Georgia Bar Journal
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The Admissibility of Scientific Evidence: A Primer on Federal Law

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by Robin Frazer Clark

Realizing the Dream of Equality for All

It is hard to believe that this is my final article for the 2012-13 Bar year. How did it go by so quickly? It has been a busy and rewarding year, which we will reflect upon and celebrate later this month during the Annual Meeting on Hilton Head Island. I hope you will join us there, so that I can personally thank you for the honor of serving as your president and all you have done to make this year a success. Being your president has been the single greatest honor of my legal career.

We will review at the Annual Meeting, and the *Georgia Bar Journal* will include, a comprehensive look back at the past year in its August edition. This month, I would like to comment on one of the year's more recent highlights.

Prior to May 1 of each year, our Committee on Professionalism reaches out to the bar associations across the state to encourage active participation in Law Day by hosting an event which engages the public on the rule of law and the importance of a strong judicial branch of government. In all corners of Georgia, our local and specialty bars rise to the occasion with well-planned, successful observances that typically feature recognition of local citizens who have helped promote a better understanding of and encouraged greater respect for the law.

> "When the leadership of an organization is truly representative of the membership, the members more readily support the organization and are much more committed to it."

The national Law Day theme for 2013, "Realizing the Dream: Equality for All," acknowledges this year's being the 150th anniversary of the issuance of the Emancipation Proclamation by President Abraham Lincoln and the 50th anniversary of Dr. Martin Luther King Jr.'s "I Have A Dream" speech in front of the Lincoln Memorial.

A special celebration of Law Day took place April 22 as the State Bar partnered with a number of local and specialty bar associations and the National Center

for Civil and Human Rights to host a day-long public educational event at the Bar Center. Hundreds of school children were in attendance.

Spearheading the event on behalf of the State Bar were Treasurer Patrise Perkins-Hooker and Executive Committee member Rita Sheffey. Working closely with leaders from the National Center for Civil and Human Rights, Patrise and Rita did a stellar job of helping line up the program and these other co-sponsoring organizations: the Atlanta Bar Association, the Chief Justice's Commission on Professionalism, the Gate City Bar Association, the Georgia Asian Pacific American Bar Association, the Georgia Association of Black Women Attorneys, the Georgia Association for Women Lawyers, the Georgia Hispanic Bar Association, the Multi-Bar Leadership Council, the South Asian Bar Association of Georgia and the Stonewall Bar Association of Georgia.

Featured panelists included Ambassador Andrew Young, U.S. Attorney Sally Quillian Yates and many other civil rights leaders, state legislators and legal experts. The program was aimed specifically at making the connection between the American civil rights movement and the principles of human rights while providing an in-depth look at human rights violations that still exist at home and abroad, including juvenile justice violations, the use of torture, environmental abuses and the trafficking of an estimated 1 million people worldwide each year into involuntary servitude and sexual slavery. We can end such injustices only after acknowledging they exist.

Law Day reminds us that in America, the promise of equal treatment under the law is not supposed to be some lofty objective that we hope to achieve one day. Equality was declared some 236 years ago to be a self-evident truth and one of the basic founding principles of a new nation—despite the existence of slavery and decidedly unequal rights for women at the time.

Over the years, of course, significant strides have been made against discrimination based on race, gender, ethnicity, national origin, religion, age, disability and sexual orientation. Yet today, when it comes to equal justice, the question must be asked: are we there yet?

While we have made much progress, there are constant reminders that we have to do better. For example, during a school's recent visit to the "Journey through Justice" program at the Bar Center, a member of the Bar staff saw a young African-American student looking at the photographs of the past presidents on the wall of the third floor, along with his father who was there on the tour. The employee heard the young child say, "There isn't anyone who looks like us, Dad."

That hurts. We have more than 10,000 Georgia students walking down that third floor hall every year. They observe. They notice, and I don't want any one of them to go home thinking the State Bar of Georgia isn't an organization that they could also one day lead.

That's why we have to work harder. When the leadership of an organization is truly representative of the

membership, the members more readily support the organization and are much more committed to it. I believe diversity in and of itself is a positive desired thing because it allows all points of view to be heard and considered. It makes one stop and reconsider the framework through which you view all issues and makes you actually take a minute and put yourself in someone else's shoes before reaching any decision.

In the legal profession and this nation, we still have work to do. Hopefully, it is the generation of students now taking the "Journey through Justice" tours that will close the gap and will say "Enough." Enough discrimination, enough hypocrisy, enough subjugation of one group by another, enough hatred . . . simply enough.

This is the generation that will say "enough" of that and replace it with love. Love of your fellow man, love of the rule of law, love of equality, love of justice. But like all worthy things, we must work for it. Dr. King said, "Human progress is neither automatic nor inevitable. . . . Every step toward the goal of justice requires sacrifice, suffering, and struggle; the tireless exertions and passionate concern of dedicated individuals."

We should use every annual Law Day as an opportunity to explore the movement for civil and human rights in America and the impact that it has had in promoting the idea of equality under the law. We should also reflect on the work that remains to be done in rectifying injustice, eliminating all forms of discrimination and putting an end to human trafficking and other violations of basic human rights. As Dr. King pointed out in his Letter from a Birmingham Jail, "Injustice anywhere is a threat to justice everywhere."

I often wonder whether I would have had the same courage as Dr. King, U.S. Rep. John Lewis and other progressive Americans who stood up against racial inequality had I been an adult during the Civil Rights Movement. I like to think I would have been right there alongside the Freedom Riders, or walking across the Edmund Pettus Bridge, but admittedly it is daunting to consider risking one's life for something you believe in. I like to think I would have done that.

One of the most important human rights issues that presents itself to me now in my career is that of equality regardless of sexual orientation, and I will continue to fight for human rights, dignity and justice for all until that dream is realized. As Dr. King said, "the Arc of the moral universe is long, but it bends toward justice." This is comforting to keep in mind, but we must remain vigilant, especially when there are still "whites only" proms in Georgia and when some people still believe they have a monopoly on morality and the right to be married to the one they love merely because they were accidentally born heterosexual.

As lawyers, we must always have a keen sense of justice, in all aspects of our lives. As former Justice Fletcher eloquently wrote: "[N]owhere is that notion of equality more carefully scrutinized than in our court system. We should not take lightly the image of justice. To signify our notion of equality we have as a symbol of justice a woman blindfolded, with evenly-balanced scales, holding a sword. The sword symbolizes our willingness to fight for the rights of all our citizens. The scales symbolize the equality of treatment before the courts. And the blindfold symbolizes that the law is not a respecter of person or position." *Livingston v. State*, 264 Ga. 402, 420, 444 S.E.2d 748, 761 (1994), Fletcher, J., *dissenting*.

The promise of equality under the law is what has made America a beacon to other nations. Fulfilling that promise—by promoting the cause of justice, upholding the rule of law and protecting the rights of all citizens—remains a work in progress.

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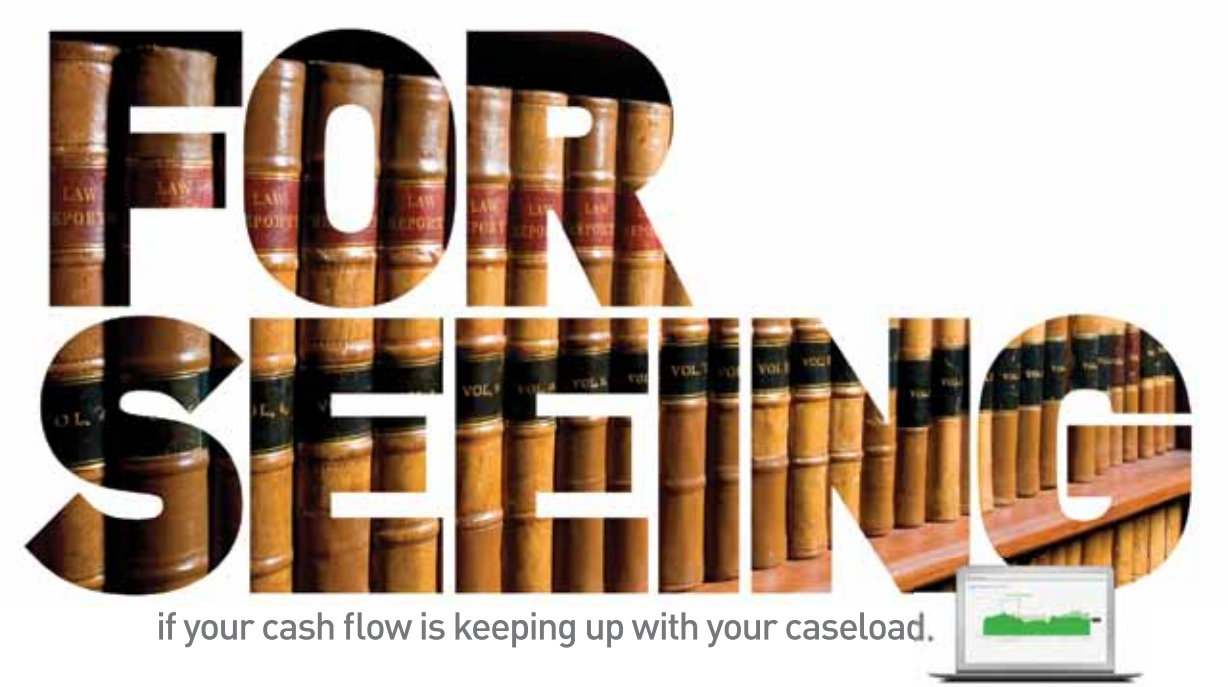

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by Jon Pannell

The State of the YLD is Great

Over the past 12 months, I have had the incredible opportunity to serve the State Bar of Georgia as the president of the Young Lawyers Division. I am humbled by the trust you have bestowed upon me to lead this great organization and thank you for all the words of encouragement and support you have given me throughout this year.

"Finally, thank you to the members of the State Bar of Georgia and the members of the Young Lawyers Division for giving me the greatest experience of my career to serve you as your YLD president."

When I was sworn in by Justice Carley as the 66th president of the YLD in June 2012, my main goal for the year was to increase the geographical diversity of the YLD. In fact, my first column published in the *Bar Journal* in August 2012 was titled "From Blue Ridge to Bainbridge to Brunswick." As stated in that original column, "[f]rom Blue Ridge to Bainbridge to Brunswick, I want to increase the efforts of the YLD in areas of the state where there are younger lawyers not currently active with the Bar."

Since the beginning of my career practicing law, I have heard too often from other attorneys that the State Bar was too concentrated in Atlanta and lawyers from outside metro-Atlanta had no role in the Bar leadership. I am happy to report that your State Bar is as diverse as ever and the YLD is helping lead the way in debunking this misconception.

Did you know that the majority of the elected YLD officers are from outside metro-Atlanta? Sharri Edenfield, the current treasurer of the YLD, practices in Statesboro; Jack Long, secretary of the YLD, lives in Augusta; and I live and practice in Savannah. Nine members of the Board of Directors of the YLD are from outside metro-Atlanta and 14 of the YLD's committee chairs reside someplace other than Atlanta. Not that those of you who practice in metro-Atlanta are not impor-

tant members of the YLD! In fact, 60 percent of our YLD membership practices in the five-county area of metro-Atlanta.

I want to thank the members of the Board of Governors for the support they have given me this year to encourage new lawyers to get involved with the YLD. We have had a record number of first-time attendees at our YLD meetings this year, and I have had numerous young lawyers tell me that they got involved with the YLD because an older lawyer in their law firm or community encouraged them to become engaged.

Another concern I heard before becoming president of the YLD was that the State Bar had too many meetings outside the state of Georgia. I am proud to boast that this year we held all of our YLD meetings inside our great state. Our YLD officer's retreat and Summer Meeting was held at Lake Oconee in August. In October, we held our Fall Meeting in Athens in conjunction with the Georgia-Tennessee football weekend. The Winter Meeting was held in January in conjunction with the State Bar Midyear Meeting in Atlanta and the YLD Spring Meeting was held in April on beautiful St. Simons Island.

I am happy to report that at the end of my term as YLD president, the state of the YLD is not only good, it is great! Attendance at YLD meetings is at an all-time high; the YLD Leadership Academy, the crowning jewel of our organization (in my humble opinion), has one of its most diverse and strongest classes to date; the YLD Signature Fundraiser donated more than $45,000 to Georgia CASA; Gov. Deal was the keynote speaker for the second year in a row for our annual YLD Legislative Luncheon; the 2nd annual Legal Food Frenzy had 249 law firms and organizations register for this year's competition, a 15 percent increase from last year; and our membership and committees are full of new lawyers who were once not involved with the YLD.

I am also excited to report that one of the YLD's projects, the rewrite of the Juvenile Justice Code, was signed into law by the governor on May 2. In 2004, the YLD was able to secure funding to create a model juvenile code through the Georgia Bar Foundation. Since 2006, a statewide coalition of stakeholders have advocated for a comprehensive update to the 42-year-old Juvenile Justice Code. This past year, the governor's Criminal Justice Reform Council focused on reforms to Georgia's juvenile law and legislation was passed unanimously by the Georgia General Assembly during the recently completed 2013 legislative term to rewrite and reorganize Georgia's juvenile law. And to think it all began as a project of the YLD!

I would love to take credit for all of the great accomplishments of the YLD over the last 12 months, but I know that the only reason this year has been successful is because I have stood on the backs of so many of you. Thank you to my officers who have worked hand-in-hand with me and have been there to encourage me throughout the year. Thank you to the YLD committee chairs, all 54 of them, who are the real reason the YLD is successful and is coined as "the service arm of the State Bar." Thank you to our director, Mary McAfee, and the Bar staff who have helped me throughout the year. We have the best Bar staff around and they time and time again amaze me at what they do. Thank you to my wife and children for managing the homefront while I frequently traveled to and from Bar meetings over the last year. Thank you to the Executive Committee of the State Bar and the Board of Governors for continuing to support the YLD. Finally, thank you to the members of the State Bar of Georgia and the members of the Young Lawyers Division for giving me the greatest experience of my career to serve you as your YLD president. I look forward to seeing all of you at the Annual Meeting on Hilton Head Island in June!

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Correction

On page 8 of the April 2013, Volume 18, No. 6, issue of the *Georgia Bar Journal*, the percentage of an appliciant's gross income for eligilibity for federal food nutrition programs was incorrectly listed as "at or below 18.5 percent. . . ." It should have read "at or below 185 percent. . . ." We apologize for this error.

The Admissibility of Scientific Evidence:

A Primer on Federal Law

by Hon. William S. Duffey Jr.

Scientific evidence is common in judicial proceedings. Expert testimony is the most common vehicle through which parties can offer technical and scientific evidence because it aids the trier of fact in understanding the evidence or determining an issue in the case.[1] Most judges and juries lack the scientific training that would permit them to evaluate thoroughly claims that turn on scientific questions.[2] Admitting expert testimony facilitates the evaluation of scientific and technical claims and evidence, and helps ensure that decisions are based on scientifically sound knowledge.[3]

Expert testimony plays a key role in arriving at scientifically sound determinations. Determining what evidence and expert testimony to admit requires careful, deliberate consideration by the court to ensure the evidence admitted is reliable and trustworthy.

Not all scientific evidence is equally reliable, and admitting scientifically unsound evidence risks confusing or misleading the jury, or may ultimately allow the jury to reach an unjust conclusion.[4] To obtain the benefits of expert testimony and minimize the dangers of permitting unsound science to enter the courtroom, the Federal Rules of Evidence and the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals* guide federal judges in ensuring that only reliable evidence is admitted at trial to assist the jury in reaching a just outcome.[5]

The Legal Framework for Evaluating the Admissibility of Expert Testimony

The admission of expert testimony in federal courts is governed by Rule 702 of the Federal Rules of Evidence, which states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based upon sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the witness has applied the principles and methods reliably to the facts of the case.

Daubert sets forth the analysis courts must use to determine whether proffered evidence is sufficiently reliable to be admissible under Rule 702. After the adoption of the Federal Rules of Evidence (FRE) in 1975,

but prior to *Daubert* being decided in 1993, courts applied the *Frye* test, which originated from a 1923 court of appeals case, when assessing the admissibility of expert testimony.[6] Under *Frye*, expert testimony only was admissible when it was based on a technique or theory that was "generally accepted" as reliable in the scientific community.[7]

In *Daubert*, the Supreme Court held that the *Frye* admissibility standard was inconsistent with the more liberal standard for the evaluation of evidence under the FRE.[8] The Supreme Court articulated a new standard in *Daubert*, holding that the *Frye* test had been superseded by the FRE.[9] In 1999, the Supreme Court decided in *Kumho Tire Company v. Carmichael* that *Daubert* applies not only to expert testimony based on scientific evidence, but also to testimony based on technical or other specialized knowledge.[10]

Under *Daubert*, for an expert's testimony to be based on "scientific knowledge," the opinion must be "derived by the scientific method."[11] At *Daubert's* core is the requirement that courts focus "solely on principles and methodology, not on the conclusions that they generate."[12] Each step of the expert's analysis must be demonstrated to be reliable; if any step fails the *Daubert* test, then the entire testimony is inadmissible.[13]

The judge serves a "gatekeeper" function in determining the admissibility of proffered expert testimony, excluding unreliable and irrelevant testimony. The court exercises broad discretion in determining whether evidence, including expert testimony, is admissible. Courts of appeal defer substantially to a trial judge's admissibility decision.[14] The critical gatekeeper inquiry is into the scientific validity of the expert's underlying reasoning or methodology.[15] The court determines not only whether the principles and methods used by the expert are reliable, but also whether those principles and methods have been properly applied to the facts of the case.[16] The inquiry under *Daubert* thus is process-oriented.[17] Judges focus on the methodology the expert used to reach his conclusions, rather than on the conclusions themselves.[18]

Applying the *Daubert* Standard

When evaluating whether to admit expert testimony, a court considers whether: (1) the expert is qualified to testify regarding the matters he intends to address; (2) the expert's methodology is sufficiently reliable; and (3) the expert's testimony assists the trier of fact to understand the evidence or to determine a fact in issue.[19] *Daubert* sets forth a non-exclusive checklist to use in evaluating the reliability of scientific expert testimony. The factors include:

> (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;
> (2) whether the technique or theory has been subject to peer review and publication;
> (3) the known or potential rate of error of the technique or theory when applied;
> (4) the existence and maintenance of standards and controls; and
> (5) whether the technique or theory has been generally accepted in the scientific community.[20]

The inquiry is flexible, and the criteria the judge applies may vary based on the facts of the case and the nature of the proffered testimony.[21] The court is not required to consider each of these factors, and the court should consider any additional factors that may advance its Rule 702 analysis.[22]

The second prong of Rule 702—that the expert testimony "assist the trier of fact"—addresses the relevance of the evidence after the court has determined it is reliable. The extent to which the trial court may inquire into the sufficiency of evidence after making the reliability determination is viewed differently in different appellate courts.[23] Some courts exclude expert testimony as lacking relevance where it is insufficient to prove the matter for which the party seeks its introduction. In others, judges only are required to find that the evidence meets a minimal relevance threshold to be admissible.

After determining that evidence is reliable, the trial judge may consider whether the evidence is "sufficiently tied to the facts of the case so that the evidence will aid the trier of fact in resolving the dispute."[24] This inquiry is sometimes described as a "fit test." Rule 702's requirement that the evidence be helpful to the trier of fact requires a valid scientific connection—a fit—to the pertinent inquiry as a precondition to admissibility.[25]

After a judge finds that the expert testimony is reliable and that it sufficiently "fits" the evidence, the judge also may evaluate whether the evidence is nonetheless inadmissible under FRE 403. Under FRE 403, a court:

> May exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.

Part of the judge's role as gatekeeper is to preclude the introduction of evidence that, although relevant on an issue in the case, is likely to be so prejudicial, misleading or confusing that it risks causing the jury to reach an unjust result.[26]

Considering and Applying the *Daubert* Criteria

Applying the *Daubert* criteria is not a rigid process resulting in a uniform template to evalu-

ate whether evidence is or is not allowed to be introduced. A short survey of cases analyzing each *Daubert* factor illustrates this point, although certain general themes emerge from these evaluations, as illustrated below.

Factor 1: Whether the expert's technique or theory can be or has been tested—whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability

Whether a theory or method can or has been tested is one of the most important indicators of its reliability.[27] That a theory can be empirically challenged, has been tested in controlled circumstances, and is reproducible weighs in favor of admissibility. Epidemiological studies are good examples of evidence that satisfies the testability criterion. These studies are carried out with controls and randomization, generally have measurable error rates and undergo peer review. These characteristics ensure their reliability.[28]

The lack of epidemiological research to support a proffered theory of causation may bear on whether the theory is considered testable. When such studies are not available, an expert's methodology may fall short of *Daubert*'s reliability standard.[29] An expert's testimony may well be excluded if the expert does not test the proffered theory or fails to identify any studies documenting or testing the theory. If the theory cannot be tested empirically, or if the expert elects not to test a theory that can be tested empirically, then the court may not admit the testimony.[30]

Factor 2: Whether the technique or theory has been subject to peer review and publication

Courts consider the peer review of a theory or technique helpful in determining that it is reliable, but peer review is not dispositive on the issue of admissibility. In *Daubert*, the Supreme Court stated that "publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability."[31] That a theory has not been peer reviewed or published, or that it has not been developed or tested in a context other than in preparation for litigation, weighs against admissibility. Peer review is significant because "scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected."[32] If peer review alone was dispositive, then the *Frye* standard of general acceptability in the scientific community would have remained adequate.[33]

Factor 3: The known or potential rate of error of the technique or theory when applied

A finding that there is no basis to establish a reliable error rate for a particular methodology can weigh against expert testimony admissibility when the expert applies that methodology. Methodologies should be objectively testable and include control groups to minimize rates of unknowable error.[34] Expert testimony based on a technique with an error rate that is not precisely quantified may still be admissible if the technique's error rate has been demonstrated to be very low.[35]

Factor 4: The existence and maintenance of standards and controls

An expert's failure to maintain proper standards and controls weighs heavily against admissibility. This is especially true when the relevant scientific community has established generally accepted professional standards governing the methodology the expert should apply. The Supreme Court stated in *Kumho Tire Company* that the objective of *Daubert* is to ensure the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[36] This requirement goes to the heart of the reliability inquiry by focusing on the methodology employed and not on the conclusion reached.

The reasons for requiring experts to follow objective, professionally accepted standards and controls are manifest. When an expert follows accepted standards, his methodologies and hypotheses may be replicated, objectively challenged and peer reviewed, all of which support a finding of reliability. When an expert's assessment is not based on an accepted methodology, or was not conducted with any methodology at all, it cannot be challenged according to these standards and the evaluation would be reduced to an *ipse dixit* assessment—if an expert states it, then it must be so. Courts do not accept *ipse dixit* assessments because they do not ensure reliability.[37] When the methodology underlying the conclusion

simply is not sound, it calls into question the validity of the expert's conclusion. It is not sufficient for an expert simply to tell a trial court that he followed a methodology; the court must investigate whether the methodology produced reliable results and was applied correctly.[38]

Below are examples of questions a court might ask when evaluating whether the characteristics of the expert's methodology weigh in favor of or against admissibility:

- Is the expert a member in good standing of the relevant professional accrediting organization? Has the examiner completed trainings and certifications required by the organization?
- Has the examination been conducted in the facilities and in the manner outlined by the guidelines? Is there evidence of compliance with or violation of the guidelines?
- Did the expert document his methodology and procedures? An expert's failure to record the methodology he applied weighs against finding admissibility.
- If the generally accepted standards are followed, then does this guarantee (or significantly improve the likelihood of) an accurate result?
- If the expert deviated from the standards, how significant was the deviation? What effect did the deviation have on the accuracy of the results? Did the deviation from the standards make it so the methodology could not be replicated or objectively tested? Did the deviation from the methodology introduce bias or substantially increase the error rate?
- If the expert deviated from the standard, was there any justification for doing so?
- Has the methodology been applied outside of a litigation context? Is there evidence that the expert applied the methodology differently in preparation for litigation than he would have in his regular professional work?
- Is the expert testifying using anecdotal evidence, or basing his opinion solely on a small number of case studies?
- Has the expert engaged in improper extrapolation, by drawing an unsupported conclusion from an accepted premise?[39]

Illustrative Examples of Court Evaluation of the Admissibility of Expert Opinions Under *Daubert* and FRE 702

Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc., No. 7:06-cv-48 (HL), 2008 U.S. Dist. LEXIS 23923 (M.D. Ga. 2008)

The plaintiff, a farmer, sought to admit an expert's opinion that a disease that caused significant damage to his crops was caused by bacteria that originated in the defendant's bell pepper seeds. Due to the low profitability of bell peppers, little research had been conducted on diseases that affected them, and no industry standard existed for testing whether the seeds were infected by the bacteria. The expert applied to the bell pepper seeds a widely accepted protocol used to test other vegetable seeds for bacteria and disease.

The court considered that although the expert did not apply a generally accepted methodology for testing the pepper seeds, this was not a case in which the expert applied a "rogue methodology instead of a widely accepted . . . standard procedure," but rather one in which a methodology did not exist for the inquiry at hand. The expert applied an established procedure for a similar inquiry. The court found that the expert diligently applied the procedure, and thoroughly documented the steps in conducting his analysis and so it admitted his testimony.

Guinn v. AstraZeneca Pharmaceuticals L.P., 602 F.3d 1245 (11th Cir. 2010)

The plaintiff's expert applied the methodology of differential diagnosis to attribute the plaintiff's disease to the defendant's drug. Differential diagnosis, when properly conducted, can be a reliable methodology under *Daubert*. The defendant challenged the expert's testimony because she failed to conduct the standard diagnostic techniques that she normally would have used to rule out potential alternative causes for the plaintiff's diseases when she attributed them to the defendant's drug.

The court concluded that the expert's testimony was not reliable because she deviated from the standard protocol for differential diagnosis in several significant ways, indicating that she had not thoroughly investigated potential alternate causes of the plaintiff's disease. The court considered that the expert did not conduct an interview as she would have in her normal practice, had only reviewed selections from the plaintiff's medical records that were prepared by her attorneys and relied without justification on the temporal relationship between the plaintiff's consumption of the drug and the onset of the disease.[40] The court did not admit the testimony.

Rembrandt Vision Technologies, L.P. v. Johnson & Johnson Vision Care, Inc., 282 F.R.D. 655 (M.D. Fla. 2012)

The plaintiff argued that the defendant's contact lens design infringed on its patent, and retained an expert to evaluate certain characteristics of the lenses that purportedly violated the patents. The defendant argued that the testimony was inadmissible because the expert's testing procedures did not conform to the generally accepted standards in the profession and the expert should have applied a different methodology.

The court did not admit the testimony because of two main concerns: that the expert departed significantly from the standard protocols and that the expert did not document

his testing procedures. On cross-examination, the expert could not recall which professional standard he used, noting that he applied one of two generally accepted standards. He stated that he did not read the criteria for the standards he used. He had difficulty explaining how his procedures met the standards, and at one point admitted that he had not complied with them. He also offered no justification for his deviation from the applicable standards after his cross-examination. He had difficulty articulating how he designed his test, and his account of his testing protocol changed throughout the trial.

The expert admitted that a scientist reviewing his work would not be able to reproduce his methodology because he kept no record of it, and would realize his procedures were inconsistent with the applicable standard. Declining to admit the expert's testimony, the court noted its serious concern that the expert's test was not reproducible, as "reproducible testing is a hallmark of reliable science."[41]

Factor 5: Whether the technique or theory has been generally accepted in the scientific community

The last of the *Daubert* criteria reflects the traditional *Frye* test. General acceptance of a theory or technique underlying the testimony among the scientific community weighs in favor of its admission, although it is not a prerequisite for admission.[42] General acceptance also is not dispositive on the court's inquiry into the reliability of expert testimony. An accepted methodology may in some cases be used to extrapolate to those cases where none exists. The Supreme Court noted in *General Electric Co. v. Joiner* that experts often used existing data to extrapolate and form conclusions.[43] This practice is acceptable as long as the gap between the data and the opinion is not "too great," and connected by something other than just the opinion of the expert.[44]

Conclusion

Whether scientific evidence and, specifically, expert opinions are admissible under FRE 702 and *Daubert* depends on the facts of a case and the application of the Rule 702 and *Daubert* standards by the judge presiding over the litigation. Although there are standards that guide the judge and substantial uniformity in the evaluation the process, by its nature, is case and fact specific. The feature common to each *Daubert* analysis is the judge's focus on the soundness of the methodologies and processes experts use to reach their conclusions. Diligent application of the *Daubert* criteria ensures that the expert testimony that is admitted into courts is reliable and will aid the trier of fact in reaching a just decision. GBJ

Judge Duffey is grateful for the capable assistance that Jennifer C. Bellis provided in preparing this article.

Hon. William S. Duffey Jr. serves as a U.S. District Judge for the Northern District of Georgia. Duffey previously served as the U.S. attorney for the Northern District of Georgia. Before his appointment as U.S. attorney, Duffey was a partner at King & Spalding in Atlanta. From 1994 to 1995, Duffey left private practice to serve as deputy independent counsel in charge of the Arkansas phase of the Whitewater investigation. He rejoined King & Spalding as a partner and his practice included complex civil and criminal litigation, focusing on trade secret, corporate espionage and fraud matters.

Endnotes

1. Daubert v. Merrell Dow Pharms., 509 U.S. 579, 591 (U.S. 1993).
2. Reference Manual on Scientific Evidence 4 (Federal Judicial Center, 2nd ed. 2000).
3. *Id.*
4. *Id.*
5. Daubert, 509 U.S. at 589.
6. Daubert, 509 U.S. at 587; Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
7. *Id.* at 584.
8. *Id.* at 589.
9. *Id.* at 588.
10. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (U.S. 1999).
11. Daubert, 509 U.S. at 590 ("In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.").
12. *Id.* at 595.
13. McClain v. Metabolife Intern., Inc., 401 F.3d 1233, 1245 (11th Cir. 2005).
14. *Id.* at 1238.
15. Manual for Complex Litigation 476 (Federal Judicial Center, 4th ed. 2004).
16. *Id.* at 473.
17. *Id.*
18. Smelser v. Norfolk Southern Railway Co., 105 F.3d 229, 303 (6th Cir. 1997) ("When evaluating reliability, the trial court must focus on the soundness of the expert's methodology and not the correctness of his conclusions."); Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 282 F.R.D. 655, 666 (M.D. Fla. 2012) ("*Daubert* does not ask courts to evaluate whether an expert's opinion is correct; instead, it requires courts to determine whether the expert has used a reliable methodology.").
19. Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1340-41 (11th Cir. 2003).
20. Daubert, 509 U.S. at 593-94.
21. *Id.* at 594.
22. Quiet Tech. DC-8, Inc., 326 F.3d at 1341.
23. Manual for Complex Litigation 481 (Federal Judicial Center, 4th ed. 2004).
24. Daubert, U.S. 509 at 591-592.
25. *Id.*
26. Baldonado v. Wyeth, No. 04 C 4312, 2012 U.S. Dist. LEXIS 124287, at *16 (N.D. Ill. Aug. 31, 2012); United States v. Pavlenko, 845 F. Supp. 2d 1321, 1327-1328 (S.D. Fla. 2012) (In weighing the relevant considerations under Rule 403, the court determined there was a danger that the jury might accord undue weight to expert's polygraph evidence offered to validate the defendant's testimony); United States v. Arthur, No. 10-20753-CR-SEITZ, 2011 U.S. Dist. LEXIS 96314, at *9 (S.D. Fla. Aug. 29, 2011) (The court determined that the expert's polygraph evidence, if admitted, would constitute impermissible bolstering of another witness's testimony.); United States v. Evans, 469 F. Supp. 2d 1112, 1115 (M.D. Fla. 2006) (The court determined that the jury could easily conclude that 'passing' the polygraph test had more significance than justified.).
27. Daubert, 509 U.S. at 593 ("Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry."); Haggerty v. Upjohn Co., 950 F. Supp. 1160, 1163-1164 (S.D. Fla. 1996) ("Whether the theory or methodology has been subjected to the scientific method is the most significant of the *Daubert* factors.").
28. Rider v. Sandoz Pharms. Corp., 295 F.3d 1194, 1198 (11th Cir. 2002) ("Epidemiology is considered the best statistical evidence of causation.").
29. Kilpatrick v. Breg, Inc., No. 08-10052-CIV-MOORE/SIMONTON, 2009 U.S. Dist. LEXIS 76128, at *25-*26 (S.D. Fla. June 25, 2009) (The expert offered no epidemiological studies on human populations to support its theory of causation, and simply extrapolated from small observational studies on humans and from studies on animal population to large human populations. The court found that this methodology was unreliable because the expert did not support the validity of his extrapolation from small to large populations, or from animal to human populations.).
30. Sumner v. Biomet, Inc., 434 Fed. Appx. 834, 842 (11th Cir. 2011) (The expert could not explain the mechanism behind his theory with certainty "without doing experiments or … calculations, which would be incredibly difficult to do," so the court found his theory virtually incapable of being tested.); Zwillinger v. Garfield Slope Hous. Corp., No. CV 94-4009 (SMG), 1998 U.S. Dist. LEXIS 21107, at *11-*12 (E.D.N.Y. Aug. 17, 1998) (The expert based his opinions on research that he had not empirically tested, even though this underlying research was the kind of scientific inquiry that lent itself to empirical testing, and so the court found his testimony inadmissible.).
31. Daubert, 509 U.S. at 593.
32. *Id.*
33. Allison v. McGhan Med. Corp., 184 F.3d 1300, 1313 (11th Cir. 1999); Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc., No. 7:06-cv-48 (HL), 2008 U.S. Dist. LEXIS 23923, at *47-*48 (M.D. Ga. 2008) (The expert's methodology had not been subject to publication or peer review, so the court considered the lack of published data but weighed this factor less heavily because no alternate methodology had been subject to peer review.); Bickel v. Pfizer, Inc., 431 F. Supp. 2d 918, 924 (N.D. Ind. 2006) (The expert's theory was not peer reviewed, and the court rejected the plaintiff's argument that expert testimony should be admissible despite its novelty,

because there was no evidence that any literature supporting the theory was forthcoming. The court noted that it was not the novelty of the expert's theory that called for its exclusion; it was the lack of a reliable scientific methodology, and application of that methodology, that warranted exclusion.).

34. Zwillinger v. Garfield Slope Hous. Corp., No. CV 94-4009 (SMG), 1998 U.S. Dist. LEXIS 21107, at *18 (E.D.N.Y. Aug. 17, 1998) (The court found the expert's work was likely to suffer from a high rate of error because he failed to develop an objective test for determining the cause of the plaintiff's alleged disease and failed to employ a control group as part of his study.); Kilpatrick v. Breg, Inc., No. 08-10052-CIV-MOORE/SIMONTON, 2009 U.S. Dist. LEXIS 76128, at *25-*26 (S.D. Fla. June 25, 2009) (The court determined that the expert's extrapolation from a small sample to a large population would leave an unexplained 40% error rate that weighed strongly against admissibility.).
35. United States v. Mitchell, 365 F.3d 215, 241 (3d Cir. 2004) (The error rate for fingerprint identification had not been precisely quantified, but several reliable methods of estimating the error rate suggested it was very low. The court determined that the absence of significant numbers of false positives in practice, the absence of false positives in an FBI survey, and the results from an FBI statistical experiment all showed an extremely low error rate that weighed in favor of admissibility.).
36. Kumho Tire Co., 526 U.S. at 152.
37. General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997).
38. McClain v. Metabolife Intern., Inc., 401 F.3d 1233, 1253 (11th Cir. 2005).
39. Moore v. Ashland Chem., Inc., 151 F.3d 269, 279 (5th Cir.1998) (The court excluded the expert testimony because it was based on unsupported extrapolations.).
40. Westberry v. Gislaved Gummi AB, 178 F.3d 257, 265 (4th Cir. 1999) ("Differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation."); In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 759 (3d Cir.1994) ("[A]t the core of differential diagnosis is a requirement that experts at least consider alternative causes.").
41. Rembrandt Vision Techs., L.P. v. Johnson & Johnson Vision Care, Inc., 282 F.R.D. 655 (M.D. Fla. 2012); Smelser v. Norfolk S. Ry., 105 F.3d 299, 303 (6th Cir. 1997) (The expert's testimony was improperly admitted where the expert failed to document adequately testing conditions and the rate of error so the test could be repeated and its results verified and critiqued.); Morehouse v. Louisville Ladder Group LLC, No. Civ. A 3:03-887-22, 2004 U.S. Dist. LEXIS 21766, 2004 WL 2431796, at *7 (D. S.C. June 28, 2004) (The court excluded the expert's testimony in part because the expert failed to record his hypothesis testing or include relevant details in his report.); Black v. Rhone-Poulenc, Inc., 19 F. Supp.2d 592, 598 (S.D.W. Va. 1998) (The court determined that an expert's failure to document his study weighed against admissibility because "independent reconstruction would be exceedingly difficult if not impossible.").
42. Daubert, 509 U.S. at 594.
43. General Electric Co. v. Joiner, 522 U.S. 136, 146 (1997).
44. *Id.*; Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc., No. 7:06-cv-48 (HL), 2008 U.S. Dist. LEXIS 23923, at *47-*48 (M.D. Ga. 2008).

Recent Advances in International Arbitration in Georgia:

Winning the Race to the Top

by Stephen L. Wright and Shelby S. Guilbert Jr.

Key recent developments propel Georgia forward as a desirable jurisdiction for international arbitration proceedings and promise to increase international trade and investment in the state. Although Georgia is already an arbitration-friendly jurisdiction, these developments create an even more hospitable environment for international arbitral proceedings. Together with the state's well-known reputation as a transportation hub and place of hospitality, the advances in rules for international arbitration proceedings redound positively for the economy at large and increase opportunities for all Bar members.[1]

This article examines the recent confluence of developments promoting international arbitration in Georgia. Perhaps the single most important development in this regard is the passage and signing into law by Gov. Nathan Deal in 2012 of a new Georgia International Commercial Arbitration Code (the ICA Code).[2] With enhancements to the widely adopted United Nations Commission on International Trade Law (UNCITRAL) international model arbitration code, the new ICA Code targets an optimal balance of judicial aid to enable successful arbitration while nonetheless leaving parties free to structure the dispute resolution process that works best for them.

Complementing the statutory innovation are recent pro-arbitration decisions from the 11th Circuit and state courts in Georgia confirming the local judiciary's strong support for international arbitration, setting Georgia apart from other U.S. jurisdictions where judicial support for international arbitration is less clear. Finally, amendments to the State Bar Rules pave the way for easier appearance by foreign counsel in international arbitral hearings in the state and otherwise to provide services on a temporary and limited basis.

Georgia's New International Arbitration Code: A Strong Legal Framework to Support International Arbitration in Georgia

Last year, Gov. Deal signed into law the new SB 383, replacing Part 2 of the Georgia Arbitration Code pertaining to international transactions with a new Georgia International Commercial Arbitration Code. Although the pre-existing international arbitration code was pioneering when first adopted some 25 years ago, countries around the world have been updating their own law to keep pace with changes in practice stemming from the increased use of arbitration in increasingly globalized commercial trade and transactions.[3] When former senator now Judge Bill Hamrick was a member of the Georgia Senate and introduced SB 383 last year, he declared, "Amending Georgia's current code to incorporate internationally recognized law is a step in the right direction towards becoming a

prominent venue for international commercial arbitration."[4]

The new ICA Code went into effect on July 1, 2012, and applies to all international commercial arbitrations in Georgia.[5] The ICA Code itself is based primarily upon the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law), as amended in 2006.[6] In basing its new ICA Code on the Model Law, Georgia now joins more than 50 civil and common law jurisdictions around the world that have adopted some version of the Model Law.[7]

Many may ask about the Federal Arbitration Act (FAA), which is already applicable, and provides the rules for international arbitration proceedings. The FAA, along with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the New York Convention),[8] and the Inter-American Convention on International Commercial Arbitration (the Panama Convention),[9] was in its time progressive and continues to provide a firm foundation for the enforceability of international arbitration agreements and international arbitral awards in the United States. Yet with 90 years in service and little updating, the FAA and ancillary laws do not reflect changes in the global commercial environment and provide only limited guidance on potentially critical issues that often arise in international arbitrations today, such as whether an international arbitral tribunal has the authority to award equitable relief, or standards for judicial assistance to assist parties in the taking of evidence for use in an arbitral hearing. As the FAA does not exclude state rules on international arbitration,[10] the Georgia state legislature stepped in to provide a modern legal framework for the promotion of international arbitration.

Greater Uniformity and Predictability

In basing the new ICA Code on the Model Law, the Georgia Legislature directed that "regard shall be given to its international origin and to the need to promote uniformity in its application."[11] The Model Law has been the subject of extensive, well-publicized commentary and case law that will aid Georgia courts and practitioners in applying the new ICA Code.[12] At the same time, foreign parties and their counsel will find greater predictability in the use of the new ICA Code and have greater comfort with Georgia as a suitable venue for arbitration.

Clarification on the Role of Georgia Courts in Facilitating International Arbitration

One highly prized advantage of arbitration, both in domestic and international settings, is the ability of parties to structure the dispute resolution process as they see best,

free from excessive judicial interference. Yet because arbitrators lack the coercive powers of the state, occasions arise where courts must be relied upon to enforce arbitration agreements and arbitral awards. Georgia's new ICA Code attempts in numerous ways to tread the fine line between providing for judicial assistance where needed while avoiding excessive interference.

Independence of the parties is preserved as the ICA Code limits judicial intervention in arbitral proceedings to those instances called out in the ICA Code.[13] Courts must refer disputes to arbitration where so provided in a writing unless the provision is found void or unenforceable for one of a limited number of reasons.[14] The new ICA Code expressly incorporates the "competence-competence" and separability principles, which affirm arbitrators' authority to rule on questions relating to their own jurisdiction, including those on the validity and scope of an arbitration agreement.[15]

While assuring the independence of the arbitral process, the new ICA Code also brings Georgia law current with international practice[16] by allowing judicial enforcement of interim measures ordered in the arbitration proceedings.[17] Interim measures may, for example, protect property and preserve it from dissipation for the eventual enforcement of an arbitral award.[18] Resort to Superior Court enforcement of interim measure orders is expressly permitted.[19] As a corollary, provision in the arbitration agreement for interim measures and their judicial enforcement does not alone undermine enforceability of the arbitration agreement.[20] In a similar manner, interim awards are likewise judicially enforceable.[21]

Georgia Enhancements to the Model Law

Although the Georgia Legislature used the Model Law as its starting point when drafting the international arbitration code, it departed from the Model Law in several important respects that give the ICA Code a definite Georgia flavor. For example, in a state blessed with 159 counties, the Model Law's provision for centralized judicial supervision[22] would have required an amendment to the Georgia Constitution. Georgia's new ICA Code instead provides by default that supervisory functions be performed by the Superior Court in any county where any portion of the hearing has been conducted, although parties remain free to jointly select the court for the exercise of these functions.[23]

In another Georgia enhancement, the ICA Code provides that arbitrators may issue subpoenas for attendance of witnesses and for the production of records and other evidence.[24] By contrast, the generic provisions in the Model Law give little guidance on how courts should assist an arbitral tribunal in the taking of evidence.[25] Fear of protracted and expensive discovery often discourages parties and counsel in civil law countries from arbitration in the U.S. This fear is addressed under the ICA Code in the discretionary aspect of subpoena issuance, whereby the arbitrator has an ability to limit discovery from becoming overly burdensome and time-consuming. The parties are in any event assured of obtaining a list of witnesses for the hearing and being allowed to examine and copy relevant documents.[26]

The Georgia Judiciary's Strong Support for International Arbitration

Having a progressive international arbitration code is critical for efforts to raise Georgia's stature as a center for international arbitral activity. A great code is worthless, however, without a judiciary ready to enforce it. Fortunately, state and federal courts in Georgia have repeatedly affirmed Georgia as one of the most pro-arbitration jurisdictions in the United States, if not the world.

The 11th Circuit strongly declared its support for international arbitration, holding that an international arbitration award issued in a U.S. proceeding is subject to vacatur only on the grounds set forth in Article V of the New York Convention,[27] thereby being one of few federal circuits to expressly reject "manifest disregard of the law" as a permissible ground.[28] The 11th Circuit is the only federal circuit to eliminate domestic arbitration law as a basis for vacating international arbitration awards and to find domestic law exclusions trumped by the New York Convention.[29] In 2012, the 11th Circuit became the only circuit where federal judicial enforcement of discovery measures under 28 U.S.C. § 1782 extends to foreign private arbitral proceedings.[30] In short, federal courts in the 11th Circuit follow the fundamental principle that the judiciary must "ensure arbitration is an alternative to litigation, not an additional layer in a protracted contest."[31]

Georgia state courts have likewise made exceedingly clear their support for arbitration, and refrain from undue interference with arbitral proceedings. Grounds for vacatur of an arbitration award are "among the narrowest known to the law."[32] The Supreme Court of Georgia declared the grounds for vacating an award expressly enumerated in Georgia's domestic arbitration code as the sole grounds for such action,[33] a rule which should apply under the new ICA Code as well. Where "no ground exists for vacating or modifying the award, it is the duty of the court to confirm it."[34]

The strong support of the local state and federal judiciary in Georgia for arbitration will encourage confidence that international arbitration agreements and awards will be upheld under the new ICA Code.

New Georgia Bar Rules Welcome International Business

Georgia boasts an expanded port in Savannah and the world's

busiest airport, with direct flight connections to more than 90 international destinations in 55 countries. Hotel and conference facilities in the state are top-rated and benefit from world-renowned southern hospitality and provide a much better value proposition than many international locations. With the globalization of business comes the globalization of the practice of law, as lawyers increasingly follow their clients around the world to support commercial transactions or to represent their clients in cross-border disputes.

Rules that address this reality directly and thoughtfully tend to make a jurisdiction a more attractive place not only for international arbitration, but also for global businesses to invest, and also reduce the risk that foreign lawyers inadvertently engage in the unauthorized practice of law. After changes adopted by the Supreme Court of Georgia on Dec. 1, 2012, Rule 5.5(e) of the Georgia Rules of Professional Conduct stands revised to encourage a greater role for international counsel alongside domestic attorneys representing clients in the state. The rule continues to prohibit international counsel from a "systematic and continuous presence" in the state, but permits temporary practice.[35]

The change reflects the five clusters of activities identified by the American Bar Association Task Force on International Trade in Legal Services as ways in which international lawyers might want to practice in a U.S. jurisdiction like Georgia:

1. Temporary Transactional Practice, or "fly in-fly out" practice, where a foreign lawyer flies into Georgia for negotiations or a transaction with a company with Georgia operations.
2. Foreign-licensed In-House Counsel, such as where a foreign multinational client with operations in Georgia may want one of its in-house lawyers to work in Georgia for a limited time.
3. Permanent Practice as a Foreign Legal Consultant, where a foreign lawyer practices in Georgia on matters governed by non-U.S. law, but does not hold himself or herself out as a fully licensed member of the State Bar of Georgia.
4. Pro Hac Vice Admission, where a foreign lawyer associates with a member of the State Bar of Georgia in a particular matter.
5. Full Licensure as a Georgia Lawyer, whereby a foreign-trained lawyer actually sits for the Georgia bar examination and becomes licensed to practice law in the state of Georgia.[36]

Georgia is now the only Bar in the United States that has adopted specific rules and policies governing all five of these categories of activity,[37] which are often referred to as the "foreign lawyer cluster."[38] Indeed, recently amended commentary to Georgia Rule of Professional Conduct 5.5(e)(3), which governs the temporary practice of law by international practitioners in Georgia, goes beyond the ABA commentary to ABA Model Rule 5.5, further confirming Georgia's openness to international practitioners.[39]

Georgia's new rules provide for a more hospitable locale for involvement of foreign attorneys in arbitration seated in the state than other states. For example, California Rule of Court No. 9.43,[40] which governs the ability of attorneys who are not members of the State Bar of California to act as counsel in international arbitrations seated in California, allows attorneys admitted to the bars of other states to participate in international arbitrations, but does not permit foreign attorneys who are not otherwise admitted in another U.S. jurisdiction to participate.

With the new ICA Code, a federal and state judiciary strongly disposed in favor of arbitration, and the liberalized rules for participation of international attorneys and parties, Georgia now stands well-poised to further grow international business in the state. To promote the state's stature as a hub of international arbitration, a new organization has been formed: the Atlanta International Arbitration Society (AtlAS). Its first annual conference in April 2012 was a huge success and featured some of the most prominent names in international arbitration. Attendees came from more than 23 countries, and the proceedings won notice in several international publications.[41]

AtlAS held the 2013 conference in Atlanta on April 21-23. The conference theme was "Convergence and Divergence in International Arbitration Practice" and featured leading practitioners and scholars from around the world. Panels focused on experiences "in the trenches" in proceedings around the world, issues with enforcement of interim and final measures and awards, matters involving sovereign actors, drafting arbitration agreements and developments in discovery availability under 28 U.S.C. § 1782. More details are available at AtlAS's website at www.arbitrateatlanta.org. GBJ

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border commercial disputes and the representation of policyholders in insurance coverage recovery matters. Guilbert has represented clients in international arbitrations under the rules of the International Chamber of Commerce, the AIDA Reinsurance and Arbitration Society (U.K.), the United Nations Commission on International Trade Law and the Singapore International Arbitration Centre, and also has represented clients in domestic arbitrations under the AAA, JAMS, ARIAS and CPR Rules, as well as litigation in state and federal courts. Guilbert is the vice chair of the Legislative Working Group of the Atlanta International Arbitration Society (AtlAS), a member of the International/London subcommittee of the ABA Insurance Coverage Litigation Committee and was named a rising star by Georgia Super Lawyers in 2012 and 2013.

Endnotes

1. A recent study shows that arbitration proceedings have a significant and positive impact on regional economies. See Charles River Associates, Arbitration in Toronto: An Economic Study (2012), available at http://www.crai.com/uploadedFiles/Publications/Arbitration%20in%20Toronto%202012-09-06.pdf. This private study, conducted for Arbitration Place in Toronto, found that arbitration activity in that region would generate $256 million in economic activity in 2012 and an estimated $273 million for 2013. Id. at 4. International arbitral proceedings typically require the use of local counsel, expert witnesses, translation services, court reporters and arbitrators, thereby benefiting the local bar, without burdening the local courts. International arbitration also brings revenues to the local hospitality industry when foreign parties and their lawyers attend arbitration hearings in Georgia.
2. O.C.G.A. §§ 9-9-20 to 9-9-59 (2012).
3. Georgians have a huge interest in promoting international commerce. With the world's busiest airport in Atlanta, two deep water ports, one of the top three distribution cities in the country and the third-highest concentration of Fortune 500 companies in the United States, global trade is one of Georgia's greatest competitive strengths. Metro Atlanta Chamber, http://www.metroatlantachamber.com/why-metro-atlanta (last visited Apr. 2, 2013); Georgia Ports Authority, http://www.gaports.com (last visited Apr. 2, 2013). In Atlanta alone, there are 67 consulates and government-sponsored trade organizations, 48 bi-national chambers of commerce and approximately 2,800 international businesses from some 65 countries that have established their U.S. headquarters. Metro Atlanta Chamber, http://www.metroatlantachamber.com/economic-development/global-commerce (last visited Apr. 2, 2013). In 2010, $28.7 billion in exports and $60.2 billion in imports passed through Georgia's ports. Jacques Couret, Ex-Im Bank Opens Atlanta Center, Atlanta Bus. Chron., Aug. 15, 2012, http://www.bizjournals.com/atlanta/news/2012/08/15/ex-im-bank-opens-atlanta-center.html.
4. Bill Hamrick, Sen. Bill Hamrick Files Legislation to Revise Georgia's International Commercial Arbitration Laws, Times-Georgian, Feb. 7, 2012, http://www.times-georgian.com/pages/full_story/push?blog-entry-Sen-+Bill+Hamrick+Files+Legislation+to+Revise+Georgia%E2%80%99s+International+Commercial+Arbitration+Laws%20&id=17443624.
5. O.C.G.A. § 9-9-21(a) (2012).
6. UNCITRAL Model Law on International Commercial Arbitration [hereinafter UNCITRAL Model Law], available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
7. See list of Model Law jurisdictions at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
8. *See* 9 U.S.C. §§ 201-208.
9. *Id.* §§ 301-307.
10. The "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration." Volt Info. Scis. v. Bd. of Trustees, 489 U.S. 468, 477 (1989).
11. O.C.G.A. § 9-9-23 (2012).
12. The legislative history of the UNCITRAL Model Law and the 2006 Amendments is available at www.uncitral.org. To promote greater uniformity in the application of model law provision, UNCITRAL also has begun collecting case law from UNCITRAL Model Law jurisdictions. See, e.g., UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, available at http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.
13. O.C.G.A. § 9-9-26 (2012).
14. *Id.* § 9-9-29(a). Such agreements may be challenged as with other contractual agreements for fraud, duress or unconscionability. Triad Health Mgmt. of Ga., III, LLC v. Johnson, 298 Ga. App. 204, 209, 679 S.E.2d 785, 790 (2009). A finding that the balance of a contract is void will not, without more, render the arbitration agreement void. O.C.G.A.§ 9-9-37(1) (2012). The Code also broadly defines "arbitration agreement" to mean "an agreement by the parties to submit to arbitration all or certain disputes that have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not," and confirms that arbitration agreements "may be in the form of an arbitration clause in a contract or in the form of a separate agreement." Id. § 9-9-22(a)(2).
15. A party challenging an international arbitration tribunal's decision that it has jurisdiction may appeal that decision to a court within 30 days, but the filing of an appeal will not stay the arbitral proceedings, thus reducing the opportunity for posing meritless procedural hurdles. Id. § 9-9-37(1)(3).
16. *See*, e.g., Int'l Chamber Com. R., Art. 28, available at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/; London Ct. Int'l Arb. R., Art. 25, available at http://www.lcia.org/Dispute_Resolution_

Services/LCIA_Arbitration_Rules.aspx; Int'l Arb. R., Art. 21, available at www.adr.org.

17. *See generally* O.C.G.A. § 9-9-27 (2012). Judicial assistance is also available where parties have failed to agree upon the procedure for appointing an arbitrator or arbitrators, id. § 9-9-32(c); where an agreed-upon method for appointing arbitrators fails due to actions by any party, party-appointed arbitrator or third party such as an arbitral institution, id. § 9-9-32(d); where a party challenges the appointment of a particular arbitrator, id. § 9-9-34; where an arbitrator becomes unable to perform his or her functions or otherwise refuses to do so without undue delay, id. § 9-9-35; where a party challenges a tribunal's interim award on jurisdiction, id. § 9-9-37(3); where a tribunal needs court assistance in the issuance of subpoenas for witnesses or other evidence, id. § 9-9-49; and where a party seeks to set aside an arbitration award for one of the limited enumerated grounds in the code, id. § 9-9-56.
18. Examples of interim measures can be found in Fed. R. Civ. P. 64(b).
19. O.C.G.A. § 9-9-38(f) (2012). Judicial refusal to recognize or enforce such interim measures may be based solely on those factors enumerated in O.C.G.A. § 9-9-39.
20. *Id.* § 9-9-30.
21. *Id.* § 9-9-22(a)(3).
22. *See* Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, cmt. 22, in UNCITRAL Model Law, supra note 6, at 29.
23. O.C.G.A. § 9-9-27 (2012).
24. *Id.* § 9-9-49(a). The ICA Code here again makes judicial aid available, this time for enforcement of subpoenas with treatment equal to that in civil actions.
25. UNCITRAL Model Law Article 27 states: "The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence."
26. O.C.G.A. § 9-9-49(c) (2012). Other Georgia enhancements to the UNCITRAL Model Law include streamlined provisions on the procedures for applying for interim relief, id. § 9-9-38; a provision allowing non-Georgia parties to opt out of certain grounds for judicial review of an arbitration award, id. § 9-9-56(e); and a provision permitting the consolidation of multiple arbitral proceedings upon the agreement of the parties, id. § 9-9-46(d).
27. Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1445 (11th Cir. 1998).
28. Frazier v. CitiFin. Corp., 604 F.3d 1313, 1323-24 (11th Cir. 2010). In other leading arbitral centers in the United States, such as New York, "manifest disregard [of the law] remains a valid ground for vacating arbitration awards." T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc., 592 F.3d 329, 339-40 (2d Cir. 2010).
29. *See* Bautista v. Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005).
30. *See In re* Consorcio Ecuatoriano de Telecomunicaciones S.A., v. JAS Forwarding (USA), Inc., 685 F.3d 987, 996-97 (11th Cir. 2012).
31. B.L. Harbert Int'l, LLC v. Hercules Steel Co., 441 F.3d 905, 907 (11th Cir. 2006), overruled on other grounds by Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008).
32. Malice v. Coloplast Corp., 278 Ga. App. 395, 397, 629 S.E.2d 95, 98 (2006).
33. Greene v. Hundley, 266 Ga. 592, 595, 468 S.E.2d 350, 353 (1996) (reversing Court of Appeals' decision that an arbitration award may be vacated if court determines there was no evidence supporting it); accord Johnson Real Estate Invs., LLC v. Aqua Indus., 282 Ga. App. 638, 642, 639 S.E.2d 589, 594 (2006); Ralston v. City of Dahlonega, 236 Ga. App. 386, 387, 512 S.E.2d 300, 301 (1999).
34. Lanier Worldwide, Inc. v. Bridgecenters at Park Meadows, LLC, 279 Ga. App. 879, 880, 633 S.E.2d 49, 51 (2006) (quoting Universal Mgmt. Concepts, Inc. v. Noferi, 270 Ga. App. 212, 214, 605 S.E.2d 899, 901 (2004)).
35. Ga. Rules of Prof'l Conduct R. 5.5(e).
36. Feb. 4, 2012, Memorandum from ABA Task Force on International Trade in Legal Services to State Supreme Courts and State and Local Bar Associations, International Trade in Legal Services and Professional Regulation: A Framework for State Bars Based on the Georgia Experience, available at http://arbitrateatlanta.org/wp-content/uploads/2011/08/FINAL-ITILS-toolkit-2-4-12.pdf [hereinafter Feb. 4, 2012, ABA Memo].
37. *See* Ga. Rules of Prof'l Conduct R. 5.5(e) (temporary practice of law), 5.5(f) (foreign licensed in-house counsel); Sup. Ct. of Ga. Rules Governing Admission to the Practice of Law, Part E (Foreign Legal Consultants); Ga. Unif. Super. Ct. R. 4.4 (pro hac vice admission of foreign lawyers); State of Georgia Board of Bar Examiners, Waiver Process and Policy Admission to Practice, available at https://www.gabaradmissions.org/waiver-process (Georgia Bar admission process for foreign-educated lawyers).
38. Feb. 4, 2012, ABA Memo, supra note 36, at 6.
39. Compare Ga. Rules of Prof'l Conduct R. 5.5 cmts. with Model Rules of Prof'l Conduct R. 5.5 cmts.
40. Cal. R. Ct. R. 9.43, available at http://www.courts.ca.gov/cms/rules/index.cfm?title=nine&linkid=rule9_43.
41. *See*, e.g., Stephen L. Wright, "The United States and Its Place in the International Arbitration System of the 21st Century: Trendsetter, Outlier of One in a Crowd?" — Inaugural Conference of the Atlanta International Arbitration Society—Atlanta, 15-17 April 2012, 2012 Paris J. Int'l Arb. 741, available at http://arbitrateatlanta.org/wp-content/uploads/2012/11/Cahiers-de-lArbitrage-2012-n%C2%B03-Br%C3%A8ves-comptes-rendus-de-colloques-e....pdf (summary of proceedings); see also Reports of the Conference Rapporteurs, available at http://arbitrateatlanta.org/wp-content/uploads/2011/11/AtlAS-Conference-Report1.pdf (full report of proceedings).

A Thousand Military Cases for Georgia Lawyers

by Norman E. Zoller

"As a veteran and lawyer, I have found that participation in the Military Legal Assistance Program (MLAP) is both rewarding and helpful in my law practice. My firm is geared toward estate and long term care planning, where I may assist many older veterans, but there is a great need to help currently serving active duty military members as well. Because of MLAP and the support and training I acquired through them, I have confidence to accept referrals and cases that I may not have otherwise received. These cases permit me to provide a rewarding public service while at the same time increase my business and revenues." – Victoria L. Collier, Decatur attorney

It's been slightly more than three years since the State Bar of Georgia launched its Military Legal Assistance Program (MLAP), and the program has connected more than a thousand military service members and veterans with lawyers who have agreed to provide legal service. These are men and women who are serving or have served our state and nation as soldiers, sailors, airmen and marines in our armed forces both in war and peacetime. As increased dedication and commitment has been demanded of our service members stationed here in Georgia and throughout the world, the legal assistance provided by Georgia lawyers helps offset the sacrifices they and their families make.

"Showing our appreciation to America's active duty military personnel, veterans and their families has become a national priority in recent years, through programs like the Obama Administration's 'Joining Forces' employment and education initiatives, spearheaded by First Lady Michelle Obama and Dr. Jill Biden," said State Bar President Robin Frazer Clark. "I am proud that the State Bar of Georgia has taken the lead in repaying those who have made so many sacrifices on our behalf with the successful start of our Military Legal Assistance Program. I am grateful to the hundreds of Georgia lawyers who have answered the call to attend to the various legal needs of the men and women who are wearing or have worn the uniform in service to our nation."

The program accepts most civil law cases (but not criminal matters), and to date, more than half of those have concerned family law matters. Multiple deployments and the mental and physical demands of service in combat have increased the strain upon military families, and regrettably more than half of the family law matters received by MLAP have been divorces and child custody matters.

Statistically, about 10 percent of the cases have been consumer law matters, another 8 percent have been real property matters (landlord-tenant issues and foreclosures) and about 10 percent involve VA benefit awards. When the MLAP program formally began in 2009, only 160 lawyers were accredited to

practice before the Department of Veterans Affairs. As a result of three CLE programs sponsored jointly by the MLAP Committee and the Military and Veterans Law Section, 505 lawyers have now been accredited. This has increased the pool of attorneys capable of assisting veterans and their dependents with obtaining federal entitlements.

Commenting about this program and the economic value to their practice and to the Bar, lawyers have said:

- "The intent of the Georgia Bar's MLAP program is to expand the availability of legal services to Georgia's deserving military and veteran communities. In that regard, it should be considered as a success, through the quantitative provision of legal services in response to nearly a thousand queries for assistance. It should also be considered a success through the qualitative performance of those services, either on a pro bono or reduced fee basis. The panoply of these services covers nearly all aspects of civil and domestic cases and has greatly supported the legal needs of Georgia's military, veteran and associated family members." — Drew Early, Decatur
- "As a retired Air Force judge advocate and veteran of the First Gulf War (Operations Desert Shield and Desert Storm), I witnessed firsthand the enormous anguish, anxiety and frustrations of our service members trying to deal with their personal legal problems during their deployments. It has been even more dramatic during United States' operations in Iraq and Afghanistan as there have been many more service members assigned to multiple deployments. It is such a relief to now be able to place our Georgia service members in touch, through the Military Legal Assistance Program, with a competent local attorney who can really help them. And best of all, seeing our volunteer lawyers reaching out and really helping our nation's finest sons and daughters with their divorce and custody problems, veterans' entitlements and a host of other legal issues is just inspiring. For our folks in uniform, it is like seeing a tank column come over the hill after they are pinned down in a fire fight. I am indeed proud of those who serve our country, but today I am equally proud of my fellow lawyers in Georgia who are 'standing tall' with our service members!" — John Camp, chair, Military and Veterans Law Section, Warner Robins
- "There are several reasons for the Military Legal Assistance Program, which was designed to assist our military sector. First, since the program consists of diverse lawyers who may be veterans themselves, we understand the never-ending challenges of our military members who struggle daily with the challenges presented by performing their jobs while their families are separated from them for long periods of time, often without any word of their status. These warriors

Photo by Stephanie J. Wilson

(Left to right) Steve Redmon, special assistant to VA general counsel; John Camp, chair, Military and Veterans Law Section; Victoria L. Collier, CELA, VA and Elder Law instructor; Patricia Hooks, regional VA general counsel; Will Gunn, VA general counsel; Patty Shewmaker, CLE committee chair; and Norman Zoller, coordinating attorney, MLAP.

"Challenge coins commemorate significant advancement in the section's activities, carry special meaning and are valued far more than cuff links, personalized pens or a (coffee) gift card. They carry a message about our section's and MLAP's purpose and what is our mission. We 'honor the military' and we 'serve those who have served' by raising the quality of the practice of military and veterans law and delivering legal assistance to our service members and veterans who would otherwise be unable to find legal assistance."—John Camp, chair, Military and Veterans Law Section

Attorney Volunteer Form

2013 Law School Orientations on Professionalism

Demonstrating that professionalism is the hallmark of the practice of law, the Law School Orientations have become a central feature of the orientation process for entering students at each of the state's law schools over the past 20 years.

The Professionalism Committee is now seeking lawyers and judges to volunteer to return to your alma maters or to any of the schools to help give back part of what the profession has given you by dedicating a half day of your time this August.

You will be paired with a co-leader and will lead students in a discussion of hypothetical professionalism and ethics issues.

Minimal preparation is necessary for the leaders. Review the provided hypos, which include annotations and suggested questions, and arrive at the school 20 minutes prior to the program. Pair up with a friend or classmate to co-lead a group

Please consider participation in this project and encourage your colleagues to volunteer.

State Bar of Georgia

Committee on Professionalism

Chief Justice's Commission on Professionalism

Full Name
(Mr./Ms./Judge)_____
Nickname_____
Address: (where we will send your group leader materials via USPS)

_____

_____
Email:_____
Phone:_____ Fax: _____
Area(s) of Practice:_____
Year admitted to Georgia Bar: _____Bar #:_____
Please pair me with: (optional)_____
Note: phone, fax numbers & email addresses may be shared with group leaders and law schools.

Return form to: State Bar Committee on Professionalism: Attn: Nneka Harris-Daniel • Suite 620 • 104 Marietta Street NW • Atlanta, GA 30303 • ph: (404) 225-5040 • fax: (404) 225-5041 • email: Nneka@cjcpga.org

☐ **Atlanta's John Marshall Law School**
Saturday, August 17
9 - 11:30 a.m. (tentative)

☐ **Georgia State University College of Law**
Tuesday, August 13
3 - 5:45 p.m. (tentative)

☐ **Mercer University School of Law**
Friday, August 16
1:30 - 3:30 p.m. (tentative)

☐ **Savannah Law School**
Saturday, August 24
10:45 a.m. - 12:45 p.m. (tentative)

☐ **University of Georgia School of Law**
Friday, August 16
2 - 4:30 p.m. (tentative)

who constantly place themselves in harm's way for this nation deserve the very best assistance after giving so much unselfish and nonyielding skill and time without question. We stand as a beacon to help these steadfast centurions with professionals who can understand and defend their cause. We also realize that many may be battling PTSD or any number of maladies contemporaneously with their duties to the nation and their families. It is with honor that the Military Legal Assistance Program continually assists veterans with defense of issues often developed during the service to their country. Our mission is to assist those who tirelessly defend us and are so deserving of our care. And these very special clients have brought new business to our office, even on a reduced-fee basis." —Fred Jones, McDonough

- "As the chair of the Pro Bono Committee of the Real Property Law Section, I have had the privilege of assisting with matching attorneys with service members in need of real estate-related legal assistance. It is inspiring to have a list of so many lawyers who are eager to assist the service members on a pro bono or reduced-fee basis as a way to say thank you for their service to our country. Through MLAP we have been able to assist active and retired service members in matters such as defending their rights in foreclosure actions and landlord-tenant disputes. MLAP is providing a tremendous service to both the members of the military as well as the attorneys who are able give back by assisting those who volunteer to protect us." —Missy Robinson, Atlanta
- "Clearly, the Military Legal Assistance Program is fulfilling its original purpose, which is to encourage Georgia lawyers to stand in the gap between the legal services available to our military personnel and their unmet needs. Bar members' participation is a great way to express our appreciation to the troops and returning veterans for their service on our behalf. The success of this program is profoundly gratifying to the Bar leaders whose vision jumpstarted the program several years ago, and to the hundreds of Georgia lawyers who have contributed to its success by making themselves available to give back to our military personnel in this way. It is definitely a win-win situation for our service people and the participating members of the State Bar." —Cliff Brashier, State Bar executive director

Photo by Norman Zoller

(Left to right) For their exemplary work in providing direct legal assistance to service members and veterans, Drew Early, Lane Dennard and Cary King, the first recipients of the Marshall-Tuttle Award, were also the recipients of the inaugural issue of "challenge coins," which will be presented from time-to-time to lawyers and others who merit special recognition for service on behalf of the Military Legal Assistance Program and of the Military and Veterans Law Section.

Additional Military Legal Assistance Developments

Special Help for Military Families During Deployments

The Military and Veterans Law Section, under leadership of John Camp, has been active in other ways with respect to protecting the rights of service members during their deployments. With Camp's advice and the help of several key members of the Georgia General Assembly, including Sen. Josh McKoon, the Georgia Military Parents Rights Act (SB 112) was enacted in 2011.[1] The act helped fill a critical gap in Georgia law that shields military parents by protecting their custody and visitation rights with their children.

Since passage of that law, the issue has been more broadly considered on a national basis, and new legislation has been proposed that would be included under the Uniform Deployed Parents Custody and Visitation Act (UDPCVA). This proposal has been assembled by the Drafting Committee of the national Commission on Uniform Laws, and was endorsed in principle by the Family Law Section of the State Bar of Georgia and by the State Bar Board of Governors on Jan. 12, 2013.

Among other provisions, as noted by Kelly Miles, chair of the Family Law Section,[2] this additional proposed legislation would (1) clarify that the jurisdictional rules limit the ability of the parties to

Observations by Service Members and Vets

What do the service members and veterans themselves say about the legal assistance they have received? Here is a sampling of comments made on the evaluations returned to the State Bar.

National Guard soldier, Fulton County: "Attorney ___ was very professional and assisted me in my case. He is a very kind man with values, and worked in my best interest. Thanks for the recommendation and supporting our military."

McIntosh County veteran: "Thanks, you guys are great. . . . I just found out I am getting out 21 Oct. . . I also found out that I am going to be disabled for a few years. . . you kind of guys are the reason we serve."

Cherokee County veteran: "Mr. ___ and his staff have been helpful and I am very pleased with the representation."

Henry County veteran: "I was very satisfied with my attorney. I felt that . . . his passion and deep concern for my problem enabled him to serve my needs more than adequately. He was very timely with his response and always returned my calls. I would recommend him to future veterans as well as retain him for myself in future services."

Active duty soldier in Afghanistan (case in DeKalb County): "I am very satisfied with this program. They helped me find my lawyer while I was deployed. (I am still [in] Afghanistan.) Thank you so much! Quick, very professional and very friendly!"

seek modifications in states other than the issuing state; (2) specify how a controlling order is to be determined and reconciled in the event multiple orders are issued; (3) clarify that the jurisdictional basis for the issuance of support orders and child custody jurisdiction are separate; and (4) establish uniform procedures for the processing of international child support cases, pursuant to the Hague Convention.

Since the Board of Governors formally endorsed this uniform legislation, HB 685 was introduced, referred to the House Judiciary Committee and will be considered in the 2014 session. Camp and the Military and Veterans Law Section have vowed to maintain the contacts and emphasis necessary to get this legislation enacted as early as possible.

It appears clear that such uniformity is needed across the country. Because of this pressing need, its adoption in some form appears to be only a matter of time. Moreover, eventual enactment of the UDPCVA will aid in providing significant relief for many active duty service members who have sought assistance through MLAP on child custody, child support and child visitation issues.

Legal Assistance at VA Medical Centers

In addition to the help provided through MLAP, veterans at the VA Medical Center in Decatur can also receive legal assistance through a program established 15 years ago by the late Melburne D. "Mac" McLendon. McLendon recognized that many of the veterans who came to the hospital for medical attention also had a variety of special legal needs that only an attorney could meet and sought a way to provide assistance. He was permitted to set up a small office at the hospital where he offered pro bono services to veterans.

Following Mac McLendon, Cary King assumed the clinic's coordinating leadership role. For the past 12 years, he has maintained the Atlanta VA Legal Clinic, and along with Greg Studdard and other recruited attorneys, continues to provide pro bono legal services on family law, consumer law, wills and estates, powers of attorney and other civil issues to veterans. King and the other lawyers on his team either provide the legal service personally or refer the matter to another attorney who specializes in that particular legal area. Annually, about 500 veterans who served in WWII, Korea, Vietnam, and more recently, the Middle East, receive this legal assistance. For his work, King was recently recognized by Will Gunn, general counsel of the U.S. Department of Veterans Affairs, and in January 2013, he received the Marshall-Tuttle Award, presented annually by the State Bar of Georgia Board of Governors.

Because of its success, expansion of this legal assistance program is being considered for the other two major VA Medical Centers in Augusta and Dublin, respectively.

Emory Law School Clinic Begins Operations

Another effort to assist veterans has been the creation of a law school clinic which began receiving and processing veterans as clients in February 2013 at the Emory Law Volunteer Clinic for Veterans.

Following the suggestion by Richard Menson, retired partner of McGuire Woods, Emory Law School Professor Charles Shanor agreed this past winter to start a program to which about 20 law students were initially recruited, along with 25 attorney-mentors who will work with the students one-on-one.

Lane Dennard, retired King & Spalding partner, was appointed adjunct professor and co-director in January, and the clinic has already processed 16 cases, including post-traumatic stress disorder; traumatic brain injury; pension for a service-connected death; a need-based pension; VA claim for physical injuries; a requested upgrade to a military discharge; and two cases before the U.S. Court of Appeals for Veterans Claims. Dennard says, "The mission of our clinic is to assist those who have served our country with legal issues that they face, especially claims for service-related disabilities. We are off to a good start with our case load and very enthusiastic student leaders and volunteers. Frankly, I am amazed at the work that the students have done. Also we have been fortunate to have the full support of the Military and Veterans Law Section of the State Bar and the MLAP."

This initiative at Emory represents a significant beginning, and the program is being considered for expansion to the four other law schools in Georgia as well.

Charles L. "Buck" Ruffin, president-elect of the State Bar of Georgia and former chair of MLAP Committee: "The need first identified by Jay Elmore and then a concept conceived and developed by his partner Jeff Bramlett during his State Bar presidency, this program is eminently achieving its intended objectives. Not only are service members and vets receiving the legal help they seek, but also these are cases for our Georgia lawyers that might not have otherwise come to them. Clearly, this is economically beneficial and potentially new business for them."

Photo by Katherine Hinson, Emory Law School

Emory Law School Clinic faculty and student leadership *(left to right)* Rachel Erdman 2L, Prof. Charles Shanor, Adjunct Prof. Lane Dennard and Martin Bunt 2L.

At this time in our nation's history, with an all-volunteer military force, multiple deployments and an aging veteran population, the military and the states are learning that much needs to be done to assist our service members and veterans with personal legal issues. Lawyers in Georgia can take special pride in knowing that more than 700 of them have stepped forward to help. Being associated with programs like these is enormously satisfying and gratifying. Special thanks go to those attorneys who are already helping or who have helped. And to those who have thought about participating, please contact me for details at 404-527-8765 or at normanz@gabar.org.

Join in. Doing so is good for our service members and vets, and it can be personally enriching and economically beneficial for you and your practice. GBJ

Norman Zoller has devoted the majority of his legal career to public service. He served as the first clerk of court for the U.S. Court of Appeals for the 11th Judicial Circuit from 1981 to 1983, when he was named circuit executive, a post he held until his retirement in 2008. Previously, he managed the Hamilton County, Ohio, courts for nearly a decade. Zoller holds bachelor's and master's degrees in public administration from the University of Cincinnati and a law degree from Northern Kentucky University. He is admitted to practice in Georgia and Ohio. An Army veteran, Zoller served almost seven years on active duty as a field artillery officer, including two tours of duty in Vietnam, first with Special Forces and then with the 82nd Airborne Division in response to the Tet Offensive in 1968. He also served 15 years in the national Guard and Army Reserves as a judge advocate officer.

Endnotes

1. O.C.G.A. Sections 19-9-1; 19-9-3; and 19-9-6.
2. Memorandum from Kelly Miles, chair, Family Law Section, to the State Bar of Georgia's Board of Governors for its meeting on Jan. 12, 2013.

2013 Legislative Review

by Russell N. "Rusty" Sewell

The 2013 session of the Georgia General Assembly adjourned sine die on March 28. During this year's session, a number of bills supported by the State Bar passed through the House and Senate and now await signature from the governor.

Perhaps most notably, this year saw reform of the Georgia Juvenile Code. Spearheaded by the efforts of the Young Lawyers Division, the Juvenile Justice bill, HB 242, completely rewrites the Juvenile Code. Among numerous other changes, the new code separates violent and non-violent juvenile crimes, offering community-based, social service programs instead of lock-up for the lesser offenses. This reform, sponsored by House Judiciary Committee Chair Wendell Willard (R-Sandy Springs), could save taxpayers approximately $90 million over five years and was a product of the Special Council on Criminal Justice Reform. The State Bar's Board of Governors voted to support the recommendations of the Council. It was the work of the Council which led to revisions in last year's criminal justice reform providing for more judicial discretion in sentencing. HB 349, which dealt with the additional changes to the adult system, was also part of the Council's report.

In addition to the Juvenile Code Reform, the General Assembly passed HB 160, which prohibits most transfer fee covenants on property. These transfer fees usually require a percentage of the sale price (typically 1 percent) to be paid to the original land developer or its trustee and can stay in effect for 99 years. The recipient of this payment has no current connection to the property or the transaction. The Real Property Law Section proposed the bill, which had been previously submitted to the General Assembly during the 2011 legislative session but failed to pass because of additional amendments that had been added. Rep. Mike Jacobs (R-Brookhaven), vice-chairman of the House Judiciary Committee, sponsored the bill in the House, and Sen. Jesse Stone (R-Waynesboro), chairman of the Senate Judiciary Non-Civil Committee, sponsored the bill in the Senate.

Another key initiative of the Bar was in response to the Supreme Court of Georgia finding that malpractice claims are assignable (*Villanueva v. First American Title*). HB 160, the transfer fee covenant bill, and Rep. Chad Nimmer's (R-Blackshear) HB 359, dealing with the unclaimed property, were both amended to include language prohibiting the assignment of legal malpractice claims. Both of these bills ended up passing the House and Senate and are awaiting the governor's signature.

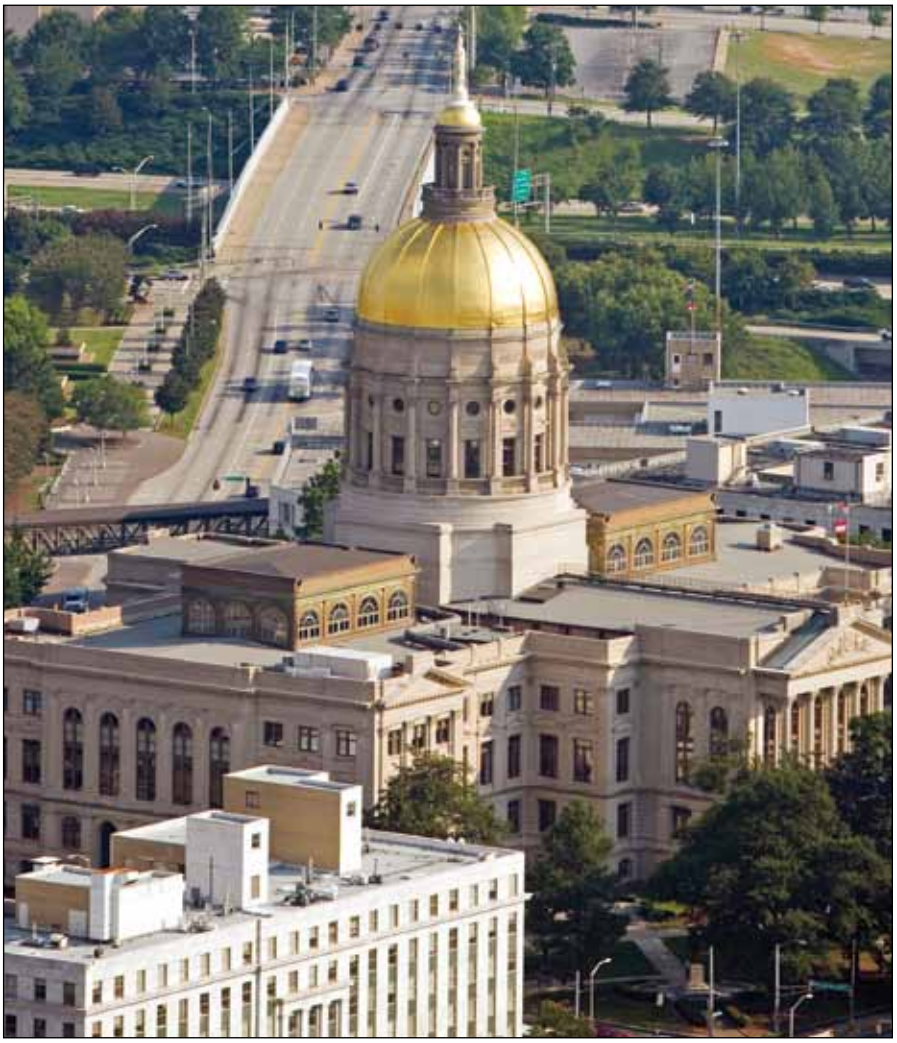
The Bar also supported several other bills passed by the Legislature. The Bench & Bar Committee's proposal to update the language used in the Oath for Bailiffs passed the General Assembly in HB 161. It was sponsored in the House by Rep. Alex Atwood (R-Brunswick) and in the Senate by Sen. William Ligon (R-Brunswick). Georgia's version of Article 9 of the Uniform Commercial Code (UCC) received an update via SB 185, sponsored in the Senate by Sen. Stone and in the House by Rep. Jacobs. The changes amend Article 9 to conform to the 2010 Amendments to Article 9 of the UCC as drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. Additionally, the amendments conform O.C.G.A. §§ 11-9-502 and 9-515 (non-uniform provi-

sions of the UCC) to the law in other states and now permit mortgages to be effective as fixture filings.

Two other important pieces of legislation include the amendments to the Uniform Interstate Family Support Act (UIFSA) and the amendment of the interlocutory appeal procedure in child custody cases. The Family Law Section proposed the changes to UIFSA in an effort to bring the statute into conformance with the 2008 amendments to the uniform law. The amendments passed in SB 193, sponsored by Sen. Bill Cowsert (R-Athens) and Rep. Regina Quick (R-Athens). The updates incorporate the United States' adoption of the Hague Convention on the International Recovery of Child Support and other forms of family maintenance. These changes allow for better enforcement of American child support orders abroad and ensure that children in the United States receive financial support owed from parents, regardless of where the parents live. The Appellate Practice Section supported the amendment of the interlocutory appeal procedure in child custody cases. The amendment adjusts the appellate procedure for orders in child custody cases and passed the General Assembly in SB 204. Sen. Cowsert and Rep. Matt Ramsey (R-Peachtree City) sponsored the bill.

The State Bar's Advisory Committee on Legislation recommended continuing funding in the State's budget for the Appellate Resource Center—which provides legal services to indigent Georgians who have received a death-sentence, as well as working on other cases—and adequate funding for victims of domestic violence. The General Assembly voted to include both proposals in the FY 2014 appropriations bill.

Three initiatives proposed by the State Bar have been introduced and will be worked on during the interim and considered next session. The first, supported by the Fiduciary Law Section, modifies the Uniform Statutory Rule against perpetuities by increasing the vesting period from 90 to 360 years. This change would make Georgia consistent with the laws in surrounding states. The language can be found in SB 159, which has been assigned to the Senate Judiciary Committee. Second, the Family Law Section proposed adding a subsection to the law governing testamentary guardianships requiring that notice be given to relatives of a minor child prior to the issuance of letters of guardianship to the testamentary guardian. This bill, HB 654, is in the House Judiciary Committee. Also in the House Judiciary Committee is HB 685, proposed by the Military and Veterans Law Section, which would update the two-year-old Uniform Deployed Parents Custody and Visitation Act to make it consistent with the uniform law.



State Bar President Robin Frazer Clark did a fine job representing the Bar on its legislative concerns and the entire Executive Committee is to be commended for its legislative efforts. This was a productive and successful session for the State Bar's newly formed lobbying team which includes lobbyists Meredith Weaver, Roy Robinson, Jim Collins and Charlie Tanksley. The State Bar increased its endeavor to expand its grassroots abilities and legislative education efforts by hosting several "lobby days" at the state capitol, led by Zach Johnson. These were well-attended, successful events and I encourage you to try to attend one of these lobby days next year. GBJ

Russell N. "Rusty" Sewell is the president of Capitol Partners Public Affairs Group and team leader for the State Bar's lobbying team.

Whitecliffe

by Mark Roy Henowitz

22nd Annual Fiction Writing Competition

The Editorial Board of the *Georgia Bar Journal* is proud to present "Whitecliffe," by Mark Roy Henowitz of Buford, Ga., as the winner of the *Journal's* 22nd annual Fiction Writing Competition.

The purposes of the competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. As in years past, this year's entries reflected a wide range of topics and literary styles. In accordance with the competition's rules, the Editorial Board selected the winning story through a process of reading each story without knowledge of the author's identity and then ranking each entry. The story with the highest cumulative ranking was selected as the winner. The Editorial Board congratulates Henowitz and all of the other entrants for their participation and excellent writing.

The undertaker had the first motorcar in town. Actually it was a hearse. He thought it gave his funerals some real cachet. It did.

In those days I didn't own a motorcar. For transport, I preferred my old bay. I didn't use a typewriter either. I wrote my pleadings out in longhand. In a nod to modernity, I had recently tossed out my loyal crow feather quill in favor of a new-fangled fountain pen.

It didn't take a horse or a horseless carriage to traverse the two blocks from my home to my law office. My office was a run down, one room affair above the pharmacy and a straight shot across the red clay street from the Courthouse Square.

The windows of my office were open. It didn't help. It was as hot as lava. My shirt was glued to my back. The marbled glass paned door to my office on which I had stenciled my name and profession slid silently open. A man I did not know entered. He wore a black suit that had been in fashion 20 years earlier.

"I'm Moses Johnson," he said.

"Please have a seat," I said, motioning him to a beat up wooden chair.

Gently, he removed his cap and lowered himself into the seat.

"John McHugh is dead," he announced in his deep baritone. It was a soothing voice that enveloped me.

I nodded. Everyone in town knew that John McHugh, the only son of the late Lachlan McHugh, in his day the master of Whitecliffe Plantation, had recently died.

"My mother told me repeatedly," Moses Johnson continued, "that when John McHugh breathed his last, that under the terms of the will of his father, Lachlan McHugh, that I was the owner of Whitecliffe."

"Whitecliffe Plantation? That land has all been sold off years ago," I said.

"Not all of it. The house remains."

"That old place? It's falling down. No one has lived there for 50 years I bet."

"Nevertheless," that voice like syrup flowed on, "it's mine. It has come to my attention that Jimmy McHugh, John's son, Lachlan's grandson, has filed papers with the court to establish his ownership of Whitecliffe. I want you, Mr. Jakes, to prove to the court that I, in fact, am the true owner."

"Have you seen the will?"

"No."

"Have you seen Jimmy's suit?"

"No. I want you to do all that."

I leaned back in my scuffed and ancient chair. Since Whitecliffe, prior to the late unfortunate war, had been the grandest plantation in the county, housing both the McHugh clan and their more than 200 slaves, it seemed to me doubtful that Moses Johnson, a black man, was the true and actual owner of the place. Having no pressing business, in fact very little business at all, pressing or otherwise, I decided to take the case.

"I'll take your case," I said. "I'll investigate it. Look into it. Check back with me later today around sundown."

Moses Johnson nodded. He rose and as silently as he had entered. He slipped out of the office.

The seat of justice was directly across the red clay street from my office. I tramped down the stairs and then bounced across the lawn to the new courthouse. It was new in the sense that it had been built 40 years earlier, in 1870, to replace the old wooden structure, which had burned to the ground. This version was red brick, with dramatic rooflines and towers, making it appear taller than its two stories.

The single courtroom was on the second floor. At ground level were the clerk's vault, the sheriff's office and the Ordinary Court.

"I need to see Lachlan McHugh's will, please," I said to Selma, the perpetual clerk of the Court of Ordinary.

"Between you and me and the bedpost, that's quite a popular item," she said.

"Is that so?"

"O'Kelley pulled it a few days ago. He's representing Jimmy McHugh, the grandson. Did you know that?" She said, pleased with her command of the topic.

"No I didn't," I said, adding to her pleasure. "Who else looked at it?"

"A fellow that came all the way from Atlanta."

"Who does he represent?" I said, adding even more to her superior feeling.

Selma smiled. She still had dimples in her ancient cheeks. "Keep this under your hat, Marcus, but I understand that he represents some long lost Yankee cousins from Massachusetts. Now, who do you represent, Marcus?"

I shrugged and said nothing.

Selma frowned. Then she changed the subject. "Do you want to know how the will survived the 1870 courthouse fire?" Selma was not about to surrender the document before displaying still more extensive knowledge of the situation.

"Tell me," I said.

"All the court papers burned at that time. All the deeds. All the wills. All reduced to ashes. Mere ashes," she said dramatically. "The Ordinary Court judge in those days was a bit scattered. In the head, you understand." She tapped her skull. "The court papers were in complete disarray. Of course, I fixed all that when I took over."

"Of course. But how did the papers being in disarray save the McHugh will?"

"The will wasn't even in the courthouse. The judge had it and several other stacks of documents at home, on his kitchen table. The will was on his kitchen table." She was very satisfied with this revelation. Then to punctuate the tale, she slapped the will of Lachlan McHugh, the master of Whitecliffe, into my palm.

The will was folded and folded again. To one quarter its size. I smoothed it out. I plopped into a wooden chair at a small table in the corner.

Following the clauses about being of sound and disposing mind, the paragraph about a Christian burial, the directions to pay just debts, the will came to the meat of the matter.

"I give bequeath and devise all of my property to my son John, for Life, then to John's child or children for their lives, and upon the death of the last of John's children to my bodily heirs in fee simple, forever.

"But, if any of them contest the validity of this Will or any provision thereof, whether or not in good faith and with good cause, then all the benefits provided for such beneficiary are revoked and annulled.

"Next, I make the following contingent bequest and devise. I take note of my faithful servant Mary, who has cared for me in my declining years. If the above bequest fails for any reason whatsoever, then in that event only, I give, bequeath and devise all of my property to the child or children of said servant Mary, in fee simple forever. However, since I have been advised by counsel that Georgia law makes a nullity of any gift to one held in bondage and since the ultimate result of the present war being uncertain and unknown, this provision is to take effect only if such child or children of Mary are at the time of their birth free persons.

"If all of the above bequests fail for any reason, then all is to go to the persons nearest related to me by blood."

I refolded the will and handed it back to Selma.

"Now who do you represent?" she repeated. "I ask because Moses Johnson came out of your office not long ago. Of course, he is the child of Mary named in the will." She had me nailed. She smiled those dimples at me.

I left the Ordinary office and took three steps across the dusty hallway to the Clerk of Superior Court. The Old Clerk greeted me at the door. He had worked at the old, burned down courthouse and 40 years later was still on the job.

"Help you, son?"

"Yes, sir, I'd like to see the McHugh will case."

"Why's that?" he said wrinkling his brow clear through his bald head.

"It is public record, sir. I don't need a reason."

"I just thought maybe, just maybe, it's got something to do with Moses Johnson being in your office today." Like Selma across the hall, the Old Clerk knew a thing or two about what went on in his town. He knew and he wanted me to know he knew. "A lot of people are interested in the case, son," he said. "Even a fellow that came all the way from Atlanta."

Grinning, he held out another set of quad folded papers. I thanked him, leaned against a wall and read.

The handwritten complaint, drafted by O'Kelley, whose office was next door to mine, was sweet and to the point. Jimmy McHugh was the only son of the Lachlan's only son, John, and the only grandchild of the deceased. Jimmy had no children and being a lifelong bachelor was unlikely to have any. There were no other parties with any interest. The will had been probated 45 years earlier. Vesting should not be postponed any longer. Jimmy was the sole and only heir and devisee. The court should declare Jimmy the owner of the deceased's only remaining asset, Whitecliffe.

I refolded the instrument. I handed it back to the Old Clerk, who had been looking at me crosseyed the entire time.

I strolled onto the courthouse lawn. A couple of geezers were playing checkers on a bench. They ignored me. I didn't return to my office. I swung right, briskly covered the two blocks to my house, slapped a saddle on my old bay, and journeyed to Whitecliffe Plantation.

Lachlan McHugh got his fortune the old fashioned way. He married it. His father was an impoverished school teacher from Massachusetts, who had drifted into Augusta as the 18th century faded. Lachlan had the good fortune and the good sense to woo and win the hand of Katherine Fitzpatrick, the daughter of the master of Silver Hill, the largest plantation on the South Carolina side of the Savannah River.

After the marriage and the dowry, Lachlan carved his own plantation out of a thousand acres on the river's Georgia side a few miles north of Beech Island. Soon

Lachlan's Whitecliffe was every bit as large and successful as its parent plantation. Lachlan's success began with his marriage to money, but was augmented by his study of and practice of scientific agriculture and was based on the labor of his hundreds of slaves.

Whitecliffe's cotton was floated down the Savannah River, which practically ran by Lachlan's front door. In Savannah the crop was cleaned, ginned, pressed and baled in the brick warehouses on the river's edge.

In time, Lachlan acquired interests in more than one of those warehouses, in which nearly all of the cotton produced in the South was first processed and then shipped to Liverpool, England. If cotton was king—and it was—then the men who ran the warehouses were the merchant princes. They and they alone, from their thrones above River Street, set the worldwide price of cotton. Lachlan McHugh was one of these princes.

Then came the War. And the blockade. And no cotton left the port of Savannah. And no prices were set. And the Cotton Kingdom was no more. Lachlan and the others were neither merchants nor princes.

Lachlan McHugh retired to Whitecliffe. Closeted and cocooned there. He withdrew into his own world awaiting the inevitable end. I've heard it said that he willed himself to die before the defeat of the Cause, remarking that he did not care to "Look behind that veil." Sherman's march to the sea began on Nov. 16, 1864. Lachlan had died three days previously.

His only son, John McHugh, enlisted as a captain. He was in the Commissary Corps in Gen. David Rumph Jones's brigade. Later he was promoted to colonel and was in the Quartermaster Corps of the Army of Northern Virginia. He was in that position when Lee surrendered at Appomattox on April 9, 1865.

John returned home to find his father dead, the slaves freed, the crops unplanted and bank loans and taxes owed. He never lived at Whitecliffe again. He began to sell off the hundreds of acres in order to pay the debts. In the end all that remained were the house and a collection of out buildings on barely three acres.

My bay enjoyed the ride. She trotted up to Whitecliffe. It looked more like an oversized farmhouse than a grand plantation manor. I dismounted and tied the bay to a hitching post. Completed in 1849, the house was a white two story. At least it had been. The white had peeled off and faded long ago. The green shutters were speckled with the work of mud dauber wasps. The double deck porch was falling off the house. The tin roof rusted through. Windows were broken. The old mansion was going to rack and ruin.

To the side of the house were a kitchen house and a stable; both falling down. Close by the manor were four log slave cabins, which in the days of bondage would have held eight families serving out their life sentences. Possibly even the father of Moses Johnson.

Stepping warily on the broken porch, dodging the wasps, I gingerly crept to the front door. I twisted the glass knob. Locked. I slipped a thin metal strip I'd brought for the occasion out of my pocket and picked the lock. The door creaked as I pushed it inward.

No one had lived here since shortly after Lachlan had died. The son, John, lived in the fashionable district of Augusta. So did the grandson Jimmy. Only the spiders and their insect prey seemed to inhabit the place. Them and maybe a mouse family or two.

The ground floor contained a central hallway with two rooms on each side. I pushed through the webs, as thick as pea soup. The room to the right was a sitting room. The dust covered furniture arranged for a tea party that never came to pass. The room to the left was the old man's study. The desk still had papers on it; covered with decades of dust. The walls were lined with leather bound books. I examined the spines. Plutarch. Rousseau. Goethe. Plato. Cicero. Livey. Tacitius. Then I saw a spine with no marking; a thin volume. I blew on it. The dust clogged my throat. I slipped it from the shelf. The book was the farm log of Whitecliffe; the handwritten journal of Lachlan McHugh, scientific farmer. It detailed the plantings, the number of acres sown in cotton and other crops, the date of planting, the yield per acre and the yield in dollars, livestock bought, sold and bred. Everything itemized, enumerated, listed and even graphed and charted.

I tucked the volume under my arm; locked the front door. Swung onto my old bay and rode back to town.

After watering the bay, putting her out to graze and leaving the farm journal in my house, I walked back to the center of town.

My office was above the pharmacy. Next to the pharmacy was the hardware store. Above it was the law office of O'Kelley. I bounded up the creaking and groaning stairs. O'Kelley sat behind his desk in the one room office, whose window framed the courthouse. He was fat as a hog, wheezed like a jackass and was as slick as a fox.

"Marcus," he said, struggling to his feet and offering me his hand. I shook it. He motioned to a chair. "What can I do for you?" he said grinning as he collapsed back into his seat.

"I read your Complaint in the McHugh will case," I said.

"What's your interest in that?" he said, screwing up his face.

"I represent Moses Johnson. He's the son of Mary. He's named in the will as the contingent beneficiary."

"That provision, Marcus, only comes into play if the initial bequest fails. It does not fail. My client, Jimmy McHugh, is the grandson of the testator. All we are asking for is earlier vesting."

"You're asking for more than that."

"Maybe. Maybe. But the court isn't going to award Whitecliffe Plantation to Moses Johnson. Come back down to earth, Marcus."

"I hear that some Massachusetts heirs of McHugh are also making a claim."

"Yes. Yes indeed. I've talked to their Atlanta lawyer, a Mr. Sparks. He also should be pragmatic. He's got no claim. Besides, the court is not awarding Whitecliffe Plantation to Yankees. I mean, Marcus, consider the intent of the old man, for God's sake."

"When is the hearing?"

"Judge Pitts will be here in two days time." The judge rode the four-county circuit. He came to our county at least once a month. "We'll be heard at that time."

I shook O'Kelley's hand and left. Down his stairs. Up my stairs.

The postman had crammed a parcel through my slot. I tore off the string and the brown wrapping. Inside was a book, if it could be called a book, the pages being crudely hand sewn together.

I whipped out my magnifying glass and gave the manuscript the Sherlockian treatment. The glass revealed the paper to be ribbed and fraying. Clearly the pages were of cotton composition, not the wood pulp paper in current use.

The glass further showed the brown ink, not the blue of current vogue, to be iron gall. The iron in the ink was in fact oxidizing; literally rusting. The magnification revealed the rust to be in fact eating the paper upon which it lay.

The manuscript dealer, a member of a notoriously fallible profession, had represented the book as a diary, stolen like so many other items, by the Union forces of occupation during their 10-year sojourn in our town and then spirited to Ohio. My glass showed the pages in fact to be of the correct age. Now, thanks to my purchase, the volume had made the complete circle, back home. The diary would fit snuggly into my growing collection, which included soldiers' letters, deeds of slaves, war photos, as well as the farm journal I had purloined from Whitecliffe that very day.

I flopped into my chair, put my feet on the desk and paged through the diary.

I was lost in space and time when my door slid silently open. Moses Johnson glided through. I looked up and motioned him to the chair. I took my feet off the desk.

"The hearing will be in a few days," I said. "When Judge Pitts gets to town. Do you want to attend?"

"No. I think not. I'll leave that to you. I'd rather stay away from the courthouse."

"I understand. That's not a problem."

"What are the chances?"

"I'd have to say slim. However, not zero. I've got a card or two up my sleeves."

"Aces?"

"Maybe not aces. But, they still may trump our foes. It's a dicey situation, considering who the players are. We are talking about Whitecliffe Plantation after all."

"Of course."

I leaned forward. "How old are you?" I said.

"Forty-five. Possibly 44 or 43."

"Have you got any proof of your birth?"

"I'm here. That proves I was born."

"Anything that proves the date of your birth? Any writing?"

He shook his head.

Judge Pitts arrived in town on Tuesday. The Old Clerk sent his 10-year-old grandson across the street to tell me that the case would be heard on Wednesday morning. I tossed the kid two bits for his trouble.

At the appointed time, I walked across the red clay road to the Courthouse Square. I climbed the steps to the second floor courtroom. It was a high ceilinged affair and wainscoted all around. There were no spectators in the pews. Even the checkers-playing geezers on the courthouse lawn agreed that this action was not worth a look. Simply put, the grandson of Lachlan McHugh was seeking his rightful patronage, the crumbling Whitecliffe Plantation manor house. Opposing him were a black man and some distant Yankee relatives. The result, in the geezers' opinion, was clearly cut and dried.

O'Kelley, attired in his rumpled seersucker suit, was seated behind the plaintiff's table.

Behind the other table was a city lawyer with slicked back hair, pince-nez glasses, a walrus mustache and a prodigious belly. He was decked out in a three piece suit, some kind of flying collar and was weighted down by a solid gold watch chain.

O'Kelley commenced with the introductions. "This is Mr. Sparks," he said about the walrus-mustached apparition. "He's from Atlanta. He represents some alleged heirs from Massachusetts." His words were spit out with a contemptuous flavor. O'Kelley next nodded in my direction. "This is Marcus Jakes. He represents the colored fellow."

The introductions complete, I started to offer my hand to the Atlanta walrus. He gazed at me with hooded eyes, like a falcon studying a mole scampering below him. Fearing he might strike, I withdrew my hand and smiled at him instead. I couldn't tell if he smiled back beneath his prodigious mustache.

There was no third station, so I tossed my satchel, uninvited, onto the walrus's table. "I guess we're bunking together," I joked.

Before the walrus had a chance to respond, the bailiff bellowed,

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"All rise."

Judge Pitts entered from the side door. He was balder than an eagle, older than the hills, and ran a no nonsense court. He took his place behind the raised bench.

"Be seated. I know Mr. O'Kelley and Mr. Jakes. Who are you?" the judge grunted at the pince-nez wearing walrus to my right.

"I. C. Sparks," the walrus said, rising.

"You see what?" the judge said.

"I. C. Sparks, your honor. That's my name. I represent certain relatives of the deceased Mr. McHugh."

"I see." Judge Pitts peered at the walrus over his outsized glasses. Perhaps the judge was familiar with Sparks' reputation among the Atlanta legal establishment as similar to that of a famished lion among herbivorous wildebeests.

Then the old judge turned to me. "Who do you represent, Mr. Jakes?"

"Moses Johnson, your honor, the true owner of Whitecliffe," I said, putting my cards on the table.

"Indeed," the judge responded prior to taking my cards as well as my whole pile of chips. "Mr. O'Kelley, what have we got here?"

"The will of Lachlan McHugh. He died in 1865. The will, written in 1864, calls for several life estates followed by vesting in his great-grandchildren. The public policy of this state favors early vesting. The will was probated 45 years ago. We subscribe to the position that the time has come to vest the corpus in Lachlan McHugh's only devisee and only grandchild, Jimmy McHugh."

"I've read the will, Mr. O'Kelley. Do you see anything wrong with the bequest to your client?"

"No, your honor."

"If it please the court," my tablemate was chomping at the bit to get into the action. "The clause in question violates the Rule Against Perpetuities."

"Perhaps," the judge said slyly, "Mr. Sparks, you could explain to Mr. O'Kelley that rule of law."

The walrus assumed a professorial air. He took his pince-nez off his nose and waved it about as he spoke. "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. The will here, grants a life estate to the son, John, followed by a life estate to the child or children of John, followed by vesting. The grandson, Jimmy McHugh, was not a life in being at the time the will was written nor when the will was probated. Therefore, the provision fails."

"Very succinct, Mr. Sparks. Mr. Jakes," the judge addressed me, "any thoughts?"

"No," I said. Why speak, I figured, when someone else was doing my job for me? And doing it better than I could.

"Mr. O'Kelley?"

"It doesn't matter, judge," O'Kelley, warrior of a thousand battles, responded dismissively. His scorn was undisguised. The old fox clearly intended to slip the hangman's noose. "If the provision is invalid, then the property goes to the last party qualified to take. That party is McHugh's son, John. My client is the sole heir of John. If, however, it does not go to the last party qualified to take under the will, because the entire gift is void, than it passes by intestacy to the heir of the Lachlan McHugh. My client is his sole heir." All roads, it appeared, led to O'Kelley's client. "It doesn't matter. It simply does not matter."

The old judge glanced over at the table I shared with the walrus. The Atlanta advocate was on his feet in an instant. "Mr. O'Kelley's client has brought this action in order to object to a term of the will. He has asked the court to modify the will as to the time of vesting. He has challenged the will. The will clearly states that if anyone entitled to take under that paragraph objects to any term of the will, even in good faith, than that person takes nothing."

O'Kelley wasn't about to concede that point. "My client did not challenge any term of the will at all. He merely requested earlier vesting."

"I see," said the judge. "Mr. Jakes, have you nothing to contribute?" The old man just didn't want me left out. He sought to pull me into the fracas.

"Clearly, Mr. Sparks is correct," I said. "The Rule Against Perpetuities voids the bequest. The In Torrorem clause, forbidding any challenge to the will, cuts off the grandson with nothing. I would add that the will is clear and precise that if that provision fails for any reason, then the property goes to the child of Mary, my client."

My tablemate added a caveat, "It goes to your client, if and only if, he was born a free man. Otherwise, it goes by the next paragraph of the will to the relatives nearest related by blood to McHugh. These relatives are my clients, the grandchildren of McHugh's father's brother."

"Interesting," the judge said. "I will rule presently on the matter of the Rule Against Perpetuities and on the matter of the In Torrorem Clause. Before I do, let us address the issue of the contingent gift to the child of Mary. The will claims to state the law of our state that a gift to a slave is null and void. Is this a correct statement of the law Mr. O'Kelley?"

"Judge," said O'Kelley, "it does not matter what the Law of Slavery is or was. My client takes, either under the will or as the sole heir at law. Period." O'Kelley was in no mood for a theoretical debate about the merits or demerits of gifts to slaves.

"Mr. Jakes?" The judge cast his gaze on me.

I didn't know the answer, so I threw a smoke grenade. "Your honor, this is the 20th century. The Law of Slavery has been in disuse in our state for nearly 50 years. It is archaic. It has no bearing on this case or any other case. The court should carry out the intent of the testator with no regard for the Law of Slavery. In equity, my client is entitled to take, as McHugh intended and directed."

My tablemate regarded me as a horned owl might regard a chicka-

dee that had landed on his branch. "Judge," the Atlanta advocate spit, "you did not ask Mr. Jakes to opine on what century we inhabit. You asked him if a gift to a slave was valid or void."

"I know what my question was," the judge said, his voice as frigid as an arctic gale.

Undeterred, the walrus continued, "Under the 1818 Anti-Manumission Act, a gift to a slave was invalid and void. All actions to free slaves in Georgia were null and void."

"Is a gift of property in a will an endeavor to free a slave?" the judge said.

"The 1818 Act went on to prohibit not only direct manumission, but freedom granted indirectly or virtually. The Act specifically prohibited allowing a slave to benefit from his labor or skill. By implication, a gift for the benefit of a slave clearly fell under the prohibition and was void."

"The will seeks to avoid this problem," the judge observed, "by making the gift contingent on Mr. Jake's client being born a free man. How do we determine if someone is born a free man? Do you, Mr. Sparks, accept that Lincoln's Emancipation Proclamation of Jan. 1, 1863, freed the slaves of Georgia?"

"No, I do not."

"Explain."

"Lincoln had no jurisdiction in Georgia at that time."

"Then what is the correct date when the slaves were at liberty?"

"The Georgia Convention of 1865 created the new post-war Georgia Constitution which recognized the abolition of slavery. The Constitution was approved by the Convention on Nov. 7, 1865."

The judge looked at me for my opinion.

I blew more smoke. "Lincoln effectively freed the slaves. As the Union army moved through Georgia, the slaves in its path were liberated," I said.

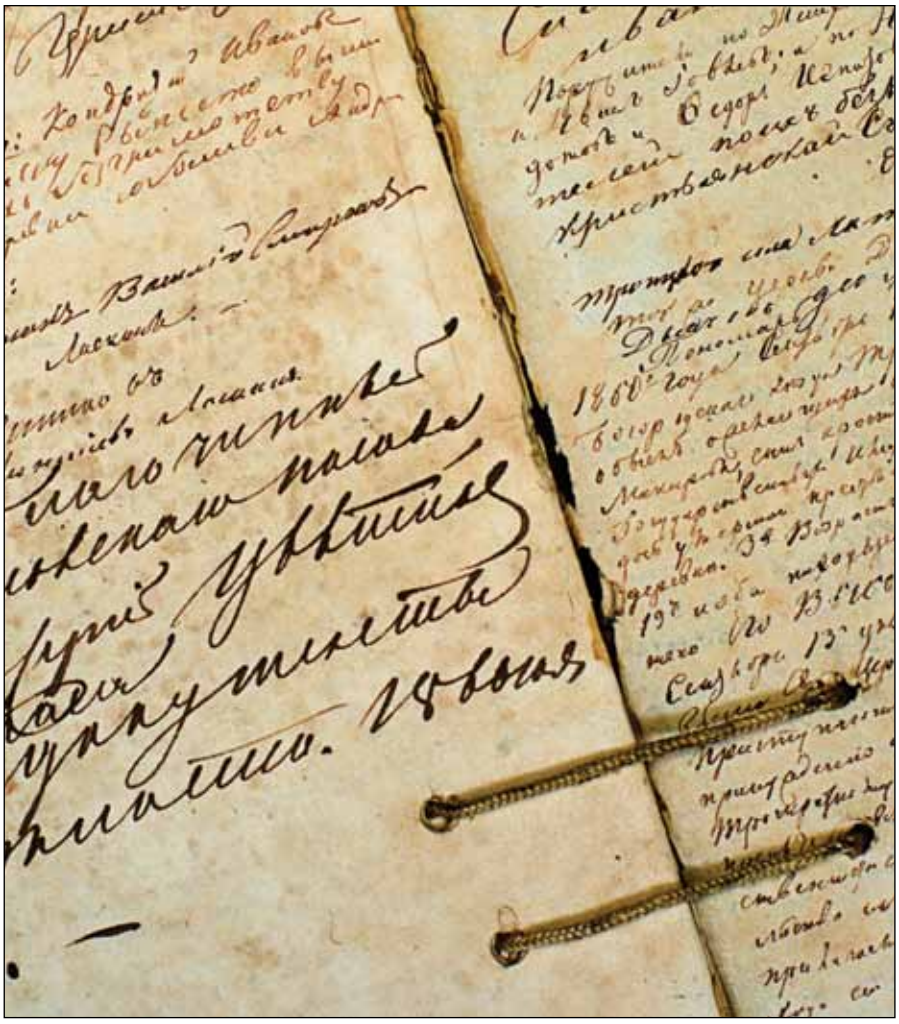
"Were the slaves of Whitecliffe in that path?" the judge asked.

"Ultimately," I lied.

"I think not," the judge declared with finality. "Georgia was separate from the Union. Lincoln's decree was of no legal effect. Sherman never came to Whitecliffe. The slaves of Whitecliffe were not free until the ratification of the Georgia Constitution on Nov. 7, 1865.

"Mr. Sparks, you've addressed the issue of a gift to a slave being a nullity," the judge continued. "But, Mr. Jake's client is not a slave today. Does it really matter at all whether or not he was born a slave?"

The walrus held up Volume 46 of the Georgia Reports, as if he were Moses on Sinai displaying the Commandments. "The case of *Bennett v. Williams*, judge, answers your question. The case is at 46 Georgia 399. It was decided by the Supreme Court of Georgia in 1872, seven years after slavery ceased to exist. The facts are uncomplicated. John Cotton died in 1859, with a will dated in 1850. He devised two lots of land in Monroe County, in trust, the profits to be applied to the benefit of three slaves." Here, Sparks dramatically flipped open



Volume 46 and read, "Old Perry, his wife Silvey and their granddaughter, Elizabeth, a mulatto girl." He looked up from the book. "Years after the end of slavery, the three former slaves sued Cotton's executor to enforce the bequest.

"The opinion of the Court was unanimous. Clearly, the enjoyment and control of the profits of the land by the three persons would have been entirely inconsistent with their condition as slaves. But, they were no longer slaves. The question was, when did the will speak? This, your honor, is the point, the crucial point, the indispensible point." He waved Volume 46 about. "The will is construed under the law as it existed at the time the will took effect, that is, at the death of the testator in 1859, prior to the abolition of slavery. It is not construed under the law of 1872, subsequent to the abolition. Because of this rule, the former slaves, the Court held, took nothing."

The judge shook his bald head. "Mr. Jakes? Any thoughts?"

I cranked up my smoke machine. "The Court could have and should have ruled the other way. The condition of the three persons was so changed, their status under the law was so different, the intent of the testator was so clearly manifested, that under the law as it existed in 1872, the bequest should have been declared valid not void."

The walrus's eyeballs bored into me like drills. "Absolutely not," he thundered. "Under the mandatory requirements of the statutes, in the case of Cotton's will, the control of the land by slaves would have been contrary to, incongruous with and irreconcilable with their status at the time the will took effect. Any change in their status after that date is irrelevant. The Court was correct that the former slaves took nothing. This case is directly on point. This decision controls here. In our case, McHugh died before the 1865 Convention and the freedom of the slaves. In order to take, the child of Mary must have been born a free man."

The judge peered over his Brobdingnagian glasses at me. "The Laws of Slavery are of no effect today. Period. But, those laws were in full force and effect at the time this will was probated. Now, Mr. Jakes," he said with the air of a Doubting Thomas, "was your client born a free man?"

I froze. I had not expected to get this far. I thought the case surely would have been resolved against me well before this point. My mouth was as dry as the Sahara. I stared straight ahead. The courtroom was silent. The interval stretched and stretched until it could be calculated in geologic time.

"Mr. Jakes," the judge broke the silence, "was your client born a free man?"

Aroused from my inertness, I pulled from my satchel two volumes. One was the farm journal that I had purloined from the Whitecliffe manor house. The other was the sewn together diary that I had received from the manuscript dealer in the post.

I held aloft the thin leather-bound farm journal. "I offer into evidence the farm records of Whitecliffe Plantation."

O'Kelley, who had been forced into silence during the walrus's peroration, struggled to his feet. "Objection. What evidence is there of the authenticity of this book?"

"I state, on my honor, as an officer of the court, that I stole this book, myself, from Whitecliffe, three days ago," I said.

"On your honor, as an officer of this court, you state that you are a thief?" the judge said.

I handed the book to the judge. "On my honor, I am a thief. I took it right off of the shelf where it sat for 45 years; right off of the shelf in the study. The book is written in Lachlan McHugh's own hand.

Mr. McHugh was a student of and proponent of scientific farming. This volume contains the record of every seed planted, every plant harvested, the yield per acre, the profit or loss. It contains the record of every cow and horse purchased, sold or bred."

"Where is a scintilla of proof to substantiate any of this?" O'Kelley said dismissively.

The judge thumbed through the book. "I'll accept it."

"In addition to cows and horses, the journal also contains a record of another plantation chattel," I said. "In Lachlan McHugh's own hand is a complete record of every slave bought, every slave sold, every slave born. Under Georgia law, and in derogation of the Common Law, the child followed the condition of the mother. Every slave born on Whitecliffe was the property of McHugh. As a matter of property law, it was incumbent upon him to substantiate ownership. Every birth was noted in his journal.

"I call the court's attention to the years of 1863, 1864 and 1865. The births of many slaves are noted. Each entry shows the name of the mother, the date of birth, the gender of the baby and the name of the baby. There is no baby born to Mary noted in the journal. Moses Johnson is not in the book. He is not shown as a slave born on Whitecliffe."

"This proves nothing," exclaimed my tablemate. "Nothing. McHugh may have been too ill or too distracted to make the entry. The war and the ending of the war may have caused such confusion that normal record keeping had ceased. The absence of the birth in the journal proves nothing about when Moses Johnson was born."

The judge leaned back in his chair. "You're trying to prove a negative, Mr. Jakes?"

"I have proven it. The detailed and precise scientific journal of Mr. McHugh is clear. Moses Johnson was not born a slave on Whitecliffe."

"Have you got anything else," the judge said before he ruled against me.

I turned to O'Kelley. "Are you acquainted with a Miss Evelyn Collins?" I asked him.

O'Kelley appealed to the judge. "I'm not a witness for Mr. Jakes in this case, your Honor."

"Mr. Jakes?" the judge said.

"If you'll please indulge me," I said.

"Answer the question, Mr. O'Kelley."

"I knew Evelyn Collins. She was my wife's aunt."

"What was the vocation or avocation of Miss Collins?"

"She was a midwife."

"For how long did she midwife in this county?"

"Forty years. Maybe longer."

"I hold in my hand the Midwife's Diary of Evelyn Collins," I said, raising the sewn together book I had received in the mail from the manuscript dealer.

"I knew Miss Collins," O'Kelley said disgustedly, "but I don't vouch for any diary."

The walrus joined in. "Are we to now have yet a second unsubstantiated volume placed into evidence?"

"Mr. Jakes," the judge said, "we reluctantly allowed the farm journal. But, now this? What proof is there of its provenance?"

"When were you born, your honor?"

"It's not enough that Mr. O'Kelley is your witness. Now I'm to be brought to the stand as well?"

"If it please the court."

"It does not please the court, not at all. I was born Aug. 10, 1845."

I handed the sewn together book to the judge. "Please turn to the page I've marked. The entry is for Aug. 10, 1845. Miss Collins assisted in the birth to Sarah Byrd Pitts. A healthy baby boy, one Hiram Byrd Pitts was delivered. It shows your birth, your honor. I ask you to authenticate this book."

The judge studied the page. Did his eyes mist slightly at the mention of his sainted mother? If so, he quickly blinked it away. Then he looked up and growled, "The book is authenticated. Proceed."

"Please turn to the next page I've marked, Jan. 17, 1866," I said. "The entry shows the birth to Mary Johnson of a baby boy, Moses. This was several months after the Georgia Convention recognized the abolition of slavery. Moses Johnson was born a free man."

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On a crisp autumn day, I rode my old bay out to Whitecliffe.

The rusted through roof had been replaced by shiny new tin. The sunlight's reflection off of the bright silver blinded me. The sad peeling and insect infested walls had been scrubbed and whitewashed until they gleamed. The shutters were a pleasing forest green shade. A spanking new first floor porch wrapped the ground floor.

Way up on the skeleton of the partly completed second story porch stood Moses Johnson, hammer in hand. He slammed a nail into a new floorboard. Then he waved his hammer at me.

"Looks great; I wouldn't have recognized the place. What are your plans?" I said, remaining in the saddle.

He leaned against a vertical beam. "I'm going to live in it," he said. "I've got the outside about fixed up. Next I'll begin on the interior. By the way, I still haven't settled your fee."

"Fee? I don't think so. I would like to keep the plantation journal I stole from you. Other than that, there is no fee. In fact, I should be paying you. That was the most fun I've had in years."

Moses Johnson smiled. He leaned over and banged another nail into the porch. GBJ

Mark Roy Henowitz graduated from the University of Florida with Phi Beta Kappa honors. He received his law degree from Columbia Southern. With more than 30 years of experience, he specializes in the area of real property title law. He may be reached at mhenowitz@comcast.net.

Kudos

Burr & Forman LLP announced that **Scott Hitch** was appointed to the **Board of Directors** for the **Green Chamber of the South**. The Green Chamber connects sustainable businesses, clean technology companies, corporations with sustainability programs, nonprofits and government organizations throughout the Southeast so that they may create enduring business connections, share best green practices, learn from one another and grow both their own bottom lines as well as create new green jobs. In addition, Hitch was selected for the **Institute for Georgia Environmental Leadership's Class of 2013**. The program focuses on leadership development with regard to current and emerging environmental issues, environmental problem solving, communication skills and conflict management.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announced that shareholder **Charles L. Ruffin** was appointed to serve on the **Board of Directors** of the **Owners' Counsel of America** (OCA). OCA is a nationwide network of experienced eminent domain attorneys dedicated to protecting the rights of private property owners large and small, locally and nationally, and to advancing the cause of property rights. In addition, Ruffin will be sworn in as the **51st president** of the **State Bar of Georgia** on June 22 at the Annual Meeting on Hilton Head Island, S.C.

Womble Carlyle Sandridge & Rice, LLP, announced that **William M. Ragland Jr.** received the **Leadership Award**—the **Atlanta Bar Association's** highest honor. Ragland served as president of the Atlanta Bar from 2004 to 2005, and recently completed a two-year term as president of the Atlanta Bar Foundation, the charitable arm of the Atlanta Bar Association.


Dial


Garrett


Russell


Beck

Kilpatrick Townsend & Stockton LLP announced that partner **Audra Dial** received the **Justice Robert Benham Award for Community Service** from the Chief Justice's Commission on Professionalism. This award honors judges and lawyers in Georgia who have made significant contributions to their communities and demonstrate the positive contributions of members of the Bar beyond their official or legal work.

Partners **C. Allen Garrett Jr.** and **Dean W. Russell** were selected as winners in the **International Law Office and Lexology's 2013 Client Choice Awards**. This year's winners were chosen from a pool of more than 2,000 individual client assessments. The awards recognize both individual partners and firms that excel across the full spectrum of client service.

Partner **Joe Beck** was named a **Power 100 Advocate** by the organization **On Being a Black Lawyer** (OBABL). Beck was recognized as a non-black attorney strongly committed to diversity in the legal profession. OBABL selected their Power 100 Advocates after carefully considering the recommendations of their Power 100 Honorees, some of the most influential black attorneys in the United States, who were asked to nominate non-black attorneys that have been strong advocates for diversity in the law.

Partner **Greg Cinnamon** was chosen by the **Association for Corporate Growth** (ACG) as a recipient of the **2013 Meritorious Service Award**. A member of ACG since 2004, he has served on the ACG Atlanta Board of Directors since 2008 and has served as ACG Atlanta chapter president since 2011. During Cinnamon's presidency, the Atlanta chapter has grown by 10 percent to more than 530 members.

Hon. Ben J. Miller Jr., who received his undergraduate degree from the **University of North Georgia** in 1992, was recognized as the university's **2013 Young Alumnus**. This honor is presented to an alumnus within 25 years of graduation who has distinguished themselves through outstanding professional careers and/or outstanding contribution to public service. Miller began serving as a juvenile court judge in the Griffin Circuit in 2004, and has been chief judge since 2008. He also remains active in his hometown of Thomaston, Ga.


Mason


Keene

HunterMaclean partner **Kirby Mason** was honored at **Savannah Technical College Foundation's** annual **2013 Tribute to Community STARs**. Every year, the foundation publicly recognizes individuals who have made significant contributions through leadership and community involvement. Founded in 1984, the Savannah

Technical College Foundation has diligently worked to enhance adult literacy, learning, workforce training and economic development in Bryan, Chatham, Effingham and Liberty Counties.

Partner **Dennis Keene** was named **chair** of the **ALFA International Product Liability Practice Group**. The ALFA International Product Liability Practice Group provides legal counsel to product manufacturers, distributors, wholesalers and retailers. Membership in this practice group includes ALFA International law firms from around the world. As chair, Keene is responsible for the overall direction and business development initiatives of the practice group.

> **Hunton & Williams LLP** announced that corporate partner **Christopher C. Green** was selected as a winner in the **International Law Office and Lexology's 2013 Client Choice Awards**.

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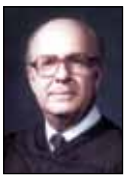
Carlock, Copeland & Stair, LLP, announced that **Megan E. Boyd** was recognized by the **American Bar Association** (ABA) and **legalproductivity.com** for her personal legal writing blog, **"Lady (Legal) Writer."** The blog, which offers grammar, style and humor to readers, was added to the *ABA Journal's* Blawg Directory and was also recognized as one of the "Top 10 Legal Writing Blogs" by legalproductivity.com.

> 

Justice Harold G. Clarke was posthumously presented with the **Southern Center for Human Rights' Lifetime Achievement Award**. Justice Clarke served on the Supreme Court of Georgia from 1979-90 and as chief justice from 1990-94. He received the award for his courageous work shedding a light on the woeful state of indigent defense in Georgia. Justice Clarke died in February 2013.

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Miller & Martin PLLC announced that member **Shelby R. Grubbs** was appointed to the **Board of Visitors** of the **Georgia State University College of Law**. The board plays an important role in helping the dean of the law school respond to particular challenges facing legal education. Members of the board are appointed by the dean and are selected for their distinction as leaders in law, business and service to the public, and demonstrated commitment to the school.

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Nelson Mullins Riley & Scarborough LLP announced that partner **Richard B. Herzog Jr.** was elected **chairman** of the **Board of Directors** of **Atlanta's John Marshall Law School**, an independent law school founded in 1933 and accredited by the American Bar Association. Herzog, a business bankruptcy and lending lawyer, has served on the board of John Marshall since 2009.

> **Sutherland** announced that **Judith A. O'Brien** was the 2013 recipient of the **Ben F. Johnson Jr. Public Service Award** presented by the **Georgia State University College of Law**. A partner at Sutherland for more than 20 years, O'Brien served as the head of the firm's pro bono and public service committee, and most recently served as the firm's pro bono partner. She retired from practice in January and is now of counsel with the firm.

On the Move

In Atlanta

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Thomas Richelo announced the relocation of his practice, **Richelo Law Group, LLC**. Richelo continues to focus his practice on construction law and commercial litigation. Since 1991, the firm has served large and small businesses and individuals in litigation, arbitration, mediation and other forms of dispute resolution, as well as providing business advice. Richelo also serves as an arbitrator or mediator on business disputes. The firm is located at 951 Glenwood Ave., Unit 1003, Atlanta, GA 30316; 404-983-1617; www.richelolaw.com.

> **Balch & Bingham LLP** announced that **Dean Calloway** and **Michael Wing** joined the firm as **partners**. Calloway is a member of the firm's business litigation practice group. Wing is a member of the firm's creditors rights and bankruptcy practice group. The firm is located at 30 Ivan Allen Jr. Blvd. NW, Suite 700, Atlanta, GA 30308; 404-261-6020; Fax 404-261-3656l; www.balch.com.

> **Ford Harrison LLP** announced that **Geetha Adinata** and **Raanon Gal** were named **partners** with the firm. Adinata concentrates her practice on all facets of business immigration and I-9 and E-Verify compliance. Gal focuses his practice on defending employers in employment discrimination, FMLA, wage and hour, harassment and wrongful termination litigation. The firm is located at 271 17th St. NW, Suite 1900, Atlanta, GA 30363; 404-888-3800; Fax 404-888-3863; www.fordharrison.com.

> **Chamberlain Hrdlicka** named **David Dreyer, Karen Kurtz** and **Robert Jeffrey Waddell** as **shareholders**. Dreyer is a commercial litigator who handles a wide variety of business disputes for clients ranging from large multi-national companies to start-up businesses. Kurtz focuses her practice on income, estate and gift tax planning for businesses and high net worth individuals. Waddell maintains a multi-faceted practice focused on the issues and concerns of business owners, including contracts, mergers, lending, acquisition of real estate, corporate succession and wealth preservation. The firm is located at 191 Peachtree St. NE, 34th Floor, Atlanta, GA 30303; 404-659-1410; Fax 404-659-1852; www.chamberlainlaw.com.

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Stites & Harbison, PLLC, welcomed **Robert Schroeder** to the firm's Atlanta office as a **partner**. Schroeder joined the firm's business litigation and healthcare service groups. His practice focuses on white collar criminal defense, business litigation and health care litigation. The firm is located at 303 Peachtree St. NE, 2800 SunTrust Plaza, Atlanta, GA 30308; 404-739-8800; Fax 404-739-8870; www.stites.com.

> 
Brock


Gupta


Callaway


Jiles


Lashley


Ams


Moulard


McDonald

Nelson Mullins Riley & Scarborough LLP announced that a team of attorneys who practice education law joined its Atlanta office. Led by **partner D. Glenn Brock**, the team of seven represents public school districts and education professionals in matters ranging from drafting and oversight of legislation and policy to accreditation issues and litigation on constitutional matters and other education-related disputes. Others joining the team are: **Nina Gupta, partner; Carol Callaway, of counsel; Suzann Wilcox Jiles, of counsel; Laura Lashley, senior counsel; Kathryn Ams, associate,** and **Brandon Moulard, associate**.

Jimmy McDonald joined the firm as **of counsel** in the Atlanta office. He is a member of the government relations team and has worked in the Georgia State Capitol for more than a decade, including five years drafting legislation as legislative counsel and nearly two years as executive director of the Georgia Legislative and Congressional Reapportionment Office. The firm is located at 201 17th St. NW, Suite 1700, Atlanta, GA 30363; 404-322-6000; Fax 404-322-6050; www.nelsonmullins.com.

> **Rohan Law, PC**, announced the relocation of their office. The firm will continue to practice in the areas of workers' compensation claims, personal injury claims and criminal defense. The firm is located at 4360 Chamblee Dunwoody Road, Suite 208, Atlanta, GA 30341; 404-923-0446; Fax 404-923-7580; www.rohanlawpc.com.

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Kilpatrick Townsend & Stockton LLP announced the addition of **David A. Reed** to the patent litigation team of the firm's intellectual property department. Reed joined Kilpatrick Townsend as an **associate** in the firm's Atlanta office. The firm is located at 1100 Peachtree St. NE, Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatricktownsend.com.

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Sherman & Howard LLC announced that **Bryan Stillwagon** joined the firm's Atlanta office as an **associate** in the labor and employment group. The firm is located at 3399 Peachtree Road NE, Suite 470, Atlanta, GA 30326; 404-567-4415; Fax 404-567-4416; www.shermanhoward.com.

> 
Starr


Stiefel


Wetzel

Carlock, Copeland & Stair, LLP, welcomed **Jefferson M. Starr, Carrie L. Stiefel** and **Tyler J. Wetzel** to the firm's Atlanta office as **associates**. Starr joined the general liability practice group. Stiefel joined the workers' compensation team. Wetzel joined the commercial litigation practice group. The firm is located at 191 Peachtree St. NE, Suite 3600, Atlanta, GA 30303; 404-522-8220; Fax 404-523-2345; www.carlockcopeland.com.

> **Taylor English Duma LLP** announced the addition of 11 new attorneys to the firm's Atlanta office. **Amy K. Bridwell** joined the firm as a **member** of the real estate, lending and finance, and lending, workout and foreclosure practice groups.

Stephanie Ford Capezzuto joined the firm as a **member** of the litigation and dispute resolution practice group. **Sonnet C. Edmonds** joined the firm as **counsel** with the corporate and business practice group, where her practice focuses primarily on energy transactional matters. **Mark E. Florak** joined the firm as a **member** of the real estate, lending and finance practice group. **Emily Stuart Horn** joined the firm as a member of the corporate and business practice group. **Hon. Michael D. Johnson** joined the firm as a **member** of the litigation and dispute resolution practice group. Prior to joining Taylor English, Johnson served as a superior court judge in Fulton County. **W. Randy King** joined the firm as a **member** of the intellectual property practice group, where he specializes in protecting patent rights in the computer arts. **Eric A. Tanenbaum** joined the firm as a member of the corporate and business and resort, hotel and hospitality practice groups. **L. Kent Webb** joined the firm as a **member** of the corporate and business practice group, where he represents technology clients and institutional clients in technology transactions. **Allen S. Willingham** joined the firm as a **member** of the litigation and dispute resolution practice group, where his practice focuses on products liability, toxic torts, professional liability, fraud, RICO and Qui Tam Actions, and insurance and reinsurance matters. **Jeff D. Woodward** joined the firm as a **member** in the corporate and business practice group, where he represents start-up and second-stage entrepreneurs, privately-held companies and investors in a variety of corporate transactional matters. The firm is located at 1600 Parkwood Circle, Suite 400, Atlanta, GA 30339; 770-434-6868; Fax 770-434-7376; www.taylorenglish.com.


Lee


Herman

The Hilbert Law Firm, LLC, announced two additions to the firm's litigation department: **Matthew J. Lee** joined as **of counsel** and **Steven Alan Herman** joined as an **associate**. Lee is experienced in the areas of litigation, commercial and consumer collections, bankruptcy and creditors' rights, with experience representing both creditors and debtors. Herman's areas of practice include transportation law, insurance litigation, business litigation, franchise law, personal injury defense and contract disputes. The firm is located at 400 Perimeter Center Terrace NE, Suite 900, Atlanta, GA 30346; 770-551-9310; Fax 770-551-9311; www.hilbertlaw.com.

Hunton & Williams LLP announced that **Robert L. Green** joined the firm's Atlanta office as a **senior attorney** and will lead the firm's transaction processing industry initiative. The firm is located at 600 Peachtree St. NE, Suite 4100, Atlanta, GA 30308; 404-888-4000; 404-888-4190; www.hunton.com.

Brian A. Becker announced the opening of **The Becker Law Firm, LLC**, a solo practice dedicated to trusts and estates, business transactions and mediation. Becker, a certified financial planner candidate, is fluent in Spanish. The firm is located at Horizon, Suite 1513, 3300 Windy Ridge Parkway, Atlanta, GA 30339; 404-590-7578; www.thebeckerfirm.com.

MendenFreiman LLP announced that **Paige P. Baker** was promoted to **partner**. A former tax accountant, Baker practices in the firm's business, estates and trusts practice groups, where she focuses on the areas of business succession planning, business transactions and governance, with a particular emphasis on McDonald's franchises, estate and trust planning, and estate administration. The firm is located at 2 Ravinia Drive, Suite 1200, Atlanta, GA 30346; 770-379-1450; www.mendenfreiman.com.

Morris, Manning & Martin, LLP, announced that **Edmund Emerson III** joined the firm as a **partner** in the Atlanta office. Emerson works in the employee benefits, compensation, corporate M&A and tax practices. The firm is located at 3343 Peachtree Road NE, 1600 Atlanta Financial Center, Atlanta, GA 30326; 404-233-7000; Fax 404-365-9532; www.mmmlaw.com.

Littler Mendelson, P.C., announced the addition of **Jeffrey Mintz** to its Atlanta office as a **shareholder**. Mintz was previously a partner with Jackson Lewis LLP and formerly Jackson Lewis' managing partner for its Atlanta office. He is experienced in all aspects of traditional labor, including preventive labor relations and representation elections, collective bargaining, as well as operational planning and strike preparation, contract administration and labor arbitrations, and injunction proceedings. The firm is located at 3344 Peachtree Road NE, Suite 1500, Atlanta, GA 30326; 404-233-0330; Fax 404-233-2361; www.littler.com.

Jonathan R. Levine, Alvah O. Smith, Rachel A. Snider and John P. Wilson III announced their new firm name, **Levine Smith Snider & Wilson, LLC**. The firm has represented clients since 2001 and will continue to practice exclusively in the area of family law. The firm remains at its same location at One Securities Centre, 3490 Piedmont Road NE, Suite 1150, Atlanta, GA 30305; 404-237-5700; Fax 404-237-5757; www.lsswlaw.com.

In Albany

Watson Spence LLP announced that **Charles K. "Chuck" Wainright II** returned to the firm as a **partner**. Wainright was previously with the firm from 1999 to 2008, having been named partner in 2004. He handles a full array of complex litigation matters, specializing in medical malpractice defense. The firm is located at 320 Residence Ave., Albany, GA 31701; 229-436-1545; Fax 229-436-6358; watsonspence.com.

In Athens

W. H. "Kim" Kimbrough Jr. announced the opening of **The Kimbrough Law Firm**, concentrating in asset protection, business, tax and estate planning, elder law and VA planning. Kimbrough was previously a partner of Fortson, Bentley & Griffin, P.A. The firm is located at 1480 Baxter St., Suite B, Athens, GA 30606; 706-850-6919; Fax 706-850-7115; www.kimbroughlawfirm.com.

In Columbus

Hatcher, Stubbs, Land, Hollis & Rothschild, LLP, announced that **D. Nicholas Stutzman** became a **partner** of the firm. Stutzman practices with the firm's real estate group with a focus on both residential and commercial real estate, as well as wills, probate, contracts, small corporate entities and land disputes. The firm is located at 233 12th St., Suite 500, Columbus, GA 31901; 706-324-0201; Fax 706-322-7747; www.hatcherstubbs.com.

In Cumming

Atlanta-based law firm **Bovis, Kyle & Burch, LLC**, changed its name to **Bovis, Kyle, Burch & Medlin, LLC**, to reflect the strategic growth of the firm and expansion of their Forsyth County office. While the firm's name changed to reflect its expanding family law practice under the leadership of **Charles Medlin**, their commitment to representing clients in litigation, corporate, labor and employment, workers' compensation, insurance, surety fidelity, self-insured and construction law matters endures. Along with the firm's expanded Cumming office

and name change, **Adam C. Grafton** was elevated to **partner** in the firm's workers' compensation practice group. The firm is located at 327 Dahlonega St., Suite 1703-A, Cumming, GA 30040; 770-391-9100; Fax 770-668-0878; www.boviskyle.com.

In Macon

Wallace Miller III, LLC, announced that **J. Kevin Walters** joined the firm. Walters' practice areas include insurance law, tort and contract litigation, local government law, corporate law and governance, contracts, health care law, aviation law, appellate law and general corporate transactions. Walters previously served as in-house counsel for an Atlanta-based aerospace engineering group and as general counsel for health and information technology corporations. He is a registered mediator for both general civil and domestic cases. The firm is located at 509 Forest Hill Road, Macon, GA 31210; 478-474-4145; Fax 478-474-4719.

James Bates Brannan Groover LLP announced that **Kathryn S. Willis** joined the firm as an **associate**. Her practice areas include insurance, general liability defense, business and commercial litigation and eminent domain. The firm is located at 231 Riverside Drive, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; jamesbatesllp.com.

In Nashville, Tenn.

Andrew C. Beasley announced the formation of the **Law Office of Andrew C. Beasley**. Beasley, a former Florida state prosecutor, focuses his practice on DUI and criminal defense. The firm is located at 144 Second Ave. N, Suite 100, Nashville, TN 37201; 615-620-5803; Fax 615-369-8754; www.andrewcbeasley.com.

In Philadelphia, Pa.

Gordon & Rees LLP announced that **Ann Thornton Field** joined the Philadelphia office as a **partner** in the firm's commercial litigation, aviation and insurance groups. Her practice focuses on commercial litigation, aviation and products liability matters. The firm is located at One Commerce Square, 2005 Market St., Suite 2900, Philadelphia, PA 19103; 215-561-2300; Fax 215-693-6650; www.gordonrees.com.

In Tamarac, Fla.

Michael R. Brodarick joined **PuroSystems, Inc.**, as its **in-house general counsel**. Founded in 1990, PuroSystems, Inc. is a leader in the franchise restoration industry, having launched PuroClean, which has become one of the fastest growing property damage remediation franchise organizations in North America. PuroSystems, Inc., is located at 6001 Hiatus Road, Suite 13, Tamarac, FL 33321; 800-775-7876; Fax 800-995-8527; www.puroclean.com.

WANT TO SEE YOUR NAME IN PRINT?

How to Place an Announcement in the Bench & Bar column

If you are a member of the State Bar of Georgia and you have moved, been promoted, hired an associate, taken on a partner or received a promotion or award, we would like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, the *Georgia Bar Journal* will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, Chambers USA, Who's Who, etc.). Notices are printed at no cost, must be submitted in writing and are subject to editing. Items are printed as space is available. News releases regarding lawyers who are not members in good standing of the State Bar of Georgia will not be printed. For more information, please contact Stephanie Wilson, 404-527-8792 or stephaniew@gabar.org.

What a Bargain!

by Paula Frederick

"Ummmm . . . boss?" your assistant hovers in the doorway looking nervous. "I know you were skeptical about that two-for-one coupon, but look at all the responses we've gotten!"

Shocked, you scan the printouts she drops on your desk. "I didn't realize there were that many people out there needing a will. . ." you marvel.

"You mean *two* wills," your assistant reminds you. "We got a total of 858 responses. The phones are already going crazy with people wanting an appointment before the coupons expire next month."

"Eight hundred and fifty-eight times two—that's more than 1,700 wills! You know, they say that lots of folks don't ever get around to using their coupons," you say hopefully.

"Even if most of them forfeit, we're looking at doing hundreds of wills in the next 45 days," your assistant reminds you. "Want me to look into hiring some assistants?"

"I'll have to check the budget and let you know," you reply. "We don't have any profit margin on this deal; it's a two-for-one so we're making half our usual rate! I just thought it was a good way to get my name out there. . . . I had no idea we'd go from famine to feast so quickly!"

Now what?

Offering an internet-based discount deal for legal services might seem like a good idea for a lawyer in need of business, but be careful what you wish for. Stories abound of sellers being overwhelmed by more business than they reasonably can handle. Lawyers run afoul of the ethics rules if they do not provide competent representation to every client.

Several states have issued ethics opinions on the propriety of using a "deal of the day" model to promote and provide legal services. Some find the situation so fraught with potential ethics problems that they prohibit it altogether. Even the opinions that do not find it unethical advise that a lawyer use extreme caution before offering to provide services in this way.

One concern is whether the payment arrangement with a "deal of the day" site constitutes fee splitting. Some opinions interpret the lawyer's payment to the site owner as paying for marketing or advertising, not as a legal fee. Others find that the amount paid for the coupon *is* payment of a legal fee, so that the lawyer may not pay the site owner a percentage of each sale.

False advertising is another concern for the states that prohibit use of "deal of the day" sites. A lawyer may advertise a flat rate for a "garden variety" service, but find that nine times out of 10 the buyer's situation is more complex, requiring extra time and money.

In addition to these concerns, the lawyer must be prepared to conduct a conflicts check for each potential client who has bought a coupon and to refund the buyer's money if conflicts prevent the representation.

Georgia has not weighed in on the propriety of using "deal of the day" sites, but stay tuned. GBJ

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

Discipline Summaries
(February 14, 2013 through April 30, 2013)

by Connie P. Henry

Voluntary Surrender/Disbarments

Zondra Taylor Hutto
Tuscaloosa, Ala.
Admitted to Bar in 1996

On March 4, 2013, the Supreme Court of Georgia disbarred attorney Zondra Taylor Hutto (State Bar No. 023157). Hutto pled guilty in the U.S. District Court for the Northern District of Alabama, Western Division, to one felony count of withholding information on a crime (misprision of felony). Hutto was sentenced to three months in prison followed by 12 months on supervised release, plus the payment of fines and restitution.

Scott Patrick Archer
Duluth, Ga.
Admitted to Bar in 1997

On March 4, 2013, the Supreme Court of Georgia disbarred attorney Scott Patrick Archer (State Bar No. 021317). The following facts are deemed admitted by default: A client retained Archer to represent him in post-trial motions and an appeal in a criminal case. Archer filed a motion for new trial and stated that he would submit a supplemental motion and brief after he reviewed the trial transcripts. Over several months, the client paid Archer $2,500 to pursue the motion for new trial. After filing the motion, Archer did nothing else in the case and has not contacted his client or refunded any part of the fee.

In another matter, a client retained Archer to represent him in efforts to obtain money owed to the client by another individual in a lawsuit the client had filed in magistrate court. The client gave Archer the paperwork and $500. The court entered a judgment in favor of the client for $10,500. Thereafter, the client paid Archer a retainer of $300 to represent him against another party who owed the client money. They agreed that the client would pay the balance of the fee when Archer had prepared the necessary papers for the case. The client contacted Archer a few months later and Archer told him everything was going well, but thereafter stopped responding to his calls, cancelled his telephone service and closed his office.

Charles Bailey Mullins II
Princeton, W.Va.
Admitted to Bar in 1988

On March 18, 2013, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of attorney Charles Bailey Mullins II (State Bar No. 005220). Mullins entered a guilty plea in the U.S. District Court for the Southern District of West Virginia to a felony count of attempting to evade or defeat tax.

Thomas W. Dickson
Atlanta, Ga.
Admitted to Bar in 2002

On March 25, 2013, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of attorney Thomas W. Dickson (State Bar No. 482888). While Dickson was employed by a law firm from December 2008 through February 2012, he repeatedly directed the accounting department to transfer funds from the firm's trust account to his personal account. He did not have authority from the firm or the clients to direct such transfers, and he did not properly account for the transfers.

Marion Jeanne Browning-Baker
Saint Thomas, V.I.
Admitted to Bar in 1992

On April 15, 2013, the Supreme Court of Georgia disbarred attorney Marion Jeanne Browning-Baker (State Bar No. 090120). The following facts are deemed admitted by default:

Respondent at one time lived in Germany, and her practice included assisting members of the armed forces with legal issues. In 2007, a retired Army officer retained her to represent him in his contested divorce case. Respondent associated counsel in North Carolina to file the divorce there. She told counsel that

the divorce would be uncontested and that the parties would consent to jurisdiction. The North Carolina court dismissed the complaint for lack of service and questioned why the complaint was filed there since the couple had lived in Germany for more than 10 years. The North Carolina attorney also learned that the wife had retained Respondent in 2003 with regard to her marriage and potential divorce. Respondent did not withdraw from the case and she did not advise her client of the developments in the North Carolina case. Instead, she associated South Carolina counsel to file the divorce action there. Respondent told counsel that her client would meet the residency requirements and that his wife would not contest jurisdiction, although neither statement was true. In her written agreement with her client, Respondent stated that he could not directly contact any local counsel that she retained on his behalf and told him that "it [was] required by [her] state bar." Although the client paid Respondent more than $12,000, she failed to complete his divorce and when he terminated her services, she failed to return his complete file until after this disciplinary proceeding was filed. Respondent did not participate in good faith in the disciplinary process and she willfully ignored discovery obligations.

Kevin Eugene Hooks
Peachtree City, Ga.
Admitted to Bar in 1993

On April 15, 2013, the Supreme Court of Georgia disbarred attorney Kevin Eugene Hooks (State Bar No. 365201). The following facts are deemed admitted by default:

A client hired Hooks to assist him in a claim of employment discrimination. Hooks did not respond to discovery requests, the motion to compel, or the motion for sanctions. Hooks filed a response to the motion for summary judgment but, when directed by the court to submit further information, Hooks did not file a response and attempted to submit an unsigned, undated, and unsworn affidavit. Hooks did not respond to telephone calls and emails from the client. Summary judgment was granted the opposing party but Hooks did not inform his client. Hooks failed to supply the client file to replacement counsel upon request.

In another case, despite having been placed on interim suspension on Dec. 2, 2010, Hooks communicated with opposing counsel discussing discovery responses and an upcoming status conference, represented his client at the Dec. 13 status conference, and with opposing counsel filed a joint status report on Dec. 15. Hooks did not inform the court of his suspension until Jan. 18, 2011, and he did not inform his client or opposing counsel of his suspension.

A grievance was filed by an attorney who reported that Hooks, after being suspended from the practice of law, continued settlement negotiations with the attorney, reaching an agreement on Dec. 14, 2010, and sending settlement paperwork to the attorney on Jan. 6, 2011.

A client hired Hooks in 2009 to represent her as a plaintiff in a civil matter. Hooks responded to the defendant's requests for discovery, but he did not respond to a request to depose the client and did not inform the client of the request. Hooks did not respond to a good-faith letter sent by counsel and did not inform his client of the letter. After a hearing, the court dismissed the complaint with prejudice for violation of the discovery rules. The client was unable to communicate with Hooks.

Two former clients jointly hired Hooks in 2010 to pursue a civil lawsuit alleging employment discrimination. They paid Hooks $2,000 but he failed to keep them informed about the case. When the clients learned of his suspension, they requested their files but received no reply.

In 2009 an attorney reported that Hooks had served as a settlement agent for a real estate transaction in March 2008, during which Hooks received $5,556.92 in fiduciary funds to be used to pay 2007 county taxes. Despite having told the title insurance companies that he was researching the issue of the fiduciary funds, Hooks did not pay the county taxes, and he did not return the funds to the lender or the borrower. The lender paid the taxes and delinquency fees to the county tax commissioner.

Charles W. Field
Lawrenceville, Ga.
Admitted to Bar in 1973

On April 29, 2013, the Supreme Court of Georgia accepted the Petition for Voluntary Surrender of License of attorney Charles W. Field (State Bar No. 259350). A client retained Field to represent her in matters resulting from her daughter's death, including guardianship of her grandson, a conservatorship to settle her daughter's estate for her grandson and a child support arrearage owed by the child's father. Field advised the client that she could pay his fee from the estate but failed to tell her that she first

needed court permission. The client paid fees in excess of $12,000 to Field, but he failed to perform the work expected. The client was forced to resign as conservator due to her use of estate funds to pay Field's fees. Eventually, the probate court entered a judgment against the client for $14,579.46, representing fees paid to Field, with interest. The client filed a fee arbitration petition with the State Bar and was awarded $11,000, but Field has been unable to make any payments.

Field expressed remorse for his misconduct and regret that he is unable to pay the fee arbitration award. Field had no prior discipline and in recent years has suffered extraordinary personal losses and medical impairments that have rendered him incapable of returning to the practice of law.

Suspensions

Carol Chandler
Princeton, N.J.
Admitted to Bar in 1981

On March 4, 2013, the Supreme Court of Georgia suspended attorney Carol Chandler (State Bar No. 120525) for 18 months with conditions for reinstatement. The following facts are admitted by default: A client paid Chandler $1,710 to represent him in an immigration matter. Chandler did not return the client's calls or otherwise communicate with him. Chandler did not file documents as she agreed to do and has not returned the fee paid by the client. In aggravation of discipline the special master noted that Chandler is currently under suspension in Pennsylvania. Prior to reinstatement, Chandler must refund $1,170 to her client.

Michael Rory Proctor
Gainesville, Ga.
Admitted to Bar in 2004

On March 18, 2013, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of attorney Michael Rory Proctor (State Bar No. 588428) and imposed an indefinite suspension with conditions for reinstatement. From 2008 through 2011 Proctor accepted money to represent clients and then failed to adequately communicate with or represent them. He also failed to appear at several court hearings and trials. Moreover, Proctor initially failed to respond to the State Bar's complaints. When the Court suspended Proctor on an interim basis in 2011, however, he ceased his practice of law and referred his clients to other attorneys. He then submitted documents indicating that during the relevant time he was suffering from various psychological, emotional and medical issues that rendered him incapable of practicing law or responding to the disciplinary authorities. While his incapacitation continues today, experts indicate that with proper medication and treatment Proctor can redevelop the capacity to perform his duties responsibly. Prior to reinstatement, Proctor must provide proof of restitution along with other provisions.

Public Reprimand

Neal Henry Howard
Columbus, Ga.
Admitted to Bar in 1991

On Feb. 4, 2013, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of attorney Neal Henry Howard (State Bar. No. 371089) and imposed a Public Reprimand. Howard mistakenly provided the wrong deposit slip for a litigation funding check to one of his clients, so the check was incorrectly deposited into Howard's firm operating account rather than his IOLTA account. Howard then issued the client a check drawn on his IOLTA for the amount mistakenly deposited into the operating account ($3,552) and a check to himself for $10,000. The check to the client cleared, but the check Howard issued to himself did not, thus causing the IOLTA to become overdrawn. The $10,000 check was for personal funds remaining from an earlier deposit Howard made in anticipation of two large client settlements. Because his IOLTA bank held large settlement drafts for up to 30 days or longer, Howard had decided to deposit his own personal funds into his IOLTA, so that when settlements were finalized, he could immediately distribute the client proceeds without waiting for the drafts to clear. When the settlements did not occur as planned, Howard began withdrawing the personal funds deposited earlier as day-to-day operations required. There were no other IOLTA violations, and without waiting for the State Bar to ask, Howard immediately changed his firm's accounting practices to ensure that no other violations would occur.

Kenneth A. Glenn
McDonough, Ga.
Admitted to Bar in 1988

On April 15, 2013, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of attorney Kenneth A. Glenn (State Bar. No. 001170) and imposed a Public Reprimand. Glenn was retained to pursue a partition action. He filed the action and took other actions, but failed to complete the matter, and failed to promptly provide a fee refund. He did finally provide the refund (the Court had rejected his previous Petition for Voluntary Discipline because he had not paid the refund).

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 Feb. 14, 2013, five lawyers have been suspended for violating this Rule and two have been reinstated.

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

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Ten Steps to Squeezing More Time Out of Your Day

by Natalie R. Kelly

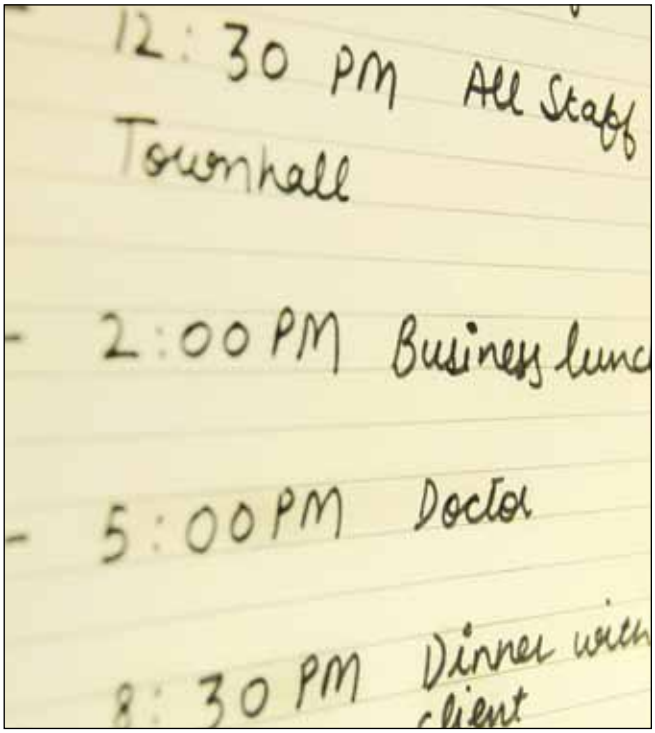
I'm always amazed at how much a person can do in a day. I am also totally aware of how much time one can waste in a day. If you are in need of help with time management, here are some tips and tricks to help you get a little more time out of your next 24 hours. The tips and tricks are followed by a list of time management resources you can obtain from the Law Practice Management Program's Resource Library—when you have time!

Plan Your Day

It goes without saying that you need to know what you have on your plate. Sometimes, however, it may seem as if you've ordered way too much, and can't figure out where to start with planning how to tackle it all. First, take a deep breath, and begin by writing down every possible thing you can think of that you need to accomplish. Barring having to run to the courthouse for a hearing or some other "must-do-right-now" activity, you should take the time to create a written list of what you need to do. Visualizing your workload can help you plan what needs to happen each day. A good trick is to use a calendaring program to record not only deadlines, but the actual times you will do certain items. The Plan Your Day exercise alone can help you get your days organized and will likely save you some time in the long run.

Set Daily Routines

By now it should be clear that there are certain things you do each day. But, they may be the very things that are robbing you of that extra time. Review your day to see if you can streamline or eliminate time-wasting activities. Create "blocks of time" to



accomplish certain tasks, and include a review of your personal routines of getting up and going each day in this process. When you plan your day, include calendar times for your personal routine items, too. Routines help keep items that suck up your time from creeping into space in your day that was intended to be time for something else.

Stop Trying to Multitask

I think society has helped us love the term "multi-tasking," but it's now come back to haunt us in many respects; think texting and driving! Instead of trying to work on multiple items at once, learn to create clear outlines for when you will accomplish individual tasks. Concentrate on finishing tasks one at a time, but efficiently instead. This focused approach to getting things done will help save you time. Plus, the blissful feeling of accomplishment alone can help you feel as if you've gotten more done, and perhaps, with some time to spare.

Organize Your Workspace

You should strive to have a well-organized workspace. Not fumbling around for items on your desk or digging through files trying to find information can be eye-opening in terms of time management. Make sure you are comfortable, have furniture placed so that it is ergonomically correct and possess the tools you need to get your job done. Wasting time just getting to what you need to do a job takes away from the time you would be using to do the work. This organization should extend from your physical workspace to any computer systems you use, too.

Manage Interruptions

Interruptions are unavoidable. They will happen, but it's how they are managed that affects how much time you spend on the diversions. Determine if the interruption requires your immediate attention. If not, then work to include it on your daily plan for another day/week/month. Interruptions include the folks who pop their heads in your office to ask a quick question or give you an update. So use a system of assessing the interruption, dealing with it quickly (only if it's a must-do-now item) or putting the interruption in its own "time out" until it fits in your daily plan for another time.

Tackle Your Email

Overflowing inboxes and constantly checking on messages after getting "the ding" that a new message has arrived are common time-wasters. Learn systems to organize messages, and use a system for when and how you will respond. Archive and store messages so you can easily access them when you need to. *Hint: Just because you have to do something based on an email doesn't mean it should just sit in your inbox to remind you*. You can either deal with the message immediately, or move it for you to deal with at a later time. You can gain a few extra minutes just learning to navigate the inbox quickly with searching, sorting and coding features in email programs.

Manage Phone Calls

Set up specific times to return phone calls and listen to voice mail. Try to complete returning calls across certain blocks of time, from 8 – 8:30 a.m. and 2 – 2:30 p.m. daily. You might find it easier to return calls as soon as you come into the office and just before you leave each day, with a quick check of voice mail and messages in the middle of the day. *Hint: Redirect or silence the phone when you don't want to be disturbed.* A ringing phone always draws one's attention and can cause you to lose focus and waste time.

Use Reminder Systems

Now that you've learned to create a plan for your day, you will likely need reminders for the items in your plan. Use people (assistant, paralegals, family, etc.) and electronics (smartphones, tablets, computers, etc.) to remind you of upcoming events and don't spend time worrying about them. The reminder system will save you time by helping you to stop wasting time going back over what you've planned. Be confident in your planning. As you plan your day, take the time to include everything you need. Plan to pick up or get the supplies you need to do a particular task or plan your time to prepare for an upcoming event. Reminders can help save time by eliminating extra time you might have to use to deal with something you forgot.

Take Training Seriously

Spending 20 minutes reviewing a help menu on a feature of a program can save you hours in the future. Don't waste time because you didn't know that you could have pushed "that button" to accomplish what you needed. Training teaches the correct way to utilize tools, and frees up time you might have otherwise wasted trying to figure out things on your own. Remember that training those around you is not a waste of time either.

Master Your Mobile Devices

Learning shortcuts for using the devices you use on a daily basis can also save you time. Texting (not while driving) quick replies where appropriate and taking notes on mobile units can save you time. Use productivity apps and programs to assist with keeping you on task. You can even use mobile devices to help you plan your day.

Time management tools and resources abound. Plan to check out these resources from the Law Practice Management Program Resource Library:

Books

- *The Time Trap*
- *Practical Systems: Tips for Organizing Your Law Office*
- *Time Management for Attorneys: A Lawyer's Guide to Decreasing Stress, Eliminating Interruptions & Getting Home on Time*
- *Legal Productivity: How Project Management, GTD, & Tomatoes Can Transform the Way You Practice Law*
- *Eat That Frog!*
- *Leave the Office Earlier*

CDs/DVDs

- "Live Your Best" — Audio Series
- "Professional Communications in the Law Office: Telephones, Voicemail and Beyond"
- "Successful Time Management Strategies for Support Staff"
- "Telephone Answering Strategies"

All of these resources are available for checkout. Call 404-527-8772 for more information. GBJ

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

Pro Bono Honor Roll




The Pro Bono Project of the State Bar of Georgia salutes the following attorneys who demonstrated their commitment to equal access to justice by volunteering their time to represent the indigent in civil pro bono programs during 2012.

** denotes attorneys who have accepted three or more cases*

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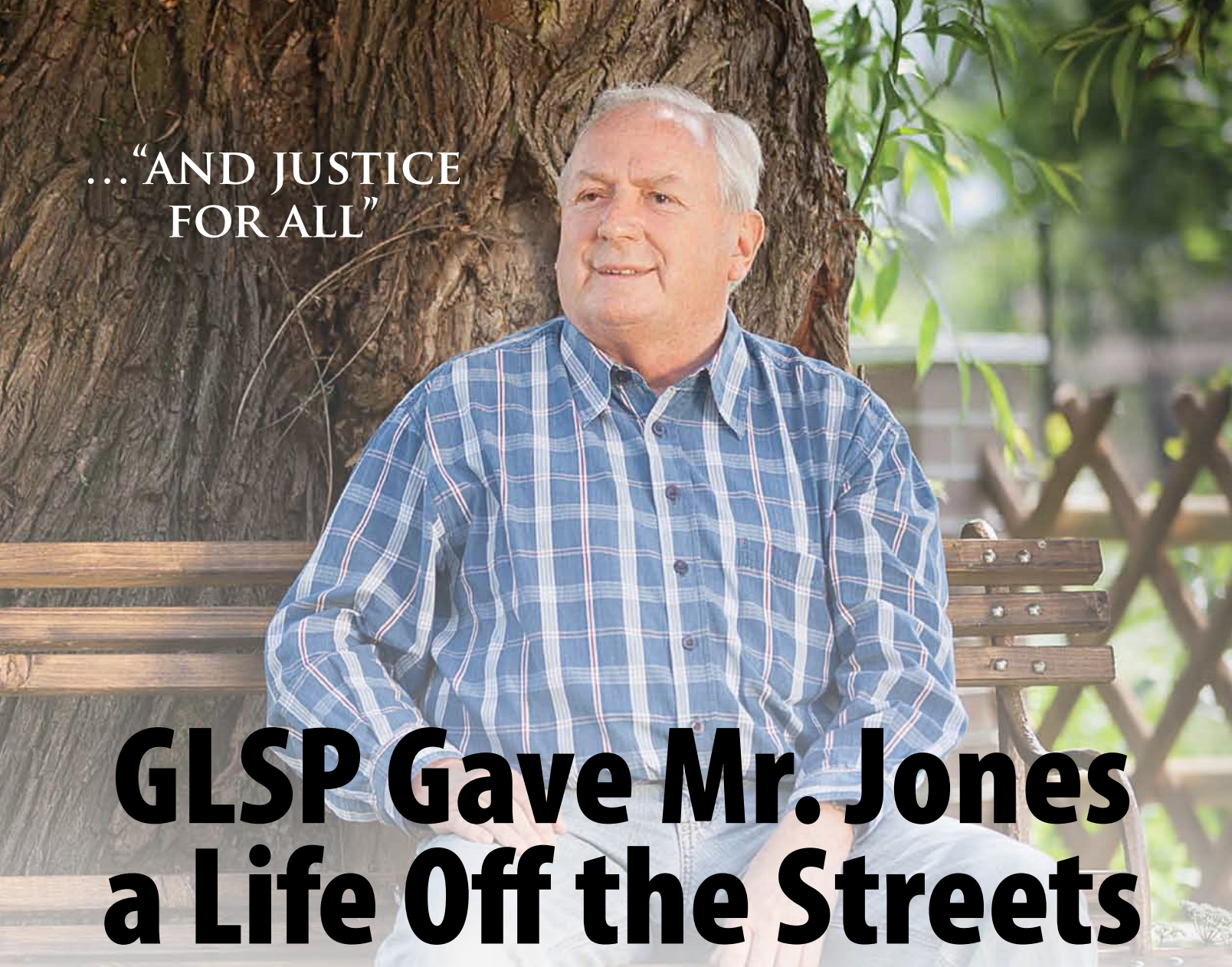

GLSP Gave Mr. Jones a Life Off the Streets

Mr. Joe Jones had worked for a large bakery for 22 years when his health problems – bi-polar disorder, diabetes, depression, and thyroid problems caused by a reaction to medication – became so severe they made it difficult for him to work. He got behind on his rent and had to leave his apartment. He was living in his car and was out of most of his medications when he came to Georgia Legal Services Program (GLSP) for help. GLSP attorney Cole Thaler helped Mr. Jones complete all the paperwork to qualify for his employer's disability pension, untangle the red tape tying up his food stamp application, and locate resources to help pay for his medications. Thaler referred Mr. Jones to local housing resources for a decent place to live. Only with GLSP's help was Mr. Jones able to work through all of it and find a home, some income, and better health.

"And Justice for All" 2013 State Bar Campaign for the Georgia Legal Services Program, Inc.

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

Fastcase's Newest Addition: Bad Law Bot

by Sheila Baldwin

On May 1, Fastcase announced a new addition to their set of visually oriented tools that make online research smarter and faster. Bad Law Bot, yes, it's really called Bad Law Bot, is an enhancement to the Authority Check feature to show you where courts have noted that a case has been treated negatively (i.e., reversed or overruled on any grounds). The Bluebook requires that courts indicate negative history of cases cited within opinions. This new feature uses algorithms to find negative citation history. Bad Law Bot then flags those cases so that you can easily spot those that have negative citation history and provides you with the links to those cases.

Fastcase differentiates itself from other search engines by designing innovative features such as the Interactive Timeline, Authority Check and now Bad Law Bot to visually display results and highlight important cases quickly and easily.

Fastcase's Interactive Timeline view shows all of the search results on a single map, illustrating how the results occur over time, how relevant each case is based on your search terms and how many times each case has been cited providing more information than any list of search results.

Fastcase's citator function, Authority Check, displays all later citing cases visually in the form of a report which shows which jurisdictions have cited the case, the number of times it's been cited and when it was last cited. This is a great research tool for finding related precedents, or helping to determine the continuing value of a case as a precedent.

Although Fastcase does not hold Authority Check out as a complete replacement for services such as Shepard's or KeyCite, with the addition of Bad Law Bot, Authority Check becomes more valuable by pointing out negative history associated with a case. When a case in the search results is found to be negative the bot identifies it as bad law by tagging the case with a red flag. The flag will also display in the document view when you view the full case. If you run Authority Check, the report will identify the case in which the negative treatment appeared.

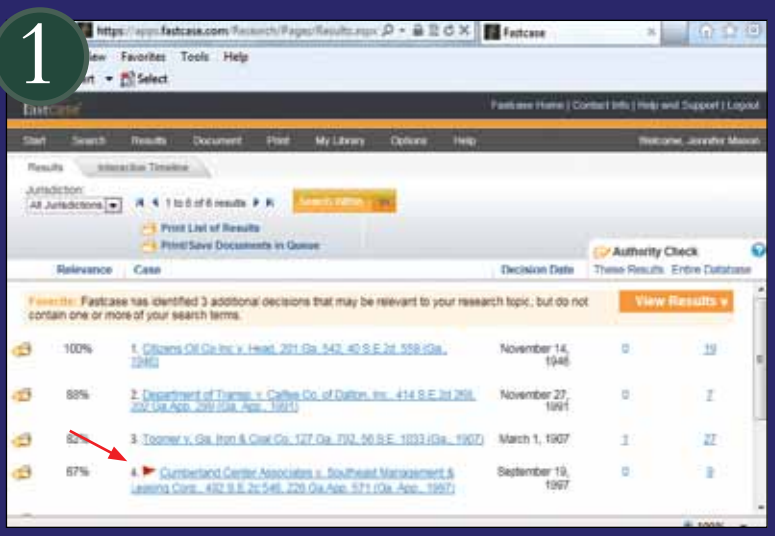
On a side note, Bad Law Bot comes complete with an avatar; I assume the only cartoon character associated with legal research after a quick google search produced this correction, "~~cartoon mascot legal research software~~." Bot—can we just call him Bot?—brings to mind the mascot of the 1996 Atlanta Olympics, Whatisit, better known as Izzy. Although the name sounds a bit nerdy, the new feature will be welcome.

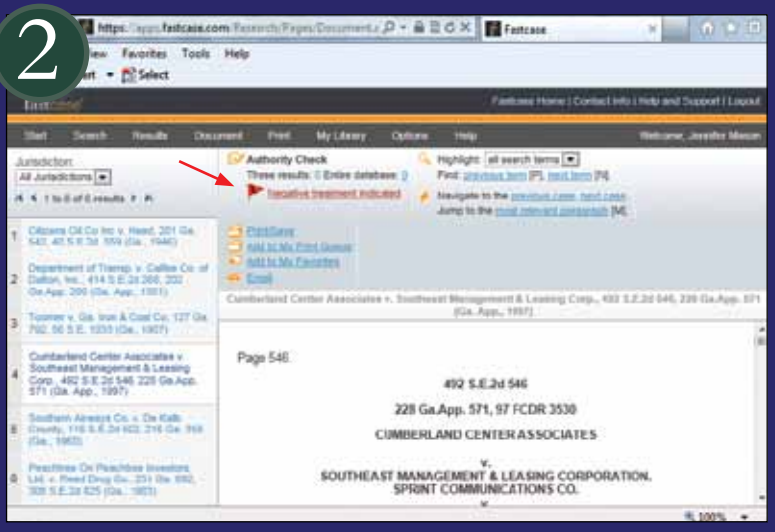
Doing a practice search with Georgia as my jurisdiction and using the terms, *(extension w/3 lease) and invalid w/5 terms,* six cases result, one of which is marked with a red flag denoting negative treatment (see fig. 1). When the case with negative history is opened to document view, the notice of negative treatment is once again seen at the top of the page marked with a red flag (see fig. 2). Finally, when the case is opened in Authority Check, all cases with negative history in the list of citing cases are seen at the top of the list and highlighted in a red background with the warning "Negative treatment indicated in this case" (see fig. 3).

Keep in mind that Fastcase searches cases by computer analytics and not by using editors to analyze cases. A red flag means that there's likely negative treatment, since a court has said as much by their use of a negative citation, but no red flag does *not* necessarily mean that a case is still good law.

Fastcase continues to find ways to improve their service for the members of the State Bar of Georgia. Please call or contact me at sheilab@gabar.org or 404-526-1136 with any questions or for help with your research. GBJ

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





Fastcase training classes are offered four times a month at the State Bar of Georgia in Atlanta for Bar members and their staff. Training is available at other locations and in various formats and will be listed on the calendar at www.gabar.org. Please call 404-526-8618 to request onsite classes for local and specialty bar associations.

Sometimes You Need to Blame Zombies

by David Hricik and Karen J. Sneddon

Passive voice. These two words send shivers down the spines of writers. This issue of "Writing Matters" returns to the topic of passive voice and draws inspiration from one of the new darlings of grammar instruction: zombies.

After some simple tricks you can use to detect passive voice—and normally then edit to eliminate it—we'll share some pointers as to when passive voice may be your best choice. Usually, it's when you need to let blame fall on zombies, and not your client or yourself.

"The deadline was not met" is a classic example of passive voice. The object of the sentence (the deadline) has been presented as the subject of the sentence to create use of the passive voice. There are benefits to hiding the subject of a sentence, especially if the truth was, "I did not meet the deadline." Writers generally believe active voice produces stronger and clearer sentence constructions, but passive voice has its place.

Tricks and Tips to Spot Passive Voice

Sometimes passive voice can wait in ambush, hard to spot. You can spot some forms of passive voice through an easy trick using just the "find" command in word processing programs. Other forms of passive voice are harder to spot, but they can be found through using a little bit of brains, so to speak.

The trick is to use "find" in your word processor program to search for words ending in "ion." Usually, an "ion" word is a nominalization, meaning that the word is a noun created from a verb or adjective. Thus, a simple scan can locate patterns that often accompany passive voice, and at the same time help eliminate wordiness.

For example, searching for "ion" would find this sentence: "Then the determination was made to fire the supervisor on Christmas Eve." This sentence is passive: who decided to fire the supervisor? In the active voice, it would be, "Mr. Grimes decided to fire the supervisor." The use of "ion" is a tell that the sentence is passive. Should it be active? Is Mr. Grimes being hidden for a reason?

Even if Mr. Grimes should remain in hiding and so the passive voice is the best choice, the sentence could be made shorter with, "Then it was determined to fire the supervisor on Christmas Eve." (Note that the sentence still has other problems: foremost, was the decision to fire the supervisor made on Christmas Eve, or was the supervisor's firing effective as of Christmas Eve? But we'll stay focused on passive writing for now.)

A second tip requires some real brains. To dig up all passive structures, you could search for forms of the verb *to be* (*e.g.*, am, is, are, was, were, be, been). Usually that will be asking too much of anyone. An alternative is to focus on these constructions: *there is*, *it is*, *this is*, *there was*, *it was* and *this was*. These bland phrases attract wordiness and delayed or hidden subjects—in other words, the problems of passive voice constructions. "There is no doubt that 'Night of the Living Dead' is the best zombie movie of all time." This sentence could be re-animated to the following: "'Night of the Living Dead' remains one of the best zombie movies of all time."

A third trick to find passive voice is more fun: after reading the sentence, ask whether you can insert "by zombies" into the sentence to identify who undertook the action. So, for example: "Then the determination was made by zombies to fire the supervisor on Christmas Eve." If you can blame zombies, it is a dead giveaway that you are using passive voice.

Sometimes You Want to Let the Reader Blame the Zombies

Sometimes deliberate use of passive voice is the best choice in writing, especially in legal writing. It might be best to leave the reader wondering who it was who was so inattentive to have missed the deadline, or so callous to have fired the supervisor on Christmas Eve. Sometimes it is best to let the reader blame zombies!

Examples of when passive voice is better abound. Whenever you do not want an actor to take responsibility for an action, let the reader be able to blame the zombies. This can happen when your client (or you) made a mistake or committed a wrongful act. Sometimes it is best to write, "The deadline was missed," rather than "I missed the deadline" or "The firm missed the deadline."

In the following examples, assume that there is no dispute over who did the act. Nonetheless, think about the circumstances—and it is the circumstances that dictate what is most effective, not some rule—in which the passive voice would be the better choice:

- "Mistakes were made," compared to, "I made mistakes."
- "The instructions were poor," compared to, "Hershel instructed us poorly."
- "The car window was broken," compared to, "Maggie broke the car window."

Our point is that no bright line rule requires active voice. Sometimes you need to blame zombies, or at least let the reader blame them. But what a writer must do is know when to use passive voice, and to do that, a writer must be able to spot it.

Some Problems for You

Here are some simple examples for you to convert to the active voice. In doing so, think about when circumstances might be such that you would want to allow the reader to blame the zombies, and not you or your client. In addition to rewriting these sentences in the active voice, see if you can shorten them even while leaving them in passive voice.

- It was the discussion of his replacement that followed the determination to fire the supervisor.
- The exploration of whether to fire the supervisor commenced.
- The duplication of the copyrighted article occurred.
- The criminal complaint made mention of him.
- She was placed under sedation.
- There was a violation of required procedures. GBJ

David Hricik is currently on leave from Mercer University School of Law, serving as law clerk to Chief Judge Randall R. Rader of the U.S. Court of Appeals for the Federal Circuit during 2012-13. He will return to Mercer in 2013. The legal writing program at Mercer University continues to be recognized as one of the nation's top legal writing programs.

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

Access to Justice:

Is the Right to Counsel Still "An Obvious Truth"?

by Claudia S. Saari

This year we celebrate the 50th anniversary of *Gideon v. Wainwright*,[1] the case in which the U.S. Supreme Court unanimously held that states have the constitutional obligation to provide counsel to indigent defendants, reaffirming the principle that justice should never be determined by a person's wealth. In 1961, Clarence Gideon was charged with the felony offense of breaking and entering. After being denied his request for an attorney to represent him at trial, he was convicted and sentenced to prison. While serving his sentence, he hand-wrote an appeal to the U.S. Supreme Court, claiming that his conviction violated his rights under the 14th Amendment.

In reversing Gideon's conviction, Justice Hugo Black wrote that ". . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him. This seems to us to be an obvious truth." Gideon was re-tried and with the assistance of an attorney he was acquitted of all charges.

Gideon set into motion changes in indigent defense that continue today. One of the more recent and important developments for Georgia was the creation of a statewide indigent defense system in 2005. By this action, Georgia made great progress in fulfilling the promise of *Gideon*. Prior to 2005, not every judicial circuit had an established public defender office. The statewide system ensures that every circuit, except for the few with established indigent defense delivery systems, now has a public defender office staffed with dedicated criminal defense attorneys and support staff. The system also provides statewide and regional training, additional resources to conduct effective defenses and conflict counsel for felony, juvenile and appellate cases.

Approximately 80 percent of all persons charged with crimes are indigent and require appointed counsel. The structures and policies of Georgia's indigent defense system make possible the most important component of effective indigent defense: representation by attorneys who are dedicated to criminal defense as a career and a calling. Every day, in every court in this state, attorneys in public defender offices are fighting to ensure quality representation for their clients and to fulfill the promise of *Gideon*. The need for representation is great and we, the public defenders, understand and embrace our professional responsibility of ensuring fairness in the justice system.

Public defender offices are equal partners with the courts, prosecutors and law enforcement in managing and improving the criminal justice system. As Justice Black wrote in the *Gideon* opinion, "lawyers in criminal cases are necessities, not luxuries." Thus, establishment of a statewide defender system serves all aspects of justice in Georgia. Efficient and effective criminal justice systems require that all parties—the prosecutors, the courts, the sheriff's departments, the police departments and the public defender's offices—have the necessary resources to fulfill their roles separately from and in concert with one another. If any one of these offices cannot effectively function because of a lack of support, the entire system grinds slowly to a halt.

Georgia's indigent defense system has many supporters, including the Chief Justice's Commission on Professionalism (the Commission.) One aspect of the Commission's mission is to ensure access to justice in both civil and criminal courts. The Commission has provided the Georgia Legal Services Program with a grant to establish the Gateway to Justice, an online triage and intake system that allows low-income house-

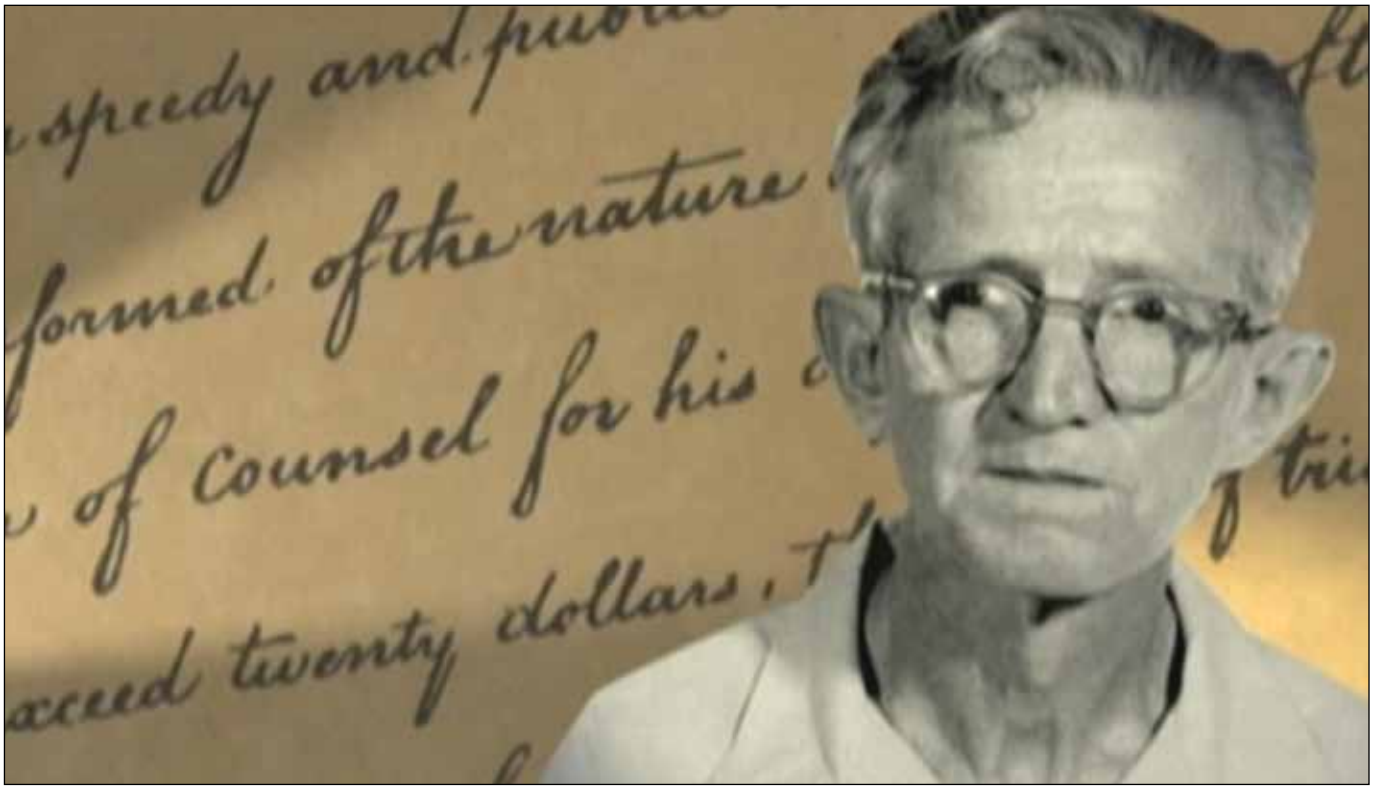


Image from www.thedocumentarygroup.com

holds to apply for legal help and information, making civil attorneys more accessible to people through the use of Internet-based services. In addition, the Commission supports Atlanta Legal Aid Society's Georgia Senior Legal Hotline, serving senior citizens throughout Georgia by offering brief legal assistance over the phone.

The Commission is considering other ways to promote access to justice, including a referral program for persons of modest means: those who do not qualify for appointed counsel, cannot afford a private attorney and who need affordable counsel, and making a request to the Supreme Court to change the rules that permit law students to practice under supervision. Expansion of the student practice rules would provide additional opportunities for law students to be involved with prosecutor, public defender and legal aid offices.

Another way the state works to support access to justice comes through the State Bar's Transition Into Law Practice Program. New public defenders are required to attend a two-week program to learn the role of the public defender, ethics, professionalism, client-centered representation, case management and trial skills. We are also fortunate to have based in Georgia Gideon's Promise (formerly The Southern Public Training Center), an organization dedicated to inspiring, teaching and supporting public defenders and leaders in public defender offices and raising the standard of representation in courthouses across the South.

With continued and expanding support for indigent defense, the future for access to justice is promising. We are better off today, although more can be done to honor the legacy of *Gideon*. There are challenges inherent with high caseloads. Staffing levels in public defender offices across the state are extremely lean and additional personnel are needed. To ensure fairness and equity in the justice system, there should be equal resources and pay parity with prosecutors. To attract and maintain good attorneys, investigators, social workers and other staff who are passionate about defending the rights of the indigent, these issues need to be addressed.

The 50th anniversary of *Gideon* is a reminder that the law is a service profession. I am honored to have served as a public defender for almost 26 years. In my daily work, I have the opportunity to give life to the guiding principle of *Gideon:* no matter how rich or poor, a person is entitled to quality legal representation when charged with a crime. All Georgians can be proud to know that across the state, there are attorneys, administrative staff, investigators and social workers in public defender offices who are dedicated to providing excellent, ethical and professional representation to those who face a criminal charge. That is an "obvious truth." GBJ

Claudia S. Saari is the interim circuit public defender of the Stone Mountain Judicial Circuit in Decatur, and a member of the Chief Justice's Commission on Professionalism.

Endnote

1. Gideon v. Wainwright, 372 U.S. 335 (1963).

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

Susan J. Aramony
Fort Lauderdale, Fla.
Emory University (1981)
Admitted 1981
Died April 2013

Robert Leon Burrell
Decatur, Ala.
Samford University Cumberland School of Law (1977)
Admitted 1977
Died March 2013

Orville L. Chapin
Gulf Breeze, Fla.
Woodrow Wilson College of Law (1977)
Admitted 1977
Died February 2013

Thomas Scott Fisher
Decatur, Ga.
University of Georgia School of Law (1980)
Admitted 1980
Died February 2013

Dean C. Houk Jr.
Atlanta, Ga.
University of Florida Levin College of Law (1962)
Admitted 1967
Died May 2013

Fred E. Johnston Jr.
Lilburn, Ga.
Atlanta Law School (1976)
Admitted 1976
Died April 2013

John William Kilgo
Tallapoosa, Ga.
University of Georgia School of Law (1976)
Admitted 1976
Died February 2013

Whitfield M. Landrum Jr.
Evans, Ga.
Augusta Law School
Admitted 1951
Died March 2013

Jack N. Lincoln
Atlanta, Ga.
Atlanta's John Marshall Law School (1969)
Admitted 1970
Died April 2013

John L. Merritt
Cumming, Ga.
Mercer University Walter F. George School of Law (1971)
Admitted 1972
Died March 2013

Gary Michael Newberry
Savannah, Ga.
Mercer University Walter F. George School of Law (1985)
Admitted 1986
Died April 2013

Kenneth O. Nix
Smyrna, Ga.
Emory University School of Law (1964)
Admitted 1965
Died October 2012

E. Randolph Parrish
Atlanta, Ga.
University of Georgia School of Law (1968)
Admitted 1968
Died April 2013

Donald F. Ruzicka
Atlanta, Ga.
Atlanta's John Marshall Law School (1975)
Admitted 1975
Died March 2013

Jesse W. Shaddix
Tyrone, Ga.
Atlanta Law School (1966)
Admitted 1976
Died April 2013

Darrell P. Smithwick
Lawrenceville, Ga.
Woodrow Wilson College of Law (1977)
Admitted 1977
Died February 2013

John W. Stokes Jr.
Lawrenceville, Ga.
Emory University School of Law
Admitted 1949
Died February 2013

L. Jack Swertfeger Jr.
Atlanta, Ga.
Emory University School of Law (1953)
Admitted 1954
Died April 2013

Declining Prospects

by Michael H. Trotter, 258 pages, CreateSpace Independent Publishing Platform

reviewed by Donald P. Boyle Jr.

Change in the practice of law since 1962 and change in the future are the subject of *Declining Prospects* by Michael H. Trotter, a business attorney and veteran of several of Atlanta's best known law firms.

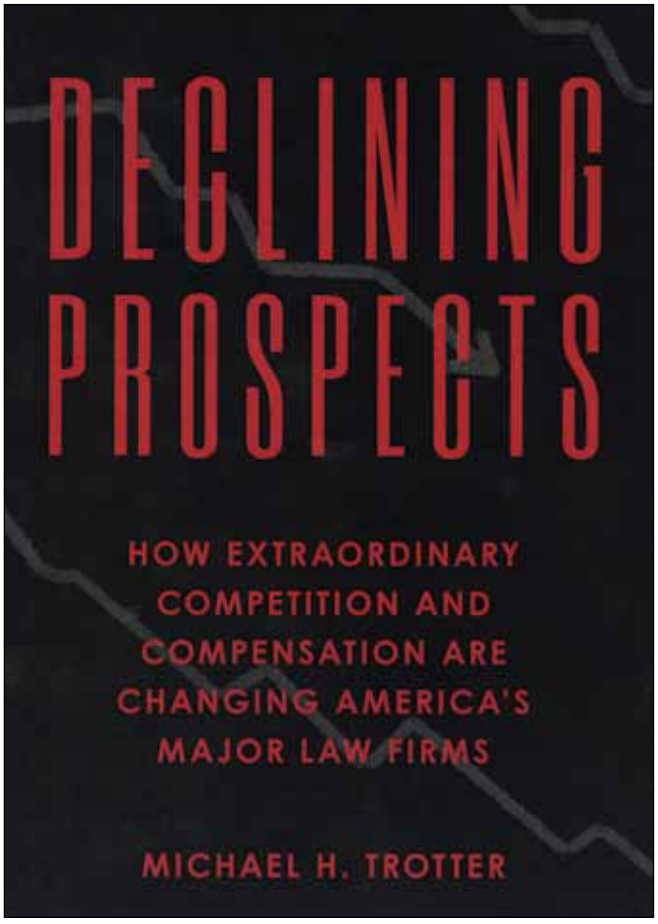
Trotter expects significant changes in law firms in the next 20 years, though he admits that he has been forecasting such changes for some time, having authored an earlier book about the legal profession, *Profit and the Practice of Law*, in 1997. The focus of the book is on what Trotter calls "major business practice firms," i.e., those law firms representing leading U.S. businesses.

The Transformation of the Major Business Practice Law Firms in the U.S.

The Transformation 1950 to 1990

In the 1950s, major law firms were generally much smaller than today. A chart at the beginning of the book shows that 19 of the best known firms have greatly increased in size, most at least twenty-fold. There were few in-house legal departments, since corporations' general counsel were almost always at an outside law firm. Liability concerns kept the size of law firms low because you had to know who your partners were, before liability insurance was widespread. For the same reason, there was little lateral movement of lawyers.

Change began with a shortage of lawyers resulting from the Great Depression and World War II. During the 1950s and 1960s, hourly rates came into favor through client pressure to see what was behind their lawyers' bills. With the increased use of hourly billing, bar associations published minimum fee schedules—lawyers were expected to bill a certain rate or face



ethical discipline. Hourly rates led to greater focus on numbers in law firm budgeting and management.

In Trotter's view, inflation during this period made hourly rate increases seem "normal." When inflation eased after the 1970s, the annual rate increases remained. Profitability became a matter for public discussion when the *American Lawyer* in 1986 began publishing lists of profit per partner (PPP). The focus on profitability led to greater leverage (associate-to-partner ratio). This had the effect of increasing client contact for younger lawyers, who could then move on and take clients with them because they often had a

better relationship than the senior lawyers did. This period also saw the widespread use of nonlawyer assistants as timekeepers, adding to law firm profits.

The Transformation Continued 1990-2010

After 1990, the average PPP generally increased over the next 15 years. This period saw a new phenomenon—the creation of "classes" of law firm partners such as nonequity partners and counsel. Lateral movement increased further, resulting in breakup and failure of some firms. The reporting of PPP, which often was based on the income of equity partners alone, was misleading as a result—if all classes of partners were considered, PPP would be significantly lower.

Trotter observes that the "financialization" of the U.S. economy increased the need for specialized legal work related to complex financial transactions and instruments (e.g., collateralized debt obligations and credit-default swaps). The total cost of legal services continued to grow.

Why Working Conditions Have Declined

The drive for greater profits and production had an inevitable effect on professional satisfaction. It has become common for lawyers to complain that their profession has become a business. Most lawyers have little time left for activities outside of work or for pro bono. Further, with increased specialization, lawyers often find less satisfaction in the legal work itself.

In Trotter's view, many of the factors contributing to dissatisfaction are beyond law firms' control; but size and leverage are within their control. The stress on profits (and resulting personal stress) has led to decreased loyalty of younger lawyers to the law firm and less investment of the law firm in younger lawyers as a whole, who are seen as a commodity, except for the perceived rising stars.

Concerns about liability from mistakes by "rogue" lawyers, increased time supervising support staff, and other issues make lawyers spend more time running a business than they ever expected or wanted when they decided to practice law. Trotter writes, "Simply put, a lot more time, effort and money is required to run a 'large' firm than a 'small' one." Adding to lawyers' stress, increased specialization makes lawyers more vulnerable to downturns in particular areas of business.

Can Working Conditions Be Improved?

Using an *AmLaw 200* chart, Trotter points out that there is no correlation shown between PPP and leverage. He concludes that firm strategy is far more important than size or leverage. "Greater size and leverage do not guarantee financial success, and can undermine much that makes the practice of law attractive in the first place," Trotter writes.

Surveys have found that most associates would trade a reduction in compensation for improvement in quality of life through lower billable hours. Trotter believes that hard work is not the same as long hours, which can often lead to exhaustion and so is counterproductive for clients. At the same time, he admits that it is hard to see how existing big firms can make a change without sacrifice in compensation by partners and associates, or an increase in rates (and clients don't seem willing to pay more for legal work).

Inside Counsel's Frustrations with Outside Counsel

Corporate counsel know how law firms operate, and this gives them concern. Their biggest concern is cost—mostly from firms' use of younger associates, who take longer to get to an answer, which often is then filtered through more senior lawyers, thus driving up the bill further.

In-house counsel want to rely on lawyers they know and not

be referred to other lawyers, often in other offices, who are unknown personally to both the referring attorney and in-house counsel. Trotter believes that mid-level partners often are the best economic choice for the in-house lawyer, because the most senior lawyers cannot justify their higher billing rates.

Five Developments Driving Change

Competition

More new lawyers are being pumped out of law schools than there is work for them to do. Clients have become more sophisticated about the legal services that they purchase. Lawyers in other states or foreign countries now are able to compete where it was previously impossible or impractical. Highly qualified students continue to apply to law schools. The long hours required for a successful legal practice tend to filter out would-be lawyers who don't want that kind of life. Despite all this competition, Trotter says, clients continue to pay a "higher than necessary price for their outside legal services."

Costs

Compensation increased in the 1960s when firms outside New York City (such as Atlanta) began recruiting at Harvard and other top law schools and had to compete with New York firms for the best students. If starting salaries in Atlanta had increased only with inflation after 1960, the starting salary would have been $26,500 in 2010; actually, it was $145,000 at several of the major firms. Compensation of the top senior partners also increased over the period, but "only" to a multiple of seven times associate compensation; in 1960, it was 12.5-16.7 times as much as associate pay.

All firms seem to be pursuing the same strategy—increasing associate compensation in order to be perceived as top tier and to attract the best law graduates, though not all can afford it. Few firms are willing to sacrifice PPP in order to address client dissatisfaction over high costs.

The high compensation of partners disadvantages them against their major competitors—corporate law departments. Corporate counsel often got their start at major law firms, and so have often acquiesced in these high costs and inefficiencies because they think that it's the way that things are done. Now, however, corporate counsel have access to reports on what firms are billing other clients for the same work. Corporate counsel are being ordered by management to cut costs. Only the major firms with the highest levels of expertise will be able to continue the current model, Trotter believes.

The Rise of Corporate Counsel

There were very few in-house lawyers in 1960. In the 1970s and 1980s, in-house legal staffs grew and became more specialized. General counsel were almost all outside lawyers in 1960; now, the reverse is true.

By the 1990s, corporate legal departments were doing most of the companies' legal work, except for the most specialized work and litigation. Corporate lawyers now are looking for the lowest cost in outside lawyers for most work that is given to them, and the highest skill in "bet the company" cases. Corporate legal departments are demanding the use of contract lawyers, non-lawyer personnel, and outsourcing to other countries. Fewer outside counsel sit on boards of companies than in the past, so that the relationship between attorney and client has become less aligned.

Commoditization

Legal services have become standardized. Through the widespread adoption of uniform laws, regional differences have been greatly reduced. As a result, law firms have changed from small, specialized concerns into large, multistate businesses.

In a related development, corporate counsel no longer want to pay for full detail on most matters; "good enough," in their view, often suffices. This has led to corporate counsel doing more of the work themselves, which they can do with the help of electronic legal research and publications on all areas of the law (e.g., Practical Law Company subscription service and Legal Zoom) without leaving their office.

Continuing legal education and law firm marketing programs have allowed lawyers to benefit from the ideas and even forms from other lawyers. This has made it easier for lawyers to become "expert" in a subject (and this includes corporate counsel).

In this area as in others under discussion in the book, the law firms have become their own worst enemy. In marketing themselves through CLE and less formal presentations to clients, they enable corporate counsel to use the information to do future work themselves, without involving outside counsel. High leverage in law firms, while good for the equity partners' immediate bottom line, has further encouraged standardization, as have lateral moves by lawyers, who take knowledge and best practices with them to the next firm.

Technology

Trotter has been practicing long enough that he recalls the days when he could send a letter to a client and move on to attend to other matters for several days before his client would get back to him. Now, communications generally go by email, and the time until the client's response may be measured in minutes. Clients increasingly demand quick answers and quick results through the use of technology.

This can lead to ethical issues. Knowledge management systems enable lawyers to reuse and adapt work product in multiple cases, but ethical rules prevent lawyers from

charging each client the full price as if the work had been done for that client alone. This further cuts into the law firms' profits, Trotter observes, but there is no way to avoid it, because other firms are using such systems, and clients demand it.

Trotter forecasts that the "computer associate" may not be too far away. It may soon be possible to get legal answers (legal memos and opinions, not just forms and case printouts) reliably from intelligent database search.

Looking Toward the Future Practice of Law

Lawyers Sick of the Practice of Law

Much of this is not news to practicing lawyers, and dissatisfaction with law practice is on the increase. The American Bar Association held its first "Raise the Bar" Colloquium in 2005, where proposals included (1) changing compensation structures to include pro bono, practice development, mentoring and training; (2) mandatory CLE on work-life balance; and (3) giving credit for efficient results. Trotter, who describes himself as one of the "pessimists" at the colloquium, recalls that corporate counsel were reluctant to get involved in suggesting how firms should address work-life balance. In fact, corporate counsel had further bad news for their outside lawyers—greater commoditization is likely to lead to further downward pressure on rates and even selection of law firms by procurement departments rather than legal departments.

Turning the Clock Back?

Trotter describes the literal decimation of law firms in the recent recession, resulting in unemployment for many recent law graduates and reduction in starting salaries for those who are lucky enough to find jobs. Partners have been "de-equitized" or laid off. He predicts a "bruising battle" among major law firms to stay in the "elite" and questions whether law firms will invest the time to look at new ways of doing business beyond the billable hour. In his view, businesses want a one-stop service for their business and legal issues, and law firms will not be able to continue to resist this transformation. Trotter believes that law firms and the bar need to look harder at solutions. The balkanization of the bar into separate jurisdictions makes a comprehensive solution difficult.

"New Model" Law Firms

One way forward is using a "new model" for law firms. New Model firms (NMFs) are characterized generally by (1) lower leverage; (2) smaller size; (3) lower overhead; (4) lower hourly rates and commitment to alternative fee arrangements; and (5) a less hierarchical structure than the traditional major business practice firms.

Trotter sees greater opportunities for NMFs as traditional big firms "move upmarket" to more profitable areas of practice in response to client pressures. NMFs can be more responsive to client demands because of fewer fixed costs, less overhead, and a willingness to depart from traditional ways of practicing law.

NMFs face the obstacle that they still have to convince many corporate law departments that they can do the work at the same skill levels as the major firms. Corporate law departments are using law firm "alliances" as a screening method before assigning work to NMFs.

Other alternatives to traditional big firms include: (1) solo practitioners, often "refugees" from big firms, who can offer excellent service to corporate clients through the use of technology; and (2) "virtual" law firms, which use technology to band together without the need for a common office space. NMFs and other alternative ways of practicing are in a "symbiotic relationship" with major business practice firms. Because young lawyers have to get training in sophisticated legal work before venturing into alternative ways of practicing law, these NMFs and virtual firms probably will never replace the traditional firms.

The Future of Lawyers?

The practice of law will continue to attract ambitious, intelligent people, but the opportunities for high compensation will be lower than in the past. Pressure from clients on fees and continued improvements in technology will cut into profits if firms continue to practice in the old ways.

Trotter believes that corporate counsel hold the future for law firms. He expects major business practice firms to see further reductions in profitability, and NMFs to increase. Ultimately, law firms are subject to the same economic pressures as other concerns, and our identity as a profession cannot change the laws of economics.

In an epilogue, Trotter advocates that banks and law firms require personal guarantees by all partners on leases and debts, at least in proportion to each partner's economic participation in the firm, as a way of preventing further dissolution of firms due to partners' moving to greener pastures. He admits, however, that it is doubtful that many partners would agree to these measures.

Trotter also predicts that some traditional firms will survive by operating with one class of partner; no lateral hiring; emphasizing quality service rather than volume; and staying at a small size—in other words, operating like the few elite firms that existed in 1960. Trotter does not believe that many firms will be able to make this transformation. GBJ

Donald P. Boyle Jr., a member of the *Georgia Bar Journal* Editorial Board and past Editor-in-Chief, is a litigator at Taylor English Duma LLP. He posts occasional reviews and essays at georgiarambler.wordpress.com.

June-August

JUN 6 ICLE
International Business Crimes: Foreign Corrupt Practice Act
Atlanta, Ga.
See www.iclega.org for location
6 CLE

JUN 7 ICLE
Complexities of Article 9 Simplified
Atlanta, Ga.
See www.iclega.org for location
6 CLE

JUN 27 ICLE
Internet Legal Research (Rebroadcast)
Atlanta, Ga.
See www.iclega.org for location
6 CLE

JUN 27-30 *Gary Christy Memorial Trial Skills Clinic*
Athens, Ga.
See www.iclega.org for location
24 CLE

JUN 27 ICLE
Elder Law (Rebroadcast)
Atlanta, Savannah and Tifton, Ga.
See www.iclega.org for location
6 CLE

JUN 28 ICLE
Trial Advocacy (Rebroadcast)
Atlanta, Ga.
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6 CLE

JUN 28 ICLE
Professionalism, Ethics & Malpractice (Rebroadcast)
Atlanta, Savannah and Tifton, Ga.
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3 CLE

JUN 28-29 *Southeastern Admiralty Law Institute*
Savannah, Ga.
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9 CLE

JUL 11-13 ICLE
Fiduciary Law Institute
St. Simons Island, Ga.
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12 CLE

JUL 26-27 ICLE
Environmental Law Summer Seminar
Amelia Island, Fla.
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8 CLE

JUL 31-AUG 1 ICLE
Real Property Law Institute (Video Replay)
Atlanta, Ga.
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12 CLE

AUG 9 ICLE
Arbitration Institute
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6 CLE

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

AUG 15
ICLE
Solo and Small Firm
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6 CLE

AUG 20
ICLE
Group Mentoring
Atlanta, Savannah and Tifton, Ga.
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6 CLE

AUG 23
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Nuts & Bolts of Family Law
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School and College Law
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AUG 23
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Contract Litigation
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6 CLE

AUG 30-31
ICLE
Urgent Legal Matters
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12 CLE

Formal Advisory Opinion Issued Pursuant to Rule 4-403

STATE BAR OF GEORGIA
FORMAL ADVISORY OPINION NO. 10-1
Approved and Issued On April 15, 2013
Pursuant to Bar Rule 4-403
By Order Of The Supreme Court of Georgia
With Comments
Supreme Court Docket No. S10U1679

The second publication of this opinion appeared in the June 2010 issue of the *Georgia Bar Journal,* which was mailed to the members of the State Bar of Georgia on or about June 10, 2010. The opinion was filed with the Supreme Court of Georgia on June 15, 2010. On April 15, 2013, the Supreme Court of Georgia issued an Order approving Formal Advisory Opinion No. 10-1. Because of the extensive discussion contained in the Order, the full text of the Order has been made part of the opinion. Following is the full text of the opinion issued by the Supreme Court. In accordance with Bar Rule 4-403(e), this opinion is binding upon all members of the State Bar of Georgia, and the Supreme Court shall accord this opinion the same precedential authority given to the regularly published judicial opinions of the Court.

COMPLETE TEXT FROM THE ORDER OF THE SUPREME COURT OF GEORGIA

Responding to a letter from the Georgia Public Defender Standards Council (GPDSC), the State Bar Formal Advisory Opinion Board (Board) issued Formal Advisory Opinion 10-1 (FAO 10-1), answering the following question in the negative:

> May different lawyers employed in the circuit public defender office in the same judicial circuit represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so?

FAO 10-1 was published in the June 2010 issue of the *Georgia Bar Journal* and was filed in this Court on June 15, 2010. On July 5, 2010, the GPDSC filed a petition for discretionary review which this Court granted on January 18, 2011. This Court posed the following question to the parties for briefing:

> May lawyers employed in the circuit public defender office in the same judicial circuit represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so?

The Court heard oral argument on January 10, 2012. For reasons set forth below, we answer the question in the negative and hereby approve FAO 10-1 pursuant to State Bar Rule 4-403(d).

1. At the heart of FAO 10-1 is the constitutional right to conflict-free counsel and the construction of Rule 1.10 (a) of the Georgia Rules of Professional Conduct. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (101 SC 1097, 67 LE2d 220). Indeed, this Court has stated in no uncertain terms that, "Effective counsel is counsel free from conflicts of interest." Garland v. State, 283 Ga. 201 (657 SE2d 842) (2008). In keeping with this unequivocal right to conflict-free representation, Rule 1.10 (a) provides as follows:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by *Rule 1.7: Conflict of Interest: General Rule, 1.8(c): Conflict of Interest: Prohibited Transactions, 1.9: Former Client or 2.2: Intermediary.*

(Emphasis in original.) Comment [1] concerning Rule 1.10 defines "firm" to include "lawyers …in a legal services organization." Comment [3] further provides "Lawyers employed in the same unit of a legal service organization constitute a firm,…."

Under a plain reading of Rule 1.10 (a) and the comments thereto, circuit public defenders working in the circuit public defender office of the same judicial circuit are akin to lawyers working in the same unit of a legal services organization and each judicial circuit's public defender's office[1] is a "firm" as the term is used in the rule. This construction is in keeping with our past jurisprudence. Cf. Hung v. State, 282 Ga. 684 (2) (653 SE2d 48) (2007) (attorney who filed motion for new trial was not considered to be "new" counsel for the purpose of an ineffective assistance of counsel claim where he and trial counsel were from the same public defender's office); Kennebrew v. State, 267 Ga. 400 (480 SE2d 1) (1996) (appellate counsel who was from the same public defender office as appellant's trial lawyer could not represent appellant on appeal where appellant had an ineffective assistance of counsel claim); Ryan v. Thomas, 261 Ga. 661 (409 SE2d 507) (1991) (for the purpose of raising a claim of ineffective assistance of counsel, "attorneys in a public defender's office are to be treated as members of a law firm. . ."); Love v. State, 293 Ga. App. 499, 501 at fn. 1 (667 SE2d 656) (2008). See also Reynolds v. Chapman, 253 F3d 1337, 1343-1344 (11th Cir. 2001) ("While public defenders' offices have certain characteristics that distinguish them from typical law firms, our cases have not drawn a distinction between the two."). Accordingly, FAO 10-1 is correct inasmuch is it concludes that public defenders working in the same judicial circuit are "firms" subject to the prohibition set forth in Rule 1.10(a) when a conflict exists pursuant to the conflict of interest rules listed therein, including in particular Rule 1.7.[2] That is, if it is determined that a single public defender in the circuit public defender's office of a particular judicial circuit has an impermissible conflict of interest concerning the representation of co-defendants, then that conflict of interest is imputed to all of the public defenders working in the circuit public defender office of that particular judicial circuit. See Restatement (Third) of the Law Governing Lawyers §123 (d)(iv) ("The rules on imputed conflicts . . . apply to a public-defender organization as they do to a law firm in private practice…").

2. Despite the unambiguous application of Rule 1.10 (a) to circuit public defenders, GPDSC complains that FAO 10-1 creates a per se or automatic rule of disqualification of a circuit public defender office. We disagree. This Court has stated that "[g]iven that multiple representation alone does not amount to a conflict of interest when one attorney is involved, it follows that counsel from the same [public defender office] are not automatically disqualified from repre-

senting multiple defendants charged with offenses arising from the same conduct." Burns v. State, 281 Ga. 338, 340 (638 SE2d 299) (2006) (emphasis in the original). Here, Rule 1.10 does not become relevant or applicable until after an impermissible conflict of interest has been found to exist. It is only when it is decided that a public defender has an impermissible conflict in representing multiple defendants that the conflict is imputed to the other attorneys in that public defender's office. Thus, FAO 10-1 does not create a per se rule of disqualification of a circuit public defender's office prior to the determination that an impermissible conflict of interest exists.

Although a lawyer (and by imputation his law firm, including his circuit public defender office) may not always have an impermissible conflict of interest in representing multiple defendants in a criminal case, this should not be read as suggesting that such multiple representation can routinely occur. The Georgia Rules of Professional Conduct explain that multiple representation of criminal defendants is ethically permissible only in the unusual case. See Rule 1.7, Comment [7] ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."). We realize that the professional responsibility of lawyers to avoid even imputed conflicts of interest in criminal cases pursuant to Rule 1.10 (a) imposes real costs on Georgia's indigent defense system, which continually struggles to obtain the resources needed to provide effective representation of poor defendants as the Constitution requires. See Gideon v. Wainwright, 373 U.S. 335 (83 SC 792, 9 LE2d 799) (1963). But the problem of adequately funding indigent defense cannot be solved by compromising the promise of Gideon. See Garland v. State, 283 Ga. 201, 204 (657 SE2d 842) (2008).

Since FAO 10-1 accurately interprets Rule 1.10 (a) as it is to be applied to public defenders working in circuit public defender offices in the various judicial circuits of this State, it is approved.[3]

Formal Advisory Opinion 10-1 approved. All the Justices concur.

Endnotes

1. There are 43 circuit public defender offices in Georgia.

2. Rule 1.7 of the Georgia Rules of Professional Conduct provides:

   (a) A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as permitted in (b).
   (b) If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent confirmed in writing to the representation after: (1) consultation with the lawyer pursuant to Rule 1.0(c); (2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; and (3) having been given the opportunity to consult with independent counsel.
   (c) Client informed consent is not permissible if the representation: (1) is prohibited by law or these Rules; (2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or a substantially related proceeding; or (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients. The maximum penalty for a violation of this Rule is disbarment.

3. Our opinion cites several precedents that concern the constitutional guarantee of the assistance of counsel, and it is only fitting that we think about the constitutional values that Rule 1.10 promotes as we consider the meaning of Rule 1.10. We do not hold that the imputation of conflicts required by Rule 1.10 is compelled by the Constitution, nor do we express any opinion about the constitutionality of any other standard for imputation. Rule 1.10 is the rule that we have adopted in Georgia, FAO 10-1 correctly interprets it, and we decide nothing more.

FORMAL ADVISORY OPINION NO. 10-1

QUESTION PRESENTED:

May different lawyers employed in the circuit public defender office in the same judicial circuit represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so?

SUMMARY ANSWER:

Lawyers employed in the circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so.

OPINION:

In Georgia, a substantial majority of criminal defendants are indigent. Many of these defendants receive representation through the offices of the circuit public

defenders. More than 40 judicial circuit public defender offices operate across the State.

Issues concerning conflicts of interest often arise in the area of criminal defense. For example, a single lawyer may be asked to represent co-defendants who have antagonistic or otherwise conflicting interests. The lawyer's obligation to one such client would materially and adversely affect the lawyer's ability to represent the other co-defendant, and therefore there would be a conflict of interest under Georgia Rule of Professional Conduct 1.7(a). See also Comment [7] to Georgia Rule of Professional Conduct 1.7 ("…The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant"). Each such client would also be entitled to the protection of Rule 1.6, which requires a lawyer to maintain the confidentiality of information gained in the professional relationship with the client. One lawyer representing co-defendants with conflicting interests certainly could not effectively represent both while keeping one client's information confidential from the other. See Georgia Rule of Professional Conduct 1.4 ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . .").

Some conflicts of interest are imputed from one lawyer to another within an organization. Under Georgia Rule of Professional Conduct 1.10(a), "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so…." Therefore, the answer to the question presented depends in part upon whether a circuit public defender office constitutes a "firm" within the meaning of Rule 1.10.

Neither the text nor the comments of the Georgia Rules of Professional Conduct explicitly answers the question. The terminology section of the Georgia Rules of Professional Conduct defines "firm" as a "lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10: Imputed Disqualification." Comment [1] to Rule 1.10 states that the term "firm" includes lawyers "in a legal services organization," without defining a legal services organization. Comment [3], however, provides that:

> Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

That is the extent of the guidance in the Georgia Rules of Professional Conduct and the comments thereto. In the terms used in this Comment, the answer to the question presented is determined by whether lawyers in a circuit public defender's office are in the same "unit" of a legal services organization.

The Supreme Court of Georgia has not answered the question presented. The closest it has come to doing so was in the case of Burns v. State, 281 Ga. 338 (2006). In that case, two lawyers from the same circuit public defender's office represented separate defendants who were tried together for burglary and other crimes. The Court held that such representation was permissible because there was no conflict between the two defendants. Presumably, therefore, the same assistant public defender could have represented both defendants. The Court recognized that its conclusion left open "the issue whether public defenders should be automatically disqualified or be treated differently from private law firm lawyers when actual or possible conflicts arise in multiple defendant representation cases." Id. at 341.

Other states, in case law and ethics opinions, have decided the question presented in disparate ways. Some impute conflicts within particular local defender offices. *See* Commonwealth v. Westbrook, 400 A2d 160, 162 (Pa. 1979); Turner v. State, 340 So.2d 132, 133 (Fla. App. 2nd Dist. 1976); Tex. Ethics Op. 579 (November 2007); Va. Legal Ethics Op. No. 1776 (May 2003); Ct. Informal Op. 92-23 (July 1992); S.C. Bar Advisory Op. 92-21 (July 1992). Some courts and committees have allowed for the possibility that there can be sufficient separation of lawyers even within the same office that imputation should not be automatic. Graves v. State, 619 A.2d 123, 133-134 (Md. Ct. of Special Appeals 1993); Cal. Formal Op. No. 2002-158 (Sept. 2002); Montana Ethics Op. 960924. Others have decided more generally against a per se rule of imputation of conflicts. *See* Bolin v. State, 137 P.3d 136, 145 (Wyo. 2006); State v. Bell, 447 A.2d 525, 529 (N.J. 1982); People v. Robinson, 402 N.E.2d 157, 162 (Ill. 1979); State v. Cook, 171 P.3d 1282, 1292 (Idaho App. 2007).

The Eleventh Circuit Court of Appeals looked at an imputed conflict situation in a Georgia public defender office. The Court noted that "[t]he current disciplinary rules of the State Bar in Georgia preclude an attorney from representing a client if one of his or her law partners cannot represent that client due to a conflict of interest." Reynolds v. Chapman, 253 F.3d 1337, 1344 (2001). The Court further stated that "[w]hile public defender's offices have certain characteristics that distinguish them from typical law firms, our cases have not drawn a distinction between the two." Reynolds, supra, p. 1343.

The general rule on imputing conflicts within a law firm reflects two concerns. One is the common eco-

nomic interest among lawyers in a firm. All lawyers in a firm might benefit if one lawyer sacrifices the interests of one client to serve the interests of a different, more lucrative client. The firm, as a unified economic entity, might be tempted to serve this common interest, just as a single lawyer representing both clients would be tempted. Second, it is routine for lawyers in a firm to have access to confidential information of clients. A lawyer could access the confidential information of one of the firm's clients to benefit a different client. For at least these two reasons, a conflict of one lawyer in a private firm is routinely imputed to all the lawyers in the firm. See RESTATEMENT OF THE LAW GOVERNING LAWYERS Third, Sec. 123, Comment b.

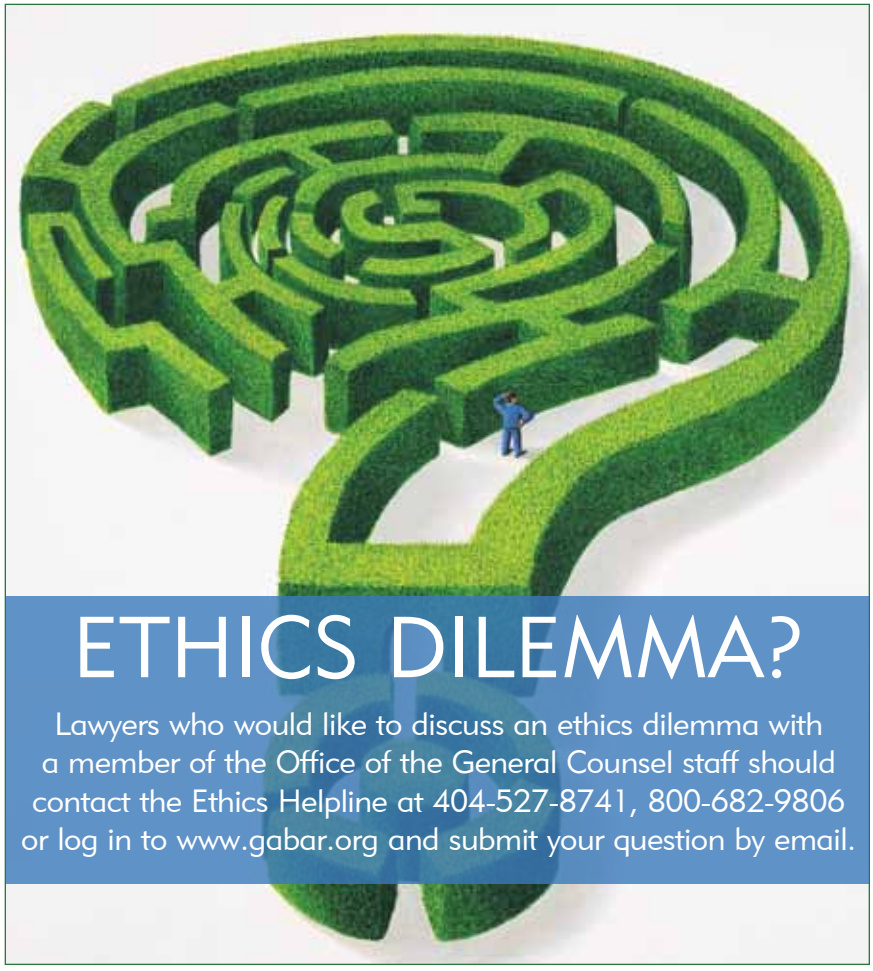
The first of these concerns is not relevant to a circuit public defender office. "The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice." Frazier v. State, 257 Ga. 690, 695 (1987) citing ABA Formal Opinion 342.

The concerns about confidentiality, however, are another matter. The chance that a lawyer for one defendant might learn the confidential information of another defendant, even inadvertently, is too great to overlook.

Other concerns include the independence of the assistant public defender and the allocation of office resources. If one supervisor oversees the representation by two assistants of two clients whose interests conflict, the potential exists for an assistant to feel pressured to represent his or her client in a particular way, one that might not be in the client's best interest. Furthermore, conflicts could arise within the office over the allocation of investigatory or other resources between clients with conflicting interests.

The ethical rules of the State Bar of Georgia should not be relaxed because clients in criminal cases are indigent. Lawyers must maintain the same level of ethical responsibilities whether their clients are poor or rich.

Lawyers employed in the circuit public defender office are members of the same "unit" of a legal services organization and therefore constitute a "firm" within the meaning of Rule 1.10. Lawyers employed in the circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so. Conversely, lawyers employed in circuit public defender offices in different judicial circuits are not considered members of the same "unit" or "firm" within the meaning of Rule 1.10.



The State Bar of Georgia Handbook is always available online at www.gabar.org/barrules/.

First Publication of Revised Proposed Formal Advisory Opinion No. 10-R2

Pursuant to Rule 4-403 (c) of the Rules and Regulations of the State Bar of Georgia, on June 1, 2012, the Formal Advisory Opinion Board made a preliminary determination that Proposed Formal Advisory Opinion No. 10-R2 should be issued. Proposed Formal Advisory Opinion No. 10-R2 appeared in the August 2012 issue of the *Georgia Bar Journal* for 1st publication. State Bar members were invited to file comments to the proposed opinion with the Formal Advisory Opinion Board. Several comments regarding the proposed opinion were received from members of the Bar.

Upon further review of the proposed opinion, the Formal Advisory Opinion Board has revised the proposed opinion and determined that the revised proposed opinion should be issued. State Bar members are invited to file comments to the revised proposed opinion with the Formal Advisory Opinion Board at the following address:

State Bar of Georgia
104 Marietta Street NW
Suite 100
Atlanta, Georgia 30303
Attention: John J. Shiptenko

An original and one (1) copy of any comment regarding the revised proposed opinion must be filed with the Formal Advisory Opinion Board by July 15, 2013, in order for the comment to be considered by the Board. Any comment to a proposed opinion should make reference to the number of the proposed opinion. Any comment submitted to the Board pursuant to Rule 4-403(c) is for the Board's internal use in assessing proposed opinions and shall not be released unless the comment has been submitted to the Supreme Court of Georgia in compliance with Bar Rule 4-403(d). After consideration of comments, the Formal Advisory Opinion Board will make a final determination of whether the opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

REVISED PROPOSED FORMAL ADVISORY OPINION NO. 10-R2

QUESTIONS PRESENTED:

1. Does a lawyer violate the Georgia Rules of Professional Conduct when he/she conducts a "witness only" closing for real estate?

2. Can a lawyer who is closing a real estate transaction meet his/her obligations under the law and the Georgia Rules of Professional Conduct by reviewing, revising as necessary, and adopting documents sent from the lender or from other sources?

3. May a lawyer deliver funds from a real estate closing directly to the seller or lender, without depositing them into his/her IOLTA account?

SUMMARY ANSWER:

A Georgia lawyer may not ethically conduct a "witness only" closing. Unless parties to a transaction are handling it pursuant to Georgia's pro se exemption, Georgia law requires that a lawyer handle a real estate closing (see O.C.G.A § 15-19-50, UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 86-5), which means that the lawyer must review all documents to be used in the transaction, resolve any errors in the paperwork, detect and resolve ambiguities in title or title defects, and otherwise act with competence. When handling a real estate closing in Georgia a lawyer does not absolve himself/herself from liability for either malpractice or violations of the Georgia Rules of Professional Conduct by claiming that he/she has acted only as a witness and not as a lawyer. (See UPL Advisory Opinion No. 2003-2 and Formal Advisory Opinion No. 04-1). A lawyer conducting a closing may use documents prepared by others after ensuring their accuracy, making necessary revisions, and adopting the work. A lawyer who takes funds from a real estate transaction must deposit them into his/her IOLTA account or into the IOLTA account of another Georgia lawyer. (See Georgia Rule of Professional Conduct 1.15(II) and Formal Advisory Opinion No. 04-1).

OPINION:

A "witness only" closing occurs when an individual presides over the execution of deeds of conveyance and other closing documents but purports to do so merely as a witness and notary, not as someone who is practicing law. (UPL Advisory Opinion No. 2003-2). In order to protect the public from those not properly trained or qualified to render these services, lawyers are required to "be in control of the closing process from beginning to end." (Formal Advisory Opinion No. 00-3). A lawyer who purports to handle a closing in the limited role of a witness violates the Georgia Rules of Professional Conduct.

In recent years many out-of-state lenders, including some of the largest banking institutions in the country,

have changed the way they manage the real estate transactions they are funding. These national lenders hire lawyers who agree to serve the limited role of presiding over the execution of the documents (i.e., witness only closings). In advance of a witness only closing a lawyer typically receives "signing instructions" and a packet of documents prepared by the lender or at the lender's direction. The instructions specifically warn the lawyer NOT to review the documents or give legal advice to any of the parties to the transaction. The "witness only" lawyer obtains the appropriate signatures on the documents, notarizes them, and returns them to the lender or to a third party entity by mail.

Proponents of these arrangements claim that they offer convenience to consumers who do not want to travel to a lawyer's office to conduct their closing, and that they are usually less expensive than traditional closings conducted by lawyers. Detractors point out that the lawyer's failure to review closing documents can facilitate foreclosure fraud, problems with title, and other errors that may not be detected until years later when the owner of a property attempts to resell it.

A Georgia lawyer must provide competent representation and must exercise independent professional judgment in rendering advice. (Rules 1.1 and 2.1, Georgia Rules of Professional Conduct). When a lawyer agrees to serve as a mere figurehead, so that it appears there is a lawyer "handling" a closing, the lawyer violates his/her obligations under the Georgia Rules of Professional Conduct. The lawyer's signature on the closing statement is the imprimatur of a successful transaction. Because UPL Advisory Opinion No. 2003-2 and the Supreme Court Order adopting it require (subject to the pro se exception) that only a lawyer can close a real estate transaction, the lawyer signing the closing statement would be found to be doing so in his or her capacity as a lawyer. Therefore, when a closing lawyer purports to act merely as a witness, this is a misrepresentation of the lawyer's role in the transaction. Georgia Rule of Professional Conduct 8.4 provides that it is professional misconduct for an attorney to engage in "conduct involving . . . misrepresentation."

The Georgia Rules of Professional Conduct allow lawyers to outsource both legal and nonlegal work. (See ABA Formal Advisory Opinion 08-451.) A lawyer does not violate the Georgia Rules of Professional Conduct by receiving documents from the client or elsewhere for use in a closing transaction, even though the lawyer has not supervised the nonlawyers who have prepared the documents. The lawyer is responsible for utilizing these documents in compliance with the Georgia Rules of Professional Conduct and remains responsible for any matters arising from using documents provided by others. (Rule 5.5, Georgia Rules of Professional Conduct) Lawyers do not have an obligation to supervise nonlawyers who are not in their employ; but, a lawyer may review and adopt work completed by a nonlawyer who is not an employee of the lawyer's firm. Georgia law allows a title insurance company or other nonlawyer to examine records of title to real property, prepare abstracts of title, and issue related insurance. (O.C.G.A § 15-19-53). Nonlawyers may provide attorneys with paralegal and clerical services, so long as "at all times the attorney receiving the information or services shall maintain full professional and direct responsibility to his clients for the information and services received." (O.C.G.A § 15-19-54; also see UPL Advisory Opinion No. 2003-2 and Rules 5.3 and 5.5, Georgia Rules of Professional Conduct).

While a lawyer does not violate the Georgia Rules of Professional Conduct by using work product of nonlawyers who he/she does not employ, the lawyer has an affirmative obligation to review the work product and may not use it unless he/she revises it if necessary, approves it, and adopts it as his/her own. The lawyer is responsible for the entire closing transaction and each document used in the transaction, whether he/she completes the documents himself/herself, has employees complete them, or employs documents sent from elsewhere. A Georgia lawyer must avoid facilitating activity that would result in aiding others in the unlicensed practice of law. (Rule 5.5, Georgia Rules of Professional Conduct)"

The obligation to review, revise, approve and adopt documents used in a real estate closing applies to the entire series of events that comprise a closing. (Formal Advisory Opinions No. 86-5 and 00-3, and UPL Advisory Opinion No. 2003-2). While the Supreme Court has not explicitly enumerated what all of those events are, they may include, but not be limited to: (i) rendering an opinion as to title and the resolution of any defects in marketable title; (ii) preparation of deeds of conveyance, including warranty deeds, quitclaim deeds, deeds to secure debt, and mortgage deeds; (iii) overseeing and participating in the execution of instruments conveying title; (iv) supervising the recordation of documents conveying title; and (v) in those situations where the lawyer takes physical possession of funds, collecting and disbursing funds exchanged in accordance with Rule 1.15(II). Since the Georgia Rules of Professional Conduct allow a lawyer to provide "unbundled" services to a client, it is not necessary that all of these events take place in the lawyer's office, or even in the State of Georgia. Rule 1.2(c) specifically allows a lawyer to limit the scope and objectives of representation if the limitation is reasonable under the circumstances and if the client gives informed consent. Yet, the lawyer's ability to limit the scope and objectives of his/her representation is not unconstrained. Even if these steps are performed elsewhere, the lawyer maintains full professional and direct responsibility for

the entire transaction and for the services rendered to the client. In Georgia, "those who conduct witness only closings…are engaged in the practice of law." (UPL Advisory Opinion No. 2003-2). Given the irreducible nature of this principle, it would not be reasonable for a lawyer to attempt to further delimit his/her role in the delivery of legal services.

Finally, as in any transaction in which a lawyer handles client funds, a lawyer must comply with Georgia Rule of Professional Conduct 1.15(II) when handling a real estate closing. If the lawyer handles funds on behalf of a client or in any other fiduciary capacity he/she must deposit the funds into, and administer them from, an IOLTA account. (Formal Advisory Opinion No. 04-1). It should be noted that Georgia law also allows the lender to disburse funds. (O.C.G.A. § 44-14-13(a)(10)). A lawyer violates the Georgia Rules of Professional Conduct when he/she delivers closing proceeds to a title company or to a third party settlement company without depositing them into an attorney escrow account. Pursuant to O.C.G.A. § 44-14-13, it is a misdemeanor for a third party closing agent to receive or disburse loan proceeds because only lawyers and lenders can serve as settlement agents.

Notice of Motion to Amend the Rules and Regulations of the State Bar of Georgia

No earlier than thirty days after the publication of this Notice, the State Bar of Georgia will file a Motion to Amend the Rules and Regulations for the Organization and Governance of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, *2012-2013 State Bar of Georgia Directory and Handbook,* p. H-6-7 (hereinafter referred to as "*Handbook*").

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

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

Cliff Brashier
Executive Director
State Bar of Georgia

IN THE SUPREME COURT
STATE OF GEORGIA

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

MOTION TO AMEND 2013-2

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

COMES NOW, the State Bar of Georgia, pursuant to the authorization of its Board of Governors at its meeting on March 9, 2013, and upon the recommendation of its Executive Committee, and presents to this Court its Motion to Amend the Rules and Regulations of the State Bar of Georgia as set forth in an Order of this Court dated December 6, 1963 (219 Ga. 873), as amended by subsequent Orders, and published at *2012-2013 State Bar of Georgia Directory and Handbook,* pp. 1-H, *et seq.*, The State Bar respectfully moves that Rule 1-208 regarding resignation from membership be amended as set out below.

I.

Proposed Amendments to Part I, Creation and Organization, Chapter 2, Membership, Rule 1-208, Resignation from Membership, of the Rules of the State Bar of Georgia

It is proposed that Rule 1-208 regarding Resignation from Membership in Part I, Chapter 2, of the Rules of the State Bar of Georgia be amended by deleting the struck-through sections and inserting the sections underlined as follows:

Rule 1-208. Resignation from Membership

a. Resignation while in good standing: A member of the State Bar in good standing may under oath, petition the Executive Committee for leave to resign from the State Bar. Upon acceptance of such petition by the Executive Committee by majority vote, such person shall not practice law in this state nor be entitled to any privileges and benefits accorded to active members of the State Bar in good standing unless such person complies with part ~~(b)~~ (f) or ~~(c)~~ (g) of this Rule.

1. ~~The petition for leave to resign while in good standing shall be filed, under oath, with the Executive Director of the State Bar and shall~~

~~contain a statement that there are no disciplinary actions or criminal proceedings pending against the petitioner and that petitioner is a member in good standing. A copy of the petition shall be served upon the General Counsel of the State Bar.~~

2. ~~No petition for leave to resign while in good standing shall be accepted if there are disciplinary proceedings or criminal charges pending against the member or if the member is not a member in good standing.~~

3. ~~A petition filed under this paragraph shall constitute a waiver of the confidentiality provisions of Rule 4-221(d) as to any pending disciplinary proceedings.~~

b. Resignation while delinquent or suspended for failure to pay dues or for failure to comply with continuing legal education requirements: A member of the State Bar who is delinquent or suspended (but not terminated) for failure to pay dues or failure to comply with continuing legal education requirements may under oath, petition the Executive Committee for leave to resign from the State Bar. Upon acceptance of such petition by the Executive Committee by majority vote, such person shall not practice law in this state nor be entitled to any privileges and benefits accorded to active members of the State Bar unless such person complies with part (f) or (g) of this Rule.

c. A petition for leave to resign from membership with the State Bar shall comply with the following:

1. the petition shall be filed under oath with the Executive Director of the State Bar and shall contain a statement that there are no disciplinary actions or criminal proceedings pending against the petitioner; and,

2. the petition shall contain a statement as to whether the petition is being filed under part (a) or part (b) of this Rule. If the petition is being filed under part (b), the petition shall state the term of the delinquency and/or suspension for failure to pay dues or to comply with continuing legal education requirements.

d. No petition for leave to resign shall be accepted if there are disciplinary proceedings or criminal charges pending against the member, or if the member is not in good standing for failure to pay child support obligations under Bar Rule 1-209.

e. A petition filed under this Rule shall constitute a waiver of the confidentiality provisions of Rule 4-221(d) as to any pending disciplinary proceedings.

~~b.~~ f. Readmission within five years after resignation: for a period of five years after the effective date of a voluntary resignation, the member of the State Bar who has resigned ~~while in good standing~~ pursuant to this Rule may apply for readmission to the State Bar upon completion of the following terms and conditions:

1. payment in full of any delinquent dues, late fees and penalties owing at the time the petition for leave to resign was accepted, and payment in full of the current dues for the year in which readmission is sought;

2. payment of a readmission fee to the State Bar equal to the amount the member seeking readmission would have paid during the period of resignation if he or she had instead elected inactive status; ~~and~~,

3. for resignations while suspended for failure to comply with continuing legal education requirements under part (b) of this Rule, submission of a certificate from the Commission on Continuing Lawyer Competency declaring that the suspended member is current on all requirements for continuing legal education; and,

4. ~~3.~~ submission to the membership section of the State Bar of a determination of fitness from the Board to Determine Fitness of Bar Applicants. Provided the former member seeking readmission has applied to the Board to Determine Fitness of Bar Applicants before the expiration of the five year period after his or her resignation, the former member shall be readmitted upon submitting a determination of fitness even if the five year period has expired. ~~This provision shall be applicable to all former members who applied to the Board to Determine Fitness of Bar Applicants on or after January 1, 2008.~~

~~(c)~~ g. Readmission after five years: after the expiration of five years from the effective date of a voluntary resignation, the former member must comply with the Rules governing admission to the practice of law in Georgia as adopted by the Supreme Court of Georgia.

If the proposed amendments to Rule 1-208 of the Rules of the State Bar of Georgia are adopted, the new Rule 1-208 would read as follows:

Rule 1-208. Resignation from Membership

a. Resignation while in good standing: A member of the State Bar in good standing may under oath, petition the Executive Committee for leave to resign from the State Bar. Upon acceptance of such petition

by the Executive Committee by majority vote, such person shall not practice law in this state nor be entitled to any privileges and benefits accorded to active members of the State Bar in good standing unless such person complies with part (f) or (g) of this Rule.

b. Resignation while delinquent or suspended for failure to pay dues or for failure to comply with continuing legal education requirements: A member of the State Bar who is delinquent or suspended (but not terminated) for failure to pay dues or failure to comply with continuing legal education requirements may under oath, petition the Executive Committee for leave to resign from the State Bar. Upon acceptance of such petition by the Executive Committee by majority vote, such person shall not practice law in this state nor be entitled to any privileges and benefits accorded to active members of the State Bar unless such person complies with part (f) or (g) of this Rule.

c. A petition for leave to resign from membership with the State Bar shall comply with the following:

1. the petition shall be filed under oath with the Executive Director of the State Bar and shall contain a statement that there are no disciplinary actions or criminal proceedings pending against the petitioner; and,

2. the petition shall contain a statement as to whether the petition is being filed under part (a) or part (b) of this Rule. If the petition is being filed under part (b), the petition shall state the term of the delinquency and/or suspension for failure to pay dues or to comply with continuing legal education requirements.

d. No petition for leave to resign shall be accepted if there are disciplinary proceedings or criminal charges pending against the member, or if the member is not in good standing for failure to pay child support obligations under Bar Rule 1-209.

e. A petition filed under this Rule shall constitute a waiver of the confidentiality provisions of Rule 4-221(d) as to any pending disciplinary proceedings.

f. Readmission within five years after resignation: for a period of five years after the effective date of a voluntary resignation, the member of the State Bar who has resigned pursuant to this Rule may apply for readmission to the State Bar upon completion of the following terms and conditions:

1. payment in full of any delinquent dues, late fees and penalties owing at the time the petition for leave to resign was accepted, and payment in full of the current dues for the year in which readmission is sought;

2. payment of a readmission fee to the State Bar equal to the amount the member seeking readmission would have paid during the period of resignation if he or she had instead elected inactive status;

3. for resignations while suspended for failure to comply with continuing legal education requirements under part (b) of this Rule, submission of a certificate from the Commission on Continuing Lawyer Competency declaring that the suspended member is current on all requirements for continuing legal education; and,

4. submission to the membership section of the State Bar of a determination of fitness from the Board to Determine Fitness of Bar Applicants. Provided the former member seeking readmission has applied to the Board to Determine Fitness of Bar Applicants before the expiration of the five year period after his or her resignation, the former member shall be readmitted upon submitting a determination of fitness even if the five year period has expired.

g. Readmission after five years: after the expiration of five years from the effective date of a voluntary resignation, the former member must comply with the Rules governing admission to the practice of law in Georgia as adopted by the Supreme Court of Georgia.

SO MOVED, this _____ day of _____, 2013.

Counsel for the State Bar of Georgia
Robert E. McCormack
Deputy General Counsel
State Bar No. 485375

OFFICE OF THE GENERAL COUNSEL
State Bar of Georgia
104 Marietta Street, NW, Suite 100
Atlanta, Georgia 30303
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State Bar of Georgia

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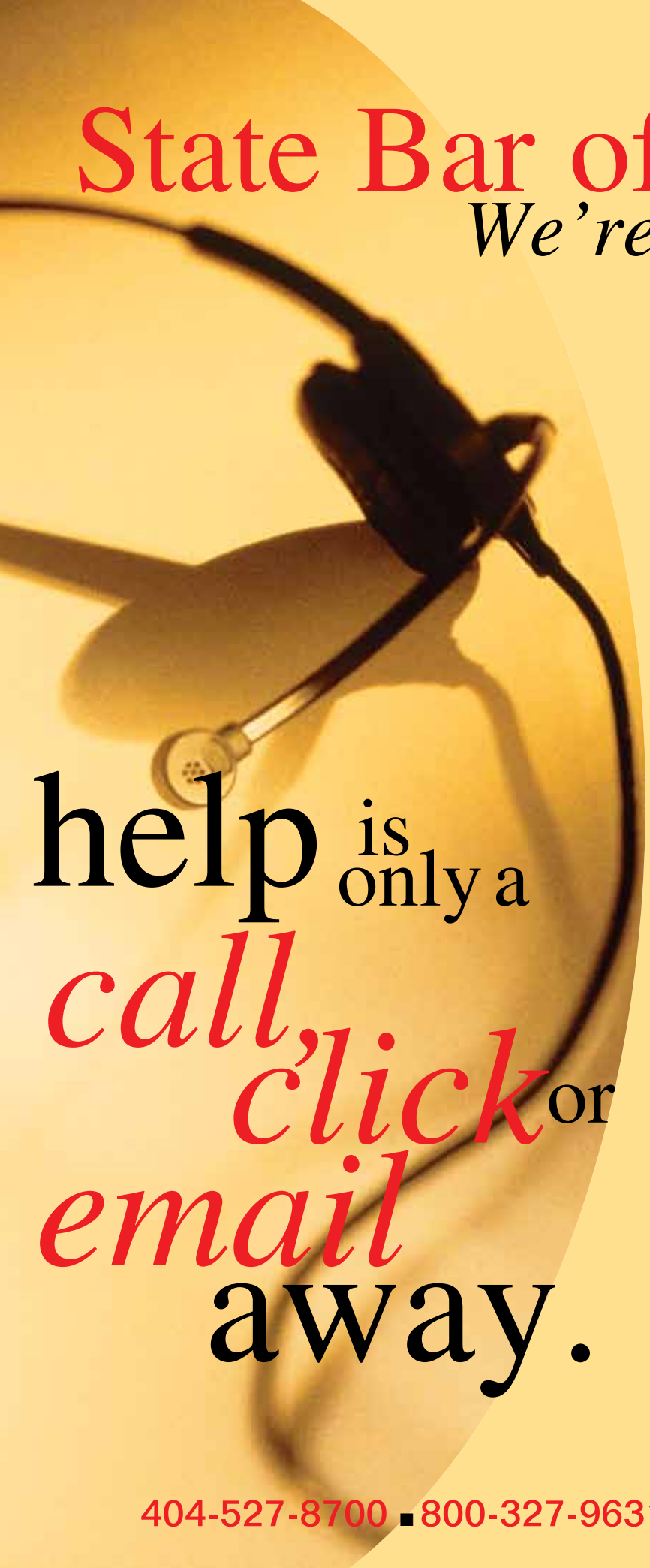

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Law Practice Management Program

The Law Practice Management Program is a member service to help all Georgia lawyers and their employees put together the pieces of the office management puzzle. Whether you need advice on new computers or copiers, personnel issues, compensation, workflow, file organization, tickler systems, library materials or software, we have the resources and training to assist you. Feel free to browse our online forms and article collections, check out a book or videotape from our library, or learn more about our on-site management consultations and training sessions, 404-527-8772.

Consumer Assistance Program

The purpose of the Consumer Assistance Program (CAP) is to serve the public and members of the Bar. Individuals contact CAP with questions or issues about legal situations, seeking information and referrals, complaints about attorneys and communication problems between clients and their attorneys. Most situation can be resolved informally by CAP's providing information and referrals to the public or, as a courtesy, contacting the attorney. CAP's actions foster better communications between clients and attorneys in a non-disciplinary and confidential manner, 404-527-8759.

Lawyer Assistance Program

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

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

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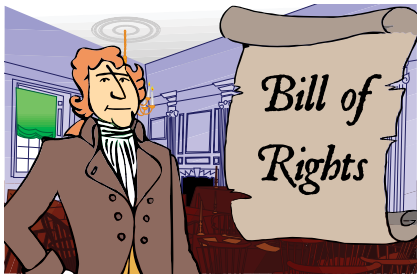
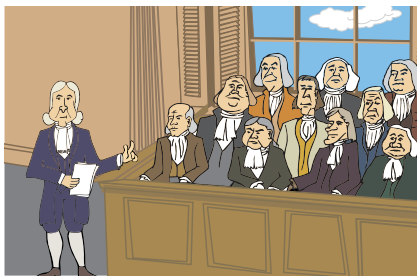
Trial By Jury: What's the Big Deal?



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

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

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

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

State Bar of Georgia

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