

GEORGIA BAR Journal

OCTOBER 1998 • VOL. 4 NO. 2

Barber
Shop

Haircuts

Divorce/Wills

Bankruptcy

Tax Planning

A LITTLE OFF THE TOP:
ACCOUNTING
FIRMS
EDGE
INTO THE
LEGAL
MARKETPLACE

6-MEMBER CIVIL JURY • HEALTH CARE FRAUD • MILLENNIUM BUG

West group directory - New

EDITORIAL BOARD

THEODORE H. DAVIS JR., *Editor-in-Chief*

JENNIFER M. DAVIS, *Managing Editor*

LYN ARMSTRONG

D. SCOTT MURRAY

GARY C. CHRISTY

MARISA ANNE PAGNATTARO

O. WAYNE ELLERBEE

EARNEST REDWINE

GEORGE W. FRYHOFFER III

AMELIA TOY RUDOLPH

MICHAEL JABLONSKI

WILLIAM W. SAPP

ANNE R. JACOBS

JOHN SPANGLER III

MICHELLE W. JOHNSON

PAMELA WHITE-COLBERT

SARAJANE N. LOVE

J. MICHAEL WIGGINS

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

WILLIAM E. CANNON JR., ALBANY
President

RUDOLPH N. PATTERSON, MACON
President-elect

JAMES B. FRANKLIN, STATESBORO
Secretary

GEORGE E. MUNDY, CEDARTOWN
Treasurer

LINDA A. KLEIN, ATLANTA
Immediate Past President

ROSS J. ADAMS, ATLANTA
YLD President

JOSEPH W. DENT, ALBANY
YLD President-elect

JAMES D. HYDER JR., AUGUSTA
YLD Immediate Past President

EDITORS EMERITUS • (EX OFFICIO MEMBERS)

L. BRETT LOCKWOOD, 1995-1997

STEPHANIE B. MANIS, 1993-1995

WILLIAM L. BOST JR., 1991-1993

CHARLES R. ADAMS III, 1989-1991

L. DALE OWENS, 1987-1989

DONNA G. BARWICK, 1986-1987

JAMES C. GAULDEN JR., 1985-1986

JERRY B. BLACKSTOCK, 1984-1985

STEVEN M. COLLINS, 1982-1984

WALTER M. GRANT, 1979-1982

STEPHEN E. RAVILLE, 1977-1979

ROBERT H. WALLING, 1975-1977

COMMUNICATIONS COMMITTEE

DENNIS C. O'BRIEN, MARIETTA
Chairperson

LAMAR W. SIZEMORE JR., MACON
Vice-Chairperson

STAFF

JENNIFER M. DAVIS
Director of Communications

ERIN E. MILES
Internet Coordinator

AMY E. WILLIAMS
Communications Coordinator

DENISE PUCKETT
Administrative Assistant

GEORGIA BAR Journal

OCTOBER 1998 • VOL. 4 NO. 2

On the Cover: *This cover, which is a composite of a real photo and computerized enhancement, spoofs what the future may hold for the legal profession as other groups cut into services traditionally offered by lawyers. Our cover story explores how accounting firms may be "taking a little off the top" by offering legal advice in addition to their traditional services. The photo was taken at the Brass Chair Barber Shop in Avondale Estates and the owner, Don Graves, appears as the barber. The flowers and clay planters were provided by GardenTopia in Decatur. Photograph by Richard T. Bryant.*

QUICK DIAL

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

HEADQUARTERS

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

Visit us on the Internet at www.gabar.org

SOUTH GEORGIA OFFICE

244 E. Second St. (31794) • P.O. Box 1390 • Tifton, GA 31793-1390
(800) 330-0446 (912) 387-0446
FAX (912) 382-7435

MANUSCRIPT SUBMISSIONS

The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (16th ed. 1996). Please address unsolicited manuscripts to: Theodore H. Davis Jr., Editor-in-Chief, Kilpatrick Stockton LLP, 1100 Peachtree St., Suite 2800, Atlanta, GA 30309-4530. Authors will be notified of the Editorial Board's decision following its next meeting.

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

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

PUBLISHER'S STATEMENT

The *Georgia Bar Journal* (SSN-0016-8416) is published six times per year (bi-monthly) by the State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303-2934. © State Bar of Georgia 1996. One copy of each issue is furnished to members as part of their State Bar dues. Subscriptions: \$36 to non-members. Single copies: \$6. Periodicals postage paid in Atlanta, Georgia and additional offices. Opinions and conclusions expressed in articles herein are those of the authors and not necessarily those of the Editorial Board, Communications Committee, Officers or Board of Governors of the State Bar of Georgia. Advertising rate card will be furnished upon request. Publishing of an advertisement does not imply endorsement of any product or service offered. **POSTMASTER:** Send address changes to same address.

DISABILITIES

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

Lexis Nexis
pick up 6/98 -
p4

GEORGIA BAR Journal

OCTOBER 1998 • VOL. 4 NO. 2

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

COVER STORY

A Little Off the Top: Accounting Firms Edge Into the Law Market

By Gregory S. Smith
10

LEGAL ARTICLES

The Six-Member Civil Jury: In Georgia?

By R. Perry Sentell Jr.
16

Health Care Fraud: What Do You Do When the Government Knocks?

By John G. Malcolm and Robert F. Schroeder
22

Juvenile Court Focus

"Committable for Mental Illness": Is this a True Challenge to Transfer?

By Lyn K. Armstrong
32

FEATURES

Grants to Provide Legal Services to Domestic Violence Victims

By Billie Bolton
40

Changing the Way Attorneys Do Business in Georgia

By Secretary of State Lewis Massey
42

Opening the Doors of Public Business

By Hollie Manheimer
44

Bar Foundation Awards \$2.25 Million

By Len Horton
46

High School Mock Trial Sets New Goal

By Carol Brantley
48

With Data and Justice For All

By Amy E. Williams
51

DEPARTMENTS

From The President

Too Much Talking, Not Enough Listening
By William E. Cannon Jr.
6

From The Director

What is the State Bar Doing for You?
By Cliff Brashier
7

Letter to the Editor

9

From the YLD President

Congratulations to YLD For National Awards
By Ross J. Adams
53

Book Reviews

On The Road to Same-Sex Marriage:
A Supportive Guide to Psychological, Political
and Legal Issues
Reviewed by Chip Rowan
54

Pro Bono

Access to Justice: A Fuller Sense of
Pro Bono Publico
By Michael L. Monahan
58

Practice Tips

Practical Suggestions for Handling
Independent Adoptions
By David P. Darden
60

Law Practice Management

Millennium Bug: Is your Firm Infected?
By Terri Olson
62

Professionalism

Law School Orientations Expand
64

Law School News

Emory Endowment to Honor a Legal Pioneer
66

Client Relations

Improved Client Relations Starts With
Looking Through the Client's Eyes
By Henry W. Ewalt
68

Community Service

Preserving Georgia's Rich History
By Willie Jordan
70

Who's Where

72

Voluntary Bars

74

South Georgia News

75

Section News

76

From the Attorney General

77

Bench & Bar

78

Georgia Trial Reporter

79

In Memoriam

80

Lawyer Discipline

81

Notices

Notice of Proposed Formal Advisory Opinion
Supreme Court Issues
Formal Advisory Opinions
82

CLE Calendar

86

Ad Index

86

Classifieds

90

TOO MUCH TALKING, NOT ENOUGH LISTENING



By William E. Cannon Jr.

The car radio is the object of much disagreement in the Cannon family. I am a talk radio junkie and no one else in my family shares this affliction. Whenever I drive Dawn's car I always reset the radio to a talk radio station. This results in a frown followed by "I don't see how you can listen to that stuff!" Being trained in the nuances of human language, I quickly realize that she does not wish to be entertained by Rush, Neal or J. Gordon, and I surrender control of the radio dial.

For some inexplicable reason I enjoy listening to people with whom I often disagree. Even though my blood pressure climbs and I sometimes talk back to the radio, I seem to be unable to kick the habit. Just as school children run to a playground fight, I cannot resist the sound of intellectual combat.

Talk radio has its roots in the beginning of our American republic. Taverns throughout the colonies were places of lively discussion. Sports bars didn't exist so the topic often discussed was politics. I imagine that the debate was intense in Boston when the tea tax was imposed. Wouldn't you have enjoyed the heated exchanges in Philadelphia taverns in early 1776 over the

subject of rebellion? Out of this wonderful intellectual energy came our Constitution and our country's reverence for free speech.

Free speech is wonderful but it has little value unless there is also an abundance of listening. The First Amendment protects not only our right to express our own ideas. It also protects our right to listen to other person's ideas—especially those who disagree with the majority point of view.

Increasingly on talk radio I hear too much talking and not enough listening. A radio host introduces the topic of the day and invites listeners to call with their comments. The remainder of the show consists of callers echoing the very same thoughts expressed by the host and ridiculing anyone who would dare think differently. Rarely am I treated to a caller who disagrees. Even more rare is the host who admits that someone with a different viewpoint may be correct on some issue. What a wasted opportunity.

Talk radio and spirited public debate can invigorate our system of government and our citizens. It offers a wonderful opportunity for people in Los Angeles to know what folks in Valdosta think. Information that is briefly mentioned on the six o'clock news can be discussed in depth. However, little is accomplished if no one is listening to all of the information offered.

I yearn for the day when talk radio will be alive with differing ideas—when the host will be hard pressed to defend ideas and callers will disagree with each other. Defending your intellectual choices

requires that you listen to those who disagree and that is the element missing from the airwaves today. Instead of Rush hearing "dittos" I want him to hear people who disagree with his position on issues. I want to hear someone on the radio—I don't care if it's a caller or host—say, "I will concede you are right on that point but what about...?"

Perhaps talk radio has something to learn from lawyers. We encourage debate. In fact, our legal system is built on the assumption that the best way to determine the truth is to have vigorous advocates on both sides of an issue. But lawyers also encourage listening. In arguing before the bench or a jury we listen to the argument of the other side, craft our response and often concede those issues where the other side is clearly correct.

The same approach is taken with transactional matters. Lawyers will exchange drafts of documents after carefully reading the other side's proposal. At the same time, the prudent transactional lawyer will advise the client when the other party has raised a valid point.

I see the same level of advocacy during debate at meetings of the State Bar Board of Governors. Positions are vigorously argued and the Board is often closely divided. However, members compliment each other on their presentations and are often willing to admit when some portion of the opposing view is correct. This type of debate is healthy and productive and the consensus that usually follows leads to wise decisions.

Lawyers have a wonderful tradition of lively debate and careful listening. Good lawyers listen to their opponent before responding. Good judges listen carefully before making a decision. Good citizens should do likewise. ☐

WHAT IS THE STATE BAR DOING FOR YOU?



By Cliff Brashier

The State Bar's role in assisting the Supreme Court of Georgia in the regulation of the legal profession is well known. But the Bar's many other services are not. This is understandable because there are so many programs that it would be very difficult for any busy lawyer to keep up with them all. Our goal, however, is to enhance awareness to the maximum extent possible through more and different means of communication.

Most State Bar programs support the regulatory purpose by helping lawyers to practice law better and prevent problems in their client relationships. When the results are successful, clients, lawyers, the legal profession, and the judicial system all benefit.

The *Georgia Bar Journal* remains our traditional source for providing information to Georgia lawyers. It has been expanded and improved during the past two years to make it both more comprehensive and reader friendly.

The latest communication vehicle is the State Bar's Web site. All lawyers with Internet access can now take advantage of free legal research, law practice management forms, the directory and handbook, links to other legal organizations,

and much more. Simply go to www.gabar.org to see how this can help your practice.

Presentations to local, circuit, and voluntary bar organizations are another important communications resource. Some of the most popular programs are as follows:

- ♦ **Officer Presentations:** Bill Cannon, the State Bar President; Rudolph Patterson, the President-elect; Ross Adams, YLD President; and other Bar officers are available

Most State Bar programs support the regulatory purpose by helping lawyers to practice law better and prevent problems in their client relationships.

to share information about current issues and opportunities for our profession.

- ♦ **Foundations of Freedom:** This newest program is designed to educate and restore the public's confidence in the legal process. The program will establish a grass roots speaker bureau to contact business, community, civic and school groups offering programs on all aspects of the legal system, including the role lawyers play in protecting our freedom and ensuring equal justice for all, the

importance of an independent judiciary, and other topics of current interest to the public.

- ♦ **Professional Enhancement Program:** This full-day seminar is designed to help attorneys improve client relations and avoid disciplinary complaints. It is approved for 6 hours of CLE credit including 3 professionalism hours and 3 ethics hours. Shorter ethics presentations are also available.
- ♦ **Standards of the Profession Mentor Program:** The State Bar is conducting a statewide pilot mentor program. If successful, this could result in a significant development in the post law school education of new attorneys.
- ♦ **Judicial District Professionalism Program:** The Board of Governors recently adopted this new program which will utilize peer pressure on an informal basis to discourage unprofessional and uncivil conduct.
- ♦ **Bar Center Update:** Many local bars have hosted this presentation which includes detailed information on the work of the Bar Center Committee on the new home of our profession. The intent is to make it a useful meeting place for all lawyers. Actual occupancy is expected in the year 2001.
- ♦ **Law Practice Management Program:** We recognize that law firms, especially small law firms and sole practitioners, frequently do not have the resources or the time to manage the business side of their law practice without help. So, to assist all lawyers, the Law Practice Management program provides in-office consultations, a resource library, and many other important services.
- ♦ **Web Site Demonstration:** This popular presentation helps lawyers see the information available on

CONTINUED ON PAGE 8

Continued from page 7

our Web site and understand how easy it is for them to use.

- ♦ **Lawyers Foundation of Georgia Inc.:** The mission of this Foundation is to serve the public and the legal profession by promoting the fair administration of justice and encouraging the highest standards of integrity, competence, civility and well-being of all members of the profession. It has recently reorganized.
- ♦ **Others:** The Georgia Diversity Program, Young Lawyers Division committee activities, Fee Arbitration Program, Lawyer Assistance Program, High School Mock Trial, Consumer Assistance Program, Unauthorized Practice of Law Program, Clients' Security Fund, BASICS Program, Pro Bono Project, Professionalism, and many more topics are also available for discussion.

If you would like to see your local, circuit, or voluntary bar association sponsor any of these programs, just contact your bar's president or program chairperson. If their meeting schedule permits, they can call me to arrange the details. Or if you just want to ask a question about the foregoing or any other State Bar services, I welcome your call.

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). ☒

In November, Give Me Five!

CONSTITUTIONAL AMENDMENT #5, on the ballot for voter approval in November, is designed to take the politics out of setting salaries for our state public officials. Approval of Amendment #5 would establish a commission composed of citizens from each congressional district. Every two years the Commission would establish recommended salaries for judges, district attorneys, Governor, Lt. Governor, the General Assembly and other constitutional officers. The General Assembly could adopt or modify the Commission's recommendations or if the legislature failed to act, the Commission's recommendations would go into effect.

The concept embodied in Amendment #5 is the result of two

major studies: the Georgia Chamber of Commerce's Commission on Legislative Service and the State Bar of Georgia's Commission on Judicial Compensation. Both blue-ribbon commissions recommended the creation of a state official compensation procedure similar to that in Amendment #5 and both organizations, along with many others, support its approval in November. A large number of other states use a similar procedure to establish their officials' salaries.

Take the politics out of setting our state officials' salaries and support a fair, business-like system of compensation that will help attract and retain competent, highly-qualified public officials. Vote YES on Amendment #5. ☒



20 Years of Service



State Bar President Bill Cannon and Immediate Past President Linda Klein recognize two Bar employees for their outstanding work. Gayle Baker (left), Director of Membership, and Rita Payne (right), Director of Fee Arbitration, were presented with certificates in honor of 20 years of loyal service.

HOPING TO CONTINUE WENDELL HELTON'S LEGACY



MS. PARKER'S WONDERFUL and moving tribute to her father, Mr. Wendell Helton, published in the August 1998 *Georgia Bar Journal* was a pleasant and enlightening surprise to me. Although I knew nothing about Mr. Helton, who kept an office in the building where I work, he touched my life in a powerful way a few days after he died.

One afternoon, shortly after I took the Georgia Bar, I received a telephone call from a woman whose mother was a former client of Mr. Helton's. The woman had just learned of Mr. Helton's death. She called our office with the hope of tracking down her mother's divorce decree, the proof of which would enable her mother to receive social security benefits. Mr. Helton filed the divorce in the early 1950s.

Out of respect for Mr. Helton and bursting with renewed enthusiasm following post-traumatic bar syndrome, I volunteered to go to the courthouse and retrieve her mother's file. I found it recorded among the dusty tomes and requested it from the archives.

En route to the courthouse I stopped by my apartment to check my mail to learn whether I passed the bar. I passed. I floated the rest of the way downtown, telling my apartment manager, the courthouse guards and complete strangers my news. When I picked up the ancient file, I flipped through its legal-size, old-fashioned crinkley parchment covered with legalese, when a sad thought struck me.

What struck me was that I was carrying on my family tradition of lawyering alone. I am a third generation lawyer, but neither my father nor

grandfather were there to acknowledge my rite of passage, nor would they ever know of my struggles to earn my law degree.

I looked down at the parchment at Mr. Wendell Helton's distinctive signature and I wondered what kind of attorney he had been. Then I looked around to see if anyone was watching me, I looked up at the ceiling, nodded a private salute toward heaven, and said, "Mr. Helton, this is for you. I cannot help but think there is something significant in the first act of my legal career commencing in service to one of your clients just a few days after your career ends on this Earth. Thus, I am going to pick up where you left off. I don't know anything about you. I don't know what kind of attorney you were. But in some way, I feel indebted to you for allowing me to help the cycle of service to those who cannot help themselves

continue." With that, I finished copying the file, paid for it with my own money and sent it to the client.

Several months passed and then the article on Mr. Helton was published in the *Georgia Bar Journal*. I was flabbergasted to read the details of Mr. Helton's "long and honorable service" to the practice of law.

I was overjoyed to know that Mr. Helton had been the kind of man and lawyer he was. I felt honored to have helped one of his clients. I felt honored to have been able to take such a small part in his memorable life of service and giving. Thus, I am renewed and more determined than ever that the cycle of that kind of lawyering will continue. Thank you, Ms. Parker, for such a moving tribute to your father. And thank you, Mr. Helton, for more than you will ever know.

A. Claire Farley
Atlanta

MARK YOUR CALENDARS FOR THESE STATE BAR OF GEORGIA MEETINGS

FALL MEETING
NOVEMBER 5-7, 1998
SANDESTIN BEACH HILTON
DESTIN, FL



MIDYEAR MEETING
JANUARY 21-23, 1999
SWISSOTEL
ATLANTA, GA

SPRING MEETING
APRIL 15-18, 1999
RENAISSANCE PINEISLE RESORT
LAKE LANIER, GA



ANNUAL MEETING
JUNE 16-20, 1999
HYATT REGENCY RIVERFRONT
SAVANNAH, GA

A Little Off the Top: Accounting Firms Edge Into the Legal Market

By Gregory S. Smith

What would you say if I predicted that every major law firm in Atlanta would change its name in the next 10 years? Would you smile politely and tell me I was crazy?

Would you still be smiling if I told you the new names might be Arthur Andersen, Ernst & Young, Price Waterhouse Coopers, Deloitte & Touche, and KPMG Peat Marwick?

This is no laughing matter. Lawyers must awaken now to the growing challenge we face from accounting firms. A tidal wave of change is on our horizon, and if we do not prepare, we may soon lose our independence in the same way that doctors have lost theirs to managed care.

Background

This is a difficult article to write. Lawyers and accountants have long enjoyed a cordial relationship, often referring clients to one another. Moreover, our association is one of all lawyers, some of whom work for accounting firms. Still, this issue is too timely to ignore. And it shows why bar associations, far from being irrelevant, are in fact more relevant today than ever.

First, some background. There are fundamental differences between accounting and law that led to their separation. Accountants have a duty to objectively analyze and publicly disclose information. They are, quite literally, the referees and score keepers for American business. Attorneys, meanwhile, have a different—and some might say irreconcilable—duty, to act as advocates, and to protect client communications under several recognized privileges.

Barber Shop

Haircuts

Divorce/Wills

Bankruptcy

Tax Planning

SHAVE & SHINE



Accounting Firms Now Openly Practice Law Worldwide

The accounting profession once prided itself on an almost monastic isolation from ordinary business pressures. That began to change about 10 years ago, however, as accountants saw their bread-and-butter business of income tax preparation flatten in the wake of IRS simplification. Major accounting firms moved into consulting work, and by the early 1990s, into the actual practice of law in Europe, courtesy of a more relaxed regulatory atmosphere there. By January of 1998, Arthur Andersen & Co. had a subsidiary openly practicing law in England, France, Spain, and Australia. The global coordinator for Coopers & Lybrand announced that he expects his operation to be among the largest law firms in the world by the year 2000. KPMG acquired the largest law firm in France, and it now openly practices law in nine other European countries, plus Australia. Price Waterhouse has over 300 business lawyers—not tax lawyers, business lawyers—in 33 European countries. Deloitte & Touche is practicing law in France, Austria, Belgium, the Netherlands and Spain. By April, the *Fulton County Daily Report* reported that Andersen's 1,500 lawyers worldwide makes it the second-largest law firm in the world.

So far, this movement has not spread openly into the

United States, due mainly to our ethical rules prohibiting lawyers from sharing fees with non-lawyers—a bar rule that exists in every jurisdiction in the U.S. except the District of Columbia. Historically in the U.S., in-house lawyers can represent the company for which they work, but they cannot represent other clients and then share such fees with their corporate employer. Let me talk a bit about this rule.

The rule on its face sounds selfish—as if we simply don't want to share our profit. But that is not at all what this rule is about. The rule instead is a codification of the need for independent judgment by lawyers. In the past decade, we have seen first-hand the loss of independence faced by doctors who began sharing their fees with other entities. The public has been the loser.

So why won't this rule—or our unauthorized practice of law (UPL) laws—stop accounting firms? Because it has merely slowed them elsewhere. Fee-sharing prohibitions exist in Canada and England too, but those walls are being scaled. In a June 23 article in *The Lawyer*, a Deloitte insider, discussing his firm's recent hiring of the ex-managing partner of Toronto's Torkin Manes, noted how "UK [Deloitte]

partners are under pressure from European partners to create a UK legal capacity." E&Y now has a law firm in Toronto—which has quickly grown to 25 lawyers.

As for England, the Labour Party promised before the

RANKING THE BIG SIX

With proposed mergers, the Big Six national accounting firms will become the Much Bigger Four. Data for 1996 shows the size of existing firms. The size of new firms, shown in all caps, created by proposed mergers between KPMG Peat Marwick and Ernst & Young, and between Price Waterhouse and Coopers & Lybrand are estimates. Worldwide totals include the United States.

United States	Revenue	Partners	Other staff
KPMG Ernst & Young	\$5.8billion	3,502	30,161
Arthur Andersen	\$4.5billion	1,649	29,523
Price Waterhouse Coopers	\$4.1billion	2,204	24,501
Ernst & Young	\$3.6billion	1,993	16,902
Deloitte & Touche	\$2.9billion	1,556	15,587
KPMG Peat Marwick	\$2.3billion	1,509	13,259
Coopers & Lybrand	\$2.1billion	1,241	13,026
Price Waterhouse	\$2.0billion	963	11,475
Worldwide	Revenue	Partners	Other staff
KPMG Ernst & Young	\$15.3billion	11,820	115,169
Price Waterhouse Coopers	\$11.8billion	8,557	100,066
Arthur Andersen	\$9.5billion	2,611	70,997
Ernst & Young	\$7.8billion	5,500	54,500
KPMG Peat Marwick	\$7.5billion	6,320	60,669
Deloitte & Touche	\$6.5billion	4,793	47,250
Coopers & Lybrand	\$6.8billion	5,250	58,200
Price Waterhouse	\$5.0billion	3,307	41,866

Source: Bowman's Accounting Report/ABA Journal, February 1998

last elections to sweep away all remaining barriers to multidisciplinary practice. While it has since softened its position, merely urging the Law Society to withdraw its rules against fee-sharing, the Government has indicated that a stronger stance may be taken soon if movement does not occur.

In April, Arthur Andersen announced that it would take on board its first large existing London law firm, Wilde Sapte. *Investors Chronicle* talked of a future in which “solicitors” might be eliminated by merging their roles with accountants—leaving only litigation and “complex legal drafting” in the exclusive realm of “barristers” (for now). While Andersen later chose to pull out of its deal with Wilde Sapte after some of the law firm’s key partners left, Price Waterhouse has said it may step into Andersen’s place. Meanwhile, Nick Prentice, “tax and legal European managing partner” for Andersen, says he has identified 10 other “credible” large law firm candidates. Listen to *Investors Chronicle*’s analysis: “What is remarkable is that [this] point has been reached so quickly.”

On March 24, *Financial Times* noted the major accounting firms’ desire for a worldwide legal network and then summarized: “Already well-established in Europe, only the U.S., of the large legal services markets, remains closed to them for the time being.”

U.S. Market is Next on the Horizon

Accounting firms now appear to view future opportunities to practice law in the U.S. not merely as a challenge, but as a given. Don’t just take my word for it; listen to Ernst & Young’s global chief executive Mike Henning, speaking in the June 11 *International Accounting Bulletin*:

It is inevitable that, in the next 10 years, the major law firms will have some alliance with the Big Five [accounting] firms. ... We have developed an infrastructure in 125 countries. ... In continental Europe, which is the big driver, the legal and tax professions are indistinct. So we are, by necessity, one of the largest law firms in Spain, Germany, Switzerland, France and Italy. In South America, ... I think you’ll see top law firms there aligning very quickly with the Big Five. The stumbling block preventing a ‘Big Bang’

from happening is the current situation in the U.S. and the U.K. The breakthrough will come when some big firm decides strategically that they want it to happen. ... It’ll be worked out when they decide they don’t have the wherewithal internationally to continue to generate the fees they have been generating.

If they come, get ready. As noted in the February *ABA Journal*, “the huge accounting firms are well-armed,

with billions of dollars in revenues that make even the largest law firms appear as specks in the marketplace.” We are not weak so much as divided. ABA Litigation Chair Larry Fox warns, “If the profession doesn’t get its act together, we’re just going to get bulldozed.”

Already, accounting firms are offering services such as financial planning, litigation support, ADR, and international tax practice. Last year, Washington, D.C.’s Miller & Chevalier formed the first U.S. “strategic alliance” with an accounting firm. And Congress recently passed a bill extending a client privilege to accountants and other non-lawyers practicing before the IRS.

Will the Professions Remain Separate in the U.S.?

Ultimately, the deterrent value of our fee-sharing rules and UPL laws will turn on their interpretation. What many lawyers would say is the practice of law, accounting firms call “consulting.” Saying they offer mere “consulting” services, and not legal advice, they opine that it is not the practice of law at all—and that all such work can be done by anyone, with all fees shared.

This debate likely will be resolved first in Texas, where a complaint alleging that Andersen and Deloitte illegally practice law is being investigated by the State Bar’s UPL committee. While the complaint remains under seal, one of its four parts addresses actions in U.S. Tax Court, where Andersen has openly admitted drafting documents and filing about 60 petitions for its clients since 1992, as part of a “tax controversy practice.” Don’t expect an easy win for lawyers. The *Dallas Business Journal* notes that the UPL Committee’s \$60,000 budget faces the Dallas office of Weil, Gotshal & Manges, representing Andersen. Jenkins & Gilchrist initially considered representing the UPL committee, but later declined because it too represents several large accounting firms.

By April, the *Fulton County Daily Report* reported that Andersen’s 1,500 lawyers worldwide makes it the second-largest law firm in the world.

Another seeming deterrent might be expected from the Securities Exchange Commission, where, according to a March 29 article in the *Washington Post*, certain officials already have warned that the independence of the auditing function is being threatened by the growing business ties between accountants and the companies they audit. Still, the SEC has simply watched as the percentage of revenue derived by top accounting firms from consulting has risen sharply, from 21 percent in 1990 to 37 percent in 1996—even without any real push into the U.S. legal market. One wonders how accounting firms can retain their independence as auditors at the same time they're racing to sell fancy new consulting services to their auditing clients. While accountants claim they have rendered disinterested audit opinions despite such new competitive pressures, ultimately it is not only the fact of neutrality—but also the *perception*—which ought to matter to regulators, as well as the investing public. Nevertheless, while SEC disciplinary actions against accountants have increased sharply—to about 100 at the end of last year—no generalized action or rules appear to be on the horizon.

Multidisciplinary Practice Will Affect Us All

For those who saw doctors sell out their practices—and their independence—the accounting firms' acquisition of European law firms sounds rather familiar: law partners typically are offered a sizeable bonus for the first few years. Will we too soon sell out our independence on the front end and, like managed-care doctors, essentially then become employees for the rest of our lives?

Will the same ills that beset the medical field soon reach our profession? Will a few accounting firms negotiate legal fees with companies worldwide—largely without our input, much like HMOs—and then give us a budget to meet? Will we see firm consolidations, followed by “downsizing”? Will all our strategy decisions be second-guessed or compromised—not only by the client, but also by a multinational intermediary run by non-lawyers? Will every billing matter need to fit into the right “code”? Will clients be forced to get special referrals—as in medicine—before consulting with legal “specialists”? Will we have the freedom to spend the time we need with our client-friends, now that we must explain this beyond our circle of lawyer-partners? Will our local clients even matter much to a multinational corporation? Will clients routinely be forced to refer first with paralegals and other assistants—much as it is in doctors' offices today? Will limits be placed on trials, or on the depositions we can take, regardless of our profes-

sional judgment? And what about pro bono? Or our lifestyle—will we, like many accounting consultants, be forced to let others use our office whenever we go out of town, all in the name of corporate “efficiency”?

This is not merely an issue of concern to large law firms, any more than HMOs affected only large medical practices. Mid-sized accounting/consulting firms will jump on this bandwagon, and many of our clients have accountants who could easily push such “integrated” service. In England, Andersen's entry into the legal market prompted *Financial Times* to speculate that it is the tier below the largest law firms which faces “the largest threat to the established order,” as other accounting firms jockey for position. In a recent *Illinois Legal Times* roundtable discussion, Deloitte law firm consultant J. Mark Santiago predicted local offices of national U.S. law firms aligned with accounting firms—which he said would kill the mid-size general practice law firm.

What the Organized Bar is Doing for You

The ABA is finally facing this issue, which made the cover of the February *ABA Journal* (see sidebar article, page 15). The main seminar at the ABA's Annual Meeting in Toronto was devoted to this challenge.

The Atlanta Bar will also be involved. I hope to bring some of these participants from the ABA's seminar to Atlanta this fall, as a part of our free “Presidential Showcase” CLE program on the state of our profession. State Bar President Bill Cannon and I are working to form a joint task force designed to establish the organized bar's response to this challenge. If you are interested in serving on this task force, please let either of us know.

Perhaps I overstate all this. Perhaps our great and proud profession will remain truly independent. Or perhaps our law firms will merely form “affiliations” with accounting firms, and will retain their firm names—at least nominally, and at least for now.

But in 1934, Atlanta Bar President Frank Carter announced a campaign, later successful, to stop the growing practice of local banks writing wills and trusts for their customers: “We have sat idly by and witnessed large fields of legal endeavor usurped ... the interests of the public have been injured thereby.” The challenge we face from non-lawyers is no different today, and the economic forces will be far greater. Whether or not we can prevent these changes from occurring, we must act now, so we at least can shape the accommodation of those changes. ☐

Gregory S. Smith is the President of the Atlanta Bar Association. He is a staff attorney with the Federal Defender Program. This article is reprinted with permission from the Atlanta Bar Association newsletter.

Squeeze Play: Lawyers Caught Between Accountants and Professional Rules

Editor's Note: The following excerpts were published in the ABA Journal in February, 1998, as part of a cover story by John Gibeaut on the issue of accounting firms entering the legal arena.

THE HOTTEST FRICTION BETWEEN THE TWO professions arises from their fundamentally different duties—accountants' objectivity and lawyers' advocacy. Moreover, while accountants can do work for clients with competing interests, self-imposed conflict rules more often than not prohibit entire law firms from undertaking such representations, even if the conflict involves only a single lawyer in the firm.

That rub—and the ABA Model Rules—likely will be the points where the conflict is joined. “I think the battle will be over whether or not the Model Rules will survive,” says Washington, D.C., lawyer James P. Holden, an expert on ethical standards in tax practice.

Lurking beneath that battleground is the other core question of how to define the practice of law. Beyond representing clients in court, no one appears to be sure where law practice stops and other professions begin. ...

Ward Bower, a Newtown Square, Pa., lawyer who chairs an International Bar Association committee on multidisciplinary practices, says it is crucial for the bar to convince the public, legislators and even the courts that accounting and law are fundamentally different and in many ways irreconcilable.

“Nobody’s going to shed a tear if lawyers are forced to compete with these other organizations to deliver legal services,” Mr. Bower says. “The argument itself has to be based on public interest.”

But even though statutes and rules governing unauthorized law practice and fee-splitting may change or even disappear, accountants still cannot answer one basic question that separates them from

lawyers: how to resolve conflicts of interest.

In accounting, it is not uncommon for the same firm to represent both sides in a corporate merger or acquisition. Clients routinely consent, and a firm can handle each side’s interests and preserve confidentiality by screening its employees on each end of the deal from each other.

More than Six Degrees of Separation

For lawyers it’s just not that simple, because rules of conduct make it nearly impossible to represent clients with adverse interests and because opponents in legal disputes often are on less than friendly terms to start with.

Conflicts thus pose a potentially insurmountable quandary for accountants who want to get into the law business, especially firms at the Big Six level that already compete for an elite yet limited client base.

Moreover, accountants who become advocates for clients may destroy the independence and objectivity of their own functions in the process.

“It is like saying you can wear the same pair of tennis shoes to a black-tie formal that you can wear to the beach,” says Houston lawyer Steve Salch, past chair of the ABA Tax Section. “It does not work that way. If it were so, accounting firms would not have to hire lawyers.”

Thus, too, arises perhaps the bar’s best consumer-oriented argument: While accountants may be cheaper and faster, they cannot offer broad-ranging confidentiality or loyalty to their clients and the protections those duties try to guarantee.

“In the broadest sense of the terms, loyalty and conflicts are going to be the areas where they don’t have the answers,” Mr. Salch says.

But to convince the public of that, lawyers first must strap on their helmets and get into the action. ■



The Six-Member Civil Jury: In Georgia?

By R. Perry Sentell Jr.

I.

Reflecting an illustrious common law heritage, the Georgia Constitution mandates that “[a] trial jury shall consist of 12 persons”¹ Accordingly, the Georgia Supreme Court explicates, “[a]bsent a waiver or stipulation to the contrary, there is a right to a 12-person jury in cases tried in superior court.”²

Resolutions introduced in the 1998 Georgia General Assembly proposed constitutional changes,³ one of which the General Assembly “to prescribe a jury of six persons in all courts in all civil cases.”⁴ Another proffered amendment directly declared that “[a] trial jury in all civil cases shall consist of six persons.”⁵ In these fashions, the forces of judicial change advanced two primary jury “reforms”: first, a sharp delineation between criminal and civil

cases;⁶ and second, a reduction from twelve to six in the members of a civil jury.

Although neither resolution successfully cleared the 1998 legislative session, the proposals are not likely to disappear from public view. In all probability, the jury-reduction movement will be on future legislative agenda. If successful there, of course, the issue will be finally resolved by Georgia voters. The reduction movement thus precipitates debate on yet another challenge to the historic civil jury.

Presumably, the efforts at jury size reduction reflect such concerns as streamlining the civil trial process, achieving greater judicial efficiency, and conserving limited public resources. Those implicit concerns are all praiseworthy. They fail woefully in carrying the case for jury size reduction, however, absent one linchpin demonstration: Do six jurors fulfill, as capably as twelve jurors,

the foundational purposes of the civil jury? Otherwise, those purposes rank far too precious to be placed at risk upon the conjectural alter of “reform.”

II.

The United States Supreme Court has refused to view the issue as one of constitutional dimensions.⁷ In its famous 1970 decision of *Williams v. Florida*,⁸ the Court upheld the validity of a state statute providing for six-person juries in noncapital criminal cases. Despite its earlier indications to the contrary,⁹ the Court held that “the 12-man panel is not a necessary ingredient of trial by jury;”¹⁰ rather, the common law’s jury of twelve “appears to have been a historical accident.”¹¹

Three years later, in *Colegrove v. Battin*,¹² the Court sustained the use of six-person juries in federal civil trials. Denigrating previous “dicta,”¹³ the Court held that “a jury of six satisfies the Seventh Amendment’s guarantee of trial by jury in civil cases.”¹⁴ The Court summarily discounted concerns over whether the smaller number could, as adequately as the larger, serve the civil jury’s important purposes.¹⁵ Indeed, “four very recent studies have provided convincing empirical evidence ... that ‘there is no discernible difference between the results reached by the two different-sized juries.’”¹⁶

Nevertheless, the Court reached its limit in 1978 when, in *Ballew v. Georgia*,¹⁷ it invalidated a county criminal court’s five-member jury.¹⁸ In *Ballew*, the Court cautioned that more recent studies now indicated that smaller juries are deficient in representing all community views, in fostering group deliberation, and in withstanding biases.¹⁹ Those studies “raise significant doubts about the consistency and reliability of the decisions of smaller juries.”²⁰ Although reaffirming *Williams*, the *Ballew*

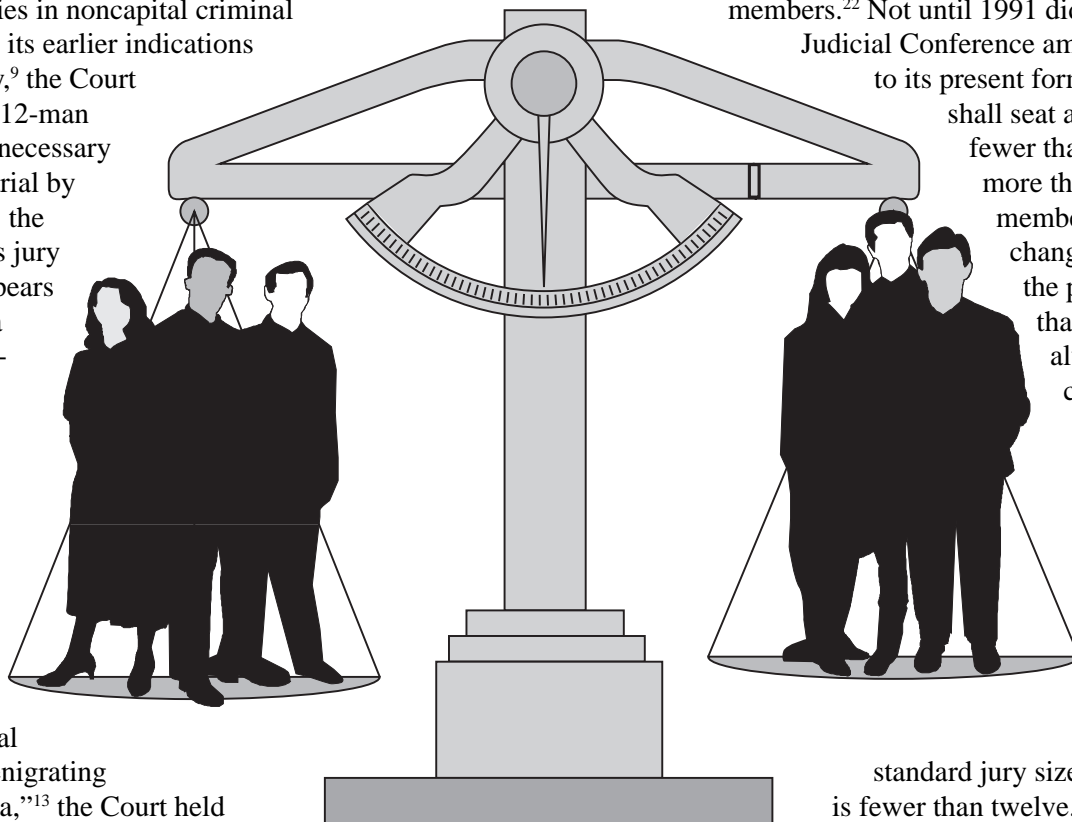
Court tendered a striking concession: “We readily admit that we do not pretend to discern a clear line between six members and five.”²¹

III.

The Supreme Court’s decisions churned high turbulence in the federal trial system. Prior to, and during the period of those decisions (1970-1978), the Federal Rules of Civil Procedure assumed a civil jury of twelve members.²² Not until 1991 did the Federal

Judicial Conference amend Rule 48 to its present form: “The court shall seat a jury of not fewer than six and not more than twelve members. ...”²³ This change “removed the presumption that the jury always must be composed of twelve members absent party stipulation and formally recognized the validity of local rules that make the standard jury size a number that is fewer than twelve.”²⁴

Rather than settling the issue, however, the 1991 revision precipitated further study by the Judicial Conference’s Standing Committee on Rules of Practice and Procedure. Reportedly, that Committee considered evidence that smaller juries: (1) subject minority-viewpoint jurors to greater pressure, (2) yield to the control of aggressive jurors, (3) suffer poorer overall deliberations, and (4) reach outcomes different from those of larger juries.²⁵ Such evidence prompted the Committee to recommend the Judicial Conference’s reinstatement of the twelve-person jury requirement for all federal civil trials.²⁶ In September, 1996, however, the Judicial Conference rejected that recommendation.²⁷ Presently, therefore, the Supreme Court abides, and the federal system authorizes (but does not require), the six-member civil trial jury.



IV.

The Supreme Court's cavalier and belittling characterization of the twelve-member jury as "an historical accident" has suffered sustained scholarly rebuttal.²⁸ For instance, "twelve was the common number throughout Europe, particularly Scandinavia, and ... it made its way with the Danes into England."²⁹ During the Middle Ages the "presentment jury" of the English hundred (county subdivisions) consisted of twelve; the first English "petit jury" was twelve; and "any variation in number ended during the reign of Edward IV (1461-1483) when the unanimous verdict of twelve unquestionably and invariably became the law of England, absent consent of the parties."³⁰

The same destination derives from a different perspective: "If the twelve apostles on their twelve thrones must try us in our eternal state, good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve."³¹

A history of this magnitude weighs decisively against judicial or legislative trifle: "If the number twelve was settled on five hundred years ago and was used without interruption until twenty years ago, it carries with it a certain presumption of regularity, a certain entitlement to respect. ..." ³² In substantial sum, the scholars maintain, "[h]istory ... might have embodied more wisdom than the Court would allow. It might be more than an accident that after centuries of trial and error the size of the jury at common law came to be fixed at twelve."³³ Finally, there seems little "historical accident" in the conclusion that "the Founders believed a 'jury' to be twelve when they drafted the Seventh Amendment."³⁴

V.

By any objective standard, the Supreme Court's "empirical" support for the smaller jury has fared disastrously under the lens of doctrinal dissection. The six studies cited in *Williams*³⁵ for the Court's "no discernible difference" conclusion almost immediately suffered devastating refutation:³⁶ the first study relied upon an unsubstantiated assertion; the second, third, and fourth studies reported casual observations by courtroom

officials; the fifth study noted the fact of a county court's experimentation; and the sixth study predicted economic benefits from permitting litigants to opt for six-member juries.³⁷

In *Colegrove*, the Court added "four very recent studies" to its "convincing empirical evidence."³⁸ Once again, the refutations were sure and swift.³⁹ Two of the studies rested on trials permitting party choice of jury size, rather than the random assignments essential to

accurate experimentation.

One before-and-after study suffered distortion from the state's simultaneous introduction of mediations and discovery of insurance policy limits. The final study, a laboratory experiment, utilized a case so overwhelmingly favoring the defendant that every jury in the experiment found against the plaintiff.⁴⁰ As summarized, the refutations "demonstrate that signifi-

cant flaws in the design of each study preclude any cautious observer from basing conclusions about differences between six- and twelve-member juries on the reported results."⁴¹ Small wonder, then, that by the time it reached *Ballew*, even the Supreme Court conceded "these post-*Williams*" refutations to "raise significant doubts about the consistency and reliability of the decisions of smaller juries."⁴²

VI.

Challenged both historically and empirically, the six-member jury attracts a continuing, and strikingly vigorous, scholarship. That body of learning, even superficially summarized, reflects remarkable consensus on at least five critical features.

(1) In fulfilling the foundational purpose of representing a broad cross-section of the community, the six-member jury falls markedly short. Statistically projected, minorities would be represented on 73 percent of all twelve-person juries (on the average), but only on 47 percent of six-member panels.⁴³ A subsequent actual experiment yielded an even more glaring contrast: 82 percent to 32 percent.⁴⁴ Accordingly, "the six-member jury is thus more limited than the 12-member jury in representing the full spectrum of the community, and not by a negligible margin."⁴⁵

(2) Use of the six-member jury "greatly decreases the

In *Ballew*, the Court cautioned that more recent studies now indicated that smaller juries are deficient in representing all community views, in fostering group deliberation, and in withstanding biases.

chance that a minority viewpoint will be heard” during panel deliberations.⁴⁶ Furthermore, jurors who hold a minority view are far more likely to defect to the majority in six-member juries, because those jurors are far less likely to have additional support on the panel.⁴⁷ Statistically, the expectation of having more than one minority advocate on the twelve-member jury is 34 out of every 100; on the six-member jury, that expectation falls to only 11 out of 100.⁴⁸ Consequently, “an individual in the minority of a 5 to 1 vote is far more likely to defect than is an individual in the minority of a 10 to 2 vote, even though the proportion remains the same.”⁴⁹

(3) The decisions rendered by six-member juries are far less predictable than decisions of twelve-member panels. With the larger jury, “decisions are likely to be more consistent across similar cases and more closely approximate decisions that would prevail if the entire community could judge the trial for itself.”⁵⁰ Six-member juries “will show an approximately 41 percent greater variation in verdicts” than will juries consisting of twelve members.⁵¹ This “means that damages awarded by two different juries to two plaintiffs suffering similar injuries are likely to be closer in amount if the juries each have twelve members than if they each have six.”⁵² The smaller panel’s lower predictability rate serves to increase the perceived “gamble” taken by litigants in going before a jury; that magnified uncertainty leads in turn to an increase in jury waivers and a decrease in jury trials.⁵³

(4) The six-member jury suffers a significantly greater likelihood of falling under the influence of a single juror than does the twelve-member jury.⁵⁴ The smaller panel appears far more vulnerable to domination by the personality characteristics of an aggressive member. “Individuals on six-person panels are far more likely than those on 12-person panels to be swayed by a single aggressive juror;”⁵⁵ thus, the six-member jury “is more likely to come under the dominance of a single juror.”⁵⁶ That increased vulnerability portends jury decisions based on personal idiosyncracies rather than on the evidence in the case.⁵⁷

(5) The six-member jury’s deliberations are likely to be both shorter and of lower quality than the deliberations of a twelve-member panel. The larger panel excels in remembering and understanding the facts of the case, a quality crucial to an effective deliberative process.⁵⁸ Moreover, the larger the size of a randomly selected group, the greater the heterogeneity of its membership.⁵⁹ “Research indicates that heterogeneous groups are more likely to arrive at correct solutions to problems than homogeneous groups.”⁶⁰ The twelve-member panel’s decisions bode less likely to be completely aberrant, because that panel is less likely to be overwhelmingly composed of individuals representing disfavored posi-

tions in the community.⁶¹ Thus, the six-member jury poses a higher risk of returning “bizarre verdicts” that cause “every lawyer in the courtroom, including the judge, [to be] flabbergasted.”⁶²

VII.

Arguments favoring the six-person jury highlight “four areas in which smaller juries might have an advantage over larger ones.”⁶³ Each of those arguments, and its accompanying rebuttal, is suitable for summary.

(1) The members of smaller juries are more likely to be satisfied with their jury service. Even so, that satisfaction does not translate into better decisions; indeed, it decreases the likelihood of deliberative challenge to the dominant group perspective. “[C]onformity increases as [small] group ties become stronger” and relations more comfortable.⁶⁴

(2) Mechanically, disruptive problems of coordination are more likely in larger juries. Even so, and conceding the resulting requirement of more time for decision, “there is no reason to expect that the solutions reached [by twelve-member juries] would be inferior” to those of six-member panels.⁶⁵

(3) Smaller juries encourage equality of participation by all members. “Even though low participators in a group of six can be expected to participate more than low participators in a group of twelve, the advantages of the increased heterogeneity of the larger group should not be substantially diminished.”⁶⁶

(4) Larger panels more likely divide into factions that decrease the quality of their decisions. Contrarily, the presence of factions (and factiousness), more likely in larger juries, may force the individuals of the group to communicate more factual material and less opinion. Moreover, deliberations in unity may well inhibit the expression of minority opinions.⁶⁷

In sum, any “efficiencies” achieved by civil jury size reduction, whether monetary or otherwise, would come at an extremely high price.

VIII.

The point is not that the materials here surveyed conclusively make the case for Georgia’s retention of the twelve-member civil jury. Those materials do conclusively demonstrate, however, that a heritage as sacred as this one must not be jettisoned merely upon the whim of “modern reform.” They also demonstrate that a heavy burden unequivocally rests upon those who advance such reform. Finally, they demonstrate, the reformers appear light years removed from satisfying that burden. ■

R. Perry Sentell Jr. is a Carter Professor of Law, University of Georgia,



concentrating in torts, local government law, and legislation. He received his A.B. and L.L.B. magna cum laude at the University of Georgia. He has earned many honors as a law professor, including the Distinguished Service Award of the Georgia Municipal Association (1974), and the Alumni Distinguished Service Award of UGA Law School Association (1995).

Endnotes

1. GA. CONST., art. I, § I, para. XI. Exceptions are that "the General Assembly may prescribe any number, not less than six, to constitute a trial jury in courts of limited jurisdiction and in superior courts in misdemeanor cases." *Id.*
2. *Hague v. Pitts*, 262 Ga. 777, 777-78, 425 S.E.2d 636 (1993).
3. Both resolutions were referred to the House Judiciary Committee.
4. HR 173. The resolution proposes to amend art. I, § I, ¶ XI as follows: "(b) A trial jury shall consist of 12 persons; but the General Assembly may prescribe a jury of six persons in all courts in all civil cases, in courts of limited jurisdiction in any cases, and in superior courts in misdemeanor cases."
5. SR 200. The resolution proposes to amend art. I, § I, ¶ XI as follows: "(b) a trial jury in criminal matters shall consist of 12 persons; but the General Assembly may prescribe any number, not less than six, to constitute a trial jury in misdemeanor cases. A trial jury in all civil cases shall consist of six persons."
6. *I.e.*, between nonmisdemeanor criminal cases and civil cases.
7. For more detailed discussions, see 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2491; Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 *HOFSTRA L. REV.* 1 (1993); Note, *Developments in the Law: The Civil Jury*, 110 *HARV. L. REV.* 1408, 1466-89 (1997).
8. 399 U.S. 78 (1970).
9. See *e.g.*, *Thompson v. Utah*, 170 U.S. 343 (1898).
10. 399 U.S. at 86.
11. *Id.* at 89. The Court held that there was no constitutional requirement of twelve-member criminal juries at either the state or federal level. As for the concerns of fostering deliberation, freedom from intimidation, and cross-sectionalism, the Court read four studies to indicate "that there is no discernible difference between the results reached" by six-member and twelve-member juries. *Id.* at 101.
12. 413 U.S. 149 (1973).
13. "It is true, of course, that several earlier decisions of this Court have made the statement that 'trial by jury' means 'a trial by a jury of twelve. ...' But in each case, the reference to 'a jury of twelve' was clearly dictum. ..." *Id.* at 157.
14. *Id.* at 160. The Seventh Amendment provides as follows: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rule of the common law."
15. The Court said that "much has been written about the six-member jury, but nothing that persuades us to depart from the conclusion reached in *Williams*." *Id.* at 159.
16. *Id.* at 159 n.15.
17. 435 U.S. 223 (1978).
18. "Petitioner was brought to trial in the Criminal Court of Fulton County. After a jury of 5 persons had been selected and sworn, petitioner moved that the court impanel a jury of 12 persons ... That court, however, tried its misdemeanor cases before juries of five persons. ..." *Id.* at 225-26.
19. The Court observed that its decisions in *Williams* and *Colegrove* had "generated a quantity of scholarly work on jury size ... which raise significant questions about the wisdom and constitutionality of a reduction below six." *Id.* at 231-32.
20. *Id.* at 235. "[T]hese studies, most of which have been made since *Williams* was decided in 1970, lead us to conclude that the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size below six members." *Id.* at 239.
21. *Id.* The Court concluded "that the five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment as applied to the States through the Fourteenth. . . ."
22. Former Fed. R. Civ. P. 48: "The parties may stipulate that the jury shall consist of any number less than twelve. ..." As observed, "[t]he requirement of a stipulation in order to deviate from a twelve-person jury suggests that twelve was considered the standard jury size." 9A Wright & Miller, *supra* note 7, § 2491 n.8.
23. FED. R. CIV. P. 48.
24. 9A Wright & Miller, *supra* note 7, § 2491.
25. These grounds are collected from journalistic reports by Note, *Developments in the Law: The Civil Jury*, *supra* note 7, at 1487-88.
26. *Id.* The Committee members "apparently decided that the efficiency achieved by using smaller juries was not worth a deterioration in the quality of the deliberative process."
27. *Id.* Reasons reported for the proposal's defeat included the belief by federal district judges that larger juries were unwieldy, and that a return to the larger jury would cost the federal judiciary an additional ten million dollars each year.
28. See, *e.g.*, Hans Zeisel, ... And Then There Were None: The Diminution of the Federal Jury, 38 *U. CHI. L. REV.* 710 (1971); Arnold, *supra* note 7.
29. Arnold, *supra* note 7, at 11. "The singular unanimity in the selection of the number twelve to compose certain judicial bodies is a remarkable fact in the history of many nations." *Id.* (quoting JOHN PROFFATT, *TRIAL BY JURY* 11 (1877)).
30. Arnold, *supra* note 7, at 8.
31. *Id.* at 11 (quoting JAMES B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 90 (quoting GILES DUNCOMBE, *TRIALS PER PAIS* 92 (1766)).
32. *Id.* at 12.
33. Zeisel, *supra* note 28, at 712.
34. Arnold, *supra* note 7, at 12; see also 9A Wright & Miller, 9A *supra* note 7, § 2491: "[T]he universal understanding was that the Seventh Amendment preserved jury trial as it was known at common law."
35. *Williams v. Florida*, 399 U.S. 78, 101 (1970). The six studies were: Philip M. Cronin, *Six-Member Juries in District Courts*, 2 *BOSTON B.J.* 27 (1958); Richard H. Phillips, *A Jury of Six in All Cases*, 30 *CONN. B.J.* 354 (1956); Edward A. Tamm, *The Five-Man Civil Jury, A Proposed Constitutional Amendment*, 51 *GEO. L.J.* 120 (1962); Lloyd L. Wiehl, *The Six Man Jury*, 4 *GONZAGA L. REV.* 35 (1968); New Jersey Experiments with Six-Man Jury, 9 *BULL. OF THE SECTION OF JUD. ADMIN. OF THE ABA* (May 1966); *Six-Member Juries Tried in Massachusetts District Court*, 42 *J. AM. JUD. SOC.* 136 (1958).

36. “This is scant evidence by any standards.” Zeisel, *supra* note 28, at 713-15.
37. These refutations are summarized in Arnold, *supra* note 7.
38. *Colegrove v. Battin*, 413 U.S. 149, 159 n.15 (1973). The four cited studies were: INSTITUTE OF JUDICIAL ADMINISTRATION, A COMPARISON OF SIX- AND TWELVE-MEMBER CIVIL JURIES IN NEW JERSEY SUPERIOR AND COUNTY COURTS (1972); Gordon Berman & Rob Coppock, *Outcomes of Six- and Twelve-Member Jury Trials: An Analysis of 128 Civil Cases in the State of Washington*, 48 WASH. L. REV. 593 (1973); Note, *An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes*, 6 U. MICH. J.L. REF. (1973); Note, *Six-Member and Twelve-Member Juries: An Empirical Study of Trial Results*, 6 U. MICH. J.L. REF. 671 (1973).
39. Hans Zeisel & Shari S. Diamond, “*Convincing Empirical Evidence*”: *on the Six-Member Jury*, 41 U. CHI. L. REV. 281 (1974).
40. The refutations are summarized in Richard O. Lempert, *Uncovering “Nondiscernible” Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 644, 646 n.12 (1975).
41. *Id.* at 646.
42. *Ballew v. Georgia*, 435 U.S. 223, 235 (1978).
43. Arnold, *supra* note 7, at 30.
44. Michael Saks, *Ignorance of Science is No Excuse*, TRIAL, Nov.-Dec. 1974, at 18.
45. Zeisel, *supra* note 28, at 716.
46. Note, *supra* note 7, at 1486 n.165.
47. Lucy M. Keele, *An Analysis of Six vs. 12-Person Juries*, TENN. B.J. Jan.-Feb. 1991, at 32, 35.
48. Zeisel, *supra* note 28, at 720.
49. Note, *supra* note 7, at 1486 n.165.
50. A.E. Gelfand, *A Statistical Case for the 12-Member Jury*, TRIAL, Feb. 1977, at 41, 42; *see also* Lempert, *supra* note 40, at 679.
51. Zeisel, *Twelve is Just*, TRIAL, Nov./Dec. 1974, at 13, 15; *see also* Michael J. Saks, *If There Be A Crisis, How Shall We Know It?*, 46 MD. L. REV. 63, 76 n.51 (1986).
52. Lempert, *supra* note 40, at 681.
53. Zeisel, *supra* note 28, at 719.
54. Arnold, *supra* note 7, at 31.
55. Note, *supra* note 7, 1486, n.166 (1997) (citing J.R. Snortum, et. al., *The Impact of An Aggressive Juror in Six and Twelve-Member Juries*, 3 CRIM. JUST. & BEHAV. 255, 259 (1976)).
56. *Id.* (citing Victor J. Baum, *The Six-Man Jury—The Cross Section Aborted*, 12 JUDGES’ J. 12, 13 (1973)).
57. Arnold, *supra* note 7, at 31 (citing Norbert L. Kerr & Juin Y. Huang, *Jury Verdicts: How Much Difference Does One Juror Make?*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 325 (1986).
58. Lempert, *supra* note 40, at 687.
59. *Id.*
60. *Id.* (citing Hoffman, *Homogeneity of Member Personality and Its Effect on Group Problem-Solving*, 58 J. AB. & SOC. PSYSH. 27 (1959)).
61. *Id.* at 672.
62. Note, *supra* note 7, 1484 (quoting Victor J. Baum, *The Six-Man Jury—The Cross Section Aborted*, 12 JUDGES’ J. 12 (1973)).
63. Lempert, *supra* note 40, at 690.
64. *Id.* at 691.
65. *Id.*
66. *Id.* at 693.
67. *Id.* at 697.

ASI - pickup
8/98 p.7

Golden Lantern -
pick up 4/98 - use
“advertisement” at
top

Health Care Fraud: What Do You Do When the Government Knocks?

By John G. Malcolm and Robert F. Schroeder

It is a seemingly ordinary day. You are sitting in your office when the telephone rings. It is the president of your best client, a health care provider. Just last week, he had called to tell you that some “troublemakers” in the accounting department had quit. Now, he is telling you that federal agents are on the company’s premises armed with a subpoena (or worse still, a search warrant) and are trying to interview the company’s employees. The president wants to know how he should respond to the agents, and what the company should be doing to protect itself. Fortunately, once you have read this article, you will be able to take a deep breath and respond appropriately.

Overview

In 1996, health care costs in this country exceeded one trillion dollars—over one-seventh of the nation’s economy—and it is estimated that as much as 10 percent

of this money may be wasted due to fraud and abuse.¹ In any program in which there are large dollars involved, the potential for fraud is great, and both the federal government and the State of Georgia have taken action to combat health care fraud.

There are literally hundreds of federal prosecutors and agents throughout the country whose time is devoted almost exclusively to investigating and prosecuting health care fraud. Health care fraud has been named as the top white collar crime priority, and the number two priority overall, by the Department of Justice. Among the federal agencies throughout the United States that are investigating health care fraud are U.S. Attorneys’ Offices, the FBI, the IRS, the Offices of Inspectors General for Health and Human Services, the Office of Personnel Management, the Department of Labor, the Railroad Retirement Board, the Department of Veterans Affairs, the Health Care Financing Administration, the U.S. Postal Inspection Service, the Defense Criminal Investigative Service, the

DEA, the Federal Drug Administration, and the Federal Trade Commission.

Under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),² better known as the Kassebaum-Kennedy bill, approximately \$544 million is earmarked for the Fraud and Abuse Control Program and the Medicare Integrity Program, the primary thrust of these two newly-established programs is to strengthen law enforcement efforts to detect and prosecute Medicare fraud. This amount will rise to approximately \$960 million in the year 2003. Further, under HIPAA, all criminal fines and forfeitures, as well as civil recoveries under the False Claims Act and the Civil Monetary Penalty Law, in health care cases are used to replenish the Trust Fund that provides for these law enforcement appropriations.

The federal government has begun various law enforcement initiatives such as Operation Restore Trust, Operation Goldpill, PATH (Physicians at Teaching Hospitals), and the 72-hour window program. In addition to Operation Restore Trust (a federal and state initiative to prosecute health care offenses which was recently expanded to include Georgia), Georgia's hospitals have recently been the subject of federal initiatives involving alleged abuses in the billing practices of outpatient clinics, the billing practices of hospitals for patients with pneumonia, with the promise of many more national and local initiatives in the future.

In addition to the federal law enforcement efforts, forty-seven states have established Medicaid fraud control units to investigate fraud in the Medicaid program, which is jointly funded by the respective states and by the federal government. In Georgia alone, there are approximately 49,000 Medicaid providers serving approximately 1.2 million indigent care patients. Each year, the Georgia Medicaid Program pays out over \$3 billion to these providers. Georgia's Health Care Fraud Control Unit, which is jointly operated by the Department of Law, the Georgia Bureau of Investigation, and the Department of Audits and Accounts, is comprised of agents, auditors,

analysts, and attorneys, whose primary duty is to investigate and prosecute health care providers who engage in Medicaid fraud.

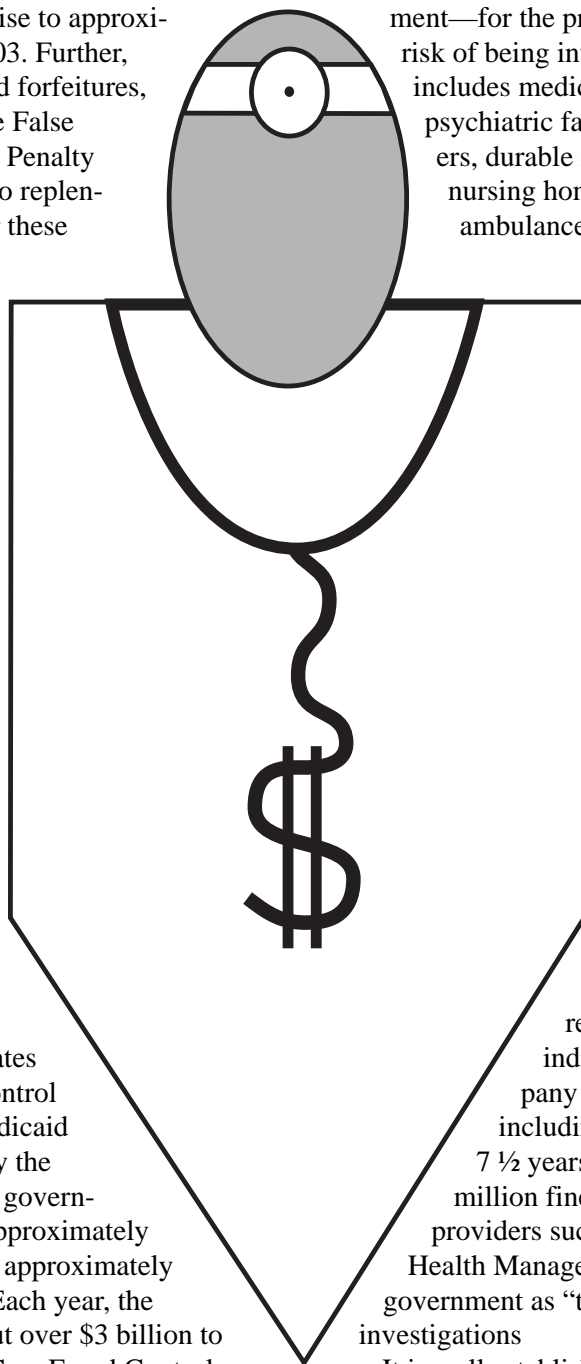
Who is at Risk?

Virtually anybody or any entity that bills or provides a cost report to a third-party payer—such as an insurer, an employer, state government, or the federal government—for the provision of health care services is at risk of being investigated and prosecuted. This includes medical doctors, chiropractors, hospitals, psychiatric facilities, home health care providers, durable medical equipment providers, nursing homes, pharmaceutical companies, ambulance services, taxi companies that

provide transportation for Medicare and Medicaid patients, clinical laboratories, and the list goes on and on.

Governmental investigators are not only focusing on individuals who engage in criminal activity, but are also targeting organizations, seeking to hold them vicariously liable for the criminal actions of its officers and employees. For instance, in 1996, First American Health Care of Georgia, Inc., which was the largest privately owned home health care provider in the country, was prosecuted and convicted of various felonies including falsely billing Medicare for \$1.1 million. The company was ordered to pay \$9.9 million in restitution and fines, and four individuals connected with the company received substantial sentences, including the owner who was sentenced to 7 ½ years in prison and ordered to pay a \$10 million fine.³ More recently, large health care providers such as Columbia/HCA and Olsten Health Management have been identified by the government as "targets" of ongoing criminal investigations

It is well established that a company can be held criminally liable for the actions of its employees—even when those employees disregard explicit instructions—so long as the acts were performed with the requisite crimi-



nal intent and with the intent to benefit the entity.⁴ Further, a company is deemed to be responsible for the “collective knowledge” and actions of all of its employees.⁵ Therefore, a company can be held liable even in cases in which no single employee possesses the requisite mens rea or actus rea to support a criminal conviction. Given the fact that health care providers frequently employ thousands of individuals, the implications in terms of exposure to potential criminal liability—and civil liability—are frightening.

Common Types of Health Care Fraud

Health care fraud takes many forms. As well, the type of fraud that is likely to be committed depends to a large degree on whether the provider is reimbursed under a fee-for-service system or a capitation system, since the incentives change. In general, a fee-for-service reimbursement system (in which providers are paid for each service rendered) encourages overutilization, while a capitation reimbursement system (in which providers are paid a fixed amount of money for all services rendered to a “covered” person) encourages underutilization. Certain common types of health care fraud that are investigated include:

- ♦ “Unbundling,” which refers to the process of submitting multiple bills, in order to obtain a higher reimbursement, for tests and services that were performed within a specified time period and which should have been submitted as a single bill.
- ♦ Submitting bills for services that were not provided (sometimes referred to as “miscoding”) or which were not medically necessary.
- ♦ “Upcoding,” which refers to the practice of billing for complex services when only simple services are rendered, billing for brand-name drugs when only generic drugs were provided, listing treatment as having been for a more complicated diagnosis than was actually the case, and the like.
- ♦ Submitting bills by physicians who lack the proper credentials.
- ♦ Submitting bills for non-reimbursable expenses such as entertainment, travel, gifts, and certain non-emergency care.
- ♦ Submitting altered cost reports to obtain higher reimbursements.
- ♦ Paying referral fees and other forms of kickbacks and benefits to physicians as an inducement to refer patients.
- ♦ Engaging in “self-referral” practices by referring patients to entities in which the physician, or a close family member, has a financial interest.

- ♦ Enrolling fictitious employees into health care plans or failing to provide necessary medical services to patients who belong to an insurance plan that reimburses providers on a capitated basis.

Potential Criminal, Civil, and Administrative Actions

Such conduct can expose entities and individuals to literally a slew of federal and state criminal, civil, and administrative sanctions. With respect to criminal liability, applicable federal statutes include false statements,⁶ false claims,⁷ theft and embezzlement related to health care,⁸ obstruction of criminal investigations of health care offenses,⁹ money laundering,¹⁰ RICO,¹¹ mail fraud,¹² wire fraud,¹³ false statements relating to health care matters,¹⁴ health care fraud,¹⁵ false statements involving the Medicare and State health care programs,¹⁶ the anti-kickback statute,¹⁷ false statements regarding the conditions of a Medicare or Medicaid provider,¹⁸ and charging or accepting excess Medicaid payments.¹⁹ Applicable state criminal statutes include theft by taking,²⁰ false statements and writings,²¹ conspiracy to defraud the State,²² and Medicaid fraud.²³

The primary civil statute that can be used against health care providers is the False Claims Act,²⁴ which prohibits improper billing of the federal government. The anomaly of this statute is that anyone, including competitors or disgruntled employees, can file a so-called “whistleblower” suit, also referred to as a *qui tam* suit, against an entity on behalf of the United States under the False Claims Act. A plaintiff, who is referred to as the relator, who files such an action must do so under seal and give the Department of Justice the opportunity to intervene and take control of the action. The potential rewards to relators are huge. The False Claims Act provides for treble damages,²⁵ the costs of investigation including attorney’s fees,²⁶ and an additional penalty of between \$5,000 to \$10,000 per false claim submitted.²⁷ In cases in which the federal government intervenes, a relator can receive between 15 percent to 25 percent of the amount recovered, and relators can receive up to 30 percent in cases in which the federal government does not intervene.²⁸

Because such actions are filed under seal, a “whistleblower” can continue to funnel information to the government from the inside until it decides whether to intervene. As well, once the existence of such an action is exposed, relators are granted a measure of protection under the False Claims Act.

Health care providers have recently been besieged with “whistleblower” lawsuits, with hundreds of suits

resulting in millions of dollars in recoveries for the federal government and for relators. While health care fraud cases accounted for only 12 percent of all “whistleblower” suits filed in 1987, they now account for over half of all such cases filed annually.²⁹ It was recently reported that dozens of such suits may already have been filed against Columbia/HCA to further add to its woes.

On the administrative side, an entity can be subjected to a monetary penalty by an administrative law judge under the Civil Monetary Penalty Act.³⁰ Perhaps most fatally, an entity can be excluded by the Secretary of HHS from further participation in either the Medicare or Medicaid programs.³¹

The causes of action discussed in the preceding paragraphs are in the nature of government enforcement actions, including *qui tam* suits in which relators seek to enforce the government’s rights. There are, of course, a rash of potential civil suits by fiscal intermediaries and by private groups and entities that can be asserted against a health care provider who is alleged to have engaged in fraudulent practices. Health care providers can be sued by, among others, private insurers and, in the case of publicly-traded companies, by shareholders. As well, individual physicians who are found to have engaged in fraudulent conduct can have their licenses suspended or revoked by State Medical License panels or can have hospital privileges revoked.

How Investigations Begin

Governmental investigations can begin in a variety of ways. The government can receive information about health care providers from disgruntled former or current employees, competitors, insurers, patients, or as a matter of course during a routine audit. That having been said, the question becomes how to deal with the government once your client suspects that it is under investigation.

In instances in which you suspect, but are not sure, that your client is the subject of an investigation, it is sometimes possible to verify the existence of such an investigation by placing a telephone call to the appropriate agency or prosecutor’s office. Alternatively, you can consider filing a request under the Freedom of Information Act for any records that the applicable agency may have in your client’s name. If the answer is that no such

records exist, this may indicate that there is no ongoing investigation. If, on the other hand, the answer is that such records do exist but that you are not entitled to see them, this may well indicate that there is an ongoing investigation.

Strategies for Success During the Investigation

A. Conduct an Internal Investigation

If your health care client is under investigation, it becomes essential to get a handle on the situation and to engage in possible damage control. Although you obviously should begin by

interviewing and re-interviewing your client to develop information, an attorney should never rely solely on his client’s statements. Oftentimes the wording of search warrants or subpoenas (which can take the form of grand jury subpoenas, inspector general subpoenas, or the newly-created attorney

general subpoenas that have been authorized in health care fraud cases by HIPAA), knowledge of whom has been interviewed, or knowledge of items that have been seized can give you some idea of the areas upon which the government is focusing.

Counsel should also give serious consideration to conducting a thorough internal investigation and self-audit, for which it may be best to utilize the services of a health care consultant who is familiar with the applicable laws and medical practices. There are several reasons to conduct an internal investigation into allegations of fraud. First, as in all areas of litigation, the best way to defend a client is by knowing more about the facts than your adversary. Second, you may be able to discover and isolate “whistleblowers.” Third, you can help fulfill the fiduciary obligations of your client’s Board of Directors. Fourth, you can identify and remedy problems to prevent them from recurring. And, fifth, by taking remedial steps to identify and solve problems, you may be able to convince the government’s lawyers and investigators that they should be focusing their attention elsewhere, or, at least, that they should give your client favorable consideration in resolving matters.

The first step to conducting such an internal investigation or a self-audit is to establish a mechanism for

While health care fraud cases accounted for only 12 percent of all “whistleblower” suits filed in 1987, they now account for over half of all such cases filed annually.

gathering and preserving all of the relevant documents, and to identify individuals who may need to be interviewed. Obviously if your client has a policy of routinely destroying documents, such a policy must be immediately suspended. This will not only enable you to review all pertinent records, but will also prevent the government from seeking to use your client's destruction of documents as evidence of knowledge that your client is engaging in misconduct. Always remember that, in addition to learning all of the pertinent facts, one of your paramount goals is to control the flow of information to the government. Therefore, it is essential, whenever possible, to review all documents before they are provided to the government and to interview all employees before they are interviewed by the government.

B. Controlling Employee Information

Law enforcement agents will often attempt to contact individuals by telephone or will appear unannounced and request an on-the-spot informal interview. While the Department of Justice maintains the position that it is perfectly free to speak to employees of target companies prior to formal charges being brought,³² this position may have been dealt a setback recently by the Eighth Circuit Court of Appeals in the case of *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*³³ In that case, an individual named Daniel O'Keefe filed a *qui tam* action under the False Claims Act alleging that employees at McDonnell Douglas had mischarged their hours while working on military contracts. Investigative agents began making ex parte contacts with current employees at the company without the consent of the company's counsel. The district court entered a protective order preventing the interviews, which the Eighth Circuit affirmed.³⁴ The court cited a Missouri rule prohibiting contacts with represented persons that is analogous to the rule in Georgia.³⁵ The government argued that recently-promulgated Justice Department regulations regarding such contacts had the force and effect of federal law, thereby superseding local bar rules.³⁶ The court rejected this argument, though, concluding that while the Attorney General had authority to promulgate internal agency procedures, she lacked statutory authority to promulgate substantive regulations,

such as those involving contacts with represented persons, that would exempt government lawyers from having to comply with local bar rules.³⁷

Although *McDonnell Douglas* involved a *qui tam* action rather than a criminal investigation, there is nothing in the reasoning of that opinion which would seem to preclude its application to criminal cases. In light of *McDonnell Douglas*, counsel's first approach in most instances should be to advise the government that it

should not attempt to interview any of the target company's current employees without your being there. Generally, an experienced prosecutor will recognize that if he or she fails to comply with this request, such a prosecutor is risking his or her bar license, particularly given the unsettled state of the law in this area. Nonetheless, it may be necessary to litigate the issue before a court, and counsel, as a last resort, may need to con-

sider filing a bar complaint.

Further, as a precaution, should the government choose to ignore such warnings and attempts to interview current employees, or in the likely event that the government contacts prior employees, current and former employees should be advised that they are under no obligation to speak with law enforcement agents. Likewise, such employees should be advised that they can set the parameters of any agent interviews, including having a lawyer present. Under no circumstances, however, should an employee be told that he or she cannot under any circumstances speak to a law enforcement official, as this might raise the spectre of obstruction of justice. Employees should be informed that, in the event they are contacted by an investigator, they should (1) be polite, (2) get the agent's name, telephone number, and title, and say that he or she will get back to the agent shortly, and (3) inform your client as soon as possible that he or she has been contacted by an agent so that you can interview the employee first.

C. Protecting Work Product and Corporate Records

To protect information from the prying eyes of the government and of third parties who may be contemplating civil action, it is vital that you structure your internal investigation so that it is cloaked with all applicable

Employees should be advised that they are under no obligation to speak with law enforcement agents. Likewise, such employees should be advised that they can set the parameters of any agent interviews, including having a lawyer present.

privileges, such as the attorney-client and work-product privileges.³⁸ As well, if you choose to affiliate with a health care consultant and/or another attorney,³⁹ it should be made clear that such advisers are being hired and directly supervised by you. In general, it is best if all persons assisting counsel in conducting an internal investigation sign confidentiality agreements.

Although, as all practicing lawyers know, it is impossible to devise a foolproof system for protecting privileges, there are several steps that counsel can take to minimize the risk of waiver while at the same time conducting an effective investigation. First, you and your client should prepare a written document that states that the client has expressly authorized you to conduct an internal investigation for certain designated purposes, which should include the solicitation of legal advice in anticipation of potential litigation. The document should state that it is understood by all parties that strict confidentiality is required and that all employees have a duty to cooperate with the investigation.

Second, all documents should be reviewed and all privileged documents should be designated as such. Counsel must be careful, however, to be discriminating about what gets labeled as privilege because a reviewing court may well take a dim view of counsel who labels a document as privileged just because it contains deleterious information. As a corollary, counsel should draft reports and other documents in such a way as to make clear that privileges apply, including stating mental impressions, legal advice, and analysis, wherever possible.

Third, counsel should conduct interviews with employees and officers in private. Counsel should be guarded, ever-vigilant to the possibility that the interviewee may be a “whistleblower,” by listening intently and not disclosing any non-essential information. All interviewees should be told the purpose of the investigation as well as counsel’s duty to the corporate client. The interviewee should be informed that he or she has the right to separate counsel and that you do not represent them. Counsel should stress the confidentiality of the interview and discourage the interviewee from taking notes to prevent the unregulated flow of documents and information. Interviewees should also be reminded about what to do if contacted by government agents.

D. Dealing with Whistleblowers and the Government During the Investigation

During the course of your internal investigation, you may discover or suspect that one of your client’s employees is a “whistleblower.” Whistleblowers must be treated with delicacy and caution because, in all likelihood, that

individual is continuing to make inquiries and is funneling information to the government. Although your client’s instincts will be to treat such an individual harshly, you should advise against such a course of action. Section 3730(h) of the False Claims Act provides that a whistleblower “who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment” has a separate cause of action against the offending entity.⁴⁰ As a general rule, you should advise your client to transfer the suspected whistleblower to an area where that person does not have access to sensitive information, but not to deduct that person’s salary or benefits and to continue treating that person with courtesy and respect.

Additionally, although this may seem axiomatic, counsel should try to maintain cordial relations with government investigators and prosecutors and should, whenever possible, appear cooperative. Appearing unnecessarily combative or argumentative will almost never serve your client’s interests. Remember that at some point you are most likely going to want to make a presentation to the government to attempt to address its concerns to present the facts in the light most favorable to your client. If the investigators and prosecutors don’t like or trust you, chances are high that they will not listen to you. As well, as a general rule, for which there are exceptions, it is better to be prepared to make such a presentation sooner rather than later. The more time the government invests in a case, the less likely it is to be favorably disposed to resolving the case without a conviction or substantial civil fine.

E. Corporate Compliance Programs and Voluntary Disclosure

A key element to avoiding problems in the first instance for any corporate health care provider is the existence of an effective corporate compliance plan. Although there is no “one-size-fits-all” compliance plan, each plan should take into effect such factors as the type, size, and existing structure of the organization, as well as that organization’s particular risk areas. Plans should also include a protocol for educating employees about the law, a system whereby high-level personnel monitor compliance, and a mechanism for employees and patients to report potential violations and other problems on a confidential basis. An attorney representing a corporate health care provider that is under investigation may be able to trumpet the existence of an effective compliance program in an effort to persuade a prosecutor to use her considerable discretion by focusing her attention elsewhere.

In addition to heading trouble off at the pass, so to speak, another advantage to having an effective corporate

compliance plan is that it can minimize the damage if a company is facing the prospect of a federal conviction. Although a corporation obviously cannot go to prison, the amount of any fine levied under the organizational sentencing guidelines is determined by the seriousness of the offense and the culpability of the organization.⁴¹ The seriousness of the offense is generally based on the gain to the offender, the pecuniary loss, or the amount in the guideline level fine table, whichever will yield the highest result. The organization's culpability is generally determined by the steps that the organization took to prevent and detect criminal conduct, the level of involvement in or tolerance of the offense by key personnel, and the remedial steps (which might include voluntary disclosure) that the organization took after the offense was discovered. If an organization can show that it acted as a "good corporate citizen" by, for instance, having an effective compliance plan in place, it can reduce the size of any fine dramatically.⁴²

The decision about whether to voluntarily disclose employee misconduct (or additional misconduct, if the entity is already under investigation), as one might imagine, is one that should not be made lightly, and may well depend on the perceived likelihood that the conduct will come to light eventually anyway through a qui tam suit or otherwise. A corporation that is considering voluntarily disclosing employee malfeasance to the government must realize that there is no guarantee that the company will not be subjected to prosecution. Further, the company should be prepared to make full restitution, to completely cooperate including making all employees available for government interviews, to take swift disciplinary action against the wrongdoers, and to react to any adverse publicity. It is also important to recognize that the Department of Justice will most likely scrutinize any corporate compliance program to see whether it is truly effective or whether it is a toothless, paper policy.

Health care regulations are confusing and are often given conflicting interpretations by state and federal authorities. It will oftentimes enable you to argue that your client's actions, which are the subject of inquiry, constituted a "good faith" effort to comply with the law.

Strategies for Success in Settlement Negotiations

A. Pursuing a Global Settlement Strategy

Settlement negotiations in the area of health care must be handled with particular dexterity, and it is generally advisable to resolve all criminal, civil, and administrative issues in a global manner where possible. Before entering into settlement negotiations with the

government, however, counsel should discover as much as possible about how the government has treated other health care providers. Through discreet inquiries with contacts at other health care providers,⁴³ FOIA requests, and Nexus searches, it is possible for you and your client to obtain information about how the government has dealt with others in similar situations. You may well discover that the government has given conflicting interpretations of pertinent regulations in the past or that it has treated others with comparative leniency. Such

information can be useful in cases in which the government believes that your client has acted with criminal intent or when you believe that the government's demands are unduly punitive.

As your health care clients will tell you, health care regulations are confusing and are often given conflicting interpretations by state and federal authorities. Although such confusion constitutes a daily burden for your client under normal circumstances, it will oftentimes enable you to argue that your client's actions, which are the subject of inquiry, constituted a "good faith" effort to comply with the law, and should be treated accordingly. Pointing out ambiguities in the applicable regulations and other legal flaws in the government's analysis will also greatly enhance the likelihood that the government will consider reasonable settlement offers rather than running the risk of expending a great deal of time and money and coming away empty-handed.

Before pursuing a global settlement strategy, you should first thoroughly analyze your client's potential civil, criminal, and administrative exposure, and determine which area poses the greatest risk to your client.

This analysis may lead you to the somewhat counterintuitive conclusion that civil or administrative sanctions could be more harmful to your client's long-term position than criminal sanctions. Next, in pursuing a global settlement strategy it is important to understand and capitalize on the fact that your client's leverage will be at its greatest while it is negotiating a possible resolution of its outstanding difficulties. While it may be beneficial in certain instances for your client to secure concessions from the government and pursue a negotiated settlement in lieu of a trial, thereby minimizing the potentially damaging consequences to your client's business, it must be remembered that the government obtains significant benefits from a negotiated settlement as well. Clearly, a negotiated settlement allows the government to save the costs associated with an expensive investigation and trial, whose ultimate result is uncertain, while obtaining some measure of relief. You should understand and emphasize these economies during your negotiations and pursue a settlement strategy that accounts for all civil, criminal and administrative issues, such as criminal sanctions, civil monetary penalties, exclusion from Medicare and state health care programs, and the loss of licenses or certifications. Of course, in pursuing a global settlement strategy, you should try to involve all federal *and* state authorities in the process.

B. What to do if a Global Settlement isn't Possible.

Although you may desire to resolve all pending criminal and civil issues simultaneously, you must be prepared to deal with the possibility that the government may be at different stages in its criminal and civil investigations, thereby interfering with your ability to reach closure on all outstanding issues at the same time. Oftentimes criminal and civil prosecutors proceed at different speeds due to different prosecutive strategies and standards of proof. If this is the case, you should analyze whether it would be more beneficial for your client to wait and resolve all outstanding issues simultaneously, or resolve one aspect of the government's investigation and attempt to use that resolution to its advantage in dealing with other aspects of the investigation.

Although it is generally not advisable to resolve your client's potential criminal exposure before dealing with any civil ramifications, it may make sense, in certain circumstances, to reach a civil settlement with the government before resolving a pending criminal investigation. Very often criminal prosecutors look favorably on civil settlements, because they believe it reflects positively on your client's willingness to acknowledge its outstanding problems. Further, a civil settlement can be a more

effective basis from which to argue that your client has already been punished, that the amount of the settlement was equitably related to the seriousness of the conduct and your client's culpability, and that the government should decline to criminally prosecute your client in light of the civil sanction as well as the remedial measures which you have, or will, institute in the future. You should, however, avoid making any admissions as part of a civil settlement that could be used against your client in a criminal investigation or exclusion hearing just in case the government is not mollified and opts to proceed.

As a general rule, the government's willingness to negotiate with you will reflect its perception of degree of your client's malevolence. Although there may be items that are non-negotiable, there are many areas that are potentially negotiable of which you should be aware. For instance, there may be room for negotiation in the area of exclusion from further participation in state and federal health care programs. Although independent of the Department of Justice, HHS-OIG typically works closely with DOJ. While a conviction of certain specified crimes automatically triggers the mandatory exclusion provisions, the Department of Health and Human Services' Office of Inspector General retains permissive exclusion authority for other crimes.⁴⁴ Therefore, which crime a company or individual ultimately pleads to may be critical to its ability to receive funds in the future. In cases in which the government is seeking forfeiture, you may be able to negotiate about the amount of the forfeiture.

In False Claims Act cases, while the government may be entitled to treble damages, and will usually insist upon double damages, there may be some negotiation as to the applicable multiplier. Similarly, there is frequently room for negotiation about the amount of compensatory damages to which the multiplier is applied, and about the amount of any penalties to be assessed. You may also be able to negotiate an extended payment schedule if the negotiated sum is particularly onerous. You should also try to negotiate the best possible release from the government for claims that it has not investigated or for which it has not received compensation. As well, there may be some room for negotiation over the tax consequences of settlement payments or of the costs associated with the settlement.

Conclusion

The health care field is in a never-ending state of transition. Health care providers are constantly bombarded with a myriad of vague, confusing, and conflicting statutes, rules, and interpretations. The potential civil, criminal, and administrative consequences for inadvertent

mistakes and arguably-unintentional conduct are enormous. Further complicating the picture, many health care providers are now fighting over shrinking health care dollars at the same time that political leaders and governmental agencies are scrutinizing this field with a greater array of investigative tools and resources than ever before. In such an environment, when a health care provider is confronted with potential liability, a qualified, experienced attorney must be prepared to navigate this treacherous field in order to safeguard the provider's many interests. ☒



John G. Malcolm is a partner at Malcolm & Schroeder LLP, which concentrates in white collar criminal defense and internal investigations, health care litigation, commercial litigation, and medical malpractice litigation. Mr. Malcolm is an honors graduate of Columbia College and Harvard Law School, and a member of the bar in Georgia and Washington, D.C. Prior to joining the firm, he was an Assistant U.S. Attorney in Atlanta assigned to the fraud and public corruption section, and also served as an Associate Independent Counsel in Washington, D.C.



Robert F. Schroeder is a partner at Malcolm & Schroeder LLP. He is an honors graduate of St. John's University and St. John's Law School, and a member of the bar in Georgia and New York. Prior to joining the firm, Mr. Schroeder was an Assistant District Attorney in New York, an Assistant U.S. Attorney in Atlanta assigned to the fraud and public corruption section, and also served as an Associate Independent Counsel in Washington, D.C.

Endnotes

1. U.S. DEP'T OF JUSTICE, HEALTH CARE FRAUD REPORT FISCAL YEARS 1995 & 1996, HEALTH CARE FRAUD: CRISIS OF THE NINETIES 2 (1997); Richard H. Girenti, Joseph A. Spinelli and Jill Konviser, *Federal Prosecution of Health Care Fraud*, 216 N.Y.L.J. S5 (1996); Robert Pear, *\$1 Trillion in Health Costs is Predicted*, N.Y. TIMES, December 29, 1993, at A12; *Administration Announces Task Force Recommendations to Combat Health Care Fraud and Abuse* (January 13, 1993) (joint release of the Secretary of Health and Human Services, the Director of the Office of Management and Budget, and the Attorney General).
2. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of the U.S.C.).
3. DEPARTMENT OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GENERAL, SEMIANNUAL REPORT, APRIL 1, 1996 - SEPTEMBER 30, 1996 (1996).
4. See, e.g., *United States v. Gold*, 743 F.2d 800, 823 (11th Cir. 1984); *United States v. Beusch*, 596 F.2d 871, 877-78 & n.7 (9th Cir. 1979); *Standard Oil Co. v. United States*, 307 F.2d 120, 128 (5th Cir. 1962).
5. See *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855-56 (1st Cir. 1987).
6. 18 U.S.C. § 1001 (1994 & Supp. II 1996).
7. 18 U.S.C. § 287 (1994).
8. 18 U.S.C. § 669 (Supp. II 1996).
9. *Id.* § 1518.
10. 18 U.S.C. §§ 1956 & 1957 (1994 & Supp. II 1996).
11. 18 U.S.C. § 1963 (1994).
12. *Id.* § 1341.
13. *Id.* § 1343.
14. 18 U.S.C. § 1035 (Supp. II 1996).
15. *Id.* § 1347.
16. 42 U.S.C.A. § 1320a-7b(a) (West Supp. 1998).
17. *Id.* § 1320a-7b(b).
18. 42 U.S.C. § 1320a-7b(c) (Supp. II 1996).
19. 42 U.S.C.A. § 1320a-7b(d) (West Supp. 1998).
20. O.C.G.A. §§ 16-8-2, 16-8-12 (Michie 1996 & Supp. 1998).
21. O.C.G.A. § 16-10-20 (Michie 1996).
22. *Id.* § 16-10-21.
23. *Id.* § 49-4-146.1.
24. 31 U.S.C. §§ 3729 *et seq.* (1994).
25. *Id.* § 3729(a)(7).
26. *Id.* § 3730(d).
27. *Id.* § 3729(a)(7).
28. *Id.* § 3730(d).
29. 12 TAF QR 41 (Jan. 1998).
30. 42 U.S.C.A. § 1320a-7a (West Supp. 1998).
31. *Id.* §§ 1320a-7(a) & (b).
32. See 28 C.F.R. § 77.10 (1997).
33. 132 F.3d 1252 (8th Cir. 1998).
34. *Id.* at 1254.
35. *Id.*; see also State Bar of Georgia Standard of Conduct 47.
36. *Id.* at 1254-56.
37. *Id.* at 1257.
38. A third, less-well-known, and less-accepted privilege is the so-called self-evaluative privilege, which may also provide a measure of protection to internal investigations. See, e.g., *Diversified Indus. v. Meredith*, 572 F.2d 596 (8th Cir. 1977); *In re LTV Sec. Litig.*, 89 F.R.D. 595 (N.D. Tex. 1981).
39. If you are an in-house counsel for a health care provider, it is particularly important that you affiliate with outside counsel since the advice you gave (or did not give) may become an integral part of an internal investigation, thereby bringing your objectivity into question.
40. 31 U.S.C. § 3730(h) (1994).
41. See generally Chapter Eight, UNITED STATES SENTENCING GUIDELINES (1998) (sentencing of organizations).
42. For a good discussion of corporate compliance programs in light of federal sentencing guidelines, see Nicholas A. Lotito, *The Evolution of Antitrust Prosecutions and Implications of the Federal Sentencing Guidelines: Real Time for Real Crimes*, 31 GA. STATE BAR J., at 6, 9 (1994).
43. One must, of course, be extremely careful about disclosing information to any outside entity which might adversely impact upon your client's legal or competitive position.
44. See generally 42 U.S.C. § 1320a-7 (1997).

Landy Insurance - pickup 4/98 p87

JUVENILE COURT FOCUS

“Committable for Mental Illness”: Is this a True Challenge to Transfer?

By Lyn K. Armstrong

Introduction

This article addresses the issue of transfer of juvenile cases to adult criminal court for criminal prosecution and focuses in particular on one criteria for transfer: Is the juvenile offender committable to an institution for the mentally ill? The purpose of this article is to examine how Georgia courts have addressed the commitment issue as a basis for denying transfer.

The transfer of cases from juvenile court to adult criminal court cannot be fully addressed without first making a passing comment on Senate Bill 440.¹ The enactment of the Bill relieves the juvenile court of its jurisdiction over the following crimes: murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and armed robbery with a firearm. These crimes, which have come to be known as the “seven deadly sins,” are now within the exclusive jurisdiction of the superior court. As a result, the torch of transfer is passed to the district attorney, who decides which cases will remain in superior court and which will be transferred to juvenile court.²

There is still a significant genre of cases that SB 440 does not impact: recidivism and aggravated assault

crimes,³ and designated felonies,⁴ thereby making transfer issues in these matters still relevant. With the enactment of tougher laws addressing youthful offenders, it remains to be seen if the Georgia legislature will broaden the scope of SB 440 to include these crimes or enact similar laws eventually making transfer of cases from juvenile court to criminal court obsolete altogether.

I. Statutory Considerations

When the issue of commitment is raised, the question most often presented is, should the standard for commitment meet the criteria for civil commitment or should transfer fail at any suggestion of a mental disorder? The question is an important one, because a finding by the juvenile court that a juvenile offender is not committable results in the court relinquishing its jurisdiction.

The law authorizes transfer of cases when, *inter alia*, the court in its discretion determines there are reasonable grounds to believe that the juvenile is not committable to an institution for the mentally ill.⁵ Title 15 does not define mental illness, nor does it set forth the standard to determine the basis for commitment.

In a 1976 opinion, the Attorney General established that juvenile commitment issues must necessarily refer-

ence portions of Title 88 of the then-extant Georgia Code,⁶ which authorized the involuntary hospitalization of mentally ill persons and further outlined the standard for a civil commitment.⁷ This opinion is significant for two reasons. One, it offers the only direction as to how Georgia courts should define what conditions require commitment for youthful offenders; but more profoundly, this opinion establishes that child mental disorders are to be given no greater value because the person facing criminal prosecution is under the age of

seventeen. Being the prevailing standard, civil commitment therefore imposes upon the juvenile court a two-fold duty: (1) a finding of mental illness and (2) a finding that the child requires involuntary hospitalization.⁸

II. The Civil Commitment Standard

A. Mental Illness

Surprisingly, the number of cases addressing mental illness is unremarkable and these few cases have failed to define a disorder that would serve as the underlying basis for denying transfer.⁹ Those addressing specific disorders are reviewed below:

In *In re L.L.*,¹⁰ the juvenile offender suffered from schizophrenia, which was in remission and was controllable with medication. Although the Court of Appeals fell short of discussing schizophrenia as a significant disorder or impairment, the court did conclude that it is not a condition that will avoid transfer if in remission or controlled by medication.

In *In re K.S.J.*,¹¹ the juvenile offender suffered from conduct disorder and attention deficit disorder. The court ruled that these conditions did not give rise to mental illness, stating they were neither “mental disorders” nor “mental defects.” Also significant was that the court based its decision in part on evidence indicating the juvenile had the capacity to distinguish right from wrong and was competent to stand trial.

Finally, in *In re E.W.*,¹² the Supreme Court ruled that

antisocial behavior is not a mental illness. As in *K.S.J.*, the court considered that the juvenile knew right from wrong at the time of the crime and further added that E.W. was

not clinically depressed, was responsible for his behavior, and could assist his attorney in preparing his defense.¹³

B. Expert v. Non-Expert Testimony

When addressing the mental condition of a juvenile, the court may receive opinion testimony from almost anyone who can establish a basis for such opinion. Expert testimony is often considered by the court, but non-

expert testimony is also admissible.¹⁴ In *In re J.T.*,¹⁵ the Court of Appeals upheld transfer based on the testimony of an investigator from the sheriff’s department and a juvenile court officer. Both testified that they had several conversations with the juvenile and had observed his interactions with friends. Both testified that the juvenile was not mentally ill. The Court of Appeals ruled that the juvenile court was authorized in finding that J.T. was not mentally ill based solely on the testimony of the non-expert witnesses.

The court further established that the record must be clear as to the basis of the witness’ opinion, expert or non-expert, if the juvenile court relies on that opinion in authorizing transfer.¹⁶ It is when the basis for the court’s decision is lacking, as in *L.K.F. v. State*,¹⁷ that the court abuses its discretion to transfer. In *L.K.F.*, the juvenile court based its finding that the juvenile offender was not mentally ill on the testimony of a witness who declined to express any opinion at all on the juvenile’s mental condition. The witness was asked several questions regarding the juvenile’s capacity and, although he testified that the child “appeared to be able to carry on an intelligent conversation” and could not be assessed as “someone who was retarded,” he also testified that his observations of the juvenile were limited and that he neither had the expertise nor the information upon which to base an opinion. The Court of Appeals vacated the judgment of the juvenile court and remanded the case back for a new hearing.

When the issue of commitment is raised, the question most often presented is, should the standard for commitment meet the criteria for civil commitment or should transfer fail at any suggestion of a mental disorder? The question is an important one, because a finding by the juvenile court that a juvenile offender is not committable results in the court relinquishing its jurisdiction.

The Supreme Court, in *In re J.H.*,¹⁸ echoed the *J.T.* decision that the record must support the court's ruling. Even though the evidence is conflicting, the order of transfer will not be disturbed provided there is some basis for the court's decision. In *J.H.*, the Supreme Court upheld transfer where the juvenile was evaluated by two psychiatrists who disagreed on whether the juvenile was in need of involuntary hospitalization. Faced with a factual question, the juvenile court relied on the testimony of the doctor who testified against involuntary treatment. The Supreme Court ruled that the juvenile court's order of transfer was supported by competent evidence and that the court did not abuse its discretion in authorizing transfer.¹⁹

C. Remand

Remand has been the consistent remedy for curing a record lacking in evidence supporting the court's ruling. In *In re S.P.*, the only evidence showing the juvenile should be transferred was evidence of the underlying delinquent act and subsequent escapes of the child. There was no mention of the child's mental condition or the need for involuntary treatment. In finding no factual basis to support the ruling that the child did not meet the criteria for civil commitment, the Court of Appeals vacated the juvenile court's order of transfer and remanded the case back to juvenile court for a new hearing.²⁰ In a dissent, Judge Pope agreed with the majority that the record offered no competent evidence to support the court's conclusion, but stated that the order of transfer should not be vacated and remanded back to the juvenile court allowing for a second hearing. The dissent opined that such a disposition permitted the prosecution, who bears the burden of proof, a second chance to satisfy its burden.

Four years earlier, Judge Pope wrote a similar dissent in *L.K.F. v. State*,²¹ concluding then that a rehearing to allow the state to present additional evidence was improper and the state was not "entitled to a second opportunity to prove its case."²² Judge Pope relied on *Fulton County D.F.C.S. v. Perkins*,²³ a 1979 case that held that the decision in a transfer proceeding is a final judgment and is reviewable by direct appeal.

L.K.F. and *S.P.* have seemingly reached the opposite conclusion of earlier cases ruling that a transfer proceeding is a final judgment. The conflicting opinions leave open to debate whether or not the Court of Appeals intended to reverse itself on this issue.

D. Hospitalization

In addressing involuntary hospitalization as the second criteria for a civil commitment, two decisions

must be revisited: *In re L.L.*²⁴ and *In re J.H.*²⁵ At issue in *L.L.* was whether the juvenile should be hospitalized due to mental retardation.²⁶ It was undisputed that the 15-year-old not only suffered from schizophrenia, but also had an IQ of 44 and a mental age of eight. It was the opinion of the experts who examined him that institutional hospitalization was the appropriate treatment to address his needs. There was also an inference from the evidence that the juvenile's needs could be met by a combination of non-institutional treatments. In this case, the Court of Appeals ruled that if there were alternative treatments that could equally suit the needs of the juvenile, then the juvenile was not committable and transfer would be affirmed.²⁷

In *J.H.*, the court based its finding of mental illness on the testimony of two psychiatrists who evaluated the juvenile and who both agreed that the juvenile was mentally ill. The court then addressed the need for hospitalization. Interestingly, there were two hearings conducted on this issue. A state psychiatrist, ordered by the court to prepare a report regarding the child's mental condition, testified at the first hearing that the juvenile should receive involuntary hospitalization. Based on this testimony, the court would have been authorized to deny transfer. In an unprecedented move, however, the court recessed, stating that it desired further psychiatric testimony, and ordered a second report. At the second hearing, the second psychiatrist testified that, even though the juvenile was mentally ill, she did not require involuntary hospitalization.²⁸ The court ordered the case transferred and its ruling was upheld by the Supreme Court.²⁹

J.H. and *L.L.* are the two leading examples of a step by step application of the civil commitment standard since the Attorney General's 1976 opinion.

Conclusion

Challenging transfer on the grounds that a juvenile offender is committable due to mental illness has had little success in Georgia courts. Even though the courts have offered little direction in pinpointing a mentally ill condition, it seems clear that conduct disorders and antisocial behaviors are not conditions that will persuade the juvenile court to retain jurisdiction. Further, if a known mental illness can be controlled with medication, then that condition will not be a basis for retaining jurisdiction.

A final note: Title 15 does not include competency to stand trial as a criteria for determining whether or not a case should be transferred. Nevertheless, Georgia courts have in the past considered the matter of competency in determining the status of a child's mental condition for

the purpose of determining commitment. In these cases, the court attached no greater value to competency than to any of the other factors considered. It should be noted as well that competency was not challenged, so it is not known whether the court would have found a different result upon a finding of incompetence.

Legislation on child competency is inevitable. And it is likely that such legislation will prohibit the court from making a discretionary transfer of an incompetent child. Should such legislation pass, the standard for civil commitment will remain unchanged in cases where competency is not at issue. In cases where competency is raised, and there is a finding by the court that the juvenile offender is incompetent, the juvenile court will retain jurisdiction over the juvenile, and long-term treatment will commence. ■

Lyn K. Armstong is the Chief Assistant, Juvenile Court Division, in the Fulton County District Attorney's Office. Previously she was law clerk to Fulton Superior Court Judge William H. Alexander. She received her B.A. degree cum laude from Howard University and graduated from Howard University School of Law.

Endnotes

1. O.C.G.A. § 15-11-5(b)(2)(A)(1994).
2. *Id.* § 15-11-5(b)(2)(C). This statute provides that “[b]efore indictment, the district attorney may, after investigation and for extraordinary cause, decline prosecution in the superior court. Upon declining such prosecution in the superior court, the district attorney shall immediately withdraw the case and lodge it in the appropriate juvenile court for adjudication.”
3. *Id.* § 15-11-5(b)(2)(A).
4. *Id.* § 15-11-39.1.
5. *Id.* § 15-11-39(a)(3)(B).
6. Recodified as O.C.G.A. title 37.
7. 76 Op. Att’y Gen. 111 (1976).
8. *Id.*; see also VICTORIA C. FERREIRO, MCGOUGH’S GEORGIA JUVENILE PRACTICE AND PROCEDURE WITH FORMS (2d ed. 1994); O.C.G.A. § 37-3-1(9.1) (providing that a person in need of involuntary inpatient treatment is one who is mentally ill and presents a substantial risk of imminent harm to himself or others” or “who is so unable to care for his own physical health and safety as to create an imminently life endangering crisis”); O.C.G.A. § 37-3-1(11) (defining mental illness as “having a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life”)
9. The few cases raising the issue generally make no mention of specific disorders or behaviors. In these cases, the courts have stated that the child is not committable to an institution for the mentally retarded or mentally ill. The question then becomes whether the Juvenile court abused its discretion in authorizing transfer based on its finding that the child was not committable. See generally *In re S.D.H.*, 187 Ga. App. at 745, 371 S.E.2d at 150 (1988); *D.T.R. v. State*, 174 Ga. App. at 696, 331 S.E.2d at 71 (1985).
10. 165 Ga. App. 49, 299 S.E.2d 53 (1983).
11. 258 Ga. 52, 365 S.E.2d 820 (1988).
12. 256 Ga. 681, 353 S.E.2d 175 (1987).
13. *Id.* at 681, 353 S.E.2d at 176. The Court also stated that the child did not need to be hospitalized.
14. *In re J.T.*, 214 Ga. App. 349, 447 S.E.2d 702, 703 (1994); see also *In re of R.A.J.*, 214 Ga. App. 162 at 163, 447 S.E.2d 158, 159 (1994); *Leonard v. State*, 157 Ga. App. 37, 38, 276 S.E.2d 94, 96 (1981); *Spencer v. State*, 236 Ga. 697, 700 (4c), 224 S.E.2d 910, 914(a)(c)(1976) (citing Ga. Code Ann. § 38-1708 (recodified as O.C.G.A. § 24-9-65)).
15. *J.T.*, 214 Ga. App. at 349-50, 447 S.E.2d at 703-04.
16. *Id.*, 447 S.E.2d at 703-04.
17. 173 Ga. App. 770, 328 S.E.2d 394 (1985); see also *In re S.P.*, 189 Ga. App. 829, 377 S.E.2d 911 (1989).
18. 260 Ga. 447, 396 S.E.2d 885 (1990).
19. *Id.* at 450, 396 S.E.2d 888.
20. *S.P.*, 189 Ga. App. at 892-30, 377 S.E.2d at 912; see also *In re R.A.J.*, 214 Ga. App. at 162, 163, 447 S.E.2d 158, 159 (1994).
21. *L.K.F.*, 173 Ga. App. at 772, 328 S.E.2d at 396 (Pope, J., dissenting). “The decision by a juvenile court to surrender its jurisdiction is a critical determination affecting the tenor of the juvenile’s subsequent treatment in the courts and therefore must measure up to the essentials of due process and fair treatment. The decision in a transfer proceeding ... is final and reviewable by direct appeal. In light of these circumstances, I do not believe in the opportunity to prove its case.” *Id.*, 328 S.E.2d at 396 (Pope, J., dissenting) (punctuation and citations omitted)
22. *Id.*, 328 S.E.2d at 396 (Pope, J., dissenting).
23. 244 Ga. At 237, 259 S.E.2d 427 (1979); see also *J.T.M. v. State*, 142 Ga. App. 635, 636, S.E.2d 764, 765 (1977).
24. 165 Ga. App. 49, 299 S.E.2d 53 (1983).
25. 260 Ga. 447, 396 S.E.2d 885 (1990).
26. *L.L.*, 165 Ga. App. at 49, 299 S.E.2d at 54.
27. *Id.* at 50, 299 S.E.2d at 54-55.
28. *J.H.*, 260 Ga. at 447-49, 396 S.E.2d at 886-87.
29. *Id.* at 450, 396 S.E.2d at 888.

Lawyer at
work(West) pickup
8/98: 2-page spread

Lexis Law Publishing - New

Legal Image - new

\$1.5 MILLION TO GEORGIA LEGAL SERVICES, ATLANTA LEGAL AID

Grants to Provide Legal Services to Domestic Violence Victims

By Billie Bolton

THE JUDICIAL COUNCIL OF Georgia has awarded \$1,500,000 to two legal services agencies for increased capacity to assist victims of domestic violence. Chief Justice Robert Benham announced that the Atlanta Legal Aid Society and the Georgia Legal Services Program are the first agencies to receive funding from this competitive grant program. These services will assist people in all parts of the state. The Georgia General Assembly is providing state funds to the Judicial Council to launch this initiative.

The awards were presented during a press conference held Sept. 1, 1998 featuring Chief Justice Benham, State Bar Immediate Past President Linda A. Klein, Attorney

General Thurbert Baker, and Sen. Roy Barnes.

The project is the culmination of an effort of the State Bar of Georgia last year under the leadership of then

basic matters such as: access to housing, employment, schools, and health insurance. Without ongoing help they were unable to break away from abusive spouses or boyfriends

and thus break the cycle of violence. For poor women there is literally nowhere to turn.

Through the State Bar's Access to Justice Committee, community organizations and local bar associations were alerted to the critical need for legal assistance to battered women. The State Bar organized A Season of Hope: Aid-a-Shelter last November

to encourage voluntary bar associations to "adopt" women's shelters in their communities and sponsor a collection drive for necessity items — from toys to toiletries to canned goods.

Ms. Klein also sought help from



Among those participating in the press conference were (L-R): Phyllis Holmen, Georgia Legal Services Program Executive Director; State Bar Past President Charlie Lester; Attorney General Thurbert Baker; State Bar Immediate Past President Linda Klein; Chief Justice Robert Benham; Sen. Roy Barnes; Richard Horder; and Steve Gottlieb, Atlanta Legal Aid Society Executive Director.

President Linda Klein. During her tenure as an officer of the State Bar, Ms. Klein received numerous calls from women around the state who were unable to obtain ongoing legal assistance. These battered and often indigent women needed help with

the General Assembly and the Judicial Council of Georgia. Chief Justice Benham and Attorney General Baker supported her idea and asked for funds in the Judicial Council FY99 budget. With help from many individuals and a coalition of interested groups — from the National Organization of Women to the Partnership Against Domestic Violence — the funding was obtained. The grants to Georgia Legal Services and Atlanta Legal Aid will bring help to thousands of families across the state.

The Georgia Legal Services Program received \$1,060,000 to assist victims in 154 counties. The agency will expand services to victims and expand training programs for service providers, attorneys and law enforcement. With 12-15 new attorney positions, one in every regional office, they expect to serve 2,800 new clients. The agency will broaden the scope of its services beyond immediate crisis response. Special attention will focus on domestic violence victims in rural areas and on military bases. A training component for law enforcement officers will increase their awareness and ability to assist victims. The expanded legal services will include temporary and permanent restraining orders, child custody and support matters and assistance with economic security and stability issues.

The Atlanta Legal Aid Society (ALAS) will receive \$440,000 to provide services in Fulton, DeKalb, Gwinnett, Clayton and Cobb counties. Its Domestic Violence Project will enable ALAS to hire additional staff to work with battered spouses, seniors, children and immigrants. The agency will work cooperatively with Georgia Legal Services on a Statewide Domestic Violence Task Force. Among the services to be provided are: advice lines for shelter

Communications Department Honored For Aid-a-Shelter Campaign

THE COMMUNICATIONS

Section of the National Association of Bar Executives (a division of the American Bar Association) recently presented the State Bar of Georgia Communications Department with a Luminary Award for Excellence in Public Relations. The award, which is

sponsored by West Group, was presented to Director of Communications Jennifer M. Davis (center) by West representatives Molly Ready and John Shaunessy.

The award recognizes the Communications Department's efforts in organizing the "Season of Hope: Aid-a-Shelter" campaign during the 1997 holidays. As part of that endeavor, voluntary bar associations were asked to adopt a batter women's shelter in their community and host a collection drive for day-to-day items. The Communications Department matched bar associations with

shelters and coordinated a statewide newspaper and television campaign to publicize the individual groups efforts. "Aid-a-Shelter" was

intended to raise awareness of the plight of domestic violence victims which was the focus of then-State Bar President Linda A. Klein's administration.



She adds, "The campaign was a precursor to the successful request by the State Bar and others for the Legislature to appropriate \$2 million to ensure that these women who are already suffering at the hands of their abusers are not also suffering at the hands of the legal system."

Other staff members of the Communications Department who coordinated the effort were: Susan Hale, Communications Coordinator; Erin E. Miles, Internet Coordinator; and Denise Puckett, Administrative Assistant. ☐

staff to consult with legal aid lawyers, mutual training programs and referrals for intensive social services. A new volunteer coordinator with the Atlanta Volunteer Lawyers Foundation will make more assistance available for protective order "second hearings."

In addition to the \$1.5 million allocated through this round of grants, there is an additional \$500,000 remaining from the appro-

priation. These funds will be awarded following another competitive application process. The subsequent grants will address the needs of hard-to-serve groups or particularly hard-to-reach regions of the state. Announcement of these grants is expected by Jan. 1, 1999. ☐

Billie Bolton is the Senior Communications Officer of the Administrative Office of the Courts.

SECRETARY OF STATE CORPORATIONS DIVISION

Changing The Way Attorneys Do Business In Georgia

By Secretary of State
Lewis Massey

CORPORATE ATTORNEY JIM

Wagner of the firm Powell, Goldstein, Frazer and Murphy remembers when just reaching an operator in the Secretary of State (SOS) Corporations Division was an exercise in patience. Many legal professionals remember a time not long ago when callers to our Corporations Division were often placed on hold for up to 10 minutes before reaching an agency operator. Once a customer actually reached a live voice, it was not uncommon to wait seven to 10 days for a name reservation approval and up to 21 days for corporate documents to arrive.

When I arrived at the Capitol in January of 1996, performance indicators like these prompted me to work to improve customer service offerings in all five Secretary of State operating divisions. In the two and a half years since, we have made technological improvements and

personnel changes in each division of our agency. Since recent improvements to our corporate products and services have been in part inspired

Corporations Division can better serve you.

Today, the average telephone hold-time has been reduced by 80 percent. On "high volume" days such as Mondays and the day after holidays, average hold time is sometimes close to two minutes. Most other days the average wait before reaching a customer service representative is less than 30 seconds. And once a representative is reached, the long wait of recent years has been replaced by instantaneous confirmations on name reservation requests. This is particularly impressive when you consider that approximately 1,500 telephone calls are received by the Corporations Division each day. This "instant approval" alone has speeded the incorporation process by at least seven days and is saving

taxpayers more than \$40,000 per year in postage and other costs associated with unnecessary mailing of name confirmations.

The volume of business conducted by the Corporations Division



by feedback from you—Georgia's legal professionals—I would like to share a few of these improvements for the benefit of all State Bar of Georgia members and encourage your continued input on how our

is astounding and, I believe, indicative of the Georgia Bar's efforts to make this state an attractive forum for incorporation, and of Georgia political leaders' aggressive pro-business stance. In addition to the 1,500 phone calls received per day, an average of 1,200 corporate filings are received each week, more than 6,000 corporate names are reserved and 7,000 certificates and copies are mailed each month.

The Secretary of State home page located at www.sos.state.ga.us has become an invaluable tool for attorneys doing business with the Corporations Division. The site allows customers to search for basic corporate information—updated daily—such as registered agent, entity status, officer name and address and date of formation online, free of charge, 24 hours a day. In addition, Internet requests for name reservations, certificates of existence (good standings) and certified copies are now also accepted and may be made by clicking a link at the Corporations Division Web site to reveal a convenient “form fill” order blank.

On-line name requests received during business hours will almost always be confirmed by return e-mail within one hour of receipt; certificates of existence requested before 3 p.m. will be mailed the same day as requested and certified copies will be mailed no later than one business day after the day of request.

Jim Wagner also recalls a recent example of how the Corporations Division on-line services have enabled him to save his firm's clients and himself valuable time. “While on a phone conference with a client who was contemplating a merger with an entity the client believed to be a corporation, we accessed the SOS Web site and determined that the other entity was in fact a limited

liability company. Having this information at our fingertips enabled us to immediately counsel the client that the contemplated merger would not work with an LLC, and that the transaction would have to be restructured.” Representing clients doing business in virtually all 50 states, Wagner considers the Georgia Secretary of State's office to be “on the leading edge of corporate information and services.”

The Corporations Division recently expanded its on-line service with the addition of a new feature allowing Georgians to pay for certificates and copies using a credit card when purchased through the Secretary of State Web site.

This new service allows Georgia law firms to specify shipping instructions and essentially write just one check for all monthly corporate purchases. As of Aug. 1, 1998, customers may also establish accounts with the GeorgiaNet Authority to be debited each time an order is placed. The new system is faster than traditional document requests by mail and fax, and can be used for all Corporations Division activity, including payments associated with new filings. In many cases customers receive same day service, or no later than next day service. For security purposes, all credit card processing is handled by GeorgiaNet. Contact Linda Driskill at (404) 656-6576 to establish an account.

While we believe the Internet is the most efficient tool for name reservations and document requests, Georgians without access to the Internet should notice considerably improved telephone service due to the development of an innovative customer assistance program. The Customer Service Group is staffed by nine full-time employees and one supervisor. As there has been no employee turnover in that unit in more than a year, these “seasoned

professionals” are yielding real dividends, the most obvious of which is the absence of complaints by callers into the division.

In addition to providing customers with instant name reservation confirmation and reducing telephone hold-time for basic corporate information, experienced customer service operators now provide callers with timely answers to commonly asked questions.

The Secretary of State Corporations Division is committed to further enhancing customer access to the division's products and services. Division staff are actively involved in the Digital Signature Task Force and the Georgia Electronic Commerce Association in the hopes of increasing on-line service capabilities of this office. We will continue to work with the State Bar of Georgia to meet the growing needs of its members.

Comments and suggestions are welcomed and should be directed to Corporations Division Director Warren Rary at (404) 657-8371 or Assistant Secretary of State Cathy Cox at (404) 656-2881. ☐

website
ad from
jennifer

Opening the Doors of Public Business

By **Hollie Manheimer**

PUBLIC ACCESS TO GOVERN-ment meetings and records is vital to guarantee a successful democratic society. Open public meetings allow citizens to voice opinions about zoning, budgetary and school board decisions. They allow us to be present when a local housing authority meets to authorize a \$20,000 raise for its chief.

Similarly, open records laws allow us to obtain police and accident reports, learn the amount for which a city settled a sex discrimination suit against a city employee, discover where our tax monies go and see incident reports documenting a local shooting and riot. In short, just about any action by a public body or agency is public knowledge.

Fortunately, laws exist in Georgia to mandate this concept of open government. We know these laws as the open meetings and open records law, the sunshine laws, the access laws, or in general, the principal of freedom of information. Unfortunately, however, these laws often are not enforced.

In 1994, First Amendment lawyers, public interest advocates, press organizations, academics and others around Georgia organized to form the Georgia First Amendment Foundation (GFAF). This 501(c)(3) non-profit agency was incorporated with the sole mission of educating the State about the access laws and their importance. GFAF hoped to elevate interest in the laws, and to

educate all concerned — both the public officials empowered to make the decision to keep meetings open and records available, and the public and press who too often felt they were shut out inappropriately.

The open meetings act, codified at O.C.G.A. § 50-14-1 *et seq.*



prescribes the general principal of openness: all public meetings are to be open and accessible to the public, unless a narrowly tailored exception applies.

Analogously, the open records act, codified at O.C.G.A. § 50-18-1 *et seq.* prescribes a similar principal of openness: all public records are to be open for personal inspection by

the public, unless a narrowly tailored exception applies.

The problem is the laws, as they now stand, really provide only one option for anyone who may wish to challenge a supposed improper closure. If you don't get what you want, you can sue. The aggrieved open door seeker may file a lawsuit demanding access and alleging the law was violated. But is the average citizen really going to pursue any of these options? Is it really worth going to court to challenge the fact that a city council authorized the purchase of a new police car, without even meeting, much less in public? Or to find out which businesses in town failed to comply with the city's sewer ordinance? These shortcomings were the impetus behind the formation of GFAF, and behind some more recent changes in the law itself.

Since its inception, in an attempt to serve as the watchdog of public access to government, GFAF has written numerous inquiry letters to public agencies, inquiring about the agency's compliance with the open government laws. If GFAF learns that a public agency routinely meets, but fails to comply with the notice (of meetings) requirements set out by statute, it writes the agency to inquire as to why. Similarly, if GFAF learns that a public agency is charging more than the \$.25 per copy per page of public records prescribed by law, it writes the agency to inquire as to why.

GFAF also has conducted innumerable workshops around the State in an effort to teach awareness

of the laws. Recently, in Ellijay, a member of the Gilmer County Commission, the news editor for the (Ellijay) *Times Courier*, and a First Amendment lawyer participated in a dialogue about the practical implications of the sunshine laws. In the afternoon, the audience members—a composite of public officials, the public, and the press—participated in practical exercises attempting to work through access disputes in a safe setting to determine the appropriate interpretation of the law.

Similarly in Columbus recently, the Mayor of Columbus, the metro editor of the *Columbus Ledger Enquirer* and a First Amendment lawyer again led a panel discussion about the access laws. The audience members later that day tried their hand at hypothetical exercises designed to teach understanding of the laws.

GFAF also has created a series of literature in an effort to spread such information as widely as possible. GFAF's newest publication, due out by the end of 1998, is a joint project with the office of the state attorney general. The two offices will publish "A Citizen's Guide to Open Government in Georgia." The seven page volume will arm both public officials and citizens with the rudimentary interpretations of the open government statutes, provide resource material for further inquiry and include sample open records request forms.

GFAF's quarterly newsletter ledgers statewide open government violations, and provides substantive and insightful analysis concerning current open government issues. The newsletter also provides resource material for further inquiry. The newsletter is the vehicle which keeps those interested abreast of access

developments around Georgia.

GFAF responds to inquiries from public officials, the public and press, such as the following examples:

1. From public officials: Reporters demand information that I don't think is a public record. And they want to see it immediately. In fact, their requests seem so broad that I would need to spend all of my working hours to comply. How do I handle this?

Is it really worth going to court to challenge the fact that a city council authorized the purchase of a new police car, without even meeting, much less in public?

2. From the public: My city council closes public meetings at the drop of a hat, invoking an exception to the Open Meetings Act, only to emerge announcing a decision on some issue clearly not covered by the exemption. What can I do about this?
3. From the public: My county commission whips through its agenda so fast, it seems that they've met beforehand to privately thrash out their differences. Can I do anything about this?
4. From the press: My local school board seems to spend more hours in executive session than in public session. Do I have a remedy to challenge this?
5. From the press: Our local police department conveniently misplaces incident reports involving prominent citizens. How do we address this?
6. From the public and press: My local agencies charge prohibitively expensive fees for finding and copying records. In fact, they

always charge more for a copy than the \$.25 cents a page allowed by Georgia law. What should I do?

GFAF seeks to prevent problems like these before it becomes necessary to go to court to resolve them.

In terms of recent legislative developments, Georgia's 1998 session left observers with some optimism as to the future state of open government in Georgia. The General Assembly passed H.B. 1549

which empowers the state attorney general to bring civil and criminal actions to enforce compliance with the access laws. The new law, effective just as of July 1, 1998, offers citizens another potential avenue of relief.

GFAF welcomes inquiries, and welcomes requests to receive its newsletter and other publications. Furthermore, GFAF welcomes the opportunity to conduct workshops and to speak in communities around Georgia. For more information, please contact GFAF at 990 Edgewood Avenue, N.E., Atlanta, GA 30307, (404) 525-3646. ☎

Hollie Manheimer is the Executive Director of the Georgia First Amendment Foundation. She received her J.D. degree from Emory University and was admitted to practice in 1992.

**Marvin
Brown -
new**

Bar Foundation Awards \$2.25 million

By Len Horton

AT ITS ANNUAL GRANT

decision meeting on Aug. 14, 1998, the Board of Trustees of the Georgia Bar Foundation approved 26 grants, totaling \$2,250,000 — the largest total amount ever

awarded in one year. The 24 different grant recipients were selected from among 42 applicants requesting more than \$3.5 million.

The \$2.25 million total was in addition to approximately \$1.7 million awarded to the Georgia Indigent Defense Council and more than \$415,000 to the Georgia Civil Justice Foundation as stipulated by order of the Supreme Court of Georgia.

"I am very proud of the support the Foundation was able to provide at this meeting," said William D. Harvard, President of the Georgia Bar Foundation. "Some really important organizations in every area of the state are committed to solving a number of law-related problems of concern to us all. Georgia's lawyers, working in partnership with Georgia's bankers as part of the Interest On Lawyer Trust Accounts program, are helping to solve these problems. All Georgia attorneys should be proud of their

contribution, which enabled the grant awards of this Board."

Several grant awards, in accordance with the stated purpose of the Foundation, were made to support civil legal services for people who cannot afford a lawyer. Together,

Project, The Georgia Law Center on Homelessness and Poverty and the Pro Bono Project of the State Bar of Georgia all received grant awards.

Another area where the Foundation has made a major commitment over the years is education. The

Youth Judicial Program of the State YMCA of Georgia 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.

The YLD High School Mock Trial

Committee has also received grant awards every year since 1986. For fiscal year 1998-1999, it received \$58,000. Over the decade, it has become an effective and popular part of a comprehensive, law-related educational curriculum in many Georgia schools. By playing the roles of attorneys and witnesses in a fictitious case, students gain a basic understanding of how our judicial system helps resolve disputes. (See article on page 48.)

Another educational effort



Len Horton (left), Executive Director of the Georgia Bar Foundation, Wanda Torbert, Executive Director of The Children's Tree House, Patty Cardin, Chairperson of The Children's Tree House board and Paul Kilpatrick, former President of the State Bar of Georgia and board member of The Children's Tree House, share a laugh during a visit to the Center. The Georgia Bar Foundation awarded \$24,000 to The Children's Tree House during the coming year.

Georgia Legal Services and Atlanta Legal Aid received approximately \$1.6 million, the largest amount ever awarded to them in one year.

In addition to helping the two major organizations named to receive Legal Services Corporation funding in Georgia, the Foundation 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

targeting Georgia's school children is the Georgia Law-Related Education Consortium of the Carl Vinson Institute of Government at the University of Georgia. This year's grant award of \$70,800 from the Foundation ensures that the LRE Consortium will help provide civics education to children from kindergarten through the 12th grade.

The Center for Children and Education received a grant for \$10,000 to assist parents and their children in improving their local school systems. Their reach extends to rural Georgia as well as major cities.

As it has for many years, the Foundation continued to help children in other ways as well. The Athens Area Child Abuse Prevention Council, the Barrow County Children's Advocacy program, the Cherokee County Children's Advocacy program, the Children's Tree House, the Edmondson Telford Center for Children, the Gateway Center, 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 soon-to-be-released inmates was the major focus of the grant to The BASICS World of Work, which is led by Ed Menifee — a motivational speaker and prominent leader of efforts to help people avoid returning to crime after being released from prison. Mr. Menifee gives his lectures 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.

Another criminal law related grantee receiving funds was the Georgia Justice Project. This program, too, specializes in returning supposedly "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 \$36,000. An article in the last issue of the *Journal* focused on GJP.

Since 1989, the Lowndes County Drug Action Council has become a special project of the Foundation. This program has taken the streets away from drug dealers in two housing projects in Valdosta. LODAC has also become a model for other areas needing a way to turn youth living in public housing away from drugs. Under the leadership of attorney Steve Gupton, the Valdosta Bar Association has made LODAC its major project.

The Foundation also made a grant to the Southern Center for Human Rights. The goal of the \$27,500 award was to help solve the legal problems of inmates in the Georgia prison system.

The Diversity Program of the State Bar of Georgia received a \$10,000 award to create two new programs suggested by Chief Justice Benham. The first will provide advice to lawyers and law firms who want to hire a minority associate for the first time. The second seeks to establish a lending program to help any minority attorney starting a new practice.

State Bar President Bill

Cannon's Foundations of Freedom program received \$37,100 to establish a speakers bureau to educate business, community, civic and school groups about the law and the judicial system. With a better understanding of the judicial system will come a better appreciation of lawyers and the role they play in society.

Together, these 26 grants are 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 funnels money to Georgia's counties to help pay for legal assistance to people charged with crimes. Since IOLTA was created, GIDC has received more than \$10 million.

The Supreme Court of Georgia has also ordered that 10 percent of net IOLTA revenues should go to the Georgia Civil Justice Foundation, 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, in your participation in IOLTA and with the assistance of Georgia bankers and under 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. ☐

Len Horton is Executive Director of the Georgia Bar Foundation.

High School Mock Trial Sets New Goal

By Carol Brantley

FOLLOWING A SUCCESSFUL

Tenth Anniversary campaign, leaders of the YLD's high school mock trial program are already at work on its first-ever fall funding campaign. "On behalf of the 1500 students, 120 teachers, and 800 attorneys expected to take part in the 1999 Georgia Mock Trial Competition, I welcome the support of members of the State Bar of Georgia," stated Rick Sager, Chair of the YLD High School Mock Trial Committee.

The Committee's Subcommittee on Development manages the funding effort and the Awards Banquet. Last year's Awards Banquet was the first sponsored by the group, and it honored Justice George H. Carley along with attorneys Elizabeth Bloom Hodges and Warner S. Fox. The second annual Awards Banquet will take place in April of 1999 and honor the Georgia Bar Foundation for its 10 years of support for the program. Other honorees will be announced in January. Firms and

individuals who have been friends of the program will be contacted this fall for donations to the annual fund. The goal is to exceed last year's

results by 10 percent.

"We need to continue our efforts to broaden the base of support for the program," said Roy Manoll, Vice Chair of the Committee.

The program has been funded again for 1998-1999 by the Georgia Bar Foundation using IOLTA funds. With additional private support, program leaders hope to increase by 5 percent the number of schools and students participating in the program. According to Manoll, "We see so many positive benefits for the students, their schools, and their communities, that we would like to see the program in many more Georgia schools."

Donors who contributed \$50 or more are listed on page 50.

Growing from a small effort by two Clayton County teachers, a local judge and district attorney, the competition has rapidly become the largest program—in numbers of affected people—supported by the State Bar. The Georgia Bar Foundation's grants from IOLTA funds have also played a key role in the growth of the



The 1998 Georgia Champion Mock Trial Team from Clarke Central High School in Athens (above) attended the national tournament in Albuquerque, New Mexico. The coaches are pictured, l-r: Solicitor Kenneth Mauldin, Phillip Griffeth, George Harwood, Professor Tom Eaton, Elizabeth Grant, and Rick Connelly. (Photos by Craig Harding)



program. Program co-sponsors from the General Practice and Trial Law Section and Criminal Law Section of the State Bar have also made major annual contributions. Increasing demand to expand the program to more Georgia high schools has created the need for an even larger funding base.

"The response last year was wonderful, and we are particularly appreciative of the donations which were sent in to honor the memories of several persons who had been active supporters of the program. Donations by friends of the late Barry Karp and Susan Devitt, for example, will be used for special projects. We are preparing a brochure to explain the various options for supporting the program while meeting concerns about tax implications," stated

Philip Newton, State Mock Trial Coordinator.

Over the program's history, students have explored many legal subjects through mock trial cases, including drug trafficking, DUI (host liability), battered woman syndrome defense to murder charge, freedom of speech in a school setting, sexual harassment in the work place, and wrongful death. Each year a new civil or criminal problem is explored, often on the cutting edge of developments in the law. There are opportunities for attorneys to work with teams and to organize the competitions. "It is absolutely the best thing I do for myself, and I encourage all my friends to get involved," stated Rhonda Klein, an attorney with the EEOC and team coach at the Lorenzo Benn Youth Development

Center. "Seeing the change in the students and their excitement in exploring the case remind me why I wanted to be a lawyer."

The program conveys to young



Craig Harding, the founder of the Georgia Court Artist Contest, was killed in a tragic car accident on June 2, 1998. This is a sample of Craig's court artist sketching of the 1997 Georgia Champion Mock Trial Team from Ware Magnet School in Manor while attending the national tournament in Nashville, Tennessee.

minds the power and potential of the law to change individual lives. Jeff Bradley, now a student at the University of Georgia, was being held in a youth development center when a caring teacher persuaded him to join a mock trial team. The same is true for Edward Corbett, who just won a \$50,000 Guy Milner Scholarship to support his college studies. Not all students turn to the law as a career, as did Kim V. Gross from the Jonesboro High School team, or Adam Webb from the Brookstone School team, but all come away with a new appreciation for the rule of law, a better understanding of sound argument, and greater self-confidence in speaking.

The foundation of the program is the attorneys who donate their time. The program is unusual in its ratio of

volunteer-to-cash contributions; for every \$1 contributed last year, some \$64 in services was donated. A modest budget of about \$120,000 supports the teams, fourteen regional competitions, the state competition, and various special contests.

"Our goal is to increase cash donations in order to offer more support to local teams, include more Georgia high schools, and diversify the funding base," said Charles T. Lester Jr., of Sutherland, Asbill & Brennan, a team coach who also serves as Honorary Chair of the Subcommittee on Development of the YLD High School Mock Trial Committee.

A new contributor joined the program this year to underwrite its media-related contests. The Georgia Press Educational Foundation

gave \$1,000 to support the Court Artist and Journalism Contests. The Court Artist Contest went state-wide in 1998 and is judged by the Savannah College of Art and Design. The Journalism Contest is still being field-tested and was judged in 1998 by the *Athens Daily News*. The field-testing of a Video Contest is anticipated for the 1999 season.

Another new program currently underway is the inaugural session of a Law Academy. In association with the Walter F. George School of Law at Mercer University, the Committee will hold mock trial training sessions over a long weekend, November 12-15, in Macon. Applications for admission and scholarships are available from the mock trial office.

For more information on sponsorship opportunities or registration for any of the Committee's programs, or to be added to the banquet invitation list, contact Philip Newton at the mock trial office at the State Bar headquarters: (404) 527-8779, (800) 334-6865, mtrial@gabar.org. Gifts may be made as memorials or designated for special programs—like the Law Academy, Summer Law Camp, or fund for the expenses of the state champion team at the national tournament. Donations should be made payable to the "Fellows Foundation" and are fully tax deductible. ☐

Carol Brantley is the Development Consultant to the YLD High School Mock Trial Committee.

**Dan
Turner
Builders
pickup 4/
98 p83**



The Young Lawyers Division of the State Bar of Georgia
and its High School Mock Trial Committee
express appreciation to those whose generosity made possible
the 1998 Awards Banquet celebrating the Tenth Anniversary
of the High School Mock Trial Program Honoring

Justice George H. Carley

the Carl Vinson Institute of Government at the University of Georgia
and Committee founders Elizabeth Bloom Hodges, Warner S. Fox, and Phillip Newton

Event Sponsors

Criminal Law Section and
General Practice and Trial Law Section
of the State Bar of Georgia

Sponsors

Alston & Bird
Georgia Civil Justice Foundation
King & Spalding

♦ ♦ ♦

Hosts

Atlanta Council of Younger Lawyers
Georgia Press Educational Foundation Inc.
Long, Aldridge & Norman

Thomas William Malone PC
Powell, Goldstein, Frazer & Murphy LLP
Sutherland, Asbill & Brennan

♦ ♦ ♦

Other Supporters

Bankruptcy Law Section,
of the State Bar of Georgia
Leanne C. Butler
Bird & Associates
Champion & Holdbird
Hawkins & Parnell
Holland & Knight
Insurance Specialists Inc.
Linda A. Klein

Rhonda L. Klein
Aimee R. Maxwell
McCalla, Raymer, Padrick, Cobb,
Nichols & Clark
The Westminster Schools Mock
Trial Team
Blumer International PC
Drew, Eckl & Farnham
Reid & Morgan LLP

♦ ♦ ♦

Special appreciation to
Pitney Bowes Management Services
Courtroom Visual Systems
The Men's Wearhouse

With Data and Justice For All

By Amy E. Williams

IN THE PURSUIT OF JUSTICE, a powerful new tool has been issued to Georgia courts. This tool comes in the form of a new information management system developed by senior research scientist Lisa Sills and her team in the Information Technology and Telecommunication Laboratory at the Georgia Tech Research Institute. They have been working closely with officials in Georgia's state, superior and juvenile courts to develop a new database that will span county lines, putting important information on criminal and civil cases at every judge's fingertips.

Georgia Tech first announced the creation of this database in April of 1998 and predicted it's release in June of the same year. The release went as scheduled, and the database was introduced into Georgia courts, beginning with DeKalb, Chatham, White and Floyd counties. Now, superior and state court judges have access to information about individual criminal records and criminal and civil case histories in all participating counties, all of which can be conveniently tracked either by a case docket number or the names of the individuals involved. The user-friendly system will even run a search on partial or phonetic spell-

ings if an official does not know an individual's full name.

Only a few months old, the database has already had a positive impact on the courts in which it has been used. When judges pull up a person's name, they can see a list of all charges against that individual, regardless of county, and instantly

circumstances of the crime and all those involved in the case. They can take extenuating circumstances into account, or take note of constant litigators.

Juvenile courts have their own section of the new information system, which was introduced in June to DeKalb, Fulton, Clayton and Gwinnett counties. Daily updates of the information makes multi-county juvenile case records immediately available. This easy and timely accessibility supports the decision to hold or release a minor, aids in sentencing and can play a role in custody cases. Having such information at hand affords judges a broader perspective and the ability to seek methods of rehabilitation, rather than simply punishment.

Both of these sections of the system are strictly confidential and can be accessed only by certain judges and court officials.

But there is a component of the system open to the public. Certain forms for probate court are available via the Internet, and citizens can download and fill them out before visiting the courthouse, thus expediting their process.

The new database also saves time for court officials and administrators. It performs case counting functions



Judge Hilton Fuller and senior research scientist Lisa Sills discuss how a new electronic database will improve access to important court information.

know if they are dealing with a repeat offender.

"The more information we have, the better decisions we can make," said Judge Hilton Fuller, a DeKalb County Superior Court judge and chairman of the Georgia Courts Automation Commission, which is funding the project.

When judges look into a criminal or civil case, they see not only the result, but also details of the trial,

CONTINUED ON PAGE 88

ANLIR pickup 8/98 p33

CONGRATULATIONS TO YLD FOR NATIONAL AWARDS



By Ross J. Adams

While we are all taught to be humble, sometimes we have to toot our own horns. The Young Lawyers Division has long been known within the State Bar of Georgia for its work, both service to the public and service to the profession. However, it is very nice to occasionally get confirmation of this from outside sources. The recently held meeting of the Young Lawyers Division of the American Bar Association in Toronto certainly served this purpose.

The ABA YLD annually bestows Awards of Achievement to recognize excellence in four specific subject areas, and then also presents a Comprehensive Award for overall excellence. The four topics are Service to the Bar, Service to the Public, Minority Project and Newsletter. For the first time in recent memory, the State Bar of Georgia placed in all of the categories.

For the fifth year in a row, the State Bar of Georgia Young Lawyers Division won first place in the Newsletter competition, continuing a tradition of dominance begun many years ago. For those of you who have not read the *YLD Newsletter* recently, I commend it to your attention. In addition to the news of the Division, there are frequently practice tips and

ethical issues and answers published. In addition, this year I have extended an open invitation to all State Bar Section chairs to write an article describing their sections in order to demystify them for younger lawyers. It is hard to improve on a great product, but I feel a lot of pressure from my predecessors to keep up the winning tradition.

The Minorities in the Profession Committee took second place in the Minority Project category for its program, *Minority Lawyers and Politics: A Panel Discussion*. The program featured a panel of distinguished minority lawyers in politics including Justice Leah Sears and Attorney General Thurbert Baker. In addition, the Women in the Profession Committee received Special Recognition in the Service to the Profession category for its seminar, *Rainmaking Techniques for Younger Women Lawyers*.

While receiving the above mentioned awards was very exciting, they were only the tip of the iceberg. The Celebration of Educational Excellence program of the Juvenile Law Committee of the State Bar of Georgia YLD won first place as the *most outstanding law-related public service project in the entire country*. The Celebration is a graduation party for children who grew up in foster care and obtained their GED or graduated from high school, technical school or college. (See article in the February 1998 issue of the *Journal*.) The Celebration recognizes children who, against all odds, accomplished their educational goals. This is an absolutely fantastic project that exemplifies what a good

committee with dedicated members can accomplish. The committee chairs—Judge Karen Galvin of the Fulton County Juvenile Court and Karen Worthington of the Juvenile Advocacy Division of the Georgia Indigent Defense Council—along with committee member Michelle Barclay, Project Director of the Georgia Supreme Court's Child Placement Program, are to be congratulated for this incredibly worthy endeavor, as is the entire Juvenile Law Committee.

In addition to all of the special topic awards, the Young Lawyers Division of the State Bar of Georgia won the Comprehensive Award as the best overall bar of our size in the country, reaffirming that the YLD accomplishes great work that benefits the public and the profession. While the YLD members present in Toronto received the actual accolades, all of the awards, but particularly the Comprehensive Award, really belong to every State Bar of Georgia member who participated in a YLD project this past year. From projects and committees as diverse as High School Mock Trial and Aspiring Youth to Appellate Admissions and Corporate and Banking, the entire State Bar won the Award of Achievement, and should be very proud of this accomplishment. ☐

YLD Elections Notice

The Nominating Committee of the Young Lawyers Division will meet immediately following the YLD Executive Council Meeting at the Fall Board of Governors/YLD Meeting at Sandestin Hilton Resort on November 7, 1998.

Anyone interested in running for YLD President-elect, Treasurer or Secretary should contact the YLD office at (404) 527-8778 or (800) 334-6865 ext. 778.



Exploring the Social, Legal Issues Surrounding Same-Sex Marriage

Robert P. Cabaj, M.D. and David W. Purcell, J.D., Ph.D., eds., *On The Road to Same-Sex Marriage: A Supportive Guide to Psychological, Political, and Legal Issues*. Jossey-Bass, Inc. 256 pp. \$23.00

Reviewed by Chip Rowan

The title of a recent book edited by Robert P. Cabaj, M.D. and David W. Purcell, a psychologist and former Atlanta attorney, *On the Road to Same-Sex*

Marriage, may seem like a misnomer in view of recent legislative efforts around the country to outlaw marriages for gay and lesbian couples, including Congress' enactment of the so-called Defense of Marriage Act ("DOMA"). But, after reading the book, one realizes that the fact that same-sex marriage is now so hotly debated in courts and Congress is an indication of how far the gay rights agenda has progressed. No one could have imagined that Congress and state legislatures would even be debating such a topic only 10 years ago.

On the Road is a collection of essays from legal, sociological, psychological, historical, and religious perspectives concerning the various implications of same-sex marriage. The essays survey the broad societal ramifications of same-sex marriage and, while generally supportive of legal recognition of same-sex unions, point out that many of the ramifications of such a sea change in legal status for homosexuals is unknown.

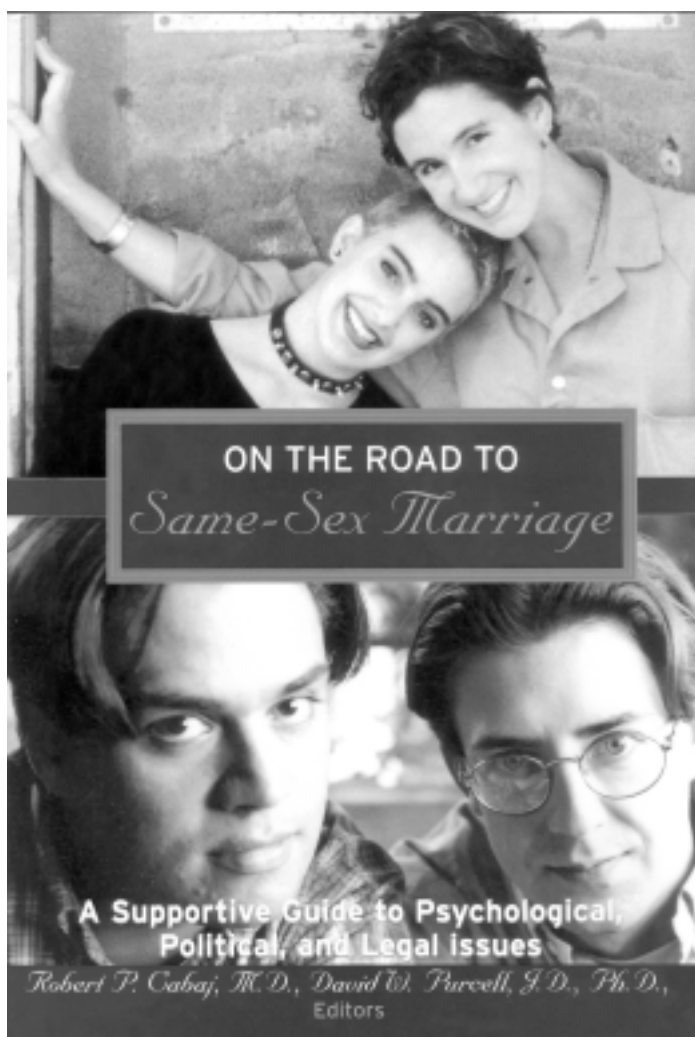
The various contributors to *On the Road* succinctly

review the profound importance of marriage as the most fundamental social institution. The book points out that depriving gay men and lesbians of participation in this institution has *deleterious* effects for them not only in financial matters such as the various tax advantages inuring to married heterosexuals, but also has serious psychological effects which contribute to the feelings of ostracism which impair gay citizens' abilities to participate fully in our society.

As the writers point out, opposition to same-sex marriage is rooted in homophobia and stereotyped notions about gay people and their relationships. Many people continue to believe that men and women should conform to subscribed roles in society and are opposed to any change in their notions of pre-set "masculine" and "feminine" roles. Many heterosexuals do not realize that most gay relationships do not consist of a "masculine" and "feminine" partner, but instead are based on an egalitarian model, with both partners sharing similar responsibilities in an equal relationship.

The book also explores the objections of certain religious sects to same-sex marriages, but points out that there are many churches that perform same-sex marriage

ceremonies and otherwise support gay relationships. The continuing debate among Christian denominations about the roles of gays in the church and the propriety of gay marriages shows a definite trend toward fuller



acceptance of gay men and lesbians in all aspects of religious life.

For attorneys, the most interesting essays in the book will undoubtedly be those that explore the legal developments in this area. While legal arguments challenging bans on same-sex marriage failed in the past, the Hawaii Supreme Court's recent decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), may signal growing judicial acceptance of the argument that gay people should be afforded the same right to marry as heterosexuals. In *Baehr*, the Hawaii court became the first to apply strict scrutiny to the state's prohibition on same-sex marriage, and required the State to prove that it had a compelling interest in preventing such marriages. Subsequently, on remand, the trial court found that Hawaii had no such compelling reason. In so doing, the court rejected familiar anti-gay marriage arguments, such as the argument that the purpose of marriage is procreation. After all, not all heterosexual couples do procreate, and some gay couples do.

Recently, opponents of same-sex marriage have argued that homosexuals should not marry because, by definition, marriage is a union between a man and a woman. But as the book notes, this argument is mere tautology. Furthermore, the book likens sexual orientation to race and gender in the sense that these characteristics are immutable, and, drawing on the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which struck down laws banning interracial marriage, argues that the equal protection guarantee in the U.S. Constitution requires gays to be afforded the same right to marry as heterosexuals.

The book points out that even if same-sex marriage is not legally sanctioned in the near future, there are growing legal issues arising from the increasing visibility of gay unions in our society. For instance, increasing numbers of gay men and lesbians are having children through surrogates, artificial insemination, and conventional conception. The legal issues concerning the rights of gay and lesbian parents and the partners of these parents are already being heard in courts around the country. Other legal issues arise when gay couples break up and questions of which party gets the jointly-owned property of

the couple are also being litigated.

Many people mistakenly feel that all gay men and women want to get married. While the book points out that surveys show that 80 percent of gays and lesbians would marry if allowed, some gay men and lesbians are opposed to marriage. Noting the plethora of problems faced by heterosexual married couples, including high

rates of divorce and spousal abuse, many in the gay community see no reason to mimic what they see as a failed heterosexual institution.

Nor are the benefits of same-sex marriage to gays and lesbians obvious. On the one hand, it can be argued that marriage would promote stability among gay men and lesbians, facilitating their assimilation into the larger straight community. But this result is not inevitable, and there is of course no data to

support this supposition.

Perhaps the most salient point made in *On the Road* about the present prohibitions on same-sex marriage is that government sanctioned discrimination against gays in the most profound social institution legitimizes discrimination against them in all walks of life, including employment, housing, and public accommodations. This discrimination prevents society from benefitting from the full talents and contributions of a significant portion of its citizens.

On the Road is an interesting, thoughtful, and multifaceted look at this timely and controversial issue. It is a must read for lawyers who will no doubt be faced with issues concerning the rights and responsibilities of same-sex partners. ☐

Chip Rowan, of Rowan & Neis in Atlanta, concentrates in representation of persons with disabilities in civil matters; a significant portion of the firm's cases deal with issues involving HIV infection. Prior to entering private practice in 1995, Mr. Rowan was the Director of the AIDS Legal Project, a unit of the Atlanta Legal Aid Society for eight years. Mr. Rowan has served on numerous boards of AIDS service providers, including the AIDS Survival Project, the AIDS Research Consortium of Atlanta, the Ryan White Planning Council for Fulton County and the Haven Foundation. He received his law degree, with distinction, from Emory University in 1986.

The book likens sexual orientation to race and gender in the sense that these characteristics are immutable, and argues that the equal protection guarantee in the U.S. Constitution requires gays to be afforded the same right to marry as heterosexuals.

Duly Noted

In federal and state courts and legislatures a number of issues regarding the legal rights of gays and lesbians are hotly contested, including: same-sex marriage, child custody, gays in the military, domestic partnership benefits, sexual harassment, and laws prohibiting so-called “special rights.” As such, a number of books address legal concerns related to these issues.

***Sexual Orientation and Legal Rights, 2 vols.* By Alba Conte (John Wiley & Sons, Inc. \$265.00)**

This two-volume set provides an excellent overview of the constitutional background of gay rights law, sexual orientation discrimination and sexual harassment. Topics covered in this comprehensive look at gay rights include: employment discrimination, specific employment issues (such as domestic partnership benefits), and family law (marriage and dissolution, child custody and visitation, alternative reproduction, and domestic partnerships). An especially useful feature is a state-by-state survey of gay-related statutes and case law.

Keenan Law
Firm new

***Women, Gays and the Constitution: The Grounds for Feminism and Gay Rights in Culture and Law* by David A. J. Richards (University of Chicago Press, \$22.00)**

New York University Law Professor David A.J. Richards compellingly argues that the case for gay rights is “a wholly principled and just interpretation of the demands of American revolutionary constitutionalism both in respect for basic human rights (conscience, speech, intimate life, work) and in the suspectedness of sexual preference on the basis of constitutional principles that condemn (in areas of religion, race, gender, and sexual preference) the expression through law of forms of rights denying moral slavery.” Prof. Richards’ thorough and timely study, which extends the thinking of antebellum feminist abolitionists, incorporates cultural history, political philosophy and legal analysis to present a thought-provoking case for justice.

***The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment* by William N. Eskridge Jr. (The Free Press, \$25.00)**

William Eskridge’s readable study offers arguments in favor of expanding the institution of marriage. His rationale is, however, likely to be controversial with both opponents and proponents of same-sex marriage. For instance, Mr. Eskridge presents evidence that only the “modern West has failed to provide some form of sanction for same-sex marriage,” then argues that legalizing such marriage “would help civilize gays” and allow gays and lesbians to fully participate in “institutions of civic life.” The book also contains an appendix of letters from a wide-range of American clergy members in support of legalization of same-sex marriage.

***Legally Wed: Same-Sex Marriage and the Constitution* by Mark Strasser (Cornell University Press, \$25.00)**

Arguing that bans of same-sex marriage can be challenged on Equal Protection and Substantive Due Process Grounds, Mark Strasser presents a persuasive constitutional case that the “Supreme Court must recognize that the right of same-sex partners to marry is fundamental, for the sake of those individuals whose rights are being abridged, for the sake of those individuals’ children, and for the sake of society as a whole.” ☒

Wallace Law registry new

Note change



Access to Justice: A Fuller Sense of *Pro Bono Publico*

By Michael L. Monahan

Editor's Note: This is the second of a series of articles focusing on the topic of access to justice for low-income Georgians.

MANY LAWYERS SPEND

substantial time helping people avoid problems, minimize them or resolve them simply and inexpensively with concise, useful information delivered in the proper context. This is true whether clients are affluent or impoverished. Access to information about legal rights and responsibilities is very important to the public, according to studies by the American Bar Association and our own personal experience—experience that tells us about 50 percent of the legal needs of low-income Georgians can be resolved through very low-cost intervention such as consumer-friendly legal information and self-help materials.

Programs like Georgia Legal Services and Atlanta Legal Aid Society have been experimenting with some low-cost methods like these. The private bar could help us evaluate them, improve upon them and share with us activities that have worked successfully for them, as well as their ideas for other low-cost methods.

User-friendly information about the legal system and about specific

legal matters is the underpinning of greater access to some part or all of the judicial system. Knowing where to go, whom to see and what to ask are all essential in starting the process of dealing with a legal problem or in preventing a problem from the outset. People need to know that they can settle certain disputes without a lawyer in magistrate court and they need to know when it is best to see a lawyer. And when they do consult a lawyer, people should have specific referral information available so the search for an attorney qualified to handle their legal need doesn't consume them before they have a chance to resolve their problem.

A long-favored method for meeting the legal needs of Georgia's citizens is client legal education in the form of brochures covering a wide range of topics such as landlord/tenant law, bankruptcy and wills. Brochures are not only low-cost and low-tech, but a larger portion of the population can be reached with brochures written in plain English at a reading level appropriate to the audience. These are particularly effective when they provide lawyer referral information. Currently, many legal education brochures are available both in English and in Spanish. The State Bar of Georgia already produces some fine consumer pamphlets, and

soon will be joined by the Hispanic Bar Association and the Georgia Chapter of the National Asian-Pacific Bar Association, who have had a proposal approved to translate and print four State Bar pamphlets into Korean, Spanish and Vietnamese.

The paper format of the brochure is easily converted to an Internet-ready electronic file that someone in rural Georgia could access from a computer at a local library or school. Equally effective as the brochure are law-related education for adults and local library shelf space dedicated to popular legal topics, including divorce, child support, name change, landlord-tenant and bankruptcy issues. While no form of client legal education can take the place of legal advice, all are useful in diagnosing and evaluating the magnitude of a legal problem, and in helping a person sort out whether or not she should talk to a lawyer. Occasionally, brochures are sufficiently informative to empower a person to address effectively their legal problem without the direct assistance of a lawyer.

Self-help materials remain an important tool for legal services attorneys in providing access to justice. Materials designed to help legal services seekers help themselves can be used to afford volunteer lawyers more time to devote to

the intensive advocacy work that only they can do. Frequently, in legal matters that fall under the jurisdiction of a magistrate or probate court, clients seeking legal assistance can be given advice by a lawyer followed by self-help materials. Some landlord/tenant and probate issues (minor birth certificate corrections, guardianships, even simple estate matters, for example) are suitable for self-help, as are some administrative matters or agency fair hearing requests. Self-help packets covering specific legal issues for magistrate courts and small claims would be useful to both the client and the court. The packets could contain both affirmative and defensive materials that the litigants could use in fashioning their pleadings. There is also a need for good self-help information about non-litigation matters, such as drafting powers of attorney.

We already know that many people are in court on a *pro se* basis (many by choice, many not by choice). And we know that the courts are struggling to meet the challenges of legal consumers who are entitled to their day in court. In fact, the Judicial Council's Committee on *Pro Se* Litigants, which includes several State Bar appointees, is expected to deliver its report this fall.

Other kinds of information that foster access to justice include technology-based systems such as legal hotlines and "warmlines" (automated telephone information systems that provide general legal information about one or more specific topics), and Internet-based services—all designed and supervised by Georgia lawyers. There are two hotlines currently providing advice and brief legal services to low-income Georgians. Georgia Legal Services operates a state-wide landlord/tenant hotline supervised by a lawyer and using

volunteer lawyers to screen and answer calls on topics such as evictions, repairs and security deposits. The Atlanta Legal Aid Society manages the Seniors Legal Hotline, which provides legal advice and brief services through paid staff and volunteers. Both hotlines use specialized technology for gathering information, making referrals and producing client correspondence. Hotlines have the

Participants did not approach the justice system because they doubted that it would help, were concerned about the costs, felt their problem was not sufficiently serious, or simply wished to handle the matter without legal assistance.

capacity to reach a large number of people, enabling them to deal with a legal need or avoid a legal problem altogether. Feedback from callers on these ready sources of information has been overwhelmingly positive.

Internet-based legal information services offer a unique opportunity to afford access to justice. Access to the Internet is becoming widespread and available in public locations such as libraries, cybercafes, social service agencies, government offices and courthouses. The opportunities to make information widely available

through this medium are vast, and lawyers need to be working to get ahead of the curve. Our goal is to nurture targeted information services that are designed and supervised by Georgia lawyers, and that have clearly defined, measurable outcomes. Examples of Internet legal information services include a domestic violence pilot project that is already underway. In several counties in Georgia, the local courts are working in conjunction with Georgia Legal Services, Atlanta Legal Aid and local shelters for battered women to provide information on and assistance with petitions for temporary protective orders (TPOs) online. The domestic violence website (currently fully available only in the test areas) provides maps to courthouses and other legal resources, and allows women to answer questions online that result in a printed petition for a temporary protective order that complies with Georgia statutory requirements. Future plans include the addition of referral lists for local family law attorneys. Georgia lawyers helped design the website and GLSP and ALAS attorneys supervise the legal activity related to the website.

We can further the job of providing access to justice for Georgians by using our legal and communication skills to enhance the availability of low-cost intervention ideas such as these consumer-friendly legal information and self-help methods and materials. The private bar can be a valuable resource to staffed legal service and volunteer lawyer programs. It can support them in their work to meet real legal needs, and assist them with technology design and implementation, and with other efficient and cost-effective legal information tools. ☒

Michael L. Monahan is the Director of the Pro Bono Project.



Practical Suggestions for Handling Independent Adoptions

By David P. Darden

AS ANY ATTORNEY WILL attest, we are often asked “What type of law do you practice?” When I respond that my areas of concentration, other than business and personal injury trials, include adoptions, the response is almost always positive. “You must find adoption work very rewarding.”

While handling adoptions is indeed very rewarding, it is a type of practice which I believe requires sensitivity, common sense, and attention to detail. I offer several reminders and suggestions based upon my experience in handling adoptions over the years:

1. Understand the Code.

There are four types of adoptions: agency, independent, stepparent, and relative. A separate part of the Code addresses each type of adoption. O.C.G.A. §19-8-5 contains the requirements for an “independent or private” adoption when a child is adopted by a third party who is neither a stepparent nor a relative of the child, and the adoption is not done through the offices of the D.H.R. or a child-placement agency. In short, the child is not placed by an agency, but through independent or private means. A home investigation is nonetheless required for independent adoptions. The home investigation will be performed by various

institutions or agencies, depending on the county in which the petition is filed.

Some of the provisions of the Adoption Code apply to all four types of adoption. Others are specifically relevant to independent adoptions. In order to determine which provisions are applicable to independent adoptions, one must review O.C.G.A. §19-8-5.

Although they are similar, there are several important differences between independent adoptions and agency adoptions. Obviously, in an agency adoption the biological parents surrender their parental rights in favor of a child-placement agency. The agency then takes responsibility for “matching” the baby with the prospective adoptive parents. In an independent adoption, the biological parents release their parental rights in favor of the adoptive parents, with the Department of Human Resources being given responsibility for the child if the independent adoption is somehow discontinued.

Attorneys handling independent adoptions should take great care not to “match” adoptive parents with a biological mother wishing to place

her child for adoption. This activity constitutes “placement” under the rules of the D.H.R. and is limited to licensed child-placement agencies.

Perhaps the most significant difference between agency adoptions and independent adoption is the nature of financial assistance that can be provided to a birth mother. A licensed child-placement agency may provide *financial assistance*, in addition to medical expenses, provided the assistance relates to expenses arising from the mother’s pregnancy or the child’s birth. This includes reasonable living expenses.

In an independent adoption, the prospective adoptive parents are specifically forbidden from providing payments the Code refers to as “inducements.” O.C.G.A. §19-8-24(b). “Inducements” include *any* financial assistance, either direct or indirect, to a biological mother other than reimbursement for medical expenses directly related to her pregnancy, the child’s birth, and medical care for the child. Violation of this provision is a felony.

The argument can be made that this section is not violated if the prospective adoptive parents give financial assistance to the birth mother which does not “induce” her to surrender her parental rights. In other words, the argument is made that a charitable contribution to the birth mother with “no strings attached” does not serve as an *induce-*



ment and is therefore not prohibited. I am not aware of any support for this argument in reported Georgia cases and this approach would constitute a significant risk to the validity of the adoption.

2. Follow the Forms.

The essential documents to be utilized in an independent adoption are set forth in the adoption code. Georgia law provides that the surrender documents must only substantially conform to the provided forms, but it is better practice to follow the exact wording of the forms provided in the Code. The attorney (or other representative of the adoptive parents) must meet with the natural parent as a part of the process of surrendering parental rights. This will remove any question as to whether the party surrendering his or her rights fully appreciated the legal impact of the act of the surrender. If the surrender of parental right is to take place in a hospital, it is advisable to make prior arrangements with the hospital for the presence of an independent witness/notary, as many hospitals will not normally provide this service. It is also good practice to have the surrendering parents initial each page of every surrender document.

In addition, one should prepare a statement to the hospital to be signed by the natural mother. In this statement she will surrender custody of the child to the attorney for the adoptive parents and authorize the adoptive parents to obtain medical records and medical treatment for the child during that time prior to the entry of the final adoption order.

Finally, “following the forms” becomes much more difficult in an interstate adoption. The intricacies and difficulties of handling interstate adoptions is beyond the scope of this article, but it is advisable for the adoption practitioner to be familiar

of the laws of the state in which both the adoption and surrender will occur. In such cases, the attorney should make an attempt to comply in every possible respect with the adoption laws in both states, particularly with regard to those laws regarding the surrender of parental rights and the revocation of surrender.

All adoption petitions are required to contain certain information (O.C.G.A. §19-8-13). Generally, the Code requires that the petition include surrender and acknowledgment documents and affidavits, health background forms, verification of I.C.P.C. compliance and documents reflecting notification to the biological father. With regard to independent adoptions, further disclosures must be made accounting for all funds paid for the benefit of the natural mother and with regard to attorneys fees.

One final note with regard to the forms—careful consideration should be given to the drafting of the final order of adoption. Virtually every court will look to the counsel for the adoptive parents to prepare this order. The order should be drafted with care to include the proper findings of fact and conclusions of law. If the adoptive parents will need a copy of the final order of adoption in order to obtain the birth certificate or for other purposes, care should be taken on a “closed” adoption to shield the name of the biological parents.

3. Know the Parties.

Make every effort to meet with the biological mother prior to the birth of the child. This will allow her questions to be answered in an atmosphere less emotional and pressurized than in the hospital following birth. In addition, this will provide an opportunity to obtain information about the biological

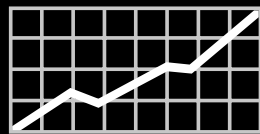
father which may prove helpful if he will be difficult to locate.

The primary rule for making an adoption “solid” is to make every effort to notify the biological father. Many states, including Georgia, now utilize a putative father registry. While the use of such registries has passed constitutional muster, every effort should nonetheless be made to provide actual notice to the biological father. If the mother names as the father someone other than her husband, it will still be necessary to terminate the husband’s rights or obtain a surrender from him in light of the presumption of the husband’s paternity.

A representative of the adoptive parents must also affirm to the court that he has met with the biological father to explain the surrender documents. This forecloses the practice of handling the father’s surrender of rights merely by mail. A representative of the adoptive parents must meet with each of the parents who are surrendering parental rights and take particular care to ensure that they understand the procedure of surrender.

Handling adoptions can be extremely rewarding, but it is an area in which the law is changing and evolving. While mastering the complexities of the adoption code is challenging, it is just as important to know the *practical* steps for working with people in an emotional time with regard to the significant issue of parenthood. Nonetheless, few areas of a law practice are as rewarding as assisting clients in bringing a new future to a child. ☒

David P. Darden is a partner with Talley & Darden PC in Marietta. He has a civil trial practice with emphasis in complex business, probate and inadequate security litigation. He also concentrates on adoptions. He is a member of the State Bar Board of Governors. This article is reprinted with permission from the Cobb Bar News.



Millennium Bug: Is Your Firm Infected?

By Terri Olson

First in a two-part series

MOST LAWYERS HAVE PROBABLY already heard, perhaps many times, about the “Year 2000 [Y2K] problem,” but may not know the details or what they should be doing about it. The so-called “millennium bug” is not a bug or error per se, it is a problem created by a combination of misplaced efficiency and lack of foresight among the designers of computer hardware and software. (We are defining “computer hardware” very broadly to include any equipment that contains computerized instruction sets). When setting up places to record and calculate dates, most designers used a format of MM/DD/YY instead of MM/DD/YYYY (03/11/98 instead of 03/11/1998, for example). There were logical reasons to do so: storage space was minimized and calculations simplified.

However, once the millennium changes, a big confusion may result: if a date recorded as 03/11/03, is it March 11, 1903 or March 11, 2003? Human beings usually have little difficulty interpreting two-digit year dates by context: if 03/11/03 is a birthdate, it’s obviously 1903, which is in the past; if it’s a credit card expiration date, it’s probably 2003, a date in the future. Some programs, however, are set to interpret an 03 entry as 1903; others will convert it to 2003.

Some everyday repercussions of the situation could include:

- ♦ “Old” data removed from credit reports
- ♦ Network logins expired

- ♦ Billing data automatically purged
- ♦ Calendaring software refusing to allow entries (if the program restricts, as many do, entries before today’s date)
- ♦ Files sorted beginning with 1999 and ending with the current entries

Generally, problems exist either in software that was programmed, or computers and other electronic equipment that were designed and



built more than three years ago. Three years is not hard and fast, of course. There are programs designed for mainframes in 1960 that use four year dates and some sold today still have not corrected the defect. But the older your equipment, the more likely that it has a problem. For example, Microsoft Access 2.0, a popular database application released in 1994, is listed by Microsoft as non-compliant.

Will all of this be a major problem? Opinions vary from “it’s totally overblown as an issue” to “the end of the world is upon us.” There are several reasons why it’s

hard to get a complete picture of whether or not disaster is imminent. For one thing, many companies are now refusing to discuss their systems with outsiders. Whether this is born of a reluctance to strike panic in the hearts of the public or a desire to avoid potential litigation, it’s hard to say. For another, many computer programs on mainframes are so large and so poorly documented that it is almost impossible to know what is in there to deal with. Some rely on programming languages that are used rarely today. And the complexity and interrelationships among programs have grown to the extent that it’s very difficult to tell at what point one system will cease to have an impact on another.

It is not realistic to call this a non-issue. There have already been reports of systems that have had trouble because of date problems. I have had credit cards that contained a year 2000 expiration date kicked out by card verification services. (I will say, however, that those problems have already been corrected.) Some users of old databases are already discovering that inputting a statute of limitations in the year 2000 produces odd results. But these problems are so far minor and fairly easily resolved.

Those who worry that the end of time is here are thinking more on a national or global level: what if banks lose track of accounts, investments with certain maturity dates go awry, transportation systems shut down, the social security databases lose or corrupt information and the

like? And at least one worried writer has sensibly pointed out that even if the United States and other countries that have programmers and resources to devote to the task succeed in correcting most defects in time, what if other countries have serious problems that they fail to resolve? What will be the effect on the global economy and on political stability?

There are three different potential problem levels which might effect you: those experienced within the law firm, those experienced by third parties that work closely with the law firm, and problems experienced by an entire city or nation.

Y2K Problems within the law firm

- ♦ Computer hardware that may not

read and calculate dates properly

- ♦ Computer software that may not read and calculate dates properly
- ♦ Other equipment within the law firm that may use date calculations to perform properly (telephone, copy, fax)
- ♦ Building systems (elevators, climate control, security, building-wide telephone systems)

These issues are the easiest to spot and to correct. If you have brand-new computers that said "Year 2000 compliant" on the box, it *may* be as simple as checking with the vendors of all your software (case management, time and billing, word processing, etc.) to ensure that the versions you use are Y2K compliant. This is an area where small firm practitioners in small towns have an enormous advantage over their urban

mega-firm counterparts. For one thing, the systems are more likely to be manual and thus excluded from consideration. For another, the systems are more likely to be small and independent of each other.

Next issue, we will cover problems associated with services outside the law firm that the firm nonetheless is dependant on, as well as national and global issues that may arise come the turn of the millennium. In addition, we will be discussing practical solutions for checking and fixing your systems. ☒

Terri Olson is the Director of the State Bar's Law Practice Management Program.

Great American pick up
8/98 p61

Law School Orientations Expand

FOR THE SIXTH CONSECUTIVE YEAR, THE Committee on Professionalism of the State Bar and the Chief Justice's Commission on Professionalism conducted Orientations on Professionalism at each of the state's law schools in August 1998. While speakers differed from school to school, they delivered the consistent message that building a reputation for professionalism as a law student and as a lawyer is the greatest asset to a career in the legal profession. In the breakout groups that followed, group leaders and students looked at hypotheticals taken from the law school experience and the daily practice of law to explore what professionalism means.

Justice Harris Hines stated plainly at Emory: "Your reputation starts today," and advised the first year class to "be concerned about the negative publicity about lawyers, but do not lose heart; you have the opportunity to make a noble profession nobler." Emory faculty proposed two pilot innovations to the orientations to make professionalism issues more pervasive in the curriculum. Faculty served with practicing lawyers and judges as co-leaders of the breakout groups at the August orientation where all the hypotheticals involved professionalism issues that arise in the law school experience. One law professor wrote on the evaluation: "Good to see interaction of academic (law faculty) and practice (attorney)—important to our common goal. A student commented: "Liked having professor/current practitioner give ideal/real world sides of issues."

Second, Emory will hold follow-up Professionalism Programs in October and February. These programs will follow a format similar to the breakout session for the August orientations. For continuity, the students and leaders will remain in the same groups for the October

and February programs. The October program, planned for Friday, October 23 from 3-5 p.m., will consider hypothetical situations taken from both the law school experience and the everyday practice of law to enable students to begin to see the connections, and differences, between their ethical and professionalism responsibilities as law students and as lawyers. The February session will

consider hypotheticals taken from law practice.

Following evaluations from leaders, faculty, and students, Emory will determine whether to continue this expanded format for its first year Programs on Professionalism. While some lawyer leaders disagreed with the omission of law practice hypotheticals in August, many expressed enthusiasm for the follow-up opportunity. Some found that the law school questions helped students relate much better to the issues.

Judge G. Alan Blackburn of the Court of Appeals cautioned

first-year students at John Marshall School of Law that they are entering a profession that requires the client's interests take precedence over the lawyer's self-interest. Chief Justice Robert Benham at Georgia State College of Law welcomed students to "a profession with core values, where the truth is better than a lie, caring and sharing are better than selfishness and greed, demeanor and reputation should show integrity and good moral character, and where chauvinism, cronyism, racism, and elitism have no place." He advised students to become involved in their communities and stressed the importance of finding a mentor to lead and guide, not by rhetoric but by example.

At the Mercer program, State Bar President Bill Cannon volunteered for double duty by giving opening remarks and leading a breakout group. He began his remarks with the question, "Why did you come to law school?" The first student he called on answered, "Be-



Chief Justice Robert Benham addresses Georgia State law students.

School	Speaker	Students	Group Leaders
Emory University School of Law	Justice P. Harris Hines Supreme Court of Georgia	238	67 (including 24 law faculty)
Georgia State University College of Law	Chief Justice Robert Benham Supreme Court of Georgia	197	48
John Marshall Law School	Judge G. Alan Blackburn Court of Appeals of Georgia	50	7
Mercer University School of Law	William E. Cannon Jr., President State Bar of Georgia	133	24
University of Georgia School of Law	Judge Dorothy T. Beasley Court of Appeals of Georgia	190	32
Total		808	178

Participants' reactions to the Orientations on Professionalism:			
Participating in the discussion groups is a real learning experience. Reinforces the importance of values in law practice.		Makes you realize that having good ethics and professionalism is a prerequisite for becoming a lawyer.	
	-Group Leader		-Law Student
Keep doing this throughout their three years.		It has made the issues more salient to me and motivated me to ask ethical questions.	
	-Group Leader		
... [I]t will be hard to be a lawyer.	-Law Student		-Law Student

cause when I was 11 years old I read *To Kill a Mockingbird*, and ever since I have wanted to be a lawyer like Atticus Finch." Another student responded, "My father is a public defender, and I have always admired him and what he does." He urged the Mercer students to "have a passion for the beauty of the law and the meaning of justice" and explained that one can be a zealous advocate while being professional.

Judge Dorothy Toth Beasley of the Georgia Court of Appeals ended the August orientations on a high note at the University of Georgia School of Law by asking the students to do their parts to "make the law more humane and the practice of law more professional." She challenged the students to engage in the work of conflict resolution. At the end of the program, Judge Beasley handed out to the students cards bearing the words:

I as a lawyer am a professional, set apart in
CONDUCT
AIMS
QUALITIES

Judge Beasley believes that the task of civility is to remind us even as we disagree to treat each other with the respect that we as humankind deserve. ☒

National
Legal Re-
search
Group -
pickup 8/
98 p43



TRIAL TECHNIQUES PROGRAM NAMED FOR KATHLEEN KESSLER

Emory Endowment to Honor a Legal Pioneer

WHEN MIAMI LAWYER MIKE Eidson received a phone call that his friend and colleague Kathleen Kessler was killed in the 1996 ValuJet Airlines crash, he was devastated. Mike had known Kathy and her husband, Richard Kessler, since the three were law students at Emory University in the '70s.

After the facts unraveled as to what caused the crash, Richard Kessler called Mike and asked that his firm, Colson Hicks Eidson, file a wrongful death suit against ValuJet. Mike Eidson agreed to take the case on the premise that the firm would handle the case pro bono as a tribute to Kathleen Kessler's pioneering achievements as a female trial attorney. Richard Kessler knew the case would be physically and emotionally exhausting and pressed Colson Hicks Eidson to accept the fee.

In an unprecedented move, Mike Eidson proposed that Colson Hicks Eidson waive any money which would have represented a fee in order to honor Kathy's memory by creating the Kessler-Eidson Endowment at Emory Law School. The Kessler family accepted the idea and agreed to make a matching gift to build the Endowment.

"We are pleased that Dick Kessler and Mike Eidson have worked to establish this unprecedented endowment in memory of one of Emory's finest graduates and a leading member of the Atlanta legal profession whose tragic death

brought great sorrow to all who knew her," says Howard O. Hunter, dean of Emory Law School. "We are grateful that something so positive

"Kathy proved that you can practice law at a high level, really help those who need it most, take time for the things that are important in life and earn the admiration and respect of others."

—Richard Kessler

has come out of this tragedy and that her legacy will continue at Emory for future generations of students."

In addition, a reading room in the MacMillan Law Library will be named for Kathleen Kessler. Moreover, Emory's Trial Techniques Program—which teaches many of the skills Kathleen Kessler refined in the courtroom—will be named the Kessler-Eidson Trial Techniques Program.

"Kathy's death was such a tragedy because she was so young and yet inspired so many women

attorneys who looked up to her," said Eidson. "Throughout her career, she was a trial attorney that never feared tackling unpopular issues that she knew needed tackling. She had sound principles and routinely gave unselfishly of her time to those who needed it the most. Through the years Kathy and I frequently exchanged ideas about the different cases we handled. She was a friend to me, and a mentor to many young women. She will be greatly missed," said Eidson.

Joining in Colson Hicks Eidson's support of the scholarship, Richard Kessler said he and his daughter, Grace, see the scholarship as a fitting tribute to "one of the few pioneers for women who pursue trial law."

"Before she was taken from us, Kathy proved that you can practice law at a high level, really help those who need it most, take time for the things that are important in life and earn the admiration and respect of others," said Richard Kessler.

At the time of her death, Kathleen Kessler was chair of the State Bar's General Practice & Trial Law Section which is the largest section with almost 3,000 members.

In addition, the Georgia Association of Women Lawyers has established a perpetual award in her name to honor other women who make significant contributions to the practice of law. ■

Nextel - new



Improved Client Relations Starts With Looking Through the Client's Eyes

By Henry W. Ewalt

ALMOST ALWAYS, WHEN A client complains about a lawyer, the crux of the issue turns out to be not how the case is being handled, but how the client is handled. Here are some simple steps to improving client relations.

Health
Care
Audi-
tors
pick up
4/98
p70

Responsiveness

"That lawyer never tells me anything. The only thing I get from him are bills to pay." A lawyer may be handling a client's matter in an efficient and effective manner. However, if all the client knows about it are the bills that are to be paid, who could blame the client for being angry? The client has a need to know. The need to know is not only about the end result, but also about the process and progress. Think about it. If all you saw your lawyer doing was to spend a half day preparing witnesses and one day in a trial, wouldn't you be distressed if the verdict were adverse and the bill high? We need to be more alert to the fact that clients want to know when you are researching the law or talking to the lawyer on the other side of the case. This need to know is not satisfied by a computer printout at the time a bill is sent or presented to the client.

Lawyers may be handling 40 or 50 matters at one time. When you review your time records, you will notice that often there is no action taken on the case of which the client would be cognizant other than by the rendering of a bill. Be alert to these needs of the client and supply the necessary information without the client's having to ask for it or being shocked by the bill.

Another frequent complaint of

clients is that phone calls are not returned. Do you recall how irritating it was when, as a child, you had a question that seemed urgent to you but when you asked your parent, the parent continued to read the newspaper or wash the dishes without immediately responding? That childish level of frustration is escalated in adults who do not hear from their lawyers. No wonder people like the commercial that asserts, "If I don't return your phone call you can rest assured I'm probably dead."

While most lawyers regard the telephone as the bane of their existence, most clients regard it as the prime source of information and relief from stress. From the client's point of view, a delayed response to the client's phone call convinces the client that the lawyer is avoiding the client for a catastrophic reason (a bad result or not doing the client's work frequently pop into clients' minds) or does not regard the client or the client's legal matter as being important.

Many lawyers do not respond promptly to clients' phone calls because nothing of significance has occurred in the case and they are dealing with immediate matters for other clients. We must divorce ourselves from this reality. Instead, substitute the realization that the most important thing to each client is not the legal matter being handled by

the lawyer. Rather, it is the recognition of the client as a person. The substance of the telephone call is not nearly as critical as the responsiveness to the client as a person.

If you, as a lawyer, saw your client on the street and said, "Hello, Mr. Client," what would be your emotional state if the client looked you directly in the eye, turned his or her head away while slightly inclining the direction of the nose, and made no verbal response as he or she continued to walk down the street? I suggest to you that the client has the same reaction when we, as lawyers, fail to promptly return telephone calls.

Another area in which we must be careful not to be unresponsive is to the substance of the client's questions. When a client asks a question of a lawyer, the client expects an understandable, meaningful answer. Those answers cannot be couched in terms of "on one hand it could be this and on the other hand it could be that." A client could get a more definitive answer from a Ouija board.

Obviously, not all questions can be given an absolute "yes" or "no." However, it is much more satisfying to the client if the lawyer answers as though speaking to a reasonably intelligent adult and discusses the alternatives and competing influences and describes percentages of opportunities or risks. Then, when the client has been educated, suggest a direction and ask for the client's blessing or alternative direction.

One effective technique is for the lawyer to follow the answer with a question to the client. Merely ask, "Is that responsive to your question?" If it is not responsive, ask the client to rephrase the question or state what is of concern. Do not leave the subject until the client confirms that you have been responsive.

Quality of Service

Some clients will fight with lawyers or switch to other service providers based on the quality of

A delayed response to the client's phone call convinces the client that the lawyer is avoiding the client for a catastrophic reason or does not regard the client or the client's legal matter as being important.

service received. In this discussion, I am not referring to lawyers who have failed to meet minimum responsive legal standards for services, such as missing a filing deadline. Those lawyers deserve to be disciplined appropriately either by the significant increase in their malpractice insurance, by the local disciplinary and/or ethics board, through appropriate litigation, or all of the preceding.

When clients "fight" about the quality of service, they are almost never complaining about the substantive legal decisions the lawyer has made. Almost always the root of the problem can be traced to a failure of the lawyer to properly communicate with a client. That failure to communicate could involve the theory of the case, the timetable upon which actions would be taken, the lack of responsiveness by the lawyer, or the amount of fees being charged.

The legal intricacies of a matter rarely enter into a client's evaluation of quality. If the client understood the technical legal aspects of a case, the client would never retain a lawyer because the client could handle the matter alone. The simple conclusion is that to avoid the fight-or-switch syndrome with clients, lawyers need to communicate promptly and responsively. ☐

Reprinted by Permission of the ABA from Through the Client's Eyes, by Henry W. Ewalt, published by the ABA Law Practice Management Section. © 1994 American Bar Association. All rights reserved.

Medical
Expert
Testi-
mony
pickup
4/98
p71

Preserving Georgia's Rich History

By Willie Jordan

This column highlights the community service and volunteer efforts of attorneys throughout Georgia. Willie Jordan is the Attorney for Community Affairs for the Chief Justice's Commission on Professionalism. Please submit the names of lawyer community servants to: Community Service, Chief Justice's Commission on Professionalism, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303, Fax (404) 527-8711.

LISA L. WHITE DESCRIBES

herself as "a lawyer who is a frustrated historian." Ms. White is the first woman and youngest person to be elected President of the 160-year-old Georgia Historical Society. Chartered by the Georgia legislature in 1839, GHS is a private, non-profit organization that serves as the historical society for the entire state. For the last two years, she has guided the organization in its mission to collect, preserve, and share Georgia history.

In addition, Ms. White is an attorney-advisor for the U.S. Army Corps of Engineers, Savannah District, where she handles real estate matters for the Army and Air Force in Georgia, South Carolina, and North Carolina. This includes buying and selling property and overseeing local government land acquisitions for federal projects that involve the Corps. She also assists the Corps in its civil works mission along the Savannah River which encompasses flood control and beach re-nourishment.



Lisa L. White

interest in history." During the last 13 years, she has served the GHS in various capacities, including First Vice President, member of the Board of Curators, and Editor of its newsletter, *GHS Footnotes*.

As President, Ms. White serves as chair of the Board of Curators and spends a large amount of time "working day-to-day with the Executive Director [Dr. W. Todd Groce] and the various board members and committees that we have in place to tend to the business of the Society."

The GHS accomplishes its mission in several ways. It has a library and archives that contain the largest collection in the country of materials related to Georgia history. It continues to collect material on Georgia and publishes the *Georgia Historical Quarterly* with the University of Georgia. The Society produces a variety of educational programs and lectures around the state on topics such as the Civil War, caring for historical records and artifacts, and the history of places like Thomasville and Rome.

Recently, the GHS has undertaken the Affiliate Chapter Program

Ms. White says, "When I moved to Savannah, I wanted to look for a way I could do community service and tie it in with my

which is connecting all of the local historical societies and related organizations in Georgia under one umbrella. Through this program, the Society helps local and county historical organizations preserve the history of their communities and the state.

Under the guidance of Ms. White, the GHS has carried out several strategic projects. It privatized its library and archives which were formerly run by the Georgia Department of Archives and History in 1997. Ms. White explains, "We've found that it's a much more efficient organization this way, and it's providing a better service to the people of Georgia."

The GHS has also adopted the Georgia Historical Marker Program from the Georgia Department of Natural Resources which ended the program after redirecting its budget last fiscal year. "We're really going to change the direction of that program by trying to mark things that didn't qualify for the state program," she says. The state program required that markers designate locations of statewide interest. Ms. White states, "We hope to document local sites and more sites that pertain to twentieth-century events, women, minorities, and that kind of thing that maybe has gone undocumented in the past."

In 1997, the Society initiated its first fundraising event (Antique Show & Sale) to support educational outreach programs and to enhance the services and collections of its library and archives.

Ms. White is proud of the fact

that lawyers serve in key positions in the Society, and she readily points out that we should recognize them as community servants alongside her. "They deserve a lot of credit. We have a lot of other lawyers who take a lot of time in working with the organization," she explains.

Dolly Chisholm, partner with Inglesby, Falligant, Horne, Courington & Nash in Savannah, serves as the GHS Secretary. The following lawyers serve as regional Vice Presidents: Wade Coleman (South Georgia), partner at Coleman, Talley, Newbern, Kurrie, Preston & Holland in Valdosta; Peter M. Wright (Atlanta Area), partner with Atlanta's Alston & Bird; and John M. Sheftall (At-Large), partner at Hatcher, Stubbs, Land, Hollis & Rothschild in Columbus. The Board of Curators includes Laurie K. Abbott, partner with Savannah's Abbott & Abbott; Hon. Robert Benham, Chief Justice of the Supreme Court of Georgia; Hon. Thomas C. Bordeaux, partner at Savannah's Bordeaux & Abbott PC and state representative since 1991; Bradley Hale (Ex-Officio), a retired partner with King & Spalding in Atlanta; Frank W. Seiler, partner at Bouhan, Williams & Levy LLP in Savannah; and Michael Thurmond, former Director of the Georgia Division of Family and Children Services and a distinguished lecturer for the Carl Vinson Institute of Government in Athens. The following attorneys are chairpersons on the Advisory Board: Griffin B. Bell (Honorary Chair), partner with King & Spalding in Atlanta; Bradley Hale; Tom Watson Brown, sole practitioner in Atlanta; Wade Coleman; Roy Lambert, partner at Madison's Lambert & Roffman; and Barry Phillips, partner with Kilpatrick Stockton LLP in Atlanta. M. Lane Morrison, partner at Hunter, Maclean, Exley & Dunn PC in

Savannah, serves on the Board of Endowment Trustees.

Besides her work for GHS, Ms. White works with many other non-profit organizations. She is Governor Miller's appointee to the Joint Legislative Study Committee on Historic Preservation which is developing better ways to oversee historic preservation in the state. The Committee on Historic Preservation has proposed a constitutional amendment for the November 1998 general election ballot that aims to create the Heritage Fund for the preservation of historic sites, water resources, and wildlife habitats. If the voters approve this amendment, it will increase the real estate transfer tax from \$1 to \$2 per \$1,000, and the extra dollar will go to the Heritage Fund.

Ms. White is a board member for the Ossabaw Island Foundation which is dedicated to preserving the island's unique resources, developing environmental programs, and providing an endowment for foundation programs. As a trustee of the Georgia Legal History Foundation, she helps to promote the study and preservation of Georgia legal history. Ms. White is also on the Advisory

Board for the Institute of Southern Legal History which works with the Walter F. George School of Law at Mercer University to publish the *Georgia Journal of Southern Legal History*. In addition, she serves as chair of the Savannah-Chatham Historic Site Monument Commission which reviews applications for historic monuments.

Ms. White says, "Lawyers probably have the unique skills and capabilities to give back to the community, and I think it's nice when you can read about the good things that lawyers are doing in their communities as opposed to some of the negative [things]." Fortunately for the citizens of Georgia, the GHS has allowed Ms. White and other lawyers to combine volunteerism with their desire to learn about the past. If you would like more information on the Society and its programs, please contact: Georgia Historical Society, 501 Whitaker Street, Savannah, GA 31499, (912) 651-2125. ☒

Willie Jordan is the Community Affairs Attorney for the Chief Justice's Commission on Professionalism.

Arthur Anthony
pickup 8/98 p76



WHO'S WHERE

In Atlanta

Womble Carlyle Sandridge & Rice PLLC announces that **Caroline Kizer Bell, Ronald A. Rice, Craig Robert Senn** and **Patricia G. Woods** join the firm's Atlanta offices as associates. Their three locations are 1275 Peachtree St. NE, Suite 700, Atlanta, GA 30309; 2296 Henderson Mill Rd. NE, Suite 404, Atlanta, GA 30345; and One Atlantic Place, 1201 Peachtree St., Atlanta, GA 30309.

Bennett & Associates announces that **Michael T. Bennett** has joined the firm as an associate. The office is located at 3223 Paces Ferry Place, NW, Atlanta, GA 30305; (404) 816-6500; www.bennettlaw.net.

Laura Jones French, J. Michael Parsons and **Lloyd N. Bell** have joined **Swift, Currie, McGhee & Hiers LLP** as associates. The office is located at 1355 Peachtree St. NE, Suite 300, Atlanta, GA 30309; (404) 874-8800.

Brynda Rodriguez Insley and **Kevin Race**, formerly of **Sullivan, Hall, Booth & Smith**, announce the formation of **Insley & Race LLC**, a civil litigation firm specializing in the areas of medical malpractice, premises liability and general insurance defense. **Sybil C. Hadley**, formerly of **Swift, Currie, McGhee & Hiers**, has joined the firm as a partner. The office is located at Two Midtown Plaza, 1349 W. Peachtree St., NW, Suite 1450, Atlanta, GA 30309; (404) 876-9819.

Katz, Smith & Cohen, one of the nation's largest music entertainment law firms, announces that it has joined forces with the international law firm of **Greenburg Traurig**. The Atlanta office is located at Ivy Place, 3423 Piedmont Rd. NE, 2nd Floor, Atlanta, GA 30305; (404) 237-7700.

Russell S. Kent has joined the firm of **Hunton & Williams** as an associate. The office is located at 600 Peachtree St., Suite 4100, Atlanta, GA 30308; (404) 888-4000.

McGuire, Woods, Battle & Boothe LLP, a Richmond, Virginia firm, will be opening a new office in Atlanta. **Gardner G. Courson**, of **McCullough Sherrill LLP**, will join the firm as partner-in-charge of the new office. Several other attorneys from McCullough Sherrill will accompany Courson to McGuire Woods, including **Laura H. Walter**, who will join as a partner. The office location is to be announced.

Jeffrey D. Paquin, Michelle J. Weckslar and **Jennifer L. Boyens** have joined the Litigation & Dispute Resolution Services Group of **Ernst & Young LLP**. Their office is located at 600 Peachtree St., Suite 2800, Atlanta, GA 30308; (404) 874-8300.

Arnall Golden & Gregory LLP announces that **Paul F. "Pete" Wellborn**, formerly of **Hunton & Williams**, has joined the firm as a partner. The office is located at 2800 One Atlantic Center, 1201 West Peachtree St., Atlanta, GA 30309-3450; (404) 873-8500.

Jonathan Wilson, formerly of **Paul, Hastings, Janofsky and Walker LLP**, has joined **King & Spalding** as counsel with the intellectual property and technology practice. The office is located at 191 Peachtree St., Atlanta, GA 30303-1763; (404) 572-4600.

J. Randal Hall and **Robert A. Mullins**, a former partner of **Hull, Towill, Norman & Barrett PC**, announce the formation of **Hall & Mullins PC**. The office is located at 1202 First Union Bank Building, 699 Broad St., Augusta, GA 30901; (706) 722-7062.

In Cumming

William P. Millisor announces the opening of his firm, **William P. Millisor PC**. The office is located at 425 Tribble Gap Rd., Suite 204, Cumming, GA 30040; (678) 947-8490.

In Madison

George W. Brown III has joined **Lambert and Roffman LLC** as an associate. The office is located at 126 East Washington St., Madison, GA 30650; (706) 342-3566.

In Milledgeville

Florence West Mixon announces the opening of the **Law Office of Florence West Mixon**. The office is located at P.O. Box 1299, 1099 Milledgeville Highway, Milledgeville, GA 31061; (706) 484-8030.

In Norcross

Steven A. Blaske, E. Kenneth Jones and **Mary Barr Palma**, of the **Unisys Corporation** Office of the General Counsel, have relocated with the Southern Group offices of Unisys. The office is now located at 5550-A Peachtree Parkway, Suite 400, Norcross, GA 30092; (770) 368-6000.

In Connecticut

Quorum/Lanier has named **Peter D. Smith**, formerly a Sales Manager with the **Xerox Corporation**, Vice President, Eastern Region Sales. Mr. Smith will be located at Lanier Professional Services in Norwalk, CT.

In Missouri

Mark A. Gonnerman has become a partner in the firm of **Helfrey, Simon & Jones PC**. The office is located at 212 S Central Ave., Suite 300, St. Louis, MO 63105; (314) 725-9100.

In Texas

Norbert Walker announces that the office of **Norbert Walker, Attorney at Law** has relocated. The new location is 105 South St. Mary's, Suite 950, San Antonio, TX 78205; (210) 227-4212.

In Washington, D.C.

Butler Derrick, formerly of **Williams & Jensen**, is joining the Washington office of **Powell, Goldstein, Frazer & Murphy LLP**. The firm also announces that **Lawrence R. Fullerton**, Deputy Assistant Attorney General in the **Antitrust Division of the U.S. Department of Justice**, has rejoined their Washington office. The office is located at 1001 Pennsylvania Ave. NW, Suite 600 S, Washington, DC 20004-2505; (202) 347-0066.

John A. Thorner has been selected as Executive Director of the **Optical Society of America**. The address is 2010 Massachusetts Ave. NW, Washington, DC 20036-1023; (202) 223-8130; fax (404) 223-1096.

Mainstreet pick up 8/98 p.75

In the Spotlight: Cobb Bar Association

THE JOURNAL WELCOMES

news about your voluntary bar association. Please share your programs with us by sending articles and photos to: Amy Williams, Communications Coordinator, State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303; e-mail: journal@gabar.org. In this issue we are spotlighting programs of the Cobb Bar Association which is led by President Robert D. Ingram.

Scholarship Fund


The Alexis Grubbs Memorial Scholarship Fund has been established in memory of Alexis Grubbs, the 16-year-old daughter of Hon. Adele Grubbs, who was killed in an automobile accident on July 28, 1998. Hon. Grubbs is a Juvenile Court Judge in Cobb County. The scholarship will be awarded annually on Law Day to a graduating Marietta High School student who is pursuing a career in the legal field. Donations, made payable to the Alexis Grubbs Memorial Scholarship Fund, should be sent to Marietta High School, in care of Ms. Lynn Plunkett, Assistant Principal, 121 Winn St., Marietta, GA 30064.

Meet the Judges CLE

As a joint cooperative effort between the Cobb County Bar Association and the Northwest Georgia Bar Association, there will be a continuing legal education course offered on Friday, Oct. 30, 1998, at the Renaissance Waverly

Hotel located at 2450 Galleria Parkway, NW. The all-day course begins at 8:45 a.m., concludes at 5:00 p.m. and offers 10 hours of continuing legal education credits. The course is entitled The Cobb Judicial Circuit: What To Know To Be Effective In The Courtroom, and will feature panel presentations by Cobb County Judges from all Courts. It will be an excellent opportunity for attorneys practicing in the Cobb Judicial Circuit to learn more about each of the judges and how their individual courtrooms are managed.

Golf Tournament

The Cobb County Bar Association is planning the First Annual Cobb County Bar Association Charity Golf Tournament to benefit the Children's Center Inc. The tournament is tentatively scheduled for April 22, 1999 and the entry fee is \$75 per person. Entries may be made as an individual or as a team. Contact Alec Galloway at Moore, Ingram, Johnson & Steele LLP, 192 Anderson St., Marietta, GA 30060, to enter. 

WANTED: PERFORMERS, MUSICIANS, COMEDY WRITERS, ETC.

TURN YOUR FRIENDS IN! TURN YOURSELF IN!

BE A PART OF THE ATLANTA BARD ASSOCIATION'S ANNUAL COMEDY SHOW ON FEBRUARY 26, 1999

PERFORMER(S): _____

MUSICIAN(S): _____

WRITER(S): _____

PRODUCTION: _____

OTHER (PR. SPONSORSHIP, ETC.): _____

REWARD OFFERED!

BOUNTY: ONE FREE DRINK TICKET IF YOU TURN IN SOMEONE WHO AGREES TO SERVE

ONE FREE TICKET TO THE SHOW IF YOUR VOLUNTEER EITHER:

(1) PERFORMS IN THE SHOW OR (2) WRITES A SKIT USED IN THE SHOW

LIMIT ONE REWARD PER BOUNTY HUNTER

FAX OR MAIL TO LOVIE MANLEY, THE ATLANTA BARD ASSOCIATION, 2500 THE EQUITABLE BUILDING, 100 PEACHTREE STREET, ATLANTA GEORGIA 30303. FAX (404) 522-0269

SPONSORED BY: THE ATLANTA BARD ASSOCIATION, A COMMITTEE OF THE ATLANTA BAR ASSOCIATION

Satellite Sighting

Our southern counterpart has always been out of sight, but never out of mind. Until now. On Aug. 18, South Georgia Office Administrator Bonne Cella and Judge Gordon Zeese, in Albany, and Executive Director Cliff Brashier, Chief Operating Officer Sharon Bryant, Director of Communications Jennifer Davis, GSAMS Director Bob Reese and GSAMS Assistant Telecommunications Manager Terrie Newsom, in Atlanta, took part in the State Bar's first ever video-conference meeting (photo 1). Facilities and equipment were provided by GSAMS—Georgia Statewide Academic and Medical Systems.



Higher Learning

Michael Shapiro (left, photo 2), Executive Director of the Georgia Indigent Defense Council, instructed two CLE programs at the Dougherty County Judicial Building. More than 24 attorneys were given basic Internet training, or learned about the GACDL Bulletin Board.



2

Twenty-five Superior Court clerks gathered in Tifton (photo 3), at the satellite office of the State Bar for a course on how to collect intangible taxes, given by representatives of the IRS.



3

Mission Accomplished

One of the projects of the State Bar Communications Committee is to build a Speakers Bureau, so that lawyers throughout the state can volunteer to be speakers at meetings and events in their own communities. A database containing information about

speakers and engagements is essential to ensure that business, community and school groups find a speaker and speakers find an audience. Bonne Cella recently visited the Florida Bar, where their Public Information Assistant Beverly Lewis (photo 4), demonstrated how their very successful Speakers Bureau operates. ☐



4

Spotlight on the Aviation Law Section

THE AVIATION LAW SECTION is chaired by E. Alan Armstrong of Atlanta, and has 170 members statewide. While it is one of the State Bar's smaller sections, members have an ambitious agenda for the year. On April 29, 1998 an annual planning session was held. They appointed as editor Richard Spivey of Macon. A newsletter and questionnaire have been circulated, and a section member directory is planned. On June 19, 1998, they held a breakfast in conjunction with the State Bar's Annual Meeting.

On July 22, 1998, the Section met at the 57th Fighter Group Restaurant in Atlanta. Their speaker was Brigadier General Robert L. Scott, the author of *God is My Co-Pilot* (book and later movie). Seventy-five people attended this luncheon. Many Section members brought their families to hear the 90-year-old General Scott speak about his flying experiences. During World War II, the General, then a Colonel, was dispatched to China in a B-17 to potentially participate in an air raid against Japan. The raid did not materialize, but the young Colonel

seized his opportunity and persuaded General Claire Chenault, the commander of the American Volunteer Group, to let him fly as a "guest" on missions of the Flying Tigers.

The Flying Tigers were American military pilots who resigned their

maintained to sign copies of his books. All proceeds from the sale of his books were donated to the Georgia Aviation Museum in Warner Robins.

Other Section Highlights

The **International Law Section**, chaired by Joycelyn L. Fleming, hosted a breakfast in Atlanta on Sept. 3. Chandra Kanagasafai, Advocate and Solicitor of the High Court of Malaysia, spoke to attendees. The topic was, "Malaysia: Foreign Investment and Its Effect on Human Rights and Equality." Ms. Kanagasafai is a sponsored guest of the United States Information Agency's International Visitor Program. She is an advocate for the protection of individual rights in multi-cultural societies and



(l-r) Chair Alan Armstrong, his daughter Sarah and General Robert Scott

commissions to fly as "civilians" on behalf of the Chinese Air Force. They were a controversial group, decried by Tokyo Rose as "war criminals." General Scott stayed on with General Chenault after the Flying Tigers were officially disbanded in July of 1942. General Scott went on to become an Ace pilot, flying P-40 Warhawks in the China skies for the remainder of World War II.

To complement General Scott's stories, renowned aviation artist Sam Lyons Jr. exhibited artwork depicting aircrafts flown by the Flying Tigers. After General Scott spoke he re-

If you would like to join a section of the State Bar, please contact the Membership Department at Bar headquarters (800) 334-6865 or in Atlanta (404) 527-8777.

CONTINUED ON PAGE 77



Chandra Kanagasabai and Jim Rayis, International Law Section

Official Opinions

Counties; intergovernmental contracts with school districts.

Counties and school districts have authority to enter into intergovernmental contracts in which the county leases real property to the school board for use as a site for a public school or other educational purpose. (7/28/98 No. 98-13)

Motor vehicles; salvage titles.

A licensed used motor vehicle parts dealer can transfer salvage titles without being licensed as a used motor vehicle dealer provided that the used motor vehicle parts dealer complies with Chapter 3 of Title 40,



Attorney General
Thurbert Baker

the "Motor Vehicle Certificate of Title Act" and the rules and regulations of the State Revenue Commissioner relating to salvage vehicles, including the requirement that a motor vehicle with a title marked "salvage" be titled in the name of the business prior to the sale of the salvage motor vehicle unless the sale is made to a licensed dealer. (8/11/98 No. 98-14)

Georgia Bureau of Investigation; records. The criminal investigation records of the Georgia Bureau of Investigation are also part of the prosecutorial file and, therefore, any discovery requests involving those

The full text of the opinions of the Attorney General can be seen at: <http://www.georgianet.ago/gaagopinions.html>

records should be coordinated with the prosecuting attorney who should be the primary source for determining the response. (8/11/98 No. 98-15)

Unofficial Opinions

Officers and employees, Public; holding dual offices. Dual service as a volunteer firefighter and a member of a city council or county commission does not appear to violate the prohibitions of either O.C.G.A. § 36-30-4 or § 45-2-2. However, cities and counties confronted with this situation must determine for themselves, based on the unique circumstances presented by dual service in their particular jurisdiction, whether a common law conflict of interest exists. (7/9/98 No. U98-8)

Superior courts; criminal jurisdiction over juveniles. In the light of the 1997 amendments to the School Safety and Juvenile Justice Reform Act limiting the exclusive jurisdiction of the superior courts to the trials of juveniles charged with offenses enumerated in O.C.G.A. § 15-11-5(b)(2)(A), judges of the magistrate court may issue arrest warrants for juveniles charged with such offenses. (7/14/98 No. U98-9)

Local governments; Consolidation. Cities that are located in more than one county may be consolidated with a county government. However, in the absence of a change in county lines or some additional general legislation to provide for consolidating governments of a city and more than one county, the city would have to give up some of its territory. (8/11/98 No. U98-10) ☒

Continued from page 76

a member of the Human Rights Committee of the Malaysian Bar Council.

At a September 11 meeting, the **Health Law Section** honored outgoing Chair and Section Newsletter Editor, Charity Scott, for her many years of service to the Section.

The **Intellectual Property Law Section** continues their very successful "Patent Roundtable Discussions." This luncheon series is designed to be inexpensive, interactive and interesting. The next

tentative date is Nov. 10, 1998.

The **Administrative Law Section** met Sept. 4 to revitalize the Section. A newsletter, directory, social events and continuing legal education programs are planned.

— *Section Liaison Lesley T. Smith*



Administrative Law Section organizers

Macon attorney **Manley F. Brown** is Georgia's 1998 Trial Lawyer of The Year. He was honored in June at a reception given by the Georgia chapter of the American Board of Trial Advocates during the Annual Meeting of the State Bar of Georgia.

On August 14, 1998, the Georgia Indigent Defense Council honored three outstanding individuals for their service and contributions to indigent defense in Georgia.

Georgia Courts Directory Now on Sale

Copies of the 1998-99 *Georgia Courts Directory* are now available for \$15 each. The new directory contains listings of all the judicial and related personnel in Georgia. The information is current as of August 1. If you would like to purchase one or more copies, send a check or money order (no cash please) to:

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

Be sure to indicate the number of copies requested and where the directories should be mailed.

Stephen Bright and the Southern Center for Human Rights were chosen to receive the Commitment to Excellence Award for their exceptional work in ensuring that Georgia's poorest citizens are provided with effective representation. **Corinne Mull** of the DeKalb County Public Defender's Office was chosen to receive the Gideon's Trumpet Award for her dedication to improving indigent defense in Georgia. And **H.B. Nicholson** was chosen to receive the Harold G. Clarke Equal Justice Award in recognition of a long-term dedication to the cause of indigent defense.

Cheryl Fisher Custer, of Conyers, has been elected to a two-year term as Vice-chairperson of the Board of Counselors for Oxford College of Emory University. She will lead the 53-member board beginning in the fall of 2000 in an advisory role to the dean of Oxford College.

Janet E. Hill, partner in the firm of Nelson, Hill, Lord & Beasley LLP, has been elected to the position of Vice President of the National Employment Lawyers' Association. This organization of over 3,500 plaintiff's attorneys is dedicated to advancing the rights of employees and assisting those who represent them.

Earle F. Lasseter, a partner in the Columbus office of Pope, McGlamry, Kilpatrick and Morrison LLP, is the Treasurer-elect of the American Bar Association. He will serve one year as Treasurer-elect before taking office as Treasurer in August 1999, where he will be responsible for maintaining the financial records of the Association,

and serve as a member of the ABA Board of Governors. The ABA is the world's largest voluntary professional association.

Charles T. Lester Jr., of Sutherland, Asbill & Brennan, was elected as the 1998-99 Chairperson of the Georgia Law-Related Education Consortium. He succeeded outgoing Chair, Juge Edward H. Johnson, and assumed office on July 1.

The Association of Trial Lawyers of America (ATLA) announces that **Richard H. Middleton Jr.**, of Savannah, is their new President-elect. Mr. Middleton is a partner with the law firm of Middleton, Mixson, Adams & Tate PC. The ATLA works to safeguard victims' rights, promote injury prevention and foster the disclosure of information critical to public health and safety.

Joan B. Sasine, an environmental partner with Powell, Goldstein, Frazer & Murphy LLP, has been elected Vice-chairperson of the Southern Section of the Air & Waste Management Association (A&WMA). The A&WMA is an international professional association with over 2,000 members and associates.

Diane O'Steen, who has been Executive Director of the Atlanta Bar Association for 32 years, was named the recipient of the prestigious Bolton Award for Professional Excellence by the National Association of Bar Executives during the ABA Annual Meeting in August. While Ms. O'Steen may not be a lawyer, her mentors have been some of Georgia's brightest legal minds. ☐

Summary of Recently Published Trials

Bibb Superior Ct . . .	Auto Accident - Intersection - Right-of-Way	\$106,100
Chatham Superior Ct	Hospital Negligence - Administration of Drug - Heart Problems	\$25,000
Chatham Superior Ct	Medical Malpractice - Laparoscopy/Surgery - Complications . .	Defense
Clayton State Ct . . .	Auto Accident - Rear-End - Following Too Closely	\$89,000
Cobb State Ct	Auto/Truck Accident - Rear-End - Minimal Impact	\$150,000
Cobb Superior Ct . . .	Fraud - Concealment of Assets - Unpaid Settlement	\$497,600
Cobb Superior Ct . . .	Auto Accident - Intersection - Liability Admitted	\$36,000
DeKalb State Ct . . .	Auto Accident - Intersection - Right-of-Way	\$50,000
DeKalb State Ct . . .	Auto Accident - Center Turn Lane - Right-of-Way	\$17,666
DeKalb State Ct . . .	Auto Accident - Intersection - Way	\$14,000
DeKalb State Ct . . .	Auto Accident - Rear-End - Liability Admitted	Defense
DeKalb Superior Ct . .	Auto Accident - Head-On - Intoxicated Uninsured Motorist . . .	\$15,580
DeKalb Superior Ct . .	Fraud - Sale of Used Vehicle - Disclosure of Prior Accident . . .	Defense
DeKalb Superior Ct . .	Medical Malpractice - Pregnancy - Managing Diabetes	Defense
Douglas Superior Ct . .	Fall Down - Supermarket - Spaghetti on Floor	Defense
Fulton State Ct	Medical Malpractice - Surgery - Gauze Left in Chest	\$70,000
Fulton State Ct	Premises Liability - Supermarket - Cart Strikes Patron	\$22,000
Fulton State Ct	Auto/Ambulance Accident - Rear-End - Lane Change	\$18,000
Fulton Superior Ct . . .	False Arrest - Bus Station - Assault & Battery	\$26,000
Fulton Superior Ct . . .	FEIA - Jacking Up Locomotive Hood - Type of Jack	\$390,000
Fulton Superior Ct . . .	Conversion - Office Space - Attorney/Former Shareholder . .	\$600,000
Fulton U.S. District Ct	Auto Accident - Mirrors - Speeding	\$750,000
Fulton U.S. District Ct	Property Loss - Salvage Carpet - Fire at Carpet Mill	\$100,000
Gwinnett Superior Ct . .	Misappropriation of Trade Secret - House Plans	\$51,700
Hall Superior Ct	Auto Accident - Rear-End - Following Too Closely	\$15,000
Hall Superior Ct	Auto Accident - Rear-End - Emergency Situation	Defense
Muscooge Superior Ct	Construction Site - Backhoe/Pedestrian Accident	\$1,000,000
Polk Superior Ct	Auto/Truck Accident - Intersection - Turning	\$20,000
Richmond Superior Ct	Auto Accident - Intersection - Red Traffic Light	\$83,000
Richmond Superior Ct	Misrepresentation - Sale of Residence - Preexisting Problems .	\$15,000

Let us help you settle your case

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

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



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

Plaintiff Physician Recovers \$3,425,000 for Wrongful Commitment to Psychiatric Facility

Plaintiff pediatrician had an argument with the staff of a psychiatric facility concerning their treatment of her aunt. Defendant internist had plaintiff involuntarily admitted for observation. (Kennedy v. Sams; Fulton County U.S. District Court)

♦ ♦ ♦

Multiple Falls on Freshly Waxed Department Store Floor Results in \$1,150,000 Verdict

Plaintiff suffered rotator cuff and disc injuries after falling multiple times on defendant's freshly waxed floor. Plaintiff fell twice on the way to the service desk to report the first fall. (Jenkins v. Kmart; Chatham County Superior Court)

♦ ♦ ♦

Plaintiff Bicyclist Settles for \$850,000 After Being Pulled Under the Wheels of a Passing Truck

While riding her bike to Georgia State University plaintiff was stopped at an intersection when defendant's dump truck rolled over the rear of her bike. Plaintiff was pulled under the wheels and suffered degloving injury from hip to foot. (Wamberg v. Wiggins; Jasper County Superior Court)

♦ ♦ ♦

Removal of Decedents Organs Without Consent Results in \$718,000 Verdict

Decedent died at defendant hospital and decedent's wife denied a request to donate organs as she did not want the body subjected to further invasive procedures. Decedent's eyes were later removed and plaintiff spouse received a thank you note for same. (McCown v. Peachtree Hospice; DeKalb County Superior Court)

♦ ♦ ♦

Defendant Employer Found Liable in the Amount of \$90,000 For Creating a Hostile Work Environment

Plaintiff secretary brought this action against her employer alleging that he frequently used profane language in her presence and engaged in sexual harassment. Plaintiff claimed that these actions resulted in emotional distress and digestive problems. (Sims v. Anderson; Fulton County U.S. District Court)

IN MEMORIAM

The Georgia Bar Foundation Inc. sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Georgia Bar Foundation 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.

Addison, Joel Nicholas Atlanta	Admitted 1950 Died August 1998	Lawson Jr., Hugh Perry	Admitted 1964 Died February 1998
Blalock III, Daniel B. Atlanta	Admitted 1975 Died January 1998	Major, William H. Atlanta	Admitted 1954 Died August 1998
Branch Jr., Eugene Thomas Stone Mountain	Admitted 1979 Died August 1998	Mallard Jr., William D. Atlanta	Admitted 1972 Died August 1998
Caraway, George D. Atlanta	Admitted 1951 Died April 1998	McKenna, Terry P. Social Circle	Admitted 1954 Died July 1998
Champion, Joe S. Albany	Admitted 1951 Died May 1997	McBrayer Jr., Henry G. Decatur	Admitted 1950 Died June 1998
Cook, Murline Ann Rancho Palos Verde, CA	Admitted 1980 Died June 1998	Moses Jr., William Graham Atlanta	Admitted 1960 Died July 1998
Crawford, Linton K. Cornelia	Admitted 1948 Died November 1997	Pender, William E. Atlanta	Admitted 1946 Died April 1998
Culver, Charles McAlister Macon	Admitted 1956 Died July 1998	Smith. Ellen Virginia Hines Spartanburg, SC	Admitted 1965 Died 1997
Dryden, Robert C. Snellville	Admitted 1955 Died September 1998	Smith, Peter Rex Marietta	Admitted 1977 Died June 1998
Evans, Glen C. Rockaway, NJ	Admitted 1950 Died October 1997	Smith, Walter A. Atlanta	Admitted 1945 Died August 1998
Evans, Robert J. Rome	Admitted 1967 Died June 1998	Taylor, Guy Raymond Atlanta	Admitted 1982 Died September 1998
Foley, Richard William Bowman	Admitted 1958 Died Spring 1998	Willingham Jr., John Davis College Park	Admitted 1982 Died June 1997
Glover, Kenneth P. Mount Pleasant, SC	Admitted 1966 Died April 1998	Willis Jr., Joel A. Warner Robins	Admitted 1951 Died August 1998
Harris Jr., John B. Macon	Admitted 1947 Died April 1998	Work, Richard Henry McDonough	Admitted 1961 Died January 1998
Hendricks Jr., Napoleon Lithonia	Admitted 1995 Died July 1998	Undercofler, Judge Hiram K. Atlanta	Admitted 1946 Died July 1998
Hoyt Jr., Wade Cothran Rome	Admitted 1938 Died 1998	Yarbrough Gee, Sonya D. Atlanta	Admitted 1992 Died September 1998
Hutto, Herbert J. Athens	Admitted 1961 Died August 1998	Young, Cam U. Valdosta	Admitted 1935 Died May 1998
Jacobs, Joseph Atlanta	Admitted 1929 Died July 1998	Zimmerman, Dana Jean Dallas, TX	Admitted 1993 Died April 1998
Janney, Larry K. Littleton, CO	Admitted 1975 Died January 1998		

Name	City	Discipline	Date of Supreme Court Order
Allen, Richard D.	Atlanta	reinstated	July 8, 1998
Bryson, Mary Lee Scott	Atlanta	disbarred	July 6, 1998
Denley, Anita Marie	Warner Robins	reinstated	July 30, 1998
Friedman, Hirsch	Atlanta	disbarred	Sept. 14, 1998
Gavel, Alan Austin	Macon	suspended	Sept. 14, 1998
Glean, Michael Anthony	Smyrna	disbarred	Sept. 14, 1998
Haywood, William Thomas	Macon	disbarred	Sept. 14, 1998
McLarty, L. Scott	Athens	disbarred	Sept. 14, 1998
Morse, Jack O.	Atlanta	review panel reprimand	Sept. 11, 1998
Perry, Diana L.	Tifton	suspended	Sept. 14, 1998
Stewart, Terry L.	Atlanta	disbarred	Sept. 14, 1998
Thompson, Lloyd E.	Brunswick	public reprimand	Sept. 11, 1998
Voss, Richard W.	Loganville	reinstated	July 8, 1998
White, Jim	Clarkston	disbarred	Sept. 14, 1998
Woodall, Hugh Robert	Atlanta	18-month suspension	Sept. 14, 1998

CAUTION! Over 30,000 attorneys are eligible to practice law in Georgia. Many attorneys share the same name.

You may call the State Bar at (404) 527-8700 or (800) 334-6865 to verify a disciplined lawyer's identity.

Also note the city listed is the last known address of the disciplined attorney.

website ad pickup
12/97 p85

Notice of Proposed Formal Advisory Opinion

NOTICE

First Publication of Proposed
Formal Advisory Opinion No. 94-R6

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

Fifteen copies of any comment to the proposed opinion must be filed with the Office of General Counsel by December 1, 1998 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 No. 94-R6

QUESTION PRESENTED:

What are the ethical considerations of an attorney defending an insured client under an insurance policy while simultaneously representing, on unrelated matters, a separate insurance company that claims a subrogation right in any recovery against the insured client?

SUMMARY ANSWER:

Under Standard 35 and Standard 36, an attorney may not simultaneously represent clients that have directly adverse interests in litigation that is the subject matter of either one of the representations. Whether or not this is the case in the Question Presented here, depends upon the nature of the representation of the insurance company.

If it is, in fact, the insurance company that is the true client in the unrelated matter, then the interests of the simultaneously represented clients in the litigation against the insured client are directly adverse even though the insurance company is not a party to the litigation and the representations are unrelated. The consent by the clients provided for in Standard 37 is not available in these circumstances because it is not obvious that the attorney can adequately represent the interests of each client. This is true because adequate representation includes a requirement of an appearance of trustworthiness that is inconsistent with the conflict of interests between these simultaneously represented clients.

If, however, as is far more typically the case, it is not the insurance company that is the true client in the unrelated matter, but an insured of the insurance company, then there is no simultaneous representation of directly adverse interests in litigation and these Standards do not apply. Instead, the attorney may have a personal interest conflict under Standard 30 in that the attorney has a financial interest in maintaining a good business relationship with the insurance company. This personal interest conflict may be consented to by the insured client after full disclosure of the potential conflict and careful consultation. The Standard 37 limitation on consent to conflicts does not apply to Standard 30 conflicts. Such consent, however, should not be sought by an attorney when the attorney believes that the representation of the insured will be adversely affected by his or her personal interest in maintaining a good business relationship with the insurance company for to do so would be to violate the attorney's general obligation of zealous representation to the insured client.

OPINION:

Correspondent asks whether an attorney may defend an insured client when the attorney also represents, in unrelated litigation, an insurance company that claims a subrogation right in any recovery against the insured client. If the representation of the insurance company is, in fact, representation of the insurance company and not representation of an insured of the company, then the analysis of this

situation is governed by Standards of Conduct 35 and 36 which prohibit accepting or continuing representation if the exercise of the lawyer's independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client. In interpreting these Standards, we are guided by Ethical Consideration 5-14:

Maintaining the independent professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

Unlike the more familiar standard applied in subsequent representation conflicts, the prohibition in simultaneous representation conflicts is not dependent upon a showing that the matters involved are substantially related. This is so because the prohibition against simultaneous representation of adverse interests is based, primarily, on concerns with loyalty to clients, the appearance of trustworthiness, and the preservation of a lawyer's independent professional judgment for each client. *See, generally*, ABA/BNA *LAWYERS MANUAL ON PROFESSIONAL CONDUCT* 51:104-105 and cases and advisory opinions cited therein. *See, also*, ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1495 (1982) (lawyer may not accept employment adverse to existing client even in unrelated matter; prohibition applies even when present client employs most lawyers

in immediate geographical area, thereby making it difficult for adversary to retain equivalent counsel). *See, also*, ABA Model Rules of Professional Conduct, Comments, Rule 1.7 ("Thus, a lawyer ordinarily may not act as an advocate against a person the lawyer represents on some other matter, even if it is wholly unrelated.")¹

Of course, some simultaneous representation conflicts can be consented to by the simultaneously represented clients. Consent, under the Standards of Conduct is limited by two requirements. The first is that consent can only be obtained in those circumstances in which the full disclosure necessary to adequately inform the clients' consents can be provided without breach of confidentiality. The second is that consent is limited, by Standard of Conduct 37, to those circumstances in which it is "obvious that [the lawyer] can adequately represent the interests of each [client]. . . ." In interpreting the "obvious and adequate" test for consent, we are guided by the provisions of Ethical Consideration 5-15. Ethical Consideration 5-15 advises that all doubts about divided loyalties should be resolved against the propriety of the representation and that, generally, consent should not be obtained when clients have differing interests in litigation and rarely obtained when they have only potentially differing interests in litigation.

In the circumstances presented here, it would be reasonable for an attorney to be concerned that the adverse interests of the simultaneously represented clients could adversely affect the quality of the representation by jeopardizing the quality of the relationship with the client. It is, therefore, not obvious that adequate representation will be provided. This is not because Georgia lawyers are not sufficiently

trustworthy to act professionally in these circumstances by providing independent professional judgment for each client unfettered by the interests of the other client. It is, instead, a reflection of the reality that reasonable client concerns with the appearance created by such directly adverse interests could, by themselves, adversely affect the quality of the representation.

If however, as is more typically the case, what is referred to in the Question Presented as representation of the insurance company is, in fact, representation of an insured of that company, then the above analysis does not apply. In such a situation, the attorney's primary ethical obligation is to the insured and not to the company, thus the fact that the company may have interests directly adverse to the other insured client is not the issue. Instead, the attorney may have a personal interest conflict under Standard 30 which provides: "Except with the written consent or written notice to his [*sic*] client after full disclosure a lawyer shall not accept or continue employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property or other personal interests." Such a conflict arises because of the attorney's need to maintain, for financial reasons, a good business relationship with the insurance company.

Personal interests conflicts are not subject to the limitation on consent found in Standard 37. Here, the insured client may consent, in writing, to the conflict after full disclosure of the potential adverse effect of the personal interest conflict and careful consultation with the attorney. No attorney, however, should seek such consent if he or she

CONTINUED ON PAGE 88

Supreme Court Issues Formal Advisory Opinions

Editor's Note: Formal Advisory Opinion No. 98-2 (published below) was one of four opinions issued by the Supreme Court of Georgia in June. We regret that it was not published along with the others in the last issue of the Journal. Also please note that in the August Journal on page 92, the bold heading Formal Advisory Opinion No. 98-1 should have read 98-3. Formal Advisory Opinion No. 98-3 presented the question: May a staff lawyer for a non-profit legal services group contact State officials to express concerns about the legality of treatment of non-clients?

**STATE BAR OF GEORGIA
ISSUED BY THE SUPREME
COURT OF GEORGIA ON
JUNE 1, 1998
FORMAL ADVISORY OPINION
No. 98-2 (Proposed Formal Advisory Opinion No. 96-R2)**

QUESTION PRESENTED:

When a lawyer holding client funds and/or other funds in a fiduciary capacity is unable to locate the rightful recipient of such funds after exhausting all reasonable efforts, may that lawyer remove the unclaimed funds from the lawyer's escrow trust account and deliver the funds to the custody of the State of Georgia in accordance with the Disposition of Unclaimed Property Act?

SUMMARY ANSWER:

A lawyer holding client funds and/or other funds in a fiduciary capacity may remove unclaimed funds from the lawyer's escrow trust account and deliver the funds to the custody of the State of Georgia in accordance with the Disposition of Unclaimed Property Act only if the lawyer, prior to delivery, has exhausted all reasonable efforts to locate the rightful recipient.

OPINION:

Many members of the Bar have contacted the State Bar of Georgia for guidance on how to manage client funds and/or other funds held in a fiduciary capacity in the lawyer's escrow trust account when the lawyer is unable to locate the rightful recipient of the funds and the rightful recipient fails to claim the funds. More specifically, the lawyers have asked whether they could ethically remove the unclaimed funds from the lawyer's escrow trust account and disburse the funds in accordance with O.C.G.A. §§ 44-12-190 *et seq.*, the Disposition of Unclaimed Property Act.

In those cases where a lawyer is holding client funds and/or other funds in a fiduciary capacity, the lawyer must do so in compliance with Standards 61, 62, 63 and 65. When the funds become payable or distributable, Standard 61 speaks to the lawyer's duty to deliver funds: "A lawyer shall promptly notify a client of the receipt of his funds, securities or other properties and shall promptly deliver such funds, securities or other properties to the client." Implicit both in this Standard, and the lawyer's responsibility to zealously represent the client, is the lawyer's duty to exhaust all reasonable efforts to locate the rightful

recipient in order to ensure delivery.

When a lawyer holding funds attempts to deliver those funds in compliance with Standard 61 but is unable to locate the rightful recipient, the lawyer has a duty to exhaust all reasonable efforts to locate the rightful recipient. After exhausting all reasonable efforts and the expiration of the five year period discussed in the Act, if the lawyer is still unable to locate the rightful recipient and the rightful recipient fails to claim the funds, the funds are no longer considered client funds or funds held in a fiduciary capacity, but rather, the funds are presumed to be abandoned as a matter of law, except as otherwise provided by the Act, and the lawyer may then deliver the unclaimed funds to the State of Georgia in accordance with O.C.G.A. §§ 44-12-190 *et seq.*, the Disposition of Unclaimed Property Act. A lawyer who disburses the unclaimed funds as discussed above shall not be in violation of the Standards.

♦♦♦

During the month of September 1998, 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
SEPTEMBER 4, 1998
FORMAL ADVISORY OPINION
No. 97-3 (Proposed Formal Advisory Opinion No. 91-R11)**

QUESTION PRESENTED:

Whether it is ethically permissible for a departing attorney to send

a communication to clients of the former law firm?

OPINION:

No Standard prohibits a departing attorney from contacting those clients with whom the attorney personally worked while at the law firm. A client is not the property of a certain attorney. The main consideration underlying our Canons of Ethics is the best interest and protection of the client.

An attorney has a duty to keep a client informed. This duty flows in part from Standard 22 which provides that a lawyer shall not withdraw from employment until that lawyer has taken reasonable steps to avoid foreseeable prejudice to the client including giving due notice to the client of the lawyer's withdrawal, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Furthermore, Standard 44 prohibits an attorney's willful abandonment or disregard of a legal matter to the client's detriment. Therefore, to the extent that a lawyer's departure from the firm affects the client's legal matters, this client should be informed of the attorney's departure. The fact or circumstances of an attorney's departure from a law firm should not be misrepresented to the firm's clients. *See* Standard 4 (which prohibits an attorney from engaging in professional conduct involving dishonesty, fraud, deceit, or willful misrepresentation); and Standard 45(b) (which prohibits an attorney from knowingly making a false statement of law or fact in his representation of a client).

If the departing attorney either had significant contact with or actively represented a client on the client's legal matters, the attorney may communicate with the client, in

either written or oral form, to advise the client of the attorney's departure from the firm. An appropriate communication may advise the client of the fact of the attorney's departure, the attorney's new location, the attorney's willingness to provide legal services to the client, and the client's right to select who handles the client's future legal representation.

Assuming the departing attorney either had significant contact with or actively represented the client, the written communication to the client does not need to comply with the provisions governing advertisements contained in Standard 6, because it would not constitute "a written communication to a prospective client for the purposes of obtaining professional employment" as contemplated by Standard 6 (i.e. the written communication is not required to be labeled an "advertisement"). Of course, any written communication regarding a lawyer's services must also comply with Standard 5, which prohibits any false, fraudulent, deceptive or misleading communications; and with any other applicable standards of conduct.

A similar analysis should also apply to an oral communication by the departing attorney to a client with whom the attorney had significant contact or active representation on legal matters while at the firm. If the departing attorney contacts such a client orally, that attorney should only provide information that is deemed appropriate in a written communication as set forth above.

With respect to the timing of the disclosure of the attorney's departure to the client, the ultimate consideration is the client's best interest. To the extent practical, a joint notification by the law firm and the departing attorney to the affected clients of the change is the preferred course of action for safeguarding the client's best interests. However, the appropri-

ate timing of a notification to the client is determined on a case by case basis. Depending on the nature of the departing attorney's work for the client, the client may need advance notification of the departure to make a determination as to future representation.

The departing attorney may also owe certain duties to the firm which may require that the departing attorney should advise the firm of the attorney's intention to leave the firm and the attorney's intention to notify clients of his or her impending departure, prior to informing the clients of the situation. Specifically, the departing attorney should not engage in professional conduct which involves "dishonesty, fraud, deceit, or willful misrepresentation" with respect to the attorney's dealings with the firm as set forth in Standard 4.

In conclusion, as long as the departing attorney complies with the Standards governing advertisements, solicitation, and general professional conduct, the attorney may ethically contact those clients with whom the attorney had significant contact or active representation at the former law firm, so as to advise the clients of the attorney's departure as well as the client's right to select his or her legal counsel. Legal issues which may arise from a particular set of facts involving a departing attorney including, but not limited to, contract or tortious interference with contract, are beyond the scope of this formal advisory opinion. ■



CLE/Ethics/Professionalism/Trial Practice

NOVEMBER 1998

3

AMERICAN HEALTH LAWYERS
ASSOC. (FORMERLY
NHLA/AAHA, INC.)
*Dummy Course for
Fundamentals of Healthcare
Law Institute*
Chicago, IL
14.8/1.0/0.0/0.0

4-8

ICLE
*Entertainment and
Sports Law*
Acapulco, MX
12.0/1.0/1.0/3.0

Advertising Index

AAA Attorney Referral	88
Analytical Services	21
ANLIR	52
Arthur Anthony	71
Avis	89
Dan Turner Builders	50
Estate Planning Attys., Amer. Acad.	39
Georgia Courts Directory	78
Golden Lantern	21
Great American Insurance Co.	63
Health Care Auditors	68
Harrison	Back Cover
Keenan Law Firm	56
Landy Insurance	31
Lexis Law Publishing	38
Lexis Nexis	4
Mainstreet	73
Marvin Brown	45
Medical Expert Testimony	69
National Lawyers Risk Management	88
National Legal Research Group	65
Nextel	67
Wallace Law Registry	57
West Group	Inside Front, 36-37, Inside Back

5

ICLE
*Professionalism, Ethics
and Malpractice*
Marietta, GA
3.0/1.0/1.0/0.0

ICLE

Premises Liability
Atlanta, GA
6.0/0.0/0.0/0.0

5-7

ICLE
*Medical Malpractice
Institute*
Atlanta, GA
12.0/0.0/0.0/0.0

6

ICLE
Bankruptcy Law
Sea Island, GA
6.0/0.0/0.0/0.0

ICLE

Punitive Damages
Statewide, GA
6.0/0.0/0.0/0.0

6-7

ICLE
ADR Institute
Atlanta, GA
8.0/0.0/0.0/0.0

7

ALABAMA INSTITUTE FOR
CONTINUING LEGAL
EDUCATION
Bankruptcy Practice
Pinson, AL
6.0/0.0/0.0/0.0

NATIONAL INSTITUTE OF

TRIAL ADVOCACY
8 Day Basic Trial Skills
Minneapolis, MN
45.8/1.0/0.0/45.8

D.C. BAR - FORUM BAR
ASSOCIATION
Mandatory D.C. Course
on the D.C. Rules
of Professional Conduct
Washington, DC
5.0/3.5/0.0/0.0

12

ICLE
Punitive Damages
Statewide, GA
6.0/0.0/0.0/0.0

ICLE

*Georgia Economic
Development Authority*
Atlanta, GA
6.0/0.0/0.0/0.0

13

ICLE
Zoning Law
Atlanta, GA
6.0/0.0/0.0/0.0

ICLE

Trial Advocacy
Statewide, GA
6.0/0.0/0.0/0.0

ICLE

Troubled and Troubling Client
Atlanta, GA
6.0/0.0/0.0/0.0

NATIONAL INSTITUTE OF
TRIAL ADVOCACY
Trial - The Ultimate Theater
Chicago, IL
6.6/0.0/0.0/6.6

13-14

ICLE

*Intellectual Property Law
Institute*

Young Harris, GA

8.0/0.0/0.0/0.0

19

ICLE

Advanced Legal Writing

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

Secured Lending

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

Trial Advocacy

Atlanta, GA

6.0/0.0/0.0/0.0

**PROFESSIONAL EDUCATION
SYSTEMS, INC.***Individual Income Tax
Strategies & Preparation:
Working with the Taxpayer*

Atlanta, GA

6.7/0.0/0.0/0.0

20

ICLE

RICO

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

Corporate Litigation

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

*Prof., Ethics & Malpractice
Avoid*

Statewide, GA

4.0/0.0/0.0/0.0

**PROFESSIONAL EDUCATION
SYSTEMS, INC.***Individual Income Tax
Strategies & Preparation:
Working with the Taxpayer*

Macon, GA

6.7/0.0/0.0/0.0

**DECEMBER
1998****3**

ICLE

Urgent Legal Matters

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

Environmental Matters

Atlanta, GA

4.0/0.0/0.0/0.0

ICLE

*Prof., Ethics & Malpractice
Avoid*

Statewide, GA

4.0/0.0/0.0/0.0

ICLE

*Professionalism: Judges and
Lawyers*

Atlanta, GA

3.0/0.0/0.0/0.0

4

ICLE

Post Judgment Collection

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

Employment Law

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

*Recent Development in
Georgia Law*

Statewide, GA

6.0/0.0/0.0/0.0

8**D.C. BAR - FORUM BAR
ASSOCIATION***Mandatory D. C. Course on
the D. C. Rules of
Professional Conduct*

Washington, DC

5.0/3.5/0.0/0.0

9

ICLE

*Litigation Under 42**U. S. C. 1983*

Atlanta, GA

7.0/0.0/0.0/0.0

10

ICLE

Winning Depositions

Atlanta, GA

6.0/0.0/0.0/0.0

ICLE

*Recent Developments In
Georgia Law*

Statewide, GA

6.0/0.0/0.0/0.0

**PROSECUTING ATTORNEYS'
COUNCIL OF GEORGIA***Forensic Evidence*

Decatur, GA

6.3/0.0/0.0/5.3

10-11

ICLE

Defense of DUI Institute

Atlanta, GA

12.0/0.0/0.0/0.0

Continued from Page 83

believes that his or her business interest will, in fact, adversely affect the quality of the representation with the insured client. To seek consent in such circumstances would be in violation of an attorney's general obligation of zealous representation of all clients.

We conclude, therefore, that if the representation in the situation described in the Question Presented is a true representation of an insur-

ance company, then an unconsentable conflict of interests exists and that entering into or continuing with such simultaneous representations would be in violation of the Standards of Conduct. If, however, the representation is not a true representation of an insurance company, but a representation of an insured of that company, then a personal interest conflict exists which ordinarily may be consented to by the insured client. ☒

Endnotes

1. The Supreme Court of Georgia has not, of course, adopted the ABA Model Rules. This citation is as persuasive authority only. The adoption of the ABA Model Rules by other jurisdictions did not change the analysis of simultaneous representation conflicts applied in this Opinion as an interpretation of Georgia Standards of Conduct. The point is that this analysis is well established.

Continued from page 51

that were formerly done by hand, and information will soon be electronically reported to the Georgia Crime Information Center as well as passed between courts. The standardized format used by this database reduces reporting time and increases accuracy

in the transfer of information.

It is this same standardized format that makes the creation of the database such a time-consuming and arduous process. Sills says that feedback from judges and court officials who have used the new system has all been positive. Their only suggestion is that the more data

included the better. And most counties are clamoring to be added to the database. But it is a slow and involved process to take data from all the existing information systems and integrate them into one. Ms. Sills expects to have full data loads for those counties already in the system by the end of October.

She hopes to add 20 more counties between now and June of 1999. The ultimate goal is to have all of Georgia's courts on one standardized system so that information from anywhere in the state is always accessible, easily shared and efficiently documented. According to Ms. Sills, more information means better-informed decisions, and "the net result is that justice is better dispensed." ☒

National Lawyers
Risk pickup 6/98
p63

AAA -
pickup 8/
98 p83

Avis - pickup w/ change
6/98 p77

change date to 6/30/99,
as shown on enclosed
copy

CLASSIFIEDS

EMPLOYMENT: ATTORNEYS

WANTED. Associate for small Macon law firm. Experienced in litigation. Send resume to: Confidential Reply Box 890, *Georgia Bar Journal*, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303.

ATTORNEY WANTED. Three attorney, AV-rated law firm in east central Georgia concentrating in Commercial Litigation, Business Bankruptcy and Agricultural Law seeking Associate with up to three years of experience; call (912) 237-7020; send resumes to P.O. Box 129, Swainsboro, GA 30401.

ATLANTA, GA. MID-SIZE AV-RATED. Bovis, Kyle & Burch LLC is seeking an associate with two to five years experience in corporate, transactional and general business. Must possess superior academic qualifications, be able to assume immediate file handling responsibility and work directly with clients with minimal supervision. Mail resume to Frank Klein, 53 Perimeter Center East, Third Floor, Atlanta, GA 30346 or fax (770) 668-0878.

ATTORNEY WANTED. Mid-sized law firm in Columbus, GA seeks attorney with 5+ years of commercial real estate experience. Respond in writing to Page, Scrantom, Sprouse, Tucker & Ford PC, P.O. Box 1199, Columbus, GA 31902, ATTN: William L. Tucker.

ATTORNEY JOBS. Harvard Law School calls our publication: "Probably the most comprehensive source of nationwide and international job openings received by our office and should be the starting point of any job search by lawyers looking to change jobs." Each monthly issue contains 500-600 current (public/private sector) jobs. \$45-3 months. Contact: Legal Employment Report, 1010 Vermont Avenue NW, Suite. 408-GBJ, Washington, DC 20005. (800/296-9611) Visa/MC/AMEX. www.attorneyjobs.com.

CULP ELLIOTT & CARPENTER PLLC, a Charlotte, NC tax firm providing sophisticated personal, corporate, international and estate tax services to high net worth clients and their companies is seeking tax and estate planning associates to join its progressive practice. Immediate client contact and responsibility. Qualified candidates will possess an LLM and 2 years experience in corporate tax and/or estate

planning matters. Extensive international tax experience a plus for corporate tax positions. Reply in confidence with resume, cover letter and transcripts to Recruiter, 227 W. Trade St., Suite 1500, Charlotte, NC 28202.

EMPLOYMENT OPPORTUNITY.

Multi-state consumer financial services company is seeking associate general counsel with 3-5 years commercial and litigation experience, securities and tax a plus. Excellent academic credentials and/or experience required. Must relocate to Chattanooga, Tennessee area. Competitive salary and benefits. Please fax cover letter and resume to: General Counsel (423) 476-9200.

ASSOCIATE POSITION. Growing AV-rated Macon law firm seeks attorney with two to four years experience in civil litigation. Compensation and benefits are competitive based upon level of experience. Send resume and compensation requirements to: Mark E. Toth, Hall, Bloch, Garland & Meyer, P.O. Box 5088, Macon, GA 31208.

BOOKS/OFFICE FURNITURE & EQUIPMENT

LAW LIBRARY FOR SALE. All in excellent condition, "Like New." GA. APP. Reports - 227 Volumes; GA. Reports - 267 Volumes; GA. Digest - 59 Volumes; and Digestive Index - 5 Volumes. (770) 448-0515

WILLIAM S. HEIN COMPANY. More than 70 years later, still your #1 source for buying/selling law books. 50%-70% savings on single volumes, major sets, Federal & State, Foreign/International law, Rare/Antiquarian law. Appraisal services available. Call (800) 496-4346. FAX (716) 883-5595. Web site: lawlib.wuacc.edu/hein/ heinused.htm

THE LAWBOOK EXCHANGE LTD. buys, sells and appraises all major law book sets—state and federal. For the best prices, top quality and guaranteed satisfaction, call toll free (800) 422-6686 for free information. Mastercard, Visa and American Express accepted. <http://www.lawbooks.exc.com>

OFFICE SPACE

FOR SALE. Estate planning and probate law practice in Greenville County, South Carolina. Owner retiring. For more information, write: Confidential Reply Box 891, *Georgia Bar Journal*, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303.

OFFICE BUILDING FOR SALE/RENT. 1901 square foot brick building in Decatur. 15 minutes to Atlanta, 2 to Decatur court. Furnished. Library/conference room, closets, phone system, basement, corner lot, free parking, MARTA line. Occupy all or lease out. 2 tenants leased. Well maintained. Excellent investment. 103 N. McDonough Street. Jim Hollingsworth, (770) 493-9586.

DECATUR-DEKALB AREA.

Attorney and secretarial offices and suites available now at the Trinity Building, 118 East Trinity Place, Decatur. Full service for attorney tenants and their personnel available. Close to courthouse, MARTA and center of Decatur. Contact one of the following: Charles Bass, Bill Witcher or Bob Wilson at (404) 479-4400.

FOR LEASE. Fully furnished law office in Toccoa across street from courthouse will be available January 1, 1999. Includes law library, conference room, and space for at least two attorneys and support staff of three. Contact: Jim Cornwell (706) 886-9451.

VACATION RENTALS

WANTED. Seeking 3-4 partners to share in ownership of ocean-front condo—Litchfield Beach, SC. Wide panoramic view of Atlantic Ocean and strand at 4th floor level. Beautifully refurbished 3BR condo, private pool, tennis courts. Call (843) 527-1066 or (843) 237-4948.

FRANCE - Burgundy - grand 17th Century Chateau - (about 4500 square feet), beautifully restored and furnished, 6 bedrooms (sleeps 13), 5 baths; weekly \$1000 to \$1800. **Classic 18th Century French farmhouse** - just restored, three bedrooms (sleeps 6), two baths; weekly \$700 to \$900. Both about 1.5 hours from Paris, near medieval art center of Vezelay. **ITALY - Tuscany - 14th C. Villa** (about 5000 square feet, former monastery), end of private road on organic vine, olive estate, 17 miles south of Florence, rent as one to three living units, 3 to 10 bedrooms (sleeps 7-27), 3 to 8 baths, pool, gardens; weekly \$1300-\$5000. **18th C. farmhouse**, end of private road on wine, olive estate, views of San Gimignano's medieval towers, 30 miles southwest of Florence, 4 apartments, (sleeps 2-7, or combine for up to 21); weekly \$800-\$1000. Law Office of Ken Lawson (Seattle), (206) 632-1085, fax (206) 632-1086, e-mail: kelaw@u.washington.edu.

KeyCite - New

the harrison company 4/C
pickup 6/98