The Appellate Review

The Newsletter of the Appellate Practice Section
State Bar of Georgia
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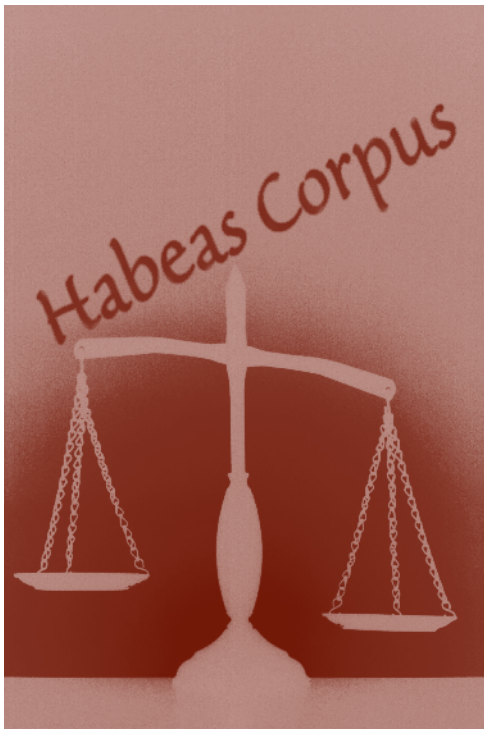
The Decline, Fall and Possible Resurrection of Indigent Appellate Advocacy in Georgia

by James C. Bonner Jr.

People who are familiar with criminal appeals generally understand that it is better for the client to have the same attorney who handled his trial also involved in his appeal. That way, counsel has an interest in projecting and preserving the appellate issues at the trial level, which is so critical to their availability and their success. There is similar widespread agreement that it is better for any system of administering public defense to have trial counsel involved in the appeal. This conserves resources, eliminates redundant labor and avoids many of the bureaucratic pitfalls of case transfers.



A trilogy of State Supreme Court opinions in the last decade or so undermined these considerations. They seemed to subordinate both the advantages of *unitary* counsel and the public defender system itself to an uninformed and anxiety-driven prerogative of the defendant to substitute appellate counsel for largely illusory gains. Recently, with the State Supreme Court having apparently restored to the process a role for professional judgment, there is reason to hope that the public defender system can finally redirect its appellate resources more effectively and more efficiently.

As with any attempt to understand a current state of affairs, such as the state of indigent appellate assistance in Georgia, some history is a useful background.

Georgia affords no right to counsel on habeas corpus and subscribes to the traditional practice placing venue in the site of detention rather than back in the trial court where the record, the evidence and the witnesses are. These difficulties naturally place an even heavier burden on the direct appeal as the most realistic vehicle for relief from criminal convictions.

Georgia also subscribes to the *earliest opportunity* rule which requires that claims of error be raised at the soonest feasible juncture and which is enforced by subsequent procedural bars, particularly on habeas corpus. Such a rule is particularly sensible where an error thus raised can still be corrected or avoided but its benefits attenuate after that. The exceptional thing about the Georgia rule is its extension to claims of ineffective assistance which could be raised during the appellate process. This extension is possible because our motion-for-a-new-trial practice is liberal enough to entail further evidentiary hearings and thus expand the record to embrace such claims. These claims are usually undeveloped on the trial record alone since trial counsel's reasoning will seldom be apparent and the *harm* of any professional dereliction will seldom be developed. Georgia's policy in this respect is the opposite of federal practice and that of most jurisdictions. In order to avoid disrupting the appellate process and to retain the benefits of unitary counsel, they encourage ineffectiveness claims to be brought collaterally, on habeas corpus or its equivalent, and they erect no procedural bar if they are deferred from direct appeal. (*Massaro v. United States*, 538 US 500 [2003].)

Since no lawyer can challenge his own performance (or that of his colleagues), the *earliest opportunity* only arises

See Advocacy on page 10

Message from the Chair

by Christina C. Smith
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Appellate Practice Section members have been busy this past year. Three members were elevated to judgeships on the Georgia Court of Appeals: Keith Blackwell, Stephen Dillard, and this section's founder, Chris McFadden. Last summer we co-hosted a retirement reception for Georgia Court of Appeals clerk Bill Martin and last fall we contributed to the State Bar's B.A.S.I.C.S. program, which helps inmates transition to life outside prison. In January, we co-hosted lunch with the State Bar Judicial Section during the mid-year bar meeting in Nashville (many thanks to Judge McFadden for speaking). Coming up are the State Appellate Practice Seminar on Feb. 25, co-chaired by Ronan Doherty and Simon Weinstein, and a lunch in June to be co-hosted with the Criminal Law Section during the State Bar Annual Meeting in Myrtle Beach (speaker invitations are outstanding, but the honorees will be familiar). We are also working with a new designer to re-vamp our web site and planning to hold some lunch meetings this spring.

My thanks to our immediate past chair, Amy Weil, for her leadership and counsel, and to our vice-chair Ronan Doherty and our secretary/treasurer Paul Kaplan for all their hard work. Paul is also the chair of our section's legislative committee, which reviewed a number of upcoming bills last year, and provided fast, accurate, thoughtful reports to the bar. In fact, Paul is now serving on a State Bar committee examining the future of our appellate courts' record appendix rule, after the legislature reduces the transcript costs, along with Chris McFadden.

My thanks also to the members and former officers who are helping this section evolve. Feedback is critical to developing an active, responsive section that serves the needs of its members, so please let me know what you think about our projects, good or bad, and tell me your ideas for the future. I'm honored to serve as chair. (But it's a lot more work than I realized!)

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Christina Cooley Smith is the senior staff attorney for Hon. Anne Elizabeth Barnes on the Court of Appeals of Georgia, and chair of the Appellate Practice Section.

Inside This Issue

To contribute information to the newsletter, please contact Scott Key, editor, at scottkey @bellsouth.net

Resolution Honoring Retiring Chief Deputy Clerk Stinchcomb

THE SUPREME COURT OF GEORGIA

Whereas: Lynn Miller Stinchcomb began working for the Supreme Court of Georgia on February 16, 1978 in the year she turned 26 years old and the first cellular mobile phone in the nation was introduced; and

Whereas: She has risen to the position of Chief Deputy Clerk during her more than three decades serving the Court; and

Whereas: She has served under 13 Chief Justices and 22 Justices; and

Whereas: She is the institutional memory of this historic Court; and

Whereas: She has been the driving force behind initiatives of modernization, having had the vision and acumen to transform the Court's docket system into an Internet-based electronic system that has revolutionized the Court; and

Whereas: She has always held the interests of this Court first and foremost; and

Whereas: The Justices of this Court describe her as tenacious, tough, loyal and true; and

Whereas: If this Court could enter an order requiring her to reconsider her decision to leave, it would;

Now therefore be it resolved:

That the Supreme Court of Georgia expresses its profound gratitude to Chief Deputy Clerk of the Court Lynn Miller Stinchcomb for her loyalty, hard work, friendship and years of service as a dedicated and devoted public servant.

Photo by Bob McAteer

Lynn Miller Stinchcomb and Chief Justice Carol W. Hunstein at the Feb. 4, 2011, presentation of the Supreme Court of Georgia resolution honoring the deputy clerk upon her retirement.

Remembering Hon. Debra Halpern Bernes

by Christina C. Smith

The Hon. Debra Bernes came to the Court of Appeals bench in January 2005, after a long, hard-fought election. After years in the Cobb County District Attorney's office, many of them in the appellate division, followed by a stint in private practice, Bernes was in her element as an appellate judge, applying her skills in a practical, far-reaching way. She was a thorough and thoughtful judge, who decided cases with current and future litigants, lawyers and judges in mind. Her staff and fellow judges speak of her with great affection and admiration, and her opinions reflect the judicial and civic philosophies she lived by.

Judge Bernes reached the merits of an appeal whenever she could, including cases involving pro se parties whose arguments could sometimes be a little garbled. If a party presented a recognizable argument, Bernes addressed it rather than simply chastising him or her for not following the rules and denying the claim without further review. For example, in *Portee v. State*, 277 Ga. App. 536 (627 SE2d 63) (2006), she noted that the appellate court could dismiss an appeal if the appellant's brief did not contain a statement about the preservation of error below, as required by the court rules. But because the appellant in *Portee* was pro se, she held, the Court would "exercise our discretion and proceed to review his claims of error to the extent possible given the limited record before us." If a pro se party's brief was completely unintelligible, Bernes at times even directed the Clerk of Court to send the party a copy of *A Citizen's Guide to Filing Appeals in the Court of Appeals of Georgia*, which explains in plain language how to appeal a case and what to include in a brief.

Termination of parental rights and custody cases were of first priority for Bernes, who had them pulled from the file room as soon as they were briefed and worked on them immediately. In her view, having one's parental rights terminated was just as traumatic as going to prison and she strongly believed that parents are entitled to due process during all stages of the proceedings. In a unanimous whole-court case, she authored an opinion holding that a parent who was denied her right to counsel during termination proceedings was not required to show harmful error, overruling and disapproving several cases holding otherwise. She wrote, "[W]hen the state is terminating a parent's fundamental and fiercely guarded right to his or her child, although technically done in a civil proceeding, the total and erroneous denial of appointed counsel during the termination hearing is presumptively harmful because it calls into question the very structural integrity of the fact finding process." *In the Interest of J.M.B.*, 296 Ga. App. 786, 790-791 (676 SE2d 9) (2009).

At the judge's direction, her staff read the record in every case from cover to cover, including every word of relevant depositions and transcripts, rather than relying solely on the parties' summations of the facts. If an issue needed to be tried, Bernes did not hesitate to reverse grants of summary judgment or directed verdicts to defendants. For example, in her first year on the bench, she reversed a trial court's directed verdict in a medical malpractice case against three obstetricians. In a 16-page opinion, Bernes exhaustively reviewed the trial testimony and the applicable law, and while "emphasiz[ing] that appellees highly dispute appellants' version of the facts," determined that the appellants had presented sufficient evidence to withstand a motion for directed verdict. *Walker v. Giles*, 276 Ga. App. 632, 648 (624 SE2d 191) (2005).

Bernes was also aware that her 20 years in the district attorney's office gave her a certain perspective in criminal cases, and with that in mind, she made a concerted effort

to look at those appeals with a fresh eye. She made sure that the State followed the rules, and that if someone was convicted of a crime, they were convicted properly.

Judge Bernes was adamant about never disparaging a lawyer, judge or party in her opinions, and believed that such commentary was not necessary to reach the merits of a case. She ensured that her opinions reflected a tone of professionalism and respect. Bernes also felt a duty to give back to the voters who put her in office, and for most of her time on the bench, she never declined an invitation to speak because she believed that as a public servant, she had an obligation to be accessible and maintain contact with the citizens that she served.

Judge Bernes inspired everyone at the court with her kindness, her thoroughness, and her determination. Her staff is grateful they had the opportunity to work with this extraordinary jurist, and she is much missed, but her legal legacy lives on in the pages of the Georgia Appeals Reports.

This article could not have been written without the assistance of Judge Bernes' talented staff: Administrative Assistant Terry Miller and staff attorneys Gordon Hamrick, Monica Owens and Tiffani Moody.

Appellate Practice Seminar

The Appellate Section of the State Bar is hosting its annual Appellate Practice Seminar on Feb. 25, 2011 at the Bar Center in Atlanta. Once again, the seminar has received generous support from the Judges of the Court of Appeals of Georgia and the Justices of the Supreme Court of Georgia, many of whom have agreed to participate in panel discussions on the appellate process. Together with several experienced practitioners, the Judges and Justices will share their advice on brief-writing, oral argument and professionalism in appellate advocacy.

In addition, the Clerks of the Supreme Court and the Court of Appeals will give a presentation on recent rules changes in their respective courts.

The seminar also will include presentations on interlocutory appeals and preserving issues for appeal, as well as the e-filing projects under way in both the Supreme Court and the Court of Appeals.

As in past years, the Appellate Section expects a good turn-out and a lively discussion on Feb. 25.

Topics include:

- Interlocutory and Discretionary Appeals: Don't Get Fooled (Again)
- Preserving Issues for Appeal
- The Winning Brief: How To Capture an Appellate Judge's Attention (and How to Lose It)
- How to E-File Your Winning Brief in Georgia's Appellate Courts
- A Conversation with the Clerks: Rules Changes in the Appellate Courts
- Effective Oral Argument: Don't Snatch Defeat from the Jaws of Victory
- Professionalism in the Appellate Process

A registration form can be found at the back of the newsletter.

2010 Recap

by Amy L. Weil

The Appellate Practice Section had a busy 2010.

It began with our Jan. 8 luncheon at the State Bar's Midyear Meeting at the W Hotel in Midtown. Those who braved last year's blizzard were rewarded with a memorable presentation by Former Supreme Court of Georgia Chief Justice Leah Ward Sears, who dispensed tips for the appellate practitioner and discussed her recent transition into private practice.

On Feb. 26, the Section hosted its annual Georgia Appellate Practice Seminar. This well-attended program featured panel discussions that included: Supreme Court of Georgia Chief Justice Carol W. Hunstein; former Chief Justice Norman S. Fletcher; former Chief Justice Leah Ward Sears; Justices P. Harris Hines; Justice David E. Nahmias; and Court of Appeals of Georgia Judges: Anne Elizabeth Barnes; Sara L. Doyle; J.D. Smith; and Debra H. Bernes.

On April 7, Eleventh Circuit Judge Gerald Bard Tjoflat was our guest speaker at a luncheon at the Commerce Club. He regaled us with his experiences from over 35 years on the federal appellate bench.

On June 18, the Section hosted a "Meet the 2010 Georgia Court of Appeals Candidates" luncheon at the Bar's Annual Meeting at the Amelia Island Plantation in Amelia Island, Fla. A Q & A session with the candidates for Georgia Court of Appeals,

On July 28, 2010, the Appellate Practice Section and the Court of Appeals co-hosted a retirement celebration for William L. Martin, III, who had been the Clerk and Court Administrator of the Court of Appeals of Georgia since 1994. The section presented a plaque to Mr. Martin "in recognition and appreciation of his professionalism, availability, reliable advice, and years of service at the Georgia Court of Appeals."

On Sept. 28, Emory Law Professor Robert Schapiro spoke at a Section luncheon highlighting the U.S. Supreme Court's 2009-10 term.

On Oct. 14 & 15, the Section co-hosted, with the Appellate Practice Sections of the Alabama and Florida Bars, the third Eleventh Circuit Appellate Practice Institute (ECAPI III), the popular bi-annual seminar that focuses exclusively on federal appellate practice in the Eleventh Circuit. A key to the success of this event is the overwhelming support of the Eleventh Circuit judges. Members of the Court participating in ECAPI III included Chief Judge Joel F. Dubina, as well as Judges R. Lanier Anderson III, Rosemary Barkett, Susan H. Black, Ed Carnes, James C. Hill, Frank M. Hull, Phyllis A. Kravitch, Beverly B. Martin, William H. Pryor Jr. and Charles R. Wilson, former Judge Stanley F. Birch, Jr., and Clerk of the Court John Ley.

On Oct. 28, 2010, the Section closed out the year by serving as a "Five Star Sponsor" of "Backing B.A.S.I.C.S.," the second annual benefit reception, hosted by Nelson Mullins and supported by the Lawyers Foundation of Georgia. The "Bar Association Support to Improve Correctional Services" program, sponsored by the BASICS Committee of the State Bar of Georgia, is an offender rehabilitation program that teaches inmates how to transition successfully to the workforce and community. Funding for the upcoming year was uncertain, and bar sections, associations, businesses, lawyers, and judges pitched in to help the program continue.

Amy Weil of The Weil Firm in Atlanta specializes in appellate litigation and is the immediate past chair of the Appellate Practice Section.

Carol Phelps; BASICS Director Ed Menifee Sr.; Joshua Menifee; and program graduates Cheryll Smith and Randy Mobley at the Oct. 28, 2010 "Backing BASICS" reception.

BASICS director Ed Menifee, Sr. describes the program's goal, to teach inmates self-respect and give them the tools they need to succeed outside of prison.

Clerk Bill Martin Retires from the Court of Appeals

Last summer, the Appellate Practice Section co-hosted a retirement celebration for William L. Martin III, the outgoing Clerk and Court Administrator of the Court of Appeals of Georgia.

Martin was honored with speeches and presentations in the Court of Appeals courtroom, followed by refreshments in the rotunda. Martin held his position for almost 20 years.

The retirement celebration was held on July 28, 2010.

Photos by Tim Smith

Retiring Clerk Bill Martin accepts a plaque from Amy Weil, then Chair of the Appellate Practice Section, while Christina Smith looks on.

Judge John J. Ellington, currently Chief Judge of the Court of Appeals, spoke about Martin's tenure at the court.

Judge M. Yvette Miller, then Chief Judge of the Court of Appeals of Georgia, addressed the crowd in the courtroom.

Presiding Justice George H. Carley of the Supreme Court of Georgia thanked Martin for his public service.

Bill Martin says goodbye to his friends and colleagues in the courtroom of the Court of Appeals of Georgia.

SPLC Committee Update

by Paul Kaplan

The State Practice and Legislation Committee is tasked with proposing and reviewing legislation that may affect the appellate process in Georgia courts. As new measures are introduced in the General Assembly each year, bills with a potential impact on appellate practice are flagged by Bar lobbyists and sent to the Committee for review. After extensive discussion, the Committee then forwards a written report to the Bar's leadership to help guide and inform its discussions with state lawmakers.

During the 2010 legislative session, the Committee (chaired by Paul Kaplan of FSB Fisher Broyles and consisting of Josh Belinfante of Robbins Freed, Keith Blackwell of Parker Hudson Rainer & Dobbs, Jim Bonner of the Georgia Public Defenders Standards Council, Brian Dempsey of Freeman Mathis and Gary, Decatur sole practitioner Chris McFadden, Leighton Moore of Troutman Sanders, Christina Smith of the Georgia Court of Appeals, and Jeff Swart of Alston & Bird) reviewed and reported on several bills, including:

- HB 357, which would have required attorneys to notify their clients in writing of the availability of a court reporter and that the failure to obtain a transcript may impede the client's ability to appeal an adverse ruling.
- HB 956, which would have allowed trial courts to dismiss appeals that were improperly filed by notice, rather than by an application for discretionary review.
- SB 429, which proposed adding two seats to the Georgia Supreme Court and three to the Court of Appeals.

Last Spring, the Committee was heavily involved in the Bar's response to HB 1055, which raised the cost of copying the record on appeal from $1.50 to $10 per page. Passed in the final days of the 2010 session and containing over 110 pages of largely innocuous increases to licensing fees for such things as pesticides, feed dealers, mortgage brokers and commemorative license plates, the bill's effect on appeal costs went unnoticed by the Bar and many legislators until after the measure was signed into law.

Together with the leadership of the State Bar, the Georgia Trial Lawyers Association, the Atlanta Bar Association and others, the State Practice and Legislation Committee worked quickly to develop a number of work-arounds for the fee increase. Within three weeks after the fee hike went into effect, and at the urging of a broad coalition of groups, the Supreme Court and Court of Appeals each adopted rules allowing parties to create and file a record appendix in lieu of the trial court record, and thus avoid the statute's onerous fees.

Last Fall, three of our members joined the Court of Appeals bench: In October, Keith Blackwell was appointed to succeed Judge G. Allen Blackburn, and in November, Chris McFadden was elected to succeed Judge Edward H. Johnson. We thank them both for their service and wish them all the best in their new roles.

The Committee added several new members last Fall as well. Again chaired by Paul Kaplan, now in-house at Home Depot USA Inc., the committee's ranks this year include Josh Belinfante of Robbins Freed, Jim Bonner of the Georgia Public Defenders Standards Council, Macon sole practitioner Charles Cork, Brian Dempsey of Freeman Mathis & Gary, Gordon Hamrick of the Georgia Court of Appeals, Atlanta sole practitioner John Kraus, Leighton Moore of Troutman Sanders, Christina Smith of the Georgia Court of Appeals, Jeff Swart of Alston & Bird, and Atlanta sole practitioner Roger Wilson.

As the General Assembly begins its 2011 session, our primary goal is to work with and encourage our appellate courts to improve and retain their record appendix rules.

While we are hopeful that last year's fee increase will be repealed, we believe that a record appendix option has important benefits beyond merely circumventing the fee increase. Most importantly, allowing the parties to submit their own record appendix can help avoid the considerable delay that parties often experience while waiting for trial courts to have the record copied for appeal.

At January's mid-year meeting, the Bar's Board of Governors adopted a resolution urging the Supreme Court of Georgia and Court of Appeals of Georgia to make their record appendix rules permanent. Three of our members—Paul Kaplan, Charles Cork and Jeff Swart—have been named to a Special Committee appointed by State Bar President Lester Tate and chaired by Bryan Cavan, to determine any issues that cause concern to the appellate courts and what recommendations the committee could suggest. We look forward to working with the courts and the many other constituencies represented on the president's Special Committee to help further the important goal of retaining the record appendix option.

Paul Kaplan, a senior attorney for commercial litigation at The Home Depot, is the secretary/treasurer of the Appellate Section and chairs the section's State Practice and Legislation Committee.

Hon. McFadden at the Midyear Meeting

By Scott Key

Approximately 23 attendees made the snow-ladened trek to the Appellate Practice Section luncheon co-hosted with the Judicial Section in Nashville, Tenn., held in conjunction with the State Bar of Georgia's Mid-Year meeting.

The Hon. Christopher McFadden, newly elected to the Court of Appeals of Georgia, gave a fascinating talk on the process of campaigning for the appellate bench, the process of moving into the court as a new judge, and his first days as the newest judge on the Court of Appeals.

Participants heard a "nuts and bolts" account of the process of getting elected to a statewide judicial seat and how Judge McFadden integrated lessons learned from his unsuccessful bid in 2008 to get into a runoff and ultimately win a resounding victory in the runoff

Hiring a Strategist/Consultant

McFadden noted that there are a few people in the state that know how to best run for statewide election. For the 2010 election, he hired one of them. The most innovative contribution was the introduction of what he termed "Robo calls." The consultant relied upon a list of phone call recipients likely to vote in the runoff election, the use of recorded endorsement messages by key Democratic and Republican figures throughout the state, and strategic times for calling. The bottom line is that robo-calls work, even if some people called him back to complain about them.

Meetings Meetings Meetings

In addition to working with a consultant and executing a set of recorded phone calls to his target audience, McFadden said that he spent a great deal of time going to meetings. Toward that end he devoted a great deal of time to attending civic organization meetings as well as Democratic and Republican party meetings throughout the state.

However, one of the challenges that came from attending partisan party meetings was maintaining a sense of "neutrality" in partisan meetings. He seemed proud of the fact that the judiciary in Georgia is non-partisan. He noted that there were moments, though few and far between, where members of his audience pressured him to "reveal" his political leanings and threatened to assume things from his choice not to disclose.

The Use of Resources

One key strategy he noted for the use of resources was to raise money and use most of it at the end of the election. The strategy appears to pay off significantly if one considers that he finished second in the general election but finished resoundingly in first in the runoff

Qualifications Succinctly Discussed

McFadden noted that one of the keys to winning a statewide election court judicial race is to pick a theme, a short phrase or single word and run with it throughout the entire election. In this election, his strategy was to compare his qualifications for the job to all of the others whom he believed to be less qualified. "I wrote the book," a reference to his appellate hornbook, became a campaign theme that was simple, resonated, and encapsulated the whole idea of superior qualifications in a single pithy phrase.

Starting Out as Judge

A new judge has to find an office. And any vacancy on the Court creates a great deal of activity as judges move to more desired offices than the ones they currently occupy. It's a process he called "musical offices on a grand scale."

For those who could attend, the Appellate Practice Section's luncheon in Nashville, Tenn., was a great opportunity learning about running for an appellate office and starting out as a new appellate judge. It was also an opportunity to get a glimpse into lawyer's perspective from both sides of the bench.

Scott Key is a sole practitioner in McDonough, Georgia. His practice is devoted to criminal appeals and post-conviction proceedings.

The Hon. Christopher McFadden speaks at a lunch co-hosted by the Appellate Practice Section and the Judicial Section in Nashville.

Advocacy continued from page 1

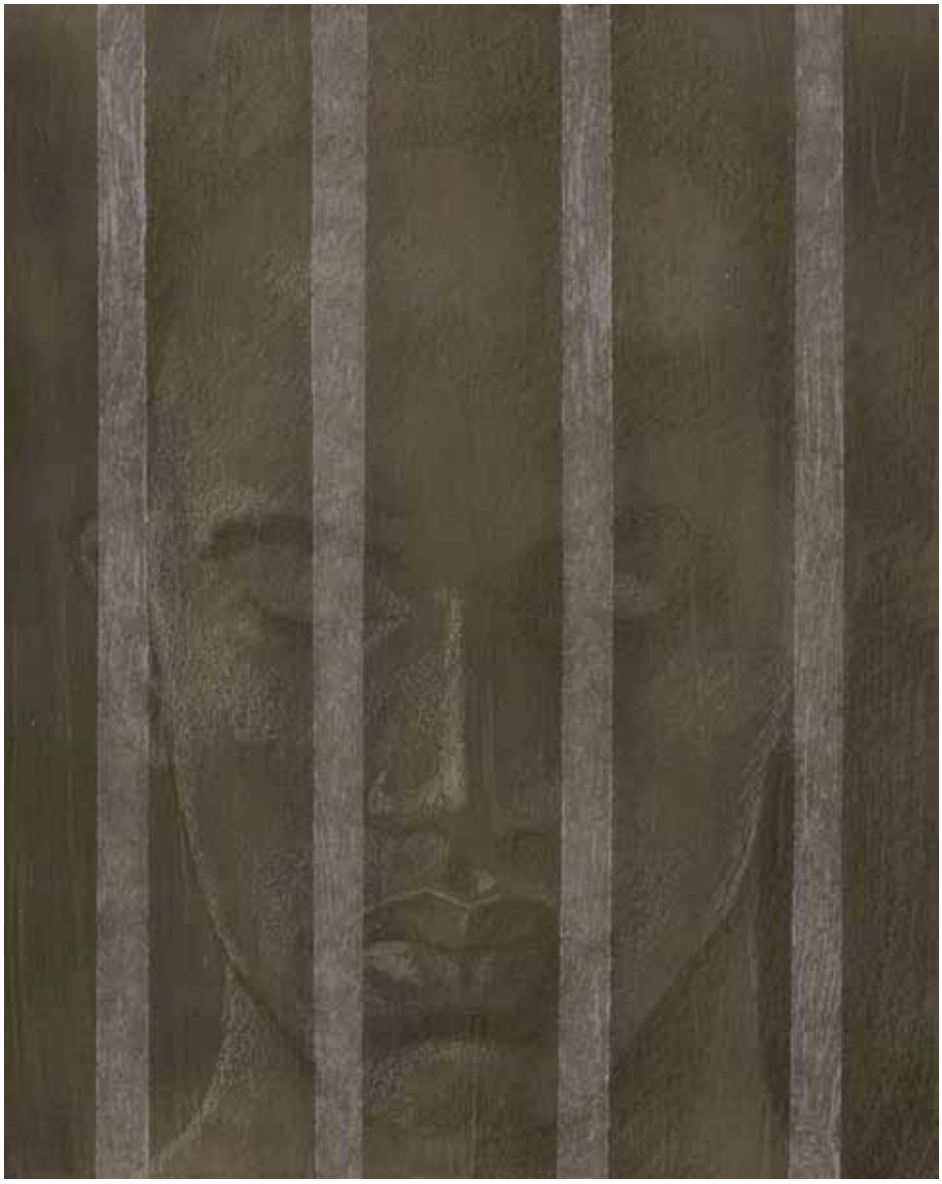
if independent counsel is substituted for trial counsel on appeal. This of course creates a certain incentive to substitute counsel. No one could much quarrel with a substitution made after a positive, professional evaluation of the merits of an ineffectiveness claim, but there is plenty of room for complaint when substitutions occur whimsically or for frivolous claims. Few such claims, after all, succeed, and those made by untutored laymen often have no basis other than a disappointing verdict.

There was a series of three particular cases which seemed to convert that incentive to substitute counsel into an actual prerogative of the defendant, utterly without reference to whether a claim could actually be articulated within the controlling legal principles. Some detail is necessary.

The first of these was *Johnson v. State*, 266 Ga. 775 (1996). There, trial counsel moved for a new trial, which was followed by a *pro se* motion asserting that he had rendered ineffective assistance. Counsel sought his own substitution but the court denied it and then addressed (and overruled) both motions on their merits, only thereafter appointing new counsel on the appeal. New counsel in turn filed an extraordinary motion raising ineffectiveness and seeking a further hearing, a motion still pending when the case reached the State Supreme Court. Recognizing that the defendant had no right to proceed both *pro se* and by counsel, the Court held that it was error below to address the *pro se* motion while the defendant was still represented by trial counsel and it remanded for consideration of the claim "under the representation of new counsel."

Kennebrew v. State, 267 Ga. 400 (1996), came on *Johnson's* heels. Kennebrew had a public defender at trial but private counsel subsequently appeared briefly, filed a skeleton motion for a new trial, and withdrew. Another public defender (a colleague of trial counsel) was appointed for the motion and appeal. Soon afterwards, Kennebrew informed the court that he wished to pursue an ineffectiveness claim and he asked for new counsel. The court declined and required Kennebrew to present his *pro se* claim while counsel argued the rest, finally denying relief on all grounds. The Supreme Court held that the trial court erred by addressing the *pro se* claim without first appointing new counsel, and it remanded for it to consider the *pro se* claim "under the representation of new counsel." Two justices dissented, disputing Kennebrew's entitlement to new counsel under the circumstances, where he had failed to make an initial showing that his claim was potentially meritorious. A series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one, they wrote. "[I]t cannot be an abuse of discretion to fail to appoint new appellate counsel to pursue a potentially frivolous ineffective[ness] claim." *Kennebrew*, over its dissent, thus clearly indicated that a claim of ineffective assistance and new counsel to press it were the defendant's prerogatives, irrespective whether it was frivolous.

That certainly seemed to be the message of *Garland v. State*, 283 Ga. 201 (2006), the capstone of this trilogy.



Following conviction, the defendant requested new counsel in order to raise a claim if ineffective assistance. His "trial counsel appropriately raised the issue on behalf of his client" as he sought to be substituted. (Although the opinion does not reflect it, counsel did not endorse the claim, only that "there wasn't a whole lot of objectionable stuff that was admitted so I think his main basis would be ineffective assistance . . . .") Citing a purported policy of the recently inaugurated state-wide public defender system (GPDSC) discouraging casual substitutions, the court declined. The Supreme Court's unanimous opinion held that this was error as a matter of Garland's constitutional right to conflict-free appellate counsel despite his indigence. It firmly rejected the notions that substitution should turn on any preliminary demonstration of potential merit (since an accused of means would have to run no such gauntlet) or that trial counsel had any role but to stand aside upon a claim against his own performance.

The *Garland* Trilogy

Thus opened the floodgates. The effects of the *Garland* trilogy on the actors on the defense side of the indigent appellate advocacy, individually and institutionally, were immense, immediate, and perverse.

Let me start with the defendant. Many who become entangled in the criminal law do not have the best judgment or social skills. In addition to the common disadvantages of poverty, many suffer from personality disorders or mental impairments. Many are unsophisticated and ill-educated, wholly unequipped to navigate alone through the intricacies of the law. An accused is rightly presumed to need the guiding hand of counsel throughout his prosecution.

Just tried and convicted, his anxiety should be at its apex and his confidence in his trial counsel at its nadir. He probably has little legal experience except as an accused and no legal training except what he can pick up so dubiously at the feet of the jail-house lawyers who might have his ear. There is no reason to suppose that he has ever read *Strickland v. Washington*, that he would understand it if he has, or that he would have the detachment to be able to apply it to his own circumstances in any event. He would ordinarily have no basis to understand what is "reasonable professional judgment" and what is not. Unequipped to peer through the mysteries of the law, to perceive the difference between good claims and poor ones, and to understand the benefits of dumping the latter to concentrate on the former, his natural predilection will be to raise as many issues as he can think of, to throw them all against the wall, and to let the courts see which stick.

The many decisions his lawyer made in his disappointing trial are a natural object of his views of what went awry. Any trial may present or omit various errors, but virtually every convicted defendant had a lawyer whose defense failed. And it always feels better to blame a sorry plight not on what one did himself did but on what someone else did. The remarkable thing is not that convicted defendants complain about their lawyers– it is that some of them do not.

Under the *Garland* trilogy, his complaint sets in train a substitution of counsel without anyone evaluating its actual substance or its legal viability. Ironically, although his expressions of dissatisfaction with trial counsel are utterly irrelevant in any substantive context (*Harden v. Johnson*, 280 Ga. 464 [2006]), in this context they are absolutely trumps. If he can only incant the words "ineffective assistance," he has a new lawyer.

What he might learn on later is that ineffectiveness claims are daunting, involve far more than losing the verdict, that they rarely prevail, that counsel's decisions need only to have been reasonable under the circumstances as they appeared at the time, that they entail a relatively high showing of harm upon the reliability and fairness of the trial, that his appeal will be delayed while new counsel gets up to speed and investigates these off–record claims, that the prerogative to raise the claim belongs exclusively to new counsel, and that if his new counsel does not raise the claim he has forfeited it–and the right to follow his own judgment-on any subsequent habeas.

Like most decisions a defendant is called upon to make, a decision to substitute counsel is a critical one, one which shapes the course of subsequent proceedings and which has important consequences. Yet oddly it is a decision which the *Garland* trilogy assures that he will make without proper advice or guidance–without the foggiest idea whether he has a real ineffectiveness claim or not.

Trial Counsel

What about trial counsel, particularly public defenders? Most criminal trial lawyers are trial lawyers because they prefer performing on their feet in court to the sedentary drudgery of legal research and brief-writing at a desk. Few like to do appeals (which, after all, commence with a verdict they lost) which is why many public defender offices have appellate specialists who work the cases with them. No one particularly likes to work for a complaining client either, but if trial counsel is going to be the subject of ineffectiveness claims, who would not naturally prefer to deal with them in his home court, before a known judge, than to take a day or two off to drive to the venue of some far-off prison?

With recent funding cuts, most public defenders–and their offices–are overburdened with cases. As a case-management device, the *Garland* trilogy is not necessarily unwelcome, sending as it does appellate cases out of the office. Indeed, if the client himself does not utter them spontaneously, many trial lawyers and a few public defender offices are happy to suggest the magic words themselves, most especially if the client or the case has been

difficult. When trial counsel himself suggests that perhaps he goofed, it has the unfortunate effects of exaggerating the defendant's belief in both the merits and prospects of an ineffectiveness claim.

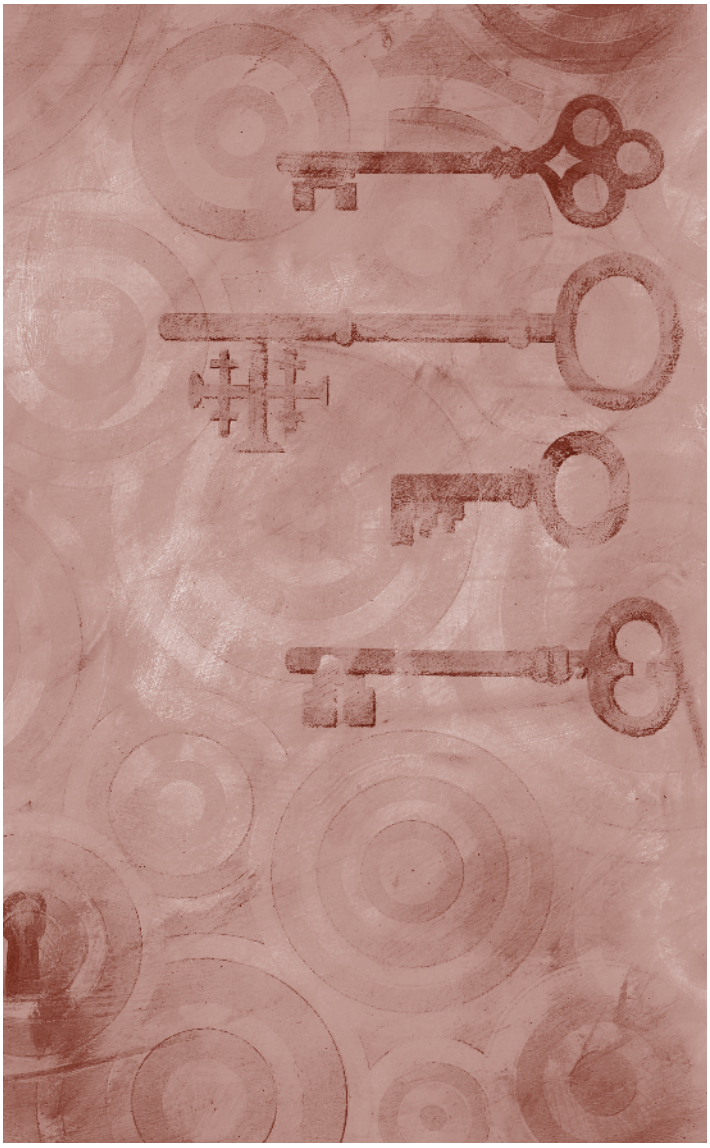
As any appellate advocate knows and as the late Hon. Jack Ruffin so well put it in his foreword to *Georgia Appellate Practice* by McFadden et al. (2nd ed. 2002), "[t]he success of an appeal always begins in the trial court where practitioners must master the twin essentials of record-making and record-protection." Is it really then to any defendant's interests to have his trial counsel disinvested in his appeal, going into the case confident that it is quite likely that his only post-trial responsibility will be as a witness, to show that his performance was reasonable under the rather generous standards of the Sixth Amendment? It is hard enough, after all, to prepare for a trial without worrying about all the hard work of laying the grounds for an appeal too, most especially, one might suppose, if the fruits of that labor are to be harvested by an antagonist, brought into the case to attack his own performance at the behest of an ungrateful client. Moreover, his usual feedback will be that he was not ineffective, that he need not change the way he did anything; his feedback from an appeal he or his office handled would more readily include what he could have done differently and better.

Casual Substitutions

What effect do casual substitutions have on new counsel? First of all, because the ineffectiveness claim apparently need not be articulated, investigated, or evaluated before any substitution, he may receive the case with the complaint completely undefined–and certainly without trial counsel's immediate response to it. He will not have the context with which to understand it and approach trial counsel with intelligent questions until he had collected the records and transcripts and read them, by which time trial counsel may not even recall the case, much less why he made one decision or another.

As the *Garland* trilogy's simple "incantation" procedure operates, there is no reason to think that new counsel's client has been told how daunting an ineffectiveness claim is or that the prerogative to bring them lies exclusively within the professional judgment of new counsel and that if he decides that it is meritless and should not be raised, the claim is forfeited on any habeas remedy. If his client was anxious and mistrustful of lawyers before, if his expectations of the claim were unreasonably heightened, imagine what he thinks when he learns all this and where the attorney-client relationship goes if new counsel's judgment is against raising the claim. Think the client is not going to pressure new counsel and complain if counsel follows his own professional judgment instead of the client's dictates?

Besides the pressure to raise a baseless ineffectiveness claim simply to humor his client, as the path of least resistance, new counsel's professional judgment is subject



to other pressures. For one, he may have to raise it because there are no other issues, other than the serendipitous and generally inferior pot-luck issues that arise unpredictably in the course of a trial, since trial counsel had no particular incentive to do the necessary appellate preparation in addition to his trial preparation. Georgia lawyers cannot file *Anders* (no-merit) briefs, but even a poor ineffectiveness claims can readily fill this void. Any glance at the reported opinions suggest that this is actually the case. They are filled with claims of dereliction or harm which are laughable to anyone familiar with *Strickland* and its progeny. These are Anders briefs by another name. Finally, new counsel has a personal interest also in raising an ineffectiveness claim against his professional judgment. If he elects not to assail trial counsel, a claim against his own performance is not barred and it is he who wins the all-expense paid trip to the venue of some desolate prison.

The Public Defender System

The effects on the nascent public defender system have been devastating. They would require the creation and funding of virtual parallel agency just to handle casual,

untutored ineffectiveness claims–except of course that is not fiscally possible to do this.

GPDSC first attempted to convert its central office appellate division from a training and consultancy to handling conflict appeals. Its staff—two lawyers, one retired and half-time lawyer, and one paralegal—was quickly overwhelmed with a caseload which rapidly reached 400 cases scattered all over the state.

It then attempted to recruit private lawyers willing to take on such cases at cut-rate fees. It proved difficult to recruit junior lawyers willing to work for the modest available fees because they gain the benefit of useful appellate experience–to be ineffective assistance cops, looking over the conduct of seasoned trial lawyers. And it proved difficult to recruit more seasoned lawyers who were willing to subject their professional judgment to the pressures of resisting or raising frivolous ineffectiveness claims for the fees involved. Especially in rural circuits with few lawyers (and fewer still willing to handle indigent appeals for what the agency can pay), many of these cases could not be transferred locally and had to be sent to counsel at some distance. With both the funds for substitutions of private counsel and the pool of willing counsel exhausted, GPDSC was recently forced to an inter-circuit trade-off system, where public defenders in one circuit exchange post-conviction cases with a neighboring circuit. While this system at least has the advantage of reducing counsel-induced case-management substitutions, the traded cases are more difficult for each office. None of them are paper cases: they require local investigations, local hearings, and they involve judges and prosecutors to whom new counsel are strangers and from whom, as carpetbaggers, they receive home-cooking. Meanwhile, the client has likely moved to a prison in yet another place, making personal contacts and interviews more time-consuming, difficult, and expensive.

As with any case transfer arrangement, there are abundant bureaucratic opportunities for files and papers to be misplaced or lost or responsibilities confused. New counsel may be awaiting a transcript on the desk of a court reporter who does not know where to send it. New counsel may acquire the trial transcript without realizing that there were important proceedings two weeks earlier about which he has no clue. Under the best of circumstances, with a complete file and record, it takes him time to get up to speed, usually without the help of trial counsel whose position has become antagonistic and with a client meanwhile growing increasingly impatient.

These sorts of difficulties would exist for well-founded ineffectiveness claims, but at least there they would be justifiable and would involve far fewer cases. The problem is that without the need, power or ability to investigate and eliminate patently poor claims at the outset, those same difficulties are imposed indiscriminately, on a far wider array of cases.

The Institutional Effects of *Garland*

Then there are the institutional effects of the *Garland* trilogy, the effects upon the defense function itself. Georgia has taken what the Supreme Court in *Strickland* plainly expressed as a warning against "intrusive post-trial inquiry into attorney performance criminal trials" lest "[c]riminal trials resolved unfavorably to the defendant [be] increasingly followed by a second trial, this one of counsel's unsuccessful defense" as an invitation to do just that. Georgia practice under the trilogy has virtually institutionalized an ineffectiveness stage of post-conviction review, actually dampening the ardor and boldness of trial counsel even as it diminishes the prospects of appellate success by making the appeal another lawyer's problem. By encouraging substitutions without regard to the substantiality of any ineffectiveness claim, the trilogy has actually reversed *Strickland's* presumption that trial counsel has performed professionally.

It has generated poor ineffectiveness claims–the reports are full of them–with little assurance that it has uncovered many which would not have been transferred anyway by trial counsel and raised anyway by new counsel, both exercising a professional judgment freed from the trilogy's pressures. Any concern that trial counsel handling the appeal might overlook or conceal his own deficient

performance is misplaced. One of the seminal cases holding that a lawyer could not attack is own performance, after all (*Castell v. Kemp*, 254 Ga. 556 [1985]), was a motion to disqualify habeas counsel who was doing just that. As mentioned above, most trial lawyers dislike and avoid appellate practice and many, in the aftermath of a lost verdict, are if anything too eager to fall on their own swords.

If prompt resolution of these claims was a goal, it has not been very well-served either. If anything, the undue primacy given ineffectiveness claims, requiring automatic assignment to outside counsel who are frequently outside the venue, has slowed the entire criminal appellate process and clogged the lower courts, resulting in slower relief for everyone.

By encouraging ineffectiveness claims regardless of professional judgment or even against professional judgment, the subject of the prosecution at the appellate stage changes from the conduct of the defendant to the conduct of his lawyer. It is a good thing that Georgia has long abandoned rehabilitation as a penological goal, because the encouragement of legally promiscuous ineffectiveness claim assures that defendant who enter upon their prison service in a frame of mind more likely blaming their lawyers than themselves.

The trilogy has utterly undermined the inestimable advantages of unitary counsel. For the short-sighted gain of an opportunity to criticize trial counsel–and again, successful ineffectiveness claims after all are rare–what the defendant loses is trial representation which actually coordinates the trial to the appeal, which intelligently constructs the former as the platform for the latter. Instead, we have a system where lawyers try cases with no concern for the appeal–hardly in any defendant's real interest, and certainly a greater interest than the occasional decent ineffectiveness claim.

A final danger to the client's interests, of course, is if an appeal does have decent regular issues (which the client may often not even be able to follow), from which limited resources have to be diverted in order to humor an unmanageable client and a poor ineffectiveness claim or which a poor ineffectiveness claim obscures and buries. And if trial counsel performed brilliantly to project and preserve such an issue, but appellate counsel succumbed to the pressure of bringing a poor ineffectiveness, its presentation is eroded if the very next issue is that trial counsel was a bum.

Conclusion

There is a possible break in the clouds. *Williams v. Moody*, 287 Ga. 665 (2010), was a habeas case where the petitioner attempted to cash in the chips *Garland* gave him. Moody complained of trial counsel in a *pro se* motion and the court substituted new counsel on appeal. For reasons undeveloped on the record, that attorney dropped out without filing anything and trial counsel resumed the case without further mention of an ineffectiveness claim. The conviction was affirmed. Moody subsequently won superior court habeas relief on the ground that he had been denied conflict-free appellate representation under *Garland*, and since there is no harm inquiry in such cases, he was entitled to a new trial irrespective of trial counsel's actual performance or the actual viability of an ineffectiveness claim on an appeal.

The Supreme Court reversed. Most significantly, it rejected the habeas court's implicit determination that counsel was in a state of actual conflict either (a) when he failed to formally relay his client's claim that he had been ineffective or (b) when he failed secure substitute counsel.

As to (a), the Court reaffirmed that the evaluation and selection of appellate issues was counsel's prerogative and that, the *Garland* trilogy notwithstanding, he was not after all obliged to stand aside upon his client's complaint against himself. As to (b) (failure to withdraw in the face of his client's *pro se* motion), the Court held that the motion, made while represented, was a nullity. The claim of ineffectiveness in *Garland*, it wrote, making the point significant for the first time, had been raised by counsel. In other words, quite contrary to *Garland's* language and spirit, the predicate compelling substitution was not mere incantation of "ineffective assistance;" trial counsel's professional judgment had some bearing after all, notwithstanding that he was the subject of the complaint.

It is hard to square the two opinions. *Moody* seems to have eroded the very foundations of *Garland*, though without saying so, restoring professional judgment to the substitution process. *Garland* seems to say that certain things are constitutionally required; *Moody* seems to say "not really." By leaving unresolved and unexplained the tension between the two cases, the Court has left those who have to work in the trenches between the two still groping under the storm-clouds. For instance, to the extent that the *Moody* result turned upon a *pro se* motion which a court could ignore, it is unclear how that affects the agency which has supplanted the courts' appointing function. Is GPDSC also free to ignore a client's complaint and leave the matter to trial counsel's professional judgment?

Moody, however offers some hopes that the ravages unleashed by casual substitutions can arrested and be controlled, limited to claims of actual substance, and that scant public defender appellate resources can be redirected far more efficiently, to the real benefit of its clientele.

James C. (Jim) Bonner, Jr., a native of Milledgeville and a resident of Decatur, is a graduate of Princeton and of Emory Law. He retired as director of the GPDSC's Appellate Division but continued on there as a part-time consultant. Previously, he worked for the Prisoner Legal Counseling Project, a clinical legal education and legal services program operated by UGA Law in the state prison system. He has spent virtually his entire career "cracking criminal convictions."

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AGENDA

Presiding: ***Ronan P. Doherty,*** Program Co-Chair, Bondurant, Mixson & Elmore, LLP, Atlanta
Simon Weinstein, Program Co-Chair, Law Office of Simon Weinstein, LLC, Atlanta

7:45 **REGISTRATION AND CONTINENTAL BREAKFAST** (All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:25 **WELCOME**
Ronan P. Doherty

8:30 **INTERLOCUTORY AND DISCRETIONARY APPEALS: DON'T GET FOOLED (AGAIN)**
W. Scott Henwood, Hall, Booth, Smith & Slover, P.C., (Formerly Reporter of Decisions for the Supreme Court and Court of Appeals of Georgia), Atlanta

9:00 **PRESERVING ISSUES FOR APPEAL**
Paul J. Kaplan, Senior Attorney, Corporate Litigation, Home Depot U.S.A., Inc., Atlanta

9:45 **BREAK**

10:00 **THE WINNING BRIEF: HOW TO CAPTURE AN APPELLATE JUDGE'S ATTENTION (AND HOW TO LOSE IT)**
Moderator: ***J. Scott Key,*** J. Scott Key, P.C., McDonough
Panelists:
Hon. Herbert E. Phipps, Presiding Judge, Georgia Court of Appeals, Atlanta
Hon. Stephen Louis A. Dillard, Judge, Georgia Court of Appeals, Atlanta
Hon. Christopher J. McFadden, Judge, Georgia Court of Appeals, Atlanta
Gerard B. Kleinrock, Assistant Public Defender, DeKalb County, Decatur

11:15 **HOW TO E-FILE YOUR WINNING BRIEF IN GEORGIA'S APPELLATE COURTS**
Moderator: ***Simon Weinstein***
Panelists:
Therese "Tee" Barnes, Clerk, Supreme Court of Georgia, Atlanta
M. Katherine Durant, Law Offices of M. Katherine Durant, LLC, Atlanta
John J. Ruggeri, III, Director of Technical Services, Georgia Court of Appeals, Atlanta

12:00 **LUNCH** (Included in registration fee)

12:30 **A CONVERSATION WITH THE CLERKS: RULES CHANGES IN THE APPELLATE COURTS**
Moderator: ***Ronan P. Doherty***
Panelists:
Therese "Tee" Barnes
Holly O. Sparrow, Clerk, Georgia Court of Appeals, Atlanta

1:15 **EFFECTIVE ORAL ARGUMENT: DON'T SNATCH DEFEAT FROM THE JAWS OF VICTORY**
Moderator: ***Paula K. Smith,*** State Law Department, Atlanta
Panelists:
Hon. David E. Nahmias, Justice, Supreme Court of Georgia, Atlanta
Hon. Sara L. Doyle, Judge, Georgia Court of Appeals, Atlanta
Hon. Keith R. Blackwell, Judge, Georgia Court of Appeals, Atlanta
J. Darren Summerville, The Summerville Firm, LLC, Atlanta

2:15 **BREAK**

2:30 **PROFESSIONALISM IN THE APPELLATE PROCESS**
Moderator: ***Nicole G. Iannarone,*** Bondurant, Mixson & Elmore, LLP, Atlanta
Panelists:
Hon. Carol W. Hunstein, Chief Justice, Supreme Court of Georgia, Atlanta
Hon. Anne Elizabeth Barnes, Presiding Judge, Georgia Court of Appeals, Atlanta
Hon. J.D. Smith, Presiding Judge, Georgia Court of Appeals, Atlanta
Hon. Leah Ward Sears, Schiff Hardin, LLP, (Former Chief Justice of the Supreme Court of Georgia), Atlanta

3:30 **ADJOURN**

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