

The background of the cover is a detailed architectural blueprint. It features various room layouts, dimensions, and handwritten notes in blue ink. A yellow L-shaped set square is positioned in the upper right corner, and a pair of drafting compasses is visible in the lower left corner. The title 'Georgia Bar Journal' is prominently displayed in a large, dark serif font, with the 'J' being particularly large and stylized. A small logo of a scale of justice is placed to the left of the word 'Georgia'.

Georgia Bar Journal

October 2011 ■ Volume 17 ■ Number 2

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Publisher's Statement

The *Georgia Bar Journal* (ISSN-1085-1437) is published six times per year (February, April, June, August, October, December) with a special issue in November by the State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, Georgia 30303. Copyright State Bar of Georgia 2011. One copy of each issue is furnished to members as part of their State Bar dues. Subscriptions: \$36 to non-members. Single copies: \$6. Periodicals postage paid in Atlanta, Georgia and additional mailing offices. Opinions and conclusions expressed in articles herein are those of the authors and not necessarily those of the Editorial Board, Communications Committee, Officers or Board of Governors of the State Bar of Georgia. Advertising rate card will be furnished upon request. Publishing of an advertisement does not imply endorsement of any product or service offered. POSTMASTER: Send address changes to same address.

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Georgia Bar Journal

October 2011 ■ Volume 17 ■ Number 2

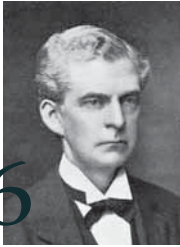


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by Kenneth L. Shigley

Virtuous Lawyer Is Not an Oxymoron

James¹ had great unrealized potential. Son of a minister in another Southern state, he won admission to an Ivy League university but washed out during his first year and went home to

complete college and law school.

A marvelous storyteller, his closing arguments could hold juries spellbound. But his cleverness was so unrestrained by mere facts that judges and other lawyers learned to distrust anything he said.

With appetites as unrestrained as his legal arguments, he loved food almost as much as liquor. Over time he became a tragicomic figure, bulging out of polyester leisure suits with his hair permed into a frizzy halo around his bald pate. A persistent, scandalous rumor about his “fee couch” was confirmed by a college girl whose brother he defended in a murder case. Observing his habits, I thought that if faced with a list of the traditional seven deadly sins—pride, wrath, greed, sloth, lust, envy and

gluttony—he might burst into an impression of Julie Andrews in *The Sound of Music*, singing “these are a few of my favorite things!” Despite his jolly veneer, James swirled into a vortex of alcohol and depression, lost his law practice and his family, and died alone far from home.

“Prudence, fortitude, temperance, justice, faith, hope and love. Cynics may claim they are but hollow words signifying nothing to us, that the idea of a virtuous lawyer is an oxymoron.”

When I think of James and his fate, I am reminded of a conversation I overheard at the Haralson County courthouse on an autumn morning in 1978. Two grizzled men, tobacco juice staining their gray stubble and faded bib overalls, sat on a bench outside the back door of the courtroom. As they awaited probation revocation hearings, they looked like they could have been failed moonshiners of a slightly earlier era. I overheard a fragment of conversation between these two “old men,” who at the time were probably younger than I am now.

“What you in for?” asked the first.

“My wife’s been running down my character,” moaned the second.

Mournfully, the first man

replied, “I ain’t got no character to run down.”

In my arrogant hubris, I chuckled about these two pathetic old losers. Eventually, as the scar tissue of life accumulated, I came to recall their exchange in a different light, as a plaintive cry from the bottom of a deep well of existential despair by human beings who, at the end of a long road of bad habits and poor choices, had given up on life.

With our fine educations, suits, briefcases and high-tech toys, we may see ourselves as far removed from those two codgers awaiting their probation revocations. But remembering the fate of the brilliant James, we can appreciate the importance of at least aspiring to develop virtuous habits and a character worthy of being run down by people who delight in repeating those tired lawyer jokes.

Not that I am any paragon, mind you. I'm as much a work in progress, and miss the mark as much as anyone. If my vices are less blatant than those demonstrated by James, they are no less real. The leaning towers of paper on my office floor and the change in my waistline since my last marathon four years ago demonstrate that my habits do not match my aspirations.

The Rules of Professional Conduct are necessary for drawing clear lines and setting enforceable standards.² Several excellent aspirational statements on professionalism and civility³ help to gently mold our conduct to a higher standard. But none of these are sufficient to build good character. Through the cumulative effect of what one learns from parents, grandparents, teachers, clergy, scoutmasters, mentors and professional colleagues over a lifetime, accompanied by philosophy, theology, culture and common sense, we may be habituated to virtue.⁴ Even if one lacked such early mentors, as long as we are on the green side of the grass it is not too late to begin a transformation.

Georgia's state motto, "Wisdom, Justice and Moderation," points toward timeless "hinge virtues" upon which scores of others depend—prudence (practical wisdom), fortitude (courage), temperance (moderation), justice, faith, hope and love.

Prudence, or practical wisdom, is the quintessential lawyerly virtue, essential to competent lawyering. It involves the pragmatic ability to see reality without delusions, to face good and bad in

human nature, choose means and courses of action, soberly balance risks and possibilities and manage life, practice and finances.⁵ The prudent lawyer can recognize that the perfect is often the enemy of the good, and that the hardest choices are not between good and bad but between good and good and between bad and bad.

One is reminded of the airline instruction to place your oxygen mask over your face before placing one on your child's face, so you can be able to help. Similarly, practical wisdom is necessary if a lawyer is to serve clients effectively over the long haul. This prudence is "a virtue of decision making that brings together thoughtfulness, experience and analytical reasoning with empathy and humanity," necessary to maintain a balance between sympathy and commitment to the client or matter at hand and loyalty to larger social and ethical imperatives.⁶ By increasing the likelihood that choices are made with thoughtfulness, analysis and empathy, prudence reduces the likelihood of regret.⁷

Prudence includes the analysis of all the ways that things could go horribly wrong for the client's case or transaction, and how to deal with those negative potentialities. It may dictate careful case selection, telling people they don't have a case that should be pursued or that a defense is without merit. It includes a duty to refer or associate when a case is outside the scope of one's expertise. Also included are good office management practices and employing the equipment, staff, training and effective management needed for efficiency in a practice area, which are things law schools don't teach and many of us don't do as well as we should.

The flip side is that while prudence may make us better lawyers, if we cannot tone it down when we leave the office, it may ironically bear seeds of our destruction. An acute recognition of all the bad things that may flow from a decision may contribute to a general

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pessimism or “paralysis by analysis.” This may be a “chicken and egg” issue, insofar as there is a correlation between a pessimistic personality type and the prudence required to excel in law. If pessimism and anxiety leads to chronic depression, the potential adverse effects on health and relationships are predictable.⁸

Fortitude includes courage and the firmness of mind and will required to stand resolute for a cause or client and work against all odds to see that justice is done, even at great personal, financial and occasionally even physical risk. Though years may pass in mundane routine, risking nothing more than a paper cut or normal fluctuations of income, any of us may at some point find it necessary to muster the courage to risk anger, contempt, retaliation and severe hardship for the sake of the law’s own good. There is no substitute for such fortitude.⁹

The future doesn’t belong to the fainthearted but to the brave.¹⁰ We ought to love something larger than ourselves—truth, justice and the common good of the community and the nation. Fortitude moderates our fear so that we may endure in doing good, even in the face of apparently insurmountable obstacles. We cannot be whole without bravely stretching toward some cause larger than ourselves. By combining prudence and fortitude in the service of worthy purposes, we can avoid the trap of smallness of the soul.

We necessarily deal with conflict, but when our clients come to us seeking vengeance, we have an obligation to counsel peace. We may face adversaries who we dare not tempt with weakness and with whom it is necessary to deal from a position of strength. But the fortitude required of us is not the same as foolhardiness or intransigence. We must remember, in the words of President Kennedy, “that civility is not a sign of weakness, and sincerity is always subject to proof. Let us never negotiate out of fear,

but let us never fear to negotiate.”¹¹ While there are times when a lawyer must courageously lay it all on the line, we should allow for the possibility that we may be wrong in our judgment. We must be wise in picking our battles.

Less dramatic, but no less important, we need fortitude in the daily grind of tedious, hard and unpleasant tasks, to do what needs to be done year after year without falling into destructive patterns of avoidance, procrastination, distraction and intemperance that ruins careers and lives.

Temperance, or moderation, does not refer to my great-grandmother’s support for the Prohibitionist Party candidates in every election from ratification of the 19th Amendment until her death. Rather, it is a reasonable, common sense, healthy moderation of habits and maintenance of a healthy balance in professional, personal and family life.

In the movie *A Time to Kill*, the young lawyer reminds his burned-out mentor—who is swaying across the lawn with a bottle of liquor in his hand—of his old aspiration to “save the world, one case at a time.” The subtext was that the old warrior had lost his will to fight for justice, at least in part because he fell victim to intemperate habits. Personal moderation and temperance for us as lawyers requires reasonableness, detached impartiality, common sense and resisting temptations that would lead to dead ends—including but not limited to the temptations of substance abuse and infidelity.

Justice is a concept debated by philosophers for millennia, but a precise definition is still somewhat elusive and subjective. At root, justice embodies not just legal positivism but a sense of fairness and morality, both within the individual and in relation to others—balance, harmony and what one writer referred to as “social music.”¹² Of course, in our daily work with conflict, that music is often discordant. For the individual practicing lawyer, our role requires a com-

mitment both to advocate for justice for clients and to sustain the operation and the fairness in the legal system.

Remember the prophet Amos who wrote, “Let justice roll on like a river, righteousness like a never-failing stream.”¹³ Though we cannot ignore economic reality, we should not be so totally focused on money that we fail to serve the cause of objective fairness. Few of us have opportunities to imitate the fictional Atticus Finch or to become a “drum major for justice” like the real life Martin Luther King Jr. But in smaller and less dramatic ways we have opportunities to promote our visions of justice. In doing so, we might keep in mind that service to others, whether organized pro bono legal work, ad hoc “low bono” labor or work with the many forms of community service, can be “billable hours for your soul.”

Faith requires a comprehensive worldview sufficient to make sense of the harsh realities we often face in the practice of law. Running ahead of pure reason, faith sees higher and farther than our own experience can. It is not mere belief rooted in intellect, or mere trust rooted in emotion. Rather, it is rooted in the heart and, dare I say it in a secular *Bar Journal* article, in the soul of the person in relationship with a higher power.¹⁴ Faith motivates us to persevere and to serve even when reason tells us all is lost.

Hope is directed to the future and is more than mere wishful thinking. It includes a view that out of the messy conflicts with which we must labor in the law, something good and worthwhile may yet somehow emerge. Without hope of something better beyond our low ceiling and limited horizon, courage turns to despair. With hope, our deepest values and ideals are not meaningless subjective blips but foretastes of an objective reality, even if we are not here long enough to see it.¹⁵

Love in this context involves a commitment to treat others as you would have them treat you,


and an unselfish concern on some level for the welfare of clients, witnesses, staff, colleagues, judges, court staff and even adversaries. It should become radically unselfish and gracious, beyond mere feeling, attraction, affection or compassion. Without love, justice turns to cruelty.¹⁶ But to manifest love for the unlovable, we need to develop both a kind of dangerous unselfishness and a capacity to exercise “tough love.”

Prudence, fortitude, temperance, justice, faith, hope and love. Cynics may claim they are but hollow words signifying nothing to us, that the idea of a virtuous lawyer is an oxymoron. Those who have done battle in courtrooms long enough to recall when bailiffs addressed all lawyers as “Colonel” can readily identify a rogue’s gallery of such lawyers who exemplify the worst public perception of the profession as callous, self-serving, devious and indifferent to justice, truth and the public good. They would try to downgrade the very concept with mockery and ridicule. But aspiring to mold our personal and professional characters in accordance with these virtues will help equip us to fulfill a high calling as the stewards of the justice system, and remind us that despite the effects of legal education and culture, we lawyers are still humans with hearts and consciences.

Habits built upon an aspiration to adhere to these virtues may strengthen us, in the words of Gen. Douglas McArthur when he spoke of “duty honor and country”:

They make you strong enough to know when you are weak, and brave enough to face yourself when you are afraid. They teach you to be proud and unbending in honest failure, but humble and gentle in success; not to substitute words for actions, not to seek the path of comfort, but to face the stress and spur of difficulty and challenge; to learn to stand up in the storm but to

have compassion on those who fall; to master yourself before you seek to master others; to have a heart that is clean, a goal that is high; to learn to laugh, yet never forget how to weep; to reach into the future yet never neglect the past; to be serious yet never to take yourself too seriously; to be modest so that you will remember the simplicity of true greatness, the open mind of true wisdom, the meekness of true strength. They give you a temper of the will, a quality of the imagination, a vigor of the emotions, a freshness of the deep springs of life, a temperamental predominance of courage over timidity, of an appetite for adventure over love of ease. They create in your heart the sense of wonder, the unfailing hope of what next, and the joy and inspiration of life.¹⁷

The lawyer with a heart and soul trained through striving to develop such virtuous habits may try in some small way to emulate the fictional Atticus Finch, promoting justice, fairness and morality in one’s own daily practice. We are not shown the fictional Finch’s daily grind of law practice in mundane situations devoid of potential for heroic drama. But perhaps at some point we too might become worthy of the scene where, beaten but unbowed, Atticus leaves the courtroom as the folk in the balcony stand and the Reverend admonishes Scout, “Stand up—your father’s passing.”¹⁸ 

Kenneth L. Shigley is the president of the State Bar of Georgia and can be reached at ken@carllp.com.

Endnotes

1. “James” is a composite of many lawyers encountered over the course of my career. Any recognizable similarity to an actual person, living or dead, is coincidental.

2. William T. Ellis and Billie J. Ellis, *Beyond The Model Rules: Aristotle, Lincoln, And The Lawyer’s Aspirational Drive To An Ethical Practice*, 26 T.M. COOLEY L. REV. 591 (2009).
3. *Lawyer’s Creed and Aspirational Statement on Professionalism*, STATE BAR OF GEORGIA DIRECTORY & HANDBOOK, http://www.gabar.org/related_organizations/chief_justices_commission_on_professionalism/lawyers_creed/ (last visited Sept. 5, 2011); Macon Bar Association, *Assurances of Professionalism*, <http://www.reidi.net/maconbar/prof.pdf> (last visited Sept. 5, 2011); Local Rules, Standards of Conduct, U. S. District Court, Middle District of Georgia, <http://www.gamd.uscourts.gov/local%20rules/local%20rules%20amended%2012-1-09.pdf> (last visited Sept. 5, 2011).
4. CHARLES P. NEMETH, AQUINAS IN THE COURTROOM: LAWYERS, JUDGES, AND JUDICIAL CONDUCT 62 (2001).
5. *Id.* at 65; Robert F. Blomquist, *The Pragmatically Virtuous Lawyer*, 15 WIDENER L. REV. 93 (2009).
6. Jay Michaelson, *In Praise Of The Pound Of Flesh: Legalism, Multiculturalism, And The Problem Of The Soul*, 6 J. L. SOC’Y 98, 132 (Spring 2005).
7. *Id.*
8. Martin E.P. Seligman, et al, *Why Lawyers Are Unhappy*, 23 CARDOZO L. REV. 33 (2001).
9. ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 145 (1993).
10. Ronald Reagan, *Space Shuttle “Challenger” Tragedy Address*, January 28, 1986.
11. John F. Kennedy, *Inaugural Address*, January 20, 1961.
12. PETER KREEFT, BACK TO VIRTUE: TRADITIONAL MORAL WISDOM FOR MODERN MORAL CONFUSION (1986) (Kindle Edition, retrieved from Amazon.com).
13. Amos 5:24 (NIV).
14. Kreeft, *supra*.
15. *Id.*
16. *Id.*
17. Gen. Douglas MacArthur, *Sylvanus Thayer Award Acceptance Address*, “Duty, Honor, Country,” U. S. Military Academy, May 12, 1962.
18. HARPER LEE, TO KILL A MOCKINGBIRD (1960).



by Stephanie Joy Kirijan*

YLD and GLSP: Celebrating Two Special Anniversaries

**Thank you to GLSP Director Phyllis Holmen for providing information for this article.*

The Young Lawyers Division (YLD) is celebrating its 65th anniversary this year.

To honor the occasion, the YLD is focusing its service efforts on an old friend, Georgia Legal Services Program (GLSP), which is commemorating its 40th anniversary. The YLD and GLSP have had an important partnership since the creation of GLSP.

The Young Lawyers Division (formerly Section) was the moving force behind the creation of GLSP. In the late 1960s, young lawyers Jim Elliot, Bill Ide (both past YLD presidents), Philip Heiner and Betsy Neely saw the need for an organization which provided lawyers for the poor and recognized the positive impact it would have on communi-

ties around the state. These young lawyers volunteered with Atlanta Legal Aid's Saturday Lawyers program. They recognized that there was a great unmet need outside of metro-Atlanta for these services, which sparked their desire to create a statewide program.

In 1968, the YLD initiated a needs assessment of lawyers for the poor. The study concluded that there was a distressing disproportion between the actual need for legal services by those who could not afford them and the present supply of legal services available to them. The study also noted the large number of lawyers in urban areas, in contrast to the concentration of Georgia's poor in rural areas where legal help is less available. The next year, a second report promoted the "provision of legal services to indigent persons to the fullest extent possible," including a draft of Articles

**"Because of the generosity
of the legal community,
GLSP continues to serve the
most vulnerable populations,
helping them rebuild their lives
through access to justice and
opportunities out of poverty."**

of Incorporation of Georgia Indigent Legal Services. In 1970, Bill Ide became the first president of Georgia Indigent Legal Services. Funding issues mandated the creation of a new organization and, in 1971, the efforts of young lawyers resulted in the creation of Georgia

Legal Services Program with Phil Heiner serving as the organization's inaugural president.

Because of the commitment to equal justice felt by young lawyers, GLSP has grown to meet the critical need for legal services for impoverished Georgians and is the largest private, nonprofit law firm in the state. GLSP serves 154 counties outside metro-Atlanta and has 11 offices around the state. Some of these counties are plagued by chronic poverty and have few lawyers. Twenty-nine of the counties that GLSP serves have fewer than five practicing lawyers and six have none at all. The presence of GLSP in these communities is imperative to the delivery of legal services to underserved populations.

GLSP provides civil legal services free of charge to families with incomes at or below 200 percent of the federal poverty level. More than one million Georgians, or 72 percent of the state's poverty population, are eligible for services. The average income of GLSP clients in 2010 was \$20,257.

Low-income Georgians have been hit especially hard by the economy. GLSP has seen a change in client services over the last year, including 95 percent more unemployment cases, 70 percent more Food Stamp cases and 40 percent more Medicaid cases. In 2010, GLSP provided legal services to approximately 10,000 clients, ranging from counsel and advice to representation in court, including appellate courts.

Even though the need for legal services programs for the poor is growing, these programs are experiencing severe budget cuts. The economic downturn has impacted funding sources, including lower interest rates on IOLTA funds, and federal and state reductions. GLSP's principal federal funder, the Legal Services Corporation, cut the 2011 grant by more than \$600,000, and the IOLTA grant has been reduced for 2011-12 by more than \$450,000, or almost 60 percent. State funding for GLSP's Landlord-

Tenant Helpline was eliminated. Other grant-funded projects are facing cuts or elimination, although GLSP is aggressively seeking new and renewal funding from a variety of sources. Because the legal community recognizes these challenges, contributions from lawyers across Georgia have increased, but more support is needed.

GLSP is an important part of the legal profession and fills a gap that may not be addressed effectively otherwise. Georgians of lower means do not often seek representation and some may not be aware of their legal rights. These individuals have a great need and lawyers can serve this often overlooked population. One way to help is by serving as a volunteer lawyer for GLSP to handle priority cases on a pro bono or reduced fee basis. Pro bono work like this helps improve the public perception of lawyers and restores faith in the judicial system for many.


The partnership with GLSP continues to be an important one for the YLD. Young lawyers act as the public service arm of the Bar and help GLSP continue in its mission to serve low-income Georgians. Since its inception two years ago, the YLD Public Interest Partnership Program has provided summer interns at GLSP offices around the state. GLSP was also the beneficiary of the YLD Signature Fundraiser in 2011, which raised more than \$60,000. The YLD will continue its commitment to GLSP in 2012 by once again dedicating funds from the Signature Fundraiser to the organization.

The YLD Family Law Committee has also chosen GLSP as the beneficiary for its Supreme Cork fundraiser. The fundraising goal for this event is \$20,000 and will support family law services. GLSP provides representation for many family law related matters, including domestic violence, divorce, child support and legitimation. In addition, GLSP initiated two new projects last year related to domestic violence. One offers educational sessions to students in middle and high school (as well as the teachers, counselors and princi-

pals around them) on how to recognize and stop dating violence and stalking. Another program educates communities about the dynamics of family violence and what legal remedies are available to victims.

I invite you to join the YLD for its fundraising events that will benefit GLSP this year. The YLD Family Law Committee will host its Supreme Cork wine tasting and silent auction on Oct. 13 at 6:30 p.m. at 5 Seasons Brewery Westside. Tickets are \$40 in advance or \$45 at the door and can be purchased at www.glsf.org.

The YLD Signature Fundraiser will take place on Jan. 7 in conjunction with the State Bar Midyear Meeting in Atlanta. Please mark your calendars and look for further details in the meeting registration materials.

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American Empire Surplus Lines v. Hathaway Dev. Co.:

An Important Occurrence in Georgia Insurance Law

by John L. Watkins

On March 11, 2011, the Supreme Court of Georgia decided *American Empire Surplus Lines Ins. Co. v. Hathaway Dev.*

Co.¹ In *Hathaway*, the Court held that a general contractor could recover from its subcontractor's insurers for the cost of repairs for damage to surrounding property resulting from the subcontractor's faulty workmanship. The decision was 6-1 and affirmed a decision by the Court of Appeals of Georgia.² Further, the Court of Appeals had issued two prior decisions reaching the same conclusion.³

Given a strong affirmance with prior Court of Appeals precedent, it would be easy to assume that *Hathaway* simply confirmed established Georgia law. Although this is one possible view of *Hathaway*, it is, as is so often the case in the law, not nearly so simple.

Hathaway is important in two areas of substantive law. First, *Hathaway* is an important decision in construction law, confirming a potential source of recovery for general contractors when property is damaged



by a subcontractor's negligence. From a different perspective, the reasoning of the *Hathaway* case provides a potential source of recovery for property owners when property is damaged by a contractor's negligence.

Second, the *Hathaway* decision's broad reasoning also definitively resolves an important question of insurance law. Commercial general liability insurance is typically written on an "occurrence" form which provides the insured with coverage for claims for bodily injury or property damage caused by an "occurrence," which is typically defined as an "accident." A number of recent cases decided under Georgia law in the federal court system had restricted coverage by holding that a chain of events resulting from what began as a volitional act was not an "occurrence." The *Hathaway* court disagreed:

[W]e . . . hold that an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property. In reaching this holding, we reject out of hand the assertion that the acts of [the subcontractor] could not be deemed an occurrence or accident under the CGL policy because they were performed intentionally. "[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act been performed correctly."⁴

By establishing controlling precedent in two important areas of substantive law, *Hathaway* is an important decision. The remainder of this article will examine the significance of the decision in greater detail.

What's the Big Deal?

Literally tens of thousands of Georgia insureds rely on liability insurance to protect them in the event a claim is asserted against them for personal injury (termed "bodily injury" in insurance parlance; "personal injury" is another type of coverage) or property damage. Most commercial general liability (CGL) policies are written on what is called an "occurrence" form. Most CGL policies cover "'bodily injury' or 'property damage' to which this insurance applies . . ."⁵ The CGL coverage "applies" to "bodily injury" or "property damage" "caused by an *occurrence*" during the policy period.⁶

The term *occurrence* is defined by most CGL policies to mean an "*accident*, including continuous or repeated exposure to the same general harmful conditions." The word "accident" is typically not defined in CGL policies, but O.C.G.A. § 1-3-3(2) defines "accident" to mean "an *event* which takes place without one's foresight or expectation or design."⁷ Notably, *all* of the words mentioned—"occurrence," "accident" and "event"—are extremely broad.⁸

Claims under CGL policies often arise from various aspects of construction activity. For example, a

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contractor may negligently install a beam in a structure, causing damage to the structure supported by the beam. A welding subcontractor may cause a fire, causing a building to burn to the ground. A contractor clearing property for a development may try to avoid run-off by placing a silt fence, but the silt fence may fail because it was improperly installed, resulting in run-off onto neighboring property.⁹

The obvious purpose of the use of the term “occurrence” in CGL policies is to provide an insured broad coverage for bodily injury or property damage resulting from unexpected events as opposed to damages specifically caused by intentional misconduct. Despite the breadth of the word “occurrence,” federal courts sitting in Georgia, prior to *Hathaway*, had decided a growing number of cases, typically in the construction context, using a very narrow interpretation of the term that resulted in an extraordinarily limited grant of coverage.

These decisions held that an unexpected or unintended consequence resulting from what began as volitional behavior was not an occurrence even if there was no intent to cause injury or damage. The issue first seems to have arisen in *Owners Ins. Co. v. James*.¹⁰ In *James*, the claim was for property damage allegedly caused by negligent installation of synthetic stucco at a residence. One of the issues was whether the damage was caused by an occurrence under the policy, which, as noted, is generally defined as an accident.

The court’s analysis of the issue started in a fairly straightforward manner:

Although “accident” is not defined in the policies, Georgia courts have construed that term to signify “an unintended happening rather than one occurring through intention or design.” See, e.g., *Allstate Ins. Co. v. Grayes*, 216 Ga. App. 419, 421, 454 S.E.2d 616, 618 (1995); *Thrif-Mart, Inc. v. Commercial*

Union Assurance Cos., 154 Ga. App. 344, 346, 268 S.E.2d 397, 400 (1980). See also O.C.G.A. § 1-3-3(2) (“‘Accident’ means an event which takes place without one’s foresight or expectation or design.”). “Accident” and “intention” are thus interpreted as converse terms. *Thrif-Mart*, 154 Ga. App. at 346, 268 S.E.2d at 399-400.¹¹

However, the court went on to state:

It is true that Georgia law distinguishes between insurance coverage for accidental injuries and coverage for injuries caused by accidental means. See *Provident Life and Accident Ins. Co. v. Hallum*, 276 Ga. 147, 147, 576 S.E.2d 849, 851 (2003). An *accidental injury* is an injury that is unexpected but may arise from a conscious voluntary act. *Id.* In contrast, an *injury from accidental means* is one that is the unexpected result of an unforeseen or unexpected act that was involuntarily or unintentionally done. *Id.*¹²

Based on this interpretation the court concluded that “the insurance policies at issue in this case provide coverage for injury resulting from accidental acts, but not for an injury accidentally caused by intentional acts.”¹³ Because the synthetic stucco was intentionally installed, although there was no intent to cause damage, the court reasoned that there was no occurrence, and hence no coverage, and the insurer was granted summary judgment.

The issue was then addressed in *Owners Ins. Co. v. Chadd’s Lake Homeowners Ass’n., Inc. (Chadd’s Lake I)*.¹⁴ In *Chadd’s Lake I*, the insureds allegedly caused silt, sediment and storm water runoff to be deposited into a lake despite taking considerable preventative precautions. Although the bulk of the court’s order was spent discussing the pollution exclusion, the court also discussed whether there was an

occurrence. The court relied heavily on *James* and adopted its analysis:

Here, as in *James*, the Policy covers only injuries resulting from accidental acts and not injuries accidentally caused by intentional acts. It is undisputed that the damages alleged . . . although unintended, were caused by the . . . Defendants’ intentional construction activities Because the damage alleged by the Association was the result of the . . . Defendants’ intentional construction activities, it was not an ‘occurrence’ and thus is not covered by the Policy.¹⁵

Interestingly, the fact that the insureds had tried to *prevent* the run-off from happening in the first place was not found to be a fact in their favor. The court stated: “[t]he fact that the . . . Defendants anticipated this damage would result from its activities and attempted (unsuccessfully) to prevent the damage does not render their intentional conduct accidental—to the contrary, it underscores the intentional quality of their conduct.”¹⁶

The issue was yet again addressed in *Travelers Indem. Co. of Connecticut v. Douglasville Dev., LLC*.¹⁷ *Douglasville Development* was another storm water runoff case, where a developer, the insured, was sued for runoff allegedly caused by its land clearing and development activities. The insured used a number of “best management practices” to try to prevent runoff while developing the property. Although the court ruled against the insured for failure to provide timely notice, it also addressed whether there had been an “occurrence” under the policy. Essentially, the court simply followed the *Chadd’s Lake* decisions:

Here, under the holdings of *James* and *Chadd’s Lake I and II*, the Policy only covers injuries or damages resulting from

accidental acts. It is undisputed that the damages alleged by the Claimants, although unintended, were caused by Defendant's intentional construction activities and the mechanisms that Defendant put in place to guard against excess run-off.¹⁸

Accordingly, the court granted the insurer summary judgment.

In *Hathaway Dev. Co., Inc. v. Illinois Union Ins. Co.*,¹⁹ a case related to the *Hathaway* case later decided by the Supreme Court of Georgia, but involving a different carrier, the 11th Circuit put its imprimatur on the issue. The Court cited *James* and held that unintended damages arising out of the subcontractors' intentionally performed work was not an occurrence.²⁰

The necessary consequence of these holdings—rendering liability insurance coverage essentially illusory—was not lost on at least one of the federal judges. In *Douglasville Development*, Hon. J. Owen Forrester expressly recognized the trouble caused by this interpretation of occurrence:

The court recognizes that the holdings in *James* and *Chadd's Lake I and II* may create a somewhat awkward environment for commercial parties seek-

ing to offset their risk with insurance. *Almost every conceivable accident for which an insured could be held liable involves some intentional action at some point in the chain of causation*, yet the courts have interpreted common commercial policy language to only provide coverage from random events that involve no element of intent or conscious action.²¹

Forrester's observation highlighted the broad issue created by *James* and its progeny: If literally taken, the holding of *James* would allow an insurance company to deny just about any claim made on an occurrence-based policy. For example, the act of driving a car involves intentional conduct, although drivers (or at least almost all drivers) have no intent to become involved in a collision. Under the logic of *James* and its progeny, an auto accident would not be covered because driving inherently "involves some intentional action at some point in the chain of causation."

The Significance of *Hathaway* in the Construction Defect Context

The *Hathaway* court joined "the trend in a growing number of juris-

dictions which have considered construction defect claims under CGL policies" in interpreting "accident" to include unexpected injuries or damages. The court later explained the practical result of this holding in the construction context:

In this case, Whisnant was a subcontractor for Hathaway on three projects. On one project, Whisnant installed four-inch pipe on an underslab, although the contract specified six-inch pipe. On another project, Whisnant improperly installed a dishwasher supply line. On the third project, Whisnant improperly installed a pipe which separated under hydrostatic pressure. Each of these missteps damaged neighboring property being built by Hathaway. The Court of Appeals correctly determined that these acts constituted an "occurrence" under the CGL policy.²²

The court's discussion underscores the reality that accidents resulting in property damage often occur on construction sites. For this reason, owners typically require contractors—and contractors typically require subcontractors—to carry CGL coverage. Prior to *Hathaway*, and under the reasoning of *James*, many insureds in the

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construction business found that, despite having paid the premium, the promise of coverage was illusory. The practical result for some insureds was financial ruin. The practical result for claimants was often no avenue of recovery.

At a minimum, *Hathaway* holds that when a subcontractor negligently damages property other than its own work, there is an occurrence that, subject to other possible policy terms, is compensable under the subcontractor's CGL policy. This result is, as alluded to by the court, consistent with the result in a number of recent cases from other jurisdictions.²³

The breadth of the *Hathaway* holding logically suggests that the same result would apply to a claim by an owner against a general contractor for damages caused to the property other than the contractor's own work.²⁴ This will afford homeowners and businesses whose property has been damaged by negligent construction another potential avenue of recovery.

It is not entirely clear under *Hathaway* whether covered damages might under some circumstances include sums necessary to repair or replace the negligently constructed *work itself*. As the quoted language indicates, the holding may be limited to damage to "neighboring property." Thus, costs to replace the negligently installed pipes would not be covered, but damages caused as a result of the improperly installed pipes would be covered.

From an analytical standpoint, *Hathaway's* analysis of what constitutes an "occurrence" should not depend upon whether the work itself or other property is damaged. Hopefully, the limiting language in *Hathaway* is simply the result of the court deciding the question before it.

In many instances, damage to the work itself may not be covered due to exclusions in the policy form. However, the coverage limitation, properly analyzed, does *not* stem from the question of whether

negligently performed construction is an occurrence, regardless of whether the work or other property is damaged. Instead, the potential limitation involves whether damages to the work itself are *excluded* by what insurers call the "business risk" exclusions typically found in a CGL policy. Without delving deeply into the muddled law regarding the application of these exclusions, they often act to preclude coverage for damages to the contractor's (or subcontractor's) own work. In *American Family Mut. Ins. Co. v. American Girl, Inc.*²⁵, the Supreme Court of Wisconsin lucidly analyzed this issue:

We agree that CGL policies generally do not cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes overlooked, and has resulted in some regrettably overbroad generalizations about CGL policies in our case law.²⁶

As indicated by the Supreme Court of Wisconsin, many courts unfortunately conflate the analysis of coverage under the insuring agreement (or basic grant of coverage)—which includes the occurrence issue—with the application of policy exclusions.²⁷ Proper coverage analysis requires a two-step process: First, to determine whether the events giving rise to the claim are potentially covered under the insuring agreement. Second, if there is potential coverage under the insuring agreement, the next step is to determine whether the claim is clearly barred under any exclusion.

In future Georgia cases involving insurance coverage for construction defects, parties and courts will be well advised to keep this two-step

process in mind, and to remember that the question of whether a claim is potentially covered under the insuring agreement is a different inquiry from assessing the potential applicability of exclusions.

How *Hathaway* Finally Clarifies What Constitutes an "Occurrence" Under Georgia Law

Although the result in *Hathaway* is of specific importance in assessing insurance coverage for construction defect cases, *Hathaway* may be of more general importance to Georgia law in clearly and expressly establishing what constitutes an "occurrence" under CGL policies. *Hathaway* resolves the fundamental problem observed by Judge Forrester in *Douglasville Development* by explicitly rejecting the confusing distinction between injuries "resulting from accidental acts" and injuries "accidentally caused by intentional acts" made in *James*.

On this fundamental point, the court left no room for doubt:

In reaching this holding, we reject out of hand the assertion that the acts of [the subcontractor] could not be deemed an occurrence or accident under the CGL policy because they were performed intentionally. '[A] deliberate act, performed negligently, is an accident if the effect is not the intended or expected result; that is, the result would have been different had the deliberate act had been performed correctly.'²⁸

Not only is the holding stated unequivocally, *James* is cited as being contrary to the holding.²⁹

Important, but More Conventional Than Radical

Although *Hathaway* is a very important case, it is hardly a radical departure from Georgia insur-



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ance law. The result in *Hathaway* is far less surprising than the prior development of a substantial and growing body of cases in the sophisticated federal courts purporting to apply Georgia insurance law in a strained manner to deny coverage to Georgia insureds.


As noted above, the terms “occurrence” and its defining term “accident” are broadly defined terms. Prior to *Hathaway*, Judge Ashley Royal of the Middle District of Georgia considered *James* and its progeny and found them unpersuasive. In remarks foreshadowing the result in *Hathaway*, Royal stated, “Curiously, none of the cases seems to acknowledge the inherent ambiguity of the term ‘occurrence’ or to consider the application of the doctrine of *contra proferentum* to such a policy term.”³⁰ Royal’s comments suggested, quite rightly, that simply applying common sense and well-established Georgia precedent would have counseled against viewing a broad term such as “occurrence” as a limitation on an insured’s right to coverage.

The Georgia rules of construction regarding insurance policies are well-established. “In construing an insurance policy, the test is not what the insurer intended its words to mean, but what a reasonable person in the position of the insured would understand them to mean. The policy should be read as a layman would read it and not as it might be analyzed by an insurance expert or an attorney.”³¹ Similarly, “insurance contracts are to be read in accordance with the reasonable expectations of the insured where possible.”³²

Georgia courts have long understood that an “insurance policy is a ‘contract of adhesion,’ prepared by legal draftsmen to be accepted by laymen.”³³ As a contract of adhesion, an insurance policy must generally be construed in favor of the insured and in favor of coverage.³⁴ “Georgia public policy disfavors insurance provisions that permit the insurer, at the expense of the insured, to avoid the risk for

which the insurer has been paid and for which the insured reasonably expects it is covered.”³⁵ “While insurance is a matter of contract, not sympathy, the policy is to be construed liberally in favor of the object to be accomplished.”³⁶ If there is an ambiguity in the language of a policy and there are two reasonable constructions of a provision, the provision most favorable to the insured must be adopted.³⁷ If these long-established rules of construction had been applied, as suggested by Royal, the very strange result in *James* and its progeny would likely never have been reached.

Conclusion

Georgia law has long recognized that when insurers try to limit coverage by playing word games about the meaning of their policies, the insured is to be given every benefit of the doubt. *Hathaway*, importantly, reaffirms this fundamental principle. Viewed in this light, the result in *Hathaway* is not surprising. *Hathaway* provides important confirmation and clarification of insurance coverage in construction defect cases. More importantly, by effectively overruling an aberrant line of cases on the meaning of “occurrence” that drastically limited coverage under CGL policies, *Hathaway* has substantially protected the rights of Georgia insureds. 



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Endnotes

- 288 Ga. 749, 707 S.E.2d 369 (2011).
- Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 301 Ga. App. 65, 686 S.E.2d 855 (2009).
- SawHorse, Inc. v. S. Guaranty Ins. Co. of Ga., 269 Ga. App. 493, 604 S.E.2d 541 (2004); QBE Ins. Co. v. Couch Pipeline & Grading Co., 303 Ga. App. 196, 692 S.E.2d 795 (2010).
- 707 S.E.2d at 372 (quoting Lamar Homes v. Mid-Continent Cas. Co., 242 S.W.3d 1, 16 (Tex. 2007)).
- J. Evans and S. Berry, *Georgia General Liability Insurance*, Appx. A-1, p. 1 (reproducing and quoting Commercial General Liability Coverage Form, § 1, Coverage A, ¶ 1(a)).
- Id.* (reproducing and quoting Commercial General Liability Coverage Form, § 1, Coverage A, ¶ 1(b)(1) and (2)).
- O.C.G.A. § 1-3-3(2)(2000) (emphasis added).
- BLACK’S LAW DICTIONARY (5th ed. 1979) generally defines “event” as “the consequence of anything . . . something that happens.” *Id.* at 498. BLACK’S goes on to say that generally an “act” is the product of will whereas an event takes place “independent of the will.” *Id.*
- These examples all have arisen in the Georgia case law.
- 295 F. Supp. 2d 1354 (N.D. Ga. 2003).
- Id.* at 1363.
- Id.* at 1364.
- Id.* The distinction drawn by the Court is difficult, at least for the author, to understand much less apply. However, as shown below, it did gather momentum in the federal courts.
- Order, Civil Action No. 1:03-cv-2050-WSD (N.D. Ga. Dec. 28, 2004).
- Id.* at 23-24 (citations omitted).
- Id.* at 23. There was a sequel to *Chadd’s Lake I*, *Owners Ins. Co. v. Chadd’s Lake Homeowners Ass’n, Inc.*, Civil Action No. 1:05-cv-00475-JOF (N.D. Ga. May 30, 2006) (Ord. on Summ. J. (“*Chadd’s Lake II*”). On the occurrence issue, the Court reached the same conclusion as in *Chadd’s Lake I*. *Id.*, Slip Op. at 5-8.
- Civil Action No. 1:07-CV-0410-JOF, 2008 WL 4372004 (N.D. Ga. Sept. 19, 2008) (“*Douglasville Dev.*”).
- Id.* at *9.
- 274 F. App’x. 787, No. 07-15155, 2008 WL 1773307 (11th Cir. Apr. 18, 2008).

20. *Id.* at 791.
21. *Douglasville Dev.*, 2008 WL 4372004 at *9 (emphasis added). Notwithstanding the court's apparent misgivings about the result, it was "loath to rule against three prior cases in this district with virtually identical facts." *Id.* Although the candor of the court is admirable, there is also a certain amount of irony in the decision. The court noted that "almost every conceivable accident" involves an element of volitional conduct, apparently overlooking that an "occurrence" is expressly defined as an "accident."
22. 707 S.E.2d at 371-72.
23. *E.g.*, *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 883-85 (Fla. 2007) (including extensive discussion of case law; arguably adopting broader view of an "occurrence" than *Hathaway*); *Lamar Homes*, 242 S.W.3d at 8-9; *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 268 Wis.2d 16, 39, 673 N.W.2d 65, 76 (2004); *Sheehan Constr. Co., Inc. v. Continental Ins. Co.*, 935 N.E.2d 160, 167 (Ind. 2010); *Travelers Indem. Co. of Am. v. Moore & Assocs., Inc.*, 216 S.W.3d 302, 308-09 (Tenn. 2007). *Contra* *Crossmann Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, No. 26909, 2011 WL 93716 (S.C. Jan. 7, 2011); *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Haw. 142, 231 P.3d 67 (Haw. App. 2010). Although a state by state survey is beyond the scope of this article, statements in *Crossmann* and *Group Builders* suggesting that *Hathaway* and similar cases constitute the "minority rule" are questionable. Different courts have applied different methods of analysis and have reached different results that make generalizations difficult.
24. *See SawHorse, Inc. v. Southern Guar. Ins. Co. of Ga.*, 269 Ga. App. 493, 497-98, 604 S.E.2d 541, 545-46 (2004) (reversing summary judgment granted to general contractor's insurer where general contractor was seeking coverage for damage to owner's property other than the work; unclear from opinion whether damage was allegedly solely caused by subcontractor).
25. 268 Wis. 2d 16, 673 N.W.2d 65 (2004).
26. 268 Wis. 2d at 39, 673 N.W.2d at 76. The Supreme Court of Tennessee further explained: "Reliance upon a CGL's 'exclusions' to determine the meaning of 'occurrence' has resulted in 'regrettably overbroad generalizations' concerning CGLs. We therefore decline to base our analysis of the 'occurrence' requirement upon the 'exclusions' in a CGL." *Travelers Indem.*, 216 S.W.3d at 307 (citation omitted); *see also Lamar Homes*, 242 S.W.3d at 9; *Sheehan Const. Co.*, 935 N.E.2d at 167.
27. *See SawHorse, Inc.*, 269 Ga. App. at 495, 604 S.E.2d at 544 (analyzing business risk exclusions before analyzing coverage issues under the insuring agreement). *SawHorse* reached a correct result, but from an analytical standpoint approached the issues in reverse.
28. 707 S.E.2d at 372 (emphasis added) (quoting *Lamar Homes*, 242 S.W.3d at 16).
29. *Id.* *James* and the Eleventh Circuit's decision in the other *Hathaway* case are the primary authorities cited in Justice Melton's lone dissent, which again confirms that *James* and its progeny are no longer valid statements of Georgia law, if they ever were.
30. *Essex Ins. Co. v. H&H Land Dev. Corp.*, 525 F. Supp. 2d 1344, 1349 (M.D. Ga. 2007) (finding the reasoning of *James* and *Chadd's Lake* unpersuasive).
31. *Cincinnati Ins. Co. v. Davis*, 153 Ga. App. 291, 294, 265 S.E.2d 102, 105 (1980). *Accord* *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 273 Ga. 710, 712, 544 S.E.2d 156, 157 (2001) ("The policy should be read as a layman would read it."); *Ace Am. Ins. Co. v. Truitt Bros., Inc.* 288 Ga. App. 806, 655 S.E.2d 683 (2007); *Georgia Farm Bureau Mut. Ins. Co. v. Meyers*, 249 Ga. App. 322, 324, 548 S.E.2d 67, 69 (2001); *Hill v. Nationwide Mut. Fire Ins. Co.*, 214 Ga. App. 715, 448 S.E.2d 747, 747-48 (1994); *Atlantic Wood Indus., Inc. v. Lumbermen's Underwriting Alliance*, 196 Ga. App. 503, 505, 396 S.E.2d 541, 543 (1990); *Michigan Homes, Inc. v. U.S. Fidelity & Guar. Co.*, 188 Ga. App. 776, 778, 374 S.E.2d 323, 325 (1988). Federal cases applying Georgia law and recognizing this principle include *York Ins. Co. v. Williams Seafood of Albany, Inc.*, 223 F.3d 1253, 1255 (11th Cir. 2000); *Hooters of Augusta, Inc. v. Am. Global Ins. Co.*, 272 F. Supp. 2d 1365, 1372 (S.D. Ga. 2003); *Arrow Exterminators, Inc. v. Zurich Am. Ins. Co.*, 136 F. Supp. 2d 1340, 1348-49 (N.D. Ga. 2001); and *Crawford v. Gov't Employees Ins. Co.*, 771 F. Supp. 1230, 1234 (S.D. Ga. 1991).
32. *Certain Underwriters at Lloyd's of London v. Rucker Constr., Inc.*, 285 Ga. App. 844, 849, 648 S.E.2d 170, 175 (2007) (quoting *Guar. Nat'l Ins. Co. v. Brock*, 222 Ga. App. 294, 297, 474 S.E.2d 46, 49 (1996). *Accord* *Ga. Farm Bureau Mut. Ins. Co.*, 249 Ga. App. at 324, 548 S.E.2d at 69; *Home Ins. Co. v. Sunrise Carpet Indus., Inc.*, 229 Ga. App. 268, 271, 493 S.E.2d 641, 644 (1997).
33. *Loftin v. U.S. Fire Ins. Co.*, 106 Ga. App. 287, 294, 127 S.E.2d 53, 58 (1962); *see also Rentrite, Inc. v. Sentry Select Ins. Co.*, 293 Ga. App. 643, 647, 667 S.E.2d 888, 892 (2008); *First Fin. Ins. Co. v. Am. Sandblasting Co.*, 223 Ga. App. 232, 233, 477 S.E.2d 390, 392 (1996).
34. *Loftin*, 106 Ga. App. at 294, 127 S.E.2d at 58; *see also Rentrite, Inc.*, 293 Ga. App. at 647, 667 S.E.2d at 892; *First Fin. Ins. Co.*, 223 Ga. App. at 233, 477 S.E.2d at 392.
35. *Barrett v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 304 Ga. App. 314, 319, 696 S.E.2d 326, 330 (2010).
36. *Georgia Farm Bureau Mut. Ins. Co. v. Meyers*, 249 Ga. App. 322, 324, 548 S.E.2d 67, 69 (2001).
37. *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 334-335, 380 S.E.2d 686, 688 (1989).

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Obtaining Out-of-State Evidence for State Court Civil Litigation: Where to Start?

by Rebecca Phalen

You are working on the discovery plan for your case, brainstorming the evidence that you need to prosecute or defend your case.

Even though your case is pending in a Georgia state court, your discovery plan is likely to list witnesses or evidence outside Georgia.

You know that a subpoena issued from a Georgia state court has no power outside the state lines.¹ But you also know that you can use deposition testimony when the deponent is out of reach of a subpoena,² and you can use documents that are otherwise admissible and have the proper foundation. You can reach witnesses and documents outside Georgia through an enforceable subpoena. Each state has a procedure in place to allow you to compel testimony or the production of documents located in that state. This guide will start you on the right path to getting the evidence you need wherever it is located.

What procedure does each state follow to issue a subpoena for cases pending elsewhere?

In federal courts you start with one rule, Rule 45, and the attorney in the underlying litigation can sign



a subpoena that is to be served in another district.³ But for litigation in state courts, each state has its own procedure for issuing and enforcing a subpoena for cases pending outside that state. Sometimes the state's procedure varies by county.⁴ Before you can compel a witness to provide testimony or produce documents in another state, you must find and follow that state's procedure.

The trend among the states is towards adopting the Uniform Interstate Depositions and Discovery Act (UIDDA), but not all states have adopted it yet. Some states, like Georgia, may require the attorney in the out-of-state action to present a commission to the clerk in the state where the witnesses or documents are located before the clerk will issue the subpoena. Other states require an application to be filed as a civil action, while still other states have procedures everywhere in between. These procedures are outlined below with cites to each state's statutes or rules.

Uniform Interstate Depositions and Discovery Act

The UIDDA permits a party to submit the "foreign subpoena" (the subpoena from the underlying litigation) to the clerk of court where the discovery is sought.⁵ The clerk must then issue a subpoena for service, and that subpoena must incorporate the terms used in the foreign subpoena and list the contact information for all counsel of record in the underlying litigation.⁶ The UIDDA eases concern about the unauthorized practice of law by clarifying that requesting the issuance of the subpoena does not constitute an appearance before the court.⁷ Under the UIDDA, the subpoena is to be served in accordance with the discovery state's law.⁸ It also provides the procedure to challenge or enforce the subpoena: an application is to be filed in the discovery state with the clerk of court that issued the subpoena.⁹

Even if a state has adopted the UIDDA, you must review that state's version. A couple of states have added different reciprocity requirements.¹⁰ For example, Utah's UIDDA only applies if the other state has adopted "provisions substantially similar to this uniform act."¹¹ Because Georgia has not (yet) adopted the UIDDA, Georgia attorneys must look to the alternative process in Utah.¹² Virginia's reciprocity requirement, however, allows a "predecessor uniform act" to suffice.¹³ Since Georgia has adopted the Uniform Foreign Depositions Act, then Georgia attorneys should be able to use Virginia's UIDDA procedure.

The states that have adopted the UIDDA, or a substantially similar statute, are: California,¹⁴ Colorado,¹⁵ District of Columbia,¹⁶ Delaware,¹⁷ Idaho,¹⁸ Indiana,¹⁹ Kansas,²⁰ Kentucky,²¹ Maryland,²² Mississippi,²³ Montana,²⁴ Nevada,²⁵ New Mexico,²⁶ New York,²⁷ North Carolina,²⁸ South Carolina,²⁹ Tennessee,³⁰ Utah,³¹ Virgin Islands³² and Virginia.³³ Earlier this year, bills to enact the UIDDA were introduced in Georgia³⁴ and Pennsylvania,³⁵ but those bills did not pass.

In Georgia, the bill to adopt the UIDDA passed the House, but the Senate passed an amendment to the bill to bifurcate it so that Part I of the bill would be in effect until the effective date of the revised evidence code, and Part II—with updated code citations—would be effective upon the effective date of the revised evidence code.³⁶ This bifurcation would permit the UIDDA to remain in effect seamlessly without any needed house-keeping measures. But when the bill as amended went back to the House, the House proposed an amendment to introduce a reciprocity provision so that the UIDDA process could only be used if the state where the underlying case is pending has adopted a similar procedure.³⁷ Interestingly, Georgia's proposed version of the UIDDA would keep a modified version of the current statute as

an alternative procedure so that there would still be a mechanism available to out-of-state attorneys should a state have not adopted a law governing the underlying action similar to the UIDDA.³⁸ The House passed the amendment with the reciprocity provision, so the Senate will likely address this amendment next year.

UFDA and Subpoenas Issued with a Commission

The Uniform Foreign Depositions Act (UFDA) remains in place in several states. It is a predecessor act of the UIDDA, adopted by the National Conference of Commissions on Uniform State Laws in 1920. It states:

Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.³⁹

The states that still have the UFDA, or a similar statute, are: Florida,⁴⁰ Georgia,⁴¹ Louisiana,⁴² Nebraska,⁴³ New Hampshire,⁴⁴ Ohio,⁴⁵ Oregon,⁴⁶ Rhode Island,⁴⁷ South Dakota,⁴⁸ Texas⁴⁹ and Wyoming.⁵⁰

If your witness is located in one of these states, then your first step should be to call the clerk of court in the county or parish where the witness is located. The clerk may require a notice of deposition, a commission or even a miscellaneous action to issue the subpoena. It is unlikely that local counsel is required for these states (with the exception of Oregon)—at least until the subpoena needs to be enforced.

Issued Without Court Intervention

A few states allow either the clerk of court or another person to issue the subpoena without filing a separate action. In these states, because you are not entering an appearance before the court—requesting the subpoena is more of an administrative task—you should not be required to hire local counsel.⁵¹ Only when you need the court to enforce the subpoena will you need local counsel.

These states are: Arkansas,⁵² Connecticut,⁵³ Iowa,⁵⁴ Massachusetts,⁵⁵ Minnesota,⁵⁶ and North Dakota.⁵⁷ Some of these states only require a notice of deposition from the foreign state. Other states only need evidence that the deposition is permitted under the foreign state's law, and a commission may be the way to meet that requirement. Because the judge in the discovery state is not familiar with the facts of the underlying litigation, the judge in the discovery state may be more likely to enforce a subpoena that was accompanied by a commission signed by the judge familiar with the litigation. A call to the clerk is recommended, but you should first review the applicable statute or rule so that you are an informed caller.

Issued with Court Involvement

Other states, however, require greater court action before they will issue the subpoena. Some will require you to file an application or motion in the discovery state's court before the subpoena can issue, and an application or motion will require local counsel. Those states are: Alaska,⁵⁸ Arizona,⁵⁹ Hawaii,⁶⁰ Illinois,⁶¹ Maine,⁶² Massachusetts,⁶³ Michigan,⁶⁴ Missouri,⁶⁵ New Jersey,⁶⁶ Pennsylvania,⁶⁷ Vermont⁶⁸ and West Virginia.⁶⁹ The statutes in some other states, however, seem to require court action, but not necessarily that you file an application or petition. Those states are: Alabama,⁷⁰ Oklahoma,⁷¹ Washington⁷² and

Wisconsin.⁷³ Given the unclear procedure in those states, you should call the clerk of court to determine their procedure. If that call is not enlightening, then local counsel should be engaged.

Should You Hire Local Counsel?

Even if local counsel is not required, if you anticipate any resistance to the subpoena, then you may gain a strategic advantage by hiring local counsel before you seek the subpoena. Hiring local counsel, and including that name on the subpoena, will alert the deponent and your opposing counsel that you have counsel ready to enforce the subpoena.

Not only can hiring local counsel give you a strategic advantage, but also local counsel can answer several questions related to the mechanics and logistics of issuing and serving a subpoena out of state:

- What methods of service are permitted?
- What are the witness and mileage fees?
- How long will it take to have the subpoena issued?
- Does the state require a specific notice period for the subpoena?
- Are there any concerns about the type of information sought, especially in cases in which protected health information is requested?⁷⁴
- Is the commission that you intend on requesting from the Georgia court sufficient?
- Who are reputable process servers and court reporters?

Local counsel can also advise you of any requirements that you be admitted *pro hac vice* to take the deposition⁷⁵ and any other unauthorized practice of law concerns. Typically, because you are licensed to practice law in Georgia and you are taking the deposition for a matter pending in Georgia, there should not be unauthorized practice of law issues, but you should

check the rule of the state from which you are seeking discovery.⁷⁶

The additional up-front cost for hiring local counsel ensures that the subpoena is issued and served properly—meeting your ultimate goal of having an enforceable subpoena. To provide certainty to your client on costs, local counsel should offer this assistance for a flat rate.

If you are pursuing evidence in a state that does not require local counsel, then review that state's statutes, which will answer most of these questions. After you are familiar with those statutes, then you can make an informed call to the clerk of court.

What Documents Do You Need From the Georgia Court to Get Started?

The state's statute or rule, as identified above, will determine the documents you need from the Georgia court. Conversations with local counsel may also alert you to other requirements.

Notice of Deposition

You may only need a notice of deposition for the other state to issue the subpoena. If you need documents from the deponent, then add the document request to the notice.⁷⁷ Even if the other state does not require a notice of deposition, a Georgia ethics opinion may. In Advisory Opinion 40, the State Disciplinary Board cautioned against the misuse of subpoenas when serving subpoenas on nonparty witnesses.⁷⁸ A subpoena should only be issued for depositions that have been scheduled by agreement or "where a notice of deposition has been filed and served on all parties, and should not be issued when no deposition has been scheduled."⁷⁹ This notice requirement is to allow parties to the litigation to contest the relevancy, confidentiality or privileged nature of the material requested.⁸⁰

Georgia Subpoena

For the states that require the submission of the Georgia subpoena,

including those that have adopted the UIDDA, the Georgia Civil Practice Act allows only for subpoenas for deposition, although a document request can be included.⁸¹ Therefore, even if the discovery state, unlike Georgia, permits a subpoena for documents alone and you only want documents, in states that require the subpoena to incorporate the terms of the subpoena in the underlying action,⁸² the subpoena issued from the discovery state must include the request for deposition. You can then outline in the cover letter that you will accept the documents (with any necessary certification to lay the evidentiary foundation) in lieu of the deposition.


Commission

For those states that require a commission, Georgia courts have the authority to issue commissions

under the Georgia Civil Practice Act. The courts can issue a commission for the taking of depositions when it is “necessary or convenient” and upon “application and notice.”⁸³ The commission may designate an officer to take the deposition by name or descriptive title.⁸⁴ You may be able to obtain consent from opposing counsel for a commission or you may have to file a motion for issuance of the commission showing why the commission is necessary or convenient for your case.

And You’ve Made It Through the Maze.

So continue brainstorming about the evidence that you need for your case—without feeling trapped by state lines. There is a way to reach the evidence. This guide provides

the procedure so that you can focus on the substantive issues facing your client. 



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Phalen, P.C. She is hired primarily for legal-research and brief-writing projects for civil litigation. She also helps out-of-state attorneys with issuing and enforcing Georgia subpoenas. She blogs on subpoenas and other topics at www.rebeccaphalen.com. She received her J.D., *magna cum laude*, from Georgia State University College of Law in 2002.

APPENDIX I Out-of-State Subpoena Citations

State where you need discovery	Method	Statute or Rule
Alabama	Issued with court involvement	ALA. R. CIV. P. 28(c)
Alaska	Issued with court involvement	ALASKA R. CIV. P. 28(c)
Arizona	Issued with court involvement	ARIZ. R. CIV. P. 30(h)
Arkansas	Issued without court involvement	ARK. R. CIV. P. 45(f)
California	Similar to UIDDA	CAL. CIV. PROC. CODE §§ 2029.100 -.900 (West 2011)
Colorado	UIDDA	COL. REV. STAT. ANN. §§ 13-90.5-101 to -107 (West 2011)
Connecticut	Issued without court involvement	CONN. GEN. STAT. §§ 52-148e(f), 52-155 (2011); CONN. R. SUPER. CT. CIV. § 13-28(g)
District of Columbia	UIDDA	D.C. CODE §§ 13-441 TO -448 (2011); D.C. R. CIV. PROC. 28-I; D.C. CODE § 14-103 (2011)
Delaware	UIDDA	DEL. CODE ANN. tit. 10, § 4311 (2011)
Florida	UFDA	FLA. STAT. ANN. § 92.251 (West 2011)
Georgia	UFDA	O.C.G.A. §§ 24-10-110 to -112 (West 2011)
Hawaii	Issued with court involvement	HAW. REV. STAT. § 624-27 (2011)
Idaho	UIDDA	ID. R. CIV. P. 45(i)
Illinois	Issued with court involvement	I.L.C.S. S. CT. RULE 204(b)
Indiana	UIDDA	IND. CODE §§ 34-44.5-1-1 to -44.5-1-11 (2011); IND. R. TRIAL PROC. 28(E)
Iowa	Issued without court involvement	IOWA CODE ANN. § 622.84 (West 2011)
Kansas	UIDDA	KAN. STAT. ANN. § 60-228a (2010)
Kentucky	UIDDA	KY. REV. STAT. ANN. § 421.360 (2011)

State where you need discovery	Method	Statute or Rule
Louisiana	UFDA	LA. REV. STAT. ANN. § 13:3821 (2011)
Maine	Issued with court involvement	ME. R. CIV. P. 30(h)
Maryland	UIDDA	MD. CODE ANN., CTS. & JUD. PROC. §§ 9-401 to -407 (2011)
Massachusetts	Issued without court involvement; alternative procedure requires court involvement	MASS. GEN. LAWS ANN. ch. 223A, § 11 (2011); MASS. GEN. LAWS ch. 233, § 45 (2011)
Michigan	Issued with court involvement	MICH. RULES M.C.R. 2.305(E); MICH. COMP. LAWS § 600.1852(2) (2011)
Minnesota	Issued without court involvement	MINN. R. CIV. P. 45.01(d)
Mississippi	UIDDA	2011 Miss. Laws 347 (S.B. No. 2264); Miss. R. CIV. P. 45(a)(3)
Missouri	Issued with court involvement	MO. SUPREME COURT R. 57.08; MO. ANN. STAT. § 492.100 (West 2011)
Montana	UIDDA	MONT. R. CIV. P. 28(d) (Effective Oct. 1, 2011)
Nebraska	Similar to UFDA	NEB. CT. R. DISC. § 6-328(e)
Nevada	UIDDA	2011 Nev. Legis. Serv. 10 (A.B. 87)
New Hampshire	Similar to UFDA	N.H. REV. STAT. ANN. § 517-A:1 (2011); N.H. REV. STAT. ANN. § 517:18 (2011)
New Jersey	Issued with court involvement	N.J. R. OF CT. 4:11-4
New Mexico	UIDDA; alternative procedure with court involvement	N.M. DIST. CT. CIV. PROC. R. 1-045.1; N.M. STAT. § 38-8-1 (2011)
New York	UIDDA	N.Y. C.P.L.R. 3119 (McKINNEY 2011)
North Carolina	UIDDA (eff. Dec. 1, 2011)	N.C. Sess. Laws 2011-247 (H.B. 379) (To Be Codified In N.C. GEN. STAT. §§ 1F-1 to 1F-7) (Effective Dec. 1, 2011)
North Dakota	Issued without court involvement	N.D. R. CIV. P. 45(a)(3)
Ohio	UFDA	OHIO REV. CODE ANN. §§ 2319.08 - .09 (West 2011)
Oklahoma	Issued with court involvement	OKLA. STATA. ANN. tit. 12, § 2004.1 (2011)
Oregon	UFDA, but local counsel requirement	OR. R. CIV. P. 38(C); UNIF. TRIAL CT. R. 5.140
Pennsylvania	Issued with court involvement	42 PA. CONS. STAT. ANN. § 5326 (WEST 2011)
Rhode Island	similar to UFDA	R.I. GEN. LAWS § 9-18-11 (2011).
South Carolina	UIDDA	S.C. CODE ANN. §§ 15-47-100 to -160 (2010); S.C. R. CIV. PROC. 28(d)
South Dakota	UFDA	S.D. CODIFIED LAWS § 19-5-4 (2011)
Tennessee	UIDDA	TENN. CODE. ANN. §§ 24-9-201 to -207 (West 2011).
Texas	similar to UFDA	TEX. CIV. PRAC. & REM. CODE ANN. § 20.002 (VERNON 2011)
Utah	UIDDA	UTAH CODE ANN. §§ 78B-17-101 to -302 (WEST 2011); UTAH R. CIV. PROC. 26(h)
Vermont	Issued with court involvement	Vt. R. CIV. P. 28(d)
Virgin Islands	UIDDA	V.I. CODE ANN. tit. 5, §§ 4922-4925B (2011)
Virginia	UIDDA	VA. CODE ANN. § 8.01-412.8 to 412.15 (West 2011)
Washington	Issued with court involvement	WASH. SUPER. CT. CIV. R. 45(e)(4)
West Virginia	Issued with court involvement	W. VA. R. CIV. P. 28(d)
Wisconsin	Issued with court involvement	WIS. STAT. ANN. § 887.24 (West 2011)
Wyoming	UFDA	WYO. STAT. ANN. § 1-12-115 (2011)

Endnotes

1. O.C.G.A. § 24-10-21 (2011) (limiting place of service of subpoena to places within the state); *see also* Parrott v. Edwards, 113 Ga. App. 422, 427, 148 S.E.2d 175, 180 (1966) (nonparty who was resident of another state was beyond the subpoena power of Georgia courts).
2. O.C.G.A. § 9-11-32(a)(3)(D) (2011).
3. FED. R. CIV. P. 45(a)(3). Different districts, even within the same judicial circuit, have interpreted the service requirement under Rule 45 differently, so one must undertake additional research. *See, e.g.*, Hall v. Sullivan, 229 F.R.D. 501 (D. Md. 2005) (denying nonparty's motion to quash subpoena because Federal Express delivery was sufficient delivery; in-hand personal service of subpoena is not required for subpoenas that only require a document production). *Compare Klockner Namasco Holdings Corp v. Daily Access.com, Inc.*, 211 F.R.D. 685 (N.D. Ga. 2002) (denying motion for sanctions for failure to appear at deposition because personal service of subpoena was required), *with* In re Falcon Air Express, Inc., No. 06-11877-BKC-AJC, 2008 WL 2038799 (S.D. Fla. May 8, 2008) (rejecting "as antiquated the so-called majority position interpreting Rule 45 as requiring personal service, and instead [adopting] the better-reasoned, modern, emerging minority position, which holds that substitute service of a subpoena is effective on a nonparty witness under Rule 45," rejecting Klockner).
4. The United States Postal Service website has a tool to locate the county by address. *See* ZIP Code Lookup, UNITED STATES POSTAL SERVICE, <http://zip4.usps.com/zip4/welcome.jsp> (enter address, then click on "Mailing Industry Information") (last visited Aug. 11, 2011).
5. UNIF. INTERSTATE DEPOSITIONS & DISCOVERY ACT § 3 (2007). The full text of the UIDDA and comments from the National Conference of Commissioners on Uniform State Laws is located at http://www.law.upenn.edu/bll/archives/ulc/idda/2007act_final.htm (last visited Aug. 11, 2011).
6. UIDDA § 3(c) (2007).
7. *Id.* § 3(a).
8. *Id.* § 4 and Comment.
9. *Id.* § 6.
10. UTAH CODE ANN. § 78B-17-103 (West 2011); VA. CODE ANN. § 8.01-414 (West 2011).
11. UTAH CODE ANN. § 78B-17-103 (West 2011).
12. UTAH R. CIV. P. 26(h); *see also* How to Take a Deposition in Utah for a Case from Another State, UTAH STATE COURTS, <http://www.utcourts.gov/resources/attorney/outofstateattorney/> (last visited Aug. 11, 2011).
13. VA. CODE ANN. § 8.01-412.14 (West 2011).
14. CAL. CIV. P. CODE §§ 2029.100-.900 (West 2011); *see also* Judicial Council Forms, CALIFORNIA COURTS, <http://www.courts.ca.gov/forms.htm> (last visited Aug. 11, 2011). Forms SUBP-030, SUBP-035, SUBP-040, SUBP-045, and SUBP-050 pertain to subpoenas for actions pending outside California.
15. COLO. REV. STAT. ANN. §§ 13-90.5-101 to -107 (West 2011); *see also* Issuing Out of State Subpoena Forms, COLORADO STATE JUDICIAL BRANCH, http://www.courts.state.co.us/Forms/Forms_List.cfm?Form_Type_ID=117 (last visited Aug. 7, 2011).
16. D.C. CODE §§ 13-441 to -448 (2011). The District of Columbia also still has the Uniform Foreign Depositions Act on the books. D.C. CODE § 14-103 (2011). Rule of Civil Procedure 28-1(b) provides an alternative procedure, requiring a certified copy of the commission or notice to be filed and a judge's approval before the clerk can issue the subpoena. D.C. R. CIV. P. 28-1; *see also* Clarification of Uniform Interstate Depositions and Discovery Act (UIDDA) in the District of Columbia, INSURANCE DEFENSE BLOG, (Jan. 5, 2011, 2:40 PM), <http://www.insurancedefenseblog.us/2011/01/clarification-of-uniform-interstate-depositions-and-discovery-act-uidda-in-the-district-of-columbia.html> (noting, also, the exception for medical records request, in which an appearance before the court must be made under D.C. Code § 14-307).
17. DEL. CODE ANN. tit. 10, § 4311 (2011).
18. IDAHO R. CIV. P. 45(i).
19. IND. CODE §§ 34-44.5-1-1 to -44.5-1-11 (2011) (UIDDA). The previous method also remains on the books. IND. R. TRIAL P. 28(E) (court may order person to provide testimony, documents, inspections, or mental examination upon application or in response to a letter rogatory). In fact, the Marion County Clerk's office has information only on how to have a subpoena issued under Indiana Trial Rule 28(E), available at <http://www.indy.gov/eGov/County/Clerk/Court/Filings/Pages/OutOfStateLitigants.aspx> (last visited Aug. 11, 2011).
20. KAN. STAT. ANN. § 60-228a (2010).
21. KY. REV. STAT. ANN. § 421.360 (West 2011).
22. MD. CODE ANN., CTS. & JUD. PROC. §§ 9-401 to -407 (West 2011).
23. 2011 Miss. Laws 347 (S.B. No. 2264). The passage of this section did not affect the prior method of obtaining out-of-state subpoenas, thus providing an alternate method. MISS. R. CIV. P. 45(a)(3) (clerk can issue a subpoena upon submission of the foreign subpoena).
24. MONT. R. CIV. P. 28(c) (effective Oct. 1, 2011). Before October 1, 2011, the previous rule remains in effect. MONT. R. CIV. P. 28(d) (district court may issue the subpoena upon proof that notice has been duly served).
25. 2011 Nev. Legis. Serv. 10 (A.B. 87) (effective Oct. 1, 2011). This bill repeals the UFDA.
26. N.M. DIST. CT. CIV. P. R. 1-045.1. An alternative procedure permits the New Mexico judge to issue an order directing a witness to provide testimony or documents. N.M. STAT. ANN. § 38-8-1 (2011).
27. N.Y. C.P.L.R. 3119 (MCKINNEY 2011).
28. The North Carolina Uniform Interstate Depositions and Discovery Act becomes effective on December 1, 2011. 2011 N.C. Sess. Laws 247 (H.B. 379) (to be codified in N.C. GEN. STAT. §§ 1F-1 to 1F-7). Before December 1, 2011, N.C. Gen. Stat. Ann. § 1A-1, Rule 28(d) (2010) remains in effect (present a commission, order, notice, or consent to the judge and it "shall be the duty of the judge" to issue the subpoena). Beginning on December 1, 2011, under H.B. 379, Rule 28(d) will be amended

- to apply only to depositions to be used in foreign countries. For local rule requirements regarding the taking of the deposition once the subpoena is issued, see Posting of Mack Sperling to North Carolina Business Litigation Report, <http://www.ncbusinesslitigationreport.com/2009/10/articles/professional-responsibility-1/out-of-state-counsel-depositions-and-pro-hac-vice-admissions-in-north-carolina/> (Oct. 26, 2009).
29. S.C. CODE ANN. §§ 15-47-100 to -160 (2010). The previous rule was not repealed, allowing an attorney or the clerk of court to issue a subpoena after filing a commission with the South Carolina court. S.C. R. CIV. P. 28(d). The South Carolina Supreme Court has noted that Rule 28(d) is consistent with South Carolina's UIDDA. Order re South Carolina Rules of Civil Procedure, 2011 Note (April 28, 2011), <http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=28.0&subRuleID=&ruleType=CIV> (amending note to Rule 28 in a Court Rule Maintenance Order).
 30. TENN. CODE ANN. §§ 24-9-201 to -207 (West 2011).
 31. UTAH CODE ANN. §§ 78B-17-101 to -302 (West 2011); *see also* UTAH R. CIV. P. 26(h) (providing that subpoena can issue upon filing of notice of deposition with the clerk). The website for Utah State Courts has provided information on how to take a deposition in Utah for a case from another state at <http://www.utcourts.gov/resources/attorney/outofstateattorney/> (last visited Aug. 11, 2011).
 32. V.I. CODE ANN. tit. 5, §§ 4922-4925B (2011).
 33. VA. CODE ANN. §§ 8.01-412.8 to -412.15 (West 2011).
 34. *See* H.B. 46, 151st Gen. Assemb., Reg. Sess. (Ga. 2011), *available at* http://www1.legis.ga.gov/legis/2011_12/sum/hb46.htm (last visited Aug. 11, 2011).
 35. *See* S.B. 79, Gen. Assemb., Reg. Sess. (Pa. 2011).
 36. *See* H.B. 46, 151st Gen. Assemb., Reg. Sess. (Ga. 2011), *available at* http://www1.legis.ga.gov/legis/2011_12/sum/hb46.htm (last visited Aug. 11, 2011) (Senate amendment at Version 2).
 37. Comments of Rep. Mike Jacobs, Afternoon House Session 3 at 1:06:35, *video available at* <http://www.gpb.org/lawmakers/2011/day-40-sine-die> (last visited Aug. 11, 2011).
 38. *See* H.B. 46, 151st Gen. Assemb., Reg. Sess. (Ga. 2011) (proposed sections 24-10-113 and 24-13-113).
 39. *See* Comments to Uniform Interstate Depositions & Discovery Act (2007), NATIONAL CONF. OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.law.upenn.edu/bll/archives/ulc/idda/2007act_final.htm (last visited Aug. 11, 2011).
 40. FLA. STAT. ANN. § 92.251 (West 2011).
 41. O.C.G.A. §§ 24-10-110 to 112 (2011).
 42. LA. REV. STAT. ANN. § 13:3821 (2011).
 43. NEB. CT. R. DISC. § 6-328(e).
 44. N.H. REV. STAT. ANN. § 517-A:1 (2011); N.H. REV. STAT. ANN. § 517:18 (2011).
 45. OHIO REV. CODE ANN. §§ 2319.08 - .09 (West 2011).
 46. OR. R. CIV. P. 38(c); UNIF. TRIAL CT. R. 5.140 (requiring either local counsel or the party to present the commission in person to register the document).
 47. R.I. Gen. Laws § 9-18-11 (2011) (statute similar to UFDA).
 48. S.D. CODIFIED LAWS § 19-5-4 (2011).
 49. TEX. CIV. PRAC. & REM. CODE ANN. § 20.002 (VERNON 2011) (statute similar to UFDA).
 50. WYO. STAT. ANN. § 1-12-115 (2011).
 51. *See, e.g.,* Ala. Rules Governing Admissions, R. 7 (must be admitted *pro hac vice* to appear as counsel before any court); Conn. Rules of Super. Ct. Regulating Admission to the Bar § 2-16 (*pro hac vice* admission required to participate in "the presentation of a cause or appeal in any court of this state").
 52. ARK. R. CIV. P. 45(f) (clerk shall issue a subpoena when a party files a certified copy of the notice of deposition).
 53. CONN. GEN. STAT. §§ 52-148e(f), 52-155 (2011); CONN. R. SUPER. CT. CIV. § 13-28(g). Depositions can be taken of Connecticut witnesses in the same manner as matters pending in Connecticut "on application" of any party to the underlying civil action. This language implies that a commission should be obtained from the court where the action is pending. Then the subpoena could be issued "in like manner" by a judge, clerk, notary public, or commissioner. CONN. R. SUPER. CT. CIV. § 13-28(b). The State of Connecticut Judicial Branch has provided instructions for deposing a Connecticut resident, stating that a Connecticut attorney or notary public may issue the subpoena or that the out-of-state attorney may apply for a court-ordered subpoena. Out of State Commission to Depose a Connecticut Resident, (Dec. 15, 2010), <http://www.jud.ct.gov/CivilProc/depose.pdf>.
 54. IOWA CODE ANN. § 622.84 (West 2011). The statute permits the "person authorized to take the depositions" to issue the subpoena when another state's laws allow a deposition to be taken. Although not stated in the statute, a commission may be a way to show that the state in the underlying action has allowed the deposition to be taken. In Iowa, clerks or attorneys may issue subpoenas. IOWA R. CIV. P. 1.1701(2).
 55. MASS. GEN. LAWS ch. 233, § 45 (2011) (person can be summoned to give deposition in case pending in another state in same manner as summoning witnesses before court, likely need commission) (one of two alternative procedures in Massachusetts); *see also* MASS. GEN. LAWS ch. 233, § 1 (2011) (stating that a clerk, notary public, or justice of the peace may issue summonses).
 56. MINN. R. CIV. P. 45.01(d) (subpoena can be issued by court administrator or Minnesota attorney provided deposition "is allowed" and has been properly noticed where action is pending).
 57. N.D. R. CIV. P. 45(a)(3) (clerk can issue subpoena, but party must file proof of service of notice or file letter of request from court where action is pending).
 58. ALASKA R. CIV. P. 28(c) (upon motion, court may order issuance of subpoena when a deposition is to be taken pursuant to the laws of another jurisdiction).
 59. ARIZ. R. CIV. P. 30(h) (must file an application as a civil action under oath and with other requirements, including attaching a notice, order from foreign state, commission, or letter rogatory).
 60. HAW. REV. STAT. § 624-27 (2011) (present verified petition when a

- commission has been issued or where notice has been given in underlying action).
61. I.L.C.S. S. Ct. R. 204(b) (petition the court for a subpoena to compel the testimony of the deponent). The Clerk of the Circuit Court of Cook County, Illinois, provides the procedures for obtaining a subpoena for deposition for a case pending in another state. Deposition for a Case Pending in Another State, CLERK OF THE CIRCUIT COURT, COOK COUNTY, ILLINOIS, <http://198.173.15.34/?section=DDPage&DDPage=3300> (click "Procedures") (last visited Aug. 11, 2011).
 62. ME. R. Civ. P. 30(h) (must file an application before clerk may issue a subpoena; statute expressly requires local counsel).
 63. MASS. GEN. LAWS ch. 223A, § 11 (2011) (court may order person to give testimony or documents upon application or in response to a letter rogatory); *see also* MASS. GEN. LAWS ch. 233, § 45 (2011) (providing an alternative process).
 64. MICH. RULES M.C.R. 2.305(E) (person authorized to take deposition may petition the court for a subpoena to give testimony or produce documents); MICH. COMP. LAWS § 600.1852(2) (2011) (court may order person to give testimony or produce documents upon application or in response to a letter rogatory); *see also* Ewin v. Burnham, 728 N.W.2d 463, 465 (Mich. Ct. App. 2006) (discussing these two rules and finding that they do not conflict). The Clerk's Office in Wayne County (Detroit), Michigan has provided instructions to have out-of-state subpoena issued under Rule 2.305(E). Issuance of Subpoena Out of State Case, WAYNE COUNTY CLERK, <http://www.co.wayne.mi.us/2118.htm> (last visited Aug. 11, 2011).
 65. MO. S. Ct. R. 57.08 (court can direct that a subpoena issue upon *ex parte* application when a deposition is to be taken pursuant to laws of another state); MO. ANN. STAT. § 492.100 (West 2011) (commissioners appointed by another state can compel the attendance of witnesses).
 66. N.J. R. OF CT. 4:11-4 (must file *ex parte* petition to order issuance of subpoena). The Superior Court of New Jersey has provided an information packet, including forms, to assist out-of-state attorneys. Out-of-State Discovery Procedure, NEW JERSEY JUDICIARY, (May 2007) <http://www.judiciary.state.nj.us/civil/forms/10518.pdf>.
 67. 42 PA. CONS. STAT. ANN. § 5326 (West 2011) (court can order someone to provide testimony or produce documents upon an application or in response to a letter rogatory).
 68. VT. R. Civ. P. 28(d) (judge may order issuance of a subpoena upon petition when the deposition is to be taken pursuant to the laws of another state).
 69. W. VA. R. Civ. P. 28(d) (upon petition, court may order issuance of subpoena when the deposition of a person is to be taken pursuant to the laws of another state).
 70. ALA. R. Civ. P. 28(c) (present a commission to the judge or proof of a duly served notice and it "shall be the duty of the judge" to issue the subpoena).
 71. OKLA. STAT. ANN. tit. 12, § 2004.1 (West 2011) (district court can issue subpoena upon proof of service of notice and no requirement of petition to be filed prior to issuance).
 72. WASH. SUPER. CT. CIV. R. 45(e) (4) (court may issue a subpoena when a person is authorized by the law of another state to take a deposition in Washington, with or without a commission).
 73. WIS. STAT. ANN. § 887.24 (West 2011) (witness may be subpoenaed before any person authorized by the state where the action is pending, but includes reciprocity requirement). The procedure is unclear from the statute, but the code section to compel a Wisconsin resident to testify at a civil action in the foreign state requires a submission to the judge, so that may guide the court's action for deposition testimony as well. WIS. STAT. ANN. § 887.25 (West 2011).
 74. *See, e.g.*, I.L.C.S. S. Ct. R. 204(c) (must have agreement of parties or order of the court to depose nonparty physicians).
 75. *See* Mack Sperleng, Out Of State Counsel, Depositions, And Pro Hac Vice Admissions In North Carolina, NORTH CAROLINA BUSINESS LITIGATION REPORT, (Oct. 26, 2009), <http://www.ncbusinesslitigationreport.com/2009/10/articles/professional-responsibility-1/out-of-state-counsel-depositions-and-pro-hac-vice-admissions-in-north-carolina/>.
 76. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (lawyer admitted in another jurisdiction can provide legal service on a temporary basis in Florida when the services are reasonably related to a pending proceeding in another jurisdiction, if that lawyer is authorized by law to appear in that proceeding); FL. R. PROF'L CONDUCT 4-5.5(c)(2) (same); GA. R. PROF'L CONDUCT 5.5(c)(2) (same).
 77. O.C.G.A. § 9-11-30(b)(1) (2011).
 78. Advisory Op. 40, STATE BAR OF GEORGIA DISCIPLINARY BOARD (Sept. 21, 1984), http://www.gabar.org/handbook/state_disciplinary_board_opinions/adv_op_40/ (last visited Aug. 11, 2011).
 79. *Id.*
 80. *Id.*
 81. O.C.G.A. § 9-11-45(a)(1)(C) (2011).
 82. *See, e.g.*, UIDDA § 3(c) (2007); MISS. R. Civ. P. 45(a)(3).
 83. O.C.G.A. § 9-11-28(b) (2011).
 84. *Id.*; *see also* O.C.G.A. § 9-11-28(a) (2011).

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History of the Western Judicial Circuit

by Donald E. Wilkes Jr.

There are 159 superior courts in Georgia—one in each county. Of all the existing courts of this state, superior courts are the oldest.

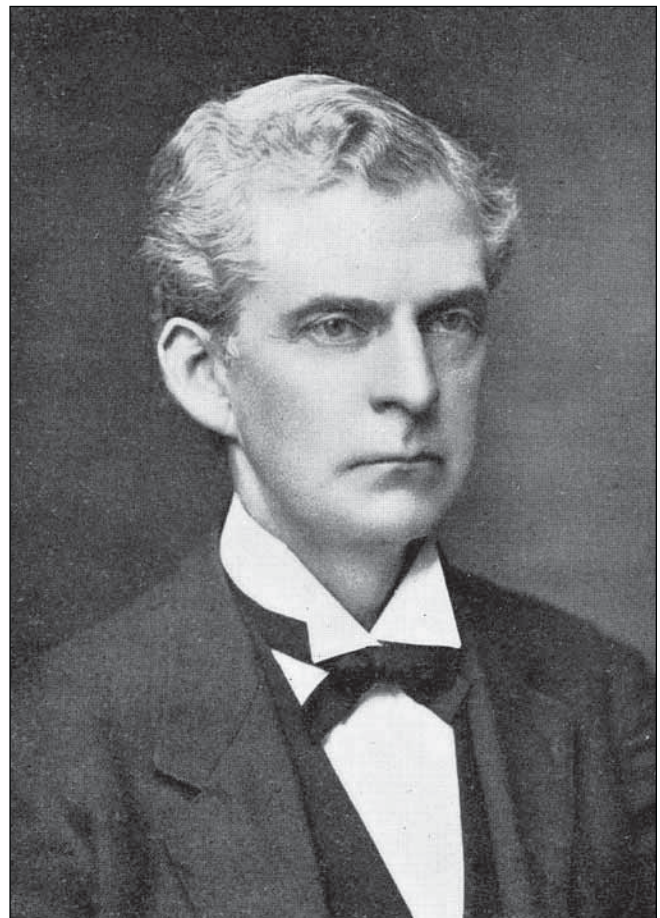
They were created 234 years ago by Georgia's first state constitution in 1777.¹ By contrast, the Supreme Court of Georgia was not established until 1845,² and the Court of Appeals of Georgia was not created until 1906.³

Presided over by superior court judges elected to serve four-year terms, superior courts are the most important trial courts in this state. Superior courts have general jurisdiction to try almost any civil or criminal case, and are the only courts with authority to exercise the powers of a court of equity or to try felonies. In addition to their expansive trial jurisdiction, superior courts have appellate jurisdiction to review certain decisions of probate courts, magistrate courts and municipal courts.

Brief History of the Western Judicial Circuit

The superior courts of this state are grouped into 49 geographically named circuits. One of these, the Western Judicial Circuit, currently consists of the superior courts of Clarke and Oconee counties. The superior court of Clarke County has been in the Western Judicial Circuit since the county was created in 1801,⁴ and the superior court of Oconee County has been in the Circuit since the county's creation in 1875.⁵

Created by a 1797 statute,⁶ the Western Judicial Circuit was, along with the Eastern and Middle



Andrew J. Cobb, associate justice on the Supreme Court of Georgia (1896-1907), Western Judicial Circuit superior court judge (1917-21) and past president of the Georgia Bar Association (1913).

Circuits, one of the first three judicial circuits established in this state. The Western Judicial Circuit originally consisted of the superior courts of eight counties: Elbert, Franklin, Greene, Hancock, Jackson, Lincoln, Oglethorpe and Wilkes. The Western Circuit received its name because at the time of its creation in the late

18th century most of what is now Georgia was still occupied by Native Americans, and these eight counties were then regarded as being in the western part of the state. Not one of those counties remains in the Western Circuit, and today the two counties forming the Circuit are in the northeastern part of Georgia. No longer is the Western Circuit located in the western part of the state.

At one time or another, the superior courts of 24 counties have been part of the Western Judicial Circuit. The most superior courts in the Western Judicial Circuit in any one period was between 1821 and 1822, when the Circuit included 11 counties: Clarke, Fayette, Franklin, Gwinnett, Habersham, Hall, Henry, Jackson, Newton, Rabun and Walton. By 1922 the number of counties in the Circuit was down to seven. In 1923 four of these counties were transferred to the newly created Piedmont Judicial Circuit, with the result that from then until 1972 the Western Judicial Circuit consisted of the superior courts of three counties—Clarke, Oconee and Walton. In 1972 the superior court of Walton County was transferred to the newly created Alcovy Judicial Circuit.

Judges of the Western Judicial Circuit

Until 1976, there was never more than one superior court judge of the Western Judicial Circuit at a time. A 1976 statute⁷ raised the number of judges to two, and a 1995 statute⁸ increased the number to its current level of three. There have been a total of 29 superior court judges of the Western Judicial Circuit since its creation in 1797. A list of these judges, with their terms of office, is set forth on page 28. The list includes some amazing jurists, three of whom also served as justices of the Supreme Court of Georgia.

The first of these three was James Jackson, who, after serving as Western Circuit superior court judge for eight years, went on to become associate justice (1875-80) and chief justice (1880-87) on the Supreme Court of Georgia. Jackson's commitment to individual rights was so great that it was said of him, "His cradle hymns were the songs of liberty."⁹

The second of these three judges, Richard B. Russell Sr., quite possibly the greatest of all Georgia judges, served seven years as Western Circuit superior court judge, then served on the Court of Appeals of Georgia for nine years (1907-16), and then was the chief justice of the Supreme Court of Georgia for 15 years (1923-38). Russell is the only person ever to serve as both chief judge of the Court of Appeals of Georgia (1913-16) and chief justice of the Supreme Court of Georgia. In 1931 Russell had the pleasure of swearing into office his son, Richard B. Russell Jr., as governor of Georgia. While serving as chief justice, Richard B. Russell Sr. displayed in his decisions an "ideology of



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Superior Court Judges of the Western Judicial Circuit and Their Terms of Office

Thomas P. Carnes (1798-1803; 1809-13)
 John Griffin (1803)
 Charles Tait (1803-09)
 Young Gresham (1813-16)
 John Mitchell Dooly (1816-19)
 Augustin Smith Clayton (1819-25; 1828-31)
 William H. Underwood (1825-28)
 Charles Dougherty (1831-37; 1845-49)
 Thomas W. Harris (1837-41)
 Junius Hillyer (1841-45)
 James Jackson (1849-57)
 N.I. Hutchins I (1857-68)
 C.D. Davies (1868-73)
 George D. Rice (1873-78)
 Alex S. Erwin (1878-83)

N.I. Hutchins II (1883-99)
 Richard B. Russell Sr. (1899-1906)
 Charles Hillyer Brand (1906-17)
 Andrew J. Cobb (1917-21)
 Blanton Fortson (1921-40)
 Stephen C. Upson (1940-42)
 Henry H. West (1942-53)
 Carlisle Cobb (1953-62)
 James Barrow (1962-90)
 Joseph J. Gaines (1976-2002)
 Lawton E. Stephens (1991-present)
 Steve C. Jones (1995-2011)
 David R. Sweat (2002-present)
 H. Patrick Haggard (2011-present)

mercy, and of sympathy for the poor, the helpless, the unprotected, and the underprivileged.”¹⁰

The third judge of the Western Circuit to serve on the Supreme Court of Georgia was Andrew J. Cobb. Unlike James Jackson and Richard B. Russell Sr., however, Andrew J. Cobb was an appellate judge before he was a trial judge. Specifically, Cobb first served as an associate justice on the Supreme Court of Georgia (1896-1907) and afterward as a Western Judicial Circuit superior court judge (1917-1921). Andrew J. Cobb “was conservative, but nevertheless he was unwilling to refuse to recognize a right or principle merely because it was novel.”¹¹ It was Cobb who wrote the opinion for the Supreme Court of Georgia in the landmark 1905 case of *Pavesich v. New England Life Ins. Co.*,¹² the first American appellate court decision to recognize a constitutional right to privacy. He also authored the learned opinion for the Court in *Simmons v. Georgia Iron & Coal Co.*,¹³ probably the single most important habeas corpus decision in the Court’s his-

tory. Andrew J. Cobb was also one of the most prominent of the courageous Georgian citizens who in the early 20th century publicly condemned lynchings, then the South’s scourge.¹⁴

Although none of the other judges of the Western Judicial Circuit have been Supreme Court of Georgia justices, many have had distinguished careers not only as jurists but also as lawyers and legislators. Furthermore, several of the 19th century Western Judicial Circuit judges lived astonishing lives spiced with adventure and occasionally marred by tragedy.

- In 1780, when he was about eight years of age, future superior court judge John Mitchell Dooly witnessed the murder of his patriot father, Col. John Dooly, by a band of Tories.¹⁵ Dooly County is named after the murdered man.¹⁶
- In 1802, future superior court judge Charles Tait, who had a wooden leg, challenged future superior court judge John Mitchell Dooly, known for his

wit, to a duel.¹⁷ Dooly is reputed to have responded to the challenge by saying he would not fight unless, in order to assure that the duel was on equal terms, he was allowed to encase one of his own legs in a “bee gum,” i.e., a hollow tree stump! Tait, stung by Dooly’s humorous reply, is said to have angrily threatened to publish Dooly as a coward, whereupon Dooly purportedly rejoined that he would rather fill the newspapers than a coffin! Although the duel never took place because Tait and Dooly reconciled on the dueling field, the incident remains the most notable duel in American history that never occurred.¹⁸

- Thomas P. Carnes, the first superior court judge of the Western Circuit, died a strange and violent death on Sunday, May 5, 1822, nine years after leaving office. Carnes “was killed as a result of an injury he received while crossing the courthouse steps. Eyewitnesses say he was going to summon law officers




Clarke County Courthouse, Athens, Ga.

from within the building to halt a nearby gun-fight. [Carnes] was not himself involved in the fight. A bullet hit his left leg and he died several days later from complications.”¹⁹

- In 1922, Western Circuit Superior Court Judge Blanton Fortson granted a temporary injunction restraining certain named persons from doing further mob violence to a black man who lived in Barrow County (then part of the Western Circuit).²⁰ This was one of the first instances in history of mob violence being restrained by court order.
- At least five of the judges of the Western Circuit also served as members of the U.S. House of Representatives, and a sixth (the one-legged Charles Tait) served as a U.S. Senator.
- At least 15 of the judges of the Western Circuit attended the

University of Georgia School of Law (known as the Department of Law until 1937) or some other unit of the University.

- At least three of the judges of the Western Circuit are eponymous. The City of Carnesville in Franklin County is named after Thomas P. Carnes. Clayton Street in Athens in Clarke County, the City of Clayton in Rabun County and Clayton County are named after Augustin Smith Clayton. Dougherty Street in Athens in Clarke County, and Dougherty County are named after Charles Dougherty. 



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Endnotes

1. GA. CONST. of 1777, art. XXXVI.
2. Act of Dec. 10, 1845, 1845 Ga. Laws 18.
3. Act of July 31, 1906, 1906 Ga. Laws 24.
4. See 1 WARREN GRICE, *THE GEORGIA BENCH AND BAR* 113 (1931).
5. *Id.*
6. Act of Feb. 9, 1797, § 2, in *A DIGEST OF THE LAWS OF THE STATE OF GEORGIA* 620 (photo reprint 1981) (Robert Watkins & George Watkins ed., Philadelphia, R. Aiken 1800).
7. Act of Mar. 18, 1976, § 1, 1976 Ga. Laws 563.
8. Act of Apr. 20, 1995, § 1, 1995 Ga. Laws 1079.
9. *Memorial of Hon. James Jackson*, 78 Ga. 807, 808 (1887).
10. *In Memoriam Chief Justice Richard Brevard Russell*, 188 Ga. 869, 873 (1939).
11. *Memorial of Hon. Andrew J. Cobb*, 162 Ga. 843, 845-46 (1927).
12. 122 Ga. 190, 50 S.E. 68 (1905).
13. 117 Ga. 305, 43 S.E. 780 (1903).
14. See, e.g., Andrew J. Cobb, *Patriotism*, in REPORT OF THE THIRTY-FIFTH ANNUAL SESSION OF THE GEORGIA BAR ASSOCIATION 170, 175 (1918) (“There can be no set of circumstances that will ever justify mob violence. . . . I do not care what crime is committed. I do not care who the perpetrator is or what race he belongs to. Any man or set of men who takes the life of another, whether black or white, except in the manner prescribed by law, and according to the due process of the courts, is a murderer in the sight of God and man.”).
15. 1 *DICTIONARY OF GEORGIA BIOGRAPHY* 265 (Kenneth Coleman & Charles Stephen Gurr ed., 1983).
16. *GEORGIA HISTORICAL MARKERS* 180 (1976).
17. There are numerous and varying accounts of Tait’s challenge to Dooly and resulting events. See, e.g., 2 LUCIAN LAMAR KNIGHT, *GEORGIA’S LANDMARKS, MEMORIALS, AND LEGENDS* 24-26 (1914); 2 *MEN OF MARK IN GEORGIA* 326 (William J. Northen ed., 1910).
18. See E. Merton Coulter, *A Famous Duel That Was Never Fought*, 43 GA. HIST. Q. 365 (1959).
19. *Thomas P. Carnes*, WIKIPEDIA, http://en.wikipedia.org/wiki/Thomas_P._Carnes (last modified Dec. 16, 2010).
20. See James H. Chadbourn, *Lynching and the Law*, 20 A.B.A. J. 71, 76 (1934).

Sen. Johnny Isakson and Jimmy Franklin Honored at State Bar Meeting

by Len Horton

Sen. Johnny Isakson and Georgia Bar Foundation Vice President Jimmy Franklin were honored at the summer Board of Governors meeting of the State Bar of Georgia for their roles in saving full IOLTA funding for low-income Georgians.

"Unlimited insurance on IOLTA trust accounts was coming to an end on Dec. 31, 2010, and many attempts had been made to save that insurance," said Aasia Mustakeem, president of the Georgia Bar Foundation (the Foundation). "Without the renewal of that insurance on those accounts, millions of dollars would have been transferred from these special accounts at smaller, local banks to much bigger national banks deemed too big to fail. This would have hurt community banks throughout America, law firms that had been using those banks and countless disadvantaged citizens who receive assistance because of the interest generated on those account balances throughout the nation."

Within hours before adjournment for the Christmas holidays, the U.S. Senate was deadlocked on solving this problem. Most supporters of the effort to save these charitable funds had given up hope. In fact several leaders of the fight emailed that the effort had failed and that it was time to go to plan B.

"That was when Jimmy Franklin called Sen. Isakson," Mustakeem continued. "Sen. Isakson used the Isakson magic to get unanimous support, which saved important sums of money from these accounts. Without Isakson, it absolutely would not have happened."

Unlimited insurance on these accounts had been scheduled to end before at the end of December, but the



Photo by Sarah I. Coole

Sen. Johnny Isakson addresses members of the Board of Governors after receiving the James M. Collier award at the Summer Meeting.

Dodd-Frank Act, which President Obama signed into law, accidentally omitted these accounts, causing the problem. This led lawyers nationwide to ask permission either to take money out of these accounts and keep it in non-interest-bearing checking accounts with unlimited FDIC insurance or to consider transferring it to much larger banks.

The impact on thousands of organizations would be devastating. In Georgia, shelters for battered women and their children would be hurt as would programs providing legal representation for low-income Georgians.

The only answer would be to modify the new Dodd-Frank law in the House and Senate, neither of which could agree on much of anything. And, given the limited time available, the modification of the law would have to be unanimous in the both the House and Senate.

After success in the House, the whole process ground to a halt in the Senate. The word went out that the valiant attempt to save these charitable dollars had failed. Sen. Isakson refused to accept the conventional thinking that the effort was over.

Working with Franklin, partner in Franklin, Taulbee, Rushing, Snipes & Marsh, LLC, in Statesboro to get the facts, Isakson intervened.

Isakson convinced his Senate colleagues to save the day and to create unanimity in a group that seldom agrees unanimously on anything.


"All I did was talk to a few folks," said Isakson.

"Sen. Isakson was the quarterback, and all I did was be the waterboy," said Franklin.

"Modesty aside," Mustakeem said, "Sen. Isakson's success in bringing his Senate colleagues on board was the single most important thing done to help law-related charities in Georgia in the last 20 years."

An official of the American Bar Association wrote in a personal thank you note, "This would definitely not have happened but for Sen. Isakson."

In recognition of this accomplishment, Mustakeem awarded each gentleman the James M. Collier award, the highest award of the Georgia Bar Foundation. The award recognizes the person who has done the most to assist the Foundation. It was the first time in Bar Foundation history that the award was presented to two people at the same time.

The Georgia Bar Foundation is the charitable arm of the Supreme Court of Georgia. It awards grants to law-related organizations that provide assistance to disadvantaged Georgians. 



Len Horton is the executive director of the Georgia Bar Foundation. He can be reached at hortonl@bellsouth.net.

Georgia Bar Foundation Awards \$399,732 in Grants

by Len Horton



The Georgia Bar Foundation awarded two organizations a total of \$399,732 at its annual grants meeting held on July 15. While it was far from the greatest financial support awarded to grantees at a grants meeting, it was very important.

"The low interest-rate environment has hurt the ability of IOLTA to support many grantees we have customarily supported," said Georgia Bar Foundation President Aasia Mustakeem. "So we agonized over how to award the limited funds and decided to focus on our core mission, which is supporting Atlanta Legal Aid and

Georgia Legal Services, our two major providers of legal assistance to the poor in Georgia."

According to an existing agreement between both organizations, Georgia Legal Services received 72 percent of the joint award for both organizations or \$287,807 and Atlanta Legal Aid received 28 percent or \$111,925.

A total of 27 law-related organizations asked for \$1,759,900. The resulting awards were the first time in several decades in which only two organizations received funding.

Given the significant support to which many legal nonprofits in Georgia had become accustomed over a period of 25 years, the actual support possible this year was what one trustee labeled, "Sad, very sad." Still, during the early days of IOLTA in Georgia, this low level of funding back then was thought to be large and very important to both Atlanta Legal Aid and Georgia Legal Services. Even though it was below what had come to be expected, funding for both organizations was very important, given the scarcity of funds and the increased number of people seeking assistance in this persistently depressed economy.

At the end of the meeting, Mustakeem was unanimously elected president of the Georgia Bar Foundation, succeeding Hon. Patsy Porter, chief judge of the state court of Fulton County.

According to Porter, "Aasia brings great experience to the job. I have learned that she is the only president ever to have served twice as both secretary and as treasurer in addition to being vice president. She will be a great president."

In addition to the election of Mustakeem as president, Jimmy Franklin was elected vice president, Hon. Bobby Chasteen was elected treasurer and Kitty Cohen was elected secretary.

The major challenge to this new leadership team is to expand support for law-related organizations throughout Georgia during a time of widespread reduced federal support and an extended period of near-zero interest rates on IOLTA accounts.

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Notice of Expiring BOG Terms

Listed below are the members of the State Bar of Georgia Board of Governors whose terms will expire in June 2012. These incumbents and those interested in running for a specific post should refer to the election schedule (posted below) for important dates.

Alapaha Circuit, Post 2..... Thomas C. Chambers III, Homerville
 Alcovy Circuit, Post 2..... Michael R. Jones Sr., Loganville
 Atlanta Circuit, Post 2..... Brian DeVoe Rogers, Atlanta
 Atlanta Circuit, Post 4..... Jeffrey Ray Kuester, Atlanta
 Atlanta Circuit, Post 6..... Dwight L. Thomas, Atlanta
 Atlanta Circuit, Post 8..... J. Robert Persons, Atlanta
 Atlanta Circuit, Post 10..... Myles E. Eastwood, Atlanta
 Atlanta Circuit, Post 12..... Elena Kaplan, Atlanta
 Atlanta Circuit, Post 14..... Edward B. Krugman, Atlanta
 Atlanta Circuit, Post 16..... Dawn Michele Jones, Atlanta
 Atlanta Circuit, Post 18..... Foy R. Devine, Atlanta
 Atlanta Circuit, Post 20..... William V. Custer IV, Atlanta
 Atlanta Circuit, Post 22..... Frank B. Strickland, Atlanta
 Atlanta Circuit, Post 24..... Joseph Anthony Roseborough, Atlanta
 Atlanta Circuit, Post 26..... Anthony B. Askew, Atlanta
 Atlanta Circuit, Post 28..... J. Henry Walker IV, Atlanta
 Atlanta Circuit, Post 31..... Viola Sellers Drew, Atlanta
 Atlanta Circuit, Post 33..... S. Kendall Butterworth, Alpharetta
 Atlanta Circuit, Post 35..... Terrence Lee Croft, Atlanta
 Atlanta Circuit, Post 37..... Samuel M. Matchett, Atlanta
 Atlanta Circuit, Post 38..... Michael Dickinson Hobbs Jr., Atlanta
 Atlanta Circuit, Post 40..... Leo E. Reichert, Marietta
 Atlantic Circuit, Post 1..... H. Craig Stafford, Hinesville
 Augusta Circuit, Post 2..... William James Keogh III, Augusta
 Augusta Circuit, Post 4..... William R. McCracken, Augusta
 Bell Forsyth Circuit..... Philip C. Smith, Cumming
 Blue Ridge Circuit, Post 1..... David Lee Cannon Jr., Canton
 Brunswick Circuit, Post 2..... J. Alexander Johnson, Baxley
 Chattahoochee Circuit, Post 1..... Joseph L. Waldrep, Columbus
 Chattahoochee Circuit, Post 3..... Peter John Daughtery, Columbus
 Cherokee Circuit, Post 1..... Randall H. Davis, Cartersville
 Clayton Circuit, Post 2..... Harold B. Watts, Jonesboro
 Cobb Circuit, Post 1..... Dennis C. O'Brien, Marietta
 Cobb Circuit, Post 3..... David P. Darden, Marietta
 Cobb Circuit, Post 5..... J. Stephen Schuster, Marietta
 Cobb Circuit, Post 7..... Andrew Woodruff Jones, Marietta
 Conasauga Circuit, Post 1..... James H. Bisson III, Dalton
 Coweta Circuit, Post 1..... Gerald P. Word, Carrollton

Dougherty Circuit, Post 1..... Joseph West Dent, Albany
 Douglas Circuit..... Robert J. Kauffman, Douglasville
 Eastern Circuit, Post 1..... Sarah Brown Akins, Savannah
 Eastern Circuit, Post 3..... Patrick T. O'Connor, Savannah
 Enotah Circuit..... Steven Keith Leibel, Dahlonega
 Flint Circuit, Post 2..... John Philip Webb, Stockbridge
 Griffin Circuit, Post 1..... Charles D. Jones, Griffin
 Gwinnett Circuit, Post 2..... Judy C. King, Lawrenceville
 Gwinnett Circuit, Post 4..... Gerald Davidson Jr., Lawrenceville
 Houston Circuit..... Carl A. Veline Jr., Warner Robbins
 Lookout Mountain Circuit, Post 1..... Archibald A. Farrar Jr., Summerville
 Lookout Mountain Circuit, Post 3..... Lawrence Alan Stagg, Ringgold
 Macon Circuit, Post 2..... Thomas W. Herman, Macon
 Member-at-Large, Post 3*..... Jeffery O'Neal Monroe, Macon
 Middle Circuit, Post 1..... John Kendall Gross, Metter
 Northeastern Circuit, Post 1..... Matthew Tyler Smith, Gainesville
 Northern Circuit, Post 2..... R. Chris Phelps, Elberton
 Ocmulgee Circuit, Post 1..... Wayne B. Bradley, Milledgeville
 Ocmulgee Circuit, Post 3..... Christopher Donald Huskins, Eatonton
 Oconee Circuit, Post 1..... James L. Wiggins, Eastman
 Ogeechee Circuit, Post 1..... Daniel Brent Snipes, Statesboro
 Out-of-State, Post 2..... Devereaux Fore McClatchey, Boston
 Paulding Circuit..... Martin Enrique Valbuena, Dallas
 Rockdale Circuit..... William Gilmore Gainer, Conyers
 Rome Circuit, Post 2..... David Clarence Smith, Rome
 South Georgia Circuit, Post 1..... George C. Floyd, Bainbridge
 Southern Circuit, Post 1..... James E. Hardy, Thomasville
 Southern Circuit, Post 3..... Gregory Tyson Talley, Valdosta
 Stone Mountain Circuit, Post 1..... Katherine K. Wood, Atlanta
 Stone Mountain Circuit, Post 3..... J. Antonio DelCampo, Dunwoody
 Stone Mountain Circuit, Post 5..... Amy Viera Howell, Decatur
 Stone Mountain Circuit, Post 7..... John G. Haubenreich, Atlanta
 Stone Mountain Circuit, Post 9..... Edward E. Carriere Jr., Decatur
 Tallapoosa Circuit, Post 2..... Brad Joseph McFall, Cedartown
 Tifton Circuit..... Render Max Heard Jr., Tifton
 Waycross Circuit, Post 1..... Douglass Kirk Farrar, Douglas
 Western Circuit, Post 2..... Edward Donald Tolley, Athens
 *Post to be appointed by President-Elect

State Bar of Georgia 2012 Election Schedule

OCT Official Election Notice, October Issue *Georgia Bar Journal*
DEC 2 Nominating petition package mailed to incumbent Board of Governors Members and other members who request a package
JAN 5-7 Nomination of Officers at Midyear Board Meeting, Loews Atlanta Hotel
JAN 31 Deadline for receipt of nominating petitions for incumbent Board members including incumbent nonresident (out of state) members

MAR 2 Deadline for receipt of nominating petitions for new Board Members including new nonresident (out of state) members
MAR 16 Deadline for write-in candidates for Officer to file a written statement (not less than 10 days prior to mailing of ballots (Article VII, Section 1 (c))
MAR 29 Ballots mailed
APR 30 11:59 p.m. Deadline for ballots to be cast in order to be valid
MAY 4 Election service submits results to the Elections Committee
MAY 11 Election results reported and made available



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Kudos

> **Hon. Glen E. Ashman** was presented with the **Special Recognition Award** from the **Georgia Council of Municipal Court Judges** "for years of tireless dedication in producing and editing the municipal judges *Benchbook*." *The Benchbook*, updated annually, is used by all of Georgia's municipal court judges. Ashman has served as a judge of the Municipal Court of East Point since 1988, and has been in solo law practice in East Point, focusing on family law and bankruptcy since 1980.

>



Vayner



Pequignot



Perez



Street



Sweeney



White

Kilpatrick Townsend & Stockton announced that associate **Sabina Vayner** was selected to serve on the **University of Georgia's Terry College of Business Young Alumni Board** for a

two-year appointment.

Associate **Andrew Pequignot**, of the firm's intellectual property department, was elected to serve as **co-chair** of the **Southeast Chapter of the Copyright Society of the USA**. Founded in 1953, the prestigious society works to advance the study and understanding of copyright law and the scope of rights in literature, music, art, theater, motion pictures, television, computer software, architecture and other works of authorship.

Associate **Adria Perez** was selected to participate in the **LEAD Atlanta Class of 2012**. Through personal and professional development and broad exposure to the community, LEAD Atlanta aims to equip young leaders early in their careers with the skills and knowledge needed to be effective leaders committed to the common good.

Partner **Phillip Street** was elected to serve a two-year term on the **Board of Directors of the Council for Entrepreneurial Development (CED)**, a private, nonprofit organization that promotes entrepreneurial efforts in North Carolina. CED was established in 1984 to identify, enable and promote high-growth, high-impact companies and accelerate the entrepreneurial culture of the Research Triangle and North Carolina.

Partner **Greg Cinnamon** was elected **president** of the Atlanta chapter of the **Association for Corporate Growth (ACG)**. ACG is the global community for

middle market mergers & acquisitions dealmakers and business leaders focused on driving growth. Cinnamon previously served ACG Atlanta as its executive vice president and chair of ACG Atlanta's Georgia Fast 40 Awards Dinner and Gala.

Partner **Neal Sweeney** announced the release of the **2011 Construction Law Update**. The 2011 edition marks his 20th year as editor of this highly regarded resource created to discuss important legal impacts on the construction industry. The *Construction Law Update* chronicles the important developments and trends that impact construction law practitioners and industry decision makers.

Wilson White, an attorney in the firm's intellectual property department, was elected to serve as **vice-chair** of the **Board of Partnership Against Domestic Violence (PADV)**. He is the first male in the organization's 35-year history to serve in this role. PADV, the largest nonprofit domestic violence organization in Georgia, provides professional, compassionate and empowering support to battered women and their children in metro-Atlanta.

>



Ford & Harrison LLP announced that **John F. Allgood** was elected to the **Board of Directors of the Atlanta Bar Association's Dispute Resolution Section**. Allgood will be responsible for encouraging the participation of members of the Atlanta Bar Association in the activities of the organization including service to alternative dispute resolution and service to the public; communicating the official position of the section; and coordinating the efforts of the younger members of the Atlanta Bar Association in promoting the welfare of the Atlanta community.

>



Casey



Osterbrock

Locke Lord Bissell & Liddell partner **Brian T. Casey** was named to the **Georgia State University Risk Management Foundation Board of Trustees** for a three-year term. The 52-year-old


public foundation raises funds, helps retain top faculty and awards scholarships for one of the country's leading academic risk management programs.


William M. Osterbrock is the new **chair** of the **Atlanta Bar Association's Corporate Counsel Section** for 2011-12. Osterbrock is a member of the firm's corporate and corporate insurance practice groups.

>

Susan R. Boltacz, group vice president and director of tax information reporting for SunTrust Bank, was appointed by the **Internal Revenue Service** as


a member of the **Information Reporting Program Advisory Committee (IRPAC)**. The IRPAC was established in 1991 and focuses on information reporting issues.

- >  **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, named **Valerie P. King** its **Atlanta Pro Bono Attorney of the Year**. Of counsel in the firm's Atlanta office, King was recognized for her pro bono efforts through direct work with clients and through support and advocacy for organizations dedicated to pro bono services. King was also the recipient of the **State Bar of Georgia's 2011 A Business Commitment (ABC) Pro Bono Business Award**.


- >  **Carlton Fields** announced that **Nestor J. Rivera**, of counsel in the firm's Atlanta office, was reappointed to a third term as **co-chair** of the **Health Law Litigation Committee of the American Bar Association's (ABA) Section of Litigation**. Additionally, Rivera was appointed to the **ABA's Special Committee on Bioethics and the Law**. Both appointments are one-year terms.


- > Attorney **Elizabeth Ann "Betty" Morgan** of Atlanta was certified as a **life member** of both the **Million Dollar Advocates Forum** and the **Multi-Million Dollar Advocates Forum**. The Million Dollar Advocates Forum is recognized as one of the most prestigious groups of trial lawyers in the United States. Membership is limited to attorneys who have won million and multi-million dollar verdicts, awards and settlements.


- > **W. Scott Creasman** of **Taylor English Duma LLP** was named **president** of the **Lawyer's Club of Atlanta**, an organization founded in 1922 by a small coalition of lawyers who sought to improve conduct standards in Atlanta's legal profession. The 1700-member club strives to continue that mission today while providing an opportunity for Atlanta attorneys to socialize with colleges in a relaxed atmosphere.

- >  **Miller & Martin** attorney **Curtis J. Martin II** was selected as one of the **Atlanta Business League's 2011 Men of Influence**. The annual list reflects the names of African-American men in metro-Atlanta who have reached senior level positions within their profession; are leading entrepreneurs in their industry; have proven histo-

ry-making feats; or have attained the ability to influence large public bodies politically and in government. In addition to professional accomplishments, the Men of Influence have demonstrated their commitment to the citizens of metro-Atlanta by maintaining significant involvement and participation in community and civic activities.


- >  The **American Association for Justice** and the **National College of Advocacy** recognized **Morgan Adams** as a **diplomat of trial advocacy** for his commitment to improving practical knowledge of trial skills and substantive law, and his dedication, commitment and enthusiasm in teaching and pursuing advanced legal education. Fewer than 200 lawyers in the United States have earned this designation.


- >  **Clark Wilson**, an associate patent attorney at **Gardner, Groff, Greenwald & Villanueva PC** in Atlanta, announced his **certification in intellectual property law** by the **Board of Legal Specialization & Education** of the **Florida Bar**. Certification is the highest level of evaluation by the Florida Bar of competency and experience within an area of law, and professionalism and ethics in practice.

- >  **Gary E. English**, an attorney with **Tecklenburg & Jenkins, LLC**, in Charleston, S.C., was elected to the **Maritime Association of South Carolina's Board of Directors**. The Maritime Association of South Carolina has been actively promoting the interests of the Port of Charleston since 1926. Today, it contributes to the growth and success of port-related businesses throughout the state.


- >  **Randi Engel Schnell**, a partner at **Bondurant Mixson & Elmore** in Atlanta, received the **Virginia S. Mueller Outstanding Member Award** from the **National Association of Women Lawyers (NAWL)**. She is also co-chair of NAWL's Mentorship Committee. At Bondurant Mixson, Schnell represents both plaintiffs and defendants in trial and appellate litigation and alternative dispute resolution in cases involving breach of contract, intellectual property, business torts and financial institutions litigation. She is also a certified mediator who is a registered neutral with the Georgia Office of Dispute Resolution.

- > **Ramona Murphy Bartos** was selected as the new **deputy state historic preservation officer of North Carolina** and **administrator of the State Historic Preservation Office**, located in Raleigh, N.C. The Historic Preservation Office identifies, protects and enhances historic properties and districts through tax incentives and technical assistance for public and private property owners, including maintenance of the National Register of Historic Places and regulatory review of government actions affecting historic resources.


- >  **Bachara Construction Law Group** announced that **Brian Crevasse**, an associate with the firm, achieved **board certification** by the Florida Bar in **construction law**. Board certification recognizes an attorney's special knowledge, skills and proficiency in construction law, as well as professionalism and ethics in practice. It is the Florida Bar's highest level of recognition for competence and experience.

- >  **Hull Barrett, PC**, announced that **Brooks K. Hudson**, an associate in the firm's litigation department, was selected to the **Augusta Metro Chamber of Commerce's Leadership Augusta Class of 2012**. Established in 1980, Leadership Augusta is an affiliate of the Augusta Metro Chamber of Commerce that enhances the civic participation of emerging leaders within the region.


- > The **American Bar Association** appointed **Johannes S. Kingma**, partner with **Carlock, Copeland & Stair, LLP**, and chair of the firm's commercial litigation practice group, as a member of the **American Bar Association Tort Trial & Insurance Practice Section (TIPS) Ethics and Professionalism Committee**; as well as **TIPS section liaison** to the ABA Standing Committee on Lawyers Professional Liability for 2011-12. Kingma has held both of these positions since 2009.

- >  The **Savannah-Chatham County Board of Public Education** selected **HunterMaclean** partner **Shawn A. Kachmar** to join the board, which is devoted to promoting excellence at area public schools. Kachmar fills the board seat left vacant when Gov. Nathan Deal appointed Greg Sapp as a state court judge. He will serve the remaining 18 months of Sapp's term as the public school board's 4th District representative.

- > Macon attorney **Christopher N. Smith** was formally presented to **Her Majesty Queen Margrethe II** at a black tie dinner at the Danish Ambassador's residence in Washington, D.C. Smith also serves as the **honorary consul of the Kingdom of Denmark** and recently presented on public diplomacy at the Danish Embassy in Washington.

- >  Savannah City Attorney **James Blackburn** was named the **Savannah Bar Association's** recipient of the **Judge Frank Cheatham Professionalism Award** for 2011. The award is presented annually to an attorney who best represents the high standard of conduct set by the late Judge Cheatham, who served for more than three decades as a Chatham County Superior Court judge.

- > The **Multi-Bar Leadership Council** presented **Lori Lynch Garrett**, vice president and managing director of the **Southeast Region Minority Corporate Counsel Association**, with the **Seth Kirschenbaum Diversity Award** at a reception on Oct. 1. The award is presented annually to a member of the Bar who embodies the council's mission of fostering meaningful and positive interaction among diverse members.

- >  **Brian D. Burgoon**, sole practitioner with The Burgoon Law Firm, LLC, in Atlanta, focusing on civil and business litigation, was appointed to serve as **co-chair** of the **Florida Bar Disciplinary Review Committee**, which oversees the prosecution and appeals of disciplinary offenses committed by Florida lawyers. Burgoon was also selected to serve on the **Florida Bar Executive Committee**.

- >  **Michael Hollingsworth**, managing partner of Nelson Mullins Riley & Scarborough's Atlanta office, joined the **executive board of Dan Uggle's Diamonds in the Rough Foundation**. The organization provides opportunities, support and resources to children and families in need. Established in 2011 by the Atlanta Braves second baseman, Diamonds in the Rough focuses on improving the lives of low-income Atlanta-area children by providing daily support and life changing experiences.

- > **Mark S. Kashdan**, senior attorney with the **Health & Human Services Office of the General Counsel, Centers for Disease Control & Prevention**, announced his membership on the **Board of Directors of Embraced Atlanta**. Embraced is an Atlanta-based

nonprofit organized to distribute slightly used or surplus orthopedic and prosthetic devices to people otherwise unable to access or afford them in the United States and around the world.

>



Adams



Shigley

Hon. Gregory A. Adams, superior court judge, Stone Mountain Judicial Circuit, and **Kenneth L. Shigley**, president of the State Bar of Georgia, were sworn in as members of the **Georgia**

Commission on Dispute Resolution in September by Supreme Court of Georgia Justice Hugh P. Thompson. The commission is the policy-making body appointed by the Court to oversee the development of court-connected alternative dispute resolution programs in Georgia.

On the Move In Atlanta

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Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announced the addition of **Sarah-Nell Walsh** to its Atlanta office. Walsh joined the firm as an **associate** with experience in business and commercial litigation. The firm is located at Monarch Plaza Suite 1600, 3414 Peachtree Road NE, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501; www.bakerdonelson.com.

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Michael Lueder joined **Locke Lord Bissell & Liddell LLP** as **of counsel** in the firm's Atlanta office. Lueder joined as part of the energy, corporate and administrative/regulatory practice groups. The firm is located at Terminus 200, Suite 1200, 3333 Piedmont Road NE, Atlanta, GA 30305; 404-870-4600; Fax 404-872-5547; www.lockelord.com.

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Prof. Robert A. Schapiro was appointed **interim dean** of **Emory University School of Law**. A member of the Emory Law faculty since 1995, Schapiro is a leading constitutional scholar, with particular expertise in federalism and state constitutional law. Emory University School of Law is located at 1301 Clifton Road, Atlanta, GA 30322; 404-727-6123; www.law.emory.edu.

>

Alston & Bird announced that **Cliff Stanford**, a 15-year veteran of the Federal Reserve Bank of Atlanta, joined the firm as **counsel** in its financial services and products group. The firm is located at One Atlantic

Center, 1201 W. Peachtree St., Atlanta, GA 30309; 404-881-7000; Fax 404-881-7777; www.alston.com.

>



The Strickland Law Firm PC, a technology and intellectual property law firm, announced the opening of its Atlanta office. The firm focuses on open source software, technology transactions, patents and patent monetization, intellectual property litigation, privacy and mergers and acquisitions. **Jackquelyn Strickland** is the **managing partner**. The firm is located at 235 Peachtree St. NE, Suite 400, Atlanta, GA 30303; 404-969-1213; Fax 404-880-3374; www.thestricklandlawfirm.com.

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Burr & Forman LLP announced that **Monika D. Vyas** joined the firm as **associate** in the general commercial litigation practice group. Her practice focuses on complex civil litigation and legal strategy in state and federal courts. The firm is located at 171 17th St. NW, Suite 1100, Atlanta, GA 30363; 404-815-3000; Fax 404-817-3244; www.burr.com.

>

Gonzalez Saggio & Harlan LLP welcomed **Jonathan D. Goins** as a **partner** in the firm's intellectual property group. Goins focuses his practice in the areas of trademarks, copyrights and trade secrets. The firm is located at 3353 Peachtree Road NE, Suite 920, Atlanta, GA 30326; 404-869-1545; Fax 404-842-1722; www.gshllp.com.

>




Ogletree, Deakins, Nash, Smoak & Stewart, P.C., welcomed **Sarah Hawk** as a **shareholder** to the firm's Atlanta office. Previously, Hawk was a partner with Fisher & Phillips LLP. Hawk focuses her practice exclusively on immigration matters and advising clients on current immigration legislation. The firm is located at 191 Peachtree St. NE, Suite 4800, Atlanta, GA 30303; 404-881-1300; Fax 404-870-1732; www.ogletreedeakins.com.


>




Carlock Copeland & Stair, LLP, hired **Thomas A. Cox** to lead its newly established **education law & litigation practice**. The practice area will focus on representation of public and private schools, school systems and other educational institutions in significant litigation matters involving diverse issues, including student rights, education of students with disabilities, employment law, construction and contract disputes, compliance with federal laws, open records and open meetings

issues, and legal issues relating to charter schools. The firm is located at 191 Peachtree St. NE, Suite 3600, Atlanta, GA 30303; 404-522-8220; Fax 404-523-2345; www.carlockcopeland.com.

>  **Weissman, Nowack, Curry & Wilco, P.C.**, announced that **Bradley A. Hutchins** joined the firm's litigation practice as **of counsel**. Hutchins focuses his practice on representing closely held businesses in litigation and with their transactional needs. The firm is located at One Alliance Center, 4th Floor, 3500 Lenox Road, Atlanta, GA 30326; 404-926-4500; Fax 404-926-4600; www.wncwlaw.com.


>  **Moore & Reese, LLC**, announced that **Mindy C. Waitsman** joined their office as **of counsel** to the firm's community association and corporate practice areas. Waitsman previously practiced with Weissman, Nowack, Curry & Wilco, P.C. The firm is located at 2987 Clairmont Road, Suite 440, Atlanta, GA 30329; 770-457-7000; Fax 770-455-3555; www.mooreandreese.com.



>  **Davis, Matthews & Quigley, P.C.**, announced that **Sabrina Nizam** joined the firm as an **associate** in the domestic relations and family law group. She represents clients in all aspects of family law including divorce, child custody disputes, modification of child support and alimony and related domestic issues. The firm is located at Fourteenth Floor Lenox Towers II, 3400 Peachtree Road NE, Atlanta, GA 30326; 404-261-3900; Fax 404-261-0159; www.dmqlaw.com.

>  **The Law Offices of Darwin F. Johnson, LLC**, announced that **Michael J. Foglio** joined the firm as an **associate**. Foglio focuses his practice on the representation of plaintiffs in workers' compensation cases. The firm is located at Harris Tower, Suite 850, 233 Peachtree St. NE, Atlanta, GA 30303; 404-521-2667; Fax 404-525-2017; www.gaworkerscomlawyers.com.


>   **Pursley Lowery Meeks, LLP**, announced that **Janine D. Willis** and **Amanda N. Wilson** joined the Atlanta office as **associates**. Willis is a member of the firm's labor and employment and general litigation groups. Wilson is a member of the health

care and general litigation groups. The firm is located at 260 Peachtree St., Suite 2000, Atlanta, GA 30303; 404-880-7180; Fax 404-880-7199; www.plmllp.com.

>  **Autry, Horton & Cole, LLP**, announced that **David R. Cook Jr.** was named a **partner** in the firm. Cook's practice focuses on construction, energy and tax law, with specialties in the development of renewable energy projects and public owner construction matters. The firm is located at 3330 Cumberland Blvd., Suite 925, Atlanta, GA 30339; 770-270-6974; Fax 770-818-4449; www.ahclaw.com.

>   **Christopher J. Willis** joined **Ballard Spahr** as a **partner** in the Atlanta office. Willis' practice is focused on complex litigation, including consumer financial services class actions, employment class and collective actions, complex business/contract litigation and arbitration, and securities litigation. **Stefanie H. Jackman** joined the firm as an **associate** in the litigation department. Jackman is a member of the complex commercial litigation group as well as the consumer financial services practice. Both Willis and Jackman were previously at Rogers & Hardin LLP in Atlanta. The firm is located at 999 Peachtree St., Suite 1000, Atlanta, GA 30309; 678-420-9300; Fax 678-420-9301; www.ballardspahr.com.

> **Reuben Mann** announced the formation of **Tax In-House, LLC**. The firm provides tax preparation, tax representation and accounting services specifically tailored to attorneys, real estate professionals, doctors and therapists. Tax In-House can be reached at P.O. Box 11854, Atlanta, GA 30355; 404-537-3000; Fax 888-404-2529; www.taxinhouse.com.

>  **Rayford Taylor** joined **Casey Gilson P.C.** in Atlanta as **of counsel**. Taylor's practice focuses on workers' compensation defense and appellate law. His practice also includes administrative and governmental law and legislation consultation. The firm is located at Six Concourse Parkway, Suite 2200, Atlanta, GA 30328; 770-512-0300; Fax 770-512-0070; www.caseygilson.com.

> **Robert C. Schock** announced the relocation of his office. Schock continues handling immigration and naturalization cases and has more than 37 years of experience. His new office is located

at 2974 Westminister Circle NW, Atlanta, GA 30327; 404-355-5319.

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Intellectual property attorney **Stephen Schaetzel** joined **McKeon, Meunier, Carlin & Curfman, LLC**, as a **principal**, adding to the intellectual property firm's growing litigation practice. Schaetzel was previously with King & Spalding.

The firm is located at 817 W. Peachtree St., Suite 900, Atlanta, GA 30308; 404-645-7700; Fax 404-645-7707; www.m2iplaw.com.

In Columbus

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Page, Scrantom, Sprouse, Tucker & Ford, P.C., announced that **Forrest Lee Champion III** joined the firm as a **partner** representing clients in the areas of general corporate, real estate, banking, mergers and acquisitions, estates and trusts, leasing and tax. The firm is located at 1111 Bay Ave., Third Floor, Columbus, GA 31901; 706-324-0251; Fax 706-243-0417; www.columbusgalaw.com.

In Cumming

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Zeliff



Watson

Peter Zeliff and **Evan A. Watson** announced the formation of **Zeliff & Watson, LLC**, a Forsyth County DUI and criminal defense practice. The firm is located at 351-A Dahlonga St.,

Cumming, GA 30040; 770-887-3720; Fax 770-887-3729; www.zwdefense.com.

In Savannah

>



Jefferson



Galis



Fenstermacher

HunterMaclean announced that associate **Shonah P. Jefferson** was designated as **counsel** in the firm's real estate practice group. Jefferson originally started at HunterMaclean in 2005, representing for-profit and nonprofit developers in the area of multi-family housing development. **Allan C. Galis** joined the firm as an **associate** in the specialty litigation group. Before joining HunterMaclean, Galis served as an associate at a Brunswick law firm where he practiced corporate, trust and estate law. **David Fenstermacher** joined the firm as **counsel** in the corporate/health care practice group. Before joining

HunterMaclean, Fenstermacher served as a partner at Parker, Hudson, Rainer & Dobbs in Atlanta, where he practiced law since 1995. His health care regulatory background includes Certificate of Need regulations, medical staff matters, Medicare/Medicaid, Stark law, HIPAA and litigation experience. The firm is located at 200 E. Saint Julian St., Savannah, GA 31401, 912-236-0261; Fax 912-236-4936; www.huntermaclean.com.

In Charlotte, N.C.

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James M. Spielberger announced the formation of **McGrath & Spielberger, PLLC**. The firm practices in the areas of business and contract law, consumer law, debt negotiation, mortgage loan modification, foreclosure negotiation, property tax appeals, wills, business litigation, civil litigation, commercial debt collection, mergers and acquisitions, small business financing and lease review and negotiations. The firm is located at 3440 Toringdon Way, Suite 208, Charlotte, NC 28277; 800-481-2180; Fax 800-962-7158; mcgrathspielberger.com.

In Winston-Salem, N.C.

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Craige Brawley Liipfert & Walker LLP announced that **Robert H. Wall** joined the firm. Wall's practice areas include taxation, corporate law, nonprofit and tax exempt organization law, estate administration and estate planning. The firm is located at 110 Oakwood Drive, Suite 300, Winston-Salem, NC 27103; 336-725-0583; Fax 336-725-4677; www.craigebrawley.com.

WANT TO SEE YOUR NAME IN PRINT?

If you are a member of the State Bar of Georgia and you have moved, been promoted, hired an associate, taken on a partner or received a promotion or award, we would like to hear from you.

For more information, please contact
Stephanie Wilson, 404-527-8792
or stephaniew@gabar.org.

Let 'Em Talk

by Paula Frederick

I know what you're up to," opposing counsel accuses. "You're trying to get my client to settle behind my back! I can't *believe* you sent Marley to try to sweet talk my client out of more money!"

"Huh?" you reply, with your usual eloquence. "I take it my client talked to your client and you think I had something to do with it?"

"Didn't you?" opposing counsel asks. "Marley even gave my client a settlement agreement that you had drafted! Good thing he had enough sense to call me before he signed it!"

"Marley did tell me he planned to talk to your client," you admit. "He figured they would see each other at church, and he asked whether it was OK to talk without the lawyers present. I didn't know he planned to take the draft settlement agreement, though."

"I'm going to call the Bar on you," opposing counsel threatens.

"Fine! I didn't do anything wrong," you respond. Did you?


Bar rules prevent a lawyer from communicating with a person who is represented by counsel when the lawyer represents an adversary. The rule is designed to prevent interference with the client/lawyer relationship, and to ensure that a lawyer does not take advantage of a layperson who has not had the opportunity to consult with their lawyer.

But what about coaching a client and sending her to negotiate a settlement agreement with the other side, without notifying opposing counsel? Wouldn't that amount to violating the rules through the acts of another?

A new Formal Opinion by the American Bar Association¹ describes a lawyer's ability to advise a client regarding the substance of proposed communication with a represented person.

The ABA opinion recognizes that it is often helpful for parties to discuss a matter directly with each other. While a lawyer may not "script" or "mastermind" such communication, it is not unethical to give the client advice about it. The lawyer may even provide the client with talking points or documents to use or present to the other side.



The opinion cautions that a lawyer crosses the line when she assists the client in securing an enforceable obligation, encourages the represented person to disclose confidential information or obtains admissions against interest without giving the represented person the opportunity to seek advice from counsel. 



Paula Frederick is the general counsel for the State Bar of Georgia and can be reached at paulaf@gabar.org.

Endnote

1. Formal Opinion 11-461, Advising Clients Regarding Direct Contacts with Represented Persons, was issued Aug. 4, 2011. It is available on the ABA website at http://www.americanbar.org/groups/professional_responsibility.html.

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Discipline Summaries

(June 9, 2011 through Aug. 10, 2011)

by Connie P. Henry

Voluntary Surrender/Disbarments

Anthony O'Dell Lakes

Norcross, Ga.

Admitted to Bar in 1995

On June 13, 2011, the Supreme Court of Georgia disbarred attorney Anthony O'Dell Lakes (State Bar No. 431153). The following facts are deemed admitted by default:

Lakes was hired to represent clients in connection with their sale of stock ownership in a restaurant. The buyer purchased the business for \$224,000, financed by a promissory note, stock pledge and security agreement. When the buyer defaulted, Lakes collected all but \$22,000 of the unpaid balance. In December 2008, Lakes left the firm and took the clients' file with him. In January 2009 he collected \$16,000 from the buyer, but failed to account for those funds, promptly deliver them to the clients or place the funds in his trust account. Instead, he commingled the clients' funds with his own and converted the funds to his own use. Lakes promised the clients' new attorney that he would return the file, but never did so.

Edward Herman Warnock

McRae, Ga.

Admitted to Bar in 1961

On June 27, 2011, the Supreme Court of Georgia disbarred attorney Edward Herman Warnock (State Bar No. 738100). Warnock was retained by a client and the client's mother to represent them in two civil actions in which they had been sued. Warnock did not file answers by the due date of July 11, 2008. On July 14, 2008, Warnock prepared answers and

gave them to the client to file. Warnock instructed the client to ask the clerk of the court if costs were due. The clerk informed the client that he believed the answers were timely and that no costs were due. Warnock made no attempt to determine whether this information was correct and because the answers were not timely and costs were due, the clients were in default. Warnock appeared at a calendar call on Jan. 6, 2009. That day the trial court entered a default judgment against the client's mother for \$50,653.56, plus interest and costs, and against the client for \$159,188.86, plus interests and costs. Warnock told the client that the cases had been continued until the following month. The client learned of the default judgments from the clerk of the court. Warnock prepared, but did not file, a motion to set aside the defaults supported by an affidavit signed by the client. Warnock forged the notary's signature on the affidavit. The clients discharged Warnock and obtained new counsel, who moved to open the defaults and set aside the judgments, but the trial court denied the motions.

Warnock submitted a signed response to the State Bar but forged the notary's signature. The Court found in aggravation of discipline that Warnock had multiple past disciplinary offenses and that he refused to acknowledge the wrongful nature of his conduct.

Suspensions

Judy Lynn Junco

Savannah, Ga.

Admitted to Bar in 2003

On June 13, 2011, the Supreme Court of Georgia suspended attorney Judy Lynn Junco (State Bar No.

405597) indefinitely. The following facts are deemed admitted by default:

A client retained Junco in 2004 regarding two charges for driving under the influence and paid her \$4,000 for legal fees and expenses. Junco did not file an entry of appearance or any pleadings and failed to appear at the hearing. The client was not able to communicate with Junco and eventually learned that the court ruled against him. The client also lost the \$2,300 he posted for bond because neither he nor Junco appeared to answer the charges. The Court allowed the client to re-open his case, but he incurred a \$150 re-docketing fee. Subsequently Junco informed the client that she would ask the judge to re-open the case, waive the re-docketing fee and allow a plea in absentia, but she never did so.

Prior to reinstatement Junco must prove to the Review Panel that she has reimbursed the client \$6,450, and that she has received certification from a board certified psychiatrist that she is mentally competent to practice law.

Fred T. Hanzelik

Chattanooga, Tenn.

Admitted to Bar in 1976

On June 13, 2011, the Supreme Court of Georgia suspended attorney Fred T. Hanzelik (State Bar No. 323950) for a period of 30 days. Hanzelik received a public censure and a 30-day suspension in the state of Tennessee based on his failure to account for funds held in a fiduciary capacity in one case, and failure to keep his client informed and to disclose a personal conflict of interest in another matter. Georgia does not have the identical discipline, but the Court agreed that a 30-day suspension is substantially similar to the discipline imposed in Tennessee.

Brett Jones Thompson

Ellijay, Ga.

Admitted to Bar in 2001

On June 27, 2011, the Supreme Court of Georgia suspended attor-

ney Brett Jones Thompson (State Bar No. 126438) for three months. Respondent pled guilty in 2010 to two misdemeanor violations of tampering with evidence and obstruction of a law enforcement officer. Thompson filed a petition for voluntary discipline seeking the imposition of a public reprimand up to a 12-month suspension.

A title examiner in Thompson's office informed her that she was going to work for another real estate attorney in the same town. A dispute arose over a non-compete agreement. The title examiner denied such an agreement existed and enlisted the help of the district attorney's office and law enforcement officers. Thompson did not voluntarily provide the non-compete agreement to investigators. When informed that law enforcement officers had a search warrant, she informed them she had given it to her attorney. After Thompson's attorney confirmed he had the original document, investigators obtained a subpoena directed to the attorney. The attorney filed a motion to quash and explained that he had returned the original document to Thompson. Investigators then searched Thompson's office and did not find the document.

The state obtained an order requiring the production of the document, and holding Thompson in civil contempt, and brought the criminal charges. The title examiner initiated a civil suit against Thompson. The criminal and civil matters were resolved by entry of the guilty pleas and settlement of the civil suit. Thompson entered guilty pleas after defense counsel found that a misdemeanor conviction for obstruction of an officer does not involve moral turpitude and after the State Bar advised her that her pleas would not subject her to any disciplinary action because they did not involve a client and did not involve matters of moral turpitude. A condition of probation was that Thompson pay substantial restitution to the title

examiner, which she paid after she obtained an advance of \$55,000 on a line of credit.

The Court considered in mitigation that Thompson had no prior discipline, and that during the relevant time period she experienced personal and emotional problems. The Court also found that Thompson has primary custody of her two minor children and carries the primary responsibility for their financial needs; that she made a good faith effort to rectify the consequences of her conduct; that she paid restitution; and that she complied with the Court's civil contempt order. Thompson displayed a cooperative attitude, exhibits good character and reputation in her community, and is deeply remorseful for her conduct.

Review Panel Reprimands

Scott Richard King

Atlanta, Ga.

Admitted to Bar in 1995

On June 27, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of attorney Scott Richard King (State Bar No. 421345) and ordered that he be administered a Review Panel reprimand. King was hired to represent a client in a civil action in which he had been sued on a bond. King filed an answer and third-party complaint and communicated with the client regarding discovery. King's assistant misaddressed two letters to the client regarding the motion for summary judgment filed by the plaintiff. The client did not receive the letters and because he did not contact King about the motion, King assumed that he had no further interest in defending the case. Thus, King did not respond to the motion. The trial court entered judgment against King's client in the amount of \$25,382.40. King thereafter effectively withdrew from representing the client, but did not notify the client and did not seek permission from the

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- Verbal and written recommendations regarding counseling/treatment to the person receiving treatment.

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court to withdraw. King did not notify the client of the judgment. After the client learned of the judgment against him, his brother, who is an attorney, contacted King to obtain the case file in March 2010. King did not return the file until August 2010.

In mitigation, King stated that other than an Investigative Panel reprimand in 2008, he has no other prior disciplinary record. He also stated that the client had no viable defense to the motion for summary judgment, but acknowledged that this belief did not excuse his actions, and stated that the client had a viable third-party complaint, which remains pending. He also stated that he provided the name of his malpractice insurance carrier to the client's counsel, that he is remorseful and that he cooperated with the State Bar.

Kelly Lynn Turner

Cumming, Ga.

Admitted to Bar in 1998

On July 11, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of attorney Kelly Lynn Turner (State Bar No. 231398) and ordered that she be administered a Review Panel reprimand. Turner represented a client in divorce and domestic-relations matters from 2001 to 2006 at the rate of \$225 per hour. During the 2006 divorce trial a detailed statement of charges at the \$225 rate was admitted as evidence through the client's testimony. Before the final decree was signed, Turner met with the client and dismissed fees owed. During the discussion, the client asked Turner to accept a pool table in lieu of some of the fees but Turner declined because she had agreed to reduce her rate to \$190 per hour. Turner provided the client with a corrected statement of charges at the new hourly rate of \$190 per hour and a copy of the check made payable to Turner and paid from Turner's IOLTA account for the balance of fees owned. In 2008, the client filed a grievance

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claiming she was not given credit for all payments, and that Turner had agreed to accept a pool table and reduce her fees to \$125 per hour. After the Bar issued a Notice of Investigation, Turner remitted the amount of reimbursement from money held in her IOLTA account, giving the client credit for two payments that she previously had not credited and reducing the hourly rate to \$190 per hour, which check the client cashed in full settlement. In a supplemental response to the Bar, Turner admitted that when she had retrieved the client's files from storage and discovered that the contract for legal services at \$225 per hour was missing, she became furious because she knew the client had taken it while retrieving personal documents from the file. Turner admitted that, in her fury and in an exercise of poor judgment, she created a contract for legal services and sent that to the client with a letter explaining the final bill in hopes of ending the dispute.

In mitigation of discipline, Turner stated she was remorseful and ashamed of her conduct; that she had never been a party to any other disciplinary proceedings; that she fully cooperated with the Bar; that the client accepted complete reimbursement and was given full credit for payments not previously credited; and that she was sorry for any grief that she caused the client.

Interim Suspensions

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since June 8, 2011, one lawyer has been suspended for violating this Rule and one has been reinstated. 



Connie P. Henry is the clerk of the State Disciplinary Board and can be reached at connieh@gabar.org.

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Protecting Your Law Firm: Tips to Keep You and Your Business Safe

by Natalie R. Kelly

A recent topic of discussion among my colleagues has been solutions for dealing with multiple law office break-ins in one West Coast community. While the incidents are far from uncommon for law offices, it reminded me that lawyers should be mindful of safety both on a personal and business level. Not to mention the need for protection from any number of natural disasters that could affect law offices from coast to coast.

Following is a series of tips and tools to aid you in creating routines and safeguards to deal with potential threats and dangerous situations for you and your law practice.

Set up a working disaster recovery plan. The real problem with disaster recovery planning is that its effectiveness can only really be tested after a disaster occurs. However, you should most definitely have a plan and be sure to test and review it in light of any disastrous or dangerous situation. For working sample plans and additional planning tips, you can search online at the Federal Emergency Management Agency and American Bar Association websites—www.fema.gov and www.americanbar.org, respectively.

Outfit your practice with good people. Hire smart with thorough background and qualifications checks to avoid embarrassing headlines about your firm



or any former employees. Contact the Law Practice Management Program at 404-527-8772 for forms to help with avoiding hiring mistakes for your firm.

Know who you have working for you with regular checks for references and bonding as appropriate for vendors servicing your firm. Doing these checks can help protect firm assets when working with others in daily operations.

Outline office security steps in your policies and procedures manual. Try to cover all of the general bases and provide specific details for when to dial 911 and

the like based on past experiences or current concerns. For instance, many firms have recently adopted policies regarding workplace violence and dealing with disgruntled former employees.

Conduct regular fire and safety drills in your office. Regardless of the size of your firm, you need to know the safest way to deal with a fire or other dangerous situation in your office. Practice drills should be conducted at least annually. Engage the services of local emergency response personnel for assistance with your drills, if appropriate.

Obtain and keep proper levels of insurance coverage. Contact the Bar's recommended broker, BPC Financial, for quotes on medical, dental, vision, long-term care and disability coverage. Also, look to the admitted carriers list for approved malpractice insurers in Georgia at www.gabar.org. Premises and personal liability insurance should also be obtained for the general operation of your business.

Have procedures in place to clearly deal with accidents and other incidents on the job. Outline specifics as to reporting and what to do about these events.

Know when local authorities patrol your business area. Most police and security officers will monitor businesses as a part of their routine duties, but make sure you know if and how often they monitor your specific property or area. Ask them to make your business a regular stop, if it is not already being monitored.

Make sure you have a computer and Internet usage policy for all staff. It is important to monitor how your business systems are being used. Again, be sure to have this information in your manual.

Conduct daily computer backups. You should layer the type of backups you do, i.e. online storage, hard disk, etc.; and you should also perform monthly test restores at the very least to ensure you can retrieve from your backups.

When working with offsite storage and online vendors, be sure to get the Law Practice Management Program's list of sample questions and checks.

All work computers should be set up with firewall protection if they are going to access the Internet. Have your IT staff or company work with you to ensure your systems are also protected from viruses and spyware with appropriate safeguards. If you are solo and looking for a free or low-cost solution, check out CNET's www.download.com website for top products and reviews.

Don't simply ignore the computer program updates notice, but do find out from your IT staff or company if and when you should install these updates to your machines. Sometimes critical security patches are being deployed. If you are a leading-edge type user, make sure that you give patch releases time to mature. You don't want to adopt too early and risk more problems.



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Put mobile safeguards in place when you work away from the office and when you are not working on your own systems. Use a Virtual Private Network (VPN) or encrypted remote access systems like GoToMY PC or LogMe In to access work computers when you are out of the office. Also, use locks via keystrokes, finger swipes or even physical locks and alerts on company laptops. You can search online for cabled and keyed laptop locks and even more information on laptop security.

Don't forget to secure mobile phone and tablet devices, too. User passwords should be used on any device containing work-related information. Also, learn how to "kill" your data on a lost or stolen device, if that is a feature of a unit you have. Look for this functionality at your next upgrade if you don't have it.

No more stickies or Post-It notes with passwords written down on them as a convenient reminder of how to log onto your server and desktop computers. Proper password management can involve the use of strong passwords (a string of letters, numbers and special characters), a secret password saved to an undisclosed location (only you and your assistant will know where passwords can be accessed or set up) or simply a general one that is changed frequently. Password managers like RoboForm and KeePass do a very good job of helping you keep up with your many personal and business passwords.

Lock your screen when you walk away from your desk. On Windows machines, simply use the CTRL + ALT + Delete keys and select Lock Computer. You will then need to use your personal or an administrator's login credentials to unlock your computer when you return. On the Mac, set your system to require a password in Security/System Preferences and use the ScreenSaver or Sleep modes to keep prying eyes out. Check for options that will not kill active programs or things you are working

on in the background. Be sure to save your work every few minutes, and more often when working on more detailed or sensitive items and using these screen lockouts.

Beware scammers! You should strive to have a well-managed online presence and keep a keen watch for identity theft (personal and business). If transacting business online, be sure to use bank-level encryption and services and programs that use the same level of security. Know who you are doing business with at all times. Contact the authorities right away if you become a victim of an apparent scam. See more about email scams online at the Bar's website, www.gabar.org/news/e-mail_scams_targeting_lawyers_and_law_firms/.

Keep checks and balances in place for the firm's financial management procedures. Have a system that includes key management and bookkeeping staff. Unopened bank statements should go to the firm owner's desk or home every month. Likewise, make sure you are reconciling and doing spot checks on every bank account each month. You can't be too safe with firm money.

Signatures for bank accounts should be checked on annually. If small amounts can be signed for by an office administrator or manager, have them produce a separate report or statement for any checks they have signed and then reconcile this report against the firm's monthly reconciliations.

Also, if you have staff dropping off bank deposits, set up a different time for the drop-offs so as not to create a clear pattern for the deposit times. It is also good to establish a personal relationship for key and frequently visited bank personnel. They may be able to spot and alert you of any concerns. Always stay on top of desktop and remote deposits if you don't physically go to the bank.

Keep any combinations for your physical safe secure. Also, get in the habit of changing your safe combinations on an

annual or bi-annual basis. Only share the safe combination if it is absolutely necessary.


Remind staff to adhere strictly to the confidentiality requirements of the law practice. Keep client information secure at all times. No outside rehashing or leaking of confidential information can be tolerated. And be careful of inadvertent disclosures while answering the telephone in the reception area while waiting guests are present.

Make sure to change passwords and collect any keys or locks from terminated employees. You should have a current listing of property, registration and serial numbers, and who it is assigned to at all times. Use asset tags and labels for larger law firm inventories.

Protect your client's data with proper file storage and handling routines. Ensure that visitors to your offices cannot see your client files or information. A good centralized storage arrangement can help keep the data protected from unauthorized access.

Lock your office windows and doors, and even in the office, be sure to secure company checks and confidential information under lock and key. Monitor your security systems, also.

Check your company parking areas for staff and guests to ensure proper lighting and security measures. Have building security guards escort late-working employees, if appropriate.

Keeping yourself and your practice safe takes diligence and a good deal of forethought. But with just an "ounce of prevention," you should be able to keep your staff and your business secure. For additional resources and more safety information and tips, please contact the Law Practice Management Program for help. 



Natalie R. Kelly is the director of the State Bar of Georgia's Law Practice Management Program and can be reached at nataliek@gabar.org.

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The Tapestry of the Tift Judicial Circuit—Richly and Uniquely Designed

by Bonne Davis Cella

Timber, turpentine and cotton lured the entrepreneurial Tifts of Mystic, Conn., to the pristine forests of South Georgia in the early 1800s. Nelson Tift founded Albany in 1836 and his nephew, Henry Harding Tift, founded Tifton in 1872. The influential family left their mark all over Georgia and Key West, Fla. Mercer Press recently published John Fair's book, *The Tifts of Georgia: Connecticut Yankees in King Cotton's Court* for those who want to know more about the Tift's legacy.

Established in 1917, the counties of Irwin, Tift, Turner and Worth make up the Tift Judicial Circuit. Irwinville (Irwin County) is best known as the capture site of Confederate President Jefferson Davis. After fleeing Richmond, Va., Davis, his family and his trusted advisors made their way to Georgia, making camp at Irwinville. The next morning, they awoke to gunfire and within minutes, members of the First Wisconsin and Fourth Michigan cavalries surrounded them. Davis was imprisoned in a damp



(Left to right) King George of Greece and Lt. Col. Henry Tift Myers, circa 1944.

cell at Fort Monroe, Va., where he remained under guard for two years. He was released on bond in May 1867, and in February 1869, the treason charges against him were dropped.¹

Ocilla (Irwin County) is known for its popular sweet potato festival, held annually the last Saturday in October. As far as taste and nutrition, the sweet potato has few rivals. An Ocilla attorney with few rivals was Emory Walters (1934-2005). Even F. Lee Bailey² was no match for Walters back in the 1970s when the two met in a South Georgia courtroom as opposing counsel in a divorce involving heavy assets. Walters' tough defensive edge prevailed and he won the case. Having more calls than he could handle from wealthy clients, Walters was ever mindful of the downtrodden in his community and found time to offer his services. His hard, crusty shell harbored a tender heart, and he will always be remembered as a "pistol" in his circuit and beyond.

Another undisputed "pistol" was Elizabeth "Betty" Shingler, born in Ashburn (Turner County) in 1923. At age 18, Betty married Herman Talmadge and soon became Georgia's youngest first lady. Betty wanted to attend college, but Herman (10 years her senior) discouraged that idea so she started a ham-curing operation, building it into a \$6 million business before selling it in 1969. During Talmadge's U.S. Senate career, Betty was a popular Washington hostess and socialite; Lady Bird Johnson was her close friend and bridge partner. Years after Talmadge's political fall from grace, a visiting *Washington Post* reporter asked the then divorced Mrs. Talmadge if she missed life inside the Capital Beltway and she said, "It's only a good town if you have a good seat, if you know what I mean, honey."

Sylvester (Worth County) is the hometown of writer Sue Monk Kidd. Deeply influenced by her life in Sylvester, her first novel, *The Secret Life of Bees*, sold more than 6 million copies, and was on the *New York Times* bestseller list for more than two years and is fast becoming a modern classic. Worth County also makes a strong claim of being the "Peanut Capital of the World" and is home to Peter Pan[®] peanut butter.

Like Peter Pan, the real-life character, Chase Salmon Osborn, also had a home in Worth County. His bungalow "Possum Polk" in Poulan was the winter home of this 27th governor of Michigan (1911-13). He loved South Georgia and his "little club of close, fine friends." Besides his tenure as governor, Osborn was a prolific writer, publisher, environmentalist, world explorer and iron prospector earning and giving away several fortunes. He enjoyed visiting his Georgia "neighbor" Franklin Delano Roosevelt at the Little White House and shared his philosophy of life that emphasized giving rather than taking. Osborn donated 3,000 acres of land in Worth county for a Boy Scout camp as well as giving large tracts of land to the universities of Michigan, Purdue and Tulane. Osborn died in 1949 at his cabin in Poulan. His biography,



(Left to right) F. Lee Bailey and Ocilla attorney Emory Walters.

Photo courtesy of the Walters family.



(Left to right) Pat Nixon and Betty Talmadge welcome Mamie Eisenhower to Washington, DC.

AP Wire Service



Gov. Chase Salmon Osborn

Photo from Osborn's autobiography, *The Iron Hunter*.



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Consumer Assistance Program

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This free program provides confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems and mental or emotional impairment, 800-327-9631.

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The Fee Arbitration program is a service to the general public and lawyers of Georgia. It provides a convenient mechanism for the resolution of fee disputes between attorneys and clients. The actual arbitration is a hearing conducted by two experienced attorneys and one non-lawyer citizen. Like judges, they hear the arguments on both sides and decide the outcome of the dispute. Arbitration is impartial and usually less expensive than going to court, 404-527-8750.

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(Left to right) President Ronald Reagan presents Dr. Glenn Burton with the National Medal of Science at the White House in 1983.



(Left to right) Turf grass pioneer Ray Jensen and Bob Reinhardt.


The Iron Hunter, written in 1919 is back in print and offers everything from Midwestern Progressive Era history to the nutritional value of reindeer milk.

Among Tifton's designated titles is "Turf Grass Capital" and rightly so with thousands of athletic fields and golf courses all over the world sporting top quality grass from Tifton. Ray Jensen, an agronomist and turf business pioneer, is a member of the University of Georgia's College of Agriculture Hall of Fame. The proclamation cited him as the first to commercially produce and harvest centipedegrass (scientific spelling) seed, making it the most popular lawn and landscaping grass anywhere. They also recognized that because of Jensen's innovation, turf is one of the largest agricultural commodities in Georgia and that his company was a key player in the development of turf into a multi-billion dollar business around the world.

Dr. Glenn Burton was a world-renowned geneticist at the Coastal Plains Experiment Station in Tifton and was most proud of his work on increasing the output of pearl millet in arid parts of India and Africa. The huge increase in pearl millet is thought to have saved millions from starving.

The first presidential pilot, Lt. Col. Henry Tift Myers, was born in Tifton in 1907 and was the nephew of Tifton's founder. Besides FDR and Truman, Myers flew Winston Churchill, Madame Chiang, King George of Greece and a host of other famous persons. Eleanor Roosevelt and Harry Truman were among his favorites. The *Sacred Cow* or the *Independence* (predecessors of Air Force One) landed in Tifton when Myers called on his mother. Word traveled fast to local residents that the presidential aircraft had landed and many rushed to the airfield for a tour of the aircraft. As they toured, Myers gave sheets of stationery with *The Flying White House* embossed at the top as treasured mementos. Because of Myers' many accomplishments in the air, the Georgia Aviation Hall of Fame inducted him as a member and he was recently nominated for membership into the National Aviation Hall of Fame.

The Tift Judicial Circuit lost one of its finest on Feb. 20 with the death of Bob Reinhardt. The former State Bar of Georgia president (1980-81) did so many things well. His many accomplishments in his profession and in the arena of public service are widely known. It is, however, the

personal side of Bob Reinhardt that is most endearing. His three attorney sons, Rob (president of the State Bar, 2004-05), John and Bill affectionately spoke of their father at his memorial service. Bill, the youngest and a superior court judge, made a simple comment that spoke volumes: "Daddy never raised his voice at us." (This is amazing given the fact that their father paid tuition to the University of Georgia for 19 consecutive years!) Simply put, Bob Reinhardt raised the bar and set the standard—he was one of the golden threads that make up the fine and distinctive tapestry of the Tift Judicial Circuit. 



Bonne D. Cella is the office administrator at the State Bar of Georgia's South Georgia Office in Tifton and can be reached at bonnec@gabar.org.

Endnotes

1. Wikipedia
2. F. Lee Bailey, famed high-profile defense attorney and best selling author was disbarred in Florida in 2001. The Massachusetts Supreme Judicial Court followed Florida's lead, revoking Bailey's law license in 2002.

Do What You Love, Love What You Do

by Derrick W. Stanley

Imagine the responsibility of being the chair of one of the largest sections of the State Bar. Imagine being the chair of one of the largest sections of the American Bar Association (ABA). Now, imagine being the chair of both. Randall Mark “Randy” Kessler has taken on that particular task, and is living proof that it can be done . . . while maintaining your practice.

I sat down with Randy one summer afternoon to talk about his plan of action and his vision for the future. It is, after all, extremely rare to have someone chairing a national and state section simultaneously.

Q: Why did you decide to take on such a monumental task? It is difficult enough chairing one section, much less two.

A: It was all in the timing. I was active in both sections and decided it would be better to donate the 3 to 5 years that it takes to work through the section leadership for both sections at the same time. With the overlap in the two sections and my practice, it just made sense to put the right staff in place to maintain the practice while serving the State and American



(Left to right) Jolie, Randy and Valerie Kessler following the ABA Family Law Section swearing-in ceremony.

Photo by Byron Lomas

Bars. This strategy allows me to rise to the requirements of the two sections, and my practice.

Q: You mentioned you staffed your office for this period of time. How do you break your time down between all of these responsibilities?

A: First, if it was not for my managing partner Marvin Solomiany who has really stepped up and supported me and our wonderful staff, I would not be where I am today. The team has really picked up the slack. From our office staff to our paralegals, associates and attorneys, they have all worked diligently to support me in this quest. I am working harder than ever before to make time to do all that I need, but even so, I figure that I am currently spending about 65 percent of my time practicing law, 10 percent of my time managing and marketing the firm and 15 percent of my time acting as chair of the ABA Family Law Section and 10 percent of my time as chair of the State Bar Family Law Section. It makes for some long hours.

Q: It seems that this puts you in the office and on the road for many additional hours. Many attorneys end up burning themselves out with this volume of work. How do you maintain your work/life balance to keep you so grounded?

A: Well, without the involvement of my wonderful wife Valerie, I would not be as involved as I am. She agreed to support me on this decision and we have not looked back. We travel to most of the meetings with our four-year-old daughter Jolie and have great family times together. Jolie has developed friendships with other ABA officers' children and looks forward to seeing them on the trips. I also will attach a day or two to each trip for family time. As anyone who has been active in a bar or nonprofit asso-



Randall M. Kessler is sworn in by Texas Supreme Court Justice and outgoing ABA Family Law Section Chair, Debra Lehmann.

ciation knows, these trips are not vacation. They are long days of wearing a suit and sitting in meetings. But of course it is great to come back to the hotel room to unwind with my family. It is truly quality time together.

Q: Looking at your first few months as chair of both sections, how have these been different than those of chair-elect/vice chair?

A: I guess you could look at the process by saying you learn the ropes in the executive committee positions, then when you are chair-elect/vice chair, you have the most work since you are planning and preparing for your year as chair. What I have noticed about being chair is that you have more fires to put out. You are the representation of the section and your name, and phone number, are in many places. It has truly been a great experience.

Q: Well, you still have a while in your tenure. What do you see as being your next stop?

A: My whole career has been my love for the practice of family law. I will serve my tenures as immediate past chair and

share the knowledge I have gleaned with those who are the future leaders of the sections. Then, I will go back to my practice where I would like spend 90 percent of my time practicing law and 10 percent managing and marketing the firm.

Q: How do you describe the differences between the two sections?

A: The State Bar section is where we can actually improve the practice and image of family law in the state. We can discuss cutting edge topics such as international custody, same sex marriages and military divorce, and we covered these topics at the Family Law Institute this past May. With the American Bar, there are more than 10,000 members with a staff of four to support the section. The national section is a force for everybody. Since states all have different laws, we have to work on issues that can be shared with all the states.

The mission of the American Bar Association Section of Family Law is to serve as the national leader in the field of Marital and

Family Law. To accomplish its mission, the Council has adopted the following six goals for the Section:

- To promote and improve the family;
- To be the pre-eminent voice on marital and family issues;
- To serve our members;
- To improve public and professional understanding about marital and family law issues and practitioners;
- To increase the diversity and participation of our membership;
- To improve professionalism of all participants in the administration of marital and family law.

Q: It is admirable how you have advanced through the leadership to serve family law practitioners on the state and national level. What prompted you to strive to this level of service to the profession?

A: Well, there is a saying that I live by; in fact, I have a carved rock that I keep in my office that states: "Do What You Love, Love What You Do." I truly love practicing family law. It gives us the ability to guide clients through some of the roughest times of their lives. I look at each situation as if it is a jigsaw puzzle and I use fam-

ily law to try to put the pieces back together.

I love the practice and I love sharing my knowledge through speaking and helping plan CLE programs. I started speaking early in my career about family law issues. This willingness to speak put me in a position where I had to become a subject matter expert. I thoroughly enjoy researching the law and applying it, especially as it relates to current topics and as it evolves. I also encourage my associates to speak as well, and to participate in the activities of bars. This allows us to give back to the community and the profession.


Q: What final tips would you like to share?

A: As I said earlier, do what you love and love what you do. The practice of law is a calling and if you love what you do, you will be successful and fulfilled in life. We have the ability to help others in ways that can repair their lives. That is our calling. Also, get yourself a Nancy.

Q: A Nancy? (Randy leaves the room and returns.)

A: This is a Nancy. Meet Nancy Miller. Nancy was the first employee I hired and we shared

an office the size of this conference area (approximately 10' x 10'). Nancy exhibits the qualities that I look for in my staff. She is knowledgeable, skillful and loyal. When you have someone in your practice that has been with you since the beginning, you have someone who can carry the history of the firm in your absence. You have someone who you can confide in and another brain to help you keep on track. [Note: On the date of the interview, Nancy celebrated the 20-year anniversary of her first day working with Randy.]

Randy Kessler has ventured into new territory by chairing two very large sections. He has been a steward for family law attorneys in Georgia, and is sharing his knowledge with attorneys across the country. He can be reached at: Kessler & Solomiany LLC, 101 Marietta St., Suite 3500, Atlanta, GA 30303; 404-688-0099 or rkessler@ksfamilylaw.com. 



Derrick W. Stanley is the section liaison for the State Bar of Georgia and can be reached at derrick@gabar.org.

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(The client story is used with permission. The photograph and name do not necessarily represent the actual client.)



Fastcase: New Features and Tips

by Sheila Baldwin

Fastcase developers are consistently working on designing new features to make the search for law easier. This article highlights several new features that you may not have noticed as well as suggestions to help you with the ones you already use. A good way to keep on top of new technology is through blogs and company news. Fastcase has both. Check out the *Fastcase Blog* and *Fastcase in the News* to keep informed on projects from the Fastcase design team. When logged into Fastcase, choose Fastcase Home at the center top of the page (see fig. 1). You will notice the blog on the far left of your page as you scroll down with the news in the center.

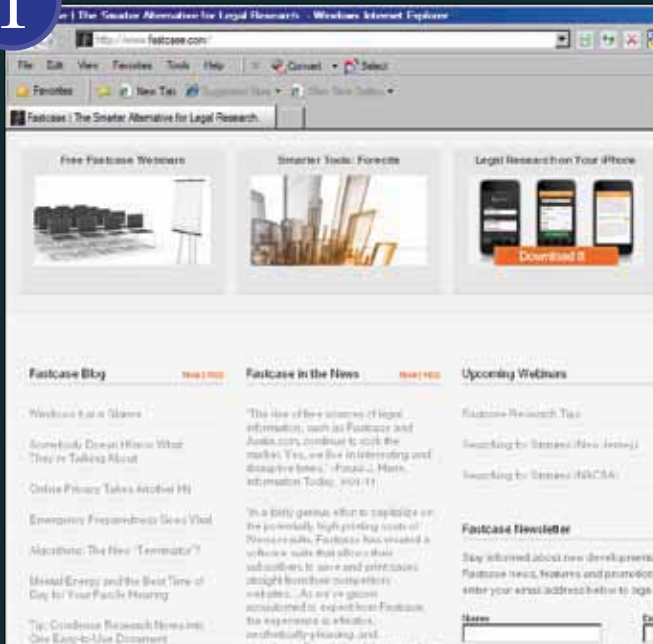
Features

- Forecite has made research almost fail proof when searching with a well-constructed query. Seminal cases that may be out of the jurisdiction or time filter but nonetheless highly cited as authoritative on your topic, will automatically be pulled and highlighted at the top of the results page (up to three cases).
- Emory law reviews have been added to our database in the past few months. Two reviews, the *Bankruptcy Developments Journal* and the *Emory Law Journal*, are under the Law Journals drop down tab on the opening page and the *Emory International Law Review* is found under the Law Review tab (see fig. 2).
- Favorites has expanded from 10 to an unlimited number making it easier to keep track of all of your most referenced cases, statutes and articles.
- Fastcase app for iPad and iPhone. The Association of American Law Librarians named this app the Product of the Year in 2010. If you use one or both of these products, you will love this user-friendly tool when you are in court or on the road. And for those of you with an Android phone, be patient. Sources say that an android app is on the way.

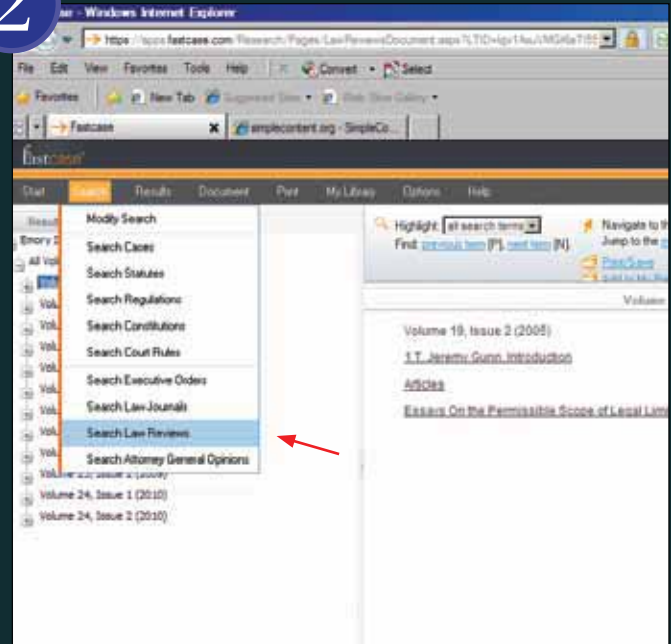
Tips

- Save your searches indefinitely by saving the URL to a file. Fastcase automatically tracks your last 10 searches but when you are interested in keeping them bookmarked long term follow these steps: on the results screen, select Favorites or Bookmarks and follow the prompts to name and save the list on your browser. Next time you want to see them, just look in your favorites menu, go the folder and find them. (Hint: Make sure you are logged in to Fastcase before accessing your bookmarks.)
- Create annotated lists in statutes by entering a statute citation within quotes in the Advanced Case Law Search box using Keyword Search (Boolean) as the search type and choose the correct jurisdiction. You may add key words if you wish to focus the search. Using the code concerning adoption requirements, enter "19-8-3" to create a list of 36 cases that cite this statute. By adding the words "and relinquish," the search narrows to three cases.
- Send your search to other Fastcase users by copying the URL from the address bar when you are on the results page. The recipient will cut and paste or open a link to the results list provided they are logged in to Fastcase. (A URL is found in the address bar and begins with https://.)
- Browse statutes in outline view instead of using a keyword search to find the exact code that governs the issue in question. Using Outline View you can see the structure of the entire statute and easily toggle back and forth between different subsections.
- Pull and print/save multiple cases within minutes. Enter a series of citations separated by commas into the search field and select Citation Lookup as the type. The cases will display in a list view with a

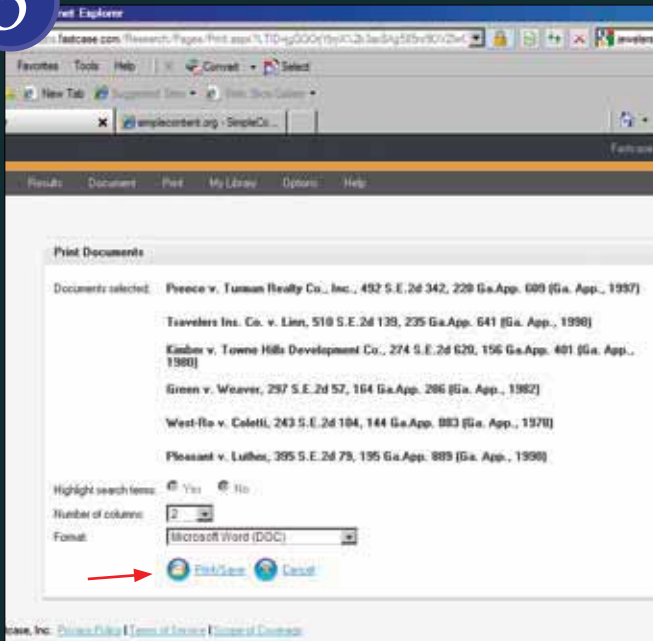
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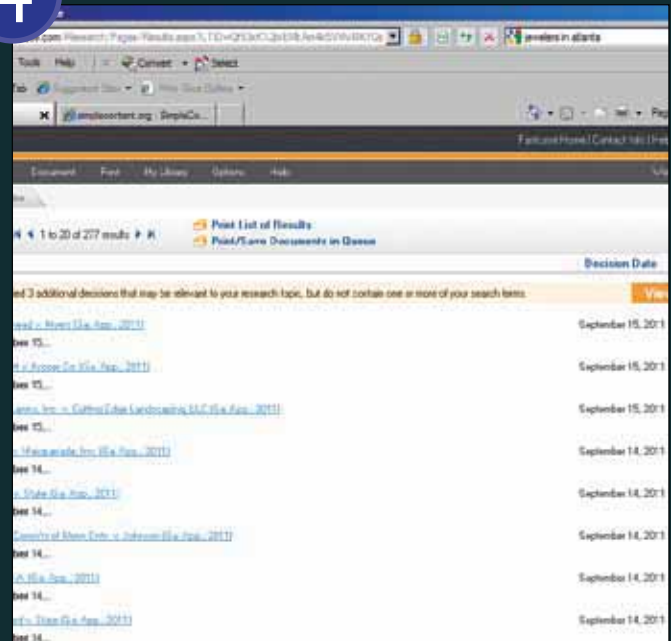
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Fastcase training classes are offered four times a month at the State Bar of Georgia in Atlanta. Training is available at other locations and in various formats and will be listed at www.gabar.org under the “Bar News & Events” section. Please call 404-526-8618 to request onsite classes for local and specialty bar associations.




Annual Fiction Writing Competition

Deadline Jan. 20, 2012






The editorial board of the *Georgia Bar Journal* is pleased to announce that it will sponsor its Annual Fiction Writing Contest in accordance with the rules set forth below. The purposes of this competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. For further information, contact Sarah I. Coole, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; 404-527-8791.

Rules for Annual Fiction Writing Competition



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

1. The competition is open to any member in good standing of the State Bar of Georgia, except current members of the Editorial Board. Authors may collaborate, but only one submission from each member will be considered.
 2. Subject to the following criteria, the article may be on any fictional topic and may be in any form (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the Board will consider in judging the articles submitted are: quality of writing; creativity; degree of interest to lawyers and relevance to their life and work; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The Board will not consider any article that, in the sole judgment of the Board, contains matter that is libelous or that violates accepted community standards of good taste and decency.
 3. All articles submitted to the competition become the property of the State Bar of Georgia and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental and that the article has not been previously published.
 4. Articles should not be more than 7,500 words in length and should be submitted electronically.
 5. Articles will be judged without knowledge of the author's identity. The author's name and State Bar ID number should be placed on a separate cover sheet with the name of the story.
 6. All submissions must be received at State Bar headquarters in proper form prior to the close of business on a date specified by the Board. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Sarah I. Coole, Director of Communications, State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. The author assumes all risks of delivery by mail. Or submit by email to sarahc@gabar.org
 7. Depending on the number of submissions, the Board may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the Board. Contestants will be advised of the results of the competition by letter. Honorable mentions may be announced.
 8. The winning article, if any, will be published. The Board reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the Board not to be of notable quality.
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printer icon on the far left side of the screen. Click on the icon to save the case to the print queue (see fig. 3). Once in print queue view, you may choose to view, print or save the cases in a single searchable document that can be saved in a client file in one easy step eliminating the need to save each one individually. Perform word searches within all cases using the Find tool (CTRL + F). For example, look for the word "reversed" or "remanded" within all the cases at one time using this option. Although the cases are saved in a single document, they will print with clean breaks between each case.

- Live Chat is the best way to get help when you are getting nowhere in your search. Experts answer your questions almost instantly. This is also a good way to learn how to create better queries; the representative will give you suggestions and send the chat transcript to your email for future reference.
- Find most recent cases by entering the current month and year in your search field. Select the jurisdiction, and all cases published in that month are pulled. Fastcase appears to be more current than the *Daily Report's* list of recently published cases in the testing I have done. In searching *September 2011* on Sept. 16, the results list showed cases with date decided as of Sept. 15, 2011 (see fig. 4).

Please email me any shortcuts or ideas you have found helpful in your experience using Fastcase. For information on upcoming training opportunities, please visit www.gabar.org under "Bar News & Events," or contact Sheila Baldwin at sheilab@gabar.org or 404-526-8618. 



Sheila Baldwin is the member benefits coordinator of the State Bar of Georgia and can be reached at sheilab@gabar.org.

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What's On the Well-Read Legal Writer's Bookshelf

by Karen Sneddon and David Hricik

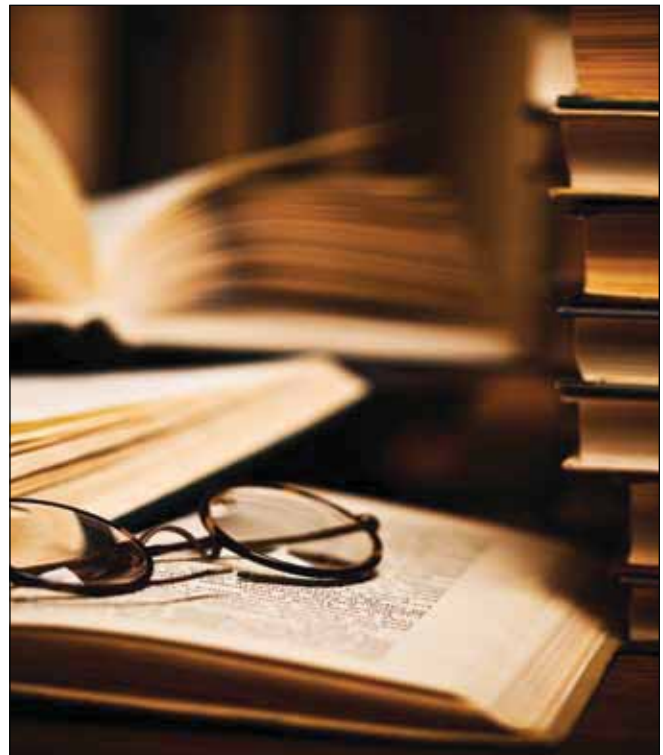
The Internet immediately gives answers to all kinds of questions, including questions relating to writing, at our fingertips—with some answers being better than others. But there is still value to accumulating a writer's bookshelf. Although impossible to list all helpful resources, here are some books currently residing on our shelves.

- Stephen V. Armstrong & Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (2d ed. Practising Law Institute 2003) (415 pages).

This book is crammed with effective exercises that illustrate the choices that legal writers make in order to balance complexity, accuracy and readability. Most exercises include both revisions and commentaries on those revisions to test your own legal writing mettle.

- Deborah E. Bouchoux, *Aspen Handbook for Legal Writers: A Practical Reference* (2d ed. Wolters Kluwer 2009) (329 pages).

This comb-bound book serves both as a helpful transition from school to practice and a friendly reminder of good practical legal writing habits. The book includes review of mechanics, strategies for organization and editing techniques. It also briefly explores genres of legal writing, including correspondence, pleadings and transactional documents. Because it is also available in a Kindle Edition, this practical reference guide can even travel with you.



- Howard Darmstradter, *Hereof, Thereof, and Everywhereof: A Contrarian Guide to Legal Drafting* (2d ed. ABA 2008) (239 pages).

This book's title says it all. Tackling legal drafting in general as well as particular documents, including contracts, this book will have you reaching for your red pen to streamline, re-orientate and improve your form file while chuckling at the ideas of "Promiscuous Capitalization," "The Definitional Tangle" and delivery by "Pony Express."

- Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer*

(3d ed. Aspen Publishers 2009) (360 pages).

Stuffed with examples that will resonate with the legal writer, this book goes beyond common usage and mechanical questions to include strategies for effective dovetailing and sentence construction. The glossary serves as a quick reference reminder on the use of “good” v. “well,” but also those tricky “advise” v. “advice” “convince” v. “persuade.”

- Mignon Fogarty, *Grammar Girl's 101 Misused Words You'll Never Confuse Again* (St. Martin's Griffin 2011) (128 pages).

Grammar Girl's empire started as a series of weekly podcasts. Her books share “quick and dirty tips for better writing,” including the conundrums of “affect” and “effect” and other words that often make even the best writer struggle and have self-doubt.

- Adam Freedman, *The Party of the First Part: The Curious World of Legalese* (Henry Holt & Co. 2007) (242 pages).

There are numerous terrific reads about legalese, including Joseph Kimble's *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press 2006) (199 pages). Freedman's book explores some of the history behind legalese, such as connecting the term “boilerplate” to the printing of 19th-century newspapers. If you know why some legalese is present, you may be able to get rid of it.

- Kevin D. Millard, *Drafting Wills, Trusts, and Other Estate Planning Documents: A Style Manual* (Bradford Publishing Co. 2006) (166 pages).

General style manuals are often helpful, but a style manual specific to your particular form of writing can be invaluable. The practical approaches in this style manual are

memorably reinforced with annotated examples of wills—the most personal of legal documents—to help achieve the client's substantive goals while using words that the client can more likely understand.

- Antonin Scalia & Bryan A. Gardner, *Making Your Case: The Art of Persuading Judges* (Thomson West 2008) (245 pages).

This book co-authored with Justice Scalia offers an inside perspective on persuasive writing that any litigator should crave. After all, legal writing—even more than any other form of writing—is about the reader, not the writer. The 115 principles outlined in this book are easy to absorb and utilize. It is just one of several of Gardner's books that grace our shelves, including a much-thumbed copy of *The Redbook: A Manual on Legal Style* (2d ed. Thomson West 2006) (with Jeff Newman & Tiger Jackson) (510 pages). Also, no lawyer's bookshelf would be complete without an edition of *Black's Law Dictionary* edited by Gardner.


- Bonnie Trenga, *The Curious Case of the Misplaced Modifiers: How to Solve the Mysteries of Weak Writing* (Writer's Digest Books 2006) (152 pages).

This book cultivates a sense of humor to regale you not only with “The Tantalizing Tale of Passive Voice” but amuse you with “The Illuminating Investigation into the Nasty Nominalization” and “The Delicious Drama of the Weak Verb,” among others. The appendices include an answer key to usage mysteries and quizzes throughout the book and even includes a “Weak Writing Rap Sheet.”

- Lynne Truss, *Eats, Shoots & Leaves* (Gotham Books 2006) (originally published 2003) (209 pages).

Introducing the panda joke that still inspires a giggle, this quirky book educates and enter-

tains. Although slightly confusing because it uses Commonwealth English punctuation norms, this book illuminates the sense and nonsense in punctuation. The popularity of this book spawned three illustrated books for children. For other books that illustrate punctuation rules in a never-to-forget-fashion, see Lynne Truss & Bonnie Timmons, *Twenty-Odd Ducks: Why, Every Punctuation Mark Counts!* (Putnam Juvenile 2008) (32 pages); Lynne Truss & Bonnie Timmons, *The Girl's Like Spaghetti: Why, You Can't Manage without Apostrophes!* (Putnam Juvenile 2007) (32 pages); and Lynne Truss & Bonnie Timmons, *Eats, Shoots & Leaves: Why, Commas Really Do Make a Difference!* (Putnam Juvenile 2006) (32 pages). Another similar book explores “the misuse of English, highlighting the prevalence of absent apostrophes, ghastly grammar, suspect sentences and rambling repetitiveness, commentators' claptrap, tortuous tautologies, insane instructions, and quirky quotations.” A. Parody, *Eats, Shites & Leaves: Crap English and How to Use It* (Metro Books 2006) (160 pages).

So, what's on your writer's bookshelf? Email us your recommendations, and we'll publish them (with attribution to you) in an upcoming installment of “Writing Matters.” 



Karen J. Sneddon is an associate professor at Mercer Law School and teaches in the Legal Writing Program.



David Hricik is a professor at Mercer Law School who has written several books and more than a dozen articles. The

Legal Writing Program at Mercer Law School is currently ranked as the nation's No. 1 by *U.S. News & World Report*.

Law School Orientations:

First-Year Georgia Law Students Pledge to a High Standard of Ethics and Professionalism

by Sanchia C. Jeffers and Aaron A. Jones

First-year law students raised their right hands and proudly pledged to honor themselves, their academic institutions and the legal profession by committing to conduct themselves with a high standard of professionalism. We remembered the day that we also raised our right hands—the day that we, determined to make a positive difference in our communities, embarked on the journey to this noble profession.

The faces of the judges and attorneys who volunteered at orientation reflected pride and purpose. Their willingness to volunteer their time and expertise to orient first-year law students on ethics and professionalism evidenced the importance of teaching these concepts from day one. Why is it important to introduce professionalism and ethics at the beginning of the law school career? According to Atlanta's John Marshall Associate Dean Kevin Cieply, "It's the concept of primacy." He says, when the most important aspects are placed first, an implicit message is sent to students "that we hold professionalism to be one of the most, if not the most, critical aspects of their legal profession." C. Joy Lampley Fortson assisted with the Georgia State University College of Law orientation. She added to this sentiment by stating that "students need to know that practicing law is not just about knowing constitutional law and criminal law," but also about knowing how to practice law in an ethical and professional man-



Photos by Terrie Latala

Mercer students recite "A Law Students Creed" during their professionalism orientation.

ner, "so that we represent our employers and clients well and improve the image of lawyers in society."

It is because of this foundational need for ethics and professionalism that the Chief Justice's Commission on Professionalism (CJCP) and the State Bar of Georgia's Committee on Professionalism (Professionalism Committee) joined forces in 1993 to institute the Law School Orientations on Professionalism

Program. This program, the first of its kind in the country, has been so successful that it's been replicated in more than 40 law schools. CJCP's Executive Director Avarita L. Hanson, and Hon. Donald R. Donovan, chair of the Professionalism Committee, work closely with Georgia law schools and dedicated judges and attorneys to make the orientations successful. Committed volunteers give their time, talents and expertise to ensure that entering students understand their professional obligations as law students and as future practitioners, to become familiar with the Georgia Rules of Professional Conduct and more fully comprehend the type of character necessary to be fit for the practice of law.

More than 1,100 students attended the 2011 Orientations on Professionalism and were treated to inspiring messages regarding the meaning and importance of ethics and professionalism. This year's orientations boasted an impressive group of keynote speakers: Lawrence J. LoRusso, Georgia State University College of Law; Federal District Court Judge Marc T. Treadwell, Mercer University Walter F. George School of Law; Hon. J. Randal Hall of the Southern District of Georgia, University of Georgia School of Law; Hon. William A. Foster III, senior judge, Dallas Superior Court, Atlanta's John Marshall Law School; and Sen. Jason J. Carter, Emory University School of Law.

The 1Ls later participated in small group break-out sessions facilitated by volunteers who helped them navigate the Georgia Rules of Professional Conduct and their student ethical codes. These rules and codes were the framework in which these aspiring attorneys discussed and pondered hypothetical situations which present ethical and professional challenges typical to the law school environment.

Georgia State University

LoRusso used examples from his experience to illustrate the

Law School	# of Students	# of Volunteers	Keynote Speaker
Atlanta's John Marshall	264	41	Hon. William A. Foster III, Senior Judge, Superior Court, Dallas
Emory	269	47	Sen. Jason J. Carter, District 42
Georgia State	229	51	Lawrence J. LoRusso, Principal, LoRusso Law Firm, PC, Atlanta
Mercer	151	34	Hon. Marc T. Treadwell, U.S. District Court, Middle District of Georgia
University of Georgia	225	40	Hon. J. Randal Hall, U.S. District Court, Southern District of Georgia

high standard of professionalism required in the legal arena. He cautioned students that they should begin putting their moral compasses to work and mentally take on the role of being a lawyer while in law school. He charged them to create a list of virtues and aspirations to which they should strive and noted that they can "always lean on other members of the profession" for support. Finally, he urged students to guard their reputations. Respectfully, he disagreed with Abraham Lincoln leaving students with this final thought: "Your time is not your stock in trade, your reputation is, and if you lose your reputation, there is not enough time left on this earth to make it back!"

Mercer University

Treadwell began by presenting a case example of a lack of professionalism illustrating that the resulting consequences could be severe sanctions. He focused on six elements that make up professionalism: (1) integrity, (2) competency, (3) confidentiality, (4) civility, (5) courage and (6) zeal. Quoting Justice Thurgood Marshall on integrity, he stated, "There is only one type of reputation that a lawyer could earn quickly, all others come slowly;" that is, "reputation for integrity . . . has to be earned." Also, Treadwell cautioned that "credibility which is established so slowly, can be

lost in an instant . . . [and] must be protected as if it were a crown jewel," since "it is indeed a pearl of great price."

University of Georgia

Hon. J. Randal Hall reminded students that they were fortunate to travel a road open to a few; a road that will expose them to "acclaim, criticism and ridicule," while challenging them "mentally, emotionally and physically." Hall focused his attention on practical rules to guide students to the goal of becoming a great professional lawyer. The rules included: (1) "your word is your bond;" (2) respect, as "you are officers of the court;" (3) "dress like a lawyer," so you do not send the message that legal matters are unimportant; and (4) be mindful of public perception and endeavor to work in the community, as professionalism "doesn't stay in the office."

Atlanta's John Marshall Law School

A captivated audience watched as Foster drove home the importance of professional appearance and conduct by himself being a "poster child" for unprofessionalism. With cell phone intentionally ringing, clad in shorts, sandals and casual shirt, he approached the podium to wide-eyed 1Ls. Students nodded affirmatively as

2011 Law School Orientations on Professionalism Volunteers

Atlanta's John Marshall Law School

Ashley A. Adams
Roy P. Ames
Jennifer L. Andrews
Frederick V. Bauerlein
George E. Bradford Jr.
Jacqueline F. Bunn
John C. Bush
Thomas A. Cole
David S. Crawford
Willie G. Davis Jr.
David S. DeLugas
Hon. Donald R. Donovan
Gregory T. Douds
Hon. James E. Drane
Hassan H. Elkhail
Hon. William A. Foster III
Amanda R. Gaddis
Deborah Gonzalez
Hon. Janis C. Gordon
Thomas E. Griner
Patricia A. Hall
Anthony A. Hallmark
Duncan M. Harle
David Holmes
Kimberly J. Johnson
David S. Kerven
Anne M. Kirkhope
John W. Kraus
Corey B. Martin
James T. Martin
Gary S. Meinken
Steven J. Messinger
Hon. Joseph H. Oczkowski
Shalamar J. Parham
Irvan A. Pearlberg
Karen J. Shelley
Katie A. Smith
Ashley M. Tumlin
Derick C. Villanueva
F. Michael Viscuse
Davené D. Walker

Emory University

Prof. Frank S. Alexander
B. Phillip Bettis
Scott L. Bonder
Mark G. Burnette
Hon. Diane E. Bessen
Hon. T. Jackson Bedford
Jay D. Brownstein
Prof. William J. Carney
Lesley G. Carroll
Darryl B. Cohen
Hon. Brenda S. Hill Cole
Michael D. Cross Jr.
Theodore H. Davis Jr.

Hon. Donald R. Donovan
Hon. William S. Duffey Jr.
Hon. Susan S. Edlein
Dean A. James Elliott
Mindy Goldstein
Steve Gottlieb
Blake D. Halberg
Phyllis J. Holmen
Joseph A. Homans
Dean James B. Hughes Jr.
Nicole G. Iannarone
Aaron R. Kirk
Deborah G. Krotenberg
T. David Lyles
Denise Arenth Miller
Justice David E. Nahmias
Prof. Carol Newman
Robert E. Norman
Prof. Polly J. Price
Dean Gregory L. Riggs
Jennifer M. Romig
Dean Ethan Rosenzweig
John C. Sammon
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Prof. Sarah M. Shalf
Prof. Julie Seaman
Prof. George Shepherd
Ian E. Smith
Hon. Wesley B. Tailor
Prof. Alexander Volokh
Randee Waldman
James M. Walters
Kirsten Widner
Prof. Paul J. Zwier II

Georgia State University

Jacqueline F. Bunn
Kendall W. Carter
Mary McCall Cash
Rory S. Chumley
Lindsey G. Churchill
Isaiah D. Delemar
Scott D. Delius
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Hon. Donald R. Donovan
Amy S. Dosik
Prof. Jessica D. Gabel
Barbara M. Goetz
Deborah Gonzalez
Hon. Kathlene F. Gosselin
Thomas C. Grant
Dan R. Gresham
Thomas E. Griner
Beth Anne Harrill
Joy B. Harter
Charles B. Hess
Prof. L. Lynn Hogue

David Holmes
Hon. Phillip Jackson
Hon. Leslie S. Jones
John W. Kraus
C. Joy Lampley Fortson
Thomas E. Lavender III
Cheryl B. Legare
Prof. Charles A. Marvin
Brett A. Miller
G. Melton Mobley
Bharath Parthasarathy
Lara P. Percifield
Sloane S. Perras
Jody L. Peskin
Elizabeth W. Quinn
Michael N. Rubin
Brandy M. Shannon
Rebecca S. Smith
Prof. B. Ellen Taylor
Michael J. Tempel
Prof. Willard N. Timm Jr.
Wayne D. Toth
Kathleen A. Wasch
Claudia N. Whitmire
Roderick B. Wilkerson
Prof. Leslie E. Wolf
Hon. B. Keith Wood
Prof. Douglas H. Yarn
Delores A. Young

Mercer University

John H. Baker
Larry D. Brox
Stephanie D. Burton
Ivy N. Cadle
Valerie E. Cochran
Lisa R. Coody
James M. Donley
James E. Elliott Jr.
Terry T. Everett
Ira L. Foster
Patricia A. Hall
A. Cullen Hammond
Stephen J. Hodges
Jane M. Jordan
Paula E. Kapiloff
Kevin Kwashnak
Donald L. Lamberth
Pamela N. Lee
Robert M. Lewis Jr.
L. Scott Mayfield
William H. McAbee II
Michael L. Monahan
Steven A. Moulds
Hon. Samuel D. Ozburn
Lisa M. Palmer
W. Warren Plowden Jr.
Blake C. Sharpton

Robbin Shipp
Christopher N. Smith
Prof. Karen J. Sneddon
Thomas G. Traylor III
Dennis A. Walker
Richard A. Waller Jr.
Nicholas E. White

University of Georgia

Douglas G. Ashworth
H. Scott Basham
Jessica I. Benjamin
Hon. Keith R. Blackwell
Fredric D. Bright
Dean C. Bucci
Scott D. Cahalan
William E. Cannon Jr.
Albert Caproni III
C. Andrew Childers
James W. Cobb
Walter N. Cohen
Cerrone G. Coker
Hon. Donald R. Donovan
Charles E. Dorr
Roslyn C. Grant
Donald E. Henderson
Pamela L. Hendrix
Steven D. Henry
Laura K. Johnson
Charles A. Jones Jr.
Hon. Leslie S. Jones
Raegan M. King
John K. Larkins III
John K. Larkins Jr.
Donyale N. Leslie
Morgan R. Luddeke
Allison E. McCarthy
Christopher A. McGraw
Joshua M. Moore
John A. Nix
Benjamin A. Pearlman
Mary Jane Stewart
Sharon D. Stokes
Aimee E. Stowe
Donald C. Suessmith Jr.
Josh B. Wages
Thomas L. Walker
Dimitri Williams
Samuel J. Zusmann Jr.

Thank You



Students discuss the role of professionalism in law during a breakout session at Georgia State University College of Law.

he stated, "I know that [the ringing cell phone and dress] offended you. It should have! If it offended you, it should tell you something; You don't need to conduct yourself that way."

Break-out session facilitator, Hon. Janis C. Gordon, was impressed that the entering students have such "high ethical standards for themselves." Realizing that "professionalism goes above and beyond the rules," she advised that if students treat people as they want to be treated, they would ultimately make the right decisions. Her words of wisdom ring loud and clear: "Before you take an action, think about whether you want it on the front page of the *Fulton County Daily Report*."

Emory University

Sen. Carter told students that an entire semester of legal professionalism could be summed up with one rule: "Do unto others as you will have them do unto you." Speaking on success, he commented wisely that "making a lot of money is not going to make you a good lawyer, and it's not going to make you happy," evidenced by the many millionaire lawyers who are miserable in the practice of law.


Urging students to dig for a deeper meaning of success, he explained that "being a lawyer is a privilege," and attached to that privilege is "an obligation to the community." Carter urged students to stand on the side of justice every chance they get for "when you find yourself in the majority, it's time to stop and reflect."

For two weeks, all Georgia law schools joined forces with the CJCP, the Professionalism Committee and a host of judge and attorney volunteers to bring the 2011 Orientations to their incoming classes. The lessons learned from the keynote speakers and volunteers are firmly entrenched in our minds and spirits.

We are grateful for the opportunity to work with the CJCP, and encourage law students to volunteer with the orientations at their respective law schools. We are deeply proud and honored to be granted the privilege to be a part of this noble profession. So with right hands raised we once again pledge to conduct [ourselves] with dignity, to be zealous advocates for our clients, to commit ourselves to service without prejudice, integrity without compromise, and at all times, personally and profes-

sionally, to conduct ourselves in a professional manner.¹

The CJCP and the Professionalism Committee extend heartfelt appreciation to the many volunteer members of the bench, bar and academia who assisted with the program and in the break-out sessions (See Honor Roll on page 66). Also, special thanks to Hon. Janis Gordon, Dean Kevin Cieply, Prof. Leslie Wolf, David Holmes, Joy Lampley Fortson, Erica Woodford, Kendal Carter, Ira Foster, James Donley and Mary McCall Cash for providing special feedback on the orientations.

Finally, we are grateful to Avarita L. Hanson, executive director of CJCP, and Hon. Donald R. Donovan, chair of the Professionalism Committee, who lead this program and are ultimately responsible for its success. Also, warm thanks and appreciation to CJCP staff members Terie Latala and Nneka Harris-Daniel who worked tirelessly on the 2011 Orientations on Professionalism. Georgia judges and attorneys desiring to serve as group leaders for the next orientation should contact the Chief Justice's Commission on Professionalism, 104 Marietta St. NW, Suite 620, Atlanta, GA 30303; 404-255-5040; or professionalism@cjcpga.org. 



Sanchia C. Jeffers is a graduating student at Atlanta's John Marshall Law School and interned with the Chief Justice's

Commission on Professionalism.



Aaron A. Jones is a second-year student at Atlanta's John Marshall Law School and interned with the Chief Justice's

Commission on Professionalism.

Endnote

1. Recitation taken from the Atlanta's John Marshall Law School Pledge.

In Memoriam

The Lawyers Foundation of Georgia Inc. sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 104 Marietta St. NW, Suite 630, Atlanta, GA 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.

Michael E. Bergin

Fairburn, Ga.
Potomac School of Law (1978)
Admitted 1978
Died May 2011

Barry H. Bolgla

Augusta, Ga.
University of Georgia School
of Law (1977)
Admitted 1979
Died July 2011

William F. Brackett

Berkeley Lake, Ga.
John Marshall Law School (1961)
Admitted 1961
Died August 2011

James Warren Brown

Savannah, Ga.
John Marshall Law School (1978)
Admitted 1978
Died February 2011

Joseph L. Chambers

Kennesaw, Ga.
John Marshall Law School (1970)
Admitted 1971
Died August 2011

Fred Seward Gates

Dunwoody, Ga.
University of Southern California
Gould School of Law (1977)
Admitted 1978
Died July 2011

James R. Gladden

Oxford, Ga.
John Marshall Law School (1977)
Admitted 1977
Died May 2011

Arthur Gregory

Atlanta, Ga.
University of South Carolina
School of Law (1968)
Admitted 1969
Died July 2011

J. Randolph Hicks

Roswell, Ga.
University of Georgia School
of Law (1975)
Admitted 1975
Died July 2011

Michael Wayne Hovastak

Atlanta, Ga.
Oklahoma City University School
of Law (1996)
Admitted 2004
Died June 2011

G. Gerald Kunes

Tifton, Ga.
Stetson University College of Law
(1972)
Admitted 1949
Died June 2011

Sherman Landau

Atlanta, Ga.
Emory University School of Law
(1965)
Admitted 1965
Died January 2011

Donald Samuel Lemmer

Glendale, Calif.
University of Georgia School
of Law (1981)
Admitted 1981
Died June 2011

Glenn Edward Loney

Arlington, Va.
University of Michigan Law
School (1972)
Admitted 1972
Died March 2011

Robert C. Lower

Atlanta, Ga.
Harvard University Law School
(1972)
Admitted 1972
Died August 2011

Doris G. Lukin

Savannah, Ga.
University of Georgia School
of Law (1945)
Admitted 1945
Died May 2011

Walter E. Maurer Jr.

McDonough, Ga.
Atlanta Law School (1949)
Admitted 1949
Died July 2011

James Michael McDaniel

Lawrenceville, Ga.
University of Georgia School
of Law (1982)
Admitted 1982
Died August 2011

F. Gregory Melton

Dalton, Ga.
Mercer University Walter F.
George School of Law (1976)
Admitted 1976
Died January 2011

Eric Lance Peterson

Marietta, Ga.
University of Dayton School
of Law (1999)
Admitted 2004
Died August 2011

Edward P. Phillips

Coral Springs, Fla.
New York University School
of Law (1970)
Admitted 1975
Died June 2011

Mary Celeste Pickron

Atlanta, Ga.
Georgetown University Law
Center (1980)
Admitted 1982
Died July 2011

William A. Powell

Lawrenceville, Ga.
Georgia State University College
of Law (2005)
Admitted 2005
Died July 2011

Richard A. Rice

Atlanta, Ga.
Woodrow Wilson College of Law
(1967)
Admitted 1969
Died August 2011

Patrick James Ryder

Saint Louis, Mo.
Western State University College
of Law (1982)
Admitted 1989
Died August 2011

Merritt E. Scoggins Jr.

Stockbridge, Ga.
John Marshall Law School (1950)
Admitted 1950
Died August 2011

Larry E. Sikes

Hilliard, Fla.
Mercer University Walter F.
George School of Law (1986)
Admitted 1986
Died March 2011

Billy Ray Smith

Atlanta, Ga.
Atlanta Law School (1980)
Admitted 1982
Died May 2011

G. Ernest Tidwell

Atlanta, Ga.
Emory University School of Law
(1954)
Admitted 1954
Died August 2011

J. Roy Weathersby

Atlanta, Ga.
Vanderbilt University Law School
(1964)
Admitted 1971
Died August 2011

Glenn M. Whittemore

Decatur, Ga.
John Marshall Law School (1952)
Admitted 1952
Died September 2011

James Jerman Williams Jr.

Suwanee, Ga.
Emory University School of Law
(1980)
Admitted 1980
Died February 2011

Anne Workman

Decatur, Ga.
Emory University School of Law
(1972)
Admitted 1972
Died September 2011



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Joseph L. “Joe” Chambers died in August 2011. He graduated from the Georgia Institute of Technology with a

Bachelor of Science in Industrial Management in 1959 and received his LL.B from John Marshall Law School in 1971. He was admitted to the practice of law in November 1971 and became an assistant district attorney in the District Attorney’s Office for the Cobb Judicial Circuit in December 1971. While in the district attorney’s office, he handled major drug cases and complex litigation and served as the chief assistant district attorney. The District Attorney’s Association of Georgia named him assistant district attorney of the year in 1979.

In October 1982, Chambers was appointed director of the Prosecuting Attorneys’ Council of Georgia, a state agency that coordinates the efforts of the state’s 49 district attorneys and 63 solicitors-general. He served in that capacity until March 2001 during which time the prosecution services in Georgia underwent a major expansion both in terms of the number of career prosecutors and the responsibilities of their offices. He was active in the National Association of Prosecution Coordinators and served as the president of that organization from 1984-85. While serving as director of the Council, he also served as the lead prosecutor in number of cases throughout the state involving political corruption and was the special assistant attorney general in charge of what became known as the “Timber Case,” a complex fraud case with more than 20 defendants.

Chambers resigned from the Council in March 2001 to become an assistant district attorney in the Tallapoosa Judicial Circuit. In September 2002, he transferred to the Dublin Judicial Circuit District Attorney’s office and he served there until his retirement in November 2005.

A dedicated Georgia Tech fan, Chambers was also a member of Roswell Street Baptist Church, serving as a deacon, a Sunday school teacher and a volunteer on numerous mission trips. He was a member of the Smyrna Optimist Club, serving as president from 1981-82. He was also a high school football referee with the Peach State Referee Association for 21 years. He enjoyed golfing, fishing and watching westerns.

William A. “Bill” Powell passed away in July 2011. Powell received his law degree in 2005 from Georgia State University College of Law. While in his third year of law school, he was chosen for the Charles Longstreet Weltner Family Law American Inn of Court. Powell was admitted to the State Bar of Georgia in November 2005 by Gwinnett Superior Court Judge Ronnie K. Batchelor. He practiced law in Lawrenceville from 2005-09.




Hon. Anne Workman passed away in September 2011 after a short illness. At the time of her death, she was serving as a senior judge for the Superior Courts of Georgia, a member of the Board of Governors of the State Bar and, by appointment of the Supreme Court of Georgia, a member of the Investigative Panel of the State Disciplinary Board of the State Bar.

A native of Spartanburg County, S.C., Workman was a graduate of Duke University and Emory University School of Law. She served DeKalb County government for 35 years in four courts, including 26 years’ service on the bench, where she is remembered both for her even-handed application of legal principles and for her instinctive talent in fulfilling the responsibility of dispensing justice.

At a time when women comprised less than 4 percent of lawyers nationwide, she became the

first woman prosecutor in DeKalb County when she began her judicial career as a solicitor of the Juvenile Court in 1973. She became the first woman judge in DeKalb County when she was appointed as a judge in the Magistrate Division of Records Court, later DeKalb County Magistrate Court. In 1984, she was one of the first two women elected to the bench in DeKalb County, beginning her 14-year tenure as a judge in the DeKalb County State Court. In 1998, she was elected as a judge of the DeKalb County Superior Court. She served as chief judge of the DeKalb County Superior Court and administrative judge for the Fourth Judicial Administrative District from 2007 until her retirement from the DeKalb County Bench in 2008.

During her long history of service to the community, she was elected the first woman president of the Council of State Court Judges of Georgia, served as mentor to the Green Gourd Academy, and was a member of the Board of Court Reporting of the Judicial Council of Georgia, the Executive Committee of the Council of Superior Court Judges of Georgia, the Judicial Council of Georgia, the Board of Governors of the State Bar of Georgia, the DeKalb Bar Association, the DeKalb Lawyers Association and the Lawyer’s Club of Atlanta. She was a recipient of the Reginald Heber Smith Legal Aid Society Fellowship and the DeKalb County Bar Association Pioneer Award.

Along with her legal work, she also worked tirelessly to improve the lives and living conditions of abandoned and injured animals. Her pets, mostly rescue animals, were her live-in family and she helped place scores of animals in loving homes. However, her greatest joy was watching the professional development of the many talented young lawyers who began their careers in her courtroom under her tutelage. 



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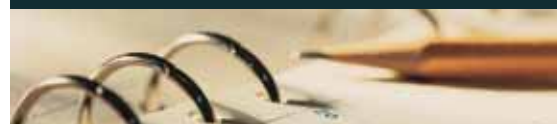
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October-December

OCT 11	Atlanta Bar Association <i>Drafting LLC Operating Agreements, Part 1</i> Teleseminar 1 CLE	OCT 13-15	ICLE <i>Workers' Compensation Institute</i> St. Simons, Ga. See www.iclega.org for location 12 CLE
OCT 12	Atlanta Bar Association <i>M&A Forum & Private Equity Summit</i> Atlanta, Ga. 6 CLE	OCT 14	ICLE <i>Advanced Health Care Law</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
OCT 12	Atlanta Bar Association <i>Commercial Arbitration</i> Live webcast 6 CLE	OCT 17	NBI, Inc. <i>Commercial Leases – Negotiating Key Provisions</i> Atlanta, Ga. 6 CLE
OCT 12	Atlanta Bar Association <i>Drafting LLC Operating Agreements, Part 2</i> Teleseminar 1 CLE	OCT 18	Atlanta Bar Association <i>ADA Update 2011</i> Teleseminar 1 CLE
OCT 12	ICLE <i>Lawyers' Assistance Program</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	OCT 18	CT Corporation <i>Uniform Commercial Code</i> Atlanta, Ga. 3 CLE
OCT 12	Lorman Education Services <i>Understanding the Current CGL Policy</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	OCT 19	ICLE <i>Tractor Trailer Collision Cases</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
OCT 13	Atlanta Bar Association <i>Employment Law for Pro Bono Organizations</i> Atlanta, Ga. 3 CLE	OCT 20	Atlanta Bar Association <i>Multi-Tasking Gone Mad</i> Atlanta, Ga. 2 CLE
OCT 13	ICLE <i>Enhancing Your People Skills</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	OCT 20	ICLE <i>Beginning Lawyers – Replay</i> Atlanta, Ga. See www.iclega.org for location 6 CLE

Note: To verify a course that you do not see listed, please call the CLE Department at 404-527-8710. Also, ICLE seminars only list total CLE hours. For a breakdown, call 800-422-0893.

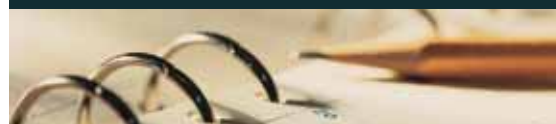


OCT 20	ICLE <i>Premises Liability</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	OCT 26	Atlanta Bar Association <i>Law & Literature – 2 sessions</i> Atlanta, Ga. 3 CLE
OCT 20	NBI, Inc. <i>Insurance Coverage Litigation</i> Atlanta, Ga. 6 CLE	OCT 26	ICLE <i>Intro to New Ga. Rules of Evidence</i> Atlanta, Ga. See www.iclega.org for location 3 CLE
OCT 20-21	ICLE <i>Business Law Institute</i> Atlanta, Ga. See www.iclega.org for location 11.5 CLE	OCT 27	Atlanta Bar Association <i>Unwinding Family Limited Partnerships</i> Teleseminar 1 CLE
OCT 21	ICLE <i>Family Law</i> Augusta, Ga. See www.iclega.org for location 6 CLE	OCT 27	ICLE <i>Employment Law</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
OCT 21	ICLE <i>Technology Law Institute</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	OCT 27	ICLE <i>Marketing that Works in the New Economy</i> Atlanta, Ga. (morning) See www.iclega.org for location 3 CLE
OCT 21	ICLE <i>Whistleblower Law</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	OCT 27	ICLE <i>Turning Time Into Money: New Rules for Working Smarter</i> Atlanta, Ga. (afternoon) See www.iclega.org for location 3 CLE
OCT 21	Lorman Education Services <i>Medical Records Law</i> Atlanta, Ga. 6 CLE	OCT 27	ICLE GABWA: <i>Family Law Section Seminar</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
OCT 25	Atlanta Bar Association <i>Corporate Governance for Nonprofit Organizations</i> Teleseminar 1 CLE	OCT 28	ICLE <i>Auto Insurance Law</i> Atlanta, Ga. See www.iclega.org for location 6 CLE

October-December

OCT 28	ICLE <i>U.S. Supreme Court Update</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 3-5	ICLE <i>Medical Malpractice Institute</i> Amelia Island, Fla. See www.iclega.org for location 12 CLE
NOV 1	Atlanta Bar Association <i>How to Start a Small Law Firm</i> Atlanta, Ga. 3 CLE	NOV 4	ICLE <i>Real Property Foreclosure</i> Statewide Live Broadcast See www.iclega.org for location 6 CLE
NOV 1	Atlanta Bar Association <i>How to Grow a Small Law Firm</i> Atlanta, Ga. 3 CLE	NOV 4	ICLE <i>Securities Litigation</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 2	Atlanta Bar Association <i>Middle Market M&A, Part 1</i> Teleseminar 1 CLE	NOV 6-13	ICLE <i>Advanced Urgent Legal Matters</i> Allure of the Seas Cruise See www.iclega.org for location 12 CLE
NOV 2	ICLE <i>Batson and Jury Selection</i> Atlanta, Ga. See www.iclega.org for location 3 CLE	NOV 7	Atlanta Bar Association <i>Technology for Lawyers</i> Live webcast 6 CLE
NOV 3	Atlanta Bar Association <i>Middle Market M&A, Part 2</i> Teleseminar 1 CLE	NOV 8	Atlanta Bar Association <i>Title Insurance in Real Estate</i> Teleseminar 1 CLE
NOV 3	ICLE <i>Ga. Military Law and VA Accreditation Symposium</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 9	ICLE <i>Buying and Selling Privately-Held Businesses</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 3	ICLE <i>Nuts & Bolts of Labor and Employment Law</i> Savannah, Ga. See www.iclega.org for location 3 CLE	NOV 9	ICLE <i>Real Property Foreclosure</i> Statewide Rebroadcast See www.iclega.org for location 6 CLE

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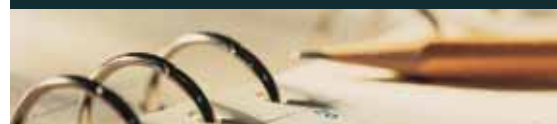


NOV 9	Lawprose, Inc. <i>Making Your Case</i> Atlanta, Ga. 3 CLE	NOV 11	ICLE <i>Immigration Consequences of Criminal Activity</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 9	Lawprose, Inc. <i>Advanced Legal Writing & Editing</i> Atlanta, Ga. 3 CLE	NOV 11	ICLE <i>Adoption Law</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 9-13	ICLE <i>Entertainment, Sports and Intellectual Property Law Conference</i> Cabo San Lucas, Mexico See www.iclega.org for location 12 CLE	NOV 11	ICLE <i>Milich on Ga. Evidence</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 10	ICLE <i>Consumer and Business Bankruptcy</i> Greensboro, Ga. See www.iclega.org for location 7 CLE	NOV 14	ICLE <i>Burge Ethics Lecture Series</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 10	ICLE <i>John Marshall Law School Seminar</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 15	Atlanta Bar Association <i>UCC Article 9/Foreclosure of Personal Property, Part 1</i> Teleseminar 1 CLE
NOV 10	ICLE <i>Writing to Persuade</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 16	Atlanta Bar Association <i>Estate Planning Forum</i> Atlanta, Ga. 3 CLE
NOV 10	ICLE <i>Keep It Simple (KISS)</i> Statewide Live Broadcast See www.iclega.org for location 6 CLE	NOV 16	Atlanta Bar Association <i>UCC Article 9/Foreclosure of Personal Property, Part 2</i> Teleseminar 1 CLE
NOV 10	Atlanta Bar Association <i>Ethics of Working with Experts</i> Teleseminar 1 CLE	NOV 16	NBI, Inc. <i>Cutting-Edge Asset Protection Skills and Techniques</i> Atlanta, Ga. 6.7 CLE

October-December

NOV 17	Atlanta Bar Association <i>Middle Income Divorce</i> Atlanta, Ga. 3 CLE	NOV 18	ICLE <i>Recent Developments</i> Statewide Live Broadcast See www.iclega.org for location 6 CLE
NOV 17	ICLE <i>Lawyers Guide to Powerful Presentations</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 18	ICLE <i>Entertainment Law Institute</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
NOV 17	ICLE <i>Keep It Simple (KISS)</i> Statewide Rebroadcast See www.iclega.org for location 6 CLE	NOV 22	Atlanta Bar Association <i>Estate Planning for Farms & Ranchland</i> Teleseminar 1 CLE
NOV 17	NBI, Inc. <i>Collections – Seeking and Collecting a Judgment</i> Atlanta, Ga. 5 CLE	NOV 29	Atlanta Bar Association <i>Trust Alternatives</i> Teleseminar 1 CLE
NOV 17	NBI, Inc. <i>The Mechanics of Ga. Civil Procedure</i> Atlanta, Ga. 5 CLE	NOV 29	The Seminar Group <i>The Best of CLE</i> Atlanta, Ga. 13 CLE
NOV 18	Atlanta Bar Association <i>Buying & Selling Unincorporated Entities</i> Teleseminar 1 CLE	NOV 30	Atlanta Bar Association <i>Trial by Jury</i> Live webcast 6 CLE
NOV 18	ICLE <i>GP for New Lawyers</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 30	Atlanta Bar Association <i>Employment Tax Planning Across Entities</i> Teleseminar 1 CLE
NOV 18	ICLE <i>RICO</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	NOV 30	Lorman Education Services <i>Immigration Liability in the Workplace Present and Future</i> Atlanta, Ga. 6.7 CLE

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DEC 1	ICLE <i>Recent Developments</i> Statewide Rebroadcast See www.iclega.org for location 6 CLE	DEC 6	Atlanta Bar Association <i>Estate Planning for Retirement Benefits</i> Teleseminar 1 CLE
DEC 1	Atlanta Bar Association <i>Business Planning with S Corps, Part 1</i> Teleseminar 1 CLE	DEC 7	ICLE <i>Food Liability</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
DEC 2	Atlanta Bar Association <i>Business Planning with S Corps, Part 2</i> Teleseminar 1 CLE	DEC 8	Atlanta Bar Association <i>Bankruptcy & Commercial Law Year in Review</i> Atlanta, Ga. 5 CLE
DEC 1-2	ICLE <i>Defense of Drinking Drivers Institute</i> Atlanta, Ga. See www.iclega.org for location 12.5 CLE	DEC 8	Atlanta Bar Association <i>Fiduciary Duties for Directors & Officers</i> Teleseminar 1 CLE
DEC 2	ICLE <i>Antitrust Law Basics</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	DEC 8	ICLE <i>Powerful Witness Preparation</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
DEC 2	ICLE <i>Matrimonial Law TP Workshop</i> Atlanta, Ga. See www.iclega.org for location 6 CLE	DEC 8	ICLE <i>Labor & Employment Law</i> Atlanta, Ga. See www.iclega.org for location 6 CLE
DEC 2	ICLE <i>Professionalism, Ethics & Malpractice</i> Statewide Live Broadcast See www.iclega.org for location 3 CLE	DEC 8	ICLE <i>Georgia Law Update</i> Augusta, Ga. See www.iclega.org for location 6 CLE
DEC 5	NBI <i>Entity Selection Beyond the Basics</i> Atlanta 6.7 CLE	DEC 8	ICLE <i>Professionalism, Ethics & Malpractice</i> Statewide Rebroadcast See www.iclega.org for location 3 CLE

FORMAL ADVISORY OPINION NO. 11-1 ISSUED PURSUANT RULE 4-403(d)

Pursuant to Bar Rule 4-403(d), the Formal Advisory Opinion Board has issued Formal Advisory Opinion No. 11-1. The second publication of Formal Advisory Opinion No. 11-1 appeared in the June 2011 issue of the Georgia Bar Journal, which was mailed to members of the State Bar of Georgia on or about June 6, 2011. The opinion was filed with the Supreme Court of Georgia on June 23, 2011. No review was requested within the 20-day review period, and the Supreme Court of Georgia has not ordered review on its own motion. Following is the full text of the opinion.

**STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY OPINION
BOARD
PURSUANT TO RULE 4-403 ON APRIL 14, 2011
FORMAL ADVISORY OPINION NO. 11-1**

QUESTION PRESENTED:

Ethical Considerations Bearing on Decision of Lawyer to Enter into Flat Fixed Fee Contract to Provide Legal Services.

OPINION:

Contracts to render legal services for a fixed fee are implicitly allowed by Georgia Rule of Professional Conduct (Ga. R.P.C.) 1.5(a)(8) so long as the fee is reasonable. It is commonplace that criminal defense lawyers may provide legal services in return for a fixed fee. Lawyers engaged in civil practice also use fixed-fee contracts. A lawyer might, for example, properly charge a fixed fee to draft a will, handle a divorce, or bring a civil action. In these instances the client engaging the lawyer's services is known and the scope of the particular engagement overall can be foreseen and taken into account when the fee for services is mutually agreed. The principal ethical considerations guiding the agreement are that the lawyer must be competent to handle the matter (Ga. R.P.C. 1.1) and the fee charged must be reasonable and not excessive. See Ga. R.P.C. 1.5(a).

Analysis suggests that the ethical considerations that bear on the decision of a lawyer to enter into a fixed fee contract to provide legal services can grow more complex and nuanced as the specific context changes. What if, for example, the amount of legal services to be provided is indeterminate and cannot be forecast with certainty at the outset? Or that someone else is compensating the lawyer for the services to be provided to the

lawyer's client? It is useful to consider such variations along a spectrum starting from the relatively simple case of a fixed fee paid by the client who will receive the legal representation for a contemplated, particular piece of legal work (e.g., drafting a will; defending a criminal prosecution) to appreciate the growing ethical complexity as the circumstances change.

1. A Sophisticated User of Legal Services Offers to Retain a Lawyer or Law Firm to Provide It With an Indeterminate Amount of Legal Services of a Particular Type for an Agreed Upon Fixed Fee.

In today's economic climate experienced users of legal services are increasingly looking for ways to curb the costs of their legal services and to reduce the uncertainty of these costs. Fixed fee contracts for legal services that promise both certainty and the reduction of costs can be an attractive alternative to an hourly-rate fee arrangement. A lawyer contemplating entering into a contract to furnish an unknown and indeterminate amount of legal services to such a client for a fixed fee should bear in mind that the fee set must be reasonable (Ga. R.P.C. 1.5(a)) and that the lawyer will be obligated to provide competent, diligent representation even if the amount of legal services required ultimately makes the arrangement less profitable than initially contemplated. The lawyer must accept and factor in that possibility when negotiating the fixed fee.

This situation differs from the standard case of a fixed-fee for an identified piece of legal work only because the amount of legal work that will be required is indeterminate and thus it is harder to predict the time and effort that may be required. Even though the difficulty or amount of work that may be required under such an arrangement will likely be harder to forecast at the outset, such arrangements can benefit both the client and the lawyer. The client, by agreeing to give, for example, all of its work of a particular type to a particular lawyer or law firm will presumably be able to get a discount and reduce its costs for legal services; the lawyer or law firm accepting the engagement can be assured of a steady and predictable stream of revenue during the term of the engagement.

There are, moreover, structural features in this arrangement that tend to harmonize the interests of the client and the lawyer. A lawyer or law firm contemplating such a fixed fee agreement will presumably be able to consult historical data of the client and

its own experiences in handling similar matters in the past to arrive at an appropriate fee to charge. And the client who is paying for the legal services has a direct financial interest in their quality. The client will be the one harmed if the quality of legal services provided are inadequate. The client in these circumstances normally is in position to monitor the quality of the legal services it is receiving. It has every incentive not to reduce its expenditures for legal services below the level necessary to receive satisfactory representation in return. Accordingly, such fixed-fee contracts for an indeterminate amount of legal services to be rendered to the client compensating the lawyer for such services are allowable so long as the fee set complies with Ga. R.P.C. 1.5(a) and the lawyer fulfills his or her obligation to provide competent representation (Ga. R.P.C. 1.1) in a diligent manner (Ga. R.P.C. 1.3), even if the work becomes less profitable than anticipated.

2. A Third-Party Offers to Retain a Lawyer or Law Firm to Handle an Indeterminate Amount of Legal Work of a Particular Type for a Fixed Fee for Those the Third-Party Payor is Contractually Obligated to Defend and Indemnify Who Will Be the Clients of the Lawyer or Law Firm.

This situation differs from the last because the third-party paying for the legal services is doing so for another who is the client of the lawyer. An example of this situation is where a liability insurer offers a lawyer or law firm a flat fee to defend all of its insureds in motor vehicle accident cases in a certain geographic area. Like the last situation, there is the problem of the indeterminacy of the amount of legal work that may be required for the fixed fee; and, in addition, there is the new factor that the lawyer will be accepting compensation for representing the client from one other than the client.

Several state bar association ethics committees have addressed the issue of whether a lawyer or law firm may enter into a contract with a liability insurer in which the lawyer or law firm agrees to handle all or some portion of the insurer's defense work for a fixed flat fee. With the exception of one state, Kentucky,¹ all the other state bar associations' ethics opinions have determined that such arrangements are not *per se* prohibited by their ethics rules and have allowed lawyers to enter into such arrangements, with certain caveats.² It should be noted that all of the arrangements approved involved a *flat fee*

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per case, rather than a set fee regardless of the number of cases.

Although the significance of this fact was not directly discussed in the opinions, it does tend to reduce the risks arising from uncertainty and indeterminacy. Even though some cases may be more complex and time-consuming than the norm, others will be less so. While the lawyer will be obligated under the contract to handle each matter for the same fixed fee, the risk of a far greater volume of cases than projected is significantly reduced by a fixed fee per case arrangement. The lawyer or law firm can afford to increase staff to handle the work load, and under the law of large numbers, a larger pool of cases will tend to even out the average cost per case.

In analyzing the ethical concerns implicated by lawyers entering into fixed-fee contracts with liability insurers to represent their insureds, several state bar association ethics opinions have warned of the danger presented if the fixed fee does not provide adequate compensation. An arrangement that seriously undercompensates the lawyer could threaten to compromise the lawyer's ability to meet his or her professional obligations as a competent and zealous advocate and adversely affect the lawyer's independent professional judgment on behalf of each client.

As Ohio Supreme Court Board of Commissioners Opinion 97-7 (December 5, 1997) explains it:

If a liability insurer pays an attorney or law firm a fixed flat fee which is insufficient in regards to the time and effort spent on the defense work, there is a risk that the attorney's interest in the matter and his or her professional judgment on behalf of the insured may be compromised by the insufficient compensation paid by the insurer. An attorney or law firm cannot enter into such an agreement.

The same point was echoed in Florida Bar Ethics Opinion 98-2 (June 18, 1998) in which the Florida board determined that such flat fixed-fee contracts are not prohibited under the Florida Rules but cautioned that the lawyer "may not enter into a set fee agreement in which the set fee is so low as to impair her independent professional judgment or cause her to limit the representation of the insured."

In addition to the Georgia Rules referenced above, a Georgia lawyer considering entering into such an agreement should bear in mind Ga. R.P.C. 1.8(f) and 5.4(c) as well as Ga. R.P.C. 1.7(a) and its Comment [6].

Rule 1.8(f) cautions that "A lawyer shall not accept compensation for representing a client from one other than the client unless. . . (2) there is no interference with

the lawyer's independence of professional judgment or with the client-lawyer relationship. . .³

Ga. R.P.C. 1.7(a) provides that:

A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as provided in (b) [which allows client consent to cure conflicts in certain circumstances].

Ga. R.P.C. 1.7(c) makes it clear, however, that client consent to cure a conflict of interest is "not permissible if the representation . . . (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients."

When a lawyer agrees to handle an unknown and indeterminable amount of work for a fixed fee, inadequate compensation and work overload may result. In turn, such effects could not only short-change competent and diligent representation of clients but generate a conflict between the lawyer's own personal and economic interests in earning a livelihood and maintaining the practice and effectively and competently representing the assigned clients. See Comment [6] to Rule 1.7: "The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client."

As other state bar ethics opinions have concluded, this situation does not lend itself to hard and fast categorical answers. Nothing in the Georgia Rules of Professional Conduct would forbid such a fee agreement *per se*. But "it is clear that a lawyer may not accept a fixed fee arrangement if that will induce the lawyer to curtail providing competent and diligent representation of proper scope and exercising independent professional judgment." Michigan Bar Ethics Opinion RI-343 (January 25, 2008). Whether the acceptance of a fixed fee for an indeterminate amount of legal work poses an unacceptable risk that it will cause a violation of the lawyer's obligation to his or her clients cannot be answered in the abstract. It requires a judgment of the lawyer in the particular situation.

A structural factor tends to militate against an out-sized risk of compromising the ability of the lawyer to provide an acceptable quality of legal representation in these circumstances just as it did in the last. The indemnity obligation means the insurer must bear the judgment-related financial risk up to the policy limits. Hence, "the duty to indemnify encourages insurers to defend prudently."⁴ A liability insurer helps itself – not

just its insured — by spending wisely on the defense of cases if it is liable for the judgment on a covered claim. Coupled with the lawyer's own professional obligation to provide competent representation in each case, this factor lessens the danger that the fixed fee will be set at so low a rate as to compromise appropriate representation of insureds by lawyers retained for this purpose by the insurer.

3. A Third-Party Offers to Retain a Lawyer or Law Firm to Provide an Indeterminate Amount of Legal Work for an Indeterminate Number of Clients Where the Third-Party Paying for the Legal Service Has an Obligation to Furnish the Assistance of Counsel to Those Who Will Be Clients of the Lawyer But Does Not Have a Direct Stake in the Outcome of Any Representation.

A situation where a third party that will not be harmed directly itself by the result of the lawyer's representation is compensating the lawyer with a fixed fee to provide an indeterminate amount of legal services to the clients of the lawyer may present an unacceptable risk that the workload and compensation will compromise the competent and diligent representation of those clients. Examples might be a legal aid society that contracts with an outside lawyer to handle all civil cases of a particular type for a set fee for low-income or indigent clients or a governmental or private entity that contracts with independent contractor lawyers to provide legal representation to certain indigent criminal defendants.

In contrast to the earlier sets of circumstances, several structural factors that might ameliorate the danger of the arrangement resulting in an unmanageable work load and inadequate compensation that could compromise the legal representation are absent in this situation. First, and most obviously, there is a disconnection between the adequacy of the legal service rendered and an impact on the one paying for the legal representation. The one paying for the legal services is neither the client itself nor one obligated to indemnify the client and who therefore bears a judgment-related risk. While the third-party payor is in a position to monitor the adequacy of the legal representation it provides through the lawyers it engages and has an interest in assuring effective representation, it does not bear the same risk of inadequate representation as the client itself in situation No. 1 or the liability insurer in situation No. 2.

Second, and perhaps less obviously, this last situation is fraught with even greater risk from indeterminacy if there is no ceiling set on the number of cases that can be assigned and there is no provision for adjusting the agreed-upon compensation if the volume of cases or the demands of certain cases turns out to far exceed what was contemplated. Sheer workload can compromise the quality of legal services whatever the arrangement for compensation. But, where the payment is set at a fixed

annual fee rather than on a fixed fee per case basis, the ability of the lawyer to staff up to handle a greater-than-expected volume with increased revenue is removed.

Accordingly, as compared to the other examples, the risk that inadequate compensation and case overload may eventually compromise the adequacy of the legal representation is heightened in these circumstances. A lawyer entering into such a contract must assess carefully the likelihood that such an arrangement in actual operation, if not on its face, will pose significant risks of non-compliance with Ga. Rules of Professional Conduct 1.1, 1.3, 1.5, 1.8(f) or 1.7.

In this regard, a fee arrangement that is so seriously inadequate that it systematically threatens to undermine the ability of the lawyer to deliver competent legal services is not a reasonable fee. Ga. R.P.C. 1.5 Comment [3] warns that:

An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required. . . .

And Comment [1] to Ga. R.P.C. 1.3 reminds that "A lawyer's work load should be controlled so that each matter can be handled adequately."

A failure to assess realistically at the outset the volume of cases and the adequacy of the compensation and to make an informed judgment about the lawyer's ability to render competent and diligent representation to the clients under the agreement could also result in prohibited conflicts of interest under Ga. R.P.C. 1.7(a). If an un-capped caseload or under-compensation forces a lawyer to underserve some clients by limiting preparation⁵ and advocacy in order to handle adequately the representation of other clients or the fixed fee systematically confronts the lawyer with choosing between the lawyer's own economic interests and the adequate representation of clients a conflict of interest is present. Ga. R.P.C. 1.7(c) makes it clear that a conflict that renders it "reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the effected clients" cannot be under-taken or continued, even with client consent.

It is not possible in the abstract to say categorically whether any particular agreement by a lawyer to provide legal services in this third situation violates the Georgia Rules of Professional Conduct. However, arrangements that obligate lawyers to handle an unknown and indeterminate number of cases

without any ceiling on case volume or any off-setting increase in compensation due to the case volume carry very significant risks that competent and diligent representation of clients may be compromised and that the lawyer's own interests or duties to another client will adversely affect the representation. Lawyers contemplating entering into such arrangements need to give utmost attention to these concerns and exercise a most considered judgment about the likelihood that the contractual obligations that they will be accepting can be satisfied in a manner fully consistent with the Georgia Rules of Professional Conduct. A lawyer faced with a representation that will result in the violation of the Georgia Rules of Professional Conduct must decline or terminate it, Ga. R.P.C. 1.16(a)(1)⁶, unless ordered by a court to continue.⁷

The second publication of this opinion appeared in the June 2011 issue of the Georgia Bar Journal, which was mailed to the members of the State Bar of Georgia on or about June 6, 2011. The opinion was filed with the Supreme Court of Georgia on June 23, 2011. No review was requested within the 20-day review period, and the Supreme Court of Georgia has not ordered review on its own motion. In accordance with Rule 4-403(d), this opinion is binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

Endnotes

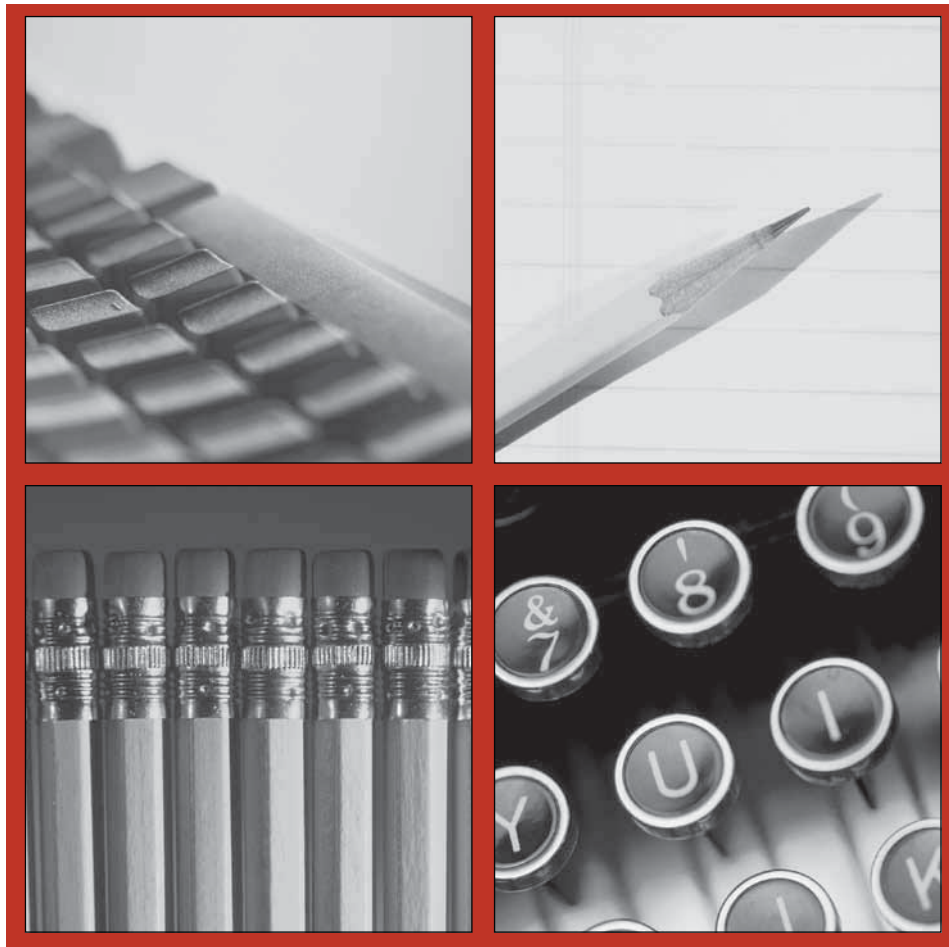
1. Kentucky Bar Association Ethics Opinion KBA E - 368 (July 1994). This opinion prohibiting *per se* lawyers from entering into set flat fee contracts to do all of a liability insurer's defense work was adopted by the Kentucky Supreme Court in American Insurance Association v. Kentucky Bar Association, 917 S.W.2d 568 (Ky. 1996). The result and rationale are strongly criticized by Charles Silver, Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers, 4 *Conn. Ins. L. J.* 205 (1997-98).
2. Florida Bar Ethics Opinion 98-2 (June 18, 1998) (An attorney may accept a set fee per case from an insurance company to defend all of the insurer's third party insurance defense work unless the attorney concludes that her independent professional judgment will be affected by the agreement); Iowa Supreme Court Board of Professional Ethics and Conduct Ethics Opinion 86-13 (February 11, 1987) (agreement to provide specific professional services for a fixed fee is not improper where service is inherently capable of being stated and circumscribed and any additional professional services that become necessary will be compensated at attorney's regular hourly rate.); Michigan Bar Ethics Opinion RI-343 (January 25, 2008) (Not a violation of the Rules of Professional Conduct for a lawyer to contract with an insurance company to represent its insureds on a fixed fee basis, so long as the arrangement does not adversely affect the lawyer's independent professional judgment and the lawyer represents the insured with competence

and diligence.); New Hampshire Bar Association Formal Ethics Opinion 1990-91 |5 (Fixed fee for insurance defense work is not *per se* prohibited; but attorney, no matter what the fee arrangement, is duty bound to act with diligence.); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 97-7 (December 5, 1997) (Fixed fee agreement to do all of liability insurer's defense work must provide reasonable and adequate compensation. The set fee must not be so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate); Oregon State Bar Formal Ethics Opinion No. 2005-98 (Lawyer may enter flat fee per case contract to represent insureds but this does not limit, in any way lawyer's obligations to each client to render competent and diligent representation. "Lawyer owes same duty to 'flat fee' clients that lawyer would owe to any other client." "Lawyers may not accept a fee so low as to compel the conclusion that insurer was seeking to shirk its duties to insureds and to enlist lawyer's assistance in doing so."); Wisconsin State Bar Ethics Opinion E-83-15 (Fixed fee for each case of insurance defense is permissible; attorney reminded of duty to represent a client both competently and zealously.)

3. Rule 5.4(c) similarly commands that: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."
4. Silver, note 1 at 236.
5. Ga. R.P.C. 1.1 requires that a lawyer "provide competent representation to a client." Comment [5] spells out the thoroughness and preparation that a lawyer must put forth, noting that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. **It also includes adequate preparation.**" (emphasis added)
6. See ABA Formal Opinion 06-441 (May 2006) titled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation," suggesting that if a caseload becomes too burdensome for a lawyer to handle competently and ethically the lawyer "must decline to accept new cases rather than withdraw from existing cases if the acceptance of a new case will result in her workload becoming excessive."
7. "... When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Ga. R.P.C. 1.16(c).

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

No earlier than thirty days after the publication of this Notice, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, *2010-2011 State Bar of Georgia Directory and Handbook*, p. H-6 (hereinafter referred to as "*Handbook*").

I hereby certify that the following is the verbatim text of the proposed amendments as approved by the Board of Governors of the State Bar of Georgia. Any member of the State Bar of Georgia who desires to object to these proposed amendments to the Rules is reminded that he or she may only do so in the manner provided by Rule 5-102, *Handbook*, p. H-6.

This Statement and the following verbatim text are intended to comply with the notice requirements of Rule 5-101, *Handbook*, p. H-6.

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT STATE OF GEORGIA

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

MOTION TO AMEND 2011-3 MOTION TO AMEND THE RULES AND REGULATIONS OF THE STATE BAR OF GEORGIA

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors, and upon the concurrence of its Executive Committee, and presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, and published at 2010-2011 *State Bar of Georgia Directory and Handbook*, pp. H-1, *et seq.*, The State Bar respectfully moves that the Rules and Regulations of the State Bar of Georgia regarding the Fee Arbitration Program be amended in the following respects:

I.

Proposed Amendments to the Preamble to Part VI, Arbitration of Fee Disputes, of the Rules of the State Bar of Georgia

It is proposed that the Preamble to Part VI of the Rules of the State Bar of Georgia regarding the Arbitration of Fee Disputes be amended by deleting the struck-through sections and inserting the sections underlined as follows:

PREAMBLE

The purpose of ~~this~~ the State Bar of Georgia's program ~~for the arbitration of fee disputes~~ is to provide a convenient mechanism for ~~(1) the resolution of disputes~~ (1) between lawyers and clients over fees; ~~(2) the resolution of disputes between lawyers in connection with the dissolution of a practice or the withdrawal of a lawyer from a partnership or the dissolution and separation of a partnership, practice;~~ (2) the resolution of disputes between lawyers in connection with the dissolution of a practice or the withdrawal of a lawyer from a partnership or the dissolution and separation of a partnership, practice; or ~~(3) the resolution of disputes between lawyers concerning the entitlement to portions allocation of fees earned from joint services. It is a process which may be invoked by either side after~~ (3) the resolution of disputes between lawyers concerning the entitlement to portions allocation of fees earned from joint services. It is a process which may be invoked by either side after ~~If the parties to such a dispute have been unable to reach an agreement between or among themselves, either side may petition the State Bar Committee on the Arbitration of Attorney Fee Disputes ("Committee") to arbitrate the dispute pursuant to these rules.~~

Regardless of whether ~~it is the a lawyer or the a client who takes~~ initiates the ~~initiative of~~ filing of a petition requesting arbitration of the disputes, the petitioner must agree to be bound by the result of the arbitration. This is intended to discourage the filing of complaints ~~which that~~ are frivolous or ~~which that~~ seek to invoke the process simply to obtain an "advisory opinion."." If the respondent also agrees to be bound, the resulting arbitration award will be enforceable under the ~~general arbitration laws of the State~~ Georgia Arbitration Code, O.C.G.A. §§ 9-9-1 et seq.

A unique feature of this program ~~provides that where the petitioner is that, if a client whose claim after investigation appears to warrant a hearing, initiates the arbitration process and agrees to be bound by the result of the arbitration and the respondent lawyer refuses to be bound by any resulting award, the matter will not be dismissed, but an ex parte still be submitted to arbitration if, after investigation by the Committee or its staff, the client's claim appears to warrant a hearing may be held.~~

If the ~~outcome of this hearing is client prevails in the client's favor~~ arbitration, the State Bar ~~will of Georgia,~~

~~upon the written request of the client, may provide a lawyer at no cost, other than actual litigation expenses, to the client to represent the client in subsequent litigation to adjust the fee in accordance with the arbitration award. This is intended to relieve the client of the burden of paying a second lawyer to recover fees determined to have been excessively charged by the first lawyer post-award proceedings at no cost other than court filing fees and litigation expenses. Alternatively, the Office of the General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings.~~

If the proposed amendments to the Preamble are adopted, the new Preamble would read as follows:

PREAMBLE

The purpose of the State Bar of Georgia's program for the arbitration of fee disputes is to provide a convenient mechanism for the resolution of disputes (1) between lawyers and clients over fees; (2) between lawyers in connection with the dissolution of a practice or the withdrawal of a lawyer from a partnership or practice; or (3) between lawyers concerning the allocation of fees earned from joint services. If the parties to such a dispute have been unable to reach an agreement between or among themselves, either side may petition the State Bar Committee on the Arbitration of Attorney Fee Disputes ("Committee") to arbitrate the dispute pursuant to these rules.

Regardless of whether a lawyer or a client initiates the filing of a petition requesting arbitration of the dispute, the petitioner must agree to be bound by the result of the arbitration. This is intended to discourage the filing of complaints that are frivolous or that seek to invoke the process simply to obtain an "advisory opinion." If the respondent also agrees to be bound, the resulting arbitration award will be enforceable under the Georgia Arbitration Code, O.C.G.A. §§ 9-9-1 et seq.

A unique feature of this program is that, if a client initiates the arbitration process and agrees to be bound by the result of the arbitration and the respondent lawyer refuses to be bound by any resulting award, the matter will still be submitted to arbitration if, after investigation by the Committee or its staff, the client's claim appears to warrant a hearing.

If the client prevails in the arbitration, the State Bar of Georgia, upon the written request of the client, may provide a lawyer to represent the client in post-award proceedings at no cost other than court filing fees and litigation expenses. Alternatively, the Office of the General Counsel of the State Bar of

Georgia may represent, assist, or advise a client in post-award proceedings.

II.

Proposed Amendments to Part VI, Chapter 1 of the Rules of the State Bar of Georgia Regarding The Committee on Resolution of Fee Disputes

It is proposed that Part VI, Chapter 1, Rules 6-101 through 6-106 regarding the Committee on Resolution of Fee Disputes be amended by deleting the struck-through sections and inserting the sections underlined as follows:

CHAPTER 1

COMMITTEE ON RESOLUTION OF FEE DISPUTES

Rule 6-101. Committee.

~~The~~ This program will be administered by the State Bar Committee on the Arbitration of Attorney Fee Disputes ("Committee").

Rule 6-102. Committee Membership.

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

Rule 6-103. Terms.

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

Rule 6-104. Responsibility Powers and Duties of Committee.

~~The Committee shall be responsible for determining jurisdiction to handle complaints which it receives, administering the selection of arbitrators, the conduct of the arbitration process, and the development and implementation of fee arbitration procedures.~~

The Committee shall have the following powers and duties:

- (a) To determine whether to accept jurisdiction over a dispute;

(b) To appoint and remove lawyer and nonlawyer arbitrators and panels of arbitrators;

(c) To oversee the operation of the arbitration process;

(d) To develop and implement fee arbitration procedures;

(e) To interpret these rules and to decide any disputes regarding the interpretation and application of these rules;

(f) To determine challenges to the neutrality of an arbitrator where the arbitrator does not voluntarily withdraw;

(g) To maintain the records of the State Bar of Georgia's Fee Arbitration Program; and

(h) To perform all other acts necessary for the effective operation of the Fee Arbitration Program.

Rule 6-105. Staff's Responsibilities.

State Bar staff shall be assigned to assist the Committee. The ~~staff so~~ assigned ~~staff~~ will have ~~the such~~ administrative responsibilities ~~as may be~~ delegated by the Committee, which may include the following:

(a) Receive and review ~~complaints~~ arbitration requests and discuss them with the parties, if necessary;

(b) Conduct inquiries to obtain ~~any~~ additional information ~~required as needed~~;

(c) Make recommendations to the Committee ~~to dismiss complaints or whether~~ to accept ~~or decline~~ jurisdiction; ~~and~~

(d) ~~Mail Transmit~~ notices ~~or of~~ arbitration hearings, arbitration awards, and other Committee correspondence.

~~The Committee shall review all of the available evidence, including the recommendations of the staff, and make a determination by majority vote whether to dismiss a complaint or to accept jurisdiction. All decisions of the Committee shall be final, subject only to review by the Executive Committee of the State Bar of Georgia pursuant to its powers, functions, and duties under the Rules governing the State Bar (241 Ga. 643).~~

Rule 6-106. Waiting Period.

~~If, following a preliminary investigation by the~~

~~staff and review by the Committee, the Committee concludes that it has jurisdiction and that the petitioner's claim appears to have merit, the Committee shall notify the parties that it has assumed jurisdiction. The Committee will then delay any further steps until the expiration of thirty calendar days following such notice during which time the parties will be urged to exert their best efforts to resolve the dispute.~~

If the proposed amendments to Part VI, Chapter 1 of the Rules are adopted, the new Chapter 1 would read as follows:

CHAPTER 1 COMMITTEE ON RESOLUTION OF FEE DISPUTES

Rule 6-101. Committee.

This program will be administered by the State Bar Committee on the Arbitration of Attorney Fee Disputes ("Committee").

Rule 6-102. Committee Membership.

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

Rule 6-103. Terms.

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

Rule 6-104. Powers and Duties of Committee.

The Committee shall have the following powers and duties:

(a) To determine whether to accept jurisdiction over a dispute;

(b) To appoint and remove lawyer and nonlawyer arbitrators and panels of arbitrators;

(c) To oversee the operation of the arbitration process;

(d) To develop and implement fee arbitration procedures;

- (e) To interpret these rules and to decide any disputes regarding the interpretation and application of these rules;
- (f) To determine challenges to the neutrality of an arbitrator where the arbitrator does not voluntarily withdraw;
- (g) To maintain the records of the State Bar of Georgia's Fee Arbitration Program; and
- (h) To perform all other acts necessary for the effective operation of the Fee Arbitration Program.

Rule 6-105. Staff's Responsibilities.

State Bar staff shall be assigned to assist the Committee. The assigned staff will have such administrative responsibilities as may be delegated by the Committee, which may include the following:

- (a) Receive and review arbitration requests and discuss them with the parties, if necessary;
- (b) Conduct inquiries to obtain additional information as needed;
- (c) Make recommendations to the Committee whether to accept or decline jurisdiction; and
- (d) Transmit notices of arbitration hearings, arbitration awards, and other Committee correspondence.

III.

**Proposed Amendments to Part VI, Chapter 2
of the Rules of the State Bar of Georgia Regarding
Jurisdictional Guidelines**

It is proposed that Part VI, Chapter 2, Rules 6-201 through 6-203 regarding the Jurisdictional Guidelines for disputes be amended by deleting the struck-through sections and inserting the sections underlined as follows:

**CHAPTER 2
JURISDICTIONAL GUIDELINES**

Rule 6-201. Petition.

A request for arbitration of a fee dispute is initiated by the filing of a petition with the Committee. Each petition shall be filed on the Fee Arbitration Petition Form supplied by Committee staff and shall contain the following elements:

- (a) A statement of the nature of the dispute and the petitioner's statement of facts, including relevant dates;

(b) The names and addresses of the client(s) and the attorney(s);

(c) A statement that the petitioner has made a good faith effort to resolve the dispute and the details of that effort;

(d) A statement that the petitioner agrees to be bound by the result of the arbitration;

(e) The date of the petition; and

(f) Each petitioner's signature.

Rule 6-202. Service of Petition.

If a petition has been properly completed and appears to have merit, Committee staff shall serve a copy of the petition, along with a fee arbitration answer form and an acknowledgement of service form, upon the respondent by first class mail addressed to such party's last known address. A signed acknowledgment of service form or a written answer from the respondent or respondent's attorney shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.

In the absence of an acknowledgment of service or a written response from the respondent or respondent's counsel, service shall be certified mail, return receipt requested, addressed to such party's last known address.

In unusual circumstances as determined by the Committee or its staff, when service has not been accomplished by other less costly measures, service may be accomplished by the Sheriff or a court-approved agent for service of process.

If service is not accomplished, the Committee shall not accept jurisdiction of the case.

Rule 6-203. Answer.

Each respondent shall have 20 calendar days after service of a petition to file an answer with the Committee. Staff, in its discretion, may grant appropriate extensions of time for the filing of an answer.

The answer shall be filed on or with the Fee Arbitration Answer Form supplied by Committee staff and shall contain the following elements:

- (a) A statement as to whether the respondent agrees to be bound by the result of the arbitration;
- (b) The respondent's statement of facts;
- (c) Any defenses the respondent intends to assert;

(d) The date of the answer; and

(e) Each respondent's signature.

The Committee staff shall serve a copy of the answer upon each petitioner by first class mail, addressed to such party's last known address.

The failure to file an answer shall not deprive the Committee of jurisdiction and shall not result in a default judgment against the respondent.

Rule 6-201 204. Accepting Jurisdiction.

The Committee or its designee may accept jurisdiction over a fee dispute only if all of the following requirements are satisfied:

(a) The fee in question, whether paid or unpaid, has been charged was for legal services rendered by a lawyer who is, or who was at the time of rendition of the service had been licensed the services were rendered, a member of the State Bar of Georgia or otherwise authorized to practice law in the State of Georgia or who has been duly licensed as a foreign legal consultant in the State of Georgia.

(b) The legal services in question were performed:

(1) in the State of Georgia; or

(b-2) The services in question were performed either in the State of Georgia or from an office located in the State of Georgia; or

(3) by a lawyer who is not admitted to the practice of law in any U.S. jurisdiction other than Georgia, and the circumstances are such that if the State Bar of Georgia does not accept jurisdiction, no other U.S. jurisdiction will be available to a client who has filed a petition under this program.

(c) At the time the legal services in question were performed there existed between the lawyer and the client an expressed or implied contract establishing between them a lawyer/client relationship. A relative or other person paying the legal fees of the client may request arbitration of disputes over those fees provided both the client and the payor join as co-petitioners or co-respondents and both agree to be bound by the result of the arbitration.

(d) The disputed fee:

(1c) The disputed fee exceeds (\$750) seven hundred and fifty dollars.

(2d)—is not one the The amount of which the disputed fee is not governed by statute or other law, nor one has any court fixed or approved the full amount or all terms of the disputed fee or all terms of which have already been fixed or approved by order of a court.

(e) The fee dispute is not the subject of litigation in court at the time the petition for arbitration is filed or when the Committee determines jurisdiction.

(ef)—A The petition seeking arbitration of the fee dispute is filed with the Committee by the lawyer or the client no more than two (2) years following the date on which the controversy arose. If this date is disputed, it shall be determined in the same manner as the commencement of a cause of action on the underlying contract.

(f) The client, whether petitioner or respondent, agrees to be bound by the result of the arbitration.

(g) The fee dispute is not the subject of litigation in court at the time the Petition for arbitration is filed.

(g) In the case of disputes between lawyers and clients, a lawyer/client relationship existed between the petitioner and the respondent at the time the legal services in question were performed. A relative or other person paying the legal fees of the client may request arbitration of disputes over those fees, provided both the client and the payor join as co-petitioners or co-respondents and both agree to be bound by the result of the arbitration.

(h) The client, whether petitioner or respondent, agrees to be bound by the result of the arbitration. If the respondent attorney does not agree to be bound by the result of the arbitration, the Committee in its discretion may determine that it is in the best interest of the public and the legal profession to accept jurisdiction. When the Committee accepts jurisdiction under these circumstances, the nonconsenting lawyer shall be considered a "party" for purposes of these rules.

(i) In case of disputes between lawyers, the lawyers who are parties to the dispute are all members of the State Bar of Georgia; and have all the lawyers involved agreed to arbitrate the dispute under this program and to be bound by the result of the arbitration.

Additionally, where the parties to a fee dispute have signed a written agreement to submit fee disputes to

binding arbitration with the State Bar of Georgia's Attorney Fee Arbitration Program, the Committee will consider the agreement enforceable if it is:

- (1) set out in a separate paragraph;
- (2) written in a font size at least as large as the rest of the contract; and
- (3) separately initialed by the client and attorney.

In deciding whether to accept jurisdiction, the Committee shall review available evidence, including the recommendations of the staff, and make a determination whether to accept or decline jurisdiction. The Committee's decisions on jurisdiction are final, except that such decisions are subject to reconsideration by the Committee upon the request of either party made within 30 days of the initial decision. Staff shall notify the parties of the Committee's decision on jurisdiction by first class mail.

(h) The petition contains the following elements:

- (1) A statement of the nature of the dispute and the particulars of the petitioner's position, including relevant dates.
- (2) The identities of both the client and the lawyer and the addresses of both.
- (3) A statement that the petitioner has made a good faith effort to resolve the dispute and the details of that effort.
- (4) The agreement of the petitioner to be bound by the result of the arbitration.
- (5) The signature of the petitioner and date of the petition.
- (6) The petition shall be filed on a form which will be supplied by the Committee. Such petition shall be served upon the opposite party at such party's last known address by certified mail, return receipt requested.

Rule 6-202 205. Termination or Suspension of Proceedings.

The Committee may ~~decline~~; suspend; or terminate arbitration proceedings or may decline or terminate jurisdiction if the client, in addition to ~~disputing the fee, claims any other form of relief pursuing arbitration of a fee dispute under these rules, asserts a claim~~ against the lawyer in any court arising out of the same set of circumstances, including any claim of malpractice or professional misconduct. Any claim or evidence of professional misconduct

within the meaning of the Code of Professional Responsibility may be ~~referred in a separate report reported~~ by the arbitrators or the Committee to the General Counsel's Office for consideration under its normal procedures.

Rule 6-203-206. Revocation.

~~After a petition has been filed,~~ jurisdiction has been accepted by the Committee and the other party has agreed in writing to be bound by the award, the submission to arbitration shall be irrevocable except by consent of all parties ~~to the dispute or by action of the Committee or the arbitration panel for good cause shown.~~

If the proposed amendments to Part VI, Chapter 2 of the Rules are adopted, the new Chapter 2 would read as follows:

CHAPTER 2 JURISDICTIONAL GUIDELINES

Rule 6-201. Petition.

A request for arbitration of a fee dispute is initiated by the filing of a petition with the Committee. Each petition shall be filed on the Fee Arbitration Petition Form supplied by Committee staff and shall contain the following elements:

- (a) A statement of the nature of the dispute and the petitioner's statement of facts, including relevant dates;
- (b) The names and addresses of the client(s) and the attorney(s);
- (c) A statement that the petitioner has made a good faith effort to resolve the dispute and the details of that effort;
- (d) A statement that the petitioner agrees to be bound by the result of the arbitration;
- (e) The date of the petition; and
- (f) Each petitioner's signature.

Rule 6-202. Service of Petition.

If a petition has been properly completed and appears to have merit, Committee staff shall serve a copy of the petition, along with a fee arbitration answer form and an acknowledgement of service form, upon the respondent by first class mail addressed to such party's last known address. A signed acknowledgement of service form or a written answer from the respondent or respondent's attorney shall constitute conclusive proof of service and shall eliminate the need to utilize any other form of service.

In the absence of an acknowledgment of service or a written response from the respondent or respondent's counsel, service shall be certified mail, return receipt requested, addressed to such party's last known address.

In unusual circumstances as determined by the Committee or its staff, when service has not been accomplished by other less costly measures, service may be accomplished by the Sheriff or a court-approved agent for service of process.

If service is not accomplished, the Committee shall not accept jurisdiction of the case.

Rule 6-203. Answer.

Each respondent shall have 20 calendar days after service of a petition to file an answer with the Committee. Staff, in its discretion, may grant appropriate extensions of time for the filing of an answer.

The answer shall be filed on or with the Fee Arbitration Answer Form supplied by Committee staff and shall contain the following elements:

- (a) A statement as to whether the respondent agrees to be bound by the result of the arbitration;
- (b) The respondent's statement of facts;
- (c) Any defenses the respondent intends to assert;
- (d) The date of the answer; and
- (e) Each respondent's signature.

The Committee staff shall serve a copy of the answer upon each petitioner by first class mail, addressed to such party's last known address.

The failure to file an answer shall not deprive the Committee of jurisdiction and shall not result in a default judgment against the respondent.

Rule 6-204. Accepting Jurisdiction.

The Committee or its designee may accept jurisdiction over a fee dispute only if the following requirements are satisfied:

- (a) The fee in question, whether paid or unpaid, was for legal services rendered by a lawyer who is, or was at the time the services were rendered, a member of the State Bar of Georgia or otherwise authorized to practice law in the State of Georgia.
- (b) The legal services in question were performed:
 - (1) in the State of Georgia; or

- (2) from an office located in the State of Georgia, or

- (3) by a lawyer who is not admitted to the practice of law in any U.S. jurisdiction other than Georgia, and the circumstances are such that if the State Bar of Georgia does not accept jurisdiction, no other U.S. jurisdiction will be available to a client who has filed a petition under this program.

- (c) The disputed fee exceeds \$750.

- (d) The amount of the disputed fee is not governed by statute or other law, nor has any court fixed or approved the full amount or all terms of the disputed fee.

- (e) The fee dispute is not the subject of litigation in court at the time the petition for arbitration is filed or when the Committee determines jurisdiction.

- (f) The petition seeking arbitration of the fee dispute is filed with the Committee no more than two years following the date on which the controversy arose. If this date is disputed, it shall be determined in the same manner as the commencement of a cause of action on the underlying contract.

- (g) In the case of disputes between lawyers and clients, a lawyer/client relationship existed between the petitioner and the respondent at the time the legal services in question were performed. A relative or other person paying the legal fees of the client may request arbitration of disputes over those fees, provided both the client and the payor join as co-petitioners or co-respondents and both agree to be bound by the result of the arbitration.

- (h) The client, whether petitioner or respondent, agrees to be bound by the result of the arbitration. If the respondent attorney does not agree to be bound by the result of the arbitration, the Committee in its discretion may determine that it is in the best interest of the public and the legal profession to accept jurisdiction. When the Committee accepts jurisdiction under these circumstances, the nonconsenting lawyer shall be considered a "party" for purposes of these rules.

- (i) In disputes between lawyers, the lawyers who are parties to the dispute are all members of the State Bar of Georgia and have all agreed to arbitrate the dispute under this program and to be bound by the result of the arbitration.

Additionally, where the parties to a fee dispute have signed a written agreement to submit fee disputes to binding arbitration with the State Bar of Georgia's Attorney Fee Arbitration Program, the Committee will consider the agreement enforceable if it is:

- (1) set out in a separate paragraph;
- (2) written in a font size at least as large as the rest of the contract; and
- (3) separately initialed by the client and attorney.

In deciding whether to accept jurisdiction, the Committee shall review available evidence, including the recommendations of the staff, and make a determination whether to accept or decline jurisdiction. The Committee's decisions on jurisdiction are final, except that such decisions are subject to reconsideration by the Committee upon the request of either party made within 30 days of the initial decision. Staff shall notify the parties of the Committee's decision on jurisdiction by first class mail.

Rule 6-205. Termination or Suspension of Proceedings.

The Committee may suspend or terminate arbitration proceedings or may decline or terminate jurisdiction if the client, in addition to pursuing arbitration of a fee dispute under these rules, asserts a claim against the lawyer in any court arising out of the same set of circumstances, including any claim of malpractice. Any claim or evidence of professional misconduct within the meaning of the Code of Professional Responsibility may be reported by the arbitrators or the Committee to the General Counsel's Office for consideration under its normal procedures.

Rule 6-206. Revocation.

After jurisdiction has been accepted by the Committee and the other party has agreed in writing to be bound by the award, the submission to arbitration shall be irrevocable except by consent of all parties or by action of the Committee or the arbitration panel for good cause shown.

IV.

Proposed Amendments to Part VI, Chapter 3 of the Rules of the State Bar of Georgia Regarding the Selection of Arbitrators

It is proposed that Part VI, Chapter 3, Rules 6-301 through 6-305 regarding the Selection of Arbitrators be amended by deleting the struck-through sections and inserting the sections underlined as follows:

**CHAPTER 3
SELECTION OF ARBITRATORS**

Rule 6-301. Roster of Arbitrators.

~~(a)~~ The Committee shall maintain a roster of lawyers available to serve as arbitrators on an "as needed" basis in appropriate geographical areas throughout the state. To the extent possible, the arbitration should take place in the same geographical area where the services in question were performed; however, the final decision as to the location of the arbitration remains with the Committee.

~~(b)~~ The Committee shall likewise maintain a roster of nonlawyer public members selected by the Supreme Court of Georgia.

Rule 6-302. Neutrality of Arbitrators.

No person shall serve as an arbitrator in any matter in which that person has any financial or personal interest. ~~Each~~ Upon appointment to a particular arbitration, each arbitrator shall disclose to the Committee any ~~bias-circumstance~~ bias-circumstance that ~~he or she~~ he or she may ~~have affect~~ have affect his or her neutrality in regard to the dispute in question, ~~or any circumstances likely to create an appearance of bias which might disqualify that person as an impartial arbitrator.~~ Either party may state any reason why he or she feels that an arbitrator should withdraw or be disqualified.

If an arbitrator becomes aware of any circumstances that might preclude that arbitrator from rendering an objective and impartial determination of the proceeding, the arbitrator must disclose that potential conflict as soon as practicable. If the arbitrator becomes aware of the potential conflict prior to the hearing, the disclosure shall be made to the Committee, which shall forward the disclosure to the parties. If the potential conflict becomes apparent during the hearing, the disclosure shall be made directly to the parties.

If a party believes that an arbitrator has a potential conflict of interest and should withdraw or be disqualified, and the arbitrator does not voluntarily withdraw, the party shall promptly notify the Committee so that the issue may be addressed and resolved as early in the arbitration process as possible.

Rule 6-303. Selection of Arbitrators.

~~Except under special procedures outlined in Chapter 6, arbitrators shall be selected as follows:~~

~~(a) The lawyer arbitrators shall be selected by the following process: the Committee shall furnish the petitioner a list of the names of four (4) possible lawyer arbitrators from which the petitioner~~

~~shall strike one (1) name; the Committee shall then supply the respondent with a list of the three (3) remaining names from which the respondent shall strike one (1); the two persons whose names remain will be the lawyer members of the arbitration panel.~~

~~(b) The non-lawyer public members shall be selected by the following process: the Committee shall furnish a list of the names of three (3) possible nonlawyer public arbitrators from which the petitioner shall strike one (1) name; the Committee shall then supply the respondent with a list of the two (2) remaining names from which the respondent shall strike one (1); the person whose name remains will be the non-lawyer member of the arbitration panel.~~

~~(c) If either party fails to exercise the foregoing strikes, the Committee is authorized to establish procedures to strike for that party.~~

The arbitrator panel shall be selected by the Committee or its staff. Except as provided below, the arbitration panel shall consist of two attorney members who have practiced law actively for at least five years and one nonlawyer public member.

In cases involving disputed amounts greater than \$750 but not exceeding \$2,500, the Committee in its sole discretion may appoint an arbitration panel consisting of one lawyer who has practiced law actively for at least five years.

~~(d) Petitioner and respondent by mutual agreement shall have the right to select the three (3) arbitrators; and. They also may mutually may agree to have the dispute determined by a sole arbitrator jointly selected by them, provided any such sole arbitrator shall be one (1) of the persons on the roster of arbitrators or shall have been approved in advance by the Committee upon the joint request of petitioner and respondent.~~

Rule 6-304. Qualifications of Lawyer Arbitrators.

~~The lawyer arbitrators shall, in~~ In addition to being impartial, have the following qualifications lawyer arbitrators shall:

~~(a) Have some experience in, or knowledge of, the field of law involved in the dispute.~~

~~(b) Have practiced law actively for at least five (5) years; and~~

~~(c) Be an active member in good standing of the State Bar of Georgia.~~

Rule 6-305. Powers and Duties of Arbitration Panel.

The panel of arbitrators shall have the following powers and duties:

(a) To compel by subpoena the attendance of witnesses and the production of documents and things;

(b) To decide the extent and method of any discovery;

(c) To administer oaths and affirmations;

(d) To take and hear evidence pertaining to the proceeding;

(e) To rule on the admissibility of evidence;

(f) To interpret and apply these rules insofar as they relate to the arbitrators' powers and duties; and

(g) To perform all acts necessary to conduct an effective arbitration hearing.

Rule 6-305 306. Compensation.

~~All arbitrators shall serve voluntarily and without fee or expense reimbursement. Provided; provided,~~ however, that arbitrators selected to serve in disputes in which all the parties are lawyers may at the discretion of the Committee be compensated, with such compensation to be paid by the lawyer parties as directed by the Committee.

If the proposed amendments to Part VI, Chapter 3 of the Rules are adopted, the new Chapter 3 would read as follows:

CHAPTER 3 SELECTION OF ARBITRATORS

Rule 6-301. Roster of Arbitrators.

The Committee shall maintain a roster of lawyers available to serve as arbitrators on an "as needed" basis in appropriate geographical areas throughout the state. To the extent possible, the arbitration should take place in the same geographical area where the services in question were performed; however, the final decision as to the location of the arbitration remains with the Committee.

The Committee shall likewise maintain a roster of nonlawyer public members selected by the Supreme Court of Georgia.

Rule 6-302. Neutrality of Arbitrators.

No person shall serve as an arbitrator in any matter in which that person has any financial or personal interest. Upon appointment to a particular arbitration, each arbitrator shall disclose to the Committee any circumstance that may affect his or her neutrality in regard to the dispute in question.

If an arbitrator becomes aware of any circumstances that might preclude that arbitrator from rendering an objective and impartial determination of the proceeding, the arbitrator must disclose that potential conflict as soon as practicable. If the arbitrator becomes aware of the potential conflict prior to the hearing, the disclosure shall be made to the Committee, which shall forward the disclosure to the parties. If the potential conflict becomes apparent during the hearing, the disclosure shall be made directly to the parties.

If a party believes that an arbitrator has a potential conflict of interest and should withdraw or be disqualified, and the arbitrator does not voluntarily withdraw, the party shall promptly notify the Committee so that the issue may be addressed and resolved as early in the arbitration process as possible.

Rule 6-303. Selection of Arbitrators.

The arbitrator panel shall be selected by the Committee or its staff. Except as provided below, the arbitration panel shall consist of two attorney members who have practiced law actively for at least five years and one nonlawyer public member.

In cases involving disputed amounts greater than \$750 but not exceeding \$2,500, the Committee in its sole discretion may appoint an arbitration panel consisting of one lawyer who has practiced law actively for at least five years.

Petitioner and respondent by mutual agreement shall have the right to select the three arbitrators. They also may mutually agree to have the dispute determined by a sole arbitrator jointly selected by them, provided any such sole arbitrator shall be one of the persons on the roster of arbitrators or shall have been approved in advance by the Committee upon the joint request of petitioner and respondent.

Rule 6-304. Qualifications of Lawyer Arbitrators.

In addition to being impartial, lawyer arbitrators shall:

- (a) Have practiced law actively for at least five years; and

- (b) Be an active member in good standing of the State Bar of Georgia.

Rule 6-305. Powers and Duties of Arbitration Panel.

The panel of arbitrators shall have the following powers and duties:

- (a) To compel by subpoena the attendance of witnesses and the production of documents and things;
- (b) To decide the extent and method of any discovery;
- (c) To administer oaths and affirmations;
- (d) To take and hear evidence pertaining to the proceeding;
- (e) To rule on the admissibility of evidence;
- (f) To interpret and apply these rules insofar as they relate to the arbitrators' powers and duties; and
- (g) To perform all acts necessary to conduct an effective arbitration hearing.

Rule 6-306. Compensation.

All arbitrators shall serve voluntarily and without fee or expense reimbursement; provided, however, that arbitrators selected to serve in disputes in which all the parties are lawyers may at the discretion of the Committee be compensated, with such compensation to be paid by the lawyer parties as directed by the Committee.

V.

Proposed Amendments to Part VI, Chapter 4 of the Rules of the State Bar of Georgia Regarding the Rules of Procedure

It is proposed that Part VI, Chapter 4, Rules 6-401 through 6-423 regarding the Rules of Procedure be amended by deleting the struck-through sections and inserting the sections underlined as follows:

**CHAPTER 4
RULES OF PROCEDURE**

Rule 6-401. Representation by Counsel.

Parties may be represented throughout the arbitration by counsel at their own expense, or they may represent themselves.

Rule 6-401402. Time and Place of Arbitration Hearing.

The Upon their appointment by the Committee, the arbitrators shall elect a chairperson chair and then shall fix a time [which and place for the arbitration hearing. To the extent feasible, the hearing shall be held no more than sixty (60) days after the appointment of the last arbitrator] and place for each arbitration hearing. At least ten (10) calendar days prior thereto to the hearing, the Committee shall mail notices, certified mail return receipt, of the time and place of the hearing to each party by first class mail, addressed to each party's last known address.

Rule 6-402403. Attendance and Participation at Hearing.

If a lawyer will not agree to be bound by the arbitrators' decision, the lawyer waives the right to participate in the hearing. The lawyer shall have the right to attend the hearing. However, he or she may not participate in it without the express consent of the arbitrators.

It is the individual responsibility of each party to arrange for, at their own expense, the attendance of themselves, their witnesses and, if desired, their counsel.

The parties shall have the right to attend and participate in the arbitration hearing at their own expense. It shall be discretionary with the arbitrators whether to allow the attendance of any persons who are not parties, witnesses, or counsel to one of the parties.

At the discretion of the arbitrators, a party may be permitted to appear or present witness testimony at the hearing by telephone conference call, video conference, computer-facilitated conference, or similar telecommunications equipment, provided all persons participating in the hearing can simultaneously hear each other during the hearing.

Rule 6-403. Counsel.

Parties may be represented at the hearing by counsel at their own expense, or they may represent themselves.

Rule 6-404. Stenographic Record.

Any party may request ask the Committee to arrange for the taking of a stenographic record of the proceeding. If such a record is stipulated to be the official record of the proceedings by the parties, or in appropriate cases determined to be such by the arbitrators, it must be made available to the arbitrators and to the other party for inspection at a time and place determined by the arbitrators. The total cost of such a record shall be shared equally

by those parties who ordered copies a party orders a transcript, that party shall acquire and provide a certified copy of the transcript for the record at no cost to the panel. Other parties are entitled at their own expense to acquire a copy of the transcript by making arrangements directly with the court reporter. However, it shall not be necessary to have a stenographic record of the hearing.

Rule 6-405. Death, Disability, or Resignation of Arbitrator.

If an arbitrator dies, resigns, or becomes unable to continue to act while a matter an arbitration is pending, the remaining two arbitrators shall not proceed with the arbitration. The Committee or its designee shall make a determination as to determine the course of further proceedings and may appoint a substitute or replacement arbitrator; or, by agreement of the parties, may proceed with one (1) arbitrator. Two (2) arbitrators shall not attempt to conduct the arbitration.

Rule 6-406. Discovery, Subpoenas, and Witnesses.

Discovery is limited in type and scope to that deemed necessary by the arbitrators in their sole discretion upon their own motion or the written request of either party. Persons having a direct interest in the arbitration shall be entitled to attend the hearing. The arbitrators shall have the power to require the retirement of any witness during the testimony of other witnesses. It shall be discretionary with the arbitrators to determine the propriety of the attendance of any other persons.

Upon the written request of a party or the panel's own motion, discovery may be allowed to the extent deemed necessary by the arbitrators in their sole discretion.

The arbitrators may issue subpoenas for the attendance of witnesses and for the production of documents and things, and may do so either upon the arbitrators' own initiative or upon the request of a party. These subpoenas shall be served and, upon application to the Superior Court in the county in which the arbitration is pending by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

Rule 6-407. Adjournments.

The arbitrators for good cause shown may adjourn the hearing upon the request of either party or upon the arbitrators' own initiative.

Rule 6-408. Oaths Arbitrators' Oath.

Before proceeding with the hearing, the arbitrators shall take an oath of office. The arbitrators have the

discretion to require witnesses to testify under oath or affirmation, and, if requested by either party, shall so require.

Rule 6-409. Order of Proceedings.

(a) The hearing shall be opened by the filing of the oath of the arbitrators ~~and by. Next, the recording of panel shall record~~ the place, time, and date of the hearing; ~~the names of the arbitrators and, the parties, and of witnesses or parties' counsel if any are present, and any witnesses who will be presenting evidence during the hearing.~~

(b) The normal order of proceedings shall be the same as ~~in at a trial, with the petitioner first presenting his or her petitioner's claim being presented first.~~ However, the arbitrators shall have the discretion to vary the normal order of proceedings ~~and, in any case, shall afford full and equal opportunity to all parties for presentation of relevant proofs.~~

(c) The petitioner shall have the burden of proof by a preponderance of the evidence.

Rule 6-410. Arbitration in the Absence of a Party.

The arbitration may proceed in the absence of a party, who, after due notice, fails to be present in person or by telephonic or electronic means. An award shall not be made solely on the default of a party; the arbitrators shall require the other party or parties to present such evidence as the arbitrators may require for the making of an award.

Rule 6-411. Evidence.

(a) ~~The parties Parties~~ may offer such relevant and material evidence as they desire and shall produce such additional evidence as the arbitrators may deem necessary to an understanding and determination of the dispute. ~~The arbitrators are authorized to subpoena witnesses and documents and may do so either upon the arbitrators' own initiative or upon the request of a party. These subpoenas shall be served and, upon application to the Superior Court in the county wherein the arbitration is pending by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action provided that the Court shall not enforce subpoenas in the event that it determines that the effect of such subpoenas would be unduly burdensome or oppressive to any party or person.~~ The arbitrators shall be the judge of the relevancy and materiality of the evidence offered. The rules of evidence shall be liberally interpreted and hearsay may be utilized at the discretion of the arbitrators and given such weight as the arbitrators deem appropriate.

(b) ~~Exhibits, when offered by either party, may be A list shall be made of all exhibits received into evidence by the arbitrators. The names and addresses of all witnesses, and a listing of all exhibits Exhibits shall be listed~~ in the order in which they were received, and the list shall be made a part of the record.

(c) The names and addresses of all witnesses who testify at the arbitration shall be made a part of the record. Upon their own motion or at the request of any party, the arbitrators shall have the power to require the retirement of any witness during the testimony of other witnesses.

(d) The arbitrators may receive and consider the evidence of witnesses by affidavit (copies of which shall be served on the opposing party at least five (5) days prior to the hearing), but shall give such evidence only such weight as the arbitrators deem proper after consideration of any objections made to its admissions admissibility.

(e) The petition, answer, and other pleadings, and including any documents attached thereto, may be considered as evidence at the discretion of the arbitrators and given such weight as the arbitrators deem appropriate.

(f) The receipt of testimony by ~~written interrogatories deposition~~, conference telephone calls, and other procedures are within the discretion of the arbitrators upon their own motion or at the written request of either any party.

Rule 6-412. Written Contract.

~~No arbitrator shall have authority to enter an award contrary to terms of an executed written contract between the parties except on the grounds of fraud, accident, mistake, or as being contrary to the laws of this state governing contracts.~~

Arbitrators shall give due regard to the terms of any written contract signed by the parties.

Rule 6-413. Closing of Hearings.

Prior to the closing of ~~the an~~ arbitration hearing, the arbitrators shall inquire of all parties whether they have any further proofs evidence to offer or additional witnesses to be heard. ~~If they have none no~~ further evidence is to be presented by either party, the arbitrators shall declare the hearing closed and make a record of that fact.

Rule 6-414. Reopening of Hearings.

~~The hearing may be reopened by the arbitrators either upon their own motion, or upon Upon the motion of either the arbitrators or of a party, an~~

arbitration may be reopened for good cause shown; at any time before an award is made. However, if the reopening of the hearing would prevent the making of an award from being rendered within the time provided by these rules, the matter may not be reopened; unless both parties agree upon the extension of such time limit.

Rule 6-415. Waiver of Rules.

Any party who, ~~proceeds with the arbitration after knowledge that any provisions, knowing of a failure to comply with a provision or requirement of these rules has not been complied with, and who,~~ fails to state an objection on the record or in writing prior to the closing of the hearing, shall be deemed to have waived any right to object.

Rule 6-416. Waiver of Oral Hearings.

The parties may provide by written agreement for the waiver of oral hearings.

Rule 6-417. Award.

If both parties have agreed to be bound by the arbitration, the award of the arbitrators is final and binding upon ~~them and may be enforced as provided by the general arbitration laws of the state the parties.~~

In cases in which a lawyer refuses to be bound by the result of the arbitration, the award rendered will be considered as prima facie evidence of the fairness of the award in any action brought to enforce the award, and the burden of proof shall shift to the lawyer to prove otherwise.

Rule 6-418. Time of Award.

The ~~award shall be rendered promptly by the arbitrators shall make all reasonable efforts to render their award promptly and~~ not later than ~~thirty~~ (30) days from the date of the closing of the hearing, unless otherwise agreed upon by the parties with the consent of the arbitrators or an extension is obtained from the Committee or its ~~Chairman chair~~. If oral hearing has been waived, then the time period for rendering the award shall begin to run from the date of the receipt of final statements and ~~proofs evidence~~ by the arbitrators.

Rule 6-419. Form of Award.

The award shall be in writing and shall be signed by the arbitrators or by a concurring majority. The parties shall advise the arbitrators in writing prior to the close of the hearing if they request the arbitrators to accompany the award with an opinion.

Rule 6-420. Award Upon Settlement.

If the parties settle their dispute during the course of the arbitration proceeding, the arbitrators, the

Committee, or the Committee's designee, upon the written consent of all parties, may set forth the terms of the settlement in an award.

Rule 6-421. ~~Delivery Service of Award to Upon Parties.~~

~~The parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the Committee addressed to each party at its last known address by certified mail with return receipt requested or to its counsel, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.~~

Service of the award upon the parties shall be the responsibility of Committee staff. Service of the award shall be accomplished by depositing a copy of the award in United States Mail in a properly addressed envelope with adequate first class postage thereon and addressed to each party at his or her last known address.

Rule 6-422. Communication with Arbitrators.

There shall be no ex parte communication between the parties a party and the arbitrators an arbitrator.

Rule 6-423. Interpretation and Application of Rules.

~~The If the arbitrators shall interpret and apply these rules insofar as they relate on a panel disagree as to the interpretation or application of any rule relating to the arbitrators' powers and duties. Any, such dispute among the arbitrators on a panel shall be decided by a majority vote of the arbitrators. If the dispute cannot be so resolved, either the arbitrators in that manner, an arbitrator or a party may refer the question to the Committee for its determination. All other rules shall be interpreted and applied by the Committee, and its decision shall be final, subject only to review by the Executive Committee of the State Bar of Georgia pursuant to its powers, function, and duties under the Rules governing the State Bar. The Committee's decision on the interpretation or application of these rules shall be final.~~

If the proposed amendments to Part VI, Chapter 4 of the Rules are adopted, the new Chapter 4 would read as follows:

CHAPTER 4 RULES OF PROCEDURE

Rule 6-401. Representation by Counsel.

Parties may be represented throughout the arbitration by counsel at their own expense, or they may represent themselves.

Rule 6-402. Time and Place of Arbitration Hearing.

Upon their appointment by the Committee, the arbitrators shall elect a chair and then shall fix a time and place for the arbitration hearing. To the extent feasible, the hearing shall be held no more than 60 days after the appointment of the last arbitrator. At least ten calendar days prior to the hearing, the Committee shall mail notices of the time and place of the hearing to each party by first class mail, addressed to each party's last known address.

Rule 6-403. Attendance and Participation at Hearing.

The parties shall have the right to attend and participate in the arbitration hearing at their own expense. It shall be discretionary with the arbitrators whether to allow the attendance of any persons who are not parties, witnesses, or counsel to one of the parties.

At the discretion of the arbitrators, a party may be permitted to appear or present witness testimony at the hearing by telephone conference call, video conference, computer-facilitated conference, or similar telecommunications equipment, provided all persons participating in the hearing can simultaneously hear each other during the hearing.

Rule 6-404. Stenographic Record.

Any party may ask the Committee to arrange for the taking of a stenographic record of the proceeding. If a party orders a transcript, that party shall acquire and provide a certified copy of the transcript for the record at no cost to the panel. Other parties are entitled at their own expense to acquire a copy of the transcript by making arrangements directly with the court reporter. However, it shall not be necessary to have a stenographic record of the hearing.

Rule 6-405. Death, Disability, or Resignation of Arbitrator.

If an arbitrator dies, resigns, or becomes unable to continue to act while an arbitration is pending, the remaining two arbitrators shall not proceed with the arbitration. The Committee or its designee shall determine the course of further proceedings and may appoint a substitute or replacement arbitrator or, by agreement of the parties, may proceed with one arbitrator.

Rule 6-406. Discovery, Subpoenas, and Witnesses.

Upon the written request of a party or the panel's own motion, discovery may be allowed to the extent deemed necessary by the arbitrators in their sole discretion.

The arbitrators may issue subpoenas for the attendance of witnesses and for the production of documents and things, and may do so either upon the arbitrators' own initiative or upon the request of a party. These subpoenas shall be served and, upon application to the Superior Court in the county in which the arbitration is pending by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

Rule 6-407. Adjournments.

The arbitrators for good cause shown may adjourn the hearing upon the request of either party or upon the arbitrators' own initiative.

Rule 6-408. Arbitrators' Oath.

Before proceeding with the hearing, the arbitrators shall take an oath of office. The arbitrators have the discretion to require witnesses to testify under oath or affirmation, and, if requested by either party, shall so require.

Rule 6-409. Order of Proceedings.

The hearing shall be opened by the filing of the oath of the arbitrators. Next, the panel shall record the place, time, and date of the hearing; the names of the arbitrators, the parties, parties' counsel, and any witnesses who will be presenting evidence during the hearing.

The normal order of proceedings shall be the same as at a trial, with the petitioner's claim being presented first. However, the arbitrators shall have the discretion to vary the normal order of proceedings.

The petitioner shall have the burden of proof by a preponderance of the evidence.

Rule 6-410. Arbitration in the Absence of a Party.

The arbitration may proceed in the absence of a party, who, after due notice, fails to be present in person or by telephonic or electronic means. An award shall not be made solely on the default of a party; the arbitrators shall require the other party or parties to present such evidence as the arbitrators may require for the making of an award.

Rule 6-411. Evidence.

(a) Parties may offer such relevant and material evidence as they desire and shall produce such additional evidence as the arbitrators may deem necessary to an understanding and determination of the dispute. The arbitrators shall be the judge of the relevancy and materiality of the evidence offered. The rules of evidence shall be liberally interpreted and hearsay may be utilized at the discretion of the arbitrators and given such weight as the arbitrators deem appropriate.

(b) A list shall be made of all exhibits received into evidence by the arbitrators. Exhibits shall be listed in the order in which they were received, and the list shall be made a part of the record.

(c) The names and addresses of all witnesses who testify at the arbitration shall be made a part of the record. Upon their own motion or at the request of any party, the arbitrators shall have the power to require the retirement of any witness during the testimony of other witnesses.

(d) The arbitrators may receive and consider the evidence of witnesses by affidavit (copies of which shall be served on the opposing party at least five days prior to the hearing), but shall give such evidence only such weight as the arbitrators deem proper after consideration of any objections made to its admissibility.

(e) The petition, answer, and other pleadings, including any documents attached thereto, may be considered as evidence at the discretion of the arbitrators and given such weight as the arbitrators deem appropriate.

(f) The receipt of testimony by deposition, conference telephone calls, and other procedures are within the discretion of the arbitrators upon their own motion or at the request of any party.

Rule 6-412. Written Contract.

Arbitrators shall give due regard to the terms of any written contract signed by the parties.

Rule 6-413. Closing of Hearing.

Prior to the closing of an arbitration hearing, the arbitrators shall inquire of all parties whether they have any further evidence to offer or additional witnesses to be heard. If no further evidence is to be presented by either party, the arbitrators shall declare the hearing closed and make a record of that fact.

Rule 6-414. Reopening of Hearing.

Upon the motion of the arbitrators or of a party, an arbitration may be reopened for good cause shown at any time before an award is made. However, if the reopening of the hearing would prevent the award from being rendered within the time provided by these rules, the matter may not be reopened unless both parties agree upon the extension of such time limit.

Rule 6-415. Waiver of Rules.

Any party who, knowing of a failure to comply with a provision or requirement of these rules, fails to state an objection on the record or in writing

prior to the closing of the hearing, shall be deemed to have waived any right to object.

Rule 6-416. Waiver of Oral Hearings.

The parties may provide by written agreement for the waiver of oral hearings.

Rule 6-417. Award.

If both parties have agreed to be bound by the arbitration, the award of the arbitrators is final and binding upon the parties.

In cases in which a lawyer refuses to be bound by the result of the arbitration, the award rendered will be considered as prima facie evidence of the fairness of the award in any action brought to enforce the award, and the burden of proof shall shift to the lawyer to prove otherwise.

Rule 6-418. Time of Award.

The arbitrators shall make all reasonable efforts to render their award promptly and not later than 30 days from the date of the closing of the hearing, unless otherwise agreed upon by the parties with the consent of the arbitrators or an extension is obtained from the Committee or its chair. If oral hearing has been waived, then the time period for rendering the award shall begin to run from the date of the receipt of final statements and evidence by the arbitrators.

Rule 6-419. Form of Award.

The award shall be in writing and shall be signed by the arbitrators or by a concurring majority. The parties shall advise the arbitrators in writing prior to the close of the hearing if they request the arbitrators to accompany the award with an opinion.

Rule 6-420. Award Upon Settlement.

If the parties settle their dispute during the course of the arbitration proceeding, the arbitrators, the Committee, or the Committee's designee, upon the written consent of all parties, may set forth the terms of the settlement in an award.

Rule 6-421. Service of Award Upon Parties.

Service of the award upon the parties shall be the responsibility of Committee staff. Service of the award shall be accomplished by depositing a copy of the award in United States Mail in a properly addressed envelope with adequate first class postage thereon and addressed to each party at his or her last known address.

Rule 6-422. Communication with Arbitrators.

There shall be no ex parte communication between a party and an arbitrator.

Rule 6-423. Interpretation and Application of Rules.

If the arbitrators on a panel disagree as to the interpretation or application of any rule relating to the arbitrators' powers and duties, such dispute shall be decided by a majority vote of the arbitrators. If the dispute cannot be resolved in that manner, an arbitrator or a party may refer the question to the Committee for its determination. The Committee's decision on the interpretation or application of these rules shall be final.

VI.

Proposed Amendments to Part VI, Chapter 5 of the Rules of the State Bar of Georgia Regarding the Post-Award Proceedings

It is proposed that Part VI, Chapter 5, Rules 6-501 through 6-502 regarding the Post-Decision Activity, referred to as Post-Award Proceedings in the amended version, be amended by deleting the struck-through sections and inserting the sections underlined as follows:

**CHAPTER 5
POST-DECISION ACTIVITY ~~AWARD~~
PROCEEDINGS**

Rule 6-501. Where Both Parties Agree Confirmation of Award in Favor of Client.

In cases where both parties agreed to be bound by the result of the arbitration and ~~the an~~ award is ~~in~~ favor of a client has not been satisfied within ~~thirty~~ (30) days after the date of its mailing or other service by the Committee, either party may request the filing of the award on the records of the Superior Court of the county of residence of the party who has failed to satisfy the award. If not a Georgia resident, the award shall be entered in the county where the award was made. The said request shall be in writing with a copy mailed to the opposing party, shall be accompanied by all filing fees, and shall designate the appropriate county in which the award is to be entered. The Committee shall then mail the original award to the Clerk of the Superior Court of the designated county who shall file it in the same manner as the commencement of a new civil action and shall serve a copy bearing the civil action number and judge assignment by certified mail on all parties, with notice that if no objection under oath, including facts indicating that the award was the result of accident, or mistake, or the fraud of some one or all of the arbitrators or parties, or is otherwise illegal, is filed within thirty (30) days, the award shall become final. Upon application of the party filing the award, the Clerk

of the Superior Court shall issue a Writ of FiFa. The FiFa may then be entered on the general execution docket in any jurisdiction three months after it was served upon the parties, the client may apply to the appropriate Georgia superior court for confirmation of the award in accordance with the Georgia Arbitration Code, O.C.G.A. §§ 9-9-1 et seq.

~~All filing fees shall be furnished by the party or parties who requested that the award be so entered.~~

Upon the written request of a client, the Committee may provide a lawyer to represent the client in post-award proceedings at no cost to the client other than court filing fees and litigation expenses. Alternatively, the Office of General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings, provided the client shall be responsible for all court filing fees and litigation expenses.

~~In the event an objection is properly filed, the Superior Court shall cause an issue to be made up which issue shall be tried by the court sitting without a jury under the same rules and regulations as are prescribed for the trials of appeals. Thus, the Superior Court shall render its decision from the record without a de novo trial on the merits and shall affirm the award, vacate the award, or return the award to the arbitrators with specific directions for further consideration. The decision of the Superior Court shall be final and not subject to appeal.~~

Rule 6-502. Confirmation of Award in Favor of Attorney.

In cases where both parties agreed to be bound by the result of the arbitration and an award has been issued in favor of an attorney, the attorney may apply to the appropriate Georgia superior court for confirmation of the award in accordance with the Georgia Arbitration Code, O.C.G.A. §§ 9-9-1 et seq.

~~The General Counsel or an Assistant General Counsel of the State Bar of Georgia, or other volunteer lawyer may represent, assist, or advise any party in the collection of a final judgement or in the Superior Court's review of awards.~~

The State Bar will not represent, assist, or advise the attorney except to provide copies of any necessary papers from the fee arbitration file pursuant to State Bar policies.

Rule 6-502503. Procedure Where Lawyer Refuses to be Bound.

In cases where an attorney refuses to be bound by the result of an arbitration and an award in favor of a

client remains unsatisfied three months after service of the award upon the parties, the State Bar, upon the written request of the client, may provide a lawyer to represent the client in post-award proceedings at no cost to the client other than court filing fees and litigation expenses. Alternatively, the Office of General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings, provided the client shall be responsible for all court filing fees and litigation expenses.

~~If an award is made to the client and the respondent lawyer refuses to be bound thereby, the State Bar will provide the General Counsel, Assistant General Counsel, or other volunteer lawyer at no cost, other than actual litigation expenses, to the client to represent him or her in any litigation necessary to adjust the fee in accordance with the award.~~

~~(a) In such cases, the An award rendered in favor of a client in a case in which the attorney refused to be bound by the result of the arbitration will be considered as prima facie evidence of the fairness of the award, and the burden of proof shall shift to the lawyer to prove otherwise.~~

~~(b) In such cases, an award made in favor of the client will terminate the right of the lawyer to oppose the substitution of another lawyer designated by the client in any pending litigation pertaining to the subject matter of the arbitration.~~

If the proposed amendments to Part VI, Chapter 5 of the Rules are adopted, the new Chapter 5 would read as follows:

CHAPTER 5 POST-AWARD PROCEEDINGS

Rule 6-501. Confirmation of Award in Favor of Client.

In cases where both parties agreed to be bound by the result of the arbitration and an award in favor of a client has not been satisfied within three months after it was served upon the parties, the client may apply to the appropriate Georgia superior court for confirmation of the award in accordance with the Georgia Arbitration Code, O.C.G.A. §§ 9-9-1 et seq.

Upon the written request of a client, the Committee may provide a lawyer to represent the client in post-award proceedings at no cost to the client other than court filing fees and litigation expenses. Alternatively, the Office of General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings, provided the client shall be responsible for all court filing fees and litigation expenses.

Rule 6-502. Confirmation of Award in Favor of Attorney.

In cases where both parties agreed to be bound by the result of the arbitration and an award has been issued in favor of an attorney, the attorney may apply to the appropriate Georgia superior court for confirmation of the award in accordance with the Georgia Arbitration Code, O.C.G.A. §§ 9-9-1 et seq.

The State Bar will not represent, assist, or advise the attorney except to provide copies of any necessary papers from the fee arbitration file pursuant to State Bar policies.

Rule 6-503. Procedure Where Lawyer Refuses to be Bound.

In cases where an attorney refuses to be bound by the result of an arbitration and an award in favor of a client remains unsatisfied three months after service of the award upon the parties, the State Bar, upon the written request of the client, may provide a lawyer to represent the client in post-award proceedings at no cost to the client other than court filing fees and litigation expenses. Alternatively, the Office of General Counsel of the State Bar of Georgia may represent, assist, or advise a client in post-award proceedings, provided the client shall be responsible for all court filing fees and litigation expenses.

An award rendered in favor of a client in a case in which the attorney refused to be bound by the result of the arbitration will be considered as prima facie evidence of the fairness of the award, and the burden of proof shall shift to the lawyer to prove otherwise.

VII.

Proposed Amendments to Part VI, Chapter 6 of the Rules of the State Bar of Georgia Regarding Special Procedures

It is proposed that Part VI, Chapter 6, Rule 6-601 regarding the Special Procedures, referred to as Confidentiality, Record Retention, and Immunity in the amended version, be amended by deleting the struck-through sections and inserting the sections underlined as follows:

CHAPTER 6 SPECIAL PROCEDURES CONFIDENTIALITY, RECORD RETENTION, AND IMMUNITY

Rule 6-601. Special Case Procedure:

~~After considering the complexity of the issues, the amount in controversy, the location of the arbitration, and all other factors, the Committee may, upon its own motion or the request of either party,~~

assign any case to be arbitrated by the following special procedure:

(a) ~~The waiting period of Rule 6-106, the arbitrator selection process of Rule 6-303, and the arbitrator qualifications of Rule 6-304, shall not apply.~~

(b) ~~The arbitrator panel shall be selected by the Committee or its staff, and~~

(1) ~~in cases involving amounts in dispute over \$2,500 shall consist of two (2) attorneys who have practiced law actively for at least five (5) years and one (1) non-lawyer public member.~~

(2) ~~in cases involving amounts in dispute of \$2,500 or less, the arbitration panel may consist of one arbitrator who shall be a lawyer who has practiced law actively for at least five (5) years.~~

(c) ~~All other rules of the Fee Arbitration program shall apply as in any other case.~~

CHAPTER 7 CONFIDENTIALITY

Rule 6-701601. Confidentiality.

~~With the exception of the award itself, all records, documents, files, proceedings, and hearings pertaining to arbitrations of any fee dispute under these rules in which both the complainant and the attorney have consented to be bound by the result, shall not be opened to the public or any person not involved in the dispute without the written consent of both parties to the arbitration. However, the Committee, its staff, or representative may reveal confidential information in those circumstances in which the Office of General Counsel is authorized by Rule 4-221 (d) to do so.~~

All records, documents, files, proceedings, and hearings pertaining to the arbitration of a fee dispute under this program are the property of the State Bar of Georgia and, except for the award itself, shall be deemed confidential and shall not be made public.

A person who was not a party to the dispute shall not be allowed access to such materials unless

all parties to the arbitration consent in writing or a court of competent jurisdiction orders such access. However, the Committee, its staff, or representative may reveal confidential information in those circumstances in which the Office of General Counsel is authorized by Rule 4-221(d) to do so.

Rule 6-602. Record Retention.

The record of any fee dispute under these rules shall be retained by the Committee in accordance with policies adopted by the Committee.

Rule 6-603. Immunity.

Committee members, arbitrators, staff, and appointed voluntary counsel assisting the program shall be immune from suit for any conduct in the course and scope of their official duties under this program. Parties and witnesses shall have such immunity as is applicable in a civil action in Georgia.

If the proposed amendments to Part VI, Chapter 6 of the Rules are adopted, the new Chapter 6 would read as follows:

CHAPTER 6 CONFIDENTIALITY, RECORD RETENTION, AND IMMUNITY

Rule 6-601. Confidentiality.

All records, documents, files, proceedings, and hearings pertaining to the arbitration of a fee dispute under this program are the property of the State Bar of Georgia and, except for the award itself, shall be deemed confidential and shall not be made public.

A person who was not a party to the dispute shall not be allowed access to such materials unless all parties to the arbitration consent in writing or a court of competent jurisdiction orders such access. However, the Committee, its staff, or representative may reveal confidential information in those circumstances in which the Office of General Counsel is authorized by Rule 4-221(d) to do so.

Rule 6-602. Record Retention.

The record of any fee dispute under these rules shall be retained by the Committee in accordance with policies adopted by the Committee.

Update Your Member Information

Keep your information up-to-date with the Bar's membership department. Please check your information using the Bar's Online Membership Directory. Member information can be updated 24 hours a day by logging on to the Members Only area at www.gabar.org.

Rule 6-603. Immunity.

Committee members, arbitrators, staff, and appointed voluntary counsel assisting the program shall be immune from suit for any conduct in the course and scope of their official duties under this program. Parties and witnesses shall have such immunity as is applicable in a civil action in Georgia.

VIII.

Elimination of Part VI, Chapter 7 of the Rules of the State Bar of Georgia Regarding Fee Arbitration

The current provisions of Chapter 7 of the Rules of the Fee Arbitration Program would be eliminated under the proposed amendments, and the provisions

formerly found in this Chapter would be relocated to Chapter 6 of the amended Rules.

SO MOVED, this _____ day of _____, 2011

Counsel for the State Bar of Georgia

Robert E. McCormack
Deputy General Counsel
State Bar No. 485375

OFFICE OF THE GENERAL COUNSEL
State Bar of Georgia
104 Marietta Street NW, Suite 100
Atlanta, Georgia 30303
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Proposed Amendment to Uniform Superior Court Rule 36

At its business meeting on July 28, 2011, the Council of Superior Court Judges approved proposed amendments to Uniform Superior Court Rule 36. A copy of the proposed amendments may be found at the Council's website at www.cscj.org.

Should you have any comments on the proposed changes, please submit them in writing to the Council of Superior Court Judges at 18 Capitol Square, Suite 104, Atlanta, GA 30334 or fax them to 404-651-8626. To be considered, comments must be received by Tuesday, Jan. 3, 2012.

Postage Statement

United States Postal Service Statement of Ownership, Management, and Circulation		
1. Publication Title Georgia Bar Journal	2. Publication Number 0217 - 560	3. Filing Date Sept. 22, 2011
4. Issue Frequency Bimonthly	5. Number of Issues Published Annually 7	6. Annual Subscription Price \$36
7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4) State Bar of Georgia Communications Department 104 Marietta St. NW, Suite 100, Atlanta, Fulton Co., GA 30303-2743		Contact Person Sarah Coole Telephone 404-527-8791
8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer) State Bar of Georgia 104 Marietta St. NW, Suite 100, Atlanta, Fulton Co., GA 30303-2743		
9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank) Publisher (Name and complete mailing address) State Bar of Georgia 104 Marietta St. NW, Suite 100, Atlanta, Fulton Co., GA 30303-2743 Editor (Name and complete mailing address) Robert R. Stubbs 1175 Peachtree Street NE, 100 Colony Square, Suite 1650 Atlanta, GA 30361 Managing Editor (Name and complete mailing address) Sarah Coole, Director of Communications State Bar of Georgia 104 Marietta St. NW, Suite 100, Atlanta, Fulton Co., GA 30303-2743		
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11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box <input checked="" type="checkbox"/> None Full Name Complete Mailing Address		
12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one) The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (Check one)		

13. Publication Title Georgia Bar Journal		14. Issue Date for Circulation Data Below August 2011	
15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		31,815	34,600
b. Paid and/or Requested Circulation			
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e. Free Distribution Outside the Mail (Carriers or other means)		91	98
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g. Total Distribution (Sum of 15c and 15f)		30,756	34,447
h. Copies not Distributed		211	331
i. Total (Sum of 15g and 15h)		30,967	34,778
j. Percent Paid and/or Requested Circulation (15c divided by 15g times 100)		99.1	99.2
16. Publication of Statement of Ownership: <input checked="" type="checkbox"/> Publication required. Will be printed in the October 2011 issue of this publication. <input type="checkbox"/> Publication not required.			
17. Signature and Title of Editor, Publisher, Business Manager, or Owner Sarah Coole Director of Communications Date Sept. 22, 2011			
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