

GEORGIA BAR Journal

DECEMBER 1999 • VOL. 5 NO. 3



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GEORGIA BAR Journal

DECEMBER 1999 • VOL. 5 No. 3

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On the Cover: *While the century draws to a close and all eyes are focused on the future, we decided to take a look back at our past. The cover story examines the history of the Cherokees in Georgia, and the ensuing legal battle that ultimately led to the Trail of Tears. Photo by Richard T. Bryant.*

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The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (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.

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WHAT DOES YOUR BAR DO FOR YOU?



By Rudolph N. Patterson

So you graduate from law school and you pass the Bar exam. Next thing you know, you're a distinguished, dues-paying member of the Bar, and you might find yourself wondering, "What exactly does the State Bar of Georgia do?" I sure did. But then I became involved with the organization, and I learned a thing or two.

For example, did you know that the organized Bar was created by the Supreme Court of Georgia in 1964 with 4,700 members? Its primary purpose was to serve as the disciplinary arm of the Court, and this remains a priority to this day. In fact, if you refer to the audited financial statement that appears in the back of this issue, you will note that 30 percent of our overall budget is dedicated to this critical function. And our discipline system is outstanding. But the contributions don't end there.

Through the development of accessible, hands-on programs, the Bar provides support and assistance to enhance professional development and improve the delivery of legal services. Our Law Practice Management team offers guidance on administering the business side of the law, something many of us could use some tips on once in a while. The Con-

sumer Assistance Program helps resolve the minor complaints that clients might have about their attorneys from time to time. Fee Arbitration can step in when a client-lawyer dispute involves fees, and the Lawyer Assistance Program is available to lawyers faced with difficult personal issues, from stress to substance abuse.

Since you are reading these words from the pages of our *Journal*,

When you break it down program by program, it becomes clear that the value of the State Bar of Georgia is certainly greater than the sum of its dues.

you may have guessed that the Bar also has a Communications Department. Well, you're right, and it is continually recognized as one of the finest in the country. From Bar news, law trends and information on the legal community, to maintaining the Bar's Web site (www.gabar.org) and handling media relations, the communications team strives to keep you and the public informed in a timely, concise and hopefully interesting manner.

Of course, in any member organization the Membership Department is indispensable, and ours is no exception. These folks are charged

with the tremendous responsibility of keeping track of all 30,000 or so of you. It is they who issue your membership cards — and by the way, new ones are in the mail to you as you read this — and they can also provide photo identification cards for a nominal fee.

Speaking of fees always brings to mind the Finance Department. It's a small group that impacts our entire organization in a big way, and they are to be commended for their work. Not only do they continuously watch the bottom line, but they also manage the Bar's information systems and, thanks to their efforts, I am happy to report the Bar is "Y2K okay."

When you break it down program by program, it becomes clear that the value of the State Bar of Georgia is certainly greater than the sum of its dues. And we have not even touched upon our committees, too numerous to name here, but much appreciated for their valuable work on behalf of our members and their clients alike.

Feel free to stop by one of your Bar offices, either the main headquarters in downtown Atlanta, or the South Georgia office in Tifton. Take a tour, visit with some of your staff, and share with me my pride in our employees and our profession.

At this time of year, with the holidays and a new millenium upon us, we cannot help but wonder about what lies ahead. Certainly this past year has seen many changes in the law and its practice, and as we move forward into the next century, I anticipate that the Bar's role as a clearinghouse of information and an advocate of the profession will become vital to us all. The Bar is already hard at work exploring such complex topics as multidisciplinary practice. In fact, we have formed a Multidisciplinary Practice Committee to monitor developments and investigate all facets of this issue, and a grant from the Georgia Bar Founda-

tion is providing us with a reporter to compile the committee's recommendations for presentation to the Board of Governors.

At times new challenges can seem insurmountable (or at least, a pretty steep climb), but let's not forget that the one constant in life is change, and that our profession has equipped us with the tools of truth, justice and impartiality. I think Governor Miller put it best during his address to our Supreme Court on its 150th anniversary, when he quoted from Ralph Waldo Emerson's essay *Experience*:

Without any shadow of doubt, amidst the vertigo of shows and politics, I settle myself ever firmer on the creed that we should not postpone and refer and wish, but do broad justice where we are.

Governor Miller also offered his own words of wisdom:

It is human nature to be continually looking forward to tomorrow with hope and anticipation. Looking back to yesterday requires a deliberate effort to turn one's head, but it is worth the effort, because a knowledge of history makes an indispensable contribution to wisdom . . . or, as Churchill once put it, "The further back you look, the further ahead you can see."

So, with this glance backward and a peek at the future, I wish you a Happy New Year. ☒

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Jennifer M. Davis, Managing Editor

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TAKE NOTE OF CHANGES TO CLE REQUIREMENTS



By Cliff Brashier

The Mandatory Continuing Legal Education (MCLE) program continues its important goal of helping attorneys maintain their professional competence throughout their active practice of law through continuing legal education. It is administered by a committee of volunteer practicing attorneys and judges appointed by the State Bar and the Supreme Court of Georgia known as the Commission on Continuing Lawyer Competency.

With the end of the 1999 CLE year near at hand, please note the following important dates:

Dec. 27, 1999 1999 reporting affidavits mailed

Jan. 31, 2000 reporting affidavit filing deadline
(a \$50 late filing fee is applicable thereafter)

March 31, 2000 ... 1999 CLE grace period ends
(a \$100 late CLE fee is applicable thereafter)

While the foregoing dates have been consistent since the program began in 1984, there are several new changes that may be of interest to you.

Members who have timely obtained all of their CLE require-

ments, who owe no fees because of prepayment by the sponsors, and who have no deletions or additions to make to their record are no longer required to file a reporting affidavit. If you qualify, your affidavit form will so indicate. Others will receive a different affidavit that does require filing by Jan. 31, 2000.

Out-of-state members are now only required to meet the mandatory CLE requirements of the state in which they practice in order to be in compliance in Georgia. This option is elected on the reporting affidavit and

requires the same CLE fees as are paid by members residing in Georgia.

Another significant change now under consideration for future years is to allow credit for internet, video/telephone conference and other distance learning formats of CLE. I will include the results of this study in a future *Georgia Bar Journal*, but it will not be available for the current (1999) CLE year.

Your comments regarding my column are welcome. If you have suggestions or information to share, please call me. Also, the State Bar of Georgia serves you and the public. Your ideas about how we can enhance that service are always appreciated. My telephone numbers are (800) 334-6865 (toll free), (404) 527-8755 (direct dial), (404) 527-8717 (fax), and (770) 988-8080 (home). ☐

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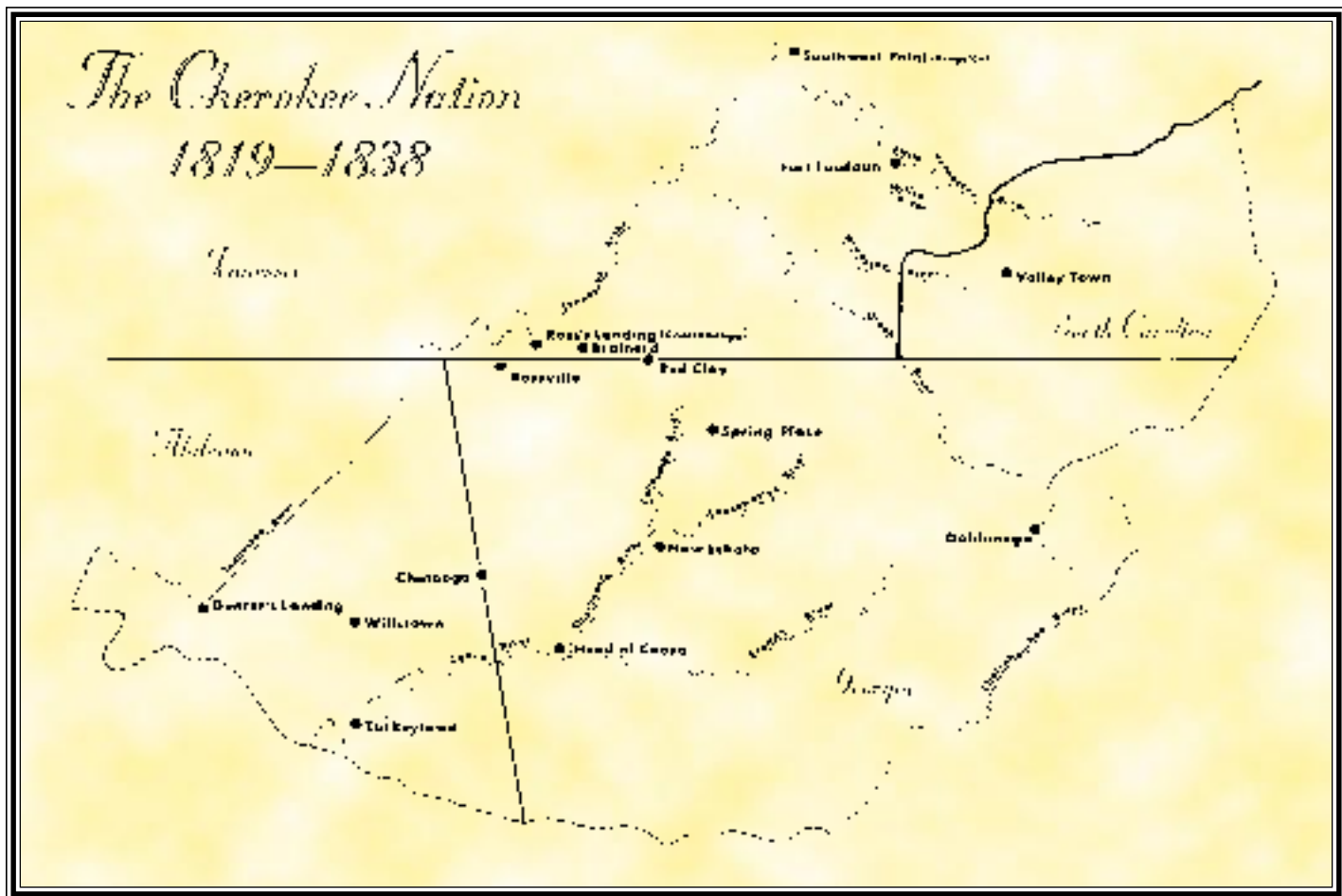
WORCESTER VS. GEORGIA:

Civil Disobedience and the Cherokee Removal

By Sidney L. Moore Jr. and Leighton Moore

Chief Justice John Marshall's decision in *Worcester v. Georgia*¹ that Georgia did not have authority to extend its police powers to the Cherokee Nation is most often studied as an early example of the Supreme Court's power of judicial review. From a historical perspective, however, the case may be more important as an example of how private civil disobedience can lead to a major Constitutional crisis.

The Rev. Samuel Worcester and his associate, the Rev. Dr. Elizur Butler, had been instrumental in the resistance to Cherokee removal. Their willingness to go to prison for their beliefs and the unwillingness of Georgia authorities to release them after their convictions were overturned by the Supreme Court not only pitted the United States against Georgia, but the executive branch of the United States government against the judicial branch.



The dispute between the Georgia and the Cherokees was long standing. The invention of the cotton gin by Eli Whitney at the Greene plantation near Savannah, coupled with the exhaustion of farms in North and South Carolina, brought a tremendous demand for new cotton acreage in Georgia. There were relatively few Indians in the North-western third of the State compared to the vast amount of land, and Georgians considered it the “manifest destiny” of whites to drive out the “merciless Indian Savages,” as Native Americans were referred to in the Declaration of Independence.²

The official attitude of the state government was no different from that of its citizens. Governor after governor made it clear to the United States government that they expected the federal authorities to clear the Cherokee land for settlement in exchange for Georgia’s relinquishment of its claim to Alabama and Mississippi. The central government might have argued, however, that much of the delay in delivery of the quid pro quo was that Georgia had clouded the title to the lands West of the Chattahoochee through the great Yazoo Land Fraud, in which nearly every member of the General Assembly had been bribed into selling 50,000,000 acres of land to speculators for a

penny an acre.³

The discovery of gold in 1828 in what is now White County between Cleveland and Helen, by an enterprising black slave from Loudsville,⁴ gave new impetus to the push for Cherokee removal. The General Assembly of 1828 purported to divide the Cherokee Nation into five parts, each of which was assigned to a different Georgia county for law enforcement purposes.⁵ This law was substantially broadened by the 1829 General Assembly.⁶ These statutes were blatantly illegal, as the Cherokee Nation was protected by treaties with the United States government. But Georgia sheriffs began asserting their law enforcement powers nonetheless, as did the Georgia Militia.

Georgia’s assertion of legal authority over the Cherokees was challenged three times in the Supreme Court of the United States during the tenure of Chief Justice John Marshall. The first case, *Cherokee Nation v. Georgia*,⁷ was filed as an original action under the provision of the United States Constitution establishing trial jurisdiction in cases of foreign nations against states. The second case, *Tassels v. Georgia*,⁸ resulted in an order staying Georgia’s execution of an Indian who had been convicted in

Gwinnett County Superior Court for murdering another Indian within the Cherokee Nation. But *Worcester v. Georgia*,⁹ the third case and the only published opinion in favor of the Cherokees, nearly started an armed conflict between the Georgia Militia and the United States Army.

Not only were the Cherokees subjected to Georgia laws and courts under the new scheme of things, but they were also prohibited from using those laws for their own benefit. The 1828 Act provided that “no Indian, or decendant [sic] of Indian, residing within the Creek or Cherokee nations of Indians, shall be deemed a competent witness, or a party to any suit, in any court created by the constitution, or laws of this state, to which a white man may be a party.”¹⁰ The 1829 Act added “except such white person resides within the said nation” — a phrase added so that the State could use Indian witnesses to prosecute the white men who had the audacity to live among the Cherokees and help them resist removal.¹¹

Armed with some of the finest lawyers in the United States,¹² the Cherokees filed *Cherokee Nation v. Georgia*, an original action against the State of Georgia in the Supreme Court of the United States, seeking an injunction against these illegal predations. The Supreme Court held, with obvious reluctance, that the Cherokee Nation was not the type of nation that was entitled to sue directly in that court against a State, and the case was dismissed.¹³

While the *Cherokee Nation* case was pending in the Supreme Court, Georgia was looking for a proper case to assert its self-ordained powers over the Indians. The case of *State v. Tassels* seemed perfect for the purpose. George “Corn” Tassels was accused of killing another Cherokee man in a dispute over a woman. Before Cherokee authorities could take action, Georgia officers arrested Corn Tassels inside the Cherokee Nation and took him to Hall County for trial.¹⁴ Tassels’ lawyers filed a motion to quash the indictment based on a lack of jurisdiction. Because Georgia did not yet have a Supreme Court¹⁵ (although the Cherokee Nation did), the legal issues were presented to a “Conference of Judges,” which issued a lengthy opinion in support of the new Georgia law.

Referring to the Cherokees as “a savage race, and of imbecile intellect,”¹⁶ the Conference ruled that Georgia, as the successor-in-interest to the conquering or discovering English, had a right to assert its jurisdiction over the conquered tribes. The conference held that, historically, conquered peoples were either:

amalgamated with their vanquishers, and became one people; or they were governed as a separate but dependent State. The habits, manners, and imbecile intellect of the Indians, opposed impracticable barriers to either of these modes of procedure They were judged incapable of complying with the obligations which the laws of civilized society imposed, or of being subjected to any code of laws which could be sanctioned by any christian community.¹⁷

The motion to dismiss was denied.

Because the Hall County Superior Court was not prepared to handle the case, venue was transferred to Gwinnett, where Corn Tassels was promptly convicted and sentenced to hang.¹⁸ Defense counsel rushed to Washington

with an application for certiorari to review the conviction, and Chief Justice Marshall issued a stay order, commanding the State of Georgia to show cause why Corn Tassels should not be set free.

The order arrived in Atlanta on December 22, 1829, and Governor George R. Gilmer

immediately sent a message to the assembled lawmakers:

I submit to the legislature for its consideration, a copy of a communication received this day, purporting to be signed by the Chief Justice of the United States, and to be a citation to the State of Georgia, to appear before the Supreme Court on the second Monday in January next, to answer to that tribunal for having caused a person who had committed murder within the limits of the State to be tried and convicted therefor.

The object of this mandate is to control the State in the exercise of its ordinary jurisdiction, which, in criminal cases, has been vested by the Constitution, exclusively in its superior court.

So far as concerns the exercise of the power which belongs to the Executive Department, orders received from the Supreme Court for the purpose of staying or in any manner interfering with the decisions of the courts of the State, in the exercise of their constitutional jurisdiction, will be disregarded, and any attempt to enforce such orders will be resisted with whatever force the laws have placed at my command. If the judicial powers thus attempted to be exercised by the courts of the United States is submitted to, or sustained, it must eventuate in the utter annihilation of the State governments, not less fatal to the peace and prosperity of our present highly favored country.¹⁹



Masthead of the *Cherokee Phoenix*, the official newspaper of the Cherokee Nation that was published in Cherokee and English.

Both the House and Senate responded by overwhelmingly (but not unanimously) adopting resolutions in support of the hanging of Corn Tassels.²⁰ The Governor dispatched a rider to Hall County with instructions to the sheriff to carry out the execution, and soon Corn Tassels was sitting on his own coffin in the back of a wagon, a noose around his neck. The wagon was pulled out from under him and he was soon dead. It was Christmas Eve, and a cold rain was falling, but that did not deter thousands of spectators from gathering in Gainesville for the event. One spectator's version of the hanging was reported in the *Gainesville Eagle* years after the event:

The prisoner was ordered by the sheriff to get up, and stand upon his coffin, on which he had for some time been sitting. The arms were tied down, the cap drawn down over the face, the ox cart was driven forward leaving the body suspended in the air. A few shrugs of the shoulders, a little drawing up of the feet, and all was still and within twenty minutes the doctors in attendance pronounced him dead.²¹

Corn Tassels' case wound up in a clerical note when the *Cherokee Nation* opinion was published.²² The same legislature that had encouraged the Governor to ignore Corn Tassels' writ from Chief Justice Marshall was determined to expand Georgia's jurisdiction over the Cherokee Nation by additional illegal statutes. They believed that President Andrew Jackson was on their side and was not going to enforce the edicts of the Supreme Court regarding the Cherokees.

President Jackson had long since earned his stripes as an Indian fighter, one of his major claims to fame being the 1814 massacre of the Creeks at the Battle of Horse-shoe Bend, followed by the Treaty of Fort Jackson in which the Creeks involuntarily ceded more than 20,000,000 acres of land in Alabama and southwest Georgia to the federal government. Governor Gilmer, then an army officer, had materially assisted Jackson in this venture by building "Peachtree Road" from Ft. Daniel in Gwinnett County to the confluence of Peachtree Creek and the Chattahoochee River, and constructing a supply fort there called Fort Peachtree.

Jackson returned the favor in the Fall of 1830 when Governor Gilmer complained to him that the United States Army was protecting the Cherokee lands from being invaded by whites seeking gold in the foothills of the Blue Ridge. President Jackson spoke with the Secretary of War, J.A. Eaton, who promptly wrote to Governor Gilmer as follows:

The President has referred to this Department your letter of the 29th of last month (October) advising him

that the Act of the Legislature of Georgia, passed at its last session, subjecting all the Cherokee territory and the persons occupying it, to the ordinary jurisdiction of the State has gone into operation, and in reply I have the honor to inform you that previously to the receipt of your letter an order was issued to Major Wages (the United States Army Commander in the Cherokee Nation), a copy of which for your information and satisfaction is here inclosed [sic]. By it you will perceive that he is instructed, as the winter is approaching, to retire with his troops into winter quarters. It is expected that the emergency which induced the troops to enter the Indian country has ceased.²³

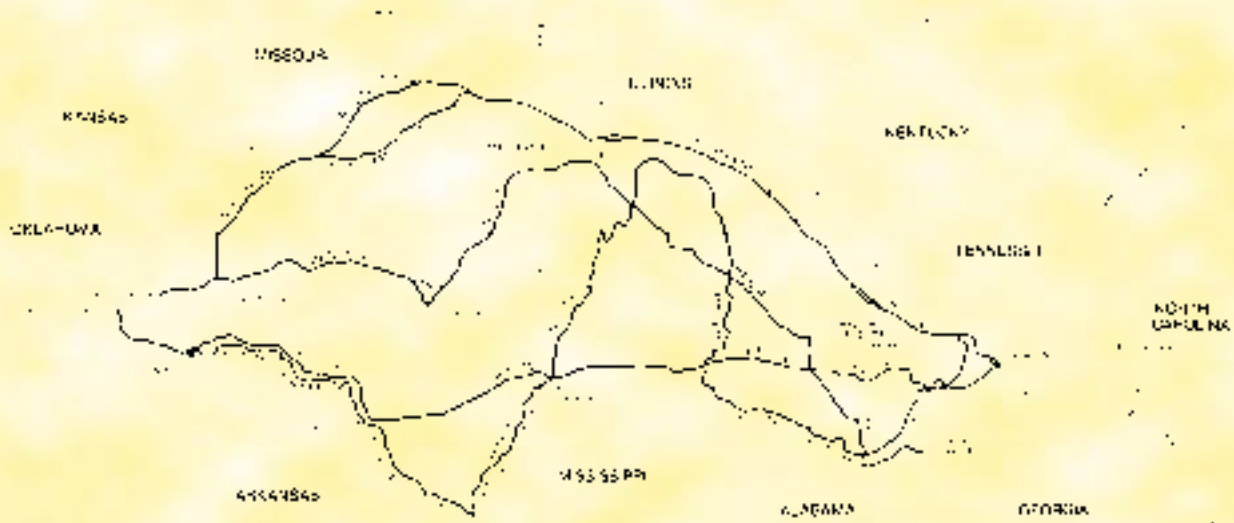
The General Assembly of December, 1830, increased Georgia's hold on the Cherokee Nation. The Cherokees were prohibited from meeting to make their own "laws, orders, or regulations for said tribe."²⁴ The Cherokees courts were ordered disbanded and their processes nullified.²⁵

But the General Assembly and Governor knew that so long as the Cherokees had the assistance of white missionaries, lawyers, and others, the fight to remove them would be a long one. It was therefore provided by law that:

all white persons residing within the limits of the Cherokee nation, on the first day of March next, or at any time thereafter, without a license or permit, from his Excellency the Governor, or from such agent as his Excellency the Governor, shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required [pledging allegiance to the State of Georgia] shall be guilty of an high misdemeanor, and upon conviction thereof, shall be punished by confinement in the Penitentiary at hard labour, for a term not less than four years.²⁶

Twelve days after the effective date of this new statute a colonel and twenty five men of the Georgia militia, all mounted and armed with guns and bayonets, showed up at Carmel and arrested the teacher and secular superintendent of a school for the education of Cherokee children. The next morning they marched him on foot to New Echota, the capital of the Cherokee Nation, a distance of some forty miles, where they arrested Rev. Worcester, a missionary to the Cherokees, and the printer of the *Cherokee Phoenix*, the nation's newspaper. Others were also taken into custody at New Echota before the prisoners were marched the next day to the Hightower ("Itowah" or "Etowah" in the Indian tongue) missionary station, a distance of another thirty miles, where another missionary was arrested. The prisoners were all then marched to a temporary headquarters of the militia, and the next day

The Trail of Tears



another thirty miles to Lawrenceville, where they were jailed. The charges were that they were living in the Cherokee Nation without a permit from the Governor. The Governor was not issuing any permits.²⁷

Several lawyers volunteered to represent the group before the Gwinnett Superior Court, including William H. Underwood and General Edward Harden. They argued first that the statute was unconstitutional and secondly that the prisoners were immune from State prosecution because of various federal offices held by them. Rev. Worcester, for example, was the Postmaster of New Echota. The Court rejected the constitutionality argument, but did release Rev. Worcester because of his position as Postmaster. The others posted bond and were released.²⁸

As Rev. Worcester was one of the primary targets of the new law, the dismissal of the case against him enraged Governor Gilmer. He quickly dispatched a letter to the President requesting that Rev. Worcester be fired as Postmaster. The President asked the Attorney General to take care of the matter and on May 7, 1831, Postmaster W. J. Barry wrote to "His Excellency Geo. R. Gilmore [sic]" as follows:

I have the honor to acknowledge the receipt of your communication of the 19 of April, transmitted under cover of a letter from the Attorney General of the United States. I feel no disposition to retain in the

service of this Department any one who is a refractory and disobedient citizen of the State within whose territory, and under whose jurisdiction he resides.²⁹

Upon receipt of this letter, Governor Gilmer wrote to Rev. Worcester:

It is part of my official duty to cause all white persons residing within the territory of the state, occupied by the Cherokees to be removed therefrom, who refuse to take the oath to support the constitution and laws of the State. Information has been received of your continued residence within that territory, without complying with the requisites of the law, and of your claim to be exempted from its operation, on account of your holding the office of Postmaster of New Echota. You have no doubt been informed of your dismissal from that office You are, therefore, advised to remove from the territory of Georgia, occupied by the Cherokees"³⁰

A similar letter was sent to the Rev. Dr. Elizur Butler, who had also become a major thorn in the side of the Governor due to his effectiveness among the Indians.

It is unknown whether Rev. Worcester responded in writing, but in a June 7, 1831, letter the Rev. Dr. Butler made clear his feelings on the matter:

Though I may have been accused of being a mortal enemy to Georgia and her measures, I solemnly affirm that I am not, although I could not in conscience subscribe to all her enactments. For instance, I could not take the oath required of white men who live in her chartered limits because I should then acknowledge the jurisdiction of Georgia over this country which would be adverse to my opinion and would essentially affect my usefulness as a missionary Rather than changing religious views to meet the exigencies of political transactions, permit me to say I should sacrifice my life If I must suffer for the above course of conduct I hope the Lord will enable me to meet suffering with Christian meekness and fortitude.³¹

Again the missionaries and others assisting the Cherokees were arrested and again they taken before the Gwinnett Superior Court. They were marched in chains along the Old Hightower (Itowah) Trail, an Indian trading path that ran from the Etowah River southeastward as far as what is now Rockdale County, and which at that time formed the part of the boundary between Gwinnett and DeKalb Counties, and then northeast along the Decatur-Lawrenceville Road. This time there was no dismissal, and the grand jury returned the indictments requested by Solicitor General Turner H. Trippe. There were two

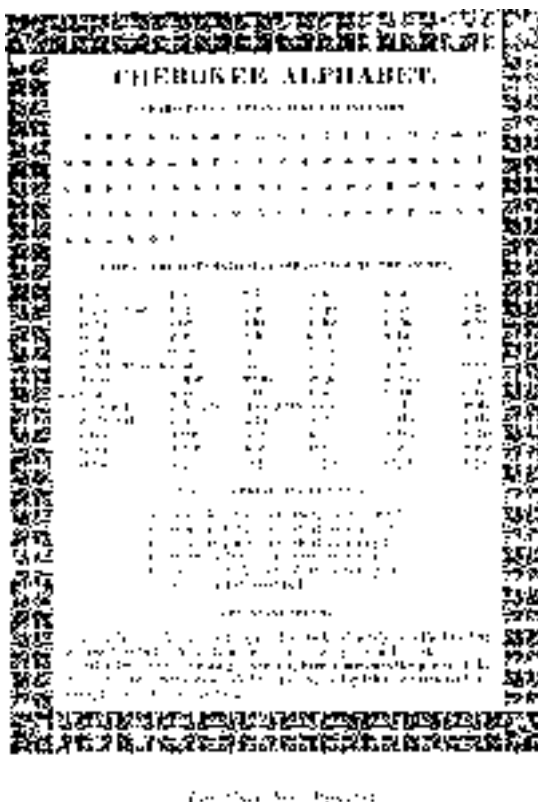
separate indictments covering a total of eleven prisoners.

All were found guilty in a one-day trial. Since the statute required a “minimum mandatory” four years of hard labor the sentences were soon forthcoming — four years in the State Penitentiary at Milledgeville. Rev. Worcester, given an opportunity to speak before sentence was pronounced, said in part:

if I am not guilty of [the indictment], which I solemnly aver before this Court and my God that I am not, then I have to say what I have already said, that this court ought not to proceed to pronounce sentence against me, because the act charged in the bill of indictment was not committed within the rightful jurisdiction of this Court.³²

Of the eleven convicted, nine ultimately were pardoned by Governor Gilmer upon their promise to leave the State of Georgia and the Cherokee Nation and never return. But Rev. Worcester and Butler, true to their religious beliefs and their belief that Georgia’s law was unconstitutional, elected to go to prison and to appeal their convictions to the Supreme Court of the United States.

A short time after sentencing, the judges of the Gwinnett Superior Court were served with an order from the Supreme Court that:



Sequoyah, far left, was considered a genius for inventing the Cherokee alphabet, shown left. The Cherokee were the most westernized of the North American indian tribes.

under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next in the said Supreme Court³³

Gwinnett Inferior Court Clerk William Maltbie soon complied with the writ, transmitting the record on November 28, 1832.

Meanwhile, in Milledgeville, the Rev. Worcester and Butler were serving their four years at hard labor and were keeping their spirits up by penning letters to their supporters. Rev. Worcester, in a letter to the editor of the *Missionary Herald at Home and Abroad*, explained his reasons for civil disobedience in Biblical terms:

I have formerly been told that there was no need of my going to the penitentiary; that it was easy for me to avoid it, *if I would* I would by no means compare myself with any of those mentioned below; but you will doubtless understand my meaning. Nehemiah might have gone into the temple, *if he would*. Shadrack and his companions might have worshipped the images of Babylon, *if they would*. Daniel might have ceased to pray for a season, *if he would*³⁴

The reversal of the convictions by the Marshall Court came almost as quickly as the prosecution.³⁵ The Cherokee Nation had been vindicated. Georgia's assertion of jurisdiction over the Cherokee lands had been declared unconstitutional. The prisoners were to be freed and could return to the Lord's work.

But nothing happened. The State of Georgia acted as if there had never been a ruling in *Worcester v. Georgia*. The prisoners remained in the penitentiary.

Attorneys William H. Underwood, Elisha W. Chester and General Ed Harden rushed to the Clerk's office in Gwinnett Superior Court with a petition for a writ of habeas corpus, seeking an order requiring the Governor to free the two missionaries. Judge Charles Dougherty of the Superior Court ordered the Clerk to refuse the filing of the writ, but he agreed to witness a statement by the lawyers that the Clerk had refused to allow it to be filed. The lawyers went to the new Governor, Wilson Lumpkin, who gave no assistance at all. Georgia would ignore the ruling of the Supreme Court of the United States, and it appeared that the President of the United States would do nothing about it.

President Jackson was rumored to have said: "John Marshall has made his decision. Now let him enforce it." In reality, however, the time had not come for federal enforcement. The Supreme Court had simply reversed the

convictions, but had not specifically ordered the federal executive branch to do anything to free the prisoners.

After Georgia's refusal to acknowledge the ruling, however, the defense attorneys traveled to Washington, seeking a writ to require the release of the prisoners under a threat of federal enforcement. Attorney Elisha W. Chester, for the defense, served notice on the Governor that the missionaries:

will therefore on Saturday, the second day of February in year eighteen hundred and thirty three by his counsel move the said Supreme Court expected to be then in session, that such further proceedings be had by said Supreme Court in said cause as shall be agreeable to law and the principles of justice and that process be issued to carry into effect the judgment rendered in said cause by said Supreme Court.³⁶

The case had reached a crisis of Constitutional proportions. Assuming that the Supreme Court would issue an order to the executive branch of the United States Government to free the prisoners, would the President comply? Would he, like President Eisenhower did in the case of Little Rock's Central High School, "send in the troops"? Or would the national government come apart at the seams?

The entire nation was watching the developments on a daily basis. Letters were streaming into the Governor's office warning of dire consequences. As February 1833 approached and tempers were flaring throughout the country over the Constitutional crisis, the Governor finally let it be known that he was prepared to pardon the missionaries and release them in compliance with the Supreme Court's order. So informed, Rev. Worcester and Dr. Butler wrote to Governor Lumpkin: "We have this day forwarded instructions of our counsel to forbear the intended motion and to prosecute the case no further." However, in an obvious spirit of defiance, they added:

We beg leave respectfully to state to your excellency that we have not been led to the adoption of this measure by any change of views . . . or by any doubt of the justice of our cause, or of our perfect right to a legal discharge, in accordance with the decision of the Supreme Court in our favor³⁷

Governor Lumpkin was enraged. He had gone against the wishes of a great number of his constituents to extend an opportunity for release to these two civil dissidents and they had slapped him in the face with the "justice of their cause." He let it be known in no uncertain terms that he might well change his mind about the pardons.

Word quickly got to the prisoners who were housed

only a short distance from the capitol in Milledgeville. Sheepishly, they penned another letter:

Sir . . . we are sorry to be informed that some expressions in our communication of yesterday were regarded by Your Excellency as an indignity offered to the state or its authorities. Nothing could be further from our design. In the course we have now taken it has been our intention simply to forebear the prosecution of our case, and to leave the question of the continuance of our confinement [sic] to the magnanimity of the State.³⁸

Rev. Samuel Worcester and Rev. Dr. Elizur Butler were released from the State Penitentiary at Milledgeville, Georgia, on January 14, 1833, having served a year and four months of their four-year sentences. Their pardon by Governor Lumpkin averted the first major Constitutional conflict between the judicial and executive branches of the federal government. But despite their firm moral stand on behalf of the Cherokees, the Cherokee Nation was doomed. While they were in prison the State of Georgia gave away the Cherokee lands by lottery. Governor Lumpkin had served as surveyor in dividing up the lands. Soon settlers were marching north of the Chattahoochee demanding that the Indians vacate their farms. Within a few years, after Jackson was out of office, those Cherokees who had not voluntarily left were rounded up and marched to Oklahoma in the dead of winter in the infamous Trail of Tears. ☒

Sidney L. Moore Jr. is a trial lawyer and legal history buff in Atlanta. Leighton Moore, Sid's son, is a senior at Harvard Law School.

Endnotes

- 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832)
- "[The King] has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions." THE DECLARATION OF INDEPENDENCE, para. 23 (U.S. 1776).
- See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 3 L. Ed. 162 (1810).
- Gold was discovered by "a Negro servant of Maj. Frank Logan . . ." according to the historical marker at Duke's Creek, between Cleveland and Helen. His name, like the names of many other slaves who did important things in Georgia history, has been long since forgotten.
- The counties were Carroll, DeKalb, Gwinnett, Hall and Habersham. 1828 Ga. Laws 88.
- 1829 Ga. L. 98 (quoted in full at 31 U.S. (6 Pet.) at 525-28, 8 L. Ed. at 488-89).
- 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).
- The stay order is alleged in the bill in *Cherokee Nation v. Georgia*, 38 U.S. (5 Pet.) 1, 8 L. Ed. 25.
- 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832).
- 1828 Ga. Laws at 89.
- 1829 Ga. Laws at 101.
- Led by William Wirt, formerly Attorney General of the United States.
- 30 U.S. (5 Pet.) 1, 20, 8 L. Ed. 1, 32 (1831).
- The Southern boundary of Hall County portion of the Cherokee Nation under the Act of 1829, was described as following Baldridges Creek from the Chattahoochee River to the creek's source, and from there to where the Cherokee Federal Road of 1804 crossed the "Hightower" (Etowah) River and then along the Federal Road to the Tennessee state line. The Northern boundary was a line which commenced at the Chestatee River "at the mouth of Hoholo Creek," up the creek to the top of the Blue Ridge, then to the headwaters of the Notley River, and then down the river to the state line. 1829 Ga. Laws at 98-99.
- It was not until 1835 that Georgia's Constitution was amended to authorize legislative establishment of a Supreme Court. 1835 Ga. Laws 49.
- State v. Tassels*, 1 Ga. Rep. Anno. 478, 481 (Hall Super. Ct. 1830).
- Id.*
- The trial records of the Corn Tassels case were unfortunately destroyed by a tornado that demolished the Hall County courthouse in 1936 and scattered its contents as far as Seneca, South Carolina. Perhaps Corn Tassels, viewing the destruction from on high, saw it as a fitting revenge by the Cherokee Gods.
- Niles Weekly Register XXXIX (Jan. 8, 1831) 338.
- The vote in the Senate, for example, was 37 to 7.
- Gainesville Eagle*, 2 (May 11, 1888).
- Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12-13, 8 L. Ed. 25, 29 (1831).
- Letter from J. A. Eaton to Governor Gilmer (Nov. 10, 1830) (on file at the Georgia Archives).
- 1830 Ga. Laws 114, 114.
- Id.* at 114-115.
- Id.* at 115-116.
- As reported in the *Missionary Herald at Home and Abroad* (1831).
- Id.*
- Letter from W. J. Barry to George Gilmer, Governor of Georgia (May 7, 1831) (on file at the Georgia Archives).
- Letter from George Gilmer, Governor of Georgia, to Rev. Samuel Worcester (1831) (on file at the Georgia Archives).
- Letter from Elizur Butler to George Gilmer, Governor of Georgia (June 7, 1831) (on file at the Georgia Archives).
- Letter to the American Board of Foreign Missions (Sept. 16, 1831).
- Supreme Court of the United States, Transcripts of Records 1832, 480-1093, Vol. 2, January Term.
- Letter to the Editor, *Missionary Herald at Home and Abroad* (1831).
- Worcester v. Georgia*, 31 U.S. 515, 8 L. Ed. 483 (1832).
- Letter from Elisha W. Chester, Attorney for Plaintiff in Error, to Wilson Lumpkin, Governor of Georgia, and to Charles J. Jenkins, Attorney General of Georgia (on file at the Georgia Archives).
- Letter from S. A. Worcester and Elizur Butler to Wilson Lumpkin, Governor of Georgia (Jan. 8, 1833) (on file at the Georgia Archives).
- Letter from S. A. Worcester and Elizur Butler to Wilson Lumpkin, Governor of Georgia (January 9, 1833) (on file at the Georgia Archives).

Juggling the FMLA and its Regulations

By Donald W. Benson

Suppose your client calls complaining that he has just been served with a completely bogus lawsuit alleging a violation of the Family and Medical Leave Act (“FMLA”).¹ After asking for the pertinent facts, you determine that: (1) the plaintiff-employee has worked off and on for the client, but his most recent term of employment has been for only eleven months; (2) the plaintiff-employee has not worked 1,250 hours for the employer in the preceding twelve months; (3) the plaintiff-employee asked for time off to care for a spouse with a serious medical condition as

defined by the FMLA, but failed to produce a medical certification saying that he was needed to care for his spouse as your client had requested; and (4) your client notified the plaintiff-employee that he was ineligible for FMLA leave one day before the employee took his leave.

You check the statute and determine, sure enough, that to be an “eligible employee” for FMLA leave, an employee must have worked for twelve months preceding the date that requested leave is to begin *and* must have worked 1,250 hours during that twelve-month period.² Moreover, the employer has a statutory right to request that the employee produce a certification from his spouse’s health

care provider stating that he was needed to care for the serious health condition of this immediate family member.³ Being indignant that a colleague would file such a frivolous lawsuit without reading the statute, you fire off a letter threatening a Rule 11 motion for sanctions and anticipate the end of the 21-day waiting period so that you may file your devastating maneuver with the court.

As usual, discretion is the better part of valor. In reply to your proposed Rule 11 motion, opposing counsel sends you a one-sentence directive: "Please review the Department of Labor's FMLA Regulations found at 29 C.F.R. § 825." You hastily read the regulations. Ouch.

I. The Practical Problem

There are situations in which the Department of Labor's FMLA Regulations ("Regulations") would say that your client was required to provide the requested leave. Who would have thought that the Regulations could produce results so apparently inconsistent with the express

wording of the statute?

Congress intended that the FMLA establish a minimum for leave policies to protect employees who need leave due to the employee's own serious health condition or that of an immediate family member, or the birth or adoption of a child.⁴ Congress also expressly provided that employers were free to provide more generous leave policies than mandated under the FMLA.⁵ For example, although the FMLA requires that employers extend unpaid leave for up to twelve weeks, employers may provide more than twelve weeks of leave or provide full or partial payment for such leave.⁶ The FMLA also allows employers to provide longer maternity leave programs, or a period of temporary disability leave with partial pay that would run co-extensive with the FMLA mandated leave.⁷ The statutory wording of the FMLA anticipates allowing employers and employees some flexibility in adopting FMLA requirements to fit more generous leave programs.

In general, the Regulations detail how the FMLA applies in given situations, clarifies definitions, and fills in



the holes of the statutory language.⁸ The Regulations include provisions that require an employer to provide its

employee notice about a variety of aspects of its leave policies, including the need for medical certification, whether the leave will be counted as FMLA leave, and whether the leave is paid or unpaid.⁹ These Regulations also provide that should the employer fail to initially provide the required notice, then the employer cannot count employee absences toward the twelve-week total of FMLA leave until proper notice is given.¹⁰

Employers have encountered two common, practical problems applying the notice provisions of the Regulations. In the first scenario, the employer discovers well after the employee's FMLA leave has begun that the employer failed to provide the requisite notice. The Regulations require that an employer notify the employee whether the leave qualifies as FMLA leave within two business days of receiving an employee request for such leave. When an employer does not provide timely notice, under the Regulations the employee is entitled to the full twelve weeks of leave after the employer provides notice, regardless of how much leave was previously offered by the employer.¹¹ In some situations, this results in a windfall to the employee.

In the second scenario, the employer has a leave policy more liberal than the FMLA. For example, the employer offers fifteen weeks of leave, or the employer requires a medical certification from a doctor only when the employee is ready to return to work. Because the employer offers a more generous leave policy than the FMLA requires, the employer does not concern itself with the detailed notice provisions of the FMLA. The employer might not send the two-day notice to the employee required by the Regulations because the employer did not intend to restrict leave to twelve weeks.¹² Likewise, the employer might not have followed the tight time requirements for requesting medical certification because the employer did not intend to demand the medical certification at the earliest time allowed under the FMLA.¹³ Employers who intend to offer more generous leave than required by the FMLA still find themselves confronted with FMLA claims based on Regulations designed to cover the minimum leave program.

Solutions to these practical problems may be emerging in a line of cases rejecting strict adherence to the notice provisions of the Regulations in situations in which the employee has been provided the full extent of leave envisioned by the FMLA. In cases addressing the timeliness and adequacy of notice to the employee of eligibility for FMLA leave, federal courts have struck down all or portions of Regulations as contradicting or exceeding the express intent of the FMLA. Courts have also refused to read penalties into Regulations where no express penalty exists. In some jurisdictions, the courts require the plaintiff to show that he has suffered a harm as a result of his employer's non-compliance with the notice Regulations. Just as firing off a Rule 11 letter without reviewing the Regulations was premature, so is assuming that the Regulations will require your client to concede liability in every situation in which notice mandated in the Regulations was not given.

II. FMLA Regulations

Section 825.208 is an example of a notice provision in the Regulations that potentially results in a windfall of leave to the employee by requiring the employer to inform the employee within two business days, absent special circumstances, that the leave is designated as FMLA leave.¹⁴ If the employer does not promptly notify the employee within two business days, then the paid leave may not be counted toward the employee's total allowable FMLA leave of twelve weeks:

If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.¹⁵

Under this Regulation, none of the pre-notice leave may be counted as part of the maximum of twelve weeks of FMLA protected leave. The employee receives both the paid leave for which the employer failed to give notice, plus an additional twelve weeks of FMLA leave. In essence, an employer would be required to provide more

than twelve weeks of leave because it failed to timely designate paid leave as FMLA leave.

The Regulations also require that the employer provide the employee with notice as to the employee's eligibility for FMLA leave. Under the FMLA, only employees who have been employed for more than twelve months *and* who have worked 1,250 hours during the twelve months preceding the date that requested leave is to begin are entitled to twelve weeks of leave.¹⁶ The Regulations require employers to notify the employee of these requirements and whether the employee has met these requirements once the employee requests leave.¹⁷ Specifically, the Regulations provide:

If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.¹⁸

Thus, under the Regulations, the penalty for a failure to notify an employee that he or she is not eligible for FMLA leave is that the employer must extend leave even though the employee would have been otherwise ineligible.

In addition to relying on insufficient notice of the eligibility for leave, plaintiffs have attempted to use the notice provisions concerning medical certification as a way to prevent employers from refusing to grant the requested leave.¹⁹ Under the Regulations, an employer may request medical certification of an employee's medical condition, but the employer must provide the employee with a *timely* notice that informs the employee that a medical certification is required and of the consequences of the failure to provide this certification:

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to pro-

vide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.²⁰

Admittedly, this Regulation does not expressly provide a penalty for the employer's failure to give the notice within two days or for a notice that does not contain the required warning about "anticipated consequences." Plaintiffs have argued, however, that the employer's failure to follow the notice regulation bars the employer from refusing to grant the requested leave.²¹ This would have the curious result that an employer must provide FMLA leave to an employee who can not obtain medical certification because the employer failed to "advise an employee of the anticipated consequences of an employee's failure to provide adequate certification" in the notice.²²

But, just as the good lawyer must check the Regulations interpreting the FMLA, the good lawyer should also not assume that every FMLA Regulation can be taken at face value. For each of the Regulations discussed above, at least one federal court has been confronted with a set of facts that led the court to reject the Regulation as inconsistent with the express intent of the statute.

III. Rejected FMLA Regulations

Recently, the Eleventh Circuit addressed the conflict between the FMLA and section 825.208 of the Regulations requiring notice of whether the employee's leave counts as FMLA leave. In *Cox v. Autozone, Inc.*,²³ the plaintiff employee took thirteen weeks of paid leave under the employer's leave policy, followed by two weeks of unpaid leave for a total of fifteen weeks.

When she returned to work, she was demoted because her prior position or an equivalent position was not available. Cox contended that, because she was not given the notice required by section 825.208, her initial thirteen weeks of paid leave would

not count toward her total of twelve weeks leave under the FMLA. She claimed that she was entitled to an additional twelve weeks of unpaid leave under the FMLA. This meant that she was not only entitled to twelve additional weeks of unpaid leave following the paid leave but also that she was covered by the FMLA when she returned at the end of fifteen weeks. Under this reasoning, the company was required under the FMLA to return her to her prior job or an equivalent position.²⁴

The district court found the plaintiff's interpretation of section 825.208 to be inconsistent with the statute. After reviewing the relevant FMLA provisions, the court held, in essence, that the FMLA guaranteed an employee a minimum of twelve weeks of unpaid leave.²⁵ According to the court, Congress never intended the FMLA to entitle employees at large companies to more than twelve weeks leave.²⁶ Additionally, the FMLA envisions that the employer be able to count any paid leave to which an employee is entitled as unpaid FMLA leave.²⁷ The court refused to extend this twelve week minimum to require additional leave just because the company failed to designate the company-provided paid leave at its commencement as running concurrently with FMLA-protected leave.²⁸ The notice requirements of the Regulations imposed additional burdens not envisioned by the FMLA and were "clearly beyond the language and intent of the FMLA."²⁹ The court held that, despite the defects in the employer's notice, the employee Cox received the full twelve weeks of leave envisioned by the FMLA, and the court refused to grant her an additional twelve weeks of unpaid FMLA leave on top of her paid leave.

The Eleventh Circuit Court of Appeals affirmed the lower court's decision, holding invalid the Regulation requiring that an employer notify the employee that the leaves run concurrently.³⁰ When faced with a challenge to such an agency regulation, federal courts conduct a two-step analysis. First, the courts examine the statute to determine if Congress has clearly expressed its intent in unambiguous statutory language.³¹ If Congress has not spoken directly on the issue, the courts next determine whether the agency's answer to the question left open by Congress "reflects a permissible construction of the statute."³² The Eleventh Circuit found that under either step, the Regulation was invalid because Congress did not

intend to create an entitlement to twelve weeks of leave following employer notice, but only twelve weeks of leave.³³ Although the *Cox* opinion restricts itself to section 825.208, the rationale of the Court of Appeals may apply to a number of other notice Regulations that could, in specific circumstances, provide employees a windfall of leave beyond the twelve weeks of leave Congress clearly intended to mandate in the FMLA.

Like the Eleventh Circuit in *Cox*, the district court in *Wolke v. Dreadnought Marine, Inc.*³⁴ held that the FMLA Regulations concerning notice of ineligibility for FMLA violate the express intent of the statute and thus are

invalid. In *Wolke*, the employee claimed entitlement to FMLA leave because the employer had not timely notified him that he had not worked twelve months prior to his taking leave as required by section 825.110(d) of the Regulations.³⁵ The district court found that the Regulations were at odds with the Congress's clear intent under the FMLA to require

leave only for eligible employees as defined in the statute: "The regulation upon which Wolke relies to establish ineligibility, 29 C.F.R. § 825.110, is invalid, because it impermissibly contradicts the clear intent of Congress to restrict the class of employees eligible for the FMLA."³⁶

Like in *Cox*, the district court applied the Supreme Court's two-pronged analysis for reviewing agency regulations.³⁷ The *Wolke* court found that Congress had spoken unambiguously on the precise issue. The FMLA states clearly that employees must work for twelve months and 1,250 hours to obtain the protections of the FMLA.³⁸ The court held that, "[a]ny regulatory exceptions which purport to shorten the twelve-month eligibility period are impermissible creations of the Department of Labor."³⁹

In addition to refusing to validate regulations that expressly contradict the FMLA, courts have refused to read penalties into notice Regulations if the penalty creates a result contrary to the express wording of the FMLA. In *Henthorn v. Olsten Corp.*,⁴⁰ the employer denied the employee's request for FMLA leave. The employer then terminated the plaintiff's employment for absenteeism because the employee never supplied a requested medical certification. Relying on section 305(d) of the Regulations, the employee claimed that she was relieved of her duty to provide the certification because the company's letter to her attorney putting her on notice of the need for medical

The best advice to any employer is to structure its policies and practices to comply with the FMLA Regulations issued by the DOL. Obviously, compliance carries the smallest risk of litigation

certification “did not advise her of any anticipated consequences for a failure to provide the requested medical certification.”⁴¹ The district court pointed out that section 305 is silent as to any consequences for an employer’s failure to include such information in its request for certification: “To read such a penalty into the regulation could effectively nullify section 2613 of the FMLA, which authorizes an employer to require an employee with a serious health condition to supply the appropriate medical certification. 29 U.S.C. § 2613. It is well-settled that a regulation cannot nullify the statute it is interpreting.”⁴²

Although the above cases have held portions of the Regulations invalid, other courts have stopped one step short of rejecting the Regulations in every circumstance. Such cases have focused on the causal connection that a plaintiff must show between inadequate FMLA notice and the alleged harm claimed. In each of these cases, the court held that not every lapse in the notice requirements automatically supports a cause of action under the FMLA. Rather, a violation of the employee notice requirements is actionable only if the inadequate notice effectively interfered with the plaintiff’s statutory rights.⁴³

In *Fry v. First Fidelity Bancorporation*, the court stated that inadequate notice amounts to interference if it causes an employee to “unwittingly forfeit protection of the FMLA.”⁴⁴ The plaintiff in *Fry* took sixteen weeks of leave under a company policy more liberal than provided under the FMLA.⁴⁵ Upon her return from pregnancy leave, however, Fry was not reinstated to her prior position as the FMLA would require at the end of a twelve week FMLA leave.⁴⁶ As in *Cox*, the plaintiff identified a notice defect, contending that the company’s employee handbook failed to adequately describe her FMLA reinstatement rights as required by the Regulations at section 825.301.⁴⁷ Instead of invalidating the Regulation as the Eleventh Circuit did in *Cox*, the *Fry* district court adopted a “no-harm/no-foul” approach. Agreeing that a violation of section 825.301 does not automatically amount to a statutory violation of the FMLA, the *Fry* court stopped short of invalidating the entire Regulation to hold that such a notice defect will be actionable “only if the inadequate notice effectively interfered with plaintiff’s statutory rights.”⁴⁸ As *Fry* and *Mora* illustrate, there is a developing willingness to overlook noncompliance with some FMLA Regulations if the defective notice failed to cause harm to an employee who would in any event have been ineligible for the requested FMLA leave.

III. Conclusion

The best advice to any employer is to structure its policies and practices to comply with the FMLA Regulations issued by the DOL. Obviously, compliance carries the

smallest risk of litigation.

When litigation has already begun, the fight may not be lost just because the employer’s actions fail to conform to some of the Regulations. A line of cases has developed in which courts have refused to award employees rights beyond those provided by the FMLA. If the employee has not lost anything to which he was otherwise entitled, even if the employer’s notice is defective, closer scrutiny of available arguments is warranted. If the employee lays claim to leave to which he was not entitled, it is prudent to brush up on administrative law and examine whether the FMLA regulation at issue can be shown to be at odds with the clear intent of Congress as expressly stated in the language of the FMLA. Just as checking the FMLA’s statutory language without reviewing the Regulations can lead to poor legal advice, the prudent practitioner should not concede liability premised on the FMLA Regulations without scrutinizing cases examining those Regulations. ☒

Donald W. Benson is a partner in the labor law firm of Constangy, Brooks & Smith LLC. He practices in the areas of employment dispute avoidance, litigation and mediation, and wage and hour laws. He received his B.A. degree from Davison College in 1976 and his masters degree in philosophy from the University of Georgia in 1978. He received his J.D. from the University of Utah College of Law in 1984.



Endnotes

1. 29 U.S.C.A. §§ 2601-2654 (1999).
2. *Id.* § 2611(2).
3. *Id.* § 2613.
4. *Id.* § 2601(b); 29 C.F.R. § 825.100(a) (1998).
5. 29 U.S.C.A. § 2653.
6. *Id.* §§ 2612(c)-(d), 2653.
7. *Id.* § 2612.
8. *Id.* § 2654.
9. 29 C.F.R. §§ 825.305, .208 (1998).
10. *Id.* § 825.208(c).
11. *Id.*
12. *See id.*
13. *Id.* § 825.305(c).
14. *Id.* § 825.208(b)(1).
15. *Id.* § 825.208(c).
16. 29 U.S.C.A. §§ 2611(2)(A), 2612 (1999).
17. 29 C.F.R. § 825.110(d) (1998).
18. *Id.*
19. *Henthorn v. Olsten Corp.*, No. 97 C 50182, 1999 U.S. Dist. LEXIS 2029, at *1 (N.D. Ill. Feb. 24, 1999).
20. 29 C.F.R. § 825.305 (1998).
21. *See Henthorn*, 1999 U.S. Dist. LEXIS 2029, at *10-*11.
22. 29 C.F.R. § 825.305(d).
23. *Cox v. Autozone, Inc.*, 990 F. Supp. 1369, 1371 (M.D. Ala. 1998), *aff’d sub nom. McGregor v. Autozone, Inc.*, 180 F.3d

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Recent Developments in Construction Law

William H. Hughes Jr. and Stephen M. Reams



I. Introduction

There is no proof that the Greek philosopher Heraclitus was thinking about construction law when he wrote “the only constant in life is change.”¹ But he certainly could have been.

This article will discuss some of the more significant recent developments in Georgia construction law and their implications for attorneys who represent owners, builders, subcontractors and design professionals. The highlights include recent cases concerning claims for negligent construction, construction arbitration, and the Georgia lien laws, and significant revisions to the widely-used form contracts published by the American Institute of Architects (“AIA”).

II. Developments in the Law of Negligent Construction

Many attorneys are unaware that, in addition to being subject to claims for breach of contract, builders who perform defective work in Georgia can also be sued for negligent construction.

A. Situations Inviting Claims for Negligent Construction

Negligent construction claims can be useful in two common situations. The first situation is that of a person who is not in privity of contract with a builder but suffers loss as a result of the builder’s defective performance. For example, a person who had no role in the construction process may incur personal injury or property damage as a result of a defect or structural failure in a poorly-constructed building, and wish to sue the builder.² Or a property owner who has entered into a contract with a general contractor may be injured by the negligent work of a subcontractor and desire to pursue the subcontractor directly because the general contractor is insolvent. Or the purchaser of a building may suffer loss as a result of negligent work performed by a builder under contract to a previous owner.³ In each of these situations, Georgia law permits the injured party to assert a claim for negligent construction directly against the responsible general contractor or subcontractor, notwithstanding a complete lack of privity of contract.

The leading case on this topic is *Ramey v. Leisure, Ltd.*⁴ In *Ramey*, the Georgia Court of Appeals permitted a subsequent purchaser of property to sue the builder for negligence, despite the fact that the owner lacked privity with the builder. In this case, the plaintiff was actually the third purchaser of the home.⁵ The owner discovered defects related to the foundation trenches of the home and

sued the builder for negligent construction and fraud.⁶ The builder moved for directed verdict based on the lack of privity. The trial court denied the motion and the builder appealed. The Georgia Court of Appeals ruled that the homeowner could sue the builder in tort, and no privity was required.⁷

The second situation that invites a claim for negligent construction is that of an injured party who is in privity with an insolvent building corporation or limited liability company, but seeks to impose personal liability on owners, officers or managers of the builder. A claim for negligent construction can be a useful means of piercing the corporate veil in this situation because, under the theory of negligent construction, an officer or manager of such a corporation or company may be held individually liable, notwithstanding the absence of privity of contract. The seminal case on this topic is *Cherry v. Ward*,⁸ in which the Georgia Court of Appeals held that a corporate officer of a construction company could be held personally liable for negligent construction if that person “specifically directed the manner in which the [structure] was constructed or participated or cooperated in its negligent construction.”⁹

The Georgia Court of Appeals revisited this issue in the recent case of *Jennings v. Smith*.¹⁰ In *Jennings*, the plaintiff sued a real estate company and its corporate officer for negligent construction and fraudulent concealment of construction defects. The trial court granted summary judgment in favor of the corporate officer. The Georgia Court of Appeals reversed, finding that the corporate officer could be held personally liable for the negligence of the corporation if the officer took part in the alleged negligent act, specifically directed the act to be done, or participated or cooperated in its commission.¹¹

B. Proving a Claim for Negligent Construction

In order to prove a claim for negligent construction under any of the fact situations described above, the plaintiff must first demonstrate that the contractor failed to meet the required standard of care. The standard of care for builders has been defined as “that degree of care and skill as is ordinarily employed by other contractors under similar conditions and like circumstances.”¹² Frequently, evidence of whether the defendant met the standard of care is introduced through expert testimony. However, in the recent case of *Bilt Rite of Augusta, Inc. v. Gardner*,¹³ the Georgia Court of Appeals held that expert testimony is not always necessary to establish the standard of care. Instead, the standard may be derived from written materials such as manufacturer’s recommendations for the installation of building components.¹⁴ Also, because neither general contractors nor subcontractors are currently included in the professions covered by O.C.G.A. § 9-11-

9.1(f), an expert's affidavit is not required to support a claim for negligent construction against a builder.

C. The Economic Loss Doctrine and Negligent Construction

One important question that the Georgia courts have not addressed is the effect of the economic loss doctrine on negligent construction claims. Under product liability law, the economic loss doctrine generally prohibits an action in negligence where there is no personal injury or damage to property other than to the allegedly defective product itself.¹⁵ None of the Georgia decisions on negligent construction discuss this defense or its applicability to defective construction claims. By implication it would appear that the economic loss doctrine does not apply to negligent construction claims, since several reported negligent construction cases involve only economic loss of the sort that would preclude a claim for negligence under that doctrine.¹⁶ Until this issue is directly addressed by the courts, however, the effect of the economic loss doctrine on claims for negligent construction will remain somewhat uncertain.

D. The Statute of Limitations for Negligent Construction Claims

Any attorney considering a claim for negligent construction should take heed of the applicable statute of limitations, which is shorter than that available for a claim for breach of contract. Indeed, unlike a claim for breach of a construction contract, which enjoys a six-year statute of limitations dating from substantial completion of the structure,¹⁷ a negligent construction claim must be brought within four years of the date on which the cause of action arose.¹⁸

A right of action for negligent construction is generally deemed to arise on the date that the negligent work was performed.¹⁹ In the recent case of *Howard v. McFarland*,²⁰ however, the Court of Appeals held that any positive affirmative act of concealment on the part of the negligent builder will toll the running of the statute of limitations until the time the defective work is discovered. Under the fraudulent concealment rule of *McFarland*, a positive affirmative act is required, and mere silence on the part of the builder is not sufficient to toll the running of the statute of limitations.²¹

III. Developments in the Law of Arbitration

Binding arbitration has a long history of use in construction disputes. Virtually all of the standard industry form contracts used on private projects include mandatory arbitration provisions.²²

The advantages of binding arbitration are well-known. These advantages include the potential for resolving disputes more quickly than is possible within the judicial system, and the opportunity to obtain a decision from arbitrators who are familiar with industry practices. In addition, arbitration generally minimizes expensive discovery and avoids lengthy appellate review.

At the same time, however, parties to binding arbitration usually relinquish their right to gather information from opposing and third parties prior to adjudication. Because of the fact-intensive nature of most arbitrations, the parties also typically forfeit their ability to enforce strict notice, waiver, and other legal terms of the applicable contracts. These disadvantages

usually cut against the interests of the construction owner, who typically has less information about the project than the architect or the builder, and who may wish to strictly enforce contract provisions requiring written change orders or timely notice of claims.

In addition, all parties can be adversely affected by the absence of an effective process for review of erroneous decisions in arbitration. Accordingly, making the decision to arbitrate requires an analysis of the potential costs as well as the possible benefits. As recent cases have emphasized, the costs and benefits may vary depending upon whether the arbitration is conducted under the Georgia Arbitration Code ("GAC") or the Federal Arbitration Act ("FAA").

A. Application of the GAC and the FAA

The FAA applies to maritime transactions and transactions involving interstate commerce in which the parties have incorporated an arbitration clause.²³ However, the parties to an agreement involving interstate commerce may agree to arbitrate using the rules of the GAC. In *Volt Information Sciences v. Board of Trustees of the Leland Stanford Junior University*,²⁴ the United States Supreme

The advantages of binding arbitration include the potential for resolving disputes more quickly than is possible within the judicial system, and the opportunity to obtain a decision from arbitrators who are familiar with industry practices.

Court ruled that the parties to a transaction involving interstate commerce may agree to arbitrate pursuant to state arbitration rules, provided that the state law does not conflict with the goals of the FAA. In *North Augusta Associates Limited Partnership v. 1815 Exchange, Inc.*,²⁵ the Georgia Court of Appeals determined that the *Volt* decision permits parties to contracts involving interstate commerce to agree to arbitrate pursuant to the GAC.²⁶

The principal substantive differences between the GAC and the FAA concern the authority of the arbitrators to make awards of attorney fees, and the standard of review applicable on a motion to vacate an arbitration award.

B. Awards of Attorney Fees under the GAC and FAA

In *Hope & Associates, Inc. v. Marvin M. Black Co.*,²⁷ the Georgia Court of Appeals held that, under the GAC,

“[i]f the parties contract for attorney’s fees, that agreement will be enforced. If the parties do not contract for attorney’s fees, each party will be responsible for the payment of his own attorney’s fees.”²⁸ Notwithstanding two subsequent appellate court decisions that have confirmed awards of attorney fees in arbitration where neither the underlying agreement nor the arbitration agreement provided for such an award,²⁹

Hope & Associates has never been overruled. Thus, under the GAC the rule remains that

attorney fees may be awarded only when expressly provided for in the applicable agreement.

By contrast, attorney fees may be awarded in arbitration

under the FAA if any one of three conditions is satisfied. First, attorney fees may be awarded if such an award is expressly provided for in the subject agreement. Second, attorney fees may be awarded if the arbitration clause provides for “resolution of all disputes.” Finally, attorney fees may be awarded if the single arbitrator or arbitration panel determines that a party has acted in bad faith.³⁰ Thus, attorney fees may be awarded much more readily in arbitration conducted under the FAA, than in arbitration governed by the GAC.

C. The Standard of Review on Motions to Vacate under the GAC and the FAA

The grounds available for attacking an arbitration award are severely limited under the GAC. Under the recent decision of the Georgia Supreme Court in *Greene v. Hundley*,³¹ arbitration awards may be vacated under the GAC only if (1) the award was tainted by corruption, fraud or misconduct, (2) a neutral arbitrator acted with partiality, (3) the arbitrators overstepped or erred in the exercise of their authority such that a final and definite award upon the subject matter submitted was not made, or (4) the arbitrators failed to follow the procedure of the Georgia Arbitration Code.³²

The Supreme Court decision in *Greene v. Hundley* followed a widely-publicized decision by the Georgia Court of Appeals in *Hundley v. Greene*.³³ In *Hundley v. Greene*, the Georgia Court of Appeals examined the factual record in a construction arbitration and concluded that the award should be vacated because there was “no evidence to support the award” and it was “completely irrational.”³⁴

After the submission of *amicus* briefs arguing that all arbitration awards would henceforth be subject to lengthy judicial review based on sufficiency of the evidence, the Georgia Supreme Court granted certiorari and reversed. The Supreme Court held that the four criteria listed above represent the *exclusive* grounds for vacating an arbitration award.³⁵ Accordingly, the *Greene v. Hundley* Court held, the GAC strictly prohibits a reviewing court from weighing evidence presented to the arbitrator, “regardless of whether the court believes there to be sufficient evidence, or even any evidence to support the award.”³⁶ The *Greene v. Hundley* decision positions Georgia at one extreme of the states whose laws address the review of arbitration awards and permit judicial review only in cases of actual fraud, misconduct, partiality or overstepping of authority.

By contrast, federal courts in the Eleventh Circuit have substantially broader powers to review awards in arbitration. In addition to the grounds recognized by the Georgia courts — including fraud, misconduct, partiality or



overstepping of authority by an arbitrator — the FAA permits federal courts to vacate arbitration awards “(1) [w]here the award was procured by . . . undue means; . . . [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or . . . [w]here the arbitrators have so imperfectly executed [their powers] that a mutual, final and definite award upon the subject matter was not made.”³⁷

In addition to these statutory grounds, the Eleventh Circuit also recognizes common-law grounds to vacate arbitration awards. In the recent case of *Lifecare International, Inc. v. CD Medical, Inc.*,³⁸ the Eleventh Circuit Court of Appeals held that an arbitration award may be vacated when the reviewing court finds that the award is “arbitrary and capricious,” meaning that “a ground for the arbitrator’s decision cannot be inferred from the facts of the case.”³⁹

The Eleventh Circuit further expanded its criteria for vacating an award in the recent case of *Scott v. Prudential Securities, Inc.*⁴⁰ In *Scott*, the Circuit Court held that “[i]n the Eleventh Circuit, a party may challenge an arbitration award without reliance on the FAA if the award is in contravention of public policy; or entered in ‘manifest disregard of the law.’”⁴¹ Thus, under *Lifecare International* and *Scott*, federal courts in the Eleventh Circuit are permitted to review both the fact findings and legal conclusions underlying an arbitration award, and may vacate the award if either is severely lacking.

IV. Developments in Georgia Lien Law

The Georgia mechanic’s and materialman’s lien statute grants a lien in favor of contractors, subcontractors, materialmen and laborers who furnish labor and material for the improvement of real estate.⁴² This remedy is in addition to traditional contract remedies and is intended to protect those who provide labor and material to construction projects by allowing them to look to the improved real estate itself for payment. Because the lien statutes are in derogation of the common law, they are strictly construed against the lienor.⁴³ Therefore, potential lien claimants must strictly adhere to all technical requirements of the statute in order to make good their claims of lien.

To perfect a lien, a lien claimant must sue the original contract debtor for the amount of the claim within twelve months of the date the debt became due, file a Notice of Suit within 14 days thereafter,⁴⁴ and obtain a judgment against the contract debtor before foreclosing the lien against the owner of the property. Historically, lien

claimants have been relieved of the requirement of obtaining a judgment against the contract debtor if it is impossible to secure such a judgment because the contract debtor has died, absconded, or been adjudged bankrupt. In these cases, subcontractors or material suppliers have long been entitled to enforce their liens in an action directly against the owner.⁴⁵

In response to a nationwide movement to protect subcontractors and suppliers who sign subcontracts and purchase orders that contain “pay if paid” provisions,⁴⁶ the Georgia General Assembly recently amended the provision of the lien statute relating to judgment against the contract debtor. The General Assembly added, to the historical situations discussed above, a new exception for subcontractors and materialmen who cannot obtain a judgment against a contract debtor because the subcontract or purchase order contains a “pay if paid” provision, and the contract debtor has not been paid by the party that owes it money.

Thus, since July 1, 1997, in those cases where a subcontractor or material supplier is unable to obtain a judgment against the contract debtor because the applicable subcontract or purchase order contains a “pay if paid” provision, the subcontractor or material supplier has been entitled to proceed directly against the owner without first obtaining a judgment against the contract debtor.

As highlighted by two recent decisions from the Georgia Court of Appeals, however, use of any of these exceptions can expose the lien claimant to a potential trap for the unwary. This trap can be sprung if the lien claimant originally files suit against the contractor and files the required Notice of Suit on the public records, and later decides to proceed directly against the owner under one of the above exclusions. According to the recent decisions in *Calhoun/Johnson Company v. Houston Family Trust No. 1*⁴⁷ and *Northside Wood Flooring, Inc. v. Borst*,⁴⁸ unless the lien claimant files a second Notice of Suit within 14 days of instituting the direct action against the owner, the second claim will be subject to dismissal. This is true because compliance with the subsection of the lien statute relating to claims against the contract debtor does not relieve the lien claimant of an obligation to comply with the subsection addressing direct claims against the owner.

Accordingly, each time a lien claimant’s theory of recovery changes in a way that implicates a different section of the lien statutes, the lien claimant should carefully consider whether any new requirements are triggered.

V. The New AIA Form Contracts

The single most important contract document in use

on construction projects today is the American Institute of Architects Document A201 “General Conditions of the Contract for Construction.” Document A201, along with Document A201CM/a (for projects using a construction manager-advisor), are incorporated by reference in the contracts for literally hundreds of Georgia construction projects each year.

The AIA promotes its form contracts by claiming that they result from a “consensus-building process” that reflects industry standards and balances the interests of all parties involved.⁴⁹ Some would surely argue, however, that the AIA forms shift a disproportionate share of risk to construction owners who, as a group, have less input into the AIA drafting process than designers and builders. Not surprisingly, industry groups representing contractors, engineers, subcontractors, and owners offer forms that compete with the AIA contracts.⁵⁰

Since 1977, the AIA has maintained a ten-year cycle for major revisions to Document A201 and its sister form, the Document B141 “Standard Form of Agreement Between Owner and Architect.” The November 1997 editions of these documents have only recently come into widespread use. Unbeknownst to many general practitioners, some of the changes in 1997 editions significantly reallocate the risks traditionally borne by owners, builders and designers.

A. New Issues for Construction Owners

The 1997 editions of Documents A201 and B141 increase the risks assumed by owners in their relationships with both builders and architects. Among the most critical issues for owners are changes in the areas of consequential damages, project termination, coordination of multiple contractors, and the owner’s relationship with its architect.

1. Mutual Waiver of Consequential Damages

Both the A201 General Conditions and the B141 Owner-Architect agreement now contain a “mutual waiver of consequential damages” provision that affects, to varying degrees, the rights of the owner, builder, and designer.⁵¹

The term “consequential damages” is not defined in Document B141. In Document A201, the term is defined to include any damages incurred *by the owner* for rental expenses, loss of use, income, profit, financing, business and reputation, or loss of management or employee productivity or services.⁵² This definition applies only to losses of the owner and, in effect, waives all claims of the owner against its builder and architect for damages other than the direct cost of correcting defective design or construction work.

This waiver is important because of the significant consequential damages a commercial owner can incur

when a project is delayed or defects appear. Such damages include lost revenues and profits caused by delayed completion, as well as losses from disruption in ongoing operations due to the discovery and repair of defects. While the waiver provision in Document A201 does make an exception for “liquidated direct damages,”⁵³ the use of the word “direct” in this exclusion is very significant. The primary purpose of most liquidated damages provisions is to compensate the owner for indirect damages such as lost profits or revenues from delayed completion. Because only liquidated *direct* damages are excepted from the waiver of damages in Document A201, a strong argument could be made that the waiver precludes any recovery under a liquidated damages provision that is intended — as virtually all liquidated damages provisions are — to compensate the owner for indirect and consequential damages.

Attorneys who represent construction owners should also be aware that, while the waivers of consequential damages in Documents A201 and B141 are labeled “mutual waivers,” both the builder and the architect retain rights to recover consequential losses under other provisions of the contracts. For example, Document B141 permits the designer to recover, in the event of wrongful termination of the contract, “termination expenses” that are defined elsewhere in the contract to include all expenses “directly attributable to termination for which the architect is not otherwise compensated.”⁵⁴ Similarly, under Document A201 a builder is entitled to recover its jobsite costs and anticipated profit arising from the project including, in the event of termination, reasonable overhead and profit on the work not yet executed.⁵⁵ By following a few simple bookkeeping procedures, a builder can characterize a substantial portion of its consequential loss exposure so that it fits within these broad categories.

2. Coordination of Separate Contractors

On many modern construction projects, the owner hires several general contractors or trade contractors to work on the site simultaneously or in sequence. The increased risk to the owner created by the waiver of consequential damages discussed above is further exacerbated by the owner’s obligation, under the new Document A201, to coordinate the work of all of the separate builders on such projects. Under Document A201 the owner is strictly liable to each contractor for any damage incurred by that contractor due to delays, improperly timed activities or defective construction by another contractor.⁵⁶ In addition, the owner is responsible to all contractors for improper design services provided by a designer acting under contract with the owner.⁵⁷

There are those who would argue that any costs the owner incurs to fulfill these responsibilities to the various

contractors are “consequential” damages to the owner. Under the mutual waiver of consequential damages discussed above, the owner would be barred from maintaining an action against the responsible contractor or designer to recover these consequential damages. Thus, under the 1997 forms the owner could become, in effect, the guarantor to each contractor of the performance of the design team and every other contractor, while waiving its right to recover consequential damages incurred in fulfilling its obligations under that guaranty.

3. Termination for Convenience

Owners have long complained about the absence, in previous editions of Document A201, of a provision permitting the owner to terminate the owner/builder contract for the owner’s convenience. There are many legitimate reasons why an owner might wish to terminate a project for convenience. For example, an owner might wish to cancel a project that is no longer needed, that has become obsolete, or for which funding has become unavailable. Typically, upon termination for convenience an owner is willing to pay the builder its costs and profit on work performed through the date of termination, along with reasonable costs of demobilization and terminating subcontracts or supply contracts. Most owners are not willing, however, to pay the builder’s lost profits on work not yet performed. Indeed, the owner is not required to pay lost profits under the termination for convenience provisions contained in several other form contracts, including the forms used on federal government projects.⁵⁸

The new Document A201 includes a termination for convenience provision, but with a twist. Under the termination provision contained in the new Document A201, an owner who terminates for convenience is held responsible for paying for all completed work and costs incurred by reason of the termination, plus the builder’s reasonable overhead and profit on the work not yet executed.⁵⁹ Thus, under the termination for convenience provision in AIA Document A201, the owner is effectively held responsible for payment of statutory damages for breach of contract.⁶⁰ This is a far cry from what most owners consider to be reasonable terms for termination

for convenience.

4. Notice of Claims

As compared to previous editions, the new Document A201 simultaneously relaxes and tightens the requirements for making claims. While claims by both the owner and builder must still be submitted within twenty-one days after the claimant first recognizes the condition giving rise to the claim, now the original submission need only “initiate” rather than “make” the claim. This change in language relaxes the burden for including information in the initial notice of claim, since the term “initiate” pre-

sumes subsequent supplementation and explanation.

However, under the new Document A201 written notices of claim by both the owner and the builder must be sent to the other party *and to the architect*. If either the owner or the builder submits a claim directly to the other party, without copying the architect, the notice will not satisfy the notice provisions of Document A201 and the claim may be considered waived.⁶¹

5. Architect’s Control of Design Documents

In a dispute between the owner and designer, the importance of control over the drawings and specifications cannot be overstated. Without design documents, the project cannot proceed. Whoever controls the design documents controls the future of the project.

The new Document B141 states that the owner’s use of drawings, specifications and other documents prepared by the architects and its consultants is under a limited license that expires if the owner-architect agreement is terminated.⁶² Regardless of which party terminates the agreement, all copies of the design documents must be returned to the architect within seven days after termination.⁶³ Under the new Document B141, the architect is entitled to retain these documents throughout any ensuing dispute with the owner, and the owner may regain use of the documents only after the architect is “adjudged” to be in default through a court proceeding or binding arbitration.⁶⁴

Thus, under the new Document B141 the designer has complete control over the design documents and is in a position to shut down the project in the event of a dispute with the owner. In addition, under the waiver of

In a dispute between the owner and designer, the importance of control over the drawings and specifications cannot be overstated. Without design documents, the project cannot proceed. ... Whoever controls the design documents controls the future of the project.

consequential damages discussed above, as well as a contract provision permitting the architect to suspend services in the event of non-payment by the owner for any reason,⁶⁵ the architect cannot be held responsible to the owner for the severe indirect and consequential damages that most commercial owners will incur if a project is shut down and delayed.

It should be clear from the above discussion that architects enjoy significant advantages under the new Document B141. The architect's position is further enhanced by provisions in the new Document B141 that (i) guarantee the architect's anticipated profits for services not yet performed if the agreement is terminated for convenience or otherwise without the fault of the architect,⁶⁶ (ii) limit the number of certain services that will be provided by the architect without additional compensation,⁶⁷ (iii) mandate additional compensation to the architect if the requirements of the project change,⁶⁸ and (iv) require that the architect approve any changes in the A201 agreement that would affect the architect and are inconsistent with the B141 agreement.⁶⁹

B. New Issues for Contractors

Although the 1997 A201 and B141 documents shift significant risks to owners, there are also new concerns for contractors.

1. Contractor's Design Responsibility

A controversial new paragraph in Document A201 addresses the contractor's responsibilities for design. The provision provides some new protection to the contractor by requiring the architect to state specifically when the design services of the contractor are needed. Once design responsibilities are delegated, the contractor becomes solely responsible for them, and the architect is permitted to rely on their adequacy, accuracy and completeness.⁷⁰

Left hanging are numerous questions including how specific the architect's delegation needs to be and what interpretation should be given to mixed specifications that include both prescriptive specifications and performance requirements. Contractors should be sure to obtain clear instructions concerning delegated design before bidding on, or signing a contract for, a project using the new Document A201. Contractors should also pay close attention to their own insurance and that of their subcontractors, to make sure that the risks arising from delegated design are covered.

2. Contractor's Responsibility for Comparing Design to Field Conditions

A new paragraph in Document A201 relaxes the standard for the contractor's review and comparison of the design documents with field conditions, but imposes strict penalties for failure to conduct such a review.⁷¹ The

contractor's review is now expressly "for the purpose of facilitating construction" and not for the purpose of discovering errors, omissions or inconsistencies in the contract Documents. A contractor who does not properly perform this review, however, will be strictly liable for any costs and damages which would have been avoided had it fulfilled its duties.

3. One-Year Period for Corrective Work

Like the old version, the new Document A201 specifies a one-year call-back period for performance of corrective work.⁷² Contrary to popular belief, the contractor's warranty obligations do not expire at the end of this one-year period. Rather, the contractor's potential liability for breach of contract, breach of warranty and negligent construction extends until the statute of limitation expires.

4. Second Notice of Default Before Termination

Under the new Document A201, the owner is still required to give the contractor two notices of default before termination.⁷³ However, the time limit for the second notice is now only three *calendar* — not *business* — days. A second notice given on a Friday afternoon and not cured by Monday could result in termination on Tuesday.

5. Architect's Authority

The owner is now required to designate in writing a representative who has express authority to provide approvals or authorizations on behalf of the owner.⁷⁴ Absent written designation by the owner, the contractor cannot assume that the architect has such authority. Also, under a new paragraph in Document A201, substitutions may be approved only by the owner.⁷⁵ The architect has no independent authority to approve substitutions.

The new AIA documents create significant issues for all involved in construction projects using these form agreements. Substantial risks have been reallocated in ways that may not always be anticipated by the parties involved. However, in virtually all cases the parties will engage in negotiations over the final form of the documents. All of the above provisions are subject to change, deletion or modification by the parties before reaching final agreement. Accordingly, prior to entering into any agreements, even form agreements as widely used as the AIA, it is imperative that competent legal counsel be consulted. ☒

William H. Hughes, Jr., a partner in the construction practice group of Alston & Bird, has a national construction law practice involving projects in 22 states and Mexico. He received his B.A. degree from the University of North Carolina in 1980, and his J.D. from the University of Virginia in 1983. Hughes has been a member of the State Bar's Litigation Section since 1983, and has served as director and chair of the Construction Law Section of the Atlanta Bar Association.



Stephen Reams works in the construction litigation practice group of Alston & Bird. Previously, he practiced construction litigation in Tampa, Florida. He graduated from the University of Notre Dame School of Law in 1996, where he served as an articles editor for the *Journal of Legislation*. Reams received his B.A. in economics from Centre College. He is admitted to practice in Florida.



Endnotes

1. Plato, CRATYLUS, 402A.
2. See, e.g., *Hudson v. Santangelo*, 228 Ga. App. 768, 492 S.E.2d 673 (1997) (injured contractor sued owner for personal injuries based on theory that owner served as his own general contractor; contractor failed to establish evidentiary basis for negligent construction).
3. See, e.g., *Ramey v. Leisure, Ltd.*, 205 Ga. App. 128, 421 S.E.2d 555 (1992).
4. *Id.*
5. *Id.* at 128, 421 S.E.2d at 556.
6. *Id.*
7. *Id.* at 130-31, 421 S.E.2d at 558.
8. 204 Ga. App. 833, 420 S.E.2d 763 (1992).
9. *Id.* at 834, 420 S.E.2d at 765.
10. 226 Ga. App. 765, 487 S.E.2d 362 (1997).
11. *Id.* at 766, 487 S.E.2d at 363-64.
12. *Hudson*, 228 Ga. App. at 773, 492 S.E.2d at 677; see also *Cherry*, 204 Ga. App. at 833, 420 S.E.2d at 765 (actionable negligence defined as the "failure to adhere to the established and accepted standards of professional care or conduct in the community, which defect the builder knew or should have known by the exercise of ordinary care" (quoting *Williams v. Runion*, 173 Ga. App. 54, 57, 325 S.E.2d 441, 446 (1984))).
13. 221 Ga. App. 817, 472 S.E.2d 709 (1996).
14. *Id.*; see also *Rentz v. Brown*, 219 Ga. App. 187, 188, 464 S.E.2d 617, 619 (1995); *Hudson*, 228 Ga. App. at 773, 492 S.E.2d at 677.
15. *Advanced Drainage Systems, Inc. v. Lowman*, 210 Ga. App. 731, 437 S.E.2d 604 (1993). Exceptions are made for sudden and calamitous events that pose an unreasonable risk of injury to persons or property other than the product itself and for certain acts of misrepresentation. *Id.* at 734, 437 S.E.2d at 607.
16. See, e.g., *Ramey*, 205 Ga. App. 128, 421 S.E.2d 555; *Cherry*, 204 Ga. App. 833, 420 S.E.2d 763; *Jennings v. Smith*, 226 Ga. App. 765, 487 S.E.2d 362 (1997); *Bilt Rite of Augusta, Inc. v. Gardner*, 221 Ga. App. 817, 472 S.E.2d 709 (1996).
17. *Fort Oglethorpe Associates II, Ltd. v. Hails Construction Co. of Georgia*, 196 Ga. App. 663, 396 S.E.2d 585 (1990).
18. O.C.G.A. § 9-3-30 states that "[a]ll actions for trespass upon or damage to realty shall be brought within four years after the right of action accrues."
19. *Travis Pruitt & Assoc. v. Bowling*, 238 Ga. App. 225, 225, 518 S.E.2d 453, 454 (1999) ("a cause of action in negligence accrues and the statute of limitation begins to run when there is a negligent act coupled with a proximately resulting injury"); *Corporation of Mercer Univ. v. National Gypsum Co.*, 258 Ga. 365, 368 S.E.2d 732 (1988); *Millard Matthew Builders, Inc. v. Plant Improvement Co.*, 167 Ga. App. 855, 307 S.E.2d 739 (1983). But see *Ramey*, 205 Ga. App. 128, 421 S.E.2d 555. *Ramey* made it possible to extend the period of limitations significantly if the subsequent owner can state a cause of action for fraudulent concealment. In *Ramey*, the Court ruled that a claim for fraudulent concealment of negligent construction could be brought by any subsequent purchaser of a building, at any time within four years after that purchaser discovered a defect. *Ramey*, 205 Ga. App. at 130-31, 421 S.E.2d at 558.
20. 237 Ga. App. 483, 515 S.E.2d 629 (1999).
21. *Id.* at 486, 515 S.E.2d at 633 (citing *Comerford v. Hurley*, 154 Ga. App. 387, 388, 268 S.E.2d 358, 360, *aff'd*, 246 Ga. 401, 271 S.E.2d 782 (1980)).
22. The form contracts published by the American Institute of Architects ("AIA"), the Associated General Contractors ("AGC") and the Engineers Joint Contract Documents Committee ("EJCDC") all include mandatory arbitration provisions.
23. 9 U.S.C. §§ 1-2 (1999); see, e.g., *Medical Development Corp. v. Industrial Molding Corp.*, 479 F.2d 345, 347 (10th Cir. 1973).
24. 489 U.S. 468, 109 S.Ct. 1248 (1989).
25. 220 Ga. App. 790, 469 S.E.2d 759 (1996).
26. *Id.* at 791-92, 469 S.E.2d at 761-62. See generally Douglas H. Yarn, *Alternative Dispute Resolution, Practice and Procedure in Georgia* § 8-11 (2d ed. 1997).
27. 205 Ga. App. 561, 422 S.E.2d 918 (1992).
28. *Id.* at 562, 422 S.E.2d at 919.
29. See *Haddon v. Shaheen & Co.*, 231 Ga. App. 596, 499 S.E.2d 693 (1998); *Akintobi v. Phoenix Fire Restoration Co.*, 236 Ga. App. 760, 761, 513 S.E.2d 507, 508 (1999) (parties implicitly agreed to arbitrate attorney's fees during the course of the arbitration).
30. See Yarn, *supra* note 25, § 8-51 (Supp. 1999) (citing *Marshall & Co. v. Duke*, 114 F.3d 188 (11th Cir. 1997)).
31. 266 Ga. 592, 468 S.E.2d 350 (1996).
32. O.C.G.A. § 9-9-13(b). Under O.C.G.A. § 9-9-13(b)(4), the fourth ground may be waived if the party moving to vacate continued the arbitration without objection after becoming aware of the arbitrator's failure to follow the Code.
33. 218 Ga. App. 193, 461 S.E.2d 250 (1995).
34. *Id.* at 197, 461 S.E.2d at 254.
35. *Greene*, 266 Ga. at 595, 468 S.E.2d at 352 (citing *Raymer v. Foster & Cooper, Inc.*, 195 Ga. App. 200, 201, 393 S.E.2d 49 (1990); *Cotton States Mut. Ins. Co. v. Nunnally Lumber Co.*, 176 Ga. App. 232, 236, 335 S.E.2d 708, 711-712 (1985)).
36. *Id.* at 597, 468 S.E.2d at 354.
37. 9 U.S.C.A. § 10(a) (1999).
38. 68 F.3d 429 (11th Cir. 1995).
39. *Id.* at 435 (citing *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412 (11th Cir. 1990); *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992)).
40. 141 F.3d 1007 (11th Cir. 1998), *cert. denied*, ____ U.S. ____, 119 S. Ct. 798 (1999).
41. *Scott v. Prudential Securities, Inc.*, 141 F.3d at 1017 (citing *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456 (11th Cir. 1997)).
42. O.C.G.A. § 44-14-361(a)(2) (Supp. 1999).
43. *Northside Wood Flooring, Inc. v. Borst*, 232 Ga. App. 569, 572, 502 S.E.2d 508, 510 (1998), *cert. denied*, (Ga. Oct. 2, 1998).
44. O.C.G.A. § 44-14-361.1(3) (Supp. 1999).

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Board of Governors Convenes in Brasstown Valley for Fall Meeting

By Jennifer M. Davis

THE NORTH GEORGIA MOUNTAINS were ablaze with color when the Board of Governors convened at the Brasstown Valley Resort from Nov. 12-14, 1999. The Fall Meeting opened in the foothills of the Blue Ridge mountains on Friday evening with a campfire cookout under the stars.

On Saturday morning the Board of Governors for its last meeting of the millennium. Meanwhile, their spouses and guests experienced the region's Cherokee Indian heritage by exploring illustrations of native Indian arts and crafts, followed by an interactive session on the art of pottery.

While the guests reflected on the history of the area, Board members looked to the future. In doing so, the Board addressed two of its most important duties — nominating candidates for officer positions and setting the Bar's legislative agenda. To find out what the Bar will be monitoring when the General Assembly convenes in January 2000, please see the article on page 36. The complete text of the legislative proposals also appear on the Bar's Web site at www.gabar.org/ga_bar/legislat.html.

Nomination of Candidates

The slate of candidates for the 2000-2001 election were nominated

as follows: James B. Franklin, of Statesboro for president-elect; James B. Durham of Brunswick for a second term as treasurer; and William D. Barwick and Phyllis J. Holmen, both of Atlanta, in a contested race for secretary.

Next the Board voted to amend Bylaw Article X, Section 1 to change the age of the ABA Delegate from the Young Lawyers Division from 35 to 36 (to be in agreement with the ABA YLD age cut off).

Then the following ABA delegates were nominated for 2-year terms (2000-2002): Allan Jay Tanenbaum, Post 1; Cubbedge Snow Jr., Post 3; S. Kendall Butterworth, Post 5 (YLD); Linda A. Klein, Post 7.

Ballots — which will include the officers, ABA delegates and contested races for Board of Governors' posts — were mailed on Dec. 15 and are due back at Bar headquarters by Jan. 26.

Board Apportionment and Attendance

With elections on their minds, the Board of Governors debated the current attendance policy which requires members to attend at least 50 percent of the Board meetings held during the Bar year, unless the absence is excused by the Executive Committee. The Board decided the present list of excused absences was too limiting, and voted to amend the

policy to allow the Bar secretary the sole discretion to grant an excused absence.

The Board also heard a report from the committee investigating apportionment of the Board of Governors. Committee co-chair John Chandler discussed his group's struggling to balance the size of the Board with the growing population of lawyers and their need for a representative voice. Among other research, they are surveying how other bar associations' boards are configured.

Bar Center Usage

The Board also reviewed a draft strategic plan to outline the usage of the Bar Center, since we will begin the move-in process in about two years. The preamble states the "plan is dedicated to the recognition that all members are entitled to benefit financially and professionally from their investment in the future of the legal profession in Georgia." Furthermore, the mission statement regarding the new headquarters professes:

The Bar Center is the home of the lawyers of Georgia. It is their professional gathering place. As such, it is dedicated to serve all members of the State Bar and the public through the administration of justice in the highest traditions of the legal profession. All Georgia lawyers welcome to enjoy their new home today and for many decades to come.

Executive Director Cliff Brashier



1. Board member Walter Hartridge goes for a trail ride. 2. Treasurer Jim Durham reports on the Bar's finances. 3. Secretary Jimmy Franklin of Statesboro was nominated for 2000-2001 president-elect. 4. (l-r) Board member Forrest Champion and President Rudolph Patterson enjoy Friday's cookout.

5. (l-r) Board members Fielder Martin and Judge Johnny Mason study the agenda at their meeting. 6. On Friday evening, Board member Tina Roddenbery stays warm by the fire with her daughter, Megan, and husband, Hansell. 7. Board member Chuck Driebe and Past President Linda Klein visit at the opening dinner. 8. Judge Bonnie Oliver talks with (l-r) her husband, Andy, and fellow Board members Todd Carroll and Robert Ingram on Saturday night. 9. President Rudolph Patterson (left) and YLD President Joe Dent don their cowboy duds, alongside Margaret Patterson (right) and Christy Moore.



announced that the Bar's leasing agent Cushman & Wakefield will begin pre-leasing space. The strategic plan will be submitted to the Board of Governors for adoption at the Mid-year Meeting in January 2000. The plan will then be published for Bar members' review in a future *Journal*.

Multidisciplinary Practice

Another look into the future addressed one of the hottest buzzwords to enter the legal arena: multidisciplinary practice. If you need proof, you need only look to Europe where Arthur Andersen is the largest law firm. Linda Klein, who is heading a committee to study the issue in Georgia, announced the Georgia Bar Foundation had ap-

proved funding for a reporter to compile the group's findings. Professor Christopher Wells of Mercer University will fulfill that role as the committee explores issues including: client confidences, professional independence, conflicts of interest, unauthorized practice of law, fee splitting, certification and discipline, and interstate and cross border activities.

Finally, Disciplinary Rules & Procedure chair Judge Ed Carriere reported his committee is exploring the confidentiality rule, which currently mandates silence prior to a finding of probable cause. The committee is reviewing case law on the subject as they formulate a recommendation for the Board of Governors to consider.

Other Business

Other highlights from the Board meeting were:

- ♦ The following sections changed their section year to coincide with the State Bar's fiscal year: Aviation, Administrative, Computer, and General Practice & Trial.
- ♦ William E. Cannon Jr. and Aasia Mustakeem were appointed to a 2-year term on the Commission on Continuing Lawyer Competency.
- ♦ Members were urged not only to sign up for the Bar's speakers bureau, but also to contact their local community and school groups to schedule lawyer speakers. For more information call Bonne Cella at (800) 330-0446. ☐

State Bar Gears Up for 2000 Georgia General Assembly

By Mark Middleton

AFTER A SUCCESSFUL 1999 session of the General Assembly, the State Bar is preparing its agenda for the 2000 session that begins in January. This will be the second session of the two-year term served by the current members of the legislature. It is expected that the Governor's agenda will again dominate the session as his Educational Reform Commission comes forth with its recommendations.

Review of 1999 Session

Last year the General Assembly passed State Bar endorsed bills which expanded the Georgia Court of Appeals from ten to twelve members, updated the corporate code, revised the Limited Partnership and Liability Company Acts, and improved the process for canceling security deeds in real estate closings. The State Bar also was successful in advocating increased appropriations for the Court Appointed Special Advocates (CASA) Program, the Victims of Domestic Violence Program, the Indigent Defense Council, judicial pay raises, and continued funding for

the Georgia Appellate and Educational Resource Center.

Development of The 2000 Legislative Agenda

Between legislative sessions, the various Sections of the State Bar



meet to prepare the legislative and funding proposals affecting their specific area of practice. These Section proposals are forwarded to the State Bar's Advisory Committee on Legislation (ACL) for consideration. The ACL reviews the proposals individually to determine whether the proposal is within the scope and purpose of the State Bar. If the ACL determines to recommend the proposal, the item is taken to the Board

of Governors (BOG) for approval at either its November or January meeting.

The BOG at its November meeting has approved the following items to be part of the State Bar's legislative package for the 2000 General Assembly Session:

1) Funding for

Domestic Violence. The BOG approved the proposal of the Women & Minorities in the Profession Committee to fund the Domestic Violence Program at 2.25 million dollars, an increase of \$150,000.00 and consistent with the Chief Justice's budgetary request to the Governor. There is no known opposition to the continued funding of this program. "This program is proving its worth by saving countless women and

children from the harmful effects of domestic violence," says Chief Justice Robert Benham.

2) Funding for Indigent Defense Council. The BOG approved the request of the Indigent Defense Committee to increase the funding to the levels set forth in the Chief Justice's request for supplemental and FY2001. The State currently appropriates 4.1 million dollars for the Georgia Indigent Defense Coun-

cil, and \$900,000 for the Multi-County Public Defender's Office. The funds requested by the Committee for FY2001 total \$9.1 million.

3) Funding for Georgia Appellate Practice & Educational Resource Center. The Resource Center, established in 1986, through the efforts of the State Bar, exists to provide post-conviction support to attorneys of indigent sentenced to death. The legislature currently funds the Resource Center at \$500,000, and the BOG approved supporting the Center's request for a total appropriation of \$700,000. The Chief Justice has included this item in his budgetary request to the Governor.

4) Funding for Georgia Court Appointed Special Advocates. The BOG supports seeking a total appropriation of \$1,231,250 for FY 2001. This is an increase of approximately \$500,000. This request for increased funding is consistent with the Senate Study Committee on Foster Care and Adoption that recommends an expansion of the CASA Program. "The CASA program is important to the lives of the children who would be otherwise unrepresented," said State Bar President Rudolph Patterson. "We need to continue to support this fine program."

The State Bar will undoubtedly add items to its agenda at the Board meeting in January.

Carryover Bills to Be Considered in 2000 Session

The legislature will also consider bills that the State Bar endorsed last year. For example, the Real Property Section initiated H.B. 597 authored by Allen Hammontree (R-Cohutta). This bill requires Superior Court Clerks to maintain printed copies of the grantor/grantee index even if they computerize the filing system. This

provision protects against computer system failures and addresses questions over accuracy and availability of records. H.B. 597 passed the House and the State Bar expects that it will be among the first House bills considered in the Senate during the 2000 Session.

Also, the State Bar supports the effort to create a state-funded juvenile court in every jurisdiction. This would provide improved service in areas that do not have a designated juvenile court judge and provide budgetary relief to counties that do have juvenile court judges. H.B. 182, has passed the House and will be taken up by the Senate in the 2000 session. Also, the Bar will support the efforts to have this initiative fully funded by the legislature.

Another Bar endorsed initiative carried over from the last session is H.B. 708, authored by Tom Bordeaux (D-Savannah) which would conform service procedures to the Federal Rule. The members are currently studying this bill in the House Judiciary committee.

Finally, the Bar will continue to support S.B. 176, authored by Senator Clay Land (R-Columbus). This is an important Bar initiative that would create a procedure for collecting basic case filing data on a statewide basis. If approved, this initiative would allow the Bar and policy makers to obtain reliable data to consider in matters relating to the practice of law and the allocation of resources in the judicial branch of government.

Membership Participation in State Bar Legislative Activities

A number of opportunities exist for lawyers who would like to become active in the legislative efforts of the State Bar. A bar

member can join a section of the Bar and participate in its legislative activities. Historically, the two most active sections — the Corporate and Banking Section and the Real Property Law Section — have passed bills in virtually every session in the 1990s. The Fiduciary Law and Criminal Law Sections are quite active as well. Also, other sections such as the General Practice & Trial Law Section are proactive in providing information on bills affecting the practice of law. The Young Lawyers Division holds an annual legislative breakfast that is very well attended. Another excellent way to participate is by making the voluntary legislative contribution to the State Bar. This year about 50 percent of Georgia lawyers contributed to the legislative program.

The recent years have brought continued success for the State Bar's legislative activities. We should all be thankful for the many lawyers who have provided leadership, expertise, and commitment to the legislative efforts of the Bar. In particular, we are grateful for those lawyers who have sacrificed to serve the people of our state as members of the General Assembly. Because of these efforts, the influence of the State Bar continues to grow. As we approach the 2000 Session of the General Assembly, the State Bar will continue to work in a nonpartisan, proactive way to help shape the future of our profession and the great state of Georgia.

There are also many ways to monitor the legislative activity of the State Bar. For full texts of State Bar proposals, go to the Bar's Web site at www.gabar.org/ga_bar/legislat.html or call the State Bar legislative representatives Tom Boller, Rusty Sewell, Wanda Segars, and Mark Middleton at (404) 872-2373 or (770) 825-0808 for further legislative information. ☐

Georgia Bar Foundation Awards \$2.4 million in Grants

By Len Horton

AT ITS ANNUAL GRANT DECISION MEETING, held on Sept. 17, 1999, the Board of Trustees of the Georgia Bar Foundation approved 28 grants totaling \$2,466,000 — the largest total amount ever awarded in one year. The 28 different grant recipients were selected from among 43 applicants requesting \$3,149,000. The total amount presented was in addition to \$2,346,195 awarded by order of the Supreme Court of Georgia to the Georgia Indigent Defense Council and the Georgia Civil Justice Foundation by the end of the just completed fiscal year.

“This meeting did a world of good for needy Georgians through the support we were able to give to a number of law-related organizations throughout the state,” said William D. Harvard, president of the Georgia Bar Foundation. “Georgia’s lawyers, working in partnership with Georgia’s bankers as part of the Interest On Lawyer Trust Accounts program, are helping provide legal services to people who cannot afford an attorney, insuring that everyone has the right to be represented in court, no matter who they are or where they live or what their circumstances may be.”

Harvard added, “We continued to help children including those who have been abused by their parents, those who need help to avoid living lives involved with drugs and crime, and those who need to learn about our form of government including the judicial system. Because we had more money than usual to award as a result of having completed the best year in our history, we were also able to fund a couple of projects that directly improve the judicial system. All Georgia attorneys should be proud of their contributions, which enabled the grant awards of this Board.”

Grants to support civil legal services for people who cannot afford a lawyer were funded at 100 percent of the requested amount of \$1,688,000 — the largest amount ever awarded to both Georgia Legal Services and Atlanta Legal Aid in one year. The Foundation also awarded grants to several other organizations working to help provide legal assistance to the poor. The Atlanta Volunteer

Lawyers Foundation, Georgia Access To Justice Project, Georgia Justice Project, Georgia Law Center on Homelessness and Poverty, Southeast Georgia Communities Project and State Bar of Georgia Pro Bono Project all received assistance.

Educating Georgia’s youth received a high priority. The Youth Judicial Program of the State YMCA introduces 11th and 12th graders to our judicial system, from trial to appellate courts, by having them debate both sides of an issue before a panel of lawyers and judges. The recipient of \$9,400 this year, it is a very popular and highly praised program that has been supported by the Foundation annually since 1986.

Also, the YLD High School Mock Trial Committee, which has received grant awards from IOLTA money annually since 1986, received \$71,000. With the help of funding from the Foundation, it has become an effective and popular part of a comprehensive, law-related educational curriculum in many Georgia schools. Students gain a basic understanding of how our judicial system helps resolve disputes by playing the roles of attorneys and witnesses in a fictitious case.

A major educational effort targeting Georgia’s school children is the Georgia Law-Related Education (LRE) Consortium of the Carl Vinson Institute of Government at the University of Georgia. This year’s grant award of \$75,000 insures that the LRE Consortium will help provide civics education to children from kindergarten through the 12th grade.

As it has for many years, the Foundation continued to help children in other ways as well. The Adopt-A-Role-Model program in Macon, the Athens Area Child Abuse Prevention Council, the Barrow County Children’s Advocacy program, the Children’s Tree House in Columbus, and Kids in Need of Dreams all received grant awards.

Since 1988, the Foundation has been a major supporter of CASA, the Court Appointed Special Advocates program in Georgia. The \$35,000 awarded this year will be used to help create several new programs throughout the state. The premise of CASA is that children need

advocates for them in court proceedings regarding their abusive parents. The program encourages volunteers to assist in these cases and to continue to look after the needs of these kids.

Helping people about to be released from prison was the major focus of the grant to the BASICS World of Work, which is managed by Ed Menifee, a leader of efforts to help people avoid returning to crime after being released from prison. Menifee and his staff conduct training programs in transition and diversion centers throughout Georgia. Since 1986, the Foundation has consistently supported this popular, much praised program, which boasts a low recidivism rate.

The Georgia Justice Project is another criminal-law-related grantee receiving funds. This program, too, specializes in returning "lost cause" people to productive, law-abiding lives. By making these people, in effect, a part of the family of staff members who run the program, GJP creates an artificial but realistic family environment where pleasing a new family becomes more important than falling back into a life of crime. This program is managed by Doug Ammar and received \$45,000.

Since 1989, the Lowndes County Drug Action Council has become a special project of the Foundation. This program has taken the streets back from drug dealers in Hudson

Docket and Ora Lee West housing projects in Valdosta. Prodded by attorney Steve Gupton, the Valdosta Bar Association has made LODAC its major project. LODAC has become a model for how cities can fight crime and win.

Standing for the principle that everyone in this country, even those in prison, are entitled to legal representation, the Foundation made grants to both the Southern Center for Human Rights and Aid To Children of Imprisoned Mothers (AIM). The Southern Center helps solve the legal problems of inmates in the Georgia prison system while AIM concentrates on helping imprisoned mothers reduce the impact of their confinement on their children.

Two new educational programs received funding this year. The Atlanta Lawyers for the Arts conducts seminars to educate artists about important legal issues such as copyright, licensing and contracts. The Georgia First

Amendment Foundation conducts a series of workshops in rural Georgia to educate people about the importance of open meetings and the First Amendment.

The Diversity Program of the State Bar of Georgia received a \$10,000 award to assist minority attorneys in becoming part of the law firm mainstream in Georgia.

State Bar President Rudolph Patterson's request to receive funds to hold hearings on the concept of multidisciplinary practice in law received funding. The goal is to decide how to deal with the growing public interest in combining law practice with accounting and other services to clients. Also, the Foundation funded a program to insure that certified interpreters are available in Georgia courts, which are experiencing increasing numbers of litigants who do not speak English.

These 28 grants represent a significant contribution of

the lawyers and bankers of Georgia, working together for the good of all Georgians. A complete listing of all grants awarded is available upon request.

In addition to these discretionary grant awards, the Foundation, by order of the Supreme Court of Georgia, gives 40 percent of all net Interest On Lawyer Trust Accounts (IOLTA) revenues to the Georgia Indigent Defense Council (GIDC). The GIDC channels money to Georgia's counties to help pay for

legal assistance to people charged with crimes.

The Supreme Court of Georgia has also ordered that 10 percent of net IOLTA revenues should go to the Georgia Civil Justice Foundation (GCJF), which is the charitable arm of the Georgia Trial Lawyers Association. GCJF specializes in developing programs to educate the public about the civil justice system.

Through you, the lawyers of Georgia, and your participation in IOLTA, and with the assistance of Georgia bankers and the guidance of the Supreme Court of Georgia, the Georgia Bar Foundation has become your charitable organization devoted to helping solve some of the most important and challenging legal problems of the state. ☒



State Bar President Rudolph N. Patterson (second from right) presents a Georgia Bar Foundation grant to Macon's Adopt-A-Role-Model program. Accepting are (l-r) Jestine "Tina" Dennard, program co-founder; Susan S. Cole, president of the Macon Bar; and Alex C. Habersham, program co-founder. (Photo by C. Richardson, Macon Telegraph)

Len Horton is executive director of the Georgia Bar Foundation.

Providing and Protecting Assets For a Person With a Disability

By Robert M. Fink

A TRANSFER OF ASSETS BY gift or inheritance, intended to benefit a disabled heir, can in fact be depleted on expenses that would otherwise have been covered by public assistance programs. Generally, a person with a disability is entitled to receive both Supplemental Security Income (SSI) and Medicaid benefits. These public assistance benefits are based on financial need, measured by a maximum allowable income of approximately \$500 per month and a maximum allowable resource amount of \$2,000, excluding a residence and other specified assets.¹

A beneficiary with a disability will lose public assistance eligibility, if his or her total assets after receiving a gift or bequest exceed the maximum allowable amount. Similarly, a judgment in a lawsuit for injury or a payment in settlement of a dispute disqualifies a person with a disability from receiving public assistance benefits when the payment results in total assets exceeding the maximum allowable amount. The person with a disability must then use these resources toward costs that would have been covered by SSI and Medicaid and will not qualify for SSI or Medicaid until the assets are depleted.

The Georgia Solution

The Georgia Community Trust solves this dilemma. An individual can transfer assets to the Trust for the benefit of an intended beneficiary. A judgment or settlement payment can be made to the Georgia Community Trust for the benefit of the beneficiary. Through this arrangement the beneficiary does not forfeit basic care he or she may receive through public assistance programs since the assets in the Trust are not considered assets of the beneficiary.² The assets in the Trust can then be used to enrich the life of the beneficiary by covering expenses complementary to those benefits provided by public assistance.³ The funds can be used for supplemental education, private rehabilitation, recreation, entertainment, medical and diagnostic treatment beyond Medicaid benefits, services of a caretaker, and the purchase of furniture for the person with the disability.⁴

Legislation making the Georgia Community Trust possible was passed by the Georgia General Assembly and signed by Governor Zell Miller in 1996.⁵ The law is intended to help Georgia citizens provide for the special needs of family members with a disability while preserving assets for the other members of the family as well. It also is intended to give a person with a

disability an opportunity to provide for their own special needs. Under this law, a community trust must be sponsored by a nonprofit corporation,⁶ and trustees are required to have experience in business, finance, investment management, and providing services to persons with disabilities.⁷ An eligible beneficiary must have a disability that substantially limits one or more major life activities, whether the impairment is congenital or acquired by accident, injury, age, or disease.⁸

The Georgia Community Trust the only community trust in the state, is sponsored by Ridgeview Institute, Inc., a non-profit behavioral health facility in Smyrna, Georgia. The National Mental Health Association of Georgia is a supporting sponsor organization. Until the Trust has a large number of beneficiaries to require a full-time administrator, the President of Ridgeview Institute will serve as Executive Director without compensation.

How the Georgia Community Trust Helps Families

Bob Seamons* is an 80-year-old widower with an estate of \$20,000. He has two adult sons, Robert and Richard. Robert, who has a developmental disability, has lived in a state institution for 40 years and receives

both Medicaid and SSI benefits. Bob would like his estate to help Robert. But if he leaves his money directly to him, Robert will be forced to leave the state institution or will be charged for his care. Bob's \$20,000 estate will be quickly depleted and Robert will have to go back on public assistance. Richard will inherit none of his father's money at either his father's or his brother's death.

The Georgia Community Trust offers Bob Seamons a new option. He can place all or part of his assets in the Trust to benefit Robert. Richard can serve as co-trustee to authorize expenditures for Robert's special needs. For example, the money can be used to enroll Robert in a woodshop class at a local community center and can pay for a trip to California to visit Richard and his family — including the cost of caretaker to accompany him. At Robert's death the assets in his Trust account will be transferred to Richard in accordance with Bob Seamons' wishes.

How the Georgia Community Trust Helps a Recipient of a Judgment

Jim Stack* is a 30-year-old individual with a disability. He receives monthly SSI payments and Medicaid benefits. Jim is injured in an automobile accident caused by the driver of a truck. He engages an attorney and sues the owner of the truck for damages. A judgment is awarded to Jim Stack in the amount of \$20,000. When he receives the payment, he will forfeit his right to receive SSI and Medicaid benefits until his assets are reduced to \$2,000. If, however, he transfers the funds from the judgment to the Georgia Community Trust for his own special needs, he will not lose his eligibility for public assistance.

Community Trust With Individual Accounts

The Georgia Community Trust is considered one trust fund for investment and management purposes.⁹ Individual beneficiaries of the fund have separate accounts to which net income is credited in proportion to each beneficiary's contribution.¹⁰ These proportions change depending on expenditures allocated to individual beneficiaries. For example, assume that the trust has ten beneficiaries, and \$10,000 has been contributed to each of their accounts. Each beneficiary receives 10% of the income from the Trust.

When \$5,000 from the Trust has been distributed to cover the needs of a beneficiary, his allocation percentage becomes 5.16% ($\$5,000/\$95,000$); the allocation for the other nine beneficiaries increases to 10.54% ($\$10,000/\$95,000$).

Successor Beneficiaries

When the donor transfers assets to the Georgia Community Trust, successor beneficiaries are designated.¹¹ Upon the death of the person with the disability, the remaining balance in the account of the beneficiary will be distributed to the successor beneficiary.

Georgia Community Trust I

The Georgia Community Trust consists of two trusts, Trust I and Trust II. The donor of the funds selects a trust fund based upon desired investment goals. The short-term goal of the Georgia Community Trust I is to keep funds available to meet the immediate needs of each beneficiary and the long-term goal is capital growth. To achieve the short-term goal, trustees invest in a quality money market fund that ensures ready cash. For capital growth, most

of the Trust's assets will be invested in a taxable bond fund that provides a high level of current income from diversified portfolios of fixed income investments. Funds will also be invested in an equity fund of domestic common stocks that pay dividends.

Georgia Community Trust II

The short-term goal of the Georgia Community Trust II is to keep funds available to meet the immediate needs of each beneficiary and the long-term goal is preservation of capital with some amount of growth. To achieve the short-term goal, trustees invest in a quality money market fund that ensures ready cash. For capital preservation with some amount of growth, most of the Trust's assets will be invested in certificates of deposit of national banks and U. S. Government Obligations.

Appointment of a Co-trustee

Each donor creating a trust account appoints a co-trustee, usually a family member, to advocate for the beneficiary with the disability and request funds to cover particular expenses.¹² The co-trustee is the liaison between the Trust and the beneficiary.

Fees

Fees for establishing and maintaining a Trust account are:

- ♦ **Initial enrollment fee:** a one-time \$300 fee paid by the person who will transfer assets to the Trust.
- ♦ **Consultation fee:** a \$400 fee to cover consultation to the co-trustee. This fee is charged at the end of each calendar year (prorated if for a period of less than twelve months) and is charged against each beneficiary's account.

In accordance with Georgia law, the beneficiary's account cannot be charged a fee in excess of the income allocated to the account.¹³ Therefore, the principal transferred to the trust for a beneficiary will only be used for the needs of the beneficiary.

Protecting a Judgment or Settlement Payment

A judgement or settlement agreement may provide for payment to the Georgia Community Trust for the benefit of the person with the disability. The judgement or settlement may also designate a co-trustee and provide for payments to successor beneficiaries. Since the funds resulted from a lawsuit brought on behalf of the beneficiary, the funds will be considered to be donor-beneficiary funds.

Donor-Beneficiary

If a donor designates himself or herself as the life beneficiary, then the account of the life beneficiary is subject to certain limitations. In such case the contribution to the Trust is irrevocable and the donor or spouse cannot serve as co-trustee.¹⁴ The funds remaining in the account upon the death of the life beneficiary may be distributed to a successor trust for the benefit of indigent persons with a disability.¹⁵ If the donor-beneficiary designates a successor beneficiary other than the supporting Trust, then upon his or her death, the account balance will be subject to repayment for medical assistance prior to the distribution to the successor beneficiary.¹⁶

How Expenses are Paid for the Beneficiary

A member of the Expenditure Committee of the Trustees will approve all requests to ensure that only expenditures permitted by the various public assistance programs are authorized by the Georgia Community Trust. Income and principal may be used only to provide non-cash benefits for special needs of the disabled person beyond the basic support offered by Medicaid and SSI. When these requirements are met, the disabled person retains his eligibility for public assistance.

Management of the Trust

The Georgia Community Trust is managed by its board of trustees shown below. The Georgia Community Trust was created in January 1998 and currently has twelve beneficiaries. ☒

Endnotes

1. 42 U.S.C.A. §§ 1381-1383 (1991, 1992 & Supp. 1999).
2. O.C.G.A. § 30-10-3(a) (1997).
3. *Id.* § 30-10-1(5).
4. *Id.* § 30-10-6(b)(6).
5. *Id.* § 30-10-1.
6. *Id.* § 30-10-4.
7. *Id.*
8. *Id.* §§ 30-10-6(b)(1), 30-10-2(5).
9. *Id.* § 30-10-6(b)(2).
10. *Id.*
11. *Id.* § 30-10-6(b)(3).
12. *Id.* § 30-10-6(b)(6).
13. *Id.* § 30-10-6(b)(3).
14. *Id.* § 30-10-6(b)(4)(C).
15. *Id.* § 30-10-6(b)(4)(B).
16. 42 U.S.C.A. § 1396p(d)(4)(C) (Supp. 1999).

*Names are fictitious.

GEORGIA COMMUNITY TRUST BOARD OF TRUSTEES

Robert M. Fink, Founder and CEO of Ridgeview Institute; former partner of Troutman Sanders LLP, and former partner of Coopers & Lybrand.

Rodney F. Banks, Executive Vice President of Bank of America; Trustee of Kennesaw State College, and the Foundation for Medically Fragile Children.

Ira E. Cavallo, President, The Georgia ARC/Network.

Beth English, Executive Director, Southwest Georgia Easter Seal Society, Inc. and past president of The Georgia ARC/Network.

Elizabeth Finnerty, Executive Director of Skyland Trails, a non-profit mental health residential facility, and Executive Director of the George West Mental Health Foundation.

Ruthann P. Lacey, Esq., Attorney specializing in Elder Law.

George Olsen, Investment Vice President, J.C. Bradford & Company, Atlanta, Georgia.

David P. Pollan, Esq., Attorney specializing in Elder Law.

Theresa Prestwood, Director of Development, Childkind.

Cynthia A. Wainscott, Executive Director, National Mental Health Association of Georgia.

Lynn M. Wilson, Chief Financial Officer, Ridgeview Institute.

THE UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT: New Legislation for E-Commerce?

By Jonathan B. Wilson

ONE OF THE CONCERNS OF

software developers and others promoting the growth of e-commerce is a perceived lack of uniformity in the state laws governing software licenses and online transactions. Like other contracts, the interpretation and enforcement of software licenses and online contracts is largely a matter of state law. Because the use of personal computers in business is relatively recent by legal standards (counting from the mid-1980s, we are fewer than 20 years from the beginning of the industry) there are relatively few judicial decisions on the many issues that can arise in contracts relating to software.

In 1991 the National Conference of Commissioners on Uniform State Laws (the "NCCUSL") addressed an ABA study group with the hopes of beginning a new uniform law that would modify Article 2 of the Uniform Commercial Code to better accommodate computer software licensing transactions. The NCCUSL convinced the ABA that a change was needed and from 1991 to 1995 the NCCUSL and the American Law

Institute worked on several drafts of changes to Article 2 of the UCC. After four years of trying, however,

with the result that a consensus could not be reached. By February 1999 the process ground to a halt when the

ALI/ABA refused to endorse the final draft of Article 2B. The reasons for the ALI/ABA's refusal ran the gamut, with some of the expressed reasons appearing to contradict each other. Even in their disagreement over the points in the final draft, many of the participants could not agree on the basis for their disagreement.

On July 29, 1999, acting on its own initiative in an attempt to salvage a uniform law from the almost decade-long drafting effort, the NCCUSL adopted a modified version of the

final draft of Article 2B, which they named the Uniform Computer Information Transactions Act ("UCITA").¹ That action marks the beginning of a new chapter in this long running saga, as the NCCUSL recommends UCITA for adoption by state legislatures in the coming months.²

What Does UCITA Do?

Like the original Uniform Commercial Code in whose footsteps



the ALI and the NCCUSL in 1995 agreed that the changes to the law were so sweeping that they could not be accomplished with a mere change to Article 2. The ALI/ABA and NCCUSL then spent nearly four years trying to pull together a new uniform law to pre-empt Article 2 in the area of software transactions, to be known as Article 2B.

The Article 2B drafting sessions were rancorous. Industry, consumer and other advocacy groups coalesced around disparate points of interest

UCITA follows, the UCITA drafters argue that UCITA is consistent with existing common law and commercial practice (even though an espoused impetus for UCITA was the elimination of inconsistencies and complexities in the current legal framework). In the prefatory note to UCITA, the drafters argue with an appeal to history that the need for a new uniform law to override Article 2 is much like the need that existed in the 1930s for a new uniform law (the 1939 version of Article 2) to override the common law that existed at the time.

The drafters argue by analogy that the common law of the 1930s was developed over the preceding century in the context of a largely agrarian economy. Common law rules allocating risk and liability in commercial transactions used the paradigm of a sale of agricultural goods (livestock, grains and the like) rather than the sale of manufactured goods. The development of the economy and the predominance of manufactured goods over agricultural goods drove the need to develop a new uniform law to provide default rules in transactions for the sale of manufactured goods. This paradigm lies at the heart of Article 2.

Likewise, the drafters argue, “The economy has changed again. Goods-based transactions remain important, but transactions in intangibles of computer information are a central element of commerce.”³ As the drafters note, “Software, multimedia, digital databases, artificial intelligence systems, and other computer information products are governed by an intellectual property law dominated by copyright law.”⁴ The holder of a copyright has an exclusive right to create copies of the work. If the software is one where the owner has kept secret the source code for the software, that source code may also be protectible under various

trade secret theories. Copyright is a creature of U.S. federal law. Trade secrets are a creature of state law. In the paradigmatic transaction covered by Article 2 — a sale of tangible goods — no analogous rights of a seller are involved.

Based upon the interplay of state and federal law on transactions involving rights in computer information, the drafters of UCITA argue that a new uniform state law is required to eliminate the transaction costs associated with creating contracts under the current legal framework. The drafters claim as their guiding principles in creating UCITA:

- (1) the paradigm transaction is a license of computer information, rather than a sale of goods;
- (2) innovation and competitiveness have come from small entrepreneurial companies as well [as] larger companies;
- (3) computer information transactions engage fundamental free speech issues;
- (4) a commercial law statute should support contract freedom and interpretation of agreements in light of the practical commercial context; and
- (5) a substantive framework for Internet contracting is needed to facilitate commerce in computer information.⁵

Few of the opponents of Article 2B, and now UCITA, have quarreled with these basic tenets. Rather, opposition has grown to the practical applications of UCITA as it proposes to change some baseline assumptions about the way online contracts operate in today’s business world.

When Does UCITA Apply?

By its terms, UCITA applies to “computer information transactions,”⁶ which it defines as “an agreement or the performance of it to

create, modify, transfer, or license computer information or informational rights in computer information.”⁷ In transactions that involve both the sale of goods and the licensing of “computer information,”⁸ UCITA will govern the entire transaction except to the extent certain provisions of the UCC will override UCITA or the opt-out rules of Section 104 will cause UCITA not to apply.⁹ If a copy of computer information is included in a sale of goods (a term that is not defined) UCITA will apply to the copy of the computer information.¹⁰ However, if a copy of computer information is contained in and sold or leased as part of other goods, UCITA applies to the computer information only if “(A) the other goods are a computer or computer peripheral; or (B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type sold or leased.”¹¹

Likewise, UCITA will not apply:

- (1) to the extent of a conflict between UCITA and Article 9 of the UCC;¹²
- (2) to any subject matter within the scope of Articles 3, 4, 4A, 5, 6, 7 or 8 of the UCC;¹³
- (3) to “a financial services transaction”;¹⁴
- (4) to “a contract to create, perform or perform in, including information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display (A) audio or visual programming that is provided by broadcast, satellite, or cable as defined in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering that programming; or (B) a motion picture, sound recording, musical work, or phonorecord as defined

or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording”;¹⁵

- (5) to “a compulsory license”;¹⁶ or
- (6) to “a contract of employment of an individual other than as an independent contractor.”¹⁷

Conflicts With Other Laws

The conflict provisions of UCITA are extremely complex and not altogether clear and could easily be the subject of an extended dissertation. For the purposes of this article, it is sufficient to note that they are complicated, implicate a variety of different legal topics and are likely to be the subject of future dispute, litigation and academic debate. For example, courts will one day likely need to resolve the conflict between the provisions of an anti-assignment clause in a software license and the Article 9 rights of secured creditors of the licensee to enforce a security interest in the software or the hardware on which the copy of the software resides. While UCITA contains a number of provisions regarding the rights of financiers who hold a security interest in computer information outside of Article 9, UCITA permits Article 9 to govern the effect of security interests in computer information to the extent Article 9 applies. Generally, a provision in a software license subject to UCITA may include a provision that prohibits the licensee from assigning any rights under the contract.¹⁸ A secured creditor with an Article 9 security interest in a computer on which resides a piece of software that is subject to a license in which there is an anti-assignment clause will need to somehow unload, destroy or return to the licensee/debtor the software if the creditor forecloses on its security interest in the computer. Such an

outcome, consistent with both UCITA and Article 9, could well prove to be a complicated and onerous one.

In addition contrast to the conflicts rules in Section 103, UCITA also contains “opt-in” and “opt-out” rules. These rules permit contracting parties to apply UCITA where it might not otherwise apply (opt-in) or exclude UCITA where it might otherwise apply (opt-out). The opt-out rules have the greatest impact in consumer transactions (such as the click-wrap terms and conditions that govern most online transactions on the Web). Section 104(2) permits the parties to agree to exclude application of UCITA, other than Section 214 (regarding defenses to liability allowed to consumers) and Section 816 (regarding a licensor’s use of certain self-help measures).

Electronic Self-help

As alluded to above, UCITA contains certain “self-help” provisions which, if adopted, would make life more difficult for providers of online service and software that rely on self-help measures. The self-help rules of Section 816 generally make self-help provisions unenforceable unless they comply with a long list of requirements, including (1) the licensee must separately manifest assent to a provision authorizing electronic self-help; (2) the self-help provision must provide for advance notice of exercise, state the name of the licensee representative to receive such notice and provide a “simple” procedure for the licensee to change its representative to receive notice; and (3) the licensor must provide at least 15 days’ prior notice to the licensee of the exercise of licensor’s self-help remedies. That notice must indicate the nature of the claimed breach, and the name, title and address (including direct telephone number, fax or e-mail address) of a person with whom the licensee may communicate

concerning the claimed breach.¹⁹

These requirements are likely to be onerous in an online services context where a service provider may have millions of customers. With such a customer base, the service provider could easily have tens of thousands of customers in default for non-payment in any given month. Under current law and practice, most service providers include language in their contracts allowing for disconnection of the service in the event of non-payment, most likely following some specified grace period. The self-help provisions of UCITA (which, per Section 104(2)(A), cannot be waived) impose a notice requirement, require personal access for the licensee, and mandate an effective 15-day waiting period. Importantly, the non-waivable rules governing self-help will apply not only in the consumer context (where a consumer’s ability to negotiate provisions for notice of default is non-existent) but also in the commercial context (where the parties’ ability to negotiate notice provisions may vary greatly with the relative strength of the parties). Moreover, even if a licensor complied with all of the requirements of Section 816, the licensor will not be permitted to exercise self-help if it “will result in substantial injury or harm to the public health or safety or grave harm to the public interest substantially affecting third persons not involved in the dispute.”²⁰

The impact of these provisions is further complicated by the potential damages a licensee may recover for a wrongful exercise of self-help. In the current environment, licensors often try to limit contractually their liability for consequential damages. Section 816 permits a licensee to recover consequential damages (notwithstanding a contractual provision excluding consequential damages) for a wrongful exercise of

self-help if: (1) within the 15-day notice period licensee gives notice to licensor of the "general nature and magnitude" of licensee's damages, (2) licensor has reason to know the exercise of self-help will result in substantial injury to public health and safety or the public interest under Section 816(f), or (3) licensor fails to give the requisite prior notice required by Section 816(d).²¹

Recognition of Click-wrap Contracts

UCITA reflects current commercial and legal practice in that it expressly recognizes the validity and enforceability of click-wrap contracts entered into on the Web. In nearly every Web-based transaction, the purchaser will be asked to click on an "I Accept" or "I Agree" button before the purchaser's order is confirmed. The Web site in most cases will prompt the user to review its terms and conditions of sale and to click on the acceptance button if the terms are agreeable. Practitioners reasoned that this method created a contract between the site owner and the user by analogy to other contract forms and from the few cases available on the subject.²² In Section 209, UCITA provides that "[a] party adopts the terms of a mass-market license . . . only if the party agrees to the license, such as by manifesting assent, before or during the party's initial performance or use of or access to the information."²³ Section 211 provides that a Web site owner makes the terms of its license available if the terms are posted on the site or there is a hypertext link to the terms "in close proximity to" the description of the computer information being licensed on the site.²⁴

Web site terms and conditions and other online contracts often also include disclaimers of warranties and liability by the seller. UCITA permits

the disclaimer of warranties much in the way disclaimers are permitted under Article 2 of the UCC, though questions arise as to how some related concepts translate onto the Web. Like Article 2 of the UCC, under UCITA, in most transactions a disclaimer of warranties must be "conspicuous."²⁵ The parallel term in Section 316 of Article 2 of the UCC

In nearly every web-based transaction the purchaser will be asked to click on an "I Accept" or "I Agree" button before the purchaser's order is confirmed.

also requires that such waivers be "conspicuous." In practice, and through judicial interpretation, this has come to mean that waivers must be printed in bold text or in capitalized letters.²⁶ What this will mean for disclaimers or warranties in Web-based contracts is uncertain.

The Future of UCITA

There is a fair level of doubt whether UCITA will ever be adopted in a majority of the states. Its adoption by the NCCUSL was opposed in a letter signed by the Attorneys General of 13 states, together with the Administrator of the Georgia Fair Business Practices Act.²⁷ Certainly the history of the development of UCITA, with the last-minute abandonment of the project by the ALI, suggests that this is a matter of some controversy. Whether UCITA is adopted by one or more state legisla-

tures or not, the problem of providing a stable and predictable body of law on which to base online contracts is likely to remain for some time. ☒

Jonathan B. Wilson is an attorney with King & Spalding in Atlanta and is the founding chair of the Internet Industry Committee of the ABA Public Utility, Communications and Transportation Law Section.

Endnotes

1. The version of the Uniform Computer Information Transactions Act (hereinafter "UCITA") presented for adoption by the NCCUSL at its meeting in Denver, Colorado, in July 1999 included a preface and a commentary that gave some insights to the intention of the drafting committee. References to that draft are hereinafter made to the "Committee Draft." The Committee Draft is available at <http://www.law.upenn.edu/bll/ulc/ucita/citam99.htm>. Subsequent to its adoption by the NCCUSL on July 29, 1999, the NCCUSL Style Committee modified the draft of UCITA in a new draft dated October 15, 1999. References to that draft are hereinafter made to the "October 15th Draft." The October 15th Draft is available at <http://www.law.upenn.edu/bll/ulc/ucita/cita10st.htm>. References to "UCITA" in the text of this article refer to the October 15th Draft.
2. A representative of the NCCUSL, in a telephone conversation with the author on November 16, 1999, and several memoranda available on the NCCUSL's website at <http://www.law.upenn.edu/bll/ulc>, suggest that the NCCUSL style committee may make further changes and that the final "official" text may not be available until January, 2000.
3. Committee Draft, Preface at 2.
4. *Id.* at 4.
5. *Id.* at 5.
6. October 15th Draft, § 103(a).
7. *Id.* § 102(a)(11).
8. The October 15th Draft of UCITA defines "computer information" as "information in electronic form which is obtained from or through the use of a computer or which is in a form capable of being processed by a computer. The term includes a copy of the information and any documentation or packaging associated with the copy." *Id.* § 102(a)(10). Because this defini-

tion relies on the format of the information, and not its content, it effectively includes every type of information that is available on the Internet and the contents of any form of electronic media, including compact disks, whether that information includes text, graphics, music, computer programs or any other kind of data. Later provisions exclude from UCITA's coverage videos and audio recordings in digital format. *Id.* § 103(d)(2)(B).

9. *Id.* § 103(b).

10. *Id.* § 103(b).

11. *Id.* § 103(b)(1).

12. *Id.* § 103(c).

13. *Id.* § 103(d)(6).

14. *Id.* § 103(d)(1).

15. *Id.* § 103(d)(2).

16. *Id.* § 103(d)(3).

17. *Id.* § 103(d)(4).

18. *Id.* § 503(2).

19. *Id.* § 816(d).

20. *Id.* § 816(f).

21. *Id.* § 816(e).

22. While the facts deal with a "shrink-wrap" contract, and not click-wrap terms and conditions, the court in *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), held that a shrink-wrap contract on the exterior of a software package could be enforceable between the software developer and the purchaser of the package if the purchaser had the opportunity to review the terms of the license before purchasing the package or if the purchaser had the opportunity to return the package for a refund after reviewing, and disagreeing with, those terms. In practice, attorneys have relied on the reasoning in *Zeidenberg* in developing web site "terms and conditions" that have purported to limit the web site owner's liability and to give notice of copyright claims, trademark claims and the like. Stephen J.

Davidson & Scott J. Bergs, *Open, Click or Download: What Have You Agreed To? The Possibilities Seem Endless*, COMPUTER LAWYER, Apr. 1999 at 1.

23. October 15th Draft, § 209(a).

24. *Id.* § 211.

25. *Id.* § 406(b).

26. *See, e.g.*, O.C.G.A. § 11-2-316(2)(1994) (requiring warranty disclaimer to be "conspicuous"); *Apex Supply Co. v. Benbow Indus., Inc.*, 189 Ga. App. 598, 376 S.E.2d 694 (1988) (holding that language was "conspicuous" if it was set forth in all capital letters, in a separate paragraph and in a distinct type font).

27. Letter to Gene Lebrun, President, NC-CUSL (July 23, 1999) (available at <http://www.2bguide.com/docs/799ags.html>).

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THE YLD IS WORKING FOR THE BAR



By Joseph W. Dent

When this article goes to press, we will be about halfway into the 1999-2000 Bar year. With that in mind, I would like to take this opportunity to highlight the many accomplishments of the Division thus far, and to thank all the many volunteers for their dedicated efforts.

The YLD has already sponsored several seminars this year. Ben Finley and Tim Buckley chaired Bridge-the-Gap, which 311 new admittees attended. Evaluations indicate Bridge-the-Gap is a worthwhile seminar that helps new admittees transition into the practice.

Thurston Lopes chaired a seminar sponsored by the Criminal Law Committee, where several prominent criminal trial lawyers discussed the various elements of a criminal trial from both the perspective of the prosecutor and the defense attorney.

The Employer's Duties and Problems Committee sponsored a seminar chaired by Christine MacIver and Stewart Duggan. Under their leadership, the committee is also updating a pamphlet that addresses common employer/employee problems, which is distributed to new businesses by the Secretary of State's office.

The Law-Related Education Committee sponsored its second annual golf tournament, raising more than \$15,000 for the Law-Related Education Consortium. The tournament was a huge success, thanks to the tireless efforts of Beth Ellen Shaw and Alla Shaw. Much gratitude is also due to Jay Sadd and Chief Judge Edward Johnson of the Georgia Court of Appeals for their support of the tournament.

The High School Mock Trial Program is in its 14th season this year.

I am proud to be president of this organization. We are fulfilling our mission which is to provide service to the Bar and to the public.

Owing to the dedication of Joycel Averils and Rhonda Klein, the Committee also hosted a very successful Law Academy in November. The Academy provided intense and valuable training for high school students participating in the Mock Trial Competition. Through the hard work of committee chair Roy Manoll and vice-chairs Jennifer Mann and Christine Barker, the High School Mock Trial Program will undoubtedly have yet another successful year.

The Ethics and Professionalism Committee, led by Andy Lewis, is in

the process of preparing a pamphlet that identifies ethical pitfalls for younger lawyers. The proposed pamphlet has caught the eye of the ABA/YLD, which recently provided the committee with a grant to assist with production costs. The pamphlet will be an excellent resource tool and is yet another example of how the YLD is providing service to the Bar.

Under the direction of Brad McFall, the Solo and Small Firm Practice Committee plans to hold panel discussions about being a sole practitioner or working in a small firm at each of the law schools during Law Week. What an excellent way to participate in the Law Week celebration.

Speaking of Law Week, the YLD has scheduled the 5th Annual Great Day of Service to coincide with the kick-off of Law Week 2000. This year, the event will be held on Saturday, April 29. The Great Day of Service is a State Bar project coordinated by the Young Lawyers Division that gives lawyers throughout the state the opportunity to participate in a service project coordinated in the communities in which they practice and live. A special thanks goes to Damon Elmore, Beth Guerra, Sharell Lewis and the many others who are helping to make this year's Great Day event a huge success.

As I look back on the first half of the year and consider the many worthwhile projects and programs of the YLD, I am proud to be president of this organization. We are fulfilling our mission which, in a nutshell, is to provide service to the Bar and to the public. Due to space limitations, I cannot identify everyone who has made a contribution to the efforts of the Division. So, to all those who have volunteered their time, I thank you for your efforts and commend you for a job well done. ☒

Search Begins For Mock Trial Coordinator

THE STATE BAR OF GEORGIA is searching for a new coordinator for its high school mock trial program, to assume the post in the summer of 2000. Applications are being received through Jan. 15, and details about the job and search process may be found on the program's Web site at, www.gabar.org/ga_bar/yld.htm, or be requested from the mock trial office at 800/334-6865 (ext. 779) or mocktrial@gabar.org. Philip Newton is leaving the post at the end of his 13th season to pursue a degree in sacred music. Compensation is negotiable based on experience, skills, and education. ☐



Coaches, Judges, Evaluators Needed!

Inquire about coaching opportunities or volunteer for judging opportunities by contacting the mock trial office.

Judges/evaluators may also register for regional competitions and

State Finals online at www.gabar.org/ga_bar/yld.htm

For more information, contact the Mock Trial Office

404/527-8779 ♦ 800/334-6865 ♦ mocktrial@gabar.org

So. Ga. Mediation new --



WHO'S WHERE

InAtlanta

Hunton & Williams has named **Kristen L. Hathcoat** as associate on the labor & employment practice team at the firm's Atlanta office. Hathcoat is a 1999 graduate of Wake Forest University School of Law. Her practice focuses on employment litigation and preventive labor relations. Also, **Lynn Gavin** has joined the firm's Atlanta office as an associate in the public finance section of the banking & finance group. Her practice centers on public finance, municipal bonds, corporate trust and state and federal governmental law. The Atlanta office is located at NationsBank Plaza, Suite 4100, 600 Peachtree Street, NE, Atlanta, GA 30308-2216; (404) 888-4000.

Ganek, Wright & Dobkin PC is pleased to announce that it has named **D. Mark Seib** as associate. Seib will work at the firm's Midtown office, located at One Midtown Plaza, Suite 900, 1360 Peachtree Street, NE, Atlanta, GA 30309; (404) 892-7300; Fax (404) 892-726.

Finley & Buckley PC announces

that **G. Brian Raley** has joined the firm as head of its commercial litigation practice. The office is located at 2931 N. Druid Hills Road, Suite C, Atlanta, GA 30329; (404) 320-9979.

Robert A. Elsner and **Guerry T. Thornton Jr.** have moved their practice. The firm will continue to handle matters of civil litigation, personal injury, wrongful death, negligence, family law, DUI, malpractice mediation and dispute resolution. The new office is located at 3379 Peachtree Road, NE, Suite 255, Atlanta, GA 30326-1054; (404) 995-0610; fax (404) 237-4527.

Kennedy, Davis & Hodge LLP an intellectual property law firm of five registered patent attorneys, announces the relocation of its Atlanta office to Five Concourse Parkway, Suite 900, Atlanta, GA 30328; (770) 396-2244.

Barksdale and Associates, a new staff counsel office of the Hanover Insurance Companies, has opened at 1455 Lincoln Parkway, Suite 100, Atlanta, GA 30346; (770) 353-6038; fax (770) 353-6625.

Kilpatrick Stockton announces the addition of **Bradley Miller** to the firm's litigation group. Also, **Jason Jasper** has joined the firm's construction law and public contracts group.

Nelson Mullins Riley & Scarborough LLP has added 10 associates to the firm's Atlanta office: **Rebecca Culpepper** (real estate), **Robert Elzey** (litigation), **Laura F. Gartin** (real estate), **Mary Sellers Kirby** (litigation), **Jennifer A. McCoid** (corporate/technology corporate), **Elisa Smith** (litigation), **Lee Ann Sparks** (litigation), **Gene Watkins** (litigation), **Patrick J. Whelchel** (corporate/international) and **Steve R. Wilson** (corporate). The Atlanta office is located at 999 Peachtree Street, NE, First Union Plaza, Suite 1400, Atlanta, GA 30309; (404) 817-6000.

Insley and Race LLC is pleased to announce that **Evan W. Jones** has become a partner with the firm. Jones will continue to concentrate in the areas of medical malpractice defense, product liability, wrongful death and personal injury. The office is located at Two Midtown Plaza, 1349 West Peachtree Street, NW, Suite 1450, Atlanta, GA 30309; (404) 876-9818.

InNorcross

The law firm of **Thompson, O'Brien, Kemp & Nasuti PC** announces that **Sylvia K. Morrow** has become an associate of the firm, located at 4845 Jimmy Carter Blvd., Norcross, GA 30093; (770) 925-0111; e-mail smorrow@tokn.com.

N.GA Mediation new

Official Opinions

Open Records. Decisions of the Office of State Administrative Hearings are public records unless they contain information from evidence received in the course of a hearing which has been sealed pursuant to a confidentiality provision. (9/7/99 No. 99-13)



**Attorney General
Thurbert Baker**

Probation detention centers; confinement in. While misdemeanants may only be referred to probation detention centers upon initial sentencing pursuant to O.C.G.A. § 42-8-35.4, misdemeanants may also be referred to such facilities pursuant to probation revocation proceedings under O.C.G.A. § 42-8-34.1, and housed in detention centers by the Department of Corrections after a probation revocation proceeding pursuant to O.C.G.A. § 17-10-1(a)(3)(A). (10/1/99 No. 99-14)

Real estate brokers, price opinions. A licensed real estate broker who is not licensed as a real estate appraiser may provide a real estate broker's price opinion to a lending institution for financing purposes. (10/1/99 No. 99-15)

InSavannah

Savage & Turner PC announces that **Christie Register** has joined the firm as an associate. Register is a registered nurse and a 1998 graduate of the Mercer University Walter F. George School of Law. The firm is located at 304 East Bay Street, Savannah, GA 31401; (912) 231-1140. ☒

Unofficial Opinions

Teachers Retirement System. A teacher at a charter school, which is operated by a non-profit corporation as permitted by the Charter Schools Act of 1998, shall be a member of the Teachers Retirement System. (9/21/99 No. U99-4)

Probation; community service. Persons sentenced to community service may be utilized to assist counties or municipalities in preserving and protecting abandoned cemeteries or burial grounds. (10/15/99 No. U99-5)

Judges, Probate court; authority. A probate judge may not employ an attorney to prosecute criminal cases in the probate court. (10/15/99 No. U99-6)

Education, County boards of. Members of a county board of education may be employed by a separate school system even if the county board

of education contracts with that system for use of its middle and high schools. (10/15/99 No. U99-7)

Education, County boards of, vacancies. Where a vacancy is created by the prospective resignation of a member of a local board of education, the board may move to fill that vacancy prior to the effective date of the resignation. (10/22/99 No. U99-8)

Georgia Indigent Defense Council. Interest from cash bonds transferred by a sheriff to the appropriate clerk of court is not required to be remitted to the Georgia Indigent Defense Council unless the statute governing the particular clerk of court requires that the clerk remit interest to the Council. Also, since O.C.G.A. § 15-16-27(b) applies to cash bonds held by the sheriff, it does not apply to bonds posted by professional bondspersons. (10/22/99 No. U99-9) ☒

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A SIMPLISTIC INDICTMENT OF THE CRIMINAL JUSTICE SYSTEM

***Getting Away with Murder: How Politics is Destroying the Criminal Justice System* by Susan Estrich
Harvard University Press. 176 pages. \$20.50**

Reviewed by Bruce S. Harvey

In John Lescroart's recent novel, the *Mercy Rule*, a lawyer defending an accused murderer wrestles with putting on a defense that his client actually committed the act (a so-called mercy killing of his terminally ill father). Even though he believes and the accused denies committing the act:

Driving back uptown, Hardy was going around with it. It was starting to look as though his defense would be to admit that Graham, who couldn't admit it to himself had committed a murder that in fact he hadn't committed. For a reason he didn't have. And this, if it worked, might set his client free. The law, he thought, was a sublime and terrible thing.

In *Getting Away with Murder*, Professor Susan Estrich boldly indicts the criminal justice system, including criminal defense lawyers whom she categorizes as having a "traditional license to lie." It is just such generic hyperbole that characterizes this short, and wholly simplistic look at the system she so cavalierly dismisses.

The criminal justice system, according to Estrich, is purely political at base. While acknowledging that teaching criminal law to first-year law students at the University of Southern California is "not criminal law as prac-

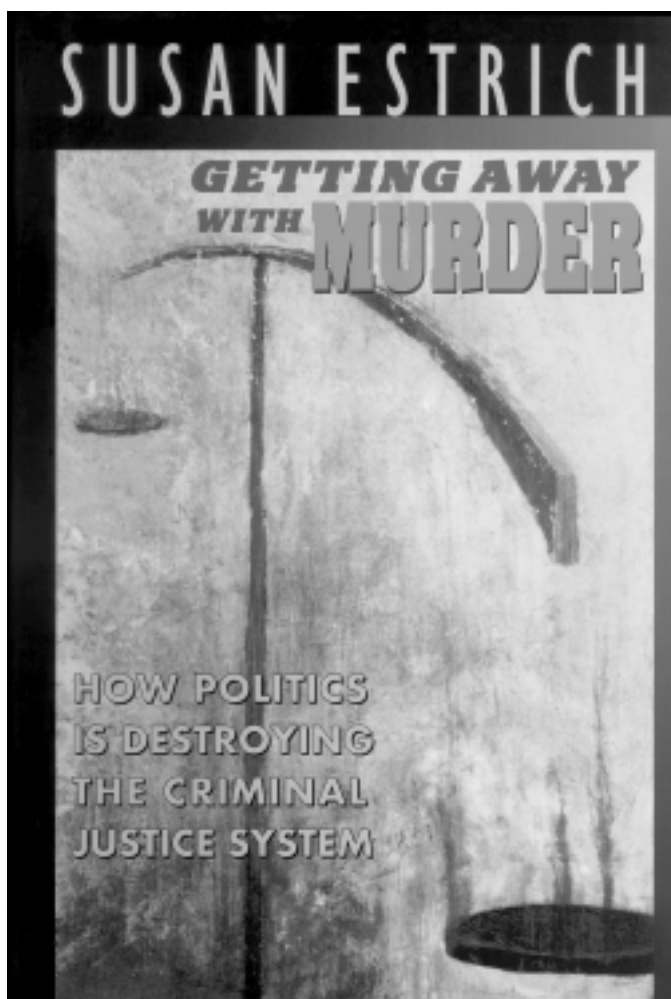
ticed in the system every day," Professor Estrich sets the stage for her thesis which is based on no experience in the practice of criminal law, anecdotal evidence, and kaffee klatsch stereotypes.

Of course the criminal justice system is shaped by politics. No news flash there. Our history is replete with example after example of overreaction to political expediency: from Lincoln's suspension of habeas corpus, passage of the alien and seditions laws during and after World

War I and World War II, and the incarceration of Japanese Americans during World War II, to name just a few. As Estrich finally acknowledges, it's not that we cannot or do not draw lines — it's who draws them and where they are drawn. Complain at the ballot box or deal with the reality of politically motivated draconian sentences and policies in the courthouse.

Professor Estrich also looks at recent calls for group-based "jury nullification," a concept that has been around since the founding of this country.¹ Throwing lip service to the obvious — that the system is awash in a cesspool of racism — Estrich nonetheless sees the system as one in which the "thugs rule the roost." The framers of the Constitution considered the jury in criminal trials to be a fundamental safeguard against liberty threatening incursions by a central government. The jury

has been central to the hallmark of Anglo-American jurisprudence standing between a potentially oppressive government and private citizens. It is juries who confront the core issue of fairness and justice in our society.



In fact, many have argued that jury nullification does not subvert the law, but in fact occurs within the law and is morally correct.² Estrich's call for a reexamination of whether the jury system is a "political idea worth preserving and safeguarding" is one which deserves ridicule rather than respect.

Estrich swings into one area, however, that even I can agree with — politicians who outdo each other to prove who is toughest and legislatures that pass draconian laws. Since 1985, the prison population has doubled, with almost two million Americans currently incarcerated. Three strikes statutes, mandatory minimums, and guideline no-discretion sentencing schemes are ubiquitous. Contrary to popular belief, the guilty person who walks free is the spectacular exception.

But there is a cost, both human and financial. It is still the disenfranchised who are being hammered by the new laws. Over recommendation by the Sentencing Commission itself, Congress maintained the "100 to one" ratio which treats crack cocaine 100 times more harshly than powder cocaine (possession of 5 gms of crack, an amount equal to five packets of Sweet-n-Low, triggers a five-year mandatory minimum no parole sentence). That mandatory minimums and sentencing guidelines have interacted in untoward ways is, in the words of Supreme Court Chief Justice William Rehnquist (no bed-wetting liberal), "a good example of the law of unintended consequences."

Do not misunderstand the basic premise: adopting a system of mandatory minimums, no parole and broad prosecutorial power had a rational purpose. For the dangerous felon who has committed genuine crimes, the new schemes have drastically ratcheted up the consequences. For these crimes, prosecutors can and should come down equally hard on everyone. But lesser, non-violent crimes are a different matter. Measured by time served, the average people are carrying the freight. As Estrich puts it, "the shadow of Willie Horton gets in the way." She's right. To answer the gods of the polls, we invest too little in prevention and we are paying the price.

The basic problem with the Estrich book is that it is written for those who are still preaching the decade old "lock-em-up-and-throw-away-the-key" philosophy. During the 1980s when violent crime was escalating (at least in the mind of the public), society called for blood, and was rewarded by trashing the old rehabilitation model of punishment and replacing it with a pure retributive model. It was popular, even defensible, for the law-abiding citizen to feel that even if some people suffered unjustly under a severe sentencing scheme, it was preferable to allowing violent offenders to escape punishment. But now, the system has become so efficient in locking up all types of offenders — violent or not, the moral equation has

changed. And, as always in our profession, it is the moral equation which is the *sine qua non* of our profession. Let's keep it that way. ☒

Bruce Harvey is 1977 graduate of the University of Georgia School of Law. Harvey is a sole practitioner in Atlanta concentrating in criminal defense. He has defended a number of defendants in high-profile cases, including the Columbus Strangler, the mail bomber and the Tokars case.

Erdotes

1. See e.g. Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY, 89:1 (Fall 1998).
2. See, e.g., Brown, D.K., *Jury Nullification Within the Rule of Law*, 81 MINNESOTA L. REV. 1149 (1997); Butler, P., *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). See also Niedermeier, et al., *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos*, 23 LAW & HUMAN BEHAVIOR 331 (1999) (finding that nullification instructions actually heightened jurors' concerns about fairness and did not result in runaway or rogue juries).

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Narrowing the Gap From Law School to Law Practice

FRESH OUT OF LAW SCHOOL, equipped with learning skills and information derived from countless hours of reading, note-taking, analyzing cases and perhaps some clinic experience, a young lawyer crosses the threshold. With degree in hand and Bar exam passed, ideals and commitment for the future swelling inside, the young lawyer steps into the practice of law.

This tremendous step is a challenge that every practicing attorney must meet. Some beginning lawyers have the benefit of an experienced lawyer to guide them. They have the opportunity to ask questions and gain insights from a long-practicing professional. On the other hand, some new lawyers are left to rely on classroom lessons and trial and error, as they assume the responsibilities of attorneys and counselors at law.

Fortunately, something is being done to forge a closer link between law school and the practice of law. The State Bar of Georgia, the Chief Justice's Commission on Professionalism and ICLE are conducting a statewide Transition Into Practice Pilot Project to test the feasibility of a mentorship program for newly admitted members of the State Bar. Funded by the State Bar, the Georgia Bar Foundation, the Commission, ICLE and grants from private sources, the project recognizes that the State Bar and its individual

members have a professional obligation to assist beginning lawyers. They must help all lawyers entering the profession to acquire the practical skills, seasoned judgment and sensi-

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

—John T. Marshall

tivity to ethical and professional values that are necessary to practice law in a highly competent manner and serve the needs of the public.

The State Bar of Georgia currently requires newly admitted attorneys to participate in the ICLE

program called "Bridge the Gap," but this program includes only a 12-hour curriculum. It does not provide a new lawyer with one-on-one contact with a seasoned lawyer. With this in mind, 1996 Bar President Ben Easterlin appointed a Committee on the Standards of the Profession during his term. He charged this committee with investigating whether the State Bar should require a period of internship or other supervised work prior to admission to membership in the State Bar. Chaired by John T. Marshall, partner at *Powell, Goldstein Frazer & Murphy LLP* in Atlanta, the committee studied internship, apprenticeship, and courses for newly admitted lawyers in other states. Attempting to use the most effective features of these and to avoid the attendant problems, the committee recommended mentorship integrated with an extensive curriculum component. The program would allow a new lawyer to be paired in a learning relationship with a more experienced Georgia lawyer. Marshall said that the goal is to help new lawyers become competent practitioners through assisting them in the extremely formative period right after law school. The combination of mentoring with intense skills and values education is the dynamic aspect of this project:

- ♦ **Mentorship.** Every beginning lawyer would be provided with

access to meaningful counsel and professional guidance from an experienced lawyer (mentor) during the first two years after admission to the bar.

- ♦ **Curriculum component.** Every beginning lawyer would be required to complete practical skills and values training courses during the first two years after starting to practice. These courses will replace the current “Bridge the Gap” program.

During the first year, the basic curriculum will focus on topics such as Client Relations, Counseling, Negotiations, ADR, Law Practice Management, Legal Ethics and Professionalism. For example, in a course on Client Relations, matters such as oral and written communication skills, recognition and resolution of conflicts of interest, proper use of escrow accounts and billing will be taught. In the second year, beginning lawyers will be encouraged to select courses in such practice areas as Litigation (Civil or Criminal), Business Practice, Real Estate Practice, Family Law, Trusts and Probate Law. “I think everyone agrees on the need for a program to help young attorneys,” Marshall said. “I have heard no dissent on that point. The main purpose of this pilot program is to determine what will work.”

Authorized by the Supreme Court of Georgia and the Board of Governors of the State Bar, the Pilot Project will include 150 newly admitted lawyers and an appropriate number of mentors. The Standards of the Profession Committee, representing a broad cross-section of the practicing bar and the organized bar as well as the law schools, is directing the project.

The Pilot Project spans four years. Work on the program began in 1997 with preliminary research, securing funding, and garnering

support from the legal community. The actual phase where new attorneys are paired with seasoned lawyers will be in early 2000.

A number of questions must be answered before it can be determined whether this program will be useful for beginning lawyers throughout the state. The Standards Committee is in the process of selecting a test group of mentors and beginning lawyers. One of the most important goals in this selection process is to make sure that the test pool is diverse, with regard to areas of law, geography, race and gender.

Several other areas being worked on are developing CLE courses and determining CLE credit. Since the program would replace “Bridge the Gap,” both mentors and new attorneys will receive CLE credit for the curriculum components of the program. Ideally, the mentorship will turn into a lasting relationship between the mentor and mentee. Through the process of continual teaching, learning and guidance, the relationship will assist the new lawyer with practical skills and professional challenges.

“The central feature of this program is to help beginning attorneys,” Marshall said. “That means

translating classroom exposure into problems of actual law practice by addressing issues such as relationships with clients, the judiciary and colleagues.”

Evaluating the results of the pilot program will allow the committee members to decide what works best. Of course, in the end, the goal is to continue legal education by assisting the transition from law school to law practice in a way that equips each beginning lawyer to discharge competently his or her professional obligations. ☐

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Alcohol/Drug Abuse and Mental Health Hotline

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

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

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Summary of Recently Published Trials

Clarke U.S. District Ct.	Youth Detention Center - Medical Treatment - Fatality	\$1,750,000
Clayton State Ct.	Falldown - Apartment - Water on Floor	\$23,000
Clayton State Ct.	False Arrest - Theft of Own Truck - Emotional Distress	\$80,000
Clayton Superior Ct.	Auto/Truck Accident - Rear-End - Following Too Closely	\$150,000
Clayton Superior Ct.	Multi-Vehicle Accident - Disabled Truck on Roadway ...	Defense Verdict
Cobb State Ct.	Auto Accident - Rear-End - High Speed Impact	\$28,800
Cobb Superior Ct.	Auto Accident - Rear-End - Liability Admitted	Defense Verdict
Cobb Superior Ct.	Professional Services - Leg Brace Repair - Falldown	\$250,000
DeKalb State Ct.	Auto/Bus Accident - Rear-End - Liability Admitted	\$35,000
DeKalb State Ct.	Auto/Truck Accident - Rear-End - Following Too Closely	Defense Verdict
DeKalb Superior Ct.	Truck/SUV Accident - Left of Center - Fatality	\$1,200,000
Fayette State Ct.	Auto Accident - Turning - Right-of-Way	\$276,409
Fulton State Ct.	Apartment - Rape - Broken Sliding Glass Door	\$500,000
Fulton State Ct.	Auto Accident - Head-On - Red Traffic Light	\$200,000
Fulton State Ct.	Auto/Truck Accident - Speeding on Curve - Loss of Control	\$1,000,000
Fulton State Ct.	Auto/Truck Accident - Turning - Right-of-Way	\$230,000
Fulton State Ct.	FELA - Falldown - Catwalk Collapse	\$1,465,000
Fulton State Ct.	Medical Malpractice - Medications - Contraindication	\$1,000,000
Fulton State Ct.	Medical Malpractice - Placental Abruption - Diagnosis	Defense Verdict
Fulton State Ct.	Shooting - Truck Driver - Vicarious Liability	\$75,000
Fulton Superior Ct.	Bus Accident - Winter Storm - Passenger Injured	\$250,000
Fulton Superior Ct.	Premises Liability - Intoxicated Patron Falls on Patron	Defense Verdict
Fulton U.S. District Ct.	Auto Accident - Rear-End - Stopped at Traffic Light	\$50,000
Fulton U.S. District Ct.	Falldown - Loading Dock - Broken Metal Bar	\$27,500
Gwinnett State Ct.	Assault & Battery - Bar Patron - Unprovoked Attack	\$369,000
Gwinnett State Ct.	Auto/Truck Accident - Turning - Right-of-Way	\$225,000
Gwinnett Superior Ct.	Auto Accident - Exiting Driveway - Right-of-Way	\$237,370
Muscogee State Ct.	Auto Accident - Head-On - Liability Admitted	\$1,000,000
Polk U.S. District Ct.	Malicious Prosecution - Shoplifting - Probable Cause ..	Defense Verdict
Richmond Superior Ct. ...	Property Damage - Condominium - Sinking Foundation	\$76,000

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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."



Interference in Medical Practice Results in a \$1,037,000 Verdict

Plaintiff anesthesiologist declined to join defendant's local anesthesiology group resulting in the local hospital assigning her to fewer surgeries. (*Gibbons v. Alta Anesthesia*; Glynn County Superior Court)

♦ ♦ ♦

Falldown at Kroger Results in Herniated Disc and Verdict for \$10,000,000

While shopping at Kroger this 18 year-old plaintiff slipped and fell on a wet spot resulting in a herniated lumbar disc and multiple surgeries. (*Brice v. Kroger*; Newton County Superior Court)

♦ ♦ ♦

Farm Laborer Suffers Severe Facial Injuries From Defective Farm Equipment Yielding a Verdict of \$2,600,000

This 62-year-old farm laborer was turning a crank handle on a disk farrow when it fractured and struck his face, resulting in catastrophic injuries (*Cunningham v. Case Corp*; Richmond County Superior Court)

♦ ♦ ♦

Hospital Malpractice Results in Severe I/V Infiltration and \$300,000 Verdict

Defendant Hospital was found negligent when an I/V administered to the 6-week-old infant plaintiff infiltrated surrounding tissue resulting in severe muscle damage and scarring. (*Lewis v. Putney Memorial Hospital*; Dougherty County State Court)

♦ ♦ ♦

Assault on Plaintiff Bar Patron by Defendant's Bouncers Results in \$265,487 Verdict

Plaintiff suffered head injuries after being attacked by defendant's bouncers in the parking lot of defendant's bar where he had been a patron. (*Nichelson v. Cadillac Ranch*; Forsyth County State Court)

Chief Justice Benham Honored for LAP Work

Chief Justice Robert Benham of the Supreme Court of Georgia was among 16 judges recognized by the American Bar Association (ABA) for their work with lawyer assistance programs in their jurisdictions. The awards were presented by the ABA Commission on Lawyer Assistance Programs on Sept. 29, during the 12th National Workshop for Lawyer Assistance Programs, in Stevenson, Wash. Judges receiving the awards were nominated by the lawyer assistance program in their region for

working to support funding for the program; promoting mandatory continuing legal education in the area of chemical dependency; supporting confidentiality and immunity for program participants; and supporting alternative dispensation rather than suspension in cases of lawyer addiction. The Commission on Lawyer Assistance Programs first presented certificates of recognition for judges working to promote lawyer or judicial recovery from addiction in

1994. This is only the second time the awards have been presented. The recognition of addictions within the legal profession has spurred bar association involvement. Some type of lawyer assistance program or committee now exists in every state, compared to 26 state bar programs in 1980. The ABA Commission provides guidance, support and an exchange of information for lawyer assistance programs throughout the U.S. and Canada. ☐

**Dan
Turner
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p7**

Emory University School of Law has presented its Distinguished Alumni Award to three individuals who have contributed extensively to their communities and the law: **J. Guy Beatty Jr.**, class of 1957; Fulton County Superior Court Senior Judge **Elmo Holt**, class of 1948; and **Jean Zimmerman**, class of 1975. Beatty is a senior partner with the law firm of Miller & Martin, located in Chattanooga, Tenn. An Atlanta native, he currently serves as secretary of Coca-Cola Enterprises Inc. and is a founding member of the Emory Law School Council. Holt, who served in the U.S. Army during World War II, is past president of the Atlanta Board of Education, the Georgia Council of Juvenile Court Judges and the Georgia Council of Superior Court Judges. He is also known as one of the "framers" of the current Georgia Constitution as well as the revised juvenile code in Georgia. Holt resides in Roswell. Zimmerman is Senior Vice President,

General Counsel and Secretary for IBJ Whitehall Financial Group. She also serves on the Emory Law School Council and the Alumni Career Network in New York City. A New York regional officer in the Association of Emory Alumni since 1995, Zimmerman became president of the New York alumni group this past fall. She lives in New York.

James W. Butler III has been appointed by Commerce Secretary William M. Daley to the President's Export Council Subcommittee on Encryption (PECSENC). PECSENC serves as a senior-level advisory committee to the Department of Commerce and, specifically, to the Bureau of Export Administration. Butler will represent the Association of On-line Professionals (AOP), where he sits on the Board of Directors and serves as secretary. The AOP is the leading trade association for Internet access, business and electronic commerce in the U.S. Butler is a partner at one of Atlanta's

THE DOUGHERTY CIRCUIT BAR

Association, Georgia Legal Services and the Pro Bono Project of the State Bar of Georgia sponsored a CLE program called *Boosting Your Family Law Practice –Child Support and Family Violence: What you Need to Know*. Among the presenters were Judge Loring A. Gray, Chief Judge of the Dougherty Circuit; Judge John Frank Salter, State Court Judge for the Dougherty Circuit; Francis D. Hand, Assistant D.A. for the Dougherty Circuit; Brian Nichols, Program Coordinator for Men Stopping Violence Inc.; Mike Monahan, Director of the Pro Bono Project for the State Bar of Georgia; and Vicky Kimbrell, Family Violence Project Director, Georgia Legal Services.

The satellite office of the State Bar of Georgia facilitated the program. If your local bar is interested in a similar program, contact the satellite office at (800) 330-0446 for assistance. ☒



Above (l-r) Dougherty Superior Court Judge Stephen S. Goss, State Court Judge John Frank Salter and Judge Salter's Law Clerk, Susan Elrod Huff. At right, participants at the the Dougherty Circuit Bar seminar.



largest law firms, Arnall Golden & Gregory LLP. He also teaches Internet law at the Georgia Institute of Technology.

John Gornall, also a partner with Arnall Golden & Gregory LLP, has been unanimously elected to serve as a member of the Board of Directors of the Georgia Economic Developers Association (GEDA) for 1999-2001. GEDA is a 35-year-old statewide association of professional economic developers and service providers with more than 1,000 members. Gornall is

only the third lawyer to be elected to the Board of GEDA.

Donald F. Samuel has been elected as a fellow in the American Board of Criminal Lawyers, a distinguished group of criminal attorneys from throughout the U.S., Canada and the Philippines. The standards of acceptance include major felony trial requirements, the highest ethical standards, and exceptional recommendations from distinguished jurists and lawyers.

Timothy M. Curtin, of Law

Offices Emory Schwall located in Atlanta, has been admitted to membership in the Commercial Law League of America (CLLA). Founded in 1895, the CLLA is North America's premier organization of bankruptcy and commercial law professionals; its members are regularly invited to provide expert testimony before Congressional committees and other administrative agencies on behalf of the fair and equitable administration of bankruptcy and other commercial laws. ☒

DISCIPLINE NOTICES (As of November 1, 1999)

Disbarred

Ronald A. Cohen **Thomasville, GA**

Attorney Ronald A. Cohen (State Bar No. 175000) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Cohen's surrender by Supreme Court Order dated October 18, 1999. Cohen admitted that he conspired to commit wire fraud in violation of Title 18, United States Code, Sections 1343, 1956(h) and 2.

Robert E. Lowe **Decatur, GA**

Attorney Robert E. Lowe (State Bar No. 459880) has been disbarred from the practice of law by Supreme Court Order dated October 18, 1999. Lowe failed to respond to State Bar disciplinary charges. Accordingly, the Supreme Court found that in three disciplinary cases, Lowe abandoned legal matters entrusted to him by his clients, and failed to handle client funds properly.

Paige Elizabeth Samsky **Decatur, GA**

Attorney Paige Elizabeth Samsky (State Bar No. 624445) has been disbarred from the practice of law by Supreme Court Order dated October 18, 1999. Samsky failed to respond to State Bar disciplinary charges. Accordingly, the Court found that Samsky was retained to represent clients in divorce proceedings, but after accepting payment of attorney fees and filing fees from her clients,

failed to take further action. She failed to return telephone calls from her clients. In one instance, Samsky led her client to believe she had filed the divorce papers when she had not. In another instance, Samsky never filed the divorce papers and the client was forced to hire another attorney to represent her.

Floyd W. Keeble Jr. **Lavonia, GA**

Attorney Floyd W. Keeble Jr. (State Bar No. 410200) has been disbarred from the practice of law by Supreme Court Order dated November 1, 1999. Keeble failed to respond to State Bar disciplinary charges. Accordingly, the Court found that Keeble was retained to file a bankruptcy petition on behalf of his client, and told his client he had filed the petition when he had not. The Court considered the fact that Keeble received an Investigative Panel reprimand for his violation of Standard 65(D) in deciding to disbar him.

B. Dean Grindle Jr. **Dahlonega, GA**

Attorney B. Dean Grindle Jr. (State Bar No. 312600) has been disbarred from the practice of law by Supreme Court Order dated November 1, 1999. Grindle failed to respond to State Bar disciplinary charges. Accordingly, the Court found that Grindle received a \$1,000.00 retainer to represent a client in a timber dispute. After conferring with the client about responses to discovery requests, Grindle failed to respond to

the requests. He also informed the client that the client's case was proceeding as it should when it was not. Grindle failed to respond to a pretrial calendar notice resulting in the dismissal of the client's case by the court. He failed to inform the client that the court had dismissed the client's case. Afterwards, Grindle failed to return the client's telephone calls. Grindle later informed the client that the case had been dismissed, withdrew from representing the client, and returned the \$1,000.00 retainer to the client. In a second case, Grindle received a \$2,500.00 retainer to represent a client in a real estate matter. Grindle abandoned the legal matter entrusted to him by the client and failed to return the client's documents and retainer.

Suspension

Perry O. Lemmons **Atlanta, GA**

Attorney Perry O. Lemmons (State Bar No. 446400) has been suspended from the practice of law for two years with conditions on his reinstatement by Supreme Court Order dated October 18, 1999. Lemmons falsely represented himself as a certified public accountant duly licensed to practice public accountancy in Georgia to the Internal Revenue Service, the Superior Court of Fulton County, the Supreme Court of Georgia, and others after his permit to practice public accountancy had expired. Following his two year

suspension, Lemmons must show the Office of the General Counsel that he has been reinstated as a certified public accountant or has discontinued holding himself out to the public as a certified public accountant.

**Steven Robert Schrader
Centereach, NY**

Attorney Steven Robert Schrader (State Bar No. 629790) has been suspended from the practice of law in Georgia for one year by Supreme Court Order dated November 1, 1999. Schrader has been a member of the State Bar of Georgia since 1990. He moved to Suffolk County, New York in 1996. Schrader pled guilty to filing a pleading to probate a will in the Surrogate's Court of Suffolk County, New York, without first seeking pro hac vice admission in the probate matter. Schrader's

misdemeanor conviction in New York constitutes a violation of Standard 66 of Bar Rule 4-102(d).

Review Panel Reprimand

**Jason Roy Hasty
Marietta, GA**

Attorney Jason Roy Hasty (State Bar No. 336727) has been ordered to receive a Review Panel reprimand by Supreme Court Order dated November 1, 1999. Hasty assisted his client in the negotiation and execution of a separation agreement with the client's wife knowing that the client's wife was represented by counsel. Hasty was informed by his client that the client's wife had discharged her attorney and was proceeding on her own. He failed to confirm his client's statement with opposing counsel. Hasty revised the separation agree-

ment as requested by his client, and delivered the amended agreement to his client. His client returned moments later with an executed agreement witnessed by one of Hasty's secretaries. The Court concluded that Hasty caused his client to communicate directly with a party Hasty knew to be represented in the legal matter.

Reinstatement

**Harold W. Spence
Atlanta, GA**

Harold W. Spence filed a petition for reinstatement to the practice of law and the Supreme Court approved his petition by order dated November 1, 1999. Spence must take the bar examination before he may be readmitted. ☐

Morningstar pickup 10/99 p94



SECTION NEWS

January 6-9, 2000, the **State Bar's Midyear Meeting** will be held at the Swissotel in Atlanta. Seventeen sections will sponsor functions during the meeting. Section notices were mailed at the end of October.

The **Individual Rights Section** held its annual Halloween Party on October 28 at the Lynne Farris Gallery, located in the lobby of the Hurt Building in downtown Atlanta.

Products Liability Law members just received their *first* newsletter! On November 12, the Section held its "Product Liability Megaconference II" at the Ritz Carlton in downtown.



Some of the **Products Liability** seminar speakers pictured are (l-r) Laura Ellsworth; Stephanie Parker, chair of the Section; Laura Owens; and Ursula Henninger.

School & College Law members received their *first* newsletter in December. The Section is chaired by Patrick McKee.

Antitrust, Computer & Intellectual Property co-sponsored a Holiday Dinner Party on December 1 at the Houston Mill in Houston, Atlanta. These sections also co-sponsored a seminar on December 2 titled "Navigating the Distribution Revolution in E-Commerce." Anti-



In costume from the **Individual Rights Section** (l-r) are Michel Phillips; Georgia Lord; Megan Gideon; and Susan Garrett, chair).

trust is chaired by Barbara Tinsley, Computer by Jeffrey Kuester and Intellectual Property by Jason Bernstein.

The **Computer Law Section** held a breakfast November 12 at the Buckhead Club in Atlanta. David Brown, a partner with Alston & Bird's Washington office, addressed the section on e-commerce and technology legislative developments. Brown's comments focused on federal legislation relating to electronic signatures, privacy in the financial and medical industries and legislation

that will soon be considered by many states dealing with electronic and computer transactions.

Corporate Counsel sections of the Atlanta Bar and State Bar of Georgia will join together to co-sponsor a holiday party in December. Ray Willoch chairs the State Bar's Corporate Counsel Section.

The **Entertainment & Sports Law Section**, chaired by Ivory T. Brown, teamed up with the Atlanta

Lawyers for the Arts for their Annual SchmoozeFest Reception. This year it took place on November 21 at Loca Luna in Atlanta. This event provided an opportunity for section members, hip artists and entertainers of all kinds to mix and mingle. Events are also scheduled for December and January, so stay tuned, members.

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 has 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.



Pictured from the **Computer Law Section** (l-r) are Sandra Cuttler, David Brown and Jim Meadows.

Join a Section for half price after January 1, 2000. For information, visit the State Bar's Web site or call State Bar Membership at (404) 527-8777 or (800) 334-6865. ☒

— Lesley T. Smith, *Section Liaison*

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.

Barlow, Robert D. Atlanta	Admitted 1960 Died September 1999	Kenan, James G. Atlanta	Admitted 1938 Died October 1999
Brookins, Ernest D. Villa Rica	Admitted 1952 Died September 1999	Lee, Glenda M. Marietta	Admitted 1967 Died May 1999
Buice, R. Avon Perry	Admitted 1958 Died September 1999	Lee, Ralph Monroe Atlanta	Admitted 1952 Died September 1999
Bullock, Loren J. Birmingham, AL	Admitted 1959 Died May 1999	Lunsford, Jr., Julius R. Atlanta	Admitted 1936 Died September 1999
Chavis, Sharon Marquetta East Point	Admitted 1990 Died November 1998	Murphy, Rupert L. Rome	Admitted 1938 Died January 1999
Dillingham, Lee D. Acworth	Admitted 1964 Died October 1999	Paxton, Ronald Lamar Atlanta	Admitted 1976 Died September 1999
Harris, James W. Atlanta	Admitted 1974 Died September 1999	Ronick, Howard Robert Atlanta	Admitted 1974 Died September 1999
Hinely, Lacy W. Rincon	Admitted 1933 Died January 1999	Smith, Roland P. Canton	Admitted 1947 Died September 1999

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99- p76 BW

Supreme Court Issues Formal Advisory Opinion

During the month of October, 1999, the Supreme Court of Georgia issued a formal advisory opinion that was proposed by the Formal Advisory Opinion Board. Following is the full text of the opinion issued by the court.

**STATE BAR OF GEORGIA
ISSUED BY THE SUPREME
COURT OF GEORGIA ON
OCTOBER 18, 1999
FORMAL ADVISORY OPINION
NO. 99-2 (Proposed Formal
Advisory Opinion No. 94-R11)**

QUESTION PRESENTED:

In a transaction involving a real estate lending institution and its customer, may the in-house counsel for the institution provide legal services to the customer relative to the transaction? May the real estate lending institution charge the customer a fee for any legal services rendered relative to the transaction?

SUMMARY ANSWER:

The answer to both questions is "no." An in-house counsel for a real estate lending institution assists that entity in the unauthorized practice of law in violation of Standard 24, if he or she provides legal services to its customers which are in any way related to the existing relationship between the institution and its customer. Such conduct would also constitute an impermissible conflict of

interest under Standards 35 and 36. This prohibition does not, however, prevent in-house counsel from attending closings as attorney for the institution and preparing the documents necessary to effectuate the closing including those documents that must be signed by the customer and that may benefit both the institution and the customer. Nor does the prohibition prevent the institution from seeking reimbursement for the legal expenses incurred in the transaction by including them in the cost of doing business when determining its charge to its customer. The charge, however, may not be denominated as a legal or attorney fee but must be included in the charge being made by the institution. There is inherent risk of confusion on the part of the customer regarding the role of in-house counsel. Prudent lawyers will act on the assumption that courts will honor the customer's reasonable expectation of in-house counsel's duties created by the closing attorney's conduct at the closing.

OPINION:

Standard 24, proscribing assistance in the unauthorized practice of law, prohibits in-house counsel for a real estate lending institution from providing legal services to its customers. See also, Georgia Code of Professional Responsibility, Canon 3; Georgia Code of Professional Respon-

sibility, Ethical Considerations 3-1 & 3-8; Georgia Code of Professional Responsibility, Directory Rule 3-101, and ABA Model Rules of Professional Conduct, Model Rule 5.4(d). Standards 35 and 36 prohibit such conduct if the ability to exercise independent professional judgment on behalf of one client will be or is likely to be adversely affected by the obligation to another client. See also, Georgia Code of Professional Responsibility, Canon 5; Georgia Code of Professional Responsibility, Ethical Consideration 5-14 - 5-20; Georgia Code of Professional Responsibility, Directory Rule 5-105, and ABA Model Rules of Professional Conduct, Model Rule 1.7. Specifically, in-house counsel may not provide legal services at a closing or elsewhere to a customer borrowing from the lending institution and arising out of the existing relationship between the customer and the institution. This is true whether or not the customer is charged for these services. The role of employee renders the actions of in-house counsel the action of the employer. The employer, not being a lawyer, is thus being assisted in and is engaging in the unauthorized practice of law. The in-house counsel by virtue of the existing employer/employee relationship and its accompanying obligation of loyalty to the employer cannot exercise independent professional judgment on behalf of the customer.

This prohibition does not, however, prevent in-house counsel from attending the closing as the institution's legal representative and preparing those documents necessary to effectuate the closing. This includes those documents that must be signed by the customer. In such a situation, in-house counsel is providing legal services directly to the institution even though others, including the customer, may benefit from them.

The prohibition on assisting in the unauthorized practice of law does not prevent the lending institution from including the expense of in-house counsel in the cost of doing business when determining the fee to charge its customer. The lending institution may, in other words, recoup the expenses of the transaction including the cost of legal services. This conduct does not in and of itself, create a duty to the customer on the part of the in-house counsel nor does it constitute a violation of the prohibition against the sharing of legal fees with a non-lawyer. On the other hand, charging the cost of legal services to the customer (1) is likely to create an unintended expectation in the mind of the customer, (2) constitutes a non-lawyer receiving the fee for legal services rather than an attorney, (3) constitutes a lawyer splitting a fee with a non-lawyer, or (4) directly invites the unauthorized practice of law. It is accordingly prohibited even if limited to actual costs. The customer cannot be made a part of the attorney/client, employer/employee relationship.

The situation in which in-house counsel attends closings as attorney for the lending institution and prepares the documents necessary to effectuate the closing is fraught with both legal and ethical risks beyond assistance in the unauthorized practice of law and conflict of interests. Even though the above analysis (1) requires that in-house counsel's lawyer-client relation-

ship be restricted to the lending institution, and (2) prohibits the direct billing for legal services by the institution, the fact remains that the customer may benefit from the actions of in-house counsel. Thus the risk of confusion about the role of in-house counsel at the closing will be high. Prudent in-house counsel should anticipate that courts may treat the reasonable customer expectations regarding these legal services as creating duties even in the absence of a lawyer-client relationship. The Restatement (Second) of Torts reports that an attorney who represents only the lender may still be held liable in

negligence to a borrower. See, e.g., *Seigle v. Jasper*, 867 S.W. 2d 476 (Ky. Ct. App. 1973). A similar result may obtain under traditional contract or agency principles regarding third party beneficiaries. This position is supported by the Restatement of the Law of Lawyering. While declaring the current state of Georgia law on this issue would be inappropriate and beyond the scope of this Formal Advisory Opinion, it is clear that prudent in-house counsel will not ignore these risks both in advising the lending institution and in his or her conduct toward the customer as a matter of good lawyering. ☒

Notice of Amendments to the 11th Circuit Rules

Following receipt and consideration of comments to the proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit, the court has adopted the proposed amendments, with modifications, effective January 1, 2000.

Please note the court adopted new procedures for requesting extensions of time to file briefs and record excerpts in civil appeals THAT ARE MORE STRINGENT.

The revised rules distinguish between a party's first request for an extension of time of *seven calendar days or less*, a party's first request for an extension of time of *more than seven calendar days*, and a party's second request for an extension of time. See 11th Cir. R. 31-2. **PRACTICE NOTE:** Standards for granting a second request are higher than the standards for granting a first request. Parties are well advised to properly plan and make the first request

appropriate and accurate.

The court also adopted MORE STRINGENT rules that provide for **DISMISSAL WITHOUT FURTHER NOTICE** in civil appeals when appellant fails to file or correct a brief or record excerpts within the time permitted, and that establish MORE STRINGENT procedures for requesting **reinstatement** of a civil appeal thus dismissed. See 11th Cir. R. 42-2 and 42-3.

The court also determined to make additional minor revisions to the following Rules and Internal Operating Procedures (IOP) of the court: IOP 1 (p. 57); 11th Cir. R. 31-2; and IOP 2 (p. 85). Pursuant to 28 U.S.C. §2071(e), these additional amendments also take effect on January 1, 2000, at the same time as the other amendments to the Rules.

The circuit rules, including amendments thereto, may be found at the Eleventh Circuit's Internet Web site at www.call.uscourts.gov. ☒

First Publication of Proposed Formal Advisory Opinion Request No. 99-R2

Pursuant to Rule 4-403 (c) of the Rules and Regulations of the State Bar of Georgia, the Formal Advisory Opinion Board has made a preliminary determination that the following proposed opinion should be issued. State Bar members are invited to file comments to this proposed opinion with the Office of General Counsel of the State Bar of Georgia at the following address:

Office of General Counsel
State Bar of Georgia
800 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303
Attention: John J. Shiptenko

An original and eighteen copies of any comment to the proposed opinion must be filed with the Office of General Counsel by January 15, 2000 in order for the comment to be considered by the Formal Advisory Opinion Board. Any comment to a proposed opinion should make reference to the request number of the proposed opinion. After consideration of comments, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia for formal approval.

PROPOSED FORMAL ADVISORY OPINION REQUEST NO. 99-R2

QUESTIONS PRESENTED:

- I. Disclosure of Billing Statements to Non-Clients.
May a lawyer whose professional services are paid by a person other than the client disclose to the person paying the bill, or to third-parties such as an insurer's outside auditing service, client confidences or secrets contained in detailed, narrative billing statements which describe the professional services rendered?
- II. Request by Non-Client to Obtain Client's Consent to Disclose Billing Statements.
May a lawyer ethically comply with a request by a person who pays the lawyer's billings, other than the client, to seek or obtain the client's consent for the lawyer to disclose client confidences or secrets contained in billing statements to be submitted to an outside audit service?
- III. Guidelines for Professional Services Imposed by Non-Client.
May a lawyer whose professional services are paid by a person other than the client ethically comply with detailed guidelines regarding billings or services rendered as imposed by a person other than the client who is paying the bill for legal services?

SUMMARY ANSWERS:

- I. Disclosure of Billing Statements to Non-Clients.
A lawyer may not disclose to a person who pays the lawyer's billings other than the client, or to third-parties such as an insurer's outside auditing service, confidential information concerning the client without the client's consent, except for disclosures that are impliedly authorized to carry out the representation.
- II. Non-Client Request to Obtain Client's Consent to Disclose Billing Statements.
A lawyer should not comply with the requirement of a person who pays the lawyer's billings, other than the client, that the lawyer seek or obtain the client's consent to disclosure of client confidences or secrets in billing statements to be submitted to an outside audit service.
- III. Guidelines for Professional Services Imposed by Non-Client.
A lawyer whose professional services are paid for by a person other than the client can ethically comply with guidelines of the person paying the bill, provided the guidelines do not require disclosure of confidential or secret information of the client, without the client's consent, or interfere with the attorney's independent professional judgment in rendering legal services to the client or with the attorney-client relationship.

OPINION:

I. Disclosure of Billing Statements to Non-Clients.

*"Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him."*¹

It is the duty of every lawyer to maintain inviolate the confidences and, at every peril to themselves, to preserve the secrets of their clients. Standards 28 and 29; O.C.G.A. §15-19-14(3); see also, Rule 1.6, ABA Model Rules of Professional Conduct. The attorney/client privilege is for the benefit of the client, not the lawyer. *Marriott Corp. v. American Academy of Psychotherapists Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981). Therefore, a lawyer cannot disclose to a person who pays the lawyer's billing, such as an insurer, or to third-parties such as an insurer's outside auditing service, confidential information concerning the client without the client's consent, except for disclosures that are impliedly authorized to carry out the representation. Standard 28(b); EC 4-2. The exception for disclosures that are impliedly authorized is to be narrowly construed and does not allow the attorney's disclosure, without specific client consent, of confidential client information to a third-party hired by the person or entity paying the fee other than the client.

An insurance carrier that has undertaken a contractual obligation to furnish legal services on behalf of an insured would have implied authorization to receive and review the billing statements for professional services in order to satisfy those contractual obligations. However, if

counsel discloses client confidences and secrets to a third party, such as a fee auditor, this can result in a waiver of the attorney-client privilege or contravene the lawyer's professional ethics, or both. *Griffin v. Williams*, 179 Ga. 175, 175 S.E. 449 (1934).

The very nature of detailed narrative billing statements for the services rendered by a lawyer will normally contain client confidences and secrets. Ethical considerations which define client confidences and secrets are broader than the attorney-client privilege. EC 4-4 provides:

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

The definition of client "confidence" or "secret" is expansive and would include much of the kind of information that might normally be found in detailed narrative billing statements. Rule 3-104, DR 4-101.² A client's secret is not only anything that might be embarrassing to the client but also anything that relates to the representation. See, *In the Matter of T. Edward Tante*, 264 Ga. 692, 453 S.E.2d 688 (1994). This body has recognized that the mere identification or location of a client may be a confidence or secret. See, State

Disciplinary Board Advisory Opinion Nos. 17 and 42.³

Must a lawyer consult with the client to determine what is a confidence or secret (and therefore not to be disclosed to the auditors) or can the decision be made unilaterally? In the absence of actual full disclosure and consultation with the client, prudence dictates that counsel should assume that any information about the client and the representation is confidential.

What obligation does a lawyer have upon discovering that a statement for legal services has been produced to an unauthorized third party without his client's consent? A lawyer should object upon learning that a payer of his fee other than his client is forwarding bills for legal services to an outside auditor. See, Standard 29; see also, *Maryland State Bar Association*, Ethics Advisory Opinion 99-7 (December 18, 1998). No additional detailed bills may be sent by the lawyer to the non-client payer without the client's consent after the lawyer learns that the bills are being forwarded to an outside auditor. *Vermont Bar Association*, Opinion 98-7.

II. Request by Non-Client to Obtain Client's Consent to Disclose Billing Statements.

A lawyer may not ethically comply with the requirement of a person other than the client who pays the lawyer's billings that the lawyer seek or obtain the client's consent to potential disclosure of client confidences or secrets contained in billing statements to be submitted to an outside audit service. Such a requirement would put the attorney in an ethical dilemma, precluding the attorney from representing the client.

It is fundamental that a lawyer should exercise independent judgment on behalf of a client. Standard 41; Rule 3-105. This requires that the professional judgment of a lawyer

should be exercised, within the bounds of the law, solely for the benefit of the lawyer's client, free of the compromising influences of either his personal interests, the interests of other clients, or the desires of third persons. EC 5-1. The Ethical Considerations under Rule 3-105 related to the "Desires of Third Persons" are directly on point:

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may

be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasion, decisions on priority of work may be made by the employer rather than by the lawyer with the result that prosecution of work already undertaken for the clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

An unacceptable ethical dilemma would be created in situations where a person other than the client pays the lawyer's billings and requests that the attorney seek or obtain the client's consent to potential disclosure to third parties of client confidences or secrets contained in billing statements. A lawyer cannot disclose client confidences without the informed consent of the client, and in this scenario, fully and fairly informing the client is fraught with danger in the form of subtle influences on the manner and method used by the lawyer to inform the client. A benign written disclosure is not likely to "fully inform" the client, since the client's consent to release of confidential information must be completely informed, based upon more

than the mere fact that his or her billing records will be released to the auditors. See, Vermont Opinion 98-7. The more prudent approach would arguably require that the client be informed that releasing the billing statement to an outside party could lead to a waiver of the attorney-client privilege, as well as any other adverse impact that the lawyer knew or should have known. The dilemma for the lawyer in providing the client with the veritable "list of horrors" lies in the potential chilling effect that might result from even a subconscious desire to avoid offending the person responsible for payment of the lawyer's services.

However, the most troubling dilemma in this situation can occur when the client asks the lawyer for advice on whether or not to consent to disclosure, and this request for advice would be a normal and automatic reaction to any efforts to fully inform. In order to avoid both the subtle and obvious influences which may come into play in situations where a person other than the client pays the lawyer's billings and requests that the attorney seek or obtain the client's consent to potential disclosure of client confidences or secrets contained in billing statements, the situation must be analyzed from the perspective of any other independent lawyer whose fees are not being paid by a person other than the client. Where disclosure of the billing statements interjects the slightest risk that the client could be prejudiced by agreeing to disclosure, and the client gains nothing in return, a truly disinterested lawyer would not conclude that the client should agree and would advise the client accordingly. See, e.g., 98 *Formal Ethics Opinion 10*, North Carolina State Bar Association; *Washington State Bar Association, Formal Opinion 195* (January 12, 1999).

Prudence dictates that a lawyer

avoid situations which create a substantial potential for undermining the attorney/client relationship. Our Rules of Ethics require that a lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment. Standard 4I; Rule 3-105 and DR5-107. Therefore, a lawyer may not ethically comply with the requirement of a person other than the client who pays the lawyer's billings that the lawyer seek or obtain the client's consent to potential disclosure of client confidences or secrets contained in billing statements to be submitted to an outside audit service.

III. Guidelines for Professional Services Imposed by Non-Client.

Standard 4I A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services. A violation of this standard may be punished by disbarment.

A lawyer whose professional services are paid by a person other than the client can ethically comply with guidelines of the person paying the bill, provided the guidelines do not require disclosure of confidential or secret information of the client, without the client's consent, or interfere with the attorney's independent professional judgment in rendering legal services to the client or with the attorney-client relationship. See, Rule 3-105, DR 5-107; see also, Rule 1.8(f), 2.1 and 2.3, *ABA Model Rules of Professional Conduct*.

Guidelines cannot be followed if they interfere with the lawyer's exercise of the lawyer's professional judgment, and the lawyer must inform the client about any guidelines. Any guideline which arbitrarily and unreasonably limits or restricts

compensation for the reasonable time spent on task necessary to the representation is to be avoided. Billing guidelines that impose a *de facto* or arbitrary rate for certain services, such as compensating a lawyer at paralegal rates, are also to be avoided. See *Washington State Bar Association*, Formal Opinion 195 (January 12, 1999).

A lawyer must obtain the informed consent of the client before complying with any restrictions on representation of the client that are imposed by a party other than the client, such as the payer of the attorney's legal services. *Vermont Bar Association*, Opinion 98-7. See also *Alabama State Bar*, RO-98-02. ☐

Endnotes

1. EC-4-1
2. Rule 3-104, DR 4-101
Preservation of Confidences and Secrets of a Client
(a) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.
3. Ethics bodies have recognized instances where the mere fact that a client has sought legal assistance may be a confidence or secret. See, *Vermont Opinion 98-7*; *Maryland Ethics Advisory Opinion 99-7*; *Washington Formal Opinion 195*.

Continued from Page 23

- 1305 (11th Cir. 1999).
24. *Id.*
25. *Id.* at 1375-76.
26. *Id.* at 1376.
27. *Id.*
28. *Id.* at 1376-77.
29. *Id.* at 1381.
30. *McGregor v. Autozone, Inc.*, 180 F.3d 1305 (11th Cir. 1999).
31. *Id.* at 1307 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 2782 (1984)).
32. *Id.*
33. *Id.* at 1308.
34. *Wolke v. Dreadnought Marine, Inc.*, 954 F. Supp. 1133 (E.D. Va. 1997).
35. *Id.* at 1135.
36. *Id.*
37. *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841-44, 104 S. Ct. 2778, 2781-82 (1984)).
38. *Id.* at 1136.
39. *Id.* at 1137; cf. *Dormeyer v. Comerica Bank Ill.*, No. 96 C 4805, 1998 U.S. Dist. LEXIS 16585, at *11-*13 (N.D. Ill. Oct. 14, 1998) (rejecting regulation that would have required employer to offer FMLA leave to employee who had not worked 1,250 hours within a twelve month period because employer failed to notify employee the she failed to qualify under the FMLA).
40. See *Henthorn*, 1999 U.S. Dist. LEXIS 2029, at *6.
41. *Id.* at *10.
42. *Id.*
43. See *Fry v. First Fidelity Bancorporation*, No. 95-6019, 1996 U.S. Dist. LEXIS 875, at *1 (E.D. Pa. Jan. 30, 1996).
44. *Id.* at *13.
45. *Id.* at *4-*6.
46. *Id.* at *4.
47. *Id.* at *6.
48. *Id.* at *16; see also *Mora v. Chem-Tronics, Inc.*, 16 F. Supp. 2d 1192, 1127 (S.D. Cal. 1998) ("This Court likewise holds that to succeed on a claim of interference based on inadequate notice, a Plaintiff must show that the Defendant's failure to inform resulted in the **unknowing** forfeiture of the protection of the FMLA.") (emphasis added).

Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court

The version of Proposed Formal Advisory Opinion Request No. 97-R6, which appears in the October 1999 issue of the Georgia Bar Journal for second publication, was not the version approved by the Formal Advisory Opinion Board. Due to a clerical error, an incorrect version was inadvertently placed in the October issue. Below you will find the version that was approved by the Board.

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 December 15, 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 REQUEST 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, a lawyer should never place a nonlawyer in situations in which he or she is called upon to exercise what would amount to independent professional judgment for the lawyer's client. Nothing in this limitation precludes paralegal representation of clients with legal problems whenever such is expressly authorized by law.²

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 when-

ever 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 in the representation of the lawyer's client.

As applied to the specific questions presented, a lawyer permitting a nonlawyer to give legal advice to the lawyer's client based on 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.³

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.⁴ 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 opinions 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 the nonlawyer is called upon to exercise what would amount to independent professional judgment for the lawyer’s client. Nor should a nonlawyer be placed in situations in which decisions must be made for the lawyer’s client or advice given to the lawyer’s client based on the nonlawyer’s legal knowledge, rather than that of the lawyer. Finally, nonlawyers should not be placed in situations in which the nonlawyer, rather than the lawyer, is called upon to argue the client’s position. Nothing in these limitations precludes paralegal representation of clients with legal problems whenever such is

expressly authorized by law.⁵

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 provided and the nature of the representation in violation of Standards of Conduct 4 and 5. In those circumstances where nonlawyer representation is specifically authorized by regulation, statute or rule of an adjudicatory body, it must be made clear to the client that they will be receiving nonlawyer representation and not representation by a lawyer.

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. Lawyers, as professionals, are ultimately responsible for maintain-

ing 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. See footnote 5 *infra*.
3. 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.
4. The language relied upon from *Huber v. State* was later codified in O.C.G.A. §15-19-50.
5. For example, it is perfectly permissible for a nonlawyer, employed as a paralegal by a law firm or by a non-profit corporation, such as the Georgia Legal Service Program, doing business as a law firm, to represent his or her own clients whenever paralegal representation is permitted by law, as it would be if the representation were on a food stamp problem at an administrative hearing, or before the Social Security Administration, or in other circumstances where a statute or the authorized rules of the adjudicatory body specifically allow for and regulate representation or counsel by persons other than a lawyer. It must be made clear to the clients, of course, that what they will be receiving is paralegal representation and not representation by a lawyer. Nothing in this opinion is intended to conflict with regulation, by statute or rule of an adjudicatory body, of use of non-lawyers in such authorized roles.

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Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court

Second Publication of Proposed Formal Advisory Opinion Request No. 99-R3

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has made a final determination that the following Proposed Formal Advisory Opinion should be issued. 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 December 15, 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 REQUEST NO. 99-R3 QUESTION PRESENTED:

Ethical propriety of lawyers telephonically participating in real estate closings from remote sites.

SUMMARY ANSWER:

Formal Advisory Opinion No. 86-5 explains that a lawyer cannot delegate to a nonlawyer the responsibility to "close" the real estate transaction without the participation of an attorney. Formal Advisory Opinion No. 86-5 also provides that "Supervision of the work of the paralegal by the attorney must be

direct and constant to avoid any charges of aiding the unauthorized practice of law." The lawyer's physical presence at a closing will assure that there is supervision of the work of the paralegal which is direct and constant.

OPINION:

Formal Advisory Opinion No. 86-5 (86-R9) issued by the Supreme Court states that the closing of real estate transactions constitutes the practice of law as defined by O.C.G.A. §15-19-50. Therefore, it is ethically improper for lawyers to permit nonlawyers to close real estate transactions. Correspondent inquires whether it is ethically permissible to allow a paralegal to be physically present at a remote site for the purpose of witnessing signatures and assuring that documents are signed properly. The paralegal announces to the borrower that they are there to assist the attorney in the closing process. The lawyer is contacted by telephone by the paralegal during the closing to discuss the legal aspects of the closing.

The critical issue in this inquiry is what constitutes the participation of the attorney in the closing transaction. The lawyer must be in control of the closing process from beginning to end. The supervision of the paralegal must be direct and constant.

Formal Advisory Opinion No. 86-5 states that "If the 'closing' is defined as the entire series of events through which title to the land is conveyed from one party to another party, it would be ethically improper for a nonlawyer to 'close' a real

estate transaction." Under the circumstances described by the correspondent, the participation of the lawyer is less than meaningful. The lawyer is not in control of the actual closing process from beginning to end. The lawyer is brought into the closing process after it has already begun. Even though the paralegal may state that they are not a lawyer and is not there for the purpose of giving legal advice, circumstances may arise where one involved in this process as a purchaser, seller or lender would look to the paralegal for advice and/or explanations normally provided by a lawyer. This is not permissible.

Formal Advisory Opinion No. 86-5 provides that "Supervision of the work of the paralegal by the attorney must be direct and constant to avoid any charges of aiding the unauthorized practice of law." By allowing a paralegal to appear at closings at remote sites at which lawyers are present only by telephone conference will obviously increase the likelihood that the paralegal may be placed in circumstances where the paralegal is actually providing legal advice or explanations, or exercising independent judgement as to whether legal advice or explanation is required.

Standard 24 is not met by the lawyer being called on the telephone during the course of the closing process for the purpose of responding to questions or reviewing documents. The lawyer's physical presence at a closing will assure that there is supervision of the work of the paralegal which is direct and constant. ☐

Proposed Amendment to Uniform Superior Court

At its meeting on October 11, 1999, the Executive Committee of the Council of Superior court Judges elected to provide notice and pursue comment regarding a proposal to amend Rule 9 of the Uniform Superior Court rules. The proposed amendment shows exactly which language has been changed; the additional language has been underlined.

Rule 9: Telephone Conferencing (Executive Committee draft)

Rule 9. Telephone and Video conferencing.

9.1 Telephone conferencing. The trial court on its own motion or upon the request of any party may in its discretion conduct pre-trial or post-trial proceedings in civil actions by telephone conference with attorneys for all affected parties. The trial judge may specify:

- (A) The time and the person who will initiate the conference;
- (B) The party which is to incur the initial expense of the conference call, or the apportionment of such costs among the parties, while retaining the discretion to make an adjustment of such costs upon final resolution of the case by taxing same as a part of the costs; and,
- (C) Any other matter or requirement necessary to accomplish or facilitate the telephone conference.

9.2 Videoconferencing.

(A) The following matters may be conducted by a two-way audio-visual telecommunications system:

- 1. Determination of indigence and appointment of counsel;
- 2. Hearings on appearance and appeal bonds;

- 3. Probable cause hearings;
- 4. Arraignment or waiver of arraignment;
- 5. Entry of pleas in criminal cases;
- 6. Imposition of sentences upon pleas of guilty or *nolo contendere*;
- 7. Probation revocation hearings;
- 8. Acceptance of special pleas of insanity (incompetency to stand trial);
- 9. Special situations involving inmates with highly sensitive medical problems or who pose a high security risk; and
- 10. Testimony of youthful witnesses.

Notwithstanding any other provisions of this rule, a judge may order a defendant's personal appearance in court for any hearing.

(B) Confidential Attorney-Client Communication. Such communication shall be covered by Georgia law pertaining to attorney-client privilege.

(C) Expert Testimony. In any pending matter, an expert witness may testify via two-way audio-visual telecommunications system. In any criminal matter, timely objection by any party to the use of such system for expert testimony shall be sustained; however, such objection shall act as a motion for continuance and waiver of any speedy trial demand. "Timely objection" means an objection made within ten (10) days of filing written notice of a party's intention to present expert testimony by means of a two-way audio-visual telecommunications system.

(D) Recording of Hearings. Every use of a telecommunications system under this rule may be recorded on audio-visual tape and such tapes shall be preserved as if

records of certified court reporters. Such tapes shall be part of the record of the case and transmitted to courts of appeal as if part of a transcript.

(E) Audio-Visual Minimum Standards. Any audio-visual telecommunications system utilized under this rule must conform to the following minimum requirements:

1. all participants must be able to see, hear, and communicate with each other simultaneously; and

2. video quality must be adequate to allow participants to observe each other's demeanor and nonverbal communication. ☒

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Care
Auditors
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Board of Governors Meeting Attendance

1-99	3-99	4-99	6-99(Fri)	6-99(Sat)	8/99	
Atlanta	Macon	Lanier	Savannah	Savannah	Amelia	
*	*	*	*	*	*	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	*	*	J. Lane Bearden
*	*	*	*	*	*	James D. Benefield III
*	*	*	*	*	*	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	*	*	William K. Broker
*	*	*	*	*	*	James Michael Brown
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
e	*	*	*	*	*	Bryan M. Cavan
*	*	*	*	*	*	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
n/a	n/a	n/a	n/a	*	*	Adele P. Grubbs
*	*	*	*	*	*	Robert R. Gunn, II
*	*	*	*	*	*	John P. Harrington
n/a	n/a	n/a	n/a	*	*	Walter C. Hartridge
*	*	*	*	*	*	Steven A. Hathorn
*	*	*	*	*	*	James A. Hawkins
*	*	*	*	*	*	Joseph J. Hennesy, Jr.
*	*	*	*	*	*	Phyllis J. Holmen
*	*	*	*	*	*	Roy B. Huff
*	*	*	*	*	*	Donald W. Huskins
*	*	*	*	*	*	Robert D. Ingram
*	*	*	*	*	*	James Irvin
*	*	*	*	*	*	Rachel K. Iverson
*	*	*	*	*	*	Michael R. Jones, Sr.
n/a	n/a	n/a	n/a	*	*	William Alan Jordan
n/a	n/a	n/a	n/a	*	*	J. Benjamin Kay, III
*	*	*	*	*	*	Dow (Kip) N. Kirkpatrick
*	*	*	*	*	*	William P. Langdale, Jr.
*	e	e	e	*	*	Earle F. Lasseter
*	*	*	*	*	*	J. Alvin Leaphart
*	*	*	*	*	*	Francis Marion Lewis
*	*	*	*	*	*	David S. Lipscomb

1-99	3-99	4-99	6-99(Fri)	6-99(Sat)	8/99	
Atlanta	Macon	Lanier	Savannah	Savannah	Amelia	
*	*	*	*	*	*	Hubert C. Lovein
*	*	*	*	*	*	Leland M. Malchow
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	*	*	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	*	*	Robert V. Rodatus
*	*	*	*	*	*	Tina Shadix Roddenbery
*	*	*	*	*	*	Joseph Roseborough
*	*	*	*	*	*	William C. Rumer
n/a	n/a	n/a	n/a	*	*	Dennis C. Sanders
*	*	*	*	*	*	Thomas G. Sampson
n/a	n/a	n/a	n/a	*	*	Robert L. Shannon, Jr.
*	*	*	*	*	*	Michael M. Sheffield
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	*	*	Philip C. Smith
*	*	*	*	*	*	R. Rucker Smith
*	*	*	*	*	*	S. David Smith
n/a	n/a	n/a	n/a	n/a	*	Hugh D. Sosebee
*	*	e	*	*	*	Huey Spearman
*	*	*	*	*	*	Lawrence A. Stagg
*	*	*	*	*	*	John Stell
*	*	*	*	*	*	Frank B. Strickland
*	*	*	*	*	*	Richard C. Sutton
*	*	*	*	*	*	Jeffrey B. Talley
*	*	*	*	*	*	John J. Tarleton
*	*	*	*	*	*	S. Lester Tate, III
*	*	*	*	*	*	Henry C. 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; **blank** - did not attend; **n/a** - not on Board

Financial Institutions Approved as Depositories For Attorney Trust Accounts As of November 1999

If your bank is not listed,
please call the Office of the
General Counsel at (404) 527-
8720 or (800) 334-6865.

ABBEVILLE, GA

Dorsey State Bank
Wilcox County State Bank

ACWORTH, GA

Premier Bank

ADAIRSVILLE, GA

Bank of Adairsville

ADEL, GA

Adel Banking Company
Farmers and Merchants Bank, Inc.

AILEY, GA

Montgomery County Bank

ALAMO, GA

Wheeler County State Bank

ALBANY, GA

First National Bank of South
Georgia
Regions Bank
Security Bank & Trust Company
SunTrust Bank, South Georgia, N.A.

ALMA, GA

Alma Exchange Bank & Trust
First National Bank of Alma

ALPHARETTA, GA

First Colony Bank

AMERICUS, GA

Citizens Bank of Americus
Sumter Bank & Trust Company

ASHBURN, GA

Ashburn Bank
Community National Bank

ATHENS, GA

Athens First Bank & Trust
First American Bank & Trust
Company
SouthTrust Bank, N.A.
SunTrust Bank, Northeast
Georgia, N.A.

ATLANTA, GA

AmTrade International Bank of
Georgia
Capitol City Bank & Trust
Company
CDC Federal Credit Union
Citizens Trust Bank
Embry National Bank

First Union National Bank
NationsBank, N.A.

Regions Bank
SouthTrust Bank, N.A.
The Summit National Bank
SunTrust Bank, Atlanta
Wachovia Bank, N.A.

AUGUSTA, GA

Georgia Bank & Trust Company
of Augusta
SunTrust Bank, Augusta, N.A.

BAINBRIDGE, GA

First Community Bank of
Southwest Georgia
First Port City Bank

BARNESVILLE, GA

The First National Bank
United Bank

BARWICK, GA

Barwick Banking Company

BAXLEY, GA

Peoples State Bank & Trust

BLACKSHEAR, GA

The Blackshear Bank
Peoples Bank

BLAIRSVILLE, GA

First National Bank of Union Co.
United Community Bank

BLAKELY, GA

Bank of Early
First State Bank of Blakely

BLUE RIDGE, GA

Fannin County Bank, N.A.
Peoples Bank of Fannin County

BROXTON, GA

Colony Bank Southeast

BRUNSWICK, GA

Atlantic National Bank
Barnett Bank, N.A.
The Coastal Bank of Georgia
The First Bank of Brunswick
First Georgia Bank
NationsBank, N.A.
SunTrust Bank, Southeast
Georgia, N.A.

BUCHANAN, GA

First National Bank of Georgia

BUFORD, GA

Peoples Bank & Trust

BUTLER, GA

First Liberty Bank

BYRON, GA

First Liberty Bank

CAIRO, GA

Cairo Banking Company
Citizens Bank
First National Bank of Grady
County

CALHOUN, GA

First National Bank of Northwest GA
Georgia Bank & Trust

CAMILLA, GA

Bank of Camilla
Planters & Citizens Bank

CANTON, GA

Bank of Canton
Bank of North Georgia
Etowah Bank
Security State Bank

CARNESVILLE, GA

First Bank and Trust

CARROLLTON, GA

Citizens Bank & Trust of West
Georgia
Community First Bank
Regions Bank
West Georgia National Bank of
Carrollton

CARTERSVILLE, GA

Bartow County Bank
First Community Bank & Trust

CEDARTOWN, GA

The First National Bank of Polk
County
Regions Bank

CHATSWORTH, GA

Cohutta Banking Company
The First National Bank of
Chatsworth

CLAXTON, GA

The Claxton Bank
Tippins Bank and Trust

CLAYTON, GA

First Clayton Bank & Trust
Company
Rabun County Bank
Regions Bank

CLEVELAND, GA

Regions Bank
White County Bank

COCHRAN, GA

The Citizens Bank of Cochran
State Bank of Cochran

COLQUITT, GA

Peoples Community Bank

COLUMBUS, GA

SouthTrust Bank, N.A.
Columbus Bank & Trust Co.
Regions Bank
SunTrust Bank, West Georgia,
N.A.

COMER, GA

Merchants & Farmers Bank

COMMERCE, GA

Community Bank & Trust-Jackson
First National Bank of Commerce

CONYERS, GA

Main Street Savings Bank, F.S.B.
Regions Bank

CORDELE, GA

Central Bank & Trust
Cordele Banking Company
Regions Bank

CORNELIA, GA

Community Bank & Trust
Habersham Bank
Regions Bank

COVINGTON, GA

First Newton Bank
Main Street Bank

CRAWFORD, GA

The Commercial Bank

CUMMING, GA

The Citizens Bank of Forsyth
County
Premier Bank
Regions Bank

DAHLONEGA, GA

Bank of Dahlonega
Lumpkin County Bank
United Community Bank

DALLAS, GA

Regions Bank

DALTON, GA

Colonial Bank
First Bank of Dalton
Hardwick Bank & Trust Company
Regions Bank

DANIELSVILLE, GA

Bank of Danielsville

DARIEN, GA

Sapelo National Bank
Southeastern Bank

DAWSON, GA

Bank of Dawson
The Citizens State Bank

DAWSONVILLE, GA

Dawson County Bank
First Community Bank of
Dawsonville

DECATUR, GA

Bank Atlanta
Decatur First Bank
Fidelity National Bank

DONALSONVILLE, GA

The Citizens State Bank
First State Bank of Donalsonville
Merchants and Farmers Bank

DORAVILLE, GA

Global Commerce Bank

DOUGLAS, GA

First Liberty Bank
First National Bank of Coffee
County

DOUGLASVILLE, GA

Citizens and Merchants State Bank
Douglas County Bank
Regions Bank

DUBLIN, GA

Farmers & Merchants Bank
Farmers State Bank
The Morris State Bank

DULUTH, GA

Premier Bank
Georgia First Bank, N.A.

DUNWOODY, GA

Colonial Bank
The Enterprise National Bank of
Atlanta

EAST POINT, GA

Regions Bank

EASTMAN, GA

The Bank of Dodge County
Bank of Eastman
Citizens Bank and Trust Company

EATONTON, GA

Farmers & Merchants Bank
The Peoples Bank

EDISON, GA

The Bank of Edison

ELBERTON, GA

Pinnacle Bank, N.A.
Regions Bank

ELLAVILLE, GA

Bank of Ellaville

ELLIJAY, GA

The Bank of Ellijay
Gilmer County Bank
Regions Bank

FAIRBURN, GA

Fairburn Banking Company

FAYETTEVILLE, GA

First Citizens Bank of Georgia

FITZGERALD, GA

The Bank of Fitzgerald
Community Banking Company of
Fitzgerald

FOLKSTON, GA

First National Bank

FORSYTH, GA

The Farmers Bank
Monroe County Bank

FORT VALLEY, GA

The Citizens Bank
First South Bank, N.A.

FRANKLIN, GA

Regions Bank

GAINESVILLE, GA

Gainesville Bank & Trust
Georgia First Bank, N.A.
Lanier National Bank
Regions Bank

GLENNVILLE, GA

First Citizens Bank
The Glennville Bank and Trust
Company
South Georgia Bank, FSB

GORDON, GA

The Gordon Bank

GRAY, GA

Bank of Gray

GREENSBORO, GA

Citizens Union Bank
Premier Bank

GREENVILLE, GA

Greenville Banking Company

GRIFFIN, GA

The Bank of Spalding County
First National Bank of Griffin
United Bank

HADDOCK, GA

Jones County Bank

HAHIRA, GA

Citizens Community Bank

HARTWELL, GA

Bank of Hartwell

HAWKINSVILLE, GA

Planters Bank
SunMark Community Bank

HAZLEHURST, GA

Bank of Hazelhurst

HIWASSEE, GA

Bank of Hiawassee
Towns County Bank

HINESVILLE, GA

The Coastal Bank
The Heritage Bank

HIRAM, GA

Community Trust Bank

HOGANSVILLE, GA

The Citizens Bank

HOMER, GA

Regions Bank

HOMERVILLE, GA

Citizens Bank

IRWINTON, GA

Wilkinson County Bank

JACKSON, GA

McIntosh State Bank

JASPER, GA

Crescent Bank & Trust Company
Jasper Banking Company
Regions Bank

JEFFERSON, GA

Regions Bank

JEFFERSONVILLE, GA

Peoples State Bank

JESUP, GA

Wayne National Bank

JONESBORO, GA

Heritage Bank

KENNESAW, GA

The Westside Bank & Trust
Company

KINGSLAND, GA

Citizens State Bank

LAFAYETTE, GA

The Bank of LaFayette, Georgia

LA GRANGE, GA

Commercial Bank & Trust
Company of Troup County
Community Bank & Trust-Troup
First Flag Bank

LAKELAND, GA

Farmers and Merchants Bank

LAVONIA, GA

Northeast Georgia Bank
Peoples Bank

LAWRENCEVILLE, GA

The Brand Banking Company
Colonial Bank
Premier Bank

LENOX, GA

Bank of Lenox

LINCOLNTON, GA

Farmers State Bank

LITHONIA, GA

Peoples Bank

LOUISVILLE, GA

First National Bank & Trust
Company

LUMBER CITY, GA

Bank of Lumber City

LUMPKIN, GA

Farmers State Bank

MABLETON, GA

Georgia State Bank

MACON, GA

Colonial Bank
First Liberty Bank
First South Bank, N.A.
Security Bank of Bibb County
SunTrust Bank, Middle Georgia, N.A.

MADISON, GA

Bank of Madison
Regions Bank

MANCHESTER, GA

F&M Bank & Trust Company

MARIETTA, GA

Charter Bank & Trust Company
First Alliance Bank
Riverside Bank

MCDONOUGH, GA

First Community Bank of Henry
County

McRAE, GA

The Merchants & Citizens Bank
The Security State Bank

METTER, GA

The Brown Bank
Metter Banking Company
Pineland State Bank

MILAN, GA

Citizens Bank

MILLEDGEVILLE, GA

Century Bank & Trust
Exchange Bank
First National Bank of Baldwin
County
Premier Bank

MILLEN, GA

First National Bank & Trust
Company
Regions Bank

MOLENA, GA

First Bank of Pike

MONROE, GA

The National Bank of Walton
County
Walton Bank & Trust Company

MONTICELLO, GA

Bank of Monticello

MOULTRIE, GAAmerican Banking Company
Southwest Georgia Bank**MOUNT VERNON, GA**

Mt. Vernon Bank

NASHVILLE, GABank of Alapaha
The Citizens Bank
The United Banking Company**NEWINGTON, GA**

Bank of Newington

NEWMAN, GABank of Coweta
The Bank of Newnan
First Citizens Bank
First South Bank, N.A.**NORCROSS, GA**Excel Federal Credit Union
First Capital Bank
First Security National Bank
Regions Bank**OCILLA, GA**Citizens Security Bank
The First State Bank of South
Georgia**PEACHTREE CITY, GA**Fayette County Bank
Peachtree National Bank**PELHAM, GA**Family Federal Savings Bank
Pelham Banking Company**PEMBROKE, GA**

First Bank of Coastal Georgia

PERRY, GAThe Bank of Perry
Crossroads Bank of Georgia**PINE MOUNTAIN, GA**

First Peoples Bank

POWDER SPRINGS, GAIndependent Bank & Trust
Company**QUITMAN, GA**The Citizens National Bank of
Quitman
Heritage Community Bank**REIDSVILLE, GA**

The Tattnall Bank

RICHMOND HILL, GA

Bryan Bank & Trust

RINCON, GA

AmeriBank, N.A.

RINGGOLD, GA

Northwest Georgia Bank

RIVERDALE, GA

First Citizens Bank of Georgia

ROBERTA, GAFirst Community Bank of Georgia
First Liberty Bank**ROCKMART, GA**

United Bank & Trust Company

ROME, GAAmSouth Bank of Georgia
Citizens First Bank
First Floyd Bank
Greater Rome Bank
Regions Bank
SunTrust Bank, Northwest
Georgia, N.A.**ROSSVILLE, GA**

Rossville Bank

ROSWELL, GA

Milton National Bank

ROYSTON, GA

Pinnacle Bank, N.A.

ST. MARYS, GA

First National Bank

ST. SIMONS ISLAND, GA

Frederica Bank & Trust

SANDERSVILLE, GACitizens Bank of Washington
County
The Geo. D. Warthen Bank**SARDIS, GA**

Bank of Burke County

SAVANNAH, GAAmeriBank, N.A.
The Carver State Bank
The Savannah Bank, N.A.
SunTrust Bank, Savannah, N.A.**SENOIA, GA**Farmers & Merchants Community
Bank**SMYRNA, GA**

Regions Bank

SNELLVILLE, GAThe Eastside Bank & Trust
Company**SOCIAL CIRCLE, GA**

Georgia Central Bank

SPARTA, GABank of Hancock County
United Security Bank**SPRINGFIELD, GA**

First National Bank of Effingham

STATESBORO, GAEagle Bank & Trust
Farmers & Merchants Bank
First Bulloch Bank & Trust
Company
Sea Island Bank**STOCKBRIDGE, GA**The First State Bank
Wachovia Bank, N.A.**SUMMERVILLE, GA**Farmers & Merchants Bank
First National Bank of Chattooga
County**SUWANEE, GA**

Quantum National Bank

SWAINSBORO, GAThe Citizens Bank of Swainsboro
Spivey State Bank**SYLVESTER, GA**

Sylvester Banking Company

TALBOTTON, GA

The Peoples Bank of Talbotton

THOMASTON, GABank of Upson
Thomaston Federal Savings Bank
West Central Georgia Bank**THOMASVILLE, GA**Bank of Thomas County
Commercial Bank
Farmers & Merchants Bank
Thomasville National Bank**THOMSON, GA**First Bank of Georgia
Regions Bank**TIFTON, GA**Citizens Security Bank
First Community Bank of Tifton
South Georgia Banking Company**TOCCOA, GA**The Bank of Toccoa
Liberty Bank & Trust
Regions Bank
Stephens Federal Bank**TRENTON, GA**Bank of Dade
Citizens Bank & Trust**TUCKER, GA**Community Bank of Georgia
Mountain National Bank
Tucker Federal Bank**TWIN CITY, GA**

Durden Banking Company, Inc.

UNION POINT, GA

The Farmers Bank

VALDOSTA, GACommercial Banking Company
First State Bank & Trust Company
of Valdosta
The Park Avenue Bank
Valdosta Bank & Trust**VIDALIA, GA**Altamaha Bank & Trust
Darby Bank & Trust Company**VIENNA, GA**Bank of Dooly
Citizens Bank**VILLA RICA, GA**HomeTown Bank of Villa Rica
Regions Bank**WADLEY, GA**First National Bank & Trust
Company**WARNER ROBINS, GA**

CB&T Bank of Middle Georgia

WARRENTON, GA

Citizens Bank

WATKINSVILLE, GAAthens First Bank & Trust
Oconee State Bank**WAYCROSS, GA**First Georgia Bank
First Liberty Bank
The Patterson Bank
Waycross Bank & Trust**WAYNESBORO, GA**

First National Bank

WEST POINT, GA

First National Bank of West Point

WINDER, GAPeoples Bank
Regions Bank**WINTERVILLE, GA**

Main Street Bank

WOODBURY, GA

Woodbury Banking Company

WOODLAND, GA

The Talbot State Bank

WOODSTOCK, GACitizens Bank (Cherokee County)
First National Bank of Cherokee**WRENS, GA**

First State Bank

WRIGHTSVILLE, GA

Bank of Wrightsville

ZEBULON, GA

United Bank

AUDITED 1999 FINANCIAL STATEMENT

JOHN BALTUS GEORGIN

AUDITED 1999 FINANCIAL STATEMENT

7-6778 1953 11 4 10 1048A

University of California

Xiao; Lu; Qian; Wu; Zhai; Zhao

[illegible]

Yes, I understand that it is incorrect to use the word "I" in a title.

4:32PM EST (1) 316.15

Notes: 1. $\mu = 0.001$ and $\sigma = 0.001$.

Pen. Pol. 23.144

- **variety of significant accounting policies**

10. **How often do you use the following services?**

The same may be seen in the debate that has developed over economic union in the State of Ceará, which century after century has been torn between access for foreign capital

2. **Armed Forces**

The findings of stage 10 of the 'same' data have been reported on the occasion of a meeting of the 'same' group, and are available in the form of a paper by the author.

12. **നിരവധി കർമ്മങ്ങൾ**

The finite time interval τ is chosen so that $\tau \ll \tau_{\text{relax}}$ and τ is sufficiently small so that the density of states at the impurity remains constant, $N_{\text{imp}}(\epsilon) \approx N_{\text{imp}}(\epsilon_0)$, and therefore there are no inelastic and spin-flip scattering events.

A restricted fee does not mean that an individual is not subject to an income tax. The fee is merely a surcharge on the income tax liability. The purpose of the fee is to provide a source of revenue for the state. The fee is not a tax on the income of the individual, but a tax on the income of the state. The fee is not a tax on the income of the individual, but a tax on the income of the state.

temporarily restricting the availability of these resources currently available for use. For example, the use of resources (as defined by the degree of genetic and molecular variability) by the value of the resource and on the basis of the probability of their such resources originating locally and, only for those resources, for specific purposes or for a specific future purpose. When a plant is started as a result of an experiment, the use of resources is restricted to the purpose of the experiment and the use of resources is not possible for other purposes.

[illegible]

AUDITED 1999 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1999 and 1998

(a) Cash and Cash Equivalents

The State Bar reports all cash and amounts with maturities of three months or less as cash and equivalents. Indebtedness is stated at and when appropriate, interest value.

(b) Investment

Investments are recorded at fair market value.

(c) Building, Furniture, Fixtures, and Equipment

Building, furniture, fixtures, and equipment are carried at cost. Additions, improvements, on-going repairs, and the expense as incurred, within the period of the cost of the item, are charged to the expense. A depreciation schedule is computed based on the estimated useful life of the respective asset. It is in the depreciation method of depreciation. The estimated useful life is charged to the depreciation method of depreciation.

(d) Deferred Income

Annual dues for and that have not been received are reported as deferred income in 1999. They were reported in 1998. The amounts collected prior to June 30, 1998 are reported as deferred income.

(e) Funded Allocation of Expenses

The costs of providing the various programs and other activities have been allocated to the various areas based on the statement of activities. Accordingly, certain costs have been allocated among the programs and supporting activities.

(f) Use of Fundraising Management

Management of the State Bar has made certain expenses and management related to the reporting of account expenses and deferred compensation to prepare the financial statements in accordance with generally accepted accounting principles. Such results could differ from those reported.

(g) Insurance

The State Bar is covered from 1998 through 1999 under Section 115 of the Georgia Insurance Code.

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1999 and 1998

(g) Reinsurance

Financial institutions are required to report reinsurance to the State Bar of Georgia.

(h) Membership

Membership in the State Bar of Georgia is required for all members of the State Bar of Georgia.

(i) Investments

Investments are recorded at fair value. In June 30, 1999 and 1998, investments were reported as follows:

	1999	1998
Investments in mutual funds	\$ 1,111,111	\$ 1,111,111
Investments in other securities	88,000	88,000
	<u>\$ 1,199,111</u>	<u>\$ 1,200,111</u>

(j) Building, Furniture, Fixtures, and Equipment

Building, furniture, fixtures, and equipment are stated as follows:

	1999	1998
Building	\$ 1,111,111	\$ 1,111,111
Furniture and fixtures	88,000	88,000
Equipment	88,000	88,000
Less: accumulated depreciation	<u>(1,111,111)</u>	<u>(1,111,111)</u>
	<u>\$ 88,000</u>	<u>\$ 88,000</u>

The State Bar of Georgia is a non-profit organization.

By order of the Board of Directors
 State Bar of Georgia
 Secretary

	1999	1998
By order of the Board of Directors	\$ 1,111,111	\$ 1,111,111
State Bar of Georgia	88,000	88,000
Less: accumulated depreciation	<u>(1,111,111)</u>	<u>(1,111,111)</u>
	<u>\$ 88,000</u>	<u>\$ 88,000</u>

AUDITED 1999 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1999 and 1998

(5) Retirement Plan

The State Bar has defined contribution pension plan and covers substantially all employees. Contributions of 10% of pay in 1998 and 1999 were approximately \$180,000 and \$192,000, respectively.

(6) Leases

Through 1998, the State Bar leased its principal office space under a lease agreement estimated for an additional three years. The lease agreement, however, was not in accordance with Georgia law. In 1999, the State Bar entered into a new lease agreement for its principal office space which expires in September 2000.

Future minimum lease payments under these agreements are as follows:

Years ending June 30	
2000	\$ 1,000.00
2001	1,000.00
2002	1,000.00
Total	\$ 3,000.00

Actual expense changes in operations attributable to depreciation fully offset both for the years ended June 30, 1999 and 1998.

(7) Related Party Transactions

The State Bar was reimbursed by related organizations for the payment of salaries and operating expenses during 1999 and 1998 as follows:

	1999	1998
Georgia Bar Conference Inc.	\$ 45,000	\$90,000
Third Judicial Commission on Professional Standards	11,000	22,000
Continuing Education Law Center	68,000	136,000
	\$ 124,000	\$248,000

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1999 and 1998

(8) Deferred Compensation for Retired General Counsel

The State Bar has an agreement with its retired general counsel providing for a lump sum payment of \$200,000 upon the death of the retiree. The amount payable will be reduced as needed. In 1999, the State Bar has not yet received any payments which will be required under the agreement. The State Bar has not yet received any payments which will be required by future payments to the beneficiaries. As of June 30, 1999 and 1998, the amount payable will be \$200,000 and \$200,000, respectively.

(9) Board-Designated Net Assets

The State Bar has Board-Designated net assets for the following purposes after June 30, 1999 and 1998:

	1999	1998
Operating expenses	\$ 180,000	\$81,000
Operating reserve	91,000	182,000
General fund	1,000,000	1,000,000
	\$ 1,271,000	\$1,263,000

(10) Operating Transfers

The State Bar transfers of funds to other organizations are as follows for the years ended June 30, 1999 and 1998:

	1999	1998
Operating reserve	\$ 180,000	\$182,000
Operating reserve	91,000	182,000
Operating reserve	1,000,000	1,000,000
	\$ 1,271,000	\$1,264,000

AUDITED 1999 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Audited Financial Statement

June 30, 1999 and 1998

(12) Temporary Restricted Net Assets

Net assets are restricted from their use for other than 1999 for certain expenses arising after restricted purposes or the occurrence of other events specified by donors as follows:

Restricted Reserves - Unexpended	1999	1998
Public School Mass Trial	\$ 11,000	12,000
Supreme Court Trial	2,000	
Law School	2,000	
Bar School Conference	343	800
Expenditure	12,343	12,800
Legal Journals	2,000	1,500
Unexpended	2,657	800
Total Restricted Assets	\$ 14,997	\$ 13,600

Bar School Mass Trial Conference at the 1998 and 1999 meetings available for the following purposes:

	1999	1998
Bar School Mass Trial	\$ 11,000	12,000
Supreme Court Trial	2,000	
Law School	2,000	
Bar School Conference	343	800
Expenditure	12,343	12,800
Legal Journals	2,000	1,500
Unexpended	2,657	800
Total Restricted Assets	\$ 14,997	\$ 13,600

(13) Bar Course Purchase

On April 19, 1999, the State Bar purchased an office building from the Federal Reserve Bank of Atlanta for \$9,257,500 (purchase price of \$9,000,000 plus capital and costs of \$257,500). The building will be utilized as headquarters for the State Bar and affiliated entities following completion in 2000. The Federal Reserve Bank of Atlanta will remain as tenants of the office building until completion is complete on their new building in 2001 and will pay rent to the State Bar of \$67,500.

STATE BAR OF GEORGIA

Audited Financial Statement

June 30, 1999 and 1998

Expenses of the building, the State Bar entered into a note payable agreement with the Federal Reserve Bank of Atlanta for \$9,257,500. The State Bar estimates its carrying cost with the Federal Reserve Bank in 1999 is about a note requiring monthly interest of \$90,000 on a fixed interest rate of 6.5%. This note requires the State Bar remain in obligations from the previous only required the right to redeem the note bank.

From, minimum principal payments are as follows:

Years ending June 30	
2000	\$ 900,000
2001	900,000
Total	\$ 1,800,000

In 2002, in the building of annual principal payments, the State Bar charges cost of its members a \$100 assessment payable in \$10 installments over four years. On the year ended June 30, 1999 and 1998, these fees were \$1,000 and \$1,000, respectively.

(14) Commitments and Contingencies

State Bar is subject to various claims and judgments arising in the ordinary course of its business and has been named as a defendant in several lawsuits. The outcome of the outcome of the Georgia Court of Appeals and every other appellate court is likely to be filed with the State Bar without material adverse effect on the financial position of the State Bar.

ANNOUNCEMENT

Annual Fiction Writing Competition

THE EDITORIAL BOARD

of the *Georgia Bar Journal* is pleased to announce that it will again sponsor the Annual Fiction Writing Competition in accordance with the rules set below. The purposes of the competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar, and to provide an innovative vehicle for the illustration of the life and work of lawyers. For further information contact Jennifer M. Davis, Communications Director, State Bar of Georgia, 800 The Hurt Bldg., 50 Hurt Plaza, Atlanta, GA 30303. Phone (404) 527-8736.



Rules for Annual Fiction Writing Competition

The following rules will govern the Fiction Writing Competition sponsored by the Editorial Board of the *Georgia Bar Journal*:

- (1). The competition is open to any member in good standing of the State Bar of Georgia, except current members of the Editorial Board. Authors may collaborate, but only one submission from each member will be considered.
- (2). Subject to the following criteria, the article may be on any fictional topic, and may be in any form (humorous, anecdotal, mystery, science fiction, etc.) Among the criteria the Board will consider in judging the articles submitted are: quality of writing; creativity; degree of interest to lawyers and relevance to their life and work; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The Board will not consider any article that, in the sole judgment of the Board, contains matter that is libelous, or that violates accepted community

standards of good taste or decency.

- (3). All articles submitted to the Competition become the property of the State Bar of Georgia, and by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental, and that the article has not been previously published.

- (4). Articles should not be more than 7,500 words in length and should be submitted in *triplicate* on double-spaced, typed,

letter-size (8½" x 11") paper.

- (5). Articles will be judged without knowledge of the identity of the author's name and State Bar ID number should be placed only on a separate cover sheet with the name of the story.

- (6). All submissions must be *received* at State Bar Headquarters in proper form prior to the close of business on **Friday, January 28, 2000**. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, *Georgia Bar Journal*, 800 The Hurt Bldg., 50 Hurt Plaza, Atlanta, GA 30303. The author assumes all risks of delivery by mail.

- (7). Depending on the number of submissions, the Board may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the Board. Contestants will be advised of the results of the Competition by letter. Honorable mentions may be announced.

- (8). The winning article, if any, will be published. The board reserves the right to edit articles, and to select no winner and to publish no article from among those submitted if the submissions are deemed by the Board not to be of notable quality. ☐

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Continued from Page 33

45. *Id.* § 44-14-361.1(4).
46. "Pay if paid" or "contingent payment" clauses are contractual provisions which provide that payment to a subcontractor or material supplier is contingent upon the general contractor's receipt of payment from the owner. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Georgia Interstate Elec. Co.*, 187 Ga. App. 579, 370 S.E.2d 829 (1988). In order to be effective, such clauses must use "condition precedent" language or otherwise express and clearly show the intention of the parties. *Id.* at 580, 370 S.E.2d at 831 (citing *Sasser & Co. v. Griffin*, 133 Ga. App. 83, 86, 210 S.E.2d 34, 39 (1974); *D.I. Corbett Elec. v. Venture Constr. Co.*, 140 Ga. App. 586, 587, 231 S.E.2d 536, 537 (1976); *Peacock Constr. Co. v. West*, 111 Ga. App. 604, 606, 142 S.E.2d 332, 333 (1965)).
47. 236 Ga. App. 793, 513 S.E.2d 759 (1999).
48. 232 Ga. App. 569, 502 S.E.2d 508 (1998).
49. *See* Document A201-1997, General Information.
50. The Engineers Joint Contract Document Committee, comprising the American Society of Consulting Engineers council, American Society of Civil Engineers, and the NSPE's Professional Engineers in Private Practice division, offer form contracts. The Associated General Contractors and American Subcontractors Association also offer forms. The Associated Owners and Developers is in the process of creating another set of form agreements.
51. Document A201-1997, Section 4.3.10; Document B141-1997, Section 1.3.6.
52. Document A201-1997, Paragraph 4.3.10.
53. *Id.*
54. Document B141-1997, Paragraph 1.3.8.7.
55. Document A201-1997, Paragraphs 4.3.10 and 14.4.
56. Document A201-1997, Paragraph 6.2.3.
57. *United States v. Spearin*, 248 U.S. 132, 39 S. Ct. 59 (1918).
58. *See, e.g.*, Federal Acquisition Regulations, § 52.249-2.
59. Document A201-1997, Paragraph 14.4.
60. Under O.C.G.A. §§ 13-6-2 through 13-6-9, a non-breaching party may generally recover its costs of performance to date plus the reasonably-anticipated benefit of future performance.
61. Document A201-1997, Paragraph 4.3.2.
62. Document B141, Paragraph 1.3.2 and 1.3.8.
63. *Id.*
64. *Id.*
65. Document B141-1997, Paragraphs 1.3.8.1 and 1.3.9.1.
66. Document B141-1997, Paragraph 1.2.2.1.
67. Document B141-1997, Paragraph 2.8.
68. Document B141-1997, Paragraphs 1.2.2.1 and 1.2.2.2.
69. Document B141-1997, Paragraph 2.6.1.1.
70. Document A201-1997, Paragraph 3.12.10.
71. Document A201-1997, Paragraph 3.2.
72. Document A201-1997, Paragraph 12.2.2.
73. Document A201-1997, Paragraph 2.4.1.
74. Document A201-1997, Paragraph 2.1.1.
75. Document A201-1997, Paragraph 2.1.1.

Insurance
Specialists
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ads

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gal Research
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p36



CLE/Ethics/Professionalism/Trial Practice

JANUARY 2000

6

ICLE

Working Smarter, Not
Harder

Atlanta, GA

6.0/0.0/0.0/0.0

PRACTISING LAW
INSTITUTE

Intellectual Property
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