

GEORGIA BAR Journal

DECEMBER 1999

**Lawyer
to Lead
Georgia**

Governor-Elect Roy Barnes

SPECIAL SECTION: ALTERNATIVE DISPUTE RESOLUTION

KeyCite - New

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On the Cover: *Governor-elect Roy Barnes leads a wave of lawyers chosen by Georgia voters to govern the state. (Photograph by Richard T. Bryant)*

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American Arbitration Association - new 4C

GEORGIA BAR Journal

DECEMBER 1998 • VOL. 4 NO. 3

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

COVER STORY

"Lawyer Barnes" Takes Charge

By Michael Jablonski

10

SPECIAL SECTION

ADR in the Georgia Courts

By Ansley Boyd Barton

14

**Limitations on the Meaning and
Impact of *DeGarmo v. DeGarmo***

By Clifford P. Altekruze

20

Ethics and Professional Responsibility

By R. Wayne Thorpe and Ansley Boyd Barton

25

Corporate Use of ADR in Georgia

By Robert S. Glenn Jr.

32

**A Mediation Primer for the Solo or
Small Firm Practitioner**

By Nadine DeLuca Elder

38

**Conflict Resolution in Georgia
Law Schools**

By Carolyn Benne

44

Juvenile Court Mediation

By Sheila Friedman

48

FEATURES

**Fall Meeting: Board of Governors
Looks Ahead to 1999**

By Jennifer M. Davis

50



1999 Georgia Legislative Preview

*By Thomas M. Boller
and Mark Middleton*

53

**Atlanta Leaders Unite to Decongest
the City and Clean Its Air**

*By Sharon A. Gay
and Charles S. Conerly*

55

Annual Fiction Writing Competition

64

Audited 1998 Financial Statement

88

DEPARTMENTS

From The President

No More Sitting on the Sidelines

By William E. Cannon Jr.

6

From The Director

We're Doing Something Right

By Cliff Brashier

7

From the YLD President

Could This Be the Start of a
Beautiful Relationship?

By Ross J. Adams

58

Law Practice Management

Millennium Bug: Has Your Firm

Got the Fever?

By Terri Olson

60

Professionalism

Orient Express: Emory Law School

Orientation on Professionalism, Part II

By Amy Williams

62

From the Attorney General

65

Who's Where

66

South Georgia News

67

Pro Bono

Give Access to Justice Some Byte

By Michael L. Monahan

68

Section News

70

In Memoriam

71

Lawyer Discipline

71

Bench & Bar

72

Georgia Trial Reporter

73

Notices

New Formal Advisory Opinion

Proposal to Amend Bar Rules

11th Circuit: Proposed Rules and
Notice of Amendments

Proposed Formal Advisory Opinion

76

Ad Index

98

Classifieds

98

NO MORE SITTING ON THE SIDELINES



By William E. Cannon Jr.

We have all been there. It's a holiday party at a friend's house. The atmosphere is festive, the food and drink are plentiful and we are enjoying being away from the care and concerns of practicing law.

Then it happens. A well-meaning friend feels compelled to share the latest lawyer joke. Frantically looking around the room, we try to find a quick way out. We feel our face beginning to burn as we sense every eye in the room on us. Praying that this will be that rare animal — a truly funny lawyer joke — we fix an awkward grin on our faces and steel ourselves for the punch line.

The disgusting joke is finally over and everyone laughs, waiting for our reaction. Too embarrassed to express our true feelings, we mumble something unintelligible and either leave the room or change the subject. For the rest of the evening we feel like a social outcast.

For years I endured that scenario at a variety of social gatherings. It bothered me so much that I eventually began avoiding social occasions as one means of coping with the problem. However, there was no escape. The jokes didn't go away. They simply became more offensive and began to include all aspects of

the legal system as a subject of ridicule.

When it reached the point that politicians — who historically were held in such low regard that they could not throw stones at lawyers — began to use lawyers and the legal system to advance their own political agenda, I decided I would no longer ignore what was going on.

Do you want to go to holiday parties and other events with your head held high? Then quit standing around waiting for some other lawyer or some organization to defend you.

As the attacks on lawyers and our system of justice increased in intensity, I began to respond more aggressively. My early responses largely took place in airports and on airplanes. When polite chatter about jobs resulted in the inevitable lawyer joke or derogatory comment, I no longer attempted to win approval by laughing politely or nodding in approval. I told the person that I was offended by the comment and, if it was based on misinformation, why I viewed the attack as unfair. The first step in fighting back was taken and I had survived!

The next significant step in the process took place when I was

backstage during a production of my community theater. One member of the cast felt compelled to entertain me with a lawyer joke, and I responded by telling him that he should go ahead and tell some cruel ethnic jokes or jokes to embarrass people who are physically challenged. After all, I told him, if you want to be a bigot, why stop with lawyers?

Other members of the cast who had been listening drifted away in the awkward silence. However, during the next few performances several cast members told me privately that they were glad that I stood up for my profession.

As President of the State Bar, I now have a "bully pulpit" from which I can defend lawyers and our system of justice. Speaking to civic clubs, I receive positive and thoughtful responses from most of the members. When forced to think about the role that lawyers and our system of justice play in our county's freedom, most fair-minded people realize we have been attacked unfairly.

A strong response to lawyer bashing is not required because we are overly sensitive or lack a sense of humor. We must speak out because the attacks on our profession threaten the very foundation of our legal system — our independence. If lawyers can be intimidated from representing unpopular causes and people, how will their voices be heard? Many of our majority viewpoints today were in yesterday's minority. In order for the system to work lawyers on both sides of an issue must have the freedom to be effective advocates and judges must have the independence to reach fair decisions.

The best way to attack intolerance and ignorance is with facts and

CONTINUED ON PAGE 8

FEEDBACK SAYS WE'RE DOING SOMETHING RIGHT



By Cliff Brashier

A letter I received from Kenneth G. Menendez of Atlanta is reprinted below with his permission along with my public reply to him.

Dear Mr. Brashier:

This letter is something you may not receive too frequently. It is a fan letter.

Last week I had the opportunity to serve as a member of an arbitration panel in the State Bar's Fee Arbitration program. My experience was tremendously enlightening and gratifying, due in large part to the organization and professionalism exhibited by Ms. Rita Payne.

The proceedings ran like clockwork from start to finish (except for the instances when we arbitrators ran behind schedule). Ms. Payne provided us with extremely helpful counsel regarding the applicable procedures and was available to assist us whenever questions arose.

Due to certain last minute changes on the part of some of the parties, Ms. Payne was required to substitute a number of cases during the day, which she accomplished without missing a beat. One of the parties had a number of procedural objections and Ms. Payne provided the arbitrators with exceptional guidance regarding that matter. In

short, Ms. Payne performed in exemplary fashion from start to finish.

I have practiced law in Georgia for over 18 years. During the course of that time, I have been involved with the State Bar frequently, including five years as a member of the Formal Advisory Opinion Board and three years as a member of the

We have initiated a new total quality management approach to examine many of our procedures and systems with the goal to make them more responsive to your needs.

Bar's Special Committee to Redraft the Model Rules of Professional Conduct. In all of that time, I have never been so impressed by the State Bar as I was last week when I saw Ms. Payne in action. Ms. Payne and her able assistant, Melissa Allen, are the sort of people any organization would be lucky to have as members of their team. Wherever you found these superb professionals, I respectfully suggest that you should return to that locale on your future recruiting ventures.

**Yours very truly,
Kenneth G. Menendez**

Dear Mr. Menendez:

Thank you for taking the time to

report on your experience as an arbitrator in the State Bar's Fee Arbitration service. You are right — it is nice to get a fan letter. I'm pleased that we get them frequently. We do get more letters with suggestions for improvements or new programs, but nearly all are written to be helpful and are not critical. All letters are given to the relevant committee for consideration and many do lead to improvements in services to our members and the public.

Rita Payne and Melissa Allen exemplify the level of professionalism, courtesy, and dedication that we expect from all members of our staff. Because of feedback that I have received from other lawyers about other staff members, I believe that Rita and Melissa are very representative of our staff as a whole.

We constantly strive to be helpful and responsive. Toward that goal we have just initiated a new total quality management approach called Service First. An enthusiastic group of front line, non-management employees will examine many of our procedures and systems with the only goal being to make them more responsive to your needs. Our staff will probably find this to be a refreshing change from having to listen to me preach about quality service. I will be excited to see their recommendations implemented.

I also want to thank you for volunteering to serve as an arbitrator. With skilled help from you and about a thousand other experienced lawyers and public members, very contested fee disputes are resolved in a fair and respectful manner. I know of no other profession that makes such an effort at responsible self governance. The only reason it has worked so well for the past two decades is because of caring volunteers like yourself.

CONTINUED ON PAGE 8

President, continued from Page 6

the truth. Your State Bar is working diligently on a program to restore public confidence in lawyers and the legal system by doing just that. You will be hearing more about this Foundations of Freedom program in another issue of the *Bar Journal*. However, the Foundations of Freedom program will not work unless our entire membership is motivated

and willing to respond to unfair attacks on our profession.

You can start right now. When you see an unfair attack in a publication, respond in writing, sign your name and send me a copy. Don't be too embarrassed to let your friends and clients know you respect your profession and find coarse lawyer jokes insulting. Tell your friends in public office that unfounded attacks

on our system of justice pose a real danger to the entire political process.

Are you tired of the jokes? Do you want to go to holiday parties and other events with your head held high? Then quit standing around waiting for some other lawyer or some organization to defend you.

We all worked hard to become lawyers. Let's show a little pride in what we have accomplished. ☒

Director, continued from Page 7

Thanks again for your letter and please continue to help us better serve our wonderful profession.

Sincerely yours,
Cliff Brashier

♦ ♦ ♦

The entire State Bar of Georgia
— from your elected Officers and
Board of Governors representatives,

to the thousands of volunteer attorneys, to every staff member — are dedicated to providing the very best service we can offer. I hope you will join Kenneth Menendez and many of your peers by working on committees and by letting me know whenever you see ways for us to offer even better service.

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 or (404) 527-8755 (direct dial); (404) 527-8717 (fax); and (770) 988-8080 (home). ☒

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Jennifer M. Davis, Managing Editor

ANLIR - new

“Lawyer Barnes” Takes Charge

By Michael Jablonski

I pledge that as long as I have breath to breathe and the people of the State of Georgia choose to honor me as their Governor, I will defend this profession.” Roy Barnes bid farewell — temporarily — to the practice of law with this promise in a speech before the Cobb County Bar Association on November 19, 1998. On January 11 he will be sworn as Georgia’s 80th governor, the first lawyer to lead the state since George Busbee was elected in 1974.

“It is an honor and a privilege to practice law. The profession we follow is a noble profession.” Barnes explained that lawyers are the keepers of order in modern society. “We allow people to settle disputes without resorting to violence. It is about fairness to those accused of crime. We do not allow mobs to go door-to-door in the dead of night and pull people out of their houses to punish them for crimes. That is what the practice of law is all about.” The Barnes administration will be shaped by a

strong belief that lawyers are important to a civilized society, as well as a conviction that no matter what job he holds, Roy Barnes will always be a lawyer.

Roy Barnes cultivated a fascination with politics by observing political discussions in the family general store. The store, which is still operated by the family in Mableton, was more than a place to buy goods but served as a center to exchange information and air opinions. It was natural for him to join the debate team at the University of Georgia while majoring in history. At UGA Law School he was elected president of the Student Bar Association. He was named the law school’s outstanding senior in 1972.

Returning home to Cobb County, Barnes learned to try cases as a prosecutor in the District Attorney’s office. He started a private practice two years later with Tom Browning. The two lawyer practice, which eventually developed into the Marietta law firm of Barnes, Brown-

ing, Tanksley & Casurella, operated without a formal partnership agreement. When Barnes began packing his office to move to the Capitol after the election, he still had his portion of the first fee the two partners ever took in – half of a twenty dollar bill with a handwritten note from Browning transmitting an equal share of the fee.

In the second year of practice at Barnes & Browning,

Roy Barnes succeeded in a bid for election to the state Senate. He stayed there for eight terms. During his third term he chaired the Judiciary Committee.

Governor Joe Frank Harris asked him to serve as Administration Floor Leader in the Senate from 1982 through 1989. During this time Barnes worked on the Governor's Growth Strategies Commission and was Senate Chairman of the Constitutional Revision Committee. After an unsuccessful run for governor in 1990, Barnes

returned to the legislature in 1993, this time in the House of Representative representing the 33rd House District. He was secretary of the House Judiciary Committee and member of the Governmental Affairs and Banks and Banking Committees at the time he decided to run for governor in 1998.

Lawyering remained important to Barnes while he was in the legislature. In effect, the House and the Senate were just different venues for him to use the skills of a lawyer. The law practice, which focuses on individual problems, and politics, which deals with the same issues on a broader scale, both provide Barnes with challenges. Barnes undertook a major class action case involving loan practices in poor communities after the unsuccessful 1990

gubernatorial campaign. The case required creative legal thinking to resolve issues that just did not seem to be fair.

The willingness to commit to a difficult case won Barnes praise in many quarters. "Roy is a working man's lawyer," explained Martin Luther King III. "He stepped forward and went into the black community addressing these issues not just for financial reasons but to do

justice." King became a major supporter in the 1998 campaign.

Some members of the business community grumbled about Barnes' involvement in the loan cases. The representation did not appear to be consistent with his business interests or with the reputation for promoting economic development he developed as a legislator. The confusion, according to Barnes, was based on a misunderstanding of what lawyers do. "Lawyers are easy targets for

"I promise that whenever anyone disparages the profession — no matter their position or their political party — I will speak up first to defend this profession."
— Roy Barnes



Celebrating with the governor-elect are (l-r) Alison Barnes, a second-year University of Georgia law student, Marie Barnes, Roy Barnes, U.S. Sen. Max Cleland, Michael Coles.

anyone who is unhappy with society. We are on the cutting edge. Businesses are uncomfortable with us because we call them to account for their actions when we seek damages. People are uncomfortable with us because we take on those accused of despicable crimes in the name of justice and fairness."

The essence of being lawyer, according to Barnes, is integrity and a sense of service. He insists that lawyers in his firm take pro bono cases as well as indigent criminal cases. Our justice system works only because lawyers make it work, Barnes believes. When lawyers become too concerned with labels and unconcerned with justice then real problems develop. The current trend to blame lawyers for all societal ills is based on an incorrect perception of the

function of lawyers in a society based upon adherence to laws. “Lawyers are under attack because they defend liberty. That is considered radical by some people.” Barnes continues, “When we take on unpopular causes, we are labeled as being ‘too liberal and soft on crime.’ We need to teach those

everyone lived by the standards that lawyers set for themselves. The essence of being lawyer to Barnes is a sense of integrity and a sense of service. He always insisted that lawyers in his firm take pro bono cases as well as indigent criminal cases, but he instilled in all of his lawyers a sense

would be to do without them. “I have often thought that all the lawyers should go on strike for about one month,” he suggested. “The resolution of disputes and the adjudication of justice would stop. There would be chaos. Then our importance to society would be obvious.”

Lawyers work as advocates.

Barnes believes that lawyers should use these skills to educate the general public about the profession. The responsibility to educate does not rest on any bar association or the courts, it is the duty of everyone who practices the profession. “Each person who is a lawyer has a responsibility to let the public know what our role is. Each person who is a lawyer has a responsibility to speak up in defense of the profession.” Barnes pledges to do his part. “I promise that whenever anyone disparages the profession – no matter their position or their political party – I will speak up first to defend this profession.”

Roy Barnes will always be a lawyer. He looks forward to being governor, but he also looks beyond his term of office to a return to active participation in the profession he loves. On the day after the election he told a partner in his law firm that he loved campaigning, but that it taught him that he was a lawyer at heart. “The one regret I have in winning is that I am no longer in practice.”

“I will miss the practice of law which I have been doing for 25 years. This is but a temporary respite.” With a twinkle in his eye Barnes pleads, “Don’t let the profession be destroyed in my absence.” ☒

Michael Jablonski is a partner at Barnes, Browning, Tanksley & Casurella. He served as strategist for the Barnes campaign. He is also a member of the Georgia Bar Journal editorial board.

“The one regret I have in winning is that I am no longer in practice. I will miss the practice of law which I have been doing for 25 years. This is but a temporary respite.”
— Roy Barnes



who attack us to understand what we really stand for.”

The new governor promises to use the attention now given to him to promote the profession. At every opportunity Barnes discusses the role of lawyers. He preaches that all Georgians would be better off if

that every case incorporated responsibility to society.

In his speech before the Cobb Bar group, Barnes tried to imagine a society without lawyers. He suggested, comically, that the best way to convince people that lawyers were not only important, but were beneficial,

Jennifer ad

West group directory - New

ADR in the Georgia Courts

By Ansley Boyd Barton

The use of alternative dispute resolution (ADR) in the Georgia courts has grown dramatically during this decade. In 1990, three counties — Fulton, DeKalb, and Chatham — offered ADR in their courts.

Today, 81 Georgia counties throughout the state are served by 31 court-connected ADR programs, making the processes of mediation, non-binding arbitration, and early neutral evaluation available to more than 5.5 million residents. ADR is offered not only in superior and state courts, but also in magistrate, juvenile, and probate courts. Those services are provided by more than 1,000 neutrals registered with the Georgia Office of Dispute Resolution.

Driving the popularity of ADR are the benefits it can offer to the courts and the parties. ADR use can shrink dockets and reduce case-processing times, thus offering relief to overburdened court resources. Cases that would take years to resolve in court may be settled in months. Moreover, a process such as mediation, with its emphasis on communication and conciliation, helps parties to craft for themselves satisfactory and durable settlements.

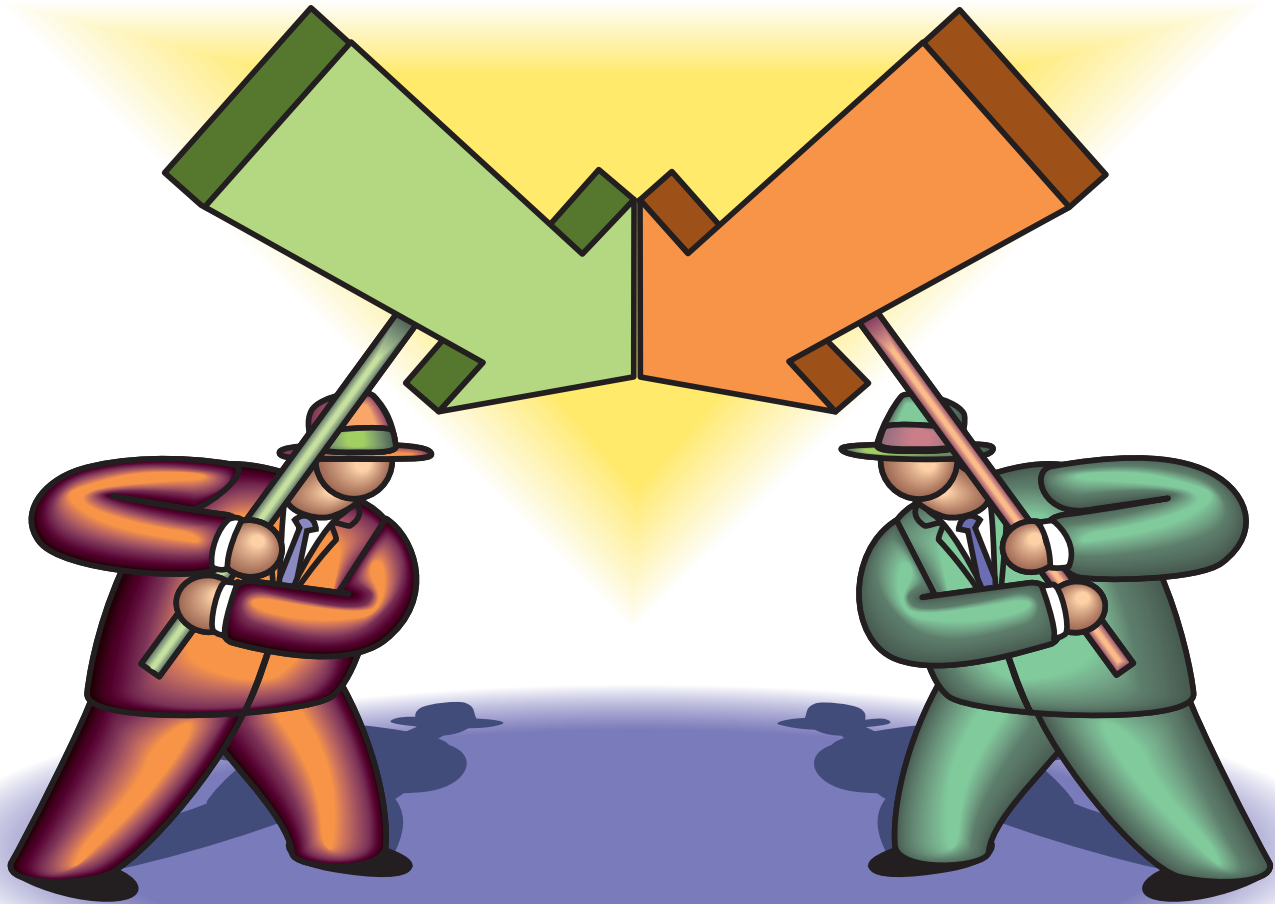
Georgia is among the leaders in the adoption of court-

connected ADR. That leadership position is due in great part to the Supreme Court of Georgia and the State Bar of Georgia, which combined their vision and expertise to create the court ADR system we enjoy today.

The Constitutional Mandate

The Georgia Constitution of 1983 requires that the judicial branch of government provide “speedy, efficient, and inexpensive resolution of disputes and prosecutions.” Pursuant to this constitutional mandate, in September 1990, the Supreme Court of Georgia created the Joint Commission on Alternative Dispute Resolution under the joint leadership of the Chief Justice of the Supreme Court of Georgia and the President of the State Bar of Georgia. The members of the Joint Commission were appointed by then-Chief Justice Harold Clarke and then-State Bar President Evans Plowden.

The Supreme Court directed the Joint Commission to explore the feasibility of using court-referred ADR processes, particularly mediation and non-binding arbitration, to complement existing dispute resolution methods. The mission was to gather information, implement



experimental pilot programs, and draw up recommendations for a statewide, comprehensive ADR system. (Funding for the early work of the Joint Commission was provided by the State Bar of Georgia, the Georgia Civil Justice Foundation, the National Institute for Dispute Resolution and the Georgia Bar Foundation. The Georgia Bar Foundation provided grants to the Joint Commission and its successor, the Georgia Commission on Dispute Resolution, from 1991 to 1994.)

The Joint Commission studied the impact of ADR nationwide and analyzed information gathered within the state from the bench, the bar, directors of existing programs, private providers of ADR, and others. In September 1992, it recommended to the Supreme Court that ADR processes be available to courts and litigants throughout the state.

The Supreme Court of Georgia ADR Rules

A draft of these recommendations was widely circulated for comment by the bench, bar, private providers of ADR, and others. In October 1992, the Supreme Court adopted the recommendations in the form of rules that

apply to court-ordered or court-referred ADR. On the one hand, the Supreme Court rules make it possible for every trial court in Georgia to employ ADR processes if it wishes to do so. On the other hand, no court is required to employ ADR processes; while the Supreme Court is convinced that the use of ADR processes will enhance the quality of justice in the state, it is also committed to the *voluntary* use of such programs. (The impetus to set up a committee or task force to study the establishment of a statewide ADR plan has typically come from state supreme courts. States vary as to the authority used to implement ADR programs. In some states, a comprehensive system is established by legislative authority. Elsewhere, the authority comes from the rule-making power of the courts. In Georgia, the Supreme Court implemented comprehensive statewide ADR through use of its rule-making powers under the 1983 Georgia Constitution.)

The Georgia rules are accompanied by Appendix A, which sets forth specific rules for court programs using ADR processes. Appendix A was adopted as part of the uniform rules of the superior, state, magistrate, juvenile, and probate courts upon the advice and consent of their various judicial councils.

The responsibility for establishing qualifications for neutrals — mediators, arbitrators, and early neutral evaluators — serving Georgia court programs was delegated to the Georgia Commission on Dispute Resolution by the Georgia Supreme Court. These qualifications are found in Appendix B to the rules.

Appendix C, adopted by the Georgia Commission on Dispute Resolution in 1995, contains the ethics code which governs the professional conduct of registered mediators. In 1996, the Georgia Commission on Dispute Resolution developed written procedures for hearings before the Commission and before the Commission's Committee on Ethics. The Commission has recently asked the Court to increase the confidentiality of ethics hearings before the Committee and the Commission, and to extend subpoena power and immunity to the Committee and to the Commission.

Funding of Court-Connected ADR in Georgia

Court-annexed and court-referred ADR programs are funded in a variety of ways across the United States. User fees are charged in some jurisdictions. Court budgets provide funding in some states, while others depend upon legislative appropriations or local government funding. Still other states use a filing fee surcharge to fund ADR programs, and some of those states apply the surcharge statewide. The fee is then administered through a central office that provides funds to local programs through grants.

The work of the Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution is funded through a state appropriation and fees paid by neutrals registered with the office. The Georgia Court-Connected Alternative Dispute Resolution Act of 1993, O.C.G.A. § 15-23-1, *et seq.*, provides for a filing fee surcharge on civil cases. The funding mechanism set forth in the statute is available to any court that has developed a program meeting the standards of the Georgia Supreme Court's Uniform Rules for Alternative Dispute Resolution Programs.

A surcharge of up to \$7.50, in addition to all other legal costs, may be charged and collected in each civil action in the superior, state, magistrate and probate courts of counties choosing to implement ADR programs. The funding scheme has no impact upon litigants in counties that do not implement ADR programs. Funds are collected and administered locally by a board of trustees, allowing for more local autonomy. Courts in a judicial administrative district are free to pool their resources to administer joint programs by circuit, by district, or in any

REGISTERED NEUTRAL INFORMATION

Current Number of Registered Neutrals:	1021
Number of New Registrations for 1998:	132
Number of Neutrals Renewed for 1998:	473

Number of Neutrals Registered in the Following Categories:

General Mediation:	943
Domestic Relations Mediation:	413
Arbitration:	243
Early Neutral Evaluation:	57
Multiple Categories:	500

Education - Highest Degree Attained:

High School	26
Some College	24
Associates	10
Bachelors	181
Masters	150
Law	581
Doctorate	45
Unknown	6
<i>Neutrals Holding Multiple Advanced Degrees:</i> 146	

Gender:

Male	558	55%
Female	463	45%

Ethnicity:

American Indian/Alaskan Native	7	1%
Asian/Pacific Islander/Asian-American	7	1%
Black/African-American/Non-Hispanic	110	11%
Hispanic	10	1%
White/Caucasian/Non-Hispanic	800	78%
Unknown	87	9%

Age:

Under 30	36	4%
30-39	166	16%
40-49	339	33%
50-59	306	30%
Over 60	168	17%
Unknown	6	1%

Districts:

1	41	4%	7	176	17%
2	29	3%	8	20	2%
3	85	8%	9	117	12%
4	189	19%	10	32	3%
5	208	20%	Out of State	12	1%
6	88	8%	Unknown	29	3%

combination that would foster an efficient use of resources.

Under guidelines promulgated by the Georgia Commission on Dispute Resolution, a court may set an hourly rate for compensation of non-volunteer neutrals by the parties. Such costs are based upon the complexity of the litigation, the skill level required of the neutral, and the litigants' ability to pay. A court may also set a user's fee for ADR services.

The Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution

The Georgia Commission on Dispute Resolution, the successor to the Joint Commission on Alternative Dispute Resolution, is the ADR policymaking body appointed by the Supreme Court. The Commission, consisting of judges, lawyers, and non-lawyer members, meets regularly to consider issues important to the development of court-connected ADR in Georgia. These meetings are open to the public.

The Commission's responsibilities include: a) overseeing the statewide comprehensive ADR program; b) overseeing and ensuring the quality of court-connected ADR programs; c) developing guidelines for court-connected programs; d) developing criteria for training and qualification of neutrals; e) establishing standards of conduct for neutrals.

The Commission's early work primarily concerned the qualifications of neutrals and training programs for those neutrals. The Commission then turned its attention to writing a code of ethics for neutrals working in Georgia court programs, and developing guidelines for screening for domestic violence. The code of ethics adopted in 1995 applies to all mediators working in Georgia court programs. Also in 1995, the Commission approved Guidelines for Mediation in Cases Involving Issues of Domestic Violence and sponsored the special training of a group of Georgia mediators to handle cases involving issues of domestic violence.

The Georgia Office of Dispute Resolution was created by the Supreme Court to staff the Commission and implement its policies. The Office provides technical assistance to courts, provides training for neutrals who serve in court programs, and registers neutrals who work in Georgia court programs. Registration, an important component of the Commission's work in ensuring the quality of court programs, is predicated upon completion of approved training, observations, and recommendations by neutrals.

In 1996, the Office launched a statewide statistical project to evaluate the quality of the state's ADR programs, providing software and technical assistance so that statistics are gathered in a uniform manner. The project is on-going. In 1998, the Commission received a grant from the State Justice Institute to undertake an in-depth survey of participant satisfaction with the mediation process. The Office will analyze the quantitative and qualitative data gathered from these projects with the goal of producing a sophisticated evaluation of court-connected ADR in Georgia.

Georgia ADR Programs

The Commission and the Office have worked closely with court programs, providing partial funding and, in many cases, technical assistance and training. The design of these programs shows the variety in Georgia's ADR programs. Because no court is required to use ADR and because the Supreme Court rules encourage experimentation and variety, each court is free to use ADR in a manner best suited to the needs of litigants in its jurisdiction. The Commission's funding to courts developing ADR programs was made possible by grants from the Georgia Bar Foundation from 1991 to 1994. Here's a look at court programs around the state.

- ♦ The LaGrange/Troup County mediation program, begun in November of 1991, received initial referrals primarily from the Municipal Court of LaGrange, the State Court of Troup County, and the Magistrate Court of Troup County. The program now receives referrals from the Superior Court of Troup County as well and has expanded to serve the entire Coweta Judicial Circuit. Carroll County has a separate magistrate court program.
- ♦ DeKalb County has established a multi-door approach to dispute resolution. Parties in all eligible cases are screened for appropriateness by the Dispute Resolution Center and then scheduled for a mandatory intake conference. During this conference, an intake specialist explores with parties and attorneys the processes available at the multi-door (mediation, case evaluation, early neutral evaluation, and arbitration), as well as the options of private ADR and litigation. While the intake conference is mandatory, the choice of process is left to the parties. The ADR program for the Griffin and Flint circuits has recently embraced a multi-door approach, offering several different processes to litigants.
- ♦ The Ninth Judicial Administrative District program currently offers mediation in 14 counties in northeast Georgia. These counties pool their filing fees to support a district-wide mediation program adminis-

COUNTIES WITH COURT-CONNECTED ADR PROGRAMS



In 1990



In 1998

tered out of Gainesville. Many counties in this district are sparsely populated and would have neither the financial resources nor the caseload to warrant a separate program. The collaboration makes mediation services available to litigants in participating counties. Most of the mediators in this project are willing to serve in several counties. Gwinnett County, which is within the Ninth Judicial Administrative District, has a separate mediation program.

- ♦ The Third Judicial Administrative District has undertaken a mediation program covering 16 counties from Macon to Columbus. Like the program in place in the Ninth Judicial Administrative District, the Third District program operates with resources pooled by the counties it serves.
- ♦ Cobb County has established an extensive civil mediation program. During its first year of operation, 1066 domestic and 502 general civil cases were referred to mediation. The Cobb County Magistrate Court has a separate mediation program.
- ♦ Fulton County's Civil Arbitration and Mediation program is the oldest court-annexed ADR program in

Georgia. This program provides non-binding arbitration and mediation for superior and state court civil cases. Fulton County's landlord/tenant mediation program trains and uses as mediators primarily law students from Georgia State University and Emory University (see article on page 44). A separate Fulton County program offers mediation for domestic-relations cases. In addition, cases from magistrate, probate, and juvenile courts are mediated at the Justice Center of Atlanta.

- ♦ The Western and Northern circuits have a combined mediation program. Mediation programs are also found in Clayton County and in the Conasauga, Dublin, Southern, Cordele, Alapaha, and Eastern circuits. In Douglas County, cases are referred individually by the court to mediation. There is no separate ADR program. In Dougherty County, a non-binding arbitration program handles superior and state court cases.

Several programs handling superior and state court cases have expanded to offer arbitration and case evaluation as well.

Discreet ADR programs have been established in the

juvenile courts of Bartow, Clayton, Cobb, DeKalb, Houston, and Whitfield counties. Several other court programs, including the Ninth Judicial Administrative District and Third Administrative District, take mediation referrals for cases involving juvenile issues. A new program serving Floyd County magistrate, probate, and juvenile courts has just begun operation, making court-connected ADR services available in a total of 81 of Georgia's 159 counties.

ADR's Benefits in Court

A familiar statistic is that 90-95 percent of all civil cases settle prior to trial. The important question in terms of resources is *when*. Early settlement through ADR processes can save precious judicial resources and reduce costs to litigants. Even in cases that ultimately go to trial, ADR processes can streamline cases, making them less costly to try.

Savings of time and money for courts and for litigants is crucially important, but such information, while encouraging, does not tell the whole story. Much of the evidence of the value of ADR processes is anecdotal. Much of the value is manifested in ways that are not easily measured. For example, in LaGrange, the mediation program is providing an unexpected benefit to the indigent defense program. Administrators of that program estimate that the mediation program is responsible for a 25-30 percent decrease in the requests for appointed counsel because of the use of mediation in criminal misdemeanor cases. An important goal of the Commission, the Office, and the court programs is to capture statistics that will reflect some of these more elusive benefits of mediation programs.

Georgia has been selected to participate in a five-state mediation program model study along with Ohio, Maine, Hawaii and Colorado. Papers describing mediation program models in the five states will be published in the *Ohio State Journal of Dispute Resolution* in 1999.

Long-Range Planning

In 1997, the Commission appointed a Long Range Planning Committee, chaired by former Chief Justice Harold Clarke, to study the scope of the Commission's work as Georgia enters the next century. The report of the

Long Range Planning Committee was adopted by the Commission on March 5, 1998. Three long-range goals were described: 1) To encourage the expanded availability and diversity of court-connected ADR options through education, technical assistance, and training; 2) to look beyond the Commission's immediate mandate in order to support and encourage effective dispute resolution systems in other governmental entities, the schools, and the private sector through education, technical assistance, and training; 3) to remain open to

continuous review of Commission policies, procedures, and rules.

As we approach the new millennium, Georgians can expect that the use of ADR in the courts will continue to expand as more judges and attorneys become more familiar with the processes and parties demand swifter and better options for resolving their disputes. The Georgia Commission on Dispute Resolution and the Georgia Office of Dispute Resolution will continue to nurture the use of ADR in courts, as well as ways that will prevent disputes from ever reaching the courts. ☐

A familiar statistic is that 90-95 percent of all civil cases settle prior to trial. The important question in terms of resources is *when*. Early settlement through ADR processes can save precious judicial resources and reduce costs to litigants. Even in cases that ultimately go to trial, ADR processes can streamline cases, making them less costly to try.



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Limitations on the Meaning and Impact of *DeGarmo v. DeGarmo*

By Clifford F. Altekruze

In May of 1998, the Supreme Court of Georgia rendered a 4 to 3 decision in *DeGarmo v. DeGarmo*.¹ On a superficial review of the opinion, *DeGarmo* could be misinterpreted in a way that would greatly limit the perceived utility of mediation. When properly interpreted, however, the decision reiterates well-established principles of Georgia law that provide guidance for the drafting of settlement agreements.

Background Facts

Mr. DeGarmo filed a complaint for divorce.² Ms. DeGarmo sought to join, *inter alia*, a corporation as a party in the case, alleging that stock in the corporation had been issued so as to deprive her of her interest in a business to which she had contributed significantly. The trial court denied the wife's motion, and the parties went to mediation.³

The focus of the Supreme Court's opinion was a handwritten "draft" settlement signed by the husband and wife, as well as their attorneys, following their mediation session. The wife renounced the handwritten settlement shortly after mediation. In response, the husband moved the trial court to enforce the settlement.⁴

The trial court initially denied the husband's motion to enforce the mediated settlement. The husband applied for interlocutory appeal to the Supreme Court, but that application was denied. The wife subsequently renewed her motion to join additional parties, and moved to set aside as fraudulent the issuance of stock in the corporation. The trial court did not rule on the wife's renewed motion to join additional parties, or on her motion to set aside conveyance of the corporation's stock. Instead, the trial court reconsidered and granted the husband's motion to enforce the settlement.⁵ Significantly, however, the version of the settlement agreement adopted by the trial

court included several provisions either not included in the handwritten draft agreement or different from those originally agreed upon by the parties,⁶ leading the wife successfully to seek discretionary review by the Supreme Court.⁷

On appeal, with Justices Fletcher, Hines and Sears dissenting, the Court held that the trial court erred in

settlement containing more substantive terms than the parties' settlement itself contained, and that the divorce decree should accurately reflect the settlement reached by the parties.¹⁴ Those statements appear to rest, ultimately, upon a public policy in favor of enforcing contracts as written and agreed upon by the parties.¹⁵ In divorce cases particularly, the Supreme Court has stated that a strong



enforcing the revised settlement agreement.⁸ The Court found further error in the trial court's refusal to grant the wife's motion to have the corporation joined as a party in the case. The Court held that the disputed facts concerning the necessity for joinder of parties entitled Ms. DeGarmo to have the parties added.⁹ (The Court held that a third issue, the wife's contention that the trial court erred in failing to set aside the issuance of the corporation stock, was to be resolved by the trial court on remittitur.¹⁰) Each error identified by the Court in *DeGarmo* appears to give independent grounds for reversal.

Discussion

Chief Justice Benham's opinion for the Court in *DeGarmo* held that the trial court erred in enforcing the revised settlement agreement on two separate grounds. First, the trial court erroneously adopted the revised settlement, which differed in several provisions from the parties' handwritten, original settlement.¹¹ Secondly, the trial court erred in enforcing the parties' settlement because that settlement was inadequate (unenforceable), as it left issues to be resolved in the future.¹²

The trial court erred in enforcing the revised settlement because that revised settlement differed from the settlement agreed to by the parties. Citing *Moss v. Moss*,¹³ *DeGarmo* held that a trial court is not authorized to adopt as its judgment of divorce a memorialization of the

public policy encourages negotiations and settlement by the parties, and that policy would be greatly eroded if we allow trial courts to add substantive terms to agreements read and recorded in open court. Additionally, it would create an anomaly if we allow trial courts to make substantive additions in voluntary agreements made before the court while forbidding substantive changes in jury verdicts.¹⁶

This public policy rests in part on the backlog in domestic relations case loads in Georgia's Superior Courts.¹⁷

The Adequacy of the Settlement Agreement

DeGarmo's holding that the trial court erred in enforcing the revised settlement, because that revision contained matter not included in the original handwritten settlement, appears to be a simple application of settled law. The trial court should not add to the parties' settlement, as public policy favors the parties' right to reach their own settlement. *DeGarmo*, however, having so held, went on to state "that the original agreement was inadequate because it left matters for later resolution."¹⁸ A contradiction exists between those two bases. The trial court committed error by incorporating revisions that changed what the parties had agreed to, yet the Court also held that the parties had reached no settlement agreement

at all.¹⁹ In short, the first basis on which the Court relied in reversing the trial court's adoption of the settlement appears to be undermined by the second basis.

That inconsistency may suggest that *DeGarmo* rests primarily on the first stated basis of error, *i.e.*, that a trial court may not adopt as its judgment in a divorce case a memorialization of the parties' settlement that adds substantive matters to the settlement. The dissenting Justices apparently agreed with the majority that the trial court's judgment did not correctly reflect the parties' original settlement.²⁰ In other words, the dissenting Justices appear to join in the substance of the first basis for the Court's determination that the trial court erred in enforcing the (revised) settlement. Thus, the first basis of error relied upon by the Court in *DeGarmo* is clear, concise, and settled. The second basis is less clear, as discussed below.²¹

The dissenting Justices in *DeGarmo* contended that the trial court's departure from the parties' handwritten settlement should be remedied by remanding the case to the trial court for entry of judgment in conformity with the parties' settlement.²² The majority simply reversed the trial court. Therefore, *DeGarmo* may be viewed as a case in which the Justices agreed that the trial court erred in adopting as its judgment a revised settlement that differed from the parties settlement, but split over the question of the appropriate remedy for that error.

The split in *DeGarmo* concerning the correct remedy rests on differing views of the original handwritten settlement's completeness. Although the point was arguably secondary to the *DeGarmo*'s holding, and therefore perhaps of arguable precedential value, the majority's opinion held that the mediation settlement agreement originally drafted by the parties was "inadequate" because "it is plain that some issues were, indeed, left for future resolution and the resolutions were added to the agreement."²³ The dissenting opinion in *DeGarmo* is founded, in contrast, on the fundamental position "that all essential terms are incorporated. Contrary to the majority's view, the only item left for future resolution is the exact language of the decree."²⁴

To understand the holding in *DeGarmo*, the precise meaning of the phrase "issues were left for later resolu-

tion" must be gleaned from the majority opinion. On the one hand, the majority opinion notes that the wife argued "the agreement was unenforceable because it *specified* certain issues for resolution in the future."²⁵ If the issues were "specified" by the settlement, then it appears that

the parties themselves positively identified certain issues for resolution in the future. The opposite conclusion is suggested by the Court's observation that the parties' subsequent revisions to the original handwritten settlement show that "issues were, indeed, left for future resolution and the resolutions were added, to the agreement,"²⁶ even though the majority opinion describes at least one of those "revised" issues as

"entirely absent from the original agreement."²⁷ An issue specified by the agreement for later resolution would presumably not be "entirely absent" from that agreement.

If the handwritten settlement was inadequate because it put off until the future resolution of affirmatively identified issues, the *DeGarmo* Court would appear to hold simply that the parties never actually reached an agreement on all issues identified by the settlement. Alternatively, if the Court was concerned that the parties left issues out of their handwritten settlement altogether, then *DeGarmo* would be more far reaching, suggesting that the adequacy of the parties' settlement depends not on what is stated within the four corners of the document, but on a court's view of the relevant issues that the parties should include in the settlement. Indeed, the dissenting Justices in *DeGarmo* appeared to perceive a broad implication in the majority's opinion, observing that: "This agreement was reached after a long process aided by a skilled mediator, attended by both parties and counsel. If this agreement is not enforceable, then almost no agreement will be."²⁸

DeGarmo gives no hint of a judicial intention to alter established law. Yet, the principle of freedom to contract would be altered substantially if a settlement agreed to by the parties could be invalidated because a court concluded that additional, relevant terms should have been included in the settlement. Under Georgia law, parties are free to contract about any matters and on any terms they choose, absent some purpose prohibited by statute or public policy.²⁹ Further, contracts are to be construed and

The settlement agreement was unenforceable because that settlement left issues for future resolution. The core principle of *DeGarmo* is simply a reiteration of the rule that an agreement to agree is unenforceable.

enforced as written and agreed upon, so as to give effect to the intention of the parties by accomplishing the contract's purpose and creating the relationship contemplated.³⁰ Contracts must include certain fundamental terms, such as "subject matter, a consideration, and mutual assent by all parties to all terms" as a matter of law.³¹ A valid contract also requires an agreement "expressed plainly and explicitly enough to show what the parties agreed upon."³² Nevertheless, although the parties must state what they mean in their settlement, that requirement is very different from requiring that the parties consider and provide for all issues a court might deem relevant to such an agreement.

A party's unilateral, mistaken expectation concerning a contract may not vary the unambiguous terms of that contract, absent exceptional or equitable reasons for doing so.³³ Further, equity will not relieve a party's unilateral ignorance resulting from the lack of reasonable diligence on the part of that party.³⁴ That rule would be substantially eroded if a party could challenge the enforceability of an executed settlement on the grounds that the party failed to consider some issues that it later alleged to be relevant.

As a practical matter, the Supreme Court is unlikely to have intended for trial courts to review all settlement agreements for completeness. On the contrary, the Court has emphasized that the public policy encouraging parties to reach settlements is based in part on over loaded Superior Court domestic dockets, and that policy prohibits a trial court's adding substantive terms to the settlement reached by the parties.³⁵ *DeGarmo* would be markedly inconsistent with those purposes, if it intended to require trial courts to invalidate settlements that do not include all terms a court might consider relevant. The Court's opinion in *DeGarmo* does not give any indication that such a departure from prior case law and policy was intended.

DeGarmo may be understood as simply reiterating the settled rule of contract law that parties are not contractually bound by an agreement to resolve their issues in the future. Georgia case law is quite clear that no contract arises where the parties leave for later resolution issues that must be resolved in order for their agreement to be complete:

Unless all the terms and conditions are agreed on, and nothing is left to future negotiations, a contract to enter into a contract in the future is of no effect. An agreement to reach an agreement is a contradiction in terms and imposes no obligation on the parties thereto.³⁶

As previously noted, *DeGarmo* characterized the appellant as contending that the original settlement "specified certain issues for resolution in the future."³⁷ If

the settlement specified that some issues would not be resolved until later, the parties would appear to have reached at mediation no more than an agreement to agree on those issues. Such agreements have repeatedly served as the basis for invalidating divorce settlements.³⁸

The *DeGarmo* Court cited *Moss v. Moss*³⁹ as authority for the statement "that the original agreement was inadequate because it left matters for later resolution."⁴⁰ In *Moss*, the Supreme Court held that a mediated settlement was unenforceable because the settlement provided that the method of making a critical appraisal would be agreed to by the parties' attorneys in the future.⁴¹ The citation to *Moss* suggests that the *DeGarmo* settlement suffers the same defect as the agreement in *Moss*, i.e., a failure to resolve an issue that the settlement itself identifies as essential to a final agreement. Under this reading of *DeGarmo*, the inadequacy of the settlement was not its failure to address every relevant issue, but rather the failure to resolve a particular issue that the settlement itself stated the parties would settle in the future.

DeGarmo causes concern in part because the parties in that case appeared to believe that they had settled their dispute at mediation, implying that the settlement was invalid as a result of issues so minor that the parties themselves were unaware of them. Nevertheless, the parties may identify as essential what appear to be minor issues. Divorce cases, and mediations in general, often involve small but contentious issues. In the give and take of negotiations, attorneys and parties often expect, and may even promise, that they will resolve such issues in due time. Frequently, draft settlements expressly state as much. No matter how minor the issue or certain the expectation that it will be resolved, however, an agreement exists on that issue only when the resolution is actually reached in a manner that binds the parties.⁴² A case in which the parties fail to fulfill their intention to agree on terms in the future is entirely different from "a case where an agreement to terms was clearly made and then someone changed his mind."⁴³ By expressly reserving such issues for future resolution, the settlement may be interpreted as stating that the parties do not have an agreement until they resolve the issues.

The original, handwritten settlement in *DeGarmo* does contain language supporting the view that the parties reached only an agreement to agree in the future. For example, the detailed visitation terms of the agreement conclude by stating merely that "other notice provisions shall be included in the agreement."⁴⁴ The quoted visitation term appears to mandate future agreement on notice provisions concerning visitation, but no key is provided in the settlement concerning the substance of the required

additional provisions.

In the end, the Supreme Court held in *DeGarmo* that the settlement agreement was unenforceable because that settlement left issues for future resolution. *DeGarmo* may be taken as a warning about the importance of the drafting of settlement agreements, but should not be understood as fundamentally altering Georgia law with respect to either settlement agreements or mediation. The core principle of *DeGarmo*, as to the adequacy of the settlement, is simply a reiteration of the rule that an agreement to agree is unenforceable.

Conclusion

Careful analysis of the majority's opinion indicates that *DeGarmo* holds only secondarily that the settlement was inadequate. That holding, further, was based on the familiar principle that an agreement to agree on the resolution of issues in the future is not an enforceable contract. Finally, *DeGarmo* must be read in the context of divorce considerations that limit its general application. ■



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Endnotes

1. 269 Ga. 480, 499 S.E.2d 317 (1998).
2. It must be emphasized that *DeGarmo* involved a complaint for divorce, and the holding in that case is subject to the rules and law specifically applicable in divorce cases. Thus, *DeGarmo* is not necessarily applicable to all mediation cases, and may be inapplicable in significant ways for non-divorce cases.
3. *Id.* at 480, 499 S.E.2d at 317.
4. *Id.*, 499 S.E.2d at 317.
5. *Id.*, 499 S.E.2d at 317.
6. *Id.* at 480-81, 499 S.E.2d at 318.
7. *Id.* at 480, 499 S.E.2d at 317-18.
8. *Id.* at 481, 499 S.E.2d at 318.
9. *Id.* at 481, 499 S.E.2d at 318.
10. *Id.* at 481-82, 499 S.E.2d at 318.
11. *Id.* at 480-81, 499 S.E.2d at 318.
12. *Id.* at 481, 499 S.E.2d at 318.
13. 265 Ga. 802, 463 S.E.2d 9 (1995).
14. *See DeGarmo*, 269 Ga. at 480, 499 S.E.2d at 318.
15. *See Daniel v. Daniel*, 250 Ga. 849, 852, 301 S.E.2d 643, 645 (1983).
16. *See Robinson v. Robinson*, 261 Ga. 330, 331, 404 S.E.2d 435, 436 (1991).
17. *Id.*, 404 S.E.2d at 436.
18. *See DeGarmo*, 269 Ga. at 481, 499 S.E.2d at 318.
19. *Id.*, 499 S.E.2d at 318.
20. *DeGarmo*, 269 Ga. at 482, 499 S.E.2d at 319 (Fletcher, P.J., dissenting).
21. *See infra* note 25 and accompanying text.
22. *DeGarmo*, 269 Ga. at 482, 499 S.E.2d at 319 (Fletcher, P.J., dissenting).
23. *See id.*, 499 S.E.2d at 318.
24. *Id.*, 499 S.E.2d at 319 (Fletcher, P.J., dissenting).
25. *Id.* at 481, 499 S.E.2d at 318 (emphasis supplied).
26. *Id.*, 499 S.E.2d at 318.
27. *Id.*, 499 S.E.2d at 318.
28. *Id.* at 482, 499 S.E.2d at 319 (Fletcher, P.J., dissenting). Justice Fletcher might be suggesting by these observations that the settlement was sufficiently thorough that any unresolved details should be viewed as matters of minor significance to the parties, rather than as details that could void an otherwise valid agreement. Particular details may be left for subsequent agreement where the parties have expressed a sufficiently certain agreement to create a mutually enforceable obligation. *See, e.g., Hennessey v. Froehlich*, 219 Ga. App. 98, 99-100, 464 S.E.2d. 246, 248 (1995).
29. *See Tahoe-Vinings v. Vinings Partners*, 205 Ga. App. 829, 830, 424 S.E.2d 30, 31 (1992).
30. *See, e.g., O.C.G.A. § 13-2-3; see also Daniel v. Daniel*, 250 Ga. 849, 852, 301 S.E.2d 643, 645 (1983); *West End Cab Co. v. Stovall*, 98 Ga. App. 724, 728-29, 106 S.E.2d 810, 813 (1959).
31. *See Dibrell Bros. v. Banca Nazionale Del Lavoro*, 38 F.3d 1571, 1582 (11th Cir. 1994) (internal quotations omitted); *see also Laverson v. Macon Bibb County Hospital Auth.*, 226 Ga. App. 761, 762, 487 S.E.2d 621, 623 (1997) (requirement of certainty extends also to parties, and even time and place of performance where essential).
32. *See Dibrell Bros.*, 38 F.3d at 1582 (internal quotations omitted); *see supra* note 28.
33. *See e.g. O.C.G.A. §§ 23-2-31 & 23-2-32* (1994); *see also Georgia Glass & Metal v. Arco Chem.*, 201 Ga. App. 15, 17, 410 S.E.2d 142, 143-44 (1991).
34. *See, e.g., O.C.G.A. § 23-2-29* (1994).
35. *See Robinson v. Robinson*, 261 Ga. 330, 331, 404 S.E.2d 435, 436 (1991).
36. *See Autrey v. UAP/GA AG Chem., Inc.*, 230 Ga. App. 767, 769, 497 S.E.2d 402, 405 (1997) (internal quotations omitted).
37. *See, DeGarmo*, 269 Ga. at 481, 499 S.E.2d at 318.
38. *See, e.g., Moss v. Moss*, 265 Ga. 802, 463 S.E.2d 9 (1995); *Bridges v. Bridges*, 256 Ga. 348, 349 S.E.2d 172 (1986).
39. 265 Ga. 802, 463 S.E.2d 9 (1995).
40. *See DeGarmo*, 269 Ga. at 481, 499 S.E.2d at 318.
41. *See Moss*, 265 Ga. at 803, 463 S.E.2d at 10.
42. *See, e.g., Bridges*, 256 Ga. at 348-49, 350 S.E.2d at 173-74; *compare supra* note 28.
43. *See id.* at 350, 349 S.E.2d at 174.
44. The text of the settlement agreement in *DeGarmo* appears at page 90 of the record of the case at the Supreme Court.

SOME IMPORTANT QUESTIONS ABOUT ADR

Ethics and Professional Responsibility

By R. Wayne Thorpe and Ansley Boyd Barton

As mediation, arbitration and other alternative dispute resolution processes become more a way of life in litigation throughout Georgia, it becomes increasingly important that everyone involved — parties, lawyers, neutrals and judges — be knowledgeable about ethical and professional responsibility issues that relate to various ADR processes, both in the private and court-annexed contexts.

The various sets of rules discussed below do not provide definitive answers to many difficult ethical and professional responsibility questions. Likewise, the case law and regulatory opinions from

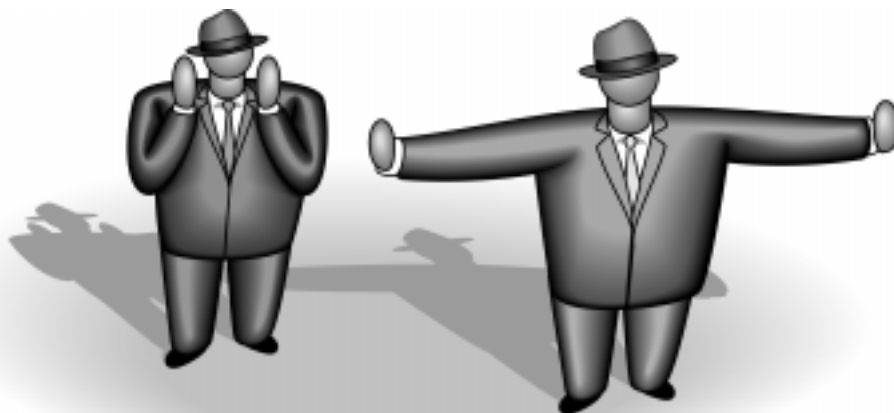
Georgia and other states and various model ethical rules do not yet provide full guidance. ADR processes are rapidly evolving, and the analysis and development of issues related to ethics and professional responsibility — and their answers — are in their early stages.

1. Which Rules Apply?

As a starting point, informed counsel and neutrals

should know which rules of ethics and professional responsibility apply to a particular ADR process. There are many possibilities.

There can be no doubt that the Georgia Code of Professional Responsibility



“Georgia CPR”), which governs lawyer professional conduct generally, applies to the conduct of lawyer-advocates in ADR processes in Georgia regardless of whether the ADR process is private or court-connected. The Georgia CPR, however, was written with little attention to possible participation by lawyers as neutrals in ADR processes.

The Georgia Supreme Court Alternative Dispute Resolution Rules (hereinafter “Supreme Court ADR Rules”), including Appendix A, the Uniform Rules for Dispute Resolution Programs (“Uniform ADR Rules”), deal with certain issues of ethics and professional responsibility in court-annexed and court-referred ADR. The Georgia Ethical Standards for Neutrals (“Ethical Standards”) (Appendix C to the Supreme Court ADR Rules), established by the Georgia Commission on Dispute Resolution (“Georgia Commission,”) also apply to neutrals serving in court programs. The Ethical Standards explicitly apply only to mediators; at present there are no analogous standards for other court-annexed ADR processes. The Commission has observed that it also has some limited “disciplinary jurisdiction” for other neutrals, based on a “good moral character” standard.¹ In addition, it is arguable that the Commission has “jurisdiction” to sanction a registered neutral for conduct occurring in an ADR proceeding that is not court-annexed or court-referred.

The Georgia Commission also has promulgated Model Court Mediation Rules for consideration by the various ADR programs in Georgia’s state courts, and most court programs have localized program rules. Many U.S. District Courts including the Northern (Local Rule 290) and Middle (Local Rule 11) Districts of Georgia also have local rules on ADR. Most of these various sets of court rules contain specific rules that pertain to ethics and professional responsibility.

Private ADR processes are often conducted pursuant to provider rules that may cover certain issues of ethics and professional responsibility,² and the parties may also agree to establish certain *ad hoc* rules of conduct. Also, several sets of uniform model rules of conduct provide some guidance on various questions of ADR ethics.³ The ABA Section on Dispute Resolution and the CPR Institute for Dispute Resolution are engaged, both jointly and separately, in a variety of projects examining standards of conduct in ADR for neutrals, advocates, provider organizations and judges.

Finally, the Georgia Code of Judicial Conduct and the Code of Conduct for United States Judges explicitly apply to “mediating or settling matters,” even though it is unlikely that judges and lawyers think of traditional judicial settlement conferences as ADR processes.

2. Does a Lawyer Have a Duty to Advise about ADR?

Under EC 7-5, lawyers in Georgia, and in some other states,⁴ have an explicit duty to advise clients about alternative dispute resolution processes: “A lawyer as advisor has the duty to advise the client as to various forms of dispute resolution. When a matter is likely to involve litigation, a lawyer has a duty to inform the client of forms of dispute resolution which might constitute reasonable alternatives to litigation.”

Lawyers in Georgia, at present, likely provide much of the ADR advice they give to clients close on the heels of receiving a notice from a court advising of a court-mandated ADR process for a particular lawsuit. They may give relatively less advice with a view towards using either a private or court ADR process when not provoked by the court. And, they likely give less still in the transactional and counseling setting — unless we count the routine, but not always thoughtful, inclusion of form arbitration clauses in contract documents.

To amplify on EC 7-5, it would be hard to dispute these two basic propositions:

- ◆ Counsel to a party who is either in, or potentially headed for, a legal dispute should thoughtfully and continually assess the viability of all forms of dispute resolution, including mediation, arbitration, other ADR processes, and traditional litigation and negotiation.
- ◆ Transactional counsel should understand the various types of ADR processes and thoughtfully evaluate them for possible inclusion in contract documents.

In the litigation context, counsel should advise on a variety of specific issues, including:

- ◆ What are the client’s goals in the dispute (*i.e.*, winning, saving money, preserving relationships, etc.), and what is the most appropriate form of dispute resolution — litigation, mediation, arbitration, case evaluation, etc.?
- ◆ Is the client better served with court-annexed or private ADR — and in either case, with which neutral?
- ◆ How should the party and counsel prepare for an ADR process, and what role should each play in the proceeding?

Counsel and parties do not always prepare for mediation or other non-adjudicative procedures as thoroughly and thoughtfully as they might. They should recognize such a proceeding as one with a high likelihood of concluding the case, and they should prepare for it accordingly, in order best to achieve their goals.

Transactional counsel often utilize a form arbitration clause, sometimes without much effort to choose the most appropriate dispute resolution approach for the particular

contract involved. Counsel should consider not just arbitration, but also mandatory mediation or negotiation as possible methods to resolve future disputes. Counsel should also consider whether to “tweak” a form arbitration clause on such issues as selection of arbitrators, identity of administrator organization, arbitrator qualifications, evidentiary rules, discovery rules, attorney fees, finality of award, and other issues.

3. Does Anyone (Neutral or Advocate) Have a Conflict of Interest?

Among the most difficult ethical issues in ADR — at least for neutrals who practice law — are those relating to conflicts of interest. These issues can most obviously lead to an impediment in the selection of a neutral because of a conflict of interest that a particular neutral has in a particular case.

In addition, conflicts of interest can prevent a neutral from later representing, or becoming adverse to, parties to the proceeding in which he previously served as a neutral. This is a potentially troubling issue for the legal profession. To the extent that these conflict of interest issues are resolved in favor of finding conflicts, as several courts have ruled, the ability of practicing lawyers to serve as mediators or arbitrators becomes limited.

Lawyers in law firms, with hundreds, thousands, and maybe tens of thousands of present and past client relationships and adversarial relationships imputed to them, can find daunting even the “routine” conflict of interest questions that arise from traditional lawyer relationships with clients and adversaries. Those problems become nightmarish when complicated further by an ADR neutral’s relationships with all the parties to an ADR process.

When a lawyer serves as mediator or arbitrator, do all the parties to the process become clients — or adversaries — or something else — for purposes of later evaluating conflicts of interest? What of the “downstream” conflicts when a lawyer/neutral — or a partner or an employee — wants to represent or sue one of the parties to an ADR process in which the lawyer/neutral previously served as neutral, even in an unrelated matter? These issues have been hotly disputed by legal writers.⁵

Lawyers, of course, have rules, clarified by case law, for evaluating whether a conflict of interest exists, but this body of law has been developed principally for client relationships and adversarial relationships, and not necessarily for neutral relationships. Do those rules, traditionally governing lawyer conflicts of interest, even apply to a lawyer serving as a mediator or arbitrator? Some courts and regulatory agencies have said they do, at

least in the context where a neutral in an ADR process later wants to represent or be adverse to a party to the prior ADR proceeding.⁶

As to current conflicts for neutrals, Georgia’s Ethical Standard IIIA (again, for mediators only) provides that, “Mediators should avoid any dual relationship with a party which would cause any question about the mediator’s impartiality.” The standards may prohibit a neutral from mediating with a present client or adversary. Standard IIIB, in a general way, addresses “downstream” conflicts where the lawyer/mediator later wants to represent or be adverse to a party to the mediation — by noting that, “future business dealings with parties may give the appearance of impropriety.”

The “downstream” conflict issue has been addressed by the Ethics Committee of the Georgia Commission on Dispute Resolution, in an opinion arising from a complaint against a lawyer/mediator. This group has opined that a lawyer/mediator who served as a mediator in a divorce case should not, several months later, act as estate planning counsel to one of the parties to the divorce, where the legal work “could have consequences adverse to some interests of the [other party].”⁷

The Committee went on to state, however, that the law firm of the lawyer/mediator should not be disqualified by imputation, largely because of the peculiarly confidential nature of the mediation that would preclude disclosure of confidences by the lawyer/mediator to other members of this firm. The Committee’s ruling and rationale on this latter point have been rejected in at least one other state.⁸

The “jurisdiction” of the Georgia Commission is confined, in general, to “court-annexed” and “court-referred” ADR processes. The State Bar could be called upon to evaluate the same conflict of interest problem in the context of lawyer discipline, and courts in Georgia could be called upon to evaluate the issue in the context of motions to disqualify counsel due to conflicts of interest. Would the State Bar and the courts agree with the rulings of the Ethics Committee of the Georgia Commission?

The answer could turn partly on EC 5-20:

A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

This provision may address only a very narrow issue, however. The first sentence of EC 5-20 indicates that it is

limited to situations where a lawyer mediates or arbitrates between parties who are, or were, “clients,” probably in the traditional use of the term. Further, EC 5-20 appears to prohibit lawyers who are mediators or arbitrators (and arguably their law firms) from representing only those parties “in the dispute,” following service as their mediator or arbitrator. In other words, this provision does not address “downstream” representation or adverse relationships as to those not “in the dispute” — *i.e.*, in unrelated disputes or even substantially related disputes.

Courts and regulatory agencies in other states have reached varying conclusions on similar conflict of interest issues:

- ♦ Where a mediator in a case involving co-parties X and Y later sought to represent X in a suit against Y, a federal court in Colorado disqualified him, based upon MCPR 1-9 (prohibiting representation adverse to interest of former client in same or substantially similar matter).⁹
- ♦ Where a judge engaged in confidential settlement conferences with opposing parties A and B, then resigned to join the law firm representing A, the judge’s new law firm was disqualified by a California court.¹⁰
- ♦ Where a party to a mediation sought to retain the mediator’s law firm (but not the mediator himself) in a dispute related or unrelated to the mediated dispute, the mediator and law firm would be disqualified during the mediation, but after mediation would not be disqualified so long as the mediated matter is unrelated to the new engagement.¹¹

4. Has the Neutral Made Sufficient Disclosures?

Georgia’s Ethical Standard IIIA requires neutrals to disclose “any connection with a party or attorney which would cause or appear to cause an occasion for bias.” This may arguably include present or past personal, social, business, financial and representational relationships.

Concerns for disclosure may be greater in binding arbitration (where the arbitrator decides the case) than in mediation or other non-adjudicative processes where the neutral does not actually render a decision. In arbitration cases, courts have invalidated awards when certain disclosures were not made.¹²

5. Is an ADR Neutral Practicing Law?

Can service as a neutral constitute the practice of law? If so, then non-lawyer ADR neutrals could be

engaged in the unauthorized practice of law. But under the Supreme Court ADR Rules, Appendix B, certain neutrals in court-annexed ADR programs are not required to be lawyers. Mediators are not required to be lawyers; case evaluators are. Arbitrators in court-annexed non-binding arbitrations must be lawyers to serve as sole or chief arbitrator. About half of the mediators registered in Georgia are not lawyers. Rules for court programs in other jurisdictions take a wide variety of approaches to the question of whether a neutral must be a lawyer.

Legal academics have debated vigorously the question of whether mediation is the practice of law.¹³ At least one state has found a non-lawyer mediator to be engaged in the unauthorized practice of law in certain circumstances.¹⁴ Further, courts in some states have held lawyer/mediators to lawyer standards of conduct, at least in certain instances involving conflict of interest issues.¹⁵

These intriguing academic and public policy questions find themselves illustrated in numerous, repeated day-to-day relationships between litigants and neutrals. For example, domestic cases are among the most frequently mediated cases in this state or anywhere else. Frequently, in mediations of domestic cases, neither party is represented, or only one party is represented. The thoughtful and properly trained mediator will explain very carefully to the litigants that he or she is not there to serve as counsel to any of the parties, and that like all participants in a mediation, the litigants are there to make their own decisions about resolving or continuing their litigation. But, when all is said and done, can we really expect that litigants, who sit through a mediation with a trained and experienced mediator — without benefit of their own counsel — will walk away really believing they got no legal advice from the mediator about a dispute that is fundamentally legal in nature?

Indeed, a non-lawyer mediator in Virginia has been found to be engaged in unauthorized practice of law. The mediator had written a letter to parties setting forth legal options and analysis and drafted a mediation separation agreement. This issue gave rise to a vigorous debate in Virginia on the proper role of non-lawyer mediators in preparing mediation agreements. The Virginia bar also recognized that preparing agreements for unrepresented parties could raise questions of potential dual representation for lawyer/mediators. These issues are far from resolved.¹⁶

6. Is Evaluative Mediation Proper?

Like some other questions here, this one has ignited bonfires of academic debate.¹⁷ Some scholars argue that a mediator should only “facilitate” negotiations, and that

any form of “evaluation,” where a neutral offers an opinion about a case, is directly contrary to the purpose and meaning of mediation. Others consider evaluation, at least in most forms, to be merely a form of “reality testing” for the parties and their counsel.

For many practicing mediators, at least in the context of mediation of civil litigation, the academic debate probably has little practical meaning. They recognize the importance to parties and counsel alike of seeing and hearing a mediator engaged in serious analysis of the merits of a case. For these people, at least, the issue may usually resolve into a question of nothing more than the style in which the mediator delivers an evaluation. Even most adherents of the “facilitative-only” school recognize the propriety and importance of “reality testing” — which can seem awfully “evaluative” when delivered through incisive rhetorical questions carefully designed to expose weaknesses in a party’s position.

While an evaluative style of mediation may be suitable for litigation in which parties are ably represented by counsel, it might raise more than a mere academic debate in other kinds of cases. There is no need to further belabor the above-mentioned divorce case with unrepresented parties; a similar situation can also arise frequently in magistrate courts, juvenile courts, and a variety of other settings in which one or both parties are often unrepresented by counsel. An evaluative mediation in that context, unbuffered by independent counsel for each party, could more easily be seen as problematic.

The Georgia rules do not address these complex issues fully and directly, although Ethical Standard IE does prohibit a neutral from providing professional advice to a party in an ADR proceeding.

7. What is the Requisite “Full Authority” for Mediation?

Court orders directing parties to mediate sometimes direct that a client representative attend who has “full authority” to settle, although the Supreme Court ADR Rules do not expressly require such “full” authority to settle. Appendix A, Rule 4, does require parties to attend all ADR proceedings, and attorneys to attend all proceedings except mediations. The attendance requirements are subject to contempt and other such sanctions. The Rule further provides that, “[i]n every process, the presence of a representative with authority to settle without further consultation is required if the decision to settle depends upon an entity other than a party.” Court orders and rules sometimes more explicitly require attendance by someone with “full authority” to settle.

Just what is “full authority” and when is it required?

The words themselves arguably could be interpreted to mean that a defendant’s representative satisfies this requirement so long as he has the authority to reject any settlement other than an unqualified dismissal with prejudice for no compensation. At the opposite extreme, the language could mean that a defendant’s representative must be present who has authority to pay the plaintiff’s last demand. In either event, the Rule would hardly seem worth writing.

What should “full authority” mean? At a minimum, it should include power to make an agreement on the basis of the party’s current, pre-mediation evaluation of the case. It might also include certain other, somewhat subjective requisites that might require, for example, that the representative understand the party’s current evaluation, that he participate in the mediation with an open mind towards changing that evaluation, and that he report back to the person who really controls the money with a view toward determining if the party’s bargaining position should change. It would be essential that the person with control of the money be readily available by telephone during the mediation. Ultimately, however, the term “full authority” is somewhat vague and presents difficult enforcement problems.

8. Is Good Faith Required in Mediation?

Academics have vigorously debated the need for a good faith requirement in mediation.¹⁸ Although court orders directing mediation in Georgia often require good faith participation, the Supreme Court ADR Rules do not contain such a requirement. Indeed, the Commentary to Georgia’s Ethical Standards for Neutrals comes very close to rejecting expressly a requirement to bargain in good faith:

When a mediator realizes that a party is not bargaining in good faith, he or she often experiences an understandable frustration and a desire to report the bad faith to the court. The pledge of confidentiality extends to the question of conduct in the mediation, excepting of course threatened or actual violence. The possible damage to the process by reporting more than offsets the benefit in a given case. Further, if the lodestar of mediation is the principle of self-determination, the unwillingness of a party to bargain in good faith is consistent with that party’s right to refuse the benefits of mediation.

In short, principles of confidentiality and self-determination are thought to be inconsistent with requiring good faith participation in mediation.

9. Is Your Mediation Agreement Enforceable?

If successful, a mediation will end with an agreement of the parties to resolve their dispute. Settlement agreements reached through mediation can give rise, however, to several issues relating to their enforceability and interpretation. Suppose the parties conclude a mediation with an agreement intended to settle the lawsuit, but they fail to reduce the agreement to writing, or only record certain “key points.” Can the oral or partly written agreement be enforced?

It is arguable that testimony by the mediator — and for that matter by anyone else present — is precluded by the rules of confidentiality that govern mediations. If no one can disclose the contents of the mediation outside the mediation, how can anyone testify about an oral agreement allegedly reached in the mediation?

Rule 8 of Appendix A to the Supreme Court ADR Rules presently provide that “[a]greements reached as a result of court-connected ADR process are enforceable to the same extent as any other agreements.” Furthermore, Supreme Court ADR Rule VII provides that “[a]n agreement resulting from a court-annexed or court-referred mediation ... is not immune from discovery unless the parties agree in writing.” This latter provision was relied upon by the Georgia Commission’s Ethics Committee in determining that a mediator had committed no ethical violation in providing an affidavit in support of a motion to enforce an oral settlement agreement, although the committee did consider that providing the affidavit was not good practice. The explicit provision allowing “discovery” of the agreement overrode the confidentiality concern. The Georgia Commission has voted to ask the Supreme Court to amend the ADR Rules and the Uniform ADR Rules in Appendix A to make clear that only written mediated agreements are discoverable and enforceable and that oral agreements are not discoverable and not enforceable.¹⁹

Several courts in other jurisdictions have refused to enforce settlement agreements that are not in writing, based on differently worded confidentiality requirements. The rules themselves in some other jurisdictions, however, explicitly require that a settlement agreement, reached in mediation, must be in writing in order to be enforced.²⁰

At the conclusion of a mediation, it is important for the lawyers and neutrals to have a clear understanding not only whether they have an agreement, but also whether it is fully enforceable. An outline of basic terms requiring later drafting of actual language may inadvertently be viewed in the eyes of the law as a mere agreement to

agree, and a good settlement may be lost as a result. A mediator may even owe some sort of duty to the parties, and to the process, to raise the question whether they intend to have — and indeed do have — a final and binding contract.²¹

10. Which ADR Ethics Rules Apply to Judges?

Do the Georgia Ethical Standards for neutrals apply to judges when they are engaged in judicial settlement conferences? These rules by their terms apply to mediators. So, is the judge acting as a mediator in a settlement conference? Judges fairly often try to facilitate negotiations, explore parties’ non-positional interests, and “reality-test” the positions of the parties. They also sometimes engage in confidential, *ex-parte* communications separately with each side. But in the end, a judicial settlement conference usually differs from a mediation in several obvious ways: a judge’s “reality-testing” will often seem much more realistic, because the judge decides some of the issues under consideration; parties and counsel will much less willingly and completely take a judge into their confidences about relative weaknesses in their legal or bargaining position when they know the judge will rule on certain issues in the case; and parties and counsel may feel under more coercion or duress in a settlement conference with a judge than with a mediator because of the judge’s unique role.

More obviously applicable to judicial settlement conferences is the Code of Judicial Conduct. Section 3B(7) prohibits *ex parte* communications, except in certain circumstances: “Judges may, with the consent of the parties, confer separately with the parties or their lawyers in an effort to mediate or settle matters pending before the judge.” “Consent” is a critical component here, and perhaps sometimes an ambiguous one.

Some writers, including the author of one of the leading treatises on federal procedure, have criticized judicial involvement in mediation/settlement efforts, because the judge may learn of settlement positions or evidence that he cannot eliminate from his decision making.²² The Code of Judicial Conduct and the federal analogue arguably address this concern, in Section 3E(1), requiring judges to disqualify themselves when “their impartiality might reasonably be questioned, including ... when the judge has a personal bias or prejudice concerning a party or party’s lawyer, or personal knowledge of disputed evidentiary facts.” Federal cases applying a similar test have routinely found against disqualification where a judge allegedly “becomes biased” or learns of evidentiary facts in the course of settlement discussions,

because the alleged bias or knowledge was not acquired extra-judicially.²³

In practice, different judges have very different approaches to participation in settlement discussions. Some simply do not do it. Others are far more active. Of course, trial lawyers like to tell stories of heavy-handed pressure by judges to settle a case. Many of these anecdotal stories are likely somewhat overstated, but they are too numerous to think they are all imaginary.

Both actual studies and common sense tell us that lawyers want judicial involvement in settlement. Moreover, there are sound reasons to think judges can provide meaningful input into settlement discussions, so long as they are attentive to certain limitations. First, the court should not act coercively, and equally important, judges should be mindful that parties and counsel may have a lower threshold for what amounts to duress or coercion than might the judge. Second, the court must be very careful to remain neutral and unbiased and not start to form opinions that can affect later decisions by the court, especially if the opinions are based upon (a) inadmissible evidence or incomplete facts, and/or (b) *ex parte* communications. Finally, the court should remember that there are many other opportunities for settlement besides a judicial settlement conference, including private negotiation and mediation and other forms of ADR, and those processes can operate without risk of coercion of the parties or bias of the judge.

Especially when judicial settlement conferences occur immediately before trial, it is worth remembering that parties and counsel are ready for trial and have typically exerted a lot of energy and resources to get there. One logical explanation for that fact is that they really want to try the case — which after all is a principal reason we have the courts. The compulsion sometimes felt by some courts to push for settlement on the very eve of trial might be diminished somewhat if the judge had directed the parties to pursue other forms of dispute resolution in advance of trial.

11. Conclusion

The ethical and professional responsibility issues discussed here are difficult and interesting. Most do not have clear answers. As the title of the article states though, these are just “some” of the important questions; there are other, equally tough and intriguing questions. For example:

- ♦ To what extent do mediators have the responsibility to the parties to ensure that any agreement reached be fair? Does the answer turn in any way on whether

parties have lawyers present?

- ♦ What are the limitations, if any, on the ability of a mediator to serve as a binding arbitrator in a dispute in which he has served as a mediator?
- ♦ What are the ethical implications of misstatements (or omissions) of fact or law to a mediator or to an arbitrator, and how do these circumstances compare to similar misstatements or omissions to courts and to opposing counsel?

Mediation and arbitration are centuries-old concepts that have been rapidly deployed by courts and lawyers in recent times as a vehicle for resolution of civil litigation more quickly, less expensively, and more efficiently. Questions of ethics and professional responsibility in these processes inevitably will continue to arise, and like those discussed here, many will be hard to answer. ☒



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Endnotes

1. GEORGIA COMMISSION ON DISPUTE RESOLUTION, ETHICAL PROCEDURES 2 n.2.
2. For example, J.A.M.S./ENDISPUTE and the American Arbitration Association (“AAA”) have each established such standards of conduct.
3. Other ADR ethical codes include, for example, The Standards of Conduct for Mediators, established in 1994 by the American Bar Association (“ABA”) Section on Dispute Resolution, the Society for Professionals in Dispute Resolution (“SPIDR”), and AAA. These and other professional organizations have developed several bodies of model codes of conduct for mediation and arbitration.
4. *E.g.*, COLO. ST. R.P. 2.1 (1998); HAW. R. PROF. CONDUCT 2.1 (1997); KAN. OP. 94-01 (April 15, 1994). Numerous state and federal courts also have procedural rules requiring consider-

CONTINUED ON PAGE 65

Corporate Use of ADR in Georgia

By Robert S. Glenn Jr.

In May of 1997, *Forbes* magazine and the American Arbitration Association sponsored a conference in Washington, D.C. entitled "The Alternative Dispute Resolution Superconference; Strategies to Insure Profitability." The impressive list of registrants included representatives of Fortune 500 companies, trade associations, government agencies, accounting firms, and America's leading law firms.¹ The sponsors of the conference promised to enlighten the attendees "about the ways in which ADR can resolve even the most complex disputes and help maintain valued business relationships."

The two day conference included such topics as: "Utilizing Alternative Dispute Resolution in Environmental Disputes"; "The Use of ADR in Mergers and Acquisitions"; "Is The Brave New World of Employment ADR Right for My Company?"; "Practical Considerations in Drafting Dispute Resolutions Provisions in International Commercial Contracts: A U.S. Perspective"; and "Opting into ADR for Product Liability and Mass Tort Disputes." With the exception of a vocal minority view expressed by representatives of the American Civil Liberties Union and various labor unions, the presenters at the conference

engaged in a love-fest for ADR. It was clear that corporate America had endorsed ADR, that it was excited about sharing the details of its experience with ADR, and that it believed the use of ADR would continue to expand among the corporate community.

Speakers at the Superconference made frequent reference to a survey conducted by Cornell University, The Foundation for the Prevention and Early Resolution of Conflict (PERC), and Price Waterhouse, which obtained information from the corporate counsel of the 1,000 largest U.S.-based corporations about the use of ADR.² The results of the survey confirmed that corporate America was embracing ADR. In the prior three years, 88 percent of the respondents reported using mediation and 79 percent reported using arbitration. The prediction of respondents was that they would increase their use of ADR in the future. Over 84 percent indicated that future use of mediation was likely; 69 percent forecasted the future use of arbitration. Based on these statistics, the study concluded that corporate lawyers preferred mediation or other non-binding techniques to arbitration.

An analysis of the survey data enabled Cornell to draw the conclusion that to a certain extent, corporate

policy and conflict resolution varied with the type of dispute. Specifically, the survey indicated that the use of mediation and arbitration was more widespread in employment disputes than in corporate finance, financial reorganization and workout disputes. Mediation was preferred to arbitration, particularly in personal injury disputes and product liability cases, where approximately twice as many corporations had used mediation as arbitration.

The study attributed the growth of ADR to three basic factors: cost control, legal mandates, and dispute management. With respect to cost control, the corporate respondents to the Cornell Survey had adopted an ADR strategy to try to reduce the cost of their legal disputes. Viewing mediation as a cost saving measure, the corporate interest in saving time and money induced many of them to encourage their outside law firms to become more familiar with ADR and to employ it more frequently.

Legal mandates, largely stemming from statutes such as the Civil Rights Act of 1991 and the Americans With Disabilities Act, as well as the growing use of ADR by administrative agencies such as the EEOC and State Workers Compensation boards, require the use of ADR. Many state court systems have adopted court-annexed programs to help reduce their dockets. These court mandates were cited by 64 percent of the respondents as the reason they use mediation, while 44 percent of the respondents cited court mandates as a reason for using arbitration.

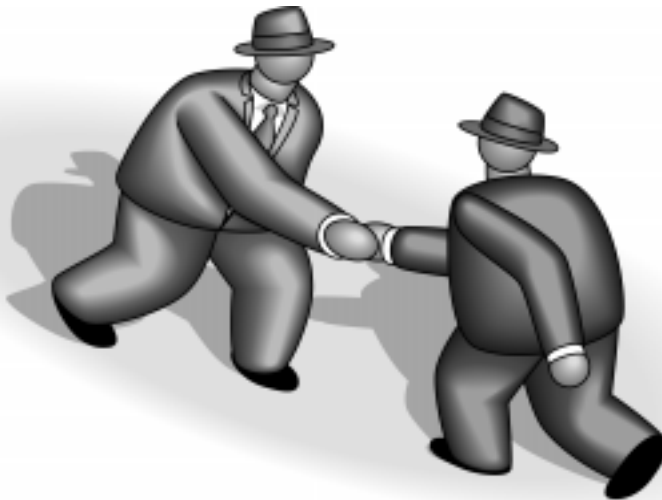
In their executive summary, Lipsky and Seeber suggest that corporations also use ADR techniques "to gain greater control over the process and outcome of dispute resolution." They cited the fact that 81 percent of the respondents agreed that one of the reasons to use mediation was that it provided "a more satisfactory process" than litigation. Fifty-nine percent of the respondents stated that mediation "preserves good relationships."

Interestingly, the survey exposed reservations about the qualifications of the neutrals involved in ADR. A majority indicated that in its view, mediators and arbitrators were only "somewhat qualified." Corporate America

apparently does not believe there is a lack of ADR neutrals, only a lack of qualified neutrals. It was pointed out that in approximately 20 percent of the mediations in which the respondents had been engaged, mediators were provided by the courts. Private ADR providers were cited as another important source of mediators.

With the focus of the May Superconference and the Cornell Study in mind, the planners for the State Bar's Fourth Annual ADR Institute in October 1997, included a

panel discussion on corporate use of ADR. The panel consisted of James J. Seifert, Assistant General Counsel at Toro Inc., in Bloomington, Minn., who spoke on Toro's pre-litigation intervention program, which features mediation as a vehicle for resolving claims; George Wratney, Corporate Ombuds-



man for United Technologies Corporation of Hartford, Conn., who spoke about the decade-old, world-wide ombuds program for United Technologies' 174,000 employees; and William E. Beringer, the retired former Vice-President and General Counsel for Siemens Energy and Automation in Atlanta, who spoke on his experience with mediation and arbitration at Siemens. The positive presentations of the three panelists were very well-received by the attendees at the ADR institute, as indicated by the comments and questionnaires received at the end of the seminar. Many of them wanted to know more.

The questions arise: What is the attitude of *Georgia's* leading corporations toward ADR? Do they embrace it? Do the Georgia corporations draw the distinctions between mediation and arbitration that are reflected by the data from the Cornell study? Do they intend to continue to use ADR in the future? The best (and the worst) way to obtain answers to these questions is through a questionnaire. With the Cornell Study as a model, I created a questionnaire which sought information about the use of ADR, the existence of formal ADR programs, both external and internal, the relative satisfaction with mediation and arbitration, the cost savings, and the sources of and qualifications of neutrals. I sent the questionnaire to 28 of the largest corporations in Georgia and received responses from 17 of them.³ It might be difficult to argue

that the responses of these 17 corporations give us statistically valid data. Thus, I will not try to draw ultimate conclusions from this material, but to present this data as a matter of information, which nonetheless provides us with an impression of the extent to which major corporations in Georgia are using various ADR processes.

A brief profile of the corporations which answered the questionnaire is helpful. All of them had more than 1,000 employees and most of them had more than 3,000. Surprisingly, only half of them employed in-house counsel, and of those that did, only four had a member of their legal department specifically assigned to ADR. With respect to ADR training, approximately half of the respondents required or provided training in ADR techniques for their in-house staff. Four of the corporations had trained mediators on staff and only two of the corporations had staff counsel who are active arbitrators.

Although most of the corporations had some experience with ADR, only about half of the respondents had a formal corporate ADR policy. Four of the corporations have in place an internal ADR program for employee claims. These internal programs employ mediation and/or arbitration to resolve employment discrimination claims, wage disputes, labor matters, claims under the Americans With Disabilities Act, and sexual harassment claims. None of the corporations polled has kept statistics on the number of internal claims submitted to ADR during the last three years.

After inquiring into general background matters and the existence of a formal ADR policy, the next series of questions on the survey dealt with the use of various ADR processes, the level of satisfaction with these processes, and the relative importance of various factors which are generally cited as justifying the use of ADR. The responses are interesting. All but four of the respondents had used mediation to resolve external claims within the last three years. Several had used mediation only two or three times and several had used it as many as 20 times, with one corporation having used it 50 times and another having employed it 90 times.

There was a similarly wide disparity in the use of arbitration. All but six of the respondents had been involved in arbitrations of external claims within the last three years, with several having engaged in only one or two, and a couple having engaged in as many as 20 arbitrations. Only two corporations reported experience with the ADR process known as "early neutral evaluation," and two corporations noted that they had employed other ADR techniques without specifying what they were.

It appears that the old adage "time is money" still holds true for Georgia corporations. When asked to evaluate the importance of various reasons for employing

mediation and arbitration, "saving time vs. litigation" was the most important factor for both processes. The other factors for using mediation in relative order of importance were: cost savings, control over the process, more satisfactory results, and preserving the relationships of the parties. For arbitration, the relative importance of the factors was: control over the process, cost savings, preserving the relationship of the parties, and more satisfactory results.

These rankings are revealing in several respects. Apparently, preserving the relationships of the parties is a relatively unimportant factor to the respondent corporations. Perhaps this is not surprising since this series of questions did not deal with internal disputes such as employee claims. Another interesting result, which is entirely consistent with the results of the Cornell Study, is that "control over the process" and "more satisfactory results" received higher rankings of importance with respect to mediation than arbitration.

When mediation and arbitration were compared directly, mediation emerged as the clear preference. On a scale of 1 to 5, with 1 being "highly satisfied" and 5 being "not satisfied," mediation scored a 2.2 and arbitration scored a 3.1. Thirteen of the respondents preferred mediation over arbitration, two preferred arbitration, two had no preference, and one added that it preferred to arbitrate international claims. For the most part, the comments comparing mediation and arbitration were consistent with the results of the rankings.

One of the respondents felt that arbitration could be just as time-consuming and costly as litigation. Another focused on the results in arbitration, observing: "[a]rbitrators tend to 'split the baby' but mediation allows the parties to more freely exchange views and reduce the tension that created the conflict." Emphasizing the strengths of the mediation process, one respondent wrote:

We generally prefer mediation. It allows us to give the other party a summary of the strengths of our case in a less adversarial setting. I have also found that it can be very effective when the other party 'caucuses' with the mediator, who often points out the weaknesses of their case, as an independent knowledgeable third-party. Even if a case does not settle at mediation, oftentimes the mediation lays the groundwork for a future settlement.

One of the companies emphasized the finality of arbitration: "I favor arbitration in disputes involving technical code and industry issues. It is required by certain of our contracts and thus brings the rashly litigious to the table for final resolution. Mediation too often is frustrated by oppos-

ing counsel or his client's intransigence."

In spite of the fact that cost savings was near the top of the list as a justification for using ADR, very few of the respondents, only four, actually keep track of the results of their ADR experiences in terms of cost savings. One company estimated that \$100,000 spent in attorney's fees in ADR saved it \$500,000 in jury trial results.

The responses regarding sources for mediators and arbitrators and satisfaction levels with them varied widely. The most frequent source for obtaining mediators was "word of mouth," followed by "court-appointed mediators" and "ADR providers," which tied for second. This question may have been somewhat confusing, though, since a mediator identified by word of mouth could be associated with one of the ADR providers and thus fit into both categories. In terms of levels of satisfaction, mediators obtained by word of mouth ranked highest, followed by those obtained from ADR providers. Court-appointed mediators were a very close third.

The overall satisfaction rating for arbitrators was significantly lower than that of mediators. Arbitrators scored 3 on a 1 to 5 scale with 1 being "highly satisfied" and 5 being "not satisfied." This score was not entirely consistent with the fact that a majority of respondents answered "no" to the question: "Do you believe there is a shortage of qualified arbitrators?" This was one of the few responses where our Georgia corporations differed from those polled in the Cornell study.

All but two of the companies agreed that they were likely to increase the use of mediation in the future and more than half agreed that they were likely to increase the use of arbitration. Seven of the corporations also stated that they planned to use more early neutral evaluation. One vehicle for increasing the use of ADR is contractual provisions. A majority of the corporations already include arbitration clauses in their contracts; slightly less than one-half include mediation provisions in contracts; and one corporation contractually requires early neutral evaluation. It can be inferred from the responses that Georgia corporations will begin to include mediation clauses in their contracts more frequently in the future.

In the final section of the questionnaire, there was a space for comments about any dissatisfaction the respondents may have had with ADR. There were only two comments, one voicing dissatisfaction with international arbitration under the ICC Rules on the ground that it was costly and takes too long, and one general criticism of arbitration on the ground that it lacks the "procedural protections" of litigation, especially the right of appellate review to correct mistakes made by arbitrators.

Two prominent Georgia corporations, Home Depot and Georgia-Pacific, have instituted comprehensive ADR

programs largely due to the foresight of their corporate legal departments. David Rutherford is in charge of the ADR program at Home Depot. He came to Home Depot from private practice where he concentrated in construction law, a practice area which provided him with exposure to arbitration and mediation. When he arrived at Home Depot two years ago, he found the company was very receptive to his suggestions about increasing the use of ADR.

Although Home Depot has typically included arbitration clauses in its construction contracts and its vendor buying agreements, Mr. Rutherford hopes to add to the company's contracts provisions which would require mediation as a pre-condition to arbitration or litigation. In addition, Home Depot is in the process of fashioning an internal ADR program for employment claims. This program is expected to take effect in 1999. To encourage outside counsel to use ADR techniques, Home Depot now requires in its engagement letters that counsel take a careful look at the forum and mechanisms for resolving claims and advise the company of the possibilities of using ADR for resolution. Mr. Rutherford related that he has found the construction bar to be very familiar with the use of arbitration and mediation, and he has found the personal injury bar to be willing to use mediation to resolve claims. With respect to disputes in the commercial context involving, for example, leases, real estate, or property and casualty claims, he has found attorneys less familiar with ADR or less willing to employ ADR techniques.

Georgia-Pacific describes the transformation of its approach to lawsuits as a "culture change."⁴ Prior to 1993, Georgia-Pacific handled lawsuits much as most of America's other corporations did. In-house legal staff dealt with outside attorneys who conducted 18-36 months of time-consuming and expensive discovery before settling the case. When James F. Kelley became Georgia-Pacific's Vice-President and General Counsel, he sought to cut legal fees and costs by involving in-house legal staff at an earlier stage of the process and by taking a more active role in the management of litigation. A part of the active involvement which Mr. Kelley expected of his staff was early case evaluation "with an emphasis on alternative dispute resolution."⁵ G-P's lawyers began attending training sessions in ADR, began to review every file with an eye toward settlement or ADR, and began to attempt the resolution of cases prior to the onslaught of expensive discovery.⁶

Georgia-Pacific reports that the results of this culture change have been "impressive." Nearly 50 cases mediated in 1996 at a savings of at least \$1.5 million, and approximately 74 cases mediated, arbitrated or settled through early case evaluation in 1997 at a savings of at least \$6.5 million.⁷ These numbers have certainly con-

vinced management of the value of Mr. Kelley's thinking.⁸ Philip Armstrong summed up Georgia-Pacific's experience as follows:

It's a new day at Georgia-Pacific with a new approach to managing litigation. Cases get settled, business relationships are preserved, management spends less time responding to discovery (or otherwise providing factual support for the case) and the company saves money, sometimes big money.⁹

Mr. Armstrong has some very helpful suggestions to corporations who may wish to follow in the footsteps of Georgia-Pacific and others in setting up an ADR program. They are as follows:

1. Get top management to buy-in. The executives in the company must be shown the economic benefits of early case resolution versus a "winning-at-all-costs" philosophy.
2. Training. While most lawyers today are at least familiar with ADR, few have had formal training. An interactive training session, complete with role plays, is money well spent.
3. Start small. Don't try to change the corporate culture too quickly. Perhaps begin with a category of cases, *e.g.*, product liability claims, then expand.
4. Require ADR clauses to be routinely incorporated into your commercial agreements. This provides a mutual, face-saving method of forcing the parties to utilize alternative means to resolve disputes "before the battle lines are drawn."
5. Assign someone full time responsibility for promotion and utilization of ADR. In-house expertise is essential to any successful program.
6. When the existence of a dispute becomes known, promptly investigate the facts, objectively evaluate the case, and, when appropriate, initiate negotiation or ADR.
7. Build a library of resource materials. Treatises and periodicals on alternative dispute resolution are both extensive and readily available.
8. Be willing to fully litigate those cases that call for it. An aggressive program does not mean every case is suitable for ADR. However, you should screen every case to determine its suitability for early settlement or ADR.
9. Measure the results. This can be somewhat tricky since you must estimate what you *would* have to spend had a claim been litigated. However, most litigators know what a case will cost and, with some exceptions, can reasonably estimate the outcome. It's not a science, but one's ability to evaluate a claim properly in its early stages is the key to a successful program.

10. Be patient. It takes time to build a successful program and not every ADR experience will be positive. Over time, however, the results will speak for themselves.¹⁰

As noted above, it would be unwise to assume that the results of this survey are unassailable. The sampling was too small statistically. It can be said, however, that if these responses accurately reflect the thinking of the larger corporations in Georgia, ADR, especially mediation, is well-accepted and its use will grow in the future. It also appears that the attitude of the Georgia corporations which participated in the survey mirrors in most particulars the attitude of America's largest corporations, as reflected in the Cornell Study. ☐

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Endnotes

1. The list included Georgia-Pacific, General Electric, NCR, Corp., Sony Electronics, Texaco, McDonalds, Colgate-Palmolive, CIGNA, AT&T, Chevron, Johnson & Johnson, Xerox, Westinghouse Electric, The EPA, The EEOC, The Department of the Navy, The Department of Justice, The U.S. Army Corps of Engineers, Coopers & Lybrand, KPMG Peat Marwick, Ernst & Young, and many more.
2. David P. Lipsky and Ronald L. Seeber, *The Use of ADR in U.S. Corporations: Executive Summary*, A Joint Initiative of Cornell University, The Foundation for the Prevention and Early Resolution of Conflict (PERC) and Price Waterhouse, LLP.
3. Those corporations responding were: American Family Life Assurance Corporation, BellSouth, Cable News Network, Coca-Cola, Crown Crafts, Delta Air Lines, Georgia-Pacific, Georgia Power, Genuine Parts, Gulfstream, Home Depot, Mohawk Industries, Scientific-Atlanta, Southwire, SunTrust Bank, Union Camp, and United Parcel Service.
4. Philip M. Armstrong, *Culture Change: Georgia-Pacific's Aggressive Use of Early Case Evaluation and ADR Has Changed The Way It Manages Litigation* (unpublished paper) (copy on file with author). Mr. Armstrong is the Associate General Counsel for Georgia-Pacific and is in charge of its ADR efforts.
5. *Id.*
6. *Id.*
7. *Id.*
8. Mr. Armstrong points out in his paper that Georgia-Pacific does not settle every case. If claims are frivolous, involve important precedent or matters of principle, Georgia-Pacific may follow a "scorched earth" policy.
9. *Id.*
10. *Id.*

Wallace Law registry pick
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A Mediation Primer for the Solo or Small Firm Practitioner

By Nadine DeLuca Elder

Mediation has gained wide acceptance as a means of resolving commercial and family law matters, and is used regularly by large law firms and corporations. It is also true there is still a notable subset of attorneys who have not yet incorporated the mediation process into their overall business and litigation arsenal.

Mediation is possible without a prior written agreement between the parties and there are professional mediation resources dedicated to helping attorneys settle all types of cases, at all levels of sophistication.

This article offers some practical advice on how to decide whether to mediate, how to get the client to agree, and how to get through the process.

If and When Should Parties Mediate?

Consider mediating a claim, regardless of size or subject matter, if any of the following questions are answered affirmatively:

- ♦ Is there an ongoing relationship that needs to be preserved?
- ♦ Is this one of many repetitive claims that are likely to occur?
- ♦ Would a discreet conclusion to the problem be beneficial because the parties belong to the same community (social or business-related)?
- ♦ Does the client want to send a message, or avoid sending a message, about the subject of the dispute?
- ♦ Would a public airing of dirty laundry generate unwanted and negative publicity for one or both sides?
- ♦ Are the parties in good standing with each other on a personal level, but have a specific disagreement

confined to a business matter?

- ♦ Are there significant economic/business costs (*i.e.*, loss or waste of profits) that will be avoided by an expeditious conclusion to the dispute?¹

Convincing the Client and the Other Side to Mediate

Unlike a civil action, which is instigated by one party, a mediation cannot occur unless all the parties agree to mediate.² If there is no pre-existing agreement requiring mediation, convincing both the client and the opposing party that mediation is in everyone's best interest can be a delicate diplomatic venture. This is especially true given that the need for



mediation often grows out of a problem the parties were unable initially to resolve on their own. One of the obvious pitfalls in proposing mediation is the misperception that such a suggestion signals a weak position.³ For example, a client may think that her lawyer is weak because he is not eager to flay the opposition aggressively in open court. Consequently, the attorney may fear that the client will fire him if he proposes to mediate a dispute.⁴ Furthermore, each side may feel an obligation to maintain a "warrior reputation" and will view mediation as the "wimp's way out."⁵ The opposing party may also view the suggestion to mediate as either an attempt to get a free peek at his litigation strategy or a sign that the other side is willing to pay a lot of money to make the case go away.

There are several practical arguments that can overcome these objections. First and foremost is cost. Mediating is less expensive than the other options. Mediators generally charge an hourly or daily rate and the parties can agree to split the fee. Mediation does not require extensive formal discovery with its attendant expenses. Preparation for mediation will not entail writing detailed legal briefs. Mediation is also less costly in terms of time since most mediation sessions can be concluded within one or two days, and are conducted at the convenience of the parties. Mediators are much more flexible about

calendaring events than courts because the parties have specifically engaged them to help resolve the matter.

Mediations can, however, result in monetary settlements that are less than those awarded by a court. Although this would appear to be a disincentive for a plaintiff to mediate, in fact, the opposite is true when the real costs saved by the plaintiff are considered. For example, the plaintiff will have a much shorter wait for a monetary settlement and will not have to sit through the seemingly endless trial and appeal processes. The plaintiff

will also avoid the substantial out-of-pocket expenses necessary to litigate a case such as experts, witnesses, and court reporters.

As mentioned above, one very attractive benefit to mediation is that it is controlled by the parties. The same

client who wants a pound of flesh from the court may also be enticed to mediate by the thought that he will be able to vent his frustrations to a third party and take part in fashioning a remedy. A party who feels taken advantage of may welcome the chance to have more control over the process of resolving the problem and to air her views. As the advocate, you may need to do some armchair psychology to determine whether your client's particular character is amenable to this process.

The fact that mediation is a private and informal way to resolve differences can also be a selling point to some clients. Parties who have an ongoing relationship or travel in the same social or business circles may prefer to settle their problems away from the eyes of the public. Mediated disputes entailing powder-keg issues such as sexual harassment or other misconduct cases will circumvent negative and damaging publicity, as well as eliminate the trauma of testifying to personal matters in open court. Parties will avoid the risk of establishing adverse case law by privately resolving their problems. Without all the rigid evidentiary and procedural rules attendant in a civil action, mediation is less stressful for the participants and more conducive to resolving problems than battling in court.

Although mediation is most cost-effective before a lawsuit has been filed, it is always possible to mediate a

case prior to entry of a final judgment. A client who has had the opportunity to see his mounting legal costs and the relative speed of even a “rocket docket” in civil court may be more amenable to engaging in an informal settlement discussion in the middle of a drawn-out civil case.⁶

What to Expect from Mediation: Every Player has a Role

Mediation requires the active participation of the parties on a much greater scale than in a civil trial or even an arbitration. To use a phrase much bandied about in the nineties, mediation is an interactive process.

The Attorney’s Role. Whether the attorney represents the defendant or the plaintiff, the attorney’s role changes from litigator to counselor once the parties agree to mediate. This is a subtle but profound distinction. As a counselor, an attorney must balance protecting the client with promoting an equitable resolution of the case as well as preserving the client’s best case scenario, should the mediation not reach an accord.⁷

The Client’s Role. The client is more than a passive participant; the client will make the final decision on whether to settle and on what terms. Successful negotiations are the product of creativity and compromise, and it will be up to the client to provide both. Thus, if a business client sends a representative to the mediation, the representative must have clear authority to make or accept an offer of settlement while sitting at the table. The purpose of the mediation will be defeated if the attendees must first confer with someone who is not present. (In theory, it is possible to telephone the final decision makers, but from personal experience I can assure you that they are never around when you need them.)

The Mediator’s Role. The mediator, unlike a judge, jury or arbitrator, does not have any decision-making power. While all mediators should strive for a just and equitable resolution, the mediator does not act in the interests of either party. Therefore, a lawyer should not assume that he relinquishes his role of advocate to the mediator. The mediator acts as a facilitator, and will encourage each side to explore different settlement options, and is a resource for both sides to draw upon for procedural and substantive feedback.⁸

Who Pays?

In the typical case, the parties split the mediator’s fee. In certain situations, however, a party with greater economic power may find it advantageous to offer to pay for the mediator. For example, if an employee sues his

company after being terminated, he may not have the cash on hand to pay the mediator. The company, in an effort to avoid any unnecessary publicity and to settle the matter quickly, could offer to pay for the mediator.

Who Attends?

This is a question of both psychology and strategy. In some cases, a party may literally need someone (such as a family member) to hold his hand. In other situations, a corporation may need to send a management representative to engage in the negotiations, as well as an operations person who can address technical questions central to the dispute. Each side should disclose who will be attending the mediation, and in what capacity. For obvious reasons, the game is not to load up the number of people on each side. The parties run the risk of creating a circus atmosphere that is not conducive to resolving their problems; and it may appear that David is being pitted against Goliath.

Exchanging Information

Although formal discovery is not a part of the mediation process, a voluntary exchange of information is generally advantageous to both sides because accurate data forms the cornerstone of good negotiations. From a practical point of view, if information is readily discoverable anyway, there may be little harm in turning over some information during mediation, if only as a show of good faith.⁹ Parties may feel more comfortable sharing trade information if they have a confidentiality agreement in place.¹⁰ In addition, there may be other pressures that will prevent voluntary disclosure of information; however, the degree of disclosure is a strategy call that must be made by each party.

Where and When

In general, parties should set aside one or two consecutive days for a mediation, unless there are a large number of issues to resolve or the issues are very complex. Saturday meetings can be very conducive to resolving disputes, because people tend to be more relaxed on weekends. Having food available such as coffee and sandwiches can also go a long way in setting the right mood for fruitful discussions. The meeting place should have a joint meeting room and a separate caucus room. If both parties agree, the mediation may be held at either the attorneys’ or parties’ offices. Such an arrangement may cut down on expenses and avoid the headache of scheduling conference rooms at a hotel or other establishment.

For a variety of reasons, it is also convenient to have access to a copier and word processing.

Choosing the Mediator

The perfect mediator has been described as someone who possesses “the temperament of a negotiator, the persuasive skills of a litigator, and the insight of a psychologist” and always maintains his or her neutrality.¹¹ In addition, the mediator must be someone each side trusts and respects. When choosing a mediator, advocates should not be shy about asking for references and gathering as much information as possible about the potential mediator. The old adage “caveat emptor” applies to buying mediation services as much as it does to buying a car.

The mediator cannot have any personal, business, or professional interest in the outcome of the matter. The need to preserve neutrality, however, should not exclude a mediator who is personally acquainted with the parties or their attorneys. In fact, it may be easier for both sides to agree on a mediator already known to the parties or their counsel.

Review of the mediator’s professional background is also a must. Some mediators are retired civil judges and magistrates, who should have a thorough grounding in procedural rules and first-hand experience in fashioning remedies. Others maintain private law practices in conjunction with their mediation work, while some are full-time mediators. A good mediator, moreover, does not necessarily have to be a lawyer or judge. Therapists, who are trained in handling family issues and emotional trauma, may be better prepared than even an experienced legal practitioner, to work with a family that is squabbling over simple legal issues that have complex emotional subtexts.

One beneficial aspect in a highly technical or legally complex case is to choose a mediator who has particular knowledge within the industry involved in the dispute — for example, securities or construction or a legal area such as bankruptcy or divorce. Even if the parties are unable to agree upon an individual with expertise in the subject of their dispute, the parties should not give up. An intelligent mediator can be “schooled” in the necessary technical details by a thorough pre-mediation statement or during a pre-mediation conference call.

There are a variety of sources to use when searching for a mediator. The first is simply word of mouth — it never hurts to ask around for recommendations. Local mediation services may be found on the Internet, in the yellow pages or through a lawyer compilation source such as Martindale Hubbell, which publishes a Dispute Resolution Directory.

Agreement to Mediate

Most mediators will insist that the parties sign a pre-mediation agreement. The agreement generally bars either side from calling the mediator as a witness, from subpoenaing his mediation notes, or from using at trial any information divulged in the mediation, should the mediation not result in a settlement. While the federal and state rules of evidence provide that information divulged or statements made as part of settlement negotiations are not admissible in court, the rules do not address whether such information is discoverable and do not currently provide a “mediator’s confidentiality privilege.” Hence the need for a written document providing these safeguards.¹²

How to Prepare for Mediation

Know the Facts and the Case. Because mediation is essentially a form of negotiation, an advocate will be at a significant disadvantage if she does not have a working knowledge of the law involved or the facts in dispute.¹³ In order for the attorney and the client to decide what type of settlement is acceptable, the attorney needs to have a realistic view of the strengths and weaknesses in her client’s position.¹⁴

Although mediation does not entail questioning witnesses on the stand or proffering extensive evidence, the use of simple charts, graphs, pictures, or other condensed diagrams prepared ahead of time can be helpful in dissecting complex issues or tracing convoluted fact patterns during the mediation.

The Mediation Statement. Another fairly standard procedure is for each side to prepare a written statement for the mediator to read prior to the meeting. A mediation statement simply sets out the position of each party and is not as formal as a memorandum of law submitted to a court. The mediation statement should contain a concise accounting of the facts and is an opportunity to advise the mediator of any unusual or complicated issues or points of law. Attachments should be included if they will aid the mediator’s understanding of the situation. The parties should decide whether to exchange mediation statements or keep them confidential to the mediator.

Preparing the Client. In addition to preparing herself for the mediation, the attorney needs to prepare the client before the mediation. The attorney should explain how mediation works, and the role of the client. This is also an opportunity to focus the client on his ultimate goals and encourage the client to think through viable and creative solutions. This should give the attorney a good idea which settlement options are most palatable to the client.

The Mediation Process

Pre-Mediation Conference Call. With the availability of conference calling, informal pre-mediation discussions are sometimes helpful to iron out procedural details and give the mediator an opportunity to ask preliminary questions or to suggest additional fact development that he believes is necessary.¹⁵

The Opening Session. A mediation begins with a joint meeting and introductory remarks from the mediator regarding ground rules for the mediation. The mediator's goal in the opening session is to create a safe and positive environment in which the parties can feel comfortable working.

Each side generally makes an opening statement. This statement, addressed to the other side as much as it is addressed to the mediator, sets the tone for the rest of the discussion. In developing an opening statement, remember that the goal of mediation is not the same as litigation — *ad hominem* attacks and inflammatory statements do not build the groundwork for a good settlement dialogue later in the day. Similarly, bottom-line declarations of what the party will accept or agree to compromise should be avoided because the client may have to “eat crow” afterward.¹⁶ The opening statement needs to succinctly present a persuasive argument for the relief sought or defense offered.¹⁷ It is also an opportunity to begin extending the olive branch and the language used should be tailored accordingly.

The Private Caucus. Typically, the parties will not be ready to discuss settlement terms during the opening session. The mediator will begin a series of individual meetings with each side after the opening session. The purpose of the private caucus is for the mediator to (1) uncover the real goals and needs of each party;

(2) begin to define the common areas or joint problem(s); and (3) facilitate discussions with each party on how best to solve the joint problem(s).¹⁸ This is the longest part of the process because more than one meeting with each side may be necessary before the parties can compromise.

The private caucus is a forum for the client to air any grievances and vent frustrations to the mediator.¹⁹ The mediator will transmit the party's position when caucusing with other side by filtering out the emotional content. Since the discussions are confidential, the parties can use these private caucuses to discuss their case, position, risks, and needs with the mediator.²⁰ The mediator will not convey any information to the other side without authorization from the disclosing party. Moreover, a party can obtain a neutral evaluation of her novel theories of law or settlement options during these caucuses before actually presenting the idea to the other side.²¹ The mediator will use the separate caucus to dispel any unreal expectations voiced by a party through a review of the facts and will offer his unbiased analysis of the matter to give the parties a different, and neutral perspective.²²

The Offer. Offers of settlement should only be made after the party has thoroughly and honestly weighed the risks and costs of walking away from the table in light of the settlement options discussed. The mediator should be able to gauge when the parties are ready to make or receive the first offer.

Because the parties have already expended time and effort to prepare for the mediation, proposed offers should be realistic and made in good faith. Positional bargaining with high demands and low offers will insult the intelligence of both the mediator and the opposition, and from a practical point of view will not move the parties in a positive direction. Such negotiating tactics are, in short, a waste of time.

There is no guarantee that the first offer is going to be acceptable to both parties. There may be considerable “shuttle diplomacy” by the mediator when the parties volley offers. Oftentimes, it seems that the closer the parties get to a workable resolution, the more picayune the demands and concessions become. The lesson in all of this is not to be discouraged by seemingly petty requests. The parties can begin by agreeing on the simplest issues first, and then build up to a final resolution.

The Impasse. Of course, it is possible that even reasonable people will be unable to compromise. The

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parties may find themselves at an impasse for a variety of reasons: tempers may be flaring, there may be a philosophical point the parties cannot move beyond, or the parties simply cannot agree on a bottom line number.

There are several ways the parties can respond to such a development. The first is to ask the mediator to call a joint session and offer his evaluation of the case. The mediator may be able diplomatically to propose a solution that neither side has considered up until that time. In a joint session, the parties may also be able to work directly together in developing an acceptable resolution. On the other hand, a hiatus in the negotiations for a few hours or even a few days may be beneficial — the parties can regroup and digest or verify any new information obtained during the course of the mediation discussions. Or, if it is clear that the parties have made an informed decision not to settle because the risks and costs of litigation outweigh the benefits of the proposed resolution, the parties may be able to agree upon some penultimate issues or stipulate to certain facts that have been established through the mediation discussions and litigate the remaining issues.²³

Wrapping it Up

Once a resolution has been agreed upon, the settlement terms need to be memorialized as soon as possible before anyone's memory begins to fail them, or the parties begin to have second thoughts. The mediator or one of the parties may draft a preliminary memorandum of understanding that the parties sign at the immediate end of the mediation, with the more formal agreement to be drafted as soon as practical. One benefit to having a word processor available at the mediation is that such a draft proposal can be generated immediately. The parties may want to ask the mediator to draft the final agreement to avoid a dispute later on over any perceived bias in the agreement. Of course, there is nothing wrong with one party drafting the agreement, subject to the review by the other side.

The settlement agreement should recite all basic terms of the agreement such as who is paying what and to whom. A dispute resolution mechanism, such as arbitration or another mediation, should be included to settle any conflicts that may arise from the settlement. The document should also contain a confidentiality clause reiterating that any information gleaned from the mediation discussions may not be used at a later date and that the mediator and her notes are not to be subpoenaed in court. Finally, the parties should not overlook assigning certain "housekeeping" tasks, such as the dismissal of any pending lawsuit or removal of a lien or other encumbrance.²⁴

Conclusion

Every mediation is unique because of the people and issues involved. With few exceptions, there are no set "rules" that must be followed and the parties are free to construct a process that will best suit their needs. With an understanding of the basic concepts behind mediation attorneys should be encouraged to integrate mediation into their overall litigation strategy, to the maximum benefit of their clients. ☒

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Endnotes

1. See Suzanne J. Schmitz, *Using ADR for Your Client: An Illinois Lawyer's Guide*, 85 ILL. B.J. 64, 65 (1997).
2. Generally, the need to arbitrate is driven by contract, regulation, or industry rules. Since commercial parties often do not include mediation provisions in contracts, mediation is considered only after a dispute arises.
3. See Schmitz, *supra* note 1, at 69.
4. See *id.* at 68-69.
5. See *id.*
6. See *id.*
7. See Laurence D. Connor, *The Role of the Advocate in Mediation*, 76 MICH. B.J. 160 (1997).
8. See ABE ORDOVER, *ALTERNATIVES TO LITIGATION: MEDIATION, ARBITRATION AND THE ART OF DISPUTE RESOLUTION* 153 (1993).
9. See *id.* at 26.
10. See *id.*
11. See William L. Norton, Jr. *The Mediator's Role - Qualifications and Training Programs for Mediators*, 6 NORTON BANKR. L. & PRAC. 2d §146:7 (Feb. 1997 Supp).
12. See Schmitz, *supra* note 1, at 68.
13. See Connor, *supra* note 7, at 162.
14. See Norton, *supra* note 11, § 146:11.
15. See Ordover *supra* note 8, at 45.
16. See Dominic P. Carestia, *Toward a Truer Understanding of What Mediation Is*, 22 MONT. LAW. 5 (1997).
17. See Norton, *supra* note 11, § 146:11.
18. See Ordover, *supra* note 8, at 35.
19. See *id.* at 22-23.
20. See Carestia, *supra* note 16, at 5.
21. See John W. Cooley, *Reasons for Using Mediation Besides Settlement*, 40 RES GESTAE 26, 27 (1997).
22. See Carestia, *supra* note 16, at 5.
23. See Cooley, *supra* note 21, at 26.
24. See Ordover, *supra* note 8, at 70.

Conflict Resolution in Georgia Law Schools

By Carolyn Benne

Over the past 10 years, ADR, “Appropriate Dispute Resolution” or “Alternative Dispute Resolution,” has gained increased acceptance in the Georgia legal community. Court-connected ADR programs have rapidly expanded and major publications focusing specifically on ADR in Georgia, such as Professor Douglas Yarn’s “Alternative Dispute Resolution: Practice and Procedure in Georgia” (Harrison, 2d ed. 1998) have emerged offering guidance to attorneys exposed to dispute resolution more and more frequently in their practice. It should be no surprise, then, that ADR is earning its place among the curricula and programs of Georgia’s four law schools.

Dispute resolution was taught sporadically in the late 1980s and early 1990s. At one time, Professor Yarn was teaching as adjunct faculty at three of the four Georgia law schools. Today, all Georgia attorneys are required to complete continuing legal education credits in conflict resolution. The requirement is fulfilled in the first year of practice for students who take an ADR course in law school. This increased attention to dispute resolution, along with recognition by the McCrater Commission that negotiation and other forms of ADR are important components of a good skills-based legal education, has led law schools to approach teaching

conflict resolution with more seriousness.

ADR is taught differently from law schools’ standard Socratic method or Langdellian case study method. The approach in most dispute resolution courses is to build an understanding of the theory of the discipline, and to develop the skills and abilities required for students to practice what they learn. Many courses contain a simulation or role playing component offering students the opportunity to have their skills observed and critiqued by professors or other professionals in the field. Some schools also offer clinical or practicum programs which are almost entirely practice based. Following are descriptions of the ADR courses and programs offered at Georgia’s four law schools.

Emory Law School

Emory Law School offers several courses in mediation and alternative dispute resolution. ADR professionals such as Ansley Barton, Director of the Georgia Office of Dispute Resolution and Mori Irvine, Circuit Mediator for the Eleventh Circuit Court of Appeals, often serve as adjunct professors. Each course includes lectures and discussion along with numerous simulations and role play scenarios. Students explore the role of advocates and

neutrals in various ADR settings. They may be required to observe actual mediation and/or participate as an advocate or a neutral. Course objectives include gaining an understanding of the theory behind and practice of various forms of dispute resolution and improving problem-solving skills and collaborative and creative thinking skills. Upon completion of these courses, students may be qualified to register as neutrals in court-connected ADR programs.

Emory offers several courses that integrate the study of substantive areas of law with ADR processes. During the spring of 1998, an experimental course called "Negotiations in Family Law" was offered for the first time. This course combined advanced study in substantive family law issues with a focus on the practical skills of interviewing, negotiating, and counseling. Simulating real client situations, students devised negotiated settlements in difficult divorce and child custody cases.

Students also engage in various forms of dispute resolution in other practice simulation courses which reinforce doctrinal study and build skills in fact evaluation, problem solving, negotiation, dispute resolution, and legal writing. In "Corporate Practice," students identify ways to resolve the problems of corporate clients without litigation. Problems addressed may include contract negotiation, drafting corporate documents, corporate structuring issues, joint ventures, and non-litigation corporate dispute resolution. Exercises involve questions of corporate securities, tax, employment, and debtor-creditor law. Similarly, in the "Criminal Litigation" course and "Corporate Crimes Workshop," simulation problems may require students to negotiate a plea bargain and appear before the "court" for a guilty plea and sentencing hearing.

To round out their course offerings, Emory is developing courses in dispute resolution and international law. A unique course in international arbitration is currently available, and plans are underway for additional offerings.

On the clinical side, Emory offers a mediation field placement which requires students to complete an intensive mediation training course followed by two semesters' work with the Fulton County Landlord/Tenant Project. This project engages Emory Law School students, along with students from the Georgia State University College of Law, in service to the court system as mediators in landlord/tenant disputes. A more detailed

description of the program is included in the Georgia State section.

Georgia State University (GSU) College of Law

The College of Law at Georgia State University offers an array of opportunities for exposure to ADR through course work and clinical opportunities in the United States and abroad.

Georgia State employs three adjunct professors, who are professionals in the dispute resolution field, to teach "Interviewing, Counseling and Negotiation" and a survey course titled "Introduction to ADR." Professor Douglas Yarn teaches one section of the survey course along with an "Advanced ADR Seminar." The seminar introduces students to the concepts of conflict management system design and provides mediation training approved by the Georgia Office of Dispute

Resolution.

Professor E. Ray Lanier, a renowned expert in international commercial dispute resolution and comparative civil practice, directs the GSU College of Law's unique ABA-approved summer program on international and comparative dispute resolution in cooperation with the Institute of Civil Procedure, Johannes Kepler Universitat, Linz, Austria. The program focuses on the resolution of commercial disputes under international and various domestic conciliation and arbitration systems. During May and June each year, GSU law students attend lectures in Linz and at judicial and arbitral forums in Salzburg, Vienna, Prague, and Budapest. In addition, they visit law firms and companies, such as Coca Cola, where corporate counsel expose them to issues that arise in their work. The program accepts applications from law students who attend law schools other than Georgia State. As another part of the program, the College of Law and its Consortium on Negotiation and Conflict Resolution have arranged faculty exchanges with the Institute of Civil Procedure in Linz. In the fall of 1998, Professor Hans Dolinar, Director of the Institute, came to the College to teach international commercial arbitration, and visits from several other dignitaries from various arbitral centers in central Europe are planned throughout the year.

In conjunction with Emory Law School, Georgia



State's College of Law offers second and third year students the opportunity to become mediators in the Fulton County Landlord/Tenant Mediation Project. Students receive 20 hours of civil mediation training which qualifies them to become registered mediators with the Georgia Office of Dispute Resolution. Upon completing the training, students work a minimum of 10 hours per week, under the supervision of an attorney, mediating cases that deal with numerous issues of law within the court system. Students begin mediating landlord/tenant disputes, and as they become more skilled, are allowed to mediate cases in a broader arena including the State and Magistrate courts. Topic areas include small claims civil issues such as disputes between neighbors, consumers and businesses, and creditors and debtors. If an agreement is reached in mediation, students are responsible for drafting the Order detailing the agreement.

The Consortium on Negotiation and Conflict Resolution (CNCR), an inter-disciplinary, inter-institutional program focused on theory building and practice in conflict resolution is also located in the College of Law at Georgia State. CNCR offers students exposure to a wide variety of experiences and subjects in conflict resolution through two-year graduate research assistant positions. Students who are interested in conflict resolution are also encouraged to attend CNCR's research symposia and practitioner fora, which provide education and networking in the conflict resolution theory building and practice arenas, respectively.

In the spring of 1999, the College of Law, with

CNCR, will establish a multi-disciplinary clinical program in which law students and other GSU students will teach conflict resolution skills to students in the pre-school through twelfth grades. CNCR is seeking to collaborate with the ADR sections of the local, state and national bar associations to focus on ways to incorporate conflict resolution into the curriculum of Georgia's primary and secondary schools.

Mercer Law School

At Mercer Law School, students attend a week long introductory conflict resolution course before their third-year classes begin. Six Mercer faculty members teach the course which incorporates visits from guest speakers who specialize in ADR or who administer ADR programs. The 20-hour course introduces students to both theoretical and practical aspects of conflict resolution. "Getting to Yes," by Roger Fisher and William Ury, is required reading along with a notebook of materials on conflict resolution theory, regulations, and Georgia-specific information such as registration requirements to mediate in court programs. Students spend two days learning about negotiation, one day each on mediation and arbitration, and a final day on wrap-up. Structured much like an ADR workshop, the course provides students the opportunity to engage in discussion around ADR concepts and to practice newly learned skills through role playing. Upon completion of the course, students are qualified to register as neutrals with the Georgia Office of Dispute Resolution.

WHAT'S YOUR ATTITUDE TOWARD ADR?

Douglas Yam, Associate Professor at Georgia State University College of Law, and Bonnie Powell, a third-year law student, will be distributing a questionnaire this winter to a random sample of attorneys throughout Georgia. Please take a moment to answer any or all of the following questions and use additional pages if necessary. The information received from your responses may be useful in corroborating data gathered from the questionnaire. All responses will remain confidential. You may respond anonymously.

1. What is your opinion of ADR? _____
2. Has ADR changed the way you practice law? If so, how? _____
3. Do you think ADR has changed the legal culture? _____
4. How would you describe your firm's predominant attitude toward ADR? _____
5. What, if anything, has your firm done in response to the occurrence of ADR in the legal environment? _____
6. Has ADR saved your clients time and money? _____

E-mail to CNCR@gsu.edu. or mail to: GSU College of Law CNCR, Attn: Bonnie Powell, P.O. Box 4037, Atlanta GA 30302-4037. Thank you!

Faculty at Mercer hope that this introductory course will whet students' interest and appetite for ADR.

Students who are interested in completing additional related course work may choose from four courses in their third year: "Negotiations," "Case Settlement Negotiations," "Divorce Mediation," and "Labor Arbitration." In "Negotiations," students are divided into two-person law firms. They are "retained" by clients in divorce cases in which they interview clients, conduct discovery, and negotiate a settlement with opposing counsel. Much of students' activity is videotaped and reviewed. "Case Settlement Negotiations" requires students to evaluate hypothetical clients' cases and attempt to negotiate a settlement with an opposing party. "Divorce Mediation" is designed to enable students to develop skills required by attorneys or mediators in mediating divorce issues such as child custody, visitation, property division, and alimony. Students explore both the distinctions between mediation and other dispute settlement methods and issues of substantive law relevant to mediation including confidentiality of the process and products associated with mediation. Topics such as judicial review of arbitration awards, ethics and professional responsibility of arbitrators, arbitration awards and public policy, and arbitration and individual rights are covered in "Labor Arbitration."

Mercer also offers students the opportunity to test their negotiation skills beyond performing role plays in the classroom. Each year, second and third-year students enter an intra-school competition for the honor of representing Mercer Law School in the National Negotiation Team Competition sponsored by the Law Student and Young Lawyers Divisions of the American Bar Association. Students selected to enter the competition receive intensive instruction from a faculty coach who observes and evaluates their negotiation skills. Team members also critique themselves and one another by viewing videotaped practice sessions. The school team competes against other law schools at the regional level. Those who advance compete against other regional winners in the national competition. Last year, in their first year at the competition, both Mercer Law student teams placed in the regional top ten.

University of Georgia (UGA) Law School

In response to a study performed in 1993 in which University of Georgia Law faculty identified ADR as an area worthy of more focus in the future, the law school has committed resources to developing its dispute resolution curriculum. Today, students may choose from specific ADR courses including "Basic Dispute Resolu-

tion," "Interviewing, Counseling, and Negotiation," and an "Arbitration Seminar," a simulation course on labor arbitration. In addition, professors teaching first-year courses engage in extended discussion of dispute resolution in the context of the core courses.

Two practicum offer students the opportunity to utilize their dispute resolution and dispute management skills. In the "EDOA Practicum," taught by professor Laurie Fowler, law students work in teams with ecology students as environmental dispute consultants. Stakeholders give students assignments to which they apply dispute resolution and an advanced dispute management framework. Plans exist for a collaboration between this program and UGA Law's civil clinics to integrate dispute resolution and dispute management training into environmental policy learning. Professor Alex Scherr teaches the "Public Interest Practicum," in which students explore the line between dispute resolution, dispute management, and advocacy. Students serve as advisors, negotiators and ombudspersons, representing traditionally unrepresented or under-represented clients. They hear clients' practical and legal problems and act as neutrals or advocates, as the situation requires.

UGA Law School offers a variety of clinical programs, directed by Professor Scherr, in dispute resolution and dispute management. The externship program places students in a dispute resolution environment, principally in an environmental or government setting. The "Civil Clinic Externship Seminar" teaches students the interaction between advocacy, planning, and negotiation with heavy stress on the ability to recognize opportunities to employ alternatives to court and provide services. Students are introduced to the interactions between theory and practice, with a focus on the thought processes required of a lawyer in practice.

♦ ♦ ♦

The growth of ADR at Georgia law schools reflects the increasing importance of attorneys' focus on alternatives to traditional methods of addressing their clients' problems. Law schools are teaming up with the other organizations, both within and outside the legal and dispute resolution communities, to provide well-informed, comprehensive offerings. It remains to be seen how the entry of new lawyers trained in "appropriate dispute resolution" will impact the historical practice of law. ☐

Carolyn Benne is the Manager of CNCR at GSU College of Law. Other contributors to the article include: Prof. Molly O'Brien, Emory Law School; Sarita James, Program Coordinator, Externships, GSU College of Law; Prof. David Walter, Mercer Law School; and Alex Scherr, Director, Civil Clinics, UGA Law School.

Juvenile Court Mediation

By Sheila Friedman

In the 1980s, the Clayton County Juvenile Court began informally mediating minor misdemeanor delinquent offenses to divert them from formal court involvement. In 1986, a pilot Mediation Program was implemented under the auspices of the Carl Vinson Institute of Government at the University of Georgia. The types of cases referred to the Program include assaults, affrays, batteries, disorderly conducts, criminal trespasses, thefts, and others. Unlike other types of informal adjustments, an admission or denial of guilt is not required for the respondent youth to participate in the Program. The parties are mandated by the Court to attend the mediation session; however, once the mediation begins, the process becomes voluntary, allowing any party, for any reason, to stop the mediation. The case will then be scheduled for a court hearing.

The mediation sessions are confidential. Only the signed mediation guidelines and an agreement, if one is reached, are reported to the Court. Agreements reached in mediation are presented to the Judge for approval and may be monitored for a maximum of 90 days. If all the terms of the agreement have been fulfilled, the case will be dismissed. The case may be referred for a formal court

hearing if the youth does not fulfill the agreement terms.

The participants in the mediation are the respondent youth, his or her parent(s), the victim of the alleged offense and/or the person who filed the complaint. The respondent(s)' parents or legal guardian(s) must be present at the mediation. In a criminal trespass case, the mediation participants may include several respondents, their parents and, perhaps, some neighbors who filed the complaints. Another example may be the respondent youth, his/her parent(s), and a store representative in a theft by shoplifting case.

Juvenile court mediation is one of the few instances in which adults and children are placed on a level playing field to negotiate with one another. Skilled mediators, especially those who are parents, sometimes have a difficult time mediating in juvenile court at first because they are accustomed to lecturing children — not discussing with them. However, the mediator's role, as in any other type of mediation, is to remain unbiased, not to take sides, and not to give advice or to lecture one party. The mediator is to preserve the integrity of the process by using his or her active listening skills to create a comfortable environment for open communication by all participants.

Juvenile court mediation agreements must be balanced, rather than weighted against the respondent youth. For example, the youth may agree to do 20 hours of community service at a local homeless shelter and the store representative may agree to dismiss the case once the community service hours have been completed. The respondent youth's parent(s) may agree to provide the youth with transportation to the community service site. The agreements may be as creative as the participants' imagination allows. Some complainants/victims even have agreed in the mediation process to serve as mentors for the youth. Some youth have discovered interests in careers through their community service sites or other programs.

Under O.C.G.A. § 15-11-1, the role of the juvenile courts is to restore children to law-abiding members of society. The mediation process enables the parties to open the lines of communication in an effort to guide the respondent youth and his/her family onto the right track. There are many court sponsored programs that the youth may choose to put in the mediation agreement if all the parties agree. Some of the programs include a grief/loss group for children who have experienced a loss from the death of a parent or grandparent, abandonment or divorce; conflict resolution/anger management; life and job skills; and a shoplifter's alternative program.

In March of 1998, the Program began mediating status offenses such as runaway and ungovernable. Status offenses, which refer to the respondent's status as a child, are often the most difficult cases to mediate because of the emotional nature of the parent-child relationship. These cases often do not settle in mediation. In a status offense the parties to the mediation are the parent(s), the youth and, sometimes, other family members. In these cases there may be no "right or wrong," but rather behavior by both child and parent(s) over a long period of time which has led them to the court. Mediation is an opportunity for parent(s) and child to listen to one another with the guidance of an unbiased mediator. The mediation process may be therapeutic, but it is not therapy; however, counseling is an option that the family can pursue. As a mediator, one must constantly remind oneself and the participants that the mediator is not a therapist, but a mediator. Often small steps such as spending time to-

gether or agreeing to speak positively to one another along with other programs and/or counseling can make a difference. The goal in parent-child mediation is not to solve the overwhelming problems in a few hours, but to empower a family to draft a positive road map for the future.

In October 1998, the Mediation Program launched an

innovative pilot project to mediate third party deprivation petitions for custody, also known as the "granny" cases. In these cases, grandparents, other relatives or family acquaintances are seeking custody of the child(ren) in question. The parent(s) often consent to the granting of custody to the petitioner because they are a teen, incarcerated, have a substance abuse problem or are just unable to

provide for the needs of the child(ren). The issues to be discussed in mediation may include visitation, payment of child support, medical coverage for the child(ren) and any reunification issues.

The Mediation Program has received praise from the Clayton County Juvenile Court Judges for a number of reasons, including its ability to free up courtroom time, while addressing community problems in creative ways. From July 1997 through July 1998, over 500 case files were referred to the Mediation Program. Three hundred eighty-five respondent youth participated in mediation; 360 youth reached agreements. Only 25 youth who participated did not reach an agreement through mediation. Participants, from parents to youth to victims, applaud the opportunity to resolve the dispute themselves and to give the youth a second chance. The 15 volunteer mediators for the program enjoy using their skills to benefit the community.

During my first three months in this position as Program Coordinator, I received a thank you note from a parent whose child had recently participated in the Mediation Program. The parent wrote that her child has matured and is getting on the right track after participating in the mediation process. She also wrote, "Keep up the good work!" We intend to do just that. ☐

Sheila Friedman has been the Mediation Program Coordinator at Clayton County Juvenile Court since March 1997.



Fall Meeting: Board of Governors Looks Ahead to 1999

By Jennifer M. Davis

FALL IS OFTEN THE BEST TIME to travel to the coast. The temperature is mild and the crowds of summer have dissipated leaving the beach open for private enjoyment. The Board of Governors experienced just this sort of tranquil setting during its Fall Meeting at the Hilton in Sandestin, Fla. from Nov. 6-8, 1998.

The Fall Meeting officially began on Friday evening with a welcome reception and oyster roast. There was even a knee-high table for the smaller set with chicken fingers, M&Ms and other childhood delights. A few adults were even caught sneaking morsels from the children's buffet! Following the reception, everyone scattered in groups for dinner on their own.

On Saturday morning, the Board enjoyed a continental breakfast courtesy of George E. Mundy who was later nominated for president-elect. The Board meeting followed breakfast, while spouses and guests set out on a variety of tours from antique browsing to outlet shopping.

Two of the most important functions of the Board are performed annually at the Fall Meeting: nominating candidates for officer positions and setting the Bar's legislative agenda. To find out what the Bar will be monitoring when the Legislature convenes in January 1999, see the article on page 53. The complete text

of the legislative proposals also appears on the Bar's Web site at: www.gabar.org/ga_bar/bar/section/legislat.htm.

Nomination of Candidates

The nomination of officers marks the height of the election season. In addition to the nomination of Mr. Mundy of Cedartown for president-elect, James B. Franklin of Statesboro was nominated for a second term as secretary, and James B. Durham of Brunswick was nominated for treasurer. Also, because of the increase in lawyer population in Georgia, we received an additional seat in the American Bar Association House of Delegates. Linda A. Klein was appointed to that post by President William E. Cannon Jr. The following were nominated for two-year terms to the ABA House of Delegates: Gregory S. Smith, Post 2; Paula J. Frederick, Post 4; J. Littleton Glover Jr., Post 6. Election ballots were mailed Dec. 15 and must be received in Bar headquarters by Jan. 27.

Improving the Lawyer Discipline System

The Board next divided into small groups to discuss proposed improvements to the Bar's disciplinary rules based on the ABA Model Rules of Professional Conduct. The Disciplinary Rules and Procedure

Committee, lead by Judge Edward E. Carriere Jr., has been studying changes to the current process to enhance its service to both members and the public. The Committee will take the comments from Board members into account as they consider changes to the system. The Committee will then make a formal, written recommendation to the Board at either the January or March meeting.

Restoring Confidence in the Profession

One of President Cannon's main objectives during his term is to combat the negative image that plagues the profession. With the hope of counteracting this epidemic, he established the Foundations of Freedom program which is being overseen by the Communications Committee led by Chair Dennis C. O'Brien of Marietta. The goal of the program is to restore public confidence in lawyers and the judicial system. There are several components which are briefly described as follows:

There will be a statewide speaker's bureau set up to match lawyers with groups who need a keynote speaker (*i.e.*, rotary clubs, schools, chambers of commerce, etc.). The Committee has approved the production of a video which will highlight the importance of lawyers to everyday life, and the many ways lawyers are serving the public and

protecting justice. This video will also touch on hot topics like independence of the judiciary and tort reform, and will be available to participants in the speaker's bureau as an introduction to their presentation. There will also be pattern speeches on a range of legal topics available to the speakers, although they are welcome to develop their own.

The Committee is also working with an advertising agency to develop camera ready ads which individual lawyers, law firms or voluntary bars can use and affix their own logo. The idea is to place the ads in their local paper, high school football program, theater playbill, etc. to spread the message that lawyers are important players in the justice system.

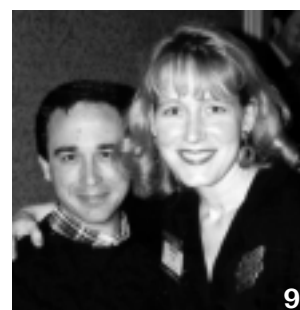
The Committee is also developing a brochure to dispel lawyer myths, like "Doesn't my lawyer have to be nasty to win?" This brochure will be available for lawyers to distribute and display in their law offices as part of the State Bar's consumer pamphlet series.

In addition, the Committee is working on a Client Care Kit based on a model produced by the Canadian Bar Association. The kit will be for lawyers to distribute to clients, and will include important information that explains the working relationship between the two. Among other topics, the kit will discuss: the first meeting with a lawyer, legal fees, steps in the case, going to court, and legal documents. It will provide forms for the client to use in documenting, understanding and following the case.

In an effort to impact the juror population, the Committee is working with judicial councils to develop a pattern jury charge that explains the nature of a civil dispute and the role lawyers play. This charge will be disseminated to judges statewide as part of a campaign to encourage



1. Rob Reinhardt addresses the Board as President Bill Cannon (right) and Secretary Jimmy Franklin (left) listen. 2. Hill Jordan of the Corporate & Banking Law Section, presents his group's legislative proposals. 3. (l-r) Justice George Carley visits with Theresa and Joseph Roseborough at the reception on Friday. 4. (l-r) At the Board meeting, Dwight Davis, Emily George and Larry Melnick study the agenda. 5. President Bill Cannon shows a propaganda piece, entitled "Stop Lawsuit Abuse in Mississippi," that a group was distributing outside its conference room next door to the Board meeting. 6. Judge Rucker Smith, Immediate Past President Linda Klein and Bar lobbyist Tom Boller enjoy the welcoming reception. 7. Dennis O'Brien explains the Foundations of Freedom program. 8. Board member Wayne Ellerbee reviews material during the meeting. 9. Bill and Cheryl Custer enjoy the oyster roast. 10. Judge Ed Carriere leads a breakout group discussing the model rules.



them to use it during trials.

If you would like to be a part of the speaker's bureau in your area, please call Bonne Cella at the State Bar's South Georgia office at (800) 330-0446 or (912) 387-0446.

Voluntary Bar Activities

Judge Gordon R. Zeese reported on the plans of the Local Bar Activities Committee which he chairs. They are working to improve relations and exchange of information between the over 100 statewide groups and the State Bar. Among their efforts will be a Bar Leadership Institute to be held in conjunction with the Midyear Meeting in January 1999. The Committee is also trying to contact every group and determine their meeting schedule and current officers. The Committee hopes to set up a more formal means of exchanging successful program ideas and reporting those good works not only to other lawyers through the *Journal*, but also to the public through press releases. And speaking of the media, the Committee plans to disseminate resources on how to handle inquiries from reporters. This will also be among the topics covered at the Bar Leadership Institute. Finally, Bonne Cella, the administrator of the South Georgia office, is available to assist voluntary bars with planning meetings—from finding locations to coordinating caterers to attending in person to explain the resources the Bar can offer. And, as is tradition, the Committee will sponsor and judge the annual Award of Merit, Law Day and Best Newsletter competitions in the spring.

Lawyers Assistance Program Changes

The Lawyers Assistance Program (LAP) will undergo a transition as reported by committee chair

Robert D. Ingram. The LAP serves lawyers who are suffering from substance abuse additions or mental health problems. The Board approved the proposed changes to the program which will now be clinically administered by The Resource Group in Atlanta. This outsourcing will not only result in about a \$45,000 savings to the Bar budget, but also the program will better serve those in need. Following are the specific services as explained in the letter of agreement:

The Resource Center will establish a toll-free hotline which it will answer saying, "Lawyer Assistance Program, may I help you?" The hotline will be open 24 hours a day, 7 days a week. All persons contacting The Resource Center through LAP will be offered two Clinical Assessment and Support Sessions. These sessions will include: thorough in-person interviews with the attorney, family member(s) or other qualified persons; complete assessment of problem areas including drugs and alcohol, gambling, sex addiction, and/or other behavioral health disorders; collection of supporting information from family members, friends and the LAP, when necessary; verbal and written recommendations regarding counseling/treatment.

All persons referred to The Resource Center through LAP or those contacting the LAP hotline will receive two years of continued monitoring by the Center which will consist of: monthly phone contact for a minimum of 30 minutes (if phone contact reveals a need for a clinical in-person session, this will be offered); written reports to LAP on a quarterly basis; consultation with the referred party or his or her family members to assist in treatment or making necessary adjustments; creation of a partnership between the person seeking assistance and a

member of the Legal Eagles, which is a group of recovering attorneys who volunteer to assist others who are struggling with similar additions/problems; coordination with the LAP's intervention counselor, Henry Troutman Jr., in recommending intervention for those patients not responding appropriately to treatment.

Other Business

The Board also approved several proposed amendments to the State Bar rules which appear on page 76 for member comment. Also, they approved the appointment of Gary C. Christy of Vienna to a four-year term on the Judicial Qualifications Commission. Further, the Board received an update about the Bench & Bar Committee's Judicial District Professionalism Program which seeks to diffuse unprofessional or uncivil conduct with peer pressure on an informal basis. The Committee is drafting Bar rules to set forth the goals and operational procedures of the program.

Sweet Serenade

On Saturday evening, the crowd was serenaded during dinner by local pianist David Seering, a former Atlanta resident. Immediate Past President Linda Klein was especially thrilled when forced to appear on stage for a birthday song in her honor. The group was captivated by the Mr. Seering's performance and began making requests after dinner. Listening to the sounds of Broadway and other favorites was a wonderful way to close the meeting. Although afterwards, many chose to end the weekend with a moonlight stroll along the powder white seashore. ☼

BOARD OF GOVERNORS SET AGENDA FOR NEXT SESSION

1999 Georgia Legislative Preview

By Thomas M. Boller
and Mark Middleton

AS GEORGIA GEARS UP FOR

the final countdown to the year 2000, we will do so under new leadership at the Capitol. With lawyer Democrats Roy Barnes and Mark Taylor prevailing in the November election for Governor and Lt. Governor respectively, the mystery of who would lead us into the next century was answered. While many speculated that the Republican Party may assume the majority, in the end the Democrats retained every statewide office they held prior to election day.

In the Georgia legislature, the voters basically maintained the status quo. In the House, the Democrats achieved a net gain of one seat as they defeated two Republican incumbents and lost just one open seat. Now, there are 78 Republicans and 102 Democrats in the House.

On the Senate side, it appears the party split will remain as it was, 34 Democrats and 22 Republicans. (There is a recount in Senator Sonny Huggins' (D) race where the challenger Jeff Mullis (R) beat Huggins by 24 votes.)

In the U.S. Senate and Congressional races, Republicans maintained

firm control. Senator Paul Coverdell won reelection relatively easily as did all of the Congressional delegation.

African-American voter turnout was higher than in the past (22

have to wait until the elections of 2000, to see whether the Democratic strength at the state level is a temporary occurrence or signals a more permanent alignment.

The total number of attorneys in the '99 General Assembly will remain about the same as in the previous legislature, though some of the faces will be different. There will be 38 lawyers in the 180-member House and eight lawyers in the 56-member Senate. In statewide offices, lawyers clearly dominated as seven of 10 constitutional officers elected in November were attorneys: Roy Barnes, Governor; Mark Taylor, Lt. Governor; Thurbert Baker, Attorney General; Cathy Cox, Secretary of State; John Oxendine, Insurance Commissioner; Michael Thurmond, Commissioner of Labor; and Bobby Baker, Public Service Commissioner.

Thousands of lawyers across this state participated in the campaigns of '98 —

some as candidates, others as advisors, volunteers and contributors. We commend you for your commitment to the political life of our state.

With the elections over, the newly-elected state leadership will turn to consideration of matters of



Getting a facelift: The Georgia Capitol is being replated with gold in anticipation of the 1999 General Assembly, reflecting a change in leadership under the dome.

percent of the total vote in 1996 and more than 25 percent of the total vote in 1998), and they voted overwhelmingly Democratic. The Democratic ticket also did better in 1998 across the board, including rural Georgia and white voters. We'll

public policy. Education, air and water quality, transportation, health care and public safety are all high on the executive and legislative agendas.

Committees and sections of the State Bar have been hard at work over the summer and fall addressing issues important to the profession and developing legislative proposals for presentation to the Board of Governors (BOG). The following legislative proposals have been approved by the Board of Governors and will be part of the State Bar's legislative package for the 1999 General Assembly session.

1. Expansion of the Court of Appeals. The BOG recommends expanding the Georgia Court of Appeals by adding a new panel of three judges and one judge to serve as administrative and chief judge.

2. Appropriation for Domestic Violence Program. The BOG recommends the endorsement of the Chief Justice's budgetary request of \$2.5 million for use in providing legal services to the victims of domestic violence. The request is increased from the \$2.0 million appropriation for the first time last year.

3. Appropriation for CASA Program. The BOG recommends endorsement of additional funding of \$219,541 for a total allocation of \$839,541 for the CASA (Court Appointed Special Advocates) program.

4. Revisions to Corporate Code. The BOG recommends passage of a bill containing the following five revisions to the corporate code.

a. Amendment of Unused Classes of Blank Preferred Stock. Amend O.C.G.A. Section 14-2-602(c) to allow a board of directors to amend the rights of series of preferred stock without shareholder approval if no such share were outstanding.

b. Electronic Proxy Voting. Amend O.C.G.A. Sections 14-2-722 and 14-2-140 to add a new definition for "electronic transmission" or "transmitted electronically." It is believed that this amendment would allow Georgia to join several other states in bringing significant cost savings to corporations with large numbers of shareholders.

For full texts of these proposals and other information on the State Bar of Georgia's legislative affairs program, go to the Bar's Web site at www.gabar.org/ga_bar/bar/section/legislat.htm.

c. Mergers of Parent Corporations into Subsidiary Corporations. Amend O.C.G.A. Section 14-2-1104 and 14-2-1302 to allow a parent corporation owning at least 90 percent of a subsidiary corporation to merge into the subsidiary.

d. Definition of Beneficial Owner. Amend O.C.G.A. Section 14-2-1110(4) and 14-2-1131(1) to harmonize the definition of "Beneficial Owner" to be consistent with the most recent definition adopted by the General Assembly.

e. Exceptions to Transacting Business in Georgia. Amend O.C.G.A. Section 14-2-1501 to clarify instances when a certificate of authority is not necessary to conduct business in Georgia.

5. Revisions to Limited Partnership and Limited Company Act. The BOG recommends the amendment of the Georgia LLC Act and Limited Partnership Act to implement changes appropriate in light of recently adopted regulations by the Internal Revenue Code.

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For full texts of these proposals and other information on the State Bar of Georgia's legislative affairs program, go to the Bar's Web site at www.gabar.org/ga_bar/bar/section/legislat.htm or call Tom Boller at (404) 872-0335.

The legislative program has achieved major accomplishments over the last few years. Our efforts have resulted in greatly enhanced access to the judicial system and improvements in the practice of law. Funding for victims of domestic violence, CASA, indigent defense and judicial salaries; passage of ADR legislation; a new corporate code; LLC; LLP; probate code; and trust code were all issues developed by our sections and committees, lobbied by our legislative team and passed by the General Assembly.

As we look forward to the '99 session, we want to thank all those Bar members who have given their talent, expertise, time, energy and financial support to the Bar's legislative program. All our members should be encouraged to take an interest in and become involved in the political and legislative life of our state. We, as lawyers, bring a unique combination of expertise, experience and education to the public policy debate. We need your participation and involvement to maintain the health and vitality of the profession and to continue the profession's contribution to the public good. ☐

Thomas M. Boller and Mark Middleton are legislative representatives for the State Bar.

Atlanta Leaders Unite to Decongest the City and Clean Its Air

By Sharon A. Gay
and Charles S. Conerly

ON THURSDAY, JUNE 18, 1998, the *Wall Street Journal* fired the shot heard 'round Atlanta. In an article questioning the sustainability of Atlanta's unsurpassed recent economic growth and its status as one of America's most livable cities, staff reporter Greg Jaffe asked: "Is Traffic-Clogged Atlanta the New Los Angeles?" The article compared both traffic congestion and air quality in the two cities and at least suggested that Atlanta's economy will slow with its traffic. More importantly, the article provided a much needed call-to-arms for metro area leadership to deal with two significant problems left unresolved for far too long.

Atlanta's Double Whammy: Congestion and Air Quality

With no geographic barriers to confine Metro Atlanta's growth, development has leapt the city limits, consuming square mile after square mile of surrounding counties. And because MARTA only serves two counties in the 13-county metro area, most Metro Atlantans depend upon the automobile for transportation. In fact, Metro Atlantans drive further each day than people living in any other American city, with an average travel distance of 34 miles per person per day. The result is the traffic nightmare Atlantans experi-

ence daily: miles of congested roads on which commuters sit idling in frustration while the exhaust from their cars exacerbates another metro area problem — air pollution.

The Metro Atlanta area has an air quality problem, and that problem is primarily ozone. Ozone — a gas at standard temperature and pressure consisting of three oxygen atoms per molecule — is both necessary for human life and, at the same time, harmful to human health. Whether ozone is a human benefactor or malefactor depends upon its location. In the upper atmosphere, ozone forms a protective layer surrounding the earth and blocking the sun's potentially dangerous ultra-violet rays. At ground-level, ozone creates the smoggy haze that covers the Atlanta skyline on hot summer days. Most importantly, ground-level ozone is a powerful respiratory irritant that health officials believe is responsible for tens of thousands of hospital visits nationwide each year.

Ground-level ozone is not emitted directly into the air, but rather is a product of a chemical reaction involving nitrogen oxides (NOx) and volatile organic compounds (VOCs). On hot summer days when the winds are either light or non-existent, NOx and VOCs "bake" together in the sunlight to form ozone. And while prior regulatory efforts to combat ozone have focused primarily on VOCs, more recent attempts to address the ozone

problems confronting Atlanta and other American cities are focusing on sources of NOx.

NOx is a product of combustion and a large variety of sources emit NOx, ranging from coal-fired power plants to lawn mowers and leaf blowers. But in the Metro Atlanta area, the largest sources of NOx are emissions from cars and light-duty trucks, and therein lies the problem for the metro area. The equation is simple: longer commutes mean more vehicle miles traveled (VMT); more VMT means more NOx; and more NOx means more ozone. Unfortunately, this simple equation only begins to explain the problem.

Due in large part to Atlanta's sprawling growth and its corresponding travel patterns, Atlanta does not meet the United States Environmental Protection Agency's (EPA) standards for ground-level ozone. In fact, Atlanta has exceeded EPA's ground-level ozone standards for nearly 20 years. Although automobile emissions have been declining in recent years due to cleaner burning engines, the projected increases in the number of vehicles in the Metro Atlanta area will soon reverse this trend. The Atlanta Regional Commission (ARC) estimates that 500,000 new residents will arrive in the 13-county metro area between 1995 and 2005, adding two million more car trips per day. While the metro area is currently designated a "serious" ozone nonattainment area,

it may ultimately be reclassified as a “severe” ozone nonattainment area, and the economic consequences for both remaining an ozone nonattainment area and ultimately being reclassified are significant.

Chief among the consequences, Atlanta’s status as an ozone nonattainment area means that — with the exception of traffic control measures and highway maintenance — federal highway funds cannot be spent on new highway projects in the 13-county area. Fewer highway projects for an increasing population will almost certainly result in even more congestion and more air pollution, and will adversely affect economic growth. In addition, more industrial facilities will be regulated as major sources of air pollution, subjecting them to more stringent regulatory requirements. Importantly, these additional regulatory requirements will make it more difficult to construct and operate new sources of air emissions or to modify existing sources. For these reasons, remaining an ozone nonattainment area may cause new industry to locate in other states.

The Metro Atlanta Transportation Initiative

In response to the growing publicity and sense of urgency surrounding Atlanta’s congestion and air quality problems, the Metro Atlanta Chamber of Commerce unveiled its Metro Atlanta Transportation Initiative (MATI) in June. MATI is an ambitious six-month effort to address Metro Atlanta’s traffic congestion problem and, as a necessary consequence, its air quality problem. Chaired by Georgia-Pacific Corporation CEO Pete Correll, the MATI Board of Directors (MATI Board) consists of 33 members who represent a cross-section of metro area government, civic, and business leaders, including Georgia

ATLANTA TRANSPORTATION INITIATIVE BOARD OF DIRECTORS

Chairman of the Initiative: Pete Correll
 Chairman & CEO, Georgia-Pacific Corporation
 Chairman, Metro Atlanta Chamber of Commerce

Members (Listed alphabetically):

<p>Jim Balloun Chairman & CEO, National Services Industries Inc.</p> <p>Juanita Baranco Vice President, Baranco Automotive Group</p> <p>Mallard Benton General Manager, General Growth Properties Inc.</p> <p>Susan Bledsoe Chair, The Georgia Conservancy</p> <p>The Honorable Crandile Bray Chairman, Clayton County Commission</p> <p>The Honorable Bill Byrne Chairman, Cobb County Commission</p> <p>The Honorable Charlie Camp Mayor, City of Douglasville</p> <p>The Honorable Bill Campbell Mayor, City of Atlanta</p> <p>David Chesnut Chairman, Georgia Rail Passenger Authority</p> <p>Dr. Wayne Clough President, Georgia Institute of Technology</p> <p>Dr. Tom Cole President, Clark Atlanta University</p> <p>Tom Coley CEO, Southtrust Bank</p> <p>Brad Currey Chairman & CEO, Rock-Tenn Company</p> <p>Allen Franklin President & CEO, Georgia Power Company</p> <p>The Honorable Wayne Hill Chairman, Gwinnett County Commission Chairman, Atlanta Regional Commission</p> <p>Jim Lientz President, NationsBank NA Chairman, Georgia Chamber of Commerce</p>	<p>Dr. Audrey Manley President, Spelman College</p> <p>Dr. Carl Patton President, Georgia State University</p> <p>Joe Prendergast Sr. Executive Vice President, Wachovia Corporation</p> <p>The Honorable Cecil Pruett Mayor, City of Canton</p> <p>Harold Reheis Director, Georgia Environmental Protection Division</p> <p>Wayne Shackelford Commissioner, Georgia Department of Transportation</p> <p>Rick Simonetta General Manager, MARTA</p> <p>Dr. Richard Skinner President, Clayton State College & University</p> <p>Nelson Toebke CEO, Rockdale Health Systems Inc.</p> <p>Judy Turner President, Decatur First Bank</p> <p>Jackie Ward President & CEO, Computer Generation Inc.</p> <p>Ray Weeks Chairman & CEO, Weeks Corporation</p> <p>J.T. Williams President, Killam Properties</p> <p>John Williams Chairman & CEO, Post Properties</p> <p>Pelham Williams Sr. CEO, Williams-Russell & Johnson, Inc.</p> <p>Dr. Steve Wrigley Carl Vinson Institute of Government, Univ. of Georgia</p>
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Environmental Protection Division (EPD) Director Harold Reheis and Department of Transportation Commissioner Wayne Shackelford.

The MATI Board met for the first time on July 1, and after determining that the initiative should focus primarily on regional transportation issues, the MATI Board commenced a six-month study of metro area traffic, the causes of congestion, potential impediments to solving Atlanta’s traffic problem,

and approaches taken by other cities to address congestion issues. At the conclusion of the six-month study period, the MATI Board will announce its findings and its recommendations for addressing Atlanta’s traffic and congestion problem, and then present them to Governor-elect Roy Barnes and the newly-elected General Assembly.

As of the writing of this article, the MATI Board has not reached any final conclusions or made its recom-

mentations. However, the MATI Board has been focusing on the following issues:

Regional Planning. The Metro Atlanta area has historically employed a “bottom-up” system of regional planning, whereby regional plans are driven by plans and projects proposed by local governments and state agencies. Furthermore, regional planning in the metro area is primarily the responsibility of ARC, a planning body that — since its inception — has been hampered by a lack of authority to enforce its recommendations and its plans.

The MATI Board has studied other cities that incorporate a more “top-down” approach to planning, whereby regional plans drive, or at least influence, local planning and state and local transportation projects. Some of these cities also vest considerably more enforcement and funding authority in their regional planning bodies than that currently vested in ARC. The MATI Board has also considered the possibility of greater coordination between transportation and land use planning.

Traffic/Congestion Targets. In the metro area, plans are currently developed without specific congestion-related targets. Other cities employ a variety of such targets, including volume to capacity ratios, travel time between various points, or the percentage of travelers using alternatives to single occupancy vehicles (SOV). These cities then design their regional transportation plans with these targets in mind.

In addition to examining whether such targets should be established for Metro Atlanta, the MATI Board is also considering whether the performance in meeting such targets should be publicized and whether there should be incentives (or consequences) for meeting (or failing to meet) the targets.

Funding. The MATI Board has investigated a number of issues with respect to the adequacy and flexibility of funding for transportation projects. As mentioned above, one such issue is whether and how much funding authority should be vested in a regional authority for regional transportation projects. In addition, the MATI Board has considered more flexible use of existing state transportation funds, including the possibility of amending the Georgia Constitution to allow gasoline tax proceeds to be spent on non-highway projects, such as transit. The MATI Board has also examined potential sources for additional funds to meet the transportation needs of the region and the state.

Another issue with respect to transportation and funding is whether transportation plans should be developed in light of anticipated fiscal constraints or, in the alternative, whether transportation plans should be developed to meet transportation targets regardless of available funding. The latter approach is intended to engender public/political support for the funding necessary to meet transportation targets by illustrating the difference between (1) the cost of a plan that actually meets the transportation goal and (2) available funding.

Education. Earlier this year, Georgia EPD stepped up its efforts to educate Georgians with respect to traffic congestion and air quality through its Voluntary Ozone Action Program (VOAP). VOAP is designed to educate citizens about the effects of ground-level ozone and to promote voluntary actions by employers, employees, and others to reduce congestion and ozone-causing emissions on hot summer days when ground-level ozone is likely to form. The MATI Board has examined a variety of efforts like VOAP to educate both the general public and

government leaders on various issues, like the true costs of driving (including impacts on air quality), the benefits and myths of rapid transit, and alternatives to SOV driving.

Business Leadership. Finally, the MATI Board has explored various means for ensuring long-term involvement of the business community in addressing congestion and air quality issues. This could include business leaders working with governmental leaders to develop plans to reduce congestion and to secure adequate funding for the plans. It could also include encouraging businesses to initiate alternatives to SOV commuting for their employees, like company-sponsored van and car pools, shuttle services from businesses to rapid transit stations, and “flex-time” or 4-day week programs.

Conclusion

MATI’s recommendations should be an important step in achieving an effective, balanced transportation system necessary for Atlanta to sustain its economic growth and a good quality of life for its citizens. In addition, through its efforts to address traffic and congestion issues, MATI will play an important role in solving the region’s air quality problem. The MATI Board’s recommendations should also help to establish traffic congestion and air quality issues as priority items for the 1999 General Assembly. ☐

Sharon A. Gay is the Vice President – Governmental Affairs for the Metro Atlanta Chamber of Commerce. As the Chamber’s state and regional political and policy strategist, she has been integrally involved in MATI. Charles S. Conerly is an associate with Alston & Bird LLP. He concentrates on environmental litigation and regulatory matters, including air quality issues.

COULD THIS BE THE START OF A BEAUTIFUL RELATIONSHIP?



By Ross J. Adams

FOR A WHILE, I COULD NOT mention my occupation without someone following my statement with the line, “Have you heard the one about the lawyer who...” — making yet another tired lawyer joke. My usual response would be to inquire about that person’s profession, then ask if they have any questionable members among their ranks. After the admission that there were, I would ask if the joke teller thought I was a decent person. Then the person would exclude me from the general population of lawyers, saying something like, “Well, you aren’t like most lawyers.” I would then explain that I am like most lawyers, and like in all other professions and occupations, only a small percentage of lawyers are bad; unfortunately the rest of us suffer as a result of their improper behavior.

However, recent events indicate that I may not have to go through that sort of dialogue as often. It is my hope that lawyer jokes will become passé. Perhaps there may soon be a general acceptance of the concept that lawyers may not be the bane of society as once believed.

The results of the recent election are a significant indication of the possible change in perception. Of the 10 constitutional officers in Georgia,

seven are now lawyers, compared to four before the election. What is most interesting is that all five of the candidates elected who were elected for the first time are lawyers.

This election reminds me of when I was a child, and I met a good friend of my father’s who was a lawyer and a state legislator. I was so impressed by him, because not only

It is very exciting, as a lawyer, to believe society may accept that one of our colleagues can actually be an upstanding member of the community, and perhaps even a leader of that community.

did he work to achieve justice as a lawyer, but he also worked to serve the public as a legislator. My interaction with him is a significant reason I chose to become a lawyer, and further, to get involved in work for the State Bar, doing what I can to try to improve our profession. As a matter of fact, nearly 30 years later, I still occasionally call on him for advice as a mentor.

The results of the election say to me that the general public seems willing to trust an attorney to be a government official. It is very exciting, as a lawyer, to believe there

is a chance society may accept that one of our colleagues can actually be an upstanding member of the community, and perhaps even a leader of that community.

Another observation that makes me optimistic about the change in perception came to me at the appellate court mass swearing-in ceremony held at the Court of Appeals, and sponsored by the Appellate Admissions Committee of the Young Lawyers Division. It was truly inspiring to see so many young lawyers excited about beginning their careers. As I spoke to them about what I have gotten out of being a lawyer and being involved in Bar activities, I could see heads nodding. They appeared to be agreeing that, while being a lawyer can be difficult, it can also be very rewarding, not just monetarily, but also intellectually and emotionally. They also seemed genuinely interested in Bar work, and the additional rewards it can provide not only to them, but also more importantly to the public and the profession.

It is this spirit of pride in being a lawyer that needs to be engendered in all of us. Not the somewhat embarrassed, half-hearted, defensive admission to being a lawyer that some lawyers are almost forced to make. If we can achieve that pride, and continue working hard towards educating the public about the good work that lawyers accomplish, like Bill Cannon’s Foundations of Freedom program, perhaps my recent observations will be just the initial proof that the relationship between lawyers and the public is improving. ■



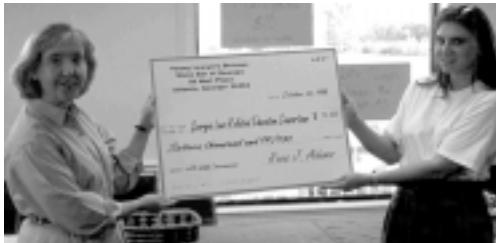
LRE Golf Tournament Raises \$16,000

THE YOUNG LAWYERS DIVISION ORGANIZED the first LRE Golf Tournament on Oct. 20, 1998, at the Oaks Course in Covington, Ga. The tournament raised over \$16,000 all of which goes to the Georgia Law-Related Education Consortium.

The Georgia LRE Consortium was officially organized in March, 1990. The Consortium is an association of institutions, agencies, organizations and individuals with the belief that law-related education is an essential element in developing productive, law-abiding citizens.

Law-related education provides young people with knowledge, skills and ideas necessary for informed, well-reasoned participation in our American constitutional democracy.

The Young Lawyers Division thanks all those who participated and especially the sponsors below who made the event possible. ☒



Anna Boling, Executive Director of the LRE Consortium, accepts the check from Alla Shaw, right, who helped plan the event.

H.S. Mock Trial Adds New Region, Needs Help

GROWTH IN PARTICIPATION BY HIGH SCHOOLS in the northwest sector of the Atlanta metropolitan area has required the creation of the new Cherokee County Region, based in Canton. This has expanded the need for volunteers to serve as judges for competition rounds on Saturday, Feb. 27, in the following cities: Macon, Jonesboro, Brunswick, Decatur, Atlanta, Lawrenceville, McDonough, Rome, Athens, Valdosta, Albany, Savannah, and Canton.

Judge volunteers will find helping with the competition to be enjoyable and informative. The presentations by the students are not only impressive; they are also entertaining. The 1999 case is the first high school mock trial case to deal with the question of the effect of second-hand smoke, and it was written by leaders of the Georgia and South Carolina mock trial programs. It is a civil problem involving the possible damage of second-hand smoke to children at a daycare center.

Attorneys with at least two hours free on this date are urged to contact the mock trial office to volunteer to judge a competition round. We will assign volunteers to the closest city and send you competition materials. Over 600 attorneys are needed statewide. Contact the mock trial office at: (404) 527-8779, (800) 334-6865 (ext. 779), mttrial@gabar.org. ☒

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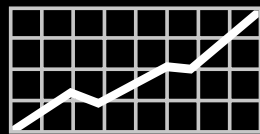
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Millennium Bug: Has Your Firm Got the Fever?

By Terri Olson

LAST ISSUE, I PROVIDED AN overview of the so-called "millennium bug" with a description of some of the possible consequences within the law firm. This month, we continue with a discussion of more far-reaching problems along with a potpourri of suggestions for keeping those difficulties to a minimum.

Y2K Problems Associated With Commonly Used Third-Party Services

- ♦ Court systems (computerized court dockets or other databases)
- ♦ Service providers (couriers, court reporters, package delivery systems, etc.)
- ♦ Justice systems (incarceration records, offender histories, etc.)
- ♦ Legal research databases (EDGAR, Patent & Trademark databases, LEXIS& Westlaw, etc.)

Even if a firm makes sure its own house is in order, there is the possibility that others on whom the firm regularly relies have been less careful. Imagine walking into court one morning and discovering that the current court docket has vanished! Law firms should contact their vendors and request that the local bar association meet with a representative of the local courts and jails to inquire whether they have looked into these issues.

Second in a two-part series

Larger Scale Y2K Problems

- ♦ Transportation systems (air controllers, ticketing and reservation systems, metro rails, computerized elevators, etc.)
- ♦ Financial systems (bank accounts, credit card accounts, loans, lines of credit, etc.)
- ♦ Communications systems (phone companies both local and long distance, cable systems, Internet access providers, etc.)
- ♦ Government systems (IRS, social security, welfare rolls, etc.)

There is little the average citizen can do about these issues other than wait and hope. However, it may be prudent for firms to avoid travel out of the region, transferring large sums of money, changing service providers, or other activities that depend on the Y2K compliance of others for the first few weeks of the new millennium. It is also a good idea to make paper backups of any transactions with large computer systems (e.g., access bank records on-line and print out transmittal statements at the time of transaction; print out, copy, and store backup for quarterly income and payroll tax statements) if you do not already do so.

What to do about it now

The most obvious suggestion is: check with all your software and hardware vendors to determine whether what you are using is Year

2000 compliant. If it is not, upgrade now! And by *now* I mean *now*, not sometime in 1999! Why? Because it is quite possible that demand for some popular products may exceed supply as the end of the millennium approaches and all the companies, government agencies, etc. decide at once to upgrade their old copies of Microsoft Word, WordPerfect, Netware, and the like. In addition, if either your programs or hardware requires customization or modification before use, you may not be able to get qualified personnel to work on it as Dec. 31, 1999 looms closer. At the very least, contract programmers will probably drastically increase their rates (they are already going up for work on Y2K issues).

You may receive a response from your vendors of "it's not compliant now, but we're working on it." That is not acceptable. At a minimum, your vendor should provide you with a compliance date that is far enough in advance of the end of the millennium that, should the vendor be unable to perform, you would still have adequate time to convert to a new, compliant system. Many vendors of programs that run in DOS and Windows have Windows versions that are already compliant and are now working on conversion of DOS versions as time permits. Do not sit around and wait for these products to be ready — get the Windows version *now* and be done with it!

You may ask, "How do I determine whether my systems are compliant?" There are various tools

available to help. If you are not computer literate, you are best served by contacting a competent professional who will agree to audit all your systems and make corrections as needed.

Anyone in a medium to large firm would be well advised to do this. Those in very small firms, or those who want to make a preliminary study before pulling in a professional, may want to look at the following:

- ♦ Visit www.law.ufl.edu/college/lti/projects/year2000/year2000.htm. This site is maintained by the Legal Technology Institute, and it contains a searchable database of hardware and software used by the legal profession, along with information on compliance as well as the source of the information. Not all products listed have a full

It is possible that demand for some popular products may exceed supply as the end of the millennium approaches.

report in yet, but more are being added every day.

- ♦ Test your computer to see if the hardware can recognize dates properly (easy-to-follow instructions can be found at the Web site listed above).
- ♦ Alternatively, download Test2000 from www.righttime.com to test your system.
- ♦ Look at www.microsoft.com/year2000, which is a good resource center as well as the best source of information on Microsoft products. Here is where you will find information that Windows 3.11 and Windows 95

original release are compliant “with minor problems,” and where you can download a full description of any potential problems that might occur.

- ♦ Review the firm’s other computerized equipment, such as higher-end copiers, fax machines, postage meters, and the like.
- ♦ Check with your business insurance carrier to see how they will be classifying any losses that arise from Y2K problems. You may not have coverage for these problems, especially if the carrier feels that any problems were foreseeable and therefore not accidental losses. ☐

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

Mainstreet pick up 8/98 p.75

Orient Express: Emory Law School Orientation on Professionalism, Part II

By Amy Williams

THE FIRST CLASSROOM I

went into was quiet. So quiet that my entrance was a matter of great disturbance, even excitement after I pulled out a camera and was asked to announce my purpose. The class I was interrupting is part of a new three-part program developed by Emory University School of Law and the State Bar Committee on Professionalism to expand on the Orientation on Professionalism that has been held in August at every law school in Georgia since 1993.

First-year students at Emory meet in professionalism sessions in October and February as well. These second and third sessions follow a format similar to the breakout session for the August Orientation, where group leaders and students discuss ethics and professionalism issues raised by hypothetical situations.

The focus of the second professionalism session was the transformation the students are experiencing as they move from being consumers in the legal system to participants who bear responsibility for it. Emory is currently the only law school in

Georgia offering this comprehensive program, but others are watching closely to learn how it could be adapted for their schools.

Two new features of the Emory

practitioner. This is intended to expand the reach of the professionalism programs while at the same time providing continuity of the community formed in the breakout group among students, faculty and practitioners.

It was one of these breakout groups, following the general address to all first-year students, that I had just walked in on. I tried to make myself as inconspicuous as one can be standing at the front of a classroom with a camera, while the law professor and his practicing attorney co-leader continued to pose the hypothetical situation I had interrupted. The

professor's request for feedback was followed by about 10 seconds of silence before one of the nine or 10 students in the room began tentatively to offer an opinion, as if afraid of interrupting somebody. The attorney offered an amusing anecdote from her own experience having to do with the hypothetical situation under discussion to force the students to crack a smile. Shared laughter stimulated a few comments and opinions. Seeing that an actual discussion was imminent, I slipped out before I could cause any more interruptions.



Associate Dean Jim Elliott (right) leads a discussion with first-year Emory Law students.

Orientation on Professionalism in August were carried over into the October program. One is the pairing of law faculty with practitioners as group leaders to encourage faculty to make discussion of ethics and professionalism issues a part of all first-year courses. Another is using hypotheticals drawn solely from law school experience in the August and October programs. The third session will include hypos taken from the practice of law. In October, students were assigned to the same group as in August with the same faculty co-leader and, when possible, the same

In the second classroom I entered the ball was already rolling, and my entrance was not as noticeable. A student was talking, responding to the same hypothetical situation I had just heard proposed in the previous classroom. Throughout the ensuing discussion, the professor and the practicing attorney worked together to point out details and nuances that the students might have overlooked in their responses. They even modified the hypo to make it more realistic, closer to home and to search out the gray areas of the situation.

The third classroom I entered was the liveliest, and almost immediately after entering I noticed signs of a true discussion — the students were not only responding to their group leaders, but were replying directly to each other with the many possible views to be taken on the topic at hand. This group was discussing a different hypothetical situation than the previous two I observed.

I entered a fourth classroom near the end of the scheduled time. The discussion was winding down and the group leaders were concerned with what the students might take away from the session. The professor proposed an interesting question. He asked if the students thought that law school had made them more dishonest. The general answer seemed to be that it did not make one more dishonest, but made one more aware of ambiguity. The practitioner then pointed out that he saw improvement in the discussion. In this second of the three sessions, he said, the students had been more honest than at the beginning of the school year, when this group of law school neophytes was reserved in expressing their opinions. The students admitted that three months earlier they were still a little bit intimidated, but if three months of law school had

taught them anything, it had taught them that they were there to think for themselves.

Having only recently become an Emory College alum, I was able to spot some familiar faces among the students attending the reception which followed, and infiltrate. Although those students I spoke with made a point of making sure they would not be quoted, I can assure you the talking that went on in the classrooms was only the beginning of a larger discussion. Opinions differed among students as well as group leaders as to whether the programs on professionalism could actually change one's mind or improve a dishonest person. But of the conversations I heard among the students surrounding me, I only occasionally heard "How did you do on that memo," or "What are you doing this weekend." A matter of

greater concern to these future professionals was whether honor is an obligation to oneself or to society, and whether intentions extenuate a breach of law or confidence. And virtually everybody would agree that, while discussion is by no means an end, it is at least a beginning.

Perhaps two law students best summed up the impact of this session in anonymous evaluations. One wrote, "The discussion in this type of seminar is crucial. Much better than any kind of lecture on ethics and professionalism." Another called the program, "Extremely effective in relating professionalism as a lawyer to ethics as a law student." ■

Amy Williams is the Communications Coordinator for the State Bar of Georgia.

Golden Lantern -
pick up 10/98 - use
"advertisement" at
top

ANNOUNCEMENT

Annual Fiction Writing Competition

THE EDITORIAL BOARD

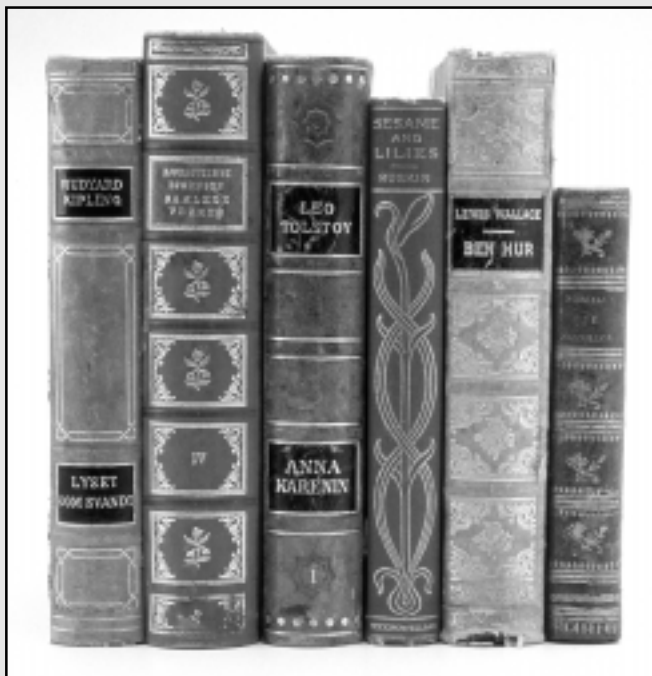
of the *Georgia Bar Journal* is pleased to announce that it will again sponsor the Annual Fiction Writing Competition in accordance with the rules set below. The purposes of the competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar, and to provide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

Rules for Annual Fiction Writing Competition

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

(1). The competition is open to any member in good standing of the State Bar of Georgia, except current members of the Editorial Board. Authors may collaborate, but only one submission from each member will be considered.

(2). Subject to the following criteria, the article may be on any fictional topic, and may be in any form (humorous, anecdotal, mystery, science fiction, etc.) Among the criteria the Board will consider in judging the articles submitted are: quality of writing; creativity; degree of interest to lawyers and relevance to their life and work; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The Board will not consider any article that, in the sole judgment of the Board, contains matter that is libelous, or that violates ac-



cepted community standards of good taste or decency.

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

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

on double-spaced, typed, letter-size (8½" x 11") paper.

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

(6). All submissions must be *received* at State Bar Headquarters in proper form prior to the close of business on **Friday, January 30, 1999**. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, *Georgia Bar Journal*, 800 The Hurt Bldg., 50 Hurt Plaza, Atlanta, GA 30303. The author assumes all risks of delivery by mail.

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

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

Official Opinions

Employees, State; training expenses. Unless the General Assembly otherwise provides, state agencies should presumptively consider college courses as being beyond the scope of the ordinary training agencies may provide employees in state government, but in certain narrow circumstances, agencies may train employ-



**Attorney General
Thurbert Baker**

ees in college courses which provide job-specific instruction. (9/11/98 No. 98-16)

Insurance Commissioner, Authority of. The Insurance Commissioner has the authority to tax HMO receipts of Medicaid premium payments. (10/5/98 No. 98-17)

Unofficial Opinions

Criminal arrest record; expungement of. The City of Atlanta Solicitor's office does not have the authority under O.C.G.A. § 35-3-37(d) to approve the expungement by an original agency of a

criminal arrest record involving a felony or misdemeanor state offense which is dismissed in municipal court and for which no indictment or accusation has been drawn. (9/4/98 No. U98-11)

Judicial employees, State; county supplement to. The governing authority of a county may supplement the salary of a state judicial employee without separation local legislation. Further, a state employee may not contract with a county to perform services during the same forty-hour work week. (9/11/98 No. U98-12) ☒

Continued from Page 31

ation of alternative means of resolving disputes.

5. *E.g.*, Carrie Menkel-Meadow, *Ethics in Alternative Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities*, 38 So. Tex. L. Rev. 407 (1997); Geoffrey C. Hazard, Jr. "When ADR is Ancillary to a Legal Practice, Law Firms Must Confront Conflict Issues," 12 ALTERNATIVES 25 (1994).
6. *E.g.*, Poly Software Int'l Inc. v. Su, 880 F. Supp. 1487 (D. Utah 1995); Cho v. Superior Court, 45 Cal. Rptr. 2d 863 (Ct. App. 1995); S. Ct. Tex. Prof. Ethics Comm. Op. No. 496 (Nov. 1994).
7. Committee on Ethics of the Ga. Comm'n on Dispute Resolution, Advisory Op. 4 (Sept. 11, 1997).
8. S. Ct. Tex. Prof. Ethics Comm. Op. No. 496 (Nov. 1994).
9. Poly Software Int'l Inc. v. Su, 880 F. Supp. 1487 (D. Utah 1995).
10. Cho v. Superior Court, 45 Cal. Rptr. 2d 863 (Ct. App. 1995).

11. S. Ct. Tex. Prof. Ethics Comm. Op. No. 496 (Nov. 1994).
12. *E.g.*, There is an excellent and succinct discussion of arbitrators' disclosure duties in Robert A. Holzman, *What Is An Arbitrator's Duty of Disclosure?*, 3 JUST RESOLUTIONS, May 1998, at 1.
13. Menkel-Meadow, *supra* note 5; Hazard, *supra* note 5; Bruce Meyerson, *Mediation and the Practice of Law*, 3 DISPUTE RESOLUTION MAG., Vol. 3, No. 2, at 11 (1996).
14. Steinberg v. Virginia, Case No. CL 96000504-00(May 7, 1996), *app. pet. denied*, denied, Dkt. No. 990167 (Va. Sup. Ct. Apr. 19, 1997).
15. *See supra* note 6.
16. For a discussion of the Virginia case and its aftermath, see *When Mediation Becomes the Unauthorized Practice of Law*, ALTERNATIVES, July/Aug. 1997, at 2.
17. *See* Edward F. Sherman, *Court-Mandated ADR: What Form of Participation Should Be Required?*, 46 SMU L. REV. 2079 (1993).
18. *See, e.g.* Kimberley Kovach, *Good Faith in Mediations—Requested, Recommended or Required? A New Ethic*, 38 So. TEX. L. REV. 575 (1997); Sherman, *supra* note 17.
19. The Georgia Model Rules require that a mediation settlement agreement "be reduced to writing." The Model Rules do not address the relationship between enforceability and the writing requirement, and, in any event, that provision only applies in court programs where the particular model rule has been adopted.
20. For a full discussion of cases and statutes related to this issue, see R. Wayne Thorpe and Jennifer Boyens, *Mediation Settlement Agreements: Legal, Ethical and Practical Issues*, ALTERNATIVES, July/Aug. 1998 at 1.
21. *See id.*
22. 3 MOORE'S FEDERAL PRACTICE, 16.53 § [9][c][i] at 16-141, 16-142; *see also* MANUAL FOR COMPLEX LITIGATION (Third), §§ 23.11, 33.29.
23. *See* MOORE'S FEDERAL PRACTICE, *supra* note 22.



WHO'S WHERE

In Albany

The law firm of **Langley & Lee LLC** announces that **Paula Kay Jernigan** has joined the firm as an associate. The office is located at 412 West Tift Ave., Albany, GA 31702-1826; (912) 431-3036.

In Atlanta

Ballard & Still LLP is changing its name to include partner **Tamara M. Ayres**. The new **Ballard, Still & Ayres LLP** also has a new address. The office is located at 400 Colony Square, Suite 1018, 1201 Peachtree St., NE, Atlanta, GA 30361; (404) 873-1220.

Jones & Askew LLP announces the addition of six attorneys. **M. Scott Boone, John M. Briski, Chris J. Chan, Lisa C. Esevier, Craig C. Hemenway** and **Paul E. Knowlton** have joined the firm as associates. The office is located at 191 Peachtree St., NE, 37th Floor, Atlanta, GA 30303-1769; (404) 818-3700.

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p88

Kilpatrick Stockton LLP

announces that five partners and four associates from the nationally-known Atlanta construction law firm of **Smith, Currie & Hancock LLP** have joined the firm. The five partners are **Randy Hafer, Neal Sweeney, Bill Dorris, Robbie Poplin** and **Joe Henner**. The four associates are **Randy Edwards, Lee Mann, John Alden** and **Geoff Dendey**. The office is located at 1175 Peachtree St., NE, Suite 2800, Atlanta, GA 30309; (404) 815-6500.

The law firm of **Hurley & Meyer LLC** announces the addition of **Jeffrey W. Melcher**, formerly counsel to **Cofer, Beauchamp, Stradley & Hicks LLP**, as a partner. The firm will now be known as **Hurley, Meyer & Melcher LLC**. The office is located at 5775-B Glenridge Dr., Suite 410, Atlanta, GA 30328; (404) 257-0330 or (404) 843-0121.

Andy Rogers, formerly of **Finch, McCrainie, Brown, Hendrix & Sullivan**, and **Cliff Howard**, former Chief Assistant Solicitor General of DeKalb County, announce the formation of **Rogers & Howard LLC**. The office is located at 10 Park Place South, Suite 700, Atlanta, GA 30303; (404) 588-1331.

In Newnan

Christy Calbos has joined the office of the **State Court of Coweta County** as Assistant Solicitor-General. The address of the State Court of Coweta County is P.O. Box 663, Newnan, GA 30264; (770) 254-2646.

Williams J. Stemberger, formerly of **Knight, Stemberger & Gomez**, has opened his own practice, **Stemberger & Associates PC**. The office is located at 27 Jackson St., P.O. Box 1175, Newnan, GA 30264; (770) 253-0913.

In Savannah

Sarah H. Lamar and **Michael J. Thomerson** have joined the firm **Hunter, Maclean, Exley & Dunn PC**. The office is located at 200 East Saint Julian St., Savannah, GA 31401; (912) 236-0261.

In Toccoa

Adams, Clifton, Sanders & Smith PC announces that former member **Alton M. Adams** has left the firm to open his own office and **Marie K. Evans** has joined the firm as an associate. The firm is now **Clifton, Sanders & Smith PC**. The office is located at 311 S. Big A Road, Toccoa, GA 30577; (706) 886-7533.

In Alabama

Jackson R. Sharman III has been made a partner at **Lightfoot, Franklin & White LLC** in Birmingham. His practice focuses on environmental litigation and white collar criminal and civil defense.

In Washington, D.C.

Stephen F. Gertzman, formerly of **Sutherland, Asbill & Brennan LLP**, is now National Director of Federal Tax Accounting for **Ernst & Young LLP**. The office is located at 1225 Connecticut Avenue, NW, Washington, D.C. 20036; (202) 327-8832. ☐

SOUTHERN CIRCUIT BOARD

of Governors member Wayne Ellerbee organized a barbecue and meeting recently at the Quitman Country Club. State Bar President Bill Cannon and Executive Director Cliff Brashier were the speakers. More than 90 bar members from the Southern Judicial Circuit attended and heard Mr. Cannon discuss ways of improving the image of lawyers. Mr. Brashier told the members about the new bar center. **(photo 1, from left, Bill Cannon, Judge Kelly Turner, Debra Jenkins, Laverne Gaskins and Detria Carter).**



◆ Rob Reinhardt was the speaker for Civic Day at Charles Spencer Elementary School **(photo 2)**. After speaking on the early beginnings of our government, the children asked him questions about the law and the role of lawyers. Mr. Reinhardt has volunteered to be on the State Bar's



newly-formed speakers' bureau which provides attorney speakers to school and civic groups.

◆ The Tifton Judicial Circuit Bar Association and the Arts Experiment Station co-hosted a reception in honor of *Hands Across Georgia* — a celebration of fine Georgia Crafts and their makers. The reception, held at the Tifton Museum of Arts and Heritage, featured the art of State Bar member Wilby Coleman of Valdosta. As a steel sculptor, he fashions works of art from found articles and other interesting materials. Pictured are Bar member John Spurlin and daughter Ashley who is checking one of the sculptures **(photo 3)**.



◆ The Tift County Foundation for Educational Excellence — a citizens group of business leaders who contribute funds to public schools — have been meeting at the satellite office and wish to thank the State Bar for use of the facility. Three members of the Foundation are spouses of State Bar members: Helene Fleming, Susan Reinhardt and Jane Gray.

◆ The first PEP (Professionalism Enhancement Program) produced outside of Bar Headquarters was held for the Cartersville and Gordon County Bar Associations at the Cartersville Country Club on Oct. 2 **(photos 5-6)**. The seminar, which is

a service of the State Bar, provides 6 CLE hours including ethics and professionalism. Chief Justice Robert Benham **(photo 4)** welcomed the 38 bar members and the State Bar staff to his hometown of Cartersville. Presenters were Sally Winkler, Director of Chief Justice's Commission on Professionalism; William P. Smith, General Counsel; Cliff Brashier, Executive Director; Jenny Mittelman, Senior Assistant General Counsel; and Terri Olson, Director of Law Practice Management.

If you are interested in having the program for your bar association, please call the satellite office at (800) 330-0446. ☐



Give Access to Justice Some Byte

By Michael L. Monahan

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

ACCORDING TO MANY INFORMATION technology experts, our profession is, by default, moving toward a more inclusive model of service, a transformation energized by the availability of information at a few keystrokes — even legal information. Richard Susskind, an information society visionary, considers today's lawyering style out of touch with the wants and needs of the public and writes in *The Future of Law: Facing the Challenges of Information Technology*:

The information society will always need access to legal knowledge and expertise. What will not be sustainable is any continuation from the position in today's legal paradigm

whereby the legal profession enjoys an exclusive position as the interface between individuals and businesses on the one hand and access to the rule of law on the other. ... the legal profession of the future will be constituted of two tiers, not the solicitors and barristers of today, but the legal specialists and legal information engineers of the information society.

Technology advancements, particularly the Internet, bring great opportunities to increase the numbers of clients we lawyers can reach. On-line client interviews, information, advice, direct service, forms, pleadings, and research are all sound possibilities using today's electronic technology. Legal information Web sites, listservs, e-mail, "chat," video and more are available to us and to the public. While access to the Internet is not yet readily available to low-income households, we have the capacity to make the technology

user-friendly, to reach downward to accommodate Georgians struggling with a technology that can do much to improve their lives. According to the experts on Internet technology, not only can we reach larger audiences more efficiently, we can do so while tailoring the legal information and service to fit the needs of the individual client. Web technology appears poised to recognize each user's unique personal profile. The mechanics that formerly required the user to initiate the search then sift through the retrieved information now make informed determinations about you and your needs — even legal needs — and create an integrated and interactive package for you culled from a variety of resources on the worldwide web. For some insights into lawyering through technology, visit Richard Granat's Web site at: www.digital-lawyer.com.

Here's a sampling of what the future of equal access to justice may hold:

Legal service programs, pro bono programs, courts and volunteers will link together in a holistic approach to meeting legal needs. For a view of a few legal services Web sites under development that provide forms, educational materials and links to courts and other agencies, take a look at: www.law.emory.edu/PI/ALA (Atlanta Legal Aid Society—the first legal services program to develop a Web site); www.fcny.org/dv (Georgia Legal Services on-line domestic violence project, a model nationally) and

Arthur Anthony
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p71

www.ptla.org (Pinetree Legal Assistance).

State and local bar associations will develop Web sites for research, information and linkages to other statewide resources. The State Bar of Georgia's Web site, www.gabar.org provides an extensive array of research links as well as links to professionalism and pro bono resources. The Michigan State Bar Foundation (www.msfb.org) provides an indepth view into the workings of the Bar, the Bar Foundation and the planning process for improving the legal system.

Lawyers will help the low-income public in those circumstances where intensive lawyering is unnecessary, where a form and advice is enough and the quality of the legal product can be monitored: www.abanet.org/lpm/newsletters/wp/Su97Laur.html and www.maricopa.gov/supcrt/ssc/sschome.html. The Northwest Justice Project offers an online library on issues commonly affecting low-income households. To view the library shelves on topics (and related links) such as senior issues, taxes and farmworker law, point your browser to: www.nwjustice.org.

Lawyers will "e-travel" to the client. "Points of presence" — or "POPs" — involve computer hook-ups, often with audio/video capabilities, at accessible locations in communities, such as libraries, domestic violence shelters and courthouses. Lawyers can use these to provide important and useful service to clients who otherwise could not travel to meet a lawyer who could handle their case. There are safeguards built into these points of presence that protect client confidentiality.

In an experimental program in Florida to deliver legal services to low-income communities far from a legal services office, the computer

software captures a photograph of the client which is then stored in both the computer and paper file for comparison purposes at later Internet video-conferencing interviews. Forms and pleadings can be printed out at the distant location for the client to sign and file with the assistance of a lawyer or, in some circumstances, the client can file the documents. In today's environment, this POP model is not even considered a complex use of technology.

Specially focused Web sites that offer basic forms and courthouse information are also on the horizon. Access to these Web sites can be restricted to clients who have a relationship with a lawyer. If a lawyer can't represent a low-income client, she could, after an interview and assessment of the legal problem, provide the client an access code to one of these specialized Web sites—let's say a child support enforcement site or a site that helps a person print out a petition for a temporary protective order. Take a look at the Web site of the People's Law Library of Maryland at: www.peoples-law.com. For information on what state courts around the country are doing to provide more information to users, visit: www.ncsc.dni.us.

Tomorrow's lawyer will employ an array of technological tools in her everyday practice that offer an opportunity to reach larger audiences while providing advice

and services that are individualized. Granted, change is slow for a profession such as ours that is so steeped in tradition. But we do regard the future. Today's information technology represents a challenge to the way we provide our services, especially in how we will provide access to the courts for low-income Georgians. We lawyers need to lead in managing the possibilities. ☒

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

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98 p65

Individual Rights and Entertainment & Sports Sections Team Up for Annual Halloween Party

ON OCTOBER 29, SECTION members attended a jointly sponsored Halloween party at the Lynne Farris Gallery in the lobby of the Hurt Building in downtown Atlanta. Pictured below are Gerry Weber, Megan Gideon and Johnny Mason — in costume of course.

Entertainment & Sports Section members have just returned from their annual three-state seminar — this year it was held in Acapulco. On Dec. 2, the section held an hour-long CLE luncheon with attorney/panelists Lin Wood of Wood & Grant and G. Watson Bryant Jr.—attorneys for Richard Jewell.

Legal Economics Law Section

Bruce P. Cohen, Chair of the Legal Economics Section, is spearheading a revitalization of that group. Many projects are being planned. A directory and member questionnaire were recently distributed. On Nov. 17, a reception was held at the firm of Gambrell & Stolz, giving section members an opportunity to meet each other.



(l-r) Gerry Weber, Megan Gideon and Johnny Mason celebrate Halloween.

Antitrust Law Section

The Antitrust Section cosponsored a seminar titled, “Today’s Antitrust Issues For Business Practitioners.” The group is chaired by John T. Orr.

Holiday Parties Planned

Many State Bar sections annually plan holiday parties. This year Computer and Intellectual Property Law Sections co-sponsored their holiday party Dec. 3 at the Houston Mill House in Atlanta.

Workers’ Compensation Donates to Kids’ Chance

This section recently donated \$5,000 to Kids’ Chance, a scholarship fund for children of injured workers founded by the Section. To date the section has contributed more than \$250,000 to this fund. ☒

ad from jennifer

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.

Barton, B. Hanford	Admitted 1950	Hughes Jr., Thomas J.	Admitted 1974
Augusta	Died January 1998	Atlanta	Died September 1998
Conrad Jr., Herbert Clifton	Admitted 1975	Kohler Jr., Ben	Admitted 1948
Canton	Died September 1998	Atlanta	Died October 1998
Cropp, Robert James	Admitted 1979	Magis, Thomas H.	Admitted 1973
Atlanta	Died October 1998	Atlanta	Died September 1998
Deloach, Judge Harry R.	Admitted 1948	Prince Jr., E. Carl	Admitted 1972
Claxton	Died December 1996	Carrollton	Died 1998
Gemmette, Paul R.	Admitted 1973	Sebert, Kevin Andrew	Admitted 1996
Columbus	Died June 1998	Atlanta	Died October 1998
Green, Catherine Smith	Admitted 1981	Smith, Grady F.	Admitted 1955
Pflugerville, TX	Died October 1998	Atlanta	Died October 1998
Henritze Jr., Walter M.	Admitted 1962	Williams Jr., Wheat	Admitted 1949
Atlanta	Died October 1998	Decatur	Died October 1998

The Membership Department regrets an error which appeared in the In Memoriam section of the last issue of the Journal. Eugene Thomas Branch Jr. was listed as deceased. The listing should have read: Eugene Thomas Branch, Admitted 1947, Died August 1998. We apologize to Eugene "Tom" Branch Jr. for this error and send condolences for the loss of his father.

LAWYER DISCIPLINE

Name	City	Discipline	Date of Supreme Court Order
Davidson, Darryl Giles	Florida	disbarred	Oct. 5, 1998
Freeman, Ronald J.	Atlanta	90-day suspension	Oct. 13, 1998
Goldberg, Harvey N.	Atlanta	vol. surrender of license	Sept. 21, 1998
Heard, Constance Pinson	Stone Mtn.	6-month suspension w/conditions	Oct. 5, 1998
Horn, Edgar Bridges	Columbus	disbarred	Sept. 21, 1998
Moore, Theron M.	Norcross	disbarred	Oct. 5, 1998
Morgan, Michael L.	Marietta	suspended with conditions	Oct. 5, 1998
Thompson, James E.	Atlanta	90-day suspension	Oct. 26, 1998
Utey, Margie A.	Atlanta	disbarred	Oct. 26, 1998
Washington, Wallace D.	Jonesboro	disbarred	Sept. 21, 1998
Young, Ronald W.	Brunswick	reinstated	Sept. 29, 1998
Zaleon, Ruth A.	Atlanta	suspended	Sept. 21, 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.

EMORY UNIVERSITY HAS presented **Judge Anthony A. Alaimo** with its highest alumni award, the Emory Medal. This award is given to six outstanding alumni in recognition of their distinguished service to the university or the community at large. In his law career, Judge Alaimo has served on the federal bench, spent 14 years as chief judge of the Southern District of Georgia, was appointed in 1990 to the Judicial Conference of the United States and is currently a senior federal judge for the Southern District of Georgia. Also active in civic affairs, Judge Alaimo chaired the Board of Directors of the Coastal

Georgia Regional Development Center and obtained many economic development grants crucial to the increasing prosperity of the region. For his outstanding contributions in law and public service, Judge Alaimo also received Emory Law School's Distinguished Alumnus Award in 1993.

The Atlanta Legal Aid Society announces that staff attorney **Karen E. Brown** has been selected as the 1998-99 John Heinz Senate Fellow. She will take a one year leave of absence which she will spend in Washington assisting ranking Democratic Senator Christopher Dodd (Connecticut) in representing the interests of low income and senior homeowners. After completing the Heinz Fellowship, Ms. Brown plans to return to the Atlanta Legal Aid Society's Home Defense Program.

Lawrie E. Demorest, a medical malpractice partner with Alston & Bird LLP, has been elected Co-chair of the Board of Governors of the Human Rights Campaign (HRC). HRC is the largest lesbian and gay political organization in the United States, with 250,000 gay and non-gay members nationwide. As Co-Chair, she will work with the 113 board members to plan and implement fundraising, volunteer and membership activities nationwide.

Scott M. Hobby, a partner in the business practice group and head of the technology practice team at the law firm of Hunton & Williams, has been elected to the Board of Directors of SciTrek, the science and technology museum of Atlanta.

Kilpatrick Stockton attorney **Stephen F. Humphreys** recently

attended the Opening of the Courts Ceremonies (Rentree) in both Montreal and Quebec, Canada. Humphreys was invited by the Canadian, Montreal and Quebec Bar Associations as the sole representative for the United States and the American Bar Association. The Rentree represents the premier gathering of Canadian attorneys from the French-speaking provinces along with outstanding attorneys from French-speaking countries worldwide. Mr. Humphreys speaks French fluently and has represented the ABA twice in Paris at La Rentree Solenelle, a ceremony similar to Canada's Opening of the Courts.

The U.S. district judges for the Northern District of Georgia have selected **Janet Fuller King** as the new U.S. Magistrate Judge for the district. Judge King has been employed with the U.S. Attorney's Office in Atlanta since 1980. Her 18-year career has been marked with much recognition and numerous commendations, such as the 1996 Director's Award for Superior Performance, the U.S. Department of Justice Special Achievement Award and the U.S. Department of Justice Special Commendation for Outstanding Service. She has also received awards and recognition from various law enforcement agencies.

Spencer Lawton Jr., Chatham County's District Attorney, has been chosen as a recipient of the National Organization for Victim Assistance's Morton Bard Allied Professional Award. The award was given in recognition of his participation in the local and national programs of the organization. ☐

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Summary of Recently Published Trials

Chatham State Ct.	Medical Malpractice - Fractured Arm - Treatment	\$350,000
Chatham Superior Ct.	Infliction of Emotional Distress - Removing Body from Plot	\$67,000
Clayton State Ct.	Falldown - Apartment Stairway - No Handrail	Defense Verdict
Cobb State Ct.	Truck/Pedestrian Accident - Minor Standing Near Auto	\$695,000
Cobb State Ct.	Falldown - Restaurant - Black Ice on Sidewalk	\$120,000
Cobb Superior Ct.	Partnership Agreement - Operation of Business - Fraud	\$160,000
DeKalb State Ct.	Auto/Tractor-Trailer Accident - Following Too Closely	\$850,000
DeKalb State Ct.	Auto Accident - Stalled Vehicle - Uninsured Motorist	\$35,000
Floyd U.S. District Ct.	Employment - Sex Harassment - Hostile Work Environment	\$20,240
Fulton State Ct.	FELA - Switch Maintenance - Foreseeable Injury	\$400,000
Fulton State Ct.	Auto/Truck Accident - Exiting Ramp - Right-of-Way	\$325,000
Fulton State Ct.	Contract - Employment - Profit Sharing	\$8,500
Fulton Superior Ct.	Auto Accident - Loss of Control - Speeding	\$175,000
Fulton Superior Ct.	Real Estate - Construction of Residence - Visible Defects	\$210,000
Fulton Superior Ct.	Premises Liability - Store - Boxes of Fans Fall on Customer	\$725,000
Fulton Superior Ct.	Assault & Battery - Shopping Center - Security	\$65,000
Fulton Superior Ct.	Auto/Bicycle Accident - Head-On - Right-of-Way	\$13,000
Fulton Superior Ct.	False Arrest - Hotel Patrons - Reservations	Defense Verdict
Fulton U.S. District Ct.	Employment - Constructive Discharge - Retaliation	Defense Verdict
Fulton U.S. District Ct.	Employment - Wrongful Discharge - Retaliation	\$50,000
Fulton U.S. District Ct.	Shooting - Police - Civil Rights	Defense Verdict
Fulton U.S. District Ct.	Employment - Americans With Disabilities Act	Defense Verdict
Fulton U.S. District Ct.	Employment - Race Discrimination	\$2,053,000
Gwinnett Superior Ct.	Assault & Battery - Road Rage	\$7,500
Gwinnett Superior Ct.	Fraud - Sale of Used Truck - Odometer Mileage	\$36,128
Gwinnett Superior Ct.	Worksite Accident - Pipe Falls Through Office Ceiling	\$2,805
Henry Superior Ct.	Falldown - Restaurant - Ice in Parking Lot	\$118,000
Muscogee Superior Ct.	Construction Site - Backhoe/Pedestrian Accident	\$1,000,000
Richmond Superior Ct.	Collection - Loan to Attorney - Counterclaim	\$325,102
Thomas Superior Ct.	Falldown - Worker Riding in Back of Dump Truck	\$1,514,982

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Plaintiff Employee Recovers \$185,000 from Her Employer for Malicious Prosecution

Plaintiff was a bookkeeper for Defendant. Defendant had plaintiff arrested and incarcerated for two hours for stealing rental money. The case was not prosecuted due to insufficient evidence. (*Clayton v. Teal*; Cobb County Superior Court)

♦ ♦ ♦

Teenager Drowns While Playing in Municipal Water System and City Settles for \$750,000

Plaintiff's decedent and friends had removed an unsecured manhole cover several months earlier and had been playing in defendant city's water pipes. The system was activated and decedent drowned. (*Pierce v. Toccoa*; Habersham County Superior Court)

♦ ♦ ♦

Plaintiff Locomotive Engineer Wins \$1,000,000 in FELA Action

Plaintiff was adjusting his seat in his locomotive when the seat jammed and plaintiff sustained aggravation of a preexisting bone spur which resulted in cervical surgery and permanent disability. (*Bentley v. Georgia Railroad*; Floyd County U.S. District Court)

♦ ♦ ♦

Hot Asphalt Burns Roofer but Seller of Defective Hose not Liable

Plaintiff roofer was using a flex hose that was allegedly manufactured by defendant. The hose split and the asphalt burned plaintiff. Jury returned a defense verdict as to seller and the manufacturer was being pursued for default. (*Hill v. Reeves Roofing*; Coweta County U.S. District Court)

♦ ♦ ♦

Mastoidectomy Ends with Severed Facial Nerve and \$617,000 Verdict

Defendant otolaryngologist had performed only six of these procedures when he allegedly became disoriented while attempting to locate anatomical landmarks. (*Steinberg v. DeJak*; Fulton County State Court)

Supreme Court Issues Formal Advisory Opinion

During the month of October 1998, the Supreme Court of Georgia issued a formal advisory opinion that was proposed by the Formal Advisory Opinion Board. Following is the text of the opinion issued by the court.

**STATE BAR OF GEORGIA
ISSUED BY THE SUPREME
COURT OF GEORGIA ON
OCTOBER 29, 1998
FORMAL ADVISORY OPINION
NO. 98-4 (Proposed Formal
Advisory Opinion No. 97-R4)**

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QUESTION PRESENTED:

Is it ethically proper for a lawyer to represent a criminal defendant when a co-defendant in the same criminal prosecution is represented by a second attorney who is listed on letterhead as "of counsel" to the same law firm?

SUMMARY ANSWER:

Because an attorney who is held out to the public as "of counsel" should have a close, regular, personal relationship with the affiliated firm, the standards of conduct applicable to multiple representations by partners and associates of law firms, should also apply to "of counsel" attorneys. Accordingly, when an "of counsel" attorney would be required to decline or withdraw from multiple representations under Standards 35, 36 and 37, then under Standard 38, no partner, associate or other "of counsel" attorney of the principal firm may accept or continue such employment.

OPINION:

I. USE OF THE TERM "OF COUNSEL" ON MATERIALS INTENDED FOR PUBLIC DISTRIBUTION.

The use of the term "of counsel" to denote relationships between attorneys and law firms has increased in recent years. Traditionally the term was used to designate semi-retired lawyers who desired to maintain a regular association with a law firm for which they were previously a full-time attorney. Today, the term "of counsel" is used to describe a wide range of associations and relationships including lateral hires

or attorneys who are in-between associate and partnership classifications. While the primary purpose of this opinion is not to limit or define the terms of such relationships, the Board does believe that some clarification is necessary to protect members of the public who may rely upon the "of counsel" designation in selecting legal representation.

Although the Georgia Code of Professional Responsibility does not define the term "of counsel," the American Bar Association has issued a formal opinion which describes the core characteristics of the term as follows:

... A close, regular, personal relationship; but a relationship which is neither that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term; nor, on the other hand, the status ordinarily conveyed by the term 'associate', which is to say a junior non-partner lawyer, regularly employed by the firm.

(Emphasis added). ABA Formal Advisory Opinion 90-357 (1990). The ABA also continues to adhere to aspects of its earlier opinion which prohibited the use of the term "of counsel" to designate the following relationships: (1) a relationship involving only a single case, (2) a relationship of forwarder or receiver of legal business, (3) a relationship involving only occasional collaborative efforts, and (4) relationship of an outside consultant. See ABA Formal Opinion 90-357 (1990) (reaffirming in part ABA Formal Opinion 330 (1972)). Other jurisdictions which

have considered this issue have adhered to the ABA's description of the "of counsel" relationships. See Florida Professional Ethics Committee Opinion Nos. 94-7 (1995); State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1993-129 and the New York State Bar Association Committee on Professional Ethics Opinion No. 262 (1972).

The Board is of the opinion that the use of the term "of counsel" on letterhead, placards, advertisements and other materials intended for public distribution should denote more than casual contact such as mere office-sharing arrangements and that requiring a close, regular, personal relationship between the "of counsel" attorney and the principal firm is in accordance with the reasonable expectations of the consuming public. Requiring attorneys who are held out to the public as "of counsel" to have a close, regular, personal relationship with the principal firm is also in keeping with well-established standards of conduct requiring lawyers to be scrupulous in the representation of their professional status and prohibiting attorneys from practicing under trade names which are false, fraudulent, deceptive or that would tend to mislead laypersons as to the identity of lawyers actually practicing in the firm. See Standards of Conduct 8 and 9 and EC 2-11 and EC 2-13.

II. CONFLICTS ANALYSIS FOR "OF COUNSEL" RELATIONSHIPS.

The issue as to whether or not a member of a law firm may represent a defendant who potentially has an adverse interest to a co-defendant in the same criminal prosecution and who is simultaneously being represented by an "of counsel" attorney to the same firm must be analyzed in light of the requirement that such an

"of counsel" relationship be "close, regular and personal". The Board believes that the prudent and ethical course is for the attorneys involved to apply the same standards in analyzing this potential for conflict of representation as would be applied in more traditional relationships existing between associates and partners with other attorneys in their law firms.

Under these long-standing rules, an attorney is prohibited from continuing multiple employment if the exercise of his independent professional judgment on behalf of a client will be, or is likely to be, adversely affected by his representation of another client. See Standards of Conduct 35 and 36 and DR 5-105(B). If the lawyer is required to decline or withdraw from employment due to the reasons stated in Standards 35 and 36, then no partner or associate of his firm may accept or continue such employment. See Standard of Conduct 38 and DR 5-105(D). The standards do provide for an exception if it is obvious that the lawyer can adequately represent the interest of each of the clients and each client consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's professional judgment on behalf of each client. See Standard of Conduct 37 and DR 5-105(C).

In addition to associates and partners of law firms, the Board believes that these are sound principles for "of counsel" attorneys to follow as well. This is especially true, given the requirement that attorneys listed as "of counsel" on letterhead and other materials distributed to the public have a close, regular, personal, relationship with the principal firm. Accordingly, when an "of counsel" attorney would be required to decline or withdraw from multiple representations under

Standards 35, 36 and 37, then, under Standard 38, no partner, associate or other "of counsel" attorney of the principal firm may accept or continue such employment. This opinion is consistent with those reached by other jurisdictions which have addressed this issue. See State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1993-129; Florida Professional Ethics Committee, Opinion 94-7 (1995); and Opinion 72-41 (1973). ☐

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Proposal to Amend Rules and Regulations

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

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

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

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT
STATE OF GEORGIA

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

MOTION TO AMEND 98-2

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

The State Bar of Georgia, pursuant to authorization and direction of its Board of Governors in regular meetings held on March 28, 1998 and November 7, 1998, and upon concurrence of its Executive Committee and Committee on Organization of the State Bar, presents to the Court this Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia as set forth in an Order of this

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

I. Amendments to Part IV, Discipline, Chapter 2 (Disciplinary Proceedings)

It is proposed that Part IV, Discipline, Chapter 2 (Disciplinary Proceedings), Rules 4-203 and 4-221(d) be amended by deleting the stricken portions and inserting the underlined phrases as follows:

Rule 4-203. Powers and Duties.

(a) In accordance with these rules, the Investigative Panel shall have the following powers and duties:

- (1) To receive and evaluate any and all written grievances against members of the State Bar and to frame such charges and grievances as shall conform to the requirements of these rules. A copy of any grievance serving as the basis for investigation or proceedings before the Panel shall be furnished to the respondent by the procedures set forth in Rule 4-204.2;
- (2) To initiate grievances on its own motion, to require additional information from a complainant, where appropriate, and to dismiss and reject such grievances as to it may seem unjustified, frivolous, or patently unfounded; ~~provided, however,~~ that the rejection of a grievance by the Investigative Panel shall not deprive the complaining party of any right of action he or she might otherwise have at law or in equity against the respondent;
- (3) To issue letters of instruction when dismissing a grievance;
- (4) To delegate the duties of the Panel enumerated in subparagraphs (1),

(2), (11) and (12) hereof to the chairperson of the Panel or chairperson of any subcommittee of the Panel or such other members as the Panel or its chairperson may designate subject to review and approval by the Investigative Panel or subcommittee of the Panel;

- (5) To conduct probable cause investigations, to collect evidence and information concerning grievances, to hold hearings where provided for in these rules, and to certify grievances to the Supreme Court for hearings by special masters as hereinafter provided;
- (6) ~~to docket petitions for reinstatement for referral to a special master, and~~ To pass upon petitions for protection of the clients of deceased, disappearing or incapacitated members of the State Bar;
- (7) To adopt forms for formal complaints, subpoenas, notices, ~~applications for reinstatement~~ and any other written instruments necessary or desirable under these rules;
- (8) To prescribe its own rules of conduct and procedure;
- (9) To receive, ~~to~~ investigate, and to collect evidence and information; and to review and ~~to~~ accept or reject such Petitions for Voluntary Discipline which request the imposition of confidential discipline and are filed with the Investigative Panel prior to the time of issuance of a formal complaint by Bar counsel; ~~provided, however, that~~ Each such petition shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these rules sufficient to authorize the imposition of discipline. Bar counsel shall, upon filing of such petition, file with the Panel its recommendations as to acceptance or rejection of the petition by the Panel, giving the reasons

therefor, and shall serve a copy of its recommendation upon the respondent presenting such petition;

- (10) ~~T~~to sign and enforce, as hereinafter described, subpoenas for the appearance of persons and for the production of things and records at investigations and hearings;
- (11) ~~T~~to extend the time within which a formal complaint may be filed;
- (12) ~~T~~to issue letters of formal admonition and Investigative Panel Reprimands as hereinafter provided;
- (13) ~~T~~to enter a Notice of Discipline providing that unless the respondent affirmatively rejects the notice, the respondent shall be sanctioned as ordered by the Investigative Panel;
- (14) ~~T~~to use the investigators, auditors, and/or staff of the Office of the General Counsel in performing its duties.

(b) In accordance with these rules, the Review Panel or any subcommittee of the Panel shall have the following powers and duties:

- (1) ~~T~~to receive reports from special masters, and to recommend to the Supreme Court the imposition of punishment and discipline, ~~and to pass upon petitions for reinstatement, subject to judicial review by the Supreme Court as hereinafter provided;~~
- (2) ~~T~~to adopt forms for subpoenas, notices, and any other written instruments necessary or desirable under these rules;
- (3) ~~T~~to prescribe its own rules of conduct and procedure;
- (4) ~~This subparagraph is reserved. (Reserved).~~
- (5) ~~to, t~~Through the action of its chairperson or his or her designee and upon good cause shown, to allow a late filing of the respondent's answer where there has been no final selection of a special master within thirty days of service of the formal complaint upon the respondent;
- (6) ~~to, t~~Through the action of its chairperson or his or her designee, to receive and pass upon challenges and objections to special masters.

(The double underlined section of Rule 4-221(d)(5)(x) indicates a proposed rule change currently pending with the Court).

Rule 4-221

(d) Confidentiality of Investigations and Proceedings.

- (1) All investigations and proceedings provided for herein prior to a filing in the Supreme Court shall be confidential unless the respondent otherwise elects or as hereinafter provided in this rule.
- (2) After a proceeding under these rules is filed with the Supreme Court, all evidentiary and motions hearings shall be open to the public and all reports rendered shall be public documents.
- (3) Any person who is connected with the disciplinary proceedings in any way and who makes a publication or revelation which is not specifically permitted under these rules prior to a filing in the Supreme Court concerning such proceedings shall be subject to rule for contempt by the Supreme Court of Georgia.
- (4) The Office of the General Counsel of the State Bar of Georgia or the Investigative Panel of the State Disciplinary Board may reveal information which would otherwise be confidential under this rule under the following circumstances so long as the recipient is admonished that the recipient may not disclose the information except as necessary to complete the tasks for which the information was provided:
- (i) In the event of the charge or charges of wrongful conduct against any member of the State Disciplinary Board or any person who is otherwise connected with the disciplinary proceeding in any way, either Panel of the Board or its Chairperson or his or her designee, may authorize the use of information concerning disciplinary investigations or proceedings to aid in the defense against the charge or charges.
- (ii) In the event that the Office of the General Counsel receives information which suggests criminal activity, such information may be revealed to

the appropriate criminal prosecutor.

(iii) In the event of subsequent disciplinary proceedings against a lawyer, the Office of the General Counsel may, in aggravation of discipline in the pending disciplinary case, reveal the imposition of confidential discipline under Rules 4-205 to 4-208 and facts underlying the imposition of discipline.

(iv) A complainant or lawyer representing the complainant may be notified of the status and/or disposition of the complaint.

- (5) The Office of General Counsel may reveal confidential information to the following persons if it appears that the information may assist them in the discharge of their duties so long as the recipient is admonished that the recipient may not disclose the information except as necessary to complete the tasks for which the information was provided:
- (i) the Committee on the Arbitration of Attorney Fee Disputes;
- (ii) the Trustees of the Clients' Security Fund;
- (iii) the Judicial Nominating Commission;
- (iv) the Lawyer Assistance Program;
- (v) the Board to Determine Fitness of Bar Applicants;
- (vi) the Judicial Qualifications Commission;
- (vii) the Executive Committee with the specific approval of the following representatives of the Investigative Panel of the State Disciplinary Board: the chairperson, the vice-chairperson and a third representative designated by the chairperson; ~~and~~
- (viii) the Formal Advisory Opinion Board; ~~and~~
- (ix) the Consumer Assistance Program;
- (x) the General Counsel Overview Committee; and
- (xi) an office or committee charged with discipline appointed by the United States Circuit or District Court or the highest court of any state, District of Columbia, commonwealth or possession of the United States.

- (6) Any information used by the Office of the General Counsel in a proceeding under Rule 4-108 or in a proceeding to obtain a Receiver to administer the files of a member of the bar, will not be confidential under this rule.
- (7) The Office of General Counsel may reveal confidential information when required by law or court order.
- (8) The authority or discretion to reveal confidential information under this rule shall not constitute a waiver of any evidentiary, statutory or other privilege which may be asserted by the State Bar or the State Disciplinary Board under Bar Rules or applicable law.
- (9) Nothing in this rule shall prohibit the Office of the General Counsel or the Investigative Panel from interviewing potential witnesses or placing the Notice of Investigation out for service by sheriff or other authorized person.

II. Amendments to Part IV, Discipline, Chapter 3 (Reinstatement)

It is also proposed that Part IV, Discipline, Chapter 3 (Reinstatement), Rules 4-301 et seq. be amended by deleting the stricken portions and inserting the underlined phrases as follows:

CHAPTER 3

This Chapter is Reserved **REINSTATEMENT**

Rule 4-301. Petition for Reinstatement.

(a) A petition for reinstatement under these rules shall be in writing, verified by petitioner, and shall be addressed to the Investigative Panel of the State Disciplinary Board together with eighteen copies thereof, one for each member of the Panel and one for the General Counsel of the State Bar. The petition shall set forth the full name, age, residence and mailing address of the petitioner; the offense or misconduct for which he was disbarred or suspended; a concise statement of the facts claimed to justify reinstatement; the name and mailing address of the complainant in the original disciplinary proceedings, if that proceeding was conducted under these rules; and such other information

as may be required from time to time by the Panel.

(b) The Investigative Panel shall assign the petition a docket number and promptly mail a copy of the petition to the last known address of the complainant in the original disciplinary proceeding if that proceeding was conducted under these rules; provided, however, that a petition for reinstatement shall not be considered by either Panel of the State Disciplinary Board unless the signature requirement, set out in paragraph (c) herein, is met within four months of the docketing of the petition.

(c) Before a petition for reinstatement may be considered by the Investigative Panel, the following signatures must be obtained approving the petition:

- (i) if the respondent was practicing law in the State of Georgia at the time of the infraction, two-thirds of the presently active members of the State Bar residing in those counties which comprise the circuit where the disciplined respondent was practicing at the time of the infraction giving rise to the filing of the formal complaint, or one hundred of such attorneys, whichever is the lesser, or
- (ii) if the respondent was not practicing law in the State of Georgia at the time of the infraction, one hundred active members of the State Bar of Georgia.

Provided, however, that the written approval shall not accompany the petition but shall be mailed by the individual member of the Bar to the Clerk of the Supreme Court. The Clerk shall keep the names confidential and certify to the Investigative Panel whether the proper number of lawyers in the circuit have or have not given approval.

(d) A petitioner for reinstatement shall proceed under the rules in effect at the time of the filing of the petition and the petition shall be considered under the rules then in effect without respect to the rules as they may have existed at the time of disbarment.

This rule is reserved.

Rule 4-302. Hearing.

The Investigative Panel shall cause

an investigation to be conducted promptly, and the petition shall be assigned for hearing within a reasonable time either before the Investigative Panel or before such special master as may be designated by the Supreme Court. The hearing and further proceedings shall be in general accordance with the provisions of these rules applicable to disciplinary proceedings. The Review Panel shall recommend to the Board to Determine Fitness of Bar Applicants whether the petition should be granted or denied. Such recommendation shall be binding on the Board to Determine Fitness of Bar Applicants except in those instances where, after an investigation, clear and convincing evidence is adduced which indicates such recommendation should not be accepted. In any event, the provisions of the Rules Governing Admission to the Practice of Law, Part A, with respect to investigations, conferences, hearing and appeals shall be complied with. Provided, however, that in cases where the Review Panel has recommended reinstatement and the Board to Determine Fitness of Bar Applicants has concurred, the petition must be submitted to the Supreme Court for review. The petitioner for reinstatement may not be finally certified as fit to practice law unless the petition is approved by the Supreme Court.

This rule is reserved.

Rule 4-303. Filing Fee.

The State Disciplinary Board shall have the power, in its discretion, to require a reasonable filing fee for any petition for reinstatement to cover the cost of conducting an investigation and to defray other expenses to be incurred by reason thereof.

This rule is reserved.

Rule 4-304. Minimum Time.

No petition for reinstatement shall be filed within three years following disbarment, indefinite suspension or voluntary surrender of license to practice law for disciplinary reasons, or within two years following an adverse decision upon a previous petition for reinstatement filed by the same person.

This rule is reserved.

Rule 4-305. Examination for Reinstatement:

After the petitioner for reinstatement has been certified as fit to practice law by the Board to Determine Fitness of Bar Applicants and after the petition is approved by the Supreme Court, the petitioner shall not resume the practice of law until the petitioner has satisfied all of the requirements of Part B, Rules Governing Admission to the Practice of Law, including taking and passing the Georgia Bar Examination and achieving a scale score of a 75 on the Multi-State Professional Responsibility Examination.

This rule is reserved.

Rule 4-306. Restitution to Clients' Security Fund and Compliance with Rules:

No petition for reinstatement shall be considered until the petitioner has made restitution to the Clients' Security Fund for amounts paid by the fund as a result of the petitioner's conduct and unless the petitioner can establish that he or she complied fully with the requirement of Rule 4-219(c).

This rule is reserved.

III. Amendments to Part VI, Fee Arbitration

It is further proposed that Part VI, Fee Arbitration, Chapter 1, Rule 6-102 and 6-103(Committee on Resolution of Fee Disputes) be amended by deleting the stricken portions and by inserting the underlined phrases as follows:

Rule 6-102. Membership.

~~The Committee shall consist of three lawyer members and two public members who are not lawyers. The three lawyer members shall be appointed by the President of the State Bar, and the two public members shall be appointed by the Supreme Court of Georgia.~~

(a) The Committee shall be composed of such number of members as determined from time to time by the Board of Governors as necessary to perform its task. There shall be at least four public members appointed by the President.

(b) The Committee is authorized to organize itself into as many subcommittees as it may deem necessary. However,

each subcommittee shall include at least two public members.

Rule 6-103. Terms.

~~Initially, two members of the Committee, including one of the public members, shall be appointed for a period of three years; two members, including the remaining public members, for a period of two years; and one member for a period of one year. As each member's term of office on the Committee expires, his or her successor shall be appointed for a period of three years. The President of the State Bar shall appoint the Chairperson of the Committee each year from among the members. Vacancies in unexpired terms shall be filled by their respective appointing authorities.~~

All appointments shall be for staggered terms of three years so that one-third of the members of each committee shall retire at the end of each year. Initially, Committee members may be appointed for one, two, or three year terms to achieve the staggered rotation of Committee members.

IV. Amendments to Part X, Client Security Fund

It is further proposed that Part X, Client Security Fund, Rule 10-109 and 10-111, be amended by deleting the stricken portions and by inserting the underlined phrases as follows:

Rule 10-109. Restitution and Subrogation

(a) A lawyer whose dishonest conduct results in reimbursement to a claimant shall be liable to the Fund for restitution; ~~and~~ the Board may bring such action as it deems advisable to enforce such obligation.

(b) As a condition of reimbursement, a claimant shall be required to provide the Fund with a pro tanto transfer of the claimant's rights against the lawyer, the lawyer's legal representative, estate or assigns, and ~~of~~ the claimant's rights against any third party or entity who may be liable for the claimant's loss.

(c) No petition for reinstatement to practice law in the state of Georgia shall be granted until the petitioner has made restitution to the Clients' Security Fund for all amounts paid by the Fund as a

result of the petitioner's conduct plus accrued interest ~~as determined by a special master in accordance with the reinstatement procedures found in Part IV of these Rules.~~

Rule 10-111. Confidentiality

(a) Claims, proceedings and reports involving claims for reimbursement are confidential until the Board authorizes reimbursement to the claimant, except as provided below. After payment of the reimbursement, the Board may publicize the nature of the claim, the amount of reimbursement, and the name of the lawyer. The name and the address of the claimant shall not be publicized by the Board unless specific permission has been granted by the claimant.

(b) This Rule shall not be construed to deny access to relevant information by professional discipline agencies or other law enforcement authorities as the Board shall authorize, or the release of statistical information which does not disclose the identity of the lawyer or the parties.

(c) In the event a lawyer whose conduct resulted in the payment of a claim files a petition for reinstatement to the practice of law, the Board shall release all information pertaining to the claim to the Board to Determine Fitness of Bar Applicants as may be pertinent to the reinstatement proceeding.

Counsel for Movant:

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

Romaine L. White
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(404) 527-8720

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Notice of and Opportunity for Comment on Proposed Amendments to the Rules of the 11th Circuit U.S. Court of Appeals

Pursuant to the 28 U.S.C. §2071(b), notice is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit (Rules).

Some of the proposed amendments to the Rules would:

- ♦ provide that briefing schedules would begin on the date the court reporter files the transcript or, if no transcript is to be prepared, on the date the appeal is docketed by the court of appeals;
- ♦ modify procedures for ordering the transcript;
- ♦ reduce the time for filing a Civil Appeal Statement to 10 days;
- ♦ eliminate, in criminal appeals only, the requirement that district courts apply indexing tabs to documents in the record on appeal;
- ♦ provide that, in the absence of a notice of appeal, a district court should construe an application for a certificate of appealability as also a notice of appeal.

A copy of the proposed amendments may be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, GA 30303; (404) 335-6100. The proposed amendments may also be obtained from the Eleventh Circuit's Internet Web site at www.ca11.uscourts.gov. Comments on the proposed amendments may be submitted in writing to the Clerk at the address above by Jan. 7, 1999.

Notice of Additional Amendments to the Rules of the 11th Circuit U.S. Court of Appeals

Following receipt and consideration of comments to the proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit, the court has determined to make the following additional revisions to the Rules as set forth below. Pursuant to 28 U.S.C. § 2071(e), these additional amendments took effect on Dec. 1, 1998, at the same time as the other amendments to the Rules.

1. New 11th Cir. R. 27-1(b)(4) is amended to begin with the following clause: "Except in capital cases in which execution has been scheduled, ..."
2. 11th Cir. R. 28-2(a) is amended to conform to the list of items contained in FRAP 32(a)(2).
3. 11th Cir. R. 32-3 is amended to add the following sentence: "The clerk may exercise very limited discretion to permit the filing of briefs in which the violation of

FRAP and circuit rules governing the format of briefs is exceedingly minor if in the judgment of the clerk recomposition of the brief would be unwarranted."

4. 11th Cir. R. 27-1(c)(5) is amended to end with the following clause: "..., but only when the court's opinion is unpublished."
5. 11th Cir. R. 27-1(e) is amended to read: "Two Judge Motions Panels. Specified motions as determined by the court may be acted upon by a panel of two judges."
6. 11th Cir. R. 47-5(a) is amended to delete the last sentence.
7. IOP 8, Negative Poll (p.85) is amended to read: "If the vote on the poll is unfavorable to en banc consideration, the chief judge enters the appropriate order."

The revised rules may be found at the Eleventh Circuit's Internet Web site at www.ca11.uscourts.gov.

Proposed Amendments to Uniform Superior Court Rules

RULE 17: Conflicts—State and Federal Courts

(first reading 07/27/98)

17.2. Attorneys Serving as Part-time Judges

A judge presiding in a civil matter shall give prompt consideration to resolving scheduling conflicts resulting from an attorney's serving as a part-time judge of a court of record. The presiding judge should be mindful of the strict time limitations of juvenile proceedings. See, e.g., Ga. Unif. Juvenile Court Rules 6.8, 7.3 and 23.5. However, a continuance by reason of such scheduling conflicts should not be granted in a scheduled Superior Court criminal matter, nor of a scheduled Superior Court civil matter involving the safety of a child or the need of a custodial parent for temporary support.

Superior Court Continued

RULE 43: Mandatory Continuing Judicial Education (MCJE)

(first reading 07/27/98)

43.1. Program requirements.

(A) Every superior court judge, including senior superior court judges, shall attend approved creditable judicial education programs or activities, totaling a minimum of twelve hours every year. At least one hour of the mandated twelve hours per year shall be devoted to the topic of legal or judicial ethics or legal or judicial professionalism. If a judge completes more than twelve hours for credit in any calendar year the excess credit shall be carried over and credited to the education requirements for the next succeeding year only.

43.4. Sanctioning procedures.

(1) In December of each year, the Committee on Mandatory Continuing Judicial Education will receive a report from the Council of Superior Court Judges detailing the creditable participation of judges in MCJE activities for that year. At the same time, every superior court judge will also receive from the Council of Superior Court Judges a report on his or her creditable activity.

Judges failing to attain the required twelve hours in any year will be notified by the committee chair that they have not met the MCJE participation requirement for that year. Following receipt of such notice a judge shall submit a plan for making up any deficiency in education requirements for the proceeding year. Education credit hours earned thereafter shall first be credited to the deficiency for any prior year. ☒

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First Publication of Proposed Formal Advisory Opinion No. 97-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 February 1, 1999, 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. 97-R6

QUESTION PRESENTED:

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

SUMMARY ANSWER:

Yes, a lawyer is aiding a nonlawyer¹ in the unauthorized practice of law when the lawyer allows a nonlawyer member of his or her staff to prepare and sign correspondence which threatens legal action or provides legal advice or both. Generally, a lawyer is aiding a nonlawyer in the unauthorized practice of law whenever the lawyer effectively substitutes the legal knowledge and judgment of the nonlawyer for his or her own. Regardless of the task in question, lawyers should never place nonlawyers in situations in which they are called upon to exercise what would amount to independent professional judgment for a client. Nor should they be placed in situations in which decisions must be made for a client or advice given based on the nonlawyer's legal knowledge, rather than that of the lawyer. Finally, they should not be placed in situations in which, they, rather than the lawyer, are called upon to use rhetorical judgment in

speaking persuasively to others in the client's best interests.

In order to enforce this limitation in the public interest, it is necessary to find a violation of the provisions prohibiting aiding a nonlawyer in the unauthorized practice of law whenever a lawyer creates the reasonable appearance to others that he or she has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own.

As applied to the specific question presented, a lawyer permitting a nonlawyer to give legal advice to a client based upon the legal knowledge and judgment of the nonlawyer rather than the lawyer, would be in clear violation of Standards of Conduct 24, 4, and 5. A lawyer permitting a nonlawyer to prepare and sign threatening correspondence to opposing counsel or unrepresented persons would be in violation of these Standards of Conduct because doing so creates the reasonable appearance to others that the nonlawyer is exercising his or her legal knowledge and professional judgment in the matter.

OPINION:

This request for a Formal Advisory Opinion was submitted by the Investigative Panel of the State Disciplinary Board along with examples of numerous grievances regarding this issue recently considered by the Panel. Essentially, the request prompts the Formal Advisory Opinion Board to return to previously issued advisory opinions on the

subject of the use of nonlawyers to see if the guidance of those previous opinions remains valid for current practice.²

The primary disciplinary standard involved in answering the question presented is:

Standard 24, (“A lawyer shall not aid a nonlawyer in the unauthorized practice of law.”)

As will become clear in this Opinion, however, Standard 4 (“A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit or willful misrepresentation.”) and

Standard 5 (“A lawyer shall not make any false, fraudulent, deceptive, or misleading communications about the lawyer or the lawyer’s services.”) are also involved.

In interpreting these disciplinary standards as applied to the question presented, we are guided by Canon 3 of the Code of Professional Responsibility, “A Lawyer Should Assist in Preventing the Unauthorized Practice of Law,” and, more specifically, the following Ethical Considerations: Ethical Consideration 3-2, Ethical Consideration 3-5, and Ethical Consideration 3-6.

In Advisory Opinion No. 19, an Opinion issued before the creation of the Formal Advisory Opinion Board and the issuance of advisory opinions by the Supreme Court, the State Disciplinary Board addressed the propriety of Georgia lawyers permitting nonlawyer employees to correspond concerning “legal matters” on the law firm’s letterhead under the nonlawyer’s signature. The Board said that in determining the propriety of this conduct it must first define the practice of law in Georgia. In doing so, it relied upon the very broad language of a then recent Georgia Supreme Court opinion, *Huber v. State*, 234 Ga. 458 (1975), which included within the definition of the practice “any action taken for

others in any matter connected with the law,” to conclude that the conduct in question, regardless of whether a law suit was pending, constituted the practice of law.³ Any lawyer permitting a nonlawyer to engage in this conduct would be assisting in the unauthorized practice of law in violation of Standard 24, the Board said. The Board specifically limited this prohibition, however, to letters addressed to adverse or potentially adverse parties that, in essence, threatened or implied a threat of litigation. Furthermore, the Board noted that there was a broad range of activities, including investigating, taking statements from clients and other witnesses, conducting legal research, preparing legal documents (under “direct supervision of the member”), and performing administrative, secretarial, or clerical duties that were appropriate for nonlawyers. In the course of performing these activities, nonlawyers could correspond on the firm’s letterhead under their own signature. This was permitted as long as the nonlawyer clearly identified his or her status as a nonlawyer in a manner that would avoid misleading the recipient into thinking that the nonlawyer was authorized to practice law.

Whatever the merits of the answer to the particular question presented, this Opinion’s general approach to the issue, *i.e.*, does the conduct of the nonlawyer, considered outside of the context of supervision by a licensed lawyer, appear to fit the broad legal definition of the practice of law, would have severely limited the role of lawyer-supervised nonlawyers to what might be described as in-house and investigatory functions. This Opinion was followed two years later, however, by Advisory Opinion No. 21, an Opinion in which the State Disciplinary Board adopted a different approach.

The specific question presented in Advisory Opinion No. 21 was: “What are the ethical responsibilities of attorneys who employ legal assistants or paraprofessionals and permit them to deal with other lawyers, clients, and the public?” After noting the very broad legal definition of the practice of law in Georgia, the Board said that the issue was instead one of “strict adherence to a program of supervision and direction of a nonlawyer.”

This insight, an insight we reaffirm in this Opinion, was that the legal issue of what constitutes the practice of law should be separated from the issue of when does the practice of law by an attorney become the practice of law by a nonlawyer because of a lack of involvement by the lawyer in the representation. Under this analysis, it is clear that while most activities conducted by nonlawyers for lawyers are within the legal definition of the practice of law, in that these activities are “action[s] taken for others in . . . matter[s] connected with the law,” lawyers are assisting in the unauthorized practice of law only when they inappropriately delegate tasks to a nonlawyer or inadequately supervise appropriately delegated tasks.

Implicitly suggesting that whether or not a particular task should be delegated to a nonlawyer was too contextual a matter both for effective discipline and for guidance, the Disciplinary Board provided a list of specific tasks that could be safely delegated to nonlawyers “provided that proper and effective supervision and control by the attorney exists.” The Board also provided a list of tasks that should not be delegated, apparently without regard to the potential for supervision and control that existed.

Were we to determine that the lists of delegable and non-delegable

tasks in Advisory Opinion No. 21 fully governed the question presented here, it would be clear that a lawyer would be aiding the unauthorized practice if the lawyer permitted the nonlawyer to prepare and sign correspondence to clients providing legal advice (because it would be “contact with clients . . . requiring the rendering of legal advice) or permitted the nonlawyer to prepare and sign correspondence to opposing counsel or unrepresented persons threatening legal action (because it would be “contacting an opposite party or his counsel in a situation in which legal rights of the firm’s clients will be asserted or negotiated”). It is our opinion, however, that applying the lists of tasks in Advisory Opinion No. 21 in a categorical manner runs risks of both over regulation and under regulation of the use of nonlawyers and, thereby, risks both the loss of the efficiency nonlawyers can provide and the loss of adequate protection of the public from unauthorized practice. Rather than being applied categorically, these lists should instead be considered good general guidance for the more particular determination of whether the representation of the client has been turned over, effectively, to the nonlawyer by the lawyer permitting a substitution of the nonlawyer’s legal knowledge and judgment for that of his or her own. If such substitution has occurred then the lawyer is aiding the nonlawyer in the unauthorized practice of law whether or not the conduct is proscribed by any list.

The question of whether the lawyer has permitted a substitution of the nonlawyer’s legal knowledge and judgment for that of his or her own is adequate, we believe, for guidance to attorneys in determining what can and cannot be delegated to nonlawyers. Our task, here, how-

ever, is broader than just giving guidance. We must also be concerned in issuing this opinion with the protection of the public interest in avoiding unauthorized practice, and we must be aware of the use of this opinion by various bar organizations, such as the Investigative Panel of the State Disciplinary Board, for determining when there has been a violation of a Standard of Conduct.

For the purposes of enforcement, as opposed to guidance, it is not adequate to say that substitution of the nonlawyer’s legal knowledge and judgment for that of his or her own constitutes a violation of the applicable Standards. The information for determining what supervision was given to the nonlawyer, that is, what was and was not a substitution of legal knowledge and judgment, will always be within the control of the attorney alleged to have violated the applicable Standards. To render this guidance enforceable, therefore, it is necessary to find a violation of the Standards prohibiting aiding a nonlawyer in the unauthorized practice of law whenever a lawyer creates the reasonable appearance to others that he or she has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own.

Thus, a lawyer is aiding a nonlawyer in the unauthorized practice of law whenever the lawyer creates a reasonable appearance to others that the lawyer has effectively substituted the legal knowledge and judgment of the nonlawyer for his or her own. Regardless of the task in question, lawyers should never place nonlawyers in situations in which they are called upon to exercise what would amount to independent professional judgment for a client. Nor should they be placed in situations in which decisions must be made for a client or advice given based on the nonlawyer’s legal

knowledge, rather than that of the lawyer. Finally, they should not be placed in situations in which, they, rather than the lawyer, are called upon to use rhetorical judgment in speaking persuasively to others in the client’s best interests.

In addition to assisting in the unauthorized practice of law by creating the reasonable appearance to others that the lawyer was substituting a nonlawyer’s legal knowledge and judgment for his or her own, a lawyer permitting this would also be misrepresenting the nature of the services he or she provides and the nature of the representation in violation of Standards of Conduct 4 and 5. It is important, then, to recognize that in some situations nonlawyers working for lawyers may be more restricted in their activities than other nonlawyers would be. In certain areas of practice — estate planning, insurance adjusting, debt collection, tax preparation, real estate transactions, title insurance, trade associations representation, and representation before administrative agencies, for example — some forms of nonlawyer representation, including rhetorical advocacy, are permitted in what are arguably legal matters. If, however, a lawyer or law firm has been retained to represent a client on a legal matter, it would be inappropriate to substitute nonlawyer representation, in the manner described above, even though nonlawyer representation, not under the supervision of a lawyer, may be permitted. Thus, in some situations, a nonlawyer employee of a law firm will find himself or herself confronted by nonlawyer representatives representing clients in a manner that would be impermissible for the nonlawyer employee.

Applying this analysis to the question presented, if by “prepare and sign” it is meant that the legal advice to be given to the client is

advice based upon the legal knowledge and judgment of the nonlawyer, it is clear that the representation would effectively be representation by a nonlawyer rather than by the retained lawyer. A lawyer permitting a nonlawyer to do this would be in violation of Standards of Conduct 24, 4, and 5. A lawyer permitting a nonlawyer to prepare and sign threatening correspondence to opposing counsel or unrepresented persons would also be in violation of these Standards of Conduct because by doing so he or she creates the reasonable appearance to others that the nonlawyer is exercising his or her legal knowledge and professional judgment in the matter.

For public policy reasons it is important that the legal profession restrict its use of nonlawyers to those uses that would improve the quality,

including the efficiency and cost-efficiency, of legal representation rather than using nonlawyers as substitutes for legal representation. Lawyers, as professionals, are ultimately responsible for maintaining the quality of the legal conversation in both the prevention and the resolution of disputes. This professional responsibility cannot be delegated to others without jeopardizing the good work that lawyers have done throughout history in meeting this responsibility.

Footnotes

1. The term “nonlawyer” includes paralegals.
2. In addition to those opinions discussed in this opinion, there are two other Advisory Opinions concerning the prohibition on assisting the unauthorized practice of law. In Advisory Opinion No. 23, the State Disciplinary Board was asked if an out-of-state law firm could open and maintain an office in the State of Georgia under the direction of a full-time associate of that firm who was a member of the State Bar of Georgia. In determining that it could, the Board warned about the possibility that the local attorney would be assisting the nonlicensed lawyers in the unauthorized practice of law in Georgia. In Formal Advisory Opinion No. 86-5, an Opinion issued by the Supreme Court, the Board was asked if it would be improper for lawyers to permit nonlawyers to close real estate transactions. The Board determined that it would be if the responsibility for “closing” was delegated to the nonlawyer without participation by the attorney. We view the holding of Formal Advisory Opinion No. 86-5 as consistent with the Opinion issued here.
3. The language relied upon from *Huber v. State* was later codified in O.C.G.A. § 15-19-50.

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AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Statements of Financial Position

June 30, 1998 and 1997

	<u>1998</u>	<u>1997</u>
Assets		
Cash and cash equivalents		
State Bar	\$ 3,332,165	3,698,788
Public Service Foundation		575,050
Accounts receivable	119,402	55,377
Receivable from Georgia Bar Foundation (note 7)	2,589	3,827
Receivable from Chief Justice's Commission on Professionalism (note 7)	35,095	45,147
Receivable from Commission on Continuing Lawyer Competency (note 7)	24,197	56,667
Prepaid and other assets	147,859	158,595
Investments (note 5)		
Client Security	2,543,810	2,589,087
State Bar	2,206,622	2,480,938
Bar Center	300,114	47,751
Furniture, fixtures, and equipment, at cost, less accumulated depreciation (note 4)	274,925	376,675
Bar Center Building, at cost, less accumulated depreciation (notes 4 and 12)	8,827,539	9,010,676
Total assets	\$ 18,838,225	19,006,572
Liabilities		
Accounts payable	\$ 651,728	277,617
Accrued vacation	117,453	110,389
Accrued rent (note 6)	15,833	106,589
Deferred income	2,125,492	2,651,805
Health claims reserve	151,758	144,557
Payable to Pro Bono	42,095	20,959
Payable to Client Security Fund	2,543,810	2,589,087
Payable to Public Service Foundation		575,050
Deferred compensation payable (note 8)	375,514	451,148
Accrued interest		164,650
Deferred income Bar Center (note 12)	876,107	794,289
Loan payable (note 12)	8,903,200	8,001,000
Total liabilities	13,368,668	15,855,730
Net assets		
Unrestricted:		
Undesignated	1,487,422	1,200,402
Board-designated (notes 9 and 10)	5,821,768	1,757,257
Total unrestricted	7,309,190	2,957,659
Temporarily restricted (note 11)	67,367	193,803
Total net assets	5,469,557	3,151,462
Total liabilities and net assets	\$ 18,838,225	19,006,572

See accompanying notes to financial statements.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Statement of Activities

Year ended June 30, 1998

	Unrestricted		Temporarily	
	Undesignated	Board-Designated	Restricted	Total
Revenues and other support				
Fees:				
License	\$ 4,146,848	—	—	4,146,848
Advertising	157,879	—	—	157,879
Membership	121,283	—	—	121,283
Sections	6,252	—	—	6,252
Total fees	4,432,232	—	—	4,432,232
Contributions	—	500,000	193,562	693,562
Section dues	—	405,953	—	405,953
Convention and meeting fees	—	255,787	—	255,787
Interest income	234,599	104,343	—	338,942
Rental income (note 17)	—	872,068	—	872,068
Assessment income (note 12)	—	1,420,513	—	1,420,513
Other	155,531	12,068	—	167,600
Total other revenues	186,142	3,510,522	193,562	4,112,216
Net assets released from restrictions (note 11)	—	421,998	(425,998)	—
Total revenues and other support	4,618,374	3,932,520	(232,436)	8,742,448
Expenses				
Program expenses:				
Course	1,875,210	—	—	1,875,210
Membership	264,972	—	—	264,972
Meetings	66,185	—	—	66,185
Communications	590,111	—	—	590,111
Consumer Assistance Program	297,031	—	—	297,031
Fee arbitration	195,859	—	—	195,859
Lawyers' Assistance Program	88,876	—	—	88,876
Law Practice Management	165,624	—	—	165,624
Younger Lawyers	195,111	8,584	—	203,695
Board of Governors	41,995	—	—	41,995
Section expense	—	424,362	—	424,362
Mock trial	—	125,011	—	125,011
Bar media conference	—	872	—	872
Legislative	—	187,295	—	187,295
Family and estates	—	1,700	—	1,700
Clerks' hours and meeting	—	216,199	—	216,199
Georgia Diversity Program	—	100,554	—	100,554
Prothon	76,080	—	—	76,080
President's Program	6,721	—	—	6,721
Total program expenses	3,863,646	1,064,656	—	4,928,302
Management and general:	592,648	807,531	—	1,399,981
Total expenses	4,456,294	1,961,989	—	6,418,283
Change in net assets	356,020	1,992,531	(139,436)	2,518,115
Other changes in net assets - transfers (note 10)	(75,000)	75,000	—	—
Net assets at June 30, 1997	1,290,492	1,757,207	295,800	3,151,142
Net assets at June 30, 1998	\$ 1,481,422	\$ 1,824,768	\$ 165,367	\$ 3,405,557

See accompanying notes to financial statements

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Statement of Activities

Year ended June 30, 1997

	Unrestricted	Temporarily	
	Undesignated	Restricted	Total
Revenues and other support			
Fees	\$		407,191
License	3,892,561		3,892,561
Admission	130,557		130,557
Membership	167,584		167,584
Total fees	4,190,702		4,190,702
Contributions		5,000	5,000
Section dues		3,125	3,125
Convention and meeting fees		206,155	206,155
Interest income	219,216	47,436	266,652
Rental income - other		203,000	203,000
Other	171,561	62,185	233,746
Total other revenues	390,777	518,776	909,553
Net assets released from restriction (note 11)		156,981	156,981
Total revenues and other support	\$ 4,581,479	674,602	\$ 5,256,081
Expenses			
Program expenses			
Unmanned	1,863,864		1,863,864
Membership	252,318		252,318
Meetings	85,363		85,363
Communications	521,195		521,195
Continuing Assistance Program	210,110		210,110
Fee reimbursement	151,417		151,417
Lawyers' Assistance Program	67,718		67,718
Law Practice Management	196,948		196,948
Youth Law Office	101,932	3,350	105,282
Barrel at conventions	14,011		14,011
Section expense		443,797	443,797
Bar dues	1,335	5,982	7,317
Magazine		86,855	86,855
CLE School		3,000	3,000
Bar meeting conference		11,451	11,451
Light office		169,247	169,247
Handy and tools		6,299	6,299
Conventions and meeting		187,756	187,756
Georgia Bar Association		44,513	44,513
Bar dues	26,000		26,000
Refundable		836	836
Total program expenses	3,612,532	995,638	4,608,170
Management and general	480,640	33,235	513,875
Total expenses	4,093,172	1,028,873	5,122,045
Change in net assets	488,307	645,729	1,134,036
Other changes in net assets (note 11)	193,001	4,000	197,001
Net assets at June 30, 1996	861,308	1,111,100	1,972,408
Net assets at June 30, 1997	\$ 1,249,615	1,756,829	\$ 3,006,444

See accompanying notes to financial statement.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Statements of Cash Flows

Years ended June 30, 1998 and 1997

	1998	1997
Cash flows from operating activities:		
Change in net assets	\$ 2,318,115	924,541
Adjustments to reconcile change in net assets to net cash provided by operating activities:		
Depreciation	442,180	197,174
(Increase) decrease in accounts receivable	(94,115)	39,479
Decrease in receivable from Georgia Bar Foundation	1,238	8,605
Decrease (increase) in receivable from Chief Justice's Commission on Professionalism	10,052	(14,462)
Decrease in receivable from Commission on Continuing Lawyer Competency	12,470	11,162
Decrease in prepaid and other assets	15,756	6,182
Increase in accounts payable	380,111	17,916
Increase (decrease) in accrued vacation	3,064	(39)
Decrease in accrued rent	(71,066)	(71,068)
Increase (decrease) in deferred income	70,687	(540,423)
Increase in health claims reserve	7,181	11,975
Increase in payable to Pro Bono	21,134	20,959
(Decrease) increase in payable to Client Security Fund	(15,277)	383,055
(Decrease) increase in payable to Public Service Fund	(573,050)	487,791
Decrease in deferred compensation payable	(75,634)	(74,857)
(Decrease) increase in accrued interest on real estate note	(164,630)	164,630
Increase in deferred income Bar Center	31,818	794,389
Net cash provided by operating activities	<u>2,320,034</u>	<u>2,369,914</u>
Cash flows from investing activities:		
Purchase of furniture, fixtures, and equipment	(42,746)	(69,225)
Purchase of Bar Center building	(154,393)	(9,093,337)
Purchase of investments	(2,000,000)	(2,000,000)
Proceeds from sale of investments	2,038,230	1,672,507
Net cash provided by (used in) investing activities	<u>(158,909)</u>	<u>(9,490,060)</u>
Cash flows from financing activities - proceeds from (payments on) Bar Center note	<u>(2,100,800)</u>	<u>8,004,000</u>
Net increase in cash and cash equivalents	60,325	883,854
Cash and cash equivalents at beginning of year	<u>4,271,838</u>	<u>3,387,984</u>
Cash and cash equivalents at end of year	\$ <u>4,332,163</u>	\$ <u>4,271,838</u>
Supplemental disclosure of cash flow information - interest paid	\$ <u>540,600</u>	<u>164,630</u>

See accompanying notes to financial statements.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1998 and 1997

(1) Summary of Significant Accounting Policies

(a) Description of Business

The State Bar of Georgia (the "State Bar") is a membership organization of attorneys in the State of Georgia which performs as a society and regulatory agency for its membership.

(b) Accrual Basis

The financial statements of the State Bar have been prepared on the accrual basis of accounting and reflect all significant receivables and payables.

(c) Basis of Presentation

The State Bar's net assets and revenues, expenses, gains, and losses are classified based on the existence or absence of donor-imposed restrictions. Accordingly, net assets of the organization and changes therein are classified and reported as unrestricted and temporarily restricted.

Unrestricted net assets include amounts that are not subject to donor-imposed stipulations which are used to account for resources available to carry out the purposes of the State Bar in accordance with its charter and bylaws. The principal sources of unrestricted funds are membership fees and dues. The State Bar's governing board has designated certain unrestricted net assets to be held for specific purposes as indicated in the statement of financial position.

Temporarily restricted net assets are those resources currently available for use, but expendable only for purposes specified by the donor or grantor and may or will be met by the action of the State Bar and/or the passage of time. Such resources originate from grants and contributions restricted for specific purposes or a specific future time frame. When a donor or grantor restriction expires, temporarily restricted net assets are reclassified to unrestricted net assets and reported in the statement of activities as net assets released from restrictions.

Revenues are reported as increases in unrestricted net assets unless use of the related assets is limited by donor-imposed restrictions. Expenses are reported as decreases in unrestricted net assets. Gains and losses on investments and other assets or liabilities are reported as increases or decreases in unrestricted net assets unless their use is restricted by explicit donor stipulation or by law. Expirations of temporary restrictions on net assets (i.e., the donor-stipulated purpose has been fulfilled and/or the stipulated time period has elapsed) are reported as reclassifications between the applicable classes of net assets.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1998 and 1997

(d) Cash and Cash Equivalents

The State Bar considers all cash investments with maturities of three months or less to be cash equivalents. Cash equivalents are stated at cost which approximates market value.

(e) Investments

Investments are recorded at fair market value.

(f) Building, Furniture, Fixtures, and Equipment

Building, furniture, fixtures, and equipment are carried at cost. Additions, improvements, and major renewals are expensed as incurred within the operating fund of the State Bar. Depreciation expense is computed based on the estimated useful life of the respective assets using the straight-line method of depreciation. The estimated useful lives range from five to twenty-seven and a half years.

(g) Deferred Income

Annual license fee and Bar Center assessment notices for the fiscal year ending June 30, 1999 were sent out in April 1998. These amounts collected prior to June 30, 1998 were recorded as deferred income.

(h) Functional Allocation of Expenses

The costs of providing the various programs and other activities have been summarized on a functional basis in the statement of activities. Accordingly, certain costs have been allocated among the programs and supporting services benefited.

(i) Use of Estimates by Management

Management of the State Bar has made certain estimates and assumptions relating to the reporting of accrued expenses and deferred compensation to prepare the financial statements in conformity with generally accepted accounting principles. Actual results could differ from these estimates.

(j) Income Taxes

The State Bar is exempt from income taxes under Section 115 of the Internal Revenue Code.

(k) Reclassifications

Certain reclassifications have been made to 1997 balances to conform with 1998 balances.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1998 and 1997

(2) Membership

Membership in the State Bar was 29,658 and 28,870 on June 30, 1998 and 1997, respectively.

(3) Investments

Investments are recorded at fair value. At June 30, 1998 and 1997, investments consist of the following:

	1998	1997
Fixed income mutual funds	\$ 4,855,875	4,850,034
Annuity contract	<u>213,721</u>	<u>237,747</u>
	\$ <u>5,049,546</u>	<u>5,087,776</u>

(4) Building, Furniture, Fixtures, and Equipment

Furniture, fixtures, and equipment consist of the following:

	1998	1997
Leasehold improvements	\$ 145,555	145,555
Furniture and office equipment	342,946	340,895
Telephone equipment	71,100	85,161
Computer equipment	<u>391,685</u>	<u>432,294</u>
	954,286	1,003,905
Less accumulated depreciation	<u>679,361</u>	<u>667,230</u>
	\$ <u>274,925</u>	<u>336,675</u>

The Bar Center building is summarized as follows:

	1998	1997
Building	\$ 9,247,730	9,095,337
Less accumulated depreciation	<u>820,351</u>	<u>82,667</u>
	\$ <u>8,427,379</u>	<u>9,012,670</u>

(5) Retirement Plan

The State Bar has a defined contribution pension plan that covers substantially all employees. Contributions to this plan in 1998 and 1997 were approximately \$100,735 and \$96,000, respectively.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1998 and 1997

(6) Lease

During 1998, the State Bar exercised its option to renew its lease for office facilities in Atlanta for an additional three years resulting in an expiration date of September 30, 2001. Under the lease agreement, the rent is subject to adjustment based on an 8% escalation rate. Under the term of the current lease agreement expiring on December 2, 1998, no payments of rent were due in the first two years of the lease term. The financial statements reflect a liability for accrued rent associated with this lease.

During 1998, the State Bar renewed its lease at a satellite office in Dalton, Georgia, entering into a lease agreement for office space which expires on September 30, 1998.

Future minimum rental commitments under these agreements are as follows:

Years ending June 30

1999	\$ 412,014
2000	409,764
2001	409,764
2002	102,441
Total	\$ 1,333,983

Rental expense charged to operations for the year ended June 30, 1998 and 1997 amounted to approximately \$415,000 and \$411,000, respectively.

(7) Related Party Transactions

The State Bar was reimbursed by related organizations for their share of salary and operating expenses during 1998 and 1997 as follows:

	<u>1998</u>	<u>1997</u>
Georgia Bar Foundation, Inc.	\$ 59,107	97,694
Chief Justice's Commission on Professionalism	213,700	180,431
Commission on Continuing Lawyer Competency	<u>438,584</u>	<u>472,752</u>
	\$ 711,391	750,877

(8) Deferred Compensation for Retired General Counsel

The State Bar has an agreement with a retired general counsel ("retiree") in which the State Bar will provide a monthly pension payment to the retiree and his wife (the "beneficiaries"). Upon the death of the retiree, the monthly benefit payable will be reduced by one-half. In accrual for future payments which will be required under this agreement, the State Bar has recorded an actuarially determined liability of \$375,514 and \$452,148 at June 30, 1998 and 1997, respectively. This liability will be reduced by future payments to the beneficiaries. At June 30, 1998 and 1997, the monthly payment under this agreement was \$6,997 and \$6,790, respectively.

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1998 and 1997

(9) Board-Designated Net Assets

The State Bar has designated net assets for the following purposes after June 30, 1998 and 1997:

	<u>1998</u>	<u>1997</u>
Sections	\$ 654,385	\$91,497
Conventions	75,937	36,333
General operations	696,377	679,128
Bar Center	<u>2,398,185</u>	<u>490,284</u>
	\$ <u>3,824,884</u>	<u>1,297,242</u>

(10) Operating Transfers

The State Bar transferred funds from undesignated net assets to Board-designated in 1998 and 1997 to be used for the following purposes:

	<u>1998</u>	<u>1997</u>
Facilities reserve	\$ 20,000	20,000
Operating reserve	50,000	50,000
Computer reserve	<u>5,000</u>	<u>20,000</u>
	\$ <u>75,000</u>	<u>90,000</u>

(11) Temporarily Restricted Net Assets

Net assets were released from donor restrictions in 1998 and 1997 by incurring expenses satisfying the restricted purposes or by occurrence of other events specified by donors:

Purpose Restrictions Accomplished

	<u>1998</u>	<u>1997</u>
High School Mock Trial	\$ 125,012	\$6,856
Test Claims		839
CLJ School		3,020
Bar Media Conference	872	11,461
Legislative	187,295	169,247
Family and Courts	1,366	6,249
YLS Resumed	7,276	2,100
YLS Fellows	1,008	1,351
Basic Grants		55,985
Georgia Minority Counsel	<u>109,534</u>	<u>44,843</u>
	\$ <u>427,968</u>	<u>361,298</u>

AUDITED 1998 FINANCIAL STATEMENT

STATE BAR OF GEORGIA

Notes to Financial Statements

June 30, 1998 and 1997

Temporarily restricted net assets at June 30, 1998 and 1997 were available for the following purposes:

	<u>1998</u>	<u>1997</u>
High School Mock Trial	\$ 18191	12,559
CEI School	14,628	13,738
Bar Media Conference	27,572	14,712
Legislative	86,949	117,031
Family & Courts	4,756	4,758
YLS Restricted	4,158	11,634
YLS Fellows		1,088
Georgia Minority Counsel	<u>76,120</u>	<u>18,283</u>
	<u>\$ 165,567</u>	<u>195,803</u>

(12) Bar Center Purchase

On April 1, 1997, the State Bar purchased an office building from the Federal Reserve Bank of Atlanta for \$9,247,730 (purchase price of \$9,004,000 plus capitalized costs of \$243,730). This building will be utilized as headquarters for the State Bar and affiliated entities following renovation in 2001. The Federal Reserve Bank of Atlanta will remain as tenants of the office building until construction is complete on their new facility in 2001 and will pay monthly rent to State Bar of \$67,667.

To purchase the building, the State Bar entered into a note payable agreement with the Federal Reserve Bank of Atlanta for \$8,004,000. The State Bar refinanced its original note with the Federal Reserve Bank in 1998 to obtain a note requiring monthly interest payments based on a fixed interest rate of 6.59%. This note released the State Bar from all obligations from the debt acquired from the Federal Reserve Bank.

Future minimum principal payments are as follows:

Years ending June 30,

1999	\$ 3,160,800
2000	1,660,800
2001	1,201,600
Total	<u>\$ 5,903,200</u>

To assist in the funding of annual principal payments, in 1997 the State Bar began charging each of its members an annual assessment of \$50. For the year ended June 30, 1998, these fee assessments were \$1,476,513.

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Advertising Index

AAA Attorney Referral	66
American Arbitration Association	4
Analytical Services	42
ANLIR	9
Arthur Anthony	68
Dan Turner Builders	72
Golden Lantern	63
Great American Insurance Co.	87
Harrison	Back Cover
Health Care Auditors	75
Hill International	83
Mainstreet	61
Medical Expert Testimony	74
National Legal Research Group	69
Nextel	Inside Back
Wallace Law Registry	37
West Group	Inside Front, 13, 80-81

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