard C. Alderman** has retired from the practice of law — he reports he is going to try his hand at fishing and golf. Alderman's office was located in Marietta; he may now be reached at 1202 S.E. 21st Ave., Cape Coral, FL 33990; (941) 573-4757.

In Thomaston

DeAnn Wheeler has joined the **Law Office of Alan W. Connell** as an associate. The office is located at Suite 203, Bank of Upson Bldg., 108 S. Church St., Thomaston, GA; (706) 647-8180.

In California

Don S. Lemmer, formerly with Kelley Drye & Warren LLP, has joined **Coudert Brothers** as a senior attorney in its Los Angeles office, where he will continue to represent management in labor and employment matters. The office is located at 1055 West Seventh St., Twentieth Floor, Los Angeles, CA 90017; (213) 688-9088.

David M. Walsh has been elected partner, litigation department, in the Los Angeles office of **Paul, Hastings, Janofsky & Walker LLP**.

In Florida

Long-time federal prosecutor **Spencer Eig** announces the formation of law offices at 420 Lincoln Rd. in Miami Beach. Most recently, Eig served as trial attorney for the Immigration and Naturalization Service. He can be reached at (305) 672-2770.

Mary J. Berger has been promoted from senior attorney to

Official Opinions

Prison labor.

Inmate labor may not be used to work for a solid waste management facility that is operated by a private, for-profit entity, where the inmate labor inures



**Attorney General
Thurbert Baker**

to the benefit of that private, for-profit entity. (7/28/1999 No. 99-12)

There were no Official Opinions issued in August.

Unofficial Opinions

There were no Unofficial Opinions issued in July or August. ☒

assistance general counsel at **Rayonier**, a global supplier of timber, specialty pulp and wood products. Her address is 501 Centre Street, P.O. Box 496, Fernandina Beach, FL 32035-0496; (904) 261-9823 FAX (904) 277-4465.

In South Carolina

Nexson Puet Jacobs Pollard & Robinson LLP announces that **Alan B. Linkous**, formerly of Haynsworth, Marion, McKay & Guerard LLP, has become an associate in the firm's Charleston office. Mr. Linkous can be reached at (843) 577-9440 or abl@npj.com.

In Washington, D.C.

Powell, Goldstein, Frazer & Murphy LLP is pleased to announce that **G. Lee Skillington** has joined the firm's international business practice as counsel in Washington. The firm also welcomes **Wayne Zell** to its Washington office as partner in tax practice. Visit the firm's Web site at www.pgfm.com.

Troutman Sanders LLP announces that **Mary Clare Fitzgerald**, founder and executive director of the Electronic Commerce Forum, has joined the firm as Washington Director of Public Policy – Finance and Electronic Commerce. The firm's Washington office is located at 1300

I St., N.W., Suite 500 East, Washington, D.C. 20005; (202) 274-2955.

Claudia Callaway, previously with Troutman Sanders LLP, has joined **Paul, Hastings, Janofsky & Walker LLP** as special counsel at the firm's Washington, D.C. office. ☒

Dan
Turner
pickup
8/99
p51



COURTROOM AS THEATER, LITIGATORS AS PERFORMERS

The Trial Lawyer's Art by Sam Schrager
Temple University Press. 245 pages. \$29.95

Reviewed by Robyn Ice Sosebee

For well over two millennia, humans have recognized the entertainment value of conflict, as played out in the structured courtroom setting. Audiences in Greek amphitheaters pondered the human frailties on trial in Aeschylus's *Oresteia* and, later, Elizabethans considered the quality of mercy in Shakespeare's *The Merchant of Venice*. Present-day movie fans vicariously experience tension and anguish in *Anatomy of a Murder*, *The Verdict*, and *To Kill a Mockingbird* and find comic relief in *Adam's Rib* and *My Cousin Vinny*.

Sam Schrager is a member of the Evergreen State College faculty in Olympia, Wash., and also served as curator of the American Trial Lawyer's Program at the Smithsonian Institution's Festival of American Folk Life. In *The Trial Lawyer's Art*, he effectively melds the human fascination with courtroom drama with traditional folkloric characters and plots. Thus, instead of focusing solely upon the victories of great trial lawyers, he delves deeper, seeking to pinpoint the most effective "performance" qualities of the most persuasive advocates. In the process, he compares contemporary trial lawyers to the archetypal heroes and traditional plotlines of folklore, and likens their stylistic talents to those of skilled storytellers.

For example, Schrager compares Philadelphia lawyer Cecil B. Moore to "a folk hero in the mold of others celebrated for their moral and physical strength — men like Jack Johnson, the heavyweight boxing champion who

beat every great white hope." A great trial lawyer, he observes, combines a competitive edge with a strong commitment to the client's cause, a love of the spoken language, and a deep understanding of human emotions.

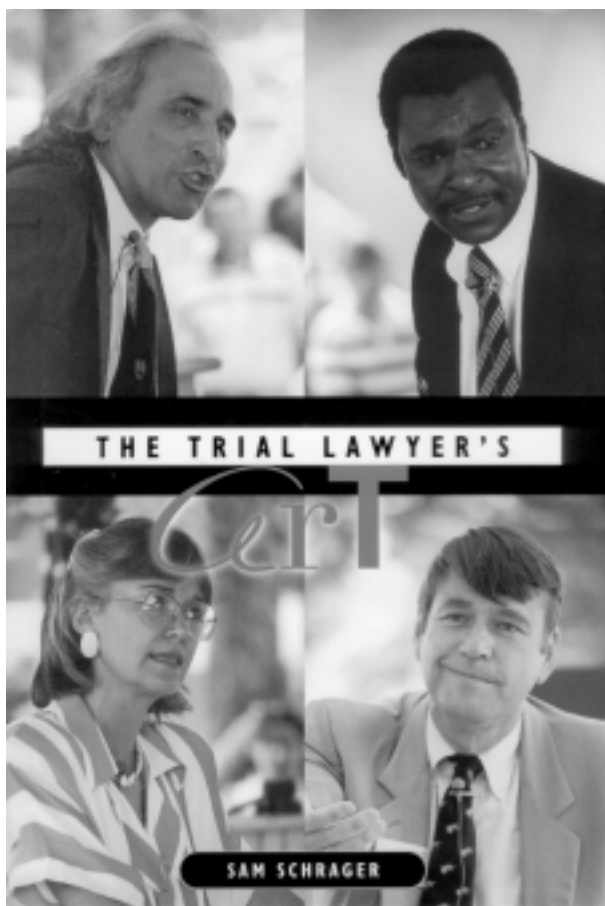
In chapters focusing on style, identity, and other aspects of courtroom presentation, Schrager studies the speech patterns of several 20th century trial lawyers. In scripts taken from audiotapes, trial transcripts, interviews,

and other sources, he employs italics, capitalization, and other devices to capture on paper the cadences, expressions, and speech patterns of several well-known trial lawyers. His subjects include Clarence Darrow, J. Tony Serra, Roy Barrera, Roger King, Lorna Propes, Jo Ann Harris, Diana Marshall, and others.

Schrager's analogy to traditional folklore is particularly appropriate to his discussion of instances in which lawyers have employed verbal skills and nimble minds to capitalize upon the inadvertent verbal lapses of witnesses. He tells of a defendant who responded to all questions with precisely the same answer. Nonetheless, under clever cross-examination, he was led to confess to a brutal murder. Citing the recurrent folktale plot in which "a fool follows instructions literally, with disastrous results," Schrager

observes, "unlike pure-of-heart clients, who win over the jury by the gradual revelation of their character, clients in these confession stories signal their guilt with an instantaneous lapse."

Schrager also assesses the effect of the persuasive presentational styles upon the jury. Some studies suggest that evidence is the decisive factor in jury decisions, while others conclude that juries decide cases based upon a



variety of tangible and intangible factors, including jury composition, attractiveness, race, social class, and speech styles of defendants and plaintiffs. Schrager reasons that the data remains inconclusive because researchers have paid “scant attention to the effect of lawyers’ skills — perhaps because, since they infuse the trial, they can’t be measured.”

Ultimately, Schrager cautions that, “trial lawyers, in short, must live with the consequences of their craft.” His discussion of the moral responsibilities of trial lawyers is an appropriate conclusion. “Skill in the trial craft obviously serves the purpose of winning. Unless governed by a more general ethic, does it also serve justice?” While Schrager does not venture a simple answer to this question, he does force the reader to consider the results of the frequent courtroom collisions between skillful persuasive techniques and simple truth.

Robyn Ice Sosebee is a partner at Alston & Bird LLP, where her practice focuses upon the regulatory, transactional and adversarial aspects of environmental law. She received her J.D., cum laude, from Georgia State University College of Law, where she served as Editor-in-Chief of the Law Review; her M.F.A. in Children’s Theatre from University of Georgia; and her B.F.A., magna cum laude, in Theatre from West Virginia University.

Duly Noted

The Georgia Trial Court Desktop (Carl Vinson Institute of Government, \$349). This reference product installs directly to a computer’s hard drive for convenient access to a number of databases, including Civil and Criminal Jury Instructions, the U.S. and Georgia Constitutions, Georgia Court Rules (Supreme Court, Court of Appeals, Superior, State, Juvenile, and Magistrate), as well as Superior court Civil and Criminal Bench Books and the Juvenile Court Bench Book. The main tool bar also includes quick reference to the trial statutes in the Georgia Code. Other features readily available: search engine, export to a built-in word processor and hyperlinks to statutes. According to the Council of Superior Court Judges of Georgia, *Trial Court Desktop* “is already becoming a central tool in the effort to modernize Georgia’s trial courts and make the administration of justice more efficient.” For more information, contact the Carl Vinson Institute of Government (706) 542-6239 or www.cviog.uga.edu.

◆ ◆ ◆
O’Connor’s Federal Rules: Civil Trials 1999 (4th edition) Updated by Michael C. Smith and Gregory S. Coleman and **O’Connor’s Federal Forms: Civil Trials**

1999 (2nd edition) by D. Bryan Hughes, Clyde M. Sieberman and Mary L. Sinderson (Jones McClure Publishing, Inc., \$49.95 for each volume). Boasting that the hallmark of their books is “plain English writing and straightforward organization,” Jones McClure Publishing Inc. is trying to make inroads in the federal rule books market, which is dominated by the West Group. *O’Connor’s Federal Rules* contains the Federal Rules of Civil Procedure, Federal Rules of Evidence (with annotations), and Federal Rules of Appellate Procedure, Advisory Committee Notes, 28 U.S.C., the Hague Convention on Service Abroad, the U.S. Constitution, and timetables for tracking deadlines. Moreover, this volume also contains 10 chapters of commentary covering every phase of a federal trial. The companion book, with matching chapter and section numbering, *O’Connor’s Federal Forms*, is equally comprehensive providing forms for the most common pleadings and motions, as well as forms for cases involving civil rights suits under 42 U.S.C. §1983, Federal Employers’ Liability Act, breach of contract, Federal Tort Claims Act, copyright infringement, employment suits under Title VII and the ADA, and negligence in auto accidents. For ordering information, contact the publisher at (800) 626-6667 or orders@jonesmcclure.com.

◆ ◆ ◆

Expert Testimony: A Guide for Expert Witnesses and the Lawyers Who Examine Them by Steven Lubet (\$29.95) and **Expert Rules: 100 (and more) Points You Need to Know About Expert Witnesses** by David M. Malone and Paul J. Zwier (\$12.95) (National Institute for Trial Advocacy “NITA”). Especially in the wake of

Daubert v. Merrill Dow Pharmaceuticals, Inc. and *Kumho Tire Co. v. Carmichael*, these two paperback volumes are indispensable. *Expert Testimony* is designed to teach witnesses how to “say what they really mean” in a way that is easily understandable and avoids the “traps and snares that may be set by opposing counsel.” Chapter subjects include: credibility, preparation, direct examination, cross-examination (three chapters on the basics, what to expect and how to cope), depositions and discovery, and ethics and professionalism. *Expert Rules* is a convenient 4-by-6-inch guide designed for quick and easy access when lawyers and

students need to think quickly on their feet. Topics covered include: expert reports, preparing and deposing expert witnesses, admissibility of expert testimony, direct examination, constructive and destructive cross-examination, and summary of exhibits, visual aids and expert demonstrations. The books are available from NITA at (800) 225-6482 or www.nita.org. ☐



GSU Holds One of Several Professionalism Orientations

By Nikki Hettinger

“EVERY HUMAN BEING IS entitled to respect,” stated the Honorable Harold G. Clarke, former Chief Justice of the Supreme Court of Georgia. He was addressing a group of 190 first-year law students, but his words would inspire any layperson believing in truth, justice and the American way. “Do the right thing for the right thing’s own sake,” he advised, and heads throughout the auditorium nodded, possibly in agreement or in understanding, or maybe just in appreciation for the much-needed reminder.

This introductory speech launched the 1999 Georgia State University Law School’s Orientation on Professionalism, held on August 17. Not only did the former Chief Justice open this year’s proceedings, he also spearheaded the project that created the entire orientation campaign. In 1989, under Justice Clarke’s leadership, the Chief Justice’s Commission on Professionalism was established. In 1993 the Commission, in conjunction with the State Bar Committee on Professionalism, began conducting Orientations on Professionalism each August for

first-year law students at every law school in the state, in an ongoing effort to secure and maintain the highest ethical and professional standards in the practice of law.

The Orientation on Professionalism consists of an introductory address to the entire first-year class, followed by two-hour discussion sessions conducted in small groups of eight to 10 students. Each group is assigned two group leaders from among Georgia lawyers and judges who volunteer to participate, and topics are selected from a list of hypothetical situations distributed to each student prior to orientation. Orientation ends with a reception for all participants.

The Good, the Bad and the Law

In one of the discussion groups, introductions ensue, first by the group leaders and then by the students. Right away it becomes clear that this is not a timid bunch. The students are not just stating basic information (name, educational background, etc.), several are provid-



President Rudolph Patterson, above, speaks to students at his alma mater, Mercer Law School. Below right, Associate Dean Jim Elliott and Supreme Court Justice Harris Hines administer the student professionalism oath to first-years at Emory. Below left, leading a discussion group at Georgia State are (standing) Mary McCall Cash, an attorney in private practice, and Fulton County Solicitor General Phillip Jackson.



ing unprompted (albeit entertaining) anecdotes about themselves, their schools and their hometowns. Needless to say, the ice is broken by the time the ethics discussion begins.

The students are instructed by the group leaders not to “think like attorneys,” but rather, to trust their “gut instincts” in responding to each hypothetical problem. The discussion is lively, with hands being raised continuously. The students tend to gravitate towards very broad interpretations of the hypotheticals, so the group leaders repeatedly rephrase the problems so that the ethical issue is pinned down, rather than circumvented. Since there is no right or wrong answer to these problems, discussion continues until the group is satisfied with the depth of its exploration. Certainly, the opportunity exists for a participant to get to know his or her own heart.

Down the hall is another discussion group, where a more relaxed discourse is taking place. Here, the group leaders are challenging the students with possible variations on each hypothetical, making the question, “What is the right thing to do?” more and more difficult to answer. The group leaders sprinkle the discussion with accounts of their own real-life experiences, providing valuable insight.

A total of 24 such groups are gathered throughout the Georgia State College of Law on this summer afternoon and, as participants begin trickling out into the main lobby area for the reception, animated faces and energetic strides indicate the orientation was an invigorating experience for many.

Around the State

Other institutions throughout the state presenting Orientations on Professionalism at their law schools last August included Emory University,

Mercer University and the University of Georgia, with 250, 162 and 225 student participants, respectively.

All of these schools followed an orientation format similar to Georgia State’s, with the exception of Emory, which expanded its Orientation on Professionalism last year into a three-part series for first-year students to be held every August, October and February.

Emory introduced a new element to the program this year in the administration of a Student Oath by Supreme Court Justice Harris Hines. This oath, kept on file by the registrar, invokes jurisdiction for purposes of prosecution under the Honor Code at Emory. But far more importantly, it expresses the determination of the Emory Law School community to

promote the values that undergird the profession within the law school, and to reorient students from their past academic context towards their professional future.

Emory is also the only school to incorporate faculty members into its pool of group leaders, assigning one professor and one community volunteer to each discussion group. This comprehensive approach has received much statewide attention since its inception, and other universities may adopt similar programs in the future. Emory also won an award from the ABA for its program (see page 66). There is also talk of Emory developing an orientation session for second-year law students, but plans for this have not been confirmed to date. ☒

N.GA Mediation pickup 8/99 p34

Georgia Courts Directory Now on Sale

Copies of the 1999-2000 *Georgia Courts Directory* are now available for \$20 each. The new directory contains listings of all the judicial and related personnel in Georgia. The information is current as of August 1. If you would like to purchase one or more copies, send a check or money order (no cash, please) to the address below. Be sure to indicate the number of copies requested and where the directories should be mailed.

Administrative Office of the Courts
244 Washington Street, SW
Suite 550
Atlanta, GA 30334-5900

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.

Baxter, Harry S. Atlanta	Admitted 1941 Died July 1999	Metz, Donald Bernard North Augusta, SC	Admitted 1975 Died February 1999
Clarke Jr., J. Caleb Atlanta	Admitted 1930 Died August 1999	Neely III, Edgar A. Atlanta	Admitted 1965 Died August 1999
Crabbe, Danny W. Silver Creek	Admitted 1984 Died September 1998	Register, J. Willard Columbus	Admitted 1938 Died April 1999
Dunaway Jr., Marson G. Rockmart	Admitted 1949 Died October 1997	Roescher Sr., Waldo F. Decatur	Admitted 1949 Died July 1999
Freeman, Hon. Richard C. Atlanta	Admitted 1953 Died August 1999	Saunders, Robert Scott Golden, CO	Admitted 1979 Died March 1999
George, William V. Forest Park	Admitted 1949 Died July 1999	Shirley, Bill A. Loveland, CO	Admitted 1947 Died June 1999
Griffeth, Ronald C. Augusta	Admitted 1972 Died October 1998	Thompson Jr., M. E. Valdosta	Admitted 1959 Died July 1999
Hall, Merlyn D. Waycross	Admitted 1981 Died March 1999	Van Hemert, M. H. Paul South Miami, FL	Admitted 1961 Died June 1998
Jackson, Thomas M. Macon	Admitted 1963 Died July 1999	Williams, David Wayne Atlanta	Admitted 1989 Died August 1999
Lissner Jr., Jack J. Brunswick	Admitted 1930 Died 1994		

West (Chap 7...) pickup 8/
99- p46 BW

Summary of Recently Published Trials

Chatham Superior Ct	Auto Accident — Intersection — Last Clear Chance ...	Defense Verdict
Chatham Superior Ct	Auto Accident — Intersection — Backing Up at Traffic Light	Defense Verdict
Chatham Superior Ct	Auto/Truck Accident — Intersection — Right-of-Way	\$16,000
Chatham Superior Ct	Landlocked Property — Interference with Easement	\$38,000
Clayton Superior Ct	Premises Liability — Supermarket — Automatic Door	Defense Verdict
Cobb State Ct	Auto Accident — Center Turn Lane — Right-of-Way	\$92,200
Cobb State Ct	Medical Malpractice — Acute Frontal Sinusitis — Treatment ..	Defense Verdict
Cobb State Ct	Medical Malpractice — Endometriosis — Diagnosis	Defense Verdict
Cobb State Ct	Falldown - Exiting Bar — Steep Ramp with No Handrail	\$107,500
Cobb State Ct	Auto/Bicycle Accident — Turning — Right-of-Way	\$25,000
Cobb Superior Ct	Partnership — Promise to Execute Written Contract	\$38,750
Fayette Superior Ct	Worksite Accident - Backhoe Strikes Laborer	\$98,500
Floyd U.S. District Ct	Falldown - Residence — Porch Swing	\$40,000
Fulton State Ct	Falldown — Store Parking Lot — Ice	\$12,000
Fulton State Ct	Truck/Bus Accident — Left of Center — Passengers Injured	\$1,188,000
Fulton State Ct	Falldown — Cafeteria — Accumulation of Water on Floor	\$25,000
Fulton State Ct	Falldown — Apartment — Icy Sidewalk	\$150,000
Fulton State Ct	Indemnification — Falldown — Grocery Store	\$70,000
Fulton Superior Ct	Bus/Pedestrian Accident — Crossing on "Walk" Signal	\$575,000
Fulton Superior Ct	Property Damage — Excessive Water Flow — Lot Alterations	Defense Verdict
Fulton Superior Ct	Falldown - Bus Passenger — Sudden Stop	Defense Verdict
Fulton Superior Ct	Auto/Truck Accident — Rear-End — Fatality	\$798,411
Fulton Superior Ct	Auto/Truck Accident — Rear-End — Fatality	\$1,392,750
Fulton United Ct	Falldown — Discount Store — Liquid on Floor	\$8,270
Gwinnett State Ct	Auto Accident — Rear-End — Vehicle Stopped on Roadway	\$72,000
Richmond Superior Ct	Auto Accident — Intersection — Red Traffic Light	\$42,000
Rockdale State Ct	Property Damage — Residence — Termite Infestation	\$142,500
Rockdale Superior Ct	Auto Accident — Head-On — Hydroplaning Vehicle	\$380,000
Spalding Superior Ct	Truck Accident — Alcohol — Dram Shop Liability	\$234,000
Troup State Ct	Falldown — Furniture Store — Chair Collapse	\$15,000

Let us help you settle your case

The Georgia Trial Reporter is the litigator's best source for impartial verdict and settlement information from State, Superior and U.S. District courts.

For 10 years GTR case evaluations have assisted the Georgia legal community in evaluating and settling difficult cases. Our services include customized research with same-day delivery, a fully searchable CD-ROM with 10 years of data and a monthly periodical of recent case summaries. Call 1-888-843-8334.

Wade Copeland, of Webb, Carlock, Copeland, Semler & Stair of Atlanta, says, "Our firm uses The Georgia Trial Reporter's verdict research on a regular basis to assist us in evaluating personal injury cases. We have been extremely pleased with both the results and service and would recommend them to both the plaintiff's and defense bar."



Display Rack in K-Mart Falls on Customer Resulting in a \$2,778,448 Verdict

Plaintiff was shopping at K-Mart when a large display rack of rubber balls fell and struck plaintiff causing spinal fusions. (*Capilos v. K-Mart; Cobb County State Court*)

♦♦♦

Racial Discrimination Verdict of \$440,000 for Three High School Band Members for Refusal to Serve Them in a Restaurant

Defendant Waffle House restaurant refused to serve three black members of the North Atlanta High School marching band after the band had stopped their bus at defendant's restaurant. (*Middlebrooks v. Waffle House; U.S. District Court*)

♦♦♦

14-year-old Boy Fails to Prove Sexual Abuse and The Jury Returns a Defense Verdict

Plaintiff, 14-year-old Down's Syndrome child, allegedly accused his father of sexual abuse but at trial he had no recollection of the abuse claimed by his caregivers. (*Chisenhall v. Chisenhall; Gwinnett County State Court*)

♦♦♦

Medical Malpractice Results in a Delay in Treatment Resulting in a Herniated Disc and a \$600,000 Verdict

Plaintiff was an inmate at Defendant Baldwin State Prison when she was injured in a volleyball game and her CT scan was delayed due to the scanner being broken. (*Stitt v. Correctional Medical Systems; Baldwin County Superior Court*)

♦♦♦

Defendant's Failure to Yield the Right of Way Results in a \$770,000 Verdict for Herniated Discs

Defendant made a left turn into the path of plaintiff's oncoming auto resulting in plaintiff undergoing two diskectomies. (*Jenkins v. Georgia Department of Agriculture; Muscogee County Superior Court*)

Richard H. Middleton Jr. of Savannah was elected president of the Association of Trial Lawyers of America (ATLA) during their annual convention held July 17-21 in San Francisco. The association of over 56,000 members was established in 1946 to safeguard victims' rights, promote injury prevention, strengthen the civil justice system through education, and encourage the disclosure of information critical to public health and safety.

The Savannah Association of Criminal Defense Lawyers recently elected its officers for 1999-2000. They are as follows: Kathleen Aderhold, president; George Haygood, vice-president; and Tammy



Cox, secretary/treasurer.

James P. Smith, a partner in the Atlanta-based law firm of Arnall Golden & Gregory LLP, was voted president-elect of the University of Georgia (UGA) Law School Association Council. The election took place at the annual meeting

The newest judges of the Court of Appeals, appointed by Gov. Roy Barnes, were sworn-in on July 12 and began work immediately. They are pictured (l-r): Judge John J. Ellington, formerly a State Court Judge in Treutlen County; Judge M. Yvette Miller, formerly a State Court Judge in Fulton County; and Judge Herbert E. Phipps, formerly a Superior Court Judge in the Dougherty Circuit. (Photo by Laura Heath, Governor's office)

of the UGA Law School Association at the State Bar Annual Meeting in June. The Association promotes law school interests and the cause of legal education, while fostering a permanent affiliation and fellowship among UGA law graduates. ☐

So. Ga. Mediation pickup 8/99 p67

Emory to Sponsor Cumberland Study

EMORY LAW SCHOOL'S

Turner Environmental Law Clinic has established a historical and legal research project on issues concerning Cumberland Island, Ga. The project is sponsored by the Savannah law firm of Hunter, Maclean, Exley & Dunn.

"There are several issues of importance regarding Cumberland that have not been thoroughly explored from an objective point of view. That's what we propose to do," says Lee Ann de Grazia, director of the Turner Environmental Law Clinic, in describing the project's goals. "We believe our academic research capability is of greater benefit to this situation than an advocacy role."

According to de Grazia, Cumberland Island encompasses one of the first areas of the country to be designated a wilderness area under the Federal Wilderness Act of 1972, as well as cultural and historic resources protected under the National Historic Preservation Act.

The goal of the project, says de Grazia, is to produce a scholarly research report that will address issues such as: the interaction between the Historic Preservation Act and the Wilderness Act, concerns of private ownership and retained rights on the island, the Wilderness Management Plan and management of feral animals.

The independent academic study will draw no conclusions, but will present legal facts for use by the various groups that are involved in shaping the future of the island.



John Tatum, left, managing partner of the Savannah law firm Hunter Maclean, describes the project on Cumberland Island, above.

Interested parties include environmental and historical organizations, landowners, retained rights holders and the National Park Service. The final research papers will be presented at Emory University in the fall.

The southernmost barrier island off the Georgia coast, Cumberland Island is 17.5 miles long and 33,900 acres, of which 16,890 are marsh, mud flats and tidal creeks, according to the National Park Service. Although much of the island became part of the park system in 1972, it also has approximately 2,000 acres that are privately held. The combination of private residents, a wilderness area, numerous historic sites, and diverse natural resources poses many challenges for all concerned.

Two Emory law students, Marc Goncher and Amanda Epstein, worked as summer associates at Hunter Maclean. The law firm is donating half of Goncher and Epstein's hours to the project, which are supervised by Professor de Grazia. In addition, Marc Biondi, a graduate of Emory Law School, is

working on the project as law clerk with the Turner Environmental Law Clinic. The Project has also received a generous donation from the Coastal Environmental Organization.

Hunter Maclean is Georgia's largest law firm outside of Atlanta, with 48 attorneys, including several who concentrate on environmental law. "We have a high regard for Emory's Law School and are pleased to support them on a major academic project," explains John Tatum, managing partner for the firm. "We are in the business of solving problems and resolving disputes. That is why we support this unbiased research, which we hope will be a first step in helping all parties involved to find a common solution for the future of the island."

According to Ben Bruton, President of Coastal Environmental Organization, the group's mission is to protect and defend Georgia's coastal resources, including natural, historical, cultural and other indigenous resources. ☐

DISCIPLINE NOTICES (As of September 22, 1999)

Disbarred

Joseph B. Ervin Savannah, GA

Attorney Joseph B. Ervin (State Bar No. 240996) has been disbarred from the practice of law by order of the Supreme Court dated September 14, 1999. Ervin was retained by a guardian of a minor child to represent the child in a personal injury case. Ervin settled the case without notifying or receiving the guardian's authorization. He represented to the insurance company that the guardian had signed the settlement documents, and received two settlement checks on behalf of his client. Ervin failed to deposit the checks in his trust account. He also failed to provide the guardian with an accounting of the funds held in a fiduciary capacity. Ervin falsely represented to the Probate Court that he had deposited the settlement funds in his trust account. He wrote a check to the guardian from his trust account for settlement funds, and the check was presented against insufficient funds.

Gary W. Forbes Duluth, GA

Attorney Gary W. Forbes (State Bar No. 267650) has been disbarred from the practice of law by order of the Supreme Court dated September 13, 1999. Forbes was suspended pending the outcome of disciplinary proceedings by order of the Supreme Court dated March 1, 1999. Forbes failed to respond to State Bar disciplinary charges. Accordingly, the Supreme Court found that Forbes received \$10,500.00 in settlement funds on behalf of his client. He wrote a check from his trust account to his client for settlement funds, and the check was dishonored on more than one occasion. Forbes failed to maintain a balance in his trust account to cover the settlement funds. He failed and refused to provide the settlement funds to

his client. Forbes failed to account for funds held in a fiduciary capacity.

Mark Frantz Atlanta, GA

Attorney Mark Frantz (State Bar No. 274370) has been disbarred from the practice of law by order of the Supreme Court dated September 13, 1999. Frantz was convicted of bribery in federal court, and appealed his conviction through the U.S. Supreme Court. When the Supreme Court denied certiorari, Frantz argued that his appeal had not terminated because of a pending Motion to Vacate his sentence. The Georgia Supreme Court determined that Frantz's disbarment was appropriate at this time.

Bret Jerald Pangborn Dunwoody, GA

Attorney Bret Jerald Pangborn (State Bar No. 560680) has been disbarred from the practice of law by order of the Supreme Court dated September 20, 1999. Pangborn failed to respond to State Bar disciplinary charges. Accordingly, the Court found that in three disciplinary proceedings, Pangborn wilfully abandoned legal matters entrusted to him by his clients and lied to his clients about the status of their case. He failed to disburse settlement funds on his clients' behalf to medical care providers, and failed to account for funds held in a fiduciary capacity.

Dennis J. Redic Atlanta, GA

Attorney Dennis J. Redic (State Bar No. 597335) has been disbarred from the practice of law by order of the Supreme Court dated September 13, 1999. Redic failed to respond to State Bar disciplinary charges. Accordingly, the Court found that Redic used \$48,775.00 in fiduciary funds for his own benefit. He failed to provide his client with an accounting for funds held in a fiduciary capacity. Redic failed to deliver

the funds to his client.

Edward Thomas Smith Stockbridge, GA

Attorney Edward Thomas (State Bar No. 656745) has been disbarred from the practice of law by order of the Supreme Court dated September 13, 1999. Smith failed to respond to State Bar disciplinary charges. Accordingly, the Court found that Smith was retained to represent a client and her minor daughter in a personal injury claim but failed to represent the client's interests or return the client's property. He also failed to return the client's telephone calls or letters. Smith vacated his offices without providing a forwarding address. Prior to his disbarment, Smith was suspended from the practice of law for failure to respond to the State Bar's Notice of Investigation by Supreme Court order dated December 2, 1998.

Louis Starks Norcross, GA

Attorney Louis Starks (State Bar No. 676510) has been disbarred from the practice of law by order of the Supreme Court dated September 13, 1999. Starks failed to file a timely response to State Bar disciplinary charges. Accordingly, the Court found that Starks failed to keep his client advised about the status of her case, and settled the case without notifying the client or receiving authorization from her. Starks then received settlement funds, negotiated the check without the client's authorization, and used the settlement funds for his personal use. Starks failed to provide his client with an accounting for funds held in a fiduciary capacity.

William E. Sumner Atlanta, GA

Attorney William E. Sumner (State Bar No. 692300) has been disbarred from the

practice of law by order of the Supreme Court dated September 13, 1999. Sumner failed to respond to State Bar disciplinary charges. Accordingly, the Court found that Sumner wilfully abandoned legal matters entrusted to him by his clients and failed to return client funds he held in a fiduciary capacity. He used funds held in a fiduciary capacity for his personal benefit. Sumner failed to provide his clients with an accounting for funds held in a fiduciary capacity. Sumner advised his clients that he was performing legal services on their cases when he was not.

Suspension

Gary Wayne Bross Norcross, GA

Attorney Gary Wayne Bross (State Bar No. 086350) petitioned the Supreme Court for voluntary discipline. The Supreme Court accepted Bross' petition. Bross has been suspended from the practice of law for one year by order of the Supreme Court dated September 13, 1999. Bross was retained to prepare a will for his client. Bross admitted that he notarized the self-proving affidavit attached to his client's will even though no disinterested witnesses were present to sign the will. He also admitted that he offered the will for probate after the client's death knowing it was improperly executed. He then provided a false response to an interrogatory regarding the circumstances of the signing and witnessing of the will. Bross has no record of prior discipline.

Gaeton Leonard Drexinger Marietta, GA

Attorney Gaeton Leonard Drexinger (State Bar No. 230310) petitioned the Supreme Court for voluntary discipline. The Supreme Court accepted Drexinger's petition. Drexinger has been suspended from the practice of law for 60 days by order of the Supreme Court dated September 13, 1999. Drexinger was hired to assist a client with the closing in the sale of a business. Drexinger admitted that he aided in a fraudulent scheme against the lending institution and the U.S. Small Business Administration by failing to disclose certain material information related to the sale of the business. Drexinger has no prior attorney discipline.

Ronald M. Lawrence Atlanta, GA

Attorney Ronald M. Lawrence (State Bar No. 439888) petitioned the Supreme Court for voluntary discipline. The Supreme Court accepted Lawrence's petition. Lawrence has been suspended from the practice of law for 60 days with conditions on his reinstatement by Supreme Court order dated September 13, 1999. Lawrence was retained to probate his client's mother's will. Lawrence received \$3,500.00 plus filing fees from the client and \$32,000.00 from the estate. He paid \$23,000.00 in estimated estate taxes but failed to file the final tax documents on behalf of the estate. Following payment of the estimated estate taxes, Lawrence used the balance of the funds to pay fees and expenses associated with the estate, but failed to provide his client with an accounting of the funds. During Lawrence's representation of the client in the probate matter, he entered into real estate investment with the client. The business in which he invested his client's money filed Chapter 11 bankruptcy. Lawrence also failed to provide the client with an accounting of the investment funds, and failed to inform the client that the business had filed bankruptcy.

Barbara C. Miller Huntsville, AL

Attorney Barbara C. Miller (State Bar No. 506175) has been suspended from the practice of law for 90 days, *nunc pro tunc* to June 19, 1995 by order of the Supreme Court dated September 13, 1999. Miller is licensed to practice law in Alabama and Georgia. Miller was suspended from the practice of law in Alabama for 90 days on or about May 25, 1995. Miller pled guilty to violations in Alabama that correspond with Standards 21, 43, 45, 50, and 68 of Bar Rule 4-102. Miller has no prior disciplinary record in Alabama or Georgia.

Review Panel Reprimand

Daniel L. Britt Griffin, GA

Attorney Daniel L. Britt (State Bar No. 083225) has been ordered to receive a Review Panel reprimand with conditions by order of the Supreme Court dated September 10, 1999. Britt failed to file a

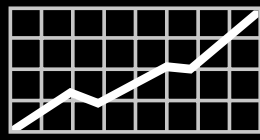
timely response to State Bar disciplinary charges. Accordingly, the Court found that Britt was retained to represent clients in a trust and estate matter and was later discharged. Britt failed to provide the clients with an accounting of funds paid by the client, an itemization of professional time spent on their case, or a refund of unearned attorney's fees. He also divided fees paid to him with another attorney who was not his partner or associate without the clients' consent. Britt refunded \$3,000.00 to his clients following a fee arbitration hearing. Britt must submit all of his trust account records for the years 1996 – 1998 to the State Bar for audit within six months of the Court's order. Britt must also submit to an evaluation by the Law Practice Management Program at his expense within six months of the Court's order, and must implement any recommendation.

Jackson L. Culbreth Atlanta, GA

Attorney Jackson L. Culbreth (State Bar No. 200300) petitioned the Supreme Court for voluntary discipline. The Court accepted Culbreth's petition on September 14, 1999. Culbreth has been ordered to receive a Review Panel reprimand. Culbreth was retained to represent a client in the sale of a grocery store through a broker. Culbreth admitted that his client was involved in a fraudulent scheme against the lender and U.S. Small Business Administration. The sale was later the subject of a federal investigation. Culbreth should have directed his client not to participate in the transaction.

Interim Suspension

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 the August 1999 issue, one lawyer has been suspended for violating this Rule.



Still Not Networked? Why Not?

By Terri Olson

BELIEVE IT OR NOT, I STILL hear the question, “Why should my law firm computers be networked?” on a regular basis. Those who ask are frequently people at law firms where each secretary works exclusively for one attorney, has his or her own printer, and uses an independent paper calendar. In other words, since the bulk of the work is not shared, and since resources do not need to be shared among staff, the benefits of networking seem nonexistent.

I believe, however, that networking is an absolute necessity, even at small firms with minimal applications and staff. For those of you who are already networked (the majority) but feel your system may not be operating to its fullest potential (also probably the majority), as well as for those of you who are still “electronically disconnected” from coworkers, the following summary of benefits may prove helpful:

Backup. One technical issue that can be a nightmare in a non-networked office is backup. If it is done, it generally consists of each secretary or lawyer remembering to copy critical information onto a floppy disk on a regular basis. In a networked environment, especially one where information is stored centrally, backup can be done using a single tape drive for the entire network at once.

Easier access to data. In an office where documents are stored on individual PCs, searching for a file is

comparable to rifling through a dozen unlabeled, unorganized file cabinets. While networks do not single-handedly solve organization problems, they certainly make it easier to designate centralized storage areas for specific items (forms, client files, discovery, research, etc.) so anyone needing to access this information later on may do so, quickly and easily.

Calendaring. In any office where there is more than one lawyer and one secretary, information about the comings and goings of others needs to be shared. It is embarrassing, not to mention poor marketing practice, for a receptionist to admit (s)he has no idea where a staff member is. In fact, if a partner fails to notice that his or her colleague (who landed in the hospital with diverticulitis last night) had a critical hearing scheduled this morning, it may be considered outright malpractice. The simplest and most accurate method, hands down, for sharing this type of information is through a group calendar that can be accessed across a network.

Printers. It is far cheaper in the long run to set up one high-end printer for network access than to place multiple personal laser printers on people’s desks. True, secretaries will have to get up and walk 10 feet to pick up a print job. On the other hand, a network printer is faster (sometimes as much as three times faster), offers multiple input and output trays (and options such as dedicated envelope bins), and can

even include more advanced duplexing and sorting features, all of which certainly compensate for any time spent walking to the printer.

Using a printer that has its own network card offers a host of additional benefits. Since such a printer is not dependent on a particular PC in order to operate, it can function even when the personal computers are not running. Also, because the print commands do not need to go through a computer first, the actual print time is shorter, and computers are not slowed down while a print job is being processed.

Internet access. Only a few years ago, the most cost-effective way to access the Internet from your desk was to install a modem into your PC that either shared a line with your telephone or had its own dedicated phone line. These days, though, the cost of network-based routers allowing multiple users to browse through a network connection that goes to one or two modems on the server has dropped dramatically. There are also software-only solutions for the very small office. Either way, more and more, Internet access through your local area network is the way to go.

Streamlining billing and accounting functions. Does the bookkeeper have to drop everything to run the senior partner a work-in-progress report for an important client? Do the secretaries or bookkeeping staff spend hours a week inputting time for the attorneys? Do you have to turn away a client who wants a bill on demand because the bookkeeper is

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) 433-3258
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

out to lunch and no one else can access his or her computer? Many billing functions in a law firm work far more smoothly in a networked environment. Those attorneys wishing to enter their own time can do so from their desktops. Attorneys who need access to particular financial information can (with appropriate security precautions) run those reports directly, instead of requesting them from bookkeeping. In fact, anyone with security access to a billing function can perform it directly, rather than lose valuable time waiting for the billing computer to become available.

Messaging. I've saved the best for last. The ability to easily send messages back and forth locally across a network is sufficient reason, on its own, to network. Messages sent through any popular network e-mail package can be forwarded, sorted and stored in all kinds of ways; sent to multiple parties instantaneously; marked as urgent; sent with documents attached; annotated and returned; and the list goes on.

As any receptionist who works on the first floor of a two-story law firm will tell you, the likelihood that a message will arrive quickly at the desk of any given lawyer actually

goes up when that message is sent electronically. And even computer illiterate partners catch on to the possibilities inherent in e-mail with amazing speed. A memo listing complaints about a downturn in WIP hours can be sent to eight errant associates in 10 seconds! Seriously, in my experience, e-mail is the one application that practically all network users will pick up almost instantaneously, once it has been demonstrated to them. ☐

Terri Olson is Director of the Law Practice Management Program.

Notice of Motion to Amend State Bar Rules

Upon the later of November 1, 1999, or thirty days after the publication hereof, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia, *Ga. Ct. and Bar Rules*, pp. 11-1 *et seq.* (hereinafter referred to as "Rules").

I hereby certify that the following is the verbatim text of the proposed amendment as approved by the Board of Governors of the State Bar of Georgia. Any member of the State Bar of Georgia who desires to object to the proposed Amendment to the Rules is reminded that he or she may only do so in the manner provided by Rule 501-2, *Rules*, p. 11-93.

This statement, and the following verbatim text, are intended to comply with the notice requirements of Rule 5-101, *Rules*, pp. 11-92.7 and 11-93.

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT
STATE OF GEORGIA

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

MOTION TO AMEND 99-2

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

COMES NOW the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors, in a regular meeting held on August 28, 1999, and upon the concurrence of its Executive Committee, presents to the Court this Motion

to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, *Ga. Ct. and Bar Rules*, pp. 11-1 *et seq.*, and respectfully moves that the Rules and Regulations of the State Bar of Georgia be amended further in the following respects:

Amendment by the addition of Part XIII, Judicial District Professionalism Program, to the Rules of the State Bar of Georgia

It is proposed that a Part XIII, Judicial District Professionalism Program, be added to the Rules of the State Bar of Georgia. The proposed text of Part XIII is as follows:

PART XIII Judicial District Professionalism Program

Preamble

The purpose of the Judicial District Professionalism Program (hereinafter referred to as "JDPP") is to promote professionalism within the legal profession through increased communication, education and the informal use of local peer influence. The JDPP will be comprised of committees of Board of Governors members from each of Georgia's Judicial Districts. These committees shall be called Judicial District Professionalism Committees (hereinafter referred to as "JDPC").

Rule 13-101. Voluntary Nature of Program.

The JDPC seeks to use local peer

influence on an informal basis to open channels of communication on a voluntary basis. No judge or lawyer is required to cooperate or counsel with the JDPC or any of its representatives. If the party against whom the inquiry is addressed refuses to cooperate by voluntarily meeting with JDPC representatives, the JDPC shall take no further action regarding the inquiry.

Rule 13-102. Privacy of Proceedings.

(a) The privacy of all inquiries and proceedings provided herein shall be respected. The JDPC and staff shall not make disclosure of said inquiries and proceedings in the absence of the agreement of all participating.

(b) Except as expressly permitted by these Rules, the JDPC and staff shall not disclose information concerning or comment on any proceeding under these Rules.

(c) The JDPC and staff may reveal private records when required by law, court rule, or court order.

(d) Any records maintained by the JDPP, as provided herein, shall be available to counsel for the State Bar only in the event the State Bar or any department thereof receives a discovery request or properly executed subpoena requesting such records.

(e) The JDPP record of any inquiry against any lawyer or judge under these Rules shall not contain the name of the inquiring or responding party. Only information for raw statistical data shall be maintained by the JDPP or each JDPC.

(f) In order to preserve privacy, no lawyer or judge shall be required to

respond when asked if there are any JDPP inquiries against the lawyer or judge.

Rule 13-103. Immunity.

The State Bar, its employees, the JDPC members, the Chief Justice's Commission on Professionalism, its employees, the Bench and Bar Committee members and advisors of the JDPC shall be absolutely immune from civil liability for all acts in the course of their official duties.

JDPP Internal Operating Procedures

1. Judicial District Professionalism Program Committees.

(a) The Judicial District Professionalism Program (hereinafter "JDPP") will be comprised of committees of Board of Governors members from each of Georgia's Judicial Districts.

(b) Each Judicial District Professionalism Committee (hereinafter "JDPC") shall consist of the current members of the Board (of Governors) of the State Bar, as described in Part I, Chapter 3 of the Bar Rules and Article III of the Bylaws, from a particular Judicial District.

(c) The JDPC members for each of the Judicial Districts will select one or more State and/or Superior Court judge to serve as JDPC advisors within each district.

(d) The longest serving member on the Board (of Governors) within each Judicial District shall serve as the chair for that district unless said representative declines to serve or a majority of the JDPC members vote to have someone else serve as chair.

(e) In the event there is a tie for the longest serving Board (of Governors) representative, the JDPC will elect a chair from among the members.

(f) Each JDPC may act through panels or subcommittees if it so elects.

2. Judicial Advisors.

(a) The judicial advisors shall be selected to serve at the beginning of the State Bar year during the first JDPC meeting following the Board of Governors meeting held in conjunction with the Annual Meeting of the State Bar.

(b) The judge's actual involvement in counseling with members of the bench and bar will be determined on a case by case basis. In some situations where appropriate, the JDPC might determine it best for the judicial advisor to approach other judges about questionable conduct or practices without the involvement of other JDPC members.

3. Oversight of the JDPP.

(a) The advisory and oversight responsibility for the JDPP shall be vested in the Bench and Bar Committee.

(b) The Committee shall have authority to adopt additional operating procedures for the administration of the program, which are not otherwise inconsistent with the Rules.

(c) The JDPP shall operate under the supervision of the Executive Director of the State Bar.

(d) The Bench and Bar Committee shall report as needed to the Board of Governors regarding the JDPP and present recommendations regarding its continued operation or modification. Each JDPC shall furnish statistical data to the Bench and Bar Committee to assist its evaluation of the JDPC.

4. Scope of JDPP.

(a) The JDPP shall promote professionalism within the legal profession through increased communication, education, and the informal use of local peer influence to alter unprofessional and uncivil conduct.

(b) The JDPP shall not deal with lawyer/client disputes, lawyer/employee disputes, lawyer/vendor disputes, or with violations of the Code of Judicial Conduct or of Part IV (Discipline) of the Rules and

Regulations for the Organization and Government of the State Bar of Georgia.

(c) The JDPP should also serve the mentor function of providing guidance in "best practices" when approached by lawyers and judges.

(d) For purposes of these Rules, inquiry shall mean any inquiry concerning unprofessional conduct, as previously defined herein or in any Rules or operating procedures adopted by the Bench and Bar Committee, but shall not include any disciplinary charge, ethics violation, criminal conduct, or any other matter which falls under the provisions of Part IV (Discipline) of the Rules and Regulations for the organization and Government of the State Bar of Georgia or the Code of Judicial Conduct.

(e) JDPP committees may address the following conduct by State Bar members:

Unprofessional Judicial Conduct

- (1) Incivility, bias or conduct unbecoming a judge;
- (2) Lack of appropriate respect or deference;
- (3) Failure to adhere to Uniform Rules;
- (4) Excessive delay;
- (5) Consistent lack of preparation;
- (6) Other conduct deemed professionally inappropriate by each JDPC with the advice of the judicial advisors.

Unprofessional Lawyer Conduct

- (1) Harassing conduct.
- (2) Lack of appropriate respect or deference;
- (3) Abusive discovery practices;
- (4) Incivility, bias or conduct unbecoming a lawyer;
- (5) Consistent lack of preparation;
- (6) Communication problems;
- (7) Deficient practice skills;
- (8) Other conduct deemed professionally inappropriate by each JDPC with the advice of the

judicial advisors.

(f) Inquiries from only lawyers or judges shall be referred to the JDPP. Inquiries from clients or other members of the public shall be handled by the Consumer Assistance Program or other appropriate State Bar programs. Inquiries or requests for assistance relating to pending litigation or current transactional matters are better left to the judicial process or the negotiations of the parties; consequently, any JDPC response to such requests should generally be delayed until the conclusion of the matter.

5. Procedures.

(a) Inquiries and requests for assistance shall be directed to a member of the JDPC or staff who shall forward the inquiry to the appropriate JDPC chair.

(b) Upon receiving an inquiry, the JDPC chair shall either call a committee meeting to address the inquiry or refer the matter to a subcommittee appointed by the chair for the purpose of investigating and approaching the inquiring party and the party against whom the inquiry is addressed in an effort to informally resolve the matter.

(c) The JDPC members shall have the authority to contact and counsel the lawyer or judge involved to determine if the inquiry can be resolved in an informal method either through communications with the JDPC members or by referral to other State Bar programs including, but not limited to, the Consumer Assistance Program, Fee Arbitration Program, Clients' Security Fund, Law Practice Management Program, and the Lawyer Assistance Program or to the Judicial Qualifications Commission.

(d) Each JDPC shall have independent authority to consider whether to consider and how to resolve inquiries. The JDPC may determine that certain inquiries do not merit consideration or counseling

while others may warrant extensive consideration and counseling.

(e) The actions of each JDPC as they relate to a specific inquiry are confidential and shall not be reported to the inquiring party or any other person or entity.

(f) JDPC members shall follow written guidelines developed and established by the Bench and Bar Committee, with the advice and counsel of the Bar Counsel and Executive Director of the State Bar, and approved by the Executive Committee, Board of Governors of the State Bar and Executive Committee of the Council of Superior Court Judges.

6. Inquiries Involving Lawyers and Judges Outside Their Judicial District.

A JDPC may encounter or receive an inquiry involving lawyers and judges from outside their Judicial District. In such situations, local committee members receiving the inquiry should refer the matter to the JDPC chair in the district where the lawyer or judge against whom the inquiry is addressed maintains his or her principal office.

7. Records.

Each JDPC shall maintain and report data about the types of matters and inquiries it receives and resolves to the Executive Director of the State Bar, the President of the Council of Superior Court Judges and Bench and Bar Committee. The purpose for maintaining such records is to identify problems that can be subjects of Continuing Legal Education or Continuing Judicial Education programming and other preventive programs. Furthermore, information on the results of the JDPC's efforts will help determine the program's effectiveness. JDPC records shall be kept for statistical purposes only and shall not contain the names of any person involved in a JDPC inquiry.

Only file numbers and raw statistical data shall be maintained.

8. Promoting Professionalism.

(a) The JDPC members shall establish an annual professionalism award for the member in their local Judicial District who demonstrates the professionalism others should strive to emulate.

(b) Committee members shall also promote professionalism by preparing and publishing memorial tributes to lawyers and judges in their local area who pass away during the bar year. These tributes shall be published in local bar newsletters and/or forwarded to local newspapers recognizing our deceased colleagues for their positive contributions to our profession.

(c) The State Bar Communications Director and the Chief Justice's Commission on Professionalism shall work with each JDPC to help promote their activities, programs and awards.

9. Training for Judicial District Professionalism Committees.

An orientation program shall be developed by the State Bar and the Chief Justice's Commission on Professionalism for the purpose of training Board (of Governors) members on how to handle professionalism inquiries from members of the bench and bar. The training program may be given in conjunction with a Board of Governors meeting, and subsequent programs could be given each year following the annual meeting for all newly-elected Board members. ☐

Notice of Motion to Amend State Bar Rules

On or after the 1st day of November 1999, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations of the Organization and Government of the State Bar of Georgia (hereinafter referred to as "Rules").

It is hereby certified by the undersigned that the following is the verbatim text of the proposed amendments as approved by the Board of Governors of the State Bar of Georgia. Any member of the State Bar of Georgia desiring to object to these proposed Rules is reminded that he or she may do so in the manner provided by Rule 5-102, *Ga. Ct. and Bar Rules*, p.11-1 *et seq.*

This statement and the following verbatim text are intended to comply with the notice requirements of Bar Rule 5-101.

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT
STATE OF GEORGIA

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

MOTION TO AMEND 99-2

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

The State Bar of Georgia, pursuant to authorization and direction of its Board of Governors, in a regular meeting held on June 19, 1999, and upon concurrence of its Executive Committee and Committee on Organization of the State Bar, presents to the Court this Motion to Amend the Rules and Regulations for the Organization and Government of

the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, *Ga. Ct. & Bar Rules*, pp. 11-1 *et seq.*, and respectfully moves that the Rules and Regulations of the State Bar be amended further in the following respect:

Amendments to Part XII, Consumer Assistance Program

It is proposed that Part XII, Consumer Assistance Program, Rule 12-102(a) and 12-102(b) be amended by deleting the stricken portions and inserting the underlined phrases as follows:

Rule 12-102. Consumer Assistance Committee; Membership and Terms.

(a) The Committee shall ~~initially~~ consist of ~~seven~~ eight members including ~~six~~ seven State Bar members and one public member. At least two-thirds of the State Bar members shall be members of the Board of Governors of the State Bar at the time of their appointment. Committee members shall serve staggered three-year terms. The number of members shall be subject to change by a majority vote of the Board of Governors but shall never be less than five.

(b) The public member shall be appointed by the Supreme Court for a three-year term. All other Committee members shall be appointed by the President of the Bar for three year terms except, initially, two Committee members shall be appointed for one-year terms, two members shall be appointed for two-year terms, and two members shall be appointed for a three-year term. Committee terms

shall begin with the operational year of the State Bar. Should additional members be approved, their three-year terms shall be assigned in such fashion as to best maintain uniformity in the number of members to be appointed each year.

(c) The Committee shall elect a chairperson and such other officers as the Committee members deemed appropriate.

(d) Vacancies shall be filled by appointment of the President of the State Bar for any unexpired term. ☐

Health
Care
Auditors
pickup
8/99
p59

Proposed Superior Court Rules Changes

At its business meeting on July 20, 1999, the Council of Superior Court Judges tentatively approved several changes to the Superior Court Sentence Review Panel Rules. The proposed amendments appear below with the additional language underlined and the deleted language stricken through. In accordance with the procedure for approval of uniform rules changes and with Section XVI of the Rules of the Supreme Court, the proposed amendments are published here for Bar member comment.

Superior Court Sentence Review Panel; Proposed Rules Changes

(first reading 07/20/99)

Rule 2. The President of the Council of Superior Court Judges shall appoint annually ~~an Administrative Board of 3 Superior Court Judges to maintain continuity between the Panels; to prepare annually a budget; to consider and revise the Rules; and to supervise activities of the Clerk and support staff~~ a Committee of 3 Superior Court Judges to consider and review the operations of the Panel.

Rule 3. ~~The Administrative Board shall appoint a Clerk and support staff necessary to implement the Act. The Clerk and support staff shall serve at the pleasure of the Administrative Board~~ The Clerk and support staff shall be employed by the Council of Superior Court Judges.

Rule 4. The Panel shall not review death penalty cases, life sentences for murder or misdemeanors. Cases involving a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1 shall not be eligible for review by the Panel.

Rule 9. ~~The Panel will not consider an Application for Review of Sentence in an appealed case until after the remittitur from a Georgia appellate court affirming the conviction is made the judgment of the sentencing court.~~

Rule 27. The Clerk of Superior Court shall certify and transmit to the Clerk of the Panel, within 10 days after filing of the Application for Review of Sentence, 1 copy of the following:

- (1) Application;
- (2) Sentence(s);
- (3) Indictment(s), plea(s), court/jury verdict(s);
- (4) Criminal record, if any, of applicant;
- (5) Pre-sentence or post-sentence report, if any;
- (6) ~~Notification of a pending motion for new trial/appeal or remittitur from a Georgia appellate court affirming the conviction;~~
- (7) ~~Eligibility Determination Form if the Application for Review of Sentence is not timely filed;~~
- (8) Clerk's certification.

Rule 31. ~~Following transmittal of the case to the Panel, the Clerk of Superior Court shall forward to the Clerk of the Panel copies of subsequent filings of any amendment to the sentence, motion for new trial, notice of appeal, remittitur from a Georgia~~

~~appellate court or any other actions affecting the sentence under review~~ Following the transmittal of a case to the Panel, the Clerk of Superior Court shall forward to the Clerk of the Panel copies of subsequent filings of any amendment to the sentence.

Rule 47. The Superior Courts Sentence Review Panel shall be in continuous session and shall meet at such times as may be necessary to dispose of all cases within 90 days after they are ripe for consideration. The Chairman shall call the meetings. A case shall be considered ripe for consideration if the 15 days for submission of written argument have elapsed, ~~no appellate action is pending;~~ and all documents pertinent to the review of the case have been received.

Rule 52. As soon as it is practicable after the entry of the judgment, the Clerk of the Panel shall transmit the order and remittitur to the Clerk of the Superior Court from which the case was received. If the sentence is affirmed or the application is dismissed, a copy of the order and remittitur will be mailed to the applicant. If the sentence is reduced, a copy of the order and remittitur will be mailed to the sentencing judge, applicant, district attorney, probation office, parole office and the Department of Corrections. The Clerk of the Panel shall forward a copy of any reduction order to the Georgia Crime Information Center showing the defendant's state identification number, social security number and date of birth on the face of the order. ☐

Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court

Second Publication of Proposed Formal Advisory Opinion Request No. 97-R6

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. 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 November 1, 1999. 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 opinion.

Proposed Formal Advisory Opinion No. 97-R6

QUESTION PRESENTED:

Is a lawyer aiding a nonlawyer in the unauthorized practice of law when the lawyer allows a nonlawyer member of his or her staff to prepare and sign correspondence which threatens legal action or provides legal advice or both?

SUMMARY ANSWER:

Yes, a lawyer is aiding a nonlawyer¹ in the unauthorized practice of law when the lawyer allows a nonlawyer member of his or her staff to prepare and sign correspondence

which threatens legal action or provides legal advice or both. Generally, a lawyer is aiding a nonlawyer in the unauthorized practice of law whenever the lawyer effectively substitutes the legal knowledge and judgment of the nonlawyer for his or her own. Regardless of the task in question, lawyers should never place nonlawyers in situations in which they are called upon to exercise what would amount to independent professional judgment for a client. Nor should they be placed in situations in which decisions must be made for a client or advice given based on the nonlawyer's legal knowledge, rather than that of the lawyer. Finally, they should not be placed in situations in which, they, rather than the lawyer, are called upon to use rhetorical judgment in speaking persuasively to others in the client's best interests.

In order to enforce this limitation in the public interest, it is necessary to find a violation of the provisions prohibiting aiding a nonlawyer in the unauthorized practice of law whenever a lawyer creates the reasonable appearance to others that he or she has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own.

As applied to the specific question presented, a lawyer permitting a nonlawyer to give legal advice to a client based upon the legal knowledge and judgment of the nonlawyer rather than the lawyer, would be in clear violation of Standards of Conduct 24, 4, and 5. A lawyer permitting a nonlawyer to prepare and sign threatening correspondence to opposing counsel or unrepresented

persons would be in violation of these Standards of Conduct because doing so creates the reasonable appearance to others that the nonlawyer is exercising his or her legal knowledge and professional judgment in the matter.

OPINION:

This request for a Formal Advisory Opinion was submitted by the Investigative Panel of the State Disciplinary Board along with examples of numerous grievances regarding this issue recently considered by the Panel. Essentially, the request prompts the Formal Advisory Opinion Board to return to previously issued advisory opinions on the subject of the use of nonlawyers to see if the guidance of those previous opinions remains valid for current practice.²

The primary disciplinary standard involved in answering the question presented is: Standard 24, ("A lawyer shall not aid a nonlawyer in the unauthorized practice of law.") As will become clear in this Opinion, however, Standard 4 ("A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit or willful misrepresentation.") and Standard 5 ("A lawyer shall not make any false, fraudulent, deceptive, or misleading communications about the lawyer or the lawyer's services.") are also involved.

In interpreting these disciplinary standards as applied to the question presented, we are guided by Canon 3 of the Code of Professional Responsibility, "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law," and, more specifically, the

following Ethical Considerations: Ethical Consideration 3-2, Ethical Consideration 3-5, and Ethical Consideration 3-6.

In Advisory Opinion No. 19, an Opinion issued before the creation of the Formal Advisory Opinion Board and the issuance of advisory opinions by the Supreme Court, the State Disciplinary Board addressed the propriety of Georgia lawyers permitting nonlawyer employees to correspond concerning “legal matters” on the law firm’s letterhead under the nonlawyer’s signature. The Board said that in determining the propriety of this conduct it must first define the practice of law in Georgia. In doing so, it relied upon the very broad language of a then recent Georgia Supreme Court opinion, *Huber v. State*, 234 Ga. 458 (1975), which included within the definition of the practice “any action taken for others in any matter connected with the law,” to conclude that the conduct in question, regardless of whether a law suit was pending, constituted the practice of law.³ Any lawyer permitting a nonlawyer to engage in this conduct would be assisting in the unauthorized practice of law in violation of Standard 24, the Board said. The Board specifically limited this prohibition, however, to letters addressed to adverse or potentially adverse parties that, in essence, threatened or implied a threat of litigation. Furthermore, the Board noted that there was a broad range of activities, including investigating, taking statements from clients and other witnesses, conducting legal research, preparing legal documents (under “direct supervision of the member”), and performing administrative, secretarial, or clerical duties that were appropriate for nonlawyers. In the course of performing these activities, nonlawyers could correspond on the firm’s letterhead under their own

signature. This was permitted as long as the nonlawyer clearly identified his or her status as a nonlawyer in a manner that would avoid misleading the recipient into thinking that the nonlawyer was authorized to practice law.

Whatever the merits of the answer to the particular question presented, this Opinion’s general approach to the issue, *i.e.*, does the conduct of the nonlawyer, considered outside of the context of supervision by a licensed lawyer, appear to fit the broad legal definition of the practice of law, would have severely limited the role of lawyer-supervised nonlawyers to what might be described as in-house and investigatory functions. This Opinion was followed two years later, however, by Advisory Opinion No. 21, an Opinion in which the State Disciplinary Board adopted a different approach.

The specific question presented in Advisory Opinion No. 21 was: “What are the ethical responsibilities of attorneys who employ legal assistants or paraprofessionals and permit them to deal with other lawyers, clients, and the public?” After noting the very broad legal definition of the practice of law in Georgia, the Board said that the issue was instead one of “strict adherence to a program of supervision and direction of a nonlawyer.”

This insight, an insight we reaffirm in this Opinion, was that the legal issue of what constitutes the practice of law should be separated from the issue of when does the practice of law by an attorney become the practice of law by a nonlawyer because of a lack of involvement by the lawyer in the representation. Under this analysis, it is clear that while most activities conducted by nonlawyers for lawyers are within the legal definition of the practice of law, in that these activities are “action[s] taken for others in . . .

matter[s] connected with the law,” lawyers are assisting in the unauthorized practice of law only when they inappropriately delegate tasks to a nonlawyer or inadequately supervise appropriately delegated tasks.

Implicitly suggesting that whether or not a particular task should be delegated to a nonlawyer was too contextual a matter both for effective discipline and for guidance, the Disciplinary Board provided a list of specific tasks that could be safely delegated to nonlawyers “provided that proper and effective supervision and control by the attorney exists.” The Board also provided a list of tasks that should not be delegated, apparently without regard to the potential for supervision and control that existed.

Were we to determine that the lists of delegable and non-delegable tasks in Advisory Opinion No. 21 fully governed the question presented here, it would be clear that a lawyer would be aiding the unauthorized practice if the lawyer permitted the nonlawyer to prepare and sign correspondence to clients providing legal advice (because it would be “contact with clients . . . requiring the rendering of legal advice”) or permitted the nonlawyer to prepare and sign correspondence to opposing counsel or unrepresented persons threatening legal action (because it would be “contacting an opposite party or his counsel in a situation in which legal rights of the firm’s clients will be asserted or negotiated”). It is our opinion, however, that applying the lists of tasks in Advisory Opinion No. 21 in a categorical manner runs risks of both over regulation and under regulation of the use of nonlawyers and, thereby, risks both the loss of the efficiency nonlawyers can provide and the loss of adequate protection of the public from unauthorized practice. Rather than being

applied categorically, these lists should instead be considered good general guidance for the more particular determination of whether the representation of the client has been turned over, effectively, to the nonlawyer by the lawyer permitting a substitution of the nonlawyer's legal knowledge and judgment for that of his or her own. If such substitution has occurred then the lawyer is aiding the nonlawyer in the unauthorized practice of law whether or not the conduct is proscribed by any list.

The question of whether the lawyer has permitted a substitution of the nonlawyer's legal knowledge and judgment for that of his or her own is adequate, we believe, for guidance to attorneys in determining what can and cannot be delegated to nonlawyers. Our task, here, however, is broader than just giving guidance. We must also be concerned in issuing this opinion with the protection of the public interest in avoiding unauthorized practice, and we must be aware of the use of this opinion by various bar organizations, such as the Investigative Panel of the State Disciplinary Board, for determining when there has been a violation of a Standard of Conduct.

For the purposes of enforcement, as opposed to guidance, it is not adequate to say that substitution of the nonlawyer's legal knowledge and judgment for that of his or her own constitutes a violation of the applicable Standards. The information for determining what supervision was given to the nonlawyer, that is, what was and was not a substitution of legal knowledge and judgment, will always be within the control of the attorney alleged to have violated the applicable Standards. To render this guidance enforceable, therefore, it is necessary to find a violation of the Standards prohibiting aiding a nonlawyer in the unauthorized

practice of law whenever a lawyer creates the reasonable appearance to others that he or she has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own.

Thus, a lawyer is aiding a nonlawyer in the unauthorized practice of law whenever the lawyer creates a reasonable appearance to others that the lawyer has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own. Regardless of the task in question, lawyers should never place nonlawyers in situations in which they are called upon to exercise what would amount to independent professional judgment for a client. Nor should they be placed in situations in which decisions must be made for a client or advice given based on the nonlawyer's legal knowledge, rather than that of the lawyer. Finally, they should not be placed in situations in which, they, rather than the lawyer, are called upon to use rhetorical judgment in speaking persuasively to others in the client's best interests.

In addition to assisting in the unauthorized practice of law by creating the reasonable appearance to others that the lawyer was substituting a nonlawyer's legal knowledge and judgment for his or her own, a lawyer permitting this would also be misrepresenting the nature of the services he or she provides and the nature of the representation in violation of Standards of Conduct 4 and 5. It is important, then, to recognize that in some situations nonlawyers working for lawyers may be more restricted in their activities than other nonlawyers would be. In certain areas of practice — estate planning, insurance adjusting, debt collection, tax preparation, real estate transactions, title insurance, trade associations representation, and representation before administrative

agencies, for example — some forms of nonlawyer representation, including rhetorical advocacy, are permitted in what are arguably legal matters. If, however, a lawyer or law firm has been retained to represent a client on a legal matter, it would be inappropriate to substitute nonlawyer representation, in the manner described above, even though nonlawyer representation, not under the supervision of a lawyer, may be permitted. Thus, in some situations, a nonlawyer employee of a law firm will find himself or herself confronted by nonlawyer representatives representing clients in a manner that would be impermissible for the nonlawyer employee.

Applying this analysis to the question presented, if by "prepare and sign" it is meant that the legal advice to be given to the client is advice based upon the legal knowledge and judgment of the nonlawyer, it is clear that the representation would effectively be representation by a nonlawyer rather than by the retained lawyer. A lawyer permitting a nonlawyer to do this would be in violation of Standards of Conduct 24, 4, and 5. A lawyer permitting a nonlawyer to prepare and sign threatening correspondence to opposing counsel or unrepresented persons would also be in violation of these Standards of Conduct because by doing so he or she creates the reasonable appearance to others that the nonlawyer is exercising his or her legal knowledge and professional judgment in the matter.

For public policy reasons it is important that the legal profession restrict its use of nonlawyers to those uses that would improve the quality, including the efficiency and cost-efficiency, of legal representation rather than using nonlawyers as substitutes for legal representation.

CONTINUED ON PAGE 94

N O T I C E S

Board of Governors Meeting Attendance

11-98 Destin	1-99 Atlanta	3-99 Macon	4-99 Lanier	6-99(Fri) Savannah	6-99(Sat) Savannah	
*	*	*	*	*	*	Ross Adams
*	*	*	*	*	*	Anthony B. Askew
*	*	*	*	*	*	William Steven Askew
		*				Thurbert E. Baker
		*		*	*	Donna Barwick
	*	*		*	*	William D. Barwick
*	*	*	*	*	*	Robert L. Beard, Jr.
n/a	n/a	n/a	n/a	n/a	*	J. Lane Bearden
*	*	*	*	*	*	Barbara B. Bishop
*	*	*	*	*	*	Joseph A. Boone
*	*	*	*	*	*	Wayne B. Bradley
*	*	*	*	*	*	Jeffrey O. Bramlett
*	*	*	*	*	*	Sam L. Brannen
*	*	*	*	*	*	James C. Brim, Jr.
n/a	n/a	n/a	n/a	n/a	*	William K. Broker
*			*	*	*	Thomas Michael Brown
n/a	n/a	n/a	n/a	n/a	*	Thomas R. Burnside, Jr.
*	*	*	*	*	*	S. Kendall Butterworth
*	*	*	*	*	*	William E. Cannon, Jr.
*	*	*	*	*	*	Edward E. Carriere, Jr.
*	*	*	*	*	*	Paul Todd Carroll, III
*	*	*	*	*	*	Bryan M. Cavan
e	e	*	*	*	*	Thomas C. Chambers, III
*	*	*	*	*	*	F. L. Champion, Jr.
	*	*	*	*	*	John A. Chandler
	*	*	*	*	*	Joseph D. Cooley, III
*	*	*	*	*	*	Delia T. Crouch
*	*	*	*	*	*	William D. Cunningham
*	*	*	*	*	*	William V. Custer, IV
*	*	*	*	*	*	David P. Darden
*	*	*	*	*	*	Dwight J. Davis
*	*	*	*	*	*	Joseph W. Dent
*	*	*	*	*	*	Ernest De Pascale, Jr.
*	*	*	*	*	*	Foy R. Devine
*	*	*	*	*	*	Charles J. Driebe
*	*	*	*	*	*	C. Wilson DuBose
*	*	*	*	*	*	James B. Durham
*	*	*	*	*	*	Myles E. Eastwood
*	*	*	*	*	*	Gerald M. Edenfield
*	*	*	*	*	*	J. Franklin Edenfield
*	*	*	*	*	*	O. Wayne Ellerbee
*	*	*	*	*	*	Michael V. Elsberry
*	*	*	*	*	*	J. Daniel Falligant
*	*	*	*	*	*	B. Lawrence Fowler
*	*	*	*	*	*	James B. Franklin
*	*	*	*	*	*	Gregory L. Fullerton
*	*	*	*	*	*	Gregory A. Futch
*	*	*	*	*	*	H. Emily George
*	*	*	*	*	*	Adele P. Grubbs
n/a	n/a	n/a	n/a	n/a	*	Robert R. Gunn, II
*	*	*	*	*	*	John P. Harrington
*	*	*	*	*	*	Walter C. Hartridge
n/a	n/a	n/a	n/a	n/a	*	Steven A. Hathorn
*	*	*	*	*	*	James A. Hawkins
*	*	*	*	*	*	Joseph J. Hennessy, Jr.
*	*	*	*	*	*	Phyllis J. Holmen
*	*	*	*	*	*	Roy B. Huff
*	*	*	*	*	*	Donald W. Huskins
*	*	*	*	*	*	Robert D. Ingram
*	*	*	*	*	*	James Irvin
*	*	*	*	*	*	Rachel K. Iverson
*	*	*	*	*	*	Michael R. Jones, Sr.
*	*	*	*	*	*	William Alan Jordan
n/a	n/a	n/a	n/a	n/a	*	J. Benjamin Kay, III
n/a	n/a	n/a	n/a	n/a	*	Dow (Kip) N. Kirkpatrick
*	*	*	*	*	*	William P. Langdale, Jr.
e	*	e	e	e	*	Earle F. Lasseter
*	*	*	*	*	*	J. Alvin Leaphart
*	*	*	*	*	*	Francis Marion Lewis
*	*	*	*	*	*	David S. Lipscomb

11-98 Destin	1-99 Atlanta	3-99 Macon	4-99 Lanier	6-99(Fri) Savannah	6-99(Sat) Savannah	
*	*	*	*	*	*	Hubert C. Lovein
*	*	*	*	*	*	Leland M. Malchow
n/a	n/a	n/a	n/a	n/a	*	Edwin Marger
*	*	*	*	*	*	H. Fielder Martin
*	*	*	*	*	*	C. Truitt Martin, Jr.
n/a	n/a	n/a	n/a	n/a	*	Johnny W. Mason, Jr.
*	*	*	*	*	*	William C. McCalley
*	*	*	*	*	*	William C. McCracken
*	*	*	*	*	*	Ellen McElyea
*	*	*	*	*	*	Joseph Dennis McGovern
*	*	*	*	*	*	Larry M. Melnick
*	*	*	*	*	*	C. Patrick Milford
*	*	*	*	*	*	J. Brown Moseley
*	*	*	*	*	*	A. L. Mullins
*	*	*	*	*	*	George E. Mundy
*	*	*	*	*	*	Aasia Mustakeem
*	*	*	*	*	*	John A. Nix
*	*	*	*	*	*	Dennis C. O'Brien
*	*	*	*	*	*	Bonnie C. Oliver
*	*	*	*	*	*	Rudolph N. Patterson
*	*	*	*	*	*	Matthew H. Patton
*	*	*	*	*	*	Carson Dane Perkins
*	*	*	*	*	*	Patrise Perkins-Hooker
*	*	*	*	*	*	J. Robert Persons
*	*	*	*	*	*	R. Chris Phelps
*	*	*	*	*	*	John C. Pridgen
*	*	*	*	*	*	Thomas J. Ratcliffe, Jr.
*	*	*	*	*	*	George Robert Reinhardt
*	*	*	*	*	*	Jeffrey P. Richards
n/a	n/a	n/a	n/a	n/a	*	Robert V. Rodatus
*	*	*	*	*	*	Tina Shadix Roddenbery
*	*	*	*	*	*	Joseph Roseborough
*	*	*	*	*	*	William C. Rumer
n/a	n/a	n/a	n/a	n/a	*	Dennis C. Sanders
*	*	*	*	*	*	Thomas G. Sampson
n/a	n/a	n/a	n/a	n/a	*	Robert L. Shannon, Jr.
*	*	*	*	*	*	Michael M. Sheffield
n/a	n/a	n/a	n/a	n/a	*	Kenneth L. Shigley
*	*	*	*	*	*	M.T. Simmons, Jr.
*	*	*	*	*	*	Lamar W. Sizemore, Jr.
*	*	*	*	*	*	William L. Skinner
n/a	n/a	n/a	n/a	n/a	*	Philip C. Smith
*	*	*	*	*	*	R. Rucker Smith
*	*	*	*	*	*	S. David Smith
*	*	*	e	*	*	Huey Spearman
*	*	*	*	*	*	Lawrence A. Stagg
*	*	*	*	*	*	John Stell
*	*	*	*	*	*	Frank B. Strickland
*	*	*	*	*	*	Richard C. Suttan
*	*	*	*	*	*	Jeffrey B. Talley
*	*	*	*	*	*	John J. Tarleton
*	*	*	*	*	*	S. Lester Tate, III
*	*	*	*	*	*	C. Henry Tharpe, Jr.
*	*	*	*	*	*	Dwight L. Thomas
*	*	*	*	*	*	Edward D. Tolley
*	*	*	*	*	*	Christopher A. Townley
*	*	*	*	*	*	Carl A. Veline, Jr.
*	*	*	*	*	*	Joseph L. Waldrep
*	*	*	*	*	*	J. Henry Walker
*	*	*	*	*	*	J. Tracy Ward
*	*	*	*	*	*	George W. Weaver
*	*	*	*	*	*	N. Harvey Weitz
*	*	*	*	*	*	A. J. Welch
*	*	*	*	*	*	Andrew J. Whalen, III
*	*	*	*	*	*	James L. Wiggins
*	*	*	*	*	*	William N. Withrow, Jr.
*	*	*	*	*	*	Gerald P. Word
*	*	*	*	*	*	Anne Workman
*	*	*	*	*	*	Gordon R. Zeese
*	*	*	*	*	*	Marvin H. Zion

* - attended; e - excused; no - did not attend; n/a - not on Board

Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court

Second Publication of Proposed Formal Advisory Opinion Request No. 98-R6

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. 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 November 1, 1999. 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 opinion.

Proposed Formal Advisory Opinion No. 98-R6

QUESTION PRESENTED:

When the City Council controls the salary and benefits of the members of the Police Department, may a councilperson, who is an attorney, represent criminal defendants in matters where the police exercise discretion in determining the charges?

SUMMARY ANSWER:

Representation of a criminal defendant in municipal court by a member of the City Council where the City Council controls salary and benefits for the police does not violate any Standards and does not subject an attorney to discipline. In any circumstance where it may create

an appearance of impropriety, however, it should be avoided.

OPINION:

We have previously addressed a related question, that is, the ethical propriety of an attorney/city council member representing private clients before city-appointed judges when the council is involved in appointing judges. Formal Advisory Opinion No. 89-2. That opinion recognized that no Standards were applicable, but upon consideration of Directory Rule 8-101(a)(2), concluded that as an ethical matter, the attorney should remove himself to avoid creating the appearance of impropriety.

Directory Rule 8-101-1(a)(2) provides: "A lawyer who hold public office shall not ... use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or a client ..." It is not directly applicable here, because the concern is not with influence upon a tribunal, but rather with influence upon a law enforcement officer. Where the law enforcement officer works with the prosecutor and has significant impact on the exercise of prosecutorial discretion, however, any improper influence may affect the tribunal by affecting the charges presented to the tribunal.

This opinion addresses itself to a situation where the City Council member votes on salary and benefits for the police. Particularly in small municipalities, this situation could give rise to a perception that a police officer's judgment might be affected. For example, a police officer might be reluctant to oppose a request that he recommend lesser charges or the dismissal of charges when the request

comes from a council member representing the accused. As Formal Advisory Opinion No. 89-2 explains, situations like the one at hand give rise to inherent influence which is present even if the attorney who is also a City Council member attempts to avoid using that position to influence the proceedings.

Directory Rule 9-101. "Avoiding Even the Appearance of Impropriety," is also implicated in this situation. Directory Rule 9-101 provides in section C that "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." As a general matter, a police officer is a public official. *See White v. Fireman's Fund Ins. Co.*, 233 Ga. 919 (1975); *Sauls v. State*, 220 Ga. App. 115 (1996). *But see* O.C.G.A. §45-5-6. Where a police officer exercises discretion as to the prosecution of criminal charges, the police officer is a public official within the meaning of Directory Rule 9-101. Pursuant to Directory Rule 9-101, therefore, an attorney should not represent a criminal defendant where an inference of improper influence can reasonably be drawn.

This opinion, as did Formal Advisory Opinion No. 89-2, "offers ethical advice based on the applicable ethical regulations." The representation discussed, if engaged in, would not *per se* violate any Standard and would not subject the attorney to discipline. We also note that the ethical concerns raised by this representation are personal to the attorney and would not be imputed to other members of the law firm. ❏

Lawyers, as professionals, are ultimately responsible for maintaining the quality of the legal conversation in both the prevention and the resolution of disputes. This professional responsibility cannot be delegated to others without jeopardizing the good work that lawyers have done throughout history in meeting this responsibility.

Endnotes

1. The term “nonlawyer” includes paralegals.
2. In addition to those opinions discussed in this opinion, there are two other Advisory Opinions concerning the prohibition on assisting the unauthorized practice of law. In Advisory Opinion No. 23, the State Disciplinary Board was asked if an out-of-state law firm could open and maintain an office in the State of Georgia under the direction of a full-time associate of that firm who was a member of the State Bar of Georgia. In determining that it could, the Board warned about the possibility that the local attorney

would be assisting the nonlicensed lawyers in the unauthorized practice of law in Georgia. In Formal Advisory Opinion No. 86-5, an Opinion issued by the Supreme Court, the Board was asked if it would be improper for lawyers to permit nonlawyers to close real estate transactions. The Board determined that it would be if the responsibility for “closing” was delegated to the nonlawyer without participation by the attorney. We view the holding of Formal Advisory Opinion No. 86-5 as consistent with the Opinion issued here.

3. The language relied upon from *Huber v. State* was later codified in O.C.G.A. § 15-19-50.

Morningstar pickup 8/99 p47



NOVEMBER 1999

1

ICJE

*Juvenile Court Judges Fall
'99 Seminar*

Lake Lanier Island, GA
14.0/0.0/1.0/1.6

3

ICLE

Business Valuation
Atlanta, GA
6.0/0.0/0.0/0.0

4

ICLE

*American Justice:
Professionalism, Ethics &
Malpractice*
Kennesaw, GA
3.0/1.0/1.0/0.0

ICLE

Internet Legal Research
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE

Punitive Damages
Atlanta, GA
6.0/0.0/1.0/6.0

PROFESSIONAL EDUCA-
TION SYSTEMS INC.

*Georgia/Federal Estate &
Gift Tax Workshop*
Atlanta, GA
8.0/0.0/0.0/0.0

CHATTANOOGA BAR
ASSOCIATION

*Advanced Family Media-
tion Training*
Chattanooga, TN
8.0/0.0/0.0/8.0

5

ICLE

Zoning Law
Satellite Broadcast
6.0/0.0/0.0/1.0

ICLE

Premises Liability
Atlanta, GA
6.0/1.0/0.0/3.0

ICLE

Mentor Training
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE

Intellectual Property Law
Institute
Young Harris, GA
9.0/1.0/1.0/1.0

GEORGIA ASSOCIATION OF
CRIMINAL DEFENSE
LAWYER

Fall Seminar
Helen, GA
10.0/1.0/1.0/3.0

CHATTANOOGA BAR
ASSOCIATION

ADR In the Federal
Courts: Mediation,
Arbitration & the Other
Processes

Chattanooga, TN
7.5/0.0/0.0/0.0

8

CHATTANOOGA BAR
ASSOCIATION

*General Civil Mediation
Services*
Chattanooga, TN
36.0/4.0/0.0/0.0

9

AMERICAN ARBITRATION
ASSOCIATION

*Commercial Arbitrator
Training Workshop*
Atlanta, GA
5.3/1.3/0.0/0.0

10

NATIONAL BUSINESS
INSTITUTE

*Current Issues in Public
Sector Labor Law in
Georgia*
Atlanta, GA
6.0/0.5/0.0/0.0

CHATTANOOGA BAR
ASSOCIATION

*Employee Benefits Law &
Practice Update*
Chattanooga, TN
4.0/0.0/0.0/0.0

11

ICLE

Zoning Law
Satellite Re-Broadcast
6.0/0.0/0.0/1.0

ICLE

Insurance-Beyond the
Basics: Working with the
Affluent
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE

Commercial Real Estate
Atlanta, GA
6.8/1.0/0.0/1.0

ICLE

Medical Malpractice
Institute
Sea Island
12.0/1.0/1.0/3.0

12

ICLE

Products Liability
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE

E-Commerce
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE

Plaintiff's Personal Injury
Satellite Broadcast
6.0/1.0/1.0/3.0

15

CHATTANOOGA BAR
ASSOCIATION

Family Mediation Training
Chattanooga, TN
46.0/2.0/0.0/0.0

16

ICLE

Fiduciary Law Institute
Video Replay
Atlanta, GA
12.0/1.0/1.0/3.0

LORMAN BUSINESS
CENTER INC.

Workers' Compensation
Albany, GA
6.0/0.0/0.0/0.0

17

NATIONAL BUSINESS
INSTITUTE

Nursing Law in Georgia
Atlanta, GA
6.0/1.0/0.0/0.0

AMERICAN ARBITRATION
ASSOCIATION

*Construction Industry
Arbitration Training*
Atlanta, GA
7.5/1.3/0.0/0.0

CHATTANOOGA BAR
ASSOCIATION

Bridge the Gap
Chattanooga, TN
6.0/1.5/0.0/5.0

LORMAN BUSINESS
CENTER INC.
*Georgia Tax-Exempt
Organizations*
Atlanta, GA
6.7/0.0/0.0/0.0

18

ICLE
Child Custody
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Advanced Legal Writing
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Secured Lending
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Plaintiff's Personal Injury
Satellite Re-Broadcast
6.0/1.0/1.0/3.0

PRACTISING LAW INSTI-
TUTE
Securities Filings
Atlanta, GA
11.0/0.5/0.0/0.0

CHATTANOOGA BAR
ASSOCIATION
*Pre-Trial Considerations in
Criminal Domestic Abuse
Cases*
Chattanooga, TN
1.5/0.0/0.0/1.5

LORMAN BUSINESS
CENTER INC.
Collection Law in Georgia
Savannah, GA
6.7/0.0/0.0/0.0

19

ICLE
Clarence Darrow: Crimes,
Causes & the Courtroom
Columbus, GA
3.0/0.0/0.0/0.0

ICLE
Practical Tax: Individual
& Estate Taxation for the
Non-Tax Lawyer
Atlanta, GA
6.0/1.0/0.0/0.0

ICLE
Corporate Litigation
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Debt Collection
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Professionalism, Ethics &
Malpractice
Satellite Broadcast
4.0/0.0/0.0/0.0

ICLE
Alternative Dispute
Resolution Institute
Pine Mountain, GA
8.0/1.0/1.0/3.0

PROFESSIONAL EDUCA-
TION SYSTEMS INC.
*The Complete Trust Work-
shop*
Atlanta, GA
6.7/0.0/0.0/0.0

PROFESSIONAL EDUCA-
TION SYSTEMS INC.
On Point: Sharpening
Your Deposition Strategy
Atlanta, GA
6.0/1.0/0.0/6.0

LORMAN BUSINESS
CENTER INC.
Georgia Estate Planning
Atlanta, GA
6.7/0.0/0.0/0.0

GEORGIA INDIGENT
DEFENSE COUNCIL
*State Bar Criminal Defense
Training*
Macon, GA
6.5/0.0/0.0/4.0

23

CHATTANOOGA BAR
ASSOCIATION
The SEC Primer: An
Introduction to the
Federal Securities Laws
Chattanooga, TN
4.0/0.0/0.0/0.0

30

NATIONAL BUSINESS
INSTITUTE
*Georgia Construction Law:
What Do You Do When...?*
Atlanta, GA
6.0/0.5/0.0/0.0

LORMAN BUSINESS
CENTER INC.
Collection Law in Georgia
Athens, GA
6.2/0.5/0.0/0.0

**DECEMBER
1999**

1
NATIONAL BUSINESS
INSTITUTE
*Advanced Post-Mortem
Planning
& Probate in Georgia*
Atlanta, GA
6.7/0.5/0.0/0.0

CHATTANOOGA BAR
ASSOCIATION
*Current Developments in
Bankruptcy Law, Including
New Legislation*
Chattanooga, TN
2.0/0.0/0.0/0.0

2

ICLE
Environmental Law
Atlanta, GA
3.0/0.0/0.0/0.0

ICLE
*Professionalism & Ethics:
Judges & Lawyers*
Atlanta, GA
3.0/0.0/0.0/0.0

ICLE
Professionalism, Ethics &
Malpractice
Satellite Re-Broadcast
4.0/0.0/0.0/0.0

ICLE
White Collar Crime
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Antitrust Law
Atlanta, GA
6.0/0.0/0.0/0.0

NATIONAL BUSINESS
INSTITUTE
Title Law in Georgia
Atlanta, GA
6.0/0.5/0.0/0.0

LORMAN BUSINESS
CENTER INC.
Judgement Enforcement
Atlanta, GA
6.0/0.0/0.0/0.0

3
ICLE
Post Judgement Collec-
tion
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE
Urgent Legal Matters
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE Recent Developments in Georgia Law Satellite Broadcast 6.0/0.0/0.0/0.0	ICLE Defense of Drinking Drivers Institute Atlanta, GA 12.0/0.0/0.0/0.0	LORMAN BUSINESS CENTER, INC. Partnerships, LLC's & LLP's: Organization & Operation Savannah, GA 6.7/0.0/0.0/0.0	17 ICLE Labor & Employment Law Atlanta, GA 6.0/0.0/0.0/0.0
7 CHATTANOOGA BAR ASSOCIATION <i>Quality of Life in the Practice of Law</i> Chattanooga, TN 3.5/3.5/0.0/0.0	PROSECUTING ATTORNEYS' COUNCIL OF GEORGIA <i>Forensic Evidence</i> Decatur, GA 6.3/0.0/0.0/6.3	15 CHATTANOOGA BAR ASSOCIATION Collecting Judgements from General Sessions Cases Chattanooga, TN 1.0/0.0/0.0/0.0	ICLE Matrimonial Law Trial Practice Workshop Atlanta, GA 7.0/0.0/0.0/0.0
CHATTANOOGA BAR ASSOCIATION <i>1999 Update: Clean Air Act</i> Chattanooga, TN 4.0/0.0/0.0/0.0	10 ICLE Trial Advocacy Satellite Broadcast 6.0/0.0/0.0/0.0	16 ICLE Landlord & Tenet Law Atlanta, GA 6.0/0.0/0.0/0.0	ICLE Recent Developments in Georgia Law Atlanta, GA 6.0/0.0/0.0/0.0
8 CHATTANOOGA BAR ASSOCIATION <i>Understanding, Preventing & Litigating Year 2000 Issues: What Every Lawyer...</i> Chattanooga, TN 7.0/0.0/0.0/0.0	ICLE Y2K & Internet Litigation Atlanta, GA 6.0/0.0/0.0/0.0	ICLE Sir Thomas Moore Atlanta, GA 3.0/0.0/1.0/0.0	ICLE Writing to Persuade Atlanta, GA 6.0/0.0/0.0/0.0
LORMAN BUSINESS CENTER, INC. <i>Collection Law in Georgia</i> Macon, GA 3.0/0.0/0.0/0.0	ICLE Georgia Tort Law Atlanta, GA 6.0/0.0/0.0/0.0	ICLE <i>Word of Mouth</i> Atlanta, GA 3.0/1.0/0.0/0.0	NATIONAL BUSINESS INSTITUTE <i>How to Successfully Make & Manage Objections at Trial</i> Atlanta, GA 3.0/0.0/0.0/3.0
9 ICLE Section 1983 Litigation Atlanta, GA 7.0/0.0/0.0/0.0	14 ICLE SELECTED VIDEO REPLAYS Atlanta, GA	ICLE Trial Advocacy Satellite Re-Broadcast 6.0/0.0/0.0/0.0	LORMAN BUSINESS CENTER, INC. <i>Taking & Defending Effective Depositions in Georgia</i> Atlanta, GA 6.0/0.0/0.0/6.0
ICLE Recent Developments in Georgia Law Satellite Re-Broadcast 6.0/0.0/0.0/0.0	NATIONAL BUSINESS INSTITUTE <i>Adoption Law in Georgia</i> Atlanta, GA 6.0/0.5/0.0/0.0	CHATTANOOGA BAR ASSOCIATION <i>Deposition Issues in Domestic Abuse Criminal Cases</i> Chattanooga, TN 1.5/0.0/0.0/1.5	GEORGIA INDIGENT DEFENSE COUNCIL <i>State Bar Criminal Defense Training</i> Atlanta, GA 6.5/0.0/0.0/4.0
ICLE Corporate Counsel Institute Atlanta, GA 12.0/0.0/0.0/0.0	AMERICAN ARBITRATION ASSOCIATION <i>Commercial Arbitrator Training Workshop</i> Atlanta, GA 5.3/1.3/0.0/0.0	CHATTANOOGA BAR ASSOCIATION Disposition Issues in Domestic Abuse Cases Chattanooga, TN 1.5/0.0/0.0/0.0	

CLASSIFIEDS

EMPLOYMENT: ATTORNEYS

ATTORNEY POSITION. Plaintiffs' tort practice in downtown Savannah seeking computer literate attorney with litigation experience. Must be willing to travel, take depositions, handle pleadings and prepare and try cases. Compensation commensurate with experience. Send resume and compensation requirements to: Confidential Reply Box 900, Communications Department, The State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303.

ATTORNEYS NEEDED throughout Georgia for volume of traffic cases. General practitioners preferred. Discounted rates for other referrals. Fax flat fee volume rates to Peninsula State/Southern Legal Services, Inc., (904) 730-0023 or call 1-800-356-LAWS.

FEDERAL STAFF ATTORNEY POSITIONS, U.S. Court of Appeals, 11th Circuit, Atlanta. Several one-to-five-year clerkships beginning immediately. Accredited school, excellent academics, superior research/writing skills, law review/equivalent. Resume, law school transcript, unedited writing sample, and professional references no later than November 15, 1999 to: U.S. Court of Appeals, 11th Circuit, Staff Attorneys' Office, 56 Forsyth Street, Atlanta, Georgia 30303-2289.

INTERNATIONAL LEGAL REFORM. The American Bar Association Central and East European Law Initiative (CEELI) seeks experienced attorneys to

work on criminal, environmental, commercial and/or civil law reform projects in Central and Eastern Europe and the former Soviet Union. Support includes all housing, transportation and living expenses. Call (800) 982-3354 for an application.

TRIAL COUNSEL WANTED, SOUTH GEORGIA. Atlanta plaintiff personal injury firm seeks experienced trial attorney to associate as lead counsel. Please send information re: trial experience/curriculum vitae to P.O. Box 95902, Atlanta, Georgia 30347-0902.

BOOKS/OFFICE FURNITURE & EQUIPMENT

THE LAWBOOK EXCHANGE LTD. buys, sells and appraises all major law book sets—state and federal. For the best prices, top quality and guaranteed satisfaction, call toll free (800) 422-6686 for free information. MasterCard, Visa and American Express accepted. www.lawbookexchange.com

OFFICE SPACE

LAW OFFICE FOR SALE—attorney retiring. Half interest in historic home (circa 1821) in growing Milledgeville, Georgia. Greek Revival architecture. Other half interest presently owned and used as a law office. One block from new courthouse. Photo and price on request. Call (912) 452-3587 or (912) 452-7580.

OFFICE SPACE AVAILABLE on North Druid Hills road near I-85 and Georgia 400. Experienced attorney offers economical expense sharing, library, receptionist, fax, copier and some referral work. Call (404) 321-7733.

SERVICES

LEGAL SOFTWARE CONSULTING, sales, installation, training, and support on top legal software including Amicus Attorney®, PCLaw®, and Timeslips.® Organize your practice and capture more billable hours. Steven J. Best, Esq., Best Law Firm Solutions, 1010 Huntcliff, Suite 1350, Atlanta, GA 30350. Free consultation. (770) 518-2480. Web site: www.bestlawfirm.com.

WAS YOUR CLIENT INJURED OR ARRESTED in Las Vegas? Call Craig P. Kenny & Associates, a law firm that is committed to the client, practicing primarily in the areas of personal injury, workers' compensation, medical malpractice and criminal defense. Experienced trial attorneys. Call Craig toll free (888) 275-3369 or CPKnaSSOCS@AOL.COM.

Continued from Page 31

- Communication*, 7 COMPUTERS IN HUMAN BEHAVIOR 269 (1991).
- Edward V. Jeffrey, *Computer Animation and the Law* (last modified Mar. 1, 1995), <<http://wings.buffalo.edu/complaw/>>.
 - Kevin J. Schroder, *Computer Animation: the Litigator's Legal Ally* (last modified Fall 1997), <<http://wings.buffalo.edu/complaw/>>.
 - People v. McHugh, 476 N.Y.S.2d 721 (Sup. Ct. 1984).
 - Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
 - McHugh, 476 N.Y.S.2d at 722-23.

- Cleveland v. Bryant, 236 Ga. App. 459, 512 S.E.2d 360 (1999); J.B. Hunt Transport, Inc. v. Brown, 236 Ga. App. 634, 512 S.E.2d 34 (1999); and Cornell v. State, 265 Ga. 904, 463 S.E.2d 702 (1995).
- Datskov v. Teledyne Continental Motors Aircraft Prods., 826 F. Supp. 677 (W.D.N.Y. 1993).
- Id.* at 685.
- McHugh, 476 N.Y.S.2d 721.

Advertising Index

AAA Attorney Referral	63
ANLIR	21
Arthur Anthony	52
Avis	47
Dan Turner Builders	71
Garrett Group	27
Golden Lantern	67
Health Care Auditors	87
Henning Mediation	46
Lexis Law Publishing	Back cover
Lexis Nexis	4, 37, 38-39, Inside back
Mainstreet	63
Morningstar Technologies	94
National Legal Research	36
Nextel	15
North Georgia Mediation	75
South Georgia Mediation	78
West Group	Inside front, 14, 19, 53, 76, Inside back

Lexis Nexis(CheckCite 2000)
pickup 8/99 p4 4C

Lexis Law new 4C