

Georgia
Bar

Journal

October 2004 ■ Volume 10 ■ Number 2



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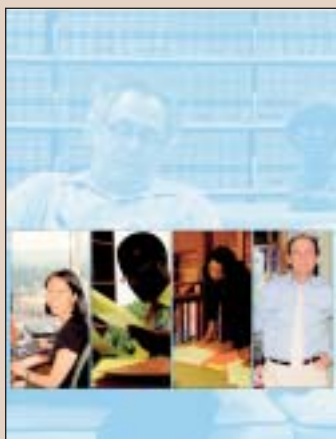
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On the Cover

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Pictured on cover, left to right, Bettina Wing-Che Yip, Stanley A. Seymour, Laquetta S. Pearson and Bertis Downs. Background photo, Michael Landau.

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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: C. Tyler Jones, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, Georgia 30303; phone: (404) 527-8736; tyler@gabar.org.

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By Rob Reinhardt

"The 'Standards' program will ensure that an inexperienced lawyer need not negotiate the briar patch that challenges professional behavior without the counsel of an experienced veteran."

Mentoring: Georgia Lawyers Must Meet the Challenge

By Rob Reinhardt

On Aug. 19, your Board of Governors made an investment in the improvement of the profession. It adopted, and agreed to fund and recommend to the Supreme Court of Georgia, a mandatory mentoring program that was developed by the State Bar's "Standards of the Profession" Committee. The program presents great promise as a vehicle for focusing attention on professionalism at the outset of a lawyer's career. But the initiative carries an element of risk; and the risk troubles me.

The genesis of the program can be traced to 1996 and a concern among the leaders of our Bench and Bar as to the deterioration of professional conduct in the practice of law. At the request of then-President Ben Easterlin, John Marshall undertook to quarterback a talented team of lawyers assembled to engineer a program to effectively preserve and promote professional conduct among members of the Bar. Sally Lockwood and the Chief Justice's Commission on Professionalism have been an important part of this

initiative from the outset. Professional conduct has many dimensions: civil communication, truthful and full disclosure and fair dealing. The Committee wrestled with many formidable threshold issues—one of the most challenging being crafting a program that would work. Some lawyers and educators advocated a clinical program involving mandatory internships. Others suggested that professional conduct, like personal character, cannot be taught—you were either born with it or you were not, and our Bar should commit to handling unprofessional lawyers through our disciplinary system.

The result of eight years of work came before your Board in Atlanta. The plan for implementation has been painstakingly designed. In broad brush, the program is anchored in the dual concept of specialized training reinforced by individual mentoring. During the initial 12 months of practice, beginning lawyers will be matched with experienced lawyers while they attend 12 hours of CLE programming that introduce basic aspects of law practice. Moreover, the training anticipated by the program is not limited to mentees. An ambitious education program has also been designed for mentors to aid them in counseling professionalism in the context of the practice of law.

We face no risk attributable to the design of the program. The risk is that we as Georgia lawyers may fail to realize the promise of the

program by uneven and insufficient commitment.

The "Standards" project has been fascinating to me from the outset. How do you teach an intangible like professional conduct? The truth that our "Standards" architects recognized is that professional conduct is not taught by lecture but by example. Lawyers learn the expectation of professional conduct by facing that expectation from practicing lawyers. Lawyers learn to practice professional conduct by watching practicing lawyers exhibit professional conduct. And it is a situational and anecdotal pilgrimage. The "Standards" program will ensure that an inexperienced lawyer need not negotiate the briar patch that challenges professional behavior without the counsel of an experienced veteran.

My challenge to you is to make the program work. Professionalism is on the problem list of bar associations across the country. Georgia is characteristically in the forefront of those bar associations that have determined to mount an aggressive response. But for the "Standards" program to work, we as Georgia lawyers have to fall in behind it.


We all lament the conduct of lawyers observed to conduct the practice in a manner that brings no honor to any of us. But I notice that we also tend to think unprofessional conduct is conduct practiced by someone else. Experienced lawyers complain that young lawyers consider effective law practice to be a "scorched earth" approach to litigation and reminisce about the collegiality of the Bar in years gone by. Young lawyers complain that experienced lawyers take advantage of that experience by unfair delay, ex parte contact and manip-

ulation of the system. The truth is the pressures of modern law practice have fogged our focus on professional conduct. Most lawyers want to do what is right. But we all operate under such intense pressure that it is hard to find time to devote adequate attention to legal issues—much less professionalism issues. Ask yourself how much time you spend discussing professional conduct with lawyers in your firm or bar association (younger and older). Is it apparent that professional conduct is important in your law practice, or do contemporaries or associates working with you have the impression that you are out to win at all costs? Would you be comfortable explaining your professional tactics to your parents or your children?

The easiest response to our "Standards" program—and one I fear too many of us at the Bar will take—is that the problem does not affect us and we don't have time to participate in the solution. But our profession will be enhanced and all of us will enjoy the reflected benefit of a professional bar if we engage and support this program. The groundwork has been done for us, and it has been done well. But the problem is endemic and the cure demanding. So our crossroads at the beginning of 2005 will be to decide we are determined this program will succeed and to collateralize that decision with a commitment to insist on professional conduct from ourselves and all that are admitted before the Bar. Serve as a mentor. Share your experience on how difficult situations should be resolved. Help lawyers understand as they spin up into the practice that professional conduct is as important as setting up a trust

account or promoting their business. My prediction is your efforts will ratchet up your professionalism alert level.

The synergy of all of us marching in the same direction will fulfill the promise of the program. Your determination to make our "Standards" program successful will communicate to lawyers entering the profession our commitment to conduct worthy of a noble profession. By endorsing professionalism, we preserve for our successors the great heritage of Georgia lawyers. Without our unstinting support, "Standards" could sunset in three years (the penalty for ineffective operation built into the proposal). That result will diminish the profession and all of us who are proud of it.

The resolution adopted by the Board of Governors, as well as the anticipated rule changes, will be published in the December issue of the *Bar Journal*. Following a 30 day comment period, the rule changes will be proposed for adoption by the Court. The resolution and plan of implementation also appears on the Bar's Web site. I invite your close attention directed through the communication medium of your choice. Your Board of Governors invested in this program with the confidence that Georgia lawyers would greet the challenge with resolve. It endorsed the direction charted for us by our "Standards" committee; and I share the confidence of your board that this program will inspire us to improve the profession. I encourage you to keep professionalism high on your list of priorities—and I need your encouragement to keep it high on mine. 



"It is important to note that Bar members cannot transfer their parking privileges to friends, family members or employees."

Be Sure to Take Advantage of New Member Benefits

By Cliff Brashier

Visiting the Bar Center, the home of all Georgia lawyers, recently became a lot easier. After all the unexpected hurdles, the 500-space Bar Center parking deck is now available for use.

Although there is still some work to be done on the Spring Street entrance and exit, Bar members are welcome to utilize the parking deck, with few exceptions. The major exception is space availability, because there are more than 35,000 members and only 500 available spaces, the Board of Governors has outlined ground rules for its use.

During business hours (6:30 a.m. to 8 p.m.) all Bar members visiting or using the Bar Center or visiting downtown for other business or social purposes may park free of charge. The Bar's receptionists on either the first or third floor will be happy to validate your ticket. Because there are a limited number of parking spaces, free parking cannot be provided for lawyers who work in other downtown buildings. Other than availability, this is the only exception to free parking.

For after-hours and weekend event parking, when the deck is open, members need to show their State Bar of Georgia membership card upon arrival at the deck. Parking is on a first-come, first-served basis. Keep in mind that the public will also be parking on a fee basis. Members should call the Bar to find out if the parking deck will be open after hours for specific events.

It is important to note that Bar members cannot transfer their parking privileges to friends, family members or employees. With the exception of Bar members, Bar staff, tenants and layperson committee members, all visitors to the parking deck must pay upon leaving. Subject to availability, non-member guests are offered parking at market rates.

Now that the parking deck is complete, I want to remind you about another exciting member benefit that is slated to be available Jan. 1, 2005—Georgia Casemaker. For those of you not familiar with Casemaker, it is an online law library that provides Bar members with free access to the legal research materials needed to serve your clients. With a powerful combination of state and federal materials, the State Bar's Casemaker library puts the

When Casemaker is made available to members, there will be a full-time Casemaker expert on staff to answer any questions members may have about using or accessing this unique member benefit.


information you need at your fingertips. As a State Bar of Georgia member, your use of Casemaker is unlimited, 24 hours a day. The cost is included in your annual dues, so there will be no other fees.

Like the other state bars, which make up the Casemaker Consortium

(Alabama, Colorado, Connecticut, Idaho, Indiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah and Vermont), the State Bar of Georgia seeks to provide members with the best tools and advantages

for the successful practice of law.

When Casemaker is made available to members, there will be a full-time Casemaker expert on staff to answer any questions members may have about using or accessing this unique member benefit. This staff member will conduct CLE training seminars on using Casemaker, as well as, upon request, travel to local bars to offer onsite training.

Your thoughts and suggestions are always welcome. My telephone numbers are (800) 334-6865 (toll free), (404) 527-8755 (direct dial), (404) 527-8717 (fax) and (770) 988-8080 (home). 

Georgia Casemaker:

An Overview on What Georgia Lawyers Can Expect

Although you've heard a lot about Georgia Casemaker, which will be available Jan. 1, 2005, the Board of Governors thought it would be a good idea to provide some background and an overview of what you can expect.

Casemaker, which was launched by the Ohio State Bar Association in 1998, is a unique online legal research tool with a powerful search engine providing access to a combination of state and federal materials. Casemaker includes historic to current cases, statutes, and regulations. In Ohio, for example, it also includes a comprehensive set of jury instructions. Review the list of cases to be included in Georgia's library at http://www.gabar.org/pdf/Casemaker_Library.pdf.


The Casemaker Consortium represents nearly 350,000 lawyers who are state bar association members in 19 states: Alabama, Colorado, Connecticut, Georgia, Idaho, Indiana, Maine,

Massachusetts, Mississippi, Nebraska, New Hampshire, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Texas, Utah and Vermont. A host of other states are currently considering membership in the Casemaker Consortium.

According to Denny Ramey, executive director of the Ohio State Bar Association, founding member of the Casemaker Consortium, "The Consortium is a win-win concept, because each member bar shares its library with all the other member bars. It levels the playing field for the 60 to 70 percent of lawyers who are sole practitioners or who practice in firms of five or fewer lawyers—many of whom cannot afford to subscribe to other online legal research services. Large firms also benefit, realizing a cost savings when they ask their lawyers to use Casemaker before turning to more expensive tools. The goal of Casemaker is to take care of 90 per-

cent of lawyers' research needs 90 percent of the time. In my opinion, no association—bar or otherwise—has provided members with a better benefit than Casemaker."

Online legal research tools are not new. Several companies—like West and Lexis—offer online legal research products. The problem is that those services are expensive, whereas Casemaker can meet many of our members' research requirements. And where lawyers need more than what Casemaker offers, they can start out in Casemaker—at no additional charge because it is included in their bar association membership—then move to pay-per-use services to expand their search.

For additional information about Georgia Casemaker, contact State Bar of Georgia Executive Director Cliff Brashier at (404) 527-8755 or (800) 334-6865 or e-mail cliff@gabar.org. 



"The YLD is comprised of lawyers from all over the state and beyond. We are here to provide services to and an opportunity for service to young lawyers from Ringgold to Bainbridge, from Toccoa to Brunswick, from Atlanta to Twin City."

The YLD — Serving Young Lawyers from Around the State

By Laurel Payne Landon

What a wonderfully diverse state we live in.

I grew up in Ringgold, Ga., located in the foothills of northwest Georgia between Dalton and Chattanooga. I lived there until I moved to Athens to attend college and law school.


Athens is such a vibrant place, combining a small-town feel with world-class culture. I lived in Savannah for two years while clerking. Is there any city more beautiful than Savannah in the springtime? Augusta is now my home, a city full of wonderful people and a special golf tournament that brings the world to our home every year.

I have never lived in Atlanta, but I have always considered it my home as well. When I was young, we would go to Atlanta for a Braves game or a shopping weekend. Many of my college and law school friends grew up in Atlanta and have returned there. I go there often now for work and other professional activities. When you enter the city limits, you can feel the energy and history of this great city.

The YLD is comprised of lawyers from all over the state and beyond. We are here to provide services and

an opportunity for service to young lawyers from Ringgold to Bainbridge, from Toccoa to Brunswick, from Atlanta to Twin City. This year, we are making a concerted effort to include those young lawyers outside of Atlanta in YLD committees, business meetings and other activities. Almost all YLD committee meetings will be accessible by conference call so that those who cannot attend the meeting in person can participate without losing an entire day of work. Business meetings are being held at different locations around the state so that most young lawyers can easily drive to the meetings. We are also planning other activities to take place outside of metro Atlanta.

In making these efforts, however, we cannot forget that the majority of young lawyers in the state live and practice in metro Atlanta. We must continue to provide quality programs and opportunities for service to Atlanta's young lawyers, who comprise a large percentage of the active membership of the YLD.

We have all heard of the "two Georgias"—Atlanta and everywhere else. I don't like that term. We live in one Georgia, and we have great citizens and great lawyers all around our state. Whether you live and practice in metro Atlanta or in some other city or small town, the YLD is relevant to you and your practice. Join a committee and attend a business meeting and find out how you can become involved. 

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A Look at the Law

By David J. Burge

Timber! – Falling Tree Liability in Georgia

Forests have always played a very important role in the history, economy and environment of Georgia. Forestry is and will remain an important industry in rural Georgia. Trees also play an important role in Georgia's cities: Savannah streets are framed by great live oaks and Atlanta is known as a city within a forest. Given the adage that "what goes up must come down" inevitably applies to trees, Georgia courts have increasingly had to address liability for casualties caused by falling trees. Under Georgia law, tort liability for falling trees depends upon the location of the tree and whether the landowner has, or should have, noticed that the tree was unsafe. An important distinction is drawn based on the location of the tree. A higher standard of care is required of a landowner in an urban area than is required of a rural landowner. Most Georgia property owners are probably unaware of the liability risks that are literally growing on their property. Georgia lawyers would be doing a valuable service to their clients by advising them of this potential area of liability.

TREES LOCATED ON RURAL LAND

Georgia trespass law has long respected the sanctity of property boundary lines.¹ For example, trespass can occur if any artificial object crosses a boundary line without the permission of the landowner.² The person responsible for the trespassing artificial object can be held liable for all property damage and personal injury caused by the wayward object, even if that person does not cross the property boundary himself.³ Trees, however, are naturally occurring objects and are considered part of the realty itself.⁴ As such, trees that fall over property lines are treated under very different rules of liability.

Georgia law regarding liability for falling trees from privately owned property was first articulated in *Cornett v. Agee*.⁵ The *Cornett* court explained that, traditionally, liability for falling trees in rural areas was governed by the common-law principle that a rural landowner is "under no affirmative duty to remedy conditions of purely natural origin," even if the conditions "may be highly dangerous or inconvenient" to adjoining landowners.⁶ This rule regarding owner liability for natural conditions on rural land was articulated by the Georgia Supreme Court in *Roberts v. Harrison*,⁷ in which a landowner was sued in nuisance for accumulations of water on his land that were claimed to have emitted "noxious and deleterious

gases injurious to the public health” of adjacent landowners. The *Roberts* court held that if the landowner had not contributed to the nuisance by his own act, the owner could not be held liable.⁸ Regardless of the ease with which the owner could have cured the nuisance, in comparison with the harm the ongoing nuisance caused, the owner was not liable for the nuisance because it arose from natural causes.⁹ According to the *Cornett* court, this “rule of nonliability for natural conditions” was, historically, a practical necessity in rural areas.¹⁰ The court noted that the rule was not applicable in urban situations, however, because of the heightened danger and consequences of such a nonliability policy in an urban setting.¹¹

Even for trees located in rural locations, the *Cornett* court recognized a growing trend away from blanket nonliability since *Roberts* was decided. Instead, if a rural

landowner has actual notice of a hazardous condition on the land, the landowner can become liable for damages arising from the condition.¹² Under current law, a rural landowner is not required to inspect the land to make sure that every tree is safe.¹³ However, if a rural landowner has actual notice that a particular tree poses a danger to a neighbor or to the public, the owner must take affirmative steps to remedy that hazard.¹⁴

TREES LOCATED IN AN URBAN AREA

General Liability of Urban Landowner

An urban landowner is held to a standard of reasonable care in inspecting trees that could fall over a property line to ensure the safety of others. This duty is limited to trees having “patent visible decay

and not the normal usual latent micro-non-visible accumulative decay.”¹⁵ In essence, the landowner is not burdened with a “duty to consistently and constantly check all trees for non-visible rot,” because “the manifestation of decay must be visible, apparent, and patent so that one could be aware that high winds might combine with visible rot and cause damage.”¹⁶ The urban landowner is liable for injuries caused by a falling tree only if the landowner knew or reasonably should have known that the tree was diseased, decayed, or in an otherwise dangerous condition.¹⁷ The only duty imposed upon an urban landowner with regard to knowledge of the health or condition of trees is that of a reasonable person. The landowner is not charged with the knowledge or understanding of an expert trained in the inspection, care, and maintenance of trees.¹⁸ Two cases illustrate this point.



A landowner that knows that a tree is decayed and may fall and damage the property of an adjoining landowner has a duty to eliminate the danger, even if the tree grew on and became part of the land by natural condition.

In *Cornett*, a tree located in a Fulton County residential neighborhood fell due to an apparent combination of high winds and the tree's visible rot.¹⁹ Before the tree fell, the owner had been notified of the tree's diseased condition and that the tree was visibly leaning toward the neighboring yard.²⁰ The court explained that when a tree is in an urban area and falls into the neighboring property, there "is no dispute as to the landowner's duty of reasonable care, including inspection to make sure that the tree is safe."²¹ A landowner that knows that a tree is decayed and may fall and damage the property of an adjoining landowner has a duty to eliminate the danger, even if the tree grew on and became part of the land by natural condition. Because the defendant in *Cornett* had notice of the hazardous condition of the tree that fell, and because the tree was located in an urban neighborhood, the defendant had breached his duty of reasonable care.

Similarly, in *Willis v. Maloof*,²² the plaintiff was severely injured when struck by a falling tree. The tree was located on the boundary dividing the land owned by the plaintiff and the defendant in a residential area in DeKalb County.²³ Because the tree was not solely located upon the defendant's property, the court first confronted the question of who was responsible for maintaining the tree. The court

held that adjoining landowners of a tree growing on a property boundary do not own the tree as tenants in common, but "each owns in severalty the part thereof which rests upon his side of the line, with an easement of support from the other."²⁴ As in the case of a party wall, the adjoining landowners have a joint duty to maintain the tree and take reasonable steps to guard against any hazardous condition the tree may pose. Next, the court determined whether the defendant had breached any duty to maintain the tree. The plaintiff's expert, who inspected the fallen tree, testified that several visible conditions on the tree indicated to him that the tree was diseased and posed a hazard.²⁵ However, the court held that the expert's testimony failed to establish that a non-expert should have reasonably known the tree was diseased.²⁶ The court explained that the defendant was not charged with the knowledge of the expert witness with regard to the health of trees.²⁷ Supporting the conclusion that a layperson would not have the expertise to recognize the diseased nature of the tree was the plaintiff's own testimony that he did not realize before the accident that the tree was dangerous or defective.²⁸ Other witnesses testified that the tree was bearing green leaves at the time it fell and did not appear to be diseased.²⁹ The plaintiff did not demonstrate that the defendant

was or should have been aware that the tree was hazardous, and therefore the defendant could not be held liable for the plaintiff's injury.

The *Willis* court did not address whether the defendant had an implied easement to cross the property line and render the jointly owned tree safe by the exercise of self help if the other owner failed to acknowledge their joint duty of maintenance. Similarly, a nervous neighbor is not entitled to enter adjoining property to remove an unsafe tree growing near the boundary that threatens to fall over the property line onto that neighbor's property.³⁰ Although Georgia will allow a neighbor to trim branches that actually cross over the property line,³¹ a self-help foray onto the adjoining property would likely be trespass. The nervous neighbor's sole right is to point out the threatening tree and the associated potential liability to the tree owner and, perhaps, to any applicable property owners association or municipal authority.

A related question is whether a property owner whose tree has fallen across a property line has the right or duty to enter a neighbor's property to remove the fallen tree. Although cases in other states suggest the fallen tree remains the property of the original owner with an implied right of retrieval,³² Georgia law has not yet addressed this issue, and the *Willis* case suggests Georgia courts may be reluctant to imply such an easement or license due to Georgia's longstanding respect for the sanctity of property lines.³³ Absent an agreement between the two neighbors, the right and responsibility to actually remove the fallen tree appears to stop at the common property

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line, with the liability for the cost of that removal likely to be resolved between the owners as provided in *Cornett* and its progeny.

Liability of Municipalities

Municipalities, like individual urban landowners, are under a duty to inspect and remove dangerous trees growing on public land if the municipality has, or should have, notice of the diseased nature of the tree. In two cases from the 1950s, *City of Bainbridge v. Cox*³⁴ and *City Council of Augusta v. Hammock*,³⁵ the Georgia Court of Appeals upheld jury verdicts against municipalities for injuries caused when visibly decayed trees growing in the public right of way fell on citizens using adjacent streets and sidewalks, citing the failure of both municipalities to exercise due care in inspecting its respective streets.³⁶ The Court of Appeals most clearly explained the theory of such municipal liability in *Carter v. Ga. Power Co.*³⁷ In *Carter*, the plaintiff was injured by a falling tree limb as he walked along a Macon city street.³⁸ The plaintiff sued the city of Macon for negligence, based on the assertion that the fallen limb had been dead for so long that it had detached from the tree and was resting on other limbs in the tree.³⁹ The plaintiff argued that the city, pursuant to the duty of a municipality to maintain the public roads free from defects, should have discovered the defect and danger posed by the tree through an exercise of reasonable care.⁴⁰

The court explained that the determination of the city's liability hinged on whether the municipality had actual notice of the danger

of falling limbs from the tree.⁴¹ Relying on *Cornett* and *Willis*, the court explained that "[j]ust as the owner of a tree has no duty to check it constantly for nonvisible rot, a city has no duty to check limbs overhanging a public road for nonvisible rot."⁴² The fact that a tree or limb may be leaning or overhanging in one direction is not alone sufficient as a basis for notice that the tree or limb is in a dangerous condition. The limb that fell on the plaintiff in *Carter* was actually decayed, but because undisputed eyewitness testimony established that the limb appeared normal, the court held the city free of liability.⁴³

Liability for Undeveloped or Uninhabited Urban Land

The duty of care established in *Cornett* applies to undeveloped land in its natural state that is located within an urban area such as metropolitan Atlanta, even if the land is located in an unincorporated section of a metropolitan county.⁴⁴ Without expressly so ruling, Georgia courts have also assumed that the *Cornett* duty applies to urban land on which the owner does not reside, and have assumed the duty applies even if the owner is physically unable to exercise reasonable care in tree inspection.⁴⁵

In *Wade v. Howard*,⁴⁶ the plaintiffs' children were killed when a tree fell across a road during a thunderstorm.⁴⁷ The tree was located on a parcel of land in unincorporated DeKalb County owned by an elderly woman who was very ill and had not lived on the property for 10 years.⁴⁸ Due to her poor physical condition, the landowner was unable to personally inspect the trees with reasonable care.⁴⁹ The landowner had never

received actual notice of a problem with the tree that fell, and the tree evidenced no signs of disease, so the landowner was not deemed to have constructive notice of a hazardous condition.⁵⁰ Consequently, the *Wade* court relied on the "three leading cases" of *Cornett*, *Willis* and *Carter*, to hold for the defendant landowner because the plaintiff failed to prove that the defendant was, or should have been, on notice of the hazardous tree.⁵¹

The application of *Cornett* to uninhabited and undeveloped land in urban areas is also demonstrated by *Wesleyan College v. Weber*.⁵² In *Wesleyan College*, a motorist was killed when a tree fell onto her car while she was driving on a Macon street next to land owned by the defendant, Wesleyan College.⁵³ The college owned a narrow strip of undeveloped land, containing a large number of trees, located across a highway from the college president's home.⁵⁴ The court reiterated the rule, established by *Cornett*, that a landowner has no duty to check all trees for non-visible rot. However, despite the fact that the land was undeveloped, a landowner does have a duty to inspect trees for the presence of "visible, apparent, and patent" decay.⁵⁵ Thus, a landowner is presumed to have constructive notice of what a reasonable inspection would reveal as to the condition of trees on his or her land. The trees in the general area where the tree fell were "blighted," and many were "dead, diseased, dying, or had fallen," and the court reasoned that a drive-by inspection of the trees would reveal to a reasonable landowner the hazardous condition of this stand of trees.⁵⁶ Such an obvious hazard would give notice to the landowner that an individ-

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ual inspection of each tree within the blighted stand was warranted. Based on this constructive notice of the hazard, and the defendant's failure to attempt to remedy the dangerous situation, the court held that Wesleyan College was liable for the death of the motorist, even though the college had no notice that this particular tree was diseased and unsafe.⁵⁷

Liability for Injuries to Invitees

The previous cases all addressed situations in which the falling tree crossed over a property boundary and struck someone in either an adjoining tract of land or in the public right of way. In these cases, the courts focused exclusively on the actual and constructive knowledge of the tree owner and did not consider the knowledge of the person struck by the tree. Georgia courts use a different analysis if the plaintiff has entered upon the property on which the tree is located and is struck by a tree growing in the interior of the property, one that considers the knowledge of the risk by both the landowner and the person struck.

Georgia courts have long held that the mere ownership of land will not cause one party to be liable for injuries sustained by another party while upon the land.⁵⁸ A landowner is not considered to be an insurer of those persons who enter upon the land, even when those persons are invitees.⁵⁹ Under well-established Georgia law, a landowner will only be liable to invitees, or other persons who enter upon the land, if the landowner has superior knowledge of a hazardous condition upon the land, while the invitee has no knowledge of the perilous

condition.⁶⁰ An invitee that has knowledge equal to that of the landowner with regard to the hazardous condition may not recover from the landowner if injured while on the land. If an invitee enters upon land while "as fully aware of the dangers and defects of the premises" as the landowner, the invitee has assumed the risk of injury, and the landowner will not be held liable upon injury to the invitee.⁶¹ Therefore, a landowner has no obligation to protect an invitee from dangers "which are known to [the invitee] or which are so obvious and apparent [that the invitee] may be reasonably expected to discover them."⁶²

Georgia courts have long held that the mere ownership of land will not cause one party to be liable for injuries sustained by another party while upon the land.

The law regarding landowner liability for injuries to invitees caused by falling trees is demonstrated in *Byrd v. Rivenbark*.⁶³ In *Byrd*, the plaintiff's decedent was fatally struck on the head by a tree limb located on the defendant's property.⁶⁴ The deceased was on the land as a business invitee, specifically for the purpose of removing the tree limb, which had detached during a storm.⁶⁵ The court explained that the hazardous condition of the branch was obviously known to the deceased,⁶⁶ because he had been invited onto the property for the express purpose of removing the branch. Therefore, the defendant's knowledge regarding the hazardous limb was not superior to the knowledge of the deceased, and the defendant was not liable for the


accident.⁶⁷ Although the risk was obvious in *Byrd*, if there is a dispute about the safety of a particular interior tree, presumably Georgia courts will look at the factors cited in *Cornett* and *Willis* to determine the standard of knowledge for both owners and visitors regarding unsafe interior trees.

The most recent case on falling tree liability, *Klein v. Weaver*,⁶⁸ also involved injuries suffered by an invitee who was struck by a diseased tree limb that fell from a tree located within the landowner's property.⁶⁹ The *Klein* court upheld summary judgment for the landowner, citing an absence of evidence in the record that the tree

limb had any outward appearance of disease or decay.⁷⁰ The court also held that the fact another limb had fallen from the same tree two weeks previously did not constitute notice of a dangerous condition in the absence of any evidence that the prior limb also was diseased or decayed.⁷¹ Finally, the court found the landowner's efforts to have limbs trimmed from the tree that were near a power line did not establish notice of a dangerous condition because the landowner was motivated by a different concern—fear of a power line accident.⁷²

CONCLUSION

Landowners in a rural area are subject to a less stringent standard of care than landowners in an urban area. A rural landowner is

not required to inspect the land to make sure that every tree is safe. When put on notice, however, that a particular tree is dangerous to a neighbor or to the public, a rural landowner must then take affirmative steps to remedy the hazard. An urban landowner, by contrast, must satisfy a standard of reasonable care in inspecting trees to ensure the safety of others. However, liability for urban landowners is limited to trees having "patent visible decay and not the normal usual latent micro-non-visible accumulative decay."⁷³ Finally, a landowner is liable to invitees for injuries from trees growing in the interior of the land if the landowner had superior knowledge to that of the invitee regarding the hazardous nature of those interior trees. 



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Endnotes

1. "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." O.C.G.A. § 51-9-1 (2000 & Supp. 2003).
2. See, e.g., *Hall v. Browning*, 195 Ga. 423, 24 S.E.2d 392 (1943) (firing a bullet across boundary line constitutes trespass); *Ledbetter Bros. Inc. v. Holcomb*, 108 Ga. App. 282, 132 S.E.2d 805 (1963) (a quarry operation that throws rocks, smoke and other debris across property line liable for trespass); *Belt v. Western Union Tel. Co.*, 63 Ga. App. 469, 11 S.E.2d 509 (1940) (telephone line crossing property line without consent constitutes trespass).
3. *Id.* See also *Reinertsen v. Porter*, 242 Ga. 624, 250 S.E.2d 475 (1978) (owner of personalty that inadvertently lands on the property of another has no implied license to retrieve that property without the landowner's permission, whereas the land owner has the right to remove the wayward object without fear of liability for conversion as long as it exercises reasonable care in removing the object).
4. O.C.G.A. § 44-1-2 (1991 & Supp. 2003).
5. *Cornett v. Agee*, 143 Ga. App. 55, 237 S.E.2d 522 (1977).
6. *Id.* at 55, 237 S.E.2d at 523.
7. *Roberts v. Harrison*, 101 Ga. 773, 28 S.E. 995 (1897).
8. *Id.* at 775, 28 S.E. at 996.
9. *Id.*
10. *Cornett*, 143 Ga. App. at 55, 237 S.E.2d at 523.
11. *Id.* at 56, 237 S.E.2d at 523.
12. *Id.*
13. *Id.* at 55, 237 S.E.2d at 523.
14. *Id.* at 56, 237 S.E.2d at 523.
15. *Id.* at 57, 237 S.E.2d at 524.
16. *Id.*
17. *Id.*
18. *Id.* See also *infra* note 27.
19. *Id.* at 55, 237 S.E.2d at 523.
20. *Id.*
21. *Id.* at 56, 237 S.E.2d at 523.
22. *Willis v. Maloof*, 184 Ga. App. 349, 361 S.E.2d 512 (1987).
23. *Id.* at 349, 361 S.E.2d at 512.
24. *Id.* at 349, 361 S.E.2d at 513.
25. *Id.* at 350, 361 S.E.2d at 513.
26. *Id.* at 350-51, 361 S.E.2d at 513-14.
27. *Id.* at 350-51, 361 S.E.2d at 514.
28. *Id.* at 350, 361 S.E.2d at 513.
29. *Id.* at 351, 361 S.E.2d at 514.
30. See DANIEL F. HINKEL, PINDAR'S GA. REAL ESTATE LAW § 9-21 (6th ed. 2004).
31. *Id.*
32. *Id.*
33. See *supra* note 1.
34. *City of Bainbridge v. Cox*, 83 Ga. App. 453, 64 S.E.2d 192 (1951).
35. *City Council of Augusta v. Hammock*, 85 Ga. App. 554, 69 S.E.2d 834 (1952).
36. *City of Bainbridge*, 83 Ga. App. at 458, 64 S.E.2d at 195; *City Council of Augusta*, 85 Ga. App. at 561, 69 S.E.2d at 839.
37. *Carter v. Georgia Power Co.*, 204 Ga. App. 77, 418 S.E.2d 379 (1992).
38. *Id.* at 77, 418 S.E.2d at 379.
39. *Id.* at 77, 418 S.E.2d at 380.
40. *Id.*
41. *Id.* at 77-78, 418 S.E.2d at 380.
42. *Id.* at 78, 418 S.E.2d at 380.
43. *Id.*
44. *Wade v. Howard*, 232 Ga. App. 55, 499 S.E.2d 652 (1998).
45. *Id.*
46. *Id.*
47. *Id.* at 56, 499 S.E.2d at 653.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 59, 499 S.E.2d at 655.
52. *Wesleyan Collge v. Weber*, 238 Ga. App. 90, 517 S.E.2d 813 (1999).
53. *Id.* at 90, 517 S.E.2d at 815.
54. *Id.*
55. *Id.* at 92, 517 S.E.2d at 816.
56. *Id.* at 94, 517 S.E.2d at 817-818.
57. *Id.* at 95, 517 S.E.2d at 818.
58. See, e.g., *Harris v. Star Servs., Co.*, 170 Ga. App. 816, 318 S.E.2d 239 (1984); *Amear v. Hall*, 164 Ga. App. 163(2), 296 S.E.2d 611 (1982).
59. *Id.*
60. *Id.*
61. *Harris*, 170 Ga. App. at 817, 318 S.E.2d at 240.
62. *Amear*, 164 Ga. App. at 169, 296 S.E.2d at 616.
63. *Byrd v. Rivenbark*, 183 Ga. App. 564, 359 S.E.2d 433 (1987).
64. *Id.* at 564, 359 S.E.2d at 434.
65. *Id.*
66. *Id.* at 565, 359 S.E.2d at 434.
67. *Id.* at 566, 359 S.E.2d at 435.
68. *Klein v. Weaver*, 265 Ga. App. 390, 593 S.E.2d 913 (2004).
69. *Id.* at 391, 593 S.E.2d at 914.
70. *Id.* at 392, 593 S.E.2d at 914.
71. *Id.* at 392, 593 S.E.2d at 915.
72. *Id.*
73. See also *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 580 S.E.2d 587 (2003) (recent reiteration of *Cornett* and *Wade* holdings).

A Look at the Law

By John K. Larkins Jr.

Considering the Consideration Approach to Classifying Georgia Contracts In Partial Restraint of Trade

In *Rakestraw v. Lanier*,¹ decided in 1898, the Georgia Supreme Court complained about the law governing contracts made in restraint of trade:

We cannot, within reasonable limits, undertake to reconcile conflicting opinions in treating of contracts in restraint of trade, nor cite the authorities which bear upon the different constituent elements which render such contracts valid, or the want of which make them void, for the reason that the first are irreconcilable, and the latter inharmonious.²

If only they could see us now. Over a century later, Georgia law governing covenants in partial restraint of trade (including non-competition, non-disclosure, non-solicitation, and non-piracy covenants—collectively referred to herein as

“Covenants”)³ is an ever-changing labyrinth from which few agreements escape.⁴ Even a sophisticated commercial agreement, negotiated at arm’s length by parties represented by counsel, may be deemed by a court to be “analogous” to an employment contract and thereby subjected to the strictest of scrutiny.

But the stage has perhaps been set for a modest but important change. Two recent decisions of the Georgia Court of Appeals have discarded the traditional “type of contract” method of categorizing Covenants for review, relying instead on an analysis based on the relative bargaining power of the parties and the existence of consideration for the Covenant. This article suggests that the “consideration” prong of this new test should be jettisoned,



and that “bargaining power” should be the sole criterion for determining which level of scrutiny a court uses to analyze a Covenant.

THE TRADITIONAL CLASSIFICATIONS OF AGREEMENTS CONTAINING COVENANTS

Under current Georgia law, the threshold task for a court considering the enforceability of a Covenant is to examine the nature of the agreement containing the Covenant. Based on the type of contract, the court then determines whether the Covenant receives strict, mid-level or low-level judicial scrutiny.⁵ Traditionally, Covenants ancillary to employment contracts receive strict scrutiny, those ancillary to professional partnership agreements receive mid-level scrutiny, and those ancillary to the sale of a business receive lower scrutiny.⁶

Significant distinctions exist among the levels of scrutiny that dramatically affect the survival of the Covenant at issue. Although Covenants of *all* types are theoretically evaluated under a “rule of reason,”⁷ a Covenant subject to strict review is subject to numerous sub-rules defining reasonableness, and the violation of any one of these sub-rules will toll the death knell for the Covenant (and possibly others associated with it). Perhaps most importantly, a Covenant receiving strict review cannot be “blue-penciled” and will fail for even the most minor transgression, whereas a Covenant receiving low-level review can be judicially modified to make it enforceable, if necessary.⁸

Traditionally, Covenants ancillary to employment contracts receive strict scrutiny, those ancillary to professional partnership agreements receive mid-level scrutiny, and those ancillary to the sale of a business receive lower scrutiny.

Although strict scrutiny is typically and nominally associated with employment contracts, as a practical matter it is the default category; if the contract is not a professional partnership agreement or a contract for the sale of a business, it will be deemed “analogous” to an employment contract and thus subject to strict scrutiny.⁹ Indeed, *Richard P. Rita Personnel Services International, Inc. v. Kot*¹⁰—the case in which the Georgia Supreme Court adopted the “no blue-pencil” rule on the basis of the “in terrorem effect on employees ... and on competitors who fear legal complications if they employ a covenantor”—involved a *franchise* agreement, not an employment contract.

Consequently, even commercial transactions between sophisticated parties bargaining at arm’s length have been deemed to be analogous to employment contracts and have fallen prey to the strict scrutiny rules. For example, in *Amstell, Inc. v. Bunge Corp.*,¹¹ a non-competition covenant contained within an agreement between two corporations regarding the distribution of a product was considered under strict scrutiny/no-blue-pencil principles, because the covenant was “ancillary to an independent contractor manufacturing and distributorship, which is treated as an employment rather than a sales contract.”¹² In some cases, the court has even engaged in a two-step anal-

ogy to arrive at strict scrutiny, holding that an agreement was like a franchise agreement and therefore like an employment agreement.¹³

A GLIMMER OF REFORM

There are indications that the Georgia Court of Appeals is seeking a new paradigm. Decided in 2001, *Swartz Investments, LLC v. Vion Pharmaceuticals, Inc.*¹⁴ involved an agreement by Swartz to raise financing for Vion. Vion agreed to a “non-circumvention provision” prohibiting it for a period of five years from contacting or negotiating with named investors regarding an investment in Vion or another company without Swartz’s permission. The covenant called for the payment of a commission to Swartz if investments were obtained in violation of the covenant.¹⁵

Finding that the provision was a covenant in partial restraint of trade, the *Swartz* court proceeded to determine the proper category of scrutiny. After identifying the traditional categories, the court made an extraordinary statement:

Of course, not every contract falls directly into one of these three categories. *Nor do we believe that the type of contract should automatically determine the applicable level of scrutiny.*¹⁶

Examining the purposes under-

In *Swartz* and *West Coast Cambridge*, the Court of Appeals took a step in the right direction by eschewing the “type of contract” approach to analyzing Covenants.

lying the varying levels of scrutiny, the court then found that the analysis is governed by the “relative bargaining power of the parties” and “whether there is independent consideration for the restrictive covenant itself.”¹⁷ The court ruled that the two corporations had equal bargaining power (the parties were sophisticated corporations and advised by counsel), but that there was “no consideration for the covenant at issue,” and therefore applied strict scrutiny.¹⁸ Thus, the absence of independent consideration for the covenant was sufficient to trigger strict scrutiny, despite the parties’ equal bargaining power.¹⁹

In 2003, the Court of Appeals followed the *Swartz* approach in *West Coast Cambridge, Inc. v. Rice*,²⁰ in which the court considered a non-competition provision in a convoluted agreement involving a physician, a corporation and a partnership. Citing *Swartz*, the court noted, “Recently, we found that the level of scrutiny is not directly tied to the type of contract under consideration.”²¹ After applying the *Swartz* bargaining power/consideration analysis, the court announced that it was “unpersuaded” that the physician lacked bargaining power and concluded that he had received “significant monetary consideration” as a passive investor.²² Based on these findings, the court held that the transaction at issue was comparable to the sale of a business and applied low-level scrutiny.²³

Swartz and *West Coast Cambridge* are certainly not unique in their use of consideration and/or bargaining

power as a rationale to justify the level of scrutiny applicable to a Covenant.²⁴ Covenants in contracts for the sale of a business have been distinguished from those in employment contracts, in part, on the grounds that the seller of a business receives consideration for the Covenant in the form of the good will portion of the purchase price, while the terminated employee supposedly receives no additional remuneration for post-termination restrictions.²⁵ Additionally, Covenants in professional partnership agreements have been scrutinized less closely than those in employment agreements on the basis that each of the partners in the partnership is reciprocally bound by the Covenant, thus demonstrating a common consideration flowing to all.²⁶

In *White v. Fletcher/Mayo/Associates, Inc.*,²⁷ the Georgia Supreme Court focused on relative bargaining power as the primary factor in determining the appropriate level of scrutiny for analyzing covenants. The issue in *White* was how to treat non-competition covenants that were simultaneously ancillary to both an employment contract and the sale of a business. The court could not determine whether the consideration for the covenants flowed from the profit from the sale or from White’s continued employment, so it turned its attention to the parties’ relative bargaining power:

[W]e hold today that where a judge is asked to determine the enforceability of a noncompetition covenant which the buyer of a business contends was given ancillary to the covenan-

tor’s relinquishment of his interest in the business to the buyer, and not solely in return for the covenantor’s continued employment, the judge must determine the covenantor’s status. If it appears that his bargaining capacity was not significantly greater than that of a mere employee, then the covenant should be treated like a covenant ancillary to an employment contract....²⁸

Likewise, in *Watson v. Waffle House, Inc.*,²⁹ which involved a non-competition covenant contained in a lease, the Georgia Supreme Court identified bargaining power as the determining factor in analyzing the covenant. In ruling that the covenant should receive strict scrutiny, the court posited that the lease arrangement was most closely analogous to an employment agreement because of the imbalance of bargaining power between the parties.³⁰ The *Watson* court did not even consider whether there was independent consideration for the covenant.

The Supreme Court clearly indicated in *White* and *Watson* that bargaining power is the primary factor in the determination or rationale for the appropriate level of scrutiny.³¹ But should it be the sole criterion?

BARGAINING POWER AS THE SOLE DISPOSITIVE CRITERION

In *Swartz* and *West Coast Cambridge*, the Court of Appeals took

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a step in the right direction by eschewing the “type of contract” approach to analyzing Covenants. As evidenced by the Supreme Court’s focus on bargaining power in *White and Watson*, however, perhaps the “consideration” prong of the analysis should be abandoned, leaving only an examination of the balance of bargaining power between the contracting parties as determinative of the level of scrutiny.

The idea, expressed in *Swartz* and adopted in *West Coast Cambridge*, that an analysis of the ultimate legality of a covenant in restraint of trade may depend on the existence of “independent consideration” for the promise has no mooring in the law.³² Only slight consideration is required to support a valid contract, and a Covenant ancillary to a valid agreement is supported by the same consideration that necessarily must exist in the underlying agreement.³³ As a practical matter, unless separate, “independent” consideration is identified in the contract itself, it is impossible for a court to truly parcel out and accurately weigh the consideration of an agreement to find out what portion is associated with the Covenant, much less to determine whether that part is “substantial.” As stated in *Rakestraw v. Lanier*, “The exact value of consideration the court ought not, and, in the nature of things cannot undertake to measure.”³⁴ For example, who knows if the investment company in *Swartz* would have created a different financial arrangement, or not done the deal at all, without the client’s promise not to circumvent their efforts? And it is no answer to say that consideration is *presumed* from the nature of the contract (for example, in a contract for the sale

of a business), for then the analysis is circular (*i.e.*, consideration, not the type of contract, is dispositive, but consideration is determined by the type of contract).

Finally, using the absence of identifiable “independent consideration” as a criterion for determining the level of scrutiny is poor policy, for it frustrates reasonable commercial expectations of parties who engage in true arm’s-length negotiations to arrive at a mutually agree-

windfall for one party, perhaps a disaster for the other, and certainly a frustration of their contractual intent.³⁶ Adoption of the bargaining power approach would change a largely unpredictable commercial environment to one in which the parties to a negotiated agreement could be assured that if their contract were found to be unreasonable because it tripped one of Georgia’s technical rules, or simply because a court considered it

Adopting bargaining power as the sole criterion for determining the level of scrutiny would effect a small but important reform in Georgia law.

able contract.³⁵ This can be seen in *Swartz*, where two sophisticated corporations with equal bargaining power negotiated for a contract in an investment transaction with enormous financial consequences, only to have a significant part of it die under a strict scrutiny analysis merely because there was no discernable “independent consideration” for the Covenant.

Adopting bargaining power as the sole criterion for determining the level of scrutiny would effect a small but important reform in Georgia law. Primarily, where the contract is in fact the product of true bargaining by parties on equal footing—and thus not an adhesion contract—the parties’ contractual expectations would not be frustrated by the unforgiving technicalities of strict scrutiny. Under current Georgia law, if two sophisticated parties freely negotiate a business agreement containing a Covenant that is subject to strict scrutiny, the Covenant will fail utterly if a court finds it to be unreasonable even in one minor detail, probably resulting in a

unreasonable in some respect, it could be judicially modified and the parties’ general contractual intention enforced.

Under a pure bargaining power approach, even some employment contracts may be subject to low-level scrutiny. And why not? If a public company enters into an agreement with its new CEO that is the product of negotiation, where both sides are represented by counsel, that contract should not be subject to the same strict scrutiny applied to the typical adhesion employment contract.³⁷

There also would be no use for the mysterious “mid-level” scrutiny. This concept was the product of the “type of contract” approach, where a professional partnership did not seem analogous to either an employment contract or a sale of business. Thus, its *raison d’être* would vanish under a method of analysis focusing only on bargaining power.³⁸ Any characteristics unique to professionals or partnerships would simply be accounted for by the court in its basic “reasonableness” analysis.

Determining the level of scrutiny solely based on bargaining power is also perfectly consistent with the policy underlying the "no-blue-pencil" doctrine. The doctrine was adopted to intimidate or punish employers who might be tempted to fashion onerous Covenants, knowing that the few Covenants that made it to court would simply be pared down and enforced.³⁹ But this rationale obviously does not apply where the parties have relatively equal bargaining power and thus negotiate the terms of the restriction in a commercial agreement. Moreover, even where blue-penciling is allowed, Georgia law establishes that the court strictly limits the covenant to what has been shown by clear and convincing evidence to be *necessary*, instead of what is merely reasonable, thus imposing a brake on a party's overreaching.⁴⁰

Adopting bargaining power as the sole criterion for classifying covenants would result in more agreements being analyzed under low-level scrutiny, but it would not involve any disruption in the basic principles of current law. Indeed, as shown above, the "bargaining power" analysis was largely the approach adopted by the Supreme Court in *White*. As the Court of Appeals has already held in *Swartz*, the mere type of contract would no longer be determinative of the level of scrutiny. The courts could reasonably adopt a rebuttable presumption that employment contracts are not the product of bargaining, and the opposite presumption for contracts for the sale of a business and contracts between persons entering into business associations. Such rebuttable presumptions would recognize that employment contracts typically involve parties of

unequal bargaining power, whereas contracts for the sale of business and agreements among persons forming a business association are usually made by parties having relatively equal bargaining power.⁴⁰ Agreements not plainly falling into these categories, however, would no longer be "analogized" based on a resemblance derived from an analysis of consideration or other factors.

Adoption of a bargaining power test would not mean that parties are free to craft a Covenant beyond judicial review—once the appropriate level of scrutiny is determined, the customary rules of "reasonableness," informed by public policy, would apply in assessing the enforceability of the Covenant. Under this model, the nature of the consideration reflected in the agreement would, at best, merely be evidence of the parties' bargaining power.

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CONCLUSION

The recent decisions of the Court of Appeals in essence go halfway towards a small but potentially meaningful reform in Georgia's Covenant law. Determining the level of scrutiny under which Covenants are analyzed by examining only the parties' bargaining power would cure some complications and uncertainties in current law, as well as strike an appropriate balance between the freedom of parties to freely negotiate their contracts and the public policy against covenants unreasonably restraining trade. 

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Endnotes

- 104 Ga. 188, 30 S.E. 735 (1898).
- Id.* at 192, 30 S.E. at 737.
- See J. Larkins, *GEORGIA CONTRACTS: LAW & LITIGATION*, Ch. 8 (Thomson West 2002) (hereinafter, *Georgia Contracts*).
- "There is no area of Georgia law of more intricate subtlety than the law governing covenants not to compete.... Despite decades of appellate decisions, covenants not to compete continue to be struck down with great frequency, and the rules continue to develop." *Georgia Contracts*, *supra* note 2, at § 8-2.
- White v. Fletcher/Mayo/Assoc., Inc.*, 251 Ga. 203, 303 S.E.2d 746 (1983); *Advance Technology Consultants, Inc. v. Roadtrac, LLC*, 250 Ga. App. 317, 551 S.E.2d 735 (2001).
- For a general discussion of the categories, see, e.g., *Habif, Arogeti & Wynne, P.C. v. Baggett*, 231 Ga. App. 289, 498 S.E.2d 346 (1998); *Georgia Contracts*, *supra* note 2, at § 8.3.
- See, e.g., *Durham v. Stand-By Labor*

- of Ga., Inc., 230 Ga. 558, 198 S.E.2d 145 (1973).
- Whether a covenant under mid-level scrutiny can be blue-penciled is undecided. *Habif, Arogeti & Wynne, P.C.*, 231 Ga. App. at 291, 498 S.E.2d at 350; *but see* *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 246 Ga. App. 398, 539 S.E.2d 216 (2000) (striking covenant subject to mid-level scrutiny without addressing blue pencil issue). There seems to be a tendency to conflate the level of scrutiny with the blue pencil rules. See *Hicks v. Doors By Mike, Inc.*, 260 Ga. App. 407, 579 S.E.2d 833 (2003) (quoting blue pencil rule during scrutiny phase of review).
- See generally *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95, 259 S.E.2d 47 (1979).
- 229 Ga. 314, 317, 191 S.E.2d 79, 81 (1972).
- 213 Ga. App. 115, 443 S.E.2d 706 (1994); see also *Advance Technology Consultants, Inc. v. Roadtrac, LLC*, 250 Ga. App. 317, 551 S.E.2d 735 (2001) (agreement between manufacturer and distributor); *Northside Hospital, Inc. v. McCord*, 245 Ga. App. 245, 537 S.E.2d 697 (2000) (covenant in sublease); *PCS Jt. Venture Ltd. v. Davis*, 219 Ga. App. 519, 465 S.E.2d 713 (1995) (exclusive distributor agreement between fertilizer manufacturer and customer).
- Amstell*, 213 Ga. App. at 116, 443 S.E.2d at 707.
- Watson v. Waffle House, Inc.*, 253 Ga. 671, 324 S.E.2d 175 (1985); *Owens v. RMA Sales, Inc.*, 183 Ga. App. 340, 358 S.E.2d 897 (1987).
- 252 Ga. App. 365, 556 S.E.2d 460 (2001).
- Id.* at 366, 556 S.E.2d at 461.
- Id.* at 369, 556 S.E.2d at 463 (emphasis added).
- Id.* The Swartz court cited *W.R. Grace & Co. v. Mouyal*, 262 Ga. 484, 422 S.E.2d 529 (1992), for its reliance on the consideration factor. An examination of *W.R. Grace* reveals, however, that the Supreme Court merely quoted *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735 (1898), for the proposition that a valid covenant must be supported by consideration, not that the covenant had to be supported by independent consideration.
- The Court of Appeals' reference here and in other places to no con-
- sideration would seem to be a mistake, since the covenant would have been entirely unenforceable if it was not supported by any consideration. Evidently, what the court was referring to was the absence of independent consideration for the covenant.
- See also *Herndon v. Waller*, 241 Ga. App. 494, 525 S.E.2d 159 (1999); *Northside Hosp. Inc. v. McCord*, 245 Ga. App. 245, 537 S.E.2d 697 (2000).
- 262 Ga. App. 106, 584 S.E.2d 696 (2003).
- Id.* at 108, 584 S.E.2d at 698 (citing *Swartz*, 252 Ga. App. at 368-69, 556 S.E.2d at 463).
- West Coast Cambridge, Inc.*, 262 Ga. App. at 109-10, 584 S.E.2d at 699. Note that the term "comparable" is indicative of the "analogy" methodology.
- Id.* at 110, 584 S.E.2d at 699.
- Rash v. Toccoa Clinic Med. Ass'n*, 253 Ga. 322, 320 S.E.2d 170 (1984); *White v. Fletcher/Mayo/Assoc., Inc.*, 251 Ga. 203, 303 S.E.2d 746 (1983). Note, however, that *White* went on to hold that bargaining power was dispositive.
- See, e.g., *Rakestraw v. Lanier*, 104 Ga. 188, 30 S.E. 735 (1898). The effect on the person restrained appears to be the primary "public policy" concern.
- Rash v. Toccoa Clinic Med. Ass'n*, 253 Ga. at 325, 320 S.E.2d at 173.
- 251 Ga. 203, 303 S.E.2d 746 (1983).
- Id.* at 208, 303 S.E.2d at 751; *but cf.* *Lyle v. Memar*, 259 Ga. 209, 378 S.E.2d 465 (1989) (possibly citing different rule, but not overruling or citing *White*).
- 253 Ga. 671, 324 S.E.2d 175 (1985).
- Id.* at 672, 324 S.E.2d at 177 ("The rationale behind the distinction in analyzing covenants not to compete is that a contract of employment inherently involves parties of unequal bargaining power to the extent that the result is often a contract of adhesion. On the other hand, a contract for the sale of a business interest is far more likely to have been entered into by parties on equal footing.").
- See also *Johnstone v. Tom's Amusement Co.*, 228 Ga. App. 296, 491 S.E.2d 394 (1997) ("The focus in such cases is on the relative bargaining power of the parties."); *Kem Mfg. Corp. v. Sant*, 182 Ga. App. 135, 355 S.E.2d 437 (1987)

- ("In order to classify an agreement containing a non-competition covenant, we consider certain factors to be determinative. Of these factors, we give primary importance to the relative bargaining power of the parties.").
32. See S. Harbour, "Restrictions on Post-Employment Competition by an Executive Under Georgia Law," 54 Mercer L. Rev. 1133, 1176 (2003). This article severely criticizes *Swartz*, *Northside Hospital*, and *Herndon v. Waller*: "In these three cases, the court could not have meant that the noncompete covenant was not supported by consideration. Lack of consideration means the covenant is not enforceable at all, not that it is subject to a higher level of scrutiny." As indicated, *supra* note 18, the "no consideration" language in *Swartz* in fact seems to refer to the absence of separate consideration for the covenant.
 33. See, e.g., *Mike Bajalia, Inc. v. Pike*, 226 Ga. 131, 172 S.E.2d 676 (1970). Indeed, the contention that a valid covenant must be supported by independent consideration was expressly rejected in *Rider v. Orkin Exterminating Co.*, 224 Ga. 145, 160 S.E.2d 381 (1968).
 34. *Rakestraw v. Lanier*, 104 Ga. 188, 196, 30 S.E. 735, 739 (1898).
 35. Arguably, the concept of consideration underlying *Swartz* and similar cases is flawed, for it seems to contemplate the discarded "injury or benefit" formula. In 1981, Georgia adopted the "bargain" theory of consideration. O.C.G.A. §§ 13-3-42; 13-3-43; see also *Georgia Contracts*, *supra* note 2, at § 4-1.
 36. This is true notwithstanding that the parties also agreed on a severability clause. See, e.g., *McNease v. Nat'l Motor Club of Am., Inc.*, 238 Ga. 53, 231 S.E.2d 58 (1976).
 37. See Harbour, *supra* note 33 (suggesting that such agreements could be subject to mid-level scrutiny).
 38. "Middle scrutiny," as a term, originated with the Court of Appeals in *Habif, Arogeti & Wynn* as an explanation for the Supreme Court's holding in *Rash*. It is now a settled, if somewhat vague, principle in Court of Appeals precedent, however.
 39. *Richard P. Rita Pers. Svcs. Int'l, Inc. v. Kot*, 229 Ga. 314, 317, 191 S.E.2d 79, 81 (1972).
 40. *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95, 259 S.E.2d 47 (1979).
 41. Such a presumption may be important because so many Covenants are the subject of TRO proceedings. Another practical consideration is the fact that many contracts will be drafted to include statements regarding bargaining power. Of course, under the bargaining power/consideration test, contracts may contain recitations concerning independent consideration as well. In either case, the rule seems to be that such recitations are not necessarily dispositive. See *Griffin v. Vandegriff*, 205 Ga. 288, 53 S.E.2d 345 (1949) (recitals must be supported by evidence); *ALW Mktg. Corp. v. Hill*, 205 Ga. App. 194, 422 S.E.2d 9 (1991) (recital that covenant is reasonable not binding); but see *Rash v. Toccoa Clinic Med. Ass'n*, 253 Ga. 322, 320 S.E.2d 170 (1984) (noting that parties agreed covenant was reasonable and its breach would cause harm).

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The 2003 Amendment to the Georgia Class Action Statute: A New Day for Georgia Class Actions?

By Corliss Lawson and Paul Kim

In 2003, the Georgia General Assembly substantially revised the Georgia class action statute for the first time since its enactment in 1966.¹ As a result of that amendment, O.C.G.A. § 9-11-23, which applies to all Georgia class actions filed on or after July 1, 2003, is now nearly identical to the federal class action statute, Fed. R. Civ. P. 23 (2004).²

By its amendment of the statute, the Georgia General Assembly resolved an important issue concerning the scope of Georgia class actions, and opened the door to the possibility of national class action lawsuits being filed in Georgia state courts. The amendment, as well as other Georgia law, however, contains significant constraints that may limit the class actions that are actually brought in Georgia state courts. Moreover, while the amendment to the statute may lead to greater judicial efficiency, oversight and predictability, it may also

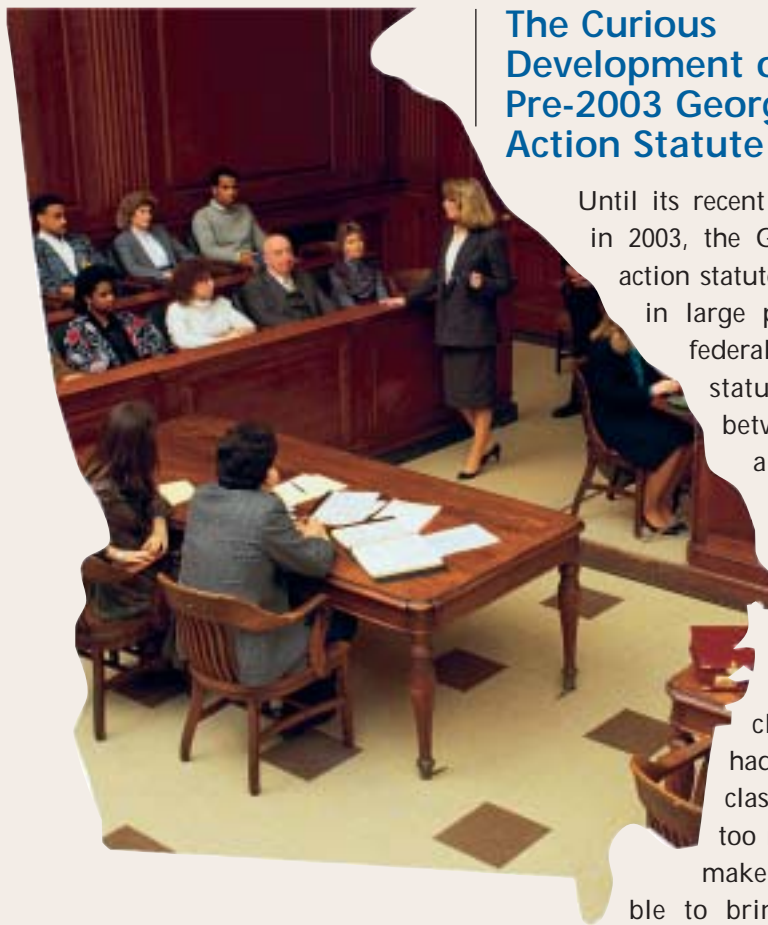
incorporate many of the same difficulties litigants currently face in the federal courts. Thus, while the revision of O.C.G.A. § 9-11-23 constitutes a significant change to the Georgia class action landscape, the ultimate effects and results remain to be seen.

The Curious Development of the Pre-2003 Georgia Class Action Statute

Until its recent amendment in 2003, the Georgia class action statute was based, in large part, on the federal class action statute in effect between 1938 and 1966. Under that federal class action statute, as a threshold matter, a class action had to involve a class of persons too numerous to make it practicable to bring them all before the court.³

Assuming such “numerosity,” the 1938 federal class action rule recognized three types of class actions depending upon the “abstract nature of the rights involved:”

(1) “true” class actions involving joint/common/undivided



rights or secondary rights where the owner of a primary right refused to enforce that right;

(2) "hybrid" class actions involving "several" rights relating to specific property, and

(3) "spurious" class actions involving "several" rights but common question(s) and common remed(ies).⁴

As "spurious" class actions do not involve joint rights or rights relating to a specific property, the former Georgia class action statute presumed that potential members of a "spurious" class lacked any "jural relationship" with one another, thereby requiring that a person intervene or "opt-in" to a class action and become an actual party in order for that person to be bound.⁵ Thus, for "spurious" class actions, the judgment would be "conclusive only upon the appearing parties."⁶

Because of the limited scope and effect of "spurious" class actions, the 1938 federal class action statute was frequently criticized for failing to achieve the hoped-for efficiency goals of the class action form. Further, an unexpected result of the "spurious" class action was the creation of a "one-way" system that permitted absent members of a plaintiff class to enter an action after a determination of liability if favorable, yet remain outside the action if the determination was adverse.⁷ As a result of these and other criticisms, Congress amended Fed. R. Civ. P. 23 in 1966 to expressly permit class actions where "common questions of law or fact predominate."⁸ Moreover, through the creation of a notice and opt-out procedure, the 1966 federal rule made clear that absent class members who failed to affirmatively act upon receiving sufficient and

adequate notice would be considered part of the class and bound by the resolution of that action. In 1998, the federal class action statute was further amended to provide discretionary interlocutory appeals shortly after a trial court's certification order.⁹

During the same year (1966) that Congress revised the federal class action statute, the Georgia General Assembly enacted the Georgia Civil Practice Act and adopted much of the Federal Rules of Civil Procedure as they existed at the time.¹⁰ Notably, however, the General Assembly did not adopt the 1966 version of the federal class action statute. Instead, the Georgia General Assembly chose both: (a) to reach back in time and adopt the federal class action statute that had been in effect between 1938 and 1966; and (b) to exclude "spurious" class actions altogether.

As one commentator opined, the Georgia General Assembly, apparently "desiring to limit class actions" in Georgia, adopted a version of the 1938 federal class action statute which "excis[ed] the . . . most commonly used class from the statute, the class based on 'common questions of law o[r] fact.'"¹¹ In so doing, however, the Georgia General Assembly opened the door to many of the same problems with which the federal courts had previously struggled between 1938 and 1966.

In 1972, the Georgia Supreme Court in *Georgia Investment Co. v. Norman*¹² corrected one of the "oversights" of the Georgia class action statute by holding that the statute included class actions involving common questions of law or fact, notwithstanding the apparent absence of "spurious" class actions in the statutory text.

Despite the resolution of this issue, however, the Norman decision left open the question of whether this new type of class action under Georgia law constituted a "spurious" class action, thereby requiring a party to intervene in order to be bound, or constituted the more modern "common question of law or fact" class action which, assuming proper and sufficient notice, could bind absent class members if they failed to act upon receipt of that notice.

Subsequent Georgia cases failed to clearly answer this important question. On the one hand, some lower Georgia courts construed the Norman decision as creating a class action, analogous to a Fed. R. Civ. P. 23 action, that was binding on all class members without requiring them to formally intervene.¹³ On the other hand, a number of Georgia appellate courts, including the Georgia Supreme Court, suggested that the Norman decision created a "spurious" class action, thereby requiring a party to intervene in order to be bound by any judgment.¹⁴

The Amendment to the Georgia Class Action Statute and its Implications

Through its adoption of the text of the federal class action statute of 2003, the new Georgia class action statute definitively resolved the issue of the nature and the scope of class actions under Georgia law. In the new Georgia statute, both the modern "common question of law or fact" class action and the notice and "opt-out" procedure are expressly adopted, thereby implicitly rejecting the "spurious" class

In addition to its potential effects on nationwide class actions being filed in Georgia state courts, the amendment may also have salutary effects in increasing judicial efficiency, consistency and predictability.

action and its attendant limitations. Thus, the new Georgia statute has clarified that, where sufficient and proper notice has been provided, all absent class members may be bound upon certification of the class unless they timely opt-out.

At first blush, this clarification of the Georgia class action statute appears to permit the filing of nationwide class actions in Georgia state courts.¹⁵ Moreover, given the absence of any minimum jurisdictional amount requirement to assert claims in Georgia's State and Superior courts, plaintiffs may view those courts as highly attractive venues in which to assert their class action claims. The possibility of such actions, however, may be tempered by several factors. First, unlike the prior Georgia class action statute, the new Georgia statute expressly requires a court to consider the "superiority" of the forum and the "desirability or undesirability of concentrating the litigation of the claims in the particular forum."¹⁶ As a result, it is likely a Georgia court will turn a deaf ear to the argument, previously asserted under the prior Georgia statute, that it should consider only the efficiency of a class action versus individual actions, rather than the efficiency of litigation in Georgia versus other fora.¹⁷

Furthermore, the Georgia General Assembly has expressly prohibited the use of the class

action procedure for certain causes of action. O.C.G.A. § 7-3-29(e) prohibits class actions against a "duly licensed lender" for alleged violations of the Georgia Industrial Loan Act; O.C.G.A. § 7-4-21 prohibits class actions for alleged violations of loans secured by interests in real estate; O.C.G.A. § 10-1-36.1 prohibits class actions for alleged violations of loans or contracts secured by interests in motor vehicles; and O.C.G.A. § 10-1-255 prohibits class actions for violations of the Below Cost Sales Act. These exclusions may make Georgia a potentially less palatable venue than other states as well as set a "precedent" for further statutory exclusions.

In addition to its potential effects on nationwide class actions being filed in Georgia state courts, the amendment may also have salutary effects in increasing judicial efficiency, consistency and predictability. With the statute expressly providing that a party may now seek immediate (albeit discretionary) interlocutory appeal of a class certification decision, a party has a greater opportunity to challenge a trial court's decision to certify a class action prior to the taking of extensive discovery and trial. This right to challenge a class certification decision may also result in greater judicial oversight of class certification decisions.

Additionally, while Georgia courts after Norman have historically looked to the federal courts'

interpretation of Fed. R. Civ. P. 23 for guidance in interpreting Georgia's class action rule, following the amendment of the Georgia statute, both parties and courts may be more certain in their application of federal authority, which may result in increased predictability and certainty on various issues. Notably, however, this increased reliance on federal case law may also result in incorporating into Georgia law some of the same difficulties that currently plague federal class action jurisprudence, including, for example, the arguably disparate results of federal trial courts in determining whether common issues predominate over individual ones.

Finally, in addition to the aforementioned effects, the amendment of the Georgia class action statute may also be of significance even in the event of ultimate passage of the federal Class Action Fairness Act. Under the proposed act, federal courts would be granted original jurisdiction over class actions where, among other things, the matter in controversy exceeds \$5 million and any member of the plaintiff class is a citizen of a state different from any defendant.¹⁸ Although the act failed to pass in Congress this year, its enactment would greatly hinder any nationwide, multi-state class action from being brought in any state court, including Georgia state courts. To the extent that a class action may still be asserted under the new Georgia class action statute, however, the increase in the scope of covered absent plaintiffs under the new statute may actually prove to be beneficial to defendants by allowing them to resolve issues on a broad scale in a single class action before a Georgia state court.




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Conclusion

In analyzing the pre-2003 Georgia class action statute and its accompanying case law, one commentator for this *Journal* noted that, as a result of its tortured legislative and judicial history, the pre-2003 Georgia class action rule had become “so confused and uncertain . . . [that] Georgians have not been able to realize the potential of the [Georgia] class action device.”¹⁹ With its recent amendment, the Georgia General Assembly has substantially clarified the nature of the Georgia class action statute and potentially expanded its reach. It remains to be seen whether and to what extent its potential may be realized. 



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Endnotes

1. The Georgia class action statute in effect between 1996 and June 30, 2003, O.C.G.A. § 9-11-23 (1966), states as follows:

(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly ensure the adequate representation of all may, on behalf of all, bring or defend an action when the character of the right sought to be enforced for or against the class is: (1) Joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or

(2) Several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action.

(b) Secondary action by shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver that the plaintiff was a shareholder at the time of the transaction of which he or she complains or that his or her share thereafter devolved on him or her by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees such actions as the plaintiff desires and the reasons for his or her failure to obtain such action or the reasons why irreparable injury to the association, incorporated or unincorporated, would result by waiting for 90 days from the date of the demand upon the managing directors or trustees. This Code section is cumulative of Code Section 14-2-831.

(c) Dismissal or compromise. A class action shall not be dismissed

or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subsection (a) of this Code section, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraph (2) of subsection (a) of this Code section, notice shall be given only if the court requires it.

The Georgia class action statute effective July 1, 2003, O.C.G.A. § 9-11-23 (2003), states as follows:

(a) One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) The class is so numerous that joinder of all members is impracticable; (2) There are questions of law or fact common to the class; (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) The representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of subsection (a) of this Code section are satisfied, and, in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of: (A) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or (B) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a

class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) The desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) The difficulties likely to be encountered in the management of a class action.

(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits. (2) In any class action maintained under paragraph (3) of subsection (b) of this Code section, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that: (A) The court will exclude the member from the class if the member so requests by a specified date; (B) The judgment, whether favorable or not, will include all members who do not request exclusion; and (C) Any member who does not request exclusion may, if the member desires, enter an appearance through counsel. (3) The judgment in an action maintained as a class action under paragraph (1) or (2) of subsection (b) of this Code section, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under paragraph (3) of subsection (b) of this Code section, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in paragraph (2) of subsection (b) of this

Code section was directed, and who have not requested exclusion, and whom the court finds to be members of the class. (4) When appropriate: (A) An action may be brought or maintained as a class action with respect to particular issues; or (B) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly. (d) In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) Imposing conditions on the representative parties or on intervenors; and (4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly. The orders may be combined with other orders, and may be altered or amended by the court as may be desirable from time to time. (e) A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. (f) The appropriate appellate court may in its discretion permit an appeal from an order of a trial court granting or denying class action certification under this Code section if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the trial court unless the trial judge or the appellate court so orders.

2. As of its effective date of July 1, 2003, the new O.C.G.A. § 9-11-23 was practically identical to the Fed. R. Civ. P. 23 then in existence. Effective December 1, 2003, Fed. R. Civ. P. 23 was amended by Congress to require, among other things, certification "at an early practicable time," rather than "as soon as practicable," and clearer guidelines for what a judge must include in a certification order. The new federal statute left unchanged the standards by which a court is to make its determination of class certification or the basic procedure for notice to absent class members. Given this article's focus on those factors as well as the Georgia General Assembly's non-adoption of the recent federal changes, this article does not address in further detail the December 2003 amendment to the federal class action statute.
3. Fed. R. Civ. P. 23 (1938).
4. *Id.*; see also, Advisory Committee Notes to the 1966 Amendment of Fed. R. Civ. P. 23.
5. *Herring v. Ferrell*, 233 Ga. 1, 4-5, 209 S.E.2d 599, 601 (Ga. 1974) (Hall, J. dissenting) (quoting 3B W. MOORE, FEDERAL PRACTICE §§ 23.10, 23.601 (2d ed.)).
6. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harvard L. Rev. 356, 378 (1967).
7. *Id.* at 385.
8. Fed. R. Civ. P. 23 (1966).
9. Fed. R. Civ. P. 23 (1998).
10. 1 GEORGIA PROCEDURE COURT SYSTEM AND TYPES OF ACTION, § 6-1 (2004).
11. *Id.*
12. 229 Ga. 160, 190 S.E.2d 48 (1972). In *Norman*, the court acknowledged that the rights in question were: (a) not joint because each depended on separate contracts with the defendants; (b) not derivative as the parties themselves directly owned the rights, not others who refused to enforce them; and (c) not several, but relating to or affecting specific property. Despite having apparently ruled out all of the statutorily specified bases for class certification under O.C.G.A. § 9-11-23 (1966), the *Norman* court turned to an interpretation of the word "com-

mon" which was set forth in the definition of a "true" class action. While it was generally accepted in federal jurisprudence that the definition of "common" rights in the 1938 Fed. R. Civ. P. 23 referred to rights that were undivided, as opposed to individual, the Georgia Supreme Court in *Norman* abstracted the word "common" from its text and provided it with new meaning: according to the *Norman* court, class certification for "common" rights may be appropriate where there exist "common" questions of law or fact and common relief is sought. 229 Ga. at 161, 190 S.E.2d at 50.

13. See, e.g., *Ford Motor Credit Co. v. London*, 175 Ga. App. 33, 36, 332 S.E.2d 345, 347 (Ga. App. 1985).
14. See, e.g., *Tanner v. Brasher*, 254 Ga. 41, 45, fn. 4, 326 S.E.2d 218, 221 (Ga. 1985) (noting that subsequent rulings by the Georgia courts had

"clouded the issue by discussing a possible requirement that class members intervene in class suits in contravention of the opt-out procedure provided in [Rule 23](b)(3) cases."); *Sta-Power Industries v. Avant*, 134 Ga. App. 952, 959, 216 S.E.2d 897, 959 (Ga. App. 1975) (permitting plaintiffs to intervene after imposition of default judgment against defendant); *Herring v. Ferrell*, 233 Ga. 1, 4-5, 209 S.E.2d 599, 601 (Ga. 1974) (Hall, J. dissenting); See, also, Jeffrey G. Casurella and John A. Bevis, *Class Action Law in Georgia: Emerging Trends in Litigation, Certification and Settlement*, 49 *Mercer L. Rev.*, 39, 54-58 (Fall 1997) (noting that "there is an argument that Georgia's rules on class actions, unlike their federal counterparts, do not allow absent members to be bound by settlements about which they know nothing.").

15. Cf., *Cheminova America Corp. v. Corker*, 779 So.2d 1175 (Al. 2000) (applying practically identical Alabama state class action statute to affirm certification of nationwide class asserting claims of defective skin care product against, among others, Spain-based manufacturer and Florida based distributor).
16. O.C.G.A. § 9-11-23(b)(3)(C) (2003).
17. See, e.g., *McGarry v. Cingular Wireless, LLC*, 2004 WL 574864 (Ga. App., Mar. 24, 2004).
18. See, S. Res. 2062, 108th Cong. (2004).
19. Dean S. Daskal and S. Ross Mansbach, *Class Struggle: The Troubled History of the Class Action in Georgia*, Ga. Bar Journal, 34, 38 (April 1998).



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A Slice of Life

The Daily Practice of 11 Georgia Lawyers

By Johanna B. Merrill and Sarah I. Bartleson

We live in a culture where *Law & Order* is a brand

unto itself and daytime television is filled with sassy judges on the bench. Even with the surging popularity of CourtTV, and real-life defendants like Scott Peterson and Kobe Bryant standing trial on our televisions, the day-to-day practice of law remains, to some, a mystery.

And perhaps not just to the public, but to other attorneys as well. Can those attorneys in small or solo practice connect to the first-year associate in an Atlanta mega-firm? Can in-house counsel relate to the daily work life of a public defender? Or perhaps across practice areas, employers and geography, the daily lives of lawyers aren't so different from each other after all.

In order to find out, the *Georgia Bar Journal* glimpsed into the work lives of real attorneys. We followed a day in the life of 11 Georgia lawyers during the week of July 19-23. Here are their stories.

Michael Landau
Professor, Georgia State University School of Law



After several years in private practice in New York with the firms of Cravath, Swain & Moore and Skadden Arps, Professor

Michael Landau realized that both his personality and “body clock” were better suited to teaching. “I love everything about teaching, with the exception of one thing—grading exams,” Landau said. “I love the independence, autonomy and freedom. I enjoy meeting new students year after year. I enjoy speaking at conferences, literally, all over the world. I feel very lucky to have a job that does not feel like work—except for grading exams.”

On July 19, Landau didn't have any exams to grade, due to summer break, so he arrived at his office on campus around 10 a.m.

“My days, in general, begin on the late side,” he said. “I tend to be a bit of a night owl.” Around 11 a.m. he spoke with an attorney in Florida regarding the possibility of being an expert witness in a “right of publicity” case.

Monday was “a good day” for Landau. He finished a manuscript for a new edition of *Lindsey on Entertainment, Publishing and the*

Arts: Agreements and the Law, and overnighted it to his publisher. He also finished editing an article regarding copyrights, trademarks and artistic attribution for an English journal, *The International Review of Law, Computers, and Technology*. The article will be published in November. Later in the day, Landau had a discussion with his editor at a publishing company regarding the possibility of marketing certain U.S. books to European lawyers. "I have spoken at several conferences in Europe in which U.S. intellectual property law was discussed at length, yet the legal publishers did not seem to be concentrating on that market," he said.

Because it was summer, Landau said this wasn't a typical day. Not only were there no classes to teach, but he was also preparing to leave for vacation, so he was busy finishing projects. However, he said many things about the day were typical. "On any given day I spend a good deal of time working on articles and books and preparing for conference presentations," he said. He left the office around 4:30 p.m.

Landau has taught at Georgia State since 1993 and is currently the head of the Intellectual Property, Technology, and Media Law Curriculum Group. He has also been a visiting professor or scholar at the University of Georgia, University of Amsterdam, Louisiana State University and Pennsylvania State University. Landau earned a bachelor's degree in economics from Pennsylvania State University in 1975 and a juris doctorate from the University of Pennsylvania in 1988. He was admitted to the New York Bar in 1989 and has been an affiliate member of the State Bar of Georgia since 1994.

Mirtha Estrada

***Assistant Public Defender,
Office of the DeKalb Public
Defender***



Every day when Mirtha Estrada arrives at the DeKalb County Public Defender's office, she stops to read a line from the Sixth Amendment that is posted in the lobby. It reads "In all criminal prosecutions, the accused shall . . . have the assistance of counsel...."

Estrada said, "The work is always stressful, the clients are often difficult, and the hours are erratic, but that quote is the reason we all keep coming back."

On July 20 she arrived a little later than usual, at 10:15 a.m., as she stayed home that morning to work without interruption on a felony appeal that has been pending since 2001. Once at her desk, she reviewed e-mail, printed out jail list requests and answered her messages. She also conducted client interviews that included: an 18-year-old single mother trying to finish school whose speeding ticket could cost her her license; a Cuban refugee ticketed for public intoxication who is worried that the charge might prevent him from becoming a resident; and a father regarding his teenage son who was ticketed and arrested for loitering.

At 11:30 a.m., Estrada realized that the only way she would finish the jail list (the list her office sends to Recorder's Court of people being held in jail on tickets for county ordinance violations) was to skip lunch and come back to the office after court that afternoon.

After a lunch of pizza at her desk, she began updating the jail list. At 3 p.m., a woman came to her office to discuss one of the men on the list. The woman's boyfriend had been in jail for more than a month, charged with loitering for drugs. Estrada ran his Recorder's Court tickets and his criminal record and added him to her client list for the next day.

Estrada left at 4:15 p.m. for Recorder's Court, where officers prosecute their own tickets. While there she picked up six new affidavits requesting an assistant public defender and left her requests for pretrials with the clerk for each courtroom. Before leaving, she noticed a young Hispanic man who didn't speak English. She didn't have too many clients that night, and since he'd been in jail for 30 days and qualified for assistance, she added him to her list of pretrial requests. She then met with each of her clients to review their facts and go over possible scenarios while they waited for the judge to call the cases.

At 6:30 p.m. Estrada was excused from court, as all her cases had been resolved. Two were dismissed for want of prosecution because the officers did not show up. The last case was the high point of Estrada's day - the resolution of the young Hispanic man's case. He is a day laborer and a three-year U.S. resident, and had already been held in jail for 30 days on a ticket. He and his family were unable to pay his bond, which is usually set approximately 30 percent higher than the cost of paying the

ticket. To further complicate matters, his ticket was missing. The officer finally agreed to release him, since they couldn't prosecute without the absent ticket. Estrada said, "I felt good about that, because if I had not been there to follow up on his case, there is a good chance he would have just been taken back to jail and held there until his ticket was found."

Estrada returned to her office after court to finish the jail list. She added eight new requests for a court date or bond, recorded six duplicate requests, and checked on each of the previous 35 requests. At 8:30 p.m. she faxed the list to the court and headed home.

"I believe my work matters because, every once in a while, I truly make a difference," Estrada said.

Estrada earned her law degree from the University of Miami and her undergraduate degree from the University of Michigan. She joined the public defender's office in November 2003 after three years as an associate with King & Spalding LLP. She was admitted to the Bar in 2000.

Patricia Thrower Barmeyer

Partner, King & Spalding LLP—Tort Litigation and Environmental Practice Group



Patricia Barmeyer started her day at 6 a.m. by participating in an aerobics class. She arrived at her downtown office before 8:30 a.m., where she spent the first 15 minutes reviewing e-mails, reading the *Fulton County Daily Report* and daily environmental reports. Barmeyer said that while she likes the fact that her practice involves a wide variety of matters and cases, it is sometimes challenging to juggle multiple clients. On July 20, Barmeyer assisted six separate clients with environmental matters throughout the course of the day. At 11 a.m. she spoke with a coastal property owner regarding permitting issues, and at 2 p.m. she participated in a conference call with a government agency official concerning recent groundwater sampling results. She also participated in an internal meeting to distribute the firm's charitable contributions.

The high point of her day was a call from a former client, now general counsel of a major transportation company, asking the firm to assist her company on environmental issues nationwide. The low point was hearing news that her good friend, Lonice Barrett, would soon be leaving his position as commissioner of the Georgia Department of Natural Resources to take on an important new assignment for Gov. Sonny Perdue as head of the Commission for a New Georgia. Barmeyer said, "This was a pretty typical day for me. I deal with multiple clients and matters in any given day, and I stay on the telephone much of the day."

Barmeyer joined King & Spalding in 1990 after serving for 17 years as an assistant attorney general for Georgia. Her practice is exclusively in environmental law and includes both environmental

and regulatory compliance and litigation, representing a broad range of public and private entities. She graduated from Harvard Law School *cum laude* in 1971 and earned a bachelor's degree from Hollins College in 1968. She was admitted to the State Bar of Georgia in 1972.

Laquetta S. Pearson ***Associate, Lisa R. Roberts and Associates P.C.***



As a child, Laquetta Pearson knew she wanted to be an attorney. In her first job out of law school, her wish has come true. Her first undertaking upon arriving at the office at 8:30 a.m. was to work on responses to a corporate client's answer to a cross-claim. However, her primary area of practice is civil law. On July 20 she worked on several custody cases, a worker's compensation claim and a divorce.

Pearson said one of the things she enjoys most about her job is "the ability to actually help clients by doing something so simple as making a phone call or writing a letter, and they tell you that you made a difference." A real-life example of this feeling put into practice was the highlight of Pearson's day:

"A woman called seeking advice about recovering arrearage child support and discussed how difficult her ex-husband was being in regards to payment. I advised her that she could probably handle her own motion for contempt, since she has filed several in the past, and the same pattern of non-payment is recurring," Pearson said. "The conversation ended with her telling me I was an angel for helping her."

On the flip side, Pearson said that it is often difficult when she has clients who are emotionally volatile, especially in family law matters, and they call and take it out on their attorney. Sometimes she has to deal with difficult matters, such as the phone call that was the day's low point: she spoke with a client who was "concerned that her ex-husband may be doing something inappropriate to their child and he refuses to allow her visitation with the child. She began to cry in my office and it made my heart go out to her."

Pearson said July 20 was characteristic of her normal workdays. "I usually take several calls from clients, provide legal counseling, talk with opposing counsel and try to resolve preliminary issues." Before leaving her Newnan office at 5:30 p.m., she and her boss, Lisa R. Roberts, met for their daily discussion of the matters and events of the day. Later she met with her personal trainer before going home for the night.

Pearson earned her juris doctorate from the Walter F. George School of Law at Mercer University and her undergraduate degree from Clemson University. She was admitted to the Bar in 2004.

Bettina Wing-Che Yip *Labor and Human Resources Counsel, Cingular Wireless LLC*



Bettina Yip starts and ends her day with a constant companion—her BlackBerry handheld. Before arriving at headquarters on the Glenridge Connector at 8 a.m., her first task was to check her BlackBerry for e-mails sent during the night. The bulk of her workload is communicating with clients both over the phone and e-mail as well as in person. One of her morning client conversations regarded a complaint of alleged religious discrimination. Her day went on to include conversations on the topics of upcoming mediation, concurring with terminations of employees and meeting with staff concerning paid and unpaid interns.

At noon, Yip ate a quick lunch she brought from home before continued conference calls and in-person meetings with clients. "I normally no longer go to court, as we usually just manage litigation performed by outside counsel," Yip said. "However, we do take part in mediations, labor arbitrations and magistrate court hearings." The

high point of her day was finding favorable precedent for an upcoming arbitration, while the low point was not finding favorable witnesses for an upcoming arbitration.

Yip said July 21 was a typical day. "My days are pretty frenetic and fast-paced, with questions coming in from clients about different areas of labor and employment law." She left the office at 6 p.m. and went to the gym before going home. Her day ended in much the same way that it began—with her BlackBerry.

Yip has been with Cingular since March 2003. Her previous employers were Meadows, Ichter and Bowers (now Balch & Bingham LLP) and King & Spalding LLP. She graduated from Columbia University School of Law in 1999 after completing her bachelor's degree at Wellesley College. She was admitted to the State Bar of Georgia in 1999.

Christine M. Morgan *Senior Associate, Jones Day*



Chris Morgan may be on a reduced-time schedule, but she isn't a reduced-time attorney. She arrived at the firm's new midtown offices around 6:45 a.m., but one or

two days a week she comes in a little before 8 a.m. so she can eat breakfast with her boys, ages 3 and 1. For most of the morning and after lunch, Morgan worked on strategy analyses, drafted correspondence, reviewed reports and spoke with clients. At 11 a.m. she met with Charles Perry, a partner with Jones Day, about a client matter. Morgan says that her unconventional schedule is possible due to the legal team she works with, which includes Perry, Of Counsel John H. Grady, and her legal assistant, Janie Allen.

"This teamwork and administrative support have been key factors to a successful reduced hours arrangement," she said. "Our group works very well as a team and we cover for each other if needed when urgent matters arise."

While Morgan said July 21 was an average day without any major highs or lows, she and her team did resolve a case strategy issue that had been challenging them for several months. Morgan is in the office five days a week to ensure continuity in her cases, but she typically leaves the office between 1 and 3 p.m. However, she checks in several times an afternoon from home to address and put out any "fires." For example, on July 21 she left the office at 1:30 p.m., but participated in a client conference call from 2:30 to 4:30 p.m. before picking up her children.

Morgan completed her undergraduate studies at Davidson College, where she became attracted to environmental law. She attended Vermont Law School, one of the top schools for those interested in a career in environmental law. Before moving to Jones Day in 2003, she was an associate with Hunton & Williams in Atlanta. Morgan was admitted to the Bar in 1995.

Sandra L. Brown *Of Counsel, Medley & Kosakoski, LLC*



Sandra Brown never planned on being anything other than an attorney, but it wasn't until her first year of law school that she realized she wanted to focus on entertainment law. She believed that the substantive business of bringing music to the masses had to be interesting, and her career has proved her right.

A visit to Brown's office leaves little doubt as to who some of her clients are, as the walls are covered with gold records and artist plaques.

"I love music," Brown said. "I simply set out to combine a favorite pastime, listening to

music, with making a living—and I accomplished that goal. My current position has not only allowed me to work for an entertainment group, but has also positioned me to handle matters for some of the most amazing musical talent in the industry, including hit producers and recording artists."

On this Thursday in July she arrived at the office at 10 a.m., after checking her BlackBerry and participating in a conference call with a client from her home. At 11 a.m. she drafted a letter to a director at a record label and sent him a demo CD of an unsigned artist at his request. The rest of the morning was spent in telephone conferences and drafting correspondence. After a sandwich from her favorite shop, My Friend's Place, Brown spent the afternoon and evening participating in several telephone conferences with clients and opposing counsel. She left the office at 8:30 p.m.

Brown's day was typical, as her workdays revolve around contracts that need to be either reviewed or drafted on behalf of a client. She said that agreements are very often negotiated at the last minute in order to meet deadlines for promotional or commercial release. On a not-so-typical day, one might find her jetting to Los Angeles or New York for awards shows or client

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appearances. On June 28 she spent a day in Los Angeles to attend the American Society of Composers, Authors and Publishers (ASCAP) Urban Music Awards. On August 27, she was in Miami for the Broadcast Music, Inc. (BMI) Urban Music Awards.

After law school, Brown was hired as the associate director of business affairs for So So Def Recordings Inc., a joint venture company with Sony Music, Inc., owned by Jermaine Dupri. In 2000, she joined the entertainment group of Greenberg Traurig, LLP, as Of Counsel, where she spent four years as primary legal counsel for various entertainers, entertainment companies and joint ventures before moving to Medley & Kosakoski, LLC. Brown earned her undergraduate degree from Nova Southeastern University in 1991 and her juris doctorate from Florida State University's College of Law in 1994. She was admitted to the Bar in 1995.

Rebecca A. Rowden
*Assistant District Counsel,
U.S. Army Corps of
Engineers, Savannah
District*



Rowden said she enjoys her practice with the Army Corps because “environmental law brings me into contact with the full spectrum of individuals, groups, agencies, universities and governmental departments that seek to address matters of environmental concern.”

On July 22 Rebecca Rowden arrived at the Office of Counsel for the U.S. Army Corps of Engineers in the Savannah District at 7 a.m.

“I am on a compressed work schedule, which means I work nine hours a day for nine weekdays and have every other Friday off,” she said. Her first daily tasks were to read and answer e-mails, check her inbox for mail and review her schedule for the day.

Her morning was filled with a review of a drafted letter to U.S. Congressman Jack Kingston regarding a constituent inquiry to a wetland permit; a document review for the Regulatory Branch; a meeting with staff from the Regulatory Branch, Environmental Protection Agency, U.S. Fish and Wildlife and the Georgia Department of Natural Resources (this group makes up the Mitigation Banking Review Team in Georgia).

For lunch she grabbed food at the snack bar and came back to her office, where she reviewed a settlement agreement on an enforcement action whereby a landowner filled wetlands without a permit in violation of the Clean Water Act. After a discussion with a project manager, they determined that the agreement was ready to be sent to the property owner for signature.

Rowden said she enjoys her practice with the Army Corps because “environmental law brings me into contact with the full spectrum of individuals, groups, agencies, universities and governmental departments that seek to address matters of environmental concern. It also provides me with the opportunity to visit diverse aquatic and wildlife habitat sites across the state.”

At 2 p.m., Rowden traveled with several regulatory branch project managers to a site near Savannah to view wetlands that may or may not be isolated. “The determination as to isolated wetlands is important because it determines whether the Army Corps has jurisdiction over the wetlands or not,” Rowden said. She wore hiking clothes and boots to work that day in preparation for the site visit. Trips like this occur about once a month, and she also travels to branch offices approximately every two months and works out of those offices for several days. Otherwise, July 22 was a typical day for Rowden. She arrived back at the Corps offices around 4:30 p.m. before heading home.

Rowden attended Samford University in Birmingham, Ala., for her undergraduate degree and earned her juris doctorate from the University of Richmond. She was admitted to the Bar in 1991.

Bertis Downs
*General Counsel for
 R.E.M./Adjunct Professor,
 University of Georgia
 School of Law*



Since 1981, Professor Bertis Downs has split his time working

for the music group R.E.M. and teaching at the University of Georgia School of Law. July 23 was no different.

Since the mid-1990s, Downs only teaches based on his availability. When he does teach, it is a four-minute walk between the R.E.M. office in downtown Athens and the law school. He likes to teach 8:30 a.m. classes, because then he knows the students want to take his class, not just fill a convenient slot in their schedule. While teaching, his days aren't that different—he just starts the R.E.M. portion of his day a little later. He says teaching is important to him because it keeps him around younger, more nimble minds in a fast-changing world and business.

"After college, I wanted to go into legal services or poverty law," Downs said. "1981 was not a good

year to emerge from law school in those areas. Luckily, the band was starting up and the law school offered me a teaching job. I have been fortunate to combine those two jobs ever since."

R.E.M. is preparing to release a new record and go on tour to support it. "There is a lot of planning and coordination that goes on in making sure all goes well," Downs said. "Some of that involves band work, dealing with record label personnel and dealing with other things at the office. My job is to know all that is going on and make sure that it gets done in a timely fashion—which can be a challenge."

When asked about the favorite part of his job, Downs answered, "All of it is intellectually challenging, and I know I am fortunate to have had such a good relationship with the band over the years." His

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least favorite aspect? He doesn't like all of the travel now that he has young children.

Downs said a typical day is spent talking on the phone and e-mailing clients. July 23 was no different, with the exception of having lunch with his good friend Dan Coenen, a fellow UGA law professor. Then it was back to the phone and his iMac for more calls and e-mails.

Downs earned his juris doctorate from the University of Georgia School of Law in 1981 and his undergraduate degree from Davidson College in 1978. He was admitted to the Bar in 1981.

Stanley A. Seymour
*Associate, Kilpatrick
Stockton LLP – Commercial
Litigation Practice Group*



Stan Seymour arrived at Kilpatrick Stockton's downtown offices on Peachtree Street at 7:30 a.m., and his first task was to work on questions for upcoming depositions in Louisiana. Later in the morning, he met with a partner to discuss additional attorney involvement in charitable, community activities, which are strongly encouraged at the firm. After lunch, Seymour joined a summer

associate at the Black Arts Festival at Underground Atlanta to watch the performance of an entertainment client. Upon his return to the office, he conferred with another partner to discuss a substantive brief, which he filed later that day. Unfortunately, after the brief was filed, he lost his keys somewhere near the Fulton County Courthouse! (He later found them.)

After leaving the office at 6:30 p.m., Seymour met a client for dinner. Following their meal, he met with a different client at the Atlantis Music Conference to discuss and watch the client's performance. Following the show, Seymour spoke with the artist and repertoire representatives from a major record label about a possible deal for the client. Seymour said, "It is not every day that an entertainment client performs in Atlanta, as most of them are outside Georgia, so it was a treat."

Seymour said he spends his days working on briefs, meeting with clients, preparing for depositions, collaborating with partners and preparing for hearings, so July 23 was a typical day for him. "What I love about practicing at a large law firm is how each matter always presents some legal issue or involves subject matter that is different and unique from case to case. There is always something different going on, or at least there is the potential for such," he said. "Plus, I really enjoy the people I work with."

Seymour attended Howard University School of Law and earned his law degree in 2001. His undergraduate years were spent at Northwestern University, where he completed a bachelor's degree in Speech Pathology in 1997. He was admitted to the State Bar of Georgia in 2002.

William H. "Beau" McClain

*Chief Assistant District
Attorney, Douglas Judicial
Circuit*



Beau McClain arrived at the Douglas County Courthouse, where the DA's offices are located, at 7:30 a.m. on July 23. On days when he isn't scheduled to appear in court, McClain spends his time on the phone, working files and visiting local law enforcement agencies, so this Friday was a "very typical" day.


Around 8 a.m. he met with a woman whose daughter is in jail on a methamphetamine trafficking charge. McClain said this meeting was the low point of his day, as the woman cried in his office and he had to "tell her the truth about the situation instead of telling her something to make her feel better." Later in the morning he spoke with a detective regarding an ongoing mortgage fraud case and another assistant district attorney about a home invasion and robbery case, and he put in a call regarding a drug case and worked out a plea. Around 12 p.m., McClain went to lunch with a friend who is a juvenile court prosecutor.

In the afternoon, McClain had several conversations with law enforcement officers and investigators concerning pending cases. He met with a detective regarding a murder case, followed by two teleconferences with other officers regarding an assault case and a drug investigation.

The day ended with a meeting with the DA's investigator regarding a fraud case. Before departing the office at 6:55 p.m., he reviewed documents related to the fraud case.

McClain said the thing he enjoys most about his job is being able to help people in difficult—and often tragic—situations.

"A few years ago I prosecuted a group of defendants who were involved in the home invasion of a man they believed to be a drug dealer. This man was brutally beaten and his family and small children were terrorized. Because of his race and the belief he was a criminal, he did not think the system would do anything. When the jury convicted the perpetrators, the victim started crying and gave me a big hug and said 'Thank you for fighting for my family,'" McClain said. "Those sort of moments make the job worthwhile."

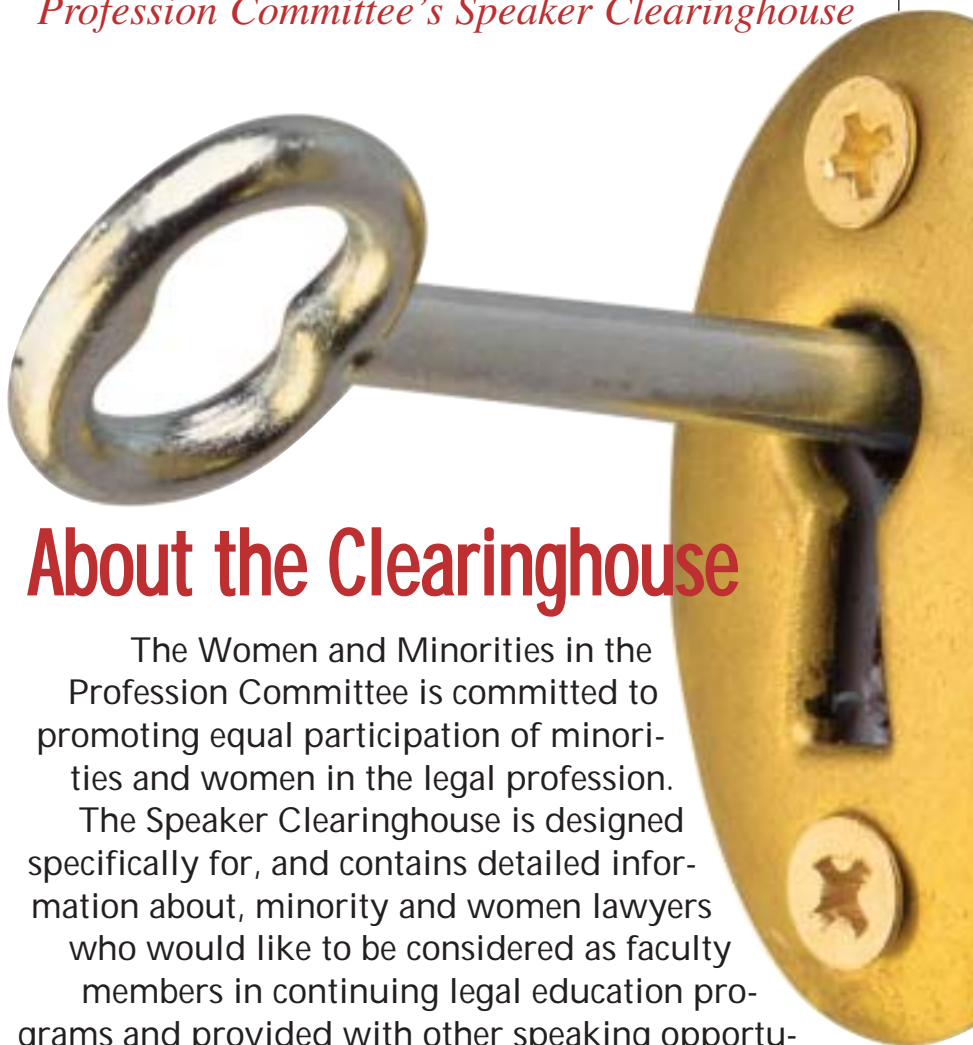
McClain attended the Emory University School of Law where he completed his juris doctorate in 1981. He also earned a bachelor's degree from Emory in 1978. McClain was admitted to the Bar in 1981. 

Johanna B. Merrill is the section liaison for the State Bar of Georgia.

Sarah I. Bartleson is the assistant director of communications for the State Bar of Georgia.

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Standing Up for the Legal Profession

By Judge Toby Producers

There are many within the legal profession who agonize over the public's perception, or misperception, of lawyers. They tend to attribute negative perceptions to lawyer misconduct and believe simply that lawyers should just learn how to act. They feel the need to apologize for the profession and their role in it. They are timid about their status as lawyers. For those who feel that way—get over it! The public will never fully understand or appreciate this profession. We should not expect them to. There are limits on our ability to affect the public's opinion.

However, the legal profession remains without a doubt the

"noblest of professions."¹ Everyone who is engaged within it should be proud of it and stand up for it. The lawyer's duty is to act as professionally as possible, and the public's image of the profession will take care of itself.

The word "professionalism" does not appear in *Black's Law Dictionary* because it is not a legal term. Instead, it is a generic term which refers to the "status, methods, character or standards" of a profession.²

In order to understand what we mean by the term "professionalism," we need to understand the particular profession we are talking about. The "status, methods, character or standards" of the legal profession differ greatly from those of such other professions as wrestling, medicine, fortune telling, accounting, acting and horse trading. Each profession is unique,

and its standards are unique. So what exactly is the essential nature of the legal profession?

The American legal profession is the only profession outside of the press or the military that is included in the federal constitution. It is constitutionalized in the form of the



Sixth Amendment's guarantee of the right to counsel. We must therefore look at lawyering in its constitutional context, especially in the context of one of the great themes of the Constitution, that is, the management and resolution of conflict.

The framers recognized that conflict is inherent in the nature of humankind. The proclivity of humans to engage in conflict is infinite. We encounter conflict involving intimate personal relationships among family, friends and neighbors. We encounter conflict at the local, state, regional, national and international levels. We encounter conflict among groups. Humans are notorious group joiners and group identifiers. Depending on what is important to a person, he or she can be a member of a race, a gender, a generation, an ethnic group, a religion, a family, a neighborhood, a city, a county, a state, a region and a nation. He or she may also be a Democrat or a Republican, a Bulldog or a Yellow Jacket, a football fan or a soccer fan, an English speaker or a Spanish speaker, a business owner or an employee, from here or not. He or she may be a liberal or a conservative, for the war or against

it, a baby boomer or generation Xer, wealthy or poor, healthy or not.

The number of groups, causes and issues is immense, especially in a society whose constitution places its primary value upon the interests of the individual as opposed to those of the state. In the American system, the propensity toward conflict is exacerbated by the fact that individuals are encouraged to compete in pursuing their opportunities. We compete for the same resources, including money, space, time and things.

The framers also recognized that, in addition to our propensity for conflict, we humans possess another great characteristic—passion. We pursue our opportunities passionately. We protect and promote our families, community and country passionately. We love the Braves and hate the Mets (or vice versa). For most of us, there is great passion behind every one of our relationships, ideas, groups or issues.

The framers understood that these passions cannot, and should not, be controlled by the state. Instead, they created an extraordinary process, at several levels, where we can fully engage our con-

flicts and passions without destroying ourselves or the primacy of the individual. At the national level, our collective passions either in favor of or against the incumbent government grow as time goes on. The framers decided that we should engage these conflicts and vent these passions by way of a process called elections. Every four years we fight mightily for the hearts and minds of similar thinkers and have a resolution in the form of an election. We do the same as the impact of government gets closer and closer to home, and we engage in state and local elections to resolve disputes as to the composition and policies of local government.

But most conflicts among humans are resolved by other processes. Historically, these disputes have been resolved by force. They have been resolved in the OK Corral, in the back alley, and according to which side had the most power or men under arms. We no longer do it this way. In our system the battlefields have been replaced with courthouses. It is in the courthouses where serious human conflicts are resolved. The rest of the landscape is safe ground.

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Several years ago, former Chief Judge Watson L. White of the Superior Court of Cobb County offered his observation at a Cobb Bar Association meeting that, largely because of the nature of the adversary system and of the scrutiny to which they are subject, lawyers are more honest, more diligent and more reliable than members of any other profession or group.

There was a movie a few years ago called *Braveheart* starring Mel Gibson. The story was set in the 14th century and involved a huge battle to determine who would govern Scotland. The two opposing forces, adorned in war paint, hurled themselves at each other in a savage encounter on the field of battle. They slashed and killed each other. The victors rampaged through the countryside raping, pillaging and burning.

We fast forward some 600 years to another great battle, this one for control of the government of the United States, the most powerful nation in the history of the world. This battle took place not on a bloody battlefield, but in Tallahassee, Fla., in a small courtroom where the air conditioning was not working. Instead of generals and soldiers with spears and arrows, this battle was fought by lawyers with briefcases. Court was called to order promptly at 9 a.m. All the lawyers stood when the judge entered the room. When one lawyer stood to speak the opposing lawyer would sit silently. When finished speaking the lawyer would sit down, and it would be the other lawyer's turn to stand and speak. When the arguments were finished, the lawyers rose, the judge left the bench, and the world peacefully awaited the decision.

What a way to fight a battle for control of the greatest and most

powerful nation in the history of earth! With lawyers, not warriors. How far civilization has come! Yet some in the public and in the media criticized these magnificent lawyers. There was criticism that over \$13 million was spent in legal fees as though the price of this great process was too much. But nobody criticized the Texas Rangers that same month when they agreed to pay a quarter of a billion dollars to sign a shortstop.³

There exists a vast amount of both substantive and procedural law that has been developed over generations by thoughtful men and women to resolve the criminal and civil disputes we find ourselves involved in. Lawyers provide us with access to these laws so that we can engage on a level playing field. Lawyers also plug us into opportunity. This is a land of opportunity. We are not dependent upon a dispassionate and disinterested bureaucracy to advise us regarding the laws which govern our undertakings as we pursue opportunities in the free enterprise system.

All lawyers cringe when news emerges of dishonest or criminal conduct by another lawyer. It does happen, but such conduct is extremely rare. The problem with the legal profession in this regard is that lawyers are drawn from the general population of human beings as a whole. There are bad

actors in the general population and some of them do find their way into the legal profession, just as they do all other professions. But that should certainly not be an indictment of the profession itself.

On the contrary, there is no more reliable group of people than those lawyers who labor within the adversary system. This is due to the great scrutiny to which they are subjected. A lawyer is subject to the intense scrutiny of the client, of the adverse party, of the adverse lawyer, of the judge, and of the disciplinary authority of the State Bar, not to mention his or her malpractice carrier. Several years ago, former Chief Judge Watson L. White of the Superior Court of Cobb County offered his observation at a Cobb Bar Association meeting that, largely because of the nature of the adversary system and of the scrutiny to which they are subject, lawyers are more honest, more diligent and more reliable than members of any other profession or group. That is because they have to be.

Lawyers must understand that the public will not necessarily appreciate their value or how critical they are to the proper functioning of our society. This is largely because, as indicated above, the lawyer's milieu is human conflict. People understandably associate lawyers with conflict. Although people are constantly involved in

conflict, they generally do not like it. It is essential, therefore, that lawyers assist in the management of conflict without creating it or making it worse. In this regard, perception is frequently more important than reality.

Professional conduct is therefore an indispensable element of the profession. And, just as important, professional conduct enhances advocacy and frequently has an impact on the outcome of a case. The lawyer's conduct and demeanor can evoke a visceral reaction on the part of the decision-maker either for or against the advocate and the cause. The following are some thoughts on professionalism in the adversary system from the perspective of the bench.

The Lawyer's Relationship with the Client

One aspect of any proceeding that the decision-maker tends to notice is how the lawyer relates to the client, or, in the case of a prosecutor, with the prosecuting witness. Most good lawyers seem to be able to develop reasonably good relationships with their clients, although certainly this is not always possible. Many clients end up being a punishment to the lawyer based on some misdeed in one of the lawyer's previous lives. But it always evokes a positive response to see the lawyer relating in a considerate, respectful manner toward the client and doing small things like making sure the client is comfortable. Of course, this can be overdone as well. But judges and juries are usually taken aback when they see a lawyer ignore the client or treat the client rudely. It does not happen often, but when it does, it is noticeable.

The Lawyer's Relationship with the Other Lawyer

The lawyer's relationship with the adversary is critical and seems to be the crux of professionalism within the legal profession. A lawyer is so much more appealing and persuasive when he or she treats the adversary lawyer with dignity and respect. Trial judges can usually tell, or at least guess, when there have been difficult encounters between the lawyers. But the good lawyers do not bring personal animosity with them into the courtroom. The effective lawyers are able to sit there and take the scorn and abuse from the other lawyer without responding in kind. Of course, there is nothing worse to a lawyer's case than to act scornfully toward the other lawyer. This goes for civil litigators as well as for defense counsel and prosecutors.

The practice of law, especially criminal law, is all about relationships. Most lawyers know that they must deal with each other another day. However, this is not always the case. Some lawyers might be tempted to engage in abusive behavior if they believe they will never see the adversary again. But lawyers and people talk. Such behavior almost invariably catches up with the culprit sooner or later. A good relationship with the other lawyer is indispensable to the ability to obtain a good outcome.

Part of establishing a good relationship is recognizing the adversary's problems. For example, the prosecutor should understand that the defense lawyer is not the accused and that the lawyer is fulfilling an essential constitutional function. The prosecutor should understand that the defense lawyer's primary source of infor-

mation is often the client, and that the client is not always reliable. The prosecutor should know that the lawyer is, in most cases, working with limited resources. The prosecutor should understand that court appearance conflicts are real and are an expected part of any busy trial practice. The prosecutor gets to go to the same courthouse and park in the same place every day. The defense lawyer does not. The prosecutor is generally assigned to

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one judge. The defense lawyer has to placate them all. The defense lawyer must anticipate which judge will claim priority and must mollify clients and witnesses in several venues all at the same time.

The defense lawyer must understand that the prosecutor is usually working under a crushing caseload and is accountable to numerous victims and public authorities. And not all prosecutors get the assistance that they need.

The better relationships that the lawyers can develop among themselves, the better they are able to serve their clients and constituencies.

The Lawyer's Conduct toward the Adverse Party or Witnesses

As indicated above, it is all about passion and conflict. But lawyers need to have it under control. Judges and juries do not like to see lawyers bashing the daylights out of each other, the parties or the witnesses. Subconsciously they hold it against the basher. Remember that it is, after all, a civilized process. Your adversary gets to ask questions and you get to ask questions. Develop your cross-examination techniques through training and practice. You are not allowed to smite the hostile witness. The most professional and effective cross-examiners are people like Hylton Dupree and the late Bobby Cleveland who never once raised their voices, used sarcasm or showed their own personal angst over the perfidy of that lie-bag on the other side. We have all seen cases where lawyers have lost simply because they were unable to control themselves emotionally in the face of a difficult cross-examination.

The Lawyer's Relationship with the Court


I tried my first case almost 30 years ago, and I still remember some of the adverse rulings I got. Of course, those rulings were wrong. Or were they? Since I have been on the bench, I have seen how the world turns from an entirely new perspective—one I wish I had been privy to way back then.

The trial lawyer needs to understand a bit about the perspective from the bench. The judge simply does not know the case as well as the trial lawyer does. The lawyer has been living with it for months or years. The judge is probably being exposed to the case for the first time. Also, the judge has to use both sides of the brain during an evidentiary hearing. One side of the brain listens to the content and quality of the testimony insofar as it relates to the merits. The other side of the brain is listening procedurally for possible objections. And, unlike the advocate, the judge is not necessarily prepared to anticipate a particular bomb blast or nuance in the evidence. So do not be surprised or alarmed if the judge does not have the same appreciation or grasp of the evidence or its context as you do.

When you get an adverse ruling, do what you need to do to preserve possible error for appeal. But it is unprofessional and counterproductive to show your pique to the judge. The judge knows in a close case that he or she might be wrong. You do not need to let the judge know by body language, eye rolls or otherwise your personal feelings on the matter. The lawyer does not need to evoke adverse visceral feelings on the part of the judge. Besides, there might be another ruling coming

right around the corner. Also, you do not need to thank the judge for a ruling either way. Understand that the lawyers and the judge are all involved in a common enterprise to resolve the dispute fairly and consistently with the rules.

There is another phenomenon that I did not know existed until I got on the bench. It is called being rude to the staff. It does not happen often and when it does happen, it is usually by *pro se* individuals. However, some lawyers have called and spoken with staff in a way they would never, ever speak with the judge. Guess what happens as soon as the conversation ends? When you speak with staff, do so just as you would speak with the judge. Also, make sure that your staff understands the importance of being courteous and civil with everyone, including the other lawyer, the parties, the witnesses, the judge and the judge's staff.

The bottom line is courtesy, dignity and respect to all participants in the adversary process. Be proud of what you do. Be proud of your profession. 



Judge Toby Prodgers is a 1974 graduate of the University of Georgia School of Law.

He clerked for a year with Justice Hiram Undercofler of the Supreme Court of Georgia. He then practiced law for 20 years with the Marietta firm of Awtrey & Parker doing primarily civil litigation and business law. He has served on the Cobb State Court bench since 1995.

Endnotes

1. *Berry v. State*, 10 Ga. 511, 522 (1851)(per Lumpkin, J.)
2. *The American Heritage College Dictionary*, p.1092 (3d ed. 1993).
3. \$25,000,000 per year for ten years to Alex "A-Rod" Rodriguez.

Ode to The First Georgia Colonel*

By Arthur A. Morrison

Who was he, this man called "Colonel,"
With no uniform in sight?
Some wondered why this simple man
Was ranked as one of might.

He never made a lot of money.
He never wore a robe.
He never was a senator.
He never shook the globe.

But who he was, this barrister,
This worthy brother of mine, —
Was a fair and honest advocate—
With a superb legal mind.

He gave his clients full measure fare
(Whether rich or poor or broke).
He gave a truthful full accounting
Of every dime he held for folk.

He bravely kept each confidence
But was loyal to the truth.
Gave wise and candid counseling.
Knew all other would be uncouth.

He treated all others fairly—
Brother at law or "Yank."
His word was "bonded debt,"
Which was honored at the bank.

A cordial friend to lawyers all, —
A mentor to the new.

He fought a fierce fight for his clients
But salved raw wounds when through.

His ethics were pure and simple—
Learned at his mother's knee.
They were the Ten Commandments—
Plus another two or three.

His practice grew through "word of mouth."
He did not advertise.
'Ads,' they then deemed "barratry,"
He'd still find most unwise.

He took his duties seriously
As an officer of the court.
Worked hard on matters pending—
Whether real estate or tort.

He made a difference for good downtown,
When his sage advice was sought.
He gave it very freely
With humor, wit, and thought.

His life, summed up for all to see
For all who really care,
Was plain but satisfying
From a trade of stress and wear.

So, who was this man called "Colonel"—
This beacon light of law?
He was just a good Georgia lawyer
Who earned our respect and awe.

When I began the practice of law in 1960, I was pleasantly surprised, when addressed by the judges and most court related persons (as well as by many elder citizens) as "Colonel." I even received a good bit of my mail from members of the older generation who prefixed my name with the title, "Colonel." This respected "title" never became permanently attached to me or to anyone whom I knew of my generation, as it had been to some of the older lawyers. Nevertheless, this unsolicited, sometimes-used name rang when heard, with a nice sound to even this loyal Navy man.

When I inquired as to why this form of address was often given to lawyers, I was told that it probably became popular after the “War Between the States,” when many militia units had been formed by local communities from untrained civilians. Because lawyers then, generally, had a bit more leadership experience and problem-solving training than most of their enlisting companions, they were usually among those who were elected as officers of the new army; and a large number of them returned home after the war as colonels. Hence, this honorary title began to be used liberally in addressing any lawyer (and still

From reading history and letters written in the South during the post-Civil War era, we can glean the fact that those were times when manners and consideration for others were highly valued. And because the lawyers by then would have been back in civilian clothes at court, often their ranks would be unknown. Hence, “Colonel” was the highest rank probable (for the generals were mostly career military officers and relatively few in number, and their names and ranks were, for the most part, well known).

If I ever hear a better explanation for this former widespread use of the term “Colonel” in the post-war

name, well fitting the description contained in my short poetic essay. And thirdly, under our fairly balanced legal system, the closest thing to a warm and fuzzy feeling a lawyer could ever have (at least for a nanosecond) is when the judge said, in a friendly voice in front of the client, “Colonel, what is your position on this matter?” For the judge to address a lawyer in this flattering manner was not only a beneficial sanction for good, but it was always sure to make the client feel that his own lawyer’s legal mind was respected by the judge, if only for that one short moment before the client’s lawyer was ruled against! This pleasant sanction is now missed.

So, although the use of that illustrious title, “Colonel,” which was once so often used, may now henceforth be relegated to the history books, it does seem that the time has finally arrived for all of us to remember, with fair reasoning, the customs which followed the 1860s war. And yes, to discard for all time those errant customs which are now known as having been wrong, while retaining those which we still perceive to have been good.

And it seems we have good reason to believe that the lessons of decency and civility which were exhibited by that same respected gentleman, who first shined a light for us down the emerging legal trails toward our own ‘Halls of Justice,’ were very good, indeed.

Furthermore, I am convinced that the vast majority of our present day younger siblings at the Bar still appreciate, and would hope to emulate, the ideals of that “First Georgia Colonel.” Indeed, most try to do so, through his or her own unique gifts of manner. For the “First Colonel’s” values were also


I am convinced that the vast majority of our present day younger siblings at the Bar still appreciate, and would hope to emulate, the ideals of that “First Georgia Colonel.”

was often so used, in the early 60s in the “Old South” community of Jonesboro, where I was then first admitted to the Bar).

This historical view and reasoning is strictly based on legend and hearsay as far as I know, for I have seen nothing before on this point in writing. However, this explanation seems particularly plausible to me when I recall that, during indoctrination taught in our military services, we were told that one should address an officer by the highest rank probable, whenever one is uncertain of the other’s actual rank, which often occurs when the parties are in civilian clothes. And if, by so doing, an error is made, the error would merely result in harmless flattery, rather than a more serious, personal slight.

South, I will willingly accept it. Until then, this logical answer will suit me just fine.

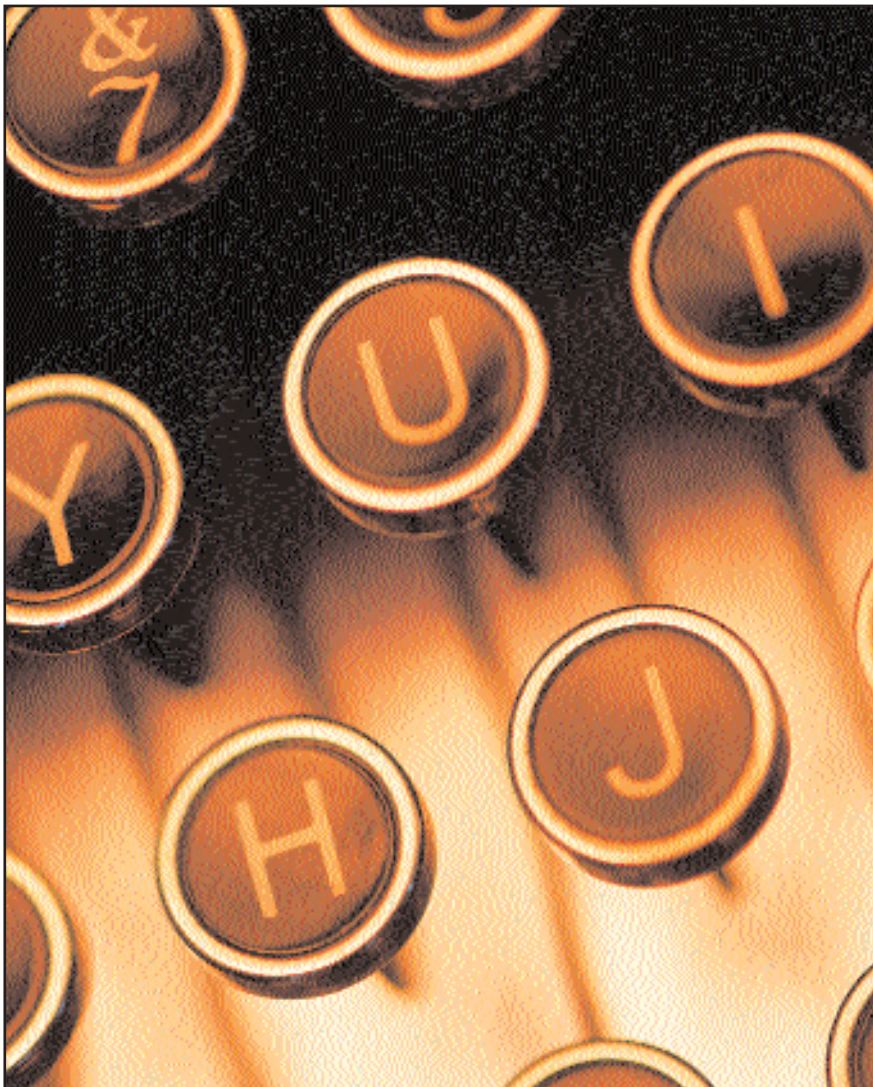
However, it appears that the use of this most honorable, honorary term, “Colonel,” has waned in recent years (seemingly being replaced by another honorable but more modern-sounding term, “Counselor”). But regardless of the real reasons for how the use actually came about, I believe our culture suffers when we forget typical Old South manners, and I rather regret the loss of use of this form of address, particularly in the case of future lawyers; for the word “Colonel,” as so used, implied a certain level of personal achievement, which had been fairly earned. Secondly, I have known many learned brothers who gave the honorary title “Colonel” a very good

the much admired standards of the 'role models' who brought us all to the Bar. 



Arthur A. Morrison is a Navy veteran, and a graduate of the University of Georgia and Emory Law School. A Savannah native, he practiced law in Clayton County. He is a past president of the Clayton County Bar and the Rotary Club. Now in retirement in South Fulton County, his hobbies include playing trombone with "The Southernares" Big Band.

**To paraphrase from several dictionaries, the term "Colonel" has been variously described as: 1. An army commander (principally of a regiment), 2. An honorary title used in the Southern states in connection with prominent businesspersons or other leaders, and 3. Earlier in the South, a title of respect given to certain noted elderly men; the term originally probably meant a leader of a column of men. In my poem, the "First Colonel" represented a composite personification of some virtuous qualities, which I often observed, early on, in many former, older members of the bar.*



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Atlanta Post 11	Roger Eugene Murray, Atlanta	Lookout Mountain Post 2	Christopher A. Townley, Rossville
Atlanta Post 13	Pat F. McMahon, Atlanta	Macon Post 1	Hon. Lamar W. Sizemore, Jr., Macon
Atlanta Post 15	Letitia A. McDonald, Atlanta	Macon Post 3	Robert R. Gunn, II, Macon
Atlanta Post 17	Kenneth L. Shigley, East Point	Middle Post 2	William Steven Askew, Swainsboro
Atlanta Post 19	Robert L. Shannon, Jr., Atlanta	Mountain	James T. Irvin, Toccoa
Atlanta Post 21	Patricia Anne Gorham, Atlanta	Northeastern Post 2	Hon. Robert W. Chambers, III, Gainesville
Atlanta Post 23	Donna G. Barwick, Atlanta	Northern Post 1	C. Patrick Milford, Carnesville
Atlanta Post 25	Phyllis J. Holmen, Atlanta	Ocmulgee Post 2	Wilson B. Mitcham, Jr., Greensboro
Atlanta Post 27	Nancy J. Whaley, Atlanta	Oconee Post 2	John P. Harrington, Eastman
Atlanta Post 29	Tina Shadix Roddenberry, Atlanta	Ogeechee Post 2	Susan Warren Cox, Statesboro
Atlanta Post 30	Karlise Y. Grier, Atlanta	Pataula	C. Truitt Martin, Jr., Dawson
Atlanta Post 32	Seth David Kirschenbaum, Atlanta	Piedmont	John E. Stell, Jr., Winder
Atlanta Post 34	Allegra J. Lawrence, Atlanta	Rome Post 1	Paul T. Carroll, III, Rome
Atlanta Post 36	Robin Frazer Clark, Atlanta	South Georgia Post 2	Gary O. Allen, Pelham
Atlantic Post 2	Joseph D. McGovern, Glennville	Southern Post 2	Robert Daniel Jewell, Moultrie
Augusta Post 1	J. Benjamin Kay, III, Augusta	Southwestern	Hon. R. Rucker Smith, Americus
Augusta Post 3	Thomas R. Burnside, Jr., Augusta	Stone Mountain Post 2	Hon. Johnny W. Mason, Jr., Atlanta/Decatur
Blue Ridge Post 2	Gregory A. Hicks, Woodstock	Stone Mountain Post 4	M.T. Simmons, Jr., Decatur
Brunswick Post 1	J. Alvin Leaphart, Jesup	Stone Mountain Post 6	A. Thomas Stubbs, Decatur
Chattahoochee Post 2	William C. Rumer, Columbus	Stone Mountain Post 8	Hon. Robert P. Mallis, Decatur
Chattahoochee Post 4	Earle F. Lasseter, Columbus	Tallapoosa Post 1	Michael Douglas McRae, Cedartown
Cherokee Post 2	J. Lane Bearden, Calhoun	Toombs	Dennis C. Sanders, Thomson
Clayton Post 1	H. Emily George, Forest Park	Towaliga	W. Ashley Hawkins, Forsyth
Clayton Post 3	Charles J. Driebe, Jonesboro	Waycross Post 2	Huey W. Spearman, Waycross
Cobb Post 2	Hon. Adele L. Grubbs, Marietta	Western Post 1	Hon. Lawton E. Stephens, Athens
Cobb Post 4	Patrick H. Head, Marietta	Out-of-State	Michael V. Elsberry, Orlando, Fla.
Cobb Post 6	John Kevin Moore, Marietta	Member at Large Post 1*	Althea L. Buafo, Macon
Conasauga Post 2	Henry C. Tharpe, J., Dalton	Member at Large Post 2*	Bettina Wing-Che Yip, Atlanta
Cordele	John N. Davis, Vienna		
Coweta Post 2	Delia T. Crouch, Newnan		

* Post to be appointed by president-elect.

State Bar of Georgia 2005 Proposed Election Schedule

October	Official election notice, October <i>Georgia Bar Journal</i>	Feb. 25	Deadline for receipt of nominating petitions by <u>new</u> BOG Candidates
Dec. 15	Mail Nominating Petition Package to BOG Incumbents and any other member requesting package	March 7	Deadline for write-in candidates for officer to file a written statement (not less than 10 days prior to mailing of ballots—Article VII, Section 1 (c))
2005		March 16	Ballots mailed
Jan. 13-15	Nomination of officers, Midyear Board of Governors Meeting, Omni Hotel, CNN Center, Atlanta	April 16	12 p.m. deadline for ballots to be cast in order to be valid
Jan. 25	Deadline for receipt of nominating petitions for incumbent BOG Members (Article VII, Section 2)	April 18	Election results available

"And Justice for All"



2004 State Bar Campaign for the Georgia Legal Services Program, Inc. (GLSP)

*Did **You** know that...*

...the Georgia Legal Services Program helps kids in crisis.



Your campaign gift helps low-income families and children find hope for a better life. GLSP provides critical legal assistance to low-income Georgians in 154 counties outside the metro Atlanta area.

The State Bar of Georgia and GLSP are partners in this campaign to achieve "Justice for All." Give because you care! Contribute on your State Bar Dues Notice, or use this coupon to mail your gift today!

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| <input type="checkbox"/> Executive's Circle \$ 750 - \$1,499 | <input type="checkbox"/> or, I'd like to be billed on (date): _____ |
| <input type="checkbox"/> Leadership Circle \$ 500 - \$ 749 | for a pledge of \$ _____ |

Pledge payments are due by December 31. Pledges of \$500 or more may be paid in installments with the final installment fulfilling the pledge to be paid by December 31. Gifts of \$125 or more will be included in the Honor Role of Contributors in the Georgia Bar Journal.

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*Thank you for your
generosity!*

The Thomas County Courthouse at Thomasville:

The Grand Old Courthouses of Georgia

By Wilber W. Caldwell

From its early beginnings in 1825, Thomasville quickly became the gateway to western Florida and the dominant trading center for the southernmost tip of the Cotton Belt in Georgia. The county's first courthouse was built in 1827 of "split pine logs covered with pine boards." In 1830, the entire county, which at that time included large portions of present-day Brooks, Colquitt and Grady counties, had only about 3000 residents.

In 1846-47, a brick courthouse replaced this first crude structure but was badly damaged by a storm in 1853 and declared unsafe in 1855. By the early 1850s, the county's population had exceeded 10,000. As new settlers, eager to exploit the compelling promise of cotton, began to clear Thomas County's great expans-

es of pine, Thomasville sought to develop its own brand of culture and refinement in what still must have been a rather remote outpost of the vanishing American frontier. In his *Statistics of the State of Georgia*, George White reported Thomasville's population at around 500 in 1849. By some accounts, the town experi-

enced considerable growth in the 1850s, reaching 2500 residents by 1860 when the Atlantic and Gulf Railroad was completed to Thomasville from Savannah.

This 1858 courthouse, designed by the transplanted Englishman John Wind, was an enormous building for its place and time, and



Photo by Wilber W. Caldwell

Built in 1858. John Wind, architect. Remodeled in 1885.

with the seeds of sophistication germinating in Thomas County's crude garden of pioneer pragmatism, symbolic architectural messages elevated this structure above mere practical considerations. To discover this building's soul, we today must mentally peel away an extensive 1885 remodeling to find

the building's original form a simple example of the early American brick vernacular style. This elementary style, which often developed along the edges of the American frontier, was usually inspired by details and elevations presented in various practical builders' guides, like the ones published in the early 19th century by Asher Benjamin. Benjamin's simple classical forms were used throughout America to convey lofty images of purity, justice, democracy, reason and so on.

Despite such imagery, the result of Wind's manipulations of Asher Benjamin's much copied form was probably more reflective of Thomasville's economic success and commercial growth than anything else. This building distinguished Thomasville more by its size and quality of construction than by its artistic qualities of design. This distinction is made even more radiant when the building is compared to many of its neighbors. Thomasville had undoubtedly managed some degree of cultural refinement by 1860, as wealthy planters achieved enough success in the fields to move their residences to town. Nonetheless, Thomas County surely had its rough edges on the eve of the Civil War, and this building, in its original form, perhaps spoke better for that practical frontier culture than it did for a fabled "planter aristocracy."

The 1885 remodeling of the Thomas County Courthouse undoubtedly did much to affirm Thomasville's belief in such aristocratic Old South mythology. The Italian Renaissance details, presumably the design of local contractors Eaves and Chase, added considerable charm to what


theretofore had been a rather stark old red brick pile. After a few years, it became natural for Thomasvillians to simply assume that the building had always radiated this refined neoclassical aura. As in so many Southern towns, an almost unavoidable inference occurred. Late 19th century architectural sophistication came to document a rose-colored vision of society in the earlier period, implying an antebellum cultural enlightenment similar to the one detailed in the then emerging myths of the Old South.

The 1885 remodeling of the old vernacular building lifted the structure out of the frontier and into a more sophisticated, if not up-to-date, American architectural era. Here we find Renaissance themes, but details generally recall the older Italianate style popular in the pre-war period rather than the modern clothing of the blossoming American Renaissance Revival, which, in the 1880s, was just beginning to gain momentum in the North. Distinctly Italianate is the fenestration, featuring both rounded and segmental arches with bold hoodmolds supported by ornamental braces. The enclosure of the portico and the addition of the pediment and its three massive supporting arches create an entrance true to the vision of the original Asher Benjamin design. Likewise, the remodeled octagonal tower is similar in effect, although more grand than Benjamin's plan.

Unlike Bruce and Morgan's 1892 Brooks County remodeling of John Wind's almost identical 1860 courthouse at nearby Quitman, this is not a step forward into the architectural future, but rather a decided step backward into the past. In fact, if we disregard the delicate

arched fenestration, the effect of the 1885 remodeling created a greater likeness to Asher Benjamin's original 1827 "Elevation for a Courthouse." Perhaps this historical focus was more in tune with the mood in Thomasville in 1885 than any modern messages.

Just as Thomasville's 1885 courthouse remodeling was completed, two magnificent resort hotels were erected, marking the period of the town's fullest flower. Mild winters and soft Southern airs had made Thomasville a popular winter resort with wealthy Northern vacationers, and these enormous facilities, the Mithcell House and the Piney Woods, added substantial elegance to the attractive natural scene. Both were designed by New York architect J. A. Wood, who would later go on to design the Oglethorpe Hotel in Brunswick and Henry B. Plant's fabulous 511-room Tampa Bay Hotel completed in 1891.

Through it all, Thomasville's population remained rather static reporting about 5500 residents in 1890 and just above 6500 20 years later. 

Excerpted by Wilber W. Caldwell, author of *The Courthouse and the Depot, The Architecture of Hope in an Age of Despair, A Narrative Guide to Railroad Expansion and its Impact on Public Architecture in Georgia, 1833-1910*, (Macon: Mercer University Press, 2001). Hardback, 624 pages, 300 photos, 33 maps, 3 appendices, complete index. This book is available for \$50 from book sellers or for \$40 from the Mercer University Press at www.mupress.org or call the Mercer Press at (800) 342-0841 inside Georgia or (800) 637-2378.

Project “Legal Lives” 2004

Fulton DA Schools Elementary Students on Law and Order

By Lyn Vaughn Vann

From reality TV police and court dramas to learning about the real thing—this is the journey Atlanta elementary school students who participate in “Project Legal Lives” take, courtesy of Fulton County District Attorney Paul Howard. Each year since 1993, when Howard initiated the program in Georgia, fifth graders from Arkwright, Dean Rusk, Mary McLeod Bethune, Peyton Forest, Venetian Hills and, this year, Benteen Elementary Schools are introduced to the workings of the criminal justice system. They become the actors in a mock trial competition, and the youngsters who give their all to the project are taken on a whirlwind trip to Washington, D.C.

Once a week for 10 weeks, the youngsters are immersed in the



Fulton County District Attorney Paul Howard sends Legal Lives students off to Washington, D.C.

law by assistant district attorneys as part of their social studies classes. They are taught the principles and values that underlie our criminal justice system—a basic respect for individual rights and respect for the common good. They also learn, as any good lawyer must, how to think critically, analyze facts and speak before an audience. Then, they’re ready for the mock trial. The District Attorney’s Community Affairs Director Jada Dawkins says, as the weeks pass, you can see the remarkable growth in the students. “It is as rewarding for us,” Dawkins says, “as it is for them.”

On trial day, the students serve as prosecutors, defense attorneys, defendants, witnesses, victims, jurors and the judge. This year’s competition took place in May at the Fulton County Courthouse in

downtown Atlanta. Members of the Fulton County District Attorney’s staff judged the competition, as in years past. For Dean Rusk Elementary School student Malik Caldwell, who won a trophy for his mock trial work, that part of the program was “totally awesome.”

The reward for the students’ enthusiasm, hard work and perseverance is an all expense paid trip to the nation’s capital. Judging by the comments of those who traveled to Washington this year, that alone is incentive to do well. “The trip to Washington was fun,” says Ngoc Vu of Dean Rusk Elementary. “I learned about Frederick Douglass and how he learned to read all by himself and how he fought for what he believed in.” Peyton Forest student Katari Fannin says, “It was fun visiting

Once a week for 10 weeks, the youngsters are immersed in the law by assistant district attorneys as part of their social studies classes. They are taught the principles and values that underlie our criminal justice system - a basic respect for individual rights and respect for the common good. They also learn, as any good lawyer must, how to think critically, analyze facts and speak before an audience.

the National Zoo and seeing all the different animals."

The competition is tough. The students who are selected to make the trip aren't judged solely on their mock trial performance. They must demonstrate commitment to Project Legal Lives by consistent participation in the classes, completing homework assignments and exhibiting exemplary behavior in and out of class. Five students from each school are chosen to make the trip. Some of the fifth-grade teachers accompany the students to Washington as chaperones. Most of the money for the program comes from a Local Law Enforcement Block Grant through the U. S. Justice Department. The Fulton County District Attorney's office provides the balance.

And who wouldn't be excited about a four-day excursion to the nation's capital?

The young people will tell you it was exhausting, yet exhilarating and exciting. This year from June 3-6, they toured the renowned Smithsonian Museum and the Air and Space Museum and visited the home of writer and orator Frederick Douglass on the African-American Heritage tour. On Capitol Hill, they were greeted by Georgia Congress members John Lewis, a civil rights hero, and David Scott.

The goal of Project Legal Lives is simple. It is to familiarize these



Legal Lives Students sit on the steps of the U.S. Capitol with Congressman John Lewis.

young people with the law and how the legal system works in order to keep them from winding up on the wrong side of the system. As Howard puts it, "I truly believe that one of the Legal Lives students will someday sit on our nation's Supreme Court. I believe they will all become better citizens. It is important for my office to continue to play an important role in this process."

The students may be too young to realize the full importance of their participation in such a program, but they do know the experience is meaningful and fun. For Takeria Michelle Nash of Arkwright Elementary, Project Legal Lives was life changing. In a letter of gratitude, she wrote, "Thank you for all you have done

for me. I really appreciate the hospitality. I have really had a good time. You have set a new goal for me to reach."

And that, says Howard, is what it's all about. 



Lyn Vaughn is acting director of public relations in the office of Fulton County District Attorney Paul Howard.

She hosts the news magazine show *Inside Dekalb* on Dekalb County TV channel 23 and writes feature articles for the new home décor magazine, *Living Space*. Lyn has worked as a broadcast journalist in the Atlanta market since 1983, most notably at CNN Headline News from 1984 to 1998.

KUDOS

K. Martin Worthy, a retired partner of Foley & Lardner in Washington, D.C., received the **2004 Distinguished Service Award** from the American Bar Association's taxation section. Worthy has held a number of leadership roles in the ABA's tax section and in the American College of Tax Counsel. The award is the highest given by the section.

The **American Health Lawyers Association**, the nation's largest educational organization devoted to legal issues in the health care field, listed **McGuireWoods LLP** as seventh in the number of lawyers in the firm (36) who belong to the AHLA. McGuireWoods' health care department represents three of the largest health care systems in the United States, two of the 10 largest surgery center companies in the country, and two of the six largest dialysis facility companies in the nation.

Earnhart A. Spencer Jr. of **Powell, Goldstein, Frazer & Murphy LLP** led a group of nine Roanoke College students on a three-week educational trip to Ghana. In addition to attending lectures at the University of Ghana at Legon, the students learned Ghanaian history and government firsthand by visiting various historical, cultural and political sites. The group also had the opportunity to participate in an International Habitat for Humanity project in the township of Assin Fossu. Spencer served as the instructor for a course on Ghanaian political history and comparative constitutional law, a mentor for the students and a chaperone on various educational excursions.

Lenny Panzitta of **Hunter Maclean** and his wife, Karen, a physician with Radiology Associates of Savannah, recently won the \$5 million Lotto South jackpot. The Panzittas are strong supporters of the HOPE Scholarship program; they purchase a \$50 Lotto South ticket every five weeks. They rarely broke even until this win, which netted them \$1.7 million after taxes. They intend to put most of the money into the bank and use the rest to fund business ventures.



The **Executive Awards Committee** of the **National Republican Congressional Committee** designated **Richard W. Wolfe** as the **2003 Georgia Businessman of the Year**. Wolfe was presented with the award at a ceremony in Washington, D.C. in April. Wolfe is a member of the NRCC Business Advisory Council and was nominated to serve as one of Georgia's voting delegates at the 2004 NRCC Tax Summit.

Kilpatrick Stockton LLP announced that **Shyam Reddy**, an attorney in the firm's corporate practice group, was selected for the prestigious **L.E.A.D. Atlanta Class of 2005**. L.E.A.D. Atlanta is a leadership initiative for young professionals. Only 36 individuals were chosen out of nearly 100 applicants.



Tyrone C. Means, of **Thomas, Means, Gillis & Seay, P.C.**, was named a member of the **Fellows Program** of the **Alabama Law Foundation**. The program honors lawyers who have been members of the Alabama State Bar Association for more than 10 years and who have demonstrated outstanding dedication to their profession and their community. Fellows must be nominated by a colleague, and they are limited to one percent of the total bar membership.

Janet E. Hill, of **Hill & Beasley, LLP**, became **president of the National Employment Lawyers Association** at its annual convention. NELA is exclusively comprised of lawyers who represent individual employees in employment-related matters. It has more than 3,000 members, including state and local affiliates.

Brent Wilson, a partner with **Elarbee, Thompson, Sapp & Wilson**, was inducted into the **College of Labor & Employment Lawyers** during the ABA Annual Meeting in Atlanta. The college consists of nearly 600 of the top labor and employment lawyers from across the country with at least 20 years of distinguished experience in the labor and employment field. There are 14 current members from Georgia.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., announced that **Margaret H. Campbell** was selected as a **fellow** of the **College of Labor and Employment Lawyers**. Election as a fellow is the highest recognition of sustained outstanding performance in the profession. Ogletree Deakins now has 18 fellows in the college—the most of any labor and employment law firm.



Jim Messer, a partner with **Fonvielle Lewis Foote & Messer** in Tallahassee, Fla., was elected to the **Board of Directors** of the **Academy of Florida Trial Lawyers** and received the **Silver Eagle Award** for his service to the academy.

Arnall Golden Gregory LLP attorney **Bryan Bockhop** was named **vice chair** of the **American Intellectual Property Law Association's Emerging Technologies Committee**. He will assume this role during the annual AIPLA meeting in October. The committee is charged with investigating new technologies and providing the AIPLA with input and educational programs relating to new legal issues arising from emerging technologies. In addition, **Marva Jones Brooks** was selected as **chair-elect** of the **National Conference of Bar Examiners board**. She will become chair in August of 2005. The NCBE works with various state supreme courts, state bar examiners organizations and American Bar Association committees to develop, maintain and apply reasonable and uniform standards of education and character for eligibility for admission to the practice of law.

Jessica J. Harper, a shareholder with **Bodker, Ramsey, Andrews, Winograd & Wildstein, P.C.**, was named "**Volunteer of the Year**" by the **Georgia Association for Women Lawyers**. This is the first time GAWL has recognized one of its own members for the award. Harper was selected from more than 7,000 members for the honor. She serves on the organization's board as vice president of special events.

The State Bar of Georgia's Young Lawyers Division received special recognition during the ABA's annual meeting earlier this year in Atlanta. The YLD received first place in the newsletter category and second place in the comprehensive category. Additionally, the YLD received special recognition for its Women in the Profession Pro Bono Fair and for its Women in the Profession Lunch & Learn Programs. The YLD also received a certificate of performance for the Minorities in the Profession Summer Picnic.

ON THE MOVE

In Alpharetta

Randolph H. Houchins was recently named **vice president and general counsel** of **CellNet Technology, Inc.**, and its affiliated companies. CellNet is a provider of wireless automated meter reading and distribution automation products and services for the utility industry. Their headquarters are located at 30000 Mill Creek Ave., Suite 100, Alpharetta, GA 30022; (678) 258 1500; Fax (678) 258 1686; www.cellnet.com.

The Newman Law Firm announced that **David W. Adams** joined the firm. He will continue to practice in the area of catastrophic injury and wrongful death. The office is located in the Park Plaza building, Suite 150, 178 South Main St., Alpharetta, GA 30004; (678) 205-8000; Fax (678) 205-8002.

Ford & Harrison announced that **Christopher Butler**, **Jeffrey Hackney** and **Jermaine Walker** joined the firm as associates in the Atlanta office, located at 1275 Peachtree St. NE, Suite 600, Atlanta, GA 30309; (404) 888-3800; Fax (404) 888-3863.

Powell, Goldstein, Frazer & Murphy LLP announced that **Charles L. Warner** joined the firm's Atlanta office as of counsel in its intellectual property development and protection practice. Warner is an electrical engineer and has served in positions at Texas Instruments and with the U.S. Air Force Civil Service. The firm is located at 191 Peachtree St. NE, 16th Floor, Atlanta, GA 30303; (404) 572-6600; Fax (404) 572-6999.



Nations, Toman & Nutter LLP announced that **Charles K. McKnight Jr.** joined the firm as a partner, and the firm will now be known as **Nations, Toman, Nutter & McKnight LLP**. McKnight was a partner at King &

Spalding. He will continue to represent plaintiffs and defendants in contract, fraud, business tort and real estate disputes. The firm is located at Suite 1550, Tower Place, 3340 Peachtree Road NE, Atlanta, GA 30326; (404) 266-2366; Fax (404) 266-2323.

Troutman Sanders LLP announced that **Lara B. Robinson** joined the firm's compensation and employee benefits group as a partner and practice group leader. The group handles all aspects of compensation and benefits law, design, consulting and application. Troutman Sanders' Atlanta office is located at 600 Peachtree St. NE, Suite 5200, Atlanta, GA 30308-2216; (404) 885-3000; Fax (404) 885-3900.

George W. Jordan III joined **Merchant & Gould** as an associate in its Atlanta office. He practices intellectual property litigation with a focus on patent and computer/electronics disputes. The firm is located at 133 Peachtree St. NE, Suite 4900, Atlanta, GA 30303; (404) 954-5100; Fax (404) 954-5099.

Jamilia N. Smith joined **Banta Immigration Law Ltd.** as an associate specializing in business immigration law. The firm is located at 1175 Peachtree St. NE, 100 Colony Square, Suite 700, Atlanta, GA 30361; (404) 249-9300; Fax (404) 249-9291.

Carlton Fields, PA, opened a new office in Atlanta, their seventh nationwide. **Wayne Shortridge** joined the firm and will serve as the Atlanta office's managing shareholder; he was a managing partner at Powell Goldstein. The new office is located at One Atlantic Center, 1201 West Peachtree St., Suite 2500, Atlanta, GA 30309; (404) 815-3400; Fax (404) 815-3415.



Barnum



Horton

The Atlanta office of **McGuireWoods LLP** announced two additions to the firm's labor and employment department: **Eric L. Barnum** as a partner and **Halima Horton** as an associate. The firm is located at The Proscenium, 1170 Peachtree St. NE, Suite 2100, Atlanta, GA 30309-7649; (404) 443-5500; Fax (404) 443-5599.

Schiff Hardin LLP added **Michael Wolensky** and **Ethan H. Cohen** as partners in their Atlanta office. Both will be members of the firm's market regulation and general litigation groups. Schiff Hardin's Atlanta office is located at 1230 Peachtree St., 18th Floor, Atlanta, GA 30309-3574; (404) 806-3800; Fax (404) 806-3801.



DoVale



Giles

Needle & Rosenberg announced that **Anthony J. DoVale Jr.** and **Brian Giles** joined the firm, DoVale as an associate in the mechanical patent practice group and Giles as a science advisor in the biotechnology practice group. The firm is located at Suite 1000, 999 Peachtree St., Atlanta, GA 30309-3915; (678) 420-9300; Fax (678) 420-9301.

Fredric Chaiken and **Stephen R. Klorfein** announced the opening of their new firm, **Chaiken Klorfein, LLC**. Their practice areas include business litigation, corporate governance, non-compete and confidentiality agreements, trademark and patent infringement, estate litigation, domestic relations, personal injury, tax planning, estate planning, mergers and acquisitions, probate, and general business representation. The firm is located at 7000 Peachtree Dunwoody Road, Building 9, Suite 300, Atlanta, Georgia 30328; (770) 668-5454; Fax (770) 668-1677.

Jefferson D. Blandford joined **Chamberlain Hrdlicka** as a shareholder in the firm's litigation practice. He focuses on labor and employment law, including ERISA, and commercial litigation. Blandford was formerly a partner with Ford &

Harrison, LLP. Chamberlain Hrdlicka's Atlanta office is located at 191 Peachtree St. NE, 9th Floor, Atlanta, GA 30303-1747; (404) 659-1410; Fax (404) 659-1852.



Ronald T. Coleman Jr. joined the firm of **Parker Hudson Rainer & Dobbs LLP** as a partner in its litigation group. His practice will continue to focus on complex business litigation, particularly in the areas of intellectual property, franchise and trade regulation litigation. The office is located at 1500 Marquis Two Tower, 285 Peachtree Center Ave. NE, Atlanta, GA 30303; (404) 523-5300; Fax (404) 522-8409.

Chitwood & Harley LLP announced that **David Worley** joined the firm as a partner; **David Bain** and **Nikole Davenport** became partners; **Robert Kahn** joined the firm as of counsel; **James Evangelista** joined the firm as counsel; and **James Wilson, Joseph Helm** and **Leslie Toran** joined the firm as associates. The firm is located at 2300 Promenade II, 1230 Peachtree St. NE, Atlanta, GA 30309; (404) 873-3900; Fax (404) 876-4476.



Corliss Scroggins Lawson, a partner with **Lord, Bissell & Brook LLP**, was named partner-in-charge of the firm's Atlanta office. Lawson's practice focuses on insurance coverage litigation, environmental liability, premises liability, products liability, construction/design defects, credit fraud, employment and general contracts. The office is located at 1900 The Proscenium, 1170 Peachtree St. NE, Atlanta, GA 30309; (404) 870-4600; Fax (404) 872-5547.

In Decatur

John E. Connerat and **Tim L. Fallaw** recently opened the law firm of **Connerat & Fallaw LLP** in Decatur. The firm focuses on real estate law with a particular emphasis on residential real estate transactions and closings. The firm is located in the Commerce Plaza building, 755 Commerce Drive, Suite 802; Decatur, GA 30030; (404) 638-5240; Fax (404) 638-5241; www.lawwcf.com.

In Duluth

Mandy L. Miller has become an associate with **Prebula & Associates LLC**, a law firm in Duluth that focuses primarily on civil litigation. Her services include assisting clients in the areas of family law, employment law, personal injury, business law and commercial litigation. The firm is located at 3483 Satellite Blvd., The Crescent Building, Suite 200, Duluth, GA 30096; (770) 495-9090; Fax (770) 497-2363.

Thompson & Slagle, P.C., announced that **Michael J. Hannan III** has joined the firm as of counsel, where he will continue his trial and appellate practice in the areas of catastrophic torts and personal injury, first party insurance, ERISA, professional liability, commercial, class action and employment litigation. The firm is located at 12000 Findley Road, Suite 250, Duluth, GA 30097-1483; (770) 662-5999; Fax (770) 447-6063.

In Jacksonville, Fla.

Christopher L. Casey, formerly of **J. Hue Henry, P.C.**, in Athens, Ga., joined the Jacksonville office of **Hinshaw & Culbertson, LLP**. Casey remains an active member of the State Bar of Georgia. The firm is located at 50 N. Laura St., Suite 1800, Jacksonville, FL 32202; (904) 359-9620; Fax (904) 359-9640.

The new chair of the **Formal Advisory Opinion Board** is **James W. Friedewald** of **Edwards, Friedewald & Grayson** in Marietta. He has been a member of the board since 2000. Professor **Jack L. Sammons Jr.** of Mercer University's **Walter F. George School of Law** was re-elected as vice chair. He has served in that capacity for the past 3 years. Sammons has been a member of the board since 1996. **Michael Bagley**, of **Drew, Eckl & Farnham** in Atlanta, served as chair for the last three years. He will continue to serve on the board. The State Bar of Georgia would like to thank all the members of the Formal Advisory Opinion Board for their service and dedication.

From the South Georgia Office

Working for you

South Georgia representatives of the Membership Services Committee met in the Tifton office to join other committee members around the state by conference call. The purpose of the meeting was to identify strategies that encourage members to take advantage of various State Bar member resources.



(Left to right) Michael Turner, Tifton; Gary Allen, Pelham; Greg Sowell, Tifton; Norman Crow, Sylvester; Lester Castleberry, Moultrie; Judge Gordon Zeese, Albany; and Walter Elliott, Valdosta.

To help generate ideas, the committee is seeking feedback from all members. Please visit www.gabar.org/Survey_member_benefits.asp to take the member benefits survey.

In Other News

Dougherty County District Attorney Ken Hodges and his chief assistant Greg Edwards were both seriously injured when their SUV hydroplaned on Interstate 75 in August. With time, both are expected to make a full recovery. To help speed up the healing, you may send a card to: P.O. Box 1827, Albany, GA 31702.

Know the Rules About Providing Additional Law-Related Services to Clients

By Paula Frederick

We've had a bit of luck," your clients Jan and Joey Kravitz announce as they enter your office. "A relative who Jan never even met left her a bundle. As soon as his estate settled and the money came through, we figured we'd better have you revise those wills you did for us a few years ago."

A quick update on the Kravitzes' situation leaves you shaking your head. "Jan and Joey, I'm surprised that you haven't hired a professional to advise you how best to invest your inheritance," you say. "I've only glanced at the information you brought me, and already I can tell that you're not taking full advantage of a number of tax credits available to you."

"We're wary of trusting anyone with our nest egg," Jan explains. "Remember that unfortunate experience we had with the phony 'investment adviser' who turned out to be wanted in five states? Joey lost half his retirement savings through that fraudster's shenanigans."

"Since then we've been managing our own financial affairs," Joey adds. "I never thought I would turn over control of my finances to anyone again, but I'll admit I'm in over my head with this inheritance. Maybe you could help us! Is there anyone you could recommend?"


"As a matter of fact there is," you announce. "I'm now a Certified Financial Planner—I've been working on getting certified for ages, and finally completed all the requirements. I'm part owner of a company that would be delighted to provide you with professional, ethical advice on managing your assets."

One of your law partners raises concern about this encounter when you describe it to him later. "Are you sure you haven't created a conflict of interest with the Kravitzes?" he asks. "I sure would hate to lose their legal business because you were trying to steer them to your financial planning company."

"It's all aboveboard and perfectly ethical," you assure your partner. "There's even a Bar rule that deals with it. Rule 5.7—Responsibilities Regarding Law-Related Services."

You are right! Rule 5.7 allows a lawyer to provide law-related services to a client. The lawyer is subject to the Georgia Rules of Professional Conduct with respect to the additional services unless they are offered in a way that is clearly separate from the legal services.

As with many other ethics rules, Rule 5.7 and its comments demonstrate a preference for disclosing information and allowing the client to make an informed decision. The concern with this particular rule is that, unless informed otherwise, clients may assume ancillary services carry all of the usual protections of the client/lawyer relationship.

Providing law-related services can benefit your clients by providing them with convenient, reliable help in a variety of areas. Before you develop a plan to offer law-related services, remember to contact the Ethics Helpline at (404) 527-8720 to discuss your situation with a lawyer in the Office of the General Counsel. 



Paula Frederick is the deputy general counsel of the State Bar of Georgia.

Discipline Notices

(June 15, 2004 through Aug. 10, 2004)

By Connie P. Henry

DISBARMENTS/VOLUNTARY SURRENDER

Richard Kenneth Capps

Douglasville, Ga.

On June 28, 2004, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of Richard Kenneth Capps (State Bar No. 108858). Capps conducted two real estate closings in October 2003 but failed to pay taxes or insurance, causing the properties to be subject to foreclosure. The client had to pay additional fees to bring his taxes and insurance up to date.

In another matter Capps represented a client in the purchase of a home. The client was due a refund. Capps wrote a check from his operating account, which was returned for insufficient funds, and then wrote a check from his trust account, which was not honored. Capps never refunded the money. He claimed he paid the title insurance, but Capps' agency had been suspended, thus, the title company had no obligation for the insurance. Capps subsequently reimbursed the client for the amount on the settlement statement. Additionally, four more checks issued in March 2003 were trust account overdrafts.

Finally, Capps closed the sale of a third client's house but failed to send the payoff funds of over \$93,000 to the bank.

Eric Vann Ross

Atlanta, Ga.

Eric Vann Ross (State Bar No. 615128) has been disbarred from the practice of law in Georgia by Supreme Court order dated July 12, 2004. Ross settled a case for \$20,000 and dismissed it with prejudice without his client's

consent. He deposited the funds into his bank account and told the client the case had been settled for \$18,000. Ross has not accounted for the funds nor delivered them to his client.

Joseph Mitchell Williams

Macon, Ga.

Joseph Mitchell Williams (State Bar No. 762969) has been disbarred from the practice of law in Georgia by Supreme Court order dated July 12, 2004. In June 2002 a client paid Williams \$350 to file a petition for a name change. Although Williams reassured the client that he was handling the matter, he did not do any work on the client's behalf. In September 2002 the client demanded her money back, but Williams failed to return the money or paperwork.

In October 2000 Williams was paid \$1,000 to handle a civil matter. In February 2001 Williams filed a statement of claim in magistrate court but failed to serve the defendant or perform any additional work. Williams failed to return the fees or file.

In a third matter Williams was paid \$4,000 to represent a client in a criminal matter. Williams negotiated a guilty plea without the client's permission. Williams failed to appear in court on the client's behalf on three separate occasions.

SUSPENSIONS

John H. Armwood

Marietta, Ga.

John H. Armwood (State Bar No. 022545) has been suspended from practicing law in Georgia by Supreme Court order dated July 12, 2004, for a period of two years with conditions for reinstatement. Armwood was paid \$1,500 in September 2002 to represent a

Consumer Pamphlet Series



The State Bar of Georgia's Consumer Pamphlet Series is available at cost to Bar members, non-Bar members and organizations. Pamphlets are individually priced at 25 and 75 cents each plus shipping. Questions? Call (404) 527-8761.

The following pamphlets are available:

Auto Accidents › Bankruptcy › Buying a Home › Divorce ›
How to Be a Good Witness › How to Choose a Lawyer › Juror's
Manual › Lawyers and Legal Fees › Legal Careers › Legal Rights
of Nursing Home Residents › Patents, Trademarks and
Copyrights › Selecting a Nursing Home › Selecting a Personal
Care Home › Wills

Visit www.gabar.org/cps.htm for an order form
and more information or e-mail daniel@gabar.org.

client against misdemeanor charges. Armwood did not file an entry of appearance, did not request a preliminary hearing, and did not respond to repeated requests for information about the case. In December 2002, at the request of the incarcerated client, the county public defender filed an entry of appearance on his behalf.


As a prerequisite to reinstatement, Armwood is required to reimburse any unrefunded portion of the \$1,500 and to complete 12 hours of Law Office Management in an ICLE-approved program.

Jeffrey N. Schwartz

Marietta, Ga.

Jeffrey N. Schwartz (State Bar No. 631020) has been suspended from practicing law in Georgia by Supreme Court order dated July 12, 2004, for a period of 18 months *nunc pro tunc* May 9, 2003. Between the fall of 2001 and March 2003 Schwartz accessed and deleted voice mail messages left on the voice mail of his former employer, an Atlanta law firm that discharged him in August 2001. Schwartz resigned his position at his current law firm and voluntarily ceased practicing law on May 9, 2003.

INTERIM SUSPENSIONS

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since June 15, 2004, four lawyers have been suspended for violating this Rule. 

Connie P. Henry is the clerk of the State Disciplinary Board.

The Small Firm Paperless Office

By David L. Masters

The paperless office exists today, not as an abstract goal but as a real possibility for virtually all small firm attorneys. Your office can be paperless, or nearly so. You won't need a degree in computer science. If you can't afford a consultant or live in an area without consultants, don't worry. The ideas here come from a rural small firm practice and can be implemented by anyone (they may or may not be extrapolated to larger firms).

So what's the catch? Making the transition to a paperless office requires a shift in thinking about how you, the lawyer, handle information. This is not a project to pass off to your staff; you, the lawyer, will be working with paperless documents. There will still be plenty of paper passing through your office; until your clients and the lawyers outside your firm go paperless, they will continue to deliver information to you on sheets of paper (lots of paper). But, once you go paperless and need to see a document that's more than a few days old, it will exist in your office digitally to be viewed on your computer. That's the catch and the shift in thinking. You need to become comfortable with working with information on your computer rather than on pieces of paper. That's where Adobe Acrobat™ comes in. Acrobat makes it possible for you to work with information on your

computer in much the same way that you work with pieces of paper.

The physical transition to a paperless office requires hardware and software, some of which you may already have and some you may need to purchase. The amount of money you will have to spend to move to a paperless office depends in part on what you already have and how elaborate you want your paperless office to be.

A Shift In Thinking

Lawyers and law firms process information, little more and little else. We receive information from clients and other sources, we add information gained from research and experience, and we deliver information. The information that lawyers deliver takes many forms; it may be a pleading, an oral presentation to a court, an opinion letter, or a contract, but in the end lawyers receive, process and deliver information.

Most of the information that comes into the law office arrives in the form of paper documents. For that matter, most of the information output from law offices, your work product, goes out as some form of document. Taking a very simple and abstract view of the typical law office, there are three primary systems involved in processing documents:

- b A document generation system;
- b A document copying or replication system; and
- b A document retention or filing system.

Figures 1 and 2 on page 64 illustrate, with rough diagrams, how these systems work in the typical law office. Notice that all docu-

ments (whether incoming or outgoing) pass through the copying or replication system. In the typical office, a photocopier acts as the copying or replication system. In the paperless office, a scanner replaces the photocopier. Incoming documents pass through the scanner, rather than a photocopier, producing digital copies that are stored electronically. Outgoing documents, rather than being scanned or photocopied, are retained in their original digital format and printed (converted) to Portable Document Format (PDF) just like the scanned documents.

Any paperless office will depend on some type of electronic filing systems and a commitment to capture digital images of all incoming paper. The file room in the paperless law office consists of electronic filing cabinets filled with folders that contain everything found in traditional paper files. Think of a shared hard disk drive as the file room: the cabinets within the room are large divisions on the disk, and within those cabinet-sized divisions are folders for each client matter. Most client matter folders are further divided into subfolders to aid in organization and navigation.

Working with documents in digital format requires a significant shift in thinking. But consider what

it will be like to have all documents at your desk without rummaging through file cabinets or boxes. Think of all the paper you put in files, because someday you may need it, only to never see it again. Consider the unpleasant process of closing those files and moving them to storage. Recall the times you've gone to storage to retrieve a single piece of paper. Now consider keeping all those documents in

electronic format, readily available if needed, and then closing files by dragging them from an active work directory to an archive directory. This is the reality of the paperless law office.

The Physical Transition

Once you've decided to think paperless, the physical half of the paperless office becomes manageable. The physical half consists of the hardware and software needed to convert paper documents to digital documents and store, retrieve, work with, and back up those digital documents.

The first item on the list will be the scanner. There are many scanners on the market, but not all are suitable for the paperless law office. Inexpensive flat bed scanners generally lack an automatic document feeder (ADF). As a result this type of scanner cannot process paper quickly enough to

be useful. Desktop, egg-carton style, sheet fed scanners likewise are too slow to provide much benefit. These devices are convenient for individual users to occasionally acquire images of documents without a trip to the main scanner. High speed sheet fed scanners are attractive, but lack the ability to handle odd size documents, books and magazines.

What you need is a scanner that combines the benefits of flatbed

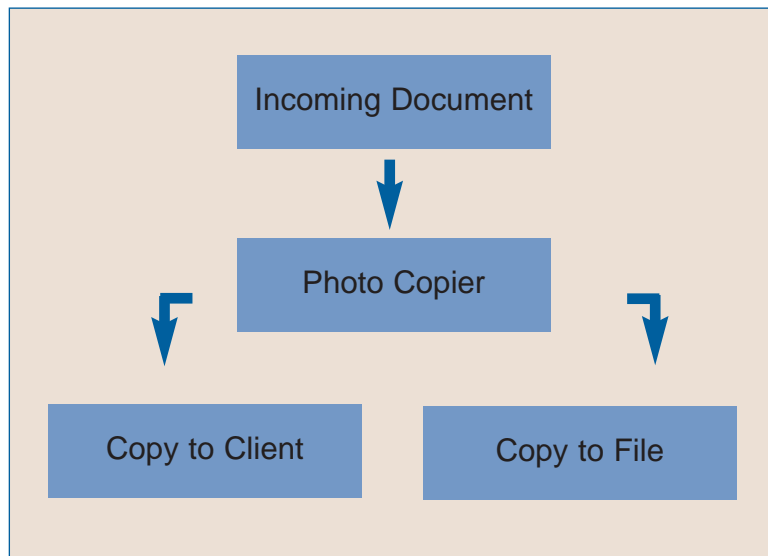


Figure 1

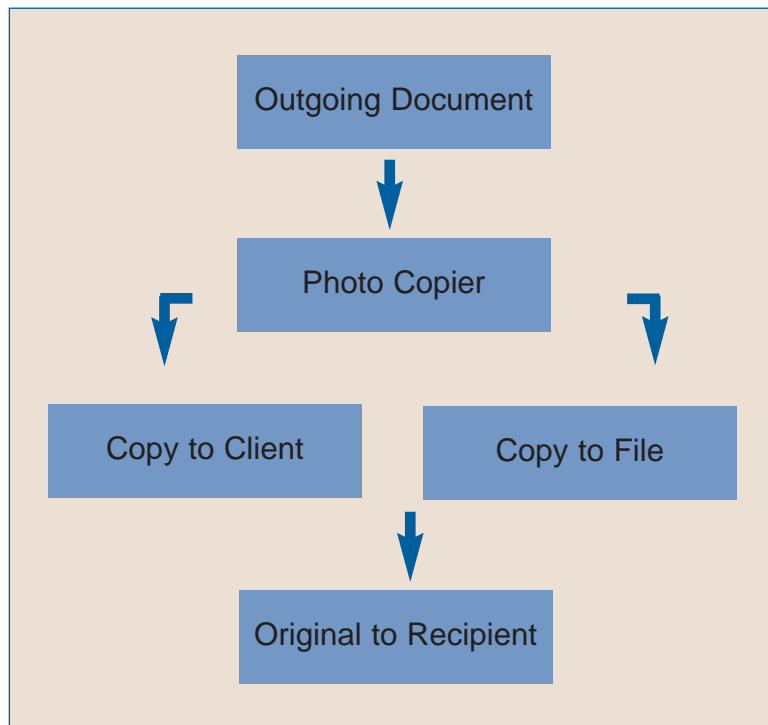


Figure 2

and sheet-fed models and has the ability to acquire images at a rate of at least 10 pages per minute (ppm). Scanners in this category start at around \$800 and the prices go up from there. Whether you realize it or not, two key pieces of your office infrastructure are rated on a page per minute basis—your printer and photocopier. Because the scanner in combination with a printer will replace the photocopier, the page per minute rating is a prime factor to consider. When shopping on the basis of pages per minute, be sure to consider the capacity of the automatic document feeder (ADF). A scanner that runs at 20 ppm with a 25-page ADF will need constant attention. Next, consider your need to acquire color images. Also, consider the frequency at which you receive and may need to image documents printed on both sides of the page. Some higher-priced scanners come with a manual duplexing feature; some of the lower priced high speed scanners can handle two sided documents through software (feed the documents through, acquire images of side one, then turn the stack over and acquire images of side two, the software then collates the pages).

Scanners, unlike photocopiers, are not stand-alone devices; scanners, like printers, must be connected to a computer or local area network (LAN). The method of connection will have an impact on the speed at which documents can be scanned and saved. There are basically two options for connecting the scanner to the computer: Universal Serial Bus (USB) and Small Computer System Interface (SCSI). USB connections are generally plug-and-play, while the SCSI connection will likely require opening the computer to insert an SCSI

interface card. Both USB and SCSI come in varying standards that transmit data at different rates. There are advantages and disadvantages to both connection systems. Do some research, talk to a consultant or a geek friend to see what will work best for you. Some scanners can be connected directly to a local area network (LAN) by way of a builtin network interface card (NIC). These scanners, sometimes referred to as "walk-up" models (because anyone can walk up and scan a document, much like using a photocopier), are usually more expensive.

Next, you will need an imaging application (you're going to capture images of all incoming documents). Once upon a time, the choice of imaging applications was difficult and complex. Today, Acrobat has become the standard for document exchange and provides an easy way to convert paper documents to digital files. Acrobat provides good image acquisition capabilities, the ability to perform optical character recognition (OCR) on the images while retaining an exact replica of the scanned pages, a variety of easy to use annotation or commenting tools, and easy sharing with other users. Many state courts have implemented systems for filing documents with the courts; documents

filed electronically are converted to PDF files (if not already in that format). Current versions of Word and WordPerfect contain drivers to publish word processing files to PDF. The federal courts are moving to an electronic filing system, again using the PDF format. With courts using PDF, it is the perfect standard for use in your law office.

In addition to using Acrobat for acquiring images, this program makes working with digital documents easier than shuffling paper. Acrobat should not be confused with Adobe Reader; the latter being a free program that anyone with an Internet connection can obtain and that you can distribute freely with your PDF document collections. For example, you can add bookmarks and sticky notes to image only files. If the files have a text background, you can highlight (pick your color, any color), underline and strike-through. PDF files with background text can be searched; image only files cannot be searched, but information contained in the document summary or in attached notes will be included in indexes of document collections.

As your new scanner begins to capture digital images of all incoming paper, you will need a new set of filing cabinets to store all those documents. These filing cabinets will, of course, be electronic com-

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ponents—typically hard disk drives. Your filing cabinets should exist on a hard disk drive shared across a LAN.

How many filing cabinets will you need? It depends, but as a general rule, when scanned at 300 dpi (dots per inch, a measure of resolution), a single scanned page (8.5" by 11") requires storage space of approximately 50KB (kilobytes). This is an average and assumes the image was acquired and stored as "black and white" or "line drawing," not color or gray scale. A single drawer in a filing cabinet will hold approximately 10,000 pages. To store the same 10,000 pages electronically requires 500MB (megabytes) of storage space. A single compact disc (CD-ROM, CD-R, or CD-RW), will hold 700MB, or the equivalent of 1.4 file cabinet drawers. An entire four-drawer filing cabinet (40,000 pages), then requires only 2GB (gigabytes). Although there are standards issues yet to be resolved, prices for single layer DVD writers have approached the reasonable range with many under \$200. A single layer DVD will hold 4.7GB, or the equivalent of two four-drawer filing cabinets. 100GB hard disk drives currently sell for less than \$100; that's the capacity of 50 four-drawer filing cabinets. If you think in terms of boxes, instead of filing cabinets, one box (15.5" x 12" x 10") holds approximately 2,500 pages. Those same 2,500 pages require only 125MB of digital storage space. Five boxes of documents will fit on a single CD-ROM with room to spare. Even if the space required for a single page, scanned at 300 dpi, was doubled to 100KB, 10,000 pages (one full file cabinet drawer or four boxes), would require only 1GB of electronic storage capacity.

The available space for digital document storage continues to grow while prices continue to drop. Contrast that with the fixed physical space for storing paper files and the continual increasing costs of that storage, and you'll have even more reason to move to a paperless office. A standard filing cabinet is 18" wide by 24" deep. Allowing 18" to open the drawers and another 18" of human space increases the depth to 60". In other words, a standard filing cabinet has a footprint of 1.5' x 5' or 7.5 square feet. To build that square footage, at \$150 per square foot, will cost \$1,125 (then you have to heat it, insure it, pay taxes on it, etc.). Renting the same footprint at \$15 per square foot will cost you \$112.50 per year (plus utilities, insurance, etc.). Would you rather pay the cost for digital storage or continue warehousing paper files?

If you commit your files to the digital realm, you can and must back them up. Think of this as a benefit, not a drawback. If your paper-based office was severely damaged or destroyed you would have not backup copies of your documents. But with paperless files you can have as many copies as you want in as many separate locations as you want. The choices for backup systems are beyond the scope of this article. However, regardless of the system you chose, there are three rules to follow.

- b Backup rule number one:** Perform full backups daily; do not rely on differential or incremental backups.
- b Backup rule number two:** Keep one or more fairly current full back ups off site.
- b Backup rule number three:** Test the process to make sure that

backups are actually being made and that you can in fact restore files.

The Digital Filing System

To complete your paperless office, we return to a mostly mental aspect of the process: designing and implementing a document management system. You have a document management system now—you use it to file and retrieve paper documents. Your current system probably sounds something like this: every client matter has a file, and somewhere you have an index of all those files (so if you want to find the Smith file and can't remember where in the filing system it resides, you go to the index, find the file identifier [i.e., a file number] and then locate the file). Now you knew the document you wanted was in the Smith file, great, but what if the Smith file contains 5,000 or 10,000 or more pages? At this point, the paper filing system starts to break down. How many sub-folders are you willing to create, and how do you keep track of them? Unless you have an absolutely huge number of files, or medium number of really huge files, then the paper file system can be replicated, refined and expanded in the digital world.

As high tech as scanning and printing to PDF may sound, the document management system adheres to an old-fashioned filing cabinet metaphor. The filing cabinet exists in virtual space (on a computer hard disk drive shared over a local area network). The filing cabinet has a name, "Work" (you may want separate digital filing cabinets for Closed Files, Administrative Files, etc.). Each computer on the network links to the filing cabinets by mapping one or more net-

work drives, e.g., X:\Work. Now each desktop has access to the filing cabinet "Work." Within the filing cabinet are folders, one for each client, e.g., X:\Work\Smith. If a client has several matters then that client folder has a subfolder for each distinct matter, e.g., X:\Work\Smith\Corporation and X:\Work\Smith\Wills. Within each client matter folder are folders for various types of documents, such as correspondence, pleadings, expense receipts, research, privilege, etc.

A simple system for electronic filing can be implemented and standardized by creating sets of predefined subfolders for various types of matters. For example, create one set of empty folders for litigation matters and another for transactions. When you open a new matter, simply highlight the desired folder set, then select all (Control-A), copy, then paste this file structure onto the folder created for the new matter. Now, all matters of a given type have the same folder structure. You will find that this filing system can provide far more categorization than what you have been using in the paper world. You can add as many subfolders you want, then simply drag-and-drop the contents from one folder to another. File reorganization can't be much easier.

The final piece of the document management system has to do with how you name the files within the folders. Follow three simple rules and your document management system will be complete and beautifully organized.

Rule 1: Begin the file name with the date of the document in reverse year-month-day order (yyymmdd). By inserting the date at the beginning of the file name (after the path, e.g., X:\Work\Smith\040819) all

documents in a given folder are sorted in year-month-day order. As simple as this may sound, using the document date as the first part of the file name is hugely important.


Rule 2: After the date, use a letter or letters to identify the author or party that generated the document. For pleadings use one or more letter to identify the party that served the document. For correspondence use the author's initials followed by the initials of the recipient. That way when you look in the correspondence folder you will see all of the correspondence arranged chronologically with an indication of who wrote the letter and to whom each was written (e.g., X:\Work\Smith\040819 DLM NGT).

Rule 3: After the initials that identify the author or party (and in the case of correspondence the recipient) add a few descriptive terms that describe the document (e.g., X:\Work\Smith\Corres\040819 DLM NGT ContractEnclosed).

If you want a system that indexes all of your files so that you can run a computer search to find the Smith lease, or that motion to compel a psychiatric examination, you already have it—it's called Windows Explorer. You can use Windows Explorer to find files containing specific words. Keep in mind that image-only PDFs are just that; images only, just digital photocopies of paper documents. Image-only files contain no text characters and as a result cannot be indexed or searched. Image-on-text files have an exact image of the hard-copy with text behind the image and can be searched. Image-on-text files are created by printing to PDF or by running a PDF image

only file through an optical character recognition (OCR) application. Acrobat document summaries and notes are included in the information searched by Explorer.

Conclusion

Any office can become a paperless office. Just keep in mind that setting up and operating a paperless office requires a shift in thinking. Anyone can make the shift; what are you waiting for? 

David L. Masters is a solo practitioner from Montrose in rural western Colorado. He practiced in a small firm setting for 13 years prior to moving to solo practice in February 2000. His practice focuses on real estate and business matters, transactions and litigation, and includes personal injury, civil rights, and employment law matters, for both plaintiffs and defendants.

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Celebrating the Role of Rural Lawyers in Delivering Civil Justice

By Mike Monahan

Into the office walks a young lady with two small children in tow. The secretary smiles and acknowledges her by her first name before asking about the reason for the visit. The two children wander off to a corner and spread out with some toys. The young mother nervously proceeds to give the secretary some facts as the lawyer walks out to greet the young woman. They know each other—she was in school with the lawyer’s younger sister. He ushers her into his office. This is pro bono client number one for the day. Several more people will likely walk in the door or phone for free advice before the business day ends. Each of that day’s new legal problems can be tracked to a few minutes’ drive from the lawyer’s home, office, church or his children’s school. It’s a small town.

This year the State Bar boasts a membership of 34,897 lawyers, 27,900 of whom are actively practicing law. Two-thirds of Georgia’s lawyers now work in the five-county metro Atlanta area, but only a minor-

ity of the state’s lawyers shoulder the work of providing access to justice in the *other* Georgia, the remaining 154 counties. Year after year, individual lawyers in the *other* Georgia demonstrate a surprising commitment to providing legal services to the poor.

The work of rural lawyers is challenging in ways that are different from those of the big city lawyer, different even from solo practitioners in a large urban environment. Over 70 percent of Georgia’s poor live outside the five-county metro Atlanta area. Small town lawyers are far, far outnumbered by the approximately three-quarters of a million poor who desperately need their services. Additionally, in areas around Dalton, Columbus and elsewhere, solo and small-firm practitioners are interfacing with ever-growing numbers of special populations. Latino and Asian-Pacific clients with new and complex issues are joining the home-grown population in the long line at the lawyer’s door.

“The many and well-chronicled problems of the urban poor shouldn’t blind us to the desperate conditions of the many poor people living in rural areas,” says William G. Paul, former president of the American Bar Association.¹ The poverty rate for the five core counties of Atlanta ranges from 5.6 percent in Gwinnett to 13.8 percent in Fulton.² Outside Atlanta, the poverty population percentage climbs significantly, ranging from 3.8 percent for close-in Fayette County all the way up to 28.6 percent in Clay County in


With three times as many poor outside Atlanta as in Atlanta, the need for free or reduced-fee civil legal services beyond the perimeter is reaching a critical level.

southwest Georgia. Eighty-eight of Georgia's counties have poverty populations exceeding 15 percent of the local population. Forty-one of these counties have poverty populations exceeding 20 percent! These numbers and numerous anecdotal lawyer stories indicate that the practice of many rural lawyers consists of a steady diet of pro bono (criminal *and* civil), reduced fee and a constant flow of free advice. Rural lawyers serve on the front lines in their own unique war on poverty.

With three times as many poor outside Atlanta as in Atlanta, the need for free or reduced-fee civil legal services beyond the perimeter is reaching a critical level. Some would say that when, as now, only 20 percent of the poor who have a legal need ever obtain a lawyer, the critical level has already been reached. That's probably true. And while the 20 percent ceiling for legal services applies to Atlanta as well, an increasing network of quality social service providers and large law firm pro bono projects provides a safety valve that simply does not exist in desperately and persistently poor areas of rural Georgia.



Rural lawyers participate in coordinated pro bono programs operated by Georgia Legal Services Program. On average, volunteer lawyers step up to the plate to handle about 1,100 cases each year, the majority of which are resolved in court or in administrative forums. Small-town lawyers also help with CLE programs covering poverty law issues. And, as if they weren't focused enough on all the reduced fee and pro bono work they do, rural lawyers contribute financially to the rural legal services program in a participation rate that matches the Atlanta Legal Aid's million-dollar campaign. While solo and small firm lawyers outside Atlanta can't match the big league firm contributions in pure dollars, rural lawyers do what they can.

Be it Tifton, Brunswick, Ellijay or Perry, lawyers face a tremendous demand for their services. Pro bono is an integral part of their daily practice for which they should receive more praise. It's high time to celebrate the role of Georgia's rural lawyers in providing access to justice. 

Mike Monahan is the pro bono director for the State Bar of Georgia.

Endnotes

1. *Contributions of Public Spirited Lawyers*, <http://www.abanet.org/publicized/lawday/talking/contributions.html>, August 10, 2004.
2. U.S. Census estimates for 2000, <http://www.census.gov/cgi-bin/saippe/saippe.cgi>.

Sections' Bar Year off to Successful Beginning

By Johanna B. Merrill

On July 30-31, the **Environmental Law Section** met at the King & Prince Resort and Spa on St. Simons Island for the annual Environmental Law Institute. This annual seminar offers section members an opportunity to catch up on recent developments in environmental law and to reacquaint themselves with environmental attorneys throughout the state.


The American Bar Association descended upon Atlanta in early August for their 2004 Annual Meeting. While the city was filled with attorneys from across the country, some of the State Bar's sections welcomed them with events. On Aug. 6, the **Administrative Law Section**, along with the Georgia Association of Administrative Law Judges and Hearing Officers, sponsored a luncheon honoring John W. Hardwicke, the executive director of the National Association of Administrative Law Judges. Also on Aug. 6, the **Eminent Domain Section** hosted a cocktail reception for real property, land use and condemnation practitioners attending the ABA convention at the offices of Pursley Lowery Meeks, LLP.

The **Technology Law Section** hosted a quarterly CLE luncheon on Aug. 12 at the Buckhead Club in Atlanta titled "Who Told You to Do That?" The discussion covered emerging issues regarding the way clients

create and store documents and the impact on costs in discovery. More than 20 attorneys met for lunch and participated in the program led by Larry Kunin of Morris, Manning & Martin and John Hutchins of McKenna Long & Aldridge. The section's Litigation Committee sponsored the meeting, of which Hutchins is the new chair.

Section chairs and officers gathered at the Bar Center in Atlanta on Sept. 23 for a brainstorming session. Topics such as meeting planning, member recruitment and retention and publications were covered. Representatives from ICLE and the Women and Minorities in the Profession Committee sponsored a luncheon following the meeting to promote and discuss the newly formed and implemented Speakers' Clearinghouse.

Reminder: The sections encourage you to submit your e-mail address to the Bar's Membership Department (membership@gabar.org) as sections are increasingly relying on electronic communication to alert their members about CLE events, social meetings and pertinent legislative and administrative information.

If you are interested in joining one of the Bar's 37 sections, including the newly formed Immigration Law or Judicial sections, you may remit the appropriate dues payment, along with your name, Bar number, address and name of the section you would like to join to: Membership Department, State Bar of Georgia, 104 Marietta St. NW, Atlanta, GA 30303. 

Johanna B. Merrill is the section liaison of the State Bar of Georgia.

Law Students Exposed to Ethics, Professionalism Issues

By Daniel L. Maguire

Justice Sandra Day O'Connor once said, "The essence of professionalism is a commitment to develop one's skills to the fullest and to apply that responsibly to the problems at hand. Professionalism requires adherence to the highest ethical standards of conduct and a willingness to subordinate narrow self-interest in pursuit of the more fundamental goal of public service. Because of the tremendous power they wield in our system, lawyers must never forget that their duty to serve their clients fairly and skillfully takes priority over the personal accumulation of wealth. At the same time, lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all." The Chief Justice's Commission on Professionalism aims to instill this sense of duty in Georgia's lawyers.

In August, Emory University School of Law held an orientation on professionalism for its new class of law students. Other law schools in Georgia held similar orientations, coordinated by the Commission as part of its efforts to educate lawyers (and lawyers-to-be) on the concepts of ethics and profession-



Photos by Daniel L. Maguire

Chilton Varner, a partner with King & Spalding in Atlanta, addresses first-year Emory law students.

alism. Chilton Varner, a partner with King & Spalding in Atlanta, addressed the group gathered in Tull Auditorium on the Emory campus.

Why does the Commission go to such lengths to inform new law students about the importance of professionalism and ethics? According to Varner, it is "because we are the problem-solvers...there is no profession that spends so much time and energy examining not just what we do, but how we do it."

"There is no reason to be a lawyer if you don't want to make things better, and you can't make things better if you don't care about standing for something ... if you don't stand for the right things," she said. "Lawyers, in a very fundamental way, invest themselves as the personal guarantee of their work. If we stand for something, and are recognized for it, it enhances enormously what we can accomplish as lawyers."

The oath taken by Emory students reads:

"I, as a student entering Emory University School of Law, understand that I am joining an academic community and embarking on a professional career. The Law School community and the legal profession share important values that are expressed in the Emory University School of Law Professional Conduct Code. I have read the Code and will conduct my academic, professional and personal life to honor those shared values."



First-year Emory law students take the oath of professional conduct.

(Right) Judge Brenda Cole of the State Court of Fulton County administers the oath.



Following, Varner's speech, Judge Brenda Cole of the State Court of Fulton County administered the oath, students participated in discussion groups where they analyzed hypothetical situations (as students and as lawyers) in which they would have to make decisions based on ethics and professionalism.


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In addition to the oath, students are asked to sign a pledge of professional conduct, which is kept on file in the registrar's office. Similar oaths are taken at Georgia's other law schools.

The Commission's efforts are not lost on the students. Slobodan Stupar, a transfer student at Emory, said he was surprised to find so much time and emphasis dedicated to professionalism for incoming students. "I am a transfer student from a California law school and do not recall having professionalism as a part of my first-year orientation," he said. "I think it is a great idea to present the entering students with the basic tenets of legal professionalism. It will hopefully create a more cooperative and civil environment during the demanding—and sometimes overly competitive—first year of law school."

Other students agreed that the lack of professionalism is a problem in the practice of law today, particularly in the public's perception of lawyers, and they appreciate the attempt to get a head start on the proper mindset.

"Professionalism is a very important part of being a lawyer, and I'm glad that Emory stresses this aspect as well as the substantive aspects," said Lindsey Anderson of Palo Alto, Calif., a first-year student. "Some lawyers will sacrifice their sense of professionalism in order to get ahead—to the detriment of themselves, their clients, the profession and our society. I think it is important that we hold ourselves to these standards." 

Daniel L. Maguire is the administrative assistant for the Bar's communications department and a contributing writer for the *Georgia Bar Journal*.

In Memoriam

The Lawyers Foundation Inc. of Georgia sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 104 Marietta St. NW, Suite 630, Atlanta, GA 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

Gwynn M. Adcock
Rossville, Ga.
Admitted 1977
Died September 2004

Larry E. Blount
Athens, Ga.
Admitted 1980
Died May 2004

Russell A. Boyd Jr.
Folkston, Ga.
Admitted 1951
Died July 2003

Joseph D. Buccellato
Decatur, Ga.
Admitted 1981
Died July 2004

Charles L. Burris
Canton, N.C.
Admitted 1949
Died November 2003

George Busbee
Duluth, Ga.
Admitted 1951
Died July 2004

John R. Calhoun
Savannah, Ga.
Admitted 1957
Died October 2003

David C. Carnahan
Eatonton, Ga.
Admitted 1969
Died August 2004

Wayman E. Cobb Jr.
Decatur, Ga.
Admitted 1952
Died July 2004

Michael Shane Davis
Atlanta, Ga.
Admitted 1996
Died August 2004

Wilborn E. Gheesling
Wichita, Kan.
Admitted 1973
Died August 2004

James B. Gilbert
Brunswick, Ga.
Admitted 1941
Died June 2004

George C. Grant
Macon, Ga.
Admitted 1938
Died May 2004

Charles G. Hicks
Decatur, Ga.
Admitted 1987
Died August 2004

Syle Paul Hunt
Cornelia, Ga.
Admitted 1991
Died March 2004

Robert W. Hurst
Atlanta, Ga.
Admitted 1960
Died July 2004

Justin L. Johnson
Atlanta, Ga.
Admitted 1990
Died August 2004

Carroll Payne Jones
Atlanta, Ga.
Admitted 1934
Died July 2004

Henry A. Keever
Cartersville, Ga.
Admitted 1951
Died May 2004

Jack Knight
Nashville, Ga.
Admitted 1940
Died August 2004

Benjamin R. Lancaster
Centre, Ala.
Admitted 1953
Died January 2004

Robert N. Leavell
Athens, Ga.
Admitted 1965
Died July 2004

Jay E. Loeb
Atlanta, Ga.
Admitted 1969
Died August 2004

James A. Mackay
Atlanta, Ga.
Admitted 1947
Died July 2004

Robert M. McCartney
St. Simons Island, Ga.
Admitted 1948
Died June 2004

Robert L. McHan
Winston, Ga.
Admitted 1950
Died August 2004

George E. Oliver
Savannah, Ga.
Admitted 1939
Died July 2004

Bernard K. Rapkin

Atlanta, Ga.
Admitted 1956
Died March 2004

Robert William Routh

New Smyrna Beach, Fla.
Admitted 1977
Died May 2004

Nancy L. Rumble

Atlanta, Ga.
Admitted 1979
Died August 2004

Richard S. Scott

Athens, Ga.
Admitted 1955
Died April 2004

Edward H. Shannon

Gainesville, Ga.
Admitted 1969
Died March 2004

Charles H. Siegel

Atlanta, Ga.
Admitted 1966
Died July 2004

William P. Trotter

LaGrange, Ga.
Admitted 1947
Died August 2004

Maxine H. Wraggs

Brunswick, Ga.
Admitted 1966
Died June 2004



George D. Busbee, 76, of Duluth, died July 16. He was governor of Georgia from 1975-83, and was the first Georgia governor to

serve two consecutive four-year terms. Busbee was born in Vienna and attended Georgia Military College and Abraham Baldwin College before joining the Navy. After his discharge, he enrolled at the University of Georgia, earning a bachelor's degree in 1949 and a law degree in 1952. He won a seat in the Georgia House of Representatives in 1956 and served for 18 years

before running for governor. After retiring from politics, Busbee became a partner in the Atlanta firm of King & Spalding; he served on several corporate boards and on the Export Council during the administrations of Jimmy Carter and Ronald Reagan. He is survived by his wife, Mary Beth Busbee; four children, George D. Busbee Jr. of Albany, Beth Kindt of Champaign, Ill., Jan Curtis of Atlanta, and Jeff Busbee of Suwanee; two sisters, Mrs. Wesley Turton of Cordele and Mrs. Madison Coley of Vienna; a brother, Dr. Perry Busbee of Cordele; and 13 grandchildren.




Jay Elliott Loeb, 59, of Atlanta, died August 24. He was a graduate of Washington University and Vanderbilt University Law School,

and was a partner in the firm of Olim & Loeb, LLP. Loeb was a former chair of the Bankruptcy Law Section of the Atlanta Bar Association as well as a member of the Atlanta Bar's board of directors. He was also co-chair of the Creditors' Rights Section in 2003-04. In May 2004, he was honored with the Morris W. Macey Lifetime Achievement Award from the State Bar of Georgia's Creditor's Rights Section. He was preceded in death by his parents, Sam and Irene Cohen Loeb of Decatur, Ill., and his sister, Linda Loeb. He is survived by his wife, Nancy Loeb; two daughters, Deborah Loeb and Kimberly Loeb, and a son, Andrew Loeb, all of Atlanta; cousins, Fred Loeb and Larry Adelman; mother-in-law, Frances Wasserman; and sister-in-law and brother-in-law, Lanie and Jerry Rose.



James A. Mackay, 85, of Atlanta, died July 2. He was a former Congressman and a founding chairman of

the Georgia Conservancy. A 1940 graduate of Emory University, he also earned a law degree from Emory in 1947 and later served as president of the alumni association and as a university trustee. Mackay served in the Coast Guard during World War II and received the Bronze Star for devotion to duty. He established a law practice in Decatur in 1946. Mackay served in the Georgia legislature for six terms. Active in the civil rights struggle, he worked to keep Georgia's public schools open during the heated debates over desegregation, and he also organized Georgia Veterans for Majority Rule. In 1964, Mackay was elected to the U.S. Congress from Georgia's 4th District. He helped to pass the Voting Rights Act and was instrumental in procuring federal aid for the Fernbank Science Center and Planetarium. The son of a Methodist minister, Mackay was active throughout his life in the United Methodist Church. At Glenn Memorial United Methodist Church, he served as chair of the Administrative Board and as a Sunday school teacher, and he represented the church at Annual, Jurisdictional and General Conferences. He was preceded in death by his first wife, Mary Caroline Lee Mackay, and his son, James Edward Mackay. He is survived by his wife, Sara Lee Jackson Mackay of Signal Mountain, Tenn.; a daughter, Kathleen Mackay of Rising Fawn, Ga.; siblings, Donald M. Mackay of Lakeland, Fla.; John Leland Mackay of Matthews, N.C.; Edward H. Mackay of Decatur, Ga. and Betty Mackay Asbury of Atlanta, Ga.; and many nieces and nephews. 

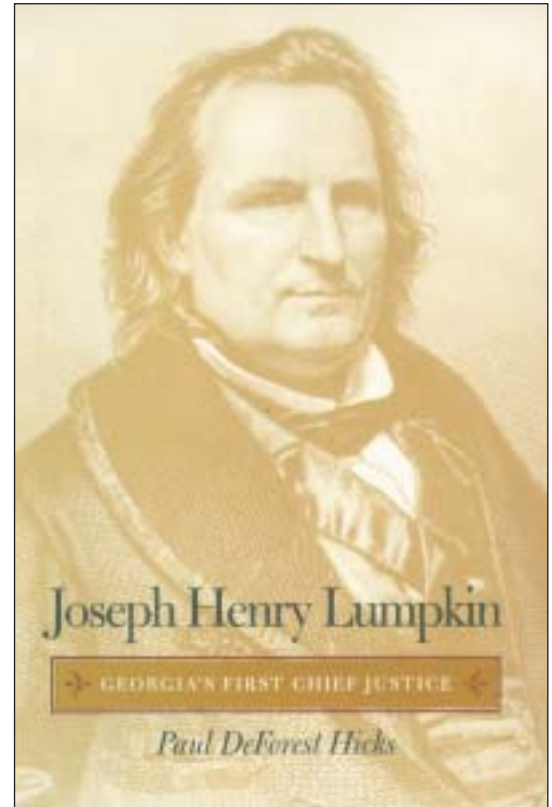
Joseph Henry Lumpkin, Georgia's First Chief Justice

By Paul DeForest Hicks, The University of Georgia Press (2002), 183 pages
Reviewed by Erin Chance

Joseph Henry Lumpkin, Georgia's First Chief Justice, by Paul DeForest Hicks, is an interesting portrayal of one of Georgia's premier judicial statesmen. Hicks, a descendant of Lumpkin, provides a glimpse into the justice's professional and personal lives and illuminates some of the compelling issues of the early-to mid-19th century. The book is a welcome addition to the sparse collection of literature regarding Southern appellate judges who made a mark on the judicial development of the country in what has been called the "golden age of American law."

Hicks's narration of Lumpkin's life logically begins with a history of the Lumpkin family and their settlement in Lexington, Ga. Hicks then outlines Lumpkin's early life, from his birth in 1799 through his early exposure to local politics through his family's many civic and political connections. The financial success of his father's farming and real estate adventures allowed Lumpkin to pursue his strong intellectual curiosity by attending a newly formed private school in Lexington and then matriculating at Princeton University. Hicks draws the connection between Lumpkin's intellectual development and the growth of his strong Presbyterian values and morals, which would subsequently guide many of his legal and social convictions.

Lumpkin returned to Lexington after graduating from Princeton and prepared for the bar examination through the apprenticeship system by studying law with Thomas



W. Cobb, a successful local attorney from a noted Georgia family. In 1820, Lumpkin passed the bar examination after less than a year of preparation, married his childhood sweetheart, and established a legal practice with his brother-in-law. Lumpkin's boundless energy and intellect enabled him to quickly build a successful legal practice while becoming involved in many civic and professional organizations. This civic involvement remained a strong theme throughout Lumpkin's life, as did his devotion to the law and his family. Lumpkin then followed in his father and brother's footsteps by serving in the state Legislature for two terms, enjoying the fruits of his familial and collegiate connections.

Due to his political visibility and his reputation for unsurpassed intelligence and elocution, Lumpkin's law practice quickly thrived,

expanding far beyond Oglethorpe County. He was soon “riding the circuit” with other lawyers, representing clients in all parts of the state, and gaining the requisite knowledge of the bench and bar of each judicial circuit. Circuit riding was required because, at this time, Georgia had not yet created a supreme court, a deficiency that left no opportunity for superior court decisions to be appealed or for conflicting superior court decisions to be reconciled. To further complicate matters, there were no digests of the Georgia statutes or published rules of procedure to assist practitioners. Unsurprisingly, given these demands of legal practice, Lumpkin’s intellect and eloquence greatly distinguished him.

During the years that his practice was growing, Lumpkin was a dedicated family man to his wife, Callender, and their 10 children. Lumpkin’s civic, religious, and benevolent involvement also increased dramatically during this period. Lumpkin believed that “merit is the sure road to fame and fortune” and to achieve the goal of a meritocracy, Lumpkin devoted much of his energy throughout his life to the improvement of education in Georgia at all levels. Among his many activities, he championed public education for the poor in Georgia, was instrumental in the establishment of Oglethorpe University, founded Phi Kappa at the University of Georgia, and was one of three founders of the University of Georgia School of Law. With his son-in-law, T. R.R. Cobb, he provided the law library for the fledgling law school and found time to lecture there once a week.


From its inception, opposition to a supreme court had been a powerful political force in

Georgia, with its constitution of 1798 prohibiting appellate review or correction of errors by any court other than the superior court in the county where the case was originally tried. In 1845, after decades of debate regarding appellate review, the Legislature created the Supreme Court of Georgia, and Lumpkin was selected as one of the three original judges. Although it was 20 years before the position of chief justice was officially established under Georgia law, Lumpkin was recognized from the outset as the presiding judge, due to his 25 years of experience as a practicing lawyer and legal scholar.

Hicks depicts a young Supreme Court that initially faced such onerous difficulties that it is almost hard to believe it was successful. The Court had no central headquarters from which to conduct business; rather, it was required to attend sessions in selected cities each year. This was a physical endurance test in which the participants had to travel hundreds of miles per year—by stagecoach—to nine different points throughout the state. To make matters worse, the justices were responsible for all costs associated with such supreme “circuit riding,” including food and lodging, out of their relatively low salaries. The Court had no library from which to gain knowledge of previous decisions or legal theory. Decisions, which were required to be made before the commencement of the next session of the Court, were written in long-hand without the assistance of a stenographer or law clerk. These decisions were made even more difficult by the Court’s charge to review “any error in any decision, sentence, judgment or decree” in

every case brought before them, not just points of law.

Lumpkin’s judicial persona was characterized by his belief, as an evangelical Christian, that “an important aspect of his judicial role was to aid the advance of civilization through reform.” He incorporated into his jurisprudence what legal historians call “legal instrumentalism,” a practical concept of the law that competed with the traditional view of the law as being based on precedent. In his decisions, Lumpkin underscored his belief that economic progress resulting from free trade and unfettered competition was the only way to serve the public interest; to this end he repeatedly ruled in favor of manufacturing and commercial enterprises to support economic development in Georgia. Lumpkin’s economic jurisprudence was also applied in the cases he decided involving slaves, whom he viewed as “a portion of the vested wealth and taxable property of the state.” Hicks navigates the evolution of Lumpkin’s thoughts concerning slavery, colonization, and secession through the many opinions Lumpkin wrote regarding these issues.

In sum, Hicks does a wonderful job of educating the reader about Joseph Henry Lumpkin and the life of the lawyer in the early-to mid-19th century. Although the book is sometimes difficult to follow because of its loose chronological organization, this problem does not overshadow the intriguing subject matter. *Joseph Henry Lumpkin, Georgia’s First Chief Justice* is an enjoyable depiction of a man who shaped much of the current judicial experience in this state. 

If I'm Such a Great Lawyer, Why Can't I Win an Argument With My Wife?

By Michael R. Hirsh

This is my official suggestion for a CLE on how husbands can win an argument with their wives.

Such a seminar would be a welcome addition to "Fascinating Nuances of Debt Collection."

It really makes perfect sense. Sure, some naysayers argue that a class like this couldn't be taught because it is virtually impossible—except for token acquiescence by the wife—for a husband to win any argument.

Notice that I have set my sights low. I didn't say for husbands to win arguments; just that we win one. And I'm not talking about when our wives let us think we've won, when all we've done is agree with them and do what they wanted all along. I'm talking about real victory here: I don't know, maybe something like getting to leave the toilet seat in the upright and locked position. Now that would be something!

But I'm a realist. There are some difficulties in having such a course offering. Not the least of which is whom would you get to teach it. Would a woman come forward to lead such a discussion? Not a

chance! That would be like Bill Clinton selling highly sensitive, top secret, military technology to Red China in exchange for a measly few million dollars in campaign contributions. Okay, bad example, but you get my point.

So the class would have to be taught by a man. But who? And is he going to tell his wife what he's doing? Yeah, right! Can't you just see it: about halfway through his lecture his cell phone rings. "Yes, dear. I know, dear. You're absolutely right, dear. I am clearly wrong, dear."

The idea for this CLE struck me during a remodeling project on my home. Sure, I call it



a remodeling project now. Back then it was trial by ordeal. Every marriage should have this experience. I had completed a major portion of the project when I summoned my wife to the room. I use the word "summon" only in the nicest sense of the word.

When she appeared in the doorway, I asked the question that thousands of husbands have asked before me: "Honey, what do you think?" Now, for you ladies reading this, the last thing any husband really wants to know is what you think. In the husband profession, we call this fishing for a compliment.

So I ask and immediately start thinking what her response might be: "Dear, this is so amazing, you are incredible . . . no, you are as a god. Your construction prowess is second to none. I can't wait to show you how much I appreciate your work. In fact, let's not wait!" My fantasy continues for the better part of a nanosecond when my wife asks flatly, "Isn't this hallway just a little too narrow?" Oh, that ought to be easy to fix!

Shortly after the hallway had been widened 6.325 inches, my bride and I were discussing what kind of light fixtures to install. My wife told me she didn't care and

that whatever I decided would be fine. What was I thinking?

Think of it this way: every decision that we are called upon to make can be classified as either white shoes or blue shoes. Your wife asks you which you like best. The dictates of reason and logic inescapably lead you to conclude that blue is the superior choice. Hint: white is clearly the correct answer. My wife really didn't mean that what I decided would be fine. She meant that the opposite of what I decided would be fine. It is clearly my fault for not knowing this.

Several hours later my choice of lighting fixture was installed and the ceiling was finished. (I did not make the 'honey-what-do-you-think' mistake.) As I was under the bathroom cabinet installing a new sink, I suddenly felt an exposed high-voltage wire enter the room. After banging my head a couple of times on my way to investigate this hazard, I discovered my wife standing there. Instead of her usual angelic countenance, she had a look of grave concern.

"What's wrong?" I ask.

"Nothing," she replies, half an octave higher than usual.

Being an astute observer of evidence, I know that something is indeed wrong.

"No, really," I continue, "what's the matter?"

"If I tell you, you'll just get mad." She says.


"Go ahead, I'm already mad."

So after some thorough explaining and airtight reasoning on my part, the virtues of the current lighting arrangement are extolled. I address the expense of changing the lights and the difficulty of redoing the ceiling. Any jury on the continent would be convinced beyond any doubt. The men of the panel would be in awe of my compelling logic, the women wooed by my impassioned eloquence.

My wife of over two decades, my friend, my companion, the mother of my children, friend to the friendless, and repository of all that has virtue, was not, however, on the jury. So I resorted to an authoritarian style. The face was red, the veins bulging. It was truly impressive. You should have seen her.

My final words were, "I am not going to replace those lights, period!" That, as they say, was that.

All in all, replacing the lights did not take me that long. And I have to admit (and I do mean have to) that the new lights look better. I know that my wife likes the new lights too.

Maybe the name of the CLE should be "Give in early—it saves time." 

Submissions Wanted for New Humor Column

The *Bar Journal* would like to see this new column find a permanent home in each issue. To achieve this, we will need contributions from you! If you have humorous anecdotes that you would like to share from your practice, from the courtroom, or just from your day-to-day lawyer life, we want to hear about it. Please limit submissions to 500 words.

Send your submissions to:
Humor Column, Georgia Bar Journal, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; sarah@gabar.org

Michael Hirsh is the managing partner of the Atlanta, Georgia office of Hirsh & Heuser, P.C., with offices in Georgia and Kentucky. The firm practices in the areas of business, business litigation, criminal defense and selected personal injury matters. Hirsh is also available for consultation on home remodeling projects (especially lighting questions) and may be reached at mrhirsh@bellsouth.net.

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.

October 2004

Sept. 29—Oct. 1

ICLE
Insurance Law Institute
Atlanta, Ga.
12 CLE

1

ICLE
Automobile Insurance Law
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6 CLE

ICLE
Winning Before Trial
Atlanta, Ga.
6 CLE

ICLE
Advanced Health Care Law
Atlanta, Ga.
6 CLE

6

ICLE
Technology Law Institute
Atlanta, Ga.
6 CLE

7

ICLE
Title Standards
Atlanta, Ga.
6 CLE

7-9

ICLE
Workers' Compensation Law Institute
St. Simons Island, Ga.
13 CLE

ICLE
Solo & Small Firm Institute
Savannah, Ga.
12 CLE

8

ICLE
Tax with George Schain
Atlanta, Ga.
7 CLE

ICLE
Securities Litigation
Atlanta, Ga.
6 CLE

14

ICLE
Class Actions
Atlanta, Ga.
6 CLE

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Effective Legal Negotiations and Settlements
Atlanta, Ga.
6 CLE

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Construction Law for the GP
Atlanta, Ga.
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15

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Atlanta, Ga.
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Employers' Duties and Problems
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6 CLE

ICLE
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3 CLE

21

ICLE
Criminal Law
Atlanta, Ga.
6 CLE

21-22

ICLE
Business Law Institute
Atlanta, Ga.
12 CLE

22

ICLE
Zoning
Atlanta, Ga.
6 CLE

ICLE
Mercer Professionalism Symposium
 Macon, Ga.
 6 CLE

27

ICLE
Selected Issues in Estate Planning
 Atlanta, Ga.
 4 CLE

28

ICLE
MBA for Lawyers
 Atlanta, Ga.
 6 CLE

ICLE
American Justice System
 Marietta, Ga.
 3 CLE

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Health Care Fraud
 Atlanta, Ga.
 6 CLE

ICLE
Georgia Personal Injury Practice
 Atlanta, Ga.
 6 CLE

November 2004

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ICLE
Premises Liability
 Atlanta, Ga.
 6 CLE

ICLE
Handling Administrative License Matters
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 6 CLE

5

ICLE
Adoption Law
 Atlanta, Ga.
 6 CLE

ICLE
Advocacy & Evidence
 Atlanta, Ga.
 6 CLE

ICLE
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 and Malpractice*
 Atlanta, Ga. and GPTV Statewide
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Construction Law: From Bidding to Final Payment
 Atlanta, Ga.
 6.7 CLE

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Commercial Real Estate
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 6 CLE

LORMAN BUSINESS CENTER, INC.
Loan Officer: An A to Z Approach
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 6 CLE

11-13

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Medical Malpractice Institute
 Amelia Island, Fla.
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12

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 Atlanta, Ga.
 6 CLE

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 Atlanta, Ga.
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Zoning and land Use in Georgia
 Athens, Ga.
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Atlanta, Ga. and GPTV Statewide
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6 CLE with 6 Trial

December 2004

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6 CLE

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16-17

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17

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 6 CLE

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- (26% of the Bar is under age 35.
- (32% of the Bar is female.
- (More than 18,650 members reside in metro Atlanta.
- (Anticipated growth of 1,300 new members each year.
- (There are 23,380 section members with 17,070 individual members who belong to one or more sections.
- (62% overall growth from 1990 to 2004.
- (35,438 members in good standing.
- (Bar members cover a wide age range from those born in 1902 and admitted in 1925 to those born in 1979 and admitted in 2002.
- (66% of our members list an e-mail address.
- (113 members reside outside the United States in 26 foreign countries.
- (789 members have been admitted to practice for 50 years or more.
- (The State Bar has members resident in all 50 states.
- (2004-05 State Bar budget: \$7.2 million
- (Full-time employees: 60
- (Part-time employees: 1

NOTICE OF FILING OF FORMAL ADVISORY OPINIONS IN SUPREME COURT

Second Publication of Proposed Formal Advisory Opinion Request No. 02-R1 Hereinafter known as “Formal Advisory Opinion No. 04-1”

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after October 15, 2004.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **the State Bar of Georgia or the person who requested the opinion** may file a petition for discretionary review thereof with the Supreme Court of Georgia. The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in

Supreme Court Rule 10, counting from the date of the order granting review. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

In accordance with Rule 4-223(a) of the Rules and Regulations of the State Bar of Georgia, any Formal Advisory Opinion issued pursuant to Rule 4-403 which is not thereafter disapproved by the Supreme Court of Georgia shall be binding on the State Bar of Georgia, the State Disciplinary Board, and the person who requested the opinion, in any subsequent disciplinary proceeding involving that person.

Pursuant to Rule 4-403(e) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, if the Supreme Court of Georgia declines to review the Formal Advisory Opinion, it shall be binding only on the State Bar of Georgia and the person who requested the opinion, and not on the Supreme Court, which shall treat the opinion as persuasive authority only. If the Supreme Court grants review and disapproves the opinion, it shall have absolutely no effect and shall not constitute either persuasive or binding authority. If the Supreme Court approves or modifies the opinion, it shall be binding on all members of the State Bar and shall be published in the official Georgia Court and Bar Rules manual. The Supreme Court shall accord such approved or modified opinion the same precedential authority given to the regularly published judicial opinions of the Court.

**STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY
OPINION BOARD
PURSUANT TO RULE 4-403
ON AUGUST 6, 2004
FORMAL ADVISORY OPINION NO. 04-1
(Proposed Formal Advisory Opinion
Request No. 02-R1)**

Question Presented:

May a lawyer participate in a non-lawyer entity created by the lawyer for the purpose of conducting residential real estate closings where the closing proceeds received by the entity are deposited in a non-IOLTA interest bearing bank trust account rather than an IOLTA account?

Summary Answer:

The closing of a real estate transaction constitutes the practice of law. If an attorney supervises the closing conducted by the non-lawyer entity, then the attorney is a fiduciary with respect to the closing proceeds and closing proceeds must be handled in accordance with Rule 1.15 (II). If the attorney does not supervise the closings, then, under the facts set forth above, the lawyer is assisting a non-lawyer in the unauthorized practice of law.

Opinion:

The closing of a real estate transaction in the state of Georgia constitutes the practice of law. See, *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 588 S.E. 2d 741 (Nov. 10, 2003), O.C.G.A. §15-19-50 and Formal Advisory Opinions Nos. 86-5 and 00-3. Thus, to the extent that a non-lawyer entity is conducting residential real estate closings not under the supervision of a lawyer, the non-lawyer entity is engaged in the practice of law. If an attorney supervises the residential closing¹, then that attorney is a fiduciary with respects to the closing proceeds. If the attorney participates in but does not supervise the closings, then the non-lawyer entity is engaged in the unauthorized practice of law. In such event, the attorney assisting the non-lawyer entity would be doing so in violation of Rule 5.5 of the Georgia Rules of Professional Conduct.²

When a lawyer is supervising a real estate closing, the lawyer is professionally responsible for such closings. Any closing funds received by the lawyer or by persons or entities supervised by the lawyer are held by the lawyer as a fiduciary. The lawyer's responsibility with regard to such funds is addressed by Rule 1.15 (II) of the Georgia Rules of Professional Conduct which states in relevant part:

SAFEKEEPING PROPERTY - GENERAL

(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 trust account 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 account.

* * * * *

(c) All client's funds shall be placed in either an interest-bearing account with the interest being paid to the client or an interest-bearing (IOLTA) account 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 by 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.

(2) With respect to funds which are nominal in amount or are to be held for a short period of time, a lawyer shall, with or without notice to the client, create and maintain an interest-bearing, government insured trust account (IOLTA) in compliance with the following provisions:

* * * * *

As set out in Subsection (c)(2) above, this Rule applies to all client funds which are nominal or are to be held for a short period of time. As closing proceeds are not nominal in amount, but are to be held for only a short period of time, they are subject to the IOLTA provisions. Therefore, the funds received in connection with the real estate closing conducted by the lawyer or the non-lawyer entity in the circumstances described above must be deposited into an IOLTA compliant account.

Endnotes

1. Adequate supervision would require the lawyer to be present at the closing. See FAO . . . etc.
2. Rule 5.5 states in relevant part that:

**UNAUTHORIZED
PRACTICE OF LAW**

A lawyer shall not:

* * * * *

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

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

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, *2003-2004 State Bar of Georgia Directory and Handbook*, p. H-6 to 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 the proposed amendments to the Rules is reminded that he or she may only do so in the manner provided by Rule 5-102, *Handbook*, p. H-6.

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

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT STATE OF GEORGIA

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

MOTION TO AMEND 2004-3

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

COMES NOW, the State Bar of Georgia, pursuant to the authorization and direction of its Board of Governors in regular meetings held on June 19, 2004, and upon the concurrence of its Executive Committee, presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, *2003-2004 State Bar of Georgia Directory and Handbook*, pp. 1-H, *et seq.*, and respectfully moves that the Rules and Regulations of the State Bar of Georgia be amended in the following respects:

I.

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

It is proposed that certain provisions of Part VI of the Rules of the State Bar of Georgia regarding the arbitration of fee disputes be amended as follows:

Preamble

[second paragraph]

A unique feature of this program provides that where the petitioner is a client whose claim after investigation appears to warrant a hearing, and the respondent lawyer refuses to be bound by any resulting award, the matter will not be dismissed, but an ex parte arbitration hearing ~~will~~ *may* be held. If the outcome of this hearing is in the client's favor, the State Bar will provide a lawyer at no cost, *other than actual litigation expenses*, to the client to represent the client in subsequent litigation to adjust the fee in accordance with the arbitration award.

Rule 6-102. Membership.

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

Rule 6-201. Jurisdiction.

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

.....

(d) The disputed fee:

(1) *exceeds (\$750) seven hundred and fifty dollars.*

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

.....

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

Rule 6-601. Special Case Procedure.

.....

(b) The arbitrator panel shall be selected by the Committee or its staff, and

(1) in cases involving amounts in dispute over \$2,500 shall consist of two (2) attorneys who have practiced law actively for at least five (5) years and one (1) non-lawyer public member.

(2) in cases involving amounts in dispute of \$2,500 or less, the arbitration panel may consist of one arbitrator who shall be a lawyer who has practiced law actively for at least five (5) years.

.....

SO MOVED, this _____ day of _____, 2004

Counsel for the State Bar of Georgia

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

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

UPL Advisory Opinion No. 2004-1

Issued by the Standing Committee on the Unlicensed Practice of Law on August 6, 2004.

Note: This opinion is only an interpretation of the law, and does not constitute final action by the Supreme Court of Georgia. Unless the Court grants review under Bar Rule 14-9.1(g), this opinion shall be binding only on the Standing Committee on the Unlicensed Practice of Law, the State Bar of Georgia, and the petitioner, and not on the Supreme Court of Georgia, which shall treat the opinion as persuasive authority only.

QUESTION PRESENTED

Is the preparation or filing of a lien considered the unlicensed practice of law if it is done by someone other than the lienholder or a licensed Georgia attorney?

SUMMARY ANSWER

A nonlawyer's preparation of a lien for another in exchange for a fee is the unlicensed practice of law. The ministerial act of physically filing a lien with a court is not the practice of law.

OPINION

There are two components to the question presented above, viz., the preparation of a lien and the filing of a lien. With regard to the latter, the Committee is of the opinion that the mere ministerial act of physically filing a lien with a court does not in itself constitute the practice of law.

As far as the preparation of a lien, the Committee looks in part to O.C.G.A. §15-19-50(3), which states that the practice of law includes "[t]he preparation of legal instruments of all kinds whereby a legal right is secured." The Supreme Court of Georgia has recently indicated that O.C.G.A. §15-19-50(3) continues to aid the judiciary in the performance of its functions with regard to defining the practice of law in this state. In re UPL Advisory Opinion 2003-2, 277 Ga. 472, 474 (2003). See also In re UPL Advisory Opinion 2002-1, 277 Ga. 521, 522 (2004).

A lien is "'a hold or claim which one person has on the property of another as a security for some debt or charge.'" Waldroup v. State, 198 Ga. 144, 149 (1944). See also Miller v. New Amsterdam Cas. Co., 105 Ga. App. 174, 176 (1961). With regard to real estate, a lien encumbers title. Lincoln Log Homes Mktg., Inc., v. Holbrook, 163 Ga. App. 592, 594 (1982). There are a variety of liens available under Georgia law. See, e.g., O.C.G.A. §44-14-320. They may vary as to the particulars of their operation, but all assert the perceived rights of the lienholder. A lien affects the status of title as to the relevant property, and is an instrument designed to secure a legal right. It follows that under O.C.G.A. §15-19-50(3) the preparation of a lien constitutes the practice of law.

During the public hearing regarding this matter, the Committee heard a presentation made by a nonlawyer business entity that prepares mechanics' and materialmen's liens for others. The customer provides the company with relevant background information, and the company performs a title search, prepares a legal description of the property, and inserts the description

into the lien document. The company then prints the lien, files it with the appropriate court, and provides notice to the property owner. According to the company, its employees do not provide legal advice to the customer. The company claims that this activity is not the practice of law, notwithstanding the existence of O.C.G.A. §15-19-50(3).

The company first asserts that its activity is essentially tantamount to performing a title search and preparing an abstract of title, an activity allowed by O.C.G.A. §15-19-53. An abstract of title "should be a complete showing in more or less abbreviated form of all instruments appearing of record in any way affecting the title, either adversely or beneficially...." 3 Hinkel, Pindar's Georgia Real Estate Law and Procedure, §26-7, p. 44 (6th ed. 2004). In the Committee's view, it is not proper to equate a title search or abstract of title with a lien. As noted above, an abstract identifies a lien;

it is not itself a lien. Moreover, an abstract, being a history of the title to land, is at its core a neutral, informational document. A lien, on the other hand, asserts a legal claim. Given the foregoing, it would be unreasonable to read O.C.G.A. §15-19-53 as extending to the preparation of liens.

In the alternative, the company states that its activity is allowed under O.C.G.A. §15-19-52, which does not prohibit drafting a legal instrument for another "provided it is done without fee and solely at solicitation and the request and under the direction of the person, firm, or corporation desiring to execute the instrument." The company claims that it collects a fee from its customer solely for preparing an abstract of title or providing a legal description of the property, and that it then prepares the lien free of charge.

The Committee views the latter contention as being disingenuous. Accepting such a deconstruction of

the transaction would effectively eviscerate O.C.G.A. §15-19-50(3), because the nonlawyer preparer of a legal document could always claim to be charging the fee for something other than the preparation of the instrument. An interpretation of O.C.G.A. §15-19-50(3) that leads to such a result cannot be a correct one. Rather, it seems more sensible to examine the reason the customer contacted the nonlawyer document preparer, the expectations of the customer, and the ultimate product of the transaction. In the situation described above, the goal of the customer is to procure a lien, not a mere abstract of title or legal description of property. The customer in fact obtains the lien, and pays the company for its services in this regard. Under the circumstances, the transaction involves the practice of law as set out in O.C.G.A. §15-19-50(3), and the consequent furnishing of legal services within the meaning of O.C.G.A. §15-19-51(a)(4).

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