

# GEORGIA BAR Journal

JUNE 1999 • VOL. 4 NO. 6

## LOOKING FOR THE TRUTH ABOUT LAWYERS



**VIEW FROM THE BENCH • FICTION WINNER • EXPERT TESTIMONY • ALIMONY**

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# GEORGIA BAR Journal

JUNE 1999 • Vol. 4 No. 6

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**On the Cover:** *President Bill Cannon's Foundations of Freedom program seeks to help the public find the truth about lawyers. The multitiered initiative is unveiled beginning on page 10. We hope every lawyer will take advantage of the tools provided to help change the climate of public distrust in the profession.*

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

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

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

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## PUBLISHER'S STATEMENT

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

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# GEORGIA BAR Journal

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# IT'S TIME TO GET BACK TO THE BASICS



By William E. Cannon Jr.

Most of my time this year has been spent on the subject of public confidence in the justice system. I have spoken to many civic clubs and bar associations about the troubled relationship between the justice system and the public. In this issue of the Bar Journal you will find a report on the Bar's effort to improve that relationship (see page 10). We have received an excellent response to the Foundations of Freedom program and it should get us moving in the right direction. However, the most important steps we can take to restore public confidence in lawyers and the legal system will not come from the State Bar — they will come from individual lawyers. Each lawyer must find a way to regain the respect of that lawyer's clients and community.

We can begin by reclaiming our passion for the law. Politicians use the phrase "fire in the belly" to describe the drive that keeps candidates going 24 hours a day during an election. In the last few days before a trial I find myself with that same feeling. I am completely focused on the case and I seem to have unlimited energy. During those times I feel like a combination of Perry Mason and Atticus Finch. What I need to work on is having that same passion on Monday morning when I'm going to the office instead of the

courtroom; feeling that same passion when I meet with a difficult client for the twenty-third time. We must recapture the excitement we felt about practicing law when we first entered the profession.

The manner in which we recapture the fire may take different forms depending on the individual lawyer. It may consist of simply setting aside a block of time each week to work on files that require special attention. We can try volunteering for pro bono work for any one of the agencies that need our time and skill. For others it may mean taking a chance and giving up one area of practice for another that you really enjoy.

Clients want lawyers who have a passion for their clients. We must communicate to our clients — each of them, one at a time — that they have hired a human being to represent them — a human being who will devote his or her brain and heart to advocacy for the client — who will listen with an attentive ear, who will prepare with inspiration and perspiration, and we will see a difference in the way the public views our profession.

Before we can obtain the public's respect we must respect ourselves and our legal system. I read an article in Trial Magazine, a publication of the Association of Trial Lawyers of America, several years ago. The article focused on the unfortunately common trial tactic of attacking opposing counsel during closing argument. The author's opponent referred to "lawyer tricks" and denigrated the author's efforts in his closing. When the trial was over the writer spoke with his opponent and told him how troublesome his conduct

was. He reminded the young lawyer that an attack on opposing counsel would cause the jury to lose respect for all lawyers.

When I read the article I recognized myself. For some time I had routinely referred to good arguments by my opponent as attempts to deceive and urged the jury to ignore such tricks. I had embarrassed myself and insulted my profession. Since that time I always compliment my opponent even when it is difficult to find something to compliment. I explain to the jury why each side needs a lawyer and while I may have a strong disagreement with the lawyer's client or the position taken, I have great respect for the attorney and the job he is doing. Think of how many people serve on jury duty and the number that could hear such free public relations each year.

The same approach can work for transaction lawyers. If you get the chance, compliment the lawyer who prepared the first draft of a contract you are reviewing for the other side in a business transaction. If probating a will prepared by another lawyer, be sure to mention to your client what a fine professional drafted the will.

We are not hired guns in a cheap western shootout. We are professionals and we must act that way. Our clients are always watching and listening to see if all those nasty things said about attorneys are true. Let's give them something positive for a change.

The respect we need must be more than between lawyers — it must also exist in bench and bar relations. It is so tempting when we receive an unfortunate ruling to blame the court — even more tempting when the court really does deserve the blame. However, I beg you today to avoid taking the easy way out. Don't let the disappointment of an adverse outcome cause you to vent with your client against the court. Try to explain that judges really do try to do the right

thing and there is no malice intended if they make a wrong decision. If we run down the system our clients, who see us as part of the system, will think less of us as well.

I am a huge fan of Rumpole of the Bailey. Rumpole is a fictional English barrister with a dry sense of humor and a wonderful appreciation of human nature. He once counseled a young lawyer who had expressed displeasure with a ruling of the court that “contempt of court is a practice best done quietly — much like meditation.” He understood that sometimes we may feel utter contempt for the manner in which a judge behaved, BUT he also understood that sharing those feelings was of benefit to no one.

Judges must also respect lawyers. The public looks up to judges — at least they will if the politicians let the judges do their jobs — and the public gets its impression of lawyers in many cases from the attitudes judges show toward attorneys in the courtroom. If a trial judge never passes up a chance to embarrass attorneys in front of the jury what message will this convey? Will it enhance the reputation of the judge or our legal system? Of course not, and you can bet those jurors will share their experiences with all their friends and neighbors.

On the other hand, if the judge treats the attorneys with respect, that judge will send a strong message that attorneys should also be respected by the jury. Even better, if, after thanking the jury for their service, the judge were to remind the jury what an important role lawyers play in peaceful dispute resolution, 6 or 12 lay persons might leave with a more favorable impression of lawyers. Judges require respect from attorneys. We attorneys deserve it as well ... and we will all benefit from its presence.

To improve our standing with the public we must market ourselves. Lawyers and the legal system have been attacked by some of the slickest

media campaigns that can be produced. From the Readers Digest to Dateline on NBC the public has been fed a steady diet of greedy and unethical lawyers and aberrant jury verdicts. And what have we done to defend ourselves? Very little. Because some of our fellow lawyers use distasteful ads, we have to a large degree refused to use one of the basic tools of good public relations. Because we are so busy we have not taken the time to let our own clients know when they are obtaining quality and value from us. Because we are busy, we have not

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## **We are not hired guns in a cheap western shootout. We are professionals and we must act that way.**

volunteered to speak to civic clubs and schools.

We must learn to use the skills and talent that we developed during law school and in the practice of law. We are trained communicators. We practice daily the art of persuasion. We must now use our special gifts to defend our profession.

It is time for us to take the offensive. We must not be reticent to market the good that we do and the importance to the average citizen of protecting their rights. It's something that any lawyer can do and its a responsibility that every lawyer has to his profession. The Foundations of Freedom program gives us marketing tools but we must take the time to use them.

Finally, we must become less focused on money. The one word that seems to be most frequently associated with lawyer is greedy. Too many people think we are motivated more by

financial gain than devotion to our profession and our clients. We do not need to reinforce this negative view of our noble profession. I received a brochure from a firm a few years ago and it consisted entirely of bragging about how much money they had made during the past year. I wonder what any lay person receiving that brochure would have thought. It would have confirmed everything derogatory they heard about attorneys.

Overemphasis on money has a less obvious effect on our profession. If we eventually succeed in becoming well off we risk losing both our passion that I talked about earlier and our independence. A couple of years ago I was fortunate enough to settle a large products liability case. I found myself with more money than I had ever dreamed of. The year that followed was one of the least satisfying of my career. Quite frankly I think I just got too comfortable. I fell in love with the good life and began to measure each day's success by whether or not I had taken in another large case. I suspect that many of my clients developed less than a favorable impression of me during that time. In contrast I spent the last year and a half focusing on two things that I really enjoyed — training two associates that we had hired and increased involvement in State Bar work. I had a significant drop in income but I felt more like a lawyer than I had in several years.

I am not asking anyone to take a vow of poverty but I am asking you to think about the possibility that we have lost our focus and the public knows it.

Are you tired of the nasty jokes? Do you want to be proud of what you do? Then let's start today, one client at a time, changing our habits, regaining our passion, proving to those we serve that we deserve their respect. ☒

# A LONG-TERM CAMPAIGN TO BUILD PUBLIC TRUST



By Cliff Brashier

I hope most of our members can find the time in their demanding schedules to read every issue of the *Bar Journal* because it always contains so much relevant information about the practice of law. But I especially hope you can read Bill Cannon's column on page 6 and the articles on his Foundations of Freedom program on page 10.

When lawyers in every state are asked to prioritize their concerns about our profession, the public's perception about lawyers and the judicial system will always rank first or second. I have watched nearly every state and many local bar associations in our nation try to address the problem. While all good, I have seen none that have the long-term potential for success that is present in Foundations of Freedom.

Since the cover story explains the multiple approaches of this new major program, I will briefly explain why two commonly suggested approaches are not included.

The first is a major statewide advertising campaign using primarily television and radio. Many states have tried this, but I know of none that have sustained it. Studies have shown that, if done on a large scale, it is effective. Public opinion can be positively changed by institutional advertising.

However, the same studies have shown that the campaign must be a continuing one or the progress is quickly lost. Because of the high cost — well over a million dollars per year for a state with as large and with as many media markets as Georgia — bar associations simply do not have the financial resources to sustain a continuous advertising program. To do so would require a large dues increase

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**I have watched bar associations try to address the problem. None have the long-term potential for success present in Foundations of Freedom.**

that many of our members cannot afford to add to their already high overheads. Other states have realized the same thing and, therefore, most of their campaigns have been limited with no long-term benefits.

As an alternate, some states are producing public service announcements (PSAs) which television and radio stations run without charge as part of their commitment to serve the public. We tried this about a decade ago with only limited and short-term benefits. Two problems caused the effort to be discontinued. We had two announcements — one aimed at drugs and the other at DUI. While both were well done, neither addressed the

public's real concerns with our profession because that is not the goal of most public service announcements. When you review the lawyer myths brochure and the speakers bureau program, you will see that the various components of Foundations of Freedom do address the real issues in an open, frank and honest manner. The other problem with our PSAs was the lack of airtime. With many different items to present to the public and very limited minutes designated for this in each broadcast day, the State Bar of Georgia's two public service announcements ran in the late night or early morning hours if they were aired at all. Again, other states have experienced the same results as we did.

Thus, Foundations of Freedom is not a public relations campaign using large media advertising and public service announcements. Instead, it is a comprehensive public educational program that is focused locally and carried out by 30,000 individual Georgia lawyers. I have great confidence this is the best long-term approach. It depends on all of us working together in a daily effort to make a real difference. I hope you will learn about Foundations of Freedom and use it every day with every client or other persons with whom you interact. When you do this, every lawyer, judge, client, and citizen will benefit by enhanced trust and confidence in our judicial system and its promise of fairness and neutrality in peaceful dispute resolution.

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



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# Rebuilding the Foundations of Freedom

By Jennifer M. Davis

**T**he nightly news is riddled with images of refugees fleeing Kosovo. Weary faces of young and old are wrinkled with fear, desperation and hopelessness. It is unconscionable that people can be banished from their own homes with no belongings, or worse executed simply because of their ethnicity. For Americans whose channels are tuned to CNN, these images seem surreal. In our country, we talk of how “lucky” we are to be free. As lawyers, you know there’s more to it than luck.

The foundations of our freedom are found in our justice system which allows the rainbow of cultural, racial and ethnic citizens to live in relative harmony. But Ameri-

cans seem to have lost sight of why we’re free. Ironically, as atrocities like the Kosovo tragedy unfold across the globe, Americans are attacking the very roots of our democracy by assaulting lawyers with denigration.

This irony is well illustrated by the misinterpretation of Shakespeare’s line in Henry VI, “The first thing we do, let’s kill all the lawyers.” This line has been taken out of context to suggest lawyers should be eliminated. What the Elizabethan bard meant was the way to ensure anarchy would be to rid the world of lawyers.

The public’s misunderstanding of the lawyer’s role in protecting our democracy is further illustrated by an American Bar Association survey that measured public



perceptions of the justice system. The survey, which was released this past February, revealed 80 percent of Americans believe that “in spite of its problems, the American justice system is the best in the world.” The survey also asked respondents to rate their confidence in 17 different institutions in American society. The U.S. Supreme Court topped the list with 50 percent “extremely or very confident” in the institution, while lawyers were second to last garnering a meager 14 percent. The only group lower was the media with only eight percent.

The survey reinforces the irony that although Americans have reverence for the justice system, they do not see lawyers as the gatekeepers — instead they view the profession with disdain. This lack of appreciation has transformed the legal profession into the scapegoat for many of the ills plaguing society.

When State Bar President William E. Cannon Jr. began his term last June, he was determined to make an impact on the public’s understanding and respect for the legal profession. As you will read in the President’s message on page 6, he believes the key lies in repairing the lines of communication between lawyers and the public by educating them about the role and purpose of lawyers.

Cannon initiated a program entitled Foundations of Freedom to remind both lawyers and the public why we enjoy liberty on our shores. He hopes the program will begin the uphill battle of reclaiming respect for the profession.

However, one person alone can not alter the state of the profession. But by working together in the trenches around the state, lawyers can use their collective voices to make a difference. And the Foundations of Freedom program will give you tools to do just that.

## Speakers Bureau

You have probably seen ads in this magazine and in your Bar Directory recruiting your participation in a speakers bureau. The State Bar is compiling a database of lawyers to send to civic organizations, schools, business groups, etc. when a group requests a speaker. This goes to the root of educating the public by bringing a positive message about the legal profession to the community level. The State Bar even has pattern speeches which volunteers

are welcome to use, or they can deliver their own message.

The State Bar is launching a partnership with the Department of Education and State School Superintendent Linda Schrenko to put lawyers in classrooms around the state. The Bar is also sending letters to civic clubs offering a lawyer to speak on a variety of topics.

Now we just need you. If you haven’t already done so, please sign up today by contacting Bonne Cella at the south Georgia office at (800) 334-6865 or (912) 387-0446.

## Making Movies

In addition to the pattern speeches, the Bar has

produced a seven minute video which is available to all lawyers who participate in the speakers bureau. The video, entitled “Honoring Your Trust, Earning Your Confidence,” illustrates the concept that lawyers are integral members of society both professionally and personally. The opening minutes explain how lawyers are there through the many phases of life whether it’s the purchase of a home, the start of a new business, preparation of a will, or

even the adoption of a child. The video, which is explained more on page 13, also features three of your colleagues who typify lawyers throughout the state — hard-working professionals who entered the practice with the intention of helping others.

The video is an ideal way to close your speech to a community group. To be sure of this, President Cannon went on a “guinea pig tour” delivering the pattern speeches and showing the video as a wrap-up to his speech before entertaining questions. During one particular outing at the Rotary Club of Paulding County, both the speech and video were well-received and led to a number of thoughtful questions from the audience. One gentleman asked why there were so many lawyers in our country and so many lawsuits. Cannon explained that while there are may be more lawyers in America per capita, we enjoy a lot more freedoms which need to be protected. He added, “I don’t know why lawsuits have gotten such a bad wrap. If I were

**CONTINUED ON PAGE 14**

# Video Highlights Georgia Lawyers

By Amy E. Williams

**THE GOAL OF THE FOUNDATIONS OF FREEDOM** project is to foster renewed faith in lawyers and the legal system. Through this program the State Bar of Georgia is mounting a full frontal attack on the misconceived stereotype of lawyers, mustering all its resources.

Of the State Bar's resources, the greatest is its members. In order to utilize this resource, the Bar had a video production company produce a seven minute video titled *Honoring Your Trust, Earning Your Confidence* to accompany the various lectures and educational efforts of the State Bar's Speakers Bureau.

This video is meant to directly address current issues of mistrust and derision facing lawyers. In producing it the Bar decided to take an approach that is unique and hard-hitting — staying positive. Instead of repeating the negative hype, it focuses on the positive aspects of lawyering.

The video opens with images of lawyers at work and the people they help. The script reminds viewers that at the significant landmarks in life, good and bad, everybody needs a lawyer. At these times a lawyer uses his or her knowledge and compassion to serve the client's best interests. This opening was designed to be compatible with the series of camera-ready print ads the State Bar has developed for members to sponsor in local programs, playbills and newspapers (see page 16).

The heart of the video is a series of interviews with three Bar members. Both in the professional setting of their offices and the comfort of their homes, the interviewees answered questions about what they like about being a lawyer and what they enjoy doing outside of their practice.

Angela Hsu, Bill Rumer and Judge Steven Jones are three lawyers from different parts of Georgia whose interests and community involvement range from minority organizations to mentoring children to coaching Little League. They also just happen to be successful and well-

respected attorneys. They were selected to be interviewed in this video precisely because in their accomplishments and their character they represent not only the best of the Bar, but also the majority of the Bar. "There is no question in my mind," says Judge Jones, a Superior Court Judge who works with the Salvation Army and mentors children in Athens, "that I am not an exception. Lots of lawyers are doing similar things and not looking for pats on the back."

All of the interviewees feel that the positive approach taken is the most appropriate and effective means of showing people how lawyers really are. Angela Hsu, who is active with the Asian Bar Association in Atlanta, says this approach will really speak to the community because it "takes on the issues [of negative public opinion] and demystifies them by stressing the issues of law."

Judge Jones agrees that "there are enough of the negatives out there." He believes in order to combat those negatives "the public has to be able to see us as ourselves, and a positive approach allows them to do that."

The video closes with a montage sequence of Georgia lawyers reciting the Lawyer's Creed. The blending of one person's sincere words into the next and the inclusion of so many lawyers from so many different parts of Georgia, different areas of practice and different walks of life suggests that Georgia lawyers are unified in their concern for their clients and their community — and that is indeed the message we are trying to disseminate.

According to Bill Rumer, Little League third base coach and litigator in Columbus, all the negative hype can get to even the best of lawyers. But this video, he says, "pumps lawyers up." He said colleagues told him watching the video made them proud to be a lawyer.

*Honoring Your Trust, Earning Your Confidence* is only one weapon in the arsenal of the Foundations of Freedom program, but it is a powerful one because it provides something that is sorely needed. It is a morale boost both to the public who must depend on the legal system, and the profession that serves it. ☒



**Bar President Bill Cannon (center) showed the video as part of his speech to the Paulding County Rotary Club. He is pictured with club President Stacey Taylor (right) and club Secretary and local lawyer Jeff Talley.**





**One copy of the Client Care Kit will be mailed to every active member of the State Bar. The kits are also available for purchase at cost. See page 16 for ordering information.**

### **Continued from page 12**

the president of a company selling burgers and our sales had skyrocketed, I'd be on the cover of Fortune magazine. Resorting to court is a means of peaceful dispute resolution. It's better to resolve differences in court than with guns."

The video can be checked-out from the State Bar at no cost. You do not have to be assigned a speaking engagement from the Bar's speakers bureau to use it. If you have been invited directly by a group to speak, please feel free to call Amy Morley at (404) 527-8792 or (800) 334-6865 and request a copy of the videotape. It is guaranteed to impress your audience and make you proud to be a Georgia lawyer.

## **Client Care Kit**

The speakers bureau and video are just one way to bring the message to the public. While it is important to use the civic platform to show that lawyers are leaders who care about their profession and their communities, it is also essential to communicate with the people you see every day — your clients.

Time is a luxury not enjoyed by many lawyers. The practice demands long hours which can leave you feeling pulled in every direction. Oftentimes lawyers are so busy, they neglect to leave the lines of communication open. The basic manifestation of this is not returning phone calls. The grander problem is not communicating clearly to the client exactly what to expect with regard to legal fees, time frame, and what to expect during the process.

To assist you with communicating with your clients, the State Bar has produced a Client Care Kit which contains a booklet that explains the lawyer-client relationship; a brochure that dispels lawyer myths; and several forms for your client to use — About Your Fees, Who's Who in Your Lawyer's Office, Documents You Need, Schedule of Important Events, and a Client Survey (see photo above). The kits can and should be personalized to meet your needs.

One copy of the Client Care Kit will be mailed to every active member thanks to funding from the Georgia Bar Foundation and the Lawyers Foundation of Georgia Inc. The kits are also available for purchase at cost, as is the lawyer myths brochure (see ordering information on page 16).

## Spreading the Message

While improving interaction with clients is one way to enhance the perception of the profession, it is also essential to extend the message to the general public. And the most effective means of reaching a broad audience is through the media. It is especially important to present a positive message about the profession in this manner since lawyers are regularly attacked in the press.

To combat this negative press, President Cannon had an idea to develop camera-ready ads which lawyers could use in a variety of outlets. We engaged Adsmith, an agency in Athens, to develop a series of ads which explain the role and importance of lawyers in everyday life. Lawyers are invited to use them at no cost, notwithstanding any charges you incur in buying advertising space. The ads are open to individual lawyers, law firms, local and voluntary bars. All of the ads appear in this issue beginning on page 16. The backs of the pages are intentionally blank so you can clip and use any one of them (the *Journal* is printed on a camera-ready grade paper). If you need additional ad slicks, please contact the Bar's Communications Department at (404) 527-8792 or (800) 334-6865 x792.

The idea is for you to use them in your community newspapers, or even when you're called upon by the local theater or high school football booster club, for example, to buy an ad in the program. You will notice on the ads that a space at the bottom has either a voluntary bar or a law firm name. This is where you can put your name, firm or bar association. Just ask the newspaper or publisher of the program to mask over the existing name with yours. The ads are copyrighted, so with the exception of your name, they should not be altered.

Also, please let us know when you place an ad and send us a copy of it so we can track how often and how widespread they are being used. You can send the copy to the Bar's Communications Department at the headquarters office.

## Jury Charges

Another excellent opportunity to speak to the public is contact with jurors. This audience is particularly desirable since they are experiencing the legal system first hand. And their experience in carrying out this civic duty will likely formulate or reformulate their opinion of the process.

We have developed two jury charges which we are working with the various judicial councils to have included in the charge book. The charges appear in the box above. While we work through the judicial channels to have them officially sanctioned, we suggest that lawyers go ahead and include the jury charges when submitting requests to charge at trial.

## Preliminary Jury Charge

In our system of justice, trials are adversarial. That means each side has the opportunity to present evidence in support of its case and in opposition to the other side's case. In this way, the trial is supposed to resolve conflicts between the parties. As officers of the court and as advocates for their side, lawyers in this trial have a duty to present their client's position in a professional and truthful manner. They will ask questions, make objections and present arguments. This is their job and should help you carry out your responsibilities. Dedicated and vigorous representation by lawyers on behalf of their clients is essential to the search for truth by our judicial system.

## Closing Jury Charge

As I instructed you at the beginning of the trial, trials are adversarial. You have now seen that each side has had the opportunity to present evidence and to make arguments about how the evidence should be interpreted by you. This process could not work unless all of the participants performed their duties carefully and thoughtfully. All of us have a responsibility to make the system of justice work fairly and efficiently. The lawyers in this case have sought to fulfill the duty to present their client's position in a professional and truthful manner. In presenting arguments, questioning witnesses, and making objections, they have done their part to assist you in your search for truth. They have been advocates for their clients. We hope that this process will help you carry out the next important phase of the trial, which is your deliberation.

## Reinforcing the Foundations

While the various components of this program are tools to help reinforce the foundations of our freedom, they can only work if lawyers like yourself take advantage of them. The public's negative impression of lawyers did not form overnight or with one voice. It will take lawyers across the state uniting together over time to rebuild public confidence in the profession and our system of justice. As President Cannon said to the Paulding Rotary Club, "I'm sure the folks in Kosovo would love to have our problems." Let's remind our fellow citizens how lucky we are to be worlds away from real chaos, and remind them too that lawyers are the ones who keep us free. ☒

## CLIENT CARE KITS, MYTHS BROCHURE, CAMERA-READY ADS

# Improved Client Communications Made Easy

**A**s part of the Foundations of Freedom program, the Bar commissioned a series of camera-ready ads which are available at no cost to you. (The various ads appear on the following pages.) The goal is for you to place the ads in your local newspaper, theater playbill, high school football program, or any other outlet. To use an ad, just cut it out of these pages and have the publication's art department place your name, firm, or voluntary bar in the space provided.

The Bar encourages individuals lawyers, law firms or voluntary bars to use these ads. And to help us keep track

of their use and effectiveness, please send the Bar a copy of the ad when it runs — send it to the Communications Department, State Bar of Georgia, 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303-2934. Again, the ads on the following pages are offered for you to use at no charge — the only cost will be what the publication charges you to place it. If you need additional ad slicks, please call the Bar at (404) 527-8792.

Also, every active lawyer will receive a copy of the Client Care Kit that is described on page 14. To order more, use the form below. ☒

## ORDER FORM

**C**lient Care Kit folders include: a booklet describing the working relationship between lawyers and clients; a pamphlet that dispels lawyer myths; and the following forms for your client to use — who's who in your lawyer's office, about your fees, documents you need to know about, schedule of important events, and a client survey. The cost is \$1.00 per copy (entire kit) and \$5.00 shipping and handling. Enhance communication with your client today!

### Client Care Kit Quantity (check one)

_____ 25 @ \$1 per kit:	\$25.00 + \$5.00 shipping & handling	= \$ _____
_____ 50 @ \$1 per kit:	\$50.00 + \$5.00 shipping & handling	= \$ _____
_____ 100 @ \$1 per kit:	\$100.00 + \$5.00 shipping & handling	= \$ _____

### Myths Brochure

The lawyer myths brochure can be purchased separately to display in your reception area. (Order in quantities of 100 — write quantity in blank)

\_\_\_\_\_ @ \$13 per 100 brochures price includes shipping & handling

### Total enclosed

Client care kits	\$ _____
Lawyer myths brochure	\$ _____
Total of Check	\$ _____

Make your check payable to State Bar of Georgia and return to:

State Bar of Georgia  
Communications Department  
800 The Hurt Building  
50 Hurt Plaza  
Atlanta, GA 30303

Payment must be received before order is processed.



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# Admissibility of Expert Testimony After *Kumho Tire Co. v. Carmichael*

By R. Scott Tewes

Few cases in recent years have caused the outpouring of bench, bar, and academic commentary evoked by the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*<sup>1</sup> In *Daubert*'s wake, legal scholarship on admissibility of expert testimony has led to proposed amendments to the Federal Rules of Evidence, particularly Rule 702.<sup>2</sup> Nevertheless, not all federal courts have agreed on the appropriate application of *Daubert* or the standards for determining admissibility of expert testimony. In December 1997, the Eleventh Circuit joined the Second, Sixth, Ninth, and Tenth Circuits<sup>3</sup> in holding that *Daubert*'s admissibility analysis for expert testimony does not apply to experts who base their testimony on experience and observation, rather than application of scientific principles

or theories.<sup>4</sup> The Supreme Court granted certiorari and reversed the Eleventh Circuit in *Kumho Tire Co. v. Carmichael*.<sup>5</sup> The Court held that *Daubert*'s "gatekeeping" requirement for assuring that expert testimony is reliable and relevant applies not only to scientific testimony, but to all expert testimony.<sup>6</sup> This article describes *Daubert*'s evidentiary gatekeeping standards and assesses *Kumho*'s potential impact on expert testimony in complex civil trials.

## ***Daubert* Sets Evidentiary Gatekeeping Standards**

In *Daubert*, the Supreme Court considered the admissibility of opinion testimony by a physician and epidemiologist that the anti-nausea drug Bendectin caused birth

defects. The district court's decision that the evidence was inadmissible eliminated any proof of causation, resulting in summary judgment against the plaintiffs on their products liability claim.<sup>7</sup> The Ninth Circuit affirmed the district court, holding that the expert opinion was inadmissible unless based on a technique "generally accepted" as reliable in the relevant scientific community.<sup>8</sup> In so doing, the Ninth Circuit relied on the general acceptance standard in *Frye v. United States*.<sup>9</sup>

The Supreme Court granted certiorari to resolve divisions among the circuits on the proper standard for admissibility of expert testimony.<sup>10</sup>

In resolving this issue, the Court observed that the Federal Rules of Evidence superseded *Frye*'s general acceptance standard. In particular, the language of Rule 702 governing admissibility of expert testimony did not incorporate the general acceptance standard and was intended to relax barriers to opinion testimony.<sup>11</sup> Given the "permissive backdrop" of the Federal Rules, the Court rejected general acceptance as an "austere standard . . . incompatible with . . . the Federal Rules of Evidence."<sup>12</sup>

In place of the *Frye* standard, the Court considered whether the scientific testimony offered by the plaintiff was sufficiently reliable and relevant to be admitted under Rule 702.

The Court concluded that "faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue."<sup>13</sup> The first aspect of this inquiry satisfies the requirement of reliability by demonstrating that the expert's reasoning or methodology is scientifically valid, while the second aspect satisfies the requirement of relevance by showing that the testimony properly applies to the facts at issue.<sup>14</sup>

The Court did not purport to state a universal standard

by which trial courts must assess an expert's principles and methodology, but did identify five factors that often would be germane to the inquiry:

1. Whether the theory or technique can be or has been tested to see if it can be falsified. In other words, the theory should have been tested, or be capable of being tested, and found not to be false.<sup>15</sup>

2. Whether the theory or technique has been subjected to peer review and publication. Although this factor may not apply to every type of scientific evidence, where applicable, it can help determine the validity of a particular methodology by exposing it to scrutiny for substantive flaws.<sup>16</sup>

3. Whether there is a known or potential rate of error.<sup>17</sup>

4. Whether the methodology is subject to standards and controls.<sup>18</sup>

5. Whether there is a degree of acceptance of the particular technique or methodology within the relevant scientific community.<sup>19</sup> Although the level of acceptance is a relevant consideration, "general acceptance," as mandated by *Frye*, is not required for admissibility.<sup>20</sup>

Courts applying *Daubert* developed additional criteria that may be relevant for trial courts to consider in performing their gatekeeper function with respect to

expert testimony. According to the advisory committee's notes to proposed Federal Rule of Evidence 702, these include:

1. Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrill Dow Pharmaceuticals Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995).
2. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See*



*General Elec. Co. v. Joiner*, 118 S. Ct. 512, 519 (1997) (noting that in some cases a trial court “may conclude that there is simply too great an analytical gap between the data and the opinion proffered”).

3. Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff’s condition). *Compare Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).
4. Whether the expert “is being as careful as he would be in his regular professional work outside his paid litigation consulting.” *Sheehan v. Daily Racing Form Inc.*, 104 F.3d 940, 942 (7th Cir. 1997). *See also Braun v. Lorillard Inc.*, 84 F.3d 230, 234 (7th Cir. 1996) (*Daubert* requires the trial court to assure itself that the expert “adheres to the same standards of intellectual rigor that are demanded in his professional work.”).
5. Whether the field of expertise claimed by the expert is known to reach reliable results. *See Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (rejecting testimony based on “clinical ecology” as unfounded and unreliable).<sup>21</sup>

Lower courts disagreed on whether the criteria outlined by the *Daubert* Court should apply to testimony that does not purport to be based on scientific principles. Some courts concluded that *Daubert* was inapplicable to expert testimony based primarily upon observation and experience, because the factors described by the Court had no bearing on the reliability of such testimony.<sup>22</sup> Others concluded that *Daubert* applied to all expert testimony, regardless of whether it purported to be based on scientific evidence.<sup>23</sup> Different panels in at least one circuit published opinions in apparent conflict on this issue.<sup>24</sup>

## ***Carmichael* Rejects *Daubert* Standards For Non-Scientific Expert Testimony.**

Against this backdrop the Eleventh Circuit held in *Carmichael v. Samyang Tire Inc.*<sup>25</sup> that the *Daubert* criteria were inapplicable to “non-scientific” expert testimony. The factual issue before the trial court was whether an automobile tire failed because of a manufacturing defect. Plaintiffs’ expert, an engineer with substantial experience in tire failure analysis, testified at his deposition that the tire at issue lacked certain indicia of abuse. In the

absence of such indicia, the expert concluded that a manufacturing defect caused the tire failure. The district court concluded that the expert’s methodology did not satisfy the criteria for reliability enumerated in *Daubert*. Accordingly, the testimony was inadmissible. Absent other proof of causation, the district court entered summary judgment for the defendant.<sup>26</sup>

The Eleventh Circuit rejected the argument that *Daubert* created a general framework for determining admissibility of all types of expert testimony.<sup>27</sup> The court observed that *Daubert* specifically limited its holding to “the ‘scientific context.’”<sup>28</sup> Although the court acknowledged that *Daubert* suggested district courts must perform a gatekeeper function, the court concluded that — at least as to non-scientific opinions — the adversary system was equipped to assess the reliability of expert testimony through the use of “‘vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof.’”<sup>29</sup>

The appellate court viewed scientific expert testimony as distinct because it “relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of [the] opinion.”<sup>30</sup> Because the Eleventh Circuit concluded that the expert in *Carmichael* based his opinion on his experience in analyzing failed tires, rather than on physics or chemical analysis, it concluded that the opinion was outside the scope of *Daubert* and that the district court erred as a matter of law in applying the *Daubert* criteria to exclude his testimony.<sup>31</sup> The Eleventh Circuit reversed and remanded the case. Nevertheless, although rejecting the applicability of the *Daubert* factors to non-scientific expert testimony, the court left open the possibility that such testimony might still be excluded on remand if it did not meet the reliability and relevance requirements of Rule 702.<sup>32</sup>

## ***Kumho* Applies *Daubert*’s Gatekeeper Requirement To All Expert Testimony.**

The Supreme Court granted certiorari in *Carmichael*, sub nom *Kumho Tire Co. v. Carmichael*,<sup>33</sup> to address “the uncertainty among the lower courts about whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon ‘scientific’ knowledge, but rather upon ‘technical’ or ‘other specialized’ knowledge.”<sup>34</sup> The Court read *Daubert* broadly as applying to all expert testimony. Under the decision, a district court has discretion in the way it exercises its gatekeeper role with respect to expert testimony and may consider one or more of the specific *Daubert* factors as appropriate in a particular case.<sup>35</sup> The Court concluded that the district court’s exclusion of the tire failure expert’s testimony based on the



*Daubert* factors was within its discretion and therefore reversed the Eleventh Circuit.

The Court saw no differences between scientific and non-scientific expert testimony that would exempt non-scientific testimony from the gatekeeping function performed by federal district judges. Both types of testimony are subject to the same admissibility requirements under Rule 702.<sup>36</sup> Witnesses offering both types of testimony enjoy the benefit of “testimonial latitude unavailable to other witnesses” in large part because they are assumed to have a reliable basis within their respective fields of expertise.<sup>37</sup> Finally, there is no clear line that would allow trial judges to differentiate one type of testimony for purposes of applying a gatekeeping obligation.<sup>38</sup>

Arguably, however, the Supreme Court distinguished a position never taken by the Eleventh Circuit. The Eleventh Circuit appears to have rejected the *Daubert* criteria as inapplicable to non-scientific testimony — rather than concluding that a district court has no gatekeeping role that would allow it to exclude unreliable or irrelevant non-scientific evidence. The Eleventh Circuit’s opinion contemplated that the district court would consider admissibility of the expert’s testimony under Rule 702 on remand, despite the conclusion that the specific *Daubert* criteria did not apply.<sup>39</sup>

More to the point is the Court’s holding that a district court may apply the criteria for admissibility suggested by *Daubert* even when the proposed testimony is based on experience and observation rather than hard science.<sup>40</sup> Thus, the Court stated that “[t]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert’s particular expertise, and the subject of the testimony.”<sup>41</sup> In particular, the Court concluded that some of the *Daubert* criteria could be helpful in evaluating the reliability of expert testimony that was experience-based.<sup>42</sup> Thus, a district court could conclude that experience-based expert methodology that was shown to have produced erroneous results or that was not generally accepted by other experts in the relevant field should be rejected as unreliable.<sup>43</sup> This approach retains the flexibility needed for district courts to “consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.”<sup>44</sup>

## Practical Implications of *Kumho*

*Kumho* reinforces the trial judge’s ability to shape the outcome of jury trials. In the exercise of the gatekeeper role, district courts have an obligation to assess the reliability

and relevance of all expert testimony (Rule 702), as well as a jury’s ability to understand such testimony and weigh it correctly (Rule 403).<sup>45</sup> Under *Kumho*, a trial judge who concludes that the risk of error is too high may exclude the evidence subject only to review for abuse of discretion.

So long as a trial judge does not simply ignore the gatekeeper obligation, the judge has broad discretion to decide the approach to take in determining whether a particular expert’s methodology is reliable.<sup>46</sup> This includes “discretionary authority needed both to avoid unnecessary ‘reliability’ proceedings in ordinary cases where the reliability of an expert’s methods is properly taken for

granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert’s reliability arises.”<sup>47</sup>

Although the caseloads of many judges may allow detailed scrutiny of experts’ methodologies in relatively few cases, the Federal Rules of

Evidence and Rules of Civil Procedure provide ample tools to support such inquiries. Under Federal Rule of Evidence 104(a), a trial court may conduct hearings to determine preliminary questions of admissibility. The Eleventh Circuit has endorsed “*Daubert* hearings,” noting that although they “are not required by law or by rules of procedure, they are almost always fruitful uses of the court’s time and resources in complicated cases involving multiple expert witnesses.”<sup>48</sup> If a trial court determines that it needs additional assistance in assessing the reliability and relevance of proposed expert testimony, Federal Rule of Evidence 706 authorizes the use of court-appointed experts.<sup>49</sup> Survey results suggest that only 20 percent of district judges have appointed experts; however, those who have done so have found them helpful.<sup>50</sup> Moreover, in exceptionally complicated cases, a trial court may wish to consider the appointment of a special master under Federal Rule of Civil Procedure 53(b) to resolve difficult admissibility issues.<sup>51</sup>

Following *Kumho*, practitioners may expect challenges to expert testimony with greater frequency, especially in complex cases. Nevertheless, although *Kumho* expands *Daubert*’s applicability, it does not impose a more stringent standard for admissibility of expert testimony than that which existed under *Daubert*. Courts may vary in their application of *Daubert*’s reliability criteria (or other relevant criteria); the surest guide for practitioners, however, may be whether the proposed expert has applied the same methodology customarily used by the expert or others in the profession outside the litigation context.<sup>52</sup> *Daubert*’s statement that “[v]igorous cross-examination, presentation

of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence”<sup>53</sup> suggests that in truly close cases, expert testimony should survive a trial court’s gatekeeping inquiry and be subjected to evaluation by the jury. ☐

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where his practice focuses on business litigation, including patent infringement and technology-related disputes. He received his B.S. and M.S. from Bob Jones University and his J.D. from the University of South Carolina School of Law. The opinions expressed are those of the author and do not necessarily reflect the views of Kilpatrick Stockton LLP or its clients.

## Endnotes

1. 509 U.S. 579 (1993). For commentary on *Daubert*, see, e.g., Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699 (1998); Dick Thornburgh, *Junk Science — the Lawyer’s Ethical Responsibilities*, 25 FORDHAM URB. L.J. 449 (1998); Paul F. Eckstein & Samuel A. Thumma, *Getting Scientific Evidence Admitted: the Daubert Hearing*, 24 LITIGATION 21 (1998); Edward J. Imwinkelried, *The Second Prong of the Daubert Test: Disturbing Implications of Two Recent Civil Cases*, 33 CRIM. L. BULL. 570 (1997); Alex Kozinski, *Brave New World*, 30 U.C. DAVIS L. REV. 997 (1997); Laurens Walker & John Monahan, *Daubert and the Reference Manual: an Essay on the Future of Science in Law*, 82 VA. L. REV. 837 (1996); Jay P. Kesan, *An Autopsy of Scientific Evidence in a Post-Daubert World*, 84 GEO. L.J. 1985 (1996). West Publishing Company has assigned Daubert materials their own database (identifier: DAUBERT) on the Westlaw System.
2. Proposed FED. R. EVID. 701-703 (May 1, 1998).
3. McKendall v. Crown Control Corp., 122 F.3d 803 (9th Cir. 1997); United States v. Jones, 107 F.3d 1147 (6th Cir. 1997); Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996); Tamarin v. Adams Caterers, Inc., 13 F.3d 51 (2d Cir. 1993).
4. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997), *rev’d*, Kumbo Tire Co. v. Carmichael, 119 S. Ct. 1167 (1999).
5. 119 S. Ct. 1167 (1999).
6. *Id.* at 1169.
7. *Daubert*, 509 U.S. at 582-84.
8. *Id.* at 584.
9. 293 F. 1013, 1014 (1923).
10. *Daubert*, 509 U.S. at 585.
11. *Id.* at 589.
12. *Id.*
13. *Id.* at 592.
14. *Id.* at 592-93. The Court expressly stated that although “Rule 702 also applies to ‘technical, or other specialized knowledge,’ . . . [its] discussion is limited to the scientific context because that is the nature of the expertise offered here.” *Id.* at 590 n.8.
15. *Id.* at 593.
16. *Id.* at 593-94.
17. *Id.* at 595.
18. *Id.* at 594.
19. *Id.* at 595.
20. *Id.*
21. Proposed FED. R. EVID. 702 advisory committee note (May 1, 1998).
22. See, e.g., Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) (inapplicable to experience-based testimony of automotive engineer); Tamarin v. Adam Caterers, Inc., 13 F.3d 51 (2d Cir. 1993) (inapplicable to accounting testimony or testimony of economist).
23. See, e.g., Watkins v. TelSmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997) (reliability determination required whether the expert testimony purports to deal with “economic valuation, advertising psychology, or engineering”).
24. Compare McKendall v. Crown Control Corp., 122 F.3d 803, 806 (9th Cir. 1997) (“*Daubert* applies only to the admission of scientific testimony”) with Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1143 n.8 (9th Cir. 1997) (“*Daubert*’s holding applies to all expert testimony, not just testimony based on novel scientific methods”); see also Michael H. Graham, *The Daubert Dilemma: At Last a Viable Solution*, 179 F.R.D. 1, 6, n.13 (1998); Daniel L. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 738-751 (1998).
25. 131 F.3d 1433 (11th Cir. 1997).
26. Carmichael, 131 F.3d at 1434.
27. *Id.* at 1435.
28. *Id.*
29. *Id.* at 1435 (quoting *Daubert*, 509 U.S. at 596).
30. *Id.*
31. *Id.*
32. *Id.* at 1436 n.9.
33. 119 S. Ct. 1167 (1999).
34. *Id.* at 1173.
35. *Id.* at 1175.
36. *Id.* at 1169.
37. *Id.*
38. *Id.*
39. Carmichael, 131 F.3d at 1437, n.9.
40. Kumho, 119 S. Ct. at 1174-75.
41. *Id.* at 1175 (quoting Brief of the United States as Amicus Curiae at 19). The case attracted eighteen amicus briefs: Brief Amici Curiae of Margaret A. Berger et al., 1998 WL 739321; Brief Amici Curiae of Neil Vidmar et al., 1998 WL 734434; Brief Amici Curiae of Ass’n of Trial Lawyers of America, 1998 WL 734430; Brief Amici Curiae of Trial Lawyers For Public Justice, P.C., Public Citizen, Inc., and the Center For Auto Safety, 1998 WL 734433; Brief Amici Curiae of Attorneys Info. Exch. Group, Inc., 1998 WL 762012; Brief Amici Curiae of Margaret A. Berger et al., 1998 WL 762013; Brief Amici Curiae of Bona Shipping (U.S.), Inc., Liberty Maritime Corp., Marine Transp. Lines, Inc., Maritime Overseas Corp., and the Offshore Marine Service Ass’n, 1998 WL 713448; Brief Amici Curiae of Washington Legal Found. and the Manufacturers Alliance, 1998 WL 541945; Brief Amici Curiae of John Allen et al., 1998 WL 541842; Brief Amici Curiae of United States of America, 1998 WL 541947; Brief Amici Curiae of American Auto. Mfrs. Ass’n, the Association of Int’l Auto. Mfrs., Inc. and Society of Automotive Eng’rs, Inc., 1998 WL 541948; Brief Amici Curiae of Defense Research Inst., 1998 WL 545899; Brief Amici Curiae of Stephen N. Bobo et al., 1998 WL 596787; Brief Amici Curiae of Rubber Mfrs. Ass’n, 1998 WL 541969; Brief Amici Curiae of American Ins. Ass’n and National Ass’n of Indep. Insurers, 1998 WL 541973; Brief Amici Curiae of Product Liab. Advisory Coun-

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AN OVERVIEW OF GEORGIA'S NURSING HOME MEDICAID PROGRAM  
AND ITS CRIMINAL AND ESTATE RECOVERY PROVISIONS

# Planning For Long-term Care

By Ira M. Leff and Daniel D. Munster


**T**hough clients may be reluctant to consider the need for long-term care planning, its import has grown significantly in recent years as life expectancies have increased and Georgia's population has aged. Those planning for, or in need of long-term care have three distinct options to consider: paying privately, long-term care insurance, and Medicaid.<sup>1</sup> For those who cannot afford to pay privately, or who cannot qualify for or afford long-term care insurance, Medicaid remains the only alternative.

In Fiscal Year 1997, 49,054 Georgians received Medicaid assistance in 346 nursing homes throughout the state.<sup>2</sup> With an average cost of \$12,865.76 per recipient, nursing home Medicaid expenditures of \$631,000,000 were second only to Medicaid costs associated with hospital services.<sup>3</sup> With so many Georgians needing or receiving long-term care assistance from Medicaid, professionals offering advice as to long-term care and estate planning

should maintain a sound understanding of the various criteria governing eligibility. This article will outline Medicaid's basic eligibility criteria before focusing on the present status of its estate recovery and criminal provisions.

## Basic Eligibility Criteria

Applicants seeking nursing home Medicaid in Georgia must be aged (65 or older), blind, or disabled and reside in a Medicaid participating facility.<sup>4</sup> Applicants must have a valid Social Security number and be either United States citizens, legal aliens who entered the United States prior to August 22, 1996, or qualified legal aliens who entered thereafter.<sup>5</sup> They must apply for and accept all other benefits to which they are entitled and agree to assign all third party resources (*e.g.*, Medicare, workers compensation, and private health insurance) to the Department of Medical Assistance.<sup>6</sup> And finally, applicants must satisfy



**In 1997, more than 49,000 Georgians received Medicaid assistance in 346 nursing homes in Georgia, with an average cost of \$12,865.76 per recipient.**

length of stay and level of care requirements.<sup>7</sup> Once applicants meet these basic prerequisites, the issues of income and resources are considered.

Although most of the above criteria apply to applicants nationwide, individual states have flexibility when setting income and resource eligibility guidelines. Accordingly, it is important to recognize that advice on long-term care planning will vary from state to state. In 1999, Georgia's basic income limit for nursing home Medicaid applicants is \$1,500.<sup>8</sup> Nevertheless, if an applicant's income exceeds this amount, a second test is applied to determine whether her monthly medical bills exceed the sum of her monthly income plus \$337.<sup>9</sup> If so, then she will qualify for nursing home assistance through Georgia's Adult Medically Needy (AMN) Medicaid program rather than directly through the nursing home class of assistance. As the cost of private nursing home care typically exceeds \$3,000 per month, most retirees can pass the AMN income test. Income

guidelines established under both the nursing home class of assistance and the AMN program govern all applicants regardless of their marital status.

Although income guidelines remain consistent regardless of an applicant's marital status, nursing home Medicaid resource guidelines diverge greatly depending upon this factor. Thus, whereas a single applicant in Georgia may not own countable resources worth more than \$2,000, a married applicant and her spouse may collectively own resources worth up to \$83,960 and still pass the resource test.<sup>10</sup> In general, an asset is a countable resource if its owner has the right, power, or authority to convert the asset to cash and is not legally restricted from using it for her support and maintenance.<sup>11</sup> There are some resources, however, that fall within this definition yet remain exempt from consideration when determining eligibility. Thus, an applicant's home, personal effects, income-producing real property, vehicles, burial contracts and plots, designated

funeral account, notes receivable, and small whole life insurance policies will be excluded for purposes of the resource determination.<sup>12</sup>

An applicant who qualifies for nursing home Medicaid by satisfying the basic and financial requirements realizes savings with regard to the cost of her care. Although private pay charges normally exceed \$3,000 per month, a resident on Medicaid is only responsible for paying a portion of her income to the facility as patient liability. Patient liability is calculated by deducting from the resident's income such items as health insurance premiums, incurred medical expenses not covered by Medicaid, and a personal needs allowance.<sup>13</sup> In addition, if the resident has a spouse living in the community, she may divert some or all of her income to the community spouse, thus reducing patient liability even more.<sup>14</sup> The amount that can be diverted is generally equal to the difference between the community spouse's personal income and the maximum allowance of \$2,049.<sup>15</sup> Thus, if a couple's countable income is less than \$2,049, the community spouse may retain all the income and the nursing home resident will only owe the facility for charges incurred at the beauty shop. By reducing the outflow of cash in this manner, the recipient's savings are protected and her exempt resources remain free to appreciate without affecting Medicaid eligibility.

## Estate Recovery

Commonly referred to as the federal Estate Recovery provision, section 1917(b)(1) of the Social Security Act generally requires Medicaid participating states to seek reimbursement from the estates of those who received nursing home Medicaid assistance prior to death.<sup>16</sup> Notwithstanding this federal mandate, Georgia has never implemented an Estate Recovery program.

Cognizant of its non-compliance, the Georgia Division of Aging published an *Informational Sheet on Georgia's Medicaid Estate Recovery Program* in April 1998, which indicated that recovery would begin in Georgia effective June 1, 1998. The announcement went so far as to suggest that liens would be placed on real property (including the recipient's home) to assure that recovery could be made in the event of a sale. A few weeks after publication of this *Informational Sheet*, however, the Division of Aging issued a retraction stating that the *Informational Sheet* contained

incorrect information.<sup>17</sup> According to the retraction, the Georgia Department of Medical Assistance had not yet determined whether to implement an Estate Recovery program.<sup>18</sup>

Uncertain about how to proceed on the issue of Estate Recovery, the Department of Medical Assistance wrote to the United States Department of Health and Human Services requesting clarification about Georgia's exposure for choosing not to implement an Estate Recovery program. The Department of Health & Human Services responded on June 18, 1998 with a letter informing the

Department of Medical Assistance that there is no penalty for failure to implement an Estate Recovery program.<sup>19</sup> Nevertheless, the letter went on to encourage Georgia to implement an Estate Recovery program as a cost-saving measure.<sup>20</sup>

Although Georgia has never implemented an

Estate Recovery program, there has been discussion about how aggressive such a program would be if the state were compelled to do so. According to a memorandum issued by the Georgia Department of Medical Assistance on January 30, 1995, any program implemented in Georgia would likely be limited in scope.<sup>21</sup> According to the memorandum, Georgia planned to seek recovery only against assets held by a decedent's probate estate, even though federal law authorizes recovery against other assets as well.<sup>22</sup>

Given its political unpopularity, it is unlikely that the Department of Medical Assistance will implement an Estate Recovery program in Georgia any time soon. In fact, Laura Marshall, a spokesperson for the Department of Medical Assistance, recently noted that "[w]e are not going to do it . . . For the emotional impact, it [is] probably not worth the cost."<sup>23</sup> Because it is impossible to predict with any degree of certainty when or if enforcement might begin, however, long-term care and estate planners might consider advising clients to take the following steps in preparation for the possible implementation of an Estate Recovery program:

- ♦ If the applicant/recipient (A/R) is married and mentally competent, or there is a power of attorney permitting gifts, A/R should transfer her assets to her community spouse. There is no penalty for such transfers between spouses.<sup>24</sup> When taking this step, counsel should confirm that the community spouse's Last Will and Testament expressly excludes A/R as a beneficiary and leaves all property to someone else. Completing these steps will

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**There are some transfers that will not be penalized regardless of the amount, timing, or recipient involved. For example, transfers between spouses are not penalized.**

reduce the possibility of Estate Recovery by assuring that the A/R's estate will be void of all assets at the time of death.

- ♦ If A/R holds any assets that allow designation of a beneficiary (*e.g.*, life insurance policies, annuity contracts, or IRA accounts), she should designate specific individuals rather than her estate as beneficiary. Similarly, if she has any bank accounts solely in her name, an additional name or names should be added so that the joint account will be payable to the survivor upon her death.<sup>25</sup> These steps will allow A/R's assets to pass directly to the designated beneficiary or joint account holder without entering her estate, thus avoiding Estate Recovery.
- ♦ If A/R is single, owns her home, and wants to keep it in the family, she should transfer the remainder interest in her home to her chosen heirs. Doing so will allow the property to avoid probate upon A/R's death. No transfer of resources penalty will be imposed on this transfer as long as the stated purpose is to avoid probate.<sup>26</sup> The heirs will receive title with a stepped-up, date-of-death income tax basis upon A/R's death.<sup>27</sup>
- ♦ If A/R holds an exempt promissory note, it is best if payment in full is not due on demand or upon A/R's death. A note that is due in small installments over many years may avoid Estate Recovery if considered too difficult to collect.

By taking these simple, legal steps designed to avoid Estate Recovery, clients will be more likely to preserve their property and life savings for the benefit of their heirs and loved ones in the event that Georgia eventually implements such a program.

## Criminal Provisions

In 1996, the United States Congress enacted a new Medicaid provision that criminalized certain gifts of assets.<sup>28</sup> Nicknamed the "Granny Goes to Jail Act," this law criminalized the knowing and willful disposition of assets to qualify for Medicaid if such disposition resulted in the imposition of a period of ineligibility.<sup>29</sup> Violators of this provision could be sentenced to a maximum of five years imprisonment and/or fined up to \$25,000.<sup>30</sup>

Under intense pressure from various lobbying groups, this provision was amended on August 5, 1997. As amended, the provision applies only to those who for a fee counsel or assist an individual in disposing of assets in order to become eligible for Medicaid, if disposing of the assets results in the imposition of a period of ineligibility.<sup>31</sup> Whereas originally Granny had to worry, only Granny's professional advisor must worry about being jailed or fined under the revised law.<sup>32</sup>

Whether a transfer penalty is imposed by the Department of Family and Children Services (DFCS), and thus whether a violation of this provision occurs, depends upon the timing, amount, and recipient of the transfer in question.<sup>33</sup> According to the formula used by DFCS, caseworkers divide the value of all uncompensated transfers made during the thirty-six months (sixty months if assets were transferred into certain trusts) preceding application by the average cost of private nursing home care in Georgia (\$2,157).<sup>34</sup> After dropping any fraction, the remaining whole number represents how many months of ineligibility will result from the transfer.<sup>35</sup>

DFCS will impose the penalty beginning on the first day of the month in which the transfer occurred.<sup>36</sup> For example, if an individual applying for nursing home Medicaid made a \$10,000 uncompensated transfer on September 15, 1998, the penalty period of four months ( $\$10,000 \div 2,157 = 4.64$ , which is rounded down to four months) would begin running on September 1, 1998 and expire on December 31, 1998. If a period of ineligibility resulting from an improper transfer expires prior to the first month of coverage sought, there is no penalty to impose, and thus, no crime is committed. Accordingly, if the individual in the previous example did not seek coverage until January 1999, the month following expiration of the penalty period, the transfer would not result in criminal prosecution.<sup>37</sup>

There are some transfers that will not be penalized regardless of the amount, timing, or recipient involved. For example, transfers between spouses are not penalized.<sup>38</sup> Moreover, an applicant will not be penalized for transferring her homeplace to a child under twenty-one years of age, a permanently and totally disabled child of any age, a sibling who owned an equity interest in the home and who lived there more than a year prior to the applicant's institutionalization, or a child who lived in the home at least two years prior to institutionalization and who provided assistance to the applicant during that period.<sup>39</sup> And finally, a general exception exists for transfers made exclusively for purposes other than to qualify for Medicaid.<sup>40</sup>

If DFCS determines that a transfer will be penalized, the applicant can avoid the penalty by recovering the subject property from the recipient.<sup>41</sup> As violation of Medicaid's criminal provisions hinges upon imposition of a transfer penalty, an applicant who successfully recovers her property before DFCS imposes a transfer penalty need not worry about criminal prosecution.

If done properly, long-term care planning will achieve your client's goals without violation of Medicaid's criminal provisions. Nevertheless, the mere threat of prosecution has prompted numerous professionals to avoid the area altogether. Recognizing this chilling effect, the New York State

Bar Association recently filed suit in federal court seeking injunctive relief against the enforcement of 42 U.S.C. § 1320a-7b(a). In *New York State Bar Association v. Janet Reno*,<sup>42</sup> the plaintiff challenged the constitutionality of 42 U.S.C. § 1320a-7b(a), arguing that the amended law violates both the First Amendment, in that it restricts free speech and is overly broad, and the Fifth Amendment in that it is vague. In an unreported opinion granting summary judgment to the plaintiff, the district court declared the amended law unconstitutional on two grounds. First, the court held that the law chilled protected speech without sufficient governmental justification. Second, noting that the defendant did not offer a single circumstance in which the law might be applied in a constitutional manner, the court held that the law was overly broad.<sup>43</sup>

While this case was pending, the United States Department of Justice carefully analyzed the constitutionality of 42 U.S.C. § 1320a-7b(a). Subsequently, United States Attorney General Janet Reno notified Congress of the following:

After close and careful scrutiny of the matter, the Department of Justice will not defend the constitutionality of Section 1128B(a)(6) because the counseling prohibition in that provision is plainly unconstitutional under the First Amendment and because the assistance prohibition is not severable from the counseling prohibition . . . I also am hereby informing the Congress that the Department of Justice will not bring any criminal prosecutions under the current version of that section.<sup>44</sup>

As the United States Justice Department does not intend to enforce this provision and at least one federal district court has found it to be unconstitutional, it appears that neither Granny nor her professional advisor need to worry about being jailed or fined if long-term care planning should run awry of the many Medicaid laws and regulations.<sup>45</sup>

## Conclusion

Maintaining a sound understanding of Medicaid's basic eligibility criteria, as well as the potential pitfalls presented by federal Estate Recovery and criminal provisions, will help prepare professionals to assist clients who seek both protection of assets and quality long-term health care. With this knowledge, professionals might recommend something as simple as disposition of assets with the intention of waiting for the period of ineligibility to expire before making application. On the other hand, they might advise the client to convert assets counted for purposes of Medicaid eligibility into the various exempt resources discussed above.<sup>46</sup> They might even suggest that the client convert excess resources into an income

stream by using an immediate annuity or similar investment product if a community spouse would benefit from the increased income. The key is for the professional to stay current on the issues outlined in this article to help clients meet their individual long-term care and estate planning goals effectively. ■



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## Endnotes

1. Medicare is not included as a viable option because it fully covers only the first twenty days a resident requires skilled nursing care following a hospital stay. Partial coverage can continue for eighty additional days if daily skilled care is required. During this period, however, the resident is responsible for co-payments of \$96.00 per day. *See* 42 C.F.R. § 409.61(b)(1997). In certain circumstances, veterans are entitled to assistance with long-term care from the Veterans Administration. *See* 38 C.F.R. § 17.42 *et seq.* (1997).
2. GEORGIA DEP'T OF MEDICAL ASSISTANCE, ANNUAL REPORT 19 (1997).
3. *Id.*
4. 42 C.F.R. §§ 435.520, 435.530, 435.540 (1997); GEORGIA DEP'T OF HUMAN RESOURCES, GEORGIA ABD MEDICAID MANUAL §§ 805, 825 (1994).
5. 42 C.F.R. § 435.403 (1997); ABD MEDICAID MANUAL, *supra* note 4, §§ 815, 820.
6. 42 C.F.R. §§ 435.608, 435.610 (1997); ABD MEDICAID MANUAL, *supra* note 4, §§ 810, 830.
7. ABD MEDICAID MANUAL, *supra* note 4 §§ 835, 840.
8. The Medicaid income limit is equal to 300 percent of the federal poverty line, and thus increases each year to compensate for inflation. *Id.* ch. 1400, App. A.



9. *Id.* § 650, App. A.
10. *Id.* § 1201, App. A.
11. *Id.* § 1201-1.
12. *Id.* ch. 1200.
13. *Id.* § 1805 *et seq.*, App. A.
14. *Id.* § 1850, App. A.
15. *Id.*
16. 42 U.S.C. § 1396p (1994).
17. Memorandum from Judith E. Hageback, Director of Division of Aging, to Area Agencies of Aging (May 8, 1998).
18. *Id.*
19. Letter from Eugene A. Grasser, Associate Regional Administrator, Division of Medicaid and State Operations, HCFA, to William R. Taylor, Commissioner, Georgia Department of Medical Assistance (June 18, 1998).
20. *Id.*
21. Memorandum from Kathy Blanton, Third Party Administration Coordinator, to Carol Robinson, Division of Family and Children Services (Jan. 30, 1995).
22. *Id.* at 4.
23. Ann Hardie, *Columns Stir Recent Action on Key Issues*, ATLANTA J.-CONST., Sept. 28, 1998.
24. ABD MEDICAID MANUAL, *supra* note 4, § 1299-2.
25. Adding a co-owner to a bank account will not result in a transfer penalty because A/R is still presumed to own the entire account. *Id.* § 1277-2.
26. So long as the transfer is for a stated purpose other than qualification for Medicaid, *viz.*, to avoid probate, then it will not be penalized. *Id.* § 1299-2.
27. Pub. L. No. 104-191, 217, 110 Stat. 1936, 2008-09 (1996) (codified at 26 U.S.C. §§ 1014, 2036 (Supp. III 1997)).
28. 42 U.S.C. § 1320a-7b(a) (1994 & Supp. III 1997).
29. *Id.*
30. *Id.*
31. *Id.*
32. Under the amended law, the crime has been reduced to a misdemeanor with a maximum jail time of one year and a maximum fine of \$10,000. *Id.*
33. The Georgia Department of Medical Assistance contracts with county departments of family and children services to perform eligibility determinations.
34. ABD MEDICAID MANUAL, *supra* note 4, § 1299-8, App. A. This state-mandated "average" has not been altered for several years, and thus, is not truly representative of the average cost of private nursing care in Georgia. Nevertheless, it remains the factor to be used when using the transfer penalty formula.
35. *Id.*
36. *Id.* § 1299-8.
37. Upon receipt of a nursing home Medicaid application, DFCS considers eligibility beginning three months prior to the month of application. *Id.* § 415. Thus, to avoid the possibility of criminal prosecution altogether, applicants should wait until three months after the penalty expires to apply for nursing home Medicaid or expressly request that retroactive coverage not be considered.
38. *Id.* § 1299-2.
39. *Id.* § 1299-3. Transfers must be to a child or sibling of A/R to fall within these exceptions. Transfers by a community spouse to children from a prior marriage or to her siblings (A/R's in-laws) will not fall within these exceptions.
40. *Id.* § 1299-2.
41. *Id.*
42. No. 97-CV-1760 (N.D.N.Y. 1997).
43. New York State Bar Ass'n v. Janet Reno, Memorandum - Decision & Order 3, No. 97-CV-1760 (N.D.N.Y. 1997).
44. Letter from Janet Reno, United States Attorney General, to Newt Gingrich, Speaker of the House of Representatives (March 11, 1998).
45. Even though the *New York Bar Ass'n* court held this law unconstitutional, and the Attorney General stated that she does not intend to initiate any prosecution under the law, it has not been repealed by Congress. Accordingly, professionals should remain current on the status of this law and whether it is ever amended again or repealed.
46. There is no penalty for converting a countable resource into one that is exempt so long as the A/R retains ownership of the new asset.

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A CRITICAL REEXAMINATION OF THE  
QUASI-PUNITIVE ASPECT

# Georgia Law of Alimony

By John Barrow

**T**here are two significant aspects of Georgia divorce law that encourage the parties to fight over past wrongs. One concerns the custody of minor children, the other the amount of alimony to be awarded.

When there are issues of both child custody and property division, one party may choose to wage a spurious custody battle as a pretext for exacting a more favorable settlement of property issues. Georgia law seeks to minimize the potential for such abuse by vesting the decision of custody issues in the court,<sup>1</sup> while giving either party the right to insist that property issues be decided by a jury.<sup>2</sup>

The problem posed by the issue of the amount of the award of alimony is different. Here, Georgia law allows the parties to use each other's past misconduct as a means of enhancing or reducing the amount of the alimony award,

but the issues of past misconduct and the amount of alimony must both be decided by the same jury.

This is fairly new. Before the advent of "no fault" divorce, evidence of prior misconduct on the part of either spouse was relevant to the issue of whether to award any alimony at all but not to the issue of how much alimony should be awarded. That changed in 1979, when the Georgia Supreme Court decided the case of *Bryan v. Bryan*,<sup>3</sup> which held that evidence of past misconduct was relevant and admissible not only as to the issue of entitlement to alimony but also as to the issue of the amount of alimony.

Divorce law in Georgia has not been the same since. Now, in virtually every case where either spouse can afford to fight over the amount of alimony, they have little choice but to fight dirty. This is because they now have something

new to fight over, and something new to fight with: the other spouse's misconduct during the marriage. This represents such a fundamental change in the Georgia law of alimony that it is surprising that it has not been subject to critical examination. It is even more surprising to discover that there is every reason to believe that this minor revolution in Georgia divorce law is a mistake.

## The law before *Bryan v. Bryan*

In the beginning, alimony was intended to compensate a wife (as the economically dependent spouse) for the economic loss caused by the dissolution of the marriage, but only when the end of the marriage was not the "fault" of the wife.<sup>4</sup> As a result, evidence of past misconduct was relevant to the issue of whether an award of alimony was to be made, but not to the question of the amount of alimony to be paid.

Because of this difference, early case law limited the admissibility of evidence of prior misconduct to the issue of alimony *vel non*. In cases where the wife's entitlement to alimony was conceded, evidence of wrongdoing, of fault, or of any other prior misconduct of the parties was irrelevant and therefore inadmissible in determining the amount of alimony to be paid.<sup>5</sup> In such cases, the only factors to be considered in determining the amount of alimony to be paid consisted of the needs of the wife and the husband's ability to pay.

## The events leading to the enactment of the 1977 statute

Things began to change in 1975 and 1976, when the Supreme Court decided the cases of *Marshall v. Marshall*<sup>6</sup> and *Loftis v. Loftis*.<sup>7</sup> These two cases addressed the issue of who was entitled to a divorce, and on what grounds, when one spouse was seeking a divorce on the recently enacted "no fault" grounds while the other spouse was seeking a divorce on one of the older "fault" based grounds, such as adultery.

In *Marshall* and *Loftis*, the Supreme Court considered

the 1973 "no fault" divorce statute<sup>8</sup> and construed that statute to manifest a public policy of avoiding recriminations between married persons seeking a divorce whenever possible. The Court therefore concluded that, *as to the narrow issue of who gets a divorce and on what grounds*, no purpose would be served by requiring the parties to litigate one side's claim that the other was at fault when the other side was entitled to a divorce on "no fault" grounds without proof of fault on the part of *either* party.

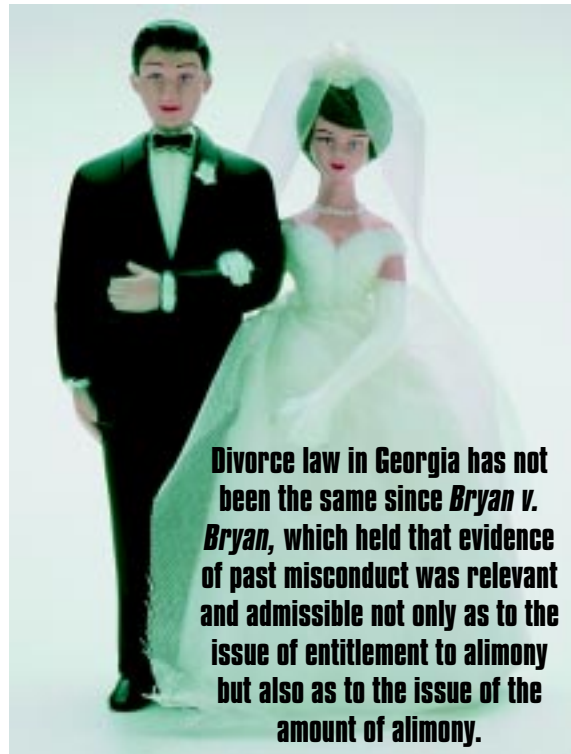
Accordingly, *Marshall* and *Loftis* held that whenever one spouse seeks a divorce on "no fault" grounds and the other spouse seeks a divorce on "fault" grounds, neither

spouse would be entitled to a divorce on grounds of fault, no matter who was at fault and no matter how much either party was at fault. Instead, *both* parties would be granted a divorce on "no fault" grounds, and neither party would be allowed to introduce evidence of fault as to the issue of who was entitled to a divorce and on what grounds.

The Supreme Court was careful to point out that the new rule in *Marshall* and *Loftis* would *only* serve to exclude evidence of fault as to the issue of divorce *vel non*, and only when one of the spouses seeks a divorce on "no fault" grounds. According to *Loftis*, "[t]his does not mean that, in the trial of other issues between the parties reserved for decision, either party is prevented from submitting relevant evidence to show, as he

or she contends, the real cause of the separation and divorce. The fact finder, whether it be judge or jury, may consider such evidence in rendering a decision on the other issues between the parties."<sup>9</sup> In other words, the new rule in *Marshall* and *Loftis* excluded evidence of misconduct only on the question of divorce *vel non*, but it did not change the preexisting rule that such evidence was admissible as to the issue of alimony *vel non* but *not* admissible as to the issue of the amount of alimony.

Things really changed when the Supreme Court decided *Anderson v. Anderson*.<sup>10</sup> In that case, the Supreme Court announced a new rule, which gave the wife, at her election, the right to exclude evidence of her own adultery, as to *both* the issues of alimony *vel non* and the amount of alimony. *Anderson* (followed the next year by *Lindsey v.*



**Divorce law in Georgia has not been the same since *Bryan v. Bryan*, which held that evidence of past misconduct was relevant and admissible not only as to the issue of entitlement to alimony but also as to the issue of the amount of alimony.**

*Lindsey*<sup>11</sup>) eliminated the distinction between the new rule excluding evidence of misconduct on the question of whether or not to grant a *divorce* and the preexisting rule admitting evidence of misconduct on the question of whether or not to award *alimony* but excluding such evidence as to the issue of the *amount* of alimony. In any case where one party seeks a divorce on “no fault” grounds, *Anderson* now held that evidence of misconduct would be irrelevant and therefore inadmissible on the questions of both the entitlement to alimony and the amount of alimony.

Now the circle was complete: In any case where either party sought a divorce on “no fault” grounds, neither party would be entitled to introduce evidence of misconduct *for any purpose at all*, even in resisting a claim for alimony by an adulterous spouse. All either party had to do to keep *both parties’* past misconduct out of the case — not only as to the issue of the amount of alimony but *also* as to the issue of *entitlement* to alimony — was to file a claim for divorce on “no fault” grounds. Thus, in the interest of avoiding recrimination, Georgia’s law of “no fault” *divorce* was converted into a law of “no fault” *alimony*.

In this move, the *Anderson* Court clearly recognized that it was going beyond the point where it had stopped in *Loftis*.<sup>12</sup> Nevertheless, what may be undesirable in deciding whether to end a marriage may be very important in deciding who has to pay, and how much, after the marriage is over. Three Justices refused to go along with *Anderson’s* “no fault” alimony rule. In a sharp dissent, Justice Ingram pointed out that the new rule excluding evidence of misconduct on the determination of both the issues of alimony *vel non* and the amount of alimony created a perfect shield for even the most outrageous misconduct on the part of a spouse, misconduct that it had been the policy of Georgia law to discourage by banning alimony whenever such misconduct was the cause of the separation. Now, Justice Ingram pointed out, the spouse whose marriage is the victim of the other spouse’s adultery would *never* be able to introduce evidence of such misconduct: As he noted, “[t]his is a radical departure from the long standing case law in our state. Indeed, it is a departure from what a majority of this court said only seven months ago in *Loftis v. Loftis*.”<sup>13</sup>

## The General Assembly overrules *Anderson v. Anderson*

In 1977, the General Assembly enacted a statute that added six sentences to former Georgia Code Annotated § 30-201.<sup>14</sup> There is no question that this statute was intended to overrule the decision in *Anderson* excluding evidence of misconduct on the issue of alimony *vel non*.

The question is whether the General Assembly also intended to overrule the longstanding preexisting law excluding evidence of misconduct as to the issue of the amount of alimony as well.

The second sentence of the 1977 amendment states that “[i]n all cases in which alimony is sought by the wife, the court shall receive evidence of the factual cause of the separation even though one or more of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court.” *Bryan v. Bryan* was the Supreme Court’s first look at this language. Apparently stung by the obvious reversal of the holding in *Anderson*, the *Bryan* Court concluded that this language was also intended to overrule the pre-*Anderson* rule excluding evidence of past misconduct as to the amount of alimony:

It was apparently the purpose of the 1977 revision of Code §30-201 to change the previous case law by statute. The factual cause of the parties’ separation was made relevant to both the issues of entitlement and amount of alimony, regardless of the grounds on which the divorce is granted.<sup>15</sup>

Before examining that conclusion more closely, it is worth noting that the question of whether the statute was intended to overrule not only *Anderson’s* rule of “no fault” alimony but also the pre-*Anderson* rule excluding evidence of past misconduct as to the amount of alimony was not at issue in *Bryan*. The only issue in *Bryan* was the question of the *retroactivity* of the 1977 amendment.<sup>16</sup>

Within the year, the Supreme Court handed down at least three decisions that relied on *Bryan* in holding that the 1977 statute admitted evidence of misconduct on the issue of the amount of alimony.<sup>17</sup> Thus, the “rule” in *Bryan* quickly became firmly entrenched in the law.

## What’s wrong with *Bryan*?

To begin with, it is clear that the first sentence of the 1977 amendment was intended to adopt Justice Ingram’s dissent as the law, and thereby overrule *Anderson’s* new rule of “no fault” alimony. The second sentence of the 1977 amendment provides the means of enforcing the prohibition in the preceding sentence: The court “shall receive evidence of the factual cause of the separation.”

The first part of the second sentence of the amendment provides that the court shall receive evidence of the factual cause of the separation “[i]n all cases in which alimony is sought by the wife.” If this phrase is construed as referring only to those cases in which the *entitlement* to alimony is in issue — as in the sense, “all cases in which alimony is

sought by the wife *and resisted by the husband*’ — then the rest of the sentence does not even address, much less change, the preexisting rule excluding evidence of misconduct as to the issue of the amount of alimony.

Nevertheless, if “all cases in which alimony is sought by the wife” includes not only all cases in which entitlement to alimony is in issue but also all cases where the only issue to be decided is the amount of alimony (because the right to alimony is conceded), then the statute goes much further than reversing *Anderson*. In that event, it also reverses the preexisting rule designed to keep alimony from becoming a *punitive* measure of damages, because it authorizes either party to inject evidence of the other’s past misconduct into a case when the only issue to be determined is compensation for the economic loss to be sustained in the future as the result of the dissolution of the marriage.

One problem with the more expansive interpretation of the phrase is that it makes nonsense out of the rest of the amendment. The very next sentence of the amendment goes on to spell out the traditional measure of damages to be paid as alimony, authorizing an award in accordance with one spouse’s needs and the other spouse’s ability to pay. According to this sentence, however, this is the rule that applies “[i]n all *other* cases in which alimony is sought by the wife.” But if, as *Bryan* concluded, the class of cases referred to in the preceding sentence includes not only all cases in which the right to alimony is at issue but also all cases in which the right to alimony is conceded, then there are no “other cases” in which alimony is sought to which the third sentence of the amendment can apply.

What, then, to make of the amendment’s reference to “all *other* cases in which alimony is sought by the wife”? This explicit reference to “other” cases in which alimony is sought by the wife — cases that are “other” than and therefore different from the “cases” covered by the preceding sentence — indicates that the two sentences are describing two different kinds of “cases in which alimony is sought by the wife.” In the “cases” covered by the second sentence of the 1977 amendment, the statute expressly admits evidence of the cause of the separation. But in the very next sentence, in what is explicitly referred to as some “other” class of “cases” in which alimony is sought by the wife, the only relevant issues are the wife’s needs and the husband’s ability to pay, which prior law regarded as issues wholly unrelated to fault.

In construing a statute, proper regard should be given to the old law, the new evil, and the remedy.<sup>18</sup> The “old law” admitted evidence of misconduct on the issue of alimony *vel non* but excluded such evidence on the issue of the amount of alimony. The new “evil” was the recent decision in *Anderson* excluding evidence of misconduct on

the issue of alimony *vel non*. The remedy was the 1977 statute.

In his dissents in *Anderson* and *Loftis*, Justice Ingram criticized the new rule announced in those decisions. But nowhere in *Anderson* or *Loftis* did the Court change the longstanding rule excluding evidence of misconduct on the amount of alimony. As to that rule, there was no new “evil” for Justice Ingram to argue against, and there was no new “evil” for the legislature to provide a remedy. It thus appears that, based on an examination of the 1977 statute itself and on an understanding of the context in which the statute was enacted, the General Assembly did not intend to change the rule excluding evidence of misconduct on the issue of the amount of alimony.

## ***Bryan’s rule is contrary to the policy its authors sought to promote***

Perhaps the most serious objection to *Bryan’s* rule is that it undermines the policy of the no fault divorce law, which was the very same policy that the Supreme Court had over-extended to the point of recognizing a right of “no fault” alimony, thereby requiring the legislature to step in to restore the *status quo ante*. That policy is to avoid recrimination between married persons seeking a divorce whenever possible. Consistent with that policy, prior Georgia law had distinguished between the issues of *liability* to pay alimony and the *amount* of alimony to be paid: A party’s *liability* to pay alimony had always been based on principles of fault, but the *extent* of the liability to pay alimony had been limited to compensation for economic loss and had never been authorized as punishment for past wrongdoing.

And yet, as everyone acknowledges, the only conceivable effect that evidence of past misconduct can have upon the determination of the amount of future alimony is to enhance or reduce an award of alimony without regard to the needs or ability of the parties. This turns what was intended to be a purely compensatory exercise into an exercise that is, at the very least, both compensatory *and* punitive. And the party seeking to take advantage of this opportunity can do so only by means of injecting issues of recrimination into the case.

Indeed, *Bryan* concedes that the only purpose to be served by admitting evidence of past misconduct on the question of the amount of alimony is to convert a purely compensatory measure of damages into a measure of damages that is both compensatory and punitive. *Bryan* likened the admission of such wrongdoing to a criminal case in which the criminal’s past crimes are “introduced against him to enhance his punishment for a present crime,” and that evidence of past misconduct is now

admissible “even though [such] evidence may enhance a current alimony award.”<sup>19</sup>

## A modest proposal

The policy behind the rule before *Anderson* and *Bryan* is all or nothing: Either the economically dependent spouse is entitled to alimony or not. If so, it should be enough to make the dependent spouse whole, not more than enough (because of the payor’s misconduct) and not less than enough (because of the payee’s misconduct).

If the legislature’s reenactment of the pre-*Bryan* rule means that the “all or nothing” approach cannot be avoided, there is still a way for the courts to insure that the “all” of an award of alimony will be based solely on economic, non-punitive factors, while at the same time preserving the right to award “nothing” in cases where the past misconduct of the prospective alimony payee is egregious enough: Bifurcate the issue of liability to pay alimony from the issue of the amount of alimony, try the issue of the amount of alimony to be paid first, and then (and only then) try the issue of entitlement to alimony.

There is no statutory impediment to this approach. The Civil Practice Act applies to divorce proceedings,<sup>20</sup> and it expressly provides that “[t]he court, . . . to avoid prejudice, may order a separate trial of any claim . . . or of any separate issue, or of any number of claims . . . or issues.”<sup>21</sup> In other words, rather than *Anderson*’s grant of total amnesty for past misconduct — which results in a right of no-fault alimony the legislature has clearly rejected — this would result in a temporary truce on the matter for the purpose of first determining the amount of alimony that should be awarded, if any, before turning to the issue of whether to withhold that award of alimony on the basis of past misconduct.

Under such a practice, all awards of alimony would more closely reflect one’s spouse’s needs and the other’s ability to pay. This may tend to reduce the extent to which punishment is used, in practice, to make an award of compensation a more adequate measure of compensation, as such. But in exchange for abandoning the prospect of enhancing alimony awards with a supplemental award intended to punish the alimony payor, this would prevent the economic privation that results in those cases where a reduction of alimony is used as a means of punishing the alimony payee.

Whatever the down-side risk to some under this modification of the *Bryan* rule as compared the down-side risk to others under *Bryan*’s rule of quasi-punitive alimony, it is certain that there is a down-side risk to all under the present rule. Any spouse who can afford to fight over the amount of alimony has an economic incentive to fight over

the past misconduct of the other, and the social cost of that policy — for the spouses, their families, and the courts — is enormous. ☐



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## Endnotes

1. O.C.G.A. §§ 19-9-1(a), 19-6-14 (1994).
2. *Id.* § 19-5-1.
3. 242 Ga. 826, 251 S.E.2d 566 (1979).
4. As one commentator has noted:  
The theory of permanent alimony has always been based on the husband’s reciprocal rights and obligations of marriage: the right to assume full control of the wife’s estate at the time of marriage and the concurrent obligation to provide support and maintenance during the marriage. This obligation to support was extended to support after separation and divorce, if the separation was due to the ‘fault’ of the husband. Generally, the wife forfeited her right to permanent alimony if she was guilty of adultery or abandonment of the husband.  
D. McCONAUGHEY, *GEORGIA DIVORCE, ALIMONY AND CHILD CUSTODY* § 3-2 (1997 ed.).
5. *See, e.g.,* DuPree v. DuPree, 224 Ga. 52, 159 S.E.2d 708 (1968) (once a decision to award alimony is reached, the question of innocence and extent of guilt or wrong are irrelevant in fixing the amount of alimony); McCurry v. McCurry, 223 Ga. 334, 155 S.E.2d 378 (1967) (jury is not authorized to consider conduct or misconduct of either party in determining the amount of alimony); Hall v. Hall, 220 Ga. 677, 141 S.E.2d 400 (1965) (matters of guilt or wrong are proper considerations in deciding whether to grant or deny alimony, but not in fixing its amount); *see also* Lindsey v. Lindsey, 238 Ga. 685, 235 S.E.2d 6 (1977); Anderson v. Anderson, 237 Ga. 886, 230 S.E.2d 272 (1976); Fried v. Fried, 211 Ga. 149, 84 S.E.2d 576 (1954).
6. 234 Ga. 393, 215 S.E.2d 117 (1975).
7. 236 Ga. 637, 225 S.E.2d 685 (1976).
8. 1973 Ga. Laws 557.
9. 236 Ga. at 639, 225 S.E.2d at 686.
10. 237 Ga. 886, 230 S.E.2d 272 (1976).
11. 238 Ga. 685, 235 S.E.2d 6 (1977).
12. “We are not unmindful of our words in *Loftis* that neither party is prevented from introducing evidence of wrongdoing “in the trial of other issues [except divorce].” 237 Ga. at 891, 230 S.E.2d at 275.
13. 237 Ga. at 893-94, 230 S.E.2d at 276 (Ingram, J., dissenting).
14. As amended, the statute read as follows:  
30-201. Definition. Permanent and temporary. — Alimony is an allowance out of the husband’s estate, made for the support of the wife when living separate from him. It is either temporary or permanent.  
[1] The wife shall not be entitled to alimony if it is established by a preponderance of the evidence that the sepa-

ration between the parties was caused by the wife's adultery or desertion.

[2] In all cases in which alimony is sought by the wife, the court shall receive evidence of the factual cause of the separation even though one or both of the parties may also seek a divorce, regardless of the grounds upon which a divorce is sought or granted by the court.

[3] In all other cases in which alimony is sought by the wife, alimony is authorized, but not required, to be awarded to the wife in accordance with her needs and the husband's ability to pay.

[4] In determining whether or not to grant alimony to the wife, the court shall also consider evidence of the husband's conduct toward the wife.

[5] Should the husband die prior to the court's order on the issues of alimony, the rights of the wife shall survive and be a lien upon the estate of the deceased.

[6] Pending final determination by the court of the wife's right to alimony, the husband shall not make any substantial change in the assets of his estate except in the course of ordinary business affairs and bona fide transfers for value.

15. 242 Ga. at 827, 251 S.E.2d at 568 (emphasis added).

16. The husband — the party who was trying to keep the evidence of his own misconduct out of the case — did not even argue that the 1977 amendment did not admit evidence of his misconduct on the issue of the amount of alimony. He assumed that the 1977 amendment admitted evidence of his misconduct as to *both* the issue of alimony *vel non* and the issue of the amount of alimony. The husband only challenged the retroactive application of that construction of the statute to the facts of his case, arguing that evidence of his adultery was inadmissible because it occurred before the 1977 amendment was enacted. 242 Ga. at 826-27, 251 S.E.2d at 567. This argument was no more appealing than it was successful.

17. *See Hand v. Hand*, 244 Ga. 41, 257 S.E.2d 507 (1979); *Davidson v. Davidson*, 243 Ga. 848, 257 S.E.2d 269 (1979); *Bigham v. Bigham*, 243 Ga. 171, 253 S.E.2d 91 (1979).

18. *Moore v. Baldwin County*, 209 Ga. 541, 545-46, 74 S.E.2d 449, 452 (1953).

19. 242 Ga. at 829, 251 S.E.2d at 569.

20. O.C.G.A. §§ 19-5-8, 9-11-81 (1994).

21. *Id.* § 9-11-42(b); *see also id.* § 9-11-13(i).

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# Appellate Practice “Helpful Hints”

*Judge Birch’s Appellate Practice “Helpful Hints” was originally prepared several years ago, after consultation with his colleagues, for a meeting of the Litigation Section of the Atlanta Bar Association. Since that time, Judge Birch has distributed “Helpful Hints” as a handout in numerous presentations. These suggestions continue to provide sound advice for effective appellate advocacy.*

By Hon. Stanley F. Birch Jr.

**1. Preserve your record by making a proffer, objection, or motion at trial.**

**2. Keep it short: The length of a brief does not determine its quality.** The brief should be written in a straightforward manner. Relevant case law should be cited, preferably case law binding in this circuit. Cases not binding in this circuit need not be cited unless there is no applicable precedent in this circuit, or unless the nonbinding case is more analogous factually and analytically. Do not use five words where two will suffice; do not use a “two-dollar word” where a “ten-cent word” is adequate and more understandable; and avoid string cites. Get to the point, make your argument, and draw your conclusion. Remember that weak arguments may detract from stronger ones, so be wary of including every conceivable argument. Using the “shotgun” approach could cause you to “shoot yourself in the foot” (or worse).

**3. In the Table of Authorities, place an asterisk (\*) in the left margin next to those cases upon which principal reliance is placed and so note at bottom of the page.** Although not dictated by any format, you may wish to place parenthetically after each citation the issue number, corresponding to the issue in your Statement Of Issues, to which that case is applicable.

**4. Realize the importance of the Summary Of Argument section of your brief.** Many judges turn initially to this section of the brief. This section should be written *after* your argument sections are composed. Synopsize each of your arguments, preferably under brief subheadings, in simple, straightforward sentences explaining the result that you desire and the reasons therefor. Do not cite cases unless you do so by footnote so as not to break

the flow of your presentation.

**5. Emphasize the standard of review in arguments when it works to your advantage.** If the court of appeals can reverse for abuse of discretion, or plain error only, *that fact is as important as the burden of proof in the district court.* In your briefs and at oral argument, remind the panel when the presumption to uphold the district court favors you.

**6. Refer to parties by name.** Throughout briefs, do not refer to the parties as “appellant,” “plaintiff,” “respondent,” or any combination thereof. In the first paragraph, it is helpful to identify the appellant in relation to that party’s position in the district court (plaintiff or defendant). Thereafter, it is confusing to refer to the parties generically.

**7. Record excerpts and accurate record cites are essential.** Many of the cases on appeal have voluminous records, and judges *will* read the record. Misstatements of the record are not appreciated and are detrimental to the misstating attorney’s case. *Every material factual statement in a brief should be followed by a cite to the record.*

**8. Avoid rambling and unclear factual recitations.** Many cases involve complicated factual situations, such as interlocking companies or the functioning of industries unfamiliar to the court. Judges are not experts in every field, although they must decide technical cases. Attorneys assist the court in explaining factual circumstances in a coherent, understandable manner. Generally, a chronological recounting of the facts is the most logical method of presentation. It is imperative that the facts in any case be recited to the court accurately. You may argue the facts as you desire, by explaining motivation for certain actions, for example. An accurate recitation of the facts is necessary for a correct application of the law. Unexposed facts, particularly ones that may be determinative as to the law, can be as damaging to your case with the court as improper legal arguments.

**9. Never cite a case for a particular proposition unless that case actually supports your argument.** If an argument is taken out of context, or an irrelevant case is used merely to bolster an argument with some authority, a serious risk is run of destroying an attorney’s credibility with the court. When an argument is novel or otherwise unsubstantiated, it is better to present that argument without authority. Use analogous cases with parenthetical



explanations where appropriate. A questionable analogy may be a creative argument, while misrepresenting the holding of a case is indefensible and counterproductive. *While you may use inferences, please tell the court that you are so doing.* Do not take a quotation or argument out of context, use dicta,<sup>1</sup> or rely on an inference that could jeopardize the court's view of a case. Judges look to counsel to provide accurate quotations as bases for their arguments. Do not be memorable to the judges for misleading the court on the governing law.

**10. Focus on the strongest argument(s).** Frivolous arguments should not be made because they weaken the attorney's position. The argument should be discussed clearly, concisely and persuasively without stretching the argument or the applicable law.

**11. An attorney should not ignore an argument raised by the other party.** The brief should address the other party's arguments and supporting cases cited therein. An attorney should demonstrate the reasons that an opposing argument is frivolous. If counsel finds an argument convincing, counsel should concede that point and focus on counsel's strongest argument(s). This will cause the reviewing court to respect that attorney's credibility.

**12. Proofread briefs carefully.** Typographical, grammatical, compilation (*i.e.*, pages out of order, repeated, or not legible) and spelling errors detract from your legal arguments. If an attorney is careless in the presentation of arguments, then he or she might also fail to be logical and thorough in legal reasoning and analysis. For example, one judge mentioned at oral argument that counsel had discussed federal and state "comedy" in his brief rather than "comity." All cases must be cite checked. Incorrect citations are annoying, particularly if volume and page numbers have been transposed, and are especially so when the case name also is misspelled.

**13. Strictly adhere to the form and page length requirements.** For example, the Eleventh Circuit Rules mandate that "[o]nly the cover page, the certificate of service, direct quotes, headings and footnotes may be single spaced. All other typed matter must be double-spaced, including the Table of Contents and the Table of Citations."<sup>2</sup>

**14. Know the trial record.** In cases involving appeals from trials, it is likely that the judges will question counsel regarding proceedings at trial, such as whether a particular objection was made. It is unhelpful and frustrating to the court when the response to such a question is: "I am sorry, your Honor, I do not know. I was not the trial attorney." If someone other than the trial counsel is arguing the case, then he or she should be completely familiar with the trial transcript so that such questions may be answered. If a judge asks a question concerning the trial that is not apparent from the briefs, then that question is likely to be

important in deciding the case. Therefore, it is important that it be answered for the court, at oral argument, or subsequently, with permission of the panel.

**15. Be prepared to answer questions.** An attorney arguing a case before a panel should be aware that most of counsel's allotted fifteen minutes generally will be spent responding to questions. When addressing a question, an attorney should answer the question directly and, thereafter, explain the response. Counsel should expect questions posed by the judges based on hypothetical situations. In response, explain the reasons for finding the hypothetical applicable or inapplicable. Panel questions usually are straightforward because the judge has a particular problem with the facts or your legal argument. An evasive response gives the impression that you are being less than candid. The astute attorney should realize that the judge asking the question actually is helping the counsel by directing him to the aspect of his or her case that is troubling for the judge. By clarifying that point for the inquiring judge, counsel benefits his or her case appreciably by addressing a fact or applied point of law that may be decisive.

**16. Sarcasm and indignation are not substitutes for hard and cold logic.**

**17. Discourage your clients from attending oral argument.** I have seen clients die the proverbial "thousand deaths" as the panel challenges and interrogates each party's counsel on the legal theories of the case. Why put your clients through such a proceeding where legal issues predominate?

**18. The appellee should be aware of all grounds supporting the district court's favorable ruling on summary judgment.** Because an appellate court can affirm the grant of summary judgment on any ground argued before the trial court, an appellee should always address the presented, but unruled-upon grounds as well as the grounds relied upon by the trial court.<sup>3</sup> ☒



*The Hon. Stanley F. Birch Jr. is U.S. Circuit Judge for the Eleventh Circuit. He received a B.A. from the University of Virginia and a J.D. and Master of Laws in taxation from Emory University School of Law. Judge Birch is a former member of the State Bar of Georgia Board of Governors.*

## Endnotes

1. For a fine discussion contrasting "dicta" and "holding," see *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488, 1450 (11th Cir. 1993) (Edmondson, J., concurring).
2. 11th Cir. R. 32-3 (emphasis added); *see also* Fed. R. App. P. 32; 11th Cir. R. 32-4.
3. *See generally* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2716, at 290-92 (3d ed. 1998).

# From the Bar to the Bench: Reflections of a Rookie Judge

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By Hon. Neal W. Dickert

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I practiced law for 22 years. Much of that time was devoted to the process of deciphering judges. I tried to determine what judges liked and disliked, what judges thought important or persuasive — in general, what made them tick. Like most lawyers, I wanted judges to like — and most importantly — to rule with me. After 22 years of trying to analyze judges, I woke up on January 2, 1997, to find that I was one.

I did not immediately command any additional respect. On the morning of my installation, I asked our Chief Judge where I should park my car. He told me to pick one of the spots in the parking lot marked “Reserved for Superior Court Judge.” When I was giving my acceptance speech, I mentioned my uneasiness about leaving my car in this reserved spot. I was concerned that I would go to the parking lot at the end of the day to find my car towed away. When I left the office that day, there was a note on the windshield of my car, which read “Please remove your car. This space reserved for Superior Court Judges.” It was allegedly signed by the Richmond County Sheriff’s Department. I learned the next morning that the note had been left by one of my former law partners.

This limited respect continued as evidenced by one of the first drafted orders I received from an attorney. In one of my first contested custody cases, I directed the Department of Family and Children Services (DFACS) to conduct home studies on both parents and to report their findings to the court. When I received the proposed order, it directed DFACS to “conduct home studies on the parties and the Court.”

The first few months were a real adjustment. As a lawyer, I always thought that the trial judge knew everything there was to know about every case before him or

her. What I did not realize is that a judge does not really have any files. As a lawyer you are involved in most of your files every few weeks. You are talking or meeting with your client or opposing counsel, you are taking a deposition, you are attending a hearing, you are corresponding with the court or opposing counsel. Your memory is constantly being refreshed as to the matters you are handling. Judges are different. We see parties briefly. They come in, and they leave. Most parties never come back. In many situations, this is a blessing. Those cases that do come back are those that you would just as soon never see again. We try to be intensely interested and concerned about the case or issue before us, but shortly thereafter, we are hearing another case that we will also probably never see again. I remember seeing the first proposed order presented to me after I had been on the bench for two or three weeks. I was devastated that I could not remember the case or anything about the facts or issues. I learned quickly the necessity of taking good notes.

I experienced withdrawal from some of the habits of law practice. I remember driving home after some of those first few days and thinking “Oh my Gosh, I didn’t write down any time slips today.” Then it suddenly dawned upon me that I did not have to write down time slips.

I also was not sure how to react to my new position. I did not know how to respond when everyone rose as I entered the room. The first time someone referred to me in the courtroom as “Your Honor,” I remember turning around to look for the judge, only to realize they were referring to me. At one of my earlier hearings, I remember asking an attorney appearing before me if she thought I had the authority to take a particular action. She responded, “You are the judge. You can do anything you want.”

I will never forget my first criminal calendar call. At the time, our criminal calendar was backlogged, so we

were operating two courtrooms with two judges presiding simultaneously. I was paired with our Chief Judge. This gave me considerable comfort. Several minutes before the beginning of the term, I walked past the courtroom. There must have been 300 people crowded into the courtroom — witnesses, jurors, parties and lawyers — all of whom were waiting for the Chief Judge to give them instructions. How comforting it was to know that the Chief would be calling the calendar. Five minutes before the scheduled time to begin, the Chief came by my office and, in a raspy voice, said to me “Neal, I have a bad case of laryngitis. I need you to call the calendar for me this morning.” Talk about on-the-job-training.

Well, I have now been on the job almost two years. I have learned much. I went from a civil trial lawyer practicing in the federal and state courts to dividing all sorts of things in domestic disputes. I can fairly comfortably call a criminal calendar. When someone uses the term “Your Honor” in the courtroom, I usually respond. I am used to making decisions, many of which do not make anybody happy. One recent litigant wrote me telling me I was several notches below Judge Wapner and Judge Judy.

I do not think I have changed. I still take out the garbage and wash the dishes. I do not think I have developed a case of “robitis.” My former partner, David Hudson, says he once knew a judge who had returned from a trip to England and expected to be addressed as “My Lord.” I think this judge had “robitis.” I have formulated my own David Letterman “top ten list” to determine if I, or any judge, contract this affliction.

## Top Ten Reasons to Know You Have Robitis

10. You go to lunch with your cronies at the bar and automatically assume it’s a free meal.

9. You attend your child’s piano recital dressed in your black robe.

8. You actually begin to believe all those flattering things lawyers tell you at cocktail parties.

7. You get a birthday card from your brother and are insulted when it’s not addressed to “The Honorable...”

6. You go to work at 10:00 a.m., leave at 3:00 p.m., take a 2½ hour lunch and think you’ve had a hard day.

5. You tell your bailiff to open court with “Hail to the Chief.”

4. You let cameras in the courtroom on the condition they shoot you from your good side.

3. On your birthday, you are disappointed when your spouse doesn’t buy you a throne.

2. You attend your son’s high school graduation. When you enter the auditorium, you expect everyone to rise.

1. You begin demanding that your spouse, your

children, and even your mother, call you “Your Honor.”

While I hope none of the above applies to me, I am pleased to say that I am probably the only trial judge with a perfect record with the appellate courts. I am batting 1000 — that means I am a perfect one and 0. I hope this article is published quickly before this changes.

On a more serious note, I have developed, in my short time on the bench, a list of “do’s” and “don’ts” that might be helpful, particularly for young lawyers, in their dealings with judges and juries. I would do another top ten list, but, with my limited experience, I could only come up with eight.

**1. Discuss the Facts.** I have obviously received a number of briefs since taking my job on the bench. Lawyers are fond of citations. Many lawyers think that the brief with the most case citations or the most footnotes wins. Usually it does not. It is a little like the charge that tells the jury that the party with the most witnesses is not necessarily the party that should prevail. The best briefs are usually the briefs that take a few cases, discuss these holdings thoroughly, and relate the holdings to the facts of the case you are handling. This is what I think we learned in law school.

**2. Put the key documents with the pleading.** I do a lot of domestic cases. Many of these cases are contempts or modifications. If you are filing a contempt or a modification, or if you are bringing suit on a promissory note or contract, attach a copy of the decree, note, or contract at issue to the pleadings. When the judge reviews the file before the hearing, he or she wants to see the underlying document upon which the action is based. If it is not in the pleading, the judge cannot be prepared.

**3. Mind your manners.** The last thing my mother used to tell me when I left home to go to school, on a date, or anywhere was to be sweet. Basically, she did not want me to do anything to embarrass her. My wife says she probably had good reason to worry. My mother is a lot like Judge Frank Hull’s mother. I know them both. They are wonderful ladies. Judge Hull quoted her mother in her acceptance speech following her installation as a judge on the Eleventh Circuit Court of Appeals. She said her mother told her that it was nice to be important, but it was more important to be nice. I think this is what my mother was trying to tell me when she told me to “be sweet.” Lawyers have the mistaken assumption that they have to be mean and arrogant to be effective. All jurors — and even some judges — are human. People like to be treated with respect and courtesy. Most people respond to good manners. Many lawyers have lost their manners under the mistaken assumption that it is effective to be rude and arrogant. I like lawyers to treat me courteously, just as much as most lawyers like judges to be courteous.

**4. Be prompt.** I know judges make lawyers wait. Sometimes it is the judge's fault. Frequently, it is the result of the judge's schedule. Few things are more frustrating, however, than to wait on a lawyer with a courtroom full of people waiting on hearings. I know that we have trains in downtown Augusta, and that there are reasons for delay in every location. Do not be late. If you are going to be late, at least call. Every lawyer I know now has a car phone. Knowing you are on the way is better than wondering where you are and having to call to track you down.

**5. Do not be greedy.** One of the most important, if not the most important, attribute of an effective advocate is credibility. The quickest way to lose credibility is to ask for something you know you are not entitled to receive. Do not ask the jury to give you \$250,000 in a \$2,500 case. Do not push the judge on a legal point you know is not strong. Once you lose credibility, it is difficult, if not impossible, to regain it. It is a little like grade reputation in school. It is very hard for a "C" student to become an "A" student once that student has established a reputation for making "C's." The same is true for your professional reputation as a lawyer. Be honest, candid, and straightforward in your arguments and presentations to judges and juries. Fight the battles worth fighting, not the ones that are meaningless or the ones that may jeopardize your credibility.

**6. Do not involve the court in lawyer arguments.** I noticed shortly after coming on the bench that some lawyers had a habit of sending me copies of their self-serving correspondence with opposing counsel. I can assure you that judges do not care about your arguments with your opponent, unless they involve issues that the judge needs to decide. Self-serving correspondence sent to judges is usually seen as an effort to ridicule opposing counsel and to ingratiate oneself with the court. It does not work. I know a judge who does not accept letters from attorneys. They are sent back as soon as they are received. I have not gone that far, but it is tempting. If you need the court to take some action, file a motion or ask for a hearing or

conference. Do not send the court copies of your letter arguments with opposing lawyers.

**7. Get to the point.** In one of my earlier jury trials, I remember asking the lawyers how long they needed for closing arguments. The response I received was, "How long will you give us?" The point is that lawyers (and judges too) will take as long as they are given. All of you have taken and

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**Do not ask the jury to give you \$250,000 in a \$2,500 case. Do not push the judge on a legal point you know is not strong. Be honest, candid, and straightforward in your arguments and presentations to judges and juries. Fight the battles worth fighting, not the ones that are meaningless or the ones that may jeopardize your credibility.**

been in depositions scheduled for all day. If it is scheduled for all day, it probably will take all day. If that same deposition had been scheduled for four hours, it probably could have been concluded in four hours. I realize I am generalizing, and that there are many cases that require lengthy depositions and hearings. However, sometimes lawyers cannot see the forest for the trees. Usually each case has one or two recurrent and dominant themes. When you ask a question or make a particular argument, ask yourself "What does this have to do with the theme of this case?"

If it does not help advance your theory or defense, why ask the question or make the argument? One of the biggest complaints I hear from jurors is boredom. They have a hard time staying awake when the lawyers ramble on with no clear direction during witness examinations and arguments.

**8. Learn to laugh at yourself.** Our work is serious. What we do has real impact upon real people. We all need to take it seriously and solemnly. We need to work conscientiously on the business of clients and give them our best efforts. We do not need to be pompous, stuffy, arrogant or egocentric. Most cases are won or lost on the facts, the law and good preparation — not on the eloquence of the lawyers. Take your job, not yourself, seriously. Life and this profession are much more tolerable if you have a sense of humor and can laugh at yourself. ☒

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*The Hon. Neal W. Dickert has served as Superior Court Judge in the Augusta Judicial Circuit since January, 1997. He received a B.S. in economics from Wofford College, and an MBA and J.D. from the University of South Carolina. A former member of the Georgia Bar Association Board of Governors, Judge Dickert previously was managing partner with Hull, Towill, Norman & Barrett.*



ACHIEVING “LITIGATIONAL NIRVANA” IN THE SOUTHERN DISTRICT OF GEORGIA

# Zen and the Art of Law Clerk Maintenance

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By J. Christopher Desmond

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**S**outhern District of Georgia law clerks are dedicated lawyers from diverse backgrounds. All care very deeply about what they do, and feel privileged to be part of the federal judicial system. But like any group of people, we have our needs and wants. Although no group thinks 100 percent alike, here are, for the most part, commonly held criticisms about lawyers and “the system.”<sup>1</sup>

## “Citational Accountability”

Many practitioners complain about judges who “cook” the facts and mischaracterize cases in order to force-fit a result. In written opinions such intellectual dishonesty can be deterred if judges (and thus, the law clerks who assist them) were obligated to cite to the record for each fact upon which they rely, and pinpoint cite to each case or legal source they invoke. Everyone can see precisely how each opinion has been constructed, and any “smoke” will be exposed. Such “citational accountability” furthers respect for the judicial system itself.

All citations to the record should be to the docket number of each brief, affidavit, exhibit, (etc.).<sup>2</sup> This increases accountability, as anyone can then check the public record and uncover any smoke. Appellate courts often sacrifice this feature in quest of that “tight, clean look,” ignoring longstanding lawyer gripes like, “Hey, where’d they get those facts from?” or “No way does that case support *that* result!”

But this is a two-way street; lawyers must be held to the same standard. Law clerks too often have to ask, “Okay, where’d you get *that* from?” We get frustrated when part or all of a “Statement of Facts” is devoid of

record cites. The implicit “Oh well, the law clerk can look it up” attitude quickly alienates us. All must remember that “[j]udges are not like pigs, hunting for truffles buried in [the record].”<sup>3</sup> Neither are their law clerks.

Such remonstrations often go unheeded, however, so we are urging the Southern District Local Rules Committee to amend Southern District Local Rules 7.1 and 56.1, and to add a separate, all-encompassing rule along these lines: “Except where good cause is shown, every factual assertion, whether made in a motion, brief, fact statement, or any other filing, shall be supported by citation to the record.”

We also insist on meticulous citation for another reason: enforcement of Rule 11 of the Federal Rules of Civil Procedure. Lawyers and litigants must employ due care when advancing positions before the courts. Scrupulous citation forces brief writers to self-illuminate their own pettifoggery. All of us want a clean presentation of your case supported by relevant evidence and legal authority, not smoke. This is especially important when accusations fly in discovery disputes. Finally, record citation forces self-confrontation, which can help you realize when it’s time to fold your tent. Some lawyers wait too long.<sup>4</sup>

## Use Southern District Local Rule 56.1 Statements Correctly

Under Southern District Local Rule 56.1, summary judgment movants must file a Statement of Undisputed Material Facts (SUMF) reciting the material facts they contend are undisputed. SUMFs are excellent time-savers and force litigants to cut to the heart of their case. Two mistakes — often borne of carelessness — typically arise here. First, the movant fails to follow each fact statement

with a citation to the record. Again, we resent the implied message (“I’m too lazy to look it up; do it for me, okay?”). Judges should order corrected re-submissions.

The second mistake — sometimes fatal — occurs when the non-moving party treats a properly supported SUMF as a Request to Admit under Rule 36 of the Federal Rules and simply responds with “denied.” This violates the nonmovant’s obligation to *rebut* each properly supported SUMF with *evidence*, or show why the SUMF is unsupported.<sup>5</sup> The nonmoving party must rebut the SUMF by citing to an affidavit, a sworn interrogatory response, deposition testimony, etc. If it does not, then the fact is deemed established by Southern District Local Rule 56.1.<sup>6</sup> Remember that SUMFs serve the purpose of clarifying what disputed facts remain to be resolved after consideration of the evidence developed by the parties and placed in the record. Anything less defeats the purpose of the SUMF itself.

## “Removal Games”

Here’s something that can really irritate us: filing a diversity case in state court that you know bears a high risk of removal, then (post-removal) being deliberately vague about whether more than \$75,000 is sought. This has forced some federal courts to resort to stipulations,<sup>7</sup> compel “summary judgment type” evidence,<sup>8</sup> and take direct testimony.<sup>9</sup> It’s a form of gamesmanship that only taxes judicial patience, and may result in a remand coupled with a warning that the gamester will pay if the case comes back within 28 U.S.C. § 1446(b)’s one-year time limit.<sup>10</sup> Possibly this problem can be addressed by a local rule.<sup>11</sup>

## “Don’t Sweat the Small Stuff”

♦ We do and we don’t “sweat the small stuff.” For example, we don’t care whether the original of what you file is on “bond paper” (an “old duffer” fetish). No rule requires that; regular copy paper will do. Similarly, some lawyers — judges even — are quite fond of using paper bearing pre-printed, left and right margin lines (used years ago to help typists stay within the margins). It’s not necessary, and some of us find it odd, since virtually 100 percent of what we receive is word-processed.

♦ Southern District Local Rule 4.2 requires that “[a]ll pleadings other than the complaint shall be submitted to the Clerk in an original and one copy.” Many lawyers file an original and two copies, wasting paper.

♦ In that regard, we have some suggestions in this area, and courts with a similar local rule may want to consider them. Our Local Rule 4.2 (“Number of Copies”) does not discriminate and mechanistically requires litigants to file duplicates of stuff we just don’t need to see (*e.g.*,

notice of deposition filings and other “ministerial” matters, expert witness reports, etc.). Now that our docket is computerized and all filed documents are scanned into our computer network, we are able to view such documents “on-screen,” so we have even less justification for requiring duplicates. Local Rule 4.2 therefore should be revised, limiting duplicates to substantive (*i.e.*, non-ministerial) motions and briefs.

♦ We also find many of the proposed orders submitted by litigants to be a waste of paper — and that’s not necessarily a judgment as to their quality. Southern District Local Rule 7.1 requires that all civil action motions, “with the exception of a motion to dismiss or motion for summary judgment, shall be accompanied by a proposed order.” The rule’s command should be contracted to require proposed orders on only the most ministerial of matters (*e.g.*, extension of time) or other “no-brainer” motions. Hence, motions *in limine* to add or drop parties, to strike, etc., should not have to be accompanied by a proposed order.

♦ When you go to final print on filings, keep in mind the following points, which apply only to original documents (they are scanned into the computer system), and not duplicate copies (which are not, so you can dress them up all you want):

(a) Use white paper only, colored won’t scan.

(b) Don’t staple anything, use a spring clip.

(c) Pleadings bound by binding tape cannot be rebound after scanning, and individual pages may not lie smooth after disassembly, so just use spring clips.

(d) Pleadings bound by “IBICO” plastic combs also drive up scanning-labor costs, so again, stick with spring clips. Also, plastic or other kinds of covers are a “no-no” for original documents.<sup>12</sup> The filing clerks must rip each document apart to scan it into our computer system, then hole-punch it into the official case files, so covers just get in the way. Nor are covers necessary for the “duplicate” copy (the one that judges and law clerks will read), though they are welcome for a really thick brief.

(e) Double-sided printing is fine for duplicate copies but not for originals, in that the scan clerk must stop and turn each page over, etc.

(f) Side-tabs (*e.g.*, for “exhibit A”) protruding off full-page dividers will show up on the computer as a blank page, so instead just separate documents with a plain white page bearing “exhibit A,” etc. on the bottom. Similarly, don’t glue or stick side tabs onto original documents. Again, however, we welcome side-tabling of duplicate copies.

♦ We really appreciate those who pay attention to copying quality. Often, page or exhibit numbers “slip off”

the end of copied pages, or some other copying defect (*e.g.*, missing, scrambled, or lopsided pages) prevents us from using (citing to) the duplicate copy, thus defeating its purpose.

- ♦ Speaking of readability, if you are going to submit a handwritten document (*e.g.*, doctor's notes) that you know is illegible, then don't expect us to decipher it either. Make an effort (*e.g.*, proffer a typed "translation") to fulfill your purpose, which is to *communicate* with us.

- ♦ The Southern District of Georgia docket is now fully computerized and available on-line to the public ("PACER") at nominal cost.

Consistent with our preference for "citational accountability," you might want your filings to cite to record documents by their docket numbers, thus mirroring our court's opinions. It'd be nice if we all spoke the same language.

This will help you in two ways. First, you'll make the law clerk happy — it's a lot easier for us to find "doc. # 41" than "Plaintiff's Supplemental Brief In Opposition To Defendant's Motion For Summary Judgment," especially in "thick-file"

cases. Second, you'll shorten your briefs. Wouldn't you rather be able to just cite to "doc. # 41"?

One last point on record cites. We cite to, for example, "doc. # 14, exh. A at 21," where "doc. # 14" is your brief, "exh. A" is the exhibit you attached to it, and "21" is the twenty-first page of "exh. A." Yet, we typically find that all of "exh. A" is unpaginated, so we have to do it ourselves.

- ♦ We like and encourage "minuscrit" or compressed depositions, especially those that include a "witness/exhibit" table of contents and an index at the end. They save paper, file space, and our time (they are faster to read).

- ♦ Southern District Local Rule 7.1 limits briefs to 25 pages, but there is no rule or consensus on "supplemental" briefs (the label lawyers often use for briefs that follow the opening, response and reply briefs). Some of us favor limits,<sup>13</sup> while others feel that the more "back and forth" the better the chance that the issues and case law will be usefully fleshed out.

- ♦ That issue dials into a major complaint among law clerks: the "lazy legal theorist" syndrome. Often, a bright lawyer will lean back and spout an engaging theory into his

dictaphone, then dispense with conducting any legal research to back it up. "Oh well," the rationale must be, "the law clerk will find something." Sometimes a response brief will point out the lack of citation and shame the lazy lawyer into coughing up some cites to support his argument (remember, even "cutting edge" theories, for which there understandably may be no case cites, can still be supported by some analogous cites; at least give us an AM.JUR or ALR cite). By then, however, it may be too late, so the lawyer risks taxing the court's patience by filing a "supplemental" brief.

Still, the supplemental brief can be of some help because the cite we would have to hunt down may finally appear. On the other hand, it is also more work to read an extra brief that, had the lawyer been doing his job in the first place, would not be necessary. So, it's a conundrum often fueled, at bottom, by laziness.

In any event, some of my colleagues join me in urging that Southern District Local Rules 7.5 and 56.1 be amended to reflect that supplemental briefs are permitted, but must be filed

within ten days of the last brief. This option should not be used to sandbag opponents (*i.e.*, by raising new issues). Also, let us know if a supplemental brief is coming, because there have been instances where opinions and supplemental briefs were filed on the same day.

- ♦ Page numbering is as simple as clicking on a word processing pagination command. Surprisingly, however, ignorance and/or sloth combine to result in a substantial number of unpaginated Southern District motions and briefs. A typical warning footnote: "Those who fail to comply with Southern District Local Rule 10.1 (court filings shall be paginated), needlessly burden this Court. The Court has manually paginated Mr. X's filings. Counsel is instructed to train himself and his staff to use his word processor's pagination feature."

We're not rabid about this, and the Southern District does not throw entire cases out for violating "ministerial formalities."<sup>14</sup> But remember that pagination *assists* the "citational accountability" interest discussed above. Judges here take pride in reaching each and every argument, rather than (as some judges have been accused) "forgetting"

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**Often, a bright lawyer will lean back and spout an engaging theory into his dictaphone, then dispense with conducting any legal research to back it up. Sometimes a response brief will point out the lack of citation and shame the lazy lawyer into coughing up some cites to support his argument.**

issues that might alter results. As part of that effort, however, it's not asking too much that you go the extra mouse click and paginate what you file.

- ♦ "Sealed documents" typically show up in civil cases where trade secrets are involved and someone has obtained a protective order. Each filing is docketed only as a "sealed document," however, and is literally sealed in a special envelope. The problem, of course, is that neither the public nor law clerks who review the docket can figure out what's been filed without breaking the seal and scrutinizing the actual document. Yet, there is virtually no civil case where the very title of the filing (typically a motion to compel or an *in limine* motion) is itself confidential. We therefore urge the enactment of a new Local Rule: "Absent good cause shown, all sealed filings shall be identified on the docket by the title reflected on the document filed."

## Miscellaneous Pet Peeves

The following occurrences — presented here in no particular order — disturb law clerks in varying degrees of intensity:

- ♦ Waiting until 4:55 p.m. on the day a brief is due to move for an extension of time.
- ♦ Filing a "Notice of Deposition Filing" without actually filing the deposition. The "window clerk" sometimes fails to notice the omission, and we don't appreciate having to look for non-existent filings.
- ♦ Referring to "exhibit A" in a brief but failing to indicate that the exhibit is actually attached to a motion or brief filed five months earlier and a dozen file documents away.
- ♦ Moving to amend your Complaint only after you've fully briefed your opposition to defendant's motion to dismiss, and after the law clerk has prepared an order for the judge to consider.

- ♦ Settling a case on a Friday afternoon but not bothering to phone it in right away, disregarding the risk that the judge and/or law clerk are devoting weekend time preparing an order (or jury charges) for the following Monday. Call the deputy clerk at his/her home if you have to, because no one likes to see their time and effort negligently wasted.

- ♦ In criminal cases, defense counsel sometimes re-copy government-submitted charges, then file essentially the same thing, re-labeling it for the defense. Just file one page communicating no disagreement, then attach any different charges you might request. You're not being paid by the pound.

- ♦ Filing a motion (*e.g.*, extension of time) that most likely will be unopposed but not bothering to ascertain that fact, much less inform us (which only hurts you, because the Clerk's office typically suspends routing until the response period expires). The ideal would be to specify "unopposed" on the face page of the motion.

- ♦ Filing a stack of motions with the administrative clerk minutes before a court appearance. Sometimes such abuse is compounded when the same attorneys fail to supply copies. It's even worse when they then claim "gee, we fully briefed the court on this!"

- ♦ Filing a stipulation of dismissal under Rule 41(a)(1)(ii) of the Federal Rules of Civil Procedure, which does *not* require a judge's signature,<sup>15</sup> but requesting one anyway.

- ♦ *Ex parte* contact with law clerks. Most chambers follow a no-contact policy: all attorney/litigant communications must go through the administrative clerk. Those of us who've been in private practice especially appreciate this rule. No one even wants to suspect that their opponent gained an unfair advantage by schmoozing the judge or his law clerk. Erring on the side of caution, some law clerks avoid or minimize social contact with attorneys. All are dedicated to equal justice for all.

## Conclusion

Here in the Southern District, the old saying, "never step into something you can't easily wipe off," applies with special force when lawyers engage in substandard litigation tactics. Lax rule enforcement fosters unprofessionalism. Courts that balk at enforcing discovery and "honesty" rules only empower rule violators, which degrades both the profession and the judicial system.

The rules are enforced here.<sup>16</sup>

# Garrett Group



Lawyers and litigants alike are held accountable for doublespeak, quibbling evasions, misleading assertions, and distortions by omission, which we equate to outright lies.<sup>17</sup> “Zealous advocacy” yields to honesty and candor.<sup>18</sup> No “Wizard of Is” should appear in this district.

Honesty and ethics, however, form only 50 percent of the equation; taking the time to assemble your motions and briefs properly supplies the other. Post-*Celotex*, most civil cases either settle or are resolved by summary disposition. If you don’t settle your case early on, then it is in your best interest to spend a few extra minutes and “get it right” before you file something.

We appreciate this opportunity to vent, and we look forward to working with you. ☒

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*J. Christopher Desmond, a 1983 University of Buffalo law school graduate, has spent half of his legal career in private practice and the other half as a law clerk and staff attorney at the federal district and appellate court levels.*

## Endnotes

- Given the extraordinary differences that exist between bankruptcy and district court practice (e.g., proposed orders on motions are more widely used in bankruptcy than in district court), the following discussion is confined to the latter.
- See, e.g., *Chemtall, Inc. v. Citi-Chem, Inc.*, 992 F. Supp. 1390 (S.D. Ga. 1998).
- United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Courts, incidentally, have repeatedly made this point in various contexts. See *Freund v. Butterworth*, 117 F.3d 1543, 1569 n.60 (11th Cir. 1997) (“In light of the enormous number of and often intentionally misleading claims placed on our docket each year, we simply cannot rely on an appellant’s uncited assertions of what facts the record discloses”), *rev’d on other grounds*, 165 F.3d 839 (11th Cir. 1999) (en banc); *United States v. Adkinson*, 135 F.3d 1363, 1378-80 (11th Cir.) (lam-basting government counsel for failing to cite to the record and instead implying that the court could search it for evidence supporting convictions in question), *later opinion*, 158 F.3d 1147 (11th Cir. 1998) (repeating same criticism while vacating some convictions for lack of evidence).
- See *Barnes v. Dalton*, 158 F.3d 1212 (11th Cir. 1998) (district court did not abuse its discretion in finding that attorney’s pursuit of plaintiffs’ allegedly frivolous disparate impact and pattern and practice claims demonstrated bad faith, thus authorizing award of sanctions against attorney under court’s inherent powers); *Battles v. City of Ft. Myers*, 127 F.3d 1298, 1299-1300 (11th Cir. 1997) (F.R.Civ.P. 11 sanctions applied against a plaintiff who went to trial with little or no evidence); see also *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1091 (11th Cir. 1994), *later appeal*, 87 F.3d 1252 (11th Cir. 1996).
- See *Union Planters Nat’l Leasing, Inc. v. Woods*, 687 F.2d 117, 119 (5th Cir. 1982) (“Defense of a proper summary judgment motion requires more than a mere denial. [Cit.] In other words, the party opposed to an evidentially supported summary judgment motion is required to bring forward significant probative evidence demonstrating the existence of a triable issue of fact”) (internal quotations omitted); 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, FED. PRAC. & PROC. CIVIL 2d § 2727 (1998).
- See *Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cir. 1988); *Simon v. Kroger Co.*, 743 F.2d 1544, 1546-47 (11th Cir. 1984).
- See *Gwyn v. Wal-Mart Stores, Inc.*, 955 F. Supp. 44, 46 (M.D.N.C. 1997).
- Mesa Indus. v. Eaglebrook Prods., Inc.*, 980 F. Supp. 323, 325 (D. Az. 1997).
- See *Shimsky v. Ford Motor Co.*, 170 F.R.D. 125, 126 (E.D. Pa. 1997).
- See *Overstreet v. Commercial Life Ins.*, Civil Action No. CV196-202 (S.D. Ga. Jan. 27, 1997).
- See *Swaish v. Circuit City Stores, Inc.*, 960 F. Supp. 154, 155 (N.D. Ill. 1997).
- See S.D. Ga. Local Rule 4.3.
- By “general orders,” Chief Judge Dudley H. Bowen Jr., Judge Anthony A. Alaimo, and visiting Judge John F. Nangle have banned “reply” or “supplemental” briefs absent leave of court and a showing of “extraordinary circumstances.” See *In re: Reply Briefs*, 198MC41 (S.D. Ga. Sept. 1, 1998) (Bowen, J.); *In re: Reply Briefs*, 198MC41 (S.D. Ga. Sept. 10, 1998) (Alaimo, J.); *In re: Reply Briefs*, 198MC41 (S.D. Ga. Feb. 3, 1999) (Nangle, J.) (adopting Judge Bowen’s September 1, 1998 order).
- See *Leslie v. Williams*, 235 Ga. App. 657, 658-59, 660-64, 510 S.E.2d 130, 131-32, 133-36 (1998) (debate within badly divided en banc court over whether to dismiss appeal for failure to file copy of enumerations of error separate from those set forth in main brief), *disapproved on other grounds*, *Herr v. Withers*, No. A98A1765, 1999 WL 150818 (Ga. Ct. App. March 19, 1999) (en banc); see also *Zachery v. State*, 233 Ga. App. 519, 504 S.E.2d 466 (1998) (en banc).
- See, e.g., *University of South Alabama v. American Tobacco*, 168 F.3d 405, 409 (11th Cir. 1999).
- See *Chemtall*, 992 F. Supp. at 1406-11 (striking answer for lying under oath and stonewalling discovery requests); *Knox v. Hayes*, 933 F. Supp. 1573, 1578-86 (S.D. Ga. 1995) (disqualifying counsel and his firm thrown off case for involvement in tendering misleading affidavit), *aff’d*, 108 F.3d 343 (11th Cir. 1997); *Malutea v. Suzuki Motor Co.*, 987 F.2d 1536, 1544-46 (11th Cir. 1993) (sanctions against defense counsel warranted because their participation in cover-up of discoverable material multiplied proceedings unreasonably and vexatiously; imposition of additional fines under district court’s inherent powers was not abuse of discretion; default judgment against defendant was warranted for violation of discovery orders); *Ferron v. West*, 10 F. Supp. 2d 1363, 1371 (S.D. Ga. 1998) (warning plaintiff’s counsel not to mischaracterize deposition testimony).
- See *Chemtall*, 992 F. Supp. at 1406-11; see also *United States v. DeZarn*, 157 F.3d 1042, 1048-51 (6th Cir. 1998) (botched questioning will not preclude perjury conviction if government can prove that defendant knew what questioner was really asking but responded with knowingly untruthful and materially misleading answers).
- See *Malutea*, 987 F.2d at 1546-47.

# 1999 State Bar Legislative Summary

By Mark Middleton

**IN A YEAR DOMINATED BY THE** new Governor's agenda, the State Bar had a very successful legislative session in which most of the Board of Governors' legislative proposals and funding initiatives were passed into law. The General Assembly passed State Bar endorsed bills expanding the Georgia Court of Appeals, updating the corporate code, revising the Limited Partnership and Limited Liability Company Acts, and improving the process for canceling security deeds in real estate closings. The legislature also appropriated additional state funds for the Victims of Domestic Violence Program, the Court Appointed Special Advocates ("CASA") Program, the Indigent Defense Council, judicial pay raises, and continued funding for the Georgia Appellate and Educational Resource Center.

## 1999 Session Accomplishments

### Expansion of The Georgia Court of Appeals

The General Assembly voted to expand the Georgia Court of Appeals by two members for a new total of 12 judges who will serve on four three-judge panels. The Governor adopted this State Bar proposal as part of his legislative package, and provided vigorous leadership in enacting the new legislation. These new positions, along with the vacancy created with

the retirement of Judge Dorothy Beasley, give the Governor an early opportunity to begin shaping the judiciary through his appointments. The new judges will stand for election in 2000.

Several members of the legislature, including Senate Judiciary Chairman Rene Kemp (D-Hinesville) and House Judiciary Chairman Jim Martin (D-Atlanta), were instrumental in making this much-needed addition a reality.

"The Bar is particularly thankful to Speaker Tom Murphy and Lt. Governor Mark Taylor for their support of the bill," said Bar President William E. Cannon Jr. "We are pleased with the creation of these new Court of Appeals judgeships." The judiciary was extremely effective in its advocacy of the expansion. Judge Edward H. Johnson, Judge Marion T. Pope, Judge John H. Ruffin, and Clerk of Court Bill Martin provided information to the legislature and contributed greatly toward the successful effort.

### Corporate Code Revision

The State Bar collaborated with Georgia's new Secretary of State, Cathy Cox, to enhance Georgia's reputation as an attractive pro-business state by improving the process for conducting corporate business electronically. H.B. 224, authored by Rep. Robert Reichert (D-Macon), allows Georgia corporations to begin using electronic proxy voting. The bill also makes the incorporation process easier through the use of technology. "I am thankful to the Bar

for working with me to make Georgia an even better place to start a business," Cathy Cox stated.

Four other Corporate and Banking Law Section initiatives were included in H.B. 224 as follows: 1) provisions to allow mergers of parent corporations into subsidiary corporations; 2) an amendment to allow corporate boards to amend the rights of certain preferred stock without shareholder approval; 3) a new definition of "Beneficial Owner" to harmonize two conflicting definitions found in the Code; and 4) an amendment to clarify instances when a certificate of authority is not necessary to conduct business in Georgia.

Corporate and Banking Chair Rich Brody was intimately involved in the presentation of these highly technical issues to the House Judiciary Committee and the Senate Special Judiciary Committee. Representative Reichert and Senate Special Judiciary Chair Mike Egan (R-Atlanta) carried the bill on the floor of each chamber.

### Revision of the Limited Partnership and Limited Liability Company Act

Prompted by recent federal tax law clarifications, the State Bar requested the passage of Senate Bills 41 and 42, authored by Senator Mike Egan, which amends the LLC statute regarding dissolution in certain instances such as the withdrawal or death of a LLC member. The changes specify that neither the withdrawal nor death of a member forces the dissolution of the company without agreement by the other members of the

LLC. These changes will make the use of Limited Liability Companies even more desirable in Georgia. Chuck Beaudrot, chair of the Partnership Committee, spent several hours meeting with the author of the bill and helped present the proposals to the Senate Special Judiciary Committee and the House Judiciary Committee.

### **Real Property Law Initiatives**

One of the most effective pieces of legislation to emerge from the 1999 session was H.B. 429 authored by Rep. Mack Crawford (R- Zebulon). Representative Crawford, a practicing real estate attorney, agreed to author a bill containing the Bar's initiative to allow closing attorneys to collect a civil penalty of \$500.00 from security deed holders who fail to provide notice of cancellation to closing attorneys who pay these instruments at a typical real estate closing. Rep. Crawford then worked with representatives from the Bar and the banking community to expand the idea to allow closing attorneys to cancel the debt instruments themselves through an affidavit that is filed with the clerk if its holder does not cancel the security deed.

This initiative, which went through about a dozen revisions, was passed in the waning hours of the last day of the session. The Bar and closing lawyers throughout the state owe a debt of thanks to Rep. Crawford, Sen. Billy Ray (R-Lawrenceville), Speaker Murphy, and Lt. Governor Mark Taylor whose efforts on the final day made its passage possible. "The passage of this bill shows the value of the Bar's bipartisan approach," said Tom Boller, the Bar's legislative representative. "We were able to achieve passage of a real solution to a problem that has troubled closing attorneys and consumers."

### **Other Bar Endorsed Initiatives**

The Bar endorsed S.B. 130, a bill

authored by Senator Michael Meyer Von Bremen (D-Albany), which protects the recipients of structured financial settlements. This law passed in the final days of the session and is quite an accomplishment for a freshman senator.

Also, the Bar opposed S.B. 19 that would have allowed non-lawyers to file garnishment pleadings on behalf of corporations. The bill passed the Senate and has been held in the House Judiciary Committee.

### **Funding of Bar Endorsed Initiatives**

The General Assembly appropriated funding for several State Bar initiatives. The grant program for Victims of Domestic Violence received \$2,125,000 for Fiscal Year 2000, an increase of \$125,000. This program, which received its initial funding last year, allows legal service providers to offer expanded services to victims of domestic violence. CASA also received an increase of \$125,000. The Indigent Defense Council received increased funding of \$100,000 for FY 2000, and The Georgia Appellate Resource Center was appropriated \$300,000 for its continued operation. Also, there are new funds for a judicial pay raise and cost of living increase totaling approximately 11 percent. "We owe a special thanks to Sen. Greg Hecht (D- Jonesboro) and Rep. Larry Smith (D- Jackson), chairs of their respective Judicial Appropriation Subcommittees for their support of the Bar's funding initiatives," said Dee Crouch, chair of the Bar's Advisory Committee for Legislation (ACL).

### **Bills To Be Considered in the 2000 Session**

The Bar made progress on several other legislative initiatives that can hopefully be completed in the 2000 Session. For example, an important Bar initiative that will be carried over to the next session is S.B. 176 that would create a procedure for collect-

ing civil and criminal case filing data on a statewide basis. If approved, this would allow the Bar and policy makers to obtain reliable data to consider in matters relating to the practice of law.

The Bar's legislative representatives spent a tremendous amount of time in negotiation with the other interested parties. At times, an agreeable resolution seemed possible. However, the Bar disagreed with the position ultimately taken by some superior court clerks that the Clerks Cooperative Authority be given ownership of the data with the authority to sell the information. Throughout the negotiations, the Bar insisted that the bill reflect the premise that the collected data belongs to the public and should be readily available for the benefit of the public. The ACL and Bar leadership are hopeful that good faith negotiations by all interested parties will result in legislation reflecting the best interests of the public, bench, and bar.

The Bar owes a debt of thanks to Senator Clay Land (R-Columbus) who authored the bill and worked diligently with the parties to accomplish this important goal. This bill has passed the Senate and the Bar anticipates House action early in the 2000 session.

Another important matter for consideration next year is the Bar recommendation to create a state funded juvenile court in every jurisdiction. This would provide improved service in areas that do not have a designated juvenile court judge and provide budgetary relief to counties that do have them. This bill has passed the House and will be taken up by the Senate in the 2000 session.

The Real Property Law Section initiated H.B. 597 authored by Allen Hammontree (R-Cohutta). This bill requires superior court clerks to maintain printed copies of the grantor/grantee index even if they computerize

the filing system. This provision protects against computer system failures and addresses questions over accuracy and availability of records. Eldon Basham, chair of the Real Property Section, provided timely advice and advocacy on both real property bills for the Bar. H.B. 597 passed the House and will be among the first bills considered in the Senate during the 2000 Session.

Another Bar endorsed initiative is H.B. 708 which would conform service procedures to the Federal Rule. Also, a bill affecting Court of Appeals retirement eligibility was introduced and will be considered next year after the mandatory actuarial study is prepared in the interim.

## Governor Barnes' Agenda

No discussion of the 1999 session is complete without a comment on the

extraordinary legislative success of Governor Roy Barnes, who set forth 27 initiatives and received passage on all of them. Moreover, legislators from both parties praised the Governor for his willingness to receive ideas from all sides on the various issues.

Among the Governor's accomplishments is the creation of a new transportation authority to combat the problems caused by sprawl in the metropolitan area. Governor Barnes also fulfilled a campaign promise to tackle the health care issue by passing several pro-consumer bills. The Governor passed a "Taxpayer Bill of Rights" which included a sizable property tax cut.

The Governor also pushed for amendments to the Open Records and Open Meetings statutes. These changes, which tighten the compliance provisions for governmental entities and their vendors, are of particular

interest to lawyers whose practice involves these matters. The Bar congratulates the Governor, who is the first lawyer to serve in that office since 1982.

## Bar Section Legislation Tracking Program

The Bar continues to rely on its Bar Section Legislative Tracking Program in which Bar sections and individual members can monitor bills of importance to the Bar during the legislative session. Approximately 30 sections and committees participated in the program. The Bar's Internet Service Provider, GeorgiaNet, held a well-attended training session on using the Internet to track legislation. Bar members tracked bills through the Bar's Web site at [www.gabar.org](http://www.gabar.org). Also, numerous bills were sent out to the sections for review and comment. A special word of thanks goes out to all Bar members who provided timely responses to the legislative representatives regarding issues affecting the practice of law. ☒

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*The State Bar legislative representatives are Tom Boller, Rusty Sewell, Wanda Segars, and Mark Middleton. Please contact them at (404) 872-2373 or (770) 825-0808 for further legislative information, or visit the State Bar's Web site.*

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2/99 p53

West (The Full Power...)  
pickup 4/99 p77

Avis pickup 4/99 p69 BW

# Spring in the Islands

By Jennifer M. Davis

**ALL THEY HAD TO DO WAS SINK A HOLE IN** one. The prize? A mere \$10,000 from the Lawyers Foundation of Georgia Inc. plus another \$10,000 to be donated in the lucky golfer's name to his or her favorite charity. So how hard could it be? Well, impossible, it turned out. But the impossibility of it did not dampen the enthusiasm to try. Nor did the unseasonably chilly temperatures.

The Spring Meeting of the State Bar's Board of Governors kicked off with the hole in one contest at the opening reception held high above the 18<sup>th</sup> hole of the Renaissance PineIsle Resort golf course. The meeting was held there at Lake Lanier Islands from April 15-17, 1999. And wouldn't tax day have been a glorious moment to win 10 grand? Plenty of lawyers took a swing at it, but Dean Ralph Beaird came the closest to the pin. While he didn't get the instant cash, he did win a Big Bertha driver compliments of the resort pro shop which was presented during a cookout following the reception.

## Foundations of Freedom

On Saturday morning, the Board of Governors convened for its 167<sup>th</sup> meeting. The highlight of the meeting was the unveiling of President William E. Cannon Jr.'s Foundations of Freedom program. The program, which has been discussed in previous issues of the *Journal*, is a multitiered educational effort designed to address the public's negative perception of the profession. Foundations of Freedom is the cover story for this issue and an article detailing the various components — speakers bureau, video, camera-ready ads, jury charge — appears on page 10.

Another important project that was completed this year involved an overhaul of the Bar's disciplinary process. In the last issue of the *Journal*, the Bar published for member comment the revised rules to govern

the conduct of lawyers. Following that publication, the motion to amend the Bar rules was filed with the Supreme Court of Georgia where they will be considered for adoption. In recognition of this monumental task which took the Disciplinary & Rules Procedure two years to conclude, President Cannon presented a resolution to each committee member who was in attendance.

## Check CLE On-Line

Cannon also reported on a new feature on the State Bar's Web site at [www.gabar.org](http://www.gabar.org) that will allow lawyers to track their continuing legal education credits with the click of a mouse. The link is on the Bar's home page where you enter your name and bar number to bring up your CLE transcript. Eventually, the Bar plans to have a database of upcoming seminars that will be searchable by date, sponsor, type of hours offered, or location.

## Legislative Activities

Delia T. Crouch, chair of the Advisory Committee on Legislation and Legislative Representative Thomas M. Boller provided an update on the 1999 session of the General Assembly. A complete report on the Bar's legislative program appears on page 70. Following their discussion, the Board approved amendments to Standing Board Policy 100: Legislative Policy and Procedure. The change will require committees and sections that submit legislative proposals to the ACL to also send a copy to each member of the Bar's Executive Committee.

## Judicial Poll

The Board also voted to change the judicial qualifications poll which is mailed to all active members in the event of a contested appellate race. The poll asks lawyers to rank the candidates' competency and the results are sent to news media outlets. This important service to the public will be updated to ask more specific information about the candidates' qualifica-



1. Judge Bonnie Oliver visits with fellow Board member Patrise Perkins-Hooker during the opening reception. 2. Members of the Disciplinary Rules & Procedure Committee received resolutions for their work in rewriting the discipline rules. Those who were present were: (l-r) Tony Askew, David Lipscomb, Judge Ed Carriere (committee chair), Rudolph Patterson, Jim Durham, Bryan Cavan, Chuck Driebe, Ben Weinberg, John Pridgen, Bar General Counsel Bill Smith, and David Smith. 3. On behalf of the Elberton Bar, Chris Phelps presented Immediate Past President Linda Klein with an etched plaque in honor of her service as the first woman President. 4. Board member Dee Crouch reviews materials during the meeting. 5. While he didn't hit a hole in one, Dean Ralph Beard came closest to the pin during the \$20,000 contest. 6. Enjoying the outdoor reception overlooking Lake Lanier were (l-r) Board member Harvey Weitz, Past President Bobby Chasteen, Supreme Court Justice Norman Fletcher, and President Bill Cannon. 7. Board members Myles Eastwood and Lamar Sizemore, along with his wife, Sandy, visit on Friday evening.



tions. Previously, the poll asked lawyers to rank the candidates in one of four categories — well-qualified, qualified, not qualified, lack sufficient knowledge to express an opinion.

The revised survey will include a brief biography prepared by the candidate answering in 10 words or less the following questions: name, primary area(s) of law practice, length of full-time practice/service on the bench, primary geographical area(s) of practice. The goal is to provide the public with the most accurate information about the competency of the candidates so citizens can make an informed decision. The revised poll will appear as follows:

- 5 = Excellent (performance is outstanding)
  - 4 = Good (performance is above average)
  - 3 = Satisfactory (performance is adequate)
  - 2 = Deficient (performance is below average)
  - 1 = Very Poor (performance is well below average and unacceptable)
- If you have no opinion or do not have enough information to form an opinion, please leave that item blank.

	Name 1	Name 2
1. Open mindedness and impartiality	_____	_____
2. Patience and courtesy to lawyers and litigants	_____	_____
3. Integrity to carry out duties of judicial office	_____	_____
4. Knowledge and application of substantive law	_____	_____
5. Knowledge and application of rules of evidence and procedure	_____	_____
6. Ability to perceive factual and legal issues	_____	_____
7. Awareness of recent legal developments	_____	_____
8. Quality and clarity of legal writing	_____	_____

## Retention of CAP Records

The Board also approved an amendment to the operating guidelines of the Consumer Assistance Program (CAP). When someone calls or writes the Bar to complain about a lawyer, a CAP staff member responds to the inquiry and attempts to identify the problem. Most problems can be resolved by providing information, calling the lawyer, or suggesting various ways of dealing with the dispute. In matters where serious ethical conduct may be involved, CAP sends a grievance that can be filed with the Office of General Counsel.

*GL-8: Expungement of Records* previously provided

that CAP should expunge any inquiry against an attorney after two years. The Board voted to amend the time “unless prohibited by law or court order ... to 30 days after the file closing date or as soon as possible thereafter.” They added language stating: “The Consumer Assistance Committee may for good cause extend the retention period beyond the normal 30 days for an additional period of time not normally to exceed one year.”

## Other Business

- The Board of Governors addressed a number of other items, including:
- ♦ approving the appointment of Sara Miller McArthur of Athens to the Investigative Panel;
  - ♦ approving the appointment of James Hughes and Lynne Y. Borsuk to the Formal Advisory Opinion Board;
  - ♦ hearing a preview of a proposal to amend the Bar Rules concerning the size and reapportionment of the Board of Governors;
  - ♦ receiving information from the ABA Commission on Multidisciplinary Practice and other bar associations on that topic and its impact on the profession;
  - ♦ receiving a report on the recommendations of the Pro Se Litigation Committee of the Judicial Council of Georgia; and
  - ♦ receiving a copy of the 1999 Board of Governors and officer election results.

## Winding Down

While the cool breeze kept everyone out of the pool after the Board meeting, members and their guests took advantage of an array of activities from golfing to boating to tennis. On Saturday evening, attendees enjoyed a sumptuous buffet dinner overlooking the water as the sun set. ☒

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# Georgia Bar Media & Judiciary Conference

By Amy E. Williams

**A LARGE ATTENDANCE AND** spirited discussions characterized this year's Georgia Bar Media & Judiciary Conference, which took place on April 30 at the Sheraton Colony Square Hotel. The Institute of Continuing Legal Education in Georgia sponsored the Conference titled, "Judges and the Modern Media: Independence and Interdependence."

Discussion was kicked off by Governor Roy Barnes, who, after welcoming the attendees, spoke in favor of House Bill 279, which, he said, "clarifies and tightens" the current open records laws. He praised the bill for making records of public functions held by private companies

subject to the Open Records Act, strengthening the 3-day rule and cutting down on government officials' closed sessions.

Governor Barnes' speech was followed by a panel discussion on "The Public and Privatization: Access and Accountability for Government and its Representatives." Hollie Manheimer, Executive Director of the Georgia First Amendment Foundation in Atlanta, moderated the discussion, posing questions to a panel made up of Otis Brumby, of the *Marietta Daily Journal*; Allison Luke, of the Georgia Hospital Association; Jeffrey L. Milsteen, Deputy Chief Attorney General of Georgia; and Kelly Pridgen, Assistant General Counsel of the Association County Commission-

ers of Georgia. The panel responded to Gov. Barnes' appraisal of House Bill 279 and explored the scope and applicability of open government laws.

The next panel discussion was "The Judiciary On Trial: Fractious Issues, Factious Elections and Fragmented Reporting." Joseph R. Bankoff, of King & Spalding in Atlanta, was interlocutor and Hon. Norman S. Fletcher, Justice on the Georgia Supreme Court; Hon. Anne Barnes, Judge on the Georgia Court of Appeals; Richard Halicks, an on-line journalist with the *Atlanta Journal-Constitution*; Roy Sobelson, a professor at Georgia State University in Atlanta; Bill Nigut, of WSB-TV, Atlanta; and Ann Woolner, of the *Fulton County Daily Report* in

## Silver Gavel Awards Honor Excellence in Legal Reporting

### Newspapers

#### First Place

*Atlanta Journal-Constitution*  
"Unequal Justice" by Bill Rankin

#### Second Place

*Atlanta Journal-Constitution*  
"Courthouse in Crisis" by Jay Croft and Rhonda Cook

#### Third Place

*The Times* (Gainesville)  
"Plight of a hispanic immigrant applying for US citizenship" by Richmond Eustis

### Television

WAGA-TV Channel 5  
"Sentences for Sale" by Randy Travis

### Radio (Top 5 Metro Areas)

Peach State Public Radio  
"Police Search Dogs" by  
Melissa Gray  
"Legislative Report"  
by James Argroves  
"Voting Fraud in  
Milledgeville" by  
Susanna Caelouto  
and Cyd Hoskinson  
"Cocaine Corridor" by  
Mike Savage,  
Melissa Gray, Teresa  
Sanders and Tom  
Patton  
"Fifty Plus One" by  
Susanna Capelouto  
and Mike Savage

### Radio (Other Areas)

WUGA-FM  
"The Individual in a Global  
Society"

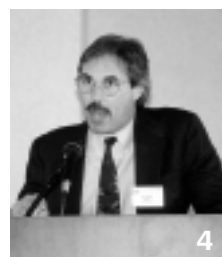


(l-r) Dorinda Dallmeyer, WUGA-FM; Randy Travis, Channel 5; Rhonda Cook and Bill Rankin, *Atlanta Journal-Constitution*; Richmond Eustis, *The Times* (Gainesville); Melissa Gray and Tom Patton, Peach State Public Radio.



1. Scott Woefel of CNN Interactive and on-line journalists Jeff Berry discuss cyberspace and the law. 2. Leading a breakout group to discuss the judiciary on trial were: (l-r) Judge Neal Dickert, Augusta Superior Court; Rexanna Keller Lester, *Savannah Morning News*; Scott Slade, WSB-750AM; and attorney George Weaver. 3. *Atlanta Journal-Constitution* editorial page editor Cynthia Tucker moderates a panel looking at the Columbine High School tragedy. 4. Hyde Post, of the *Atlanta Journal-Constitu-*

*tion*, welcomes attendees to the luncheon on behalf of the conference planning committee. 5. The Columbine panel included: (l-r) Arthur Kellerman, director of Emory's Center for Injury Control; Fulton Juvenile Court Judge Glenda Hatchett; Bill Gambill, Department of Education; and Loren Ghiglione, director of Emory's journalism program. 6. Gov. Roy Barnes opened the conference with a discussion on open government.



Atlanta, were the panelists. Pilar G. Keagy, of CNN, and Toni Friess, of Troutman Sanders LLP in Atlanta, coordinated this discussion in which a hypothetical scandal involving a government official was posed and each panelist was given a fictional role, putting them in a position to either help or hinder the discovery and reporting of the scandal. The hypothetical brought out current ethical issues in media coverage and showed from all sides the practical, legal and ethical implications of a "typical" scandal.

Attendees then broke into small groups to continue discussing the issues raised in "The Judiciary on Trial." Each group had its own facilitating faculty of judges, lawyers and journalists to stimulate the discussion. Group-leading judges included Judge Jackson Bedford, of the Fulton County Superior Court;

Judge James Bodiford, of the Cobb County Superior Court; Judge Neal Dickert, of the Augusta Circuit Superior Court; Judge Rucker Smith, of the Southwestern Circuit Superior Court; and Judge Melvin Westmoreland, of the Fulton County Superior Court. Other panelists were Doug Blackmon, of *The Wall Street Journal*; Chris Cain, of *Southern Voice*; Rexanna Keller Lester, of *The Savannah Morning News*; Joshua Levs, of WABE; Jennifer Miller, of *The Augusta Chronicle*; Kevin Sack, of *The New York Times*; Scott Slade, of WSB-750AM; Susan Stone, of WSB-TV; Randy Travis, of WAGA-TV; and George Weaver, of Hollberg, Weaver & Kytle.

An awards luncheon followed the breakout groups. William E. Cannon Jr., President of the State Bar, presented six Silver Gavel Awards to local newspapers, TV stations and

radio stations for excellence in legal reporting. Following the meal there was a special panel discussion of the recent events at Columbine High School in Littleton, Col. Panel members were Loren Ghiglione, Director of Emory University's Journalism program; Judge Glenda Hatchett, of Fulton County Juvenile Court; Arthur Kellerman, Director of the Center for Injury Control at the Rollins School of Public Health of Emory University; and Bill Gambill, Deputy State Superintendent for Finance & Technology in the Georgia Department of Education. The panel was led in discussion by Cynthia Tucker, editorial page editor of the *Atlanta Journal-Constitution* and syndicated columnist. Using their varied knowledge and experience, the panel members analyzed the media coverage as

**CONTINUED ON PAGE 87**

# SEEN UP CLOSE, YLD WORK IS AWE-INSPIRING

By Ross J. Adams



Serving as President of the Young Lawyers Division has been an awesome experience. In using the word “awesome,” I intend two definitions. First, the “Valley-speak” meaning, as in “That was awesome, dude,” and also the more formal definition contained in the dictionary: “characterized by an overwhelming feeling of admiration produced by that which is grand.”

During the time I have been involved in the Young Lawyers Division, I have had the wonderful opportunity to meet people and participate in events that I could not even have conceived of a few years ago. This has really been an incredibly fun experience, culminating in service as President. Many times, I have said that my participation in the Division has been the most fun I have had in an organization since I was involved in my fraternity in college. That statement rings even more true now that I am about to “graduate.” I would not trade the friendships I have made with lawyers from around the state for anything. The memories of our work together will stay with me the rest of my life, and God willing, even 50 years from now, I will smile as I reminisce about these times.

However, in addition to the fun, as President of the Division, I have had the privilege of presiding over an

incredible organization. The YLD, through its committee structure, sponsors and organizes a wide variety of programs, doing service for both the public and the Bar. To paraphrase the formal definition of awesome, I am overwhelmed by the admiration I have for the people who participated this year in the Division — who acted in such a grand fashion, to give of their time to improve their community and our profession. As part of the last column, I want to recognize several people for their work this year and for helping make the presidency such an awesome experience for me. However, I do so with the disclaimer that is inevitable that I will unintentionally omit someone, and for that I will apologize now.

Several committee chairs went above and beyond the call of duty this year and accomplished amazing things. Martin Chen, chair of the Advocates for Special Needs Children arranged for a seminar, through the generous sponsorship of the ICLE, at which participants agreed to take two pro bono cases for children with special needs in exchange for free attendance at the seminar. The Aspiring Youth Committee, with Doug Kertscher as chair, took the program to new heights. Damon Elmore took the Disaster Legal Assistance Committee, a committee that previously reacted to disasters, and made it a committee that proactively plans and teaches about disasters, and the participation of lawyers in relief efforts. The Elder Law Committee, chaired by Melanie McNeil and Alisa Haber, participated in numerous projects regarding the delivery of legal services to the elderly and the legal

issues that the elderly encounter. The Employer’s Duties and Problems Committee, chaired by Stewart Duggan, published a pamphlet titled “What Georgia Employers Should Know” that is being distributed by the Georgia Secretary of State with every information packet for new business entities. Rick Sager, chair of the High School Mock Trial Committee, guided an organization that produced the national champion high school mock trial team. Janne McKamey-Lopes expanded the scope of the Judicial Liaison Committee well beyond any previous year, turning that committee into a real service to the Bar. Finally, Alla Shaw took the Kids and Justice Program, which had been in planning for several years, and brought to life a full project to help fifth grade children learn about the rights and responsibilities of citizens.

The officers of the Division have also helped make this an awesome year for me. Secretary Pete Daugherty, Treasurer Kendall Butterworth and President-elect Joe Dent have been of immeasurable assistance and I am very excited about the next few years as they continue in the leadership of the Division. The Division is in very good hands. In addition to the officers of the YLD, the officers and Executive Committee of the State Bar have provided great inspiration and aid. In particular, President Bill Cannon has provided strong leadership and vision, and I am proud that I was able to serve as President of the YLD the year that he served as President of the State Bar.

I would be remiss if I did not mention the people closest to me. I want to thank my law partner, Mike Braun, for his patience. (Mike, I promise I will be back at the office soon.) Most importantly, I want to thank my wife, Robin, and daughter, Paige, for supporting me as I took the time to serve in this office. Without

**CONTINUED ON PAGE 81**

# Awards Banquet Honors High School Mock Trial

**THE SECOND ANNUAL AWARDS** Banquet for the Georgia Mock Trial Competition was held on Saturday, April 24, at the Atlanta Marriott North Central. The banquet serves as a fund-raiser for the program and gives the High School Mock Trial Committee of the Young Lawyers Division an opportunity to honor long-time supporters.

The first honoree was the Georgia Bar Foundation (GBF), which has consistently provided the major grant support for the program over the past 10 years. The program simply would not be possible without funding from this IOLTA source. Bill Harvard, chair of the GBF Board of Trustees, received the plaque presented by former YLS President Donna G. Barwick.

The second honoree was, collectively, the Gwinnett Judicial Circuit and the Court Administration Staff. For the past 10 years, Court Administrator Arthur V. O'Neill, with the support of the circuit's judges, has hosted the State Finals competition in addition to the local Gwinnett County competition. They have been gracious hosts, and the support network in Gwinnett, which includes the local bar association and the Sheriff's Department, has enabled Georgia's State Finals to be conducted at the highest professional level. Former YLS President Elizabeth Bloom Hodges presented the plaque to Superior Court Judge Debra Kaplan Turner, who represented the Gwinnett Judicial Circuit. State Court Judge and long-time High School Mock Trial Com-

mittee member Robert W. Mock Sr., was also present for the banquet.

The third honoree was the 1999 Georgia Champion Mock Trial Team from Clarke Central High School in Athens. The team also won the state title in 1998 and placed sixth at the



**Former YLS President Donna G. Barwick presents a plaque to Bill Harvard, president of the Georgia Bar Foundation's Board of Trustees.**

national tournament.

"We expanded the honoree base with this year's banquet by providing opportunities for each region in the state to recognize an outstanding teacher and attorney coach," said Linda Spievack, chair of the Subcommittee on Honors and Awards. "Many of our coaches have been active in the field for over seven years, and we feel this avenue for recognition will be very popular." Four outstanding attorney coaches were recognized:

Rick Brown and Matt Thames from the North Georgia Region, Kenneth Mauldin from the Northeast Georgia Region, and Comer Yates from the Fulton County Region.

"In addition to coaches, there are nine attorneys who celebrated their

**"At a time when so much of the public seems to take a cynical view . . . of the legal profession . . . it is refreshing to see the commitment, the hard work, and the integrity of attorneys like these."**

**— Ray Trotter, parent of Northwest Whitfield High School team member, about attorney coaches Rick Brown and Matt Thames**

tenth year as members of the High School Mock Trial Committee," said Committee chair Rick Sager. "We are fortunate to have had their dedication and wisdom in guiding the program over the past decade." The attorneys honored for a decade of continuous service are: Michael Barker, Deborah C. Craytor, William Droze, Denise Fachini, Kathryn Fallin, Mark Johnson, Rhonda Klein, Mark Webb, and Comer Yates.

Major sponsors for the banquet included the Georgia Civil Justice Foundation; King & Spalding; Sutherland, Asbill & Brennan; Powell, Goldstein, Frazer & Murphy; Thomas W. Malone; Dow, Lohnes & Albertson; Atlanta Council of Younger Lawyers; Troutman Sanders LLP; Drew Eckl & Farnham; Brown Reporting Inc.; and the Litigation Section of the Atlanta Bar Association. Also supporting the banquet by providing seats for students and teachers were Judge Dorothy Toth Beasley and YLD President Ross J. Adams. ☐

## **Continued from Page 80**

their support, my participation could not have been possible — nor would it have been worthwhile, if I could not

have shared this adventure with them. Finally, I will also always be grateful to the Division for electing me to this office. It has truly been an awesome experience. ☐



# A MAZE OF MARSHALLS: A PORTRAIT OF JUSTICE MARSHALL

**Juan Williams, *Thurgood Marshall - American Revolutionary*, Times Books, 404 pages, \$27.50**

**Reviewed by Hon. John H. Ruffin Jr.**

**WHEN ONE ATTEMPTS TO WRITE ABOUT AN** American icon, one assumes an extraordinarily mammoth task. Juan Williams masters this task superbly in *Thurgood Marshall - American Revolutionary*. All America, and indeed the world, knew Thurgood Marshall as “Mr. Civil Rights,” but Williams takes us through a maze of Marshalls for us to understand Marshall the man, and we are both enlightened and entertained.

The writer is rather simplistic in his style. Indeed this is fortunate for at least three reasons: (1) Marshall was loved and admired by millions, and his followers — who transcended race, religion, color and class — can read it with ease of comprehension; (2) it would be too great a contrast for the plebeian and sometimes crude language that Marshall used in his daily conversations were it written in a more academic style; and (3) it is directed not to scholars, but to a broader constituency, thereby making its style more conducive to its targeted audience.

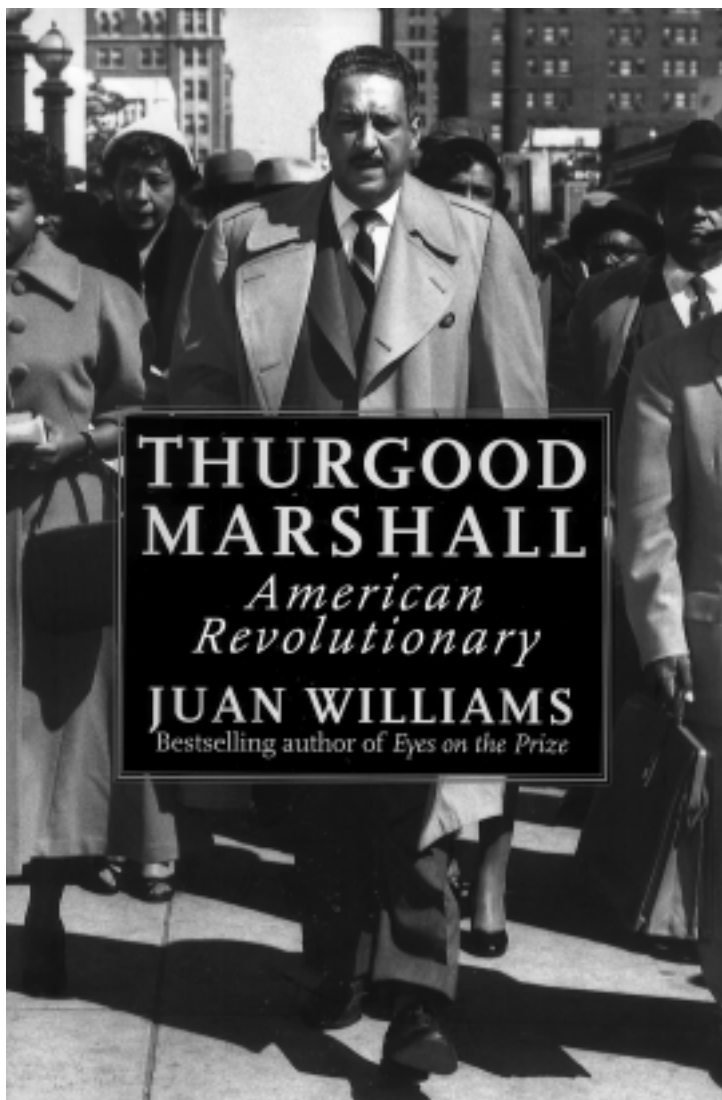
We learn that Marshall’s liberalism was rooted in his bitter, and sometimes chilling experiences in Baltimore and the Deep South, rather than emanating from any theoretical or academic

framework. He was denied admission to the University of Maryland Law School in his native Maryland because of his color; and it was an incident which he never forgot, nor was he ever able to forgive. Williams shares how anxious Marshall was to get a black plaintiff to desegregate the University of Maryland Law School, and how years later, after Marshall had earned his fame and become a justice on the U.S. Supreme Court, Marshall refused to attend the

unveiling of his portrait at the Law School. His passion for the civil rights cases he filed to equalize teachers’ salaries in the South unquestionably emanated from the fact that his mother was similarly discriminated against in the Baltimore school system.

Williams’ treatment of Marshall is thorough and objectively well-balanced. He gives us a 360 degree perspective of a myriad of Marshalls. We see Marshall the constitutionalist — and the advocate; we see him as the jokester and the storyteller; he is the womanizer and the boozier; he is obstinate, but caring; he is vindictive and the master office politician; he is an egotist, and his conversational English is crude; he is the fundraiser for the NAACP, but he is magnanimous in giving his mentor, Charles Houston, credit for the legal theories that ultimately broke the back of

segregation and which Marshall used so effectively to combat segregation. Through it all, his passion remains always with the constitution and its constituents.



If there is a flaw in the book, it is that the first chapter appears to be out of place where we are told how Marshall became a justice on the U.S. Supreme Court. We wish to go there, and Williams takes us where we want to go, but he takes us there much too quickly. As a result, we are deprived of the excitement of the buildup in getting there. Impatience, if any, should be the reader's, not the writer's.

Marshall is a patriarch-like protector of the civil rights movement. With equal zeal, he has a fidelity to the judicial system that commanded he even oppose the law-breaking tactics of Martin Luther King Jr., irrespective of how noble Dr. King's intentions were. But it was his robust respect for the constitution that allowed him to represent demonstrators with an ease that did not reflect in the least his personal views on civil disobedience.

Marshall's twilight years on the Supreme Court were years of isolation — isolation from his colleagues on the Court, as well as isolation from their positions on civil and individual rights. We are exposed to a Marshall who became bitter and dejected as he witnessed the crowning

results of his struggles dissipated by the Court's conservative majority.

Despite Marshall's flaws, he was of equal ease whether on "the party circuit or the Supreme Court." Juan Williams has done an excellent job of portraying the many sides of Marshall the man, and the legacy which Marshall left. Whatever anyone else says about Marshall, his commitment to civil rights, equality and the constitution was total; his legacy as an American revolutionary is intact; and his place in history is firmly preserved. ☐

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*Judge John H. Ruffin Jr. was appointed to the Court of Appeals of Georgia by Governor Zell Miller on August 24, 1994. He served as a superior court judge in the Augusta Judicial Circuit prior to his appointment to the Court of Appeals. He graduated from Morehouse College and Howard University School of Law. As the first African-American Superior Court Judge for the Augusta judicial Circuit, first African-American member of the Augusta Bar Association and the third African-American to serve on the Court of Appeals of Georgia, Judge Ruffin is a trail blazer in his own right.*

Mainstreet pickup 4/99 p79

# Insurance Specialists - pickup 4/99 p71



# 1999 Law School Orientations Need You!

**THE ORIENTATIONS ON PROFESSIONALISM** conducted by the State Bar Committee on Professionalism and the Chief Justice's Commission on Professionalism at each of the state's law schools have become a permanent part of the orientation process for entering law students. The Committee is now seeking lawyers and judges to volunteer from across the state to return to your alma maters or to any of the schools to help give back part of what the profession has given you by

dedicating a half day of your time this August.

- ♦ Purpose of the program: To introduce the concept of professionalism to first-year students.
- ♦ Minimal preparation is necessary for the leaders.
- ♦ Review the hypotheticals and arrive at the school 15 minutes prior to the program.
- ♦ Committee will provide leaders with a list of the hypos including annotations and suggested questions.

- ♦ Earn 2.0 hours of CLE, including 1.0 hour of ethics and 1.0 hour of professionalism.
- ♦ Pair up with a friend or classmate to co-lead a group.

Please consider participation in this project and encourage your colleagues to volunteer. Please respond by completing the form below or calling the Chief Justice's Commission on Professionalism at (404) 527-8768 or (800) 334-6865 ext. 768, fax: (404) 527-8711. Thank you. ☐

## Attorney Volunteer Form

### 1999 Law School Orientations on Professionalism

Full Name (Mr./Ms.) \_\_\_\_\_ Nickname: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

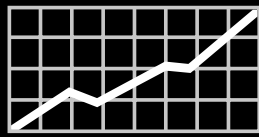
Area(s) of Practice: \_\_\_\_\_

Year Admitted to the Georgia Bar: \_\_\_\_\_ Bar#: \_\_\_\_\_

Reason for Volunteering: \_\_\_\_\_

Law schools	Date	Time	Reception/Lunch
Emory I	Friday, Aug. 20	10 a.m. - 12 p.m.	12 p.m. - 1:30 p.m.
Emory II	Friday, Oct. 22	2:30 p.m. - 5 p.m.	5 p.m. - 6 p.m.
Emory III	February, 2000	TBA	TBA
Georgia State	Tuesday, Aug. 17	3 p.m. - 5 p.m.	5 p.m. - 6 p.m.
Mercer	Friday, Aug. 20	2 p.m. - 4 p.m.	4 p.m. - 5 p.m.
UGA	TBA		

**Please return to:** State Bar Committee on Professionalism  
 ATTN: Terie Latala  
 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303  
 phone (404) 527-8768; fax (404) 527-8711



# Is an Office Manager In Your Firm's Future?

By Terri Olson

## ONE QUESTION I HEAR

frequently is "Should I hire an office manager?" Often this is phrased as "Is my firm big enough to need an office manager?" Before answering that question, let's look at what an office manager can or should do.

While the position varies from firm to firm, generally the office manager will supervise the billing and accounting functions (and in smaller offices, perform them personally); run any needed reports; coordinate the hiring, evaluation and termination of employees; track, and sometimes advise on, employee benefits; track sick and vacation leave; receive proposals from vendors for new computers and general office equipment; coordinate and order supplies; coordinate and request repairs; manage custodial services; supervise and discipline employees; coordinate work delegation and the work load; and act to resolve employee conflicts and complaints.

Please note that the terms "office manager" and "administrator" are not really interchangeable. Usually "legal administrator" designates a person with considerably more authority than the typical office manager. The law firm administrator will keep up with hours billed and general productivity of the attorneys, may have sole responsibility for hiring and firing staff, may sit in on partners' meetings, and may even be an attorney. This article is directed at those smaller firms that have not, to date, had anybody besides the attorneys respon-

sible for day to day operations, and are considering a change.

There is no magic size at which a firm automatically needs a manager; there are sole practitioners who can keep a manager busy full-time and offices of eight or nine attorneys that would be hard pressed to find tasks for that person to do. If there is a number I would point to, it relates to the number of *staff* rather than the number of *attorneys*. One of the chief duties of an office manager is to supervise non-lawyer staff, and if you have more than three or four support staff on board, you're probably already finding it difficult to provide work, assign priorities, resolve conflicts, track benefits and manage vacation schedules for all of them.

If you already keep careful track of time in your office, and you know what portion of the working day is spent on the above, you're way ahead of the game here. You have the necessary data to see how many billable hours are being lost to administrative work, and from that it's fairly easy to see whether an office manager is a cost-effective proposition. If you do not have this information, I suggest that you attempt to track it, rather than relying on "gut instinct" in deciding whether to hire someone to handle these tasks. After compiling a few months worth of information, you will be in a much better position to see whether you can really afford to hire a new person.

Also think about whether, practically speaking, it will be possible to delegate certain tasks to another employee. This doesn't mean that the

administrative work in your firm *needs* to be done by a lawyer, but it's harder than one would imagine to give up a job that through personal inclination or habit, one has always performed. A good example is the attorney who spends half of his or her time disboweling computers, or the one who enjoys running and reviewing the accounting reports. It's one thing to say "From now on, these duties are to be performed (or supervised) by the office manager," it's another thing to be prepared to enforce that decision.

I don't mean to sound cynical, but the attitude of the typical law firm toward an office manager can often be summed up as, "Please come in and do whatever is necessary to shape us up and make us more productive — as long as we don't have to change anything we're used to doing in the process." Do not hire an office manager unless the attorneys in your office have all committed to a willingness to change in order to make the new system work, and unless the manager has been granted a fairly generous level of authority and autonomy to get things going.

I say this because, unfortunately, the office manager position in a law firm can be a problematic one. The transition from having no manager to having your first manager is especially difficult. Lawyers complain to me that "The office manager isn't really saving us that much time;" the employee complains to me that "The lawyers never let me do anything." Turnover (both voluntary and involuntary) in these positions is high, as is job dissatisfaction. In order for the

## Official Opinions

### Trademarks.

The Georgia Music Hall of Fame Authority is the owner of the "GEORGIA MUSIC HALL OF FAME" and "GEORGY" marks. Additionally, the Georgia Constitution may prohibit the Georgia Music Hall of Fame Authority from delegating the exclusive right to select inductees into the Georgia Music Hall of Fame to any private entity. (3/16/99 No. 99-4)



**Attorney General  
Thurbert Baker**

**Ethics in Government Act; financial disclosures.** The Private Colleges and Universities Authority is not a "state authority" for the purposes of the Ethics in Government Act

and, therefore, its members need not file the financial disclosure forms required by O.C.G.A. § 21-5-50. (4/5/99 No. 99-5)

### Policemen, Special; powers.

Special policemen, appointed pursuant to O.C.G.A. §§ 35-9-1 through 35-9-14, have and may exercise the powers of a peace officer "only upon the property in connection with the property" to which they are appointed for the purpose of "protecting and preserving." (4/5/99 No. 99-6)

**Peace officers, Registered or exempt.** "Registered" or "exempt" peace officers who otherwise meet the certification requirements of Chapter 8 of Title 35 have the same authority as that of certified peace officers. (4/16/99 No. 99-7)

**Motor vehicle dealers, Used.** A church that accepts donations of used motor vehicles and resells the vehicles must be licensed as a used

motor vehicle dealer in the State of Georgia, unless the church would otherwise qualify for a statutory exemption. (4/29/99 No. 99-8)

**Adjutant General.** The Adjutant General cannot delegate his discretionary power or authority regarding the signing of state contracts but he can implement guidelines regarding routine contracts and then delegate to the Director of Strategic Resource Management the ministerial function of signing contracts which fall within those guidelines. The delegation should be in writing to set forth clearly the responsibility the Adjutant General has delegated. (4/30/99 No. 99-9)

## Unofficial Opinions

There were no Unofficial Opinions issued in April or May. ☒

person you hire to be valuable to you, he or she needs to be qualified, flexible and, above all, given the authority to act. At a minimum, a good office manager should be able to authorize the purchase of minor office items, place advertisements for and do initial interviews for support staff, track employees' compliance in the areas of tardiness and absenteeism and discipline them for infractions, delegate work and shift work loads, and write office account checks up to a specified amount; all without the prior approval of the attorneys in the firm.

That being said, having full-time administrative support in the form of an office manager can be a blessing. Next month, we'll look at how to hire a good one and how to make sure that he or she becomes a productive member of your team. ☒

*Terri Olson is director of the Law Practice Management Program.*

## Continued from Page 79

well as the actual events at Columbine and looked for solutions to prevent another such disaster in the future.

The next panel discussion was "Civilizing the New Frontier: Cyberspace and the Law." This discussion explored the practical and legal issues resulting from the explosive development of the Internet. Gerald R. Weber Jr., Legal Director of the ACLU of Georgia, moderated the session, and Scott Woefel, of CNN Interactive, and Jeff Berry, an on-line journalist in Alpharetta, made up the panel.

The Conference ended with a seminar called "Back to Basics." Daniel A. Kent, of Alston & Bird LLP in Atlanta, educated attendees on recent developments to prevent SLAPP. These are frivolous and slanderous lawsuits brought not for their merit, but simply to shut somebody up by tying them up in litigation.

James B. Ellington, of Hull, Towill, Norman, Barrett & Salley in Augusta, spoke next on the presence of the media in courtrooms. He cited specific trials to show the precedent that has been set on when to allow or not allow media presence at trials. He also presented perspectives on both sides of the issue. Eric R. Schroeder, of Powell, Goldstein, Frazer & Murphy LLP in Atlanta, closed with a discussion of "ride-alongs." This is something we have all seen on the news and various dramatic TV shows when a cameraperson, for example, follows a policeman on a drug bust or is in the car during a high-speed chase. Schroeder used specific examples to illustrate how such coverage can help law enforcers and how it can get them in trouble for invasion of privacy. ☒

*Amy E. Williams is communications coordinator with the State Bar of Georgia.*



## WHO'S WHERE

### In Atlanta

**King & Spalding** announces that **Carolyn Zander Alford**, **W. Randall Bassett**, **Douglas A. Bird**, **Letitia M. Brown**, **Jeffrey S. Cashdan**, **Todd P. Davis**, **William L. Durham II**, **Stacey Kipnis Geer**, **Timothy J. Goodwin**, **Edward G. Kehoe**, **Michael R. Powers**, **Andrew M. Tebbe**, and **Carlos Treistman** have been elected partner. **Homer Mullins** has been named as counsel, and **Doug Shaddix** has also joined the firm. The office is located at 191 Peachtree St., Atlanta, GA 30303; (404) 572-4600.

**Jones & Askew LLP** announces the relocation of its offices to 2400 Monarch Tower, 3424 Peachtree Rd., NE, Atlanta, GA 30326; (404) 949-2400. Also, **Adam Avrunin** and **Collen A. Beard** have joined as associates.

**Paul, Hastings, Janofsky & Walker LLP** has named **Tracey T. Barbaree**, **Cindy J. K. Davis**, **Eric Jon Taylor** and **Michael T. Voytek** to participating of counsel status. The office is located at 600 Peachtree St., Suite 2400, Atlanta, GA 30308.

The firm of **Franzén and Salzano PC** announces that **John H. Bedard Jr.** and **Shannon M. Howe** have become associated with the firm. The office is located at 3169 Holcomb Bridge Rd., Suite 202, Atlanta, GA 30071; (770) 248-2883.

**Powell Goldstein Frazer & Murphy LLP** announces that former associates **Thomas J. Biafore**, **Christopher P. Galanek**, **Todd E. Jones**, **Cynthia D. Kennedy** and **R. Wade Marionneaux** have been named as new partners. Former senior associate **Beth Lanier** was named as

counsel. The Atlanta office is located at 191 Peachtree St., 16th Floor, Atlanta, GA 30303.

**Ernst & Young LLP** announces that **James R. Eads Jr.** will join the firm from AT&T, where he has been senior attorney, law and government affairs, since 1992. He will be based in the Atlanta office located at 600 Peachtree St., NE; (404) 874-8300.

**Andy Galeziowsky** joined the Atlanta office of **Fragomen, Del Rey, Bernsen & Loewy** as a senior associate attorney concentrating in business immigration law. The office is located at 1175 Peachtree St., NE, 100 Colony Square, Suite 700, Atlanta, GA 30361.

**Holland & Knight** has added **Robert S. Highsmith** to its Atlanta office as an associate. The office is located at One Atlantic Center, 1201 W. Peachtree St., NE, Suite 2000, Atlanta, GA 30309; (404) 817-8500.

**Alston & Bird** announces the formation of a knowledge services department for creating knowledge management technologies. The firm has named law practice technologist **John B. Hokkanen** as chief knowledge counsel. The office is located at One Atlantic Center, 1201 West Peachtree St., Atlanta, GA 30309.

**Jonathan R. Levine** announces the opening of **Jonathan R. Levine LLC**. **Evin L. Somerstein** has become associated with the firm. The office is located at 945 East Paces Ferry Rd., NE, Suite 2150, Atlanta, GA 30326; (404) 237-5700.

**Mike Wagner** has been named managing partner of the Atlanta office of **Hunton & Williams**, and **Michael M. Turbes** has joined the firm as an associate in the technology practice group. The office is located at NationsBank Plaza, Suite

4100, 600 Peachtree St., NE, Atlanta, GA 30308; (404) 888-4000.

### In Kennesaw

**Ganek, Wright & Dobkin PC** announces **Dell W. Murphy** will be the managing partner of its new North Cobb/Cherokee Office located at 125 Town Park Dr., Suite 300, Kennesaw, GA 30144; (770) 429-0725.

### In Kingsland

**H.R. "Hal" Moroz** announces the opening of the **Moroz Law Firm**. The office is located at 121A N. Lee St., Kingsland, GA; (912) 673-9189.

### In Marietta

**Sams & Larkin LLP** announces that **M. Kyle Greene** has joined the firm as an associate and **David P. Hartin** has become of counsel to the firm. The office is located at 376 Powder Springs St., Marietta, GA 30064; (770) 422-7016.

### In Valdosta

**Griffin LLC**, an international crop protection company, has named **Thompson H. Gooding Jr.** as associate general counsel. He will be based in the company's Valdosta headquarters, located at P.O. Box 1847, Valdosta, GA 31601.

### In California

**Gary S. Hand**, presently associated with **Altheimer & Gray** in Chicago, will join the San Francisco office of **Graham & James LLP** as a senior associate. The office is located

Fulton County Assistant District Attorney **Rhonda Brodsky** has been asked to serve as a faculty assistant during the 1999 National College of District Attorneys' Career Prosecutor Course in June. Only a small number of graduates of the College's Career Prosecutor Course are asked to return as faculty assistants and are selected based on their performance as students and demonstrated leadership qualities. The National College of District Attorneys, now in its 30th year, is based at the University of Houston Law Center.

**A. Paul Cadenhead** of Fellows, Johnson & La Briola LLP was presented with the sixth Ben F. Johnson Jr. Public Service Award by the Georgia State University College of Law. This award is presented annually to a Georgia lawyer whose life and career reflects the high tradition of selfless public service.

**Elizabeth Christian**, who got her B.A. at the University of Georgia and her J.D. at the University of Georgia School of Law, is Director of the

Innovation and Creativity Clinic at Franklin Pierce Law Center in Concord, New Hampshire. The Clinic assists New Hampshire inventors and artists with copyright, patent and trademark issues, and was recently cited by the U.S. Department of Housing and Urban Development (HUD) as one of the top twenty community development programs in the nation.

The National Board of Trial Advocacy (NBTA) announces that **Michael E. Ingram** has successfully achieved Board Certification as a civil trial advocate through NBTA. Through a challenging application process, the NBTA provides the consumer of legal services with an objective measure by which to choose qualified and experienced legal counsel.

Georgia Wildlife Federation announces that **J. Rutherford Seydel II** and **Bob Irvin** have both been named recipients of its 1999 Georgia Conservation Achievement Awards, by which eleven Georgians are

recognized for their significant achievements in natural resource protection and conservation. Seydel received the highest award, Conservationist of the Year, and Irvin received an award for Special Conservation Achievement: Heritage Fund Legislation.

**John Witte Jr.**, director of Emory University's Law and Religion Program, has received a four-year \$546,350 grant from the Lilly Endowment to prepare four new books, related articles and public lectures on law, religion and the Reformed tradition. This is the largest single grant to Emory's Law and Religion Program to date. Witte has also been named recipient of this year's Abraham Kuyper Prize for Excellence in Reformed Theology and Public Life, awarded by Princeton Theological Seminary each year to an outstanding scholar or community leader who has contributed to the development of Reformed theology. ☒

at One Maritime Plaza, San Francisco, CA 94111; (415) 954-0200.

## In Washington, DC

**Robins, Kaplan, Miller & Ciresi LLP** announces that **Charles A. Hunnicutt**, U.S. Assistant Secretary of Transportation for Aviation and International Affairs, rejoined the firm as a partner in the Washington, DC office. The office is located at 1801 K. St., NW, Suite 1200, Washington, DC 20006; (202) 736-2680.

## In Oklahoma

**The Allison Firm** announces the association of **Kevin B. Ratliff**. The office is located at 6120 South Yale Ave., Two Warren Place, Suite 814, Tulsa, OK 74136; (918) 492-4500.

## In South Carolina

**Dority and Manning PA**, an intellectual property firm, announces that **Lloyd G. Farr** has become a partner in the firm. The office is located at NBSC Bldg., 1122 Lady St., Suite 810, Columbia, SC 29202; (803) 256-2005. ☒

**Congratulations!**  
To the **Gainesville College Paralegal Program** in obtaining **approval** by the American Bar Association.

# Section Leaders Retreat Held at Lake Lanier

## SECTION LEADERS CAME

together for a working retreat at the Renaissance Pine Isle Resort at Lake Lanier in April. The half-day retreat gave leaders an opportunity to come together, share ideas and find ways to improve services to their members. Seminar planning, publications, guidelines, legislation and social event planning were a few of the topics discussed. State Bar President-elect Rudolph Patterson, Rob Reinhardt of the State Bar's Program Committee, Larry Jones and Steve Harper of ICLE were also on hand to talk with attendees.

**The Computer Law Section** held a breakfast for members April 20 at the Buckhead Club in Atlanta. Featured speakers were: John Yates, partner with Morris, Manning & Martin and Loren Wimpfheimer, general counsel for Harbinger Corporation. They spoke about "Preparing Your Client for the IPO: Legal and Business Considerations."

**The Individual Rights Section** held a luncheon at Georgia Legal Services on April 30th. James F. Martin, Georgia House of Representatives spoke to members about legislation.

— Lesley T. Smith, Section Liaison



1. Megan Gideon of the Individual Rights Section spoke on event planning during the retreat. 2. (l-r) Melinda K. Hart, of the Military/Veterans Section; James "Rob" Williamson of the Bankruptcy Section; Frances Cullen of the Administrative Law Section; and Lyonnnette Davis of the Taxation Section visit at the retreat. 3. (l-r) Susan Garrett, newly elected chair of the section and James F. Martin, of the Georgia House of Representatives. 4. Rob Williamson participated in discussions at the retreat about legislation and creative writing for newsletters. 5. (l-r) Michael Vollmer of the Computer Law Section and Jason Bernstein, chair-elect of the Intellectual Property Section. 6. (l-r) Jeffrey Kuester, chair of the Computer Law Section and speakers John Yates and Loren Wimpfheimer of Harbinger Corporation.



# ad Jennifer

## **Alcohol/Drug Abuse and Mental Health Hotline**

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

<b>Area</b>	<b>Committee Contact</b>	<b>Phone</b>
Albany .....	H. Stewart Brown .....	(912) 432-1131
Athens .....	Ross McConnell .....	(706) 359-7760
Atlanta .....	Melissa McMorries .....	(404) 522-4700
Florida .....	Patrick Reily .....	(850) 267-1192
Atlanta .....	Henry Troutman .....	(770) 433-3258
Atlanta .....	Brad Marsh .....	(404) 876-2700
Atlanta/Decatur .....	Ed Furr .....	(404) 231-5991
Atlanta/Jonesboro .....	Charles Driebe .....	(404) 355-5488
Cornelia .....	Steven C. Adams .....	(706) 778-8600
Fayetteville .....	Glen Howell .....	(770) 460-5250
Hazlehurst .....	Luman Earle .....	(912) 375-5620
Macon .....	Bob Daniel .....	(912) 741-0072
Macon .....	Bob Berlin .....	(912) 745-7931
Norcross .....	Phil McCurdy .....	(770) 662-0760
Rome .....	Bob Henry .....	(706) 234-9442
Savannah .....	Tom Edenfield .....	(912) 234-1568
Valdosta .....	John Bennett .....	(912) 242-0314
Waycross .....	Judge Ben Smith .....	(912) 285-8040
Waynesboro .....	Jerry Daniel .....	(706) 554-5522

**West (Chap 7...) new - BW**

<b>Name</b>	<b>City</b>	<b>Discipline</b>	<b>Date of Supreme Court Order</b>
Stephanie Delphine Blair .....	Savannah .....	disbarred .....	May 3, 1999
Michael Howard Booth .....	Newnan .....	voluntary surrender of license .....	Feb. 22, 1999
James L. Eastham .....	Atlanta .....	public reprimand .....	Apr. 30, 1999
Gary W. Forbes .....	Duluth .....	emergency suspension .....	March 1, 1999
Frederick Joseph Henley Jr. .	Decatur .....	disbarred .....	May 3, 1999
Jeffrey Lee Hersh .....	Atlanta .....	disbarred .....	May 3, 1999
William H. Lumpkin .....	Augusta .....	voluntary surrender of license .....	Apr. 12, 1999
M. Randall Peek .....	Conyers .....	disbarred .....	May 3, 1999
Donnie E. Perry .....	Woodstock .....	voluntary surrender of license .....	Apr. 12, 1999
Karen Lynn Sacandy .....	Woodstock .....	formal admonition .....	Feb. 19, 1999
Daniel Prince Woodard .....	Atlanta .....	disbarred .....	Apr. 12, 1999

**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.**

So. Ga. Mediation pickup 4/99  
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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.

Born, J. William Atlanta	Admitted 1956 Died January 1997	Nelson, Ronald Emery Statesboro	Admitted 1978 Died February 1999
Cannon Jr., Hon. Olin Benjamin Louisville	Admitted 1948 Died January 1999	Nicholson, David C. Atlanta	Admitted 1971 Died March 1999
Cook Sr., Garland B. Dunwoody	Admitted 1950 Died February 1999	Noland, Robert J. Villa Rica	Admitted 1949 Died January 1998
Custer, Lawrence B. Marietta	Admitted 1960 Died March 1999	Owen, Robert G. Macon	Admitted 1949 Died September 1997
Duke, Hon. Daniel Fairburn	Admitted 1937 Died March 1999	Page, Owen H. Savannah	Admitted 1964 Died January 1999
Engelhart, Robert D. Rome	Admitted 1942 Died March 1999	Rivard Jr., Robert F. Marietta	Admitted 1983 Died September 1998
Fain, Donald M. Arlington, VA	Admitted 1953 Died April 1999	Seymour, Arthur B. Atlanta	Admitted 1974 Died April 1999
Goldthwaite Jr., J.R. Atlanta	Admitted 1946 Died March 1999	Spence, Herman J. New Port Richey, FL	Admitted 1933 Died January 1999
Haskins, Sidney Atlanta	Admitted 1942 Died September 1997	Staten, Tina Marie Lake Park	Admitted 1997 Died February 1999
Hawkins Jr., William Ewing Atlanta	Admitted 1971 Died April 1999	Stephens Jr., E. L. Dublin	Admitted 1933 Died October 1998
James, Mable D. Mableton	Admitted 1952 Died April 1999	Toumbakis, A. Christina Atlanta	Admitted 1997 Died February 1999
Jones, Sidney Shelton Ooltewah, TN	Admitted 1972 Died April 1999	Warren, Roosevelt Sparta	Admitted 1974 Died April 1999
Kitchen, Wallace Angus Columbus	Admitted 1945 Died February 1999	Wood, Hon. James Horace Commerce	Admitted 1946 Died November 1997
Maley, James E. Jasper	Admitted 1954 Died December 1998		

# Pro Bono Honor Roll

*The Pro Bono Project of the State Bar of Georgia salutes the following attorneys, who demonstrated their commitment to equal access to justice by volunteering their time to represent the indigent in civil pro bono programs during 1998.*

## GEORGIA LEGAL SERVICES PROGRAM

### Abbeville

David Morgan

### Albany

*(Sponsored by The Dougherty Circuit Bar Association)*

Jerry Brimberry  
William Cannon  
Henry Custer  
Samuel Engram  
William Erwin  
James Finkelstein  
Gregory Fullerton  
Kevin Hall  
John Hayes  
Tony Jones  
Walter Kelley  
Rodney Keys  
Terry Marlowe  
Michael Meyer Von Bremen

Daniel Murphy  
William Oakes  
Keith Pflipsen  
Randolph Phillips  
Britt Priddy

Ralph Scoccimaro

Kirby Woods

### Americus

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George R. Ellis, Jr.  
Joseph Allen Grimsley

### Ashburn

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Thomas Camp  
Brian Carney  
Stan Durden  
John Kupris  
Sherry L. Jackson  
M. Kim Michael  
Ben Parker  
George Peters, Jr.  
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Melinda Hart  
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Vicki L. Norrid  
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Benjamin Allen  
Jim Blanchard, Jr.  
Jeffrey S. Bowman  
George D. Bush  
J. Patrick Claiborne

Lisa L. Clarke  
William J. Cooney  
Paul H. Dunbar  
Douglas J. Flanagan  
David Hudson  
Harry James  
Clayton L. Jolly, III  
Scott Klosinski  
Leon Larke

Angela C. McElroy  
Jennifer McKinzie  
Leland M. Malchow  
William J. Marcum  
Timothy S. Mirshak  
Ken M. Nimmons  
Lauminnia F. Nivens  
Richard T. Pacheco  
Evita A. Paschall  
Laurel Payne  
Marilyn S. Protzeller  
Catherine V. Ryan  
Kirk P. Stiles  
James C. Walker  
Helen W. Yu  
**Bainbridge**  
Paul Fryer  
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Tamara Jacobs

### Blairsville

Mikele S. Carter

### Blue Ridge

David M. Rosenberg

### Bonaire

Debra Fox Stone

### Brunswick

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Robert M. Cunningham  
Denise S. Esserman  
Patrick J. Fetter  
Newell Hamilton, Jr.  
R. Joseph Hammill  
Kristi E. Harrison  
Eugene Highsmith  
Karen M. Krider  
Steven L. Morgan  
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Ellen McElyea  
Lauren Smith

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Ralph L. Van Pelt  
**Cartersville**  
E. Garland Lea  
Jane McElreath  
Anthony N. Perrotta

### Cedartown

Billie J. Crane  
**Chattanooga, TN**  
Charles G. Wright, Jr.

### Clarkesville

Douglas L. Henry

### Colquitt

Danny Griffin

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*(Sponsored by The Columbus Bar Association)*

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Roderick Arnic  
Jacob Beil  
Gary O. Bruce  
Jaimie DeLoach  
Larae A. Dixon  
Andrew C. Dodgen  
William A. Edwards  
Walter L. Fortson  
Kenna Garnic-Arnica  
Maxine Hardy  
Ronald S. Iddins  
Robert K. Imperial  
Gary L. Johnson  
Thomas C. Kearns  
Elizabeth McBride  
Bemon G. McBride, III  
Ashley Cooper McKenna  
Nancy B. Miller

John R. Mobley, II  
Elizabeth S. Morgan  
Theodore D. Morgan  
William Nash, II  
John H. Nix, III  
John P. Partin

Barbara D. Pruitt  
Pedro Quezada  
William C. Rumer  
Ronald W. Self  
Larry L. Taylor  
Hillman Toombs  
William L. Tucker  
Joseph W. Wiley  
Robert D. Wilson  
Richard B. Zimmerman, Jr.

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John A. Nix

### Cordele

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G. Russell Wright

### Covington

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Mario S. Ninfo

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Thomas P. Knox  
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### Dallas

G. Randall Williams  
Judith E. Shurling

### Dalton

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Raymond J. Bates  
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### Danielsville

Lane Fitzpatrick

### Darien

Virginia Bryson

### Dawson

Charles Hunt

### Douglas

Clyde W. Royals

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Jeb Chatham

Mike McKinney

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 Dolly Chisholm  
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 David H. Fritts  
 Joseph M. Gannam  
 James R. Gardner  
 Daniel Ray Gaskin  
 J. Hamrick Gann, Jr.  
 Wade R. Gastin  
 Elise O. Gray  
 Joyce M. Griggs  
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 Richard J. Harris  
 Stephen H. Harris  
 John W. Hendrix  
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 William F. Hinesley, III  
 Alvin M. Hitt, Jr.  
 Leamon R. Holliday, III  
 Kathleen Horne  
 George M. Hubbard, III  
 William T. Hudson  
 Edward M. Hughes  
 Sam P. Inglesby, Jr.  
 G. Terry Jackson  
 David H. Johnson  
 Lester B. Johnson, III  
 Carlton E. Joyce  
 Alton D. Kitchings  
 Christopher E. Klein  
 Brian E. Krapf  
 George L. Lewis  
 J. Curtis Lewis, III  
 J. Stephen Lewis  
 William S. Lewis  
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 Ralph R. Lorberbaum  
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C. James McCallar, Jr.  
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**Thomaston**  
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 Don Snow  
**Thomson**  
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 Betty Walker-Lanier  
**Trenton**  
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**Valdosta**  
 John Bennett  
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 Amanda Farahany  
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 Christopher R. Williams  
**College Park**  
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**Columbus**  
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 John H. Nix  
**Dallas**  
 G. Randall Williams  
**Dalton**  
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Mark L. Wells  
**Scottdale**  
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**Snellville**  
William Clinton Rhodes  
**Stone Mountain**  
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Mark Gaffney  
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Sabrina Scott  
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Jennifer Ide  
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Horatio Romero  
Rupal Romero  
William Rothschild  
Dwayne Rowan

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Larry Duttweiler  
Suzanne Laird  
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Phyllis Miller  
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## TRUANCY INTERVENTION PROJECT

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# Notice of Filing of Proposed Formal Advisory Opinions in Supreme Court

## Second Publication of Proposed Formal Advisory Opinion Request No. 94-R11

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has made a final determination that the following Proposed Formal Advisory Opinion should be issued. Pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, this proposed opinion will be filed with the Supreme Court of Georgia on or after July 1, 1999. Any objection or comment to this Proposed Formal Advisory Opinion must be filed with the Supreme Court within twenty (20) days of the filing of the Proposed Formal Advisory Opinion and should make reference to the request number of the proposed opinions.

## Proposed Formal Advisory Opinion No. 94-R11

### Question Presented

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

### Summary Answer

The answer to both questions is "no". An in-house counsel for a real estate lending institution assists that entity in the unauthorized practice of law in violation of Standard 24, if he or she provides legal services to its customers which are in any way related to the existing relationship between the institution and its customer. Such conduct would also constitute an impermissible conflict of interest under Standards 35 and 36. This prohibition does not, however, prevent in-house counsel from attending closings as attorney for the institution and preparing the documents necessary to effectuate the closing including those documents that must be signed by the customer and that may benefit both the institution and the customer. Nor does the prohibition prevent the institution from seeking reimbursement for the legal expenses incurred in the transaction by including them in the cost of doing business when determining its charge to its customer. The charge, however, may not be denominated as a legal or attorney fee but must be included in the charge being made by the institution. There is inherent risk of confusion on the part of the customer regarding the role of in-house counsel. Prudent lawyers will act on the assumption that courts will honor the customer's reasonable expectation of in-house counsel's duties created by the closing attorney's conduct at the closing.

### Opinion

Standard 24, proscribing assistance in the unauthorized practice of law, prohibits in-house counsel for a real estate lending institution from providing legal services to its customers. See also, Georgia Code of Professional Responsibility, Canon 3; Georgia Code of Professional Responsibility, Ethical Considerations 3-1 & 3-8; Georgia Code of Professional Responsibility, Directory Rule 3-101, and ABA Model Rules of Professional Conduct, Model Rule 5.4(d). Standards 35 and 36 prohibit such conduct if the ability to exercise independent professional judgment on behalf of one client will be or is likely to be adversely affected by the obligation to another client. See also, Georgia Code of Professional Responsibility, Canon 5; Georgia Code of Professional Responsibility, Ethical Consideration 5-14 - 5-20; Georgia Code of Professional Responsibility, Directory Rule 5-105, and ABA Model Rules of Professional Conduct, Model Rule 1.7. Specifically, in-house counsel may not provide legal services at a closing or elsewhere to a customer borrowing from the lending institution and arising out of the existing relationship between the customer and the institution. This is true whether or not the customer is charged for these services. The role of employee renders the actions of in-house counsel the action of the employer. The employer, not being a lawyer, is thus being assisted in and is engaging in the

unauthorized practice of law. The in-house counsel by virtue of the existing employer/employee relationship and its accompanying obligation of loyalty to the employer cannot exercise independent professional judgment on behalf of the customer.

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

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

The situation in which in-house counsel attends closings as attorney for the lending institution and prepares

the documents necessary to effectuate the closing is fraught with both legal and ethical risks beyond assistance in the unauthorized practice of law and conflict of interests. Even though the above analysis (1) requires that in-house counsel's lawyer-client relationship be restricted to the lending institution, and (2) prohibits the direct billing for legal services by the institution, the fact remains that the customer may benefit from the actions of in-house counsel. Thus the risk of confusion about the role of in-house counsel at the closing will be high. Prudent in-house counsel should anticipate that courts may treat the reasonable customer expectations regarding these legal services as creating duties even in the absence of a lawyer-client relationship. The

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

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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

An original and eighteen copies of any comment to the proposed opinion must be filed with the Office of General Counsel by July 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 non-lawyer in the unauthorized practice of law when the lawyer allows a non-lawyer 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 non-lawyer<sup>1</sup> in the unauthorized practice of law when the lawyer allows a non-lawyer 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 non-lawyer in the unauthorized practice of law whenever the lawyer effectively substitutes the legal knowledge and judgment of the non-lawyer for his or her own. Regardless of the task in question, a lawyer should never place a non-lawyer in situations in which he or she is called upon to exercise what would amount to independent professional judgment for the lawyer's client. Nothing in this limitation precludes paralegal representation of clients with legal problems whenever such is expressly authorized by law.<sup>2</sup>

In order to enforce this limitation in the public interest, it is necessary to find a violation of the provisions prohibiting aiding a non-lawyer 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 non-lawyer for his or her own in the representation of the lawyer's client.

As applied to the specific questions presented, a lawyer permitting a non-lawyer to give legal advice to the lawyer's client based on the legal knowledge and judgment of the non-lawyer rather than the lawyer, would be in clear violation of Standards of Conduct 24, 4, and 5. A lawyer permitting a non-lawyer 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 non-lawyer 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 non-lawyers to see if the guidance of those previous opinions remains valid for current practice.<sup>3</sup>

The primary disciplinary standard



involved in answering the question presented is: Standard 24, (“A lawyer shall not aid a non-lawyer 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 non-lawyer employees to correspond concerning “legal matters” on the law firm’s letterhead under the non-lawyer’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.<sup>4</sup> Any lawyer permitting a non-lawyer 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 non-lawyers. In the course of performing these activities, non-lawyers could correspond on the firm’s letterhead under their own signature. This was permitted as long as the non-lawyer clearly identified his or her status as a non-lawyer in a manner that would avoid misleading the recipient into thinking that the non-lawyer 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 non-lawyer, 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 non-lawyers 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 non-lawyer.”

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 non-lawyer because of a lack of involvement by the lawyer in the representation. Under this analysis, it is clear that while most activities conducted by non-lawyers 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 non-lawyer or inadequately supervise appropriately delegated tasks.

Implicitly suggesting that whether or not a particular task should be delegated to a non-lawyer 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 non-lawyers “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 non-lawyer 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 non-lawyer 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 non-lawyers and, thereby, risks both the loss of the efficiency non-lawyers 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 non-lawyer by the lawyer permitting a substitution of the non-lawyer’s legal knowledge and judgment for that of his or her own. If such substitution has occurred then the lawyer is aiding the non-lawyer 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 non-lawyer’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 non-lawyers. Our task, here, however, is broader than just giving guidance. We must also be concerned in issuing this opinion with the protection of the public interest in avoiding unauthorized practice, and we must be aware of the use of this opinions by various bar organizations, such as the Investigative Panel of the State Disciplinary Board, for determining when there has been a violation of a Standard of Conduct.

For the purposes of enforcement, as opposed to guidance, it is not adequate to say that substitution of the non-lawyer’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 non-lawyer, 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 non-lawyer 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 non-lawyer for his or her own.

*Thus, a lawyer is aiding a non-lawyer 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 non-lawyer for his or her own.* Regardless of the task in question, lawyers should never place non-lawyers in situations in which the non-lawyer is called upon to exercise what would amount to independent professional judgment for the lawyer’s client. Nor should a non-lawyer be placed in situations in which decisions must be made for the lawyer’s client or advice given to the lawyer’s client based on the non-lawyer’s legal knowledge, rather than that of the lawyer. Finally, non-lawyers should not be placed in situations in which the non-lawyer, rather than the lawyer, is called upon to argue the client’s position. Nothing in these limitations precludes paralegal representation of clients with legal problems whenever such is expressly authorized by law.<sup>5</sup>

In addition to assisting in the unauthorized practice of law by creating the reasonable appearance to others that the lawyer was substituting a non-lawyer’s legal knowledge and judgment for his or her own, a lawyer

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

Applying this analysis to the question presented, if by “prepare and sign” it is meant that the legal advice to be given to the client is advice based upon the legal knowledge and judgment of the non-lawyer, it is clear that the representation would effectively be representation by a non-lawyer rather than by the retained lawyer. A lawyer permitting a non-lawyer to do this would be in violation of Standards of Conduct 24, 4, and 5. A lawyer permitting a non-lawyer 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 non-lawyer 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 non-lawyers to those uses that would improve the quality, including the efficiency and cost-efficiency, of legal representation rather than using non-lawyers 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.

## Endnotes

1. The term “non-lawyer” includes paralegals.
2. See footnote 5 *infra*.
3. In addition to those opinions discussed in this opinion, there are two other Advisory Opinions concerning the prohibition on assisting the unauthorized practice of law. In Advisory Opinion No. 23, the State Disciplinary Board was asked if an out-of-state law firm could open and maintain an office in the State of Georgia under the direction of a full-time associate of that firm who was a member of the State Bar of Georgia. In determining that it could, the Board warned about the possibility that the local attorney would be assisting the nonlicensed lawyers in the unauthorized practice of law in Georgia. In Formal Advisory Opinion No. 86-5, an Opinion issued by the Supreme Court, the Board was asked if it would be improper for lawyers to permit non-lawyers to close real estate transactions. The Board determined that it would be if the responsibility for “closing” was delegated to the non-lawyer without participation by the attorney. We view the holding of Formal Advisory Opinion No. 86-5 as consistent with the Opinion issued here.
4. The language relied upon from *Huber v. State* was later codified in O.C.G.A. § 15-19-50.
5. For example, it is perfectly permissible for a non-lawyer, employed as a paralegal by a law firm or by a non-profit corporation, such as the Georgia Legal Services Program, doing business as a law firm, to represent his or her own clients whenever paralegal representation is permitted by law, as it would be if the representation were on a food stamp problem at an administrative hearing, or before the Social Security Administration, or in other circumstances where a statute or the authorized rules of the adjudicatory body specifically allow for and regulate representation or counsel by persons other than a lawyer. It must be made clear to the clients, of course, that what they will be receiving is paralegal representation and not representation by a lawyer. Nothing in this opinion is intended to conflict with regulation, by statute or rule of an adjudicatory body, of use of non-lawyers in such authorized roles.

## First Publication of Proposed Formal Advisory Opinion No. 98-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

An original and eighteen copies of any comment to the proposed opinion must be filed with the Office of General Counsel by July 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. 98-R6

#### Question Presented:

When the City Council controls the salary and benefits of the members of the Police Department, may a councilperson, who is an attorney, represent criminal defendants in

matters where the police exercise discretion in determining the charges?

#### Summary Answer:

Representation of a criminal defendant in municipal court by a member of the City Council where the City Council controls salary and benefits for the police does not violate any Standards and does not subject an attorney to discipline. In any circumstance where it may create an appearance of impropriety, however, it should be avoided.

#### Opinion:

We have previously addressed a related question, that is, the ethical propriety of an attorney/city council member representing private clients before city-appointed judges when the council is involved in appointing judges. Formal Advisory Opinion No. 89-2. That opinion recognized that no Standards were applicable, but upon consideration of Directory Rule 8-101(a)(2), concluded that as an ethical matter, the attorney should remove himself to avoid creating the appearance of impropriety.

Directory Rule 8-101-1(a)(2) provides: “A lawyer who hold public office shall not. . .use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or a client. . .” It is not directly applicable here, because the concern is not with influence upon a tribunal, but rather with influence upon a law enforcement officer. Where the law enforcement officer works with the prosecutor and has significant impact on the exercise of prosecutorial discretion, however, any improper influence may affect the tribunal by affecting the charges presented to the tribunal.

This opinion addresses itself to a situation where the City Council member votes on salary and benefits for the police. Particularly in small municipalities, this situation could give rise to a perception that a police officer's judgment might be affected. For example, a police officer might be reluctant to oppose a request that he recommend lesser charges or the dismissal of charges when the request comes from a council member representing the accused. As Formal Advisory Opinion No. 89-2 explains, situations like the one at hand give rise to inherent influence which is present even if the attorney who is also a City Council member attempts to avoid using that position

to influence the proceedings.

Directory Rule 9-101. "Avoiding Even the Appearance of Impropriety", is also implicated in this situation. Directory Rule 9-101 provides in section C that "A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official." As a general matter, a police officer is a public official. *See White v. Fireman's Fund Ins. Co.*, 233 Ga. 919 (1975); *Sauls v. State*, 220 Ga. App. 115 (1996). *But see* O.C.G.A. §45-5-6. Where a police officer exercises discretion as to the prosecution of criminal charges, the police officer is a public official within the meaning of Directory Rule

9-101. Pursuant to Directory Rule 9-101, therefore, an attorney should not represent a criminal defendant where an inference of improper influence can reasonably be drawn.

This opinion, as did Formal Advisory Opinion No. 89-2, "offers ethical advice based on the applicable ethical regulations." The representation discussed, if engaged in, would not *per se* violate any Standard and would not subject the attorney to discipline. We also note that the ethical concerns raised by this representation are personal to the attorney and would not be imputed to other members of the law firm. ☒

## Continued from Page 46

- cil, Inc., the Chemical Mfrs. Ass'n, the Chamber of Commerce of the United States, and Medmarc, 1998 WL 541970; Brief Amici Curiae of American Tort Reform Ass'n, American Consulting Eng'rs Council, and National Ass'n of Mfrs., 1998 WL 541950; and Brief Amici Curiae of National Academy of Eng'g, 1998 WL 541971.
42. *Kumho*, 119 S. Ct. at 1175.
43. *Id.* at 1176.
44. *Id.*
45. *Daubert*, 509 U.S. at 595.
46. A district court's decision to admit or exclude expert testimony is reviewable for abuse of discretion both as to the court's decisions about how to review the expert testimony as well as the ultimate

- conclusion on admissibility. *Kumho*, 119 S. Ct. at 1176.
47. *Id.*
48. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 565 n.21 (11th Cir. 1998) (urging hearing regarding admissibility of accounting and statistical testimony).
49. *See, e.g., Computer Assocs. v. Altai, Inc.*, 775 F. Supp. 544, 549, 559-60 (E.D.N.Y. 1991), *aff'd in part, vacated in part on other grounds*, 982 F.2d 693 (2d Cir. 1992); *Renaud v. Martin Marietta Corp.*, 749 F. Supp. 1545, 1552-53 (D. Col. 1990), *aff'd*, 972 F.2d 304 (10th Cir. 1992).
50. *Joe S. Cecil & Thomas E. Willging, Court Appointed Experts*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 535, 541 (1994).
51. *See* Margaret G. Farrell, *Special Mas-*

- ters*, in REFERENCE MANUAL, *supra* note 50, at 574.
52. *See, e.g., Rosen v. Cieba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996); *Benedi v. McNeil-P.P.C., Inc.*, 66 F.3d 1378, 1384 (4th Cir. 1995); *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995); *see also* Daniel J. Capra, *The Daubert Puzzle*, 32 GA. L. REV. 699, 732-738 (1998). In addition to being reliable, such methodology must also tend to prove or disprove the fact at issue. *See Kumho*, 119 S. Ct. at 1176-77.
53. *Daubert*, 509 U.S. at 596.

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## Annual Fiction Writing Competition

The Editorial Board of the *Georgia Bar Journal* is proud to present "Best Laid Plans," by A. Leigh Burgess of Covington as the winner of the *Journal's* Ninth Annual Fiction Writing Competition. Honorable Mention goes to Joey Loudermilk of Atlanta for "The Shyster & the Shylock."

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. As in years past, this year's entries reflected a wide range of topics and literary styles. In accordance with the competition's rules, the Editorial Board selected the winning story through a process of reading each story without knowledge of the author's identity and then ranking each entry. The story with the highest cumulative ranking was selected as the winner. The Editorial Board congratulates Ms. Burgess, Mr. Loudermilk and all of the other entrants for their participation and excellent writing.

**H**arold Becker's father was a lawyer. Harold's brother was a lawyer. Harold's wife was a lawyer. Even Harold's mother-in-law was a lawyer. As families went, it was a tough one in which to shine.

Not that this stopped anyone from trying. Harold's father had twice argued in front of the Supreme Court. His brother was the youngest district attorney ever elected in his home state, his mother-in-law was a superior court judge, and his wife was an associate in a large downtown firm specializing in patent law.

It wasn't that Harold was not successful in the traditional sense of the word. He was, but by the Becker and Hammond standard, he fell a bit short of greatness. Being born a Becker and married to a Hammond put him in a position where the rest of the world's excellence was their slightly above average.

Not that anyone openly disapproved or told Harold that he was not quite up to snuff. No one in



Harold's or his wife's family would ever say that to him. But he knew anyway. He knew when his wife casually mentioned that legislative elections were coming up in several months, didn't he want to consider it this year? Or when his father just happened to slip that information about an L.L.M. into his Christmas card last year. Or the way his mother-in-law introduced him. "This is my daughter, Katherine Hammond-Becker; she's a partner at Goldstein, Roberts, and Webb; they do patent work. Oh, and this is her husband, Harold. He's a lawyer too."

Harold met Katherine, his wife, on the first day of law school. She was young, excited, and three months out of college with a political science major. Katherine had a lot to live up to with her mother's hopes for her always present in her mind. But Katherine lived up to them. Top five percent at the end of the first year with a summer internship at the most prestigious firm in the city, law review, and a job as a teaching assistant for her contracts professor when she returned in the fall. Harold himself didn't do so bad either. He also made law review, but with only being in the top fifteen or so percent, Harold's job offers weren't as forthcoming as Katherine's, and he took a job with a small firm called Baker and Sloan in the suburbs.

Back at school that fall, Harold, who only entered on a whim, won his class's mock trial competition. Katherine had known Harold during first year, and they were on law review together, but before this prize was bestowed on him, she hadn't paid him much attention. To her he was just one of the masses. After he won the competition though, Katherine tried to spend more time around Harold. Suddenly, he was interesting. Litigation was something that interested Katherine very little, in fact, it scared her. She'd been knocked out of the competition in the first round. The fact that Harold was good, very good in fact, fascinated her. Katherine was used to being the best in anything she wanted to be, and in this one area she was unable. Harold had something she didn't and knew she never could, and while this infuriated her, it also intrigued her.

Harold fell swiftly for Katherine. She was smart, confident, and inside of her petite frame was a tough interior. In the middle of second year, Katherine made up her mind to fall for Harold. He was intelligent and funny, and as law students went, good looking. Most importantly, he had the potential to be a highly successful lawyer. Granted he was only top fifteen percent, but he was on law review, and no one could

deny that he had the makings of a top notch trial attorney. Katherine could envision the two of them at a cocktail party given by one of their respective firms, people admiring them from afar, two successful attorneys, a perfect partnership. Harold was also crazy about her, and she liked the idea of being with someone who thought she hung the moon and who would do anything for her.

Harold proposed to Katherine the summer before their third year. Harold had accepted a job with a much larger, more prestigious in-town litigation firm that summer. This pleased Katherine greatly. This firm, while not as well-known as the one with whom she was interning for a second summer, was well-respected, and known for its prowess in the litigation field. Harold's firm was in a building just two blocks from Katherine's, and when their schedules allowed, they would meet for lunch at a deli one block from each of their multi-floored buildings.

Harold and Katherine married during Christmas vacation of their third year. Both families insisted on a large wedding although Harold would have preferred a to have small, family wedding and save the money for a house. The Hammonds and the Beckers, though, dismissed that idea the minute Harold expressed it. They were determined that this wedding would be an "affair." And an affair it was, although Harold spent so much time shaking hands and meeting attorney friends of both families that he didn't even get a chance to taste the food that had been so painstakingly picked out by Katherine and her mother. Harold went along with it all without too much complaining because he loved Katherine, and he knew that in the end they'd be married, and to him, that was all that mattered.

They arrived home from a Caribbean honeymoon to cold weather and a flurry of law firm interviews. Katherine was confident she would receive an offer from the firm for whom she had interned, but she still went on as many interviews as possible. At least once a week, it seemed to Harold, Katherine was being wined and dined by different firms, all of whom seemed to want to hire her. Harold had his fair share of interviews as well. Not as many people were courting Harold as Katherine, but Katherine was certain he would be offered a job by the firm for whom he had worked the past summer, and she reminded him of it almost every day. She knew where he was going.

Harold, however, felt lost. He knew how Katherine felt, but he could not get excited about working fifteen hours a day, shuffling papers, stuck in

a building where it took ten minutes just to get to fresh air. He was proud of his mock trial championship, but that was where it stopped. He had no desire to use it to propel him into a position where he would be stuck in a pristine office dealing with clients at arm's length, working all of the daylight hours of the day, only to fall into bed as soon as he got home so he could repeat the same thing the next day. Just the summer internship with the more prestigious firm had given him a taste of something he wasn't sure he wanted to continue heaping on his plate.

In the end, Harold was rescued from having to make a decision. He was offered several associate positions with various firms, and although Katherine waited expectantly each day when Harold brought in the mail, the offer from Katherine's first choice never arrived. Secretly, Harold was glad. Months before he had gotten an offer from Baker and Sloan. It was a small firm. General practice. Lots of hands on dealing with the public. A little litigation, but not too much. A one-story building in the suburbs with windows that actually opened. Not a huge salary, but certainly enough to live on. Katherine refused to let him accept. "Tell them no," she said when one of the partners called to see if he'd made a decision yet. "Any day and you'll get the offer." That was how she referred to the anticipated call or letter from the approved firm. But that call never came. He had hoped it wouldn't although he didn't tell Katherine that. He liked the small firm in the cramped little building with letterhead that actually had room to fit all of the names of the partners and associates.

By the time the in-town firm sent him his rejection letter, a form letter at that, most of the firms acceptable to Katherine, had grown tired of waiting on his decision and had hired more eager graduates. The partners at Baker and Sloan, though, liked Harold. They recognized in him a bit of humanity, of humbleness, that were frankly harder to find these days, especially in top law school graduates. They had a feeling about Harold. All of the clients with whom he had dealt liked him immediately. And Harold liked dealing with people, they could tell. He liked sinking his hands into a client's case, delving into their personal, professional, and financial lives and making circumstances better for them. The clients appreciated that; it wasn't every day they felt an attorney was looking at them eye to eye and not from a pedestal far above. When Harold didn't come back to work with them his second summer, the firm was disappointed. They knew offering Harold a permanent position with them and having him accept was a long shot, but they

were willing to try.

Baker and Sloan were not the only ones surprised at Harold's acceptance of their offer. "What?" Katherine practically shouted at him when he told her of his decision. "What do you mean you're going to accept? Are you crazy? Hidgen and Porter are offering you almost twice what this little firm is, and as least I've *heard* of them."

"Yes," Harold agreed, "but they do only corporate work."

"So?" Katherine replied as if Harold couldn't possibly come up with an answer that would be satisfactory to her. As if Harold's own preference had no business being calculated into this decision.

"So," said Harold, "I don't want to do corporate litigation. I want to do general practice. Wills, divorces, adoptions. I want to go to deal with real people, not be some overpaid paper shuffler."

"Like me, you mean?" Katherine turned her back from him. Harold couldn't think of anything to say to that. He rinsed his plate of pasta and dropped it in the sink with a clatter.

"Listen to me, Katherine, this is what I want to do. It would make things much more pleasant if you'd be happy about it. Or at least make an effort to pretend you are." Harold grabbed his glass of wine from the table, spilling some as he did and went out onto the porch to get some fresh air. Katherine said nothing else about it. On the night they had dinner with the Baker and Sloan partners, after Harold had formally accepted, she went along, with, even though it may have been forced, a smile. Katherine never said anything else to Harold about his decision, never complained, never told him he could do better, never said anything to make him feel less because of his choice. But she didn't have to. Her looks, her sighs, her tone of voice told him, every day.

He tried not to let it bother him; he liked his new job, loved it in fact. Every day was different, every day presented him a new problem to solve for a real person who sat before him in his office. It felt good when clients appreciated him for taking time to listen. He sat and listened to Hoyt Willis, who owned a local service station he was desperately trying to save from foreclosure. Hoyt told Harold how he'd begun his business in 1934 and about Clarence, his right hand man, and all the others who had worked for him over the years. They were like family to him. Even though Harold had other things he needed to be doing, he listened to the ninety-one year old man because somebody should, and he couldn't think of any reason why it shouldn't be him.



He executed a will for Doctor Pittard the second year he was with the firm, and a year later escorted the doctor's widow to his funeral. He walked the land of many people for whom he did real estate closings. When Maryann Jensen found out her husband was having an affair, he prepared her divorce papers after she had sat in his office and cried for almost an hour. Of course, he had clients he dealt with only on paper, but that was fine with Harold. All in all, it was a balanced, challenging, fulfilling job that he was thankful he had. He was made a partner four years after he started working at Baker and Sloan and knew he was where he should be.

Katherine had apparently found her niche also, although she worked so much that Harold didn't hear it from her. By the fifth year she was with the firm, she was making well over six figures and was on the path to partnership. Harold would have preferred a little less money and Katherine home a little more, but her response was inevitably, "Just a few more years. Just a few more years, then I'll make partner, and we can think about starting a family." Harold knew that wasn't likely. Katherine was already thirty-two and religious about birth control almost to the point of obsession. Harold couldn't foresee her turning maternal in time enough to outrun the ticking of her biological clock.

Early each morning when Katherine had already been at work for at least an hour, Harold met a group of local businessmen at the corner drug store for coffee. It was there, during a particularly heated discussion concerning politics, that he first encountered Carter Cotton, local author, celebrity, and town eccentric. Cotton had written several novels classified as "southern fiction" that dealt with crime, lust, and deception in misty, moss-covered fictional southern towns. His novels were immensely popular especially among northern readers who had never visited the south, but who imagined it as a wild, sultry, untamed sort of place.

Carter Cotton was a sporadic attendee of the morning coffee chats. Whether he was caught up in the middle of prosaic inspiration or whether he just liked to give the impression of an eccentric, unpredictable author, Harold never knew. When he did attend, Cotton would enter quietly and take a seat by the window ordering hot tea rather than coffee. He always arrived impeccably dressed in an expensive suit, cufflinks shining, and a cream colored hat atop his head. Occasionally he would engage in conversation with the others, but just as often he would sit quietly sipping his tea sometimes listening to the banter,

sometimes staring ahead blankly, apparently caught up in his own thoughts. When he spoke, it was with eloquence and intelligence no matter the subject — politics, medicine, law, or even meteorological patterns. The extensive research he had done for his novels had filled him with knowledge that, while not always practical, certainly enriched conversation.

Cotton was married with two adult children, though no one with whom Harold spoke ever recalled seeing them. Cotton was reputed to be an immensely private person who lived in a log cabin, complete with modern conveniences, right outside of town by the river. It was rumored that Cotton had a sort of adult-sized treehouse, covered on all sides with glass, the northern side looking down into the lazy river below. It was not until Cotton was accused of murder that Harold knew this to be fact.

He was summoned, that was the best way Harold could describe it, to Cotton's home one day in late spring. The sun was shining, glinting off the wet leaves and ground after a pre-dawn thunderstorm, but the inviting appearance of the day didn't assuage Harold's feeling that something was looming. Harold had heard that Cotton's wife had been found in the passenger seat of her car, not far from her home, shot once through the chest the prior weekend. That had been the principle subject of the morning coffee group for the past week as well as the talk of every other person who knew or knew of Carter Cotton. There were a variety of theories floating around as to who had done it, ranging from suicide, to a bitter lover, to Carter himself. No one had glimpsed the author since his wife had been shot, and it took Harold by complete surprise when he picked up his phone one evening while waiting for Katherine to get home and heard Cotton's quiet, cultured voice on the other end.

"Mr. Becker," Cotton began without introducing himself, "I don't know quite how to say this — I never assumed that I would have to, but I need a lawyer."

"Sir?" Harold asked. He hadn't seen this coming at all.

"I need a lawyer, Mr. Becker. A defense attorney, that is, and I'd like to hire you. It seems I am to be investigated in connection with my wife's death." There was no emotion in Cotton's voice, no grief, no fear, only a matter of factness, an assuming of a role he knew he must.

Harold leaned back against the kitchen counter, one hand gripping the phone tightly to his ear, the other against the counter for balance.

"Me, sir?" Harold asked. "I'm sorry if I sound

dense, but I really don't understand."

Cotton sighed as if the telling of the thing were exhausting him. "Mr. Becker, I've found myself in a very precarious position. I may be charged with my wife's murder. I don't think I need to tell you the repercussions this could have on my career and book sales, not to mention my life. I realize I could afford any number of attorneys anywhere in the country, but I don't know them. I know you. Not very intimately, of course, but I know enough."

Harold's mind was whirling. He could probably count on one hand the number of true conversations he'd had over the years with Cotton, if they could even be classified as conversations. And a potential murder trial. Harold had done some criminal work, but save one aggravated assault on a police officer, they had been mostly misdemeanors, a few DUIs, an occasional battery or theft, cases requiring minimal prowess in the courtroom. He had won acquittals for over half of his clients, but Harold knew there were plenty of more experienced local attorneys with a better record than his. He'd never even observed a murder trial, much less defended one.

"Mr. Cotton," Harold said, "I don't want to disappoint you, but I don't think I have the experience you need. I've never tried a murder case. I wouldn't even know where to begin."

Cotton cleared his throat and spoke slowly, "It's not experience I'm looking for, Mr. Becker. It's a willingness to go to the edge for a client. You have that in abundance, from what I've seen and heard." It didn't occur to Harold to ask how Cotton had gotten that impression.

Cotton continued. "You know this area, the people, the attitudes. I don't want a high profile attorney drawing more attention to this thing than it will naturally receive. I would like to hire you."

"Mr. Cotton, I'm not sure . . ." Harold began to tell him that he wasn't confident taking on the case himself, but Cotton interrupted.

"Well *I'm* sure, Mr. Becker. And I've tried a murder case. At least on paper I have, a couple of novels ago. I didn't kill my wife, Mr. Becker. That's all there is to it."

Harold wished it were as simple as that.

"Mr. Becker," Cotton said, "I insist." And Harold found that as much as he felt he should refuse, he couldn't.

The next few months seemed a blur to Harold. Carter Cotton was indeed charged with his wife's murder. They were reportedly having "marital difficulties," as the tabloids put it, and there was a large

insurance policy at stake. While Cotton insisted he didn't kill her, there were at least two incidents when the police were called by the Cotton's live-in housekeeper to respond to "domestic disturbances." Harold knew the next few months would be anything but smooth.

Katherine was at first thrilled that her husband had landed such a sensational client. Defending Carter Cotton meant a lot of money, she kept reminded him, not to mention if Harold got him acquitted, what a boon that would have to his business. Soon, according to Katherine, he could start his own practice, or move in with a downtown firm; whatever he wanted..

Harold had barely a moment of spare time to listen to Katherine's plans for him, much less keep a check on them. Besides, Harold knew it was futile to remind his wife for at least the thousandth time in their marriage that although having such a life may be the end all for her, he preferred his life, at least his professional life, the way it was. So he let Katherine go on dreaming while he worked at a furious pace trying to familiarize himself with the intricacies of trying a murder case.

His days at the office lengthened. Not long after taking Cotton's case, he began arriving at work before seven and staying until at least eight or nine each night. His morning coffee chats were a thing of the past — if Harold had a spare moment, he felt guilty if it weren't dedicated to Cotton's defense or to his other clients, the ones he hadn't passed off to the partners at Baker and Sloan. The firm didn't mind, or they didn't let Harold know if they did. In their minds, this was a once in a career opportunity, and they were happy for Harold and the attention he was bringing to the firm. They worried, though, that after this, Harold might not be satisfied with the less sensational work he typically did at Baker and Sloan, and would want to move on to greener pastures. As much as Harold had tried to hide it over the years, they knew Katherine's personality and ambition and her preferences for Harold. So they gave Harold their blessing and took on the work Harold wasn't able to, hoping in the end the result would be good for all.

Somewhat to Harold's surprise, Cotton helped out immensely in the preparation of his own defense. He had logged countless hours in courtrooms watching criminal procedures and reading hornbooks on criminal law and evidence to gather enough knowledge to write a convincing legal tale a few years earlier. Often, Cotton would meet him at the office before dawn going over strategies, witness lists, and his own testimony. Harold probed into Cotton's

background with his wife, trying to identify any weaknesses the State was sure to discover. Cotton persisted in his denial, and through their conversations, Harold discovered that Cotton barely knew his wife at all. They had drifted apart long ago and had been sleeping in separate bedrooms as well as living separate lives for longer than Cotton cared to remember. He insisted that although his wife had been a stranger to him for more than a decade, he still loved her and could never hurt her. Most of the time, Harold believed him.

The closer Harold got to Cotton, the further he drifted from Katherine. Initially, she had been excited that he was defending the famous author, even leaving work a little early one evening to cook dinner for her husband and his client. As time passed, and the case consumed more of Harold's life, however, she lauded his defense of Cotton less and less. Because the trial date was bearing down on him, and he was still handling several of his other clients, the hours he spent at work lengthened. He couldn't remember the last time he'd gotten home before Katherine, when in the past he'd always had two or three hours to kill before he heard her keys jingling in the door. Now, he'd frequently arrive home to find her curled up on the couch breathing deeply in sleep, the TV murmuring in the background. He would lean over, remove the remote from her sleepy grip and push her hair from her face. Asleep like that, she looked so innocent and vulnerable. Often she'd stir, creases on her face, confused about the time or exactly where she was. He would offer her an arm and pull her from the comfortable folds of the sofa, guiding her to the bedroom where she'd carelessly remove her clothes and drop them onto the floor before falling into bed, mumbling vague questions to him about his day.

The times that Harold and Katherine were together and awake were often strained and uncomfortable. Katherine was frequently quiet, staring blankly out of the car window as they drove to eat dinner on a Saturday night, her mind nowhere close to the car or Harold. She insisted things were fine — she'd just gotten a raise and her work couldn't be better, but it sounded more like Katherine was trying to convince herself than to convince him. More than once, Harold caught Katherine staring at him as if she couldn't quite place him, as if he were someone she had met once but couldn't quite recall when or where. Sometimes she would ask about the defense, and when he would tell her the details, an edge of excitement in his voice, she would listen and nod, looking oddly sad.

The shorter the time before the trial got, the more Katherine seemed withdrawn and melancholy. It was unlike Katherine to be this sensitive. Lately, she'd cry at the slightest thing, a criticism from Harold, a moving story on the news. One night he came in quite a bit later than usual, and Katherine met him at the door, her eyes glazed with tears that spilt out as she explained that the weather had been bad, it was so late, and she'd been worried that he'd been in a wreck.

When Harold would question Katherine about what was bothering her, she would say it was nothing, not to worry, just concentrate on the trial. So Harold tried not to let it get to him as much as he could, hoping that after the trial, things could get back to normal, as normal as their lives could be considered.

The week before the trial Harold worked practically nonstop. At most, he got three or four hours of sleep, crawling into bed long after Katherine had been asleep and rising before she began to stir. His only communication with her was an occasional note left on the kitchen counter reminding him to pick up something at the store or to let him know she'd be working late that evening in case he called and she didn't answer.

The trial itself lasted a week with jury selection on a Monday and the jury receiving their instructions from the judge mid-morning Friday. The trial itself seemed unreal to Harold. When it was over and he looked back at the whole process, it was like being in a car accident — he remembered it, but the memory was vague and dreamlike as if it had happened to someone else and he was on the periphery watching. When he later read over the transcript from the trial, he was amazed at some of the questions he had asked and the arguments he'd made. At times, Harold felt insecure before the jury, but the transcript showed him that his arguments were sound, his questions right on the mark, and Harold realized that while he had a lot to learn, he had done a damn good job. Sometimes, he couldn't figure out from where some of his questions and arguments had come. Much of it hadn't been planned or practiced, but Harold had studied hard and absorbed so much that in the end it all came together and flowed from him as if it had a life of its own. Perhaps it was because he believed Cotton, perhaps it was because he wanted to prove something to himself, or maybe, probably, it was because he wanted to prove something to Katherine, prove that he could take on something bigger than himself, bigger than her even, and succeed.

In the end, after four and a half hours of deliberation

and one smoking break, the jury acquitted Carter Cotton. As Cotton stood beside him and the verdict was published, Harold felt a wave of emotions pulse through him — pride, relief, thankfulness, and a bit of disbelief that he had actually done it. At this point, looking back to the beginning of the whole process, Harold felt slightly nauseated as if he were looking over the edge of a cliff he had just climbed realizing only now the sheer height of it and the slippery spots that lurked in crevices he had miraculously avoided. He felt lucky.

The relief on Cotton's face was palpable as were his feelings of gratitude toward Harold. Harold was equally grateful, for without Cotton's familiarity with murder trials, Harold would have had to spend a great deal more time than he did bent over books researching. Cotton shook Harold's hand firmly clasping the handshake with his other hand. "Mr. Becker, I am indebted to you," Cotton said, looking Harold squarely in the eyes.

Harold gripped Cotton's hand. "Mr. Cotton, I haven't said it before, maybe I'm too superstitious, but I appreciate the opportunity to represent you." Harold smiled, something it seemed, he hadn't done in quite a while. It felt almost unnatural, but it felt good.

"No, it is *I* who have learned," Cotton said. "I now have an idea for the main character in my new novel." Cotton had a wry, conspiratorial smile on his face. "I'll be talking to you soon, Mr. Becker." Cotton picked up his hat, tipping it to Harold before placing it on his head and striding from the courtroom.

When Harold left the courthouse, reporters were waiting on the steps — cameras, tape recorders, and bright lights in hand. Harold had expected this, but the first glimpse of the menagerie of press waiting to talk to *him*, Harold Becker, gave him a slight thrill. He patiently answered all of their questions until they were apparently satisfied that they had captured the whole story. Then he picked up his briefcase and walked toward his car, the sun having just dipped below the horizon, street lights blinking on with the waning of the day.

When he opened the front door to their home, Harold could hear the television in the den. Katherine was standing in front of the TV, still in her work clothes, a shot of Harold leaving the courthouse not thirty minutes earlier, on the screen in front of her. When she heard Harold lay his keys on the foyer table, she turned to him with a crooked smile on her face. "You've already had nine phone calls," she said holding out a list with names and numbers. As she

did, the phone rang and Katherine laughed. "Congratulations," she said before he picked up the receiver, "in case I don't get a chance to tell you." On the coffee table, Harold saw a bottle of champagne and two flutes.

It was late, almost midnight, when the phone finally quit ringing. Katherine and Harold sat propped on opposite ends of the couch, the champagne unopened in front of them. After all the incoming calls and the calls Harold had returned, he had an offer from a well-known litigation firm downtown for a salary almost twice what he was presently making. How they had heard of the verdict and decided to offer him a job in the five or six hours that had lapsed since he left the courtroom, Harold had no idea. He only knew that his life was about to change immensely depending on the choice he made. He felt excited and flattered, yet unprepared.

"Well?" he said to Katherine after he'd relayed the details of all the messages. "It's what we've always wanted, isn't it?" Katherine sat watching him and pulled her feet underneath her as if to make herself occupy as small a space as possible. "Harold," she said softly, "I'm afraid, it's what *I*'ve always wanted." This was the first time Katherine had admitted that this dream for Harold was singly hers.

"But maybe this is what I should do," Harold argued. "Maybe winning this case was a sign that I can do more than I'm doing, that I'm not utilizing my ability to the fullest."

Harold was finally verbalizing the thoughts that had been lurking in his mind lately. "I don't know Katherine. You've always thought I could do better. I know you have," he added when she started to protest. "Maybe you're right. Maybe this is some sort of awakening for me."

Harold rambled on trying to tell Katherine what he thought she wanted to hear and convincing himself that this was what he wanted or even if it wasn't exactly, it was what he owed himself. When he quit talking, he glanced over at Katherine and was surprised to see she was crying, tears rolling down her cheeks, before she could wipe them away.

"Kate," Harold said, calling her the name used to call her when they were dating. "Kate, tell me what's wrong." For the first time that evening, Harold realized that Katherine had already been home when he arrived, a little after five. Not once since she had began working, except for the time she'd had to have her wisdom teeth removed and was beside herself with pain, had she been home that early.

Katherine's silent weeping turned to sobs. "I'm

sorry, I'm sorry," she repeated. Harold had no idea what was wrong, but he took her into his arms and held her tightly until she relaxed and finally laid her head on his chest. "I'm sorry," she whispered into his lapel.

"For what?" Harold asked. He was bewildered. He couldn't imagine what had happened to cause her to be waiting for him at five o'clock, to upset her this much.

She sat up, wiping away the mascara that had collected beneath her eyes and looked at him. "I'm sorry that I've made you think that who you are isn't enough."

Harold went to pull her closer, but she sat up and pushed him back. "Let me finish." She cleared her throat. "I've been horrible, Harold. I have. And I am so, so sorry. These past weeks, with you involved in this trial, made me realize just how awful it must have been for you. I've come home every night for a month to an empty, cold house, and it got to where I didn't even want to come home anymore. I know it's been the same for you too, but not just for a month, for years."

Harold reached out and tucked her fallen hair behind her ears. He didn't know what to say. Coming home to an empty house, knowing Katherine would rather be at work than at home *was* awful. He couldn't deny it. But Harold loved her and was willing to live a sort of shadow life rather than live without her.

"Katherine," Harold said gently, "I love you. I agree, being alone so much isn't much fun, but I knew how driven and dedicated you were when I married you. It didn't come as a shock. And it's part of the reason why I love you and why you're the person I married."

Harold could see Katherine's lower lip tremble as if she were holding something back that was struggling to come out. He reached for her hand and tears began cascading down her face. "But Harold," she sputtered, "what if I've changed, what if I don't want to be that exact person you married anymore." Harold felt his chest tighten. "What are you saying?"

"I'm saying," she said, sobbing now so that Harold had to strain to hear what she was saying. "I'm saying, that I've missed you so bad it hurts like hell. I'm saying I want you home with me at the end of the day, not with a client, or in court, or at work. I'm saying *I* want to be at home with you, not three hours later when we barely have time to speak to each other before we turn out the light."

Harold felt his own eyes begin to tear up. "And

I'm saying," Katherine continued, "I'm saying that in seven months were going to have a baby."

Harold's gaze snapped back at Katherine, his face probing hers, questioning. His mouth began to form questions, but nothing would come out. Katherine began laughing through her tears, and then fresh tears started flowing again. "I'm pregnant, Harold. Damn it. I'm pregnant. I just found out I'm about to make partner, and I'm pregnant." Harold didn't know whether to congratulate or console her. She had completely stunned and confused him, and he had absolutely no idea what was going to come next. "And you know what?" Katherine asked. Harold couldn't possibly begin to guess. "What?" he asked.

"I'm happy." As she said it, she threw her arms around his neck hugging him fiercely. "I'm happy," she said again still crying but smiling as well.

Harold hugged her back, stroking her hair, and letting a few tears fall himself. He had no idea what would come next, what this would mean for their careers, for Katherine's goals, but right now he didn't care. He just cared that his wife was there, right there with him, and it seemed like she was there to stay. Harold uncorked the champagne that he now realized hadn't been purchased just to congratulate him on his win. He poured himself a glass and poured Katherine a smaller one. They toasted each other, and curled up on the sofa together, they talked late into the night. They said all the things they hadn't said over the years and things that had never occurred to them to say. As night began to turn toward day, long after all the other lights in the neighborhood blinked out, theirs still burned. ☒

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