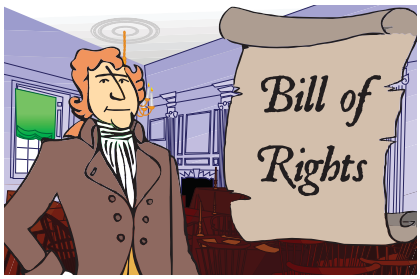
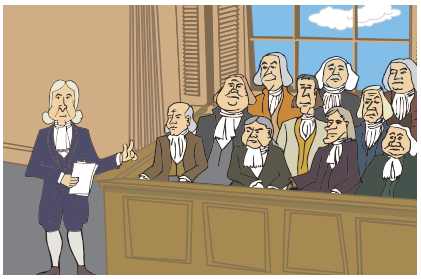

Georgia Bar
Journal
2014 State Bar of Georgia
Annual Meeting
June 5-8 | Amelia Island, Fla.

Trial By Jury: What's the Big Deal?



"Trial By Jury: What's the Big Deal?" is an animated presentation for high school civics classes in Georgia to increase court literacy among young people. This presentation was created to be used by high school civics teachers as a tool in fulfilling four specific requirements of the Social Studies Civics and Government performance standards.

This animated presentation reviews the history and importance of trial by jury through a discussion of the Magna Carta, the Star Chamber, the trial of William Penn, the Constitutional Convention in 1787, the Constitution and the Bill of Rights. Also covered in the presentation are how citizens are selected for jury duty, the role of a juror, and the importance of an impartial and diverse jury.

The State Bar of Georgia's Law-Related Education Program offers several other opportunities for students and teachers to explore the law. Students can participate in Journey Through Justice, a free class tour program at the Bar Center, during which they learn a law lesson and then participate in a mock trial. Teachers can attend free workshops correlated to the Georgia Performance Standards on such topics as the juvenile and criminal justice systems, federal and state courts, and the Bill of Rights. The LRE program also produces the textbook *An Introduction to Law in Georgia* for use in middle and high school classrooms.

You may view "Trial By Jury: What's the Big Deal?" at www.gabar.org/forthepublic/forteachersstudents/lre/teacherresources. For a free DVD copy, email stephaniew@gabar.org or call 404-527-8792. For more information on the LRE Program, contact Deborah Craytor at deborahcc@gabar.org or 404-527-8785.

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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Sarah I. Coole, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; phone: 404-527-8791; sarahc@gabar.org.

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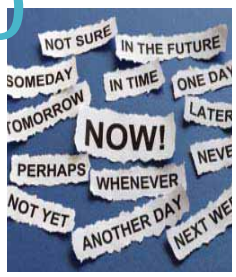

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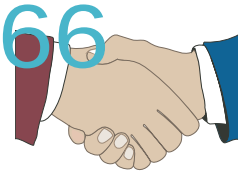

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See details on the 2014 Annual Meeting on the inside back cover of this issue. More information is available online at www.gabar.org.

Photo by Zach Porter Photography

by Charles L. Ruffin

In Celebration of the Constitution

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."—Preamble to the U.S. Constitution

The first official engagement of the American Revolutionary War—the firing of the "Shot Heard Round the World"—took place just after dawn on April 19, 1775, setting off the battle of Lexington and Concord. Less than 15 months later, on July 4, 1776, the Continental Congress formally adopted the Declaration of Independence. The rebellion by the 13 American colonies against Great Britain continued until 1783, when the Treaty of Paris ended the war and recognized the sovereignty of the United States.

"I, for one, am thankful that we have a Constitution, one built on the foundational principles of upholding the rule of law and protecting the liberties of all Americans."

The first constitution of the United States of America—known as the Articles of Confederation—had been created in 1777, and its ratification was completed in 1781. The Articles were barely sufficient to enable the Continental Congress to legitimately direct the Revolutionary War, engage in diplomacy with Europe and address territorial issues and relations with the Native Americans. But following the success of the Revolution, many of the Founding Fathers recognized the need for a stronger set of laws and a stronger federal government.

In the summer of 1787, 55 delegates, out of 74 appointed, from 12 states (all but Rhode Island, which refused to participate) gathered in Philadelphia for the Constitutional Convention and set about writing and approving a "supreme law of the land" for the United States, our present Constitution.

According to Roger A. Bruns' introduction to *A More Perfect Union: The Creation of the United States Constitution*, published in 1986 by the National Archives in Washington, D.C., the major players in Philadelphia

included Gen. George Washington, who was elected unanimously to preside over the convention; an 81-year-old Benjamin Franklin, who was crippled by gout; Alexander Hamilton of New York; and, Bruns wrote, "the small, boyish-looking, 36-year-old delegate from Virginia, James Madison." Among those absent were John Adams abroad on foreign missions, John Jay in New York and Patrick Henry who refused to attend because of his opposition to the establishment of a central government.

It was Madison who saw America's government under the Articles of Confederation as futile and weak and one which needed to be replaced with a strong central government to provide order and stability. He looked to the Constitutional Convention as the opportunity to forge a government in this mold. Throughout the sessions, Madison sat in front of the presiding officer, George Washington, and compiled a record of the proceedings, not missing a single day or a single major speech.

From the opening of the convention on May 25 through its adjournment on Sept. 17, the delegates held their sessions in secret. No reporters or visitors were permitted. In often sweltering conditions, they debated various plans for establishing the government and resolving issue after issue. The most acrimonious debate over whether the states would be represented in the legislative branch equally or based on population would deadlock the convention for a period of weeks before the "Great Compromise" split the difference: the states would be represented equally in the Senate and by population in the House of Representatives. Part of the compromise addressed a division between the northern and southern states by declaring that representation in the House would be based on the number of free persons and three-fifths of "all other persons," a euphemism for slaves.

On the final day of the convention, and just before the delegates formally signed the Constitution, Benjamin Franklin made an appeal for unity, declaring, "I think it will astonish our enemies, who are waiting with confidence to hear that our councils are confounded like those of the builders of Babel; and that our States are on the point of separation, only to meet hereafter for the purpose of cutting one another's throats." Copies of the six-page Constitution would leave Philadelphia the next morning, the debate over a national form of government moving to a larger arena: ratification by the states.

By January 1788, five of the nine states necessary for ratification of the Constitution had done so: Delaware, Pennsylvania, New Jersey, Georgia and Connecticut. They were followed in order later that year by Massachusetts, Maryland, South Carolina, New Hampshire, Virginia and New York; by North Carolina in 1789; and, finally, by Rhode Island in 1790. The first Congress convened in New York City on March 4, 1789. George Washington,

FROM Banished TO Unified

A History of the Legal Profession in Georgia

Written By **Linton S. Johnson II** | Foreword & Edited By **Charles L. Ruffin** | Designed By **Sarah I. Coole**

On the Occasion of the 50th Anniversary of
the Establishment of the State Bar of Georgia

This 252-page leather-bound coffee table book helps celebrate the unified State Bar's 50th anniversary by following the growth of Georgia lawyers and courts from their humble beginning up to the modern justice system that serves the people today.

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unanimously elected as the first president, and John Adams, the first vice president, were sworn in on April 30, 1789.

So the period that began with the first shots fired at Lexington and Concord, continued with the Declaration of Independence, the Articles of Confederation, the conclusion of the eight-year Revolutionary War, drafting and ratification of a whole new Constitution and ending with the seating of a new national government, spanned only 14 years.

Two hundred twenty-five years later, we can only marvel at our Founding Fathers' ability to produce a written instrument that, while embodying our foundational principles, established a government and the rule of law and guaranteed certain rights for a relatively small population in the 18th century. Amazingly, that Constitution has stood the test of time and continues to meet the more complex and challenging needs of more than 300 million citizens in the 21st century.

It should be noted that during our nation's formative years, England was ruled by a king, Germany by a kaiser, Russia by a czar, China by an emperor and Japan by a shogun. Situations have, of course, changed dramatically for all of those superpowers past and present. The one constant republic has been the United States and our Constitution, now the oldest in the world.

Last month, as this year's "President's Project," the State Bar of Georgia proudly hosted a National Celebration of the U.S. Constitution on the occasion of the 225th anniversary of its ratification (see page 16). Our first keynote speaker was historian and author David McCullough, who reminded us that the Founding Fathers were all imperfect mortals with human weaknesses, and that the Constitution as written in 1787 was not a perfect document. After all, as Thomas Jefferson noted in the Declaration of Independence, the birth of our nation was taking place "in the course of human events." During the ratification period, for example, support had grown for a "Bill of Rights" to be added to the Constitution. By the fall of 1788, Roger Bruns wrote, James Madison had been convinced that not only was a bill of rights necessary to ensure acceptance of the Constitution but that it would have positive effects. He wrote, on Oct. 17, that such "fundamental maxims of free Government" would be "a good ground for an appeal to the sense of community" against potential oppression and would "counteract the impulses of interest and passion." On Oct. 2, 1789, President Washington sent to each of the states a copy of the 12 amendments adopted by the Congress in September. By Dec. 15, 1791, three-fourths of the states had ratified the 10 amendments known as the Bill of Rights.

In the 225 years since its ratification, the Constitution has been amended a total of only 27 times (including the Bill of Rights), the last amendment having been ratified in 1992. These amendments have, for example, abolished slavery and ensured that women and minorities have the right to vote. It is still and always will be a work in progress.

I, for one, am thankful that we have a Constitution, one built on the foundational principles of upholding the rule of law and protecting the liberties of all Americans. Or, as David McCullough said in a 2003 speech to the National Endowment for the Humanities, "Blessed we are. And duty bound, to continue the great cause of freedom, in their spirit and in their memory and for those who are to carry on next in their turn."

When I first took office as State Bar president, I said I believe the Constitution is only as good as the people for whom it was enacted and who are covered by its provisions. The character of the population for whom the Constitution provides guiding principles is paramount to its longevity.

At the close of the Constitutional Convention in 1787, Benjamin Franklin was asked, "Well, Doctor, what have we got—a republic or a monarchy?" Franklin replied succinctly, "A republic, if you can keep it."

I ask you, are we keeping it? GBJ

Charles L. Ruffin is president of the State Bar of Georgia and can be reached at cruffin@bakerdonelson.com.

by Darrell L. Sutton

Service: Our Duty and Our Honor

For as long as I have been a young lawyer the YLD has been known as "the service arm of the Bar." Indeed, "to foster among YLD members the principles of duty and service to the public" is the third of the YLD's six stated purposes in Article I, Section 2 of its bylaws. More than any of the other five, though, it is this purpose that is fulfilled every day by the current crop of young lawyers. One needs look no further than the latest edition of the *YLD Review* (the YLD newsletter and sister publication to the *Journal)* to see that.

Why is "duty and service to the public" so important that it's a stated purpose of the YLD? Why did Meredith Sutton and Jessica Sabbath, the co-chairs of the 2014 YLD Signature Fundraiser, devote time to organizing a fundraiser when they, like the rest of us, have so little time to give? Why have Sharri Edenfield, Carl Varnedoe, John Jackson, Ivy Cadle, Adriana Capifali, Yari Lawson and Rachel Fields, the past and current chairs of the YLD's Leadership Academy, ensured that it devotes a full session each year to service to the public? Why did Katie Willett and Brandon Elijah, two young lawyers who answered my challenge to this year's slate of YLD Executive Council representatives and committee chairs to develop and implement new programming, from scratch create the YLD Wills Clinic, a program devoted to serving this state's first responders by conducting clinics where wills and other estate planning documents are prepared for them? To paraphrase YLD past president Josh Bell, they did so because it's the only means they (and we) have to pay the debt we owe the public simply for the privilege of being a lawyer.

> "You don't have to be a member of the YLD to serve our profession and the public; to join us in the journey down that uncertain path."

As lawyers we have been given an opportunity to succeed that few others have. Before we were lawyers we were given the opportunity to obtain a first-rate education. Once we became lawyers we were given the daily opportunity to influence justice with our every professional move, and be handsomely rewarded for it. How many other professionals find themselves regularly with another's fate in their hands—whether the accused criminal or the victim of a crime, the injured plaintiff or the alleged tortfeasor?

But with every opportunity comes a corresponding obligation. In other words, nothing in life is free. We

cannot continue to reap the benefits, financial and otherwise, our profession provides us without acting to fulfill the obligation that comes with it. How we fulfill this obligation is not important; that we do so is.

It is not lost on me that doing so is difficult, though. It requires that we make the hard choice to serve the public, community and Bar. This choice is hard because the benefit of service is not only uncertain, it is often unquantifiable. And everyone knows that lawyers like certainty and tangible results. We want to know the answer to a question before we ask it. We want to know how a provision will be construed before it is inserted into a contract.

The choice to serve also is hard because it requires time, of which there is a finite amount. In our business, time truly is money. So the choice to allocate an hour to a pro bono case means the choice to take that hour away from a paying case. The choice to spend a day volunteering for charity means the corresponding choice to allocate that day to a non-revenue-generating pursuit. The choice to attend a Bar function means the choice to spend time with other lawyers in a context where money likely won't be made.

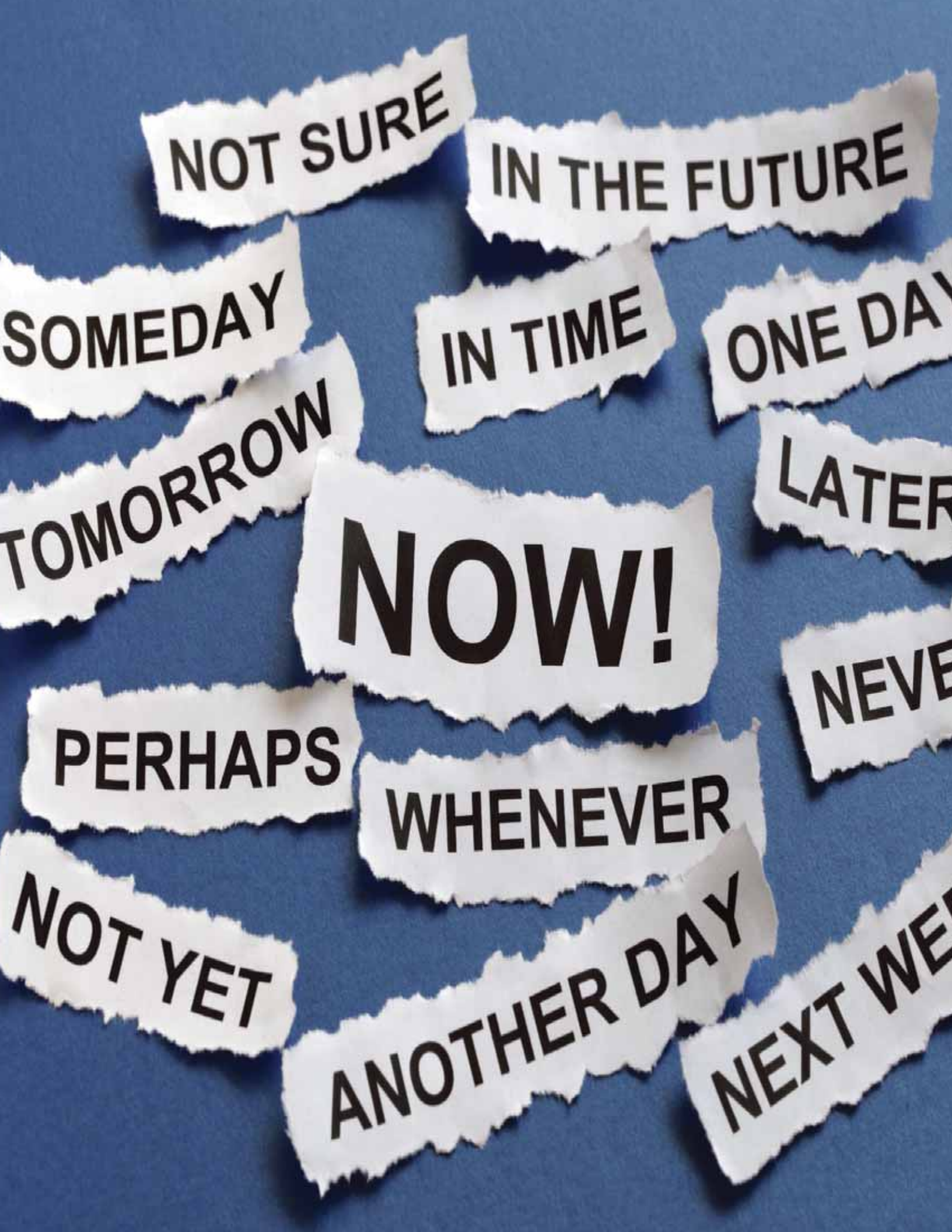
When deciding whether to make this hard choice, remember that excellence, professionally and otherwise, can be achieved only by making the hard choice. While doing so might lead to monumental failure if we make the wrong choice, it will lead to roaring, lasting success if we make the right choice. It is no secret that the hard choice requires a willingness to take risk. We have to convince ourselves to go after a result that is uncertain and far from guaranteed. And at the same time we have to ignore the easy choice, which is the pursuit of a result we feel reasonably confident will occur. To use a gambling analogy, only with high risk do we acquire high reward.

The only certain thing about the hard choice to serve causes other than our practices is that the result of doing so is uncertain. But if there is a tangible result to be gained by doing it—and I truly believe there is—the only way we'll find it is to take the risk and head down that uncertain path.

You don't have to be a member of the YLD to serve our profession and the public; to join us in the journey down that uncertain path. So won't you fulfill the obligation to serve that comes with the opportunity to be lawyer? Become an active member of a Bar section. Volunteer to serve a Bar initiative. Go beyond the Bar and volunteer to take a case pro bono, either on your own or from Atlanta Legal Aid or the Georgia Legal Services Program. Volunteer for a local charity.

No matter your chosen outlet for service, just find time to serve. It is vital because it positively impacts the Bar and everything beyond it. GBJ

Darrell L. Sutton is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at dls@sutton-law-group.com.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Discovering Clarity:

A Call to Renovate Georgia's Discovery Landscape

by Joseph C. Sullivan

You have experienced it before: an Outlook reminder appears on the computer screen and you are bluntly reminded that the discovery period in one of your cases is set to expire at the end of the month (or so you think). Your stomach begins to churn and little beads of sweat start to form just above your ever-increasing receding hairline—you ask yourself: "have five months already passed?" After a frantic review of the case documents, depositions and initial discovery responses, it becomes apparent that clarification is required on a previous interrogatory response or that recently obtained deposition testimony has unearthed additional documentation not previously produced. Although you believe 30 days remain in the discovery period, confusion (then panic) begins to set in: can you serve additional discovery requests at any time before the next 30 days expires, or must you immediately hand-serve the requests so the opposing side is afforded its statutorily provided 30 days in which to serve its responses?

Ignoring the increasing sweat consolidating around your eyebrows, you casually (yet quickly) ask your officemates for some guidance, but remain befuddled. Half of your neighbors indicate that you can still serve discovery so long as the initial six-month discovery period, which they claim is automatically provided under Georgia law, remains open. The other half indicate that immediate, hand-service of your discovery requests is required. They explain that if the initial six-month discovery period expires before the responses to your requests are actually due (i.e., if responses to your proposed requests are not due within the next 30 days), the opposing side can simply avoid responding altogether because, by operation of law, the discovery period would be over at that time. Unsatisfied with the resulting uncertainty, you struggle to remember your Westlaw password and conduct actual legal research.

Your research uncovers the following: discovery need not be completed within six months, just promptly and diligently pursued within that time period if one seeks to utilize the compulsory powers of the court.[1] If discovery need not be completed within six months, you ask, then why are you so worried? Although you have determined that discovery need not be completed within six months, you continue your research to ascertain what constitutes the "prompt" and "diligent" pursuit of discovery under Georgia law. Instead of finding comforting clarification, you are left even more confused with a Georgia Uniform Superior Court Rule[2] (the Rule) that provides:

> In order for a party to utilize the court's compulsory process to compel discovery, any desired discovery procedures must first be commenced promptly, pursued diligently and completed without unnecessary delay and within six months after the filing of the answer. At any time, the court, in its discretion, may extend, reopen or shorten the time to utilize the court's compulsory process to compel discovery.[3]

As a result, you have established that, although discovery need not be completed within six months, in order to compel responses to your anticipated discovery requests, the same must have been "commenced promptly, pursued diligently and completed without unnecessary delay and within six months after the filing of the answer."[4] In other words, there is no "Black Letter Law" when it comes to discovery deadlines in civil actions filed in Georgia's superior and state court systems. Indeed, the entire system appears to be built towards forcing our already overcrowded, overworked and understaffed judiciary to get involved in the undisputed bane of their legal existence: discovery disputes. In response, you quickly draft the required discovery requests and serve them via hand-delivery on your opposing counsel in hopes of avoiding any additional conflict. Next time, you tell yourself, you will set the calendar reminder for an earlier date.

The sequence of discovery in Georgia's legal system should not be so complicated. For instance, although one must engage in "prompt" and "diligent" discovery (that must also have been conducted within six months of the filing of the answer) in order to compel discovery responses, neither party is actually entitled to a full six months to conduct discovery under the existing Rule.[5] This fact is simply inconceivable to most litigators in our state, due in part to confusing uniform superior/state court rules (and even more perplexing cases analyzing those rules): in Georgia, no litigant is provided six months (or any other defined period) within which to engage in discovery. Indeed, U.S.C.R. 5.1 "does not . . . require that [a litigant] be given six months in which to complete discovery."[6] Nor does the Rule require that a litigant move to compel within the initial six months after an answer is filed.

> The [R]ule makes the commencement and pursuit of discovery within the six-month discovery period a condition of using the trial court's compulsory process. It does not require the compulsory process itself to be requested within the discovery period. . . . So long as discovery is promptly and diligently pursued by the moving party within the discovery period, . . . a motion to compel or for sanctions may be brought after the expiration of the discovery period.[7]

As such, there is no set discovery period, and there is no set deadline before which a motion to compel or motion for sanctions must be brought. All that the Rule requires is that such a motion be brought within six months after the answer was filed and that the discovery sought was promptly and diligently pursued.

The Court of Appeals of Georgia has often referred to a set six-month discovery period, even though the Rule is not so clear. To be sure, in several opinions on the issue, the court continually refers to a "six month discovery period" so as to provide the impression that litigants in Georgia courts are actually afforded a blanket six month period after the answer is filed to engage in discovery. For instance, in *Pascal v. Prescod*,[8] the Court of Appeals of Georgia calculated the discovery period as being an unconditional six months from the filing of the answer by citing to the Rule: "[t]he answer was filed on April 12, 2007. *The discovery period did not expire until October 12, 2007, six months after the filing of the answer. See Uniform Superior Court Rule 5.1."*[9] In *Walker v. Metro Atlanta Rapid Transit Auth.*,[10] the court once again referred to "the six-month discovery period"[11] afforded by the Rule, as if to suggest the existence of a six-month period that the current confines of Georgia law simply do not provide.

Because neither the Rule, nor the vast majority of controlling case law, provides six months in which the parties shall complete discovery, both the courts and the attorneys of this state are subject to the same nebulous discovery system. When an existing discovery rule continually confuses both the gatekeepers of a legal system and its practitioners, that rule must be amended for the benefit of us all.

In fact, despite explicit acknowledgement by the Supreme Court of Georgia (more than 25 years ago), that the Rule simply does not account for cases in which a default exists ("due to oversight in drafting," no less), the Rule has remained unchanged since that time.[12] Although a defendant in default cannot contest liability in a Georgia court, that defendant is nonetheless entitled to contest the plaintiff's entitlement to damages.[13] However, the current Rule does not provide clear guidance as to whether a defendant in default is entitled to seek discovery to contest damages at trial (because no answer would, as a matter of operation of the default, be on file with the court) and, if so, any deadline associated with that ability. Instead, the parties once again must engage in a "paper war" to force the court to decide, in its own undefined discretion, whether the defaulting party is entitled to engage in discovery, as well as the scope of that discovery (if permitted).

Ensuring prompt and diligent discovery should not be an arduous process, despite the impractical rules of our state and superior court systems. These rules essentially force their stewards to engage in a guessing game as to whether discovery is permitted and when discovery concludes, ultimately requiring the assistance of an already burdened court to play the role of referee in a game destined for an expensive and protracted finale. By amending the Rule to provide clear and unmistakable deadlines to conduct discovery, we can eradicate: the requirements that a judge make a fact-specific determination on whether the parties promptly and diligently pursued

discovery, the existing confusion over the length of the "default" discovery period (if any), as well as whether the parties can serve discovery in cases of default.

Addressing these lingering issues would not only lower the stress associated with litigation (and frantic calls to malpractice carriers), but also eliminate the court's involvement in adjudicating discovery disputes that can be more quickly and effectively resolved before a motion to compel is ever filed. The procedural framework in handling such discovery issues should be set up to require the assistance of the court only as a last resort. As the law currently exists, discovery disputes are rampant and litigants are effectively encouraged to seek the assistance of the court to adjudicate disputes that can be expediently handled with a straightforward amendment to the Rule clarifying the muddied waters we now navigate.

The Rule already provides Georgia's judiciary and attorneys the rampant and false impression that a blanket six-month discovery period exists. Given the apparent universal acceptance of this supposition, it does appear that six months is a sufficient default period for civil litigants to obtain the discovery necessary to support or defeat the claims at issue. Nevertheless, instead of simply applying a six-month discovery deadline from the filing of the answer, the current framework allows for broad interpretation in when the discovery period actually expires. As a result, some attorneys believe that they can request written discovery so long as they serve the requests within six months of the filing of the answer, while others maintain that they can request written discovery so long as the responses to same are due before the expiration of six months from the filing of an answer. Still others maintain that they can serve discovery at any time, it being the duty of the court to determine whether that discovery (be it served five months after the filing of the answer or 10 months thereafter) was promptly and diligently pursued. Again, the result is that each case must be considered on an individualized, fact-specific basis, leading to increased time and expense.

Consequently, the proposed new discovery rule must clearly define when discovery is to commence, terminate, and, more to the point, clarify that the parties request the assistance of the court only in the rarest of circumstances. A proposed uniform rule, based loosely on the existing law in North Carolina, is as follows:

> Subject to an order modifying these discovery procedures for good cause shown, all written discovery must be served, and depositions taken, within one hundred and eighty (180) days from the filing of the answer. Objections to discovery must be timely made, and, if not asserted before the expiration of the initial one hundred and eighty (180) days provided, must be filed within fifteen days (15)

from the service of the written discovery in dispute, or will be considered waived.

Motions seeking an extension of the discovery period or permission to take more discovery than is permitted under the rules shall be made or presented prior to the expiration of the initial one hundred and eighty (180) days provided to complete discovery. Such motions must set forth good cause justifying the additional time or additional discovery, and will be granted only upon such a showing of good cause.

A party in default shall have no right to engage in discovery unless that default is opened pursuant to the terms of O.C.G.A. § 9-11-55(a). If the default is opened pursuant to O.C.G.A. § 9-11-55(a), the one hundred and eighty (180) day discovery period shall commence from the 45th day after service on the defaulting party.

The proposed rule contains the following benefits: first, it sets a deadline certain within which all written discovery must be served and depositions must be taken: 180 days from the filing of the answer, resolving the confusion as to whether a party must serve discovery before the current and vaguely defined six-month "deadline." In so requiring, the rule permits a party to serve (via regular mail or hand-delivery), on the 180th day from the filing of the answer, written discovery to which the recipient can respond in accordance with the existing statutory rules. All written discovery served or depositions taken after the initial 180-day period are barred unless provided for by court order for good cause shown. This change clearly defines the discovery period and requires the assistance of the court only in situations in which additional discovery is arguably required after the initial 180 days provided for by the proposed rule. As such, litigants in Georgia will only be permitted to seek the assistance of the court on limited and clearly defined terms, as opposed to the previous Rule in which litigants were at their leisure to seek the assistance of the court at any time they deemed necessary.

Second, the proposed rule provides a date certain to timely object to discovery. Specifically, objections to discovery must be "timely made." In other words, all objections to discovery served within the 180 days following the filing of an answer are waived if not subject to a formal objection within those 180 days. Although it can be argued that such a vast deadline would enable litigants to wait until the last minute to raise an objection to requests that are overbroad or responses that are insufficient, it must be mentioned that the current Rule has no time bar whatsoever. Accordingly, the Rules permit a litigant to file a motion to compel or a motion for sanctions after the expiration of the (poorly defined) discovery period, even on the eve of trial if not otherwise barred by a pre-trial order. Discovery disputes are, unfortunately, going to exist given the nature of litigation. Nevertheless, the Rules should encourage litigants to seek rapid resolution of such disputes. Under the proposed rule, if a litigant does not take the time and/or attention to utilize the court's compulsory powers or to move for sanctions during the initial 180 days after the answer is filed in a particular case, the right to do so is forfeited.

Third, the proposed rule also provides that a party must object to any written discovery requiring a response after the initial 180 days permitted (for written discovery served on days 150–180, for instance) within 15 days from the service of the disputed discovery. For example, a party must object to such a request either via a motion to quash from the recipient after receiving service of the subject discovery requests, or via a motion to compel or for sanctions after receipt of the alleged insufficient discovery responses. Such a framework would ensure that both parties are provided the opportunity to seek (to the extent required) the assistance of the court for any written discovery that would require a response after the initial 180 days provided for by the proposed rule. The proposed terms would also, as stated earlier, prevent a party from simply sleeping on its rights until the final days leading up to trial.

Finally, the proposed rule solely requires the assistance of the court should the parties move for extraordinary relief. The proposed rule explicitly states the discovery deadlines and leaves no need for the court to determine if discovery was "diligently" or "promptly" pursued. The parties either have to move to extend the explicit 180-day discovery period before the expiration of the time provided, or no further discovery can be taken. Whereas, in the current Rule, the court can use its discretion, "at any time"[14] to extend, re-open or shorten the time to utilize the court's compulsory process to compel discovery; the court's role in involving itself in discovery disputes between the parties should be lessened as a result of the proposed modifications.

Of course, the proposed rule is not without criticism. For instance, a party in default would not be able to participate in any discovery whatsoever (including discovery limited to damages) unless that party was able to open the default "as a matter of right" pursuant to O.C.G.A. § 9-11-55(a). However, the case law and procedural rules currently in place are already detrimental to the rights of parties in default. Indeed, for cases in which a default is opened for "providential cause" pursuant to O.C.G.A. § 9-11-55(b), the defaulting party is not entitled to engage in any discovery but, instead, must announce that it is immediately "ready to proceed with the trial."[15] Given the already

existing policy to discourage parties from entering into default, the proposed rule does not generate much additional sacrifice.

Although discovery may not constitute the most exciting aspect to the practice of law, there is no question that it serves perhaps the most important functions, including, without limitation, "issue formulation and factual revelation."[16] The significance attributed to the discovery process in Georgia courts requires that its litigants be provided with clear, concise and straightforward rules in which to engage. Although the rule proposed herein may not be the supreme alternative to the system of discovery currently in place, it will (hopefully) at a minimum encourage further discussion and reflection on how we can continue to foster the most effective and productive legal system possible for Georgia. In any event, we should work to improve the current landscape and amend already acknowledged drafting errors before another 25 years pass-es and a new crop of attorneys are forced to tread this same treacherous territory. GBJ

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Endnotes

1. *See* Fisher v. Bd. of Commissioners of Douglas County, 200 Ga. App. 353, 353, 408 S.E.2d 120, 121 (1991).
2. *See* Ga. Unif. St. Ct. Note (2013) ("The Uniform Rules for the Superior Courts shall be applicable in State Courts except as follows: Wherever the words 'superior court' or 'superior courts' appear in the Uniform Superior Court Rules, the word 'state' shall apply in lieu of the word 'superior.'").
3. Ga. Unif. Super. Ct. R. 5.1 (2013).
4. *Id.*
5. *See* Alexander v. Macon-Bibb County Urban Dev. Auth., 257 Ga. 181, 184, 357 S.E.2d 62, 65 (1987).
6. *Id.* at 184.
7. *See* Fisher, 200 Ga. App. 353, 353, 408 S.E.2d 120, 121.
8. 296 Ga. App. 359, 674 S.E.2d 623 (2009).
9. *Id.* at 360 n.1 (emphasis added).
10. 226 Ga. App. 793, 487 S.E.2d 498 (1997).
11. *Id.* at 796.
12. Gray v. Whisenaut, 258 Ga. 242, 242, 368 S.E.2d 115, 115 (1988).
13. *See* O.C.G.A. § 9-11-55 (2013) ("in the event a defendant, though in default, has placed damages in issue by filing a pleading raising such issue, either party shall be entitled, upon demand, to a jury trial of the issue as to damages.").
14. Ga. Unif. Super. Ct. R. 5.1 (2013).
15. O.C.G.A. § 9-11-55(b) (2013).
16. Int'l Harvester Co. v. Cunningham, 245 Ga. App. 736, 738, 538 S.E.2d 82, 85 (2000).

Constitutional Symposium:

Celebrating the U.S. Constitution 225 Years After Ratification

by Prof. David Oedel

Before State Bar of Georgia President Charles L. Ruffin took office last year, he noted an omission among our Bar's sections. We had no section devoted to constitutional law. Georgia's Bar exam heavily tested, and still heavily tests, constitutional law for bar admission. Thereafter, though, the Bar seemed to give the subject short shrift, as if the Constitution is barely more than fodder for a secondary-school civics lesson and subsequent testing gymnastics.

Recognizing that omission as an under-appreciation of the backbone of our American rule of law, Ruffin called around. He collected a group of Georgia lawyers interested in the Constitution, and organized a new constitutional law section.

The new section's first order of business, Ruffin's presidential project for the year, was a celebration of the Constitution 225 years after the original ratification led to the first session of Congress in March, 1789. That first Congress referred 12 possible amendments to the states later in 1789. That year and the

Photos by Sarah I. Coole

State Bar of Georgia President Charles L. Ruffin gives introductory remarks and welcomes distinguished guests and attendees to the Constitutional Symposium, celebrating 225 years of the ratification of the U.S. Constitution.

next, 10 of the 12 proposals were ratified by enough states as the Bill of Rights.

Our modern celebration of that constitutional history took place in Atlanta over three days in March 2014. It was perhaps the most memorable version of continuing legal education that many veteran attendees like me had ever experienced.

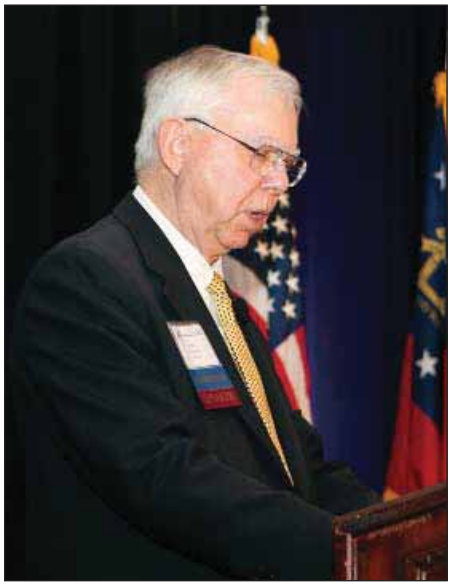
What made it special was the accomplished, thoughtful and diverse group of legal luminaries from around the country who convened to discuss, from their respective vantage points, the deep, yet ongoing, life of our Constitution.

Graciously flying across the country to join us in an opening debate, University of California Irvine Law School Dean Erwin Chemerinsky challenged New York University Law Professor Richard Epstein in a heated, intense and occasionally-amusing back-and-forth about how we should interpret constitutional language, crafted in past days, under the conditions of modern America.

Implications of that same fundamental conundrum peppered the celebration. The theme, for instance, was revisited at length by our final speaker, Justice Antonin Scalia of the U.S. Supreme Court. He joined the celebrants in showing his own appreciation for the nation's long constitutional history, as well as the relevance of constitutional history to contemporary law and politics.

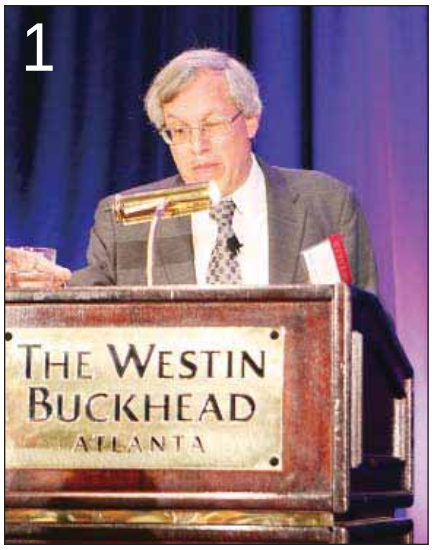
With a keen sense for the contemporary political polemics of the Constitution, Scalia twice poked gentle fun at congressperson Sheila Jackson Lee of Texas, though without naming her specifically. Lee apparently misspoke on the floor of the U.S. House March 12, at about the same time we were hearing from three distinguished historians, Akhil Amar, Jack Pratt and Mel Urofsky, about the enduring meanings of our written Constitution, and the constitutional ratification process, for contemporary purposes.

The presentation of colors by the color guard opened the symposium.



Georgia Gov. Nathan Deal *(left)* and Supreme Court of Georgia Chief Justice Hugh P. Thompson *(right)* give welcoming remarks to those in attendance, stressing the importance of the U.S. Constitution and all that went into creating the document.

11th Circuit U.S. Court of Appeals Judge Frank M. Hull joins others in opening remarks at the Constitutional Symposium.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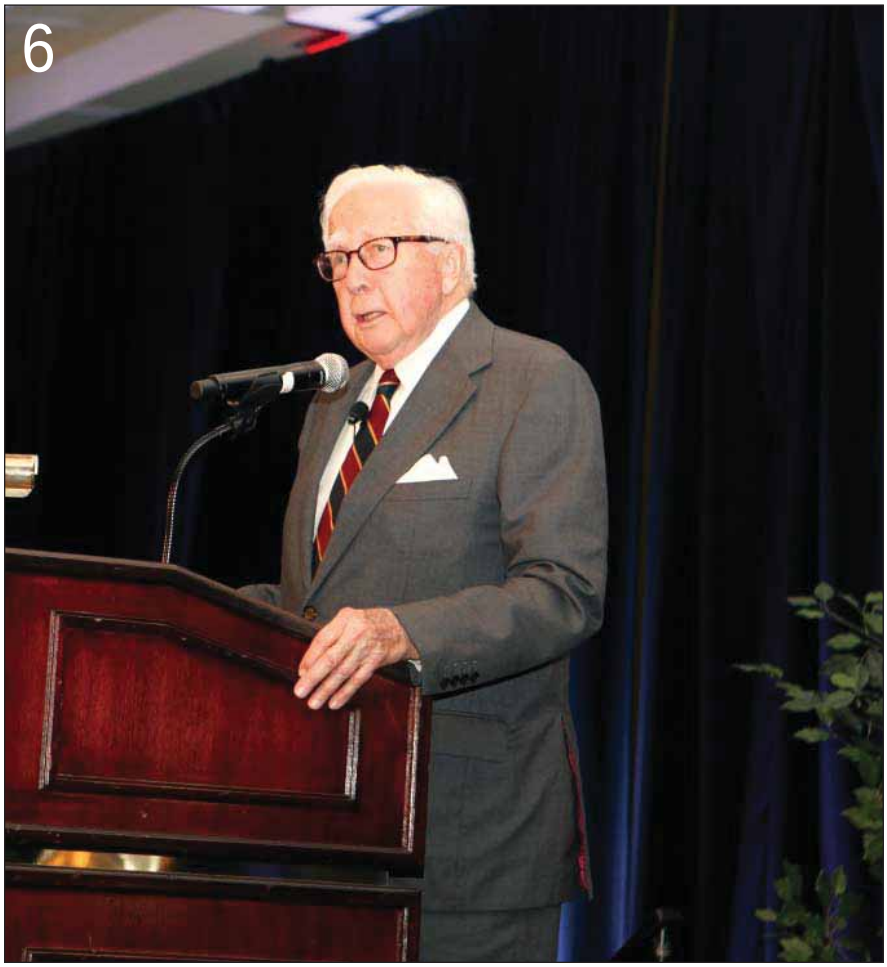
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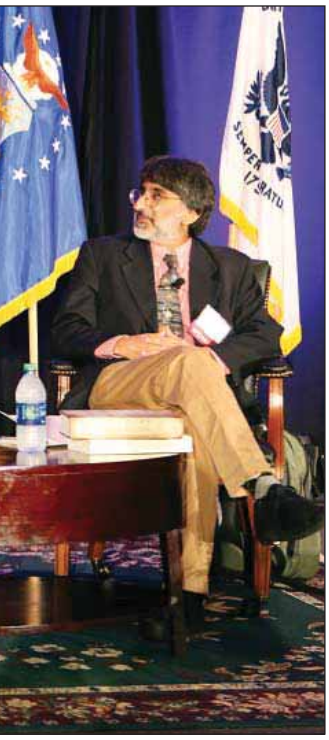
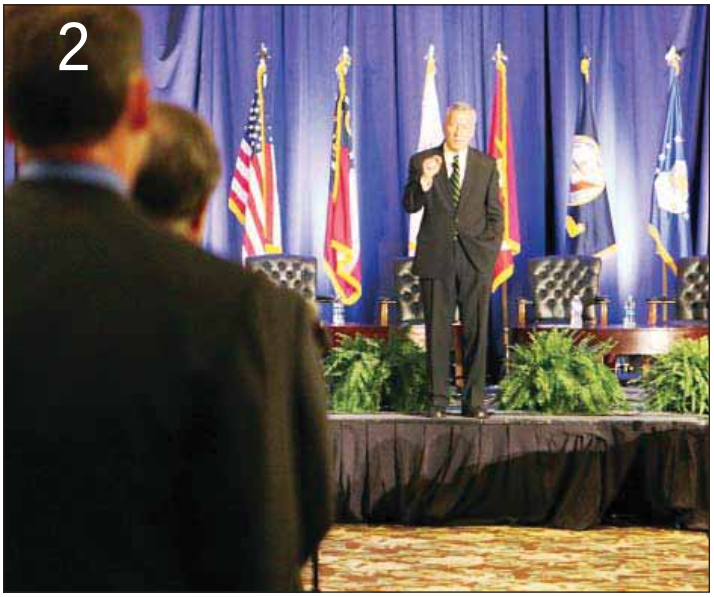
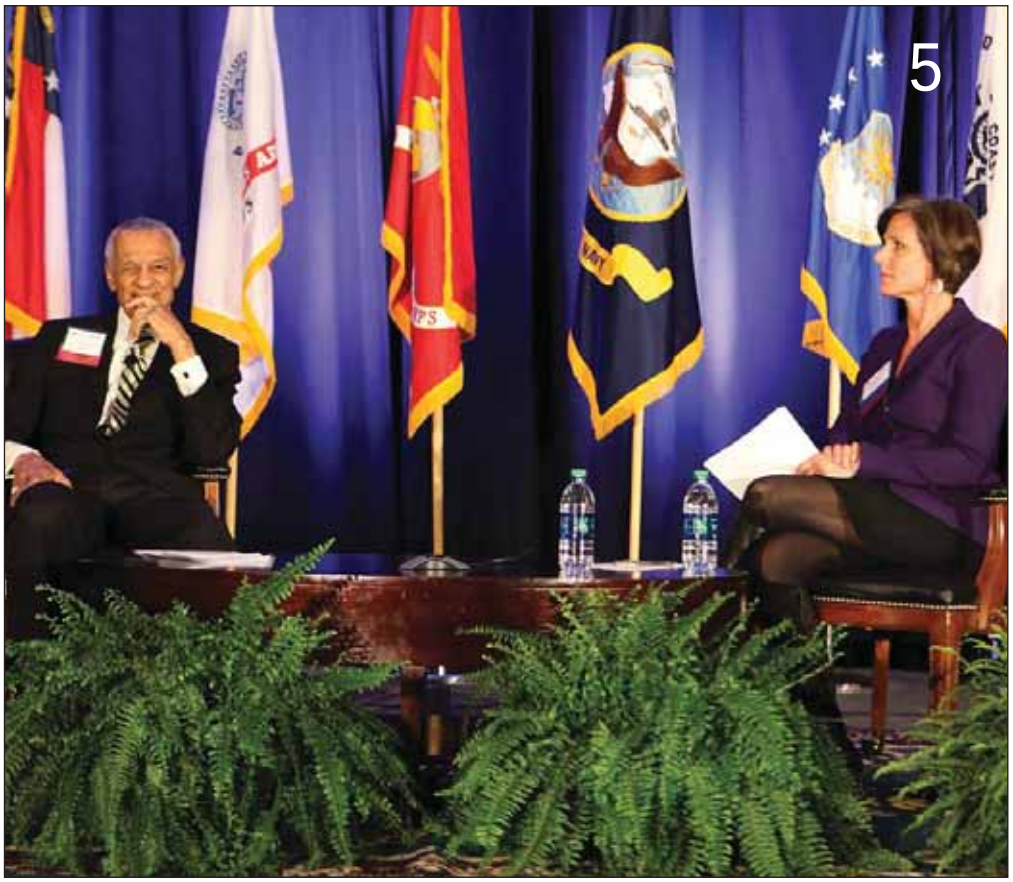


1. University of California Irvine School of Law Dean Erwin Chemerinsky participates in the session "Interpreting the Constitution: A Debate." 2. New York University School of Law Prof. Richard A. Epstein participates in the session "Interpreting the Constitution: A Debate." 3. *(Left to right)* University of South Carolina School of Law Dean Walter F. "Jack" Pratt Jr., American University Prof. Melvin Urofksy and Yale Law School Prof. Akhil Reed Amar participate in the panel "How the Ratification Process Should Affect Our Understanding of the Constitution: A Discussion." 4. *(Left to right)* State Bar President Charles L. Ruffin introduces the speakers for "The Constitutional Limits of Federal Legislative and Executive Power: A View from the States," Attorney General of Colorado John W. Suthers, Attorney General of Georgia Samuel S. Olens and Attorney General of North Carolina Roy A. Cooper III. 5. Attendees and guests in a packed ballroom at the Constitutional Symposium dinner wait to hear David McCullough's keynote address. 6. Author and historian David McCullough, two-time Pulitzer Prize winner and Presidential Medal of Freedom recipient, delivers the keynote address "The Founding Fathers and the Founding Time." 7. *(Left to right)* 11th Circuit U.S. Court of Appeals Judge Beverly B. Martin, Supreme Court of Georgia Chief Justice Hugh P. Thompson and Court of Appeals of Georgia Chief Judge Herbert E. Phipps preside over the re-enactment of the 1972 oral arguments in *Furman v. Georgia* with Stephen B. Bright, for the petitioner William Henry Furman. 8. *(Left to right)* Bancroft PLLC partner, Georgetown University Adjunct Prof. and former U.S. Solicitor General Paul D. Clement, and WilmerHale partner and former U.S. Solicitor General Seth P. Waxman served as speakers for the session "Convincing the Court: How Advocates Seek to Shape the Interpretation of the Constitution" moderated by Mercer University Walter F. George School of Law Prof. David Oedel. 9. *(Left to right)* Panelists SCOTUSblog editor Amy Howe and *New York Times* U.S. Supreme Court correspondent Adam Liptak with moderator and Jones Day partner Peter C. Canfield in the session "News Media Panel: Covering the Constitution and the Supreme Court." 10. *(Left to right)* Co-chairs of the Constitutional Symposium: Supreme Court of Georgia Justice David E. Nahmias, State Bar President Charles L. Ruffin and Walter F. George Prof. David Oedel.



1. *(Left to right)* Panelists: The Volokh Conspiracy blogger and University of California Los Angeles School of Law Prof. Eugene Volokh, National Online Review blogger and Ethics and Public Policy Center President Edward Whelan, and Balkinization blogger and Yale Law School Prof. Jack M. Balkin with moderator Emory University School of Law Dean Robert Schapiro in the session "Expanding the Constitutional Conversation: A Discussion with Leading Legal Bloggers." 2. United States Institute of Peace Past President and CEO and former Congressman Jim Marshall speaks on "Our Constitution as a Model for the World," while attendees wait to ask questions. 3. *(Left to right)* Moderator and Georgia State University College of Law Prof. Eric Segall along with panelists University of Texas School of Law Prof. Sanford V. "Sandy" Levinson, University of California Los Angeles School of Law Prof. Adam Winkler and George Mason University School of Law Prof. Nelson Lund during the session "Gun Rights and Regulations: A Recently Renewed Constitutional Debate." 4. *(Left to right)* Panelists: 9th Circuit U.S. Court of Appeals Judge Alex Kozinski and Supreme Court of Georgia Justice David E. Nahmias with moderator, Young Harris College President and former Secretary of State of Georgia Cathy Cox in the session "Interpreting the Constitution: Views from the 'Lower' Courts." 5. U.S. Attorney for the Northern District of Georgia Sally Q. Yates *(right)* introduces Urban Institute at the Interdenominational Theological Center Dean and Presidential Medal of Freedom recipient Rev. Dr. C.T. Vivian *(left)* who served as speaker for the session "The Constitution in the Real World: Recollections From the Civil Rights Movement."



All told, the State Bar of Georgia's celebration of our Constitution was both unprecedented and unforgettable. We honor and thank all who made it possible, and look forward to a reprise at some future moment of constitutional celebration. In the meantime, we can individually ponder how the Constitution impacts our own lives, as both lawyers and citizens.

Lee was saying that same afternoon on the House floor that she was "thankful for the opportunity to have a deliberative constitutional conversation that reinforces the sanctity of this nation, and how well it is that we have lasted some 400 years operating under a Constitution that clearly defines what is constitutional and what is not."

Although those of us in Atlanta were delighted to be simultaneously engaged in our own "deliberative constitutional conversation," Lee was skewered by some in the press for suggesting that the Constitution itself might be 400 years old. Scalia picked up on that gaff in his remarks to us in Atlanta less than two days later.

Lee's confusion was commonplace. Many citizens, if not congresspeople as well, have trouble distinguishing between the brave experimental settlements at Jamestown and Plymouth from another brave venture, the remarkable legal-governmental-political venture that we call our Constitution.

As between the two types of ventures, though, our American constitutional venture has panned out to be more historically significant. Most of Jamestowns adventurers died. Plymouth's settlers made only a toe-hold on a future in the New World that would probably have produced inevitable waves of immigration no matter what those early experiments showed.

By contrast, our Constitution, which re-calibrated the imbalances of the fledgling American government under the Articles of Confederation, together with the Constitution's elaborate state-by-state ratification process, was unique in the history of governance. Representative Lee more or less got that basic idea, as you can intuit from her more complete statement as quoted here, so her press skewer was somewhat unfair.

Nonetheless, Scalia's gentle chiding of Lee was apt. We need more appreciation for why our Constitution means something special in the world, and to our national future.

Three institutional embodiments of federalism in the flesh—three states' attorneys general, Generals Cooper of North Carolina, Olens of Georgia and Suthers of Colorado—also shared their views with us on the first day of the conference. They are on the front lines of what it legally means to be a sovereign state, even if that may occasionally mean only to be a last bulwark against federal coercion.

Cooper gave us interesting perspectives on what it means to be a blue official in a largely red administration. Suthers conversely offered candid observations about being a Republican attorney general in a Democratic-leaning state. Olens from Georgia offered wisdom about his own experience in fending off federal encroachment against state sovereignty while maintaining positive cooperation on matters of shared concern.

Benjamin Franklin hosted a terrific dinner party for the constitutional convention delegates in July 1787, at probably their lowest moment. It proved to be a saving evening of togetherness. Our own dinner speaker on the first day of our celebration 227 years later, David McCullough, winner of the Medal of Freedom and Pulitzer Prize (the latter twice), warmed our hearts, sharpened our perspectives and steeled our resolve to share the constitutional message with rising generations. McCullough followed Franklin well in serving as a source of practical wisdom and good humor.

On Thursday morning, the 500 attendees (registration was shut off at 500) got to experience a replay of the arguments in one of the critical constitutional cases of the 1970s, *Furman v. Georgia*, that temporarily suspended operation of the death penalty throughout the United States on constitutional grounds. Hearing re-arguments by two prominent advocates, Steve Bright and Anne Lewis, directed through the probing questions of Supreme Court of Georgia Chief Justice Hugh Thompson, 11th Circuit Judge Beverly Martin and Court of Appeals of Georgia Chief Judge Herbert Phipps, we were given special insights not only into the history of a past case, but the future of the death penalty under the Constitution. An additional gift was to hear from Senior Judge Dorothy Beasley, who argued for Georgia at the U.S. Supreme Court in the original case.

The symposium attendees next got the chance to enjoy a privilege often shared by the Supreme Court itself—hear-

(Left to right) Supreme Court of Georgia Justice David E. Nahmias, U.S. Supreme Court Justice Antonin Scalia, Gov. Nathan Deal and State Bar of Georgia President Charles L. Ruffin during a reception in Justice Scalia's honor.

ing from Paul Clement and Seth Waxman. Each of these illustrious former Solicitors General of the United States has argued about 70 times before the Supreme Court, and they continue a blistering pace of appearances. Clement served under George W. Bush, and Waxman served under Bill Clinton. At our symposium, they explored how, tactically and strategically, the Constitution today is being shaped by advocates for the federal government, state governments and private challengers. They revealed how they think about their own work in shaping argument at the Court about the Constitution. While others may talk about a living Constitution, these advocates are living the Constitution, and their discussion was riveting.

Our nation is experiencing a resurgence of everyday people owning their own Constitution, perhaps not unlike the degree of engagement felt by the people of the various states who were engaged in the 1787-91 ratification debates in the newspapers, taverns and other public spots. Citizens today are being helped in making their constitutional connections intimate and informative by the reporting of people like Amy Howe of SCOTUSblog and Adam Liptak of the *New York Times*, who spoke after lunch on March 13.

Their insights about the process of reporting on the U.S. Supreme Court opened paths for lawyer-bloggers Jack Balkin, Eugene Volokh and Ed Whelan next to discuss what is happening at the busy juncture of public conversation and expert analysis about what the Constitution means for all the people today. Both panels were fascinating for the audience, who lined up for the chance to engage the panelists with questions.

The U.S. Constitution has been touted as a prime example of democracy in formal legal garb and practical import. What is the experience, and what are the prospects, of other nations in their own forays in constitutionalism? Jim Marshall, former president of the United States Institute of Peace, U.S. congressman and law professor, offered some practical impressions about cutting-edge constitution-building abroad. He offered a disturbing message about how armed players get more deference in the final structure and content of many shaky constitutional experiments worldwide.

Speech and press made it first on the constitutional list of ratified amendments, as we discussed earlier in the day on Thursday—but arms were the subject of the Second Amendment. Some of the leading academic analysts of the constitutionality of gun regulation, including Sandy Levinson,

U.S. Supreme Court Justice Antonin Scalia addresses the attendees of the Constitutional Symposium.

Nelson Lund and Adam Winkler, joined us at the celebration next to consider the Supreme Court's 2008 landmark case of *D.C. v. Heller*, its implications for local and national gun regulation, and the amendment's broader meanings. Georgia State's Eric Segall led the panel, vigorously defending gun regulation as a counterpoint to more deferential acceptance of the *Heller* ruling.

With so much emphasis placed today on the rulings of the U.S. Supreme Court, one wonders what the many thousands of other judges around the country should think and do about constitutional interpretation. We invited three of the most brilliant judges not on the Supreme Court to speak for the judges who are practically applying the law in concrete cases on a daily basis in their far-flung jurisdictions: Hon. Alex Kozinski of the Ninth Circuit, Hon. David Nahmias of the Supreme Court of Georgia and Hon. Richard Posner of the Seventh Circuit. Their various views, sometimes edgily provocative and iconoclastic, were always also thoughtful and memorable.

The law can be the galvanizing point for citizens who are not experts in the law, but nonetheless rely on the law for their safety and advancement in the deep spirit of the American experience. After a warm introduction by U.S. Attorney Sally Yates, Rev. C.T. Vivian, age 89, Freedom Bus rider, compatriot to Martin Luther King Jr. and 2013 recipient of the Medal of Freedom, joined us to relay some of his personal history of what the Constitution meant for him, and can mean for any and all Americans.

Atlanta's primary newspaper, the *Atlanta Journal-Constitution*, reported on the interesting juxtaposition of Rev. Vivian speaking immediately before our final speaker, Antonin Scalia. The two of them proved to be an able and complementary pairing, lending justice to the notion that the Constitution is a gift to every American, of every political persuasion.

All told, the State Bar of Georgia's celebration of our Constitution was both unprecedented and unforgettable. We honor and thank all who made it possible, and look forward to a reprise at some future moment of constitutional celebration. In the meantime, we can individually ponder how the Constitution impacts our own lives, as both lawyers and citizens. GBJ

David Oedel teaches constitutional law at Mercer University Law School.

23rd Annual Georgia Bar Media & Judiciary Conference

by Stephanie J. Wilson

On Saturday, Feb. 22, attorneys, judges and journalists gathered at the Bar Center in Atlanta for the 23rd annual Georgia Bar Media & Judiciary Conference. Each year, this event brings together panelists and speakers to focus on recurring and emerging issues impacting the First Amendment. The conference is hosted by the Institute of Continuing Legal Education in Georgia and offers 6 CLE hours, including 2 ethics hours and 1 professionalism hour.

Making Movies

The first panel of the day, titled "Making Movies," examined the economic impetus for and the legal issues associated with the new Atlanta and Georgia film industry. The panel explored the competing interests of citizens, visitors, businesses (both film-related and non-film related) and First Amendment issues. The panelists were Maida N. Morgan, location manager for feature films and television; Robin Joy Sahar, chief counsel, Department of Law, city of Atlanta; and LaRonda Sutton, director, Office of Entertainment, city of Atlanta. Christopher G. Walker, assistant city attorney, city of Atlanta, served as moderator.

Photos by Stephanie J. Wilson

Stephen J. Wermiel, law professor and co-author of *The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of* New York Times v. Sullivan, shares a humorous moment with the audience during "*New York Times v. Sullivan*: A 50th Anniversary."

When the Georgia Entertainment and Industry Investment Act was passed by the Legislature and

signed by Gov. Sonny Perdue in 2008, the law put into place tax credits for companies that produce films in Georgia. These big incentives would lead to a filming boom and a big economic impact for the state: $3.3 billion generated in 2013 alone. With the shooting of movies and television on the rise, Atlanta Mayor Kasim Reed realized that industry professionals needed a single point of contact for all of their inquiries; thus, the Mayor's Office of Entertainment was created. According to their website, "To support the city's rapidly expanding film industry; the Office of Entertainment will streamline the permitting process for film productions, facilitate employment of local talent, create production-related educational and training opportunities, and safeguard the interests of residents and businesses affected by film productions."

Reed dealt with First Amendment issues when negotiating with members of Occupy Atlanta in 2011. Sahar said that when the Department of Law was constructing Atlanta's film ordinance they knew that it had to be content neutral to avoid any First Amendment issues; therefore, the ordinance only regulates *city* property, not private property. It took six hours, and lots of back and forth, to write the ordinance.

Courts and Electronic Media: Old Rules and New Practice

The second panel was "Courts and Electronic Media: Old Rules and New Practice." Hon. Susan E. Edlein, judge, Fulton County State Court, served as moderator to panelists Chief Judge David R. Sweat, Superior Court of Georgia, Western Judicial Circuit; S. Lester Tate III, vice chairman, Judicial Qualifications Commission; and April Hunt, reporter, *Atlanta Journal-Constitution.*

Professional journalists are routinely familiar with Uniform Superior Court Rule 22 which regulates electronic and photographic news coverage of judicial proceedings. But with the rise of mobile devices outside the courtroom in this modern age, more and more citizen journalists, who may not abide by the same standards as their professional counterparts, are bringing technology inside. In an attempt to strike a balance between fair trial and free press, the Council of Superior Court Judges proposed Uniform Superior Court Rule 48, which states "Except as provided under Rule 22, no persons other than the court reporter shall make any audio, video, photographic, or electronic recording of a court proceeding using any device unless expressly permitted by the court. Any such request must be submitted in writing to the court at least 24 hours prior to the proceeding, with notice to all parties. A violation of this rule may result in confiscation of the recording, removal of the violator from the courtroom, and subject the violator to con-

Jodie Fleischer, investigative reporter for WSB-TV, and Peter Canfield, partner at Jones Day, serve as panelists for "The Right to be Forgotten v. the Factual Record."

The team from CNN discusses their coverage of the Kendrick Johnson case during "Anatomy of a Modern News Story: Case Studies in Current Investigative Reporting." *(Left to right)* Victor Blackwell, correspondent; Johnita Due, assistant general counsel; and Devon Sayers, field producer.

tempt." The proposed rule met with great scrutiny.

Other states besides Georgia have struggled with this issue as well. Courts in Utah have denied use of audio or video recording, but tweets are allowed. In Kansas, no device can be used without permission. Florida has opened all court proceedings, with the exception of Department of Children and Families cases. Only time will tell how Georgia courts will accommodate the use of mobile devices by professionals and citizens alike.

Under Siege: The Fate of Investigative Journalism

The next panel, "Under Siege: The Fate of Investigative Journalism," was moderated by Lee Williams, assistant general counsel, CNN. The panel was comprised of Thomas M. Clyde, partner, Kilpatrick, Townsend & Stockton LLP; Dale Russell, senior investigative reporter, FOX 5 Atlanta; and Scott Zamost, senior investigative producer, CNN. The panelists explored the future of investigative journalism in a world that is always connected and what effects technology might have.

James Rosen. Chelsea (formerly known as Bradley) Manning. Edward Snowden. These are the names of Americans most recently charged by the U.S. government with violating the Espionage Act of 1917 (the Act). In fact, there are eight cases pending under the current administration. The government is now using the Act to force reporters to divulge their sources and to subpoena Internet service providers to turn over reporters' Internet search records. The language of the Act is vague and broad. To this end, it is being applied not only to written information revealed by whistleblowers but to verbal information as well. No intent to harm the government must be proven in order for charges to be handed down.

New York Times v. Sullivan: A 50th Anniversary

While attendees enjoyed lunch, Hank Klibanoff, director of the Journalism Program at Emory University, lead a conversation with Stephen J. Wermiel about the new book he co-authored, *The Progeny: Justice William J. Brennan's Fight to Preserve the Legacy of* New York Times v. Sullivan. Wermeil is a professor at American University's Washington College of Law in Washington, D.C. He holds expertise in the U.S. Supreme Court, having covered the Court for the *Wall Street Journal* from 1979 until 1991. During his 12-year tenure at the *Journal,* Wermiel covered and interpreted more than 1,300 Supreme Court decisions and analyzed trends on a broad array of legal issues.

In 1960, the *New York Times* ran a fundraising advertisement signed by civil rights leaders that criticized, among other things, certain actions of the Montgomery, Ala., police department. Some of the facts in the advertisement were incorrect. Although no names were mentioned, L. B. Sullivan, Montgomery's police commissioner, sued the *Times* for libel and won $500,000 in an Alabama court. The newspaper appealed. At issue was the protection given press criticism of the official conduct of public officials. In overturning the lower court's ruling, the U.S. Supreme Court held that First Amendment protection of free speech is not dependent on the truth, popularity or usefulness of the expressed ideas. The decision held that debate on public issues would be inhibited if public officials could recover for honest error that produced false defamatory statements about their official conduct. The court limited the right of recovery to public officials who could prove actual malice (i.e., that the newspaper knew the statement was false or acted in reckless disregard of the truth). By emphasizing that First Amendment protection applies to state court cases, the 1964 Supreme Court decision eased the way for news organizations covering the civil rights movement in the South.[1]

The Right to Be Forgotten v. the Factual Record

Although criminal records can be sealed and removed from public record altogether, the number of websites displaying mug shots is on the rise . . . and the accused will be forced to pay big money to have his photo taken down. In response, the Georgia Senate passed SR 247 creating the Senate Expungement Reform Study Committee. CNN's Vice President and Senior Editorial Director Richard T. Griffiths served as interlocutor for a Fred Friendly-style panel that delved into two fictitious scenarios presenting the issues surrounding expungement. Douglas B. Ammar, executive director of the Georgia Justice Project; Peter C. Canfield, partner at Jones Day (and all around good sport); Jodie Fleischer, investigative reporter for WSB-TV; and Chief Judge R. Rucker Smith, Superior Court of the Southwestern Judicial Circuit, served as panelists.

Scenario one was set in 1973 in the middle of a snowstorm in Dahlonega, Ga. The one and only snow plow that had been reported missing has been found abandoned and out of gas with a drunk Peter Canfield passed out at the wheel. Canfield is arrested and bails himself out of jail. After his conviction, Canfield takes first offender status. Since he wants to be a lawyer and is considering Yale, Canfield asks the judge to seal his record. It is now present day, and attorney Canfield is a candidate for Snow Mitigtion Czar. Full background checks are concluded, after which rumors abound regarding his 1973 conviction. As the story continued to unfold, the panelists dealt ably with piece of the puzzle as it was revealed by Griffiths.

In scenario two, a group of Georgia Tech students kid-

nap University of Georgia mascot "Uga" and set him free in Piedmont Park. "Uga" is attacked and Peter Canfield, who was out taking his own dog to the park, is arrested as a suspect. Canfield knew the students, was seen talking to them and was assumed to be involved. The charges are eventually dropped but the mug shot has already been released. How does Canfield restore his good name?

Panelist and investigative journalist Jodie Fleischer said that corrections for local stories that were picked up on a national level are seldom reported. Other panelists went on to point out that even if the accused is successful in getting content removed from the world wide web, stories, posts and tweets still lives on in screen shots and cached versions. Summing up, Fleischer said, "You can't undo the Internet."

Anatomy of a Modern News Story: Case Studies in Current Investigative Reporting

The panel "Anatomy of a Modern News Story: Case Studies in Current Investigative Reporting," provided a look behind the scenes of some of Georgia's major investigative reporting efforts of the last year. Hyde Post of Hyde Post Communications in Saint Simons Island, Ga., served as moderator.

First up was *Atlanta Journal-Constitution (AJC)* reporter Alan Judd whose stories on the tragic deaths of children highlight the failures of Georgia's child protection system. Judd spoke of Emani Moss, a 10-year-old Gwinnett County girl whose emaciated body was found burned in a trash can outside her family's apartment building in November 2013. Moss' father and stepmother were arrested and charged with murder, concealing a body and child cruelty. The *AJC* reported that Georgia's Division of Family and Children Services (DFCS) had been involved with the family in prior child abuse cases but didn't remove the children from the adults' care at the time. Moss' two other siblings are currently in the department's custody.

Judd went on to speak about a number of other child murder cases. He said that when investigating these stories one of his first steps is to make Open Records Act requests of the Child Fatality Review Panel. Although officials redact significant portions of the reports (e.g., the names of deceased children and their parents, dates of birth and death, time of day a child died) enough data remains to determine the identity of the child. HIPAA laws have also restricted reporters' ability to report the death of children. In the 2014 legislative session, the Georgia House of Representatives voted 168-0 in favor of HB 923 which would revamp the Child Fatality Review Panel and repeal confidentiality laws enacted five years ago that protect the identities of not only the children reported to DFCS but of the state officials who fail the abused children.

The Kendrick Johnson case in Valdosta, Ga., burst into the national spotlight when CNN began reporting the facts surrounding the Lowndes High School student's death. CNN correspondent Victor Blackwell, who has exclusively covered the case since it began, served as a panelist along with Johnita Due, assistant general counsel for CNN, and field producer Devon Sayers. Blackwell and his CNN co-workers took the audience step-by-step through the process of covering the bizarre details of the case including video clips of reports that have aired on CNN.

Georgia and the Sexual Legal Revolution: Gaining Ground or Losing Pace?

In June 2013, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act, which defines marriage as a legal union between one man and one woman. In that same month, the Court also confirmed its 2010 ruling that California's Proposition 8 was unconstitutional. These actions allowed married same-sex couples to gain more than 1,100 federal rights available by marriage, even if those couples reside in a state that does not recognize their union.

Ed Bean, editor-in-chief of the *Daily Report,* moderated the final panel of the day, "Georgia and the Sexual Legal Revolution: Gaining Ground or Losing Pace?" Panelists Superior Court Judge Cynthia J. Becker, Stone Mountain Judicial Circuit; Randy M. Kessler, founding partner at Kessler & Solomiany LLC; and Jeffrey M. Zitron, founding member at Hendrick, Rascoe, Zitron & Long, LLC, engaged in a lively discussion regarding recent national legal trends affecting marriage, adoption and divorce, and their potential impact in Georgia.

Conclusion

As in years past, the 2014 Georgia Bar Media & Judiciary Conference did not fail to inform, engage and enlighten the judges, attorneys and journalists in the audience. A multitude of thanks goes out to the moderators and panelists who lent their time and talents. And to Peter Canfield and the many others who work diligently to plan this annual event: congratulations on a job well done! GBJ

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Endnote

1. New York Times Company v. Sullivan, http://www.infoplease.com/encyclopedia/history/new-york-times-company-v-sullivan.html.

2013 Georgia Corporation and Business Organization Case Law Developments

by Thomas S. Richey and Michael P. Carey

This article presents an overview from a survey of Georgia corporate and business organization case law developments in 2013. The full version of the survey, which can be downloaded or printed at http://www.bryancave.com/2013-ga-survey/, contains a more in-depth discussion and analysis of each case. This article is not intended as legal advice for any specific person or circumstance, but rather a general treatment of the topics discussed. The views and opinions expressed in this article are those of the authors only and not Bryan Cave LLP.

This article catalogs case law developments dealing with Georgia corporate and business organization law issues handed down by Georgia state and federal courts during 2013. Several of 2013's decisions have significant precedential value, while others address less momentous questions of law as to which there is little settled authority. Even those cases in which the courts applied well-settled principles are instructive for the types of claims and issues that are currently being litigated in corporate and business organization disputes.

The year 2013 is probably most notable for two unresolved issues arising from the Federal Deposit Insurance Corporation's litigation against directors and officers of failed banks: first, whether bank officers and directors can be held to a simple negligence standard of care, an issue now before the Supreme Court of Georgia on certified questions from the federal courts and, second, whether the insured-versus-insured exclusions in director and officer insurance policies bar claims by the FDIC as receiver for the insured bank, with disagreement at the federal district court level on both issues.

The Georgia federal courts were also unusually active in deciding other business organization issues in 2013—48 out of the 86 decisions profiled in this article were handed down by federal district, bankruptcy and appellate courts, including potentially significant decisions regarding permissible restrictions on the transfers of corporate stock and the accrual of the statute of limitations on claims among partners. Five decisions by the Georgia courts in 2013 involved interpretation and/or enforcement of business and nonprofit corporation bylaws. There were also a comparatively large number of cases in 2013 ruling on partnership issues. Transactional cases focused mainly on the results of corporate deals—the transfer of assets by operation of law in mergers and claims of successor liability in asset sales. Among litigation issues, the cases included an important ruling upholding the dismissal of a derivative action at the corporation's request based on the results of an investigation by a special litigation committee of the board and a decision considering the requirements for criminal liability of an LLC.

The decisions are organized first by entity type—those specific to business corporations, nonprofit corporations, limited liability companies and partnerships. The remaining sections of the survey deal with (1) transactional issues potentially applicable to all forms of business organizations, and (2) litigation issues, including derivative action procedure, *alter*

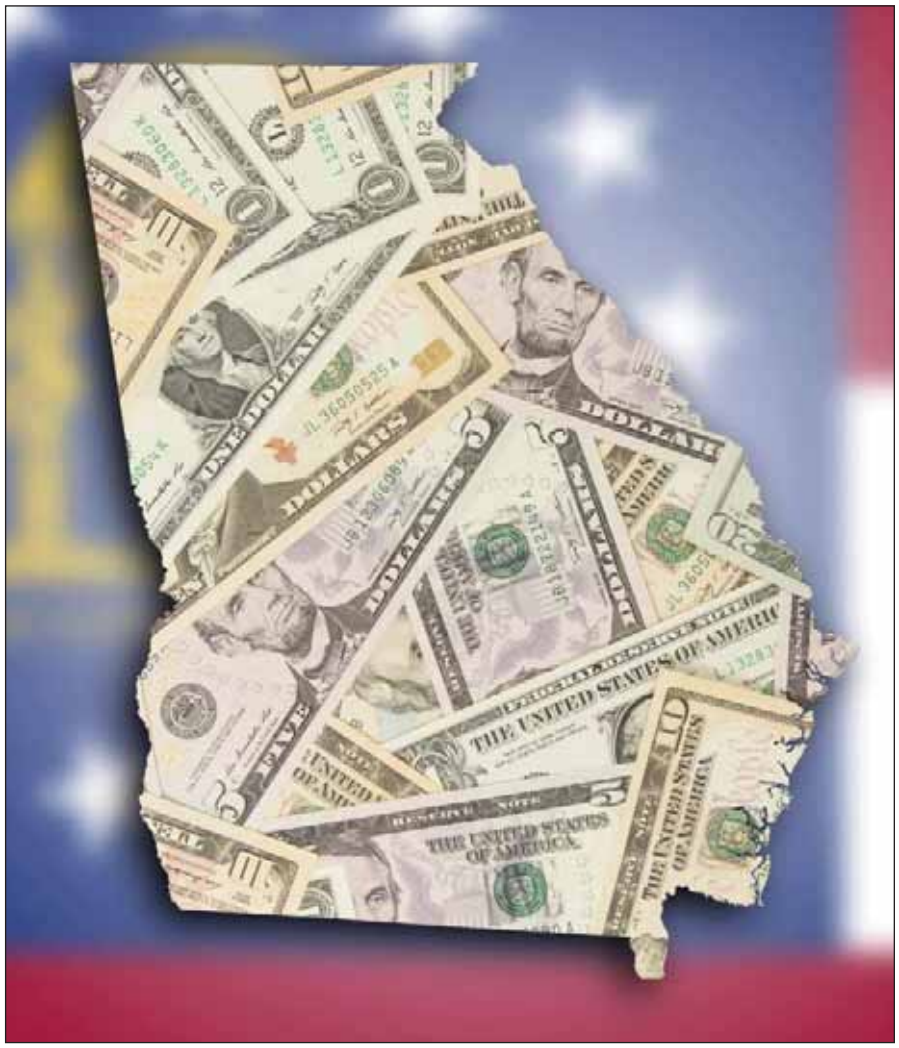
ego and other forms of secondary liability, jurisdiction and insurance issues. Finally, we cover several significant decisions handed down by the Fulton County Business Court during the year 2013.

Duties and Liabilities of Corporate Directors, Officers and Employees

The most significant development of 2013 is as of yet unresolved. In two separate decisions, *FDIC v. Loudermilk*, ___ F. Supp. 2d ___, 2013 WL 6178463 (N.D. Ga. Nov. 25, 2013) (Thrash, J.) and *FDIC v. Skow*, 741 F.3d 1342 (11th Cir. 2013), a Georgia federal district court and the 11th Circuit asked the Supreme Court of Georgia to decide whether the business judgment rule insulates bank directors from liability for claims of ordinary negligence. The Supreme Court of Georgia has docketed the two appeals as S14Q0454 and S14Q0623, with briefing underway and oral argument currently scheduled for April and May, 2014, respectively.

The immediate question before the Supreme Court is whether the FDIC, acting as receiver for failed Georgia banks, may rely on an ordinary negligence theory in pursuing claims against the banks' former directors and officers. The FDIC has filed 21 such suits in Georgia federal district courts since the onset of the financial crisis of the late 2000's, and the defendants have moved to dismiss the FDIC's ordinary negligence claims in several of the cases. Beginning with the district court's February 2012 decision in *Skow,* the initial decisions agreed that the business judgment rule as described in *Flexible Products Co. v. Ervast*, 284 Ga. App. 178, 182 (2007) and *Brock Built, LLC v. Blake*, 300 Ga. App. 816 (2009) foreclosed the FDIC's ordinary negligence claims.

In early 2013, the district court in *FDIC v. Adams*, 2013 WL 604411 (N.D. Ga. Apr. 10, 2013) (Forrester, J.), broke from these early decisions, holding that the business judgment rule applied but that its presumption could be overcome by allegations of ordinary negligence. In November, the district court in *Loudermilk, supra,* went a step further, stating that it was "not convinced" that the business judgment rule applied to bank directors in the first place. The court specifically questioned whether it made sense to treat bank directors and officers in the same manner as corporate directors and officers, reasoning that bank failures harm not only shareholders but also the FDIC and ultimately, taxpayers. While the court clearly hinted at a policy-based rationale for denying business judgment rule protection to bank directors and officers, it did not resolve the question, instead certifying to the Supreme Court of Georgia the following question: "Does the business judgment rule in Georgia preclude as a matter of law a claim for ordinary negligence against the officers and directors of a bank in a lawsuit brought by the FDIC as receiver for the bank?"



Shortly thereafter, in the *Skow* appeal, the 11th Circuit also decided to certify questions to the Supreme Court of Georgia. The 11th Circuit did not address the policy points raised in *Loudermilk*, but instead found that *Flexible Products* and *Brock Built* may conflict with the statutory standard of care set forth in the Banking Code, O.C.G.A. § 7-1-490, which it (like many previous courts) interpreted as an ordinary negligence standard. The court thus certified its own questions to the Supreme Court of Georgia: (1) "Does a bank director or officer violate the standard of care established by O.C.G.A. § 7-1-490 when he acts in good faith but fails to act with "ordinary diligence," as

that term is defined in O.C.G.A. § 51-1-2?" and (2) "In a case like this one, applying Georgia's business judgment rule, can the bank officer or director defendants be held individually liable if they, in fact as alleged, are shown to have been ordinarily negligent or to have breached a fiduciary duty, based on ordinary negligence in performing professional duties?" The Supreme Court's response to the certified questions will undoubtedly be significant to the ongoing FDIC litigation and to any litigation involving bank officers and directors. The Court's response may also have wider effects on the business judgment rule in Georgia generally, particularly if the Court addresses the interplay between the rule and the statutory standard of care. Notably, the standard set forth in the Banking Code, O.C.G.A. § 7-1-490, uses substantially the same wording as its counterparts in the Corporations Code, see O.C.G.A. §§ 14-2-830 (applicable to corporate directors) and 14-2-842 (applicable to corporate officers).

The *Adams* decision was significant in a second respect: it also addressed a failure of oversight claim under the principles established in *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996), making it the second decision in two years to consider applying *Caremark* to a Georgia banking corporation. Without deciding whether Georgia would follow *Caremark* in adjudicating director liability claims not involving business decisions, the court held that the FDIC failed to allege the complete absence of internal controls or the conscious failure to monitor such controls, and thus failed to meet the "high threshold" for a *Caremark* claim. Another issue regarding claims against failed bank directors and officers was decided in *FDIC v. Cameron*, ___ F. Supp.2d ___, 2013 WL 6490247 (N.D. Ga. Dec. 11, 2013), in which the court held that the Georgia statute of limitations for claims of negligence and gross negligence against bank directors and officers runs from the time of making bad loans, not the time when loans went into default.

A different standard of care issue was pending before the Supreme Court of Georgia at the end of 2013 in an appeal from *Rollins v. Rollins*, 321 Ga. App. 140, 741 S.E.2d 251 (2013). There, the Court of Appeals of Georgia held that trustees managing family business entities in which the trusts held minority interests may be held liable to beneficiaries under trust standards of care for their actions at the entity level and they may also be required under trust law principles to provide an accounting of those entities. The Supreme Court of Georgia recently reversed the Court of Appeals on both counts, holding that because the trusts owned minority interests in the entities, the trustees' conduct as officers and directors must be governed by corporate law principles. As for the accounting, the Court of Appeals failed to consider the discretion exercised by the trial court in denying the accounting. *Rollins v. Rollins*, Appeal No. S13G1162, ___ S.E.2d ___, 2014 WL 819500 (Mar. 3, 2014).

In other cases examining the conduct of corporate officers and directors in 2013, in *Georgia Dermatologic Surgery Centers, P.C. v. Pharis*, 323 Ga. App. 181, 746 S.E.2d 678 (2013), the Court of Appeals held that the president of a two-shareholder corporation exceeded his authority under corporate bylaws and a shareholder agreement in terminating the other shareholder / director without board and shareholder approval, even where that approval would have to come from the terminated shareholder / director. In *Coast Buick GMC Cadillac, Inc. v. Mahindra & Mahindra, Ltd.*, 2013 WL 870060 (N.D. Ga. Mar. 7, 2013), the Northern District addressed the rule permitting fraud claims to be based on misrepresentations made to third parties where the defendant allegedly knows that the plaintiff will rely on a third party who received the misrepresentation. The court also declined to apply the federal "intracorporate conspiracy doctrine" to bar a state law conspiracy claim. The Georgia federal courts in two cases, *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299 (11th Cir. 2013) and *Stuart v. Resurgens Risk Management, Inc.*, 2013 WL 2903571 (N.D. Ga. June 12, 2013), reaffirmed that personal liability of a corporate officer under the Federal Labor Standards Act requires operational control or direct supervision over the offending conduct. Finally, in *Mecca Construction, Inc. v. Maestro Investments, LLC,* 320 Ga. App. 34, 739 S.E.2d 51 (2013), the Court of Appeals applied the familiar rule that an officer who personally participates in a tort can be held individually liable to an injured party by default without resort to veil-piercing principles.

Corporate Stock and Debt—Issuance, Restrictions and Blue Sky Law Application

In *In re Beauchamp (Mossy Dell, Inc. v. AB&T National Bank)*, 500 B.R. 235 (M.D. Ga. 2013), the Middle District addressed what constitutes a valid stock transfer restriction under O.C.G.A. § 14-2-627(d), holding that the statute's list of four valid mechanisms for stock transfer restrictions is exhaustive, and any restrictions not consistent with the statute are impermissible. The court ruled that restricting transfers to family members is permitted, but a 10-year prohibition against all transfers is not valid under the statute. In *Ward v. Ward*, 322 Ga. App. 888, 747 S.E.2d 95 (2013), the Court of Appeals applied O.C.G.A. § 14-2-621(b) in holding that stock issued by a corporation's president was invalid because it was not authorized by the corporation's board of directors as required by its bylaws. In *Cushing v. Cohen*, 323 Ga. App. 497, 746 S.E.2d 898 (2013), the Court of Appeals held that unsecured promissory notes given to investors in connection with a "leveraged

lending program" were securities subject to the Georgia Securities Act. An officer of the corporation that issued notes was held liable under O.C.G.A. § 10-5-14. In *Olegbegi v. Hutto*, 320 Ga. App. 436, 740 S.E.2d 190 (2013), the Court of Appeals held that the purchaser of stock that was not delivered to him was not entitled to consequential damages stemming from tax liabilities and penalties he incurred in withdrawing funds from his 401(k) account to pay for the stock, finding that the plaintiff's evidence was insufficient.

Nonprofit Organization Decisions

The year 2013 saw several cases in which the courts were called upon to interpret or apply the bylaws and incorporation documents of nonprofit corporations. In *God's Hope Builders, Inc. v. Mount Zion Baptist Church of Oxford, Georgia, Inc.*, 321 Ga. App. 423, 741 S.E.2d 185 (2013), the Court of Appeals examined a church's bylaws for the purposes of determining whether the plaintiffs were properly members of the church and had standing to sue. In *Hall v. Town Creek Neighborhood Association*, 320 Ga. App. 897, 740 S.E.2d 816 (2013), the Court of Appeals held that a homeowners association's declarations and bylaws did not permit the developer to forego appointing a board of directors or to act in lieu of a board. In *McGee v. Patterson*, 323 Ga. App. 103, 746 S.E.2d 719 (2013), the Court of Appeals held that a homeowners' association's documents permitted residents to enforce the association's covenants notwithstanding that the residents were delinquent in paying assessments. Finally, in *Xerox Corp. v. Light for Life, Inc.*, 2013 WL 1748327 (M.D. Ga. Apr. 23, 2013), the Middle District declined to rule on which of two competing groups purporting to represent a corporation in the lawsuit was the proper party, since the issue had been mooted by the plaintiff's voluntary dismissal of the corporation.

Limited Liability Company Developments

The courts considered a variety of issues involving limited liability companies in 2013. In *Denim North America Holdings, Inc. v. Swift Textiles, LLC*, 532 Fed. Appx. 853(11th Cir. 2013), the 11th Circuit strictly construing O.C.G.A. § 14-11-305, held that non-managing members of a member-managed LLC do not owe fiduciary duties to the LLC or to other members. In so holding, the 11th Circuit reversed the Middle District, which had reasoned that the non-managing member gained *de facto* control by virtue of having the power under the operating agreement to appoint half of the managers. In *Raiford v. National Hills Exchange, LLC,* 2013 WL 1286204 (S.D. Ga. Mar. 27, 2013) LLC non-member equity holders were found unable to challenge an undisclosed sale of partnership assets under the unanimous consent requirements of O.C.G.A. § 14-11-308. In *Kaufman Development Partners, LP v. Eichenblatt*, 324 Ga. App. 71, 749 S.E.2d 374 (2013), the Court of Appeals held that a former LLC member who remained a party to the operating agreement retained rights under the agreement and had standing to sue for breaches of the agreement. In *Davis v. VCP South, LLC*, 321 Ga. App. 503, 740 S.E.2d 410 (2013), the Court of Appeals held that a member of a two-member LLC did not waive its rights under a buy-sell provision by obtaining its own independent valuation of the LLC interest.

Several other cases addressed questions of individual liability of LLC members and management. In *Jones Creek Investors, LLC v. Columbia County, Georgia*, 2013 WL 1338238 (S.D. Ga. Mar. 28, 2013), the Southern District addressed issues of individual liability of LLC officers under the federal Clean Water Act and Georgia common law. In *American Arbitration Association v. Bowen*, 322 Ga. App. 51, 743 S.E.2d 612 (2013), the Court of Appeals held that members of an LLC were individually liable for the LLC's unpaid arbitration fees, since the members personally participated in the arbitration in their individual capacities as well. Finally, in *Primary Investments, LLC v. Wee Tender Care III, Inc.*, 323 Ga. App. 196, 746 S.E.2d 823 (2013), the Court of Appeals held that a non-competition clause in an LLC's sale agreement did not bind members of the LLC who had signed the agreement only in their capacities as representatives of the LLC.

In *STC Two, LLC v. Shuler-Weiner*, ___ Ga. App. ___ 750 S.E.2d 730 (2013), the Court of Appeals of Georgia again honored the separateness of an LLC from its members, holding that an LLC would not be bound to extend a lease by payments promised by the lessee to the LLC's member. Also applying the principle of separateness, the court in *Uhlig v. Drayprop, LLC*, 2013 WL 5532883 (S.D. Ga. Oct. 4,

2013), granted summary judgment to two LLC members on third-party claims that they misrepresented the condition of a condominium building to a purchaser. The court concluded, we submit erroneously, that the members were shielded from personal liability under O.C.G.A. § 9-11-1107(j) so long as they were acting on behalf of the LLC, not on behalf of themselves.

Partnership Law Developments

The U.S. District Court for Middle District of Georgia addressed issues of partnership formation and completion in *Durkin v. Platz*, 920 F. Supp. 2d 1316 (M.D. Ga. 2013), holding that parties who contracted to write a screenplay formed a partnership for that purpose, but that the partnership ceased upon completion of the screenplay. As a result, the partners' fiduciary duties ceased and did not extend to producing a movie from it. The same court handed down a potentially far-reaching decision in *First Benefits, Inc. v. Amalgamated Life Insurance Co.*, 2013 WL 4011015 (M.D. Ga. Aug. 6, 2013), holding that the statute of limitations for claims between partners does not begin to accrue until the partnership is dissolved, basing its ruling on old Supreme Court of Georgia authority and rejecting a recent, inconsistent Court of Appeals of Georgia decision that suit must be filed within four years of the defendant partner's action.

According to the court in *Alliant Tax Credit Fund XVI, Ltd. v. Thomasville Community Housing, LLC*, 2013 WL 321548 (N.D. Ga. Jan. 28, 2013), general partners who failed to obtain audited financial statements exactly as specified in the limited partnership agreement may be subject to removal for material breach of the agreement. In *Pullar v. General MD Group*, 2013 WL 5781609 (N.D. Ga. Sept. 17, 2013), the court held that, under O.C.G.A §§ 14-8-13 and 14-8-15, a general partner can be liable to investors for fraud and breach of contract claims against the partnership arising from investment agreements with the plaintiffs, even though the general partner was not a signatory to the agreements. In *Crippen v. Outback Steakhouse International, L.P.*, 321 Ga. App. 167, 741 S.E.2d 280 (2013), the Court of Appeals held that a limited partnership officer/employee's pursuit of outside interests and his failure to devote full time to partnership business, while it violated his employment agreement, did not breach any fiduciary duty to the partnership and the partnership was not entitled to recover his profits, because there was no evidence that the outside interests were adverse to the partnership or caused it any harm. The Court of Appeals in *Petrakopoulos v. Vranas*, ___ Ga. App. ___, 750 S.E.2d 779 (2013) addressed procedural requirements in a partnership dispute, reversing the appointment of a receiver for the partnership at a hearing on a motion for appointment of an auditor, deciding which of the plaintiff's claims were direct and which were derivative, and finding factual issues in a claim for wrongful dissolution. In *NEF Assignment Corp. v. Northside Village Partnership GP, LLC*, 2013 WL 3755606 (N.D. Ga. Jul. 15, 2013), the Northern District held that guarantors of all of a general partner's obligations were liable for the general partner's obligation to repurchase another partner's interest under the buy-sell provisions of the partnership agreement. Finally, in *T.V.D.B. Sarl v. KAPLA USA*, 2013 WL 6623186 (S. D. Ga. Dec. 16, 2013), the District Court for the Southern District of Georgia found that the principal of the general partner of a limited partnership may be held liable for breach of fiduciary duty to a creditor for the unpaid debt of the partnership because she had diverted the partnership's business to a newly formed LLC. The court held that the new LLC may be subject to successor liability, but that the evidence did not support veil-piercing.

Transactional Cases

The cases in this area in 2013 reflect the courts' increasing attention to and reliance on the Georgia Business Corporation Code in resolving disputes over major transactions and the rights and liabilities of successor entities. Several decisions in 2013 addressed the rights and liabilities of successor entities following corporate mergers. These issues have most frequently come up in the foreclosure context. In *National City Mortgage Co. v. Tidwell,* 293 Ga. 697, 749 S.E.2d 730 (2013), the Supreme Court held that the surviving entity in a bank merger succeeded to the rights of the original defendant to a wrongful foreclosure suit by operation of O.C.G.A. § 14-2-1106. Because of this, the Court concluded, it was immaterial that the surviving entity had not been formally substituted as a party. Similarly, in *Diaz v. JP Morgan Chase Bank,* 2013 WL 750480 (N.D. Ga. Feb. 27, 2013) and *Abdullahi v. Bank of America, N.A.*, 2013 WL 1137022 (N.D. Ga. Mar. 15, 2013), *aff'd*, ___ Fed. Appx. ___, 2013 WL 6085241 (11th Cir. Nov. 20, 2013), the Northern District applied O.C.G.A. § 14-2-1106 in favor of security deed holders who obtained the deeds via merger, holding that title passed to the surviving entities by operation of law and that no formal assignment of the deeds was necessary. *Abdullahi* was later affirmed on appeal by the 11th Circuit. In *Patel v. Ameris Bank*, 324 Ga. App. 227, 749 S.E.2d 809 (2013), a bank obtained a note by assignment after the initial holding bank was closed by the FDIC, but the first bank had changed its name and the documents therefore did not reflect an assignment from the initial holder to the current holder. The Court of Appeals found that the evidence was sufficient to support a judgment in favor of the assignee, since the initial holder's name change had been properly recorded with the Georgia Secretary of State.

In *Herren v. Sucher*, ___ Ga. App. ___, 750 S.E.2d 430 (2013), the court

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Pictured above from L to R: Don C. Keenan, Foundation Founder and Chairman; First Place winner Ella O'Kelley (2L, John Marshall); Second Place winner Mary Hashemi (2L, Savannah); Third Place winner Ramika Gourdine (3L, Georgia State); Fourth Place winner Utrophia Robinson (3L, UGA)

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ruled that an indemnity clause in an asset purchase agreement did not constitute an agreement to assume the seller's liabilities. Successor liability was also at issue in *Fieldturf USA Inc. v. Tencate Thiolon Middle East, LLC*, 945 F. Supp. 2d 1379 (N.D. Ga. 2013), in which the court held that an acquirer of an artificial turf manufacturer had agreed to assume the company's liability for fraud claims against the predecessor. In *Freund v. Warren*, 320 Ga. App. 765, 740 S.E.2d 727 (2013), the Court of Appeals held that assets purchased by a corporation's shareholders in their individual capacities were property of the shareholders, not the corporation. In *In re Foster*, 500 B.R. 197 (Bankr. N.D. Ga. 2013), the Bankruptcy Court for the Northern District of Georgia held that a corporation's conveyance of real estate was valid even in the absence of a corporate seal, because the conveyance complied with all requirements of O.C.G.A. § 14-5-7. Finally, in UWork.com*, Inc. v. Paragon Technologies, Inc.,* 321 Ga. App. 584, 740 S.E.2d 887 (2013), the Court of Appeals rejected claims that parties to an arm's-length contract had developed a confidential relationship through their course of conduct, finding that the relationship was instead adversarial. The court also addressed the circumstances in which fraud and negligent misrepresentation claims can be based on representations made to a third party, similar to *Mahindra*, discussed above, however, finding the claims before it were insufficient.

Litigation Issues

Derivative Action Procedure

In one of the most significant cases of 2013, *Benfield v. Wells*, 324 Ga. App. 85, 749 S.E.2d 384 (2013), the Court of Appeals addressed a corporation's motion to dismiss a shareholder's derivative suit under O.C.G.A. § 14-2-744(a), holding that dismissal was proper in light of the recommendation of a special litigation committee. Specifically, the court rejected a challenge to the independence of the special committee members, finding that their independence was not destroyed by their various business and social relationships with some of the defendants.

Two other decisions addressed whether corporate litigation claims were direct or derivative in character. In *In re Pervis*, 497 B.R. 612 (Bankr. N.D. Ga. 2013), the Bankruptcy Court for the Northern District of Georgia held that an individual shareholder's suit against the corporation's only other shareholder for misappropriation and usurpation of corporate opportunity did not need to be brought derivatively, because the typical reasons for requiring derivative suits were not present. The court also held fraud claims against the debtor could not be determined to be nondischargeable because corporate officers and directors are not fiduciaries within the strict meaning of 11 U.S.C. § 523(a)(4). In *Bobick v. Community & Southern Bank*, 321 Ga. App. 855, 793 S.E.2d 518 (2013), the Court of Appeals held that a shareholder's suit against a bank alleging mismanagement by its directors and officers resulting in devaluation of her stock was subject to dismissal because the claims were derivative.

Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability

The year brought the usual array of alter ego and piercing the veil decisions, none of which reflected any change in Georgia law. In *Instituforum Techs, LLC v. Cosmic Tophat, LLC*, 959 F. Supp. 2d 1335 (N.D. Ga. 2013), the Northern District addressed both traditional alter ego theories and "reverse piercing," which is not recognized in Georgia (and which the court refused to adopt). Reverse piercing was also addressed by the Court of Appeals in two other cases. In *Holiday Hospitality Franchising, Inc. v. Noons*, 324 Ga. App. 70, 749 S.E.2d 380 (2013), the court held that in light of the Supreme Court's decision in *Acree v. McMahan*, 276 Ga. 880 (2003), it could not permit reverse piercing to enable a creditor to reach the assets of alleged sham corporations. In *Carrier 411 Servs., Inc. v. Insight Tech., Inc.*, 322 Ga. App. 167, 744 S.E.2d 356 (2013), the court found that a judgment creditor's successful traverse of a corporate garnishee's answer regarding funds owed by its majority owner did not constitute reverse piercing. In *RMS Titanic, Inc. v. Zaller*, 2013 WL 5675523 (N.D. Ga. Oct. 17, 2013), the court rejected the plaintiff's attempt to apply an alter ego theory in a Lanham Act dispute and also rejected an effort to use "reverse piercing" to create personal jurisdiction over two foreign corporations through their Georgia shareholder.

Two decisions from the Southern District rejected attempts to hold a parent company liable for alleged wrongs committed by its subsidiary. In *Roberts v. Wells Fargo Bank, N.A.*, 2013 WL 1233268 (S.D. Ga. Mar. 27, 2013), the district court declined to pierce the corporate veil to allow a class action plaintiff to assert claims against the parent corporation of an insurance company accused of participating in a kickback scheme. In *Sullivan's Administrative Managers II, LLC v. Guarantee Insurance Co.*, 2013 WL 4511319 (S.D. Ga. Aug. 23, 2013), the district court held that evidence that a parent performed certain administrative functions for its subsidiary was not enough to create an inference that the corporate form was abused.

The Court of Appeals in *Cancel v. Sewell*, 321 Ga. App. 523, 740 S.E.2d 870 (2013) (*cert.* granted, appeal pending in Ga. S. Ct.) declined to hold that a newly-formed professional association was the alter ego of the individuals who organized it and the hospital where they practiced, rejecting a claim by members of the former association who were not invited to join the new association. Finally, the bankruptcy court *In re Palisades at West Paces Imaging Center, LLC*, 501 B.R. 896 (Bankr. N.D. Ga. 2013)

addressed alter ego claims by the trustee for the debtor-LLC against the principals of the LLC and certain family entities that received some of the allegedly fraudulent transfers. The court found liability for the transfers that benefited the family entities, but not for other transfers that the principals made.

Jurisdictional Cases

There were no major developments involving jurisdiction, venue or service of process. The following decisions addressed personal jurisdiction and service of process issues: In *Gregory v. Preferred Financial Solutions*, 2013 WL 5725991 (M.D. Ga. Oct. 21, 2013), officers of a corporation were held subject to personal jurisdiction on the basis of their personal participation in alleged wrongdoing that targeted Georgia consumers. In an earlier ruling in *T.V.D.B. Sarl v. KAPLA USA, LP*, 2013 WL 1898158 (S.D. Ga. May 7, 2013), the Southern District allowed discovery in connection with challenges to personal jurisdiction by an overseas manufacturer alleged to be the alter ego of its Georgia-based distributor and a former Georgia resident living in France. In *Springer v. Bank of America, N.A.*, 2013 WL 2297053 (N.D. Ga. May 24, 2013), the Northern District addressed the rules governing service of a corporation under Federal Rule 4 and its Georgia counterpart, O.C.G.A. § 9-11-4(e)(1), holding that service of process on a bank's law firm did not constitute valid service on the bank in a wrongful foreclosure action. In *Gardner v. TBO Capital, LLC*, 2013 WL 6271897 (N.D. Ga. Dec. 4, 2013), an attempt to serve a corporation by serving the Georgia Secretary of State was held ineffective under O.C.G.A § 9-11-4 for purposes of deciding the timeliness of a removal petition, and in *Seeney v. Nationstar Mortgage, LLC*, 2013 WL 6499359 (N.D. Ga. Dec. 11, 2013), service by registered mail on an LLC was ruled ineffective under O.C.G.A. § 9-11-4 and the Georgia LLC Code.

Evidence

In *Levine v. Suntrust Robinson Humphrey*, 321 Ga. App. 268, 740 S.E.2d 672 (2013), a professional liability suit against a financial advisor, the Court of Appeals held that expert testimony regarding the value of a business over the course of time was admissible and should not have been excluded. The court rejected arguments that the expert's valuation approach was not testable and that the expert had not used the methodology before, holding that these alleged flaws were best addressed through cross-examination at trial.

Director and Officer Liability Insurance Decisions

The year saw a sudden and significant rise in disputes involving coverage under directors' and officers' (D&O) liability insurance policies. Most of this litigation involved policies issued to banks that later failed. Among the issues that have received close attention

are the policies' exclusionary clauses and the sufficiency of notices given by the insureds.

Three decisions from the Northern District of Georgia reached different and sometimes conflicting conclusions as to whether a D&O policy's "insured vs. insured" exclusion was invoked by lawsuits filed by the FDIC in its receivership capacity against former directors and officers of the bank. In January, the district court held in *Progressive Casualty Ins. Co. v. FDIC*, 926 F. Supp. 2d 1337 (N.D. Ga. 2013) that an exclusion for claims brought "by, or on behalf of, or at the behest of the Company" was ambiguous when applied to suits brought by the FDIC, since the FDIC represents multiple interests and does not merely step into the shoes of the bank. In March, another district judge decided in *Davis v. Bancinsure, Inc.*, 2013 WL 1223696 (N.D. Ga. Mar. 20, 2013) that an insured-vs.-insured exclusion applied to the FDIC's claims, citing that the relevant exclusionary language specifically included the word "receiver." The court in *Davis* also denied coverage because it found that the insureds failed to comply with the policy's notice requirements. Finally, in August, the court in *St. Paul Mercury Ins. Co. v. Miller*, ___ F. Supp. 2d ___, 2013 WL 482520 (N.D. Ga. Aug. 19, 2013) held that an exclusion containing "by or on behalf of" language similar to the policy in *Progressive*, and making no explicit reference to receivers, *did* apply to suits brought by the FDIC. The *St. Paul* decision did not cite the *Progressive* decision and the two cases are difficult to reconcile. *St. Paul* is currently on appeal to the 11th Circuit, and a decision by the appellate court could restore some clarity in the area. Another coverage defense raised by the insurer in the *St. Paul* case was the effect of a carve-out for unpaid loans from the definition of the "loss" covered under the policy. The court considered the carve-out to be ambiguous as applied to director liability claims, but did not decide the issue in light of its ruling on the insured-vs.-insured clause.

In *Bank of Camilla v. St. Paul Mercury Ins. Co.*, 939 F. Supp. 2d 1299 (M.D. Ga. 2013), the Middle District held that common law fraud and RICO claims brought against a bank that allegedly participated in a Ponzi scheme fell within an exclusion to coverage because they involved "Lending Acts" as defined in the policy.

Finally, two decisions found—on completely different grounds—that the FDIC should not be a party to coverage litigation involving claims against failed bank officers and directors. In *OneBeacon Midwest Ins. Co. v. FDIC*, 2013 WL 1337193 (N.D. Ga. Mar. 28, 2013), the Northern District rejected an insurer's attempt to sue the FDIC in a declaratory judgment action to determine coverage under a D&O policy issued to a bank before its failure, holding that the suit interfered with the FDIC's exercise of its powers and duties under federal law. In a separate ruling in the *Davis v. BancInsure, Inc.* case, 2013 WL 1226491 (N.D. Ga. Mar. 18, 2013), the court denied the FDIC's motion to intervene in an insurance coverage dispute, finding that the FDIC's potential interest in policy proceeds was not sufficient to establish intervention of right.

Nondischargeability of Breach of Fiduciary Duty Claims

The bankruptcy court in *In re Allen*, 2013 WL 6199304 (Bankr. N.D. Ga. Nov. 25, 2013), applied principles established in the corporate context, holding that the fiduciary duties owed by members of a partnership venture or LLC do not qualify those entities as the "express or technical trust" required in the 11th Circuit for purposes of nondischargeability of fiduciary liability under 11 U.S.C. § 523(a)(4). *See also In re Pervis*, 497 B.R. 612 (Bankr. N.D. Ga. 2013), *supra*. In *In re May*, 2013 WL 441440 (Bankr. S.D. Ga. Feb. 5, 2013), the Bankruptcy Court for the Southern District of Georgia held that a creditor sufficiently stated a claim for relief under 11 U.S.C. § 523(a)(6) by alleging that a corporate officer personally participated in the corporation's allegedly malicious and willful failure to pay the creditor. The court in *In re Edelson*, 2013 WL 5145714 (Bankr. N.D. Ga. Jul. 3, 2013) rejected a nondischargeability complaint against an LLC member who locked out the other member because the debtor did not conceal his actions and lacked fraudulent intent. In *In re Melton*, 2013 WL 2383657 (Bankr. N.D. Ga. May 20, 2013), the Bankruptcy Court for the Northern District of Georgia held that the personal liability of an LLC's sole owner/manager for fraud and conversion in diverting funds that were supposed to be held in escrow by the LLC was nondischargeable.

Miscellaneous Litigation Procedure Issues

In *Superior Roofing Co. of Georgia, Inc. v. American Professional Risk Services, Inc.*, 323 Ga. App. 416, 744 S.E.2d 400 (2013), the Court of Appeals held that the Georgia Insurance Commissioner, as receiver for an insolvent trust fund, had exclusive standing to pursue claims common to the receivership estate, but that claimants could individually pursue claims that are strictly personal in nature. In *Artson, LLC v. Hudson*, 322 Ga. App. 859, 747 S.E.2d 68 (2013), the Court of Appeals held that absent members of an LLC were indispensable parties to a lawsuit against a managing member that involved a dispute among all of the LLC's members.

Two cases were disposed of on principles of *res judicata*. In *Bank of the Ozarks v. DKK Development Company*, 2013 WL 2555834 (S.D. Ga. June 10, 2013), the Southern District held that a debtor's statutory setoff claims against a bank were precluded by an earlier state court equitable setoff lawsuit, since both cases turned on the same question

of whether the bank and its holding companies were alter egos of one another. In *Coffee Iron Works v. QORE, Inc.*, 322 Ga. App. 137, 744 S.E.2d 114 (2013), the Court of Appeals found that a shareholder was in privity with her corporation, which had previously litigated the same issues, and that the shareholder's suit was thus barred.

Four cases addressed attorney-client issues in the corporate context. In *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.,* 293 Ga. 419, 746 S.E.2d 98 (2013), the Supreme Court held that communications between law firm attorneys and the firm's in-house general counsel were privileged and constituted attorney work product, in a professional liability suit brought by one of the firm's clients, despite alleged conflicts of interest. The 11th Circuit held in *Abdulla v. Klosinski*, 523 Fed. Appx. 580 (11th Cir. 2013) that an attorney for a company in connection with its bankruptcy filing did not also represent its principal in his individual capacity when negotiating a personal guaranty to be signed by the principal. In *Oxmoor Portfolio, LLC v. Flooring and Tile Superstore of Conyers, Inc.*, 320 Ga. App. 640, 740 S.E.2d 363 (2013), the Court of Appeals held that an answer filed on behalf of a corporation by a non-attorney was a nullity, reiterating the settled rule that a corporation must be represented by an attorney in court proceedings. In *Vig v. All Care Dental, P.C.*, 2013 WL 210895 (N.D. Ga. Jan. 18, 2013), the Northern District addressed the same principle in considering an attorney's motion to withdraw from representing a corporation.

Other miscellaneous procedural decisions include *Rigby v. Boatright*, 294 Ga. 253, 751 S.E.2d 851 (2013) in which the Supreme Court of Georgia held that mandamus is not a proper remedy to compel a public utility corporation to include a candidate's name on the ballot for election to the board, because the corporation was not a governmental entity. In *McGee v. Sentinel Offender Services, LLC*, 719 F.3d 1236 (11th Cir. 2013), the 11th Circuit addressed the circumstances under which an LLC may be held criminally liable under principles of *respondeat superior*. Finally, in *Goodwill v. BB&T Investment Services, Inc.*, 2013 WL 6271868 (N.D. Ga. Dec. 4, 2013), the court applied a four year statute of limitations under O.C.G.A. § 9-3-31 to a breach of fiduciary duty claim against an investment advisor based on alleged misrepresentations to its client.

Fulton County Business Court Decisions

There were also a handful of noteworthy decisions from the Fulton County Business Court in 2013. *Raser Technologies, Inc. v. Morgan Stanley & Co., LLC*, No. 2012-cv-214140 was a mass action by an issuer and investors against Wall Street firms engaging in the controversial practice of "naked" short selling, in which the plaintiffs brought claims under the Georgia RICO Act and the Georgia Securities Act, among other theories, for the loss in stock value allegedly caused by the defendants. On the defendants' motion to dismiss, the court held that the plaintiffs' Georgia Securities Act and Georgia RICO claims were sufficiently pled, finding allegations that the defendants created false documentation supported a market manipulation claim. In *Melamud v. Page, Perry & Associates, LLC*, No. 2012-cv-219444, the court held that there were issues of fact regarding whether an attorney-client relationship developed between an investor and counsel for an investment advisor with whom the plaintiff was investing and doing other business. In *Hatcher Management Holdings, LLC v. Hatcher*, No. 2009-cv-179145, the court awarded over $4 million in compensatory and punitive damages against a former manager of an LLC who was found to have misappropriated LLC assets. In *Zelby v. Thomas*, No. 2012-cv-225412, the court allowed an LLC member's contractual claims under the operating agreement to go forward, but dismissed contractual claims brought against other parties who did not owe the contractual obligations, as well as a non-contractual breach of fiduciary duty claim that was not based upon a duty independent of the agreement. In *Etowah Environmental Group, LLC v. Walsh*, No. 2012-cv-211149, the court addressed the crime-fraud exception to the attorney-client privilege in the context of a dispute concerning the valuation of an LLC. GBJ

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Kudos

Chilivis, Cochran, Larkins & Bever, LLP, announced that **Brian F. McEvoy** was named the **chair** of the **State Bar of Georgia's Health Law Section**. Under McEvoy's leadership, the section will focus on increasing its membership and supporting health care based community outreach programs. Since leaving his position as health care fraud coordinator in the U.S. Attorney's Office for the Southern District of Georgia, McEvoy focuses his practice on health care litigation and federal white collar criminal defense.

Mercer University announced that **Heather Darden**, a 1998 graduate of the College of Liberal Arts and corporate counsel at RaceTrac Petroleum in Atlanta, was installed as a member of the university's **Board of Trustees.** The 45-member board is charged with overall policy-making for the university.

Holland & Knight LLP announced that Atlanta **partner Kevin Coventon** was honored with the **2013 Pro Bono Attorney of the Year** award by **Cooperative for Assistance & Relief Everywhere** (CARE) for his extraordinary contributions supporting CARE's mission to end global poverty. CARE's efforts improve basic education, end gender-based violence, provide health care and nutrition, increase access to clean water and sanitation, and expand economic opportunity.

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Hunton & Williams LLP announced that litigation and intellectual property partner **Rita A. Sheffey** received the **Litigation Counsel of America's** inaugural **Peter Perlman Service Award**. Sponsored by LCA 2013 President Peter Perlman, the award is presented to 25 LCA fellows who go above and beyond in commitment and service to their communities. Sheffey has served as director of Hunton & Williams' Southside Legal Center pro bono clinic since it opened in 1995. As chair of the Atlanta office's pro bono committee, she dedicates half her time to pro bono work and mentoring other lawyers in the firm. Sheffey also currently serves as secretary of the State Bar of Georgia.

Partner **John R. Schneider** received the **Distressed M&A Deal of the Year Award** during **M&A Advisor's 8th annual Turnaround Awards** event in March. The deal involved the foreclosure/Article 9 sale of Midstate Mills, Inc., a North Carolina flour mill, to a subsidiary of firm client Renovo Capital, LLC. Schneider was a member of the team that guided Renovo through the bankruptcy process resulting in Renovo, through its newly formed subsidiary Renwood Mills, providing the winning bid in a bankruptcy court-sanctioned foreclosure sale of Midstate's assets.

Hasner Law PC announced that partner **Tracee R. Benzo** was inducted as **president** of the **Georgia Association of Black Women Attorneys (GABWA)**. GABWA was founded in 1981 by a group of African-American women who desired to form a voluntary bar organization with a focus on women's and children's issues, increasing black female representation in the judiciary and in public offices, and taking a proactive stance on political issues. Today, GABWA has an active membership of nearly 700 women and men.

Evans Harrison Hackett PLLC announced that partner **Timothy L. Mickel** was installed as **president** of the **Chattanooga Bar Association** at the association's 116th Annual Meeting. The purpose of the association is to work for the betterment of the legal profession and the administration of justice; to take an active interest in governmental affairs; to stimulate a feeling of respect, esteem and good fellowship among members of the profession; to maintain a high standard of ethics among the members of the Bar of Chattanooga; and to correlate its activities with those of the American Bar Association, the Tennessee Bar Association, and such other professional organizations as may appear appropriate.

Allen

Wright

The Council of Superior Court Judges awarded **Hon. John D. Allen** and **Hon. Cynthia D. Wright** the third annual **Emory Findley Award** for **"Outstanding Judicial Service."** Allen has served as a Chattahoochee Judicial Circuit superior court judge for 20 years and chief judge for four years. Wright has served as an Atlanta Judicial Circuit superior court judge for 18 years and chief judge for almost four years. The award is named for the late Atlantic Judicial Circuit superior court Judge Emory Findley, who served in that role from 1976-1994, and given to honor a judge

who exemplifies Findley's virtues of visionary leadership, resolve and dedication.


McNeill


Wilson

Bryan Cave LLP announced that partner **Thomas R. McNeill** was elected **chair** of the **Board of Directors** of the **Boys & Girls Club of Metro Atlanta (BGCMA)**. BGCMA operates 27 clubs throughout the metro-Atlanta area and serves more than 3,400 children on a daily basis. McNeill has been a member of the Board of Directors of BGCMA since 2010.

Associate **Amy Taylor Wilson** was selected by the **Association of Corporate Growth (ACG) Atlanta** to participate in the 2014 ACG University. ACG is highly regarded as the ultimate resource for professionals in mergers and acquisitions. ACG University is directed towards high-potential individuals with two to seven years of experience in their respective fields related to driving corporate growth.

Rizza Palmares O'Connor, a former assistant district attorney for the Middle Judicial Circuit, was named **chief magistrate judge of Toombs County**. She was appointed to the position by Middle Judicial Circuit Chief Judge Kathy Palmer and Judge Robert Reeves. The appointment makes her the first Filipina-American judge in Georgia.

Burr & Forman LLP announced that Birmingham-based partner **Bryance Metheny** was named to the **Tennessee Chamber of Commerce & Industry's 2014 board of directors**. Metheny is serving a three-year term, and is working to promote the organization's mission to increase productivity and global competitiveness in Tennessee.

Nelson Mullins Riley & Scarborough LLP announced that partner **Michelle Johnson** received the **2013 Attorney of the Year Award** from **Pro Bono Partnership of Atlanta**, an organization that matches volunteer lawyers with local nonprofits in need of free legal counsel. Nelson Mullins also received the **2013 Law Firm of the Year Award**.

Kilpatrick Townsend & Stockton LLP announced that associate **Lindsay Hopkins** was elected **co-chair** of the **Red Ribbon Leadership Council (RRLC) for AID Atlanta**. To spread awareness, encourage prevention and foster support for people living with HIV/AIDS, the RRLC comprises young professionals actively working toward AID Atlanta's mission to reduce new HIV infections and improve the quality of life of its members and the community by breaking barriers and building community.

Baker Donelson announced that senior counsel **Nedom A. Haley** was recognized among the **2013 Attorneys of the Year** by the **Pro Bono Partnership of Atlanta (PBPA)**. PBPA provides free legal services to community-based nonprofits that operate programs benefitting low-income or disadvantaged individuals. In the past eight years, PBPA has assigned and supported more than 1,500 volunteer lawyers in aiding about 650 nonprofit clients.

Edenfield, Cox, Bruce & Classens, P.C., announced that partner **Susan W. Cox** assumed the position of **chair** of the **Georgia Board of Bar Examiners**. The six members of the Board are appointed by the Supreme Court of Georgia for a six-year term and assist in the twice-yearly administration of the state's bar exam and develop policies and procedures governing admission to the State Bar.

On the Move

Atlanta


Brouillette


Cao


Donnalley


Johnson

Kilpatrick Townsend & Stockton LLP announced the addition of **Amanda Brouillette, Carrie Cao, Kelsey Donnalley** and **Daniel Johnson** as **associates**. Brouillette joined the firm's patent litigation team. Cao joined the firm's trademark and copyright team in the intellectual property department. Donnalley joined the firm's mergers and acquisitions and securities team in the corporate, finance and real estate department. Johnson joined the firm's construction and infrastructure team in the litigation department. The firm is located at 1100 Peachtree St. NE, Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatricktownsend.com.


Rafuse


Hill


Hodges


Sharp


Swartz


Bartko


Harrison


Hill


Knoop


Palesch


Stone

Polsinelli PC announced that the 11 attorneys at **Rafuse Hill & Hodges LLP** joined the firm. The group includes five shareholders and six associates who serve local and national clients in labor and employment and litigation matters. **Nancy E. Rafuse, William B. Hill Jr., Kenneth B. Hodges III, Joseph C. Sharp** and **James J. Swartz Jr.** joined the firm as **shareholders**. **Alex Bartko, Teeka K. Harrison, J. Stan Hill, Matthew S. Knoop, Amy M. Palesch** and **Ellenor J. Stone** joined the firm as **associates**. The office is located at 1355 Peachtree St. NE, Suite 500, South Tower, Atlanta, GA 30309; 404-253-6000; www.polsinelli.com.


Cooper


Gal


Hill


Nash


Tenley

Taylor English Duma LLP announced the addition of **David S. Cooper, Raanon Gal, Mitzi Hill**, **Brian T. Nash** and **Christine Tenley** to the firm. Cooper and Hill are members of the firm's corporate and business practice. Gal and Tenley are members of the firm's employment, labor and immigration practice. Nash is a member of the firm's corporate and business and intellectual property practice groups. The firm is located at 1600 Parkwood Circle, Suite 400, Atlanta, GA 30339; 770-434-6868; Fax 770-434-7376; www.taylorenglish.com.


Dorminey


Jennings


Joslyn-Gaul


Klein


Steckel

Wimberly, Lawson, Steckel, Schneider & Stine, P.C., announced the promotion of **Elizabeth K. Dorminey, Kathleen J. Jennings, Danette Joslyn-Gaul** and **Rhonda L. Klein** to **partner**, and the addition of **Peter H. Steckel** as an **associate**. Dorminey's practice areas primarily include wage and hour, Title VII and workplace safety law in food processing, farming, manufacturing and construction. Jennings defends clients in the areas of discrimination, sexual harassment, restrictive covenant enforcement, wrongful discharge, wage-and-hour matters as well as advising clients in the development and implementation of human resources policies and procedures. Joslyn-Gaul focuses on matters involving class and collective actions, wage and hour litigation, employment discrimination and commercial litigation. Klein represents clients in the areas of equal opportunity laws, restrictive covenant provisions and discrimination matters. Steckel has experience in the areas of labor and employment law, business law and general practice and trial law. The firm is located at 3400 Peachtree Road NE, Lenox Towers, Suite 400, Atlanta, GA 30326; 404-365-0900; Fax 404-261-3707; www.wimlaw.com.


Atkins


Calhoun


Ruffin

Baker Donelson announced the addition of **Sabrina L. Atkins, Ian P. Calhoun** and **Charles W. "Chase" Ruffin** as **associates** in the firm's Atlanta office. Atkins assists clients on a variety of commercial and real estate litigation matters, with a particular focus on residential mortgage litigation. Calhoun is a member of the firm's securities and corporate governance group, where he assists with public securities offerings, SEC compliance, including 1933 Act filings and 1934 Act reporting, "Blue Sky" regulatory compliance and private placements. He also handles matters related to formation of business entities and other general corporate matters with a specific emphasis on real estate investment trusts. Ruffin is a member of Baker Donelson's advocacy department in the firm's Atlanta and Macon offices, where he assists clients in general business litiga-

tion matters. The firm is located at 3414 Peachtree Road NE, Suite 1600, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501; www.bakerdonelson.com.

Clements & Sweet, LLP, announced that **Daniel S. Levitas** joined the firm's Atlanta office as an **associate**. Levitas' practice focuses on workers' compensation, public employee disability retirement benefits and social security disability. The firm is located at 1355 Peachtree St., Suite 1800, Atlanta, GA 30309; 404-688-6700; Fax 404-688-6703; www.clements-sweet.com.

Barry

Parisi

McGuireWoods LLP announced that **George J. Barry III** and **Michael G. Parisi** were elevated to **partnership**. Barry represents individual and corporate clients in intellectual property and patent infringement litigation across the United States. Parisi represents lenders and borrowers in leveraged debt financings, focusing on transactions involving borrowers operating in the health care, media, communications, retail and manufacturing industries. The firm is located at 1230 Peachtree St. NE, Suite 2100, Atlanta, GA 30309; 404-443-5500; Fax 404-443-5599; www.mcguirewoods.com.

Ward

Segel

Swift, Currie, McGhee & Hiers, LLP, announced that **Thomas B. Ward** and **Melissa A. Segel** were named to the firm's **partnership**. Ward practices in a wide variety of litigated matters dealing primarily with insurance coverage and damage to real and personal property, including construction defect claims. Segel practices commercial litigation and insurance coverage with an emphasis on bad faith and arson and fraud. The firm is located at 1355 Peachtree St. NE, Suite 300, Atlanta, GA 30309; 404-874-8800; Fax 404-888-6199; www.swiftcurrie.com.

Schreter

Pope

Littler Mendelson P.C. announced that **Lisa A. "Lee" Schreter** was appointed **chair** of the firm's **board of directors**, and **Benson E. Pope** was elevated to **shareholder**. Schreter is the first non-California lawyer to serve in this role in Littler's 70+ year history. Pope's practice areas include discrimination and harassment, class actions, and staffing and contingent workers. The firm is located at 3344 Peachtree Road NE, Suite 1500, Atlanta, GA 30326; 404-233-0330; Fax 404-233-2361; www.littler.com.

BakerHostetler announced that it closed its combination with leading intellectual property firm **Woodcock Washburn** following the unanimous approval of the partnerships of both firms. BakerHostetler is located at 1180 Peachtree St. NE, Suite 1800, Atlanta, GA 30309; 404-459-0050; Fax 404-459-5734; bakerlaw.com.

Smith, Gambrell & Russell, LLP, announced the addition of **John R. Autry** to its **partnership**. Autry focuses his practice in commercial litigation. He is also a key member of the firm's special assets group. The firm is located at 1230 Peachtree St. NE, Suite 3100, Atlanta, GA 30309; 404-815-3500; Fax 404-815-3509; www.sgrlaw.com.

Carlock, Copeland & Stair, LLP, announced that **Brent A. Meyer** was selected to join the firm's **partnership**. Meyer focuses his practice in the areas of construction litigation, general liability and premises liability. He has represented architects, engineers, surveyors, property owners and property managers during litigation. The firm is located at 191 Peachtree St. NE, Suite 3600, Atlanta, GA 30303; 404-522-8220; Fax 404-523-2345; www.carlockcopeland.com.

Holland & Knight LLP announced that **Joshua I. Bosin** was elected to **partnership**. He was previously a senior associate. Bosin, a member of the firm's litigation section, concentrates his practice on the defense of major corporations, educational institutions and governmental entities in a broad range of labor and employment matters, including those arising under federal and state anti-discrimination laws. The firm is located at 1201 W. Peachtree St., One Atlantic Center, Suite 2000, Atlanta, GA 30309; 404-817-8500; Fax 404-881-0470; www.hklaw.com.

Jones Day announced that **Peter C. Canfield** joined the firm as a **partner** in the business and tort litigation practice. He was previously a partner in Dow Lohnes, LLP's Atlanta office. With his media and publishing industries focus, Canfield is a pre-eminent First Amendment authority with extensive experience defending libel, defa-

mation and invasion of privacy claims, counseling authors and publishers, securing access to information, and safeguarding distribution and intellectual property rights. The firm is located at 1420 Peachtree St. NE, Suite 800, Atlanta, GA 30309; 404-521-3939; Fax 404-581-8330; www.jonesday.com.


Biggerstaff


Ellis


Han


Simpson


Wagner

Hunton & Williams, LLP, welcomed **Audrey Biggerstaff, M. Clare Ellis, Benjamin Han, Carney Simpson** and **Laura Thayer Wagner** as **associates** in the firm's Atlanta office. Biggerstaff works with Hunton's pro bono practice. Ellis joined Hunton's environmental compliance, litigation and defense practice. Han joined Hunton's labor and employment practice. Simpson works with Hunton's real estate capital markets practice. Wagner joined Hunton's financial services litigation practice. The firm is located at Bank of America Plaza, Suite 4100, 600 Peachtree St. NE, Atlanta, GA 30308; 404-888-4000; Fax 404-888-4190; www.hunton.com.


Norcross


VanderBroek


Culves


Huddletson

Nelson Mullins Riley & Scarborough LLP announced that **Amanda Norcross** was elected to the **partnership** and **Mark VanderBroek** and **Sherry Culves** joined the firm as **partners**, and **Charles Huddleston** joined the firm as **of counsel**. Norcross concentrates her practice in the areas of corporate finance, venture capital, private equity, equity financings, general corporate matters and securities. VanderBroek represents clients in intellectual property litigation, commercial and business litigation (including business torts), and franchise litigation. Culves practices in the areas of education law, employment law and general litigation. Huddleston litigates commercial, employment and labor issues, drafts employment agreements and restrictive covenants, and conducts training on preventing discrimination and harassment and managing diversity. The firm is located at 201 17th St. NW, Suite 1700, Atlanta, GA 30363; 404-322-6000; Fax 404-322-6050; www.nelsonmullins.com.

Sutherland announced that **David F. Reid, Christina B. Rissler** and **Dr. David E. Wigley** were elected **partners** with the firm. Reid regularly advises institutional clients on the formation of joint ventures and funds to invest in asset classes including industrial, multifamily, hospitality, agribusiness and debt, and on the purchase, financing and sale of those assets. Rissler represents clients in secured and unsecured commercial lending and structured finance. Wigley combines his legal experience with years of academic research in chemistry to develop intellectual property strategies that protect both established and fledgling businesses. The firm is located at 999 Peachtree St. NE, Suite 2300, Atlanta, GA 30309; 404-853-8000; Fax 404-853-8806; www.sutherland.com.

Womble Carlyle Sandridge & Rice, LLP, announced that **Louis Barbieri III, Kimberly S. Justus** and **L. Christine Lawson** became **partners** with the firm. Barbieri has significant experience representing corporate clients in sophisticated and technical transactions from formation to exit. He also guides clients through state and federal corporate compliance issues. Justus represents financial institutions in real estate-secured commercial lending and in resolving troubled loans. She has extensive experience representing landlords and tenants in commercial leases and developers in real estate transactions. Lawson is an experienced product liability litigation attorney who focuses her practice on the defense of tobacco companies in smoking and health litigation. The firm is located at 271 17th St. NW, Suite 2400, Atlanta, GA 30363; 404-872-7000; Fax 404-888-7490; www.wcsr.com.


Driggers


Rutherford


Saporito

Alston & Bird LLP announced that **Stephanie B. Driggers, Samuel R. Rutherford** and **Holly Hawkins Saporito** were named partners with the firm. Driggers concentrates her practice on complex litigation matters, with an emphasis on class action defense and data privacy litigation. Rutherford is in the firm's litigation and trial practice group. He focuses his practice on complex commercial litigation, with an emphasis on the health care and financial services industries. Rutherford is also a member of the firm's health care, financial services and appellate litigation teams. Saporito is in the firm's intellectual property

litigation group, focusing her practice on all aspects of intellectual property litigation and counseling, with a particular emphasis on patent and trademark litigation. 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.


Cook


Stewart

Fisher & Phillips LLP announced that **Jessica T. Cook** and **Terri R. Stewart** were elected to **partner**. Cook is a member of the firm's global immigration practice group.

Cook's practice focuses on immigration and nationality law. Stewart represents management in all areas of labor and employment law in state and federal courts as well as before state and federal agencies. The firm is located at 1075 Peachtree St. NE, Suite 3500, Atlanta, GA 30309; 404-231-1400; Fax 404-240-4249; www.laborlawyers.com.

Miller & Martin PLLC announced that **Eileen Hintz Rumfelt** was elected to **membership** in the firm and **F. Donald Nelms Jr.** joined the firm as **of counsel**. Rumfelt concentrates her practice in the area of complex commercial litigation, including white collar crime and corporate investigations and intellectual property matters. Nelms practices in the areas of commercial and real estate lending, representing both lenders and borrowers in a variety of lending transactions and loan work-outs and restructurings. The firm is located at 1170 Peachtree St. NE, Suite 800, Atlanta, GA 30309; 404-962-6100; Fax 404-962-6300; www.millermartin.com.


Eckard


Morrison


Williams


Zeldin


Duffield

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., announced that **Michael Eckard, John Morrison, Thornell Williams Jr.** and **Lauren Zeldin** were elected to **shareholder** and **Todd C. Duffield** joined the firm as a **shareholder**. Eckard focuses his practice on human resources and employment-related litigation matters. Morrison's practice encompasses all aspects of executive compensation and employee benefits, focusing on the design and analysis of executive compensation arrangements and related corporate governance and disclosure matters. Williams' practice involves advising and representing clients in all facets of employment law. Zeldin practices primarily in the areas of employment discrimination and wage and hour litigation. Duffield's traditional labor relations practice includes union organizing campaigns and elections, unit clarifications, collective bargaining negotiations, grievance arbitrations and contract administration under the National Labor Relations Act and the Railway Labor Act. The firm is located at 191 Peachtree St. NE, Suite 4800, Atlanta, GA 30303; 404-881-1300; Fax 404-870-1732; www.ogletreedeakins.com.

Leitner, Williams, Dooley & Napolitan, PLLC, announced that **Christopher D. Gunnels** joined the firm as **of counsel** in their Atlanta office. Gunnels specializes in the defense of general liability matters, business litigation and the handling of all manners of business disputes, as well as divorce and other domestic matters, and is highly skilled in appellate practice. The firm is located at Two Ravinia Drive, Suite 1630, Atlanta, GA 30346; 770-557-3360; Fax 770-810-3560; www.leitnerfirm.com.

MendenFreiman LLP and **Siavage Law Group, LLC**, announced that their firms have **combined**. The combined firm will serve a cross-section of business industries, including the automobile dealer, franchise, distribution and manufacturing industries, as well as the electronic payments, technology, software, software as a service, hardware, reseller, distributor, health care and services sectors. The firm is located at Two Ravinia Drive, Suite 1200, Atlanta, GA 30346; 770-379-1450; Fax 770-379-1455; www.mendenfreiman.com.


Hopkins


Murray

Constangy, Brooks & Smith, LLP, announced the promotion of **Steve G. Hopkins** and **Joseph M. Murray** to **partner**. Hopkins concentrates his practice on employment law litigation, defending employers against claims that arise under Title VII of the Civil Rights Act, ADEA, ADA, and other federal and state laws. Murray's practice is devoted to representing employers in all areas of employment law litigation. The firm is located at 230 Peachtree St. NW, Suite 2400, Atlanta, GA 30303; 404-525-8622; Fax 404-525-6955; www.constangy.com.


Miller


Tabeling

Smith, Currie & Hancock LLP announced that **Garrett E. Miller** and **Douglas L. Tabeling** were named **partners** with the firm. Miller and Tableing practice in the areas of commercial litigation, construction law and government contracts. The firm is located at 2700 Marquis One Tower, 245 Peachtree Center Ave. NE, Atlanta, GA 30303; 404-521-3800; Fax 404-688-0671; www.smithcurrie.com.

Harman Law LLC announced that **J. Kyle Califf** joined the firm as an **associate**. Califf concentrates his practice on pharmaceutical and medical device product liability law, professional malpractice law and commercial litigation. The firm is located at 3414 Peachtree Road NE, Suite 1250, Atlanta, GA 30326; 404-554-0777; 888-554-2576; Fax 404-424-9370; www.harmanlaw.com.

Pursley Friese Torgrimson announced that **Louis J. Papera** joined the firm as **of counsel**. As a member of the real estate transactions team, he helps business clients effectively negotiate and close legal transactions related to commercial leasing, construction and development of commercial properties, property sales and purchases and other commercial real estate transactions. The firm is located at 1230 Peachtree St. NE, Suite 1200, Atlanta, GA 30309; 404-876-4880; www.pftlegal.com.

In Albany

Lee Durham, LLC announced that **Negin Kalantarian** joined the firm as an **associate**. Her practice focuses on personal injury, professional malpractice and general civil litigation. The firm is located at 1604 W. Third Ave., Albany, GA 31707; 229-431-3036; Fax: 229-431-2249; www.leedurham.com.

Watson Spence LLP announced that **Sarah Finney Kjellin** was named **partner**. She maintains an active litigation practice with a concentration in matters of complex commercial, estate and fiduciary, and general civil litigation. The firm is located at 320 Residence Ave., Albany, GA 31701; 229-436-1545; Fax 229-436-6358; www.watsonspence.com.

In Augusta


Crowder


Stewart

Kenneth D. Crowder and **David M. Stewart** announced the opening of **Crowder Stewart LLP**. As former assistant U.S. attorneys in the U.S. Attorney's Office for the Southern District of Georgia, Crowder was civil division chief and Stewart was health care fraud coordinator. Their new firm focuses on federal criminal and civil litigation. The firm is located at 431 Walker St., Lower Level, Augusta, GA 30901; 706-434-8799; www.crowderstewart.com.

In Cartersville

Jenkins & Bowen P.C. announced that **Robert L. Walker** was named **partner**. His practice areas include personal injury, insurance defense and coverage, condemnation, zoning and land use, and debtor's rights. The firm is located at 15 S. Public Square, Cartersville, GA 30120; 770-387-1373; Fax 770-387-2396; www.ga-lawyers.pro.

In Conyers

Michael Nation, Russ Moore and **Russel Moore** announced the formation of their new firm, **Nation, Moore & Associates, LLC**, in Rockdale County. The firm's practice areas include criminal law, domestic and juvenile law, as well as general practice. The firm is located at 957 Bank St., Conyers, GA 30012; 678-374-1040; Fax 770-922-1877; www.nationmoorelaw.com.

In Macon

Jason E. Downey announced the creation of his new law firm, The Downey Law Firm, LLC. The firm specializes in personal injury plaintiff's practice, with a focus on motor vehicle wrecks, as well as civil and domestic mediation. The firm is located at 544 Mulberry St., Suite 902A, Macon, GA 31201; 478-743-4771.

Constangy, Brooks & Smith, LLP, announced the promotion of **Jason C. Logan** to **partner**. Logan represents employers and insurers in all aspects of workers' compensation litigation including mediation, subrogation and appeals. The firm is located at 577 Mulberry St., Suite 710, Macon, GA 31201; 478-750-8600; Fax 478-750-8686; www.constangy.com.

Anderson, Walker & Reichert, LLP, announced that **Hon. S. Philip Brown** joined the firm as **of counsel** and **Allen E. Orr** joined the firm as an **associate**. Following his retirement from the bench, Brown resumed the private practice of law. He practices gen-

eral trial law, including personal injury, domestic and criminal law. Orr's practice areas include general litigation, estate planning, insurance defense, contracts, property disputes, business sales and acquisitions, secured transactions and probate. The firm is located at 577 Mulberry St., Suite 500, Macon, GA 31201; 478-743-8651; Fax 478-743-9636; www.awrlaw.com.


Smith


Stewart

Hall, Bloch, Garland & Meyer, LLP, announced that **Amanda Rodman Smith** and **Walker S. Stewart** became **partners** in the firm. Smith and Stewart continue to focus their legal practices in the areas of railroad law and transportation litigation, insurance defense and business litigation. The firm is located at 577 Mulberry St., Suite 1500, Macon, GA 31201; 478-745-1625; Fax 478-741-8822; www.hbgm.com.

In Marietta

O'Dell & O'Neal announced that **Leslee Champion** joined the firm. She practices in the areas of family/domestic law, probate and civil litigation. The firm is located at 506 Roswell St., Suite 210, Marietta, GA 30060; 770-405-0164; www.odelloneal.com.

In Savannah

Brennan & Wasden, LLC, announced that **Robert S. D. Pace** joined the firm as a **junior partner**. He continues his practice in business, corporate and real estate matters as well as estate and probate matters, contracts, banking, bankruptcy and civil litigation. The firm is located at 411 E. Liberty St., Savannah, GA 31401; 912-232-6700; Fax 912-232-0799; www.brennanandwasden.com.

Weiner, Shearouse, Weitz, Greenberg & Shawe, LLP, announced that **Helen Bacon** joined the firm. Bacon's practice is in the fields of real estate, commercial and construction litigation as well as complex business litigation. The firm is located at 14 E. State St., Savannah, GA 31401; 912-233-2251; Fax 912-235-5464; www.wswgs.com.

In Summerville

Farrar & Corbin, P.C., announced that **Catherine Farrar Jackson** joined the firm as an **associate**. Jackson has a general practice with a focus on estate planning, family law and real estate matters. The firm is located at 101 W. Washington St., Summerville, GA 30747; 706-857-3497; Fax 706-857-2236.

In Charlotte, N.C.

Alston & Bird LLP announced that **T. Scott Kummer** was named a **partner** with the firm. Kummer is a member of the corporate transactions and securities group in the firm's Charlotte office. He concentrates his practice on private equity, LBO, venture capital and merger and acquisition transactions, along with general corporate matters. The firm is located at Bank of America Plaza, 101 S. Tryon St., Suite 4000, Charlotte, NC 28280; 704-444-1000; Fax 704-444-1111; www.alston.com.

In Clearwater, Fla.

Andy Gaunce was promoted to **deputy ethics and compliance officer** at **Tech Data Corporation**. Gaunce manages the corporation's ethics and compliance program throughout the western hemisphere. Tech Data is located at 5350 Tech Data Drive, Clearwater, FL 33760; 727-538-5810; www.techdata.com.

In Greenville, S.C.

Nelson Mullins Riley & Scarborough LLP announced that **Michael F. Johnson** was elected to **partnership**. Johnson advises clients in connection with public and private securities offerings, SEC compliance and reporting, corporate law and mergers and acquisitions. The firm is located at Poinsett Plaza, Suite 900, 104 S. Main St., Greenville, SC 29601; 864-250-2300; Fax 864-232-2925; www.nelsonmullins.com.

In Winston-Salem, N.C.

Spilman Thomas & Battle announced that **Robert H. "Rob" Wall** joined the firm as **counsel**. Wall regularly counsels and advises high-net-worth individuals on estate and tax planning matters and represents clients before the IRS. He also assists businesses and individuals in matters such as acquisitions, divestitures, business combinations and entity selection. The firm is located at 110 Oakwood Drive, Suite 500, Winston-Salem, NC 27103; 336-725-4710; Fax 336-725-4476; www.spilmanlaw.com.

Never Gonna Give It Up

by Paula Frederick

"We've been served with a subpoena for a bunch of documents related to our representation of Johnny Booth," your partner announces. "They want everything from the client file to the bills we sent!"

"That case is ancient history!" you respond. "What could anyone possibly want with Booth's old business records? Johnny and his partner finally worked everything out. In fact, they started another business together a couple of years after accusing each other of fraud. I hear that one went bust too."

"His wife must think he's hiding something," your partner speculates. "He's getting a divorce. The subpoena is from her lawyer. I guess I'll go dig the file out of storage."

"Hold it! We can't just turn over a former client's file . . . can we?" you sputter.

What are a lawyer's obligations when someone subpoenas a client file?

Georgia Rule of Professional Conduct 1.6 requires a lawyer to "maintain in confidence all information gained in the professional relationship with a client." Most, if not all, of the contents of a client file would be considered confidential under the rule. A lawyer may only supply a client file in response to a subpoena if the situation falls within one of the rule's exceptions.

Client consent may be the easiest way around the confidentiality requirement. The consent must be "informed," which means that the lawyer must advise the client about any "risks of and reasonably available alternatives to the proposed course of conduct."

But what if the client says no, or what if you can't locate a former client to obtain consent? In those circumstances the rule would require a lawyer to resist disclosure of confidential or secret information by

opposing the subpoena. If a court orders it, the lawyer may then ethically turn over the requested documents.

Note that Georgia's version of Rule 1.6 is different from the ABA Model Rule, so the advice may be different in other jurisdictions. GBJ

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

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Discipline Summaries

(Dec. 14, 2013 through Feb. 24, 2014)

by Connie P. Henry

Disbarments/Voluntary Surrenders

Kristen Eugenia Richbourg
Atlanta, Ga.
Admitted to Bar 2000

On Jan. 21, 2014, the Supreme Court of Georgia accepted the Petition for voluntary surrender of license of attorney Kristen Eugenia Richbourg (State Bar No. 604410). In October 2013, Respondent entered a guilty plea in the Superior Court of Fulton County to three counts of theft by taking by a fiduciary and two counts of forgery in the first decree, all felony violations.

Hendrickx H. Toussaint
Atlanta, Ga.
Admitted to Bar 2002

On Jan. 21, 2014, the Supreme Court of Georgia accepted the Petition for voluntary surrender of license of attorney Hendrickx H. Toussaint (State Bar No. 723334). Respondent agreed to serve as escrow agent for transactions between companies seeking to acquire, rehabilitate and resell 36 residential properties. He received fiduciary funds from one of the companies to be used in the transactions. Between July 2009 and April 2010, he conducted over 60 counter transactions on his trust account involving fiduciary funds and failed to keep records regarding the source of the deposits or the payees on the withdrawals. Respondent currently is the subject of a federal criminal investigation for his conduct related to these transactions.

William C. Nesbitt
Stockbridge, Ga.
Admitted to Bar 1982

On Jan. 27, 2014, the Supreme Court of Georgia disbarred attorney William C. Nesbitt (State Bar No. 538301) based upon his conduct in setting up a law practice with a client who was not a lawyer and for his financial misconduct. The special master found the following factors in aggravation: (1) Nesbitt had a dishonest or selfish motive; (2) Nesbitt engaged in a pattern of deceitful or fraudulent misconduct; (3) Nesbitt committed multiple offenses; (4) Nesbitt made false statements at the evidentiary hearing; (5) Nesbitt refused to acknowledge the wrongful nature of his conduct; (6) the victims were vulnerable as a result of the trust they reposed in Nesbitt; (7) Nesbitt had substantial experience in the practice of law; and (8) Nesbitt showed an indifference to making restitution. Nesbitt had no prior discipline.

Richard Wesley Kelley
Atlanta, Ga.
Admitted to Bar 1998

On Feb. 24, 2014, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Richard Wesley Kelly (State Bar No. 412398). On Oct. 15, 2012, and June 4, 2013, Kelley was arrested on charges relating to his handling of clients' funds and the charges remain pending.

State Disciplinary Board Docket No. 6449—Kelley represented a couple in 2010 in a business dispute and received $100,000 from one of his clients to hold

in his trust account. When his client asked him to release some of the funds, Kelley failed to deliver the funds, failed to render a full accounting, and failed to respond to a grievance.

Docket 6470—In March 2012 Kelley was paid $1,500 to represent a client arrested for driving under the influence. On Sept. 1, 2012, Kelley's license to practice law was suspended for non-payment of Bar dues, but he did not inform his client. Kelley also failed to notify his client of a court date, failed to attend court, and as a result, a warrant was issued for the client's arrest. Kelley failed to address the problem, failed to refund the fee and failed to respond to a grievance.

Docket 6471—Kelley settled a personal injury case without consulting his client and without authorization. He failed to notify his client of the receipt of $50,000 from the liability insurer, failed to deliver the funds to her, and failed to render an accounting of the funds. When his client told him that she had completed her medical treatment several months after he had settled the case, he told her he would begin working on her claim but then ceased communicating with her. He also failed to respond to her grievance.

Dockets 6472 and 6473—While representing the husband in a divorce matter in 2009, Kelley agreed with opposing counsel to hold funds received when the wife's car was totaled during the pendency of the divorce action. In November 2011, he received $16,910.50, the value of the totaled vehicle, from State Farm. He did not notify his client or opposing counsel of the funds and misrepresented the status of the funds to the court in a 2012 hearing. He did not deliver the funds and did not render an accounting of the funds. He ceased communications with his client after the hearing, did not notify his client that his license was suspended, did not complete the divorce, did not refund the $23,000 fee, and failed to respond to the clients' grievances.

Kelley submitted the following: (1) during the relevant time frame, he was suffering from major depression, had substance abuse problems and these problems rendered him incapacitated to practice law; (2) in February 2013, he and his wife were in a serious automobile accident; his wife was killed and he was severely injured, and during this time, he failed to update the Bar with his current address, so the notices of investigation in these matters went to his old office, and he did not receive them; (3) in 2013, he attended a 28-day residential treatment program in Idaho; and (4) that he maintained a cooperative attitude towards the disciplinary process. The State Bar showed as aggravating factors that these matters involved multiples cases, that his clients suffered substantial harm, that he made no restitution, that his misconduct was motivated by dishonest and selfish motives, that his misconduct constituted illegal conduct and that he had a Review Panel Reprimand in 2012.

Suspensions

Benjamin Scott Anderson
Gretna, Neb.
Admitted to Bar 2008

On Feb. 24, 2014, the Supreme Court accepted the petition for voluntary discipline of attorney Benjamin Scott Anderson (State Bar No. 417095) and ordered that he receive a 12-month suspension with conditions for reinstatement. Anderson accepted representation of three separate clients, but failed to complete the matters for which he was retained. He failed to fully communicate with his clients when he ceased working on their matters and failed to timely refund unearned fees. He made an agreement with one client to refund fees if the client refrained from filing a grievance, but later agreed to refund all unearned fees without condition. Anderson offered in mitigation the following: he has no

Suicide Awareness Campaign

How To Save A Life

NEED HELP?

Call the State Bar's *confidential* Lawyer Assistance Program Hotline at

800-327-9631

The State Bar of Georgia has produced an educational DVD, titled "How to Save a Life," which is directed toward those who are suffering from anxiety and depression and may be at risk for suicide, as well as all Bar members, who need to recognize the severity of the problem and be able to identify warning signs among colleagues.

If you are thinking about suicide or are worried a friend may be contemplating suicide, immediate action is critical. **Call the confidential LAP Hotline 800-327-9631.**

The DVD includes three video lengths: 24 minutes, 11 minutes and six minutes. For more information or to obtain your copy of the DVD, call 404-527-8792.

State Bar of Georgia

prior discipline; during the time he was representing the clients he was struggling with alcohol addiction, but that he has begun a treatment program; he has expressed remorse personally to his clients; he has agreed to refund all unearned fees; and he has been cooperative in the disciplinary process. Anderson's reinstatement is conditioned on his providing a report from a licensed therapist or physician that he has maintained compliance with his treatment plan, along with documentation of his participation in an addiction recovery support group, and documentation of restitution to his clients.

Marshall C. Watson
Fort Lauderdale, Fla.
Admitted to Bar 1984

On Feb. 24, 1014, the Supreme Court of Georgia accepted as reciprocal discipline the petition for voluntary discipline of Marshall C. Watson (State Bar No. 741737) for a 91-day suspension *nunc pro tunc* to June 5, 2013. The Supreme Court of Florida entered an order on June 5, 2013, suspending Watson for 91 days. Watson asserted that in Florida he maintained a high-volume foreclosure practice representing lenders, but that he failed to take reasonable steps to supervise and train his employees. During the height of the national foreclosure crisis, Watson's firm was at one point handling over 66,000 cases with 71 lawyers and 597 support staff. Watson's firm employed an attorney to sign Affidavits of Reasonable Fees in foreclosure cases and many affidavits were signed by that attorney outside the presence of a notary public, and without review by the signer. Watson failed to have procedures in place to ensure the integrity of the execution of the affidavits. Additionally, some of his attorneys missed 22 case management conferences and failed to timely cancel foreclosure sales or pay clerk fees in five cases. Also, before 2010, Watson's law firm had a practice of filing unverified foreclosure complaints alleging in the alternative that the note was lost, without confirming that the client-lenders had in fact lost the note. Watson's firm failed to notify the court and opposing counsel when associate attorneys left his employ and to update the case files with the appropriate attorney of record. Prior to reinstatement in Georgia, Watson must demonstrate that he has been reinstated to the practice of law in Florida. Watson had no prior discipline in Georgia or Florida.

Public Reprimand

John V. Lloyd
Savannah, Ga.
Admitted to Bar 1972

On Feb. 24, 2014, the Supreme Court of Georgia accepted the petition for voluntary discipline of attorney John V. Lloyd (State Bar No. 455310) for a Public Reprimand. The Court had rejected Lloyd's initial petition. In that petition Lloyd admitted that he was paid $4,500 to represent a criminal defendant in an appeal, but by the time he entered an appearance, the appeal had already been dismissed. Lloyd claimed that he had done some work before the appeal was dismissed, but admitted that he did not earn the full $4,500. Lloyd refunded $375 to his client and asserted that he was unable to refund any more. The Court rejected Lloyd's petition finding it "woefully inadequate" in explaining the amount of work performed or the reasons that only $375 had been offered to the client. Lloyd then filed this amended petition contending that the employment agreement between him and his client was fully honored because it only required him to file an entry of appearance in the criminal appeal and to review the appellate decision issued to determine if any further legal action in the appellate courts had merit. Lloyd claimed that, after discussing with his client his conclusion that further legal action lacked merit, he agreed to research federal habeas corpus law. After performing that research and advising his client that such an action likely would not succeed, the client allegedly demanded a full refund. Lloyd claimed that he responded by offering $375 as a gesture of goodwill and because he was disappointed that he could not find any substantive help for his client's situation. Lloyd explained that he could not offer more because his personal and business income had been reduced by his preparations to retire due to his wife's and his health issues. In light of the aggravating and mitigating factors, the Court ordered that he receive a Public Reprimand and that he submit to binding fee arbitration pursuant to the State Bar of Georgia's Fee Arbitration Program.

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 Dec. 14, 2013, five lawyers have been suspended for violating this Rule and three have been reinstated.

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

For the most up-to-date information on lawyer discipline, visit the Bar's website at www.gabar.org/forthepublic/recent-discipline/.

The Ultimate Spring Cleaning Guide for Lawyers

by Natalie R. Kelly

It's the time of year for spring cleaning and I'm sure you're as excited about it as I am. But we all know that to overlook this important time of the year has its consequences. This article will walk you through steps for conducting an annual tidying up of your practice. Starting with the physical stuff first, this guide will help you tackle the basics of clearing off desks, credenzas and file cabinets. I'm one of those "clean from the top down" proponents myself! You will also get some clean up tips for a virtual practice or online presence. Yes, there are even some tips for clearing out your email inboxes!

Cleaning the Physical Office Space

Reception Area

A clean reception area is not only inviting to those entering your office, it's often one of the first places from which a person is to draw conclusions about you and the firm. While arguments can be made for expensive versus inexpensive yet quality furnishings, the baseline here is: always be neat and clean. This means no debris—yes, I've seen garbage at the front doors of a firm before; no empty glasses or soda cans; no wadded paper on the floor or torn magazines on the tables; no unkempt toys in play areas or overflowing wastebaskets. Make sure that you take time to have the office dusted, and even think of steam cleaning carpets, rugs and window coverings.

Conference Rooms

During office visits, clients and potential clients are typically ushered into conference rooms to meet with lawyers and staff. Make sure your space is clear of clut-

ter and client files and materials have been arranged so confidential information is not inadvertantly revealed. This includes boxes readying for trial. Think of using another place for client meetings if you need the conference room for litigation prep. You could even have a designated office space set to be the Plan B conferencing area while file prep takes over a main conference room.

Attorney/Staff Desks

Everyone likes to keep their stuff the way they want, and while this is possible without much of an issue in many cases, everyone should remember the health and safety of those around them. Firms can set up clean desk policies to help with the overall appearance of the firm workplace. Enforcing policies regarding not eating at one's desk or leaving out files and other papers might help ease some of the common clean office issues.

Law Firm Airspace

The scent-free policies of some offices are now getting a lot of buzz, and with an increased focus on those working in or visiting offices who suffer from allergies or respiratory illnesses, these can be mandatory in some places. Be sure to have your own legal team review any of these for appropriateness. Take time during your spring cleaning period to review office policies to clear the air of issues, especially those affecting workplace health and safety—smoking, perfume and even dress codes can be on the agenda.

Kitchen/Eating Areas

Doing dishes is not a favorite chore, but keeping kitchen and eating areas clean and sanitized can help everyone. Mishandling uncooked food, leaving food out and not disposing of waste properly can attract insects, causing a major problem around your water cooler and coffee pots. It is also important to keep these areas clean in case

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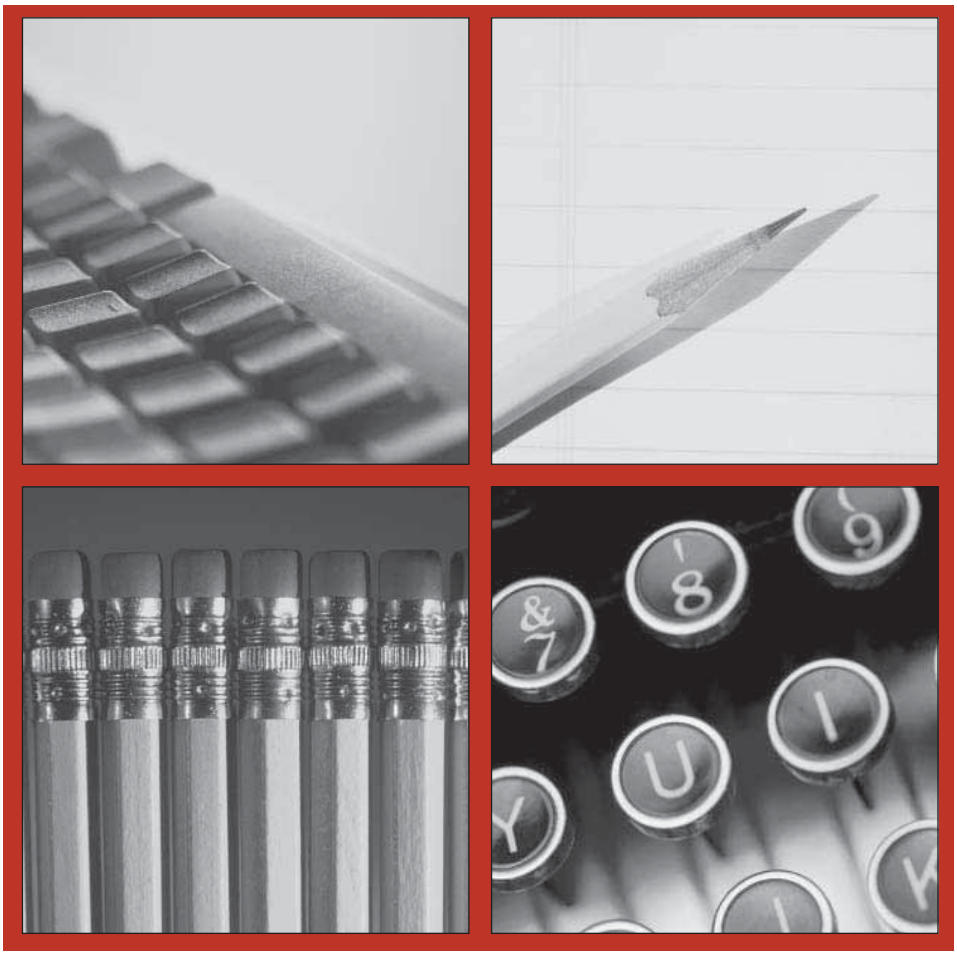

EARN CLE CREDIT

The Editorial Board of the Georgia Bar Journal is in regular need of scholarly legal articles to print in the Journal. Earn CLE credit, see your name in print and help the legal community by submitting an article today!*

Submit articles to Sarah I. Coole, Director of Communications,
104 Marietta St. NW, Suite 100, Atlanta, GA 30303 or sarahc@gabar.org.
If you have additional questions, you may call 404-527-8791.

*Not all submitted articles are deemed appropriate for the Journal.
The Editorial Board will review all submissions and decide on publication.

guests/clients may accompany you in from time to time. You should also have policies to address dealing with offensive or strong food odors.

Common File Areas/ Working Areas

As in the kitchen, no one really likes to clean up after someone else, so be sure to keep supplies organized and countertops cleared. There is nothing like wide open spaces for putting together huge, paper-intensive projects.

Firm and Public Restrooms

It goes without saying that everyone likes a clean restroom. Make sure that the facilities are cleaned regularly and have appropriate products available for washing and drying hands. Lotions, antibacterial soaps and sanitizers are welcomed by most everyone. If special instructions are needed, be sure signage is clear and readable by those who will be using the facilities. Soothing colors, soft fragrances, feel-good messages and motivational themes seem to work well in restrooms for some reason, too! If your restroom has a lounge area with chairs or a couch, be sure that these items are dusted and/or cleaned regularly.

Cleaning Up Your Online Spaces

Computer Files

With a sparkling file cabinet in the file room, one might wonder how you've maintained files on your computer systems. For spring cleaning, check out your online file storage areas. Keep files organized by practice area and by client and client matters or other administrative groupings. Use a file naming system consistently throughout the firm. You can designate someone the administrator over document management procedures; and if a software product is used, be sure to have it running on the most recently recommended version.

General Firm Software

Service packs and product releases are often not kept up to date. Tackle any upgrades or changes needed for your basic and most frequently-used software programs during your cleaning.

Backup Files

Get rid of duplicate backup files and monitor the settings used to save documents automatically at certain times. Freshen up file back-up and restore routines to make sure you have documents and firm in triplicate—on site, online and remote.

Online (and Paper) Reading Files

Update reading files and online wishlists to cover what's recent and relevant. You might also plan a reading schedule to keep another pile-up at bay.

Email Inboxes

You are likely to have multiple email accounts, and consequently, multiple inboxes to manage. Clean out each and every inbox using search and sorting functionality resident in most email programs. Delete junk files and empty recycle bins and deleted items folders. You can convert and create PDF files from email messages with Adobe Acrobat and similar services.

Passwords

Update and change all of your passwords and system logins. Convert those easily guessed passwords to stronger ones using letters, numbers and special characters. You can also work from a password management system or app to keep up with your new passwords. Change administrator passwords and address changes needed in Access and security profiles within programs.

Websites

Perform maintenance on active websites. You can gather data about who's visiting and leaving your site and plan to include fresh content or more clearly defined information to attract the attention you want. Check out reputation management system if you have concerns about any negative information that exists about you or your firm online.

Blogs

We know it's hard to keep up-to-date with blog posts, so while you are spring cleaning, take some time to write two or three extra posts and then schedule them to go live a few days or weeks later. Add tags and other categorization information to existing posts to make it easier for visitors to find those that are relevant to their needs.

Social Media Channels

Update marketing content on the social media channels you are using. Freshen up pictures and other pertinent information such as contact numbers and directions to your office.

Cleaning may not always be fun, but it is certainly necessary if the goal is to have a more efficient, safe and healthy workplace. Make your firm's spring cleaning an event to celebrate instead of one to dread by using this ultimate spring cleaning guide. GBJ

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.

Don't Forget to Renew Your Section Membership

by Derrick W. Stanley

This is the time of the year when the membership department gets ready for their busy season by preparing the dues statements which will be mailed to members at the end of April. There is valuable information on your dues notice, so please read it carefully.

You should notice that sections you are currently a member of have been pre-checked for your convenience. You can add or delete sections by indicating your choice on the statement. The important thing to remember is that even though the sections are pre-selected on the statement, they have not been included in the total payment at the bottom of the page. You will need to include the amount of section dues on Line C in the Summary Box. This will ensure your section membership(s) are renewed for the upcoming Bar year. It is important to double-check your math. If there is any variance in the amount, it may delay your sections renewal.

Also, if you are in a medium to large firm and your dues are paid through an accounting department, please make sure they submit your section dues as well as your Bar dues and include your dues notice with the payment. Many times, people are removed from sections because their section dues were not submitted with their Bar dues.

To determine if your dues section dues have been paid, follow the steps below:

- Log in to your account at www.gabar.org (see fig. 1)
- Select "Section Membership" from the left navigation bar (see fig. 2)
- A list of the sections your are a member of, as well as any committees you are on, will be displayed (see fig. 3)
- Click on the "Join Sections" link (see fig. 3)

- You are now on the "Pay Dues Online" page (see fig. 4)
- If there is a greyed check mark next to the section, then your dues have been renewed. If the check mark is black or missing, then the dues have not been renewed (see fig. 5).

Hopefully these tips will help keep your section memberships up-to-date. You can always join a section at any time by following the above steps and selecting additional sections. GBJ

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

1


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Upcoming Events
LEGISLATIVE TRACKING
2014 SPRING

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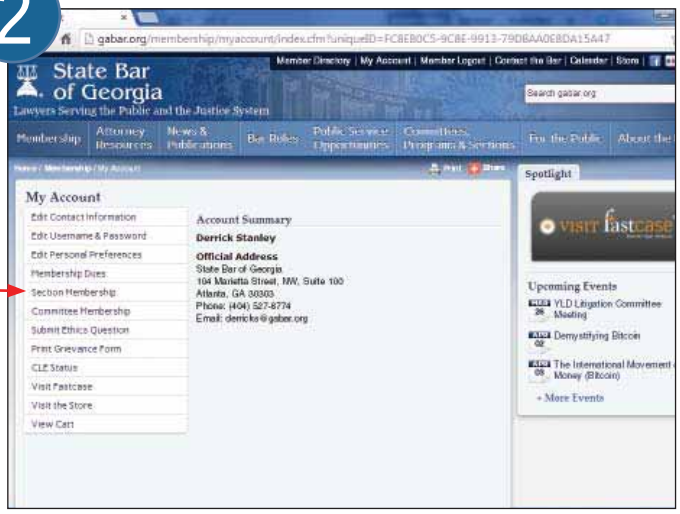
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Section Membership
Committee Membership
Submit Ethics Question
Print Grievance Form
CLE Status
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Visit the Store
View Cart
Account Summary
Spotlight
Upcoming Events

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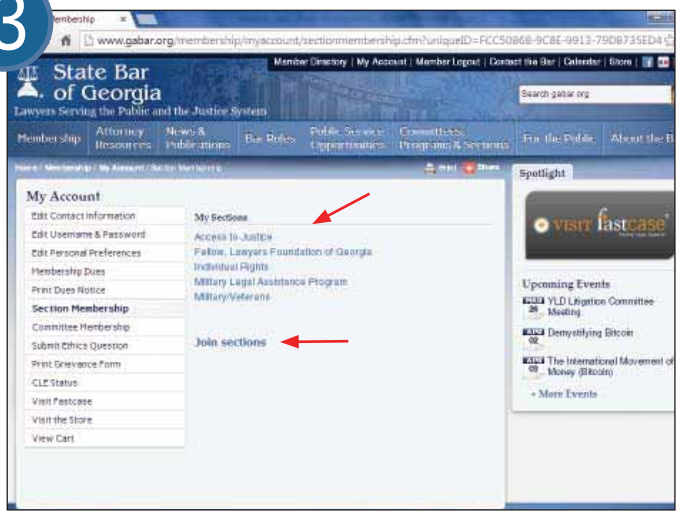
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Fellow, Lawyers Foundation of Georgia
Individual Rights
Military Legal Assistance Program
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Join sections
Spotlight
Upcoming Events

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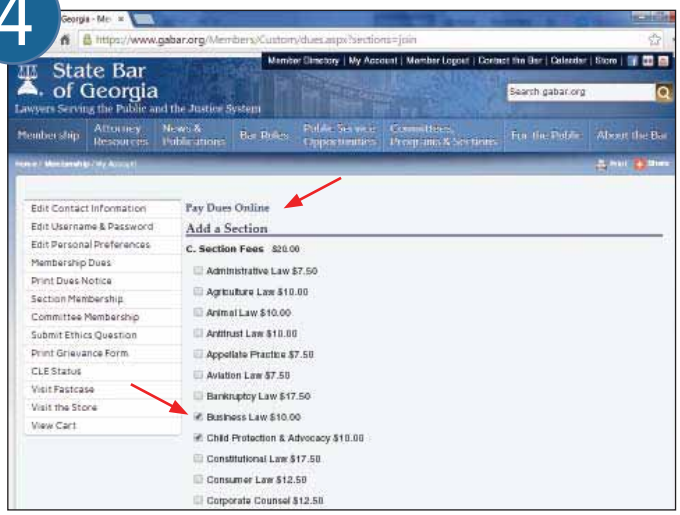
State Bar of Georgia
Lawyers Serving the Public and the Justice System
Pay Dues Online
Add a Section
C. Section Fees $20.00
Administrative Law $7.50
Agriculture Law $10.00
Animal Law $10.00
Antitrust Law $10.00
Appellate Practice $7.50
Aviation Law $7.50
Bankruptcy Law $17.50
Business Law $10.00
Child Protection & Advocacy $10.00
Constitutional Law $17.50
Consumer Law $12.50
Corporate Counsel $12.50

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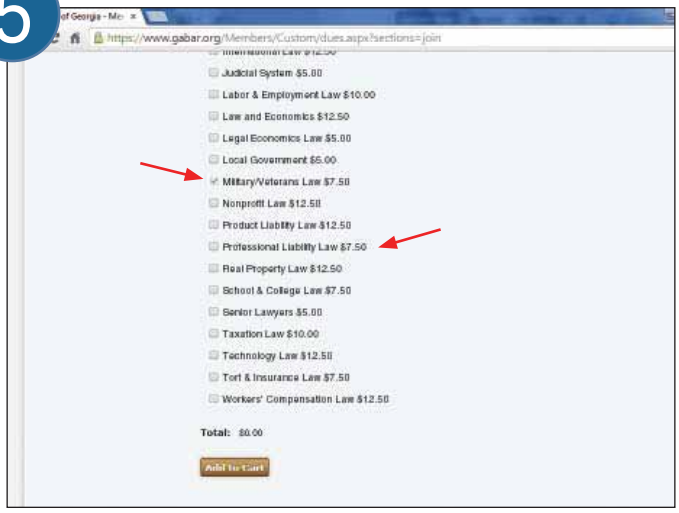
Judicial System $5.00
Labor & Employment Law $10.00
Law and Economics $12.50
Legal Economics Law $5.00
Local Government $5.00
Military/Veterans Law $7.50
Nonprofit Law $12.50
Product Liability Law $12.50
Professional Liability Law $7.50
Real Property Law $12.50
School & College Law $7.50
Senior Lawyers $5.00
Taxation Law $10.00
Technology Law $12.50
Tort & Insurance Law $7.50
Workers' Compensation Law $12.50
Total: $0.00

Member Benefits Online Vendor Directory

by Sheila Baldwin

Running a business is a complicated endeavor, especially while practicing law with one staff member or entirely on your own. You will surely encounter a few obstacles along the way. Where do you find solutions to some of these practice management challenges? The State Bar of Georgia Member Benefits Program offers Georgia attorneys a practical solution, the online vendor directory, found by clicking on the Services/Discounts for Attorneys link located under the Attorney Resources tab at www.gabar.org (see fig. 1).

Interested vendors are invited to reach out to our members by listing their products and/or services on our website, often giving a discount. Members can search by name, category or keyword to find a variety of resources. Each vendor listing appears as a business card with contact information and a link to the company website, if available. This is not intended to be inclusive or a recommendation of any vendor and due diligence is advised as in any purchase decision (see fig. 1).

If you're planning a trip to Atlanta or Savannah, check the directory under the category "Personal Services" and find hotels that offer special rates to our members. The Omni Hotel at CNN Center offers a rate of $134 for a deluxe room when you ask for the preferred State Bar rate. The Hilton Garden Inn in Savannah's historic district offers a rate of $132 for Sunday through Thursday stays; blackout rates apply; confirm at time of booking. The Hyatt Regency in Savannah offers a $167 rate, or check with any of the Hyatt properties for a corporate rate by using the code found on our vendor directory. Make sure you check the list before you book your next trip.

Computer solutions may be on your list of needs. Look under "Computer Technology" to find several categories of services: discounted software designed to help run your practice; web design to help with marketing needs; and computer consulting with complete IT solutions (see fig. 2).

For business needs, find help with printing, document management or payroll solutions. Look under financial needs for retirement, title insurance or credit card processing services. Find a large group of professional liability insurers under the "Insurance" category along with a link to our recommended health, dental and vision insurance provider, Member Benefits, Inc.

You can also view vendors by alphabetical order on the "Search by Name" option. Scroll the list and click on the name of a company to see their contact information, a brief description and a link to email addresses and website, if available.

Keyword search is the other option available to sort through the vendor list. If you enter the terms "office space" you will see a listing for Servcorp, a provider of virtual office space or "legal research" to find Fastcase, and Westlaw (see fig. 3).

Hopefully, our members will benefit from and support the vendors who offer discounts. You may know a vendor that you would like to promote because of exceptional service or good pricing; feel free to mention the vendor directory to them. Our goal is to help our members find good products and services in order to run more successful and efficient practices. For questions or further information regarding the Vendor Directory, contact me at sheilab@gabar.org or call 404-526-8618. GBJ

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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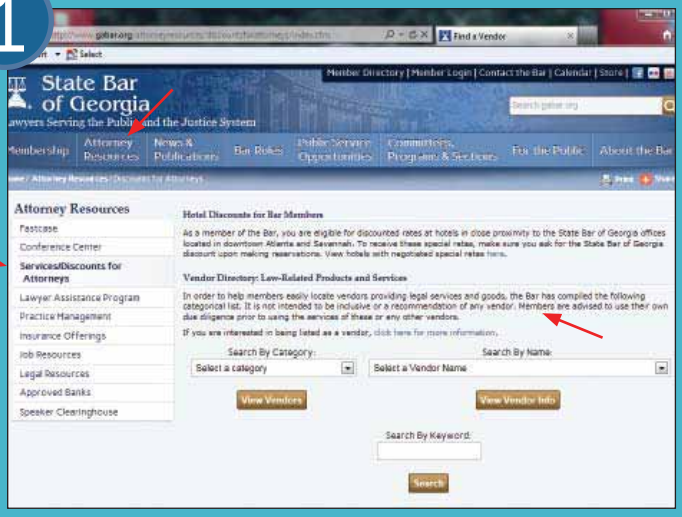

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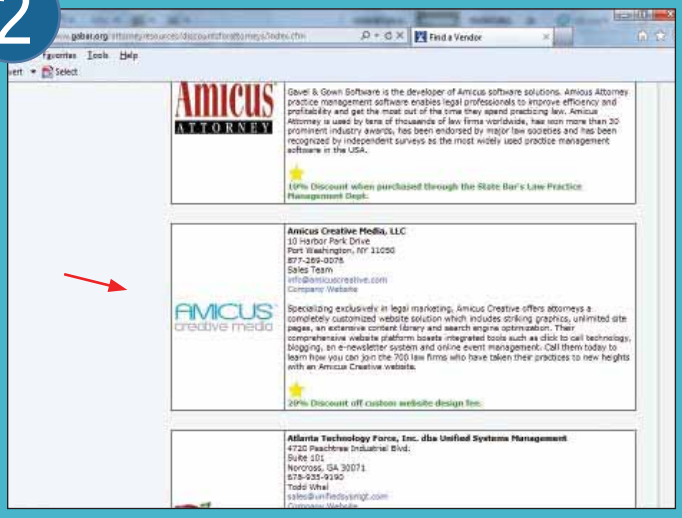

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Improving Routine Documents Part 4:
Disengagement Letters

by Karen J. Sneddon and David Hricik

One week. Ten days. Two months. Three years. Clients hire lawyers to achieve goals. Many lawyers use engagement letters even when not required because the experience of others and ethics experts teach that sending well-crafted engagement letters can avoid many problems. Writings matter. Engagement letters can anticipate client concerns and questions and outline the parameters of the particular representation. But, at some point, the client's goals—or at least some of them—are achieved and the representation draws to a close. At that time, an attorney should memorialize the completion of the representation. This installment of "Writing Matters" continues our series describing how to improve routine legal documents by focusing on disengagement letters.

At the outset, the focus here is on communications that occur when the purpose for which the lawyer was retained ends. In contrast, lawyers send withdrawal letters when the representation ends before the scope of representation is completed. A future installment of "Writing Matters" will address withdrawal letters.

Disengagement letters serve many purposes. Foremost, failing to clarify the end of the attorney-client relationship may require the lawyer to treat the "former" client as a current client, and create unexpected complications with conflict rules. A lawyer may not

be adverse to a current client, but generally may be adverse to a former client unless the adverse matter is substantially related to the lawyer's work for the former client. In addition, a lawyer who fails to clarify that the attorney-client relationship has ended may cause misunderstandings about responsibilities for future tasks.

A disengagement letter follows the conventions of a standard business letter. The disengagement letter should begin and end with an expression of appreciation for the opportunity to represent the client. Retaining and working with an attorney reflected confidence by the client that the attorney could achieve the client's goals. When the representation concludes, many clients will appreciate a lawyer acknowledging that fact.

In substance, a disengagement letter must inform the client that the purpose for creating the attorney-client relationship has been achieved and, as a result, the relationship has ended. The letter should

identify the ending date of the representation (in most cases, at the latest this will be the date of the letter). The letter should stress that the attorney will be undertaking no further action on behalf of the client. It should clearly inform the client that the attorney will not owe an ongoing duty to update the client on issues relating to the representation. Beyond that central purpose, several topics should be addressed, and are discussed below.

A disengagement letter should describe remaining administrative matters. For example, the letter should explain the firm's policy toward file retention. If the client is responsible for document retention, then the client's file should be returned with the letter (or by other appropriate means and in a reasonable period of time). If the firm's policy is to dispose of client files after a certain time, without further warning to the client, the client should be so advised in the letter.

In some instances, the disengagement letter should recite any ongoing or remaining tasks that require the client's future action or attention. For example, a client may need to pay a fee to a governmental entity in the future; the letter should remind the client of the obligation and advise the client that the lawyer will send no further reminders, unless otherwise agreed in writing.

Even though disengagement letters end an attorney-client relationship, they can and should express the lawyer's willingness to be retained for future matters. A disengagement letter can ethically inform the client that, should it have the need for legal services in the future, the client can retain the attorney again. For instance, the disengagement letter can explain that a new engagement letter would be prepared to govern any new representation.

Although there may be some initial reluctance to prepare and send a disengagement letter, the disengagement letter serves an important function. Both the attorney and the client benefit from the clarification of the nature of the relationship. Two examples of disengagement letters, along with a variety of useful practice forms, are available on the State Bar of Georgia website at www.gabar.org/committeesprogramssections/programs/lpm/forms.

Karen J. Sneddon is an associate professor of law at Mercer University School of Law.

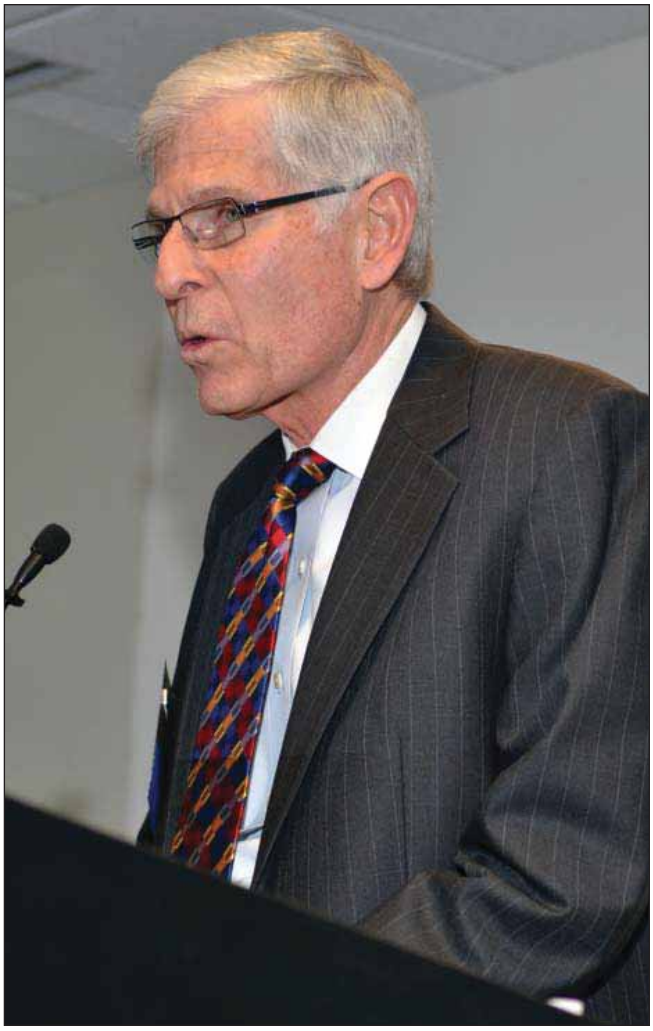
David Hricik is a professor at Mercer University School of Law who has written several books and more than a dozen articles. The Legal Writing Program at Mercer Law School continues to be recognized as one of the nation's top legal writing programs.

2014 Justice Benham Awards for Community Service

by Avarita L. Hanson

When Justice Robert Benham served as chair of the Chief Justice's Commission on Professionalism 15 years ago, a task force was created to address the importance of community and public service as a part of lawyer professionalism. Out of that task force, the Justice Robert Benham Awards for Community Service were instituted to honor the legacy of former Chief Justice Robert Benham. During his six-year tenure as chief justice, Benham focused the attention of lawyers and judges on the community and public service aspects of professionalism.

On Feb. 25, the Chief Justice's Commission on Professionalism (the Commission) and the State Bar of Georgia celebrated the 15th anniversary of the Benham Awards Program and honored 10 special and deserving Georgia lawyers. Nearly 300 well-wishers came were there to celebrate their many achievements. State Bar President Charles L. Ruffin welcomed honorees, friends, family members and colleagues. WXIA-TV Business Editor and Help Desk Manager William J. "Bill" Liss, introduced Justice



Photos by Don Morgan Photography & Video

William J. "Bill" Liss introduces Justice Robert Benham at the 15th annual Justice Benham Awards for Community Service.

(Left to right) State Bar President-Elect Patrise Perkins-Hooker, Lifetime Achievement Award recipient Joseph R. Bankoff, Justice Robert Benham and Chief Justice's Commission on Professionalism Executive Director Avarita L. Hanson.

Benham, who took time to thank those in attendance, including Commission staff, for upholding the tradition of presenting the awards.

Supreme Court of Georgia Chief Justice Hugh P. Thompson recognized the lawyers and judges honored for their exemplary and selfless service to the community, while charging lawyers with their professional responsibility to ensure access to justice. He pointed out that several Georgia counties have fewer than 10 lawyers and some have none. As Chief Justice Thompson said in his State of the Judiciary Address on Feb. 5, before the Georgia Legislature:

> Most of us grew up saying the Pledge of Allegiance at school, in which we promised "liberty and justice for all." I don't believe we ever meant, "liberty and justice only for those who can afford it." Equal justice for all is the promise embodied in our Constitution as envisioned by our forefathers. Supreme Court Justice Lewis Powell called equal justice, "perhaps the most inspiring ideal of our society . . . . [I]t is fundamental that justice should be the same, in substance and availability, without regard to economic status." As Georgia continues to grow in population and diversity, access to justice is a challenge requiring the commitment and hard work of us all.[1]

The awards were then presented by Justice Benham, who was assisted by past selection committee chair and State Bar President-Elect Patrise Perkins-Hooker.

Joseph R. Bankoff, chair, Sam Nunn School of International Affairs, Atlanta, was the recipient of the Lifetime Achievement Award. Bankoff is known not just for his 34-year law practice in the area of intellectual property with King & Spalding, LLP, but also for his leadership with the Atlanta Arts Community and the Centennial Olympic Games. A member of the State Bar of Georgia since 1972, he has brought his training, practice and experience to his law firm, clients and those who needed but couldn't afford an attorney. Bankoff has given his skills, experience and leadership to a wide variety of organizations, including the Woodruff Arts Center, the Atlanta Symphony Orchestra, the Georgia Chamber of Commerce, the Georgia Tech College of Computing Advisory Board, the City of Atlanta Policy Advisory Committee and the governor's Telecommunications Advisory Committee.

J. Edward Allen Jr., partner, Fortson, Bentley & Griffin, P.A., Athens, gives back to his community through youth and church activities and University of Georgia alumni and athletic organizations. He has served on the Athens-Clarke County Criminal Justice Task Force and is a member of the Western Circuit and McMinn County bar associations, in addition to the Cornerstone Society of Athens Regional Medical Center, Athens Area Chamber of Commerce and the Georgia Football Letterman's Club. Allen also works to positively impact lives of those affected by substance abuse.

Honorees, special guests and emcees. *(Front row, left to right)* Avarita L. Hanson, Justice Robert Benham, Chief Justice Hugh P. Thompson, Joseph R. Bankoff and Hon. Patricia M. Killingsworth. *(Back row, left to right)* Lovett Bennett Jr., C. Talley Wells, Charles T. Huddleston, President Charles L. Ruffin, Marquetta J. Bryan, John T. Longino, Cindy S. Manning, Hon. J. Lane Bearden and J. Edward Allen Jr.

Hon. J. Lane Bearden, judge, Gordon County Juvenile Court, and practicing attorney, Bearden Law Firm**,** gives countless hours coaching debate teams, voluntarily photographing community events and lending his skills elsewhere in Calhoun and Gordon County. He has been recognized by the Gordon County School Conselors Association, Gordon County CASA and the Calhoun Touchdown Club, served as president of the Gordon County Bar Association and was named to Leadership Calhoun-Gordon County (1999).

Lovett Bennett, Jr., Statesboro, is engaged in private practice and serves as the municipal court judge for the cities of Brooklet and Register. He served as president of the Bulloch County Bar Association, is a member of the board of directors of the Attorney's Title Guaranty Fund, Inc., and a member of the Advisory Board of the Citizens Bank of Bulloch County. He has devoted himself to the Boy Scouts of America in many capacities, the Ogeechee Area Hospice and Kiwanis Club, among his several volunteer endeavors.

Marquetta J. Bryan, partner, Carlock, Copeland & Stair, LLP, Atlanta, serves the Junior League of Atlanta, teaches Sunday school to fourth and fifth grade girls at Word of Faith Family Worship Cathedral and is the co-founder of the legal education program, If You Can See It, You Can Be It, a youth mentoring and encouragement project where attorneys and judges visit urban schools in metro-Atlanta. This wife and mother of three children under the age of 10 says she serves her community because it is her responsibility to do so, thereby making the community better for her children and theirs to come.

Charles T. Huddleston, of counsel, Nelson Mullins Riley & Scarborough, LLP, Atlanta, is a lawyer who is best known for mentoring and coaching young women through the Georgia Metro Girls Basketball Club and helping them secure a college education. He has served as an advisor to three Atlanta mayors and led the movement for advancement of women and minorities throughout the legal and greater community. He is co-chair of Men With Vision Committee of the Atlanta Women's Foundation, on the board of directors of Leadership DeKalb, OnBoard, Inc., and the Lawyers Committee for Civil Rights Under Law. He has chaired the State Bar's Diversity Program since 2006.

Hon. Patricia M. Killingsworth, mediator, BAY Mediation and Arbitration Services, and adjunct professor of law at Georgia State University College of Law, Atlanta, has provided two decades of service to Kids' Chance, a local and national charity for children of workers catastrophically injured on the job. She is an esteemed community leader having served with the DeKalb County Board of Ethics, Leadership DeKalb, Youth Leadership DeKalb, Glenn Memorial United Methodist Church and her neighborhood civic association. She has an outstanding record of service and dedication to her community that is an inspiration to her family, neighbors and colleagues.

John T. Longino, John T. Longino Law Office, Waleska, exemplifies the consummate servant-leader to his northern Georgia community. He has been a member of several Rotary Clubs, (Cherokee, Canton and Gilmer) and he and his family have served as a host family for a number of foreign students. He

spent time as a math and science teacher for Gilmer County primary and elementary schools, is a member and small group leader at North Point Community Church and was co-founder of Port Tack Ministries for hurricane rescue and relief by water. Longino also co-founded the Whitfield County service agency Centro Latino, Inc., the oldest agency serving Hispanics in North Georgia. His leadership and involvements impact a wide range of individuals, particularly young people and Spanish-speaking citizens.

Cindy S. Manning, partner, Manning, Levine & Marlow, LLP, Peachtree City, provides leadership and support for the community as a founding member of the Friends of Tyrone Public Library, as board chair of Advo-Kids CASA, Inc., as a coach of the Sandy Creek High School Mock Trial Team and the nursery coordinator at the Southern Crescent Church of Christ. Active with legal organizations, Manning is president-elect of the Georgia Association for Women Lawyers and serves on the Lawyers Club of Atlanta membership and technology committees.

C. Talley Wells, director, Disability Integration Project, Atlanta Legal Aid Society, Decatur, works to provide housing and services to persons with developmental disabilities and mental illness through L'Arché Atlanta, an initiative that enables persons with developmental disabilities to live in shared housing with persons who don't, and the Georgia Association for Supportive Housing, a group of services providers and advocates for people with mental illness. He also works with the Center for Working Families as a board member and chair of the strategic planning committee, board development committee executive committee and finance committee. He is actively involved with the St. Paul United Methodist Church as a children's Sunday school teacher, worship chair and regularly preaches at the services when the pastor is absent.

The good deeds of Georgia lawyers, as evidenced by the 10 honored at the Justice Benham Community Service Awards program, speak volumes to the public and to their colleagues, proclaiming that lawyers do care and do share their talents without the expectation of remuneration. Clearly, many individuals, associations, organizations, groups and places of worship benefit from the work of lawyers and judges beyond their daily duties. It is fitting that we pause each year to showcase just a few of our bench and bar members who give so much for the greater good.

There are a lot of moving parts to present this program each year, and we appreciate the involvement of many. We thank the program participants—Chief Justice Hugh P. Thompson, Justice Robert Benham, President Charles L. Ruffin, President-Elect Patrise Perkins-Hooker and William J. "Bill" Liss for making the program so successful. We acknowledge the selection committee for reviewing the nominations and bringing forward this year's honorees: Janet C. Watts, chair; Lisa E. Chang; Mawuli M. Malcolm Davis; Elizabeth L. Fite; Laverne Lewis Gaskins; Michael D. Hobbs Jr.; W. Seaborn Jones; William J. Liss; and Brenda C. Youmas. We acknowledge the support of the Young Lawyers Division: Darrell Sutton, president, and its community service committee volunteers: Ichechi Alikor, Katie Parvis and Tiffany Ragland. Other volunteers include Faith Warren Avery and Dr. Tene A. Davis. Thanks also to Eric Thomas for providing musical entertainment; videographer Vince Bailey for his professionally prepared honoree videos; and photographer Don Morgan. Finally, we thank the Commission staff, Avarita Hanson, executive director; Terie Latala, assistant director; and Nneka Harris-Daniel, administrative assistant.

While lawyers who serve are not doing so to be recognized, receipt of the Justice Benham Award for Community Service is always a special moment in their careers. Why not start now thinking about a colleague or two to nominate for next year's awards? In the fall of 2014, look for the call for nominations for the 16th annual Justice Benham Awards in the *Georgia Bar Journal* and on the State Bar of Georgia website, or contact Nneka Harris-Daniel at the Chief Justice's Commission on Professionalism at nneka@cjcpga.org or 404-225-5040.

Avarita L. Hanson is the executive director of the Chief Justice's Commission on Professionalism and can be reached at ahanson@cjcpga.org.

Endnote

1. Chief Justice Hugh Thompson, *2014 State of the Judiciary Address*, (Feb. 5, 2014), at: http://www.gasupreme.us/press_releases/14JudiSpeech_1.pdf.

In Memoriam honors those members of the State Bar of Georgia who have passed away. As we reflect upon the memory of these members, we are mindful of the contributions they made to the Bar. Each generation of lawyers is indebted to the one that precedes it. Each of us is the recipient of the benefits of the learning, dedication, zeal and standard of professional responsibility that those who have gone before us have contributed to the practice of law. We are saddened that they are no longer in our midst, but privileged to have known them and to have shared their friendship over the years.

Jeffrey Dean Anderson
McDonough, Ga.
Mercer University Walter F. George School of Law (2005)
Admitted 2007
Died February 2014

Alan B. Blaisdell
Lawrenceville, Ga.
Woodrow Wilson College of Law (1954)
Admitted 1961
Died January 2014

John W. Bland Jr.
Conyers, Ga.
Woodrow Wilson College of Law (1948)
Admitted 1949
Died December 2013

Todd Wakefield Cline
Charlotte, N.C.
University of South Carolina School of Law (1990)
Admitted 1990
Died August 2013

David M. Courtney Jr.
Lilburn, Ga.
Atlanta's John Marshall Law School (1978)
Admitted 1979
Died November 2013

Jerry M. Daniel
Waynesboro, Ga.
Mercer University Walter F. George School of Law (1968)
Admitted 1970
Died January 2014

Robert Adolph De Metz Sr.
Peachtree City, Ga.
University of Mississippi School of Law (1965)
Admitted 1988
Died February 2014

Susan Kramer Feinberg
Chappaqua, N.Y.
Pace Law School (2005)
Admitted 2007
Died August 2013

Erwin A. Friedman
Savannah, Ga.
Emory University School of Law (1953)
Admitted 1953
Died March 2014

Gary Gilbert Guichard
Denver, Colo.
Tulane University Law School (1982)
Admitted 1993
Died February 2014

Gail S. Harbour
Atlanta, Ga.
Columbia Law School (1975)
Admitted 1980
Died March 2013

Frederick C. Heidgerd
Deerfield Beach, Fla.
University of Florida Levin College of Law (1975)
Admitted 1975
Died January 2014

Thomas R. Herndon
Savannah, Ga.
Atlanta's John Marshall Law School (1980)
Admitted 1981
Died January 2014

James E. Johnson Jr.
Charlotte, N.C.
Wake Forest University School of Law (1956)
Admitted 1962
Died March 2014

Waymon T. Knight Jr.
Marietta, Ga.
Emory University School of Law (1962)
Admitted 1963
Died February 2014

Cedric Thomas Leslie
Macon, Ga.
Mercer University Walter F. George School of Law (1987)
Admitted 1987
Died February 2014

Eugene McCracken
Savannah, Ga.
University of Georgia School of Law (1957)
Admitted 1958
Died March 2014

George K. McPherson Jr.
Marietta, Ga.
University of Washington School of Law (1961)
Admitted 1964
Died March 2014

Clarence A. Miller
Sylvester, Ga.
University of Georgia School of Law (1967)
Admitted 1967
Died February 2014

Gerald D. Mills
Cumming, Ga.
University of Georgia School of Law (1971)
Admitted 1971
Died August 2013

Shay Daniel Moorman
Wrightsville, Ga.
Florida State University College of Law (2008)
Admitted 2008
Died February 2014

Karen Kelly O'Riordan
Salt Lake City, Utah
Emory University School of Law (1996)
Admitted 2004
Died September 2013

James Larry Palmer
Carrollton, Ga.
Atlanta Law School (1962)
Admitted 1973
Died March 2014

John Pat Sadler
Flat Rock, N.C.
Emory University School of Law (1975)
Admitted 1975
Died March 2014

Clayton Sinclair Jr.
Atlanta, Ga.
Howard University School of Law (1960)
Admitted 1971
Died February 2014

Jo H. Stegall III
Rome, Ga.
University of Georgia School of Law (1984)
Admitted 1984
Died March 2014

Randolph W. Thrower
Atlanta, Ga.
Emory University School of Law (1936)
Admitted 1935
Died March 2014

Charles H. Watt III
Houston, Texas
Mercer University Walter F. George School of Law (1973)
Admitted 1973
Died November 2013

April-July

APR 10
ICLE
Trial Evidence
Atlanta, Ga.
See www.iclega.org for location
6 CLE

APR 11
ICLE
Child Welfare Attorney Training
Atlanta, Savannah and Tifton, Ga.
See www.iclega.org for location
7 CLE

APR 11
ICLE
Georgia Insurance Claims Law
Savannah, Ga.
See www.iclega.org for location
6 CLE

APR 17
ICLE
Business Immigration Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE

APR 17
ICLE
Construction Law for the General Practitioner
Atlanta, Savannah and Tifton, Ga.
See www.iclega.org for location
6 CLE

APR 24
ICLE
Building Professional Presence
Atlanta, Ga.
See www.iclega.org for location
6 CLE

APR 24
ICLE
New Tax Laws
Atlanta, Savannah and Tifton, Ga.
See www.iclega.org for location
6 CLE

APR 25
ICLE
Solo and Small Firm Spring Seminar
Atlanta and Tifton, Ga.
See www.iclega.org for location
6 CLE

APR 30
ICLE
The Trial of Leo Frank
Atlanta, Ga.
See www.iclega.org for location
3 CLE

MAY 1
ICLE
Animal Law Seminar
Atlanta, Ga.
See www.iclega.org for location
6 CLE

MAY 1
ICLE
VA Mentoring
Atlanta, Ga.
See www.iclega.org for location
6 CLE

MAY 1
ICLE
Dispute Resolution
Augusta, Ga.
See www.iclega.org for location
6 CLE

MAY 8
ICLE
Fulton Superior Court: Family Division Basics Boot Camp
Atlanta, Ga.
See www.iclega.org for location
7 CLE

MAY 9
ICLE
Georgia DUI Update
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.

MAY 9
ICLE
Entertainment Law Basics Boot Camp
Atlanta, Savannah and Tifton, Ga.
See www.iclega.org for location
3 CLE

MAY 13
ICLE
May Group Mentoring
Atlanta, Ga.
See www.iclega.org for location
NO CLE

MAY 15-17
ICLE
36th Real Property Law Institute
Savannah, Ga.
See www.iclega.org for location
12 CLE

MAY 22-24
ICLE
32nd Family Law Institute
Amelia Island, Fla.
See www.iclega.org for location
12 CLE

MAY 30
ICLE
Carlson on Evidence
Savannah, Ga.
See www.iclega.org for location
6 CLE

JUN 18
ICLE
Selected Video Replays
Atlanta, Ga.
See www.iclega.org for location
6 CLE

JUN 19
ICLE
Selected Video Replays
Atlanta, Ga.
See www.iclega.org for location
6 CLE

JUN 20
ICLE
Persuasive Presentation Skills for Lawyers
Atlanta, Ga.
See www.iclega.org for location
6 CLE

JUN 26-29
ICLE
Gary Christy Memorial Georgia Trial Skills Clinic
Athens, Ga.
See www.iclega.org for location
24 CLE

JUL 10-12
ICLE
2014 Fiduciary Law Institute
St. Simons, Ga.
See www.iclega.org for location
12 CLE

JUL 25-26
ICLE
Solo and Small Firm Institute
Atlanta, Ga.
See www.iclega.org for location
12 CLE

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, *2013-2014 State Bar of Georgia Directory and Handbook,* p. H-7 (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 must do so in the manner provided by Rule 5-102, *Handbook*, p. H-7.

This Statement and the following verbatim text are intended to comply with the notice requirements of Rule 5-101, *Handbook*, p. H-7.

Robert E. McCormack
Deputy General Counsel
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 2014-1

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

COMES NOW, the State Bar of Georgia, pursuant to the authorization of its Board of Governors at its regularly-called meeting on March 22, 2014, and presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as originally set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), and as amended by subsequent Orders, published at *2013-2014 State Bar of Georgia Directory and Handbook,* pp. 1-H, *et seq.* The State Bar respectfully moves that Rule 1.15(I), Rule 1.15(II) and Rule 1.15(III) of the Georgia Rules of Professional Conduct be amended as set out below, and that a new Part IV regarding the Georgia Bar Foundation be added to the Rules of the State Bar of Georgia.

I.

Proposed Amendments to Rule 1.15(I) of the Georgia Rules of Professional Conduct

The Board of Governors of the State Bar proposes that Rule 1.15(I), Safekeeping Property – General, of the Georgia Rules of Professional Conduct be amended by deleting the struck-through portions and adding the language in bold underlined text as set out below:

RULE 1.15(I) SAFEKEEPING PROPERTY - GENERAL

a. A lawyer shall hold funds or other property of clients or third persons that ~~is~~ **are** in a lawyer's possession in connection with a representation separate from the lawyer's own funds or other property. Funds shall be kept in ~~a~~ **one or more** separate account**s** maintained in an approved institution as defined by Rule 1.15(III)(c)(1). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

b. For the purposes of this Rule, a lawyer may not disregard a third person's interest in funds or other property in the lawyer's possession if:

1. the interest is known to the lawyer, and

2. the interest is based upon one of the following:

i. A statutory lien;

ii. A final judgment addressing disposition of those funds or property; or

iii. A written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

The lawyer may disregard the third person's claimed interest if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.

c. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

d. When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and a client or a third person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[3A] In those cases where it is not possible to ascertain who is entitled to disputed funds or other property held by the lawyer, the lawyer may hold such disputed funds for a reasonable period of time while the interested parties attempt to resolve the dispute. If a resolution cannot be reached, it would be appropriate for a lawyer to interplead such disputed funds or property.

[4] A "clients' security fund" provides a means through the collective efforts of the **B**~~b~~ar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

If the proposed amendments to the Rule are adopted, the amended Rule 1.15(I), Safekeeping Property-General, would read as follows:

RULE 1.15(I) SAFEKEEPING PROPERTY - GENERAL

a. A lawyer shall hold funds or other property of clients or third persons that are in a lawyer's possession in connection with a representation separate from the lawyer's own funds or other property. Funds shall be kept in one or more separate accounts maintained in an approved institution as defined by Rule 1.15(III)(c)(1). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of six years after termination of the representation.

b. For the purposes of this Rule, a lawyer may not disregard a third person's interest in funds or other property in the lawyer's possession if:

   1. the interest is known to the lawyer, and

   2. the interest is based upon one of the following:

      i. A statutory lien;

      ii. A final judgment addressing disposition of those funds or property; or

iii. A written agreement by the client or the lawyer on behalf of the client guaranteeing payment out of those funds or property.

The lawyer may disregard the third person's claimed interest if the lawyer reasonably concludes that there is a valid defense to such lien, judgment, or agreement.

c. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

d. When in the course of representation a lawyer is in possession of funds or other property in which both the lawyer and a client or a third person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the funds or property as to which the interests are not in dispute.

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[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration or interpleader. The undisputed portion of the funds shall be promptly distributed.

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[4] A "clients' security fund" provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

II.

Proposed Amendments to Rule 1.15(II) of the Georgia Rules of Professional Conduct

The Board of Governors proposes that Rule 1.15(II), Safekeeping Property - Trust Account and IOLTA, be amended by deleting the struck-through portions and adding the language in bold underlined text as set out below:

RULE 1.15(II) SAFEKEEPING PROPERTY - TRUST ACCOUNT AND IOLTA

a. Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available ~~a~~ **one or more** trust account**s** as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from ~~such~~ **a trust** account.

b. No personal funds shall ever be deposited in a lawyer's trust account, except that unearned attor-

ney's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney's fees debited against the account of a specific client and recorded as such.

c. All client's funds shall be placed in either an interest-bearing account **at an approved institution** with the interest being paid to the client or an interest-bearing (IOLTA) account **at an approved institution** with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

   1. With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined in Rule 1.15(III)(c)(1), with the interest to be paid to the client. ~~No earnings from such an account shall be made available to a lawyer or law firm.~~

      i. No earnings from such an interest-bearing account shall be made available to a lawyer or law firm.

      ii. Funds in such an interest-bearing account shall be available for withdrawal upon request and without delay, subject only to any notice period which the institution is required to reserve by law or regulation.

   2. With respect to funds which are nominal in amount or are to be held for a short period of time, **such that there can be no reasonable expectation of a positive net return to the client or third person,** a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) **at an approved institution as defined in Rule 1.15(III)(c)(1)** in compliance with the following provisions:

      i. No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

      ii. ~~The account shall include all clients' funds which are nominal in amount or which are to be held for a short period of time.~~ **Funds in each IOLTA account shall be available for withdrawal upon request and without delay, subject only to any notice period which the institution is required to reserve by law or regulation.**

      iii. ~~An interest-bearing trust account may be established with any approved institution as defined in Rule 1.15(III)(c)(1). Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.~~

      ~~iv.~~ **iii. As required by Rule 15-103, t**~~T~~he rate of interest payable on any ~~interest-bearing trust~~ **IOLTA** account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time **periods** or quantity minimum**s**, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposit**ed** funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

      ~~v.~~ **iv.** Lawyers or law firms shall direct the depository institution:

         A. ~~to remit to the Georgia Bar Foundation interest or dividends, net of any charges or fees on that account, on the average monthly balance in that account, or as otherwise computed in accordance with a financial institution's standard accounting practice, at least quarterly. Any bank fees or charges in excess of the interest earned on that account for any month shall be paid by the lawyer or law firm in whose names such account appears, if required by the bank;~~ **to remit to the Georgia Bar Foundation interest or dividends, net of any allowable reasonable fees as defined in Rule 15-102(c), on the average monthly balance in that account, at least quarterly. Any allowable reasonable fees in excess of interest earned on that account for any month, and any charges or fees that are not allowable reasonable fees, shall be charged to the lawyer or law firm in whose names such account appears, if not waived by the approved institution;**

         B. ~~to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the rate of interest applied, the average monthly balance~~

~~against which the interest rate is applied, the service charges or fees applied, and the net interest remittance~~; **to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the applicable IOLTA account number, the rate of interest applied, the average monthly account balance against which the interest rate is being applied, the gross interest earned, the types and amounts of service charges of fees applied, and the amount of the net interest remittance;**

C. ~~to transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, the average account balance of the period for which the report is made, and such other information provided to non-lawyer customers with similar accounts.~~ **to transmit to the depositing lawyer or law firm periodic reports or statements in accordance with the approved institution's normal procedures for reporting to depositors**.

3. No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

4. Whether the funds are designated short-term or nominal or not, a lawyer or law firm may**, at the request of the client, deposit funds into a separate interest-bearing account and** ~~elect to~~ remit all interest earned, or interest earned net of charges, to the client or clients.

The maximum penalty for a violation of Rule 1.15(II)(a) and Rule 1.15(II)(b) is disbarment. The maximum penalty for a violation of Rule 1.15(II)(c) is a public reprimand.

Comment

[1] The personal money permitted to be kept in the lawyer's trust account by this Rule shall not be used for any purpose other than to cover the bank fees and if used for any other purpose the lawyer shall have violated this Rule. If the lawyer wishes to reduce the amount of personal money in the trust account, the change must be properly noted in the lawyer's financial records and the monies transferred to the lawyer's business account.

[2] Nothing in this Rule shall prohibit a lawyer from removing from the trust account fees which have been earned on a regular basis which coincides with the lawyer's billing cycles rather than removing the fees earned on an hour-by-hour basis.

[3] In determining whether funds of a client or other beneficiary can earn income in excess of costs, the lawyer may consider the following factors:

a. the amount of funds to be deposited;
b. the expected duration of the deposit, including the likelihood of delay in the matter with respect to which the funds are held;
c. the rates of interest or yield at financial institutions where the funds are to be deposited;
d. the cost of establishing and administering a non-IOLTA trust account for the benefit of the client or other beneficiary, including service charges, the costs of the lawyer's services and the costs of preparing any tax reports that may be required;
e. the capability of financial institutions, lawyers, or law firms to calculate and pay earnings to individual clients; and
f. any other circumstances that affect the ability of the funds to earn a net return for the client or other beneficiary.

[4] The lawyer or law firm should review the IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third party.

If the proposed amendments to the Rule are adopted, the amended Rule 1.15(II), Safekeeping Property-Trust Account and IOLTA, would read as follows:

RULE 1.15(II) SAFEKEEPING PROPERTY - TRUST ACCOUNT AND IOLTA

a. Every lawyer who practices law in Georgia, whether said lawyer practices as a sole practitioner, or as a member of a firm, association, or professional corporation, and who receives money or property on behalf of a client or in any other fiduciary capacity, shall maintain or have available one or more trust accounts as required by these Rules. All funds held by a lawyer for a client and all funds held by a lawyer in any other fiduciary capacity shall be deposited in and administered from a trust account.

b. No personal funds shall ever be deposited in a lawyer's trust account, except that unearned attorney's fees may be so held until the same are earned. Sufficient personal funds of the lawyer may be kept in the trust account to cover maintenance fees such as service charges on the account. Records on such

trust accounts shall be so kept and maintained as to reflect at all times the exact balance held for each client or third person. No funds shall be withdrawn from such trust accounts for the personal use of the lawyer maintaining the account except earned attorney's fees debited against the account of a specific client and recorded as such.

c. All client's funds shall be placed in either an interest-bearing account at an approved institution with the interest being paid to the client or an interest-bearing (IOLTA) account at an approved institution with the interest being paid to the Georgia Bar Foundation as hereinafter provided.

    1. With respect to funds which are not nominal in amount, or are not to be held for a short period of time, a lawyer shall, with notice to the clients, create and maintain an interest-bearing trust account in an approved institution as defined in Rule 1.15(III)(c)(1), with the interest to be paid to the client.

        i. No earnings from such an interest-bearing account shall be made available to a lawyer or law firm.

        ii. Funds in such an interest-bearing account shall be available for withdrawal upon request and without delay, subject only to any notice period which the institution is required to reserve by law or regulation.

    2. With respect to funds which are nominal in amount or are to be held for a short period of time, such that there can be no reasonable expectation of a positive net return to the client or third person, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) at an approved institution as defined in Rule 1.15(III)(c)(1) in compliance with the following provisions:

        i. No earnings from such an IOLTA account shall be made available to a lawyer or law firm.

        ii. Funds in each IOLTA account shall be available for withdrawal upon request and without delay, subject only to any notice period which the institution is required to reserve by law or regulation.

        iii. As required by Rule 15-103, the rate of interest payable on any IOLTA account shall not be less than the rate paid by the depositor institution to regular, non-lawyer depositors. Higher rates offered by the institution to customers whose deposits exceed certain time periods or quantity minimums, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of the deposited funds so long as there is no impairment of the right to withdraw or transfer principal immediately.

        iv. Lawyers or law firms shall direct the depository institution:

            A. to remit to the Georgia Bar Foundation interest or dividends, net of any allowable reasonable fees as defined in Rule 15-102(c), on the average monthly balance in that account, at least quarterly. Any allowable reasonable fees in excess of interest earned on that account for any month, and any charges or fees that are not allowable reasonable fees, shall be charged to the lawyer or law firm in whose names such account appears, if not waived by the approved institution;

            B. to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the applicable IOLTA account number, the rate of interest applied, the average monthly account balance against which the interest rate is being applied, the gross interest earned, the types and amounts of service charges of fees applied, and the amount of the net interest remittance;

            C. to transmit to the depositing lawyer or law firm periodic reports or statements in accordance with the approved institution's normal procedures for reporting to depositors.

    3. No charge of ethical impropriety or other breach of professional conduct shall attend the determination that such funds are nominal in amount or to be held for a short period of time, or to the decision to invest clients' funds in a pooled interest-bearing account.

    4. Whether the funds are designated short-term or nominal or not, a lawyer or law firm may, at the request of the client, deposit funds into a separate interest-bearing account and remit all interest earned, or interest earned net of charges, to the client or clients.

The maximum penalty for a violation of Rule 1.15(II)(a) and Rule 1.15(II)(b) is disbarment. The maximum penalty for a violation of Rule 1.15(II)(c) is a public reprimand.

Comment

[1] The personal money permitted to be kept in the lawyer's trust account by this Rule shall not be used for any purpose other than to cover the bank fees and if used for any other purpose the lawyer shall have violated this Rule. If the lawyer wishes to reduce the amount of personal money in the trust account, the change must be properly noted in the lawyer's financial records and the monies transferred to the lawyer's business account.

[2] Nothing in this Rule shall prohibit a lawyer from removing from the trust account fees which have been earned on a regular basis which coincides with the lawyer's billing cycles rather than removing the fees earned on an hour-by-hour basis.

[3] In determining whether funds of a client or other beneficiary can earn income in excess of costs, the lawyer may consider the following factors:

a. the amount of funds to be deposited;
b. the expected duration of the deposit, including the likelihood of delay in the matter with respect to which the funds are held;
c. the rates of interest or yield at financial institutions where the funds are to be deposited;
d. the cost of establishing and administering a non-IOLTA trust account for the benefit of the client or other beneficiary, including service charges, the costs of the lawyer's services and the costs of preparing any tax reports that may be required;
e. the capability of financial institutions, lawyers, or law firms to calculate and pay earnings to individual clients; and
f. any other circumstances that affect the ability of the funds to earn a net return for the client or other beneficiary.

[4] The lawyer or law firm should review the IOLTA account at reasonable intervals to determine whether changed circumstances require further action with respect to the funds of any client or third party.

III.

Proposed Amendments to Rule 1.15(III) of the Georgia Rules of Professional Conduct

The Board of Governors proposes that Rule 1.15(III), Record Keeping; Trust Account Overdraft Notification; Examination of Records, be amended by deleting the struck-through portions and adding the language in bold underlined text as set out below:

RULE 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT NOTIFICATION; EXAMINATION OF RECORDS

a. Required Bank Accounts: Every lawyer who practices law in Georgia and who receives money or other property on behalf of a client or in any other fiduciary capacity shall maintain, in an approved financial institution as defined by this Rule, a trust account or accounts, separate from any business and personal accounts. Funds received by the lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this account. The financial institution shall be in Georgia or in the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person.

b. Description of Accounts:

    1. A lawyer shall designate all trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, as an "Attorney Trust Account," "Attorney Escrow Account," "IOLTA Account" or "Attorney Fiduciary Account." The name of the attorney or law firm responsible for the account shall also appear on all deposit slips and checks drawn thereon.

    2. A lawyer shall designate all business accounts, as well as all deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," "Operating Account" or a "Regular Account."

    3. Nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account including fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, agent or in any other fiduciary capacity.

c. Procedure:

    1. Approved Institutions:

        i. A lawyer shall maintain his or her trust account only in a financial institution approved by the State Bar **of Georgia**, which shall annually publish a list of approved institutions.

            A. Such institutions shall be located within the State of Georgia, within the state where the lawyer's office is located, or elsewhere with the written consent and

at the written request of the client or ~~fiduciary~~ **third person**. The institution shall be authorized by federal or state law to do business in the jurisdiction where located and shall be federally insured. A financial institution shall be approved as a depository for lawyer trust accounts if it abides by an agreement to report to the ~~State Disciplinary Board~~ **Office of the General Counsel** whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days notice in writing to the ~~State Disciplinary Board~~ **Office of the General Counsel**. The agreement shall be filed with the Office of the General Counsel on a form approved by the **Investigative Panel of the** State Disciplinary Board. The agreement shall provide that all reports made by the financial institution shall be in writing and shall include the same information customarily forwarded to the depositor when an instrument is presented against insufficient funds. If the financial institution is located outside of the State of Georgia, it shall also agree in writing to honor any properly issued State Bar of Georgia subpoena.

B. In addition to the requirements above, the financial institution must also be approved by the Georgia Bar Foundation and agree to offer IOLTA accounts in compliance with the additional requirements set out in Part XV of the Rules of the State Bar of Georgia.

ii. The ~~State Disciplinary Board~~ **Georgia Bar Foundation** ~~shall establish procedures for a lawyer or law firm to be excused from~~ **may waive** the ~~requirements~~ **provisions** of this Rule **in whole or in part** ~~if the lawyer or law firm has its principal office in a county where no bank, credit union, or savings and loan association will agree to comply with the provisions of this Rule~~ **for good cause shown**. **A lawyer or law firm may appeal the decision of the Georgia Bar Foundation by application to the Supreme Court of Georgia**.

2. Timing of Reports:

   i. The financial institution shall file a report with the Office of the General Counsel of the State Bar of Georgia in every instance where a properly payable instrument is presented against a lawyer trust account containing insufficient funds and said instrument is not honored within three business days of presentation.

   ii. The report shall be filed with the Office of the General Counsel within fifteen days of the date of the presentation of the instrument, even if the instrument is subsequently honored after the three business days provided in ~~(2)(i) above~~ **the preceding paragraph**.

3. Nothing shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule.

4. Every lawyer and law firm maintaining a trust account as provided by these Rules is hereby and shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall indemnify and hold harmless each financial institution for its compliance with the aforesaid reporting and production requirements.

   d. Effect on Financial Institution of Compliance: The agreement by a financial institution to offer accounts pursuant to this Rule shall be a procedure to advise the State Disciplinary Board of conduct by ~~attorneys~~ **lawyers** and shall not be deemed to create a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of lawyers overdrawing attorney trust accounts.

   e. Availability of Records: A lawyer shall not fail to produce any of the records required to be maintained by these ~~Standards~~ **Rules** at the request of the Investigative Panel of the State Disciplinary Board or the Supreme Court. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these Rules for the production of documents and evidence.

   f. Audit for Cause: A lawyer shall not fail to submit to an Audit for Cause conducted by the State Disciplinary Board pursuant to Bar Rule 4-111.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] Each financial institution wishing to be approved as a depository of client trust funds must file an overdraft notification agreement with the ~~State Disciplinary Board~~ **Office of the General Counsel** of the State Bar of Georgia. The State Bar of Georgia will publish a list of approved institutions at least annually.

[2] The overdraft agreement requires that all overdrafts be reported to the Office of the General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust account, particularly in exchange for the institution's promise to delay or not to report an overdraft. The institution must notify the Office of the General Counsel of all overdrafts even where the institution is certain that its own error caused the overdraft or that the matter could have been resolved between the institution and the lawyer within a reasonable period of time.

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of the General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Waiver

[4] A lawyer may seek to have the provisions of this Rule waived if the lawyer or law firm has its principal office in a county where no bank, credit union, or savings and loan association will agree or has agreed to comply with the provision of this Rule. Other grounds for requesting a waiver may include significant financial or business harm to the lawyer or law firm, such as where the unapproved bank is a client of the lawyer or law firm or where the lawyer serves on the board of the unapproved bank.

[5] The request for a waiver should be in writing, sent to the Georgia Bar Foundation, and should include sufficient information to establish good cause for the requested waiver.

[6] The Georgia Bar Foundation may request additional information from the lawyer or law firm if necessary to determine good cause.

Audits

[~~4~~ **7**] Every lawyer's financial records and trust account records are required records and therefore are properly subject to audit for cause. The audit provisions are intended to uncover errors and omissions before

the public is harmed, to deter those lawyers who may be tempted to misuse client's funds and to educate and instruct lawyers as to proper trust accounting methods. Although the auditors will be employed by the Office of the General Counsel of the State Bar of Georgia, it is intended that disciplinary proceedings will be brought only when the auditors have reasonable cause to believe discrepancies or irregularities exist. Otherwise, the auditors should only educate the lawyer and the lawyer's staff as to proper trust accounting methods.

[~~5~~ **8**] An audit for cause may be conducted at any time and without advance notice if the Office of the General Counsel receives sufficient evidence that a lawyer poses a threat of harm to clients or the public. The Office of the General Counsel must have the written approval of the Chairman of the Investigative Panel of the State Disciplinary Board and the President-elect of the State Bar of Georgia to conduct an audit for cause.

If the proposed amendments to the Rule are adopted, the amended Rule 1.15(III), Record Keeping; Trust Account Overdraft Notification; Examination of Records, would read as follows:

RULE 1.15(III) RECORD KEEPING; TRUST ACCOUNT OVERDRAFT NOTIFICATION; EXAMINATION OF RECORDS

a. Required Bank Accounts: Every lawyer who practices law in Georgia and who receives money or other property on behalf of a client or in any other fiduciary capacity shall maintain, in an approved financial institution as defined by this Rule, a trust account or accounts, separate from any business and personal accounts. Funds received by the lawyer on behalf of a client or in any other fiduciary capacity shall be deposited into this account. The financial institution shall be in Georgia or in the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person.

b. Description of Accounts:

    1. A lawyer shall designate all trust accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, as an "Attorney Trust Account," "Attorney Escrow Account," "IOLTA Account" or "Attorney Fiduciary Account." The name of the attorney or law firm responsible for the account shall also appear on all deposit slips and checks drawn thereon.

    2. A lawyer shall designate all business accounts, as well as all deposit slips and all checks drawn thereon, as a "Business Account," a "Professional Account," an "Office Account," a "General Account," a "Payroll Account," "Operating Account" or a "Regular Account."

    3. Nothing in this Rule shall prohibit a lawyer from using any additional description or designation for a specific business or trust account including fiduciary accounts maintained by the lawyer as executor, guardian, trustee, receiver, agent or in any other fiduciary capacity.

c. Procedure:

    1. Approved Institutions:

        i. A lawyer shall maintain his or her trust account only in a financial institution approved by the State Bar of Georgia, which shall annually publish a list of approved institutions.

            A. Such institutions shall be located within the State of Georgia, within the state where the lawyer's office is located, or elsewhere with the written consent and at the written request of the client or third person. The institution shall be authorized by federal or state law to do business in the jurisdiction where located and shall be federally insured. A financial institution shall be approved as a depository for lawyer trust accounts if it abides by an agreement to report to the Office of the General Counsel whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, and the instrument is not honored. The agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty days notice in writing to the Office of the General Counsel. The agreement shall be filed with the Office of the General Counsel on a form approved by the Investigative Panel of the State Disciplinary Board. The agreement shall provide that all reports made by the financial institution shall be in writing and shall include the same information customarily forwarded to the depositor when an instrument is presented against insufficient funds. If the financial institution is located outside of the State of Georgia, it shall also agree in writing to honor any properly issued State Bar of Georgia subpoena.

B. In addition to the requirements above, the financial institution must also be approved by the Georgia Bar Foundation and agree to offer IOLTA accounts in compliance with the additional requirements set out in Part XV of the Rules of the State Bar of Georgia.

ii. The Georgia Bar Foundation may waive the provisions of this Rule in whole or in part for good cause shown. A lawyer or law firm may appeal the decision of the Georgia Bar Foundation by application to the Supreme Court of Georgia.

2. Timing of Reports:

i. The financial institution shall file a report with the Office of the General Counsel of the State Bar of Georgia in every instance where a properly payable instrument is presented against a lawyer trust account containing insufficient funds and said instrument is not honored within three business days of presentation.

ii. The report shall be filed with the Office of the General Counsel within fifteen days of the date of the presentation of the instrument, even if the instrument is subsequently honored after the three business days provided in the preceding paragraph.

3. Nothing shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule.

4. Every lawyer and law firm maintaining a trust account as provided by these Rules is hereby and shall be conclusively deemed to have consented to the reporting and production requirements mandated by this Rule and shall indemnify and hold harmless each financial institution for its compliance with the aforesaid reporting and production requirements.

d. Effect on Financial Institution of Compliance: The agreement by a financial institution to offer accounts pursuant to this Rule shall be a procedure to advise the State Disciplinary Board of conduct by lawyers and shall not be deemed to create a duty to exercise a standard of care or a contract with third parties that may sustain a loss as a result of lawyers overdrawing attorney trust accounts.

e. Availability of Records: A lawyer shall not fail to produce any of the records required to be maintained by these Rules at the request of the Investigative Panel of the State Disciplinary Board or the Supreme Court. This obligation shall be in addition to and not in lieu of the procedures contained in Part IV of these Rules for the production of documents and evidence.

f. Audit for Cause: A lawyer shall not fail to submit to an Audit for Cause conducted by the State Disciplinary Board pursuant to Bar Rule 4-111.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] Each financial institution wishing to be approved as a depository of client trust funds must file an overdraft notification agreement with the Office of the General Counsel of the State Bar of Georgia. The State Bar of Georgia will publish a list of approved institutions at least annually.

[2] The overdraft agreement requires that all overdrafts be reported to the Office of the General Counsel of the State Bar of Georgia whether or not the instrument is honored. It is improper for a lawyer to accept "overdraft privileges" or any other arrangement for a personal loan on a client trust account, particularly in exchange for the institution's promise to delay or not to report an overdraft. The institution must notify the Office of the General Counsel of all overdrafts even where the institution is certain that its own error caused the overdraft or that the matter could have been resolved between the institution and the lawyer within a reasonable period of time.

[3] The overdraft notification provision is not intended to result in the discipline of every lawyer who overdraws a trust account. The lawyer or institution may explain occasional errors. The provision merely intends that the Office of the General Counsel receive an early warning of improprieties so that corrective action, including audits for cause, may be taken.

Waiver

[4] A lawyer may seek to have the provisions of this Rule waived if the lawyer or law firm has its principal office in a county where no bank, credit union, or savings and loan association will agree or has agreed to comply with the provision of this Rule. Other grounds for requesting a waiver may include significant financial or business harm to the lawyer or law firm, such as

where the unapproved bank is a client of the lawyer or law firm or where the lawyer serves on the board of the unapproved bank.

[5] The request for a waiver should be in writing, sent to the Georgia Bar Foundation, and should include sufficient information to establish good cause for the requested waiver.

[6] The Georgia Bar Foundation may request additional information from the lawyer or law firm if necessary to determine good cause.

Audits

[7] Every lawyer's financial records and trust account records are required records and therefore are properly subject to audit for cause. The audit provisions are intended to uncover errors and omissions before the public is harmed, to deter those lawyers who may be tempted to misuse client's funds and to educate and instruct lawyers as to proper trust accounting methods. Although the auditors will be employed by the Office of the General Counsel of the State Bar of Georgia, it is intended that disciplinary proceedings will be brought only when the auditors have reasonable cause to believe discrepancies or irregularities exist. Otherwise, the auditors should only educate the lawyer and the lawyer's staff as to proper trust accounting methods.

[8] An audit for cause may be conducted at any time and without advance notice if the Office of the General Counsel receives sufficient evidence that a lawyer poses a threat of harm to clients or the public. The Office of the General Counsel must have the written approval of the Chairman of the Investigative Panel of the State Disciplinary Board and the President-elect of the State Bar of Georgia to conduct an audit for cause.

IV.

Proposed New Part XV to the Rules of The State Bar of Georgia

The State Bar of Georgia proposes that a new Part XV, providing Rules for the Georgia Bar Foundation, be added to the Rules of the State Bar. The proposed new Part XV would read as follows:

PART XV

GEORGIA BAR FOUNDATION
Preamble

The Georgia Bar Foundation ("the Foundation") is a 501(c)(3) organization named by the Supreme Court of Georgia in 1983 to receive and distribute Interest On Lawyer Trust Account ("IOLTA") funds to support legal services for the poor, to improve the administration of justice, to provide legal education to Georgia's children, to provide educational programs for adults in order to advance understanding of democracy and our system of government, to aid children involved in the justice system, and to promote professionalism in the practice of law.

Chapter 1
IOLTA ACCOUNTS

Rule 15-101. Bank Accounts.

(a) Every lawyer who practices law in Georgia, whether as a sole practitioner or as a member of a firm, association or professional corporation, who receives money or other property on behalf of a client or in any other fiduciary capacity, shall maintain or have available an interest-bearing trust account or accounts.

(b) An "IOLTA Account" is a trust account benefiting the Foundation. The interest generated by an IOLTA Account shall be paid to the Georgia Bar Foundation, Inc. as hereinafter provided.

Rule 15-102. Definitions.

(a) An "IOLTA Account" means a trust account benefiting the Foundation, established in an approved institution for the deposit of pooled nominal or short-term funds of clients or third persons, and meeting the requirements of the Foundation as further detailed below. The account product may be an interest-bearing checking account; a money market account with, or tied to, check writing; a sweep account, portions of which are regularly moved into a government money market fund or daily overnight financial institution repurchase agreement invested solely in, or fully collateralized by, United States government securities; or an open-end money market fund solely invested in, or fully collateralized by, United States government securities.

(1) "Nominal or short-term" describes funds of a client or third person that the lawyer has determined cannot provide a positive net return to the client or third person.

(2) "Open-end money market fund" is a fund that identifies itself as a money market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and, at the time of the investment, having total assets of at least $250,000,000.

(3) "United States government securities" are United States Treasury obligations and obligations issued or guaranteed as to principal and interest by

the United States or any agency or instrumentality thereof.

(b) An "approved institution" is a bank or savings and loan association which is an approved institution as defined in Rule 1.15(III)(c)(1) and which voluntarily chooses to offer IOLTA accounts consistent with the additional requirements of this Rule, including:

(1) to remit to the Foundation interest or dividends, net of any allowable reasonable fees on the IOLTA Account, on the average monthly balance in that account, at least quarterly. Any allowable reasonable fees in excess of the interest earned on that account for any month, and any fees or charges that are not allowable reasonable fees, shall be charged to the lawyer or law firm in whose names such account appears, if not waived by the approved institution.

(2) to transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent, the applicable IOLTA Account number, the rate of interest applied, the average monthly account balance against which the interest rate is applied, the gross interest earned, the types and amounts of service charges or fees applied, and the amount of the net interest remittance.

(3) to transmit to the depositing lawyer or law firm periodic reports or statements in accordance with the approved institution's normal procedures for reporting to depositors.

(4) to pay comparable interest rates on IOLTA Accounts, as defined below at Rule 15-103.

(c) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, Federal deposit insurance fees, and sweep fees. ("Allowable reasonable fees" do not include check printing charges, NSF charges, overdraft interest charges, account reconciliation charges, stop payment charges, wire transfer fees, and courier fees. Such listing of excluded fees is not intended to be all inclusive.) All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the earnings accrued on the account for any month or quarter shall not be taken from earnings accrued on other IOLTA accounts. Approved financial institutions may elect to waive any or all fees on IOLTA accounts.

Rule 15-103. IOLTA Accounts; Interest Rates

On any IOLTA Account, the rate of interest payable shall be:

(a) not less than the highest interest rate or dividend generally available from the approved institution to its non-IOLTA customers for each IOLTA Account that meets the same minimum balance or other eligibility qualifications, if any. In determining the highest interest rate or dividend generally available from the institution to its non-IOLTA customers, the institution may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting interest rates or dividends for its customers if such factors do not discriminate between IOLTA Accounts and accounts of non-IOLTA customers. The institution also shall consider all product option types that it offers to its non-IOLTA customers, as noted at Rule 15-102(a), for an IOLTA Account by either establishing the applicable product as an IOLTA Account or paying the comparable interest rate or dividend on the IOLTA Account in lieu of actually establishing the comparable highest interest rate or dividend product; or

(b) alternatively, if an approved institution so chooses, a rate equal to the greater of (A) 0.65% per annum or (B) a benchmark interest rate, net of allowable reasonable fees, set by the Foundation, which shall be expressed as a percentage (an "index") of the federal funds target rate, as established from time to time by the Federal Reserve Board. In order to maintain an overall comparable rate, the Foundation will periodically, but not less than annually, publish its index. The index shall initially be 65% of the federal funds target rate.

(c) Approved institutions may choose to pay rates higher than comparable rates discussed above.

Chapter 2
INTERNAL RULES

Rule 15-201. Management and Disbursement of IOLTA Funds; Internal Procedures of Foundation

(a) Mandatory Grants. The Georgia Bar Foundation, Inc. (the "Foundation"), which is the charitable arm of the Supreme Court of Georgia, is the named recipient of IOLTA funds. The Foundation shall pay to the Georgia Civil Justice Foundation ("GCJF") a grant of ten percent (10%) of all IOLTA revenues received, less administrative costs, during the immediately preceding calendar quarter. GCJF must maintain its tax-exempt charitable/educational status under Sections 115 and 170(C)(1) or under Section 501(c)(3) of the Internal Revenue Code, and the purposes and activities of the organization must remain consistent with the exempt purposes of the Foundation. If GCJF is determined either by the Internal Revenue Service or by the Georgia Department of Revenue to be a taxable entity at any time, or its purposes and activities become inconsistent with the exempt purposes of the

Foundation, then the Foundation shall retain all IOLTA funds which would have been granted to GCJF.

(b) Reporting by Organizations. As a condition to continued receipt of IOLTA funds, the Foundation and GCJF shall each present a report of its activities including an audit of its finances to the Supreme Court of Georgia annually. GCJF shall also send to the Foundation a copy of its annual report and audit.

(c) Discretionary Grants. The Foundation shall develop procedures for regularly soliciting, evaluating, and funding grant applications from worthy law-related organizations that seek to provide civil legal assistance to needful Georgians, to improve the working and the efficiency of the judicial system, to provide legal education to Georgia's children, to provide assistance to children who are involved with the legal system, to provide educational programs for adults intended to promote a better understanding of our democratic system of government, or to foster professionalism in the practice of law.

(d) IOLTA Account Confidentiality. The Foundation will protect the confidentiality of information regarding a lawyer's or law firm's trust account obtained in the course of managing IOLTA operations.

(e) Report to the Office of the General Counsel. The Foundation will provide the Office of the General Counsel with a list of approved financial institutions which have agreed to abide by the requirements of this Part XV of the Rules of the State Bar of Georgia. Such list will be updated with such additions and deletions as necessary to maintain its accuracy.

SO MOVED, this _____ day of _____, 2014

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
(404) 527-8720

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

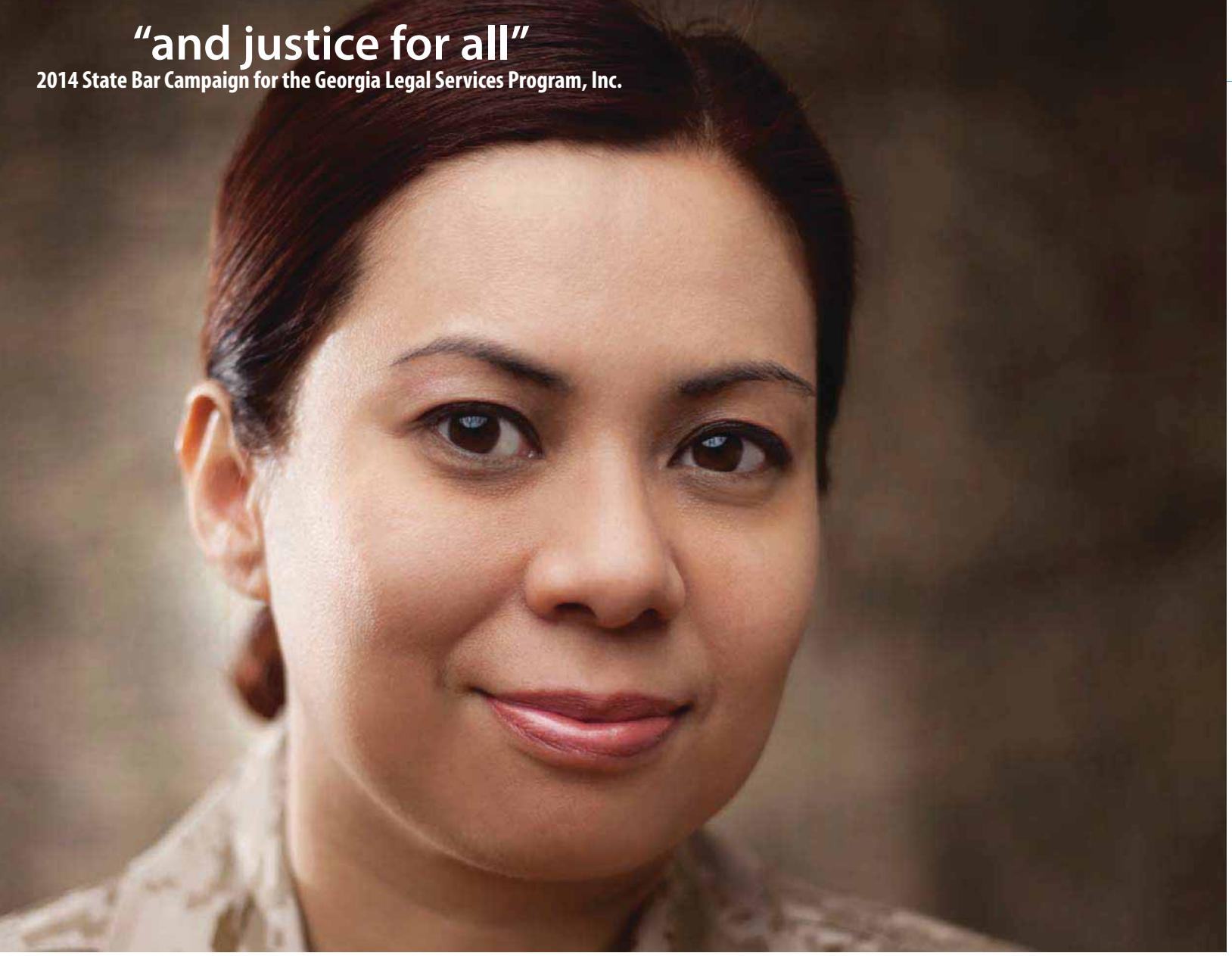
Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the U.S. Court of Appeals for the Eleventh Circuit.

A copy of the proposed amendments may be obtained on and after April 1, 2014, from the court's website at www.ca11.uscourts.gov. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St. NW, Atlanta, Georgia 30303 [phone: 404-335-6100]. Comments on the proposed amendments may be submitted in writing to the Clerk at the above address by May 2, 2014.

Proposed Amendments to Uniform Superior Court Rules 4 and 24

At its business meeting on Jan. 23, 2014, the Council of Superior Court Judges approved proposed amendments to Uniform Superior Court Rules 4 and 24. 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, Georgia 30334, or fax them to 404-651-8626. To be considered, comments must be received by Monday, July 14, 2014.



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After serving nine years in the Army, Ms. Jones had back and spine injuries, limitations on her mobility and a 30 per cent Veterans Administration disability rating. She landed a job with the Veterans Administration, but found she was having problems getting from her assigned parking lot to her work site. She sought a permit to park in handicapped parking but was turned down by her supervisor. She asked for help from her union representative and the human relations staff, but those efforts resulted in her dismissal. Further, when she applied for unemployment benefits, the Georgia Department of Labor denied the claim. Her GLSP lawyer represented her at an administrative hearing and succeeded in getting her benefits as well as back payments.

State Bar of Georgia **Georgia Legal Services Program**

Thank you for your generosity and support.

The Georgia Legal Services Program (GLSP) is a 501(c)(3) nonprofit law firm. Gifts to GLSP are tax-deductible to the fullest extent allowed by law.
(The client story is used with permission. The photograph and name do not necessarily represent the actual client.)

Property/Rentals/Office Space

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OFFICE SPACE AVAILABLE at small, Buckhead firm. One exterior, one interior office, perfect for an attorney & paralegal. $1,800 monthly. Includes reception area, conference room, telephones, internet, copier, fax, kitchen. Located atop the Lenox MARTA station. Easy access to Georgia 400, I-85 and I-75. Respond only to cjr@gaemploymentlawyers.com.

Shared conference room in Midtown Atlanta law firm. $250/month. Receptionist, phone/internet, mail, copy/print, parking optional w/additional fees. Attorney would like to split usage of a second floor 225 sq. ft. Conference room with two attorneys. Overlooks Midtown office towers and Atlantic Station. Call 404-766-8002 or email kenbrown@laylawlegal.com.

OFFICE SPACE—Class A office space for one or two attorneys, window offices with two other lawyers in Park Central building, 2970 Clairmont Road, near I-85. Includes conference room, phone/internet, copy/fax/scan, secretarial space, $1,200 to $1,500 per month. Call Salu Kunnatha at 404-633-4200 or email: skk@kunnathalaw.com.

Boutique Family Law Firm seeking legal secretary. Duties would include reception, filing, scheduling, secretarial work and occasional paralegal work. 1+ year of legal experience required, family law experience a plus. Located in Buckhead. Contact Lesley@kegelmcburney.com.

Office available in South Fulton. Prestigious Promenade Park building off Cascade Road (Exit 7, near airport). Free parking, internet, conference room usage, phone and e-fax. Secretarial services available at reasonable cost. $600/month. Also, virtual offices with mailbox, phone, e-fax and conference room usage for $150/month. Call Robert at 404-549-6773.

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Practice Assistance

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Forensic Accounting: Owner disputes, analysis of transactions, commercial insurance claims, fraud investigations, bankruptcy and troubled businesses, business litigation, estate and trust matters, ADR. Greg DeFoor, CPA, CFE | 678-644-5983 | gdefoor@defoorservices.com.

Korean Court Interpreter. Licensed by GA Commission on Interpreters. Extensive experience in depositions, trials, and other proceedings both civil and criminal. The only licensed Korean Court Interpreter in Georgia as of this month's issue of the *Georgia Bar Journal*. Call Accurate Language Services @ 770-827-8820 and ask for Jason Lee (GA Commission on Interpreters, License No. CA-01065).

New York & New Jersey Transactions and Litigation. Georgia bar member practicing in Manhattan and New Jersey can help you with your corporate transactions and litigation in state and federal courts. Contact E. David Smith, Esq., 570 Lexington Avenue, 23rd Floor, New York, New York 10022; 212-661-7010; edsmith@edslaw.net.

Position Wanted

Personal Injury Attorney—Well-established, successful Atlanta plaintiff's firm seeking personal injury attorney. Excellent financial opportunity. Collegial, professional environment. Great support. Send resume to: GBJ at spshns@me.com.

Position Available: Well-established five-person Northeast Georgia firm seeks associate with 2 – 8 years' experience in business/real estate/estate matters. Short partnership track. Compensation commensurate with experience. Send resumes to negalawposition@gmail.com.

SE LITIGATION FIRM SEEKING LAWYER (St. Simons Island, Georgia) – Full service AV-rated law firm seeking attorney with litigation experience to handle and assist in a wide array of matters. Insurance defense/coverage experience a plus. Candidates should be self-starters. Exceptional research, writing and computer skills are musts. Please submit writing sample and references with response. Send information to: ssilawyers@gmail.com.

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