



# Georgia Bar Journal

February 2012 • Volume 17 • Number 5



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**Cover Photo:** State Bar President Kenneth L. Shigley pictured  
with lawyer-legislators in the Georgia General Assembly.

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by Kenneth L. Shigley

# Independent Courts as Economic Infrastructure

A third of a century trekking between Georgia courts, first in a single rural circuit and then more or less statewide, has made me a minor connoisseur of courthouses, the most

visible physical infrastructure of the judicial system. I have tried cases in a courthouse across the street from a railroad track where cross-examination was frequently interrupted by passing freight trains. In courthouses where birds flew through open windows and found perches near

the high courtroom ceiling and in courthouses that would have been a great movie set for “To Kill a Mockingbird.”

I have tried cases in courthouses that resembled a poorly designed 1950s motel; in a “law mall” resembling an enclosed shopping center and in an architectural gem that could be a post-modern capitol of a small state.

“Economic theory generally supports the idea that high-quality courts and judicial independence facilitate economic growth.”

The centrality of courts in American life is obvious when you drive down a two-lane blacktop into the typical county seat town. On a square near the intersection of main roads stands a Neoclassical/Greek Revival/Colonial/Victorian/Romanesque/Beaux-Arts/Classical structure built in the 19th or early 20th century. A few burned and were replaced by structures for which surely no architect would claim credit, but many old courthouses have been beautifully renovated. In a number of growing counties the historic courthouse on the square has become a museum, replaced by a larger and more efficient “justice center” several blocks away. However, the centrality of the courthouse is still marked by the historic placeholder.

Before the American Revolution, when power resided with distant officials in London, the functions of local bailiffs (who sometimes acted as judges then rather than security guards), magistrates and justices of the peace—often illiterate and lacking even rudimentary legal training—were carried out in the informal settings of homes, taverns, churches or meeting halls. In the older colonies to the north small brick county courthouses began to appear in the early 18th century. In the younger colony of Georgia, where both lawyers and rum were initially prohibited, a year after the 1733 founding of Savannah a one room “Tabernacle and Court House” was included in the town plan. By the time of the Revolution a brick courthouse was built at Wright Square, while our other 11 colonial parishes apparently had no more than a crude

log court building. In 1777, the first Georgia constitution created eight counties and provided for erection of a "court-house and jail" in each of them, symbolic of the transfer of political sovereignty from a distant king to the local people.<sup>1</sup>

Over the next several generations of rapid growth, settlers and surveyors spread westward, filling the land they took from the native inhabitants and dividing it into a multitude of counties. In Georgia, the idea was that every farmer with a horse and wagon should be able to get to the county seat and back in a day. New counties proliferated until we hit a maximum of 161 before the merger of Fulton, Campbell and Milton in 1931, after which the constitution was amended to limit us to a mere 159 counties.

Wherever a new county was formed, construction of a courthouse was one of the first public acts, along with the basic "hard infrastructure" improvements of mule-scraped dirt roads, wooden bridges, and eventually railroads, telephones, rural electrification and paved roads. Scattered across rural Georgia today are a few century-old courthouses that stand almost alone among the fields and pastures, monuments to the aspirations of the founders of a newly formed county that was bypassed by railroads and major highways.

In the years after Alexis de Tocqueville described lawyers as America's "natural aristocracy" that served as a conservative restraint on the excesses of temporary majorities,<sup>2</sup> the increased professionalization of law and architecture led to construction across the country of hundreds of courthouses, proud structural symbols of democracy, law, aspiration, free enterprise and prosperity.<sup>3</sup> Courthouses were the core of infrastructure around which were built train depots, cotton gins, factories, warehouses, schools, churches, libraries and eventually hospitals. Upon such foundations many Georgia communities were built.

Political discussions of public infrastructure usually focus on "hard infrastructure" required to support commerce and quality of modern life—highways, bridges, seaports, airports, rails, dams, reservoirs, water and sewer systems, the electric power grid, natural gas and petroleum pipelines, telecommunications, waste management systems and so forth.

However, "soft infrastructure" is just as important. The services of education, health care and financial systems are key components of the "soft infrastructure." For example, without a world-class system of education for all our youth, our nation cannot preserve its pre-eminent role in the global economy of the 21st century. It is imperative that our state and local communities place priority on making our public schools competitive with the best in Shanghai, Singapore and Helsinki, equipping our children and grandchildren with competencies in math, science and creativity to be able to excel in the "flat world" of a global economy knit together through technology.<sup>4</sup> Losing our edge in education, we are vulnerable to economic decline



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Investments in high quality, independent courts can promote a “virtuous cycle” where relatively modest expenditures on court improvements enhance economic growth.<sup>6</sup>

and all that implies. A young lawyer seeking a path for public service could do worse than to serve as a volunteer tutor, become active in PTA leadership or run for the local school board with a clear focus on making their local schools competitive with the best in the world.

A strong, independent judicial branch of government is also an essential component of “soft infrastructure.” Judicial independence is periodically attacked from both right and left, depending upon whose ox was most recently gored. Any of us may passionately disagree with and bitterly criticize particular court decisions. However, attacks on judicial independence often come from folks who place their own agendas ahead of the common good or who slept through civics class.

Economic theory generally supports the idea that high-quality courts and judicial independence facilitate economic growth. Our courts uphold both public order and the rights of citizens, enforce contracts and protect property, provide an orderly manner to obtain compensation for wrongs done, promote stability, and by doing so encourage the investment necessary for economic development.<sup>5</sup>

Investments in high-quality, independent courts can promote a “virtuous cycle” where relatively modest expenditures on court improvements enhance economic growth.<sup>6</sup> Judicial independence is economically important because it serves as a mechanism for the government to turn its simple promise of equal justice for all into a credible commitment. It increases predictability for businesses and individuals so they may have a broader planning horizon necessary for higher lev-

els of investment in machinery and human capital. This empowers higher degrees of specialization, which in turn promote economic growth. Independent judiciaries, therefore, are conducive to high-income levels and growth and facilitate higher tax revenues for the state.<sup>7</sup>

Some economists have suggested that countries with legal systems based on the common law have more highly developed financial markets than civil law countries because the common law provides more secure protection of property and contract rights, creditors and minority shareholders, all of which are keys to the cost of capital. The root of such a distinction may not be in substantive differences in legal rules, but because of differing assumptions about the roles of the individual and the state. The common law has been associated with fewer government restrictions on economic and other liberties. The bottom-up nature of the common law tradition, built upon human experiences in thousands of cases, as distinguished from a top-down approach in a predominantly autocratic or regulatory state, may be seen as a proxy for the intent to limit rather than strengthen the state, and to preserve rather than erode the rights of individuals. Some also suggest that the common law’s adversarial adjudication process tends to result in the survival of efficient and the demise of inefficient rules.<sup>8</sup>

In countries such as ours with systems based upon the common law tradition, judges are independent officials occupying a high-status office, whereas in systems outside the common law tradition judges are often civil servants of relatively low-status without independent authority. An indepen-

dent judiciary serves to fragment governmental power and thus restrain the power of the state to run roughshod over the personal, property and economic rights of individuals. That is a key distinction between the constitutional systems of the United States and other countries, such as the old Soviet Union, where constitutions may look great on paper but are not enforced to restrain the power of authoritarian political systems. It is only an independent judiciary that can assure that the powerful cannot crush the weak with impunity and that political winners do not annihilate anyone who unsuccessfully opposes them.

Judicial independence faces many challenges, but perhaps the greatest threat is the erosion of judicial pay to the extent that Chief Justice John Roberts has said approaches a “constitutional crisis.” If the courts are to maintain their position of respect, strength and independence, judgeships should be attractive to successful lawyers in the prime of life. No good lawyer should be forced to choose between accepting a judgeship and sending his or her children to college.

Chief Justice Roberts has pointed out that from 1969 to 2006, inflation-adjusted federal judicial pay declined 23.9 percent while the average U.S. worker’s wage, adjusted for inflation, rose 17.8 percent, for a net gap of 41.7 percent. This left judicial compensation below that of typical mid-level (and a few first-year) associates in many large law firms.<sup>9</sup> Moreover, in 1969, a federal district judge earned 21 percent more than deans at top law schools and 43 percent more than senior professors at those schools, but by 2006 earned about half as much as top professors at such law schools. The judi-



ciary, according to Chief Justice Roberts, will soon be restricted to "(1) persons so wealthy that they can afford to be indifferent to the level of judicial compensation, or (2) people for whom the judicial salary represents a pay increase."<sup>10</sup> The comparative numbers in this analysis have surely changed during the severe recession of the past few years but the core fact of erosion of judicial pay remains true. Much the same diminution of purchasing power of judicial power has occurred in Georgia's judicial system, though the wide variations among local supplements for superior court judges and the mix of full-time and part-time state court judges make a precise comparison quite complex.

While surprisingly few judges leave office before retirement explicitly because of the pay gap between judicial salaries and what they would expect to earn in private practice, the lagging compensation does affect both judicial morale and the talent pool from which judges are drawn. In the 1950s, two-thirds of federal judicial appointees came from the private sector. Today that is nearly reversed, with more than 60 percent coming from the public sector.<sup>11</sup>

Certainly there are many superb judges whose prior careers had been primarily in the public sector. In vetoing a judicial pay raise, a former governor said he was impressed by the "quality and character of those who offer themselves for public service in the state judiciary."<sup>12</sup> However, that did not take into account the trend, especially in metropolitan areas, to draw judges primarily from public sector jobs because judicial office requires too great a financial sacrifice for lawyers in their prime who have been successful in private practice. I have heard judges comment that public service is much more palatable when one has a very highly compensated spouse or a strong base of family wealth. One wag even suggested that the solution for lagging judicial sala-

## ON THE COVER: A Special Thank You to Georgia's Lawyer-Legislators

Georgia's lawyer-legislators earn our appreciation and respect every day they take from their law practices and other responsibilities to serve in the General Assembly. The more I see of the reality of legislative service, the more I recognize the sacrifices they make for public service. All of them deserve our thanks.

Over the years, the number of lawyers in the General Assembly has dwindled. Today we are at risk of having too few seasoned lawyers in the ranks of the legislature to skillfully parse the words of legislation so as to avoid the "law of unintended consequences." Too few to explain to their non-lawyer colleagues how the court system really works. Too few to keep in focus the importance of an adequately funded, independent third branch of government.

Georgia lawyers who find public service appealing should consider running for the legislature when a seat comes open in their district. While the satisfaction of service may be its own reward, experience in the legislature can be a great step in a lawyer's career. We have a long tradition of Georgia lawyers who serve in the legislature and go on to higher office in Congress or in the state executive and judicial branches. Two of our last three Governors, and four out of eight in the past half century, have been lawyers who started their public careers in the legislature. Others have found legislative experience invaluable in building successful careers in law practice or business.

Please take the time to reach out to your Senator and Representative to thank them for their service. And if a seat comes open in your district, urge one of your colleagues to consider legislative service.

– State Bar President Kenneth L. Shigley

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ries is to require that judicial aspirants “marry rich.”<sup>13</sup> In any event, life experience in the trenches of private law practice—taking entrepreneurial risks, representing paying clients and making payroll—is a different and valuable form of preparation for judging than a career spent primarily in the public sector.

A more subtle impact may be that, at least in the federal system in major metropolitan areas, lawyers who are willing to accept huge pay cuts from lucrative partnerships at major law firms in order to become judges may be ideologically motivated. There must be a strong motivation for an equity partner at a top law firm to take a staggering pay cut in order to become a judge.<sup>14</sup> Some contend that, at least for those for whom judicial office would involve the greatest lost opportunity cost due to disparity with fairly secure private practice income in a large firm, such motivation may be, at least in part, driven by the opportunity to indoctrinate. Judges ought not be “minor league politicians” seeking to make law rather than apply the law. While this does not appear to be a major problem in Georgia today, it is a potential concern to be addressed.<sup>15</sup>

Beyond the core issue of funding, there are many other issues that a 21st century judicial system must address regarding organization, structure, case flow management and court technology. Last spring I had a conversation with Hon. David Emerson in Douglas County, currently president-elect of the Council of Superior Court Judges, about electronic court filing. He commented that we ought to step back and ask what we want the court system to look like in 20 years. Following up on that suggestion when I became president of the State Bar, I appointed a Next Generation Courts Commission,<sup>16</sup> chaired by Hon. Lawton Stephens of Athens. It includes judges, clerks and administrators representative of every class of courts in the state, legislators and practicing lawyers. The commission is divided into five hard working subcommittees, each of which has a meaty agenda of issues to address: business process improvement, technology, education & outreach, program improvements & expansion and funding. I expect that they will help determine the path to improve the judicial infrastructure for Georgia’s future.

A judicial branch of government that is independent, adequate-

ly funded and compensated and equipped for efficiency is essential infrastructure for both the liberty of our citizens and the growth of our economy. Money allocated to support a strong and independent judicial branch is money well invested. As Alexander Hamilton put it, “[t]he independence of the judges once destroyed, the constitution is gone, it is a dead letter; it is a vapor which the breath of faction in a moment may dissipate.”<sup>17</sup> GBJ

**Kenneth L. Shigley** is the president of the State Bar of Georgia and can be reached at [ken@carllp.com](mailto:ken@carllp.com).

## Endnotes

1. Chatham County Courthouse, Georgia Info, <http://georgiainfo.galileo.usg.edu/courthouses/chathamCH.thm> (viewed Jan. 25, 2012).
2. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1963) (1835) (“[In America, lawyers] form the highest political class and the most cultivated portion of society.... If I were asked where I place the American aristocracy, I should reply without hesitation that ... it occupies the judicial bench and the bar.”).

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Visit [www.gabar.org](http://www.gabar.org) for an order form and more information or email [stephaniew@gabar.org](mailto:stephaniew@gabar.org).

3. Wilber W. Caldwell, *THE COURTHOUSE AND DEPOT IN GEORGIA, 1833-1910: THE ARCHITECTURE OF HOPE IN AN AGE OF DESPAIR* (Mercer 2001).
4. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, *THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK* (Farrar, Straus and Giroux 2011).
5. Daniel Klerman, *Legal Infrastructure, Judicial Independence, and Economic Development*, UNIVERSITY OF SOUTHERN CALIFORNIA LAW SCHOOL LAW AND ECONOMICS WORKING PAPER SERIES, PAPER No. 43 (2006).
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7. Lars Feld and Stefan Voigt, *Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators*, 19 EUROPEAN J. OF POL.ECON. 497 (2003).
8. Paul G. Mahoney, *The Common Law And Economic Growth: Hayek Might Be Right*, 30 J. LEGAL STUD. 503 (2001); Richard A. Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981).
9. See CHIEF JUSTICE JOHN G. ROBERTS, JR., 2006 Year-End Report on the Federal Judiciary 1, 1-2, [hereinafter Roberts, 2006 Year-End Report], available at <http://www.uscourts.gov/ttb/2007-01/2006/index.html> (noting that the real value of a federal district judge's salary has dropped 23.9% since 1969). Cf. RICHARD A. POSNER, *HOW JUDGES THINK*, at 171-72 (Harvard 2008) (arguing that cost-of-living increases will do more to retain top talent in the judiciary than intermittent large raises).
10. See ROBERTS, 2006 YEAR-END REPORT, supra note 8, at 1.
11. *Id.*, at 2 (warning that the decline in the percentage of judges drawn from private practice will change the nature of the federal judiciary). See also, Jonathan L. Entin, *Getting What You Pay For: Judicial Compensation And Judicial Independence*, 2011 UTAH L. REV. 25 (2011).
12. Gov. Sonny Perdue, *Statement on Veto of House Bill 119*, May 14, 2008, [http://gov.georgia.gov/00/press/detal/0,2668,78006749\\_78013037\\_113513787,00.html](http://gov.georgia.gov/00/press/detal/0,2668,78006749_78013037_113513787,00.html).
13. David Lat, *A Solution to the Federal Judicial Pay Crisis: Marry Into Money*, ABOVE THE LAW (August 22, 2007, 4:30 pm), <http://abovethelaw.com/2007/08/a-solution-to-the-federal-judicial-pay-crisis-marry-into-money/>.
14. See, e.g., Meredith Hobbs, *Equity partners reap benefits of firms' 2010 revenue growth*, FULTON COUNTY DAILY REPORT, APRIL 4, 2011, <http://www.dailyreportonline.com/Editorial/News/singleEdit.asp?l=100327816132>.
15. See Christopher Zorn et al., *Working Class Judges*, 88 B.U. L. REV. 829, 837 fig. 1 (2008) (showing that between 1983 and 2003 average profits per partner at the fifty highest-grossing American law firms more than tripled); Comment, *Want Less Ideology On The Federal Bench? Pay Judges More*, 158 U. PA. LAW REV. 859 (2010).
16. The State Bar of Georgia Next Generation Courts Commission includes: Kenneth L. Shigley, president, State Bar of Georgia; Sharon L. Bryant, chief operating officer, State Bar of Georgia; Tracy J. BeMent, court administrator, Tenth JAD; Bart W. Jackson, clerk, Jones County Superior Court; Sen. Curt Thompson, District 5, Tucker; Hon. Grant Brantley, Senior Judge, Superior Courts; Greg G. Allen, Clerk, Forsyth County Superior Court; Sen. Jason Carter, District 42, Decatur; Hon. Louisa Abbot, judge, Eastern Judicial Circuit; Margaret Washburn, Margaret Gettle Washburn, P.C.; Marla Moore, director, Administrative Office of the Courts; Patty Baker, clerk, Cherokee County Clerk of Court; Hon. Walter (Jim) Clarke, judge, Gwinnett County Probate Court; Hon. Lawton E. Stephens, chair, chief judge, Western Judicial Circuit; Hon. Ben Studdard, chief judge, Henry County State Court; Carolyn Sullivan, clerk, Houston County Superior Court; Dena M. Adams, clerk, White County Superior Court; Hon. Greg Poole, judge, Cobb County Juvenile Court; Hon. Harold Benefield, chief judge, Clayton County State Court; Julius A. Powell Jr., Lindley, Powell & Rumph, PA; Hon. Michael Cielinski, chief judge, City of Columbus Municipal Court; Peter Canfield, Dow Lohnes Attorneys at Law; Hon. Robert E. Turner, judge, Houston County Magistrate Court; Hon. Alec Glenn Dorsey, judge, Wilcox County Magistrate Court; Hon. John Ellington, judge, Court of Appeals of Georgia; Hon. Kathy Gosselin, judge, Northeastern Judicial Circuit; Kevin Weimer, Fellows LaBriola LLP; Linda Pierce, clerk, Muscogee County Superior Court; Melanie Wilson, clerk, DeKalb County Magistrate Court; Rhonda Payne, clerk, Douglas County Clerk of Court; Hon. Robert V. Rodatus, judge, Gwinnett County Juvenile Court; Hon. Ron Ginsberg, senior judge, Chatham County State Court; Sandy Lee, executive director, CSCJ; Rep. Stephanie Benfield, District 85, Atlanta; Hon. Brenda S. Weaver, chief judge, Appalachian Judicial Circuit; Carter Brown, clerk, Walker County Superior Court; Hon. Charles Auslander, judge, Clarke County State Court; Cindy Mason, clerk, Columbia County Superior Court; Daniel W. Massey, clerk, Chatham County Superior Court; Eric Joseph John, executive director, CJCJ; Hon. Robin Shearer, judge, Athens-Clarke County Juvenile Court; Hon. Sara Doyle, judge, Court of Appeals of Georgia; Hon. Susan Tate, judge, Clarke County Probate Court; Sen. Bill Hamrick, District 30, Carrollton; Daniel Hauck, Bryan Cave LLP; Hon. David Emerson, judge, Douglas Judicial Circuit; David Wall, clerk, Habersham County Superior Court; Hon. Diane Bessen, judge, Fulton County State Court; Rep. Edward Lindsey, District 54, Atlanta; Hon. Harold Melton, justice, Supreme Court of Georgia; Hon. J. Stephen Schuster, judge, Cobb Judicial Circuit; Jeffrey Ray Kuester, Taylor English Duma LLP; Hon. Lynwood D. Jordan Jr., judge, Forsyth County Probate Court; Hon. Nelly Withers, judge, DeKalb County Records Court; Prof. Sarah Shalf, Emory University School of Law; Sheila Studdard, clerk, Fayette County Clerk of Court; Hon. Steve Schuster, judge, Cobb Circuit Superior Court; Tee Barnes, clerk, Supreme Court of Georgia; William M. Ragland Jr., Womble Carlyle Innovators at Law
17. Alexander Hamilton, *THE EXAMINATION, COM. ADVERTISER* (New York), Feb. 26, 1802, as reprinted in XXV THE PAPERS OF ALEXANDER HAMILTON 525 (Harold C. Syrett ed., 1977).





by Stephanie Joy Kirijan

# Help Nourish Your Community

**A**s the community service arm of the State Bar, the Young Lawyers Division (YLD) is excited to be a partner in the inaugural Georgia Legal Food Frenzy, taking place April

23 – May 4, 2012. Georgia

Attorney General Sam Olens is leading the initiative. Both Bill Bolling, founder and CEO of the Atlanta Community Food Bank and chairman of the Georgia Food Bank

Association, and Danah Craft, executive director of the Georgia Food Bank Association, are supporting the initiative. The program allows Georgia's legal community to team up with food banks across Georgia to provide food and other critical resources for low-income Georgians who suffer from hunger.

**“The Legal Food Frenzy will provide food assistance to low-income Georgians at the most critical time of year.”**

The Georgia Food Bank Association is comprised of seven regional Feeding America food banks serving all 159 counties with the help of more than 2,500 agency partners. Its members share food, resources and best practices to maximize the fight against hunger throughout the state. Information about local food banks can be found at [georgiafoodbankassociation.org](http://georgiafoodbankassociation.org).

Georgia's food banks rely on volunteers to fulfill their mission. Currently, more than 1.6 million Georgians are in need of food assistance. A large number of those in need are children, senior citizens and working families. The high unemployment rate in this state continues to drive a record high demand for food assistance as those who have lost their jobs struggle to put food on the table. Last year,

Georgia's seven regional food banks distributed more than 77 million pounds of food through a network of partner agencies and pantries. But more work is needed; there is a 35 to 40 percent increase in demand for food each year.

Due to demand, the need for food donations is important throughout the year, but food donations traditionally slow in late spring and early summer as families focus on end-of-school activities and summer vacations. At the same time, food banks and partner agencies see an increased demand for food during this time because more than 702,000 children who depend on access to breakfast and lunch at school are home for the summer months. The

Legal Food Frenzy will provide food assistance to low-income Georgians at the most critical time of year.


The Legal Food Frenzy is modeled after a similar program in Virginia started by the Norfolk & Portsmouth Bar Association in 1991. Virginia held its first statewide event in 2007 and raised 600,000 pounds of food for the Federation of Virginia Food Banks. Over the next four years, the event raised a total of 5.4 million pounds of food through more than 180 participating firms across the state. Georgia has the potential to exceed these totals with nearly 250 law firms in major cities across the state. To reach our goal, the YLD encourages each and every law firm, legal department, law office, law school and court in Georgia to participate.

The Georgia Legal Food Frenzy is a partnership between the Office of the Attorney General, the State Bar of Georgia Young Lawyers Division,

under the leadership of event co-chairs Kristi Wilson and Deepa Subramanian, and the Georgia Food Bank Association. More than 30 young lawyers around the state are serving as city representatives to help make this event a success—and the YLD is still recruiting volunteers. This two week food and fund drive is a competition among all Georgia law firms and legal organizations. In this friendly competition, the law firm or legal organization that raises the most food will be awarded the Attorney General's Cup. Other awards will be given in small, medium and large size firm categories.

The contest begins April 23 and ends May 4. Firms can register for and find the rules of the competition online at [georgialegalfoodfrenzy.org](http://georgialegalfoodfrenzy.org). Awards are based on pounds collected per employee, so firms of all sizes are competitive. Food items will be weighed at the

food bank and the results tabulated in pounds with one point given for each pound of food donated. Each dollar contributed will count as four pounds of food or four points.

The YLD is honored to be a part of Georgia's inaugural Legal Food Frenzy. Olens has encouraged the legal community to rise to the challenge and help reduce hunger in Georgia. It is as simple as picking up extra items while food shopping. The most needed items are: peanut butter, canned tuna, beans, fruits, vegetables and soups, pastas, macaroni and cheese, low sugar cereals and 100 percent fruit juice. Please consider donating these items and becoming a part of the Legal Food Frenzy. 

**Stephanie Joy Kirijan** is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at [skirijan@southernco.com](mailto:skirijan@southernco.com).



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# The Sophisticated User Defense:

It's Not Just for Drug Companies Anymore

by Andrew M. Thompson

**T**he sophisticated user defense, also known as the learned intermediary doctrine, has been widely used by drug manufacturers in defending against failure to warn claims in products liability lawsuits.<sup>1</sup> Although less well known, Georgia courts have also applied the sophisticated user defense outside the pharmaceutical drug context. Recently, in *Parker v. Schmiede Machine & Tool Corp.*,<sup>2</sup> the U.S. Court of Appeals for the 11th Circuit relied on the sophisticated user defense in affirming a district court's grant of summary judgment to the defendants in a case in which employees at Lockheed Martin's Marietta, Ga., facility alleged that they developed illnesses as a result of exposure to beryllium.

This article will discuss the origins of the sophisticated user defense in Georgia cases outside the pharmaceutical drug context, the application of the defense by the federal district court and 11th Circuit in the *Parker* case and the use of the defense in future toxic tort cases. Based upon the decisions of the district court and the 11th Circuit in *Parker* and the well-recognized basis for the sophisticated user defense in Georgia law, it is expected that practitioners will increasingly use the sophisticated user defense in defending toxic tort



claims against manufacturers and suppliers of allegedly hazardous products.

## The Origins of the Sophisticated User Defense Under Georgia Law

In products liability and toxic tort lawsuits, plaintiffs frequently allege that the manufacturer of a product



failed to properly warn the end user of the product's risks or hazards. For a plaintiff to prevail on a claim for failure to warn under Georgia law, a plaintiff must show that the defendant had a duty to warn, that the defendant breached that duty and that the breach proximately caused the plaintiff's injury.<sup>3</sup> The "sophisticated user" or "learned intermediary" defense relieves a product supplier of the duty to warn an ultimate consumer or user of a known hazard if there is an intermediary with knowledge of the hazard. In the pharmaceutical drug context, the rationale for the defense is that a patient's treating physician is in a better position than the manufacturer to warn the patient of a drug's risks.<sup>4</sup> Similarly, in the toxic tort context, the rationale for the defense is that a sophisticated employer with a history of using a particular product or substance and specific knowledge of how the particular product or substance will be used in the employer's production process, is likewise in a better position than the product manufacturer to warn its employees of the product's dangers. If a learned intermediary has actual knowledge of the dangers of a product or substance, yet would have taken the same course of action even with the information the plaintiff contends the manufacturer should have provided, then courts typically conclude that the sophisticated user or learned intermediary defense applies and the plaintiff cannot recover.<sup>5</sup>

The defense appears to have been first recognized in Georgia outside the pharmaceutical drug context in *Eyster v. Borg-Warner Corporation*,<sup>6</sup> in which residents who were injured in a house fire brought a lawsuit against the manufacturer of an HVAC unit, alleging that the manufacturer failed to warn the installer/distributor of the HVAC unit of the risks associated with an aluminum-copper connection in the unit. In affirming the trial court's grant of a directed verdict in favor of the manufacturer because the danger of an aluminum-copper connection was com-



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mon knowledge to those engaged in the installation of HVAC units, the Court of Appeals of Georgia held that "[w]here the product is vended to a particular group or profession, the manufacturer is not required to warn against risks generally known to such group or profession."<sup>7</sup>

Twenty years ago, in *Stuckey v. Northern Propane Gas Company*,<sup>8</sup> the U.S. Court of Appeals for the 11th Circuit issued its first decision addressing the scope of Georgia's sophisticated user/learned intermediary defense outside the pharmaceutical drug context. In *Stuckey*, a plaintiff who was burned in a propane gas explosion at a house owned by his parents sued a supplier that had distributed propane to a company that then sold and delivered the propane to the house. The plaintiff alleged that the supplier failed to warn him about the tendency of the odorant added to propane gas to fade over time. In appealing the trial court's denial of its motion for directed verdict, the propane supplier argued that the seller's actual knowledge of odor fade satisfied the supplier's duty to warn. Although the 11th Circuit affirmed the trial court's denial of the supplier's directed verdict motion because the propane supplier was unable to establish that the seller of the propane had actual knowledge of odor fade, the court in *Stuckey* explained the scope of the learned intermediary defense under Georgia law.<sup>9</sup> Relying on comment n to the Restatement (Second) of Torts § 388 (1965), the 11th Circuit held that "a supplier's duty to warn a consumer does not turn on whether a warning was actually given to an intermediary, but on whether the intermediary's knowledge was sufficient to protect the ultimate consumer."<sup>10</sup> In other words, and as explained by subsequent courts, if a learned intermediary "has actual knowledge of the substance of the alleged warning and would have taken the same course of action even with the information the plaintiff contends should have been provided, courts typically conclude that the learned

intermediary doctrine applies or that the causal link has been broken and the plaintiff cannot recover."<sup>11</sup>

Since *Eyster* and *Stuckey*, federal courts in Georgia have granted summary judgment to manufacturers based on the sophisticated user defense and those decisions have been affirmed by the 11th Circuit. For example, in *Argo v. Perfection Products Company*,<sup>12</sup> the district court applied the sophisticated user defense in a lawsuit by the intermediary's employees who were injured in an explosion relating to an industrial heater. In granting summary judgment to the heater manufacturer and a component-part manufacturer, the court found that the plaintiffs' employer was a sophisticated industrial user that knew or should have known how to operate and maintain the product it purchased and, "[u]nder Georgia law, when a product is sold to a particular group or profession, a manufacturer has no duty to warn against the risks generally known to that group or profession."<sup>13</sup>

In addition, although the sophisticated user defense is usually based upon an intermediary's actual knowledge, the defense can also be applied to protect a supplier or manufacturer from liability for failure to warn if the intermediary is charged by law with knowledge of the hazards of a particular substance or product. For example, in *Stiltjes v. Ridco Exterminating Company*,<sup>14</sup> the resident of an apartment complex sued the manufacturer of a pesticide that had been supplied to a licensed pest control operator for application at the plaintiff's apartment complex. The Court of Appeals of Georgia held that the pesticide manufacturer had no duty to warn the plaintiff because the manufacturer was entitled to rely on the laws charging licensed commercial applicators with knowledge of pesticide toxicity and safe methods of application.<sup>15</sup> Thus, in Georgia, if an intermediary is charged by law with knowledge that a supplier would otherwise have a duty to communicate to the eventual consumer or user, then the

supplier need not communicate the warning to the consumer or user, can rely on the learned intermediary and any failure to warn claim against the supplier is barred by the sophisticated user defense.<sup>16</sup>

## The Lengthy Saga of the *Parker* and *Berube* Beryllium Cases

In 2004, a number of current and former employees of Lockheed Martin's Marietta, Ga., facility filed a putative class action against eight defendants alleging that the plaintiffs and members of the putative class had developed beryllium sensitization and/or "sub-clinical, cellular and sub-cellular damage" from exposure to beryllium-containing products utilized at the Lockheed facility for more than 40 years.<sup>17</sup> In two orders issued in March 2005 and March 2006, the federal district court dismissed the plaintiffs' claims for alleged sub-clinical, cellular and sub-cellular damage, dismissed plaintiffs' claims for emotional distress and for medical monitoring costs, and concluded that the plaintiffs' claims for beryllium sensitization did not constitute an actionable injury under Georgia law.<sup>18</sup> The plaintiffs appealed the district court's rulings to the U.S. Court of Appeals for the 11th Circuit and in an April 2007 opinion, the 11th Circuit affirmed the district court's dismissal of the plaintiffs' claims for "sub-clinical, cellular and sub-cellular damage" and for emotional distress and medical monitoring costs, but reversed the district court's grant of summary judgment on the claims of the plaintiffs who alleged beryllium sensitization.<sup>19</sup> Based on the 11th Circuit's 2007 opinion, the plaintiffs' class allegations were defeated and the *Parker* case was limited to four plaintiffs alleging beryllium sensitization and/or chronic beryllium disease. In 2008, the *Parker* case was consolidated for discovery purposes with *Timothy Berube v. Brush Wellman, Inc.*, a very similar case involving eight additional plaintiffs alleging beryllium sensitization and/or chronic

beryllium disease from exposure to beryllium-containing products at Lockheed's Marietta facility.

After the close of over a year-and-a-half of extensive discovery in the *Parker* and *Berube* cases, the claims of the 12 remaining plaintiffs were limited to failure to warn claims against four remaining defendants<sup>20</sup> who were alleged to have supplied beryllium-containing products used at the Lockheed Martin facility. In September 2010, the district court granted summary judgment to the four remaining defendants based upon (1) the record evidence that the plaintiffs' employer Lockheed Martin was a sophisticated user of copper-beryllium and aluminum-beryllium alloys and thus the plaintiffs' failure to warn claims were barred under Georgia law; and (2) exclusion of the plaintiffs' causation expert because the expert's opinions were scientifically unreliable under the prevailing standard for admissibility of expert testimony

and without expert causation testimony, the plaintiffs' claims failed as a matter of law.<sup>21</sup>


## The 11th Circuit's October 2011 Decision

In an Oct. 21, 2011, opinion, the 11th Circuit affirmed the grant of summary judgment to the defendants, discussed its prior decision in *Stuckey* and the Georgia law applying the sophisticated user and learned intermediary defense and explained that "the 'sophisticated user' or 'learned intermediary' doctrine relieves a product manufacturer or supplier of this duty to warn the ultimate user where there is an intermediary with knowledge of the hazard."<sup>22</sup> The 11th Circuit declined to decide the specific standard to apply in evaluating the record evidence on sophisticated user, but rather assumed *arguendo* that the following standard proposed by the plaintiffs was a correct statement of the law:

if the plaintiffs here adduce evidence from which the jury could conclude that (1) the defendants possessed information, which Lockheed did not possess, regarding a particular danger associated with beryllium, and (2) the defendants failed to warn Lockheed of that danger, then summary judgment based on the sophisticated user or learned intermediary doctrine would be inappropriate.<sup>23</sup>

The 11th Circuit concluded that the plaintiffs "fail to adduce any evidence to satisfy this standard" and that "the defendants have established that Lockheed is a sophisticated user of beryllium and a learned intermediary between its employees and the manufacturers of beryllium products."<sup>24</sup> Specifically, the court explained that the Lockheed facility had produced aircraft containing beryllium parts for almost 60 years, had utilized a 1966 Department of Defense

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publication as a standard reference guide regarding the dangers inherent in the use of beryllium, had issued its own "Safety & Industrial Hygiene Standard" in 1983 that addressed actions that could lead to the generation of beryllium dust, and employed a team of industrial hygienists and toxicologists who had studied beryllium and its health effects and developed Lockheed's own internal warnings regarding the hazards of beryllium.<sup>25</sup>

In addition, the 11th Circuit expressly declined the plaintiffs' invitation to rely on the decision in *Genereux v. American Beryllia Corp.*,<sup>26</sup> in which the 1st Circuit relied on Massachusetts law in concluding that a court considering a sophisticated user defense "must analyze 'the particular dangers to be guarded against'" and engage in a detailed fact-specific analysis of whether the intermediary had sufficient knowledge of each and every particular danger of the allegedly hazardous substance.<sup>27</sup> In contrast, Georgia law regarding the sophisticated user defense requires that an intermediary possess only *general* knowledge of the dangers associated with a product's use.<sup>28</sup>

In another important aspect of its decision, the 11th Circuit concluded that a plaintiff cannot avoid application of the sophisticated user defense simply by showing that the intermediary failed to take measures to protect adequately against a certain hazard; rather, plaintiffs must show that the intermediary lacked actual knowledge of the hazard.<sup>29</sup> Thus, the inquiry is focused on the intermediary's knowledge; *not* on the adequacy of the intermediary's implementation of its knowledge or the intermediary's failure to act on its knowledge.

## The Future of the Sophisticated User Defense in Toxic Tort Cases

The decisions by the district court and 11th Circuit in *Parker* demonstrate the continuing viability of

the sophisticated user defense in toxic tort cases in Georgia in which plaintiffs allege that the supplier or manufacturer of a product failed to sufficiently warn the end user of the hazards of the product. Although the applicability of the defense is frequently very fact- and case-specific, Georgia courts have made it clear that it is an issue that is appropriately resolved at the summary judgment stage based upon the record evidence.<sup>30</sup> In addition, by (1) reaffirming the principle that an intermediary need possess only *general* knowledge of the hazards associated with a product, and (2) making it clear that the relevant inquiry is focused on the intermediary's actual knowledge and not on the adequacy of the supplier's warnings or on the intermediary's failure to act on its knowledge, the decisions by the 11th Circuit and the district court in *Parker* foreclose two relatively common means by which plaintiffs may seek to create disputed factual issues and avoid applicability of the sophisticated user defense.


Although not expressly addressed by the courts in the *Parker* decisions, the case also demonstrates how the timing of when an intermediary obtained its knowledge can impact the application of the sophisticated user defense in a case involving a lengthy alleged exposure period. In *Parker*, the plaintiffs alleged that they were exposed to beryllium for more than a 40-year period and the state of the art of knowledge of beryllium and its health risks had evolved over that time, but the record evidence was clear that Lockheed was always at the forefront of possessing knowledge regarding beryllium and its health risks. Nevertheless, it is not difficult to imagine a scenario in which a plaintiff could attempt to create a fact issue in regard to the sophisticated user defense by arguing that a particular intermediary was not a sophisticated user of a hazardous product during the early portion of the plaintiff's alleged period of exposure to the product and thus the intermediary's subsequent sophistication should not bar

the plaintiff's failure to warn claim against the suppliers of the product. In such a scenario, it will be important for courts to compare the respective knowledge of the industry and the intermediary at comparable time periods and not fall into an "apples to oranges" comparison of the current state of the art regarding a product's hazards to what was known about the product during earlier time periods.

Parties seeking to avoid application of the sophisticated user defense may also attempt to limit the impact of the *Parker* decision by arguing that the learned intermediary at issue in the case was Lockheed Martin, one of the world's largest defense contractors who employed a team of toxicologists, industrial hygienists and PhDs. However, the Georgia sophisticated user cases relied on by the 11th Circuit and the district court in the *Parker* decisions involved significantly smaller intermediaries with substantially less obvious sophistication, including the installer/distributor of an HVAC unit in *Eyster* and the installer of residential kitchen tiles in *Whirlpool*. Thus, the sophisticated user defense is by no means limited to cases involving large intermediaries.

## Conclusion

In light of the fact that employees allegedly exposed to toxic substances or hazardous products in the workplace are barred by the Georgia's Workers' Compensation Act from recovering damages from their employers, it is commonplace for such employees to name manufacturers, suppliers and distributors of allegedly hazardous products as defendants in toxic tort and products liability lawsuits. However, as demonstrated by the 11th Circuit's decision in *Parker* and the Georgia cases cited therein, summary judgment is available to manufacturers and suppliers based upon the sophisticated user defense when the plaintiffs' employer possessed general knowledge of the hazards associated with the substance or product at issue and thus any alleged failure

to warn by the manufacturer/supplier would not constitute the proximate cause of the plaintiff's injury. It is reasonable to expect that the use of the sophisticated user defense will increase as society becomes more regulated, which imputes knowledge to the regulated community and creates more "learned intermediaries," and information regarding hazardous substances and products becomes more readily available leading to more sophisticated users of hazardous products. 



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also serves as an adjunct professor at Emory University School of Law teaching a class in water law and environmental litigation. A large part of his practice involves environmental and toxic tort litigation, and he represented one of the defendants in the *Parker* and *Berube* cases. He may be contacted at athompson@sgrlaw.com. Thompson would like to thank Steve O'Day of Smith, Gambrell & Russell for his contributions to this article.

## Endnotes

1. See *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 816 n.2 (11th Cir. 2010) (affirming summary judgment in products liability case against pharmaceutical company based on "Georgia's long-recognized, unwavering use of the learned intermediary doctrine").
2. The 11th Circuit's decision was issued in two cases consolidated on appeal – *Neal Parker, et al. v. Schmiede Machine & Tool Corp., et al.*, and *Timothy Berube, et al. v. Schmiede Machine & Tool Corp., et al.*, Nos. 10-14703 & 10-14741, 2011 WL 5025135 (11th Cir. October 21, 2011).
3. *Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351, 1362 (N.D.Ga. 1999).

4. *McCombs v. Synthes*, 277 Ga. 252, 587 S.E.2d 594 (2003).
5. *Wheat*, at 1363.
6. 131 Ga. App. 702, 206 S.E.2d 668 (1974).
7. *Id.* at 670 (citing a New York case and two treatises on products liability and tort law).
8. 874 F.2d 1563 (11th Cir. 1989).
9. *Id.* at 1568-1569.
10. *Id.* at 1568 (emphasis added).
11. *Wheat v. Sofamor, S.N.C.*, 46 F. Supp. 2d 1351, 1363 (N.D. Ga. 1999) (emphasis added).
12. 730 F. Supp. 1109 (N.D. Ga. 1989), *aff'd*, 935 F.2d 1295 (11th Cir. 1991).
13. *Id.* at 1118-1119 (emphasis added) (citing *Eyster*); see also *Powell Duffryn Terminals, Inc. v. Calgon Carbon Corp.*, 4 F. Supp. 2d 1198, 1203 (S.D. Ga. 1998) ("There is . . . no duty to warn when the person using the product 'should know of the danger, or should in using the product discover the danger' . . . . 'Ordinarily, there is no duty to give warning to the members of a profession against generally known risks.'" (citations omitted), *aff'd*, 176 F.3d 494 (11th Cir. 1999).
14. 178 Ga. App. 438, 343 S.E.2d 715 (1986), *aff'd*, 256 Ga. 255, 347 S.E.2d 568 (1986).
15. 343 S.E.2d at 719.
16. *Stuckey v. Northern Propane Gas Co.*, 874 F.2d 1563, 1569 (11th Cir. 1989) (citing *Stiltjes*, 343 S.E.2d at 719).
17. Beryllium is a light metal with extreme hardness and a high melting point that makes it very desirable for use in a number of industries, particularly the aerospace industry and in the production of nuclear energy and weapons. In certain individuals, exposure to beryllium can result in beryllium sensitization, which is similar to an allergy and can be a precursor to the development of chronic beryllium disease, a respiratory illness.
18. See *Parker v. Brush Wellman, Inc., et al.*, 377 F. Supp. 2d 1290, 1296-97 (N.D. Ga. 2005); and *Parker v. Brush Wellman, Inc., et al.*, 420 F. Supp. 2d 1355, 1361-62 (N.D. Ga. 2006).
19. See *Parker v. Brush Wellman, Inc., et al.*, 230 Fed. Appx. 878 (11th Cir. 2007) (concluding that an issue of fact existed regarding whether beryllium sensitization constituted a current physical impairment).
20. Out of the eight original defendants, three were voluntarily

dismissed by the plaintiffs and Brush Wellman entered into a confidential settlement. Lockheed Martin was one of the original defendants, but once the plaintiffs' class claims were defeated and the only plaintiffs were employees of Lockheed Martin, the plaintiffs voluntarily dismissed Lockheed Martin because their claims against Lockheed were barred under the Georgia Workers' Compensation Act, O.C.G.A. § 34-9-11.

21. *Parker, et al. v. Brush Wellman, Inc., et al.*, 2010 WL 3730924 (N.D. Ga. Sept. 17, 2010).
22. *Parker, et al. v. Schmiede Machine & Tool Corp., et al.*, 2011 WL 5025135 at \*2 (11th Cir. October 21, 2011) (citing *Dozier v. Crane & Mach., Inc. v. Gibson*, 644 S.E.2d 333, 335-36 (Ga. Ct. App. 2007)).
23. *Id.* at \*3.
24. *Id.*
25. *Id.*
26. 577 F.3d 350 (1st Cir. 2009).
27. *Parker, et al. v. Schmiede Machine & Tool Corp., et al.*, 2011 WL 5025135 n.11 (11th Cir. October 21, 2011); *Genereux*, 577 F.3d at 366.
28. See *Powell Duffryn Terminals, Inc. v. Calgon Carbon Corp.*, 4 F. Supp. 2d 1198, 1203-04 (S.D. Ga. 1998) (holding that, if a user knows or should know of a general danger, then it is incumbent upon that user to investigate more particular dangers); *Whirlpool Corp. v. Hurlbut*, 166 Ga. App. 95, 101, 303 S.E.2d 284, 288 (1983) ("It is not important whether he knew the *precise*, physical nature of the hazard presented by his 'use' of the product; it is sufficient if he is aware *generally* that the 'use' being made of the product is dangerous.") (emphasis added).
29. *Parker*, 2011 WL 5025135 at \*5 n.8 ("Even if the Plaintiffs could prove that Lockheed did not employ the proper [beryllium] control devices, that proof would not be enough to rebut the evidence that Lockheed had actual knowledge of the need for such controls.").
30. See *Parker*, 2011 WL 5025135 at \*5; *Powell Duffryn Terminals*, 4 F. Supp. 2d at 1203-1204; *Argo v. Perfection Products Co.*, 730 F. Supp. 1109, 1118-1119 (N.D. Ga. 1989); *Stiltjes v. Ridco Exterminating Co.*, 178 Ga. App. 438, 442, 343 S.E.2d 715, 719-20 (1986), *aff'd*, 256 Ga. 255, 347 S.E.2d 568 (1986).

# The Confirmation Resale Conundrum

by Justin Lischak Earley and James B. Jordan

**T**he hangover from the Great Recession continues to drag more and more Georgia properties into foreclosure. As it does so, it has also worn away the veneer covering numerous rifts in the law that have long been buried just beneath the surface—some of them in existence since the Great Depression of the 1930s. One of those rifts, deriving from the so-called “confirmation statute” of 1935,<sup>1</sup> has become of increasing importance to legal practitioners and real estate investors (both commercial and residential alike) as the markets seek to clear away their distressed inventories. It involves the most basic question of all property transactions: Is title marketable? Unfortunately, when it comes to foreclosures, the answer (unlike the question) is not so simple.

This article challenges the existing assumptions about what it means to have marketable title to a foreclosed property in Georgia. Although we propose that the problem is more pervasive than most have heretofore



recognized, we also propose that the problem has solutions. The basic premise of this article is that the law should encourage the acquisition of distressed property so as to normalize the real estate markets and promote the transition of distressed properties back into healthy, productive properties.



## The (Title) Standard Answer

In 1935, with the nation mired in the midst of the Great Depression, the general assembly passed what is now codified at O.C.G.A. § 44-14-161. The statute provides, in relevant part:

When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.<sup>2</sup>

In determining whether to confirm a sale and permit a deficiency judgment action against the debtor, "[t]he court . . . shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale,"<sup>3</sup> and further, "the court shall also pass upon the legality of the notice, advertisement and regularity of the sale."<sup>4</sup>

The statute provides the judge faced with a confirmation action three possible choices: he/she may (1) confirm the foreclosure and permit the lender to pursue a deficiency judgment; (2) deny the confirmation and thereby preclude a deficiency judgment; or (3) "order a resale of the property for good cause shown."<sup>5</sup> It is this last choice—the ability to order the property to be reforeclosed—that creates the issue that this piece explores.

Because the pronounced economic downturn that began in 2007 has clobbered property val-

ues, it stands to reason that most recent foreclosures in Georgia have involved properties that are not worth the amount of the debt that encumbers them; that is, they are "underwater" and therefore possible candidates for a deficiency judgment to the extent that the debt encumbering the property is recourse (whether with regard to the borrower or to a guarantor, and whether fully, partially or contingently).<sup>6</sup> Therefore, in the ordinary Georgia foreclosure (whether commercial or residential), there exists the possibility that the lender may file a confirmation action, and upon doing so, the court could "for good cause shown" order the property to be reforeclosed upon.

Thus, whoever is holding title to the property while reforeclosure remains a possibility is holding title that is unmarketable, because there is no way to know that such person will not be divested of such title by a superior court's reforeclosure order if the lender seeks confirmation. Georgia title practitioners have long recognized this possibility. Accordingly, as stated in Georgia Title Standard 17.3, "if a confirmation is pending or subject to appeal, title is considered to be unmarketable."<sup>7</sup>

The purpose of the title standards is to serve as a set of guideposts for assisting the title examiner in exercising legal judgment.<sup>8</sup> Insofar as a marketable title is not a perfect title, the examination and certification of titles is very much a risk-weighting art,<sup>9</sup> and it is not fair to expect the title standards to be perfect, any more than it is fair to expect a title to be perfect. Yet the title standard's choice to limit the unmarketability of title in this realm only to situations where a confirmation action *is pending or on appeal* seems quite underinclusive, both in light of logic and caselaw.

Logically, it does not make sense to limit the marketability problem only to situations where there is an ongoing confirmation action or appeal. As long as the 30-day peri-

od in which the foreclosing lender may file for confirmation has not passed, there is no reason that the lender cannot file for confirmation, and thereby change the hypothetical into the real. Further, because the caselaw indicates that "good cause shown" for ordering a resale is almost entirely at the discretion of the superior court,<sup>10</sup> from the perspective of the attorney certifying title there is no way of rationally weighing this risk, and the possibility of a confirmation resale therefore seems to merit an exception to marketability as long as the 30-day statutory period for filing a confirmation action has not passed.

It is not clear why the authors of the title standards chose to draw the line where they did.<sup>11</sup> Yet the most likely reason is a practical one: If the title standard declared title to be unmarketable during any such time that a confirmation action was even *possible* (and not just pending or on appeal), then the title standards would be holding that no title acquired by foreclosure at the courthouse steps would be marketable, because such a buyer would be assuming the risk of divestiture should there be a later confirmation action in which the judge orders reforeclosure. Adopting such a policy statement would depress property prices even further, as buyers on the courthouse steps would have to price the reforeclosure risk into their bids.

From the perspective of the third-party buyer on the courthouse steps, this risk is presumably catastrophic. Such a person would pay cash (or cash equivalent) to the lender,<sup>12</sup> only to have the entire value of his or her investment (the property) stripped away by a court. In addition to being catastrophic, the risk would be nearly impossible to underwrite. How could any buyer at a public auction ever realistically determine whether the foreclosing lender will thereafter file for confirmation against the foreclosed borrower when both lender and borrower are likely total strangers to the buyer? Further, even if such

a person could weigh the risk of a filing, how is it possible to determine ahead of time whether a (to be determined) judge would thereafter order resale? The discount that third-party buyers at foreclosure auctions would demand for assuming such risks would be very steep indeed, and would risk driving down prices even further in a negative feedback loop.

In addition to being what seems like the underpinning of the title standard's choice to limit unmarketability to situations where a confirmation action is currently pending or subject to appeal, this unacceptable policy result has led many to conclude that a court *lacks the authority* to order a resale where a third party (other than the foreclosing lender) has taken title to the property at the foreclosure auction.<sup>13</sup> The basis of this theory seems to be a sort of mootness argument; the notion being that the court cannot grant effective relief because the lender (and not the property) is what is before the court in a confirmation action, and because the lender no longer has title to the property, there is no way to conduct a reforeclosure.

There are theoretical problems with this mootness argument,<sup>14</sup> but they are not worth exploring fully here because there is an even bigger problem with the mootness notion: it is not supported by the caselaw. In *Davie v. Sheffield*, the Court of Appeals of Georgia stated in language worth setting forth in full:

It might be argued that a third person may become the purchaser of the property where it is knocked off to the high bidder at public auction, and that the 1935 statute seems to concern only the creditor and the debtor (the maker and holder of the deed to secure debt), and does not contemplate a re-sale where such third person has become the purchaser. We can only say in reply that the purchaser at public outcry, whether a party to the debt, or a third

person, bids at the sale with full knowledge of the enactment of [O.C.G.A. § 44-14-161(c)], which clearly contains the language that "The court may, for good cause shown, order a resale of the property." And he is bound by this language in the statute.<sup>15</sup>

The language cited above from *Davie* is undoubtedly dicta, but it is dicta that is squarely on point. It is also dicta that fits within accepted legal understandings about notice. It is hornbook common law that ignorance of the law is no excuse for escaping its legal effect,<sup>16</sup> and it is black letter property law that all persons are deemed to have notice of matters that are on the public records.<sup>17</sup> Therefore, notwithstanding nearly 80 years of sweeping the problem under the legal rug, the law as written provides that a reforeclosure—with the attendant divestiture of title from an innocent third-party purchaser—is possible whenever a confirmation action is possible, and no policy parade of horrors can alter that language—only the general assembly can. Accordingly, absent an amendment to the statute by the lawmaking body, it is long past time that Georgia real estate law faced up to this question and decided what to do about it.

## The Guiding Principle: Avoid Forfeiture

In considering how courts, lenders, borrowers, guarantors and title insurers should approach the problem, it is worth bearing in mind that courts should seek to do equity, and what equity abhors is not necessarily a divestiture, but rather a *forfeiture*.<sup>18</sup> With that in mind, what happens when a court orders a reforeclosure after property has come into the hands of a third party? The simplest solution, of course, is that the court should simply order the lender to return the sales proceeds to the third-party purchaser. There is some statutory analogy for this approach in that

the law permits a foreclosing lender to "undo" its foreclosure within 30 days of the auction in certain enumerated circumstances, as long as the lender returns the purchase price to the auction winner, with interest.<sup>19</sup> With appropriate interest representing the lost time value of the third-party purchaser's money and non-economic costs (time, energy, etc.), there is no forfeiture of the purchaser's investment.

Unfortunately, in this age of financialism, the fact patterns are rarely so simple. What happens when (as is common with large-scale commercial foreclosures) the "lender" is a single-asset shell entity that immediately funnels the foreclosure sale proceeds up through an entity chain where numerous parties (including perhaps government entities such as the FDIC) may have interests, rendering the funds difficult (or perhaps impossible) to recoup or trace? Further, it seems that there is now a small cottage industry of confirmation-claim buyers who acquire loan documents at a discount from lenders and then pursue confirmation and deficiency claims against debtors and guarantors. In such cases, both the property *and* the loan documents can end up in the hands of third parties who had no part in the original transaction giving rise to the debt! In light of such fact patterns, how can anyone justifiably take title to property at a foreclosure auction?

There are at least two analogical hooks in the law that should protect third party buyers from this catastrophic forfeiture risk. First is the ancient principle of subrogation. The idea that a third-party buyer can be subrogated to the rights of the foreclosing lender dates back at least 100 years, before the security deed and the nonjudicial power of sale became enshrined as the universal method of real estate lending in Georgia, and the idea in fact remains a part of the Georgia code. According to O.C.G.A. § 44-14-189, "A purchaser at a void or irregular judicial sale under the mortgage shall succeed to all of the inter-



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ests of the mortgagee." This statute simply codifies the application of the equitable subrogation doctrine from the late 19th century.<sup>20</sup>

It is worth pointing out, of course, that the statute expressly deals with *judicial* sales under *mortgages*, while the universal modern practice is that foreclosure is conducted *nonjudicially* under a *security deed*. On the one hand, the distinction between the security instrument (mortgage vs. deed to secure debt) does not make a difference. Even the musty old authorities recognize that the principle (and thus the statute) should apply equally to security deeds and to mortgages.<sup>21</sup> But with respect to the form of foreclosure (judicial vs. nonjudicial), the distinction does matter. The subrogation statute was written before the confirmation statute was written, and therefore does not deal with the added wrinkle of who (if anyone) is entitled to the deficiency judgment if confirmation is granted. If the third-party buyer was subrogated to *all* the rights of the lender in the event of a reforeclosure, then the third-party purchaser is not only entitled to conduct the reforeclosure, but is also entitled to the deficiency judgment if confirmation is granted. This is an unfair windfall to the third-party purchaser and would essentially mean that every foreclosure auction in which the court subsequently orders a resale was actually a public sale of the loan documents, not simply the collateral property.

The equitable solution to this should be that the third-party purchaser is *partially* subrogated to the rights of the foreclosing lender, up to the amount of money that the third-party purchaser paid for the property. The result is that, if the court orders a reforeclosure at confirmation, the third party who acquired the property should be the one entitled to conduct and hold the reforeclosure auction. Such third-party purchaser should be entitled to "credit bid" the amount that it has previously paid for the property, along with

all of its costs and expenses in conducting the reforeclosure. If no one outbids the original third-party purchaser at the reforeclosure auction, then there is no forfeiture as regards the original third-party purchaser, because it still acquires the property, this time as the "de facto lender." In the unlikely event that another third party chooses to outbid the original third party at the reforeclosure auction, there is no forfeiture as regards the original third party because it is entitled to collect the proceeds from the auction up to its original price together with its costs of conducting the reforeclosure, with the excess going to the original lender (which accordingly reduces the borrower's potential deficiency judgment).

Although subrogation is a fine tool for protecting third-party purchasers against the forfeiture risk of acquiring foreclosed property, it is not perfect. First, the costs of conducting the reforeclosure become "baked in" to the remedy and cannot be recovered unless someone outbids the original third-party purchaser at the reforeclosure auction.<sup>22</sup> Further, the reforeclosure remedy does not protect a third-party purchaser against the risk that the borrower goes into bankruptcy (whether voluntarily or involuntarily) after the original foreclosure, but before the reforeclosure. In such an instance, it could be a significant period of time before the third-party purchaser can obtain relief from the automatic stay. Indeed, it is possible that in some circumstances the bankruptcy court will approve a plan of reorganization that reinstates the debt,<sup>23</sup> thereby trapping the third-party purchaser in its position as "de facto lender" and tying up the third-party purchaser's investment for what could be a significant period of time.

Bankruptcy/insolvency law contains its own method of protecting third-party purchasers, however, which is the second analogical hook to which third-party purchasers of foreclosed property can look for protection against the forfeiture risk.

Where a third party buys property, and a bankruptcy or insolvency court later concludes that the transaction was "constructively fraudulent" as regards the seller/debtor, such a sale can be unwound, but the third-party purchaser is protected by a lien on the property to the extent that the third-party purchaser gave value in good faith for the property. Both federal law<sup>24</sup> and Georgia law<sup>25</sup> recognize this principle.

Logically, third-party purchasers should be protected under this principle by means of a lien (superior to the lender's security deed) to the extent of the third-party purchaser's acquisition price for the foreclosed property. Because the lien primes the security deed being reforeclosed, this effectively converts the security deed being reforeclosed into a second mortgage at which bidders are bidding (if at all) for any equity that may exist in the property above the amount of the original third-party purchaser's bid at the original foreclosure auction. In what is likely to be the common outcome, the lender will be the only bidder at the reforeclosure auction (at which it is essentially bidding against itself to reduce its deficiency to a palatable number to the confirmation court).<sup>26</sup> Assuming that the lender "wins" the reforeclosure auction, equity should thereafter compel the lender to convey the property back to the original third-party purchaser in satisfaction of the third-party purchaser's lien.<sup>27</sup> To the extent that a new third-party purchaser is the winner at the reforeclosure auction, the original third party purchaser should be entitled to judicially foreclose its lien to acquire the property. Accordingly, the original third-party purchaser is protected once more from forfeiture of its investment.

Yet here too, the remedy is not perfect. The original third-party purchaser faces the prospect of having to judicially foreclose upon its lien unless the lender is the winner at the reforeclosure. Exercising such a remedy may have considerable costs. Further, in the unlikely scenario where a *new* third party is the

winner at the reforeclosure auction, the court may be faced with an uncomfortable factual scenario in that permitting foreclosure on the *original* third-party purchaser's lien would wipe out the investment of the *new* third-party purchaser made at the reforeclosure auction!<sup>28</sup>

Accordingly, neither the subrogation method nor the equitable lien method is inherently superior to the other. Rather, they are probably best viewed as alternatives to be invoked, depending upon the facts at hand. Since subrogation is probably the closest statutory remedy on this state-law issue, it stands to reason that when a court orders reforeclosure at a confirmation hearing wherein the property was sold on the courthouse steps to a third party, the court should order that such third party is subrogated to the rights of the lender to the extent of the third-party purchaser's price paid at foreclosure, or, in the alternative, is entitled to an equitable lien priming the lender's security title in the same amount.<sup>29</sup>

## What About Sales of REO After the Foreclosure?

Thus far we have only considered the question of third parties who buy on the courthouse steps. Yet many sales of distressed property occur as "real estate owned" (REO) by the lender after it has taken title to the property at foreclosure. In such a situation, there seems less need for the protective methods set forth above, for at least two reasons: First, here it is possible for the potential buyer to underwrite the risk of a confirmation resale. The buyer can wait for the 30-day confirmation filing period to expire. The buyer can also obtain a representation and warranty in its contract that the lender has not filed for confirmation, and can obtain a contractual covenant that the lender will not do so.<sup>30</sup>

Second, the public policy ramifications here are less severe. The confirmation statute exists to ensure that

properties sell for their "true market value." But if third-party purchasers cannot show up at the courthouse steps with a reasonable degree of confidence that any investment they make there will not be wiped out by acts wholly beyond their control, such persons will either not bid at all or will greatly discount their bids to account for the risk. Without competitive bidding at the foreclosure auction, it becomes impossible to obtain the "true market value" of the property, and the confirmation statute becomes entirely self-defeating. But no such issues are found in the sale of REO—the lender has already acquired the property, and its potential deficiency amount is set. Although it is doubtless true that the law should encourage the sale of REO property to foster a return to healthy markets, it seems a bridge too far to try to apply the protective methods set forth above to parties who are in a position to protect themselves, and this is therefore a policy choice best left to the legislature.

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## Conclusion

The confirmation statute, untouched since 1935, deserves attention from the legislature. There is considerable anecdotal evidence (to go along with the economic logic) that the cloud on title represented by a possible confirmation resale order continues to derail or delay sales of distressed property in Georgia. With respect to sales of REO this is a pure public policy problem, but with respect to foreclosures at the courthouse steps, it is a legal problem whose existence is belied by nearly 80 years of substantial silence (save for some distressing dicta). Yet there are common-law solutions that should give courts, title companies and foreclosure sale buyers comfort in the interim. As long as a third party acquires the property at the courthouse steps in good faith and for value, the law should respect and protect the valuable market-clearing function that such buyers serve by means of subrogation to the lender's rights and/or an equitable lien on the collateral property. 



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## Endnotes

1. 1935 Ga. Laws 381-82.
2. O.C.G.A. § 44-14-161(a) (2002).
3. *Id.* § 44-14-161(b).
4. *Id.* § 44-14-161(c).
5. *Id.*
6. Debt is fully-recourse to a borrower or guarantor when the borrower or guarantor must repay the debt regardless of the circumstances in which the loan default occurred. BLACK'S LAW DICTIONARY 955 (8th ed. 2004) (defining "recourse loan" as "[a] loan that allows the lender, if the borrower defaults, not only to attach the collateral but also to seek judgment against the borrower's (or guarantor's) personal assets." Debt can also be partially recourse, in that the borrower or guarantor must repay some portion (though

not all) of the debt, regardless of the circumstances in which the loan default occurred. Debt can also be either fully- or partially-recourse to a borrower or guarantor only in certain circumstances, such as when the borrower commits "bad boy" acts enumerated in the loan documents. See Alfred G. Adams, Jr. & Jason C. Kirkham, *The Real Estate Lender's Guide to Single Asset Bankruptcy Reorganizations*, 8 DEPAUL BUS. & COM. L.J. 1, 7 (2009). A full treatment of the subject is beyond the scope of this article, though for purposes here it is important to bear in mind that a deficiency judgment (and therefore a confirmation action as a condition precedent to such a deficiency judgment) can only arise in circumstances where some form of recourse exists on the debt.

7. Georgia Title Standard 17.3, available at <http://www.gabar.org/public/pdf/SECTIONS/realprolaw/TitleStandards.pdf>.
8. See Georgia Title Standard 1.1 cmt. ("Title Standards are primarily intended to eliminate technical objections which do not impair marketability and some common objections which are based on misapprehension of the law.").
9. See, e.g., Chicago Title Ins. Co. v. Investguard, Ltd., 215 Ga. App. 121, 122, 449 S.E.2d 681, 682 (1994) (noting that a marketable title is not a flawless title, but rather one that "can again be sold to a reasonable purchaser or mortgaged to a person of reasonable prudence").
10. E.g., RTC v. Morrow Auto Ctr., Ltd., 216 Ga. App. 226, 228-29, 454 S.E.2d 138, 140-41 (1995) ("[T]he statute does not define what constitutes 'good cause' . . . Discretion to grant a resale is discretion to deny a resale. There are special reasons that the issues of 'good cause' and resale are left to the 'considerable discretion' . . . of the trial court . . . [A]ppellate courts do not disturb that exercise of discretion unless it is clearly, patently, and manifestly abused.") (citation omitted).
11. The authors have been unable to locate any legislative history or other codified knowledge of the drafters' debates. The authors have consulted with several prior members of the title standards committee (including at least one prior chair thereof), and in their experience, this question has



- not heretofore been addressed by the committee.
12. O.C.G.A. § 9-13-166 (2006).
  13. See, e.g., Craig Pendergrast & Sara LeClec, *Georgia Foreclosure Confirmation Proceedings in Today's Recessionary Real Estate World: Back to the Future*, 16 GA. BAR J., Dec. 2010, at 12-13 ("If . . . the property is sold to a third party prior to the confirmation hearing . . . then the option of asking the court to allow a new foreclosure sale at a higher price is obviously lost . . .") (endnote omitted).
  14. For example, given the obvious cloud on title created by the reforeclosure possibility, it seems a bit aspirational to conclude that the land itself is not under the court's jurisdiction in some respect in a confirmation action. Indeed, the confirmation action is sui generis in Georgia law and "do[es] not fit neatly into the customary classification of actions in personam or actions in rem." *Henry v. Hiwassee Land Co.*, 246 Ga. 87, 89, 269 S.E.2d 2, 4 (1980); *accord* *Wall v. Fed. Land Bank*, 240 Ga. 236, 237, 240 S.E.2d 76, 77 (1977).
  15. 123 Ga. App. 228, 230, 180 S.E.2d 263, 265 (1971).
  16. Cf. O.C.G.A. § 13-1-13 (2010) ("Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered . . .").
  17. E.g., *Gallagher v. Buckhead Cmty. Bank*, 299 Ga. App. 622, 625, 683 S.E.2d 50, 53 (2009) ("A purchaser of land is charged with constructive notice of the contents of a recorded instrument within its chain of title.") (quoting *Va. Highland Civic Ass'n, Inc. v. Paces Properties, Inc.*, 250 Ga. App. 72, 74, 550 S.E.2d 128, 130 (2001)), *cert. denied* (Ga. Jan. 12, 2010).
  18. E.g., *Kiser v. Warner Robins Air Park Estates, Inc.*, 237 Ga. 385, 387, 228 S.E.2d 795, 798 (1976) ("Equity seeks to relieve against forfeitures where the rules of construction will allow.")
  19. See O.C.G.A. § 9-13-172.1 (2006).
  20. See *Dutcher v. Hobby*, 86 Ga. 198, 200-01, 12 S.E. 356, 356-57 (1890) ("We think the authorities sufficiently answer this question . . . [A] purchaser at a void judicial sale, under foreclosure, has the same rights as the original mortgagee himself."); see also *Ashley v. Cook*, 109 Ga. 653, 658, 35 S.E. 89, 91 (1900) (noting that the statute is based on and is a codification of the reasoning of *Dutcher*).
  21. See *Ashley*, 109 Ga. At 658, 35 S.E. at 91 ("The [code] section just cited . . . is sufficiently broad to include judicial sales had in pursuance of a judgment rendered setting up a special lien under the provisions of a security deed.").
  22. For example, suppose the original third-party purchaser paid \$100,000 for a property on the courthouse steps. When reforeclosure is ordered, the original third-party purchaser steps into the shoes of the lender (up to this \$100,000 amount) and conducts the reforeclosure, but in so doing it spends \$5,000 in advertising costs and attorneys' fees. While the original third-party purchaser should be entitled to "credit bid" up to \$105,000 at the reforeclosure auction, unless someone actually bids greater than that amount, the \$5,000 spent by the original third party purchaser is a cost that will never be recouped.
  23. See 11 U.S.C.A. § 1124(2) (West 2004 & Supp. 2011).
  24. *Id.* § 548(c) (West 2004) ("[A] transferee or obligee of [a fraudulent] transfer or obligation that takes for value and in good faith has a lien on . . . [the asset] transferred . . . to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer . . .").
  25. O.C.G.A. § 18-2-78(d) (2004) ("Notwithstanding voidability of a transfer or an obligation under this article, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation to . . . [inter alia] [a] lien on . . . the asset transferred . . .").
  26. That is, suppose that the balance due on the loan resulting in the original foreclosure is \$10,000,000. If the original third-party purchaser buys the property at foreclosure for \$6,000,000, and holds a lien in this amount priming the original security deed, the lender at reforeclosure is essentially playing a game of "I'm thinking of a number" with the confirmation court as regards its potential \$4,000,000 deficiency. If it bids too high, it reduces its deficiency, perhaps all the way to zero. But if it bids too low, it risks having its confirmation denied again—most likely for good this time—because the property did not bring "true market value" at the aggregated foreclosure sales.
  27. See, e.g., *Westmoreland v. Westmoreland*, 280 Ga. 33, 35, 622 S.E.2d 328, 330 (2005) (Carley, J., concurring) (invoking the familiar maxim that "equity regards as done that which ought to be done").
  28. Indeed, this speaks to how unlikely it is that any new third party would show up to bid. It is worth questioning whether equity should compel the original third-party purchaser to allow the *new* third party purchaser to pay off the original third-party purchaser's lien and take the property. Such a balance of harms is best left to individual fact patterns as they arise.
  29. It is also worth questioning whether the dicta in *Davie v. Sheffield*, 123 Ga. App. 228, 180 S.E.2d 263 (1971), should be disavowed. If so, then the traditional protections given to bona-fide purchasers may well be sufficient to give comfort to third-party purchasers, unless they had notice of the possible consequences (whether by some instrument affecting title or by actual notice that the lender intends to file for confirmation). It is also worth questioning whether, notwithstanding *Davie*, a court should ever find "good cause shown" where a third-party purchaser may be harmed. Of course, *Davie* says what it says until another court says otherwise.
  30. To the extent that the lender breaches these contractual promises, this seems an example of the sort of "bad faith" that should result in a denial of confirmation without a resale. Cf., e.g., *McDowell v. Regions Bank*, 716 S.E.2d 638, \_\_\_, No. A11A1480, 2011 Ga. App. LEXIS 795, at \*2 (Sept. 7, 2011) ("Because the record plainly shows that Regions did not act in bad faith and that the property failed to sell for its true market value, the trial court did not abuse its discretion in ordering a resale."). In the alternative, the protective methods set forth above should be available to the third-party purchaser.

# 2012 State of the Judiciary Address

by Chief Justice Carol Hunstein

*The State of the Judiciary address was originally given by Chief Justice Carol Hunstein on Thursday, Jan. 25, in the House Chambers at the State Capitol. The following is reprinted with her permission.*

*Lt. Gov. Cagle, Speaker Ralston, President Pro Tem Williams, Speaker Pro Tem Jones, friends in the legislative and executive branches, my fellow judges, ladies and gentlemen:*

**T**hank you for the opportunity once again to present to this distinguished body the annual State of the Judiciary address. This yearly tradition underscores our commitment to work together as co-equal branches of government in our common mission of serving the citizens of this great state. Together we can achieve far more than we can alone.

I am privileged to report to you today our accomplishments of the last year, the challenges we face and our plans for the future. I am honored that joining me are my friends and colleagues on the Supreme Court of Georgia—Presiding Justice George Carley, Justices Robert Benham, Hugh Thompson, Harris Hines, Harold Melton and David Nahmias. I want to pay special tribute today to my dear friend, George Carley—now presiding justice but soon to be chief justice before he retires later this year after 32 distinguished years on the bench. We in the judiciary are going to miss this



Chief Justice Carol Hunstein speaks to special guests and members of the Legislature during the State of the Judiciary address.

Photo by Ashley G. Stollar

brilliant jurist and wonderful colleague.

Also here are my friends and colleagues on the Court of Appeals of Georgia—including Chief Judge John Ellington, former Chief Judge Charles Mikell and the newly appointed Judge Michael Boggs. And we are honored to have in the gallery many judges from around the state.

On behalf of all these judges and the judiciary, I want to sincerely thank you for the work that you do. We are deeply appreciative to you in the Legislature and to Gov. Deal for your interest in—and ongoing support of—the judicial branch.

Above the bench of the Supreme Court of Georgia is a Latin phrase etched in stone. It says: “Fiat Justitia, Ruat Caelum.”

It means: “Let justice be done, though the heavens may fall.”

This pronouncement is the essence of an independent judiciary. It stands for the notion that above all else, the rule of law is the foundation of our nation, and regardless of anything else, we must protect it. That is our duty as judges. It is our job to uphold the law regardless of the outcome, regardless of public opinion, regardless of political favor. Our forefathers understood this principle through their embodiment in the United States Constitution of the three branches of government and the separation of their powers.

“In order to form a more perfect union,” our United States and state constitutions creatively check each branch’s authority and balance its limitations by guaranteeing its independence while at the same time ensuring the interdependence of all three branches.

You write the laws; the governor executes them; we interpret them. Simple but brilliant. In Georgia, at this time in our history, our three branches of government share a symbiotic relationship. Together as a whole, we can be stronger than our individual parts.

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our work this past year on criminal justice reform. Nearly a year ago, I joined Gov. Deal, Speaker Ralston, Lt. Gov. Cagle, Rep. Jay Neal and others in an unprecedented news conference where all three branches of government stood as one in our pledge to reform Georgia’s criminal justice system.

Through legislation introduced by Rep. Neal, the Special Council on Criminal Justice Reform embarked upon a detailed analysis of Georgia’s sentencing and corrections system. Our primary goal was—and remains—the public safety of our citizens.

We began this process united in our conviction that our state can no longer afford to spend more than \$1 billion a year to maintain the nation’s fourth highest incarceration rate and the nation’s No. 1 highest rate of people under some kind of correctional restraint.

We began united in our belief that warehousing non-violent offenders who are addicted to drugs or are mentally ill does nothing to improve the public safety. Indeed, in the long run, it threatens it.

And we began united in our commitment to come up with alternatives to incarceration for non-violent offenders that protect the public safety by addressing the roots of crime and reducing recidivism.

Georgia has a rich history of being tough on crime. This state did not just settle for a “three strikes, you’re out” law. In 1994, we became the first in the coun-

try to pass a “two strikes, you’re out” law. As a government, we must continue in our zeal to protect our citizens from violent and repeat offenders. Murderers, rapists, armed robbers and other violent felons deserve stiff prison sentences. No one suggests otherwise.

But if we truly want to be tough on crime, we must figure out how to reduce it. We now know that being tough on crime is not enough. We must also be smart about crime and criminal justice policy. If we simply throw low-risk offenders into prison, rather than holding them accountable for their wrongdoing while addressing the source of their criminal behavior, they merely become hardened criminals who are more likely to reoffend when they are released. The bottom line is that all those mandatory minimum sentences and get-tough prison measures did little to reduce our three-year reconviction rate, which has held steady for the last decade at nearly 30 percent.

Two months ago, the Special Council on Criminal Justice Reform published a report of its findings. The Council found that non-violent drug and property offenders represent 60 percent of all admissions to Georgia prisons. Between 1990 and 2010, their average time in prison tripled. In 2010, we who are judges sent thousands of low-risk drug and property offenders to prison—people who never before had been locked up. For those low-risk offenders, the taxpayers spent \$49 a



day to house them in prison, versus \$16 a day for community treatment at a Day Reporting Center or \$1.50 a day for probation supervision.

The Special Council found that at least one in four who entered Georgia's prisons had mental health problems. In a special newspaper series this past fall, *The Atlanta Journal-Constitution* reported that Georgia's "jails have become the new asylums" with more mentally ill people locked behind bars than all those being treated in state psychiatric hospitals combined. As I speak to you today, up to a quarter of the thousands sitting in our county jails are mentally ill. That is costing our taxpayers millions of dollars, from which they get little return on their investment.

The Special Council has looked to other states and their successes—notably Texas and South Carolina—in recommending a series of policy options that are now before you for your consideration. Texas, for instance, invested a sizable amount in diversion and treatment centers, even though it faced a shortfall in prison beds. As a result, that state estimates it has avoided the need for two billion dollars in new prison construction, and for the first time in its history, Texas is actually closing a prison. But most significantly, in 2010, Texas posted its lowest crime rate since 1973.

Following the examples of Texas and other states, Georgia's Special Council recommends giving judges more sentencing options by creating a statewide system of accountability courts, which include drug courts, mental health courts and veterans courts. Our veterans have been overseas sacrificing their lives and protecting our country. Many come back changed by traumatic brain injury, chemical dependency and mental health conditions that can lead to erratic behavior and possible involvement in the criminal justice system.

These accountability courts have a proven track record of holding offenders accountable while reduc-

ing their likelihood of reoffending. A national report issued just last month by the U.S. Government Accountability Office found that re-arrest rates for drug court graduates were 26 percent lower than the rate of recidivism among comparison groups. The goal is to turn lawbreakers from tax burdens into taxpayers, and these courts have already proven their effectiveness in doing that.

Yes, they may be more compartmentalized, but they are more efficient. Not only are they specialized, but they free up judges whose dockets have been clogged with drug crimes to deal with other important criminal and civil cases, including the very important business disputes.

The Council recommends other crime-fighting measures for your consideration. One involves offenders who are about to max out of prison—many of whom have spent the majority of their lives locked behind bars. Rather than push them out the prison gate with a bus ticket, a travel kit and \$25 in cash, the Council recommends that six months before their discharge date, they be released to parole supervision to oversee their transition back into society.

Minor traffic offenses also clog our Georgia courts. Many of our citizens don't realize that Georgia criminalizes minor traffic offenses, entitling the offender to a trial by jury if requested. Most states treat these minor traffic offenses as violations penalized by a fine. The Council recommends in its report creating a new class of violations for less serious traffic offenses so they are no longer treated as misdemeanor crimes. This recommendation specifically excludes DUIs and other serious traffic offenses.

There are many more recommendations, and I urge you to read the entire report. I join Gov. Deal in saying this is an important first step.

But this is like steering a ship. Changing our course will take time. And it will not come without courage and controversy. As Woodrow

Wilson said: "If you want to make enemies, try to change something." But, as Dr. Martin Luther King Jr. said: "A genuine leader is not a searcher for consensus but a mold-er of consensus." There are many consensus builders in this room, and I am confident in your ability to bring about significant reforms.

Gov. Deal urged the Special Council to limit its focus to changes that affect the adult prison population. I agree. We must take this one step at a time. But today, I would like to plant a seed for your future consideration. In the last year, I have heard from many of our state's juvenile judges, who have the best interests of our young people and their families at heart. With state cuts in mental health services, child welfare services, group homes and alternatives for children who do not need to be behind bars, juvenile judges are too often faced with sending young people to locked facilities to get some kind of treatment, or sending them home to get nothing at all. So today I offer you a postscript: The same reforms we are recommending to you for adults must begin with children.

Perhaps you have heard the parable about the group of people who were standing at a river bank when they watched an infant floating by and drowning in the river. One person promptly dove in and rescued the child. But then another baby came floating by. And then another, and another! Frantic, everyone jumped in to try to save the babies. But they noticed one person was walking away. Accusingly, they shouted, "Where are you going?" He answered: "I'm going upstream to stop whoever is throwing babies into the river."

In Georgia, we are throwing children into youth prisons. They are technically known as Youth Development Campuses, but many YDCs look, feel and sound just like adult prisons. Some of our children are serious, violent, repeat offenders, and we must protect our citizens from them. But many are behind bars because juvenile

judges have nowhere else to send them; because no one intervened before it was too late.

According to the Georgia Department of Juvenile Justice, during the last three years, nearly two-thirds of the more than 10,000 youths locked behind bars have some kind of substance abuse problem; more than one-third have been diagnosed with mental health conditions. As with adults, we have learned that our get-tough tactics have failed to scare juvenile offenders straight.

A recent study by The Annie E. Casey Foundation found evidence that our reliance on incarceration for young people provides no benefit to public safety, does not reduce their future offending, wastes taxpayer dollars and perhaps worst of all, exposes children to high levels of violence and abuse. In other words, our youth prisons are a pipeline to adult prison. Consider this: Within three years of juveniles' release from youth prison, up to

72 percent are convicted of a new offense, depending on the state.

Children who drop out of school, get involved in drugs, develop mental health problems, are unruly, disrespectful and out of control without ever getting any kind of intervention are strong candidates for becoming adult criminals. We must face the reality that for many of these children, Georgia's youth prisons are mere incubators for adult crime.

Tasha Hamilton was well on her way down that path to adult prison. Tasha was 8-years-old when her mother abandoned the family, leaving her behind along with her baby sisters. Although their father worked, they had little money and at times they slept in a car. Tasha grew up angry and defiant. By 11-years-old, she was smoking marijuana. By 12, she was hanging out with an older crowd and drinking. By 13, she was hooked on methamphetamine.

Tasha bounced in and out of Georgia's YDCs and boot camps—

spending 90 days here, another few months there—often for minor infractions. By the time she was 16, Tasha had been in trouble so many times that she was committed to the state. And this time, they sent her away for nearly a year.

Tasha describes the YDC as a "miserable" place full of "miserable people wanting to do harm." Tasha says youth prison "doesn't bring out the good in anybody." In her own words, she says: "You take away a little bit of bad with you. You come out knowing worse people than when you went in, and you build relationships with them."

But something happened to Tasha that made all the difference. She had a probation officer, Jennifer King, who genuinely cared and refused to give up on her. Jennifer worked in the Douglas County Juvenile Court under Jenny McDade, director of juvenile programs. Together, they made sure Tasha got the help she needed. Tasha got her G.E.D., she got drug

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treatment and ultimately she got a job. Without Jennifer, she says, it would have been easy for her to graduate into adult prison. She sadly wonders how many are in adult prison today who never had a Jennifer in their lives—someone who said to them when they were teenagers: You can do it, when they had no hope that they could.

With the help of the Douglas County Juvenile Court system, under the able leadership of Judge Peggy Walker, Tasha was accepted into West Central Technical College. Today, she works full time in insurance, taking care of her two daughters—as a taxpayer, not a tax burden. Today, Tasha has that hope in her life she once lacked. And today, it's still important to Tasha that she continues to make her probation officer proud.

Ladies and Gentlemen, it is my honor to introduce to you Tasha Hamilton, Probation Officer Jennifer King, Jenny McDade and Judge Peggy Walker.

Together, we can move this ship in a new direction. You have a challenge ahead, and I recognize you have difficult choices to make. I do not envy you. This year, as in the previous few years, you face what we hope is the end of a recession that has cost citizens their jobs, their homes and their hope in the American dream. This year, as always, you are charged with parsing out limited state funds to many worthy causes.

The judicial branch provides a core government function by protecting the public safety. We in the judiciary are grateful to you for understanding that we are bound by the Constitutions of our state and nation to uphold the rule of law and mete out justice in a fair and impartial way to all who come before us.

As I have said before, our courts are the emergency rooms of society: We must respond to all who come in front of us.

Yet in Georgia, our courts continue to struggle, putting justice in jeopardy.

State budget cuts, exacerbated by county cuts, have resulted in court backlogs across Georgia. DeKalb County has five pending death penalty cases that it cannot move forward due to a lack of resources. In some counties, including DeKalb, domestic violence cases have been delayed at the very time Georgia inches closer to the top in the rate of domestic violence homicides. According to the most recent FBI data, Georgia has gone from having the tenth-highest rate of domestic violence homicides to now having the sixth-highest rate. One metro Atlanta judge told me he worries about what could happen if a young mother found a locked courthouse door on the day she needed a temporary restraining order to protect her family from an abuser.

Civil trials in particular are being delayed in a number of jurisdictions. That is because our Constitution guarantees the right to a speedy trial in criminal cases.

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## Make it your Homepage!



## In Georgia, we are committed to making our courts as open and as accessible to the public as possible.

As a result, some judges have been forced to delay civil matters.

We are all proud that Georgia was recently ranked the fourth most business-friendly state in the nation. We in the judiciary want to do everything we can to protect that ranking by guaranteeing that businesses can resolve their disputes in a timely fashion.

In addition, divorce cases and dispossessory cases—in which people have been evicted from their homes—have been affected by court delays from Jackson County to Houston County. In one Northeast Georgia court, people are now waiting up to four months just to get a temporary hearing in a divorce—a situation that can grow volatile when children are involved. For a landlord, court delays can mean an additional two-to-three weeks before a non-paying tenant is evicted and replaced with a paying tenant. For creditors, it can mean an additional three-to-four weeks before any collection efforts can be started.

As a superior court judge told me: “We are just one case away from a serious logjam if a major case is tried or defense attorneys start filing speedy trial demands.”

Today, Georgia’s entire judicial branch is funded with less than 1 percent of the state budget. Georgia’s judiciary has never resisted sharing the burden of difficult economic times. The fact is we were lean before they struck. At the Supreme Court of Georgia—the state’s highest court—until this year, we did not even have a paid employee to greet visitors or answer our phones in the main office. Our small staff of 51 is still fewer than we had a decade ago, yet our caseload—like that of other courts—has grown.

Justice is not a privilege; it is a right. Criminal cases must be

heard; civil disputes must be resolved. Courts are critical to public safety. But in recent years, the erosion of budgets in the face of growing caseloads has put us perilously close to being unable to fulfill our constitutional mandates.

The good news is we have never idly sat by. I report to you today that even in the face of a mighty struggle, your court system remains sound, strong and stable. We are holding the line, doing more with less and moving forward.

Georgia’s courts and our 1,500 judges are problem solvers. It was a judge who first identified the need for a drug court back in 1994, when Bibb County created Georgia’s first. Since then, the number of accountability courts has grown to 100. We are greatly appreciative to you for your support of these courts in the past. The need now is to expand them statewide, along with the necessary treatment facilities, staff and security required to make them effective.

This year, we became one of the first states to move forward and create a new rule for the recusal of judges, following the U.S. Supreme Court’s landmark ruling in the 2009 case, *Caperton v. A.T. Massey Coal Company*. Thanks to the leadership of Rep. Ed Lindsey and my colleague Justice Harold Melton, we have amended by order of the Supreme Court of Georgia the Code of Judicial Conduct to ensure that judges disqualify themselves in any proceeding in which their impartiality could be questioned. Georgia’s rule has become a model rule and was recently adopted, with minor changes, by the American Bar Association.

We also continue to make strides in our efforts to switch from paper to the electronic filing of court documents. At the state Supreme Court,


we are now close to 100 percent participation among attorneys in electronically filing their motions, briefs and applications to appeal.

Georgia’s judiciary has a nationwide influence. Juvenile Judge Peggy Walker of Douglas County is now in line to become president of the National Council of Juvenile and Family Court Judges in 2014; Juvenile Judge Michael Kay of Coweta County is the immediate past national president. This past summer, I was honored to co-host the annual conference of the nation’s Supreme Court justices, as well as the nation’s court administrators. Fully 75 percent of this country’s chief justices came to Atlanta where Gov. Nathan Deal graciously welcomed them. The theme of the conference was “A World of Change: Courts and the Media in 2011.”

In Georgia, we are committed to making our courts as open and as accessible to the public as possible. As someone once said, “One of our greatest freedoms is the right to know what our government is doing.” I believe that openness and accessibility are critical to winning our citizens’ faith and confidence in their justice system.

Our open-door policy extends to you. All of us who are judges would be honored to have you visit our courts. Especially as you consider the options now before you for reforming this state’s criminal justice system, a half-day visit to your local courthouse could help enlighten you about the types of cases our judges face each day. About the challenges before them. And about the need they have for sentencing options other than prison alone. Also, you might consider attending a drug court graduation.

Thank you for standing with us as partners as we stand with you in moving Georgia into a new age. Thank you for your support of the judicial branch. And thank you for your service to this great state.

God bless you. And God bless the state of Georgia. 

# Military Legal Assistance Program Aid Tops 500 in Two Years

by Norman E. Zoller

**W**hen the State Bar of Georgia began its Military Legal Assistance Program (MLAP) in December 2009, former State Bar President Jeff Bramlett (2008-09) noted success would be measurable when one soldier had been helped. The program was designed to connect a cadre of 700 volunteer lawyers throughout the state with military service members and veterans seeking help with a variety of legal problems.

Over the past two years, more than 500 connections have been made, a remarkable achievement and a testament to Georgia lawyers who not only devote their expertise and energy to their private clients, but who also work for the public good. And as increased dedication and commitment has been demanded of our service members stationed here in Georgia and throughout the world, this legal assistance helps offset the sacrifices they and their families make.

A 2007 Department of Defense (DoD) fact-finding mission connecting American private-sector opinion



Photo by Sarah I. Coole

leaders with deployed service members inspired the State Bar's program. DoD invited a contingent of civilians, including Georgia attorney and Navy veteran Jay Elmore, to meet face-to-face with service members and commanders deployed across the Middle East

“A program that was two years in the making and now two years in operation, MLAP is achieving precisely the goals and objectives its founders had in mind. All Georgia lawyers should be proud of it and what it does for our vets and service members. Their service and sacrifice is great.” — Kenneth L. Shigley, president, State Bar of Georgia

and the Horn of Africa. At the end of the mission, DoD challenged each civilian participant to return to their private-sector lives and ponder the question: “What can be done to support those serving in harm’s way?”

Elmore shared this challenge with his law partner, Jeff Bramlett, who was about to become president of the State Bar of Georgia. In response, Bramlett appointed a committee of lawyers chaired by Charles Ruffin to study the need and to develop a blueprint for recruiting, training and coordinating Georgia volunteer lawyers to meet the legal needs of service members and veterans.

“Enthusiasm for the concept among Georgia lawyers was infectious,” recalls Bramlett. “The special committee looked at how other bar associations across the U.S. were—or were not—addressing the legal needs of service members and their families. We realized early on that Georgia was well-positioned to pioneer a unique and comprehensive program to deliver excellence to clients who had earned our gratitude and who needed our help.” In June 2009, after months of thorough investigation, the State Bar’s Board of Governors approved the creation and funding of the Military Legal Assistance Program. Norman Zoller was retained as the coordinating attorney, and the formal program was launched in late 2009. Upon establishment of the program, MLAP Chair Ruffin said, “The Bar has been considering the mechanism for an effective program to address unmet legal needs for many months, and we now look forward to this program being able

to translate Jeff Bramlett’s vision into operational reality.”

### How does MLAP help?

What kinds of services are provided and who is eligible to receive them? Basically, help is furnished on any civil matter according to the following eligibility criteria:

- Active duty service members having pre- or post-deployment related legal matters.
- Veterans separated from the service with a service-connected disability who seek legal assistance directly related to that disability.
- Representation for the spouse of an active duty service member where the legal issue affects the well-being of the family as a whole and the interests of the spouse and service member are aligned.
- Eligible clients who physically reside in Georgia and require legal assistance where jurisdiction lies in the state or federal courts of Georgia.
- Legal assistance to National Guard members, Reservists and military retirees, as attorney resources allow.

Although the program does not provide direct assistance to individuals accused of a crime, it does help direct them to public defenders, legal assistance offices or to local bar associations.

The results so far have been gratifying. As noted above, through the end of 2011, more than 500 service members and veterans—our “clients”—have been connected with lawyers. About half of those

cases have been family law matters (and regrettably about half of those have been divorces) and about a quarter of all legal help has been provided to veterans. (Approximately 774,000 veterans reside in Georgia.<sup>1</sup>)

Phone calls and email messages are received every day, mostly from active-duty service members stationed at one of the 10 military installations located in Georgia.<sup>2</sup> Additionally, phone calls and messages have been received from service members on active duty in Afghanistan, Iraq, Kuwait, United Arab Emirates, Japan, Italy, Germany and the Azores, to cite a few. Service members calling from abroad have reportedly heard about the program by word-of-mouth from their colleagues serving in Georgia. The word has gotten around and continues to spread.

Although two recent cases are both unusual in their complexity and the challenges they presented, the outcomes have proven particularly satisfying for the volunteer lawyers and their clients.

In the first, grandparents from Fayette County sought MLAP’s help in June 2010, following the sudden death in Tennessee of their son-in-law, a retired Army combat medic. Their daughter had died two years earlier and the eldest of her four children had been living with them in Georgia since her death. At the time the grandfather made contact with the MLAP office, he and his wife had been granted guardianship of all four children and were then living with them. As they began to look into what VA and other benefits the children might be entitled,





(Left to right) Will A. Gunn, general counsel, U.S. Dept. of Veterans Affairs, Washington, D.C.; Patricia A. Hooks, regional general counsel, U.S. Dept. of Veterans Affairs, Atlanta; Hon. William P. Greene Jr., U.S. Court of Appeals for Veterans Claims, Washington, DC; and Norman E. Zoller, coordinating attorney, Military Legal Assistance Program, State Bar of Georgia.

they promptly realized they needed an attorney whose expertise included military, veterans' and Social Security benefits.

MLAP helped find them that attorney,<sup>3</sup> and to the grandparents' great relief, the children are now eligible to receive future educational assistance, as well as monthly and other VA benefits. Issues still unresolved continue to be shepherded through the system by their volunteer lawyer.

In the second case, through the efforts of an MLAP volunteer attorney,<sup>4</sup> a Vietnam veteran from Fannin County suffering from post traumatic stress disorder (PTSD) and a traumatic brain injury has received a long overdue award of \$25,000 in back pay for an Agent Orange claim, as well as monthly disability benefits for his PTSD, which had been denied many times before. Still being addressed is his claim for relief from the government's attempts to recover an alleged overpayment of \$124,000 in Social Security benefits, which he received after his VA benefits were terminated. His inability to have that demand reversed on his own had left him distraught.<sup>5</sup>

Besides receiving and processing cases every day, MLAP has also sponsored or co-sponsored a num-

ber of continuing legal education programs with Georgia Institute of Continuing Legal Education and with the Bar's Military/Veterans Law Section. Some have focused on the "Nuts and Bolts of Military Law" and with the accreditation process that qualifies a lawyer to practice before the U.S. Department of Veterans Affairs. Last year more than 200 lawyers attended the VA accreditation program and this past November nearly 200 more attended. Speakers at that symposium included Will A. Gunn, general counsel of the Veterans Administration and (former Chief) Hon. William P. Greene Jr. of the U.S. Court of Appeals for Veterans Claims.

Immediate Past President Lester Tate has observed, "Members of the armed services stand ready to protect the rights and liberties of Americans whenever and wherever needed. Wouldn't it be ironic—and wrong—if we, as lawyers, were unwilling protect the rights and liberties of soldiers, sailors, marines and airmen in American courtrooms? I think "returning the favor" to those who have given so much is what MLAP is all about."

In recognition of the important service provided by the lawyers participating in this program, the MLAP Committee recommended

and the State Bar of Georgia's Board of Governors approved last year a special award to be presented annually to one outstanding lawyer. This recognition, called the Marshall-Tuttle Award, is named in honor and memory of both Army Corporal Evan Andrew Marshall, a soldier from Athens, Ga., who was killed in action in Iraq in 2008, and U.S. Circuit Judge Elbert Parr Tuttle, who served in the Army for 30 years, was a founding partner of a major Atlanta law firm and served as a federal judge for 43 years. Tuttle also provided pro bono legal services to many people, including John Johnson, a young Marine. In 1938, the U.S. Supreme Court held in the landmark and fundamental rights case, *Johnson v. Zerbst*, that counsel must be provided for all defendants in federal criminal trials who cannot afford to hire their own attorneys. The first recipient of this award was Drew N. Early, Lynch & Shewmaker LLC, Atlanta. During 2010, Early provided legal assistance without charge to several service members and veterans, in addition to teaching and mentoring other Georgia lawyers about military law to complement their civilian practices. Early is a 21-year active duty Army veteran and a graduate of the U.S. Military Academy at West Point and the Georgia State University College of Law, *cum laude*.

"Drew Early has been an exemplar of what the State Bar hoped this program would become," says Ruffin. "He not only has provided expert advice to our state's service members, but he has also been an important adviser to our committee and to other lawyers throughout Georgia on the technicalities of military law to help ensure that the rights of service members and veterans are protected. His commitment to the program and to his fellow service members has been exceptional."

## A Significant Statistic

So what kind of measurable success is the program achieving? It has obviously exceeded Jeff Bramlett's early requirement



# The Murphy House Project

brought to you by the:

**Keenan's Kids Foundation**

## WHO ARE THE MURPHYS?

John and Jeanette Murphy are the proud parents to a big and loving Irish family with even bigger hearts! They first met as counselors at a group home for disabled adults. Their work fueled a passion to reach people with disabilities at a younger age in order to help them build the needed skills to become adults who can care for themselves and each other. Passion turned into action, and the Murphy family now numbers 23, with 4 birth children and 17 children adopted with special needs.

## WHAT IS THE MURPHY HOUSE PROJECT?

While the Murphy's have created a home full of love, their old home was in a serious state of disrepair and unfit for such a large family to live in. Over the past 4 years, the Keenan's Kids Foundation has been working hard to build the Murphy's a beautiful new home in McDonough, GA. We are happy to say that the construction of the 7,100 square foot home is now complete, due, in large part, to the charitable Atlanta legal community.

However, the work is far from done. The Keenan's Kids Foundation has also taken on a substantial mortgage and is counting on your future support to help retire that debt. At the Keenan's Kids Foundation, we believe that a strong, loving and secure family is easily the most important thing in shaping a child's sense of the world and the most influential factor in developing them into adults they will become. John and Jeanette have devoted their lives to the care of their children and the well being of their family. Now we are asking our extended family to help us finish what John and Jeanette started over 20 years ago.



## HOW YOU CAN HELP:

Big or small, every little bit goes a long way in helping the Murphy family continue to nurture and care for their children in the way every child deserves.


- \$10 can help the Murphy's buy school supplies for their 23 special needs children
- \$25 can help buy seeds to grow the produce central to growing children's dietary needs
- \$50 will help maintain the family pool and yard used for physical therapy
- \$100 will help with manage the cost of vitamins, prescriptions and medical attention for the family.



### To Donate, Volunteer, or for More Information:

- [www.murphyhousesproject.com](http://www.murphyhousesproject.com) • [www.keenanskidsfoundation.com](http://www.keenanskidsfoundation.com) •
- 404-223-kids (5437) • [office@keenanskidsfoundation.com](mailto:office@keenanskidsfoundation.com) •
- Member Assoc. of Small Foundations •

to help at least one service member. More precisely, slightly more than one affirmative connection between lawyer and military/veteran client is being made each day.

For those who know a service member or veteran who needs legal assistance, or if, as an attorney, you would like to participate in this program, please contact us at either 404-527-8765 or normanz@gabar.org. Many attorneys who have already stepped forward know the satisfaction that comes from helping a service member or veteran. To all those who have volunteered, we are grateful and we say thank you. To the rest of you, we say, "join us." 



**Norman Zoller** has devoted the majority of his 36-year 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 1981-83, 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. Table 520, Veterans by Selected Period of Service and State: 2010, U.S. Census Bureau Statistical Abstract.
2. The military bases include Army

Forts Benning, Gillem, Gordon, and Stewart; Hunter Army Airfield; Air Force Bases: Dobbins, Moody, and Warner Robins; Naval Submarine Base at Kings Bay; and the Marine Corps Logistics Base, Albany. On September 15, 2011, Army Forts Gillem and McPherson formally closed as a result of decisions in 2005 by the Base Realignment Alignment and Closure Commission (BRAC).

3. H. Lane Dennard Jr., retired partner at King & Spalding, Atlanta, Georgia, along with other lawyers and staff at King & Spalding, who helped with this case.
4. M. Scott Holcomb, State Representative and General Counsel for J.P. Turner & Company, LLC, Atlanta, Georgia.
5. As noted in the main text above, one case involved the grandparents of four grandchildren, who were the children of their late daughter and his late son-in-law, a retired Army Sergeant First Class. In early 2008, the children's mother (the grandparent's daughter), died as a result of cancer. Her oldest daughter had been with the grandparents since then. The remaining three children lived with the father in Tennessee. He was a career soldier (hereafter the "father") and had retired. In late April 2010, the children returned home to find their father had passed away in his bed. The grandparents then had a guardianship of the four children granted by the probate court in a Georgia county. The daughter and the children's father were divorced at the time of both their deaths. The father left no will. The grandparents sought help from an attorney experienced with military and veterans benefits, including the following matters:

- Understanding as to what benefits the children were entitled;
- Guidance as to how to claim these benefits and secure them for the future. The veteran father was maintaining life insurance benefits for the children;
- The father was 95 percent disabled as a result of his service, and as a result, the

children might be entitled to continuing dependent compensation;

- The children might be eligible to receive some survivor benefits from the father's military retirement income;
- The children might be eligible to educational benefits currently and in the future;
- The children might be eligible to receive tri-care medical and dental insurance;
- The children might be eligible to receive continued Social Security benefits;
- Help is needed with the completion and processing of significant quantity of documents and paperwork received from the VA;
- Other benefits from the state and federal agencies; what are those and what are the sources?

At the time this case was received in June 2010, the representation was in three main areas:

- (a) Claim before the VA for survivorship rights and other rights for the children. The attorney assisted the client in preparing the VA claim which was filed in October 2010. The claim included a Dependency and Indemnity Compensation (DIC) claim and a significant issue with this part of the claim is whether the father's death was service-connected. To support this claim, the attorney requested the VA file and medical records from the VA Regional Office in Nashville, the VA Regional Hospital in Nashville, and the VA Records Management Center in St. Louis.
- (b) Survivorship rights to retirement pay. As noted, the father was a retired sergeant first class and was receiving retirement pay at the time of his death. The attorney assisted the client in filing a claim for survivorship rights with the Defense, Finance and Accounting Service (DFAS). Soon thereafter, the client received an initial check for each of the children.
- (c) Servicemember's Group Life Insurance (SGLI). The father's discharge record indicated that he had \$400,000 of SGLI



coverage, and the grandparents believed that the father had made the children the beneficiaries of this insurance policy. However, when the grandparents contacted SGLI, they were advised that the father had not converted this insurance to coverage under the Veterans Group Life Insurance Program (VGLI). Through contacts with the Office of Servicemember's Group Life Insurance and research, the attorney determined that issues remained that might yet enable the grandparents to secure the proceeds of this policy. The attorney has argued that a Disability Extension of two years should apply because the veteran was totally disabled at the time of his discharge. Although the OSGLI agency rarely grants a disability extension, the attorney believes there is a fairly strong argument that it should apply in this case. Consequently,

these matters are still being addressed by the attorney with SGLI officials.

In July 2011, a favorable decision was received from the VA Philadelphia Regional Office on the DIC claim. As was subsequently confirmed, the deceased veteran was a combat medic who fought in Iraq and the Balkans. He subsequently died of an overdose of medications. The attorney argued and the VA agreed that the death was service-connected because the medications were being taken for pain associated with service-connected physical injuries, as well as the anxiety associated with service-connected Post Traumatic Stress Disorder (PTSD). Based on the determination that the death was service-connected, the VA granted the four children Dependency and Indemnification Compensation (DIC) (a monthly benefit), as well as Dependents' Education Assistance (GI Bill) for the four children. Other aspects of this claim remain before the VA Philadelphia

Regional Office. Although such claims may ultimately not have much monetary value per se, a ruling in the family's favor, for example, could be presented to OSGLI as substantial support for the life insurance claim. As a result of this work by the attorney and others in his firm, the grandparents have written to the State Bar saying, in part, . . . "This (VA award) was the most important issue for the children because among other things, it provides educational assistance . . . . This was a major win for Dennard and his group and provided (my wife) and I with a big sigh of relief regarding college expenses . . . . On behalf of (the grandchildren, [we], want to thank you, the State Bar of Georgia Veterans group and Dennard for the untold hours that went into securing this decision by the VA. The services provided by the Military Services Program are vital in assuring that U.S. veterans and their families receive benefits due them under law."

## Judging Panel Volunteers Still Needed for 2012 State Finals Tournament

*Saturday, March 17  
Gwinnett Justice Center, Lawrenceville*

*At least two rounds of HSMT judging panel experience  
or one year of coaching experience required to serve at state.*

Volunteer forms at [www.georgiamocktrial.org](http://www.georgiamocktrial.org) under the "Volunteers" section

Contact the Mock Trial Office with questions:  
404-527-8779 or toll free 800-334-6865 ext. 779  
Email: [mocktrial@gabar.org](mailto:mocktrial@gabar.org)



## Kudos

>



Prucino



Powell



Russell



Segal



Ridenour



Blackburn

**Kilpatrick Townsend & Stockton LLP** announced that Co-Managing Partner **Diane Prucino** was named a 2011 "Most Powerful and Influential Woman" by the **National Diversity Council**.

Prucino, one of only 15 women honored, was praised for being a "professional cream of the crop" and for her ability to gracefully balance work and life demands.

Partner **Judy Powell** was presented with the "Excellence in Intellectual Property Award" by the **Association of Corporate Counsel (ACC) Intellectual Property Committee**. Moving forward the award will be known as the "Judith Powell Excellence in Intellectual Property Award" and will be presented each year to the individual who brings excellence to the IP community through the ACC IP Committee.

Partners **Dean Russell** and **Debbie Segal**, and **Sally Ridenour**, counsel, were recognized by the **Atlanta Bar Association** at the annual **Celebrating Service Luncheon**. The luncheon honored lawyers in the legal community who have preformed extraordinary pro bono representation and service. Atlanta Legal Aid recognized Russell with its Pro Bono Volunteer of the Year Award for his decade of providing representation to low-income grandparents who adopt the grandchildren in their care. Atlanta Volunteer Lawyers Foundation recognized Ridenour and Segal for five and 20 years of participation, respectively, in its Saturday Lawyers Program.

**Stan Blackburn**, a partner in the firm's Atlanta office, received the **Boys & Girls Clubs of America National Service to Youth Award** for his volunteer service as a board member and officer of Boys & Girls Clubs of Metro Atlanta, Inc. During his 30-year tenure on the board, Blackburn has been a champion of the Boys and Girls Club movement. He has served on various board committees of Boys & Girls Clubs of Metro Atlanta and as its corporate secretary and played an integral role in fostering the merger of Boys Clubs of Metro Atlanta, Inc., and Metro Atlanta Girls Clubs, Inc., that created the current organization.

>



**Parker, Hudson, Rainer & Dobbs** announced that **Eric W. Anderson** was elected for induction as a fellow of the **American College of Bankruptcy**. The college is an honorary professional and educational association of bankruptcy and insolvency professionals and plays an important role in sustaining professional excellence.

>



The **Supreme Court of Georgia** named **W. Scott Henwood** of **Hall, Booth, Smith & Slover** to the **Board to Determine Fitness of Bar Applicants**. Henwood is serving a five-year term. The board is composed of seven attorney members and three non-attorney members and is responsible for evaluating the character and fitness of applicants to practice law in the state of Georgia.

>

The **American Intellectual Property Association** elected **Elizabeth Ann "Betty" Morgan** as secretary. Morgan is the managing shareholder of The Morgan Law Firm P.C., a trial boutique in Atlanta. The firm concentrates on intellectual property litigation and business torts. Additionally, Morgan is experienced in alternative dispute resolution and is a registered mediator in Georgia.

>



The **American Bar Association** announced the second edition of ***RICO State by State: A Guide to Litigation under the State Racketeering Statutes*** by **John E. Floyd**, a partner at **Bondurant Mixon & Elmore LLP**. This fully updated edition is a comprehensive new collection and analysis of state RICO statutes and caselaw current through at least Sept. 30, 2010. It also sets forth the statutes and caselaw in each of the 33 states, as well as the Commonwealth of Puerto Rico and the Territory of the Virgin Islands, which have enacted statutes based upon the federal Racketeering Influenced and Corrupt Organizations statute.

## On the Move

### In Atlanta

>



**Locke Lord LLP** announced the addition of **Kenneth B. Franklin** as an associate in the litigation department of its Atlanta office. Franklin is a member of both Locke Lord's business litigation and arbitration and construction practice groups. The firm is located at Terminus 200, Suite 1200, 3333 Piedmont Road NE, Atlanta, GA 30305; 404-870-4600; Fax 404-872-5547; [www.lockelord.com](http://www.lockelord.com).



Wedge



Kent



Crouch



Cooper



Marion

**Smith Moore Leatherwood LLP** added five new attorneys to its Atlanta office. **Robert B. Wedge**, **G. Marshall Kent Jr.**, **R. Milton Crouch**, **J. Allen Cooper** and **Tracy A. Marion** joined the firm. All were most recently with Shapiro Fussell Wedge & Martin, LLP, in Atlanta. Wedge and Kent joined as **partners**, Crouch and Cooper joined as **of counsel** and Marion joined as an **associate**. The firm is located at Atlantic Center Plaza, 1180 W. Peachtree St. NW, Suite 2300, Atlanta, GA 30309; 404-962-1000; Fax 404-962-1200; [www.smithmoorelaw.com](http://www.smithmoorelaw.com).



Lasky



Stevens



Thompson



Wolf

**Burr & Forman LLP** announced that intellectual property attorney **Michael Lasky** joined the firm as **of counsel** in the Atlanta office. Prior to joining the firm, Lasky was a partner at the national IP firm of Merchant and Gould for 22 years and then the founder of Altera Law Group, an IP boutique, where he remains principal owner.

In addition, three new **associates** joined the firm in the business and litigation practice areas. **Tyler P. Stevens** practices in the firm's corporate section where he is a member of the banking and real estate practice group. **Ryan D. Thompson** practices in the firm's creditors' rights and bankruptcy practice group. **Katie E. Wolf** is a member of the firm's commercial litigation practice group. The firm is located at 171 17th St. NW, Suite 1100, Atlanta, GA 30363; 404-815-3000; Fax 404-817-3244; [www.burr.com](http://www.burr.com).



Bigelis



Levin

**Kilpatrick Townsend & Stockton LLP** announced that **Frank L. Bigelis** was elected **partner**. Bigelis is a member of the infrastructure and construction team in the Atlanta office.

**Matthew Levin** joined as a **partner**. Levin is a mem-

ber of the bankruptcy and financial restructuring team. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; [www.kilpatricktownsend.com](http://www.kilpatricktownsend.com).



**Laura R. Anthony** joined **Elarbee, Thompson, Sapp & Wilson, LLP**, as an **associate**. Anthony's practice focuses on representing private employers in labor and employment law litigation and on providing preventive training and other counseling services to employers facing labor and employment issues. She is also a member of the complex litigation group. The firm is located at 800 International Tower, 229 Peachtree St. NE, Atlanta, GA 30303; 404-659-6700; Fax 404-222-9718; [www.elarbeeelthompson.com](http://www.elarbeeelthompson.com).



**Ford & Harrison LLP** announced the addition of **Adam C. Keating** as an **associate** in the firm's Atlanta office. Keating's practice is focused on the representation of employers in labor and employment disputes. The firm is located at 271 17th St. NW, Suite 1900, Atlanta, GA 30363; 404-888-3800; Fax 404-888-3863; [www.fordharrison.com](http://www.fordharrison.com).

### » Proliability Lawyer Malpractice Program:

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with off-the-shelf plans that simply don't fit their real-world risk.

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\*\*What Percent of the Population Do Lawyers Comprise? Wisegeek, www.wisegeek.com, viewed 1/3/12.

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**MARSH**



>   **Nelson Mullins Riley & Scarborough LLP** announced that **Erika Birg** joined the firm as a **partner**. Birg focuses her practice on commercial litigation, alternative dispute resolution, business torts, contract disputes, trade secrets, computer fraud and non-compete matters. **Tai Hyun "Alex" Shin** joined the Atlanta office as an **associate**. He practices in the areas of debt finance and restructuring. Shin also focuses on Korean companies in the automotive industry. The firm is located at 201 17th St. NW, Suite 1700, Atlanta, GA 30363; 404-322-6000; Fax 404-322-6050; [www.nelsonmullins.com](http://www.nelsonmullins.com).

>  **Davis, Matthews & Quigley, P.C.**, announced that **Mindy Pillow** joined the firm as an **associate** in the domestic relations and family law group. She represents clients in all aspects of family law, including divorce, legal separation, paternity, legitimization, child custody, adoption and prenuptial agreements. The firm is located at 3400 Peachtree Road NE, Suite 1400, Atlanta, GA 30326; 404-261-3900; Fax 404-261-0159; [www.dmqllaw.com](http://www.dmqllaw.com).

>   **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, announced that **H. Fielder Martin** and **J. Ben Shapiro** joined the firm's Atlanta office. Martin and Shapiro, both of whom joined Baker Donelson as **senior counsel**, were previously named partners at Shapiro Fussell Wedge & Martin, LLP, in Atlanta. The firm is located at Monarch Plaza, Suite 1600, 3414 Peachtree Road NE, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501; [www.bakerdonelson.com](http://www.bakerdonelson.com).

>     **Schulten Ward & Turner, LLP**, announced that **William M. Joseph** joined the firm as a **partner**. Turner's practice focuses on domestic and international taxation, mergers and acquisitions and joint ventures. **Corey N. Cutter**, **Brandon C. Hardy** and **Leslie A. Brooking** joined the firm as **associates**. Cutter's practice areas include commercial and

business litigation and privacy law. Hardy practices in the areas of commercial real estate, business transactions, tax planning and controversies. Brooking's practice concentrates in the areas of labor and employment, insurance and personal injury. The firm is located at 260 Peachtree St. NW, Suite 2700, Atlanta, GA 30303; 404-688-6800; Fax 404-688-6840; [www.swtlaw.com](http://www.swtlaw.com).

> **James, Bates, Pope & Spivey, LLP**, announced the addition of **Alec N. Sedki** and **Michael A. Dunn** as **of counsel** joining the firm's litigation practice. The firm is located at The Lenox Building, 3399 Peachtree Road NE, Suite 1700, Atlanta, GA 30326; 404-997-6020; Fax 404-997-6021; [jamesbatesllp.com](http://jamesbatesllp.com).

> **Parks IP Law LLC** announced the relocation of their offices. The firm is located at 730 Peachtree St. NE, Suite 600, Atlanta, GA 30308; 678-365-4444; Fax 678-365-4450; [www.parksiplaw.com](http://www.parksiplaw.com).

## In Columbus

> **Whitney C. Johnson** joined **Page, Scrantom, Sprouse, Tucker & Ford, P.C.**, as an **associate**. She represents individuals and corporations in the areas of general corporate matters, taxation, acquisitions and dispositions of businesses, and estate planning and administration. The firm is located at 1111 Bay Ave., Third Floor, Columbus, GA 31901; 706-324-0251; Fax 706-243-0417; [www.columbusgalaw.com](http://www.columbusgalaw.com).

## In Macon

>    **James, Bates, Pope & Spivey, LLP**, announced the addition of **associates Doroteya N. Wozniak** and **Corrie E. Holton** to the firm's litigation practice and **Christopher E. Gilmore** to the commercial real estate and transactional practice. The firm is located at 231 Riverside Drive, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; [jamesbatesllp.com](http://jamesbatesllp.com).

## In Nashville, Tenn.

>  **Burr & Forman LLP** announced that **James M. McCarten** joined the firm as a **partner** in the Nashville office. McCarten brings more than 27 years of experience as a tax attorney, with particular focus on business succession planning and trusts and estates. The firm is located at 700 Two American Center, 3102 W. End Ave., Nashville, TN 37203; 615-724-3200; Fax 615-724-3290; [www.burr.com](http://www.burr.com).

## In Overland Park, Kansas

&gt;



**Lathrop & Gage LLP** announced the promotion of **A. Justin Poplin** to **partner** status. Poplin's practice focuses on transactional and litigated intellectual property matters, with emphasis on patent issues in a wide range of technologies. The office is located at 10851 Mastin Blvd., Suite 1000, Overland Park, KS; 913-451-5100; Fax 913-451-0875; [www.lathropgage.com](http://www.lathropgage.com).

## In Washington, D.C.

&gt;

The **U.S. International Trade Commission (USITC)** announced that **Hon. Thomas Bernard Pender** became an **administrative law judge**. Pender manages litigation, presides over evidentiary hearings and makes initial determinations in the agency's investigations involving unfair practices in import trade. Prior to joining the USITC, Pender served as an administrative law judge in the Office of Disability Adjudication and Review with the Social Security Administration in Richmond, Va. The USITC is

located at 500 E St. SW, Washington, DC 20436; 202-205-2000; [www.usitc.gov](http://www.usitc.gov).

## In Mexico City, Mexico

> **Littler Mendelson, P.C.**, joined with a prominent group of Mexican attorneys to open two offices in Mexico establishing the leading labor and employment specialty firm in the country, **Littler, De la Vega y Conde, S.C.** The office is located at Mario Pani 150, Col. Lomas de Santa Fe, Del. Cuajimalpa de Morelos, México D.F., C.P., 05300; +52 55 4738 4258; Fax +52 55 8000 7191; [www.littler.com](http://www.littler.com).

## In Monterrey, Mexico

> **Littler Mendelson, P.C.**, joined with a prominent group of Mexican attorneys to open two offices in Mexico establishing the leading labor and employment specialty firm in the country, **Littler, De la Vega y Conde, S.C.** The office is located at Blvd. Díaz Ordaz 140, Torre II, Piso 20, Col. Santa María, Monterrey, C.P., 64650; +52 81 8865 4340; Fax +52 81 8865 4839; [www.littler.com](http://www.littler.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](mailto:stephaniew@gabar.org).

# Partial Retainer

by Paula Frederick

"Mr. Sparks, I have already told you that I'm not going to take any action on your behalf until you pay the balance of my retainer," your associate says into the telephone. "Your Answer is due next week. If you want me to file it, I'm going to need that last \$500 before then. Otherwise, you're on your own," he finishes, hanging up with a satisfied smirk.

"What was that all about?" you ask.

"Just another one of those clients who thought he could get away with paying a partial retainer," your associate responds. "He put his divorce on layaway, just like a Christmas present at Sears. He's been paying me \$500 every few weeks, trying to work up to my \$5,000 retainer. Meanwhile, his wife filed first! He's got an answer due Friday and he still owes me \$500."

"So what are you going to do if he doesn't come up with the last \$500? Let the case go into default?"

"I explained from the get-go that I don't work for free," your associate announces. "If he can't afford me I don't want to take the case."

"Some would say you already have," you respond.

Nothing in the Georgia Rules of Professional Conduct prohibits a lawyer from accepting partial payment of a fee. That practice can actually be helpful for people who cannot afford to pay all at once, or who cannot manage to save the full retainer on their own.

But taking the position that representation does not start until the retainer is paid in full is another matter—one that can be risky.


At the very least, a person who makes a partial payment of a fee is a potential client to whom a lawyer owes certain obligations. Clearly the lawyer has an ongoing obligation to avoid conflicts with other potential clients. Since the partial payment is an unearned fee, the lawyer also has an obligation to promptly refund the money at the potential client's request.

The potential risk comes when the client claims he has relied on the lawyer to take action and has suffered



harm as a result. One common example is the client who appears at his preliminary hearing and tells the judge he has a lawyer. In reality, the lawyer has refused to enter an appearance until he collects the balance of the retainer. The client might miss a deadline while accumulating the fee, or might assume that the lawyer will protect the client's interests before the retainer is paid in full. A "layaway" situation can also drag on indefinitely and the delay might be harmful to the client's interests.

For your own protection, if you are holding a potential client's money you need to monitor their legal situation. If you are monitoring the situation you may as well admit that you are representing the client.

It might be easier to let the client save the retainer on his own. 



Paula Frederick is the general counsel for the State Bar of Georgia and can be reached at [paulaf@gabar.org](mailto:paulaf@gabar.org).





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# Discipline Summaries

(Oct. 15, 2011 - Dec. 14, 2011)

by Connie P. Henry

## Voluntary Surrender/Disbarments

### **Keesha Marie Brown**

Atlanta, Ga.

Admitted to Bar in 2005

On Oct. 17, 2011, the Supreme Court of Georgia disbarred Keesha Marie Brown (State Bar No. 088440). The Court addressed seven matters involving Brown. In the matter involving her conviction, while working as a public defender in 2008 Brown agreed with an inmate, who was not her client, to accept calls from him with the costs of the calls being routed to another number. In regard to the other matters, while working in private practice Brown abandoned six clients from whom she had accepted fees, accepted representations that required travel when she did not have reliable transportation, accepted one representation in which she had no competence or experience, moved out of state and did not withdraw from cases pending in court, failed to return the clients' files and failed to return unearned fees.

The special master considered in mitigation Brown's statements that she did not have adequate financial resources, she had traveled to Wisconsin to care for her ailing father and she experienced her own health issues. The special master also considered that Brown had no prior discipline and seemed remorseful. In aggravation of discipline, the special master noted the pattern of misconduct and the existence of multiple offenses.

The Court accepted the special master's findings but also found that Brown failed to take responsibility for her actions and blamed others for her errors in judgment. Considering the record as a whole, the multiple offenses, the seriousness of the offenses, the importance of protecting the public from attorneys who are not qualified to practice law due to incompetence and the need for public confidence in the profession, the Court determined disbarment to be the appropriate sanction.

### **David Michael Fuller**

Kennesaw, Ga.

Admitted to Bar in 1980

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of David Michael Fuller (State Bar No. 280100). On May

25, 2011, Fuller pled guilty in the Superior Court of Cobb County to four counts of forgery.

### **Paul T. Robinson**

Atlanta, Ga.

Admitted to Bar in 1974

On Nov. 7, 2011, the Supreme Court of Georgia disbarred Paul T. Robinson (State Bar No. 610675). The following facts are deemed admitted by default: Robinson became ineligible to practice law on Sept. 1, 2008, because of his failure to pay his State Bar dues. He was placed on suspension for not complying with continuing legal education requirements effective May 21, 2009, and was also placed on administrative suspension for a period of one year, effective July 29, 2009. Robinson represented a client in a real estate matter during the time he was suspended.

### **Douglas Liddell Kirkland**

Ocala, Fla.

Admitted to Bar in 1993

On Nov. 7, 2011, the Supreme Court of Georgia disbarred Douglas Liddell Kirkland (State Bar No. 423655). Kirkland was disbarred in Florida for making improper withdrawals from his attorney trust account, with the largest shortage amounting to approximately \$93,000. He also inappropriately filed trust accounting certificates showing compliance with the rules.

### **Karen P. Cleaver-Bascombe**

Baltimore, Md.

Admitted to Bar in 1995

On Nov. 7, 2011, the Supreme Court of Georgia disbarred Karen P. Cleaver-Bascombe (State Bar No. 129760). Cleaver-Bascombe was disbarred in the District of Columbia for submitting a fraudulent voucher seeking compensation for service she knew she had not rendered.

### **Antonio L. Toliver**

Decatur, Ga.

Admitted to Bar in 2001

On Nov. 30, 2011, the Supreme Court of Georgia accepted the petition for voluntary surrender of license



of Antonio L. Toliver (State Bar No. 714222). On Sept. 12, 2011, Toliver pled guilty in the Superior Court of Fulton County to one count of homicide by vehicle in the first degree and two counts of serious injury by vehicle, all of which are felony counts.

#### **Suzanne Marie Himes**

Ocala, Fla.

Admitted to Bar in 1990

On Nov. 30, 2011, the Supreme Court of Georgia disbarred Suzanne Marie Himes (State Bar No. 355601). The State Bar of Georgia filed a Notice of Reciprocal Discipline after Himes was disbarred in Florida for failure to cease the practice of law after her indefinite suspension from practice in Florida.

#### **Steven F. Freedman**

Atlanta, Ga.

Admitted to Bar in 1973

#### **Thomas C. Sinowski**

Atlanta, Ga.

Admitted to Bar in 1982

On Nov. 30, 2011, the Supreme Court of Georgia disbarred law partners Thomas C. Sinowski (State Bar No. 649126) and Steven F. Freedman (State Bar No. 275350). In approving a special master's report and a Review Panel's report in the consolidated case, the Supreme Court found the lawyers violated Standards 13 (paying others to secure clients) and 26 (sharing fees with non-lawyers) of Bar Rule 4-102 (d). The Supreme Court concluded the lawyers did not violate Standard 12 (soliciting clients through direct personal contact) because the lawyers did not personally solicit the clients, though the runners who they paid did. The Supreme Court concluded the lawyers should be disbarred because their scheme, which the court observed was highly organized and very lucrative, involved paying runners at least \$276,000 to solicit more than 1,300 clients. The Supreme Court also observed that the lawyers were motivated by greed and were not remorseful. Justice Nahmias was disqualified. Judge Kathlene F. Gosselin sat in for Justice Nahmias and concurred. Justice Hines and Justice Melton dissented.

## **Suspensions**

#### **Michael Boyd Seshul Jr.**

Atlanta, Ga.

Admitted to Bar in 2002

On Oct. 17, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Michael Boyd Seshul Jr. (State Bar No. 617061) and suspended him until March 31, 2013, with conditions for reinstatement. On March 31, 2009, Seshul entered a guilty plea in the Superior Court of Fulton County to one felony count of aggravated assault and one misdemeanor count of battery.



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**T**he Lawyer Assistance Program (LAP) provides free, 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. Through the LAP's 24-hour, 7-day-a-week confidential hotline number, Bar members are offered up to three clinical assessment and support sessions, per year, with a counselor during a 12-month period. All professionals are certified and licensed mental health providers and are able to respond to a wide range of issues. Clinical assessment and support sessions include the following:

- Thorough in-person interview with the attorney, family member(s) or other qualified person;
- Complete assessment of problems areas;
- Collection of supporting information from family members, friends and the LAP Committee, when necessary; and
- Verbal and written recommendations regarding counseling/treatment to the person receiving treatment.

## **2011-12 Lawyer Assistance Committee**

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*\*denotes non-attorney*

Seshul, angry with his then-girlfriend who had thrown a brick that struck him on the arm, picked up the brick and threw it at her, striking the woman's feet. He was given first offender treatment and received a five-year sentence, with one year commuted to time served and the balance to be served on probation. He was required to enter a specified program in Tennessee on June 1, 2009, and participate in the program for 90 consecutive days; to complete a family violence intervention program; and to pay \$827.20 in restitution. While enrolled in the Tennessee program, he received clinical and therapeutic treatment for chronic post-traumatic stress disorder, panic disorder and alcohol abuse.

In mitigation of discipline, the Court found that Seshul had no prior discipline; he experienced personal and emotional problems during the relevant time period; and he has taken rehabilitative steps. Prior to reinstatement, he must, between Dec. 31, 2012, and March 31, 2013, present certification from a psychiatrist or psychologist licensed to practice in Georgia that he has no mental or emotional health condition that would adversely affect his ability to practice law and provide the record of his discharge and exoneration to the March 31, 2009, plea or other proof of his completion of his probationary period.

#### **John R. Thompson**

Swainsboro, Ga.

Admitted to Bar in 1966

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of John R. Thompson (State Bar No. 708600) and suspended him pending an appeal of his criminal convictions. On July 14, 2011, Thompson was found guilty in the U.S. District Court for the Southern District to four felony counts of conspiracy, bank fraud, wire fraud and mail fraud.

## **Review Panel Reprimands**

#### **Benjamin Christopher Free**

Winder, Ga.

Admitted to Bar in 1995

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Benjamin Christopher Free (State Bar No. 275160) and ordered that he receive a Review Panel reprimand. In 2008 a client paid Free \$2,500 to represent him in a prosecution for driving under the influence of alcohol, drugs or other intoxicating substances. Thereafter, he would not return the client's phone calls and appeared two hours late for calendar call. The client terminated him and requested a refund of the fee and his file. He did not do so until after the client filed a grievance with the State Bar. In September 2011, he paid the client the \$1,250 awarded to him in a fee arbitration proceeding. Free stated that he was going through a divorce at the time, which negatively affected his handling of the case.

#### **Christopher David Elrod**

Gainesville, Ga.


Admitted to Bar in 1996

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Christopher David Elrod (State Bar No. 246640) and ordered that

he receive a Review Panel reprimand. A client paid Elrod \$4,500 to represent him in a divorce case. Elrod performed some work in the case but later became inaccessible. Elrod received a letter from another attorney advising that the client had retained her to represent him in the divorce, but she was unable to reach Elrod to arrange for substitution of counsel and he did not provide her with the client's file.

Elrod was cooperative with the State Bar and agreed to consult with the State Bar's Law Practice Management Program before Dec. 1, 2011, and to implement the recommended changes in his practice.

## **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 Oct. 15, 2011, five lawyers have been suspended for violating this Rule and three have been reinstated. 



**Connie P. Henry** is the clerk of the State Disciplinary Board and can be reached at [connieh@gabar.org](mailto:connieh@gabar.org).

**“He who is his own lawyer has a fool for his client.”**

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*An Attorney's Attorney*

# Helpful Reminder Tips and Apps

by Natalie R. Kelly

With ever-busy schedules and the continual quest for work-life balance, today's legal professionals often need special reminder tools and techniques to help keep organized. From writing down everything you need to utilizing tickler systems with automated pop-ups, below are some cool and useful tips and apps just to help you remember.

- **Siri**—You can add reminders to your iPhone 4s Reminder app just by simply asking Siri, the iPhone 4s voice-activated digital assistant, to remind you of something. The program confirms your reminder and when the reminder date and time arrives, your phone vibrates and displays a screen for you to either view or close the reminder.
- **Remember the Milk**—The online task system provides a free account to set up reminders for everything and easily makes sorting of tasks by priority settings, with breakout tabs for personal, study and work items. Remember the Milk is available in a free version or a \$25/year Pro version. The Pro account provides apps for Android, iPhone, iPad, via MilkSync for



Blackberry; and MilkSync for Microsoft Outlook.  
([www.rememberthemilk.com](http://www.rememberthemilk.com))




- Need a reminder to help find where you parked? Try apps like: Where Did I Park? (Android; free and a Premium version for \$1.85); VQ Car Finder (Blackberry, \$4.99, requires in-car Bluetooth charger for automatic location using Blackberry GPS); and G-Park and Where Did I Park My Car? (iPhone/iPad/iPod Touch; \$0.99 and \$1.99 respectively). Another practice is if you are in a smaller parking deck with only a few levels up, you can make it a rule to drive all the way to the top level. No more going from floor to floor to look for your vehicle; just go directly to the top floor. You can also jot down a quick note on your phone or notepad—or better yet, snap a quick picture of the location of your vehicle with your mobile device. If you think that's just too "low-tech," you can use Google Maps "Star" system to mark your exact location as a favorite.
- Still lost, but now just lost inside a big building? Google's latest locator app for Android devices is the Indoor Maps feature. You can actually mark locations from indoor floor plans of select buildings and airports. In the Atlanta area, indoor maps are available for Atlanta Hartsfield-Jackson International Airport and may be coming for select major retail stores like IKEA, Macy's and Home Depot.
- If you are in a location where you need to remember to take something with you at the end of the day, like leftovers from lunch or a coat or sweater, you can use your car keys as the reminder. You can't go anywhere without those. Just put keys in the refrigerator with the leftovers or the pocket of the sweater or coat to force their retrieval.
- Todoist and Wedoist are online project and task managers that can be used individually or in groups as the names suggest to make to-dos that remind you of

things. The service has built-in calendars and project and sub-project areas for task reminders. The service also features mobile apps, browser plug-ins and desktop widgets. ([www.todoist.com](http://www.todoist.com))

- Toodledo is another online to do list. The service features a Hotlist of important items that it automatically figures out from your input; filters for system lists; a scheduler that focuses on using available time; and alarms that come to you by email, text or tweet. The app is available for iOS, Android and Blackberry. ([www.toodledo.com](http://www.toodledo.com))
- Use the advanced reminders and to dos in practice management software to be reminded of tracking time for work you've completed; stay in touch with key clients; pull files for review; or to alert you of upcoming events and to dos. Because practice management software programs are designed to manage matter/case files in their entirety, the reminder functionality allows for master reminder lists as well as event-specific reminders just minutes before their occurrence. Outlook Calendar and Task list integration is also usually featured. Outlook has reminder functionality as well.
- BugMe! is one of the top iPhone/iPad reminder apps. This system creates a board of stickies that can be placed on your device home screen, Safari browser window or be sent to your wallpaper as a constant reminder. You can even pick ink and paper colors for the reminders. The app costs \$0.99.
- Most time billing and accounting packages can display reminders as soon as you enter the programs for items that are currently due or even overdue. You won't have to trust your memory for making sure you track time or pay bills on time.
- For reminders via email, give [www.followupthen.com](http://www.followupthen.com) a try. You simply use "To" or "BCC"

to send an email reminder to yourself or "CC" to schedule a reminder for you and another recipient. The service uses smart tags for date formatting for you to send an email that will prompt a reminder to be emailed to you later at the specified date and time. For example, if you send an email to [3weeks@followupthen.com](mailto:3weeks@followupthen.com), the service will send you an email in 3 weeks to cover whatever subject you put in the subject line and body of the email. The system only requires you to verify your email address and time zone to get started. The Premium version is \$24/year and allows you to include attachments, customize company logos and receive reminders via text message.

- Going to trial or out to make a presentation? Create a packing list or "punch list" for the items that are necessary for you to have. This checklist will ensure that you don't forget anything.

There are, of course, many other reminder systems out there for you to review and add to your productivity toolbox. Now, if only you can remember. 



**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](mailto:nataliek@gabar.org).

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# What is an Institute?

by Derrick W. Stanley

**T**here are many answers to the question. Merriam-Webster.com defines the first usage of institute as a noun: *a (1): an elementary principle recognized as authoritative (2)plural: a collection of such principles and precepts; especially: a legal compendium.* In the world of ICLE (the Institute of Continuing Legal Education) and Sections, we define an institute as a way to earn up to one year's worth of Continuing Legal Education credit with a means to network with peers.

Section program chairs spend many months planning institutes. They work with ICLE to develop an agenda and secure top speakers to deliver the programming. A variety of formats are used during the course of an institute. For instance, there may be panel discussions followed by keynote speakers followed by a video replay. Some sections even tie all the sessions together with a common theme for illustration. For many sections, this is the flagship pro-



gram of the year, providing cutting edge information on current topics as well as specific information on trends in the field. In addition to spending time learning about the profession, the institutes also offer social events that facilitate peer networking. From cocktail welcome receptions to awards ceremonies and tennis to golf tournaments, there is always time to enjoy the destination location. The programs are usually held in cities that provide a host of entertainment options such as St. Simons, Amelia Island, Destin and Savannah. There are even opportunities to leave the county or take a cruise. Or you may stay close to home and experience a program at the Bar Center.


As a member of a particular section, you will receive a notification of the institute before it is marketed to the general membership of the Bar. This ensures you will be able to secure a hotel room at the venue as many properties sell out. Attendance is not limited to section members and is offered on a first come, first served basis. Many attorneys who practice across several areas will attend multiple institutes to stay abreast of changes. The institutes also offer attorneys who are looking to expand or change their area of practice a way to learn a good bit of information very quick-

Section	Typical Month
Estate Planning (Fiduciary Law)	February
Real Property Law	May
Family Law	May
General Practice and Trial Law	March
Fiduciary Law	July
City and County Attorneys (Local Government Law)	September
Insurance Law Institute (Tort and Insurance Practice)	September
Business Law	October
Workers' Compensation Law	October
Entertainment and Sports Law/IP	November
Corporate Counsel Law	December

ly, while developing relationships with other practitioners.

Institutes are planned throughout the year. The table above lists the sections that currently host institutes and the months they are scheduled. ICLE does have other institutes that are not sponsored by the sections. They can be located by going to [iclega.org/programs/institute.html](http://iclega.org/programs/institute.html). Here you will find brochures for the available institutes and an opportunity to register. Be sure to download the PDF versions of the brochures as they outline any extracurricular activities that may be taking place.

The institutes that are co-sponsored by ICLE and sections pro-

vide members an opportunity to gain large amounts of topical information about the practice of law in a short period of time. The quality of the programming is some of the best around, and with ICLE's assistance, the institutes have developed quite a following as participants know they are the premier educational programs to attend. 



**Derrick W. Stanley** is the section liaison for the State Bar of Georgia and can be reached at [derricks@gabar.org](mailto:derricks@gabar.org).

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# Fastcase: Thinking Outside of the Box

by Sheila Baldwin

**A**s we approach our first anniversary with Fastcase Legal Research, those who have taken advantage of this member benefit will testify that the smart design makes research faster and simpler. Fastcase has developed unique research tools that make your work simpler, smarter and more effective. Many users become familiar with basic caselaw searching, but may not be taking full advantage of the features of Fastcase. This article will discuss ways that researchers can think outside of the box to make better use of Fastcase.


*Use the Interactive Timeline to best advantage.* The powerful sorting algorithms bring many pieces of information to your attention in one or two clicks, displaying the best results to the top of the list. The interactive timeline gives users the advantage of “stepping back” to see the big picture and then hone in on the most relevant information. One can see legal topics in their historical context while at the same time see the most highly cited cases that are both recent and relevant. Searching *evidence and (roadblock\* or sobriety checkpoint\*)* in Georgia, one can see the majority of cases are from 1990 through the present. The most highly cited recent and relevant case is clearly seen; it is the largest gold circle on the vertical axis (set to show relevancy) and toward the right side of the screen, *Baker v. State*, a 2001 case (see fig. 1). Using the drop down tool under “show” you are able to narrow to the top five, ten or 25 cases sorted by “cited in these results” to focus on the cases that will be of most help.

*Dynamic link saves time.* Later, if you want to recreate this search, go to Search>My Research Home and click on the search in the center column. The dynamic link will present the results from the original search as well as any new results. Keep in mind that the list holds up

to the 10 most recent searches. If this is a search you intend to run later you may want to copy the link into a Word document or an email for later retrieval as it will “disappear” from the list in time.

*Create an annotated list using the Code in “searching cases.”* To pull a list of cases that refer to a Code section, enter the Code number in the case search field using Georgia as the jurisdiction. In searching 19-9-3, a list of 111 cases show up in the results (see fig. 2). It is not necessary to enter the O.C.G.A portion of the statute. You can enter the Code in quick caselaw search, Boolean (keyword) or Citation to pull all 111 cases.

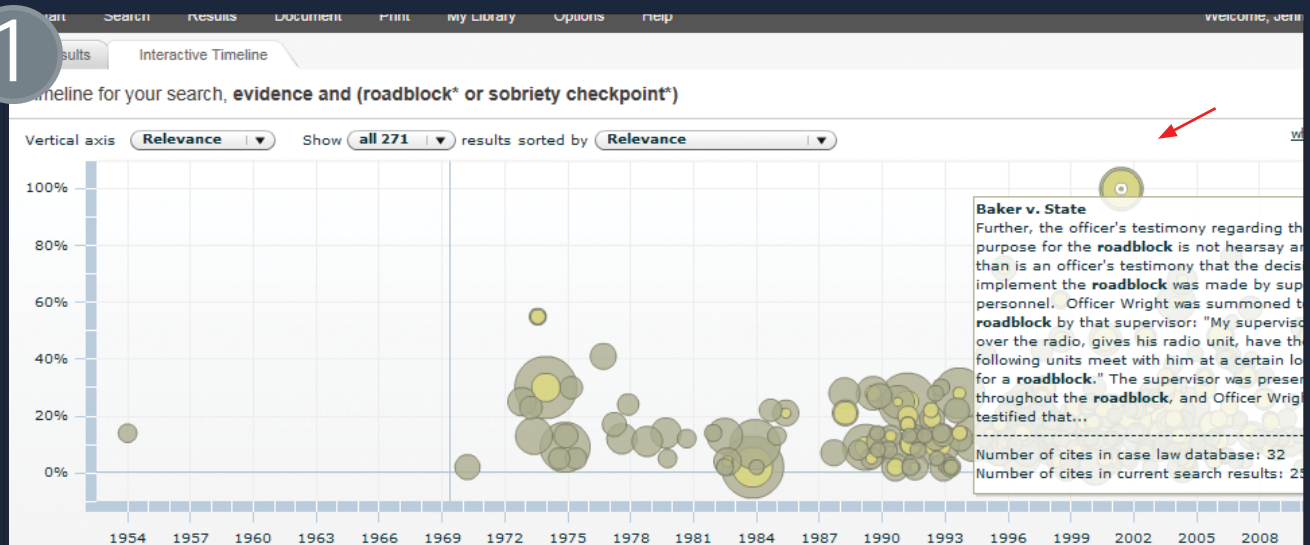
*Search names of parties in preparation for trial.* You may enter the name of an attorney or a judge in the caselaw search field to find cases to which they were party. Perhaps you have an upcoming case and want to see how a judge has ruled on issues or you want to get an idea of how many times an attorney has tried cases in a particular jurisdiction. Enter the full name in the search field in either Boolean (keyword) or citation mode using the parameter filter of w/3 or enclosing the name in quotation marks. Example: enter the following query, *Judge /3 Phipps and fourth /3 amendment and reversed* with GA as the jurisdiction in Boolean (keyword) to find 29 cases (See fig. 3).

Each month our members have access to CLE-approved training on Fastcase. We offer Fastcase overview classes at the State Bar offices in Atlanta, Tifton or Savannah, at local bar association meetings or law firms. Many attorneys have expressed interest in training geared specifically to Boolean (keyword) searching in Fastcase. Natural language searching may seem easier but it is not usually the best approach. Fastcase has developed a webinar written by one of their leading attorneys, Christine Steinbrecker Jack, to provide this option. It’s a free one hour CLE-approved training that can be taken from home or office. For information on upcoming training opportunities, please check the website under “Bar News & Events” or contact Sheila Baldwin at sheilab@gabar.org or 404-526-8618. 



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

1



2

Case Summaries

Jurisdiction: All Jurisdictions | 1 to 20 of 111 results | Print List of Results | Print/Save Documents in Queue

Relevance	Case	Decision Date	Authority Check
87%	1. <a href="#">Finklea v. Finklea (Ga., 2012)</a> OCGA § 19-9-3 (a) (3) (P) says that in determining the best interest of the child in a custody dispute between parents, a trial court "may consider any relevant factor, including but not limited to: . . . (P) Any evidence of family violence or sexual, mental, or physical child abuse or criminal history of either parent." OCGA § 19-9-3 (a) (4) says that in child custody cases "in which the judge has made a finding of family violence," the judge shall consider certain factors such as...	January 9, 2012	0
58%	2. <a href="#">Curtice v. Harwell (Ga. App., 2011)</a> A trial court hearing the issue of child custody in a dispute between the child's parents has the duty "to exercise discretion to look to and determine solely what is for the best interest of the child and what will best promote the child's welfare and happiness." OCGA § 19-9-3 (a) (2). The trial court may consider any relevant factor in determining the child's best interest. See OCGA § 19-9-3 (a) (3) (providing nonexclusive list of factors for consideration in best interest...	December 8, 2011	0
11%	3. <a href="#">Rowden v. Rowden (Ga., 2011)</a> (Punctuation omitted.) LaFont v. Rouviere, 283 Ga. 60, 62 (2) (656 SE2d 522) (2008). See also OCGA § 19-9-3...	November 7, 2011	0
19%	4. <a href="#">Caldwell v. Meadows (Ga. App., 2011)</a> 2. Caldwell next asserts that the trial court erred "by conducting the custody phase of the bench trial using an erroneous legal theory that limited evidence of the father's personal background to matters that only related to children, eliminating their right to inquire into...	October 14, 2011	0

3

Interactive Timeline

Jurisdiction: All Jurisdictions | 1 to 20 of 29 results | Print List of Results | Print/Save Documents in Queue

Relevance	Case	Decision Date	Authority Check
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100%	1. <a href="#">Wilson v. State, 271 Ga. App. 359, 609 S.E.2d 703 (Ga. App., 2005)</a> <b>PHIPPS</b> ,...	January 21, 2005	0
100%	2. <a href="#">Lyons v. State, 258 Ga. App. 9, 572 S.E.2d 632 (Ga. App., 2002)</a> Because Grant's affidavit contained insufficient information to allow a finding of probable cause to search the apartment, the trial court erred in denying Lyons's motion to suppress. Lyons's convictions of trafficking in cocaine and using a communication facility to commit a crime must be <b>reversed</b> , because these convictions were wholly dependent on the evidence which should have been suppressed. Lyons's convictions of selling cocaine, although not directly dependent on the subject evidence,...	September 6, 2002	0
90%	3. <a href="#">Johnson v. State, 665 S.E.2d 431, 292 Ga. App. 752 (Ga. App., 2008)</a> I further note that there are at least two cases from this Court from which it may be inferred that an officer who sees contraband in plain view may then seize the contraband even if it requires entry into an area otherwise protected by the <b>Fourth Amendment</b> . Specifically, in both <i>Pickens v. State</i> 17 and <i>Willis v. State</i> , 18 we found that a police officer was entitled to seize contraband located inside a motel room that he saw from his vantage point at the door. We failed to analyze whether...	July 16, 2008	0

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# To Fee For Services Rendered

by Karen J. Sneddon

**A**h, the old days when, we've heard, a lawyer would send a piece of paper to the client with the five words "to fee for services rendered" and a dollar amount. Just a few days later, the lawyer would receive a check. No questions asked.

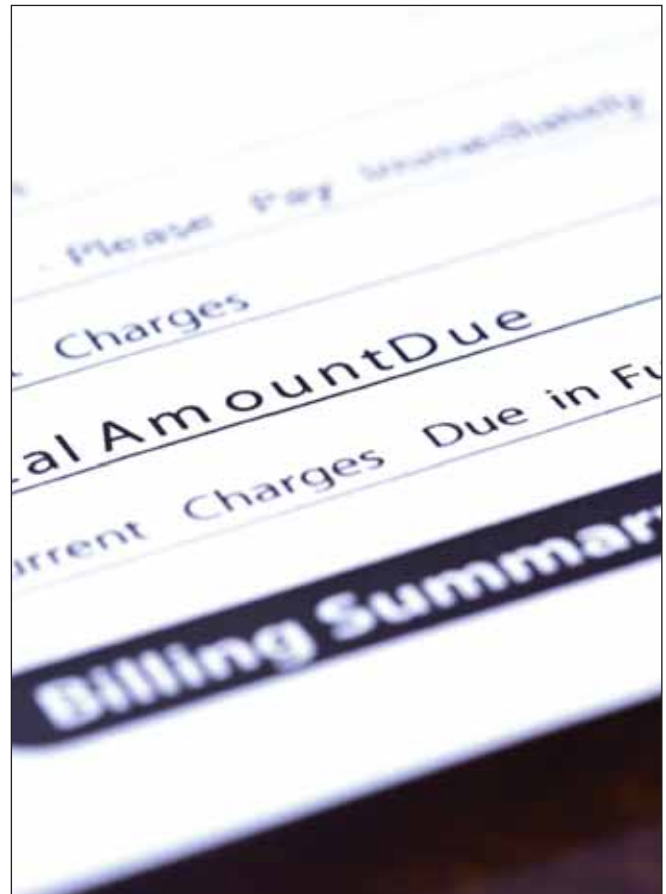
How times have changed. Today, clients pore over fee statements closely, checking for duplication, waste and other inefficiencies. Likewise, in determining attorneys' fees awards in litigation, courts are more frequently rejecting "block billing," non-contemporaneous time entries and amorphous descriptions. A fee statement is more likely to be challenged and reduced if it does not easily convey to the reader that the work performed furthered the client's goals and was efficiently performed.

As a result of these factors and general bad economic times, the content and phrasing of fee statements has become much more important. This "Writing Matters" shows how persuasive writing techniques can be used to make time entries more informative, producing fee statements more likely to please a client or a court.

## Tell the Client How Your Work Furthered the Client's Goals

A client who understands not just what was done, but why, is more likely to grasp the reasonableness of the fee. The client will recognize that the lawyers were focused on the client's needs.

A time entry that states, "researched summary judgment motion" may be accurate, but it is not persuasive. The client might wonder why this was necessary. So tell the client. Why did this further the goals of the



representation? Transform the entry to the following: "researched whether statute of limitations barred plaintiff's claim, for potential summary judgment motion." This more completely explains not just what research was done, but how the research actually benefited the client. Likewise, "telephone conference with opposing counsel" is much less informative (and hence much less persuasive) than "consulted with opposing counsel to avoid preparation and filing of motion for summary judgment on limitations."



## Avoid Phrasing That Creates the Impression of Inefficiency

In these days of multitasking and economic pressures, everyone favors efficiency. Avoiding even the impression of inefficiency is therefore important. Several practices can lead clients to suspect that a lawyer was inefficient.

One arises in drafting documents. Often, of course, it is efficient for an inexperienced lawyer to draft the first version of a document and then for a more experienced lawyer to revise and improve it. The time entries that correspond to this work may bear duplicate entries for two attorneys with the cryptic phrasing “drafted document,” or, worse, “worked on document.” Those time entries do not inform the reader that the lawyers worked efficiently, dividing the work among an inexperienced lawyer (who brings a potentially fresh perspective and a lower billing rate) and an experienced lawyer (who brings the seasoned perspective, but a higher billing rate). So, convert the seemingly duplicated cryptic entries to a sequence of entries. A time entry from the young lawyer could read, “prepared first draft of the complaint” coupled with a time entry from the senior lawyer stating “revised and completed the complaint for filing.” Both entries are truthful and avoid creating the wrong impression.

Likewise, at times it’s necessary for more than one lawyer to attend a deposition, a closing or a hearing. A description from both lawyers simply stating “attended hearing” or “attention to closing” is likely to be perceived as duplicative. So, for example, each lawyer should include descriptive terms explaining why she was present. For example, one lawyer might enter the following description: “attended hearing on motion to dismiss for lack of personal jurisdiction to assist Ms. Smith with documents and witnesses.” The other lawyer’s entry might

state, “Argued motion to dismiss for lack of personal jurisdiction, including presentation of documents and witnesses.”

A special risk for perceived duplication arises when one lawyer “talks to” another lawyer in the same firm. An entry that one lawyer talked to another lawyer reeks of duplication. In our experience, clients are particularly suspicious of intra-firm consultations. An entry that demonstrates that, rather than being inefficient or a justification of water cooler conversation, the consultation benefited the client would likely be more welcomed. Hence, if a younger lawyer had an office conference with another lawyer in the firm, the entry might state, “Consulted with Ms. Smith of our appellate practice group regarding strategy for ordering arguments in appellate brief.”

A final form of this perceived inefficiency is more substantive, but it is important to discuss it here because its use increases the likelihood of client suspicion. The appearance of inefficiency can arise when a lawyer bills short amounts of time spread out over several days on a single task. For example, a lawyer may bill “researched statute of limitations” for a tenth of an hour Monday, two-tenths on Tuesday, a half hour on Thursday. Lawyers should do their best to avoid this practice for two reasons: first, working in such short blocks of time on a single task may actually be inefficient and, second, even if efficient, it may lead many clients to more closely examine all other time entries.

## Avoid Block Entries, or at Least Be Detailed About Them

Some clients may not question an entry of six hours for “research regarding summary judgment motion.”<sup>1</sup> Nevertheless, very few will challenge a time entry that breaks out the issues further, stating for example:


6 hrs. Researched statute of limitations, personal jurisdiction, pleading requirements under Rule 9(b) and applicability of Pennsylvania law to the contract-in-dispute.

Being more specific can show the block of time was well spent on the law that is critical to the particular representation.

## Use Strong, Active Verbs

Which would you rather pay for, a lawyer who gave “attention” to a brief or a lawyer who “drafted” or “revised” the brief? Verbs that indicate activity are more persuasive. Active verbs help the client visualize the action. Avoid non-descriptive verbs, such as “reviewed,” “attention to,” “worked on” and the like. Use the active voice, and words such as “analyzed,” “drafted,” “edited” and other concrete, active verbs.

## Conclusion

An informed client is usually a happy client. We hope that this installment of “Writing Matters” will allow you to better explain to your client why you should be paid for the excellent work that you perform for your client. 



**Karen J. Sneddon** is an associate professor at Mercer Law School and teaches in the Legal Writing Program.

## Endnote

1. In disputes to recover attorney fees, courts often reduce fee requests that include block billing or discourage it in other ways. *E.g., Farfaras v. Citizens Bank & Trust of Chicago*, 433 F.3d 558, 569 (7th Cir. 2006) (affirming a reduction of 15% of fees, stating that “[a]lthough block billing does not provide the best possible description of attorneys’ fees, it is not a prohibited practice.”).

# Today's Committee on Professionalism

by Avarita L. Hanson

To maintain the highest levels of professionalism, the State Bar of Georgia maintains a committee on professionalism in addition to supporting the Chief Justice's Commission on Professionalism (CJCP). The Committee on Professionalism's charge, as posted on the State Bar's website, [www.gabar.org](http://www.gabar.org), is as follows:

This program committee shall consider and make recommendations to the Executive Committee and Board of Governors necessary to advance professionalism in the practice of law. It shall concern itself with the various facets of professionalism including knowledge, technical skill, integrity in relations with both clients and the courts, dedication to the law and public good, and ultimately the providing of competent legal services to the public.

The committee has developed several programs including: 1) Annual Law School Professionalism Orientation Programs; 2) Law Day activities for local, circuit and specialty bar associations; 3) Take Your Adversary to Lunch Program; and 4) Creative Connections. The committee works with CJCP staff to achieve their goals.

The Annual Law School Orientations on Professionalism program has a Hypothetical



Hon. Donald R. Donovan, Paulding County district attorney, serves as chair of the Committee on Professionalism.

Subcommittee that reviews the program materials for relevance and currency. As necessary, the subcommittee proposes new hypothetical information and



U.S. Department of Homeland Security Attorney C. Joy Lampley Fortson currently serves as vice-chair of the Committee on Professionalism.

modifies the program utilizing feedback from students and group leaders. Committee members welcome suggestions for new professionalism hypothetical problems.

Hon. Donald R. Donovan, Paulding County district attorney, has committed himself to the leadership of this committee for many years, including serving six years as chair. He encourages its members to develop program ideas and recruits volunteers to serve as group leaders and speakers for the orientation programs. He attends related meetings where he learns about new professionalism initiatives and shares his experiences. "I am involved in nothing so rewarding—or as important—as the professionalism movement begun nearly 20 years ago by our Bar's leaders. Our society has grown more and more litigious and unfortunately our Bar members have grown less willing to recall what it means to be a professional. I'm dedicated to and willing to put forth whatever effort necessary to promote professionalism in the State Bar of Georgia," Donovan said. He also stated he hopes the programs and ideas the committee has fostered over the years will continue to have an impact on the Bar.

U.S. Department of Homeland Security Attorney C. Joy Lampley Fortson currently serves as vice-chair of the committee. She has been managing and disseminating information to bar associations across the state to support Law Day activities. Local bars provide their information to the Law Day Subcommittee that in turn is posted on the Georgia map on the American Bar Association's website, [www.lawday.org](http://www.lawday.org), bringing attention to the projects and activities Georgia attorneys do to commemorate Law Day.

"Serving on the Committee on Professionalism," says Fortson, "ranks as one of the most important ways that I serve within the legal community because the committee has the unique opportunity to help shape perceptions of lawyers amongst law students, practicing attorneys and the public. We take our work seriously because we know that if we consistently and conscientiously utilize various methods of encouraging professionalism and integrity, then we can truly effect change in our profession."

Currently, committee members are from all parts of Georgia, representing the diversity of the State Bar. They include: David W. Adams (Atlanta); Fred V. Bauerlein (Marietta); Jennifer Blackburn (Atlanta); Joshua I. Bosin (Atlanta); Dean C. Bucci (Dallas); David Scott Crawford (Atlanta); Elizabeth L. Fite (Atlanta); Amanda J. Hanson (Alpharetta); Nicole G. Iannarone (Atlanta); Steven J. Messinger (Dallas); Denise A. Miller (Atlanta); William H. Pinson Jr. (Savannah); Prof. Alex Reed (Athens); Leah Fallin Sumner (Newnan); Gwendolyn S. Fortson Waring (Savannah); Erica L. Woodford (Macon); and Ruth W. Woodling (Atlanta).

The committee is also supported by Steven A. Moulds (Atlanta), who represents the YLD Ethics & Professionalism Committee and Jonathan A. Pannell (Savannah), the State Bar Executive Committee's

liaison. Advisors to the committee represent lay persons, Georgia law schools and other related entities. These include State Rep. Kathy Ashe; Associate Dean A. James Elliott (Emory University School of Law); Dean Sheryl E. Harrison (Atlanta's John Marshall Law School); Prof. Patrick E. Longan (Walter F. George School of Law at Mercer University); Associate Dean Roy Sobelson (Georgia State University College of Law); Doug Ashworth (Associate Director of ICLE); and Charles C. Olson (Prosecuting Attorneys' Council of Georgia).

The Committee on Professionalism welcomes suggestions from the bench and bar for activities and programs. Please feel free to contact them at [professionalism@cjcpga.org](mailto:professionalism@cjcpga.org) or 404-225-5040. 



**Avarita L. Hanson** is the executive director of the Chief Justice's Commission on Professionalism and can be reached at [Ahanson@cjcpga.org](mailto:Ahanson@cjcpga.org).

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## In Memoriam

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

**William A. Alexander**  
Chattanooga, Tenn.  
Atlanta Law School (1975)  
Admitted 1977  
Died October 2011

**Theodore E. Barner**  
Roswell, Ga.  
Atlanta Law School (1975)  
Admitted 1975  
Died January 2012

**David Jeremy Bederman**  
Atlanta, Ga.  
University of Virginia School  
of Law (1987)  
Admitted 1987  
Died December 2011

**Meshell Anne Bell**  
Saint Louis, Mo.  
University of Texas School of Law  
(1997)  
Admitted 2009  
Died December 2011

**Robert H. Brinson Jr.**  
Atlanta, Ga.  
Emory University School of Law  
(1949)  
Admitted 1946  
Died December 2011

**Thomas Garrett Brooks**  
Tallahassee, Fla.  
Atlanta Law School (1951)  
Admitted 1951  
Died December 2011

**Barbara Shapiro Brown**  
Atlanta, Ga.  
Emory University School of Law  
(1988)  
Admitted 1990  
Died September 2011

**Ellis Ray Brown**  
Hartwell, Ga.  
Atlanta's John Marshall Law  
School (1957)  
Admitted 1959  
Died December 2011

**Charles A. Coffin**  
Columbus, Ga.  
Cumberland School of Law  
at Samford University (1970)  
Admitted 1974  
Died December 2011

**George Christopher Gleason**  
Albany, N.Y.  
Seton Hall University Law School  
(2000)  
Admitted 2005  
Died November 2011

**William D. Healan Jr.**  
Winder, Ga.  
University of Georgia School  
of Law (1975)  
Admitted 1975  
Died December 2011

**Richard D. Heller**  
Fort Lauderdale, Fla.  
Indiana University Maurer School  
of Law (1975)  
Admitted 1983  
Died July 2011

**John D. Jones**  
Atlanta, Ga.  
Emory University School of Law  
(1957)  
Admitted 1957  
Died August 2011

**John Henry Land**  
Columbus, Ga.  
University of Georgia School  
of Law (1939)  
Admitted 1939  
Died November 2011

**Preston B. Lewis Jr.**  
Waynesboro, Ga.  
University of Georgia School  
of Law (1958)  
Admitted 1958  
Died December 2011

**Jack F. Peace**  
Marietta, Ga.  
Cumberland School of Law  
at Samford University (1951)  
Admitted 1974  
Died December 2011

**Barry Phillips**  
Atlanta, Ga.  
University of Georgia School  
of Law (1954)  
Admitted 1951  
Died January 2012

**Glenda Faye Purham-Brown**  
Bellaire, Texas  
Atlanta Law School (1991)  
Admitted 1991  
Died April 2011

**Alfred A. Quillian**  
Winder, Ga.  
University of Georgia School  
of Law (1951)  
Admitted 1951  
Died December 2011

**Dean Edwin Rice**  
Atlanta, Ga.  
University of Kentucky College  
of Law (1969)  
Admitted 1974  
Died December 2011

**Richard A. Rominger**  
Savannah, Ga.  
Emory University School of Law  
(1971)  
Admitted 1971  
Died December 2011

**Annie Ruth Simmons**  
Atlanta, Ga.  
Woodrow Wilson College of Law  
(1979)  
Admitted 1980  
Died December 2011

**W. Woodrow Stewart**  
Gainesville, Ga.  
Tulane University Law School  
(1966)  
Admitted 1967  
Died January 2012

**John R. Trapnell**  
Atlanta, Ga.  
Emory University School of Law  
(1965)  
Admitted 1966  
Died December 2011

**G. Stuart Watson**  
Albany, Ga.  
Emory University School of Law  
(1947)  
Admitted 1947  
Died December 2011



**David J. Bederman, K. H. Gyr Professor of Private International Law at Emory University School of Law**, died in December 2011. Born and raised in Atlanta, Bederman was a true son of the new South. After graduating from The Paideia School, he attended Princeton University, the London School of Economics, University of Virginia School of Law and The Hague Academy of International Law. Bederman returned home to Atlanta in 1991 to teach at Emory until his death in 2011. During his 20 years at Emory, Bederman taught courses and seminars on international law, torts, admiralty, international institutions, law of international common spaces, legal methods, legislation and regula-

tion, customary law, international environmental law and foreign relations power. He served as advisor to the *Emory International Law Review* and was director of international legal studies. He established the Supreme Court Advocacy Project at the law school, and was also an associated faculty member of the Center for the Study of Law and Religion.

Recognizing his extraordinary breadth as a scholar, author, legal historian, beloved teacher and expert litigator, Emory University School of Law established the David J. Bederman Distinguished Lecture, along with a summer fellowship at The Hague Academy of International Law, in honor of Bederman's career and accomplishments.

Bederman's mind was a storehouse of knowledge on legal history, constitutional law, admiralty and international law. He coupled that knowledge with a distinct capacity and passion to explore challenging legal questions ranging from how custom provides the basis for modern law to who owns the personal artifacts of the H.M.S. Titanic.

Bederman's defense of Premier Exhibitions, an Atlanta company that held the salvage rights to the Titanic, helped him become one of a handful of lawyers in the world who could navigate the arcane legal realm surrounding shipwrecks. While he turned down the chance to see the Titanic wreckage in person, he was honored for his work on this and related admiralty cases by receiving a Mel Fisher Lifetime Achievement Award in Key West.

In 2006, Bederman joined the board of Odyssey Marine Exploration Inc., which conducts extensive search and archaeological recovery operations on deep-ocean shipwrecks around the world. Last year he became its chairman. Bederman had a passion for the company's mission: to discover and share the riches of the ocean.

Bederman was counsel of record in 52 cases in the U.S. Courts of Appeals, and he argued four cases


before the U.S. Supreme Court. His first case before the U.S. Supreme Court involved torts liability standards in the Antarctic.



**Major ( Ret. ) Charles Alston Coffin** died in December 2011. Born on June 7, 1945, Coffin was the son of Charles Alston Coffin and Alice

Walker Coffin of Richland, Ga. Coffin attended the University of Georgia where he was a member of the Sigma Nu fraternity and earned his J.D. degree from Cumberland School of Law at Samford University in Birmingham, Ala. At the time of his graduation, he was the youngest graduate in the history of the law school.

After practicing law in Alabama and Georgia for a number of years, he entered the Judge Advocate General's Corps of the U.S. Army. A highly successful criminal trial lawyer and prosecutor, his work resulted in many felony convictions, including murder.

Coffin was a devoted husband and father who served as a deacon in the First Presbyterian Church of Columbus. With a passion for history, he developed a detailed knowledge of his own Coffin family who left England in the 17th century to become one of the original families to settle Nantucket Island, Mass. This family helped initiate the whaling industry and played a major role in early American maritime commerce. 

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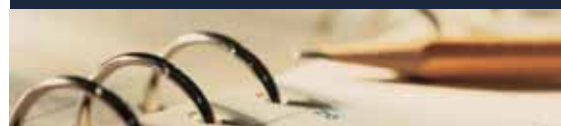
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## February-April

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<b>FEB 10</b>	ICLE <i>Residential Real Estate</i> Statewide Satellite Broadcast See <a href="http://www.iclega.org">www.iclega.org</a> for locations 6 CLE Hours	<b>FEB 16-18</b>	ICLE <i>Winter Tropical Seminar</i> Grand Cayman Island See <a href="http://www.iclega.org">www.iclega.org</a> for location 12 CLE Hours
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<b>FEB 10</b>	Atlanta Bar Association <i>Family Law</i> 6 CLE Hours	<b>FEB 17</b>	ICLE <i>Banking and Finance Law</i> Statewide Satellite Broadcast See <a href="http://www.iclega.org">www.iclega.org</a> for locations 6 CLE Hours
<b>FEB 10-11</b>	ICLE <i>Estate Planning Institute</i> Athens, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 9 CLE Hours	<b>FEB 22</b>	ICLE <i>Negotiated Corporate Acquisitions</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours
<b>FEB 13</b>	Atlanta Bar Association <i>Managing Wage &amp; Hour Risks</i> Live webcast 6 CLE Hours	<b>FEB 22</b>	Atlanta Bar Association <i>Ethics for Corporate Counsel</i> Live webcast 3 CLE Hours
<b>FEB 16</b>	ICLE <i>Health Law and the CDC</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 3 CLE Hours	<b>FEB 23</b>	ICLE <i>Advanced Debt Collection</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours

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**FEB 23** ICLE  
*Banking and Finance Law*  
Statewide Satellite Rebroadcast  
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6 CLE Hours

**FEB 24** ICLE  
*American Constitution Society*  
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2 CLE Hours

**FEB 24** ICLE  
*Criminal Practice*  
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6 CLE Hours

**FEB 24** ICLE  
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6 CLE Hours

**FEB 24** Atlanta Bar Association  
*Advanced Workers' Compensation*  
6 CLE Hours

**FEB 25** ICLE  
*Bar Media & Judiciary Conference*  
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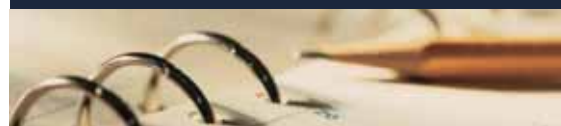
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3 CLE Hours

**MAR 1** ICLE  
*Proving Damages*  
Atlanta, Ga.  
See [www.iclega.org](http://www.iclega.org) for location  
6 CLE Hours

## February-April

<b>MAR 1</b>	Atlanta Bar Association <i>Basic Immigration Law</i> Live webcast 6 CLE Hours	<b>MAR 7</b>	Atlanta Bar Association <i>Grandparent/Relative Caregiver Project</i> Part of Pro Bono March Madness 3 CLE Hours
<b>MAR 2</b>	ICLE <i>Product Liability</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours	<b>MAR 8</b>	ICLE <i>Nuts &amp; Bolts of Local Government Law</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours
<b>MAR 2</b>	ICLE <i>Fundamentals of Health Care Law</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours	<b>MAR 8</b>	ICLE <i>Entertainment Law Boot Camp</i> (Tentative) Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 3 CLE Hours
<b>MAR 2</b>	ICLE <i>Clarence Darrow—Crimes, Causes and the Courtroom (Replay)</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours	<b>MAR 8</b>	ICLE <i>Theory to Verdict</i> Statewide Satellite Rebroadcast See <a href="http://www.iclega.org">www.iclega.org</a> for locations 6 CLE Hours
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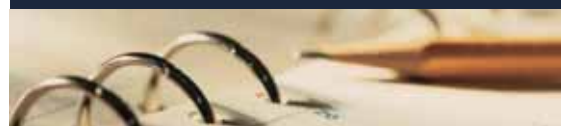
<b>MAR 12</b>	Atlanta Bar Association <i>Wills &amp; Advance Directives Project</i> Part of Pro Bono March Madness 3.5 CLE Hours	<b>MAR 15</b>	ICLE <i>Workers' Compensation for the General Practitioner</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours
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## February-April

<b>MAR 16</b>	ICLE <i>MBA Concepts for Lawyers</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours	<b>MAR 21</b>	Atlanta Bar Association <i>Les Misérables Meets Collateral Consequences</i> Part of Pro Bono March Madness 1 CLE Hours
<b>MAR 19</b>	Atlanta Bar Association <i>The Saturday Lawyer Program</i> Part of Pro Bono March Madness 7 CLE Hours	<b>MAR 22</b>	ICLE <i>Trial and Error</i> Statewide Satellite Rebroadcast See <a href="http://www.iclega.org">www.iclega.org</a> for locations 6 CLE Hours
<b>MAR 19</b>	Atlanta Bar Association <i>Guardian ad Litem</i> Part of Pro Bono March Madness 7 CLE Hours	<b>MAR 22</b>	ICLE <i>Georgia Law of Torts</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours
<b>MAR 19</b>	Atlanta Bar Association <i>One Child, One Lawyer</i> Part of Pro Bono March Madness 6 CLE Hours	<b>MAR 23</b>	ICLE <i>Jury Trial (from 1/20/12)</i> Statewide Satellite Rebroadcast See <a href="http://www.iclega.org">www.iclega.org</a> for location 6 CLE Hours
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<b>MAR 21</b>	Atlanta Bar Association <i>Heir Property in Georgia</i> Part of Pro Bono March Madness 3 CLE Hours	<b>MAR 26</b>	Atlanta Bar Association <i>Part of Pro Bono March Madness</i> The Asylum Project 4 CLE Hours

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## Formal Advisory Opinion Issued Pursuant to Rule 4-403(d)

The second publication of this opinion appeared in the December 2010 issue of the *Georgia Bar Journal*, which was mailed to the members of the State Bar of Georgia on or about Dec. 14, 2010. The opinion was filed with the Supreme Court of Georgia on Jan. 18, 2011. The State Bar of Georgia and the requestor each filed a Petition for Discretionary Review with the Supreme Court of Georgia pursuant to Rule 4-403(d), which the Supreme Court granted on March 3, 2011. On January 9, 2012, the Supreme Court of Georgia issued an Order approving Formal Advisory Opinion No. 10-2. Following is the full text of the opinion. 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.

**FORMAL ADVISORY OPINION NO. 10-2**  
**Approved And Issued On January 9, 2012**  
**Pursuant to Bar Rule 4-403**  
**By Order of The Supreme Court of Georgia**  
**Supreme Court Docket No. S11U0730**

### QUESTION PRESENTED:

May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child's objection?

### SUMMARY ANSWER:

When it becomes clear that there is an irreconcilable conflict between the child's wishes and the attorney's considered opinion of the child's best interests, the attorney must withdraw from his or her role as the child's guardian ad litem.

### OPINION:

#### Relevant Rules

This question squarely implicates several of Georgia's Rules of Professional Conduct, particularly, Rule 1.14. Rule 1.14, dealing with an attorney's ethical duties towards a child or other client with a disability, provides that "the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." Comment 1 to Rule 1.14 goes on to note that "children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody."<sup>1</sup>

This question also involves Rule 1.2, Scope of Representation, and Rule 1.7, governing conflicts of interest.<sup>2</sup> Comment 4 to Rule 1.7 indicates that "[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."<sup>3</sup>

Finally, this situation implicates Rule 3.7, the lawyer as a witness, to the extent that the guardian ad litem must testify and may need to advise the court of the conflict between the child's expressed wishes and what he deems the best interests of the child. Similarly, Rule 1.6, Confidentiality of Information, may also be violated if the attorney presents the disagreement to the Court.

#### Statutory Background

Georgia law requires the appointment of an attorney for a child as the child's counsel in a termination of

parental rights proceeding.<sup>4</sup> The statute also provides that the court *may* additionally appoint a guardian ad litem for the child, and that the child's counsel is eligible to serve as the guardian ad litem.<sup>5</sup> In addition to the child's statutory right to counsel, a child in a termination of parental rights proceedings also has a federal constitutional right to counsel.<sup>6</sup>

In Georgia, a guardian ad litem's role is "to protect the interests of the child and to investigate and present evidence to the court on the child's behalf."<sup>7</sup> The best interests of the child standard is paramount in considering changes or termination of parental custody. *See, e.g., Scott v. Scott*, 276 Ga. 372, 377 (2003) ("[t]he paramount concern in any change of custody must be the best interests and welfare of the minor child"). The Georgia Court of Appeals held in *In re A.P.* based on the facts of that case that the attorney-guardian ad litem dual representation provided for under O.C.G.A. § 15-11-98(a) does not result in an inherent conflict of interest, given that "the fundamental duty of both a guardian ad litem and an attorney is to act in the best interests of the [child]."<sup>8</sup>

This advisory opinion is necessarily limited to the ethical obligations of an attorney once a conflict of interest in the representation has *already arisen*. Therefore, we need not address whether or not the dual representation provided for under O.C.G.A. § 15-11-98(a) results in an inherent conflict of interest.<sup>9</sup>

#### Discussion

The child's attorney's first responsibility is to his or her client.<sup>10</sup> Rule 1.2 makes clear that an attorney in a normal attorney-client relationship is bound to defer to a client's wishes regarding the ultimate objectives of the representation.<sup>11</sup> Rule 1.14 requires the attorney to maintain, "as far as reasonably possible... a normal client-lawyer relationship with the [child]."<sup>12</sup> An attorney who "reasonably believes that the client cannot adequately act in the client's own interest" may seek the appointment of a guardian or take other protective action.<sup>13</sup> Importantly, the Rule does not simply direct the attorney to act in the client's best interests, as determined solely by the attorney. At the point that the attorney concludes that the child's wishes and best interests are in conflict, the attorney should petition the court for removal as the child's guardian ad litem, disclosing only that there is a conflict which requires such removal.

The attorney should not reveal the basis of the request for the appointment of a guardian ad litem to preserve confidentiality and so as not to compromise the child's position.<sup>14</sup> An exception to the duty of confidentiality may arise "[w]here honoring the duty of confidentiality would result in the children's exposure to a high risk of probable harm."<sup>15</sup>

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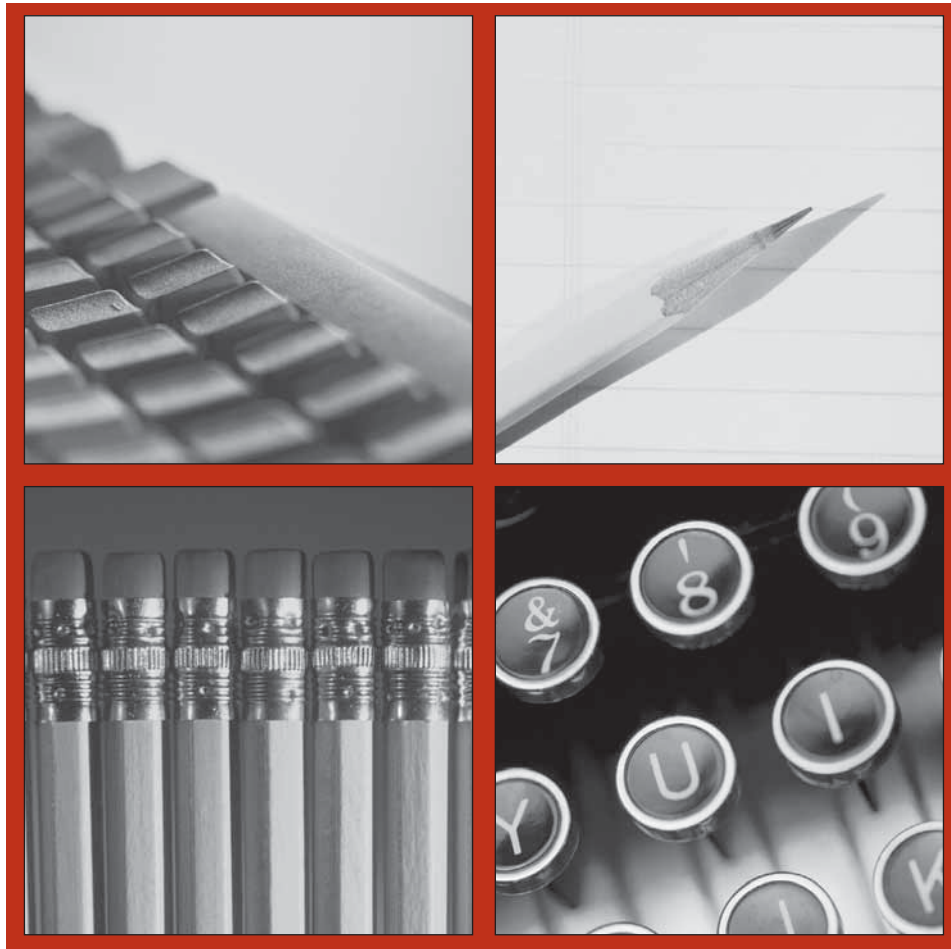
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The attorney should not reveal further information received during the representation, nor should the attorney otherwise use the information received from the child in confidence to advocate a position not desired by the child.<sup>16</sup> This contrasts with the attorney's ability to disclose such information to the court in service of the child's wishes.<sup>17</sup>

The attorney is under an affirmative ethical obligation to seek to have a new guardian ad litem appointed following his withdrawal as guardian, as Comment 3 to Rule 1.14 explains that "the lawyer should see to [the appointment of a legal representative] where it would serve the client's best interests." If the conflict between the attorney's view of the child's best interests and the child's view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16 or seek to have a separate guardian appointed.<sup>18</sup>

The attorney may not withdraw as the child's counsel and then seek appointment as the child's guardian ad litem, as the child would then be a former client to whom the former attorney/guardian ad litem would be adverse.<sup>19</sup>

This conclusion is in accord with many other states.<sup>20</sup> For instance, Ohio permits an attorney to be appointed both as a child's counsel and as the child's guardian ad litem.<sup>21</sup> Ohio ethics rules prohibit continued service in the dual roles when there is a conflict between the attorney's determination of best interests and the child's express wishes.<sup>22</sup> Court rules and applicable statutes require the court to appoint another person as guardian ad litem for the child.<sup>23</sup> An attorney who perceives a conflict between his role as counsel and as guardian ad litem is expressly instructed to notify the court of the conflict and seek withdrawal as guardian ad litem.<sup>24</sup> This solution (withdrawal

from the guardian ad litem role once it conflicts with the role as counsel) is in accord with an attorney's duty to the client.<sup>25</sup>

Connecticut's Bar Association provided similar advice to its attorneys, and Connecticut's legislature subsequently codified that position into law.<sup>26</sup> Similarly, in Massachusetts, an attorney representing a child must represent the child's expressed preferences, assuming that the child is reasonably able to make "an adequately considered decision...even if the attorney believes the child's position to be unwise or not in the child's best interest."<sup>27</sup> Even if a child is unable to make an adequately considered decision, the attorney still has the duty to represent the child's expressed preferences unless doing so would "place the child at risk of substantial harm."<sup>28</sup> In New Jersey, a court-appointed attorney needs to be "a zealous advocate for the wishes of the client . . . unless the decisions are patently absurd or pose an undue risk of harm."<sup>29</sup> New Jersey's Supreme Court was skeptical that an attorney's duty of advocacy could be successfully reconciled with concern for the client's best interests.<sup>30</sup>

In contrast, other states have developed a "hybrid" model for attorneys in child custody cases serving simultaneously as counsel for the child and as their guardian ad litem.<sup>31</sup> This "hybrid" approach "necessitates a modified application of the Rules of Professional Conduct."<sup>32</sup> That is, the states following the hybrid model, acknowledge the "'hybrid' nature of the role of attorney/guardian ad litem which necessitates a modified application of the Rules of Professional Conduct," excusing strict adherence to those rules.<sup>33</sup> The attorney under this approach is bound by the client's best interests, not the client's expressed interests.<sup>34</sup> The attorney must present the child's wishes and the reasons the attorney disagrees to the court.<sup>35</sup>

Although acknowledging that this approach has practical benefits, we conclude that strict adherence to the Rules of Professional Conduct is the sounder approach.

## Conclusion

At the point that the attorney concludes that the child's wishes and best interests are in conflict, the attorney should petition the court for removal as the child's guardian ad litem, disclosing only that there is a conflict which requires such removal. The attorney should not reveal the basis of the request for the appointment of a guardian ad litem to preserve confidentiality and so as not to compromise the child's position. The attorney should not reveal further information received during the representation, nor should the attorney otherwise use the information received from the child in confidence to advocate a position not desired by the child. The attorney is under an affirmative ethical obligation to seek to have a new guardian ad litem appointed following his withdrawal as guardian. If the conflict between the attorney's view of the child's best interests and the child's view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16 or seek to have a separate guardian appointed.

## Endnotes

1. Georgia Rules of Professional Conduct, Rule 1.14, Comment 1.
2. Georgia Rules of Professional Conduct, Rules 1.2, 1.7.
3. Georgia Rules of Professional Conduct, Rule 1.7, Comment 4.
4. O.C.G.A. § 15-11-98(a) ("In any proceeding for terminating parental rights or any rehearing or appeal thereon, the court *shall* appoint an attorney to represent the child as the child's counsel and *may* appoint a separate guardian ad litem or a guardian ad litem who may be the same person as the child's counsel") (emphasis added).

5. Id.
6. Kenny A. v. Perdue, 356 F. Supp. 2d 1353, 1359-61 (N.D. Ga. 2005), *rev'd on other grounds*, 2010 WL 1558980 (U.S. Apr. 21, 2010).
7. See Padilla v. Melendez, 228 Ga. App. 460, 462 (1997).
8. In re A.P., 291 Ga. App. 690, 691 (2008).
9. See, e.g., Wis. Ethics Op. E-89-13 (finding no inherent conflict of interest with the dual representation of an attorney and guardian but concluding that if a conflict does arise based on specific facts, the attorney's ethical responsibility is to resign as the guardian).
10. Georgia Rules of Professional Conduct, Rule 1.2.
11. Georgia Rules of Professional Conduct, Rule 1.2, Comment 1.
12. Georgia Rules of Professional Conduct, Rule 1.14.
13. Id.
14. See In re Georgette, 785 N.E.2d 356, 367 (Mass. 2003).
15. In re Christina W., 639 S.E.2d 770, 778 (W. Va. 2006).
16. See Georgia Rules of Professional Conduct, Rule 1.6, specifically subsection (e).
17. See Georgia Rules of Professional Conduct, Rule 1.6(a) (permitting disclosure of confidential information "impliedly authorized to carry out the representation").
18. See Rules 1.14 (b), 1.16 (b) of the Georgia Rules of Professional Conduct.
19. See Rule 1.9 of the Georgia Rules of Professional Conduct.
20. See, e.g., Wis. Ethics Op. E-89-13, *Conflicts of Interests; Guardians* (1989) (providing that dual representation as counsel and guardian ad litem is permitted until conflict between the roles occurs, and then the attorney must petition the court for a new guardian ad litem); *Ariz. Ethics Op. 86-13, Juvenile Proceedings; Guardians* (1986) (providing that a "lawyer may serve as counsel and guardian ad litem for a minor child in a dependency proceeding so long as there is no conflict between the child's wishes and the best interests of the child").
21. Ohio Board of Comm'rs. on Griev. and Discipline, *Op. 2006-5*, 2006 WL 2000108, at\*1 (2006).
22. Id. at \*2.
23. Id.
24. Id., quoting In re Baby Girl Baxter, 17 Ohio St. 3d 229, 479 N.E.2d 257 (1985) (superseded by statute on other grounds).
25. Id. See also Baxter, 17 Ohio St. 3d at 232 ("[w]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client's cause").
26. See Conn. Bar Ass'n Comm. on Prof. Ethics, *CT Eth. Op. 94-29*, 1994 WL 780846, at \*3 (1994); In re Tayquon, 821 A.2d 796, 803-04 (Conn. App. 2003) (discussing revisions to Conn. Gen. Stat. § 46b-129a).
27. See Mass Comm. For Public Counsel Servs., *Performance Standards*, Standard 1.6(b), at 8-10, *available at* [http://www.publiccounsel.net/private\\_counsel\\_manual/private\\_counsel\\_manual\\_pdf/chapters/chapter\\_4\\_sections/civil/trial\\_panel\\_standards.pdf](http://www.publiccounsel.net/private_counsel_manual/private_counsel_manual_pdf/chapters/chapter_4_sections/civil/trial_panel_standards.pdf); See also In re Georgette, 785 N.E.2d 356, 368 (Mass. 2003).
28. Mass Comm. For Public Counsel Servs., *Performance Standards*, Standard 1.6(d) at 11.
29. In re Mason, 701 A.2d 979, 982 (N.J. Super. Ct. Ch. Div. 1997) (internal citations omitted).
30. See In re M.R., 638 A.2d 1274, 1285 (N.J. 1994).
31. See Clark v. Alexander, 953 P.2d 145, 153-54 (Wyo. 1998); In re Marriage of Rolfe, 216 Mont. 39, 51-53, 699 P.2d 79, 86-87 (Mont. 1985); In re Christina W., 639 S.E.2d at 777 (requiring the guardian to give the child's opinions consideration "where the child has demonstrated an adequate level of competency [but] there is no requirement that the child's wishes govern."); see also Veazey v. Veazey, 560 P.2d 382, 390 (Alaska 1977) ("[I]t is equally plain that the guardian is not required to advocate whatever placement might seem preferable to a client of tender years.") (superseded by statute on other grounds); Alaska Bar Assn Ethics Committee Op. 85-4 (November 8, 1985)(concluding that duty of confidentiality is modified in order to effectuate the child's best interests); Utah State Bar Ethics Advisory Opinion Committee Op. No. 07-02 (June 7, 2007) (noting that Utah statute requires a guardian ad litem to notify the Court if the minor's wishes differ from the attorney's determination of best interests).
32. Clark, 953 P.2d at 153.
33. Id.
34. Id.
35. Id. at 153-54; Rolfe, 699 P.2d at 87.

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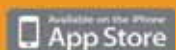
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