



Georgia Bar Journal

October 2007 • Volume 13 • Number 2

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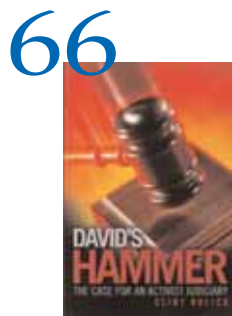
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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Sarah I. Coole,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

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by Gerald M. Edenfield

Bar Leadership Strives To Be More Inclusive, Accessible

The Bar Center on Marietta Street in downtown Atlanta is a wonderful facility that was designed with Georgia lawyers in mind, but for a portion of our 38,000 members the time and cost

associated with traveling to attend a meeting is not always the most convenient thing to do.

They are not alone in this predicament. For me, traveling from Statesboro to Atlanta to attend various State Bar meetings is not always an easy task. A few weeks ago I booked a 5 a.m. flight to Atlanta that required me to drive to the Savannah airport, which is an hour in the opposite direction. When I got there, they had cancelled the flight and I had to drive to Atlanta after all. (Except of course now, I was an hour farther away!) Yet, I chose to accept the responsibility of traveling to the Bar Center when I accepted the nomination for president. I cannot ask you to do the same.

I was recently contacted by a judge who said that he felt like he never got to speak with any Bar leaders in person and he wanted that opportunity. He told me that he felt as if he wasn't a participatory member of the Bar because he is located outside Atlanta and that most of the meetings and events weren't accessible to him. And yet he had questions about what the Bar was

doing—and how—as well as wanting to be able to discuss issues in his own circuit with Bar leaders who may not have been aware of local issues. I think he made a valid point.

I realize that many of you would like to attend and participate in Executive Committee meetings, enabling you to share your thoughts on how the State Bar can act more effectively and in your best interest. Likewise,

the members of the Executive Committee would love to hear your comments and feedback so that they can represent you in the best possible way.

To resolve this issue, we decided to bring the mountain to the people by holding our 2007-08 Executive Committee meetings in locations throughout Georgia. For our governing body to maintain the

“That’s what this program is all about: expanding the reach of our leadership by shortening the distance for our membership.”

highest standards of excellence, we must be inclusive and accessible, while making decisions that will affect the Bar's membership. As president, I will not accept anything less.

In the August edition of the *Georgia Bar Journal*, I spoke briefly about this, stating that "I encourage you to attend these meetings to keep abreast of the many issues the Executive Committee is addressing throughout the year and *communicate any concerns you have* or suggestions for dealing with the issues that are important to your community, region or area of practice."

After this plan was announced, a federal judge contacted me and was very complimentary about taking the meetings around Georgia. He told me of an attorney who had contacted him with an issue, and the judge felt that it was an issue that the Bar should be aware of and should handle. He was happy that the statewide meetings would better serve these sorts of issues.

Simply put, we want our meetings to be open and our actions more accountable to Bar members in every corner of Georgia. Transparency is the cornerstone of good governance. The members of your Executive Committee are dedicated to upholding those ideals, and I believe we have taken a major step.

Just as important, holding our meetings throughout the state will provide us with an excellent opportunity to meet local jurists, legislators, law students and others to fully ascertain what issues are most important in their part of the state.

I am especially excited about cultivating closer and stronger ties with our state legislators and other elected officials. We share a duty and responsibility of upholding the Constitution by ensuring laws are established, implemented, enforced and interpreted in a manner consistent with the principles of liberty, justice and equali-

ty. I look forward to meeting our elected officials throughout the year and engaging them in a mutually beneficial dialogue.

Another benefit is being able to share with our members the many projects and programs we are currently undertaking. From addressing lawyer advertising to encouraging more pro bono work to offering free online legal research via Casemaker, the State Bar of Georgia is working hard for you. Yet, what good is it if we cannot inform those we serve? We cannot become complacent by over relying on technology; sometimes a message is better delivered with a handshake and a hello.

The State Bar is coordinating with local bar associations to ensure maximum attendance and participation at the Executive Committee meetings; members of the Board of Governors from the host region will also be in attendance, as well as your local judges and bar association leaders.

Fortunately, I can attest to the effectiveness of this new initiative (in 30 years of practicing law, I have always made sure the facts supported what I say). Our first Executive Committee meeting took place July 12 at the Walter F. George School of Law at Mercer University in Macon. Mercer President William D. Underwood and Law School Dean Daisy Hurst Floyd were wonderful hosts, and as a Mercer Law alumnus, it was with tremendous pride that I walked those halls once again while a number of 2007 graduates were coming in to study for the Bar exam.

We had an outstanding turnout of lawyers, judges and legislators from throughout middle Georgia, which is a testament to the leadership and dedication of folks like John Kennedy, secretary of the Macon Bar Association, Superior Court Judge Lamar Sizemore Jr. of the Macon Circuit and former state Rep. Larry Walker of nearby Perry, all of whom participated in the program. One of the local televi-


sion stations even sent a reporting team to cover the activities.

That's what this program is all about: expanding the reach of our leadership by shortening the distance for our membership. I cannot overstate the importance of being able to see and hear from lawyers and judges across the state that have entrusted us with these positions.

Our second regional meeting of the Executive Committee took place Sept. 7-8 (while this edition of the *Bar Journal* was being prepared for press) in my hometown of Statesboro. While you will be hearing more details about that meeting and meetings scheduled for your area of the state, the remaining schedule is as follows:

- Oct. 4-5, 2007
Unicoi State Park in Helen
- Nov. 16, 2007
Americus (tentative)
- Jan. 25, 2008
Rome (tentative)
- April 11, 2008
Savannah (tentative)
- May 9, 2008
Columbus (tentative)

Again, our success in meeting our responsibilities to the profession and the public is dependent on your willingness to become involved. I look forward to speaking with you personally at each of these meetings. I owe each of you a "thank you" for making the rule of law a reality every day for all Georgians.

Meanwhile, the State Bar is also encouraging members of the Board of Governors to coordinate speaking engagements with local bar associations. Please take advantage of all opportunities to hear firsthand what is taking place throughout the year. More importantly, please give us the opportunity to hear from you. 

Gerald M. Edenfield is the president of the State Bar of Georgia and can be reached at gerald@ecbcpc.com.



by Cliff Brashier

Justice Threatened

At the ABA Annual Meeting held in San Francisco in August, a panel of judges including Judge George W. Greer, who oversaw the Terri Schiavo case, spoke about how their lives were affected by verdicts in high profile cases.

Collectively, they said that they would not go back and change their rulings if they had the chance, even with the knowledge of how their lives have been impacted. Greer stated that at times he still looks over his shoulder and even

used an alias when registering for the ABA meeting.

When attacks go from verbal threats to physical violence, we all need to take notice, stand up and speak out against them. Recent high-profile Georgia cases show that it's not just something going on in other areas of the United States—it's happening right here.

The tragic shootings that began at the Fulton County Courthouse on March 11, 2005, are just one notable example. Brian Nichols stands accused of killing Judge Rowland Barnes, who was presiding over Nichols' rape trial, along with court reporter Julie Ann Brandau, sheriff's deputy Hoyt Teasley and federal agent David Wilhelm.

In January 2006, Robert and Connie Brower held Statesboro attorney Michael Histilo hostage in his law office. A decade earlier, Brower faced charges in Chatham County of violently beating a man with a hammer, and was represented by public defender Histilo. Convicted and sent to prison, Brower blamed his fate on his attorney. Thankfully, Histilo was released unharmed after the more than 24-hour ordeal.

On June 25, Hon. Glenn Thomas Jr. of Jesup was murdered in his office. For 30 years he served as a district attorney and for the last several years of his life as judge of the Recorder's Court. The fact that this dedicated lawyer's lifetime of public service would be ended in such a violent manner—allegedly as an act of revenge—reminds everyone who plays a role in the judicial process of the rising tide of such attacks.

These tragic incidents illustrate the escalating number of individuals who blame the justice system—and

“Outside or unwarranted criticism of the profession may have an adverse impact on the administration of justice. Our judicial system is worth defending, and I hope you all take the opportunity to do your part.”

the judges and lawyers who serve in that system—for unfavorable outcomes in the courtroom. This misinterpretation of the role of judges and lawyers puts everyone at risk.

As representatives of the judicial system and defenders of the rule of law, we need to stand up for our fellow lawyers and judges who make the system work at great personal sacrifice. It's imperative that we continue to advocate the importance of what we do and support our colleagues when they are unfairly attacked.

While it is important that we stand up and speak out after attacks take place, it is more imperative that we prevent these attacks from ever occurring. To that end, lawyers need to speak out and explain to the public and their clients the role judges and lawyers play in the justice system. We need to educate clients on the process and duties of each judge and lawyer involved in legal cases.


When the decision that is handed down is unfavorable to the client's position, it is the responsibility of the lawyer to explain the results of the case to their disappointed clients without attacking the judge or opposing counsel. Many times, the law is about trying to find the best decision when the facts for both sides of the case hold merit. A good lawyer will refrain from blaming the judge or opposing counsel for an adverse judgment.

In many professions, you have a choice whether or not to take on an unpopular position. If you serve in the general assembly, and it's an election year, you can decide against sponsoring a bill you think your constituents will deem unfavorable. If you are a business owner, you have the luxury to refuse service to any customer who doesn't meet your standards. In the judicial branch, refusing service is not an option for our friends on the bench. The role of the judge is to rule based on the law, not on his or her personal beliefs. A decision must be made.

When judges and lawyers are unfairly criticized, including in the media, there are several ways to help defend them. You can carry your message to your community by writing articles to your local newspaper; supporting efforts for better security in the courthouses; speaking to your local civic groups; volunteering to speak to children in schools; or becoming involved in the High School Mock Trial Program, a program that instills the value of the rule of law in young people that they will carry with them into their professional lives.

The State Bar is working on these very issues through our Foundations of Freedom program, which educates the public on the justice system. By addressing civic groups, sponsoring television and radio ads, and writing newspaper articles, we are countering the unjust and unfair attacks on our judicial system. If there's a situation that you think needs the Bar's involvement, please let us know. We are always looking for opportunities to praise our members when they are making positive changes in their communities. We also want to make sure that if a judge, lawyer, or the legal system in general, is being unfairly attacked, we have the opportunity to educate those who may be misinformed.

Outside or unwarranted criticism of the profession may have an adverse impact on the administration of justice. Our judicial system is worth defending, and I hope you all take the opportunity to do your part.

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

Cliff Brashier is the executive director of the State Bar of Georgia and can be reached at cliff@gabar.org.

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by Elena Kaplan

YLD Meetings— Party With a Purpose

With 25 active committees, the YLD has a meeting or event nearly every day of the year—that’s literally hundreds of meetings and events throughout the year. These include everything from CLEs to happy hours to community service projects to meetings planning all the events. In addition, the YLD sponsors five membership meetings throughout the year at a variety of resort locations. Each of these meetings and events is a party with a purpose.

Well, I suppose calling them all a party may be a stretch, but they are all definitely a lot of fun. How could they not be with several (or several dozen) smart, personable lawyers in attendance? There is no doubt, though, that each of these meetings and events has a purpose. Most obvious, of course, is their specific purpose—the good work of the particular committee project. For example, putting on a moot court competition, providing

lawyers with an opportunity to earn CLE credit, or taking foster kids to a Hawks game.

There are two other purposes to these meetings and events that are equally important: cultivating professionalism and developing business. These purposes exist not just with respect to meetings and events of the YLD, but with respect to meetings and events of all Bar organizations. However, the YLD is unique in that it provides an opportunity for young lawyers from all over the Georgia to cultivate professionalism and develop business on a statewide basis while doing the good work of the YLD’s committees.

“Through its variety of meetings and events, the YLD creates a forum in which lawyers can interact outside the ‘day to day’ of cases and deals.”

Cultivating Professionalism

Practicing in Atlanta for the better part of the past decade, I have heard countless stories of how the legal profession has changed. For one thing, the legal community has grown dramatically. In 1970, there were only 5,960 lawyers in the state of Georgia; today there are

more than 38,000. For another, the legal community has diversified, with more women and minorities entering the profession.

In addition, technology has allowed lawyers to practice from anywhere and for clients all over the world. No longer do lawyers have to work in an office near the courthouse and have face-to-face meetings

with their clients and other attorneys. They can work closer to or farther away from their clients. They can even work from home. For example, during my first few years of practice in Atlanta, I represented clients located in Louisville, Ky., New York City, and various cities in Germany, helping them negotiate contracts with counterparties all over the United States. I could do this from Atlanta with ease because of technologies like e-mail and facsimile transmission and the magic of overnight delivery. However, I rarely, if ever, met in person the people with whom I worked.

I understand that simultaneously with all of these changes, the practice of law has become more of a business and less of a profession. Further, there has been some degradation in the level of professionalism among attorneys—so much so that a variety of committees and commissions have been formed to address the issue and annual professionalism CLEs are now mandatory. One aspect of professionalism that is addressed by these initiatives is civility.

I am not a sociologist and would be remiss to say that I understand all of the intricacies of human behavior; however, in my experience, people are more likely to be civil to people they know and are apt to see again. We have seen the obverse of this in society in general as our culture has become more transient and people are less likely to know, much less form bonds with, their neighbors. Furthermore, when people know each other and are part of an interconnected society, the usual checks of an interconnected society (*for example*, ostracism) prevent uncivil behavior. When neighbors (or lawyers) don't know each other and are not part of an interconnected society, they become anonymous, and these usual checks do not apply.

Because it is no longer the case that lawyers run into their peers week in and week out at the court-

house, at lunch, and after work at the club, the legal community has become more and more a place of anonymity where lawyers experience fewer and fewer consequences of unprofessional behavior. By taking proactive steps to get to know each other, lawyers can reduce this anonymity and help ensure that the profession, or business, if you prefer, of law does not unintentionally foster an environment of incivility. There are some lovely byproducts of such an initiative too, in that the less anonymous the practice is, the less incivility will occur, and the more pleasant and productive and less stressful the experience of practice is for all.


Through its variety of meetings and events, the YLD creates a forum in which lawyers can interact outside the "day to day" of cases and deals. In doing so, it makes the practice less anonymous and promotes civility. The YLD is not unique in achieving these ends—all lawyers' organizations do this. So, I would encourage you, if you haven't already done so, to find a lawyers' organization that suits you and begin participating. Monthly breakfasts with your local bar association, panel discussions with The Federalist Society, or public service projects with a YLD committee are but a few possibilities.

Developing Business

Hanging out with other lawyers not only promotes professionalism,

it can also help develop business. So not only can you have a more stress-free and fun practice by getting involved in the YLD (or other Bar organization), you can have a more profitable one too! The trick is to hang out with lawyers who do something different than you. By different, I mean lawyers who practice in a different area of law or in a different geographic area or who target a different category of clients. The reason that lawyers are a great source of referrals is that when a person needs a lawyer, they go to the lawyer they know (regardless of whether or not that lawyer works in the appropriate practice area) and look to that lawyer to refer them to someone who can help them. By knowing a wide variety of lawyers, you will be at the forefront for a referral when the opportunity arises. You may wish to keep this in mind in determining the legal organizations with which you would like to participate.

Party with a Purpose

I hope you are encouraged to "party with a purpose," and I look forward to running into you at some legal organization meeting or event one day soon. 

Elena Kaplan is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at ekaplan@phrd.com or 404-880-4741.

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A “False Claims Act” Is Finally Enacted in Georgia

What Georgia Lawyers Should Know About the “State False Medicaid Claims Act”

by Michael A. Sullivan



(Left to right) Carrie Downing, Director of Legislative and External Affairs of the Georgia Department of Community Health; Dr. Rhonda Medows, Commissioner of the Georgia Department of Community Health; Inspector General Doug Colburn of the Georgia Department of Community Health; Governor Sonny Perdue; Rep. Edward Lindsey, sponsor of the State False Medicaid Claims Act; Michael A. Sullivan of Finch McCranie, LLP; and Philip Consuegra, Legislative Assistant to Rep. Lindsey.

In April 2007, the Georgia Legislature enacted a state version of an important—but commonly misunderstood—federal law, the False Claims Act.¹ The new “State False Medicaid Claims Act”² mirrors the federal False Claims Act in important respects, but differs in some significant ways.

Georgia lawyers, especially those whose practices touch on health care, will quickly need to understand at least the basics of the new Georgia statute, as well as the federal False Claims Act on which it is based.

Both the Georgia and federal Acts create civil liability for *treble* damages and potentially huge penalties for fraud and false claims submitted to the government.

Both authorize “qui tam”³ or “whistleblower” lawsuits by private persons, who may share in the government’s recovery. Both have unique procedural requirements that are foreign to most lawyers. One principal difference is the narrower reach of the Georgia Act, which applies only to fraud or false claims affecting the Georgia Medicaid Program, rather than all state programs.

This article explains how the new Georgia State False Medicaid Claims Act will work, which itself requires an explanation of the unique and sometimes perplexing federal False Claims Act on which the Georgia Act is based. This article summarizes the background of the federal False Claims Act, outlines how it operates, and discusses the Act’s increasing use to combat fraud directed at public funds. This article also highlights the important differences between the Georgia and federal Acts. Finally, this article also compares other states’ False Claims Acts and discusses some of the recoveries that other states have obtained to date.

Why a “False Claims Act”?

Fraud is perhaps so pervasive and, therefore, costly to the government due to a lack of deterrence. The General Accounting Office concluded in its 1981 study that most fraud goes undetected due to the failure of governmental agencies to effectively ensure accountability on the part of program recipients and government contractors. The study states:

For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the [g]overnment often does pay.⁴

Fraud—and allegations of fraud—plague government spend-

ing at every level. Today, as the federal and state governments struggle to fund the billions of dollars spent annually on health care through Medicare and Medicaid; national security and local security efforts; Hurricane Katrina and other disaster relief; and government grants and programs of every description, there is no shortage of opportunities for fraud against the public fisc.

The federal False Claims Act has been the federal government’s “primary” weapon to recover losses from those who defraud it.⁵ The Act not only authorizes the government to pursue actions for treble damages and penalties, but also empowers and provides incentives to *private citizens* to file suit on the government’s behalf as “qui tam relators.” Over the past 20 years, recoveries for the federal government have grown dramatically since Congress amended the Act in 1986 to encourage greater use of the qui tam provisions, as part of a “coordinated effort of both the [g]overnment and the citizenry [to] decrease this wave of defrauding public funds.”⁶

The federal False Claims Act has been successful in recovering billions of dollars, increasingly through qui tam lawsuits brought by private citizens. In light of the federal Act’s successes, Congress, in the Deficit Reduction Act of 2005,⁷ created a large financial “carrot” for states that adopt state versions of the False Claims Act. Any state that passes its own “False Claims” statute with qui tam or whistleblower provisions that are at least as effective as those of the federal Act becomes eligible for a 10 percent increase in its share of Medicaid fraud recoveries.⁸

Thus, Georgia’s impetus in enacting its new “State False Medicaid Claims Act” in April 2007 was this incentive of more dollars. In 2007 to date, Georgia, New York and Oklahoma have joined the 16 other states that have enacted some version of a “False Claims” statute.⁹ At least a dozen other states¹⁰ are considering

enacting similar statutes of their own so that they, too, qualify for increased funds under the Deficit Reduction Act.

Background of the Federal False Claims Act

Although the False Claims Act may be the best-known qui tam statute, it is far from being the first. Qui tam actions date back to English law in the 13th and 14th centuries. This tradition took root in the American colonies and, by 1789, states and the new federal government had authorized qui tam actions in various contexts.¹¹

According to one writer:

In the early years of the Nation, the *qui tam* mechanism served a need at a time when federal and state governments were fairly small and unable to devote significant resources to law enforcement. As the role of the Government expanded, the utility of private assistance in law enforcement did not diminish. If anything, changes in the role and size of Government created a greater role for this method of law enforcement.¹²

Birth of the False Claims Act

The Civil War prompted Congress to enact the original False Claims Act in 1863. As government spending on war materials increased, dishonest government contractors took advantage of opportunities to defraud the United States government. “Through haste, carelessness, or criminal collusion, the state and federal officers accepted almost every offer and paid almost any price for the commodities, regardless of character, quality, or quantity.”¹³

One senator explained how the qui tam provisions of the Act were intended to work:

The effect of the [qui tam provisions] is simply to hold out to a

The federal Act's "scienter" requirement of "knowingly" presenting false claims, or "knowingly" using false records or statements, is broadly defined as well. A person is liable not only when acting with "actual knowledge," but also when acting in "deliberate ignorance" or "reckless disregard" of the truth or falsity of the information in question.

confederate a strong temptation to betray his co-conspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. . . . In short, sir, I have based the [qui tam provision] upon the old fashioned idea of holding out a temptation and setting a rogue to catch a rogue, which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.¹⁴

The original Act provided for double damages, plus a \$2,000 forfeiture for each claim submitted.¹⁵ If a private citizen or "relator" used the qui tam provision to file suit, the government had no right to intervene or control the litigation. A successful "relator" was entitled to *one-half* of the government's recovery.¹⁶

The Act survived substantially in its original form until World War II.¹⁷ In a classic and oft-quoted 1885 passage, one court rejected the argument that courts should limit the statute's reach on the grounds that qui tam actions were poor public policy:

The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most

effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.¹⁸

"Over-Correction" of the False Claims Act

Until World War II, perhaps because of the relatively small amount of government spending compared to the modern era, the Act did not attract much attention.¹⁹ World War II then spawned various qui tam actions over defense procurement fraud. Some relators sought to exploit what was effectively an unintended "loophole" in the Act that permitted them to file "parasitic" lawsuits. These relators simply copied the information contained in criminal indictments, when the relator had no information to bring to the government's attention independently.²⁰

In 1943 the Supreme Court in *United States ex rel. Marcus v. Hess*²¹ held that it was up to Congress to make any desired changes in the Act to eliminate "parasitic" lawsuits.²² Congress amended the Act that same year to do so. The 1943 Amendments eliminated jurisdiction over qui tam actions that were based on evidence or information in the government's possession, even if the relator had provided the information to the government.²³

Congress in 1943 also gave the government the right to intervene

and litigate cases filed by qui tam relators. The 1943 amendments also dramatically reduced incentives for qui tam suits to be filed, by reducing to 10 percent the maximum amount of the recovery that a relator could receive if the government intervened, with a 25 percent maximum award if the government did not intervene and the private citizen alone obtained a judgment or settlement.²⁴

The 1986 Amendments Establish the Modern False Claims Act

By the 1980s, both the Justice Department and congressional leaders realized that the 1943 amendments and "several restrictive court interpretations"²⁵ had made the False Claims Act ineffective. Congress acted decisively in 1986 to revitalize the False Claims Act.²⁶

A representative of a business association testified that the 1986 Amendments were:

supportive of improved integrity in military contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing penalties for wrongdoing, and rewarding those private individuals who take significant personal risks to bring such wrongdoing to light.²⁷

The 1986 Amendments increased financial and other incentives for qui tam relators to bring suits on behalf of the government. Congress

increased the damages recoverable by the government from double damages to treble damages, and increased the monetary penalties to a minimum of \$5,000 and a maximum of \$10,000 per false claim. The 1986 Amendments also increased the qui tam relator's share of recovery to a range of 15 percent to 25 percent in cases in which the government intervenes, and 25 percent to 30 percent in cases in which the government does not intervene, plus attorney's fees and costs.

The 1986 Amendments also clarified the standard of proof required and made defendants liable for acting with "deliberate ignorance" or "reckless disregard" of the truth. Congress also lengthened the statute of limitations to as much as 10 years, modernized jurisdiction and venue provisions, and made other changes as well.²⁸

Overview of How the Modern False Claims Act Works (with Comparisons to the New Georgia State False Medicaid Claims Act)

Conduct Prohibited

The federal False Claims Act imposes civil liability under several different theories, only four of which are generally used.

First, the Act makes liable any person who knowingly presents, or causes to be presented, a "false or fraudulent claim for payment or approval" to the federal government.²⁹ "Claim" is broadly defined to include not only submissions made directly to the federal government, but also "any request or demand . . . for money or property" made to a "contractor, grantee, or other recipient" if the federal government provides any portion of the money or property in question.³⁰

Second, the Act creates liability for using a "false record or statement" to obtain payment of a false

claim. It imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government."³¹

Third, the False Claims Act imposes liability under a "conspiracy" provision. Any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid" is also liable under the Act.³²

Fourth, since the government also can be defrauded when a private entity *underpays* or *avoids paying* an obligation to the government, the modern Act contains what is known as a "reverse false claim" provision. It creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."³³ For example, a company that is obligated to pay royalties to the government under an oil lease can be held liable if it uses false records or statements to pay less than what it owes.

Georgia Act compared: The same bases of liability are set forth in new section 49-4-168.1(a), with regard to the Georgia Medicaid program. "Claim" is also broadly defined in the Georgia statute in section 49-4-168(1). In fact, the Georgia statute's definition of "claim" eliminates a point of dispute about the federal statute³⁴ by making clear that it applies to "claims" submitted not only to the government, but also to other persons or entities, as long as the Georgia Medicaid program provides any portion of the money or property at issue.

The federal False Claims Act also creates a cause of action for damages for retaliation against employees who assist in the investigation and prosecution of False Claims Act cases.³⁵ This cause of action belongs to the employee alone, and the government does not share in any recovery for retaliation.

Georgia Act compared: New section 49-4-168.4 establishes a similar right to pursue a claim for retaliation in employment.

Broad Definition of "Knowing" and "Knowingly"

The federal Act's "scienter" requirement of "knowingly" presenting false claims, or "knowingly" using false records or statements, is broadly defined as well. A person is liable not only when acting with "actual knowledge," but also when acting in "deliberate ignorance" or "reckless disregard" of the truth or falsity of the information in question.³⁶ The Act also makes explicit that no "specific intent to defraud" need be shown to impose liability, and thus rejects this traditional "fraud" standard.

Georgia Act compared: Georgia's new section 49-4-168(2) incorporates the same broad definitions of "knowing" and "knowingly," and likewise makes clear that "[n]o proof of specific intent to defraud is required." Georgia had

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no leeway in this regard if it wished to qualify for the additional funds under the Deficit Reduction Act. In fact, when the Georgia bill was under consideration, Indiana's statute had already been determined not to qualify that state for additional funds under the Deficit Reduction Act, precisely because the Indiana statute did not define "knowing" and "knowingly" as broadly as does the federal Act.³⁷

Damages and Penalties Under the False Claims Act

Liability to defendants in False Claims Act cases can be enormous. First, the Act provides for treble damages—"3 times the amount of damages which the Government sustains because of the act of that person."³⁸

Second, the Act now provides for a civil penalty of \$5,000 to \$10,000 for each false claim submitted, an amount that has been adjusted for inflation for more recent claims to \$5,500 to \$11,000 per violation.³⁹

Georgia Act compared: The Georgia Act likewise provides for treble damages and penalties of \$5,500 to \$11,000 for each false claim submitted, under section 49-4-168.1(a).

Some of the Peculiar Jurisdictional and Procedural Requirements In Qui Tam Cases

The False Claims Act establishes a wholly different process for qui tam actions from the usual one encountered in civil litigation. The Act has unique jurisdictional and procedural requirements.

The qui tam relator brings the lawsuit for the relator and for the United States, in the name of the United States.⁴⁰ The complaint must be filed "in camera and under seal," and must remain under seal for at least 60 days.⁴¹ The relator must serve the government under Rule 4 of the Federal Rules of Civil Procedure with a "copy of the complaint and written

disclosure of substantially all material evidence and information the person possesses."⁴²

In reality, courts regularly extend the seal for many months (or even years) at the government's request. The purpose is to permit the government to evaluate and investigate the case and make its decision as to whether to intervene. Thus, it is not uncommon for the defendant to receive no notice for more than a year that it has been sued in a qui tam action, even as the government meets with the relator and relator's counsel to develop the case against the defendant. Nonetheless, defense counsel may infer the existence of a qui tam action when the client or its employees are contacted by government agents.

If the government elects to intervene, it assumes primary responsibility for prosecuting the case, although the relator remains a party with certain rights to participate.⁴³ The defendant is served once the complaint is unsealed, and has 20 days after service to respond.⁴⁴

If the government intervenes, it is not "bound by an act of the person bringing the action."⁴⁵ The government can file its own complaint and can expand or amend the allegations made.⁴⁶ Once it has intervened, the government also has the right to dismiss the case notwithstanding the relator's objections, but the relator has a right to be heard on the issue.⁴⁷

The government may petition the court before intervention for a partial lifting of the seal in order to disclose the complaint to the defendant and discuss resolution of the case, even before it decides whether to intervene.

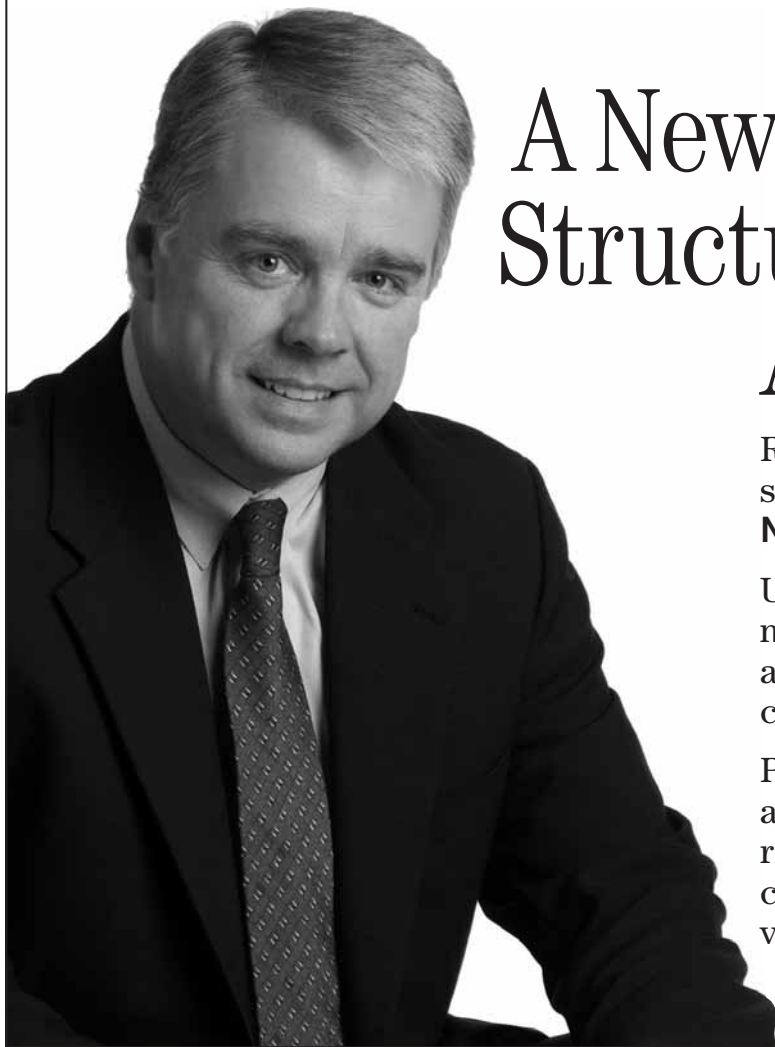
If the government elects not to intervene, the relator has the right to "conduct the action."⁴⁸ Although the relator must prosecute the case without the government, as stated the relator is entitled to a larger share of any recovery, 25 percent to 30 percent, in non-intervened cases.⁴⁹

After intervention, the government is authorized to settle the case even if the relator objects, but the relator has a right to a "fairness" hearing on any such settlement. In actuality, a relator's objections are highly unlikely to stop a settlement that the government, after intervention, seeks to make.

The Act states that, when there is an action "based upon the public disclosure of allegations or transactions" in one of three specified categories of places where disclosures can occur, the court shall lack jurisdiction over the action, unless "the person bringing the action is an original source of the information." The three specified places of "public disclosure" are "[1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or [3] from the news media."⁵⁰ (Much litigation has occurred over this provision, and a detailed discussion is beyond the scope of this article.)

Georgia Act compared: The Georgia Act establishes essentially the same procedures. It directs that the complaint and "written disclosure of substantially all material evidence and information shall be served on the [a]ttorney [g]eneral." The complaint must be filed in camera and shall remain under seal for at least 60 days, and it is not served on the defendant while it remains under seal. The attorney general may move to extend the time under seal in order to investigate the allegations of the complaint, all pursuant to section 49-4-168.1(c).

The Georgia Act arguably goes further than the federal Act in expressly recognizing in section 49-4-168.2(d)(2) that the attorney general "may dismiss the civil action, notwithstanding the objections of the person initiating the civil action, if the person has been notified by the attorney general of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." In the legislative hearings



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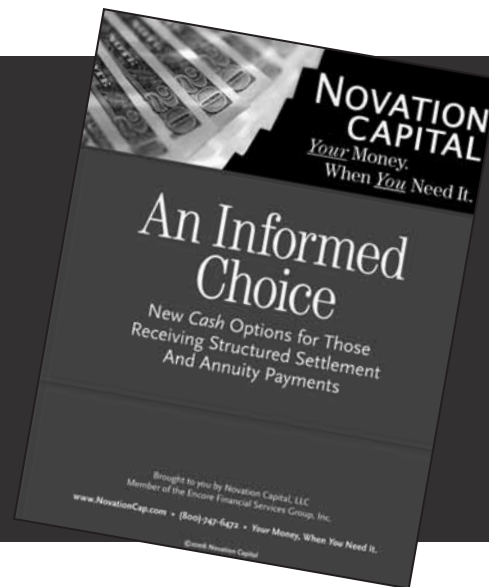
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attended by this writer, the bill's sponsor discussed how this provision permits the attorney general to have a desired degree of control over actions by private citizens under the new Act, and to perform a "screening" function.

In addition, section 49-4-168.2(f) of the Georgia law expressly recognizes that the attorney general may decline to intervene, but later reconsider and be permitted by the court to intervene for any purpose, including to seek dismissal of the action.

A substantive change from the federal Act is that, in Georgia's new section 49-4-168.2(j), the Georgia Act prohibits "public employees" and "public officials" from bringing an action based on either "(A) [a]llegations of wrongdoing or misconduct which such person had a duty or obligation to report or investigate within the scope of his or her public employment or office; or (B) [i]nformation or records to which such person had access as a result of his or her public employment or office." Under current federal case law, public employees may bring whistleblower actions under the federal Act.

Finally, Georgia's new Act in section 49-4-168.2(i)(1) designates that money recovered under the new Georgia Act shall go to the "Indigent Care Trust Fund to be used for the purposes set forth in Code Section 31-8-154."

The Trend of Recent Recoveries Under the False Claims Act

Over the past two decades since the modern False Claims Act was established through the 1986 Amendments, the federal government's recoveries of dollars have grown astronomically, especially in health care cases. The Department of Justice statistics⁵¹ tell the story.

In 1987, the government's recoveries in qui tam cases totaled zero, presumably because the 1986 Amendments had just taken

effect; and total recoveries under the False Claims Act were just \$86 million. The following year, qui tam and other False Claims Act settlements and judgments began a steady climb upward, exceeding \$200 million by 1989, and \$300 million by 1991. By 1994, the government's recoveries broke the \$1 billion mark for the first time, with \$380 million of that amount attributable to qui tam case recoveries alone.

In 2000, the government recovered more than \$1.5 billion, of which \$1.2 billion was derived from qui tam actions. In 2001, the government recovered more than \$1.7 billion, with almost \$1.2 billion of that amount from qui tam cases. With the exception of 2004, in each year since 2000 the government has recovered more than *a billion dollars per year* under the False Claims Act, and qui tam actions were responsible for the lion's share of those recoveries. For example, in 2003, government recoveries exceeded \$2.2 billion, of which \$1.4 billion came from qui tam cases. Similarly, in 2005, of the government's total recovery of \$1.4 billion, \$1.1 billion of that amount came from qui tam cases.

In 2006, the Justice Department recovered a record of more than \$3.1 billion in settlements and judgments for fraud and false claims. Of this record \$3.1 billion in recoveries, 72 percent came from the health care field; 20 percent from defense; and 8 percent from other sources. Health care alone accounted for \$2.2 billion in settlements and judgments, which included a \$920 million settlement with Tenet Healthcare Corporation, the country's second-largest hospital chain. Defense procurement fraud amounted to \$609 million in recoveries, which included a \$565 million settlement with the Boeing Company.

It is interesting that, while defense procurement fraud both inspired the Act and was the largest source of recoveries at the time of the 1986 Amendments,

health care cases now lead in recoveries, as health care costs have grown as a percentage of the federal budget. By industry, in 1987 the defense industry was the largest source of cases under the False Claims Act.⁵² The health care industry accounted for only 12 percent of cases under the False Claims Act in 1987; that percentage grew to 54 percent by 1997.⁵³

Many health care fraud cases have addressed over-billing or up-coding, fraudulent cost reporting, billing for services not provided, and failure to furnish the required "quality of care."⁵⁴ The breakdown of the Department of Justice statistics shows that government recoveries in the health care field have grown from less than \$2 million in 1988 to more than \$1.8 billion in 2003. Although the amounts recovered rise and fall each year, from 2001 to 2006 government recoveries from the health care field exceeded \$1 billion in five out of six years.

The trend continues in 2007, as the Office of Inspector General of the Department of Health and Human Services recently announced that it expects \$2.9 billion in recoveries for Medicare, Medicaid and other federal health and human services programs for the first half of fiscal year 2007.⁵⁵

In short, the health care industry now consistently accounts for the vast majority of settlements and judgments obtained by the federal government for fraud and false claims.⁵⁶

Other States' Experiences With Their Own False Claims Acts

As noted, in 2007 Georgia, New York and Oklahoma joined the 16 other states that have a False Claims statute, and at least a dozen other states are considering similar laws.⁵⁷ The financial incentives of the Deficit Reduction Act of 2005 have not only prompted states that had lacked False Claims statutes to enact them, but also have caused

many states wishing to qualify for the additional funds to amend their existing False Claims statutes.

In essence, while states may enact “tougher” or more comprehensive laws than the federal False Claims Act, states with “weaker” or less effective laws—as judged by the standards of the Deficit Reduction Act—will not qualify for the additional funds.⁵⁸

Seven of the first 10 states whose statutes were scrutinized by the Office of Inspector General (OIG) quickly learned this lesson when OIG disapproved their state statutes. These included California (which lacked a minimum penalty), Florida (which omitted “fraudulent” from its definition of claims), Indiana (which did not make defendants liable for “deliberate ignorance” and “reckless disregard”), Louisiana (which did not permit the state to intervene in cases, set too low a percentage for whistleblowers to recover, and set no minimum penalty), Michigan

(which omitted penalties and liability for decreasing or avoiding an obligation to pay the government, i.e., a “reverse false claim”), Nevada (which had a statute of limitations too short and a minimum penalty too low), and Texas (which did not permit the whistleblower to litigate the case if the state did not, and which provided for lower percentage shares to whistleblowers and lower penalties).⁵⁹ Most of these states have gone back to the drawing board to correct these deficiencies.

In sum, the Deficit Reduction Act has set minimum standards for state False Claims Acts for states wishing to receive these additional funds. In plain English, the state laws must protect at least Medicaid funds, and they must be at least as effective as the federal False Claims Act, especially in rewarding and facilitating qui tam actions for false or fraudulent claims, with damages and penalties no less than those under the federal Act.⁶⁰

How Other States’ False Claims Acts Compare to the New Georgia Statute

Many state False Claims laws have been in transition in 2007. States whose laws have been “disapproved” by OIG have begun to amend their statutes to meet the requirements for obtaining the additional funds under the Deficit Reduction Act, as Florida and Texas already have done in 2007. While these laws are in flux, some significant differences from Georgia’s new State False Medicaid Claims Act are likely to remain.

First, the majority of state False Claims statutes protect the state’s funds generally, rather than protecting only state Medicaid funds, as Georgia’s new State False Medicaid Claims Act is limited. Just as the federal False Claims Act is not limited to health care fraud, but encompasses fraud against the government generally (except for Internal Revenue violations, which are now covered by the new IRS



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Whistleblower Program),⁶¹ many states have used these statutes to protect public funds in general from fraud. Those states include California, Delaware, Florida, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, Oklahoma, Virginia and Tennessee.

In addition, several states—including Hawaii, Massachusetts, Nevada and Tennessee—have expanded on the federal Act's four commonly-used theories of liability listed above. These state laws create a new legal theory for holding liable a person or entity who is the “beneficiary” of the “inadvertent submission” of a false or fraudulent claim, if that person or entity fails to disclose (and presumably correct) the false claim after discovering it.⁶²

Moreover, Tennessee's False Claims Act reaches beyond false or fraudulent “claims” and imposes liability for false or fraudulent “conduct” that apparently does not necessarily involve “claims” submitted to the state. This state law adds a new category of liability for “any false or fraudulent conduct, representation, or practice in order to procure anything of value directly or indirectly from the state or any political subdivision.”⁶³

Because states have this leeway under the Deficit Reduction Act to pass laws that may be “tougher” or more “effective” than the federal Act, some states have set the statutory penalties higher than the federal level of \$5,500 to \$11,000 per claim. For instance, under the New York law enacted in 2007, penalties range from \$6,000 to \$12,000 for each false or fraudulent claim.⁶⁴

Some other states authorize a higher percentage of the state's recovery that a relator (whistleblower) may receive, instead of the percentages that the federal False Claims Act authorizes (which the Georgia statute also uses): 15 percent to 25 percent of the recovery in cases in which the government intervenes, and 25 percent to 30 percent in cases in which the government does not intervene. For

example, Nevada's percentages are 15 percent to 33 percent in intervened cases, and 25 percent to 50 percent in non-intervened cases; Tennessee's are 25 percent to 33 percent in intervened cases and 35 percent to 50 percent in non-intervened cases; and Montana's range from 15 percent to 50 percent.⁶⁵

Notable Results Obtained by Other States Under Their False Claim Statutes

Most qui tam cases filed under the state False Claims statutes have related to health care. Many are "global" Medicaid cases that were first developed in federal courts as Medicare and Medicaid fraud cases and that concerned a nationwide fraud that had been investigated by multiple federal and state jurisdictions.⁶⁶ Georgia now is in a position to join the process.

Most of the state settlements have come from "piggy backing" on federal law enforcement efforts and from joining in global settlements.⁶⁷ Experience with some of the newer state statutes is too recent to evaluate, but many states have reported the desire for more resources to develop such cases.⁶⁸

Texas's experience is worth special mention because the Texas Attorney General's Office has been especially effective in pursuing cases involving false claims in health care. Texas's statute has allowed it to recover more than \$216 million in health care fraud cases since 1999.


Because the Texas Attorney General's Office has been a leader in recovering damages for health care fraud by using the Texas statute, it was perhaps ironic that OIG initially "disapproved" the highly successful Texas law before it was amended in 2007 to comply with the Deficit Reduction Act standards.⁶⁹

California, whose statute is not limited to health care, recovered \$43.1 million in 2005 in a state False Claims action alleging fraud in the installation and monitoring of heating and cooling equipment in

San Francisco schools.⁷⁰ In 2001, California recovered \$31.9 million in an action alleging fraudulent billing during construction of the Los Angeles subway system.⁷¹ Similarly, California recovered \$30 million in 2000 in a matter alleging the knowing sale of defective computers to the state and political subdivisions. In 1998, California recovered \$187 million in an action alleging the improper retention of unclaimed municipal bonds.⁷²

We do not know with any precision the dollar amount of fraud that affects Georgia state government spending, or how much of that fraud can be prevented through effective use of a state False Claims Act. For now, Georgia will see how much of the Medicaid fraud losses can be recovered through its new law.

Conclusion

Georgia's enactment of its new State False Medicaid Claims Act is immediately important—and challenging—to any Georgia lawyer whose practice relates to the health care industry. Because the new law is based on the federal False Claims Act, these Georgia lawyers should gain at least a basic understanding of the new Georgia Act and the federal False Claims Act on which it is based. Based on the results obtained under the federal Act and the Texas law, the new Georgia Act should be significant in recovering damages for fraud and false claims affecting the Georgia Medicaid program. 



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Endnotes

1. 31 U.S.C. §§ 3729-33.
2. The new State False Medicaid Claims Act is codified at O.C.G.A. §§ 49-4-168 to 49-4-168.6.
3. The term "qui tam" is derived from the Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000).
4. S. REP. No. 99-345, at 3 (1986), as reprinted in 1986 U.S.C.C.A.N. 5266, 5268 [hereinafter "Legislative History"] (quoting 1981 GAO Report to Congress, "Fraud in Government Programs: How Extensive is it? How Can it be Controlled?").
5. *Id.* at 2.
6. *Id.*
7. See Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.
8. *Id.* § 6031. In the legislative hearings that led to passage of the new Georgia Act (all attended by this writer, and at which this writer also testified), Inspector General Doug Colburn of the Georgia Department of Community Health testified that Georgia currently pays approximately 38 cents of every dollar spent in the Georgia Medicaid program, and thus Georgia currently receives 38 percent of Medicaid fraud recoveries. This ten point

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- increase to 48 percent in Georgia's share of Medicaid fraud recoveries would thus effectively increase Georgia's share of these recoveries by more than 26 percent in actual dollars (i.e., by the fraction 10/38).
9. As of July 2007, the states that have enacted "False Claims" statutes are California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Tennessee, Texas, Virginia and the District of Columbia. See CAL. GOV'T CODE §§ 12650-12656; DEL. CODE ANN. tit. 6, §§ 1201-1209; FLA. STAT. §§ 68.081-68.09; O.C.G.A. §§ 49-4-168 to 49-4-168.6; HAW. REV. STAT. §§ 661-21 to 661-29; 740 ILL. COMP. STAT. §§ 175/1 to 175/8; IND. CODE §§ 5-11-5.5-1 to 5-11-5.5-18; LA. REV. STAT. ANN. §§ 46:437.1-440.3; MASS. GEN. LAWS 12 § 5A; MICH. COMP. LAWS §§ 400.601-400.613; MONT. CODE ANN. §§ 17-8-401 to 17-8-412; NEV. REV. STAT. §§ 357.010 to 357.250; N.H. REV. STAT. ANN. §§ 167:61 to 167:61-e; N.M. STAT. §§ 27-14-1 to 27-14-15; N.Y. STATE FIN. LAW §§ 187-194 (McKinney); OKLA. STAT. tit. 63, §§ 5053-5053.7 (effective Nov. 1, 2007); TENN. CODE ANN. §§ 71-5-181 to 71-5-185; TEX. HUM. RES. CODE ANN. §§ 36.001 to 36.132; VA. CODE ANN. §§ 8.01-216.1 to 8.01-216.19; and D.C. CODE §§ 2-308.13-2.308.21. A regularly updated list of state False Claims Acts appears at www.taf.org/statefca.htm. For an excellent 2005 article on state False Claims Acts, see James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks, and Marc S. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005) [hereinafter *State False Claims Act Study*].
 10. State False Claims Acts have been proposed to date at least in Arkansas, Colorado, Connecticut, Iowa, Kansas, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, and South Carolina. See John T. Boese, *FraudMail Alert*, <http://www.friedfrank.com/wcc/pdf/fm070314.pdf>.
 11. See, e.g., *Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government."). See generally CLAIRE M. SYLVIA, *THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT* § 2.3, at 34-36 (West 2004).
 12. SYLVIA, *supra* note 11, § 2:6, at 41.
 13. *Id.* § 2:6, at 42 (quoting 1 FRED ALBERT SHANNON, *THE ORIGIN AND ADMINISTRATION OF THE UNION ARMY, 1861-65*, at 55-56, 58 (1965) (other sources quoted omitted)).
 14. *Id.* § 2:6, at 43 (quoting Cong. Globe, 37th Cong., 3d Sess., 955-56 (1863)).
 15. Legislative History, *supra* note 4.
 16. Act of March 2, 1863, ch. 67, § 6, 12 Stat. 698 (discussed in SYLVIA, *supra* note 11, § 2:6, at 44 & n.18).
 17. Certain amendments to the Act did occur in the early 1900s. SYLVIA, *supra* note 11, § 2.6, at 44 & n.18. In addition, the United States Supreme Court declined to limit the Act's application in 1937 in *United States v. Kapp*, 302 U.S. 214 (1937). In *Kapp*, the Supreme Court rejected the defendant's argument that the government must show a monetary loss and that the representations in question were not material. *Id.* at 217-18.
 18. *United States v. Griswold*, 24 F. 361, 365-66 (D. Or. 1885).
 19. See generally JOHN T. BOESE, *CIVIL FALSE CLAIMS AND QUI TAM ACTIONS* §§ 1-9, 1-10 (1993).
 20. Legislative History, *supra* note 4, at 11.
 21. 317 U.S. 537 (1943).
 22. *Id.* at 546-47.
 23. Act of December 23, 1943, ch. 377, 57 Stat. 608.
 24. SYLVIA, *supra* note 11, § 2:8, at 51.
 25. Legislative History, *supra* note 4.
 26. S. 1562, 99th Cong., 2d Sess. (1986) (False Claims Reform Act) (discussed in Legislative History, *supra* note 4).
 27. Legislative History, *supra* note 4, at 14.
 28. See *supra* pp. 15-18.
 29. 31 U.S.C. § 3729(a)(1).
 30. *Id.* § 3729(c).
 31. *Id.* § 3729(a)(2).
 32. *Id.* § 3729(a)(3).
 33. *Id.* § 3729(a)(7). The Act also lists three little-used bases of liability in subsections (a)(4), (5), and (6), which are omitted from this discussion.
 34. See, e.g., *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) (claim submitted to Amtrak held outside False Claims Act), *cert. denied*, 544 U.S. 1032 (2005).
 35. 31 U.S.C. § 3730(h).
 36. *Id.* § 3729(b).
 37. See <http://www.oig.hhs.gov/fraud/docs/falseclaimsact/Indiana.pdf>.
 38. 31 U.S.C. § 3729(a). In specified circumstances in which the defendant reports the fraud to the government promptly and cooperates fully, the Act provides for double damages. *Id.*
 39. *Id.* For violations of the Act occurring after September 29, 1999, the penalty range has increased to \$5,500 to \$11,000 per violation. See 28 U.S.C. § 2461; 28 C.F.R. § 85.3(9) (2006).
 40. 31 U.S.C. § 3730(b)(1).
 41. *Id.* § 3730(b)(2).
 42. *Id.*
 43. *Id.* § 3730(c)(1).
 44. *Id.* § 3730(b)(3).
 45. *Id.* § 3730(c)(1).
 46. See *id.*
 47. *Id.* § 3730(c)(2)(A).
 48. *Id.* § 3730(c)(3).
 49. Even "non-intervened" cases sometimes result in substantial liabilities to defendants. For example, in *United States ex rel. Franklin v. Parke Davis*, No. 96-11651-PBS (D. Mass.), a relator pursued an action over the off-label marketing of Neurontin, and the government elected not to intervene. Ultimately, the defendant entered into a global settlement of \$430 million, of which \$152 million was to settle False Claims Act liability, and \$38 million was to settle civil liabilities to the fifty states. See <http://www.usdoj.gov/civil/foia/elecread/2004/Warner-Lambert%202004.pdf>.
 50. The "public disclosure" provision is as follows:
No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting

- Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
- 31 U.S.C. § 3730(e)(4)(A).
51. See Department of Justice statistics reprinted at <http://www.taf.org/statistics.htm>.
52. SYLVIA, *supra* note 11, § 2:13, at 63.
53. *Id.* § 2:14, at 64.
54. *Id.* § 2:14, at 65.
55. Recent significant recoveries under the False Claims Act in the health care industry include the following:
- a. *Tenet Healthcare Corp.*, <http://www.usdoj.gov/usao/cac/news/pr2006/088.html> (\$900 million settlement of several lawsuits in 2006 from allegedly improper billing practices).
- b. *Serono, S.A.*, http://www.usdoj.gov/opa/pr/2005/October/05_civ_545.html (\$704 million settlement of several lawsuits in 2005 from allegedly illegal schemes to promote, market, and sell Serostim, an AIDS drug).
- c. *Schering-Plough Corp.*, <http://www.usdoj.gov/usao/ma/Press%20Office%20-%20Press%20Release%20Files/Schering-Plough/press%20release.pdf> (\$435 million settlement in August 2006, arising from alleged illegal sales in marketing programs for its drugs, with \$91 million to settle civil liabilities to the states for losses to state Medicaid programs.)
- d. *Saint Barnabas Corp.*, <http://www.usdoj.gov/usao/nj/press/files/pdf/files/stba0615rel.pdf> (\$265 million settlement in 2006 of two lawsuits against the largest healthcare system in New Jersey, Saint Barnabas Corp., to settle allegations that it defrauded the federal Medicare program).
- e. *King Pharms., Inc.*, http://www.usdoj.gov/opa/pr/2005/November/05_civ_581.html (\$124 million settlement in 2005 of various lawsuits for alleged overcharges in Medicaid program to various federal and state government entities for its drug products).
56. Department of Health and Human Services Office of Inspector General, Semiannual Report to Congress (October 1, 2006-March 31, 2007), at i, *available at* <http://oig.hhs.gov/publications/docs/semiannual/2007/SemiannualFirstHalf07.pdf>.
57. See *supra* notes 9 and 10 for list of states.
58. Under the Deficit Reduction Act, the Office of Inspector General of HHS, in consultation with the Justice Department, must determine that the state law meets the following criteria in order to qualify for the increased share of Medicaid funds recovered:
- (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in [31 U.S.C. § 1396b(d)].
- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of Title 31, United States Code.
- (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.
- (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of Title 31, United States Code.
- 42 U.S.C. § 1396h(b).
59. The Office of Inspector General's reviews of these state laws may be found at <http://oig.hhs.gov/fraud/falseclaimsact.html>.
60. 42 U.S.C. § 1396h(b)(4).
61. The False Claims Act expressly "does not apply to claims, records, or statements made under the Internal Revenue Code of 1986." 31 U.S.C. § 3729(e). In December 2006, however, Congress used the False Claims Act as a model in establishing the new IRS Whistleblower Rewards Program, which provides incentives to "whistleblowers" to report violations of the Internal Revenue laws in excess of \$2 million. IRS Whistleblowers may receive 15 percent to 30 percent of the recovery. See 26 U.S.C. § 7623(b)(1) (providing for "an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts))." Information about the IRS Whistleblower Program may be found at http://www.whistleblowerlawyerblog.com/irs_reward_s_program_tax/.
62. See, e.g., TENN. CODE ANN. § 4-18-103 (imposing liability on a "beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, [who] subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim"). See also HAW. REV. STAT. § 661-21 (similar provision for failing to disclose inadvertent submission of false claim after discovery of submission); MASS. GEN. LAWS 12 § 5B (similar provision); NEV. REV. STAT. § 357.040 (similar provision).
63. TENN. CODE ANN. § 4-18-103.
64. New York's False Claims Act is at N.Y. STATE FIN. LAW § 189 (McKinney).
65. See MONT. CODE ANN. § 17-8-410; NEV. REV. STAT. § 357.210; TENN. CODE ANN. § 4-18-104.
66. *State False Claims Act Study*, *supra* note 9, at 483.
67. See testimony of Patrick J. O'Connell of Texas Attorney General's Office at <http://oversight.house.gov/documents/20070209123455-21529.pdf>.
68. *State False Claims Act Study*, *supra* note 9, at 483.
69. Texas has used its Medicaid Fraud Prevention Act since 1995. When Texas submitted the law for federal approval in 2006, however, the statute was deemed not to satisfy the criteria of the Deficit Reduction Act because, among other things, it did not permit whistleblowers to litigate cases when the state did not intervene, and it provided for lower percentages paid to whistleblowers and lower penalties. See "Bill Analysis" at <http://www.legis.state.tx.us/tlodocs/80R/analysis/html/SB00362H.HTM>. As a result, in 2007 Texas passed SB 362 to amend its statute to address these differences from the federal False Claims Act, <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=SB362>.
70. *State False Claims Act Study*, *supra* note 9, at 483.
71. *Id.*
72. *Id.*

A Look at the Law



Georgia Condominium Law: Beyond the Condominium Act

by Peter M. Crofton and Mark V. Hanrahan

The development and sale of residential condominiums and the establishment of related associations are governed by several distinct bodies of Georgia law. Foremost of these is the Georgia Condominium Act (the “Condominium Act”).¹ The Condominium Act establishes the unique rights, duties and obligations of parties developing and purchasing condominiums in Georgia. (A federal condominium statute also applies to apartments that are converted to condominiums.)²

In addition to the Condominium Act, residential condominiums are governed by a substantial body of law relating to the purchase and sale of residential real estate. This body of law encompasses pre-sale disclosure obligations, claims for construction defects and arbitration.

A third body of law that is often overlooked, but nevertheless applicable to residential condominium developments, is that relating to non-profit and for-profit corporations. The Condominium Act expressly provides that condominium associations are for-profit or non-profit corporations subject to the Georgia Business Corporation Code³ or the Georgia Nonprofit

Corporation Code,⁴ respectively.⁵ This body of law establishes standards of conduct for a corporation’s officers⁶ and directors,⁷ procedures for a corporation to conduct business,⁸ and rights and obligations of a corporation’s shareholders or members.⁹

The Georgia courts have had few opportunities to construe Georgia condominium law. Consequently, little guidance to the bar and general public exists concerning many aspects of Georgia condominium law, including the interaction between the distinct bodies of law that apply to residential condominium developments. This article will explore some of those areas of interaction.

Disclosure of Defects

Much condominium litigation involves claims of defects in the property.¹⁰ Some of that litigation also includes allegations of fraud on the part of the developer/seller based upon its failure to disclose defects prior to sale.¹¹ These failure-to-disclose claims raise the question whether a condominium developer has an obligation to inspect the property to discover defects, or even to disclose known defects.

The Georgia courts have repeatedly addressed a residential buyer’s right to claim fraud based on a seller’s failure to disclose known defects in the property:

“Fraud in the sale of real estate may be predicated upon a willful misrepresentation, i.e., the seller tells a lie; upon active concealment where the seller does not discuss the defect but takes steps to prevent its discovery by the purchaser; and thirdly a passive concealment where the seller does nothing to pre-

vent the discovery but simply keeps quiet about a defect which though not readily discernible, is known to the seller.”¹²

Georgia also recognizes two other species of fraud in the sale of residential real estate: constructive fraud and fraud through negligence.¹³ Constructive fraud occurs when a seller makes representations that it “should have known” were false or conceals material information that it should have known.¹⁴ Fraud through negligence occurs when a seller makes reckless misrepresentations of fact without any knowledge of their truth.¹⁵ Outside of these obligations, Georgia does not impose on sellers affirmative duties to inspect and disclose defects in residential property.

Unlike general real estate law, the Condominium Act imposes on developers affirmative duties to detect and disclose defects in projects that involve the conversion of an existing building into a residential condominium.¹⁶ The Condominium Act expressly defines a “conversion condominium” as one involving the creation of a residential condominium that includes any building that was occupied by a person who did not have the pre-existing contractual right to purchase the condominium.¹⁷

The scope of the definition of “conversion condominium” is a source of disagreement among practitioners. Some members of the bar contend that a conversion condominium only includes buildings that were previously used for residential purposes. Because, however, the definition does not refer to prior residential use, it appears that the term “conversion condominium” encompasses most re-use projects that renovate and convert to residential condominiums existing facilities such as warehouses, mills or historic structures such as office buildings or hotels.

The Condominium Act requires developers of conversion condominiums to include in the docu-

ments provided to potential buyers a “statement” describing the present condition and expected useful life of all structural components and mechanical and electrical components “material to the use and enjoyment of the condominium.”¹⁸ This statement must be based upon the investigation of “an independent, registered architect or engineer.”¹⁹

These provisions create an affirmative duty on conversion condominium developers to investigate the condition of the property for purposes of finding and disclosing defects. Georgia’s courts have reported no decisions involving a claim that a developer performed an inadequate investigation, thereby breaching these affirmative duties to discover and disclose defects. Nevertheless, in light of Georgia’s jurisprudence on fraud in residential real estate sales, it is possible that the courts will allow fraud claims where a developer fails to perform an adequate property condition investigation and therefore does not discover and disclose defects that would have been identified if the investigation had been properly performed.

Condition of Common Areas

Another aspect of condominium development that is the subject of litigation is the condition of common areas that the developer turns over to the association for management and care. This litigation has two distinct branches: (1) claims for work that should have been performed but was not; and (2) claims alleging defects in work that was performed.

Claims Arising From Unrepaired Common Areas

A claim that a developer did not perform work that it should have performed can be more complex than it initially appears. At first blush, such a claim might appear to relate solely to whether the developer had a duty to perform certain work: for example, whether the developer had a duty to perform

work required by applicable building codes or the Americans with Disabilities Act.²⁰ Some claims, however, also contend that the developer had a duty to fund the condominium association’s reserve accounts so that the association could perform the work later if the developer initially elected not to perform such work.

Like many states’ condominium laws, Georgia’s Condominium Act requires a condominium developer to create a condominium association that will be responsible for the “maintenance, repair, renovation, restoration, and replacement” of the common areas, unless the condominium instruments provide otherwise.²¹ The Condominium Act provides that the developer may control the association for up to seven years by appointing and removing the association’s officers and directors.²² The Condominium Act also provides, however, that the developer is liable for ensuring that the association is run in a “prudent and businesslike manner” while it controls the association.²³

An example of a claim for work not performed would arise in the context of a conversion condominium where the converted structure had worn-out flooring in common-area lobbies. If the developer opted not to replace the flooring, the condominium association would likely be faced with repairing or replacing the flooring in short order. Moreover, if the developer also failed to adequately fund the association’s reserve account to provide for the repair or replacement of the flooring, the association might be unable to fulfill its obligation to maintain the lobbies without imposing a substantial special assessment against the association members.

Courts that have addressed similar facts have found that the developer of a condominium or other planned unit development has a duty either to turn over the common areas to the association in good repair or to provide adequate funding for the associa-

tion's reserve accounts to repair and maintain the common areas:

[T]he developer has a fiduciary duty to the POA [property owner's association] to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of the transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair.²⁴

Similarly, Section 6.20 of the *Restatement (Third) of Property* delineates the scope of the obligations that a developer owes to an association and its members relating to common areas. The *Restatement* provides:

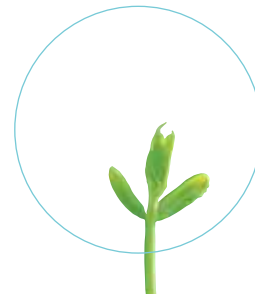
Until the developer relinquishes control of the association to the members, the developer owes the following duties to the association and its members:

- (1) to use reasonable care and prudence in managing and maintaining the common property;
- (2) to establish a sound fiscal basis for the association by imposing and collecting assessments and establishing reserves for the maintenance and replacement of common property;
-
- (6) to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining²⁵

The comments to this section of the *Restatement* make clear that a developer's liability arises from its failure to repair and maintain the common areas before turning them over to the association, coupled with its failure to fund the association's reserve accounts.²⁶ Comment (c) to Section 6.20 of the *Restatement* explains that in such circumstances, the developer is liable because purchasers of residential real estate "legitimately" expect that the common areas can be maintained without significant increases in the assessments that enable the association to fulfill its obligations to repair those common areas.²⁷

The Georgia courts have not reported a decision involving the liability of a condominium developer that fails (1) to repair and maintain common areas; and (2) to adequately fund the association's reserve accounts. Nevertheless, in light of the similar requirements of the *Restatement* and the Condominium Act, it is foreseeable, and perhaps likely, that the Georgia courts, when confronted with the issue, would adopt the substance, if not the language, of the *Restatement*.

Additionally, Georgia corporations law imposes fiduciary or "good-faith" duties on the promoters of a corporation²⁸ and on its officers and directors.²⁹ As previously discussed, the Condominium Act expressly provides that associations are subject to Georgia's statutes concerning the formation and operation of business and non-profit corporations.³⁰ Just as Georgia's corporations



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The Georgia Condominium Act is the primary, but not exclusive, legal framework governing the development, construction and sale of residential condominiums.

law requires a promoter to truthfully disclose information to prospective stockholders,³¹ the Condominium Act requires that the developer provide prospective buyers, i.e., prospective members in the association, with the association's estimated or actual budget for maintenance and reserve accounts.³² Accordingly, it would not be surprising if the Georgia courts determined that a condominium developer owes the same duties to the association and its stockholders, i.e., members, that every other corporate promoter owes the stockholders in that corporation.

Claims Arising From Defective Work in Common Areas

Intertwined in any discussion of Georgia's condominium law regarding construction defects is Georgia's statute relating to the Resolution of Construction Defects (the "Repair Act").³³ Enacted in 2004, the Repair Act sets forth a process for resolving construction disputes that the General Assembly intended as a means to reduce litigation while protecting the rights of homeowners.³⁴ That process has two principal components: (1) "claimants" must give pre-litigation written notice to "contractors" of alleged construction defects;³⁵ and (2) contractors are permitted to inspect and respond to alleged defects by offering to make repairs or to pay monetary settlements before claimants may pursue legal action.³⁶

The Repair Act broadly defines the word "contractor" to include developers and sellers of condominium units, as well as construction contractors and subcontractors.³⁷

Notwithstanding that broad definition, the most recent amendments to the Repair Act may restrict its applicability to licensed general and residential contractors.³⁸ The tension between these provisions creates a significant issue for the courts to resolve concerning the reach of the Repair Act.

Additionally, under the Repair Act, contractors are required, upon entering into a contract for the sale or construction of a residential improvement, to give the owner or purchaser notice of the contractor's right to notice and the opportunity to repair or pay for alleged construction defects before the owner can institute legal action.³⁹ To date, no Georgia court has interpreted this requirement in the Repair Act. Nevertheless, this mandatory notice requirement is found in similar repair-of-construction-defects acts of several other states. At least one court in one of these states has determined that because the notice requirement is mandatory, a contractor that fails to provide the required notice is precluded from enforcing its rights under that state's act.⁴⁰

The Repair Act also broadly defines "claimant" as "anyone who asserts a claim concerning a construction defect" in any "single-family house, duplex, or multifamily unit designed for residential use."⁴¹ Accordingly, claims asserted by condominium unit owners and associations relating to construction defects in condominium units and common areas are subject to the requirements of the Repair Act.⁴² (The Repair Act is silent on whether it applies to claims for failure to disclose defects in the property.)

The Repair Act's definition of a

"construction defect" is also extremely broad, encompassing virtually any complaint regarding performance of construction:

"Construction Defect" has the meaning assigned by a written, express warranty either provided by the contractor or required by applicable statutory law; if no written, express warranty or applicable statutory warranty provides a definition, then "construction defect" means a matter concerning the design, construction, repair, or alteration of a dwelling or common area, of an alteration of or repair or addition to an existing dwelling, or of an appurtenance to a dwelling or common area on which a person has a complaint against a contractor.⁴³

The Repair Act imposes additional requirements on a condominium association seeking to bring a lawsuit for construction defects in common areas.⁴⁴ Before filing such a suit, (1) the members must approve commencement of an action by a two-thirds vote;⁴⁵ (2) the board of directors must have met or attempted to meet with the contractor in a good-faith attempt to resolve the association's claim;⁴⁶ and (3) the association must have satisfied "all of the preaction requirements for a claimant to commence an action."⁴⁷ Notwithstanding these provisions, the association may be prohibited from pursuing an action if its declaration waives its right to bring such an action, instead requiring each unit owner to sue for the damage to its individual ownership interest in the common areas.⁴⁸


Arbitration

One way that condominium developers have responded to the wave of construction defect litigation has been to require arbitration of defect claims. Arbitration clauses in residential real estate sales and financing contracts will be enforceable, provided that the arbitration clause itself is "initialed by

all signatories at the time of the execution of the agreement.”⁴⁹

Georgia courts have narrowly construed this requirement to initial arbitration clauses. For example, in one case the court enforced an un-initialed arbitration clause in a new home warranty agreement that was separate from the sales agreement.⁵⁰ Similarly, in a more recent case, the court enforced an un-initialed arbitration clause within a warranty agreement, where the agreement provided that the Federal Arbitration Act applied to the exclusion of state law.⁵¹

Conclusion

The Georgia Condominium Act is the primary, but not exclusive, legal framework governing the development, construction and sale of residential condominiums. When analyzing legal issues in Georgia relating to condominiums, it is imperative to remember that the Condominium Act materially supplements, but does not supplant, other Georgia law relating to residential real estate and business associations. Consequently, while many provisions of the Condominium Act have yet to be interpreted by the courts, condominium developers can reduce their litigation risks by complying with the requirements of these other bodies of law. 



Peter M. Crofton has assisted clients with construction related matters since 1990. He has represented Fortune 100 and other trans-national clients with construction projects in the United States, Caribbean, Central America, Europe and Asia. Crofton has focused his practice on construction projects in the hospitality and resort, energy and industrial arenas. He has represented clients involved in various luxury hotel and resort projects, and in developing mixed use projects that feature luxury condominiums and apartment homes.



Mark V. Hanrahan has focused his practice on construction law since 1996. Hanrahan has represented both purchasers and providers of construction services, including numerous Fortune 100 clients. In addition to mediation, arbitration and litigation, Hanrahan's practice includes drafting and negotiating construction-related agreements and counseling clients through troubled projects. Hanrahan has handled a wide range of construction issues, including defaults and terminations, changed work, mechanics' liens, schedule impacts and delays, construction defects, insurance and bonding.

Endnotes

1. O.C.G.A. §§ 44-3-70 to -116.
2. 15 U.S.C. §§ 3601 to 3616.
3. See O.C.G.A. §§ 14-2-101 to -1703.
4. See *id.* §§ 14-3-101 to -1703.
5. *Id.* § 44-3-100(a).
6. See *id.* §§ 14-2-842 and 14-3-842.
7. See *id.* §§ 14-2-830 and 14-3-830.
8. See generally *id.* §§ 14-2-801 to -864 and 14-3-801 to -864.
9. See generally *id.* §§ 14-2-601 to -747 and 14-3-601 to -747.
10. See Troy McCullen, *Condo Buyers Take Developers to Court Over Failed Promises*, WALL ST. J. ONLINE, Nov. 13, 2006, <http://www.realestatejournal.com/buysell/market-trends/20061113-mcmullen.html>.
11. *Id.*
12. *Hudson v. Pollock*, 267 Ga. App. 4, 6, 598 S.E.2d 811, 814 (2004) (quoting *Smiley v. S & J Invs.*, 260 Ga. App. 493, 499-500, 580 S.E.2d 283, 289 (2003)).
13. See, e.g., *Brookshire v. Digby*, 224 Ga. App. 512, 516, 481 S.E.2d 250, 254-55 (1997).
14. *Id.* at 516, 481 S.E.2d at 254-55.
15. See, e.g., *Lanier Home Ctr., Inc. v. Underwood*, 252 Ga. App. 745, 749, 557 S.E.2d 76, 81 (2001).
16. See O.C.G.A. § 44-3-111(b)(10).
17. See *id.* § 44-3-71(10).
18. See *id.* § 44-3-111(b)(10)(A).
19. *Id.*
20. 42 U.S.C. §§ 12101 to 12213.
21. See O.C.G.A. §§ 44-3-100 and -105.
22. *Id.* § 44-3-101(a)(3).
23. *Id.* § 44-3-101(b).
24. *Concerned Dunes W. Residents, Inc. v. Georgia-Pacific Corp.*, 562

- S.E.2d 633, 638 (S.C. 2002).
25. RESTATEMENT (THIRD) OF PROPERTY § 6.20 (1), (2), (6) (2000).
26. *Id.* cmts. b and c.
27. *Id.* cmt. c & illus. 3, 4.
28. See, e.g., *Downey v. Byrd*, 171 Ga. 532, 538, 156 S.E. 259, 263 (1930).
29. See O.C.G.A. §§ 14-2-830 and -842; 14-3-830 and -842.
30. *Id.* § 44-3-100(a).
31. See, e.g., *Georgia Portland Cement Corp. v. Harris*, 178 Ga. 301, 309, 173 S.E. 105, 109 (1934).
32. See O.C.G.A. § 44-3-111(b)(6)(A).
33. *Id.* § 8-2-35 to -43.
34. *Id.* § 8-2-35.
35. *Id.* § 8-2-38(a).
36. *Id.* § 8-2-38(b).
37. *Id.* § 8-2-36(6).
38. *Id.* § 8-2-43(d) (2006).
39. *Id.* § 8-2-41.
40. See *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. P'ship*, 131 P.3d 905, 909 (Wash. 2006).
41. See O.C.G.A. § 8-2-36(3), (7).
42. See *id.* §§ 8-2-36(5), (7); 8-2-38; 8-2-42.
43. *Id.* § 8-2-36(5).
44. *Id.* § 8-2-42(e).
45. *Id.* § 8-2-42(e)(1).
46. *Id.* § 8-2-42(e)(2).
47. *Id.* § 8-2-42(e)(3).
48. *Piedmont Arbors Condo. Ass'n v. BPI Constr. Co.*, 197 Ga. App. 141, 141-42, 397 S.E.2d 611, 612 (1990); but see O.C.G.A. § 44-3-75(c) ("In the event of any inconsistency between [the Condominium Act] and the provisions of any declaration, [the Condominium Act] shall control.").
49. O.C.G.A. § 9-9-2(c)(8).
50. *Haynes v. Fincher*, 241 Ga. App. 179, 180, 525 S.E.2d 405, 407 (1999).
51. *Langfitt v. Jackson*, 284 Ga. App. 628, 635, 644 S.E.2d 460, 465 (2007).

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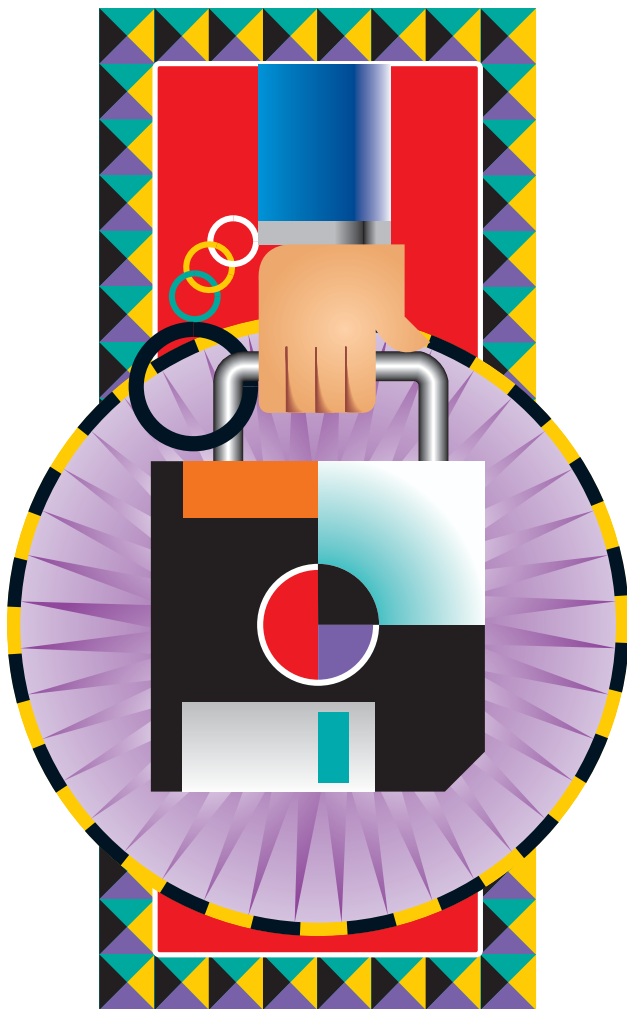
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Disk Imaging – Fair Use?

by Tom Traylor

This article originally appeared in the State Bar of Georgia's Technology Law Section's newsletter, Georgia Journal of Technology Law, in the Winter 2006 issue.

Many IT departments use “disk imaging” to distribute uniform software packages efficiently to client computers. A “disk image” is created by installing the entire set of software (including the operating system, word processor, spreadsheet, and other applications) onto one template machine. Using special software, a disk image is created of the computer’s hard drive—essentially a binary snapshot of the data. The disk image then can be uniformly and efficiently distributed to all computers on the network. Automating the installation process saves a tremendous amount of time over the traditional method of installing applications individually on each computer.



Case Analysis

Recently, this practice by the Los Angeles County Sheriff's Department (the "Sheriff's Department") became the subject of copyright infringement litigation. In *Wall Data Inc. v. Los Angeles County Sheriff's Department*,¹ the Sheriff's Department purchased a total of 3,663 licenses to use two different versions of Wall Data's RUMBA software product. This software needed to be installed on computers at the county's new detention facility. After 750 manual installations of the software on detention facility computers, it became clear that the opening of the detention facility would be delayed unless the Sheriff's Department found a more efficient way to install the RUMBA software. Compounding the problem, it was not clear at the time of installation which computers needed the RUMBA software because employee workstation assignments varied.²

As a result of these issues, the IT department created a disk image of a baseline set of applications for installation on the computers, which included the RUMBA software. When the software deployment using the disk image was complete, 6,007 computers had the RUMBA software installed. The Sheriff's Department however had purchased only 3,663 licenses to use the RUMBA software. In an attempt to limit the number of users of the RUMBA software, the Sheriff's Department configured a password system so that the number of RUMBA software users could not exceed the number of licenses at any given point in time.³

Wall Data filed suit against the Sheriff's Department for copyright infringement (and several other claims that did not make it to trial). Wall Data contended that the Sheriff's Department over-installed the RUMBA software and violated the licensing terms of the shrink-wrap, click-through and volume licensing agreements. The Sheriff's Department relied on two affirmative defenses: (i) the disk imaging of the RUMBA software was a "fair use" under 17 U.S.C. § 107; and (ii) the disk imaging of the RUMBA software was an "essential step" to executing the software code under 17 U.S.C. § 117(a)(1). The trial court granted partial summary judgment to Wall Data on the Sheriff's Department's fair use defense. After a jury trial, the Sheriff's Department was found liable for copyright infringement. Wall Data was awarded more than \$750,000 in damages, attorney's fees and costs.⁴

On appeal, the U.S. Court of Appeals for the 9th Circuit reviewed the grant of summary judgment against the Sheriff's Department on its fair use defense, evidentiary rulings related to the fair use and essential step defenses, the jury instructions regarding the essential step defense, and the award of attorney's fees and costs.⁵ The scope of this article is limited to the fair use enumeration of error.

The 9th Circuit balanced four factors in making a *de novo* evaluation of whether the use of the copyrighted material was fair. The user of the fair use defense does not need to prevail on all four factors; rather, the court will balance them. The factors are: (i) the purpose and charac-



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ter of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work.⁶

The first factor weighed in favor of Wall Data because the nature of the Sheriff's Department's use of the RUMBA software was not transformative; rather, exact copies of the software were created for the same use as the original software. Also, the disk imaging of the RUMBA software was found not to promote the ultimate goals of copyright law. The Sheriff's Department's argument that the use was commercially insignificant was not persuasive, despite the fact that not all of the copies of the software were actually used and that the Sheriff's Department did not compete commercially with Wall Data. Ultimately, the court found that the purpose and character of the Sheriff's Department's use was commercial because the use was designed to avoid either the expense of purchasing more licenses or the expense of purchasing a less rigid license. The court notably did not find the efficiency component of using a disk-imaging deployment method a *per se* problem. The Sheriff's Department could have used disk imaging permissibly to deploy the RUMBA software efficiently, as long as the Sheriff's Department had limited the deployment to 3,663 computers.⁷

The second factor weighed against the Sheriff's Department because Wall Data established that development of the RUMBA software was a multi-year and multi-million-dollar effort. The third factor also weighed against the Sheriff's Department because the disk imaging of the RUMBA software created verbatim reproductions of the original work for exactly the same purpose as the original work.⁸

Perhaps the most damaging fact for the Sheriff's Department under

the analysis of the fourth factor was an e-mail written by a Sheriff's Department employee to Wall Data in which he admitted that he "did not know how to tell which [computers] RUMBA is used on and on which ones it has never been used."⁹ The 9th Circuit found that the lack of precision in the Sheriff's Department's attempt to limit users of the RUMBA software made infringement easier and detection of overuse more difficult. This led the 9th Circuit to find that the Sheriff's Department's use of disk imaging could seriously impact the market for Wall Data's products. Because the Sheriff's Department lost on all four factors, the court easily found that the fair use defense was not applicable, and affirmed the grant of summary judgment on this issue.¹⁰


Practical Application

Certainly, the lesson to take away from this case is that better software deployment technology, such as disk imaging, can accelerate the speed that your client can get into copyright trouble. This is true even if the user is trying to "do the right thing," as the Sheriff's Department apparently attempted to do by creating its own access limitation system for the software. However well intentioned, the Sheriff's Department's use of the software did not fit the reality of the software license's use limitations.

The Sheriff's Department could have negotiated a different license structure. One approach is to negotiate an enterprise license, in which there are an unlimited number of license "seats" within a specific numerical range, e.g., 1 to 5,000. Some variations of these types of licenses require an annual reconciliation of the actual number of users, while others do not require reconciliation.

Another alternative license structure is a concurrent license structure, whereby a server would limit the number of simultaneous users of the software. Under this

approach, the software is installed on a server that allows multiple users to have concurrent access to the software. Essentially, the software's application logic runs on the server, while presenting the software to the user as if it were installed locally on their computer. Software such as Presentation Server by Citrix or Windows Terminal Services by Microsoft commonly is used for this purpose.

Finally, the Sheriff's Department could have negotiated the right to install the RUMBA software across the organization, while certifying that it would limit the number of users to the number of licenses purchased (a finite number of employees would use the software, although access to the software would be available from any department computer). In the end, this litigation could have been avoided by carefully tailoring the licensing structure of the software to the day-to-day realities of use. 



Tom Traylor is technology counsel for the Hartsfield-Jackson Atlanta International Airport. He handles technology transactions, intellectual property issues, and telecommunications matters for the airport. Traylor attended the University of Georgia where he earned a B.B.A. in Management Information Systems. After college, he earned a J.D. from Mercer University School of Law. He can be reached at 404-530-2371 or [thomas.traylor@atlanta-airport.com](mailto:traylor@atlanta-airport.com).

Endnotes

1. 447 F.3d 769 (9th Cir. 2006).
2. *Id.* at 773-74.
3. *Id.* at 774-75.
4. *Id.* at 775-76.
5. *Id.* at 776.
6. *Id.* at 777-78.
7. *Id.* at 778-79.
8. *Id.* at 780.
9. *Id.* at 783.
10. *Id.* at 781-82.

Photo by [Howard Baker](#), senior member of the firm, and former chief of staff to the president, Senate majority leader and ambassador to Japan.



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The Old Lumpkin County Courthouse at Dahlonega

The Grand Old Courthouses of Georgia

by Wilber W. Caldwell

The old 1836 courthouse at Dahlonega is today one of only seven antebellum brick court buildings still standing in Georgia. With its graceful but unsophisticated Federal style details, it is the finest standing example of the pervasive brick vernacular courthouse style that once covered the Georgia upcountry.

In 1828, the discovery of gold in the wild mountain country of north Georgia added urgency to an already ugly dispute between the Cherokee Indians and the state of Georgia. Despite the fact that the state had no legal claim to the vast tract then known as “The Cherokee Nation,” settlers began to pour into the region in search of El Dorado. A period of land grabbing ensued, and despite the fact that Federal authorities strongly opposed the settlement of Cherokee land, the State of Georgia proceeded to annex all of north Georgia. Long before a treaty was signed in 1835 and the Cherokee were packed away to Oklahoma in 1838, the state Legislature had created the enormous Cherokee County, held a Land Lottery to distribute its lands, chartered The Western and Atlantic Railroad to



Built in 1836.

Photo by Wilber W. Caldwell

run through the middle of the area, and divided the vast tract into 10 new counties. One of these was Lumpkin County.


In Lumpkin County, the extraordinarily rapid growth of towns like Auraria and Dahlonega attests to the intensity of Georgia’s “gold rush.” In the summer of 1832, two cabins were built at the future site of the

city of Auraria in Lumpkin County. By November of that year, the place had a population of 500 according to Lumpkin County historian Andrew Cain. *Nile's Register*, published in Baltimore in May 1833, offers a contemporary description of this boom town less than a year after its founding, listing over 100 dwellings, 18 or 20 stores, 12 or 15 lawyers, and a population of around 1,000.

The more centrally located village of Dahlonega was settled at about the same time. Following an early dispute over the legality of the title to property in and around Auraria, Dahlonega became the county seat and a temporary log courthouse was built there in 1832. In 1836 this fine brick court building was completed, and Dahlonega's fate as the principle city of the area was firmly rooted. In 1835, the United States Mint established one of its three new branch mints at Dahlonega (the others were at

Charlotte and New Orleans). By 1849, George White describes Dahlonega as a town of about 1,000 residents, but gives no details regarding Auraria. The old mint building was to remain for many years the largest building in north Georgia. It continued to operate until the outbreak of war in 1861, and 10 years later, the building was sold to North Georgia Agricultural College. It burned in 1879 and was replaced by Parkins and Bruce's stunning design, the first and perhaps the finest picturesque building in north Georgia. The elegant structure stands today as one of the state's best examples of Alexander Bruce's early work.

With the passing of the gold rush, Dahlonega's fortunes waned. The old courthouse would serve Lumpkin County until 1965 when it was refurbished for use as a museum. Meanwhile, population figures in Dahlonega offer striking testament to the exodus that was

occurring all across north Georgia in the first decades of the new century. In 1900, revived interest in gold mining by large commercial mining firms put Dahlonega's population at 1,255 residents. By 1910, this number was down to 829. 

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 outside Georgia.

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| JAN 30 | Deadline for receipt of nominating petitions for incumbent Board Members (Article VII, Section 2.) |
| MAR 3 | Deadline for receipt of nominating petitions by new candidates |
| MAR 17 | 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)) |
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Reception To Thank Banks For Raising IOLTA Interest Rates

by Len Horton



photo by Len Horton

Danny Jett and Jane Mahoney, both of Georgian Bank, chat with Georgia Bar Foundation President Rudolph Patterson.

The Supreme Court of Georgia hosted a reception July 27 at the State Judicial Building to thank Georgia banks for agreeing to increase interest rates on IOLTA accounts. The gathering followed the announcement that Wachovia Bank of Georgia had agreed to raise the interest it pays on IOLTA account balances of \$100,000 or more to 65 percent of the federal funds rate.

Earlier that same week, Chief Justice Leah Ward Sears presented William Linginfelter, CEO of Wachovia in Georgia, a plaque recognizing his decision to increase Wachovia's support for the Georgia Bar Foundation and its charitable activities.

"Wachovia's decision to increase interest rates on these accounts demonstrates the bank's commitment and concern for the less fortunate in our state," said Chief Justice Sears. "Wachovia's generosity will have a tremendous impact on the Bar Foundation's ability to support services for poor and vulnerable Georgians. I commend Mr. Linginfelter and Wachovia Bank for taking the lead on this important issue."

Wachovia was responding to an appeal from the Georgia Bar Foundation to treat lawyer trust account balances similarly to non-lawyer accounts with comparable balances.

Rudolph Patterson, president of the Bar Foundation, explains, "We have been asking a number of banks to expand their support for the charitable work of the Georgia Bar Foundation by increasing their rates on IOLTA accounts. Wachovia was the first bank to volunteer. We are grateful to Bill Linginfelter for his leadership and for his concern for Georgians throughout the state."

Interest On Lawyer Trust Account funds typically support a wide range of law-related organizations, including Atlanta Legal Aid, Georgia Legal Services, the Georgia Law Center for the Homeless, the Georgia Justice Project, the BASICS Program and many women's shelters throughout the state. The funds also are used to provide education to school children and adults about our government through the Carl Vinson Institute at the

University of Georgia. The popular YLD High School Mock Trial program receives operational support from the Bar Foundation, as does the state YMCA's youth judicial program.

Already more than 30 different banks have committed to supporting this new interest rate standard including Bank of America, Columbus Bank & Trust, Georgian Bank and Farmers & Merchants Bank. Some banks have decided to pay even greater interest rates on IOLTA accounts. One Georgia bank is paying 65 percent of the prime rate, which amounts to 5.49 percent.


"We are grateful for this banking support so early in our campaign to convince Georgia's financial institutions to help the Bar Foundation in its charitable work," Patterson said. "We hope that lawyers will thank these early adopters of this new standard. We also hope lawyers whose banks do not yet meet this standard will encourage their

bankers to pay rates on IOLTA accounts comparable to what they pay to other customers with similar balances."

Since the present federal funds rate is 5.25 percent, and the formula being embraced is 65 percent of that rate, supportive banks are committing to pay at least 3.41 percent on balances of \$100,000 or more. Future IOLTA account interest rates will fluctuate with the federal funds rate. Looking ahead, a number of economists are forecasting a drop before the end of the year.

"All Georgia lawyers wanting to help the charitable work of the Georgia Bar Foundation should consider having their IOLTA accounts at a bank that supports comparability," said Patterson.

The Georgia Bar Foundation is the 501(c)(3) charity named by the Supreme Court of Georgia to receive Georgia's interest on lawyer trust accounts. It has been awarding grants to law-related organizations from IOLTA funds

since 1986. Its overhead as a percentage of its revenues is typically 4 percent or less, assuring that the bulk of the funds are passed through to organizations serving the poor. 



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

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Kudos


>  **R. Scott Tobin** was named **president and chairman of the Board of Directors of the University of North Carolina's Law School Foundation**. Tobin is of counsel at Hunter Maclean in Savannah. Created in 1959, the UNC School of Law Foundation receives, manages and administers private gifts from alumni and friends of the law school.



>  **Asha F. Jackson**, of **Carlock, Copeland, Semler and Stair, LLP**, was **inducted into the Litigation Counsel of America** at the LCA's Spring Conference and Induction of Fellows in New York. Jackson's primary areas of practice include general civil litigation and trial practice, medical malpractice defense and healthcare law. The Litigation Counsel of America is a trial lawyer honorary society composed of less than one-half of 1 percent of American lawyers.

> Fifteen **Paul, Hastings, Janofsky & Walker LLP** partners across seven practice areas earned recognition in *Who's Who Legal: Georgia 2007* as preeminent lawyers in the state: **Rick Asbill** and **Andy Scott** (franchise), **Jesse Austin** (insolvency & restructuring), **Daryl Buffenstein**, **Karen Koenig**, **Kyle Sherman** and **Deborah Marlowe** (corporate immigration), **Leslie Dent**, **Weyman Johnson**, **Geoff Weirich** and **John Wymer** (labor & employment), **Walter Jospin** (mergers & acquisitions/corporate governance), **Frank Layson** (mergers & acquisitions), **Chris Molen** (banking), and **Elizabeth Noe** (corporate governance). This peer-nominated distinction is based on a comprehensive and independent survey of general counsel and private practice attorneys worldwide.

>  **Hunter Maclean** announced that real estate attorney and partner **LeeAnn W. Aldridge** was elected to the **Board of Regents for the American College of Mortgage Attorneys**, a prestigious national group of approximately 400 lawyers specializing in real estate mortgage lending and related fields of law. Aldridge, who was named one of the nation's best lawyers in real estate law earlier this year, has been an ACMA fellow since 2005.

In addition, associate **Jessica L. McClellan** was appointed **chair** of the American Bar Association's **Admiralty and Maritime Law Committee**. McClellan currently practices in the areas of maritime law and general litigation.

>  Florence, Ala., attorney **William E. Smith Jr.** was appointed **Lauderdale County Commissioner** by Gov. Bob Riley. Smith will be maintaining his law office in Florence, Ala.

>    **Kilpatrick Stockton LLP** announced that in *World Trademark Review*, three of Kilpatrick

Stockton's attorneys were among the 20 attorneys named "trademark experts' experts"—the leading trademark professionals in the United States. With the selection of **Miles Alexander**, **Chris Bussert** and **Chris Woods**, Kilpatrick Stockton is the only firm to have three attorneys included on this prestigious listing.


Also, Kilpatrick Stockton received a **Beacon of Justice Award** from the **National Legal Aid & Defender Association**. The firm received this recognition, along with 58 other select law firms across the country, for its commitment to ensuring access to justice through its pro bono representation of Guantanamo Bay detainees.


> **Fisher & Phillips LLP** announced that **Tex McIver** and **David Whitlock** were listed in *Who's Who Legal: Georgia 2007*. McIver, a senior partner, was listed under Management Labor & Employment Law. Whitlock, a partner in the Atlanta office, was listed under Corporate Immigration Law. *Who's Who Legal* assesses the foremost legal practitioners in more than 25 distinct areas of the international legal marketplace.

> *IP Law & Business*, the leading intellectual property magazine, has for the fourth straight year named the law firm of **Fish & Richardson P.C.** the **top patent litigation firm** in the country. *IP Law & Business* found that Fish & Richardson handles more patent litigation than any other law firm. The annual survey, which was published in July 2007, ranks firms by the volume of new patent cases filed. Fish was involved in a total of 79 new cases in 2006, 41 percent more cases than the firm's nearest competitor.

> **Captain Scott Delius** was **honored** with the **2007 Georgia Trial Lawyers Association "Guardian of Justice" Award** for his humanitarian work as an Army National Guard Captain in Afghanistan.

Capt. Delius has a solo trial practice in Atlanta focusing on the representation of plaintiffs in workers' compensation and personal injury matters. Delius put his practice on hold this past year to volunteer to deploy with the 41st Brigade Combat Team in Afghanistan, where he trained the Afghan National Army and organized and delivered humanitarian relief to needy Afghan civilians.

>  Mobile, Ala., attorney **Gilbert B. Laden** was honored as the **recipient** of the **2007 Pro Bono Award** by the **Alabama State Bar** at its annual meeting in July. Previously, he was similarly honored by the Mobile Bar Association.

>  **James C. Huckaby Jr.** was named as one of Alabama's leading litigators in the **2007 Chambers USA Guide: America's Leading Lawyers for Business**. Huckaby recently joined the Birmingham law firm of Christian & Small, which was listed by the *Chambers USA Guide* as one of the leading litigation firms in the state.

> The law firm of **Carlton Fields** was featured in *The Vault Guide to the Top 100 Law Firms (2008 edition)* as one of the **best law firms in which to work**. Carlton Fields ranked nationally as follows in the guide's "quality of life" categories: fifth in informal training/mentoring; eighth in pro bono; 10th in associate/partner relations; 13th in overall satisfaction; 18th in best law firms to work for. The firm also ranked nationally in the following "diversity" categories: first in diversity issues with respect to women; second in diversity issues with respect to minorities; third in best law firms for diversity. The *Vault Guide* is based on surveys conducted earlier this year of more than 18,800 associates at more than 167 top law firms.

> Three **Arnall Golden Gregory LLP** partners were **recognized** at the American Bar Association annual meeting in San Francisco for their notable achievements. **Marva Jones Brooks** was awarded the **Margaret Brent Women Lawyers of Achievement Award**. The Brent awards are bestowed upon women who have achieved professional excellence in their field, opened doors for women lawyers and advanced opportunities for women in the profession. **Bob Rothman** was installed as the **chair-elect** of the **Litigation Section**, and **Glenn Hendrix** was installed as **vice-chair** of the **International Law Section** of the ABA.

> **Hunton & Williams LLP** announced that it was **selected** as one of the **top 50 "Best Law Firms for Women"** by *Working Mother* magazine. The magazine selected law firms based on survey data collected in early 2007 by Flex-Time Lawyers LLC and Working Mother Media. The survey was designed to set benchmarks for selection as employers of choice for women and to celebrate the achievements of law firms that successfully recruit, retain and promote women lawyers.

> **John B. Johnson III**, chief assistant district attorney for the Brunswick Judicial Circuit, was **named** the **2007 Assistant District Attorney of the Year**, and **Peter J. Skandalakis**, district attorney for the Coweta Judicial Circuit, was **selected** as the **2007 District Attorney of the Year** by the District Attorneys' Association of Georgia. The announcement was made in July 2007 at the 47th Annual Summer Conference held at the Jekyll Island Convention Center, and sponsored by the Prosecuting Attorneys' Council of Georgia.

Also, **E. Wayne Jernigan Jr.**, assistant district attorney for the Chattahoochee Judicial Circuit, recently **received** the **J. Roger Thompson Award** during basic litigation training sponsored by the Prosecuting Attorneys' Council of Georgia. Each year during the training, the J. Roger Thompson award is presented to an outstanding faculty member in memory of the late J. Roger Thompson, who was the chief assistant district attorney of the Appalachian Judicial Circuit.

In addition, the **Prosecuting Attorneys' Council of Georgia** named its **council members** for 2007-08. **Tommy Floyd**, district attorney of the Flint Judicial Circuit, will lead the council as **chairman**; **Benjamin Richardson**, solicitor-general for Muscogee County, will serve as **vice-chair**; and **Kelly Burke**, district attorney for the Houston Judicial Circuit, has been named **secretary**. New council members include **Peter Skandalakis** and **Barry Morgan**, solicitor-general for Cobb County. Other members of the council include **Stan Gunter**, district attorney for the Enotah Judicial Circuit; **Denise Fachini**, district attorney Cordele Judicial Circuit; **Stephen Kelley**, district attorney for the Brunswick Judicial Circuit; and **Charles Spahos**, solicitor-general for Henry County.

> **Daniel A. Cohen** of **Rogers & Hardin LLP** addressed the **U.S. Commission on Civil Rights (USCCR)** at its hearing on Title IX in Washington, D.C., in May 2007. Cohen's testimony was in connection with USCCR's review of the so-called "third-prong" of Title IX—whether universities are meeting the athletic interests


and abilities of their students. The bipartisan USCCR, which is charged with monitoring federal civil rights enforcement, will issue a report based on the hearing and other materials, including a related legal article that Cohen co-authored that was published in the *Vanderbilt University Journal of Entertainment and Technology Law*.

On the Move

In Atlanta

> **Dennis A. Brown** and **Timothy J. Buckley III** announced the formation of their new firm, **Buckley Brown P.C.**, which focuses primarily on litigation with emphasis on casualty matters, municipal and constitutional liability claims defense, product liability, commercial litigation and workers' compensation.

The firm also includes **Barbara L. Pearsall**, principal; **Carolyn E. Wright**, counsel; and associate counsels **Kelly L. Christopher**, **Tracy K. Haff** and **Lauren E. Medley**. The firm is located at 2970 Clairmont Road NE, Suite 1010, Atlanta, GA 30329; 404-633-9230; Fax 404-633-9640; www.buckleybrown.com.

>  **Parker, Hudson, Rainer & Dobbs LLP** welcomed **John P. (J.P.) Fougousse** as an **associate** in the firm's real estate practice group. Fougousse's practice focuses on real estate development, financing and joint ventures. The firm's Atlanta office is located at 285 Peachtree Center Ave., 1500 Marquis Two Tower, Atlanta, GA 30303; 404-523-5300; Fax 404-522-8409; www.phrd.com.

>  **Fish & Richardson P.C.** announced that **Andrew Meunier** joined the firm's Atlanta office as a **principal** in its patent group. Prior to joining Fish, Meunier was the head of Alston & Bird's chemical and pharmaceutical patents practice group, as well as Alston's Atlanta patent prosecution group. Meunier specializes in preparing and prosecuting domestic and international patent applications and preparing non-infringement and invalidity opinions in the chemical, pharmaceutical and medical device areas. The firm's Atlanta office is located at 1180 Peachtree St. NE, 21st Floor, Atlanta, GA 30309; 404-892-5005; Fax 404-892-5002; www.fr.com.

> **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, and the Atlanta law firm of **Gambrell & Stolz LLP** have **combined**. The firm will maintain the name of **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**. Current plans call for the combined

firm to maintain Gambrell's existing offices in Atlanta/Buckhead and Macon, with Baker Donelson's Atlanta attorneys and staff relocating from their current offices by the end of 2007. The firm serves clients in a variety of industries such as construction, pharmaceutical and health care, real estate, finance, insurance and technology. The practice areas include commercial litigation, business and corporate finance, real estate, construction, technology and intellectual property, taxation and employee benefits, estate planning, health care and eminent domain. The firm's combined Atlanta office is located at Monarch Plaza, Suite 1600, 3414 Peachtree Road, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501. The firm's Macon office is located at 923 Washington Ave., Macon, GA 31208; 478-750-0777; Fax 478-750-1777; www.gambrell.com.

> **Sutherland Asbill & Brennan LLP** announced two additions to their corporate practice group. **B. Scott Burton** joined as **partner** and **William H. Hope II** joined as **counsel**. Burton's practice augments the corporate mergers and acquisitions and corporate finance and securities practices. Hope's practice focuses primarily on corporate finance. The firm's Atlanta office is located at 999 Peachtree St. NE, Atlanta, GA 30309; 404-853-8000; Fax 404-853-8806; www.sablaw.com.

>  **Powell Goldstein LLP** welcomed **Howard S. Hirsch** as **counsel** in its business & finance practice group in the firm's Atlanta office. Prior to joining Powell Goldstein, Hirsch was with Holland & Knight LLP. His practice focuses on real estate investment trusts, and he also has significant experience in the areas of securities law and commercial transactions, general corporate law and mergers & acquisitions. The firm's Atlanta office is located at One Atlantic Center, 14th Floor, 1201 W. Peachtree St. NW, Atlanta, GA 30309; 404-572-6600; Fax 404-572-6999; www.pogolaw.com.

>   **Hunton & Williams LLP** announced the addition of two lawyers to its Atlanta office. **Amy Alcoke Quackenboss** and **James D. Comerford** have joined the firm as **counsel**. Quackenboss returns to Hunton & Williams after one year as counsel with DLA Piper US LLP. Her commercial litigation practice focuses on bankruptcy and creditors' rights, lender liabilities, and UCC issues, as well as general business litigation. Comerford joins

Quackenboss


Comerford

Hunton & Williams from McGuireWoods LLP. He focuses his practice on all facets of public finance matters. The firm's Atlanta office is located at Bank of America Plaza, Suite 4100, 600 Peachtree St. NE, Atlanta, GA 30308; 404-888-4000; Fax 404-888-4190; www.hunton.com.

- > **Charles M. McDaniel Jr.** joined **Carlock, Copeland, Semler, & Stair, LLP**, as of counsel. McDaniel concentrates his practice in insurance coverage disputes and the defense of catastrophic injury and wrongful death cases arising out of transportation collisions. The firm's Atlanta office is located at 2600 Marquis Two Tower, 285 Peachtree Center Ave., Atlanta, GA 30303; 404-522-8220; Fax 404-523-2345; www.carlockcopeland.com.
- > **Siskind Susser & Bland P.C.** announced that **Mikiel J. Davids** joined the firm's Atlanta office as an **associate**. Davids focuses her practice on employment and business-based immigration as well as family-based immigration representation. The firm's Atlanta office is located at 100 Ashford Center North, Suite 320, Atlanta, GA 30338; 770-913-0800; Fax 770-913-0888; www.visalaw.com.
- >  **Jones Martin LLC** announced the opening of its Buckhead office. The firm specializes in residential and commercial real estate. **Samira Martin**, who co-founded the firm in 2005, will manage the new office. Martin previously served as an attorney for Fulton County where she handled tax foreclosures, quiet title actions and real estate litigation. She also served as a commercial litigation associate at Smith, Gambrell & Russell. The firm's Buckhead office is located at 2941 Piedmont Road, Suite C, Atlanta, GA 30305; 404-249-8888; Fax 404-963-0688; www.closingslaw.com.
- > **Charles G. Spalding** was appointed as an **Administrative Law Judge** in the Atlanta office of the **State Board of Workers' Compensation**. The Atlanta office of the State Board of Workers' Compensation is located at 270 Peachtree St. NW, Atlanta, GA 30303-1299; 404-656-3875; Fax 404-656-7768; www.sbwc.ga.gov.
- > **S. Gardner Culpepper III** joined **Ashe, Rafuse & Hill, LLP**, as a **partner** in the litigation division. Culpepper, previously a partner at Alston & Bird, LLP, will continue to represent national and international clients in contract disputes and business torts, more specifically in the technology, health care and telecommunications sectors. The firm is located at 1355 Peachtree St. NE,

Suite 500, Atlanta, GA, 30309; 404-253-6000; Fax 404-253-6060; www.asherfuse.com.

- > **Zack Hendon** announced the formation of **The Hendon Law Firm, LLC**, a workers' compensation and personal injury firm. Previously, Hendon worked as an in-house trial attorney for Liberty Mutual Insurance Company. The firm is located at Five Concourse Parkway, Suite 2900, Atlanta, GA 30328; 770-512-8811; Fax 866-735-4064; www.hendonlaw.com.
- > **Norman Miller** announced the opening of **Miller Legal Services, LLC**. The firm will specialize in plaintiff's personal injury litigation, as well as mediation and arbitration services. Miller was formerly an in-house attorney with Liberty Mutual Insurance Company. The firm is located at Five Concourse Parkway, Suite 2900, Atlanta, GA 30328, 770-394-1823; Fax 866-397-0242; www.millerlegalfirm.com.
- > **Kitchens Kelley Gaynes, P.C.**, announced that **Byron P. Alterman** joined the firm as a **member** of the retail leasing development group. Alterman



Attorneys Sought for Epilepsy-related Discrimination Case Referrals.


Despite recent advances in treating epilepsy, a common neurological condition causing recurrent seizures, the condition continues to evoke negative stereotypes, fear and discrimination. To help people with epilepsy fight discrimination, the Epilepsy Foundation's Jeanne A. Carpenter Epilepsy Legal Defense Fund makes case referrals to a nationwide network of cooperating attorneys, and provides these attorneys extensive case assistance. The following is a sampling of actual cases some of our cooperating attorneys are now handling:

- Police mistaking a man's seizure-induced involuntary behaviors as aggression, arrest him for assault.
- Other first responders restrain a man experiencing a seizure face down, suffocating him to death
- Schools and child care centers refuse to give emergency medication to children experiencing prolonged seizures, risking their health
- Based on misinformation about epilepsy, a company refuses to consider a 20-year employee for another job opening after he experiences a seizure

If you might be interested in receiving referrals of similar cases, please contact us. Referrals are limited to address the attorney's interests and availability, and generally involve only short-term legal advice. Cooperating attorneys are asked to provide up to three hours of pro bono services.

Also, please contact us if you have a client experiencing discrimination based on epilepsy - we want to offer assistance.

For more information or to register as a cooperating attorney, go to www.epilepsylegal.org and click on "Register as an Attorney," or contact us at legalrights@efa.org or 301-459-3700.



focuses his practice on retail leasing, development and commercial real estate. Previously, he practiced with Arnall Golden Gregory LLP. The firm's office is located at Eleven Piedmont Center, 3495 Piedmont Road NE, Suite 900, Atlanta, GA 30305; 404-237-4100; Fax 404-364-0126; www.kkgpc.com.

>  **Kilpatrick Stockton** announced that **Henry Walker** joined the firm's **litigation department**. Walker returns to the firm's Atlanta office as a **partner** after serving as chief litigation counsel for BellSouth Corporate and its successor, AT&T South. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatrickstockton.com.

> **Weissman, Nowack, Curry & Wilco, PC**, announced that **Jamie Platt Lyons** was named **managing attorney** of the firm's Perimeter office. Lyons, a partner in the firm, is a veteran real estate closing attorney and a former manager of the firm's East Cobb closing practice. The firm's Perimeter office is located at Palisades B, Suite 300, 5901 Peachtree Dunwoody Road, Atlanta, GA 30328; 404-926-4990; Fax 404-926-4600; www.wncwlaw.com.

In Duluth


>   **Ali Jamal** and **Sutton Slover** opened their new firm, **Jamal & Slover, PC**. Previously, Jamal worked for Georgia Legal Services and Sutton practiced for Hall, Booth, Smith & Slover. Jamal's practice focuses on immigration and divorce & family law. Sutton practices workers' compensation, personal injury and DUI defense. The firm is located at 2250 Satellite Blvd., Suite 240, Duluth, GA 30097; 770-813-1358; Fax 770-783-8691; www.jamalslover.com.

In Lawrenceville

> **Andersen, Tate & Carr, P.C.**, announced that **Michael L. Sullivan** was named an **equity partner/shareholder**. Sullivan heads up the firm's zoning, land use and government relations section. The firm is located at Suite 100, 1505 Lakes Parkway,

Lawrenceville, GA 30043; 770-822-0900; Fax 770-822-9680; www.atmlawfirm.com.

In Macon

>  **James, Bates, Pope & Spivey LLP** announced that **Duke R. Groover**, formerly with Groover & Childs, has joined the firm as a **partner**. His areas of practice include complex litigation, business, commercial, construction, insurance and employment law. The firm is located at 231 Riverside Drive, Suite 100, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; www.jbpslaw.com.


In Marietta

> **Steffas & Associates, P.C.**, formerly The Law Offices of Irene Steffas, P.C., welcomed **Carine L. Rosalia-Marion** as their new **associate**. The firm will continue to specialize in immigration and adoption law, with special emphasis on Hague Convention adoptions and intercountry adoptions. The firm is located at 4343 Shallowford Road, H-1, Marietta, GA 30062; 770-642-6075; Fax 770-642-9162; www.steffaslaw.com.

In McDonough

> **Matthew M. McCord** announced the opening of the **Law Office of Matthew M. McCord, P.C.** The firm is located at 78 Atlanta St., Suite 102, McDonough, GA 30253; 770-692-0261.

In Sandy Springs

>  **John L. Watkins** has joined **Wagner, Johnston & Rosenthal, P.C.**, as a **shareholder**. Watkins continues his practice in commercial litigation, including insurance coverage, construction, business tort and product liability matters. He also acts as a mediator in commercial and business disputes. The firm is located at 5855 Sandy Springs Circle, Suite 300, Sandy Springs, GA 30328; 404-261-0500; Fax 404-261-6779; www.wjrlaw.com.

In Savannah

>   **Hunter Maclean** hired **Elizabeth F. Thompson** as **special counsel** for the firm's residential real estate practice. In her new position, Thompson leads the busy practice, which handles a wide range of real estate transactions. Thompson, who worked as an associate at Hunter Maclean from 1986 to 1991, has more than 20 years of experience as a successful closing attorney and brings extensive leadership experience to her new position at the firm.

Thompson

Williamson

In the June 2007 issue of the *Georgia Bar Journal* on page 35, Kwame Benjamin of Seyfarth Shaw was incorrectly identified as Kwame Brown. Our apologies for this mistake.


In addition, attorney **J. Reid Williamson III** rejoined the firm's estates and trusts practice group. His practice will concentrate in the areas of probate, estates, trusts, fiduciary law, wills and real estate. Williamson most recently served as senior vice president at Fiduciary Services Corporation in Savannah. The firm is located at 200 E. Saint Julian St., Savannah, GA 31401; 912-236-0261; Fax 912-236-4936; www.huntermaclean.com.

- > **Michael K. Mixson** and **Suzanne Pablo** joined the firm of **Clark and Clark** in Savannah. Clark and Clark practices in the areas of wills and estates, employment, maritime, insurance, business, litigation, accident law and personal injury, tax, real estate and bankruptcy/creditor's rights. The firm is located at The Realty Building, 24 Drayton St., Savannah, GA 31401; 912-233-0300; Fax 912-233-9110; www.clarkandclarksav.com.

In Snellville

- > **Joel Beck** announced the opening of **The Beck Law Firm, LLC**. The firm will focus on representing brokerage firms, stockbrokers and investment advisers in regulatory and disciplinary proceedings, customer complaints, and industry and customer arbitrations and litigation. Beck will also provide basic estate planning services, including wills, advanced healthcare directives and powers of attorney. The firm is located at 2330 Scenic Highway, Snellville, GA 30078; 678-344-5342; Fax 678-228-2023; www.thebeckfirm.com.

In Knoxville, Tenn.

- >  **Bass, Berry & Sims, PLC**, welcomed attorney **Shayne R. Clinton** to its Knoxville office. Clinton joined the firm's litigation practice area. Prior to joining the firm, he was with Smith, Gambrell & Russell, LLP, in Atlanta. The firm's Knoxville office is located at 1700 Riverview Tower, 900 S. Gay St., Knoxville, TN 37902; 865-521-6200; Fax 865-521-6234; www.bassberry.com.

In Washington, D.C.

- >  **Eric S. Purple**, formerly a senior counsel at the Securities and Exchange Commission, has joined **Bell, Boyd & Lloyd** as a **partner** in the firm's investment management and financial markets group. Purple served with the SEC's division of investment management for eight years, including six years as senior counsel in the office of chief counsel. The office is located at 1615 L St. NW, Suite 1200, Washington, DC 20036; 202-466-6300; Fax 202-463-0678; www.bellboyd.com.

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or e-mail: mocktrial@gabar.org



The Ethics of Ghostwriting Pleadings

by Paula Frederick

“I hate to interrupt,” your assistant says, popping into your doorway, “but Judge Brooks is on line one. She says one of your cases is on for hearing this afternoon, and she wonders why you aren’t there.”

Panicked, you scramble for the phone. “Judge Brooks! I didn’t realize I had a case on today’s calendar...”

Five minutes later, you hang up with a shudder. “No good deed goes unpunished,” you remark to your assistant. “Remember that potential client from last week? Ms. Jenkins?”

“The one with the eviction?” your assistant asks. “Sure. You helped her draft an Answer but you definitely made it clear that you weren’t handling the hearing. Don’t tell me—she told Judge Brooks you were her lawyer?”

“No, it’s worse than that! Apparently the judge thought the Answer looked too professional to have been done by a nonlawyer. She asked Ms. Jenkins whether a lawyer actually prepared it. Now the judge is accusing me of deceiving the court by not signing my name or revealing my involvement!”

“What?” your assistant squawks. “But you just gave Jenkins some advice without taking the case! You don’t have to do anything else for her!”

Or do you?


Rule 1.2(c) of the Georgia Rules of Professional Conduct allows a lawyer to limit the scope of representation if the client provides informed consent. This concept—also known as “unbundled legal services”—is relatively new. It is based on the modern reality that many clients can’t afford, don’t want, or don’t need a lawyer to handle every aspect of their case. If after consultation the lawyer and the client agree, the lawyer can provide help with specific, concrete tasks such as drafting or reviewing pleadings, or making a limited appearance for a specific hearing.

A lawyer undertaking limited representation still must comply with all of the obligations imposed by the Rules of Professional Conduct. The lawyer must be sure that the client understands exactly what the representation entails. The lawyer must provide competent representation. She may not help a client with a frivolous claim, or advise a client to do something that the lawyer herself would be unable to do.

A couple of other potential pitfalls exist. There may be malpractice implications for unforeseen consequences of the limited advice. On occasion, a lawyer who expects to appear for just one hearing may be “stuck” handling the entire case when the judge refuses to grant the lawyer’s Motion to Withdraw.

While we in Georgia do not consider that a lawyer acts unethically by providing representation that is limited in scope, Georgia lawyers should be aware that other jurisdictions feel differently. Although some have explicitly held that a lawyer need not disclose the fact that he has assisted a *pro se* litigant, other jurisdictions require disclosure based upon concerns that the court and opposing counsel could be misled by a *pro se* litigant who is actually being “coached” by a lawyer behind the scenes.

Georgia lawyers should also review the local rules of court of tribunals where they regularly practice, as some courts have rules requiring a lawyer to reveal that he has provided assistance to a *pro se* litigant.

Finally, note that the American Bar Association recently issued a Formal Opinion (07-446 “*Undisclosed Legal Assistance to Pro Se Litigants*”) that deals with this topic. The opinion holds that a lawyer may provide legal assistance to *pro se* litigants, including help with preparing written submissions, without disclosing the nature and extent of such assistance. 



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

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Discipline Summaries

(June 22, 2007 through Aug. 22, 2007)

by **Connie P. Henry**

Disbarment

Alvin R. Lenoir
Dunwoody, Ga.

Admitted to Bar in 1985

On July 13, 2007, the Supreme Court of Georgia disbarred Attorney Alvin R. Lenoir (State Bar No. 446532). A client retained Lenoir in 2003 to represent him in a civil matter. The client paid Lenoir \$1,450 and Lenoir wrote one letter on the client's behalf. Although Lenoir informed the client that he would file a motion in the case, the client never received any documents from Lenoir. Lenoir would not return the client's repeated phone calls. Upon going to Lenoir's office in November 2005, Lenoir told the client that the opposing party kept pushing every motion back. In December, the client again went to Lenoir's office and Lenoir told him that he would refund \$500 in January. He had no further contact with Lenoir. In February 2006 the client learned that Lenoir had left the firm in December.

In another case a client paid Lenoir a \$15,000 retainer to represent her in a civil action. Lenoir filed a complaint in February 2004. Although opposing counsel filed an answer and request for production of documents and sent a letter to Lenoir noting that he had previously represented the defendants against his client in a substantially related matter and demanding that he dismiss the case due to the conflict of interest, Lenoir failed to respond to the discovery request and failed to dismiss the case. In March 2005, Lenoir filed a motion to withdraw; however, he failed to communicate with his client after filing the complaint, failed to notify her of his intent to withdraw from the case and failed to refund any portion of the client's retainer.

In aggravation of discipline, the Court noted that Lenoir had received a 24-month suspension in 1995, a public reprimand in 1996, and a letter of formal admonition in 2006.

Suspension


Alice Caldwell Stewart
Atlanta, Ga.

Admitted to Bar in 1981

On June 25, 2007, the Supreme Court of Georgia accepted the petition for voluntary discipline of Alice Caldwell Stewart (State Bar No. 525679) and imposed an indefinite suspension to run concurrently with a two-year suspension imposed last year, with conditions for reinstatement. Stewart undertook to represent seven different clients in civil and habeas matters, but, except in one matter, failed to pursue the legal matters entrusted to her; failed to communicate with her clients; failed to return files; and failed to return unearned fees. Additionally, Stewart continued to practice law although she failed to timely pay her dues in 2005.

Prior to reinstatement, Stewart must undergo evaluation and treatment at a medical facility approved by the State Bar and the Lawyer Assistance Program; return all client files; provide an explanation of her inability to return the materials; return all unearned fees; and prove to the Review Panel that her medical providers have certified that she is not impaired and that she has met the above requirements.

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 22, 2007, three lawyers have been suspended for violating this Rule, and two lawyers have been reinstated. 

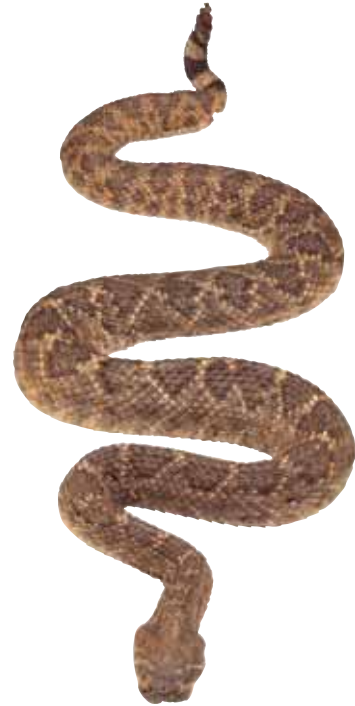


Connie P. Henry is the clerk of the State Disciplinary Board and can be reached at connie@gabar.org.

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Revisiting CRM Software

by Pamela Myers

In August, I was privileged to be a speaker at the National Bar Association's 82nd Annual Convention held in Atlanta. At this event I heard a presentation by Atlanta attorney Forrest Johnson about the special attention he affords his clients. His presentation opened an opportunity to present to the *Bar Journal's* readership another practice management tool you might want to consider when thinking about client satisfaction and marketing. I set about finding a tool to help attorneys keep track of all that information.

There is technology out there where all marketing-type information can be captured and made available as part of the client file to anyone who is working on that file—it's called client relationship management (CRM) software.

Since the design of first generation CRM technology more than 20 years ago, it has earned a less than stellar reputation among law firms. It was designed to be a centralized system for contacts and business information, but, as with a most law office automation products, many lawyers felt they should be lawyering, not entering contact information. Also, many attorneys are uncomfortable with the word "sales." Today, CRM is being viewed as the up-and-coming technology to underpin organizational change in the increasingly competitive market for legal services. When used properly, CRM can get you more focused on the client. The ABA Legal Technology Survey Report indicates that 45 percent of firms are now using some form of the software (up from 33 percent in 2005). CRM software is again making its way into the world of law office client management.

The new generation of CRM developers are adapting the older, sales-based general business programs to

center around practice areas and legal matters; more in line with the way legal software works. This type of information gathering can offer consistent, measurable improvements in every firm process, enabling enhanced client relationships, which will hopefully lead to new levels of profitability. Generally, data can be viewed by area of law, contact person or e-mail address, and can include data from multiple systems.

What is CRM Software and What Can It Do?

CRM is a client relationship management tool that provides the capabilities needed to create and easily maintain a clear picture of your clients, from first contact, continuing through their ongoing business relationship with you and/or your firm. You can have instant access to what type of service clients have required in the past (or what has actually worked to retain them) and how you can tailor your services to their future needs. Bottom line—it is a marketing tool.

Initially, CRM may help you better manage your relationships and identify opportunities to offer a broader array of services to your clients. Lots of non-legal information is learned from clients that should be part of their file. Wouldn't it be reassuring to know that an associate who is preparing to take a client to dinner could look in the file and avoid a steakhouse, as that particular client is a vegetarian? It could be invaluable.

Firms also use CRM to manage marketing and events, mostly to sort mailing and invitation lists. These functions traditionally were done with Microsoft Excel spreadsheets or Access databases, which don't change when contacts change. As CRM information is meant to be integrated with your existing word processing, case management, and list management programs, plus address book applications and PDAs, expensive data re-entry is virtually eliminated.

As you have probably heard from many sources, getting new clients is great. But long-term client relationship retention is less time consuming and often more lucrative—they return and they often refer new business.

Why would you want to consider this software for your firm? As mentioned above, the first reason is economics. It is more cost effective to grow the business of existing clients than to establish a new client relationship. The second reason is professional—clients are better served when the ownership of the relationship is tied to the firm, not just the partner.

How do you start gathering client information? The best way is to get everyone in the firm together, including your support staff—they often know more about a client than you think. Choose your largest client and work your way down your book of business. Everyone submits information they know about your clients and when that is done, designated staff should be assigned to input the information into your CRM software. This can be time consuming, but you will have a complete client file.

What Should I Look For In a CRM Software Package?

The ideal CRM software package that works for every firm and every situation has yet to be discovered; every firm has different needs for their customer relationship management needs, as well as software implementation.

When you are looking for a strong CRM software package keep the following in mind:

- Try to forget about the initial price tag.
- Focus on the integrity, usability and adaptability of the systems for your particular needs.

When looking into CRM software, it is imperative that you have a clear indication of how you want to use the program in conjunction with information you currently have stored using other software tools.

A few things to consider:

- Would you prefer web-based or in-house network based software? Both are available.

- Will it do what you want it to do? What are the most important segments of client relations that you are looking for? Does the CRM software support tracking and updating all aspects of this? For example, if your firm wants to track details of your clients' industry, past and present, to detect whether there is an opportunity to offer additional service based on these records, make sure this capability is built into the software. Down the line, customiza-



tion will be time-consuming, not to mention expensive. If you have a primary goal, make sure it is standard in the CRM software package you choose.

- Will the CRM software integrate with all your current platforms? Re-entering all your database information such as client names, addresses and phone numbers can increase the amount of money you'll spend in the long run. Smooth integration or importation of existing information is paramount.
- Is the product more than you need? Just because a big, enterprise system with a dozen features appears to be the better deal doesn't mean you should


have that program. If your firm runs on a half-dozen, million-dollar clients, you probably don't need CRM. If you have 500 smaller clients, you might not need the ultra-expensive version.

- Has a similar-sized firm used this CRM software package before? If it has been used for client databases up to 100 and you have 15,000, the system may not be capable of sustaining the volume or may grow glitches. It's very important that the product suit your firm size.

Implementation of a new CRM program requires proper management support and effective training. Management must be behind it 100 percent. Training is essential and must encompass the entire firm to ensure that all levels of personnel will embrace the new system, understanding the genuine need for it and the real goal of what you are trying to achieve with your new CRM software solution.

A number of factors are coming into play, both economic and otherwise, suggesting a change in attorney's marketing goals. Although CRM might not

be for you right now, the increased usage in law firms across the nation will continue to drive development of lawyer-specific marketing/management software in the future. As we move further into the "Age of Technology," there is a promise of more effective knowledge management for attorneys.

If you'd like a list of CRM software providers, please contact us at 404-527-8772. 



Pamela Myers is the resource advisor of the State Bar of Georgia's Law Practice Management Program and can be reached at pam@gabar.org.

Pro Bono Project Co-Hosts Seminar for Public Interest Attorneys

by Jeanette Burroughs

The Georgia Fellows of the American College of Trial Lawyers (ACTL) sponsored a two-day seminar, “Trial Advocacy for Public Interest Lawyers,” Aug. 20-21 at the Bar Center. The seminar was the fellows’ first such large-scale training for public interest lawyers.

The two-day training featured noted ACTL attorneys: Jerry A. Buchanan, Claudia Saari, Chilton Varner, Jerry Buchanan, Ray Persons, Sally Quillian Yates, former governor of Georgia Roy Barnes, Bernard Taylor, Richard Sinkfield, Dave Burch, Jon Peters and Tony Cochran. The American College of Trial Lawyers Foundation provided \$2,000 in scholarships to cover travel costs for participants from rural Georgia to ensure the training program would be accessible to public interest lawyers outside Atlanta. The State Bar of Georgia Pro Bono Project assisted ACTL in hosting the training.

The training program attracted public interest lawyers from across Georgia, including attorneys from the Georgia Legal Services Program, the Georgia Law Center for the Homeless, the Atlanta Volunteer Lawyers Foundation, the Atlanta Legal Aid Society and several lawyers from large Atlanta firms who handle pro bono cases.

The seminar was highly praised, with participants hoping for a repeat of the seminar or for related training experiences. Seminar evaluations were filled with comments such as “I have returned to my practice with new vigor. I am anxious to apply the skills acquired” and “The experience was very rewarding. It was an



Photo by Jennifer R. Mason

Jerry Buchanan, Buchanan and Land LLP, gives his closing argument for the plaintiff as Jonathan C. Peters, Peters & Monyak LLP, acts as the judge.

honor to learn from such distinguished trainers.” More than 55 public interest advocates participated in the lectures and demonstrations.


ACTL member and seminar organizer Jerry Buchanan, of the Columbus law firm of Buchanan and Land, LLP, says: “The American College of Trial Lawyers has long been dedicated to the public interest

legal community, and we are delighted to have had the opportunity to work with such dedicated lawyers who serve some of the most vulnerable segments of our society. The members of the college who served on the faculty were all inspired by the level of ability, dedication to service, and enthusiasm of the public interest lawyers who attended the program. I can assure you that we learned as much from them as they learned from us."

"Trial practice training directly benefits our clients by allowing us to be better lawyers on their behalf. The skill level of the trainers involved in this two day training was outstanding," said Doree Avera, attorney in the Brunswick Regional Office of Georgia Legal Services Program. Mike Monahan, director of the State Bar of Georgia Pro Bono Project, notes, "The American College of Trial Lawyers program fills a much-needed gap. Most, if not all of our pro bono and

legal aid programs, are confronted with a difficult budget decision: How much money can a program take away from direct client services to pay for staff training? Staff training is expensive, and it's necessary. ACTL's training contribution is very significant to these programs."

ACTL is a professional association of lawyers skilled and experienced in the trial of cases and dedicated to maintaining and improving the standards of trial practice, the administration of justice, and the ethics of the profession.

For more information about how to volunteer your time and resources to the public interest community contact the State Bar of Georgia Pro Bono Project at 404-527-8763. 



Jeanette Burroughs is the director of development and communications for the Georgia Legal Services Program, Inc.



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MK-07-100068

Test Drive Casemaker 2.0

by Jodi McKenzie

Over the past year, the people at Casemaker have been diligently working on releasing a new version of the program. Casemaker 2.0 promises to have more user-friendly features, a stronger search engine and access to more libraries. It has been an ambitious undertaking but worth the effort for our members. The final product will be more competitive with other online legal research vendors but will still remain free of charge to State Bar of Georgia members.

You can take a sneak peek at Casemaker 2.0 by going to the Georgia Library of Casemaker and scrolling to the bottom of the page. Here you will find some tips on how to use the new system, as well as a link to give you access. While Casemaker 2.0 is still in the development process, this sneak peek allows our members to get a first hand look and make comments that will help shape the final development stage (see fig. 1).

Some of the biggest changes to be made in the new version are listed before you access the program (see fig. 2). This includes the necessary use of “and” between words when you are doing a multiple word search in which you want all the search terms to appear in the resulting documents. A reminder of these new search formats will appear on the search page of Casemaker 2.0 as well.

When you enter Casemaker 2.0, you will open a search screen that is automatically set on the Federal content page. You will choose the library you want to search in by clicking on the pull-down button indicated by the upside-down arrow (see fig. 3).

This will give you a list of all the searchable libraries. Casemaker 2.0 offers the flexibility of searching multiple state libraries at the same time. Simply click on the multi-state link to begin your search. To access the Georgia library, click on the Georgia link in the pull down list (see fig. 4).

Once you have selected the library you wish to search, you then select the book you want to search. Again, click on the pull down button on the Book field (see fig. 5). This will give you a list of the books available in that library.


Here we have selected the Georgia Library and are able to view the books available in that library including Caselaw, the Georgia Code and state and federal court rules. Let’s choose to search the Caselaw library.

If you are already familiar with Casemaker, you will notice that the new search page for the Georgia Caselaw library is very similar to the advanced search screen of Casemaker 1.0. You still have a full document search query field to find cases by key words and phrases near the top of the page. What is different is that you now have separate fields for finding cases by citation number or case name. The case name search now has its own field, which it did not have in Casemaker 1.0 (see fig. 6).

A search for *property liability* in the full document query field will give you a results page listing documents that contain the phrase *property liability* in them. You no longer have to put quotation marks around your phrase to make it an exact phrase search (see fig. 7).

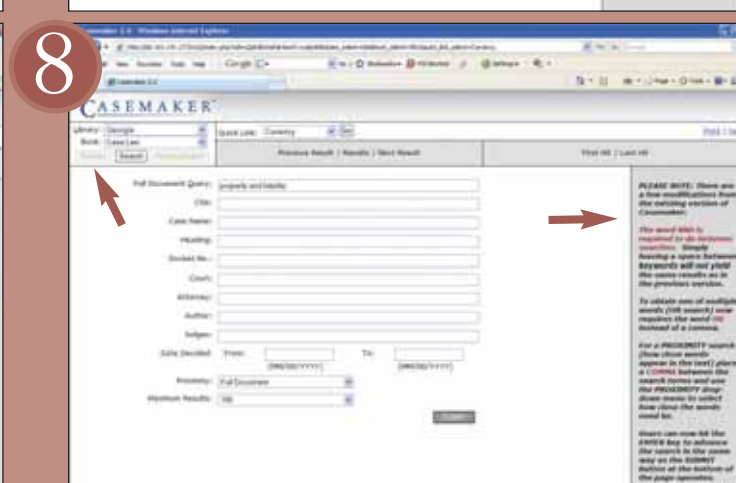
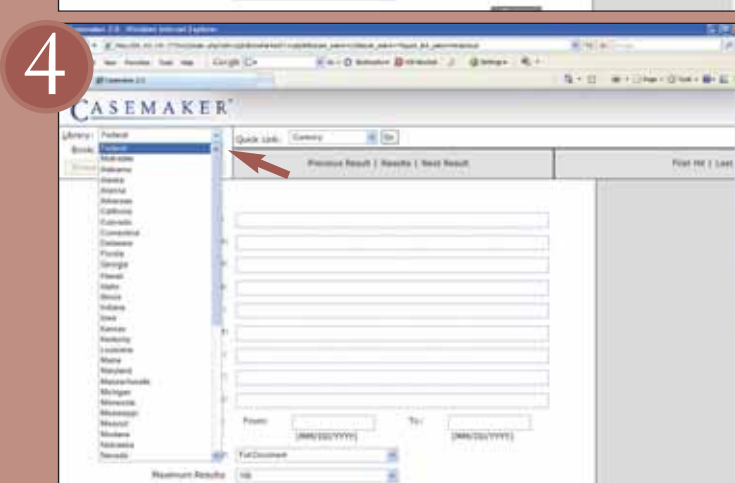
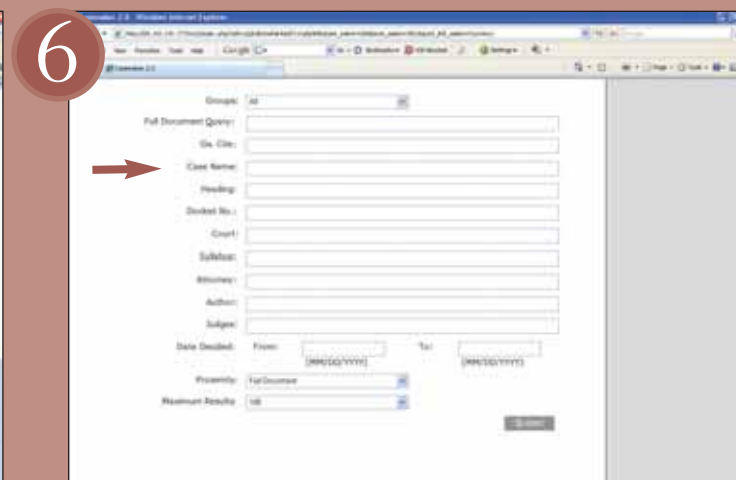
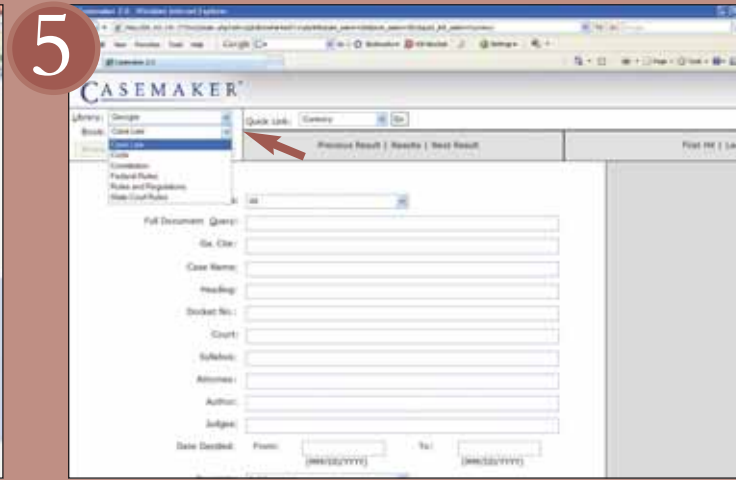
If you want to find documents that have the words *property* and *liability* in them, but not necessarily the phrase *property liability*, you now have to put an *and* between the two words to get the correct results (see fig. 8).

The right hand side of the search screen will give you a reminder of the new search formats for Casemaker 2.0. Here, you will notice that you can do an “Or Search” by simply typing the word *or* between your search phrases. You can also do an exclusionary search by typing the word *not* in front of the word you wish to exclude (see fig. 8).

Casemaker is constantly working to improve its libraries in order to make Casemaker one of the most valuable member benefits the State Bar offers. Your input is important to the development of Casemaker. After you’ve had a chance to use Casemaker 2.0, please let us know what you think. Your input will help in the development of the final version of Casemaker 2.0. You can submit your input through the Feedback button on the bottom of the Casemaker 2.0 search page, or you can contact Jodi McKenzie, member benefits coordinator at jodi@gabar.org. We look forward to hearing from you. 



Jodi McKenzie is the member benefits coordinator for the State Bar of Georgia and can be reached at jodi@gabar.org.



A Refresher on Signals: To See or not to See

by Karen J. Sneddon and David Hricik

As a continuation of our discussion of effective use of citations, this installment presents a refresher on signals. Like explanatory parentheticals, signals can increase the effectiveness of relevant citations. As you'll recall, signals are shorthand ways to convey the relevance of citations to the reader. Signals specify the relevance of the citation to the proposition stated in the preceding sentence.

The signals conventions originated from the now-ubiquitous *The Bluebook: A Uniform System of Citation* (*Bluebook*). The first edition of the *Bluebook* was a 1926 pamphlet written by a Harvard student. The current 18th edition was published in 2005. A relative newcomer is the *ALWD Citation Manual: A Professional System of Citation* (*ALWD*), first published by the Association of Legal Writing Directors in 2000. Although the two books differ in important respects, the meaning of each signal and the mechanics of their use are substantially the same. Both have been used to write this column.¹

The Four Categories of Signals Simplified

There are four categories of signals. The first two categories include opposites of each other, and a table can help simplify them (see page 57). The first category, on the left, includes signals introducing authorities that support the stated proposition. The second category, on the right, introduces authorities that contradict the stated proposition.

The third category includes signals that draw a comparison: the unwieldy “compare [one authority] with [another authority].” Even the meaning of the signal is unwieldy. According to *Bluebook*, this signal introduces authorities that either support the proposition or provide an illustration of the proposition. However, according to *ALWD*, this signal indicates a comparison between authorities that reach different results about the proposition. Generally, an explanatory parenthetical is needed for each authority to explain its relevance. We suspect that this is little used because it can be cumbersome.

The fourth category includes the signal indicating background information. The signal “see generally” indicates that the authority states background material relevant to the proposition. An explanatory parenthetical describing its relevance should be used.

Typographical Pointers


A signal should be underlined *or* italicized depending on the typeface used unless it is part of a sentence in which it functions as a verb.⁴ If more than one authority appears after the signal, the signal “carries through” until the end of the citation sentence unless a new signal appears. If more than one signal is used in a listing of authority, the *Bluebook* and the *ALWD* manual disagree on how they should be ordered (does “see” come before “see, e.g.,” for example?).⁵ A semicolon should separate different signals and their citations.

No refresher would be complete without including a brief discussion of the recent signal fracas. Although the fracas involves the Sixteenth Edition, it is still a relevant topic as many still use the Sixteenth Edition and are unknowingly perpetuating signal confusion.

The meaning of the signal “see” has been confusing judges, practitioners, professors and students for decades. The disastrous Sixteenth Edition of the *Bluebook* in 1996 strove to reduce the number of signals and simplify the distinctions between them.⁶ Under the Sixteenth Edition, unless the proposition (i) identified

| Signal | Negative Counterpart |
|--|--|
| "[No signal]" indicates that the authority (a) directly states the proposition, (b) identifies the source of a quote, or (c) identifies the authority named in the text sentence. | "Contra" indicates that the authority directly contradicts the proposition. |
| "See." As discussed below, people have debated the meaning and use of "see." "See" should be used when the authority clearly, but not directly, states the proposition. In other words, if the writer is drawing an inference from the authority to formulate the proposition, "see" should be used to introduce the authority. | "But see" indicates the authority clearly supports a proposition opposite of the stated proposition. |
| "See also" is generally used to introduce an additional authority that supports the stated. "See also" can also be used when the authority supports the proposition, but the authority is distinguishable from previously cited authorities. Using an explanatory parenthetical helps the reader understand the relevant point in the authority. | There is no "but see also" signal. |
| "Accord" is somewhat similar to "see also," but "accord" is used in a particular situation. When two or more authorities state the same proposition but the text sentence only quotes or refers to one of the authorities, the second authority is introduced using "accord." ² "Accord" can also be used to indicate that the law of one jurisdiction is in accord with the law of another jurisdiction. | There is no "but accord" signal. |
| "Cf." indicates that the authority supports the proposition by analogy. The analogy should be clarified by an explanatory parenthetical. | "But cf." indicates the authority contradicts the proposition by analogy. Like the use of "cf.," an explanatory parenthetical clarifies the analogy to the reader. |
| "E.g." indicates that the authority exemplifies several authorities that state the same proposition. "E.g." can be used with "see" to become "see, e.g." ³ | "But see, e.g.," indicates that the authority is an example of several authorities contradicting the proposition. |

the source of a quote or (ii) identified the authority named in the text sentence, the signal "see" was needed. Thus, even paraphrased propositions required "see." The Seventeenth Edition returned to the Fifteenth Edition's meaning of "see," which still lacked clarity. The Eighteenth Edition provides that "[no signal]" introduces authority that directly states the proposition while "see" introduces authority that clearly supports—but does not directly state—the proposition.

The use of signals may appear daunting. Yet, learning the signals increases the effectiveness of citations. 



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

Mercer's Legal Writing Program is consistently rated as one of the top two legal writing programs in the country by U.S. News & World Report.

Endnotes

1. The *Bluebook* rules for signals are B4, 1.2, 1.3, and 1.4. Rule B4 appears in the Bluepages. New to the Eighteenth Edition, the Bluepages have replaced the Practitioner's Notes. In *ALWD*, Rule 44 governs signals in *ALWD*. The Eleventh Circuit requires briefs comply with either *Bluebook* or *ALWD*. 11th Cir. R. 28-1(k). A more complete discussion of *ALWD* will be the subject of another installment of *Writing Matters*.

2. The below is an example of the use of "accord" by the Supreme Court of Georgia.

This Court has previously declared that "strikes are procedural and not substantive in nature," and that an amendment to the number of strikes a defendant may exercise can be given retroactive effect. *Barner v. State*, 263 Ga. 365, 367(4), 434 S.E.2d 484 (1993). *Accord Madison v. State*, 281 Ga. 640, 641 S.E.2d 789 (2007). *Chandler v. State*, 642 S.E.2d 646, 652 (Ga. 2007).

3. *Bluebook* and *ALWD* punctuate this signal differently. The *Bluebook* requires "see, e.g.," but *ALWD* requires "see e.g."

4. *Bluebook* R. 1.2(e); *ALWD* R. 44.6(b).

5. Although both manuals agree that "[no signal]" comes first, there are differences with the other signals, including the placement of "see," "e.g.," and "accord." *Bluebook* R. 1.3; *ALWD* R. 44.8(a).

6. *Bluebook* v (16th ed. 1996).

Georgia Law Students Heat Up Their First Year

by Avarita L. Hanson

As anyone who spent any time in Georgia this summer knows—it was hot! The television meteorologists tell us there were 10 days when the temperature rose above 100 degrees. On Aug. 10, it was a record 105 degrees in Athens and 106 in Macon. On that same date, incoming law students heated up their first year with discussions about professionalism at the



Photos by Mary McAfee and Terie Lataia

At Mercer University Walter F. George School of Law, DeKalb County Superior Court Judge Gregory A. Adams addressed the students on professionalism.

University of Georgia School of Law and Mercer University's Walter F. George School of Law. During the last weeks of August, students encountered the concepts of professionalism at the Georgia State University College of Law, Emory University School of Law and Atlanta's John Marshall Law School.

Spearheaded by the State Bar of Georgia's Committee on Professionalism and in conjunction with the Chief Justice's Commission on Professionalism, the 15th season of orientations on professionalism continued Georgia's proud tradition of collaboration with the

bench, bar and legal academy. These orientations bring judges, practitioners and law professors together with entering students to review their professional obligations and character at the onset of their legal education. This year, more than 800 first-year, transfer and visiting students were involved in professionalism orientations at Georgia's five law schools. According to Sally Evans Lockwood, director of the Office of Bar Admissions, these students joined others at more than 40 law schools across the country in starting their education with an orientation on professionalism.

The Committee on Professionalism's energetic chair, Hiram attorney Dick Donovan, again lead the team of committee members, volunteer judges, attorneys and law professors who served as discussion group leaders. While orientation formats differ from school to school, all Georgia law students were afforded the

opportunity to engage in a conversation on professionalism in a small group lead by the volunteer group leaders. Hypothetical situations served as the springboard for the conversations. Some of the hypotheticals posed issues relevant to the law school experience. These situations caused students to reflect on their reasons for attending law school, as well as their conscience and values. Moreover, students anticipated their likely action and were advised to pay close attention to how their behavior comports with the requirements of their school's student honor code. Other hypotheticals addressed issues legal practitioners might encounter in their practice. With the assistance of the group leaders, students explored these issues and possible solutions consistent with the Rules of Professional Conduct, as well as the aspirational statements of professionalism.

Keynote speakers at each law school sparked a fire in the students by sharing their wisdom, observations and professionalism experiences. Below is an attempt to capture the warm spirit of professionalism conveyed by each keynote speaker and the students' orientation experience at each law school.

Georgia State University College of Law

Associate Dean Roy Sobelson and Committee on Professionalism member and alumnus Philip Jackson welcomed the students to the Georgia State University College of Law orientation. Sobelson pointed out proudly to students that Georgia State rising third-year law student Holly Chapman was assisting with the orientation as a summer intern with the Chief Justice's Commission Professionalism.

Judge J. Antonio DelCampo, a Georgia State alumnus who sits on the State Court of DeKalb County, brought a fresh perspective on professionalism. As introduced by Jackson, DelCampo is less interest-

ed in focusing on his professional title than being known as a loving husband and father—the first thing he talks about when you meet him. DelCampo, a naturalized citizen originating from Peru, was the youngest and first Hispanic full-time judge in Georgia. He challenged the students by asking them, “What kind of lawyer do you want to be?” To help them answer that question, DelCampo provided both examples of professionalism and the lack thereof. By way of example, on the one hand, DelCampo related an incident concerning a law student (to whom he anonymously referred) who, while practicing under the Third Year Practice Act, appeared in his courtroom asking to reschedule his case from the spring to the fall calendar. The student had reportedly been discourteous to and dishonest with a member of the judge's staff. Clearly recalling the incident, in the open courtroom DelCampo rebuked the student for acting so rude.

On the other hand, DelCampo praised Atlanta attorney Charles Mathis, for exemplifying true professionalism. While a case was pending before him, the Court of Appeals had just rendered a ruling on a matter of law that was against Mathis' position. Mathis brought the adverse appellate ruling to the court's attention, but distinguished it factually from his client's case. Notably, Mathis' actions won the highest praise and admiration from DelCampo. Likewise, Georgia State students

appreciated DelCampo's candor and comments.

Mercer University Walter F. George School of Law

At Mercer, DeKalb County Superior Court Judge Gregory A. Adams addressed the students on professionalism. A former juvenile court judge, Adams recently had the DeKalb Juvenile Justice Center named in his honor. He asked and answered the question: “What does professionalism mean to me?” Inspiring and motivational, Adams provided examples of professionalism from his experience as a judge and former litigator.

Knowledgeable and engaging, Adams noted that by all definitions, “the foundation of professionalism is civility. . . a word mentioned time and again in all the writings I have viewed on professionalism.” As he described, “Civility incorporates respect, courtesy, politeness, graciousness and basic good manners.” Encouraging the students to be professional, he opined that “professionalism is part of what separates accomplished lawyers from ordinary lawyers.”

One Mercer student summed up the professionalism orientation experience: “While it seems slightly complicated, professionalism seems necessary to the practice of law. This introduction was well worth the time to hear experiences and think through hypotheticals.”

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John Marshall Law School students were treated to heartfelt remarks by Cobb County Superior Court Judge Adele Grubbs.

University of Georgia School of Law

Committee on Professionalism member G. Melton Mobley opened the University of Georgia School of Law orientation on professionalism by defining it. In his opinion, “professionalism is the way you get along with fellow lawyers—like when you grant an extension to another lawyer that may not be in your client’s best interest but you know the other lawyer needs it.” Mobley introduced Bar staff and leaders present—Avarita L. Hanson, executive director of the Chief Justice’s Commission on Professionalism, Douglas Ashworth, director of the Transition Into Law Practice Program, and Dick Donovan, chair of the Committee on Professionalism, so students “could put a face on the Bar leaders.”

Supreme Court of Georgia Justice P. Harris Hines scored high marks with UGA students with his “bullet points” on professionalism. He was introduced by Dean Rebecca White, who reminded students that “dress is a professionalism issue.” Hines

advised the students that, “Your professional reputation started today when you walked on this campus—not when you take the bar and start to practice. There are people who you will know for your entire professional life.” He told them, “You cannot separate your professional reputation from your personal reputation. You cannot say, ‘He/she is a brilliant lawyer, but he/she is not honest or drinks too much.’” He asked students to consider that “your professional reputation is

forged by the choices you make every day of your life. Do you wish to be kind or cruel? Temperate in your speech or vulgar?”

In a nutshell, Hines advised students to “work on being a professional as you work at other subjects” in all their dealings with fellow students, faculty and administrators. His closing comment to them was inspiring: “See wondrous things, learn wondrous things, do wondrous things.”

UGA students obviously warmed to Hines’ advice and remarks. One student declared that “having someone with an impressive background and high current stature puts weight on the topic.” Others commented that “the program is a great segue to upcoming classes and law school events” and “we learned that professionalism is personal—different people have different comfort zones with various situations and there are lots of gray areas.” Overall, while students found it hard to find a cool spot on campus that afternoon, they were introduced to hot areas of professionalism—civility and the importance of establishing a

good reputation from the beginning of law school.

Emory University School of Law

Emory’s orientation on professionalism opened with remarks from A. James Elliott, associate dean for External Affairs and member of the Chief Justice’s Commission on Professionalism. Students viewed the American Bar Association’s film, “A Renaissance of Idealism in the Legal Profession,” to encourage them to become servant leaders in the community. A panel of students added their spin on professionalism, Emory Law’s Professional Conduct Code and the law student community. Lockwood brought brief remarks on behalf of the Office of Bar Admissions.

The keynote address, welcome and swearing-in of the class of 2010 was lead by Judge T. Jackson Bedford Jr. of the Superior Court of Fulton County and president of the Emory Law Alumni Association. Jackson asked the first-years: “What is the Professional Conduct Code and how does it apply to me?” The Professional Conduct Code reflects the law school’s strong commitment to a set of sustaining, shared values that bind all its elements—students, faculty and staff—into a true community. The values underlying Emory’s legal education are excellence, integrity, respect and service. As a student of the law, they are bound by the requirements of this code.

Jackson pointed out that “to be a lawyer carries great responsibility.” To him, “poor conduct breaches the public trust and the practice of law is less rewarding. Thus, it is incumbent on each of you to take responsibility now for the ideals and values of the profession.” After his remarks, Jackson administered the honor oath to the students who, by taking their oaths as individuals, started their journey as a member of the legal profession. Prior to the swearing in, stu-

2007 Law School Orientations on Professionalism Group Leaders

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John Marshall Law School

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dents were advised to take the time to review the Professional Conduct Code so that at their swearing-in they would formally commit to its standards.

Following the keynote address, all students engaged in professionalism breakout sessions to discuss in their small groups hypothetical legal and ethical scenarios with an Emory Law professor and a local legal practitioner. A student found that the “hypotheticals all stimulated relevant discussion and significant thought about professionalism.” The varied perspectives of practitioners and academics were effective as one student noted, “they brought two points of view that came to the same conclusions working different trains of thought, which was very interesting.” Many students found the professionalism discussions the most valuable part of their orientation.

John Marshall Law School

On the last Saturday morning in August, John Marshall students were treated to heartfelt remarks by Cobb County Superior Court Judge Adele Grubbs, herself a model of professionalism. Informative and candid, Grubbs’ remarks were delivered with sincerity and moral conviction. Peppered with her experiences, her comments added great value to this school’s program.

Donovan introduced Grubbs, who hails from Manchester, England, where she attended law school. She was the first female district attorney in Cobb County, and is a 25-year practitioner who was originally appointed to the juvenile court. She later won her place on the bench by election to the Superior Court. Grubbs noted that the law is “a profession because its standards are at the highest level of society. . . lawyers are held to a higher standard.” The key to success, she advised, is to “keep objectivity, detachment from your client and

issues” and “when you get tempted to do something—don’t; it’s not worth blowing your whole career.” Her three rules for lawyering are simple: 1) Don’t lie; 2) Be on time; 3) Be courteous to all. She said, “Your reputation is the greatest asset you have among lawyers and judges.” She encouraged the aspiring lawyers to admit their mistakes.


Using a popular quotation, Grubbs said, “He who lives by the sword, dies by the sword,” suggesting that lawyers not lie to the court, or to the lawyer on the other side, nor go for every technicality—“get along, get on.” To Grubbs, professionalism equals success, alluding to high power attorneys like John Marshall Law School alumnus Jimmy Berry, as the epitome of practitioners who are credible and honest, while being zealous advocates. With an aside to the female first-years, she noted problems with how some women are dressed in her courtroom—a venue where the audience is not the client, but the judge and jury. The hallmarks of professionalism to this consummate professional are honesty, trustworthiness and cooperativeness.

Judge Grubbs was honored to be the first judge to administer John Marshall’s Professional Honor Code Pledge to the entering students. A student evaluator of this orientation said, “I realized how valuable a reputation can be in our profession.” Another student called the program “eye-opening” and noted that it stressed “the need to be a courteous person to everyone involved in the proceedings of the court.” Other student commentators on the program said, “Face time with real lawyers was extremely helpful,” the “dialogue was refreshing and offered clarity,” and “the real life examples gave a true perspective on solving the hypotheticals.”

Conclusion

New Georgia law students warmed up to professionalism in

the first days of their legal education. While the long hot days of summer have faded, the future of these aspiring lawyers is long and bright, largely because they have started to learn to distinguish the differences between ethics and professionalism. The discussions, as one student commented, “clearly defined the difference between ethics and professionalism while also exploring how this distinction can be difficult to make in real life situations.” As this year’s new students attested, their futures have been enriched, as have so many other first-year law students in the past 14 years, by their orientation to professionalism and early encounter with the bench and bar who brought to them their experiences and wisdom in their first days as law students. As one aptly put it, the orientation “showed how doing what you should is more important than what you must do.”

Our appreciation goes out to the nearly 200 volunteer members of the bench, bar and academy who served as group leaders whose names appear on our 2007 Honor Roll (see page 61). This program continues to be ably lead by Donovan and the other members of the Committee on Professionalism. Finally, we express our gratitude to the staff of the Chief Justice’s Commission on Professionalism for contributing to this program’s success: Mary McAfee, Terie Latala, Nneka Daniel and Holly Chapman. Georgia judges and attorneys interested in serving as orientation group leaders next year should contact the Chief Justice’s Commission on Professionalism, 104 Marietta St., NW, Suite 620, Atlanta, GA 30303. 



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

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Ralph H. Hicks

Atlanta, Ga.
Admitted 1960
Died August 2007

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Gray, Ga.
Admitted 1963
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Thomas Jay Potter

Atlanta, Ga.
Admitted 1992
Died December 2006

David E. Stahl

Marietta, Ga.
Admitted 1984
Died August 2007

Cary S. Tye

Rydal, Pa.
Admitted 1970
Died May 2007

Kay Yvonne Young

Avondale Estates, Ga.
Admitted 1980
Died August 2007



Ralph Harriman Hicks

was born in Jackson, Miss., on Sept. 30, 1932. He attended Georgetown Preparatory School in Washington, D.C., and Saint Stanislaus High School in Bay Saint Louis, Miss., prior to moving to Atlanta in 1948. He graduated from Marist, an Atlanta catholic high school, in 1950. He volunteered for the U.S. Naval Reserve in 1955 as a seaman recruit and retired 20 years later as a commander. Hicks attended Georgia Tech and graduated with a degree in industrial management in 1957. He was also a lifelong member of the ATO fraternity inducted while at Tech. After employment with Atlanta's GoldKist, and meeting his future wife Charlotte while working in Waycross, he decided he wanted to be an attorney. He attended Emory University Law School graduating in 1961. Hicks passed the Georgia Bar exam that year and began practicing law with the Atlanta firm of Rose and Lapis. He was subsequently recruited by Smith, Cohen, Ringle, Kohler, Martin, and Lowe, where he became a partner. Hicks was permitted to practice before the U.S. Supreme Court while an attorney with Smith Cohen. He served as president of the Atlanta Bar Association from 1977-78. In November 1978, he was appointed by then Gov. George Busby to the Fulton County Superior Court bench. He became chief judge in 1988 and resigned in 1990 to run

for a position on the Georgia Court of Appeals. He served on the Board of Governors of the State Bar of Georgia. Hicks was a lifelong catholic and a member of Christ The King parish on Peachtree Road. He was president of the Grant Estates Neighborhood Association and a member of the Kiwanis Club. He is survived by his wife of 46 years, the former Charlotte Rose Smith of Waycross; their two sons, Matthew Hicks and his wife Stephanie and Tom Hicks and his wife Lori, all of Atlanta; their daughter Shannon Sharpe and her husband Steve who live in Chattanooga, Tenn.; and seven grandchildren. He is also survived by his brother Geoffrey Hicks of Nashville, and his sisters Carol West of Atlanta, and Audrea Hicks of Mandeville, La. GBJ



For information regarding the placement of a memorial, please contact the Lawyers Foundation of Georgia at 404 659-6867 or 104 Marietta St. NW, Suite 630, Atlanta, GA 30303.

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The Lawyers Foundation of Georgia would like to acknowledge the following memorial donations to honor many of the members of the Bar who passed away in the recent year. The LFG sincerely appreciates these donations, which allow the memory and legacy of the deceased lawyers and judges to continue.

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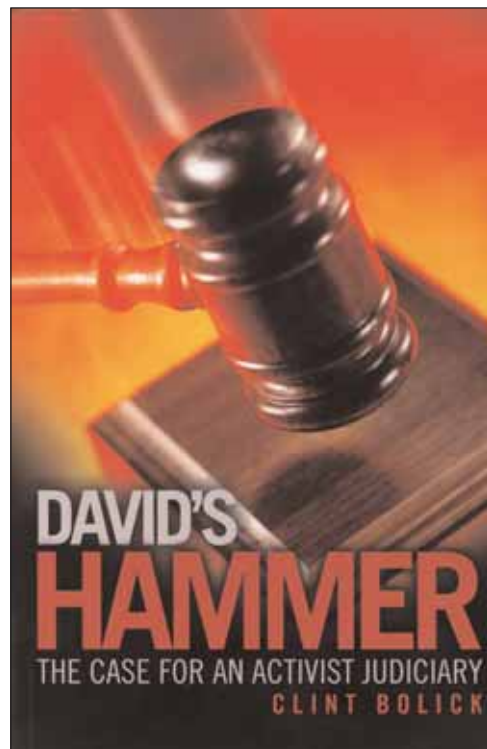
David's Hammer— The Case For an Activist Judiciary

by Clint Bolick, Cato Institute, 188 pages

reviewed by Erika Birg

David's Hammer—The Case For an Activist Judiciary by Clint Bolick is premised on Bolick's theory that an activist judiciary is critical to fulfilling our founding fathers' dream of freedom; that is, that our courts are the most important branch to ensure the protection of individual liberty. Bolick, now director of the Goldwater Institute Center for Constitutional Litigation in Phoenix, Ariz., is a pre-eminent constitutional litigator, having represented numerous individuals seeking to overturn governmental legislation that, in Bolick's view, impeded the essential elements of liberty—economic freedom, private property rights and the First Amendment (primarily the freedom of association and freedom of speech).

Through tales of his cases, from his involvement in the "wine cases" in which wine producers challenged state bans on direct shipping of wine from out-of-state to challenging District of Columbia's regulations involving African hair-braiding and shoe-shine businesses and Denver's regulation of taxi cab drivers, Bolick puts forth a persuasive argument that individ-



ual liberty must be guarded zealously by the judiciary. Indeed, Bolick's primary thesis is that the "ideal judge . . . is one who broadly interprets both constitutional liberties and limits on government power, regardless of the context." Hence, he argues that an "activist judiciary" is not to be condemned but encouraged.

In *David's Hammer*, Bolick takes on both conservatives and liberals on the issue of what is "judicial activism" and attempts to change the way "activism" is viewed. Greater sins, he believes, are judicial lawlessness and judicial abdication. He argues that the role of

our courts is to protect the Constitution, and that the Constitution's role is to preserve freedom and limit government's intrusion into those freedoms.

Admittedly, *David's Hammer* is not always easy to follow, but in the end, Bolick accomplishes what he set out to do—get the reader to think about why individual causes and individual cases can make a difference for all of us. Bolick begins with a representative case that most lawyers followed for one reason or another—the “wine cases” (which I followed because of the wine). In this early chapter, the author sets the stage for the reader to understand how some of the most important constitutional cases begin with the involvement of an individual and the mind of a creative and passionate lawyer. Indeed, Bolick's argument is best illustrated through his personal involvement in cases where the commitment of a lawyer and the ruling of a court directly, and positively, affected someone's lot in life.

Bolick's analysis of the roots of judicial review, although a necessary portion of the book for non-lawyers (and as a refresher for many lawyers), may tempt a reader to put the book down, but don't. The historical lesson is brief and a good reminder of how we got where we are today with respect to the courts' very important role in our tripartite scheme of governmental checks and balances.

One of the more compelling arguments in *David's Hammer* is Bolick's analysis of the Supreme Court's eminent domain jurisprudence. In his chapter on “Private Property Rights,” Bolick walks the reader through the *Kelo v. City of New London* case. *Kelo* involved the plight of Susette Kelo and her neighbors in New London, Conn., whose homes were taken through eminent domain so that the city could allow developers to construct a marina, research and office space, retail establishments and parking lots. Although Bolick clearly has a viewpoint on the mat-


ter, which he does not seek to hide, his defense of individual liberty in the face of governmental action (or, as he says, “government tyranny”), is eloquently articulated through a historical analysis of how and why the Court reached its decision.

Bolick's analysis of the different viewpoints of the Supreme Court justices, using University of Chicago law professor Cass Sunstein's categories of judicial philosophies—perfectionism, majoritarianism, minimalism, and fundamentalism—provides additional insight into how the Supreme Court justices think. Taking the reader through some of the more important cases over the years during which the Court was led by Chief Justice Rehnquist, Bolick provides evidence for his conclusion that the Rehnquist Court, overall, developed a “relatively strong record in fulfilling its role as a watchdog over other branches of government and as a guardian of individual liberties.”

He carries that conclusion through into his explanation of why he believes that Justice Clarence Thomas is the “Model Justice.” Through analysis of various decisions, Bolick concludes that Justice Thomas is indeed a “Model Justice,” given his understanding that “[o]ur future as a free society depends in large part on the determination of justices to faithfully apply the rule of law embodied in our Constitution.”

One of the other characteristics that makes this a good book for

lawyers is Bolick's demonstration of the works of pro bono law firms that initiate litigation on behalf of individuals. Bolick worked for both the Pacific Legal Foundation, which focuses on property rights, and at the Institute for Justice. In his vignettes about individuals and their cases, Bolick also illustrates the important role that these firms play in providing legal representation for individuals whose liberties might otherwise be eliminated without any recourse.

Although this is not a book that you would want to grab as you head down to the beach, it is an excellent critique of “judicial activism” and a thoughtful attempt to advocate for judicial protection of individual liberties against government intrusion. 



Erika C. Birg is a partner with Seyfarth Shaw, LLP, in its Atlanta office, where her practice focuses on commercial litigation,

including contract, business tort and trade secret matters. Birg received her undergraduate degree with distinction from the University of North Carolina at Chapel Hill and her Juris Doctorate from Emory University School of Law. Following law school, Birg clerked for the Hon. Stanley F. Birch Jr. on the U.S. Court of Appeals for the 11th Circuit and then for the Hon. Willis B. Hunt Jr. on the U.S. District Court for the Northern District of Georgia.



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See www.iclega.org for locations
6 CLE Hours
- OCT 18** Public Investors Arbitration
PIABA 16th Annual Meeting
Amelia Island, Fla.
16.3 CLE Hours
- OCT 19** ICLE
*ADR Institute and the 2007 Neutrals'
Conference*
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- OCT 19** ICLE
Advanced Health Care Law
Atlanta, Ga.
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6 CLE Hours
- OCT 22** NBI, Inc.
*Negotiating Favorable Divorce
Settlement*
Atlanta, Ga.
6 CLE Hours
- OCT 23** Georgia State University
School of Law
Corporate Intellectual Property Institute
Atlanta, Ga.
12 CLE Hours
- OCT 23-24** Lorman Education Services
Like-Kind Real Estate Exchanges
Atlanta, Ga.
6 CLE Hours
- OCT 23** Lorman Education Services
*Covenants not to Compete and Trade
Secrets*
Self-study
1.5 CLE Hours
- OCT 24** ICLE
Child Welfare Attorney Training
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- OCT 25** ICLE
Aviation Law
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours

October-December

OCT 25 ICLE
Admissibility of Expert Testimony in Georgia
 Atlanta, Ga.
 See www.iclega.org for locations
 6 CLE Hours

OCT 26 ICLE
Georgia Personal Injury Practice
 Atlanta, Ga.
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 6 CLE Hours

OCT 26 ICLE
Premises Liability
 Atlanta, Ga.
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 6 CLE Hours

OCT 26-27 Emory University School of Law
From Silver to Gold-The Next 25 Year of Law and Religion
 Atlanta, Ga.
 13 CLE Hours

OCT 30 ICLE
Technology Law Institute
 Atlanta, Ga.
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 7 CLE Hours

OCT 31 ICLE
Family Law Seminar
 Augusta, Ga.
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 6 CLE Hours

NOV 1 ICLE
Georgia Auto Insurance Claims Law
 Atlanta, Ga.
 See www.iclega.org for locations
 6 CLE Hours

NOV 1 ICLE
Liability of Local Governments
 Atlanta, Ga.
 See www.iclega.org for locations
 6 CLE Hours

NOV 1 ICLE
Auto Insurance law
 Atlanta, Ga.
 See www.iclega.org for locations
 6 CLE Hours

NOV 2 ICLE
Trial Technology
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 4 CLE Hours

NOV 2 ICLE
Nuts and Bolts of Adoption Law
 Atlanta, Ga.
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 6 CLE Hours

NOV 2 ICLE
Professionalism, Ethics and Malpractice
 Atlanta, Ga. – live satellite program
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 3 CLE Hours

NOV 5 Practising Law Institute
Patent Litigation 2007
 Atlanta, Ga.
 12 CLE Hours

NOV 6 NBI, Inc.
In-Depth Title Insurance Principles
 Atlanta, Ga.
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NOV 7-8 ICLE
Annual Sports and Entertainment and Intellectual Property Law Institutes
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- NOV 7** NBI, Inc.
Advanced Section 1031 Exchanges
Atlanta, Ga.
6.7 CLE Hours
- NOV 8** NBI, Inc.
An Attorneys Guide to Asset Protection
Atlanta, Ga.
6.7 CLE Hours
- NOV 8** ICLE
Professionalism, Ethics & Malpractice
Atlanta, Ga. – satellite rebroadcast
See www.iclega.org for locations
3 CLE Hours
- NOV 8** ICLE
Successful Trial Practice
Atlanta, Ga.
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6 CLE Hours
- NOV 8** ICLE
Buying and Selling Private Businesses
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 8** ICLE
Trial Evidence
Atlanta, Ga.
See www.iclega.org for locations
12 CLE Hours
- NOV 8-9** ICLE
Bankruptcy Law Update
Young Harris, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 9** ICLE
RICO
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 9** ICLE
Commercial Real Estate
Atlanta, Ga. – live satellite program
See www.iclega.org for locations
6 CLE Hours
- NOV 11-18** ICLE
Advanced Urgent Legal Matters
Tampa, Fla.
See www.iclega.org for locations
12 CLE Hours
- NOV 12** NBI, Inc.
Land Use and Zoning Law Litigation
Atlanta, Ga.
6 CLE Hours
- NOV 15** ICLE
Commercial Real Estate
Atlanta, Ga. – satellite rebroadcast
See www.iclega.org for locations
6 CLE Hours
- NOV 15** ICLE
Landlord and Tenant Law
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 16** ICLE
Accounting for Lawyers
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 16** ICLE
Business Organization Litigation
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 16** ICLE
Recent Developments
Atlanta, Ga. – live satellite program
See www.iclega.org for locations
6 CLE Hours

October-December

- NOV 16** Lorman Education Services
Legal Aspects Condominium and Homeowners Associations
Savannah, Ga.
6 CLE Hours
- NOV 26** NBI, Inc.
Proving Damages Caused by Mold Infestation
Atlanta, Ga.
6 CLE Hours
- NOV 29** ICLE
Recent Developments
Atlanta, Ga. – satellite rebroadcast
See www.iclega.org for locations
6 CLE Hours
- NOV 29** ICLE
Family Immigration
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 29** ICLE
Dickert's Foundations and Objections
Augusta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 29-DEC 1** ICLE
Medical Malpractice Institute
Amelia Island, Fla.
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12 CLE Hours
- NOV 30** ICLE
Trial Advocacy
Atlanta, Ga. – live satellite program
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6 CLE Hours
- NOV 30** ICLE
Basic Fiduciary Practice
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- NOV 30** ICLE
Law of Torts
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 5** ICLE
The 25 Credibility Arguments for Deposition and Trial
Atlanta, Ga.
See www.iclega.org for locations
6.5 CLE Hours
- DEC 6** ICLE
Mastering Medical Records
Atlanta, Ga.
See www.iclega.org for locations
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- DEC 6** ICLE
Trial Advocacy
Atlanta, Ga. – Satellite Rebroadcast
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6 CLE Hours
- DEC 6-7** ICLE
Defense of Drinking Drivers Institute
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13.5 CLE Hours
- DEC 6-7** ICLE
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12 CLE Hours
- DEC 7** ICLE
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6.5 CLE Hours

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- DEC 7** ICLE
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Atlanta, Ga.
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6 CLE Hours
- DEC 13** NBI, Inc.
*Fundamental Probate Procedures
and Practice*
Atlanta, Ga.
6 CLE Hours
- DEC 13** ICLE
Section 1983 Litigation
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 13** ICLE
Dealing with the IRS
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 13** ICLE
Selected Video Replay
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 14** ICLE
Selected Video Replay
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 14** ICLE
*Professional and Ethical Dilemmas
in Litigation Video Replay*
Macon, Ga.
See www.iclega.org for locations
3 CLE Hours
- DEC 14** ICLE
Jury Trial
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours

- DEC 14** ICLE
Matrimonial Law TP Workshop
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 14** ICLE
Labor and Employment Law
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
- DEC 14** ICLE
Professional and Ethical Dilemmas
Macon, Ga.
See www.iclega.org for locations
3 CLE Hours
- DEC 14** ICLE
Recent Developments
Atlanta, Ga.
See www.iclega.org for locations
6 CLE Hours
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At its business meeting on July 25, 2007, the Council of Superior Court Judges approved proposed changes to Uniform Superior Court Rules 13 and 24, as well as changes to the Family Violence Protective Order. A copy of these proposed amendments may be found at the Council's website at www.cscj.org. Should you have any comments on the proposed changes, please submit them in writing to the Council of Superior Court Judges at 18 Capitol Square, Suite 108, Atlanta, GA 30334 or fax them to 404-651-8626. To be considered, comments must be received by Friday, Nov. 16, 2007.

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