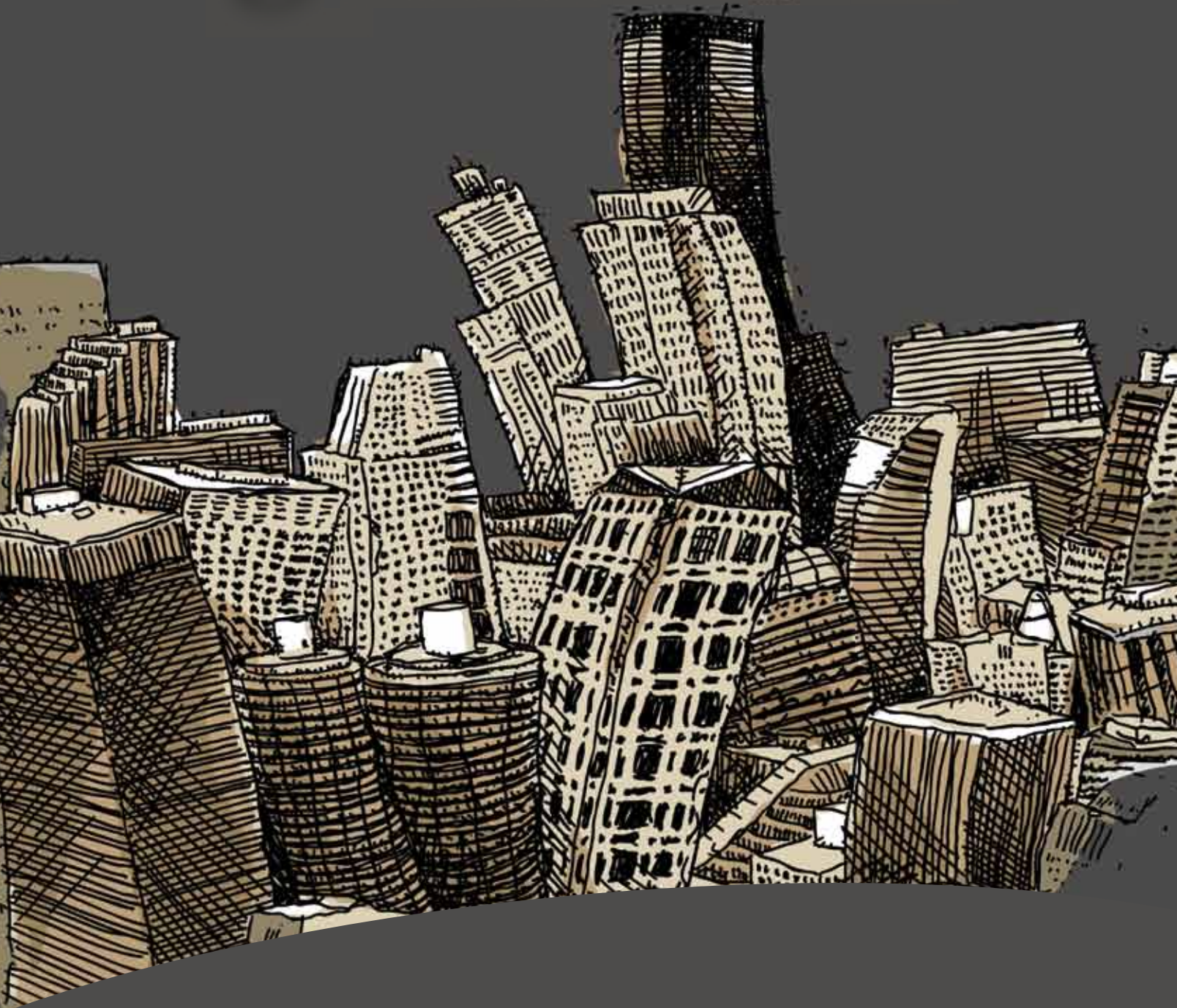


Georgia Bar Journal

December 2010 • Volume 16 • Number 4



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in Today's Uncertain Times

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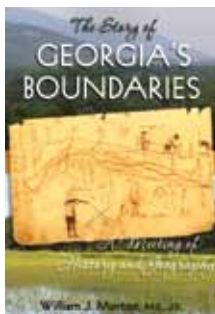
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The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (18th ed. 2005). Please address unsolicited articles to: Robert R. Stubbs, State Bar of Georgia, Communications Department, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. Authors will be notified of the Editorial Board's decision regarding publication.

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

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Headquarters

104 Marietta St. NW, Suite 100, Atlanta, GA 30303
800-334-6865, 404-527-8700, FAX 404-527-8717
Visit us on the Web at www.gabar.org.
South Georgia Office
244 E. Second St. (31794) P.O. Box 1390
Tifton, GA 31793-1390
800-330-0446, 229-387-0446, FAX 229-382-7435
Coastal Georgia Office
18 E. Bay St.
Savannah, GA 31401-1225
877-239-9910, 912-239-9910, FAX 912-239-9970

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by Lester Tate

New Year's and Another Year of Experience

Twenty-three years ago this New Year's Eve, I made a trip to the Polk County Courthouse. There, accompanied by my friends and family, and having been presented to the court by my mentor, Congressman George "Buddy" Darden, I took the oath to become a lawyer in the state of Georgia.

Although no one in my family had ever gone to college, much less become a lawyer, I was, in retrospect, destined to the legal profession. Argument and research, the main tools of a trial lawyer, always came naturally to me.

As a teenager, my training union teacher at the First Baptist Church—also a lawyer—told me that I'd argue with a billboard "with all the letters washed off," he added for emphasis. And as a child (the staff in my office finds this story very amusing), I discovered the fruits of research when I learned the "truth" about Santa Claus by looking him up in the encyclopedia.

Indeed, it was no accident at all that I was sworn in on the last day of the year. The State Bar of Georgia, perhaps sensing the danger of turning 26-year-old

recent law school graduates loose on the public, had recently enacted a new rule. It required a new lawyer to observe a certain number of various kinds of cases being tried by others before trying one himself.

The idea was that you learned by watching others. The Bar, euphemistically, I thought, called these observations "trial experiences."

Anxious to be in the courtroom and always disdainful of being told that I "had" to do anything, I abhorred the adoption of the rule.

Who needs a "trial experience," I thought, when you've just graduated from law school? It was time consuming to find and sit through all the different kinds of cases you had to observe. It could take months to complete, and, besides, I already had a case that was ready to be tried only a few weeks later.

So, I did what any good lawyer should do. I got a copy of the rule and read it. The rule went into effect on Jan. 1, 1988. It did not apply to those sworn in before that date. I had passed the bar the previous July and graduated from law school in December. I quickly got my paperwork together and arranged to be sworn in on the last day before the rule went into effect, thereby passing through a legal loophole and into the practice of law without having ever observed a single trial except on "L.A. Law."

About two weeks later, I got up at 3 a.m. and drove to Cairo, Ga., which is almost in Tallahassee, Fla., to

"Looking back, I can say that it was the beginning of a career that I truly love, one that has only become more enjoyable as I have gotten some experience under my belt."

try my first case. Though at the time I practiced with a large Atlanta firm, I appeared alone with only the giant "trial bag" briefcase I'd gotten for Christmas as my companion.

The courtroom was packed with other lawyers, all of whom, unlike me, had actually tried a case before. This, I thought, was a good omen. Imitation is not only the sincerest form of flattery, it is also one of the quickest ways to learn, I thought. I'd get to watch one of these other guys try his case, and I'd know what to do when the judge called mine for trial.

Of course, as soon as I had that thought, it also dawned on me that the State Bar might have had that same idea in mind when they adopted the trial "experience" requirements for new lawyers that I had so artfully dodged. But never mind that, I reasoned, I would have my own trial experience watching these cases before mine was called.


By this time, the judge had already called the calendar, asking each lawyer how long it would take to try his or her case. Today, I am mindful of the fact that most judges take the shortest cases first. So, if you want to get out of court quickly, you give a low time estimate. If you want some time to talk settlement—or in my case see how someone who actually knows how to try a lawsuit does it—give a lengthier estimate and you'll be moved to the back of the calendar.

I didn't know that little trick of the trade back then and, accordingly, gave a true estimate, which also happened to be the shortest of any case on the docket. The net result was that my case got called first.

Before I really knew what was happening, I was sitting at the counsel's table trying my first case. I quite literally stumbled through it. When I stood up to cross-examine the opposing party, I forgot that my big new Christmas "trial bag" was sitting on the floor next to me. I tripped trying to get to the podium and, but for the quick reflexes of a 26-year-old, would have had my face planted in the middle of the courtroom floor.

In the end, though, all was well. If the judge, with whom I have since had the pleasure of serving on the Board of Governors, knew I had never tried a case before, he never let on. And by some miracle, I even managed to win the case.

Looking back, I can say that it was the beginning of a career that I truly love, one that has only become more enjoyable as I have gotten some experience under my belt. Research and the ability to argue go a long way, but as Oliver Wendell Holmes Jr. once said, "The life of the law has not been logic, it has been experience."

So as we prepare to turn the calendar page from 2010 to 2011, I offer a toast to another year of experience and hope that all of you have found as much enjoyment in the practice of law as I have these last 23 years. Merry Christmas and Happy New Year! 

Lester Tate is president of the State Bar of Georgia and can be reached at sltate3@mindspring.com.



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C09-1005-035 (07/10)



by Cliff Brashier

Take Advantage of Fastcase Training Opportunities

In an effort to provide quality online legal research service to our members, the Board of Governors, at the recommendation of the Member

Benefits Committee, has authorized a change to Fastcase from Casemaker effective Jan. 1, 2011.

Beginning on that date, all Bar members will receive free access to the Fastcase legal research system by accessing the State Bar's website at www.gabar.org. This popular member benefit provides access to national and Georgia legal materials, including case law, statutes, regulations, court rules and attorney general opinions.

For the past two years, the committee has given much consideration to this decision because so many members have expressed appreciation for Casemaker as their "most valuable member benefit." The Member

Benefits Committee listened to the needs of our members and initiated an intense comparison of several legal research providers.

Comparisons of the overall design, ease of use, new visual tools, stability and price led to the decision that Fastcase offered more benefits to our members. The

Fastcase service is ideal for members conducting legal research online because it offers new interactive search features and an easier-to-use technology.

Fastcase features smarter technology to bring the best documents to the top of the results list, as well as sorting technologies that let users customize their results for the kind of research they are doing. Access to online legal

research—which currently costs thousands of dollars per year on traditional services—will be offered for free on Fastcase with no monthly, hourly or time-based fees to State Bar members.

To help with a smooth transition and to ensure our members are afforded adequate access to this valuable member service at all times, training is being offered at all three State Bar offices as well as in webinar formats.

"Comparisons of the overall design, ease of use, new visual tools, stability and price led to the decision that Fastcase offered more benefits to our members."

CLE Credit for Fastcase

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In-House Credit

- Webinars held in your office or home qualify for in-house CLE credit.

To receive in-house CLE credit, you must self-report to CCLC.

Credit Unavailable

- Reading manuals, FAQs and similar self-study are available, but without CLE credit.

All CLE credit carries a \$5 per hour administrative fee payable to the Commission on Continuing Lawyer Competency to include this credit on an attorney's individual CLE record.


In late October, the Law Practice Management Program started a "Fastcase Overview CLE" program, an hour-long session designed to familiarize you and your staff with Fastcase and prepare you for the transition. These programs are continuing in December at each of the three State Bar offices as follows:

- **Bar Center, Atlanta:** Dec. 1, 9 or 15, 10-11 a.m. or 2-3 p.m. Register online at www.gabar.org/public/pdf/lpm/Fastcase_Registration.pdf.
- **South Georgia Office, Tifton:** Dec. 7 or 14, 10-11 a.m., noon-1 p.m. or 2-3 p.m. To register, contact Bonne Cella at bonnec@gabar.org or call 229-387-0446 or 800-330-0446.
- **Coastal Georgia Office, Savannah:** Dec. 6 or 13, 10-11 a.m., noon-1 p.m. or 2-3 p.m. To register, contact Linda Edwards at lindae@gabar.org or call 912-239-9910 or 877-239-9910.

If you cannot attend any of these sessions but are interested in learning more about Fastcase, training is available through the Fastcase website at www.fastcase.com. Even before the transition date, you have full access to a variety of

help options, some of which include webinars; videos in bite-size format; frequently asked questions and a detailed manual. Fastcase customer service is available from 8 a.m. to 8 p.m. by phone, e-mail and live chat. Additionally, you can register for a 24-hour trial pass and try using the information that you gain through the help resources.

Members who have attended training sessions consistently report that it was very helpful. We hope you will take advantage of these training opportunities for an hour or two several times over the coming weeks to become familiar with Fastcase before the January launch. Any questions can be answered by Sheila Baldwin at 404-526-8608 or 877-CASE509, or sheilab@gabar.org or another member of Law Practice Management staff or by calling Fastcase directly at 866-773-2782.

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

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



Annual Fiction Writing Competition

The editorial board of the *Georgia Bar Journal* is pleased to announce that it will sponsor its Annual Fiction Writing Contest. The purposes of this competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. See page 36 for further information, or contact Sarah I. Coole, Director of Communications, at 404-527-8791 or sarahc@gabar.org.

Deadline January 21, 2011



by Michael G. Geoffroy

Your Bar Advocating for Georgia's Children

As the parent of two young boys, Mac, 6, and Hudson, 3, I have become acutely aware of the educational needs of Georgia kids. The difference between *right* and *wrong* is not just the foundation of the legal system, it is the most basic and repeated lesson of every parent in our state. Crime and punishment are often on my mind when vegetables are not eaten and toys are not shared. I find myself asking questions like, what is the proper punishment and restitution for breaking in line at the slide?

Beyond the lessons we teach our young children, teaching Georgia's school-age students deeper lessons about government, history and justice should be an important goal of this or any state. To that end, every state bar should make it a priority to help children learn about justice, equality, legal history, government and the legal system. In addition, helping troubled youth in our juvenile courts continues to become a bigger part of our Georgia court system. To that end, I am proud

of the part played by the Young Lawyers Division and the State Bar of Georgia in helping Georgia's students.

Here are a few ways that we try to help.

Juvenile Code Revision Project

In early 2004, the Juvenile Law Committee of the YLD began a project to revise the Georgia Juvenile Code. Currently, the juvenile code is difficult to use, lacks clarity and does not reflect research-based best practices. More importantly, the code does not meet the needs of the juvenile courts and the legal practitioners who serve them. The Juvenile Code Revision Project has created a research-based, comprehensive and well-organized model juvenile code for Georgia that reflects best practices in child welfare and juvenile law. The work of Juvenile Code Revision Project, along with input for other stakeholders, is part of the basis of SB 292 in 2010, and its supporters are working for its passage this legislative session.

High School Mock Trial

Originally started by the YLD, the Georgia High School Mock Trial Competition (GHSMTTC) helps students gain an understanding of the legal system by providing opportunities for school teams to participate in academic competitions where players assume attorney and witness roles in a court case. Lawyers coach students in developing questioning, critical thinking and oral advocacy skills. Started in 1988, the competi-

"The most important lesson of this article is that each one of these programs started with an idea of a lawyer here in our state."



2004 Craig Harding Memorial Court Artist Contest State Finalist, Brittany Richardson, North Cobb Christian School, Kennesaw.

tion now includes more than 132 high schools for 2011. In addition to the competition, the GHSMTC also puts on an annual Law Academy, where students gain leadership skills, and the Craig Harding Memorial Court Artist Contest, where students make their own court room renderings and are judged. Contact Stacy Rieke to volunteer at 404-527-8779, 800-334-6865 or e-mail stacyr@gabar.org.

Journey Through Justice

The Bar's Journey Through Justice program is a free, four-hour, interactive learning experience for students and teachers in grades 3-12. Students visit the authentic replica of Woodrow Wilson's 19th century office; participate in the Woodrow Wilson School of Law where they take a "bar exam" and become an honorary attorney for the day; work on their acting skills during age-appropriate mock trials; and learn about famous cases in the Law Museum. Through this program, the Bar Center welcomes thousands of students from around the state each year. During the school year, you can almost always find a group of students eagerly listening and learning. For more information, contact Deborah Craytor at 404-527-8785 or deborahcc@gabar.org.

Law-Related Education for Teachers

The Bar's Law-Related Education Program offers a variety of free workshops for teachers in grade levels K-12. Participants are introduced to law-related education and its resources and then are led through the legal process, from the need for rules and types of legal rules to how we deal with rules violations and alternatives to the legal process. Teachers explore a variety of law-related education teaching strategies, including mock trials and role playing exercises, and develop lesson plans for their classrooms. For more information, contact Deborah Craytor at 404-527-8785 or deborahcc@gabar.org.


Truancy Intervention Program

Developed in 1991 by former Fulton County Juvenile Court Chief Judge Glenda Hatchett and Terry Walsh, then president of the Atlanta Bar Association, the Truancy Intervention Program's (TIP) objective is to provide an early, positive intervention with children reported as truants. Serving thousands of children around the state annually, TIP has the vision of eradicating school failure through ongoing collaborations of Juvenile Courts, schools

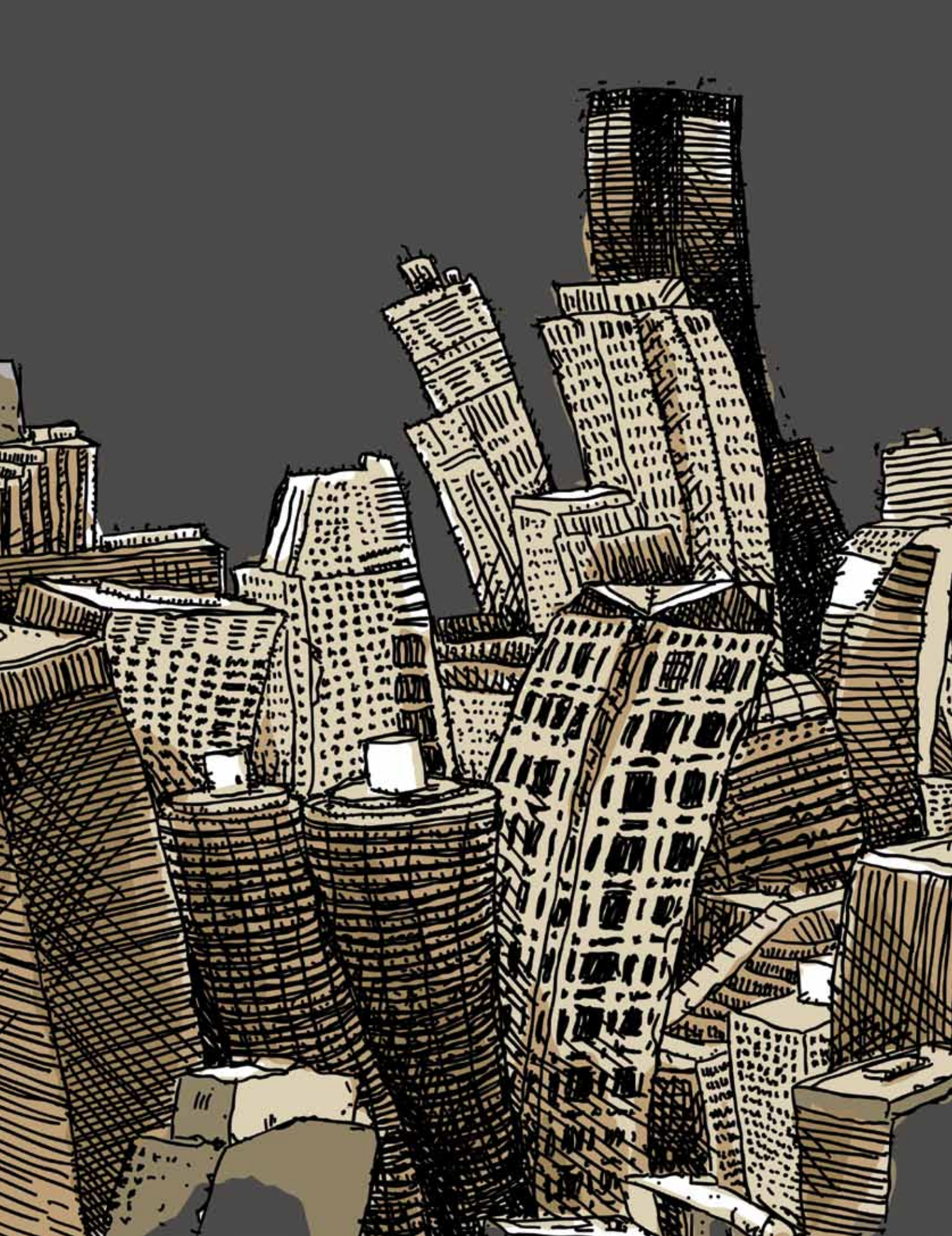
and local lawyers. Touting a 77 percent success rate, volunteers continue to work each day to save one more child from the brink of school failure and the years of private pain and public expense that they will otherwise face. I have personally taken more than a dozen of these cases and find it one of the most rewarding parts of my practice. For more information on volunteering with TIP, please visit http://truancyproject.org/getinvolved_volunteer.asp or call TIP at 404-224-4741.

Advocates for Students With Disabilities

This committee of the YLD provides technical support and networking opportunities to the community of attorneys whose practice or passion includes students with disabilities and their families. The committee works to expand the number of attorneys for this practice area and to provide continuing education opportunities. The committee also provides support on issues such as estate planning, civil rights, health care issues, powers of attorney, juvenile justice and guardianships. To sign up for the committee or for information on how to volunteer, visit the YLD's webpage at www.gabar.org/young_lawyers_division/.

The most important lesson of this article is that each one of these programs started with an idea of a lawyer here in our state. A practitioner who saw beyond the pleadings and contracts to a higher goal of serving Georgia's children. I hope that these programs inform you of opportunities to volunteer and inspire you to help create the next program and improve the lives of Georgia's children. 


Michael Geoffroy is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at michael@thegeoffroyfirm.com.



Georgia Foreclosure Confirmation Proceedings in Today's Recessionary Real Estate World:

Back to the Future

by Craig Pendergrast and Sara LeClerc



As commercial property owners face declining cash flows and commercial mortgage-backed security pools limit lender flexibility to modify and extend loan terms, foreclosures and foreclosure confirmation practice are taking front and center among lawyers for lenders, borrowers and guarantors of loans secured by commercial real property. Appraisers are in high demand, not so much for the purpose of providing valuations for underwriting of new loans, but instead for the purpose of assisting lenders in deciding how much to bid at foreclosure and participating in the inevitable battle of appraisers at the subsequent foreclosure confirmation hearing.

This article will address the law applicable to real property foreclosure confirmation proceedings in Georgia and alert secured creditors, debtors and their counsel to potential strategies relating to foreclosure.

The Georgia Foreclosure Confirmation Statute: Then and Now

The Georgia real property foreclosure confirmation statute is found at O.C.G.A. § 44-14-161. Among its provisions is one that requires a foreclosing lender to obtain the "true market value" of the property at foreclosure or else be faced with the prospect of losing any right to pursue a deficiency judgment against the borrower or guarantor of the secured debt.¹ This provision was adopted in 1935 during the Great Depression and was intended to protect debtors against unscrupulous lenders who sought to take advantage of the fire sale nature of a foreclosure sale in a tremendously depressed market by bidding in a low price to maximize the amount of a deficiency judgment that the lender might then obtain and seek to recover against the debtor.² Although the present real estate market is not generally considered to be as depressed as was the market in the 1930s, and real estate prices in some sectors were

arguably inflated above realistic values in the period preceding the recent meltdown, the present economic circumstances facing the real estate markets in parts of Georgia harken back to the days and concerns that gave birth to the Georgia foreclosure confirmation statute.

Pre-Foreclosure Considerations

To foreclose following default on a loan secured by real estate, the lender must provide the borrower with written notice of foreclosure and must publish a notice of the upcoming foreclosure for four consecutive weeks in the legal organ of the county in which the real property lies.³ As the foreclosure sale date approaches, the lender must decide whether it wants to pursue a deficiency judgment against the borrower or any guarantors if the lender believes that the value of the property is less than the amount of the debt. If so, then the lender should retain a well-qualified appraiser, preferably with substantial testimonial experience, to provide an opinion of the value of the property on or about the date of the foreclosure.

The Appraiser's Dilemma in Today's Market

In today's real estate market, the meltdown in the financial markets in the fall of 2008, has made new loans on reasonable terms hard to obtain, with buyers looking for bargain basement pricing and sellers trying to hold on to their properties until a more rational and functional market exists. Appraisers often are faced with the problem of having few, if any, reliable modern comparable sales to rely upon in developing an opinion of value. Moreover, in attempting to determine the "true market value" of a property for purposes of anticipated testimony at a foreclosure confirmation hearing, the appraiser is faced with a dilemma: the apprais-

er must determine whether the few recent sales that may be located are representative of sales in which a "typically" motivated buyer and seller have been participants,⁴ or if instead the comparable sales are atypical of a normally functioning market, with only distressed sellers, asset liquidating lenders and bargain hunting buyers occupying the field in a dysfunctional market. And if only older comparable sales can be found, then the appraiser must seek to determine whether those sales were representative of a rational market or if instead they were the product of an irrational bubble with respect to that particular sector of the real estate market.

One response of some appraisers has been to recognize the atypical nature of current markets and to perform a prospective appraisal, projecting into the future when the markets return to functionality and then discounting the anticipated pricing of that future day back to the present. Other appraisers criticize this methodology as being dependent upon too many assumptions of future conditions, including the date that the markets will return to normality and the prices, interest rates, rent terms and capitalization rates that will exist at such time. Yet even those appraisers who note the potential flaws in this approach still recognize that it is an accepted appraisal methodology,⁵ and Georgia courts have also recognized the potential viability of this approach.⁶

The lawyer who is in communication with a secured lender client in advance of foreclosure should ideally be involved in the selection of a well-qualified appraiser with good testimonial demeanor and experience and should also confer with the appraiser to assure that the appraiser's data, approach and analysis are as reliable as possible. Otherwise, when it comes time for the appraiser to defend the appraisal in the face of cross-examination at a foreclosure confirmation proceeding, embarrassment and a poor outcome very well may follow.

The Lender's Dilemmas

Once the lender has its appraisal in hand, it must then decide how much to bid at the foreclosure sale. Best practice is to bid an amount that is higher than the appraised value to account for a margin of error and to demonstrate optimum good faith on the part of the lender. In other words, the lender should show that it is not trying to take advantage of the borrower by attempting to maximize the amount of a deficiency that it will pursue later. But how much of a buffer over the appraised value is enough? Should the lender attempt to anticipate the highest possible opinion of value that an opposing appraiser may reach, thereby minimizing the possibility of being barred from pursuit of a deficiency judgment, while minimizing the amount of a potential deficiency judgment? Or should the lender rely primarily upon its selected appraiser's competence and opinion and select a somewhat arbitrary amount by which to increase its bid, thereby cushioning the possibility of an adversarial attack on the appraiser's opinion, while demonstrating good faith to the judge in the upcoming foreclosure confirmation proceeding? There is obviously no "right" answer to these questions, and the exercise of reasoned discretion under the circumstances will be required.

If the lender wishes to pursue a deficiency judgment following the foreclosure sale, the lender is faced with another dilemma. Should it resell the property as quickly as possible prior to the foreclosure confirmation hearing, which may not take place for many months, or should it wait until after the hearing and the ruling thereon? If the former approach is taken, the property is sold to a third party prior to the confirmation hearing, and the court denies confirmation due to an inadequacy of the foreclosure price or on other grounds, then the option of asking the court to allow a new foreclosure sale⁷ at a higher price is obviously lost, along with

the potential to salvage the right to pursue a deficiency for a lower amount based on the new foreclosure sale. If the lender chooses the latter approach and holds the property pending the completion of the foreclosure confirmation process, then its holding period will increase before it can realize upon the value of the property, and it will also have a longer period of dealing with the expenses and other burdens and risks of property ownership.

The Foreclosure Confirmation Proceeding

The foreclosure confirmation statute, O.C.G.A. § 44-14-161, requires that the foreclosure sale be reported to a judge of the superior court in which the land lies within 30 days of the foreclosure date. At that same time, the lender should file a petition to the court requesting that the foreclosure sale be confirmed and seek a rule nisi to set the date of the foreclosure confirmation hearing. That hearing is a special statutory

proceeding in which the only issues to be tried are the legality of the advance notice of the foreclosure sale, the regularity of the sale and the issue of whether the foreclosure sale price represented at least the true market value of the property.⁸ The confirmation statute requires that written notice of the confirmation hearing be provided at least five days in advance of the hearing to any debtor (including borrowers and guarantors) against whom the lender later elects to pursue a deficiency judgment.⁹ That said, the court's calendar typically does not allow for such quick scheduling of the hearing, and case law holds that the Georgia Civil Practice Act nevertheless applies to a confirmation hearing, at least to the extent of discovery.¹⁰ The respondent borrower(s) and guarantor(s) need not file an answer, as would be required in an ordinary civil action.

Since discovery is allowed, it is recommended that both petitioner and respondent promptly initiate written discovery to gain relevant

information, including pertinent facts, witness identities and documents (particularly appraisals) that the other party possesses. Either party may then depose the other's appraiser or any other persons who are reasonably likely to testify at the hearing or who possess information upon which an appraiser or other expert witness may rely.

The confirmation hearing, if contested, is a full-fledged evidentiary hearing, most often involving a battle of appraisers, with the primary issue usually being the determination of the true market value of the property as of the date of the foreclosure sale. Given the somewhat subjective nature of many of the assumptions, selections, adjustments and opinions of even the most accomplished appraisers, the cross-examination of an opposing appraiser represents a golden opportunity for exposing the often imprecise nature of the appraiser's ultimate opinion of value.

The lender as the petitioner carries the burden of proof.¹¹ The



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judge is the finder of fact; there is no right to jury trial.¹² The judge is required to determine only whether the foreclosure price was equal to or greater than true market value. The court need not state what it believes to have been the actual value as of the foreclosure date,¹³ and although the court on request of a party prior to ruling must set forth findings of fact and conclusions of law in its order, it may not be necessary for the court to set forth much in the way of its analysis of the market value evidence in the order.¹⁴ As finder of fact in a setting involving competing expert opinions, the court's findings on true market value will in most cases be difficult to reverse on appeal so long as there is any evidence (i.e., an appraiser's opinion that does not amount to sheer speculation) to support such finding in the absence of harmful error on an evidentiary admissibility ruling with respect to facts underlying such opinion.¹⁵

The Impact of an Unconfirmed Foreclosure Sale

If the court concludes that the foreclosure price was less than the true market value of the property (including gross inadequacy of price) and therefore declines to confirm the foreclosure sale, then the validity of the foreclosure sale is not affected, and the foreclosing lender's title remains intact in the absence of "fraud, mistake, misapprehension, surprise or other circumstances which might authorize a finding that such circumstances contributed to bringing about the inadequacy of price" so as to warrant setting aside the sale.¹⁶ However, a finding of inadequacy of the foreclosure price results in an absolute bar to the lender for purposes of pursuing a deficiency judgment against the borrower or guarantor of the loan.¹⁷ This is an unusually harsh result to the lender in comparison to the law of many other states, many of which would call upon the court to make a

finding as to the true market value of the property and then allow the lender to pursue a deficiency judgment for the amount that is the difference between the amount of the debt and the value of the property as determined by the court.

This result is also at odds with Georgia law under its version of the Uniform Commercial Code (UCC) with respect to a secured lender's disposition of secured personal property. Under the UCC, the lender is required to make a "commercially reasonable" disposition of the property, and if the method of such disposition to an unrelated third party is deemed to be commercially reasonable, then the price received from disposition generally establishes the amount to which the debt is compared for purposes of calculating a deficiency.¹⁸ If the borrower challenges the commercial reasonableness of the sale, then the lender carries the burden of proof to demonstrate commercial reasonableness.¹⁹ If the lender or related party acquires the secured personal property, then the acquisition price establishes the basis for calculating a deficiency, unless the debtor carries the burden of proving that the disposition price was significantly below the range of prices that would have been received from a commercially reasonable disposition to an unrelated third party. If successful on such challenge, the borrower is not relieved of liability for a deficiency. Instead, the deficiency simply is reduced by the difference between the price received by the lender at its sale and the amount the court determined would have resulted from a commercially reasonable sale to an unrelated third party.²⁰

Potential Order Allowing Lender to Conduct a New Foreclosure Sale

In the Georgia real property foreclosure confirmation process, the harsh result of a finding by the court that the foreclosure price was less than true market value

is potentially mitigated by the court's authority under O.C.G.A. § 44-14-161(c) to allow the lender to conduct a new foreclosure sale for good cause shown, with the lender presumably bidding in a higher price at such sale. If the court has declined to state its opinion as to a particular amount that constitutes true market value, then the lender may be faced with yet another dilemma in setting a new foreclosure bid amount that will satisfy the court. Of course, the lender could choose to bid the amount that the borrower's appraiser opined to be the true value. But it is also possible that the value of the property will have moved upward between the time of the original foreclosure sale and the new foreclosure sale, making even that approach potentially problematic.

The court is not necessarily required to order a new foreclosure sale. The confirmation statute gives the court discretion to order a resale on a finding of "good cause."²¹ What constitutes good cause for a resale is not defined by the statute and is not well-developed in case law. Lenders should argue that their good faith reliance upon a competent appraiser in determining their original foreclosure bid amount constitutes good cause for a resale,²² but if the court nevertheless declines to order a resale, then such refusal may be within the bounds of its discretion.²³ Georgia appellate courts have yet to issue an opinion that addresses the parameters of the trial court's discretion (or abuse of discretion) in this setting. Moreover, as noted above, if the lender already has sold the property to a third party prior to the confirmation hearing, then a resale will not be possible. Further, if the value of the property has declined since the time of the original foreclosure sale, then the debtor may argue that allowing a new foreclosure sale would be unfair by reason of a possible increase in the amount of the deficiency to which it would be exposed.

Lender Strategies to Avoid the Absolute Bar of a Failed Confirmation Proceeding

As discussed above, the Georgia foreclosure confirmation statute arose from concerns regarding unscrupulous foreclosure practices by lenders. But what is the scrupulous lender to do when faced with the risk of being absolutely barred from recovering any deficiency if a court were to determine that its foreclosure bid was just marginally low as compared to the true market value of the property?

One approach is to bring a suit on the note and/or guaranty at the outset and defer exercising the lender's security interest through foreclosure, levy and sale until after judgment for the debt has been entered.²⁴ A lender that follows this strategy will not be required to incur the expense and risk of a foreclosure confirmation proceeding. However, the lender must await the entry of judgment on its action on the debt before foreclosing on the property.²⁵

Another approach mentioned above is to bid in an amount substantially in excess of the lender's appraiser's opinion of value. But even that buffer may be deemed insufficient by a court given the wide range of valuation opinions that may exist between a lender's appraiser and a borrower's or guarantor's appraiser. The somewhat subjective judgments made by appraisers in their adjustments of comparable sales and in their selection of an appropriate capitalization rate using the income capitalization approach can yield tremendous differences in opinions of value, even if appraisers are otherwise in agreement as to the selection of comparable sales.

Other lender approaches to avoid this harsh result must be taken at the time the loan is made or modified. One option would be to include a choice of law clause in the loan agreement and/or guarantee calling for another state's more lender-

friendly law to govern actions arising under those loan documents. This choice of law clause could be combined with a forum selection clause pursuant to which such actions were to be brought in the same forum as the selected law.²⁶ Some nexus of the loan transaction to the chosen state preferably should exist, and such nexus will exist logically where the lender has a connection to that state.

For both Georgia and out-of-state lenders making loans to Georgia borrowers or secured by Georgia properties, another option would be to include provisions in the loan documents pursuant to which the borrower and/or guarantor waives the benefit of or otherwise modifies the Georgia foreclosure confirmation statute's strict anti-deficiency judgment pursuit provisions. One potential modification that would be fair to both lender and borrower/guarantor would be to call upon the court to make a specific finding as to the true market value of the property and to limit any deficiency to the difference between that value and the amount of the debt. Contractual waivers or modifications of statutory protections are generally enforceable in Georgia, so long as they do not run afoul of fundamental Georgia public policy.²⁷ The provisions of most Georgia statutes do not arise to such level of non-waivability²⁸ and Georgia courts generally have required that such statutes contain an express provision precluding contractual waiver to enjoy such protected status.²⁹

Although there are a number of Georgia appellate opinions that have addressed the enforceability of contractual waiver of various statutory provisions, no Georgia appellate court has addressed directly the waiver of the debtor deficiency protection provisions found in the Georgia foreclosure confirmation statute. An argument may be made that because that statutory section contains no express non-waiver language and establishes economic protections

for the benefit of individual debtors, it should not be deemed to rise to the level of non-waivable public policy³⁰ so that individual debtors through loan document provisions may waive or modify those protections. By contrast, the nearby code section that sets the requirements for public notice of a foreclosure sale contains a provision that expressly precludes any waiver of such notice requirement.³¹

If the provisions of the Georgia foreclosure confirmation statute are subject to contractual waiver, issues may arise still as to whether the language in a particular loan document amounts to such waiver. For example, would contractual language generally waiving a guarantor's defenses at law and in equity be sufficient to waive its defenses based on the foreclosure confirmation statute? Or would language in which a guarantor absolutely guarantees full and prompt payment of the underlying debt, including any deficiency remaining after a foreclosure sale, serve to waive the anti-deficiency judgment pursuit provisions of the foreclosure confirmation statute? These are questions that must be answered on a case by case basis.³²

By contrast, should a borrower or guarantor be presented with loan documents that contain non-Georgia choice of law or forum selection provisions, they would be well-advised to attempt to negotiate terms that call for application of Georgia law in a Georgia forum. Counsel for a borrower or guarantor should review draft loan document language carefully and attempt to avoid language that might serve to waive the protections of the Georgia foreclosure confirmation statute.


Conclusion

Counsel for lenders, borrowers and guarantors should be aware of the Georgia foreclosure confirmation statute at all steps of the loan relationship. In entering the loan, consideration should be given to the ramifications of the statute and

to the possibility of language that may serve to waive or modify the statute's provisions. Similar consideration should be given at the time any loan modification or forbearance agreement is negotiated. As a foreclosure sale is approaching, all parties should consider strategies that take into account the possibility of a deficiency.

On the borrower's side, this may include cooperation with the lender in connection with a friendly foreclosure or deed in lieu of foreclosure to avoid any risk of the lender pursuing a deficiency judgment. Or the borrower may consider a bankruptcy filing to attempt to buy time to find a buyer or new lender for a transaction that could avoid or minimize a deficiency.

If a foreclosure is imminent or after a foreclosure has taken place that gives rise to deficiency exposure, all parties should review the contract documents carefully to determine how their terms might serve to waive or modify the confirmation statute's provisions. In the heat of a contested foreclosure confirmation proceeding, counsel should consider discovery and other investigation and understand the pros and cons of various

appraisal methodologies to be prepared to represent their clients in the best manner possible. 



Craig Pendergrast is a partner in the litigation group of Taylor English Duma, LLP, in Atlanta. His practice includes real estate litigation,

other commercial litigation and environmental law. He is a 1980 graduate of the University of North Carolina at Chapel Hill, and he received his J.D., *cum laude*, from the University of Georgia School of Law in 1984. He may be contacted at cpendergrast@taylorenghlish.com or 678-336-7245.



Sara M. LeClerc is an associate in the litigation department of Seyfarth Shaw LLP.

Since joining the Atlanta office, she has developed a multifaceted practice comprised primarily of construction, commercial and real estate litigation matters. LeClerc has extensive experience litigating and arbitrating complex and high pro-

file disputes, and has represented clients in sophisticated foreclosure confirmation proceedings.

Endnotes

1. O.C.G.A. § 44-14-161(b) (2002).
2. *Taylor v. Thompson*, 158 Ga. App. 671, 671-72, 282 S.E.2d 157, 158 (1981).
3. O.C.G.A. § 44-14-161(c), 162(a), 162.2, 162.3 (2002).
4. Fair market value is generally defined as the most probable price that a specified interest in real property is likely to bring where the buyer and seller are each acting prudently and knowledgeably, the seller is under no compulsion to sell and is typically motivated, the buyer is under no compulsion to buy and is typically motivated, both parties are acting in their best interests, and an adequate marketing effort is made prior to completion of a contract and sale. *THE DICTIONARY OF REAL ESTATE APPRAISAL*, Fourth Edition, Appraisal Institute, Chicago, Illinois (2002)
5. Uniform Standards of Professional Appraisal Practice, Statements 4 (recognizing use, limitations, and considerations relating to prospective value opinions) and 2 (recognizing use, limitations, and considerations relating to discounted cash flow valuations).

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6. *Blue Marlin Development, LLC v. Branch Banking & Trust Co.*, 302 Ga. App. 120, 690 S.E.2d 252 (2010); *Greenwood Homes, Inc. v. Regions Bank*, 302 Ga. App. 591, 692 S.E.2d 42 (2010).
7. O.C.G.A. § 44-14-161(c)(2002)(court may order foreclosure resale for good cause shown).
8. *Vlass v. Sec. Pac. Nat'l Bank*, 263 Ga. 296, 297, 430 S.E.2d 732, 734 (1993); see also *Friedman v. Regions Bank*, 288 Ga. App. 57, 58, 653 S.E.2d 507, 509 (2007).
9. O.C.G.A. § 44-14-161(c) (2002); *Vlass v. Sec. Pac. Nat'l Bank*, 263 Ga. 296, 297-98, 430 S.E.2d 732, 734 (1993).
10. *Alliance Partners v. Harris Trust & Sav. Bank*, 266 Ga. 514, 515, 467 S.E.2d 531, 532 (1996).
11. *Gutherie v. Ford Equip. Leasing Co.*, 206 Ga. App. 258, 259, 424 S.E.2d 889, 890-91 (1992); *Echols v. Edwards*, 185 Ga. App. 688, 689-90, 365 S.E.2d 844, 845 (1988).
12. *Peachtree Mortgage Corp. v. First Nat'l Bank of Atlanta*, 143 Ga. App. 17, 18, 237 S.E.2d 416, 417-18 (1977).
13. *Echols v. Edwards*, 185 Ga. App. 688, 690, 365 S.E.2d 844, 846 (1988); *American Century Mortgage Investors v. Strickland*, 138 Ga. App. 657, 659-60, 227 S.E.2d 460, 462 (1976).
14. Compare, *PSI Pneumatic Structures, Inc. v. Citizens & Southern Newnan Bank*, 159 Ga. App. 766, 285 S.E.2d 576 (1981) (appellate court vacated for failure to set forth findings of fact other than conclusory statement that foreclosure price represented true market value); *American Century Mortgage Investors v. Strickland*, 138 Ga. App. 657, 227 S.E.2d 460 (1976) (order setting for evidence of conflicting appraisal values and conclusion that foreclosure price was less than true market value held to be sufficient).
15. *Mid-Roc, LLC v. First Southern National Bank*, 2010 Ga. App. LEXIS 851 (September 10, 2010); *Chamblee Hotels, LLC v. Chesterfield Mortgage Investors, Inc.*, 287 Ga. App. 342, 343, 651 S.E.2d 447, 448 (2007); *McCain v. Galloway*, 267 Ga. App. 505, 505, 600 S.E.2d 449, 450 (2004); *Echols v. Edwards*, 185 Ga. App. 688, 690, 365 S.E.2d 844, 846 (1988).
16. *Giordano v. Stubbs*, 228 Ga. 75, 79, 184 S.E.2d 165, 168-69 (1971).
17. O.C.G.A. § 44-14-161(a) (2002); *Powers v. Wren*, 198 Ga. 316, 321, 31 S.E.2d 713, 716 (1944); *Turpin v. N. Amer. Acceptance Corp.*, 119 Ga. App. 212, 217, 166 S.E.2d 588, 592 (1969).
18. O.C.G.A. § 11-9-610(b) (2002).
19. *Id.* § 11-9-626.
20. *Id.* § 11-9-626(3).
21. *Id.* § 44-14-161(c).
22. *Gutherie v. Ford Equip. Leasing Co.*, 206 Ga. App. 258, 261-62 424 S.E.2d 889, 892 (1992); *Adams v. Gwinnett Commercial Bank*, 140 Ga. App. 233, 234-35, 230 S.E.2d 324, 325-26 (1976), aff'd, 238 Ga. 722, 235 S.E.2d 476 (1977).
23. *Thompson v. Maslia*, 127 Ga. App. 758, 762, 195 S.E.2d 238, 241-42 (1972).
24. *Reese Developers, Inc. v. First State Bank*, No. A10A1512, 2010 Ga. App. LEXIS 848 (September 10, 2010).
25. *Vaughan v. Moore*, 202 Ga. App. 592, 415 S.E.2d 47 (1992).
26. See, e.g., *TruServ Corp. v. Flegles, Inc.*, 419 F.3d 584, 589 (7th Cir. 2005).
27. O.C.G.A. § 1-3-7 (2000)
28. *Id.* § 13-8-2 (2010)
29. *Porubiansky v. Emory Univ.*, 156 Ga. App. 602, 603-04, 275 S.E.2d 163, 165 (1980).
30. See *Wachovia Bank v. ASF Enterprises, LLC*, No. 1:09-CV-03571-JOF, 2010 U.S. Dist. LEXIS 63619 (N.D.Ga. June 25, 2010), citing to *Trust Investment & Development Co. v. First Georgia Bank*, 238 Ga. 309, 309-10, 232 S.E.2d 828 (1977), and *Taylor v. Thompson*, 158 Ga. App. 671, 672, 282 S.E.2d 157 (1981) for the proposition that the foreclosure confirmation statute does not rise to the level of public policy, which would preclude a lender from contractually reserving in loan documents the right to pursue non-foreclosure remedies prior to foreclosure.
31. O.C.G.A. § 44-14-162.3(b) (2002 & Supp. 2010).
32. For judicial analysis of contractual waiver language, consider: *United States v. Yates*, 774 F. Supp. 1368 (M.D. Ga. 1991); *Casgar v. Citizens & S. Nat'l Bank*, 188 Ga. App. 234, 372 S.E.2d 815 (1988); *Jones v. Dixie O'Brien Div.*, 174 Ga. App. 67, 329 S.E.2d 256 (1985); *Vickers v. Chrysler Credit Corp.*, 158 Ga. App. 434, 280 S.E.2d 842 (1981) (subsequently overruled with respect to personal property dispositions).

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Buying Distressed Commercial Real Estate: What are the Alternatives?

by James B. Jordan and Justin Lischak Earley

The commercial real estate economy is currently mired in what is likely the worst downturn since the Great Depression of nearly a century ago. Indeed, “[b]etween 2010 and 2014, about \$1.4 trillion in commercial real estate loans will reach the end of their terms. Nearly half are at present ‘underwater’ — that is, the borrower owes more than the underlying property is worth.”¹ Although this market cycle has wreaked havoc on owners and developers, it will likely create unprecedented opportunities for commercial property buyers. Where the unpaid mortgage balance exceeds the value of the property, even though title is vested in the owner, the owner has no equity in the property and is thus not the true economic owner of the property. Rather, the lender holding the mortgage on the property becomes the shadow owner and an essential party to any transaction.



This article will examine five common methods of buying distressed real property in Georgia²: (i) a “short sale” where the property is conveyed by the owner to the purchaser, but only after the lender agrees to accept a discounted loan payoff; (ii) the purchase of the note and deed to secure debt by the purchaser

and the later acquisition of the real estate collateral by foreclosure or by deed in lieu of foreclosure; (iii) the purchase of the property at a foreclosure sale; (iv) the purchase of the property through a receivership; and (v) the purchase of the property as real estate owned (REO) from the lender after the lender has acquired the property at the foreclosure sale.

While the lender must necessarily be involved if the owner has no equity, the degree of borrower involvement and cooperation required varies from one approach to another and one situation to another. This is a very important factor, particularly if the property is improved. If the property is raw land, the lack of borrower cooperation may not be a major problem. However, if the property is improved, then the purchaser is actually buying an operating business, and consequently the borrower's cooperation is essential for proper due diligence (e.g., physical inspection of the property, review of leases and financial records and obtaining estoppel certificates from tenants).

Foreclosure Primer

Every real estate loan is made with knowledge of the underlying law, particularly the lender's right to foreclose against the collateral. In order to understand the relative advantages and disadvantages of the various methods of acquiring distressed real property, it is first important to understand how the foreclosure process works in Georgia. Generally, foreclosure in Georgia is a non-judicial process in which the lender, acting as attorney-in-fact for the borrower, sells the property on the courthouse steps after advertising a foreclosure.³ Here is a roadmap to a typical foreclosure:

- Upon the occurrence of a default, whether monetary, non-monetary or a so-called "maturity default" (i.e., failure to repay the debt upon matu-

urity), the lender accelerates the balance due under the loan (if it is not already due) and, barring payment in full, is permitted to advertise the property for foreclosure. The advertisement is conducted in the same overall manner as the advertisement procedure used for sheriff's sales,⁴ which includes publication of notice (including the full legal description of the property) in the official legal organ of the county in which the property is located once a week for four weeks immediately preceding the foreclosure sale.⁵

- In some cases, a lender may seek appointment of a receiver to aid in consummating the foreclosure.⁶ A receiver is typically sought in cases where the rents are subject to dissipation or the collateral is subject to material damage and impairment pending foreclosure. Although many deeds to secure debt permit the appointment of a receiver as a matter of right upon a default, pursuant to Georgia law, the decision to appoint a receiver is wholly within the discretion of a judge.⁷
- After the foreclosure advertisement has run, the foreclosure sale occurs on the first Tuesday of the month by public auction on the courthouse steps in the county where all or a portion of the property is located.⁸ The foreclosure sale is conducted by the lender, usually through its counsel, as attorney-in-fact for the borrower. Most deeds to secure debt permit the lender to credit bid up to the unpaid balance of its loan, including all "add-ons" such as default interest, attorneys' fees and other matters as may be set forth in the security deed.⁹ Since all other bidders are required to submit bids in cash (or cashier's check / certified check),¹⁰ in most commercial foreclosures in Georgia, the lender (or an affiliate) has a distinct advantage by its abil-

ity to credit bid, and is almost always the successful bidder and purchaser at the foreclosure sale. Nevertheless, Georgia law requires that the foreclosure process be conducted in such a manner so as to not chill the bidding or otherwise deprive third parties of the opportunity to competitively bid to acquire the property at foreclosure.¹¹

- If the bid at the foreclosure sale does not retire the entire loan balance, the borrower or a guarantor may be personally liable for the repayment of all or a portion of the debt if the loan is recourse debt—whether fully, partially or only in the event of certain "bad boy" carve-outs to the non-recourse language. Should the lender desire to obtain a deficiency judgment, then the lender must petition for "confirmation" of the foreclosure sale within 30 days of foreclosure.¹² A confirmation proceeding is then conducted by the judge of the superior court in which all or a portion of the land lies, which focuses primarily on whether the foreclosure process was properly conducted and whether the property was sold for "true market value."¹³ If these requirements are not met, then the lender is not entitled to a judgment for the deficiency.¹⁴

Whether a foreclosure actually occurs or not, the lender's foreclosure remedies ultimately drive each potential form of distressed property acquisition. With this system in mind, we turn to the various methods of acquiring distressed property.

Short Sales

A short sale, which is a term and concept borrowed from the residential arena, is the sale of property encumbered by a mortgage for a sales price less than the unpaid balance of the mortgage.¹⁵ In a short sale, the purchaser enters into a purchase contract with the owner for the property to be sold for less

than the unpaid loan balance, but the purchase contract includes a contingency in favor of both parties such that obtaining the lender's consent to the discounted payoff of the loan is a condition precedent. While in the past it would have been most unlikely to see a commercial lender agree to a short sale, some lenders will now do so, as it allows the lender to receive cash sooner without subjecting the property to foreclosure, which might "taint" the property and diminish its value. The lender will likely require an appraisal to ensure that the short sale price is at or about the fair market value of the property.¹⁶ If the loan is recourse, the lender may agree to forgive the deficiency in whole or in part, or may simply release its deed to secure debt but maintain its rights to pursue the borrower and any guarantors for the deficiency. Even without a deficiency release from the lender, a borrower may be willing to consummate a short sale because it is thought to maximize the sales price for the property and thus minimize the deficiency claim. Further, avoiding foreclosure may permit the borrower to avoid damage to its credit.

From the purchaser's perspective, the advantages of a short sale include: (i) the purchaser has ample opportunity to perform due diligence, as the selling party is the owner and is cooperative; (ii) the purchaser has the opportunity to obtain title insurance for its acquisition; and (iii) although there may be delays in securing the lender's consent, this approach may be quicker than the other approaches and does not subject the property to the loss of control that may occur when the purchaser waits for the lender to exercise its remedies (i.e., the purchaser could lose the opportunity to buy because the lender could sell the note to another party, another party could buy the property at the foreclosure sale or the lender could acquire the property at foreclosure and then sell the property to another party).

From the purchaser's perspective, the disadvantages of a short sale include: (i) junior liens and interests are not wiped out by the short sale and would continue to encumber the real property, and the property is therefore not subject to the "title cleansing" that occurs via a foreclosure;¹⁷ (ii) there is a risk that if the owner later files for bankruptcy, the transfer could be avoided as a fraudulent conveyance or preference;¹⁸ and (iii) depending on the nature of the lender and the requisite number of internal approvals, obtaining lender consent may take some time.

Purchase of Note

Another possible way of acquiring title to distressed real property is for the purchaser to purchase the note and take an assignment of the underlying security documents. In this way, the purchaser "steps into the shoes" of the lender and succeeds to all of the lender's rights under the security documents. Once the buyer has in essence become the lender, it can take title by foreclosure or by deed in lieu of foreclosure unless the borrower exercises contractual rights to cure the default or retire the debt.

Current anecdotal evidence is that many lenders, particularly special servicers of commercial mortgage-backed securities (CMBS) debt and other institutional lenders, may prefer to sell the note rather than exercise their rights against the collateral and enter the chain of title. Since the purchaser of the note wishing to acquire the property must exercise the foreclosure remedy and thus becomes subject to the risk that the borrower might contest the enforcement actions or file for bankruptcy, the purchase price of the note should reflect this risk and theoretically be less than the fair market value of the property or the face value of the debt.

A material negotiating issue often arising in the case of a note purchase is the extent to which the lender will provide warranties and representations as to the loan. Representations

to be negotiated include whether the lender is the owner of the loan documents; whether true and correct copies of the loan documents and all amendments have been provided; whether the loan is in default and has been validly accelerated; whether the loan is subject to any defenses or claims and offsets by the borrower; and representations as to the status of the property and leases.

From the purchaser's perspective, advantages of acquiring a note include: (i) this approach is quick and avoids the buyer potentially losing control over what happens to the property; (ii) in light of the assumed risks, the purchase price should be lower than acquiring traditional fee simple title to the property; and (iii) the transactional and documentation costs can be relatively modest. Disadvantages include: (i) unless the borrower is cooperative, the purchaser may have little ability to enter on the property and perform physical due diligence as to the property, leases and financial data; (ii) by stepping into the lender's shoes, the note purchaser may be subject to certain claims and risks (for example, the borrower may claim that the loan is not in default, that all proper notices have not been provided, and may also assert lender liability claims); and (iii) the owner may file for bankruptcy, which results in an automatic stay that precludes the lender from exercising any remedies.¹⁹

If a buyer decides to purchase the note, the buyer is only halfway to its goal of property ownership. To complete the acquisition, the buyer must take title to the property either by foreclosure or deed in lieu thereof.

Foreclosure After Purchasing a Note

As a successor to the lender's rights under the deed to secure debt, the purchaser may declare a loan default, accelerate the loan and commence foreclosure proceedings. If a foreclosure is pending, it appears that the note purchaser may not step into the shoes of the lender and foreclose pursu-

ant to the pending advertisement and must instead start the foreclosure process anew.²⁰

From the purchaser's perspective, advantages to this course of action include: (i) a non-judicial foreclosure process can occur quickly without incurring significant additional expense; and (ii) unlike some of the other alternatives, all subordinate liens and other matters are extinguished by the foreclosure.²¹ In this way, "better" title to the property may be acquired by foreclosure than some of the other methods. Disadvantages include: (i) the foreclosure will extinguish subordinate matters, so the foreclosing creditor risks inadvertently displacing tenants or releasing them from subordinate leases unless the foreclosure is conducted so as to keep the leases in place, there is an attornment provision in the lease or there is a separate stand-alone attornment agreement with the tenant;²² (ii) if the loan is recourse, and the foreclosure sale does not satisfy the full amount of the debt, obtaining a deficiency judgment will require expending the time and funds necessary in seeking confirmation; and (iii) an uncooperative

borrower may contest the foreclosure by asserting defenses based in the loan documents or may ultimately sue for "wrongful foreclosure" or other claims.²³

Deed in Lieu of Foreclosure After Purchasing a Note

Rather than subjecting themselves and their property to the public stigma of foreclosure, some borrowers will agree to convey the property to the lender in lieu of foreclosure in exchange for the creditor's agreement to release the borrower from liability on the loan, to reduce the amount of the deficiency by some negotiated sum or to simply not sue the borrower for a deficiency judgment.²⁴ A deed-in-lieu transaction is, in essence, a settlement of a dispute wherein the lender and borrower compromise the issues of who is entitled to the property and the extent to which the borrower is liable for the outstanding debt. Like the short sale, the lender obtains only the title that the borrower has to convey, subject to whatever liens and encumbrances then exist, even those that are liens subordinate to the deed to secure debt, which would have been extinguished if

the deed to secure debt had been foreclosed. For this reason, the deed in lieu of foreclosure transaction is often structured so as to leave the deed to secure debt in place by conveying the property to an affiliate of the lender (or to the lender with the deed in lieu of foreclosure language containing non-merger language) and leaving the debt in existence, but granting the borrower a covenant not to sue on the debt.²⁵ In this way, the lender or its affiliate acquires title to the property subject to a loan that it or an affiliate holds. This permits the lender (in theory) to "foreclose on itself" to extinguish any liens or exceptions that are troublesome and subordinate to the deed to secure debt.²⁶

From the perspective of the grantee of the deed in lieu of foreclosure, the advantages include: (i) since the borrower is cooperative, the grantee has full and ample opportunity to investigate and perform due diligence; (ii) to the extent there are errors or inaccuracies in the loan documents, they are never tested by the crucible of foreclosure and associated litigation; and (iii) the grantee is unlikely to face lender liability claims from



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such a cooperative borrower and can negotiate a release of any such claims as part of the transaction as well. Disadvantages include: (i) the risk that the transaction is later undone in bankruptcy as a preference or fraudulent conveyance;²⁷ (ii) the possible adverse tax consequences to the borrower that may complicate the transaction;²⁸ and (iii) subordinate liens are not eliminated and can even be elevated to a higher priority.²⁹

Purchase at Foreclosure Sale

As stated above, non-judicial sales in Georgia are public auctions at which anyone can place a bid. For a variety of reasons, it is extremely uncommon for a third party unrelated to the lender to be the successful bidder on commercial property at a Georgia foreclosure sale. From the purchaser's perspective, the advantages to acquiring property at a foreclosure sale are as follows: (i) subordinate liens are extinguished by the foreclosure sale (but subordinate leases may also be extinguished absent an attornment provision in the lease or a separate stand-alone attornment agreement, or the structuring of the foreclosure so as to be subject to leases);³⁰ and (ii) the transactional costs are low given the absence of due diligence and associated attorneys fees.

However, the disadvantages to acquiring property at foreclosure sale are significant. These include: (i) the purchaser has little or no ability or time to perform due diligence because, *inter alia*, the borrower/owner is unlikely to be cooperative and the foreclosure process in Georgia is swift; (ii) the purchase price must be in cash or cash equivalent, usually a hefty sum in the case of commercial property; (iii) the buyer must often compete against the lender to win the property, and the lender can credit bid the amount it is owed on the debt; and (iv) there is always some risk that the property is disgorge by a court if the borrower ultimately

wins a wrongful foreclosure suit against the lender or a judge orders re-sale in a confirmation hearing.³¹

Although it is extremely rare for a third-party purchaser to acquire property through a competitive bid at a foreclosure sale, there may be ways for a lender and purchaser to structure an acquisition at the foreclosure sale. For instance, the lender and the purchaser may enter into a contract in advance of the foreclosure addressing due diligence and agreeing that the lender will accept the bid of a specified amount, provided that the purchaser is the highest bidder. This would permit the purchaser to perform due diligence (subject to cooperation by the borrower) and obtain title insurance coverage. As another alternative, the lender could enter into a contract in advance of foreclosure providing that if the purchaser is the successful bidder, the lender will finance the bid from the purchaser. Although these structures may be permissible, they each run the risk of being invalidated on the grounds that the competitive bid process has been "chilled," that the foreclosure sale has not been conducted in accordance with the statutory requirements or that the power of sale was not exercised in "good faith."³²

Purchase Through a Receivership

A lender may be able to have a receiver take possession of the property if a loan default has occurred or is imminent and the court is convinced a receiver is necessary.³³ As stated above, even if the loan documents provide for a receiver as a matter of right, under Georgia law, the appointment of a receiver is subject to the discretion of the court.³⁴ There is considerable question as to whether a receiver has the power under Georgia law to convey title without borrower approval, as ownership of the property remains vested in the borrower.³⁵ Assuming the receiver has authority to convey title, the receiver is able to transfer

the property free and clear of liens, in much the same way that a bankruptcy trustee can under federal bankruptcy law.³⁶ However, such a sale is ineffective as to any lien claimants not made parties to the receivership action.³⁷

To avoid any issues as to whether a receiver has the authority to convey title, a distressed property conveyance could be structured so that the borrower consents to appointment of the receiver and grants the lender a power of attorney permitting the lender (or receiver) to manage, lease and sell the property, and to execute documents for the same on behalf of the borrower. This structure is sometimes used in the commercial mortgage-backed securities context since the holder of the mortgage, having qualified as a real estate mortgage investment conduit (REMIC), cannot grant a purchase money mortgage when it sells property.³⁸ In such cases, the REMIC then markets the property, finds a buyer and conveys or causes the receiver to convey title to the buyer, subject to the existing deed to secure debt, as modified. The REMIC can thus keep the current mortgage in place (albeit subject to modification), and the borrower is released from liability with respect to the loan.

From the purchaser's perspective, the advantages to acquiring property through a receivership include: (i) the lender will not have to initiate foreclosure proceedings, so the purchaser is better able to maintain control over the transaction; (ii) the purchaser never steps into the lender's shoes, helping to mitigate lender liability claims risk; (iii) the loan documents are not tested by foreclosure or litigation; and (iv) assuming that the court and borrower consent, the purchaser will have a full and complete ability to perform due diligence and obtain title insurance coverage. The disadvantages of a purchase of a property through receivership include: (i) the need to obtain a court order and to join all relevant interests as parties to the receivership action

in court, with associated litigation expenses; (ii) complexities resulting from the introduction of a receiver and a court to the sale process; and (iii) the need to judicially confirm a receiver's sale.³⁹


Purchase REO Property from the Foreclosing Lender

Perhaps the most common method of acquiring distressed real property is the acquisition of the property from the foreclosing lender subsequent to the foreclosure. Under this alternative, the purchaser enters into a purchase contract with the lender, performs due diligence and closes in the ordinary course of business. In this way, the transaction is very much like a transaction involving property which is not distressed.

The advantages from the purchaser's perspective include (i) the full and complete ability to perform due diligence; and (ii) possible advantageous pricing and deal terms given the "taint" of foreclosure that has previously occurred and the lender's desire to rid the property from its balance sheet. The disadvantages of acquiring REO property from a lender include: (i) many lenders insist on selling the property "as is" with very limited representations and warranties; (ii) especially in the current market, the lender will attempt to protect its balance sheet and avoid the embarrassment that would result if the purchaser quickly sold the property to another party for a large gain, and the lender may cling to unrealistic purchase prices (one solution to this problem is for the lender to take back a "hope note," "a/b note" or some other sort of contingent equity kicker arrangement⁴⁰); and (iii) having been through the public ordeal of repossession by the lender, the market may view the property as "tainted."

Conclusion

"There appears to be a consensus, strongly supported by current

data, that commercial real estate markets will suffer substantial difficulties for a number of years."⁴¹ As the downcycle has apparently reached bottom, however, properties have begun to trade as the market corrects itself. Accordingly, understanding the basic forms of distressed property transactions and their relative advantages and disadvantages discussed above will be essential for the commercial real estate practitioner over the coming years. 



James B. Jordan, practice group leader for Sutherland's real estate practice group, has diverse and extensive experience in all aspects of commercial real estate and regularly represents clients in purchase and sale, lending, development, leasing and joint venture transactions for office, industrial, retail, multifamily and mixed-use real estate projects located throughout the United States. He is regularly involved in transactions involving partnerships, limited liability companies, real estate investment trusts (REITs) and corporations. Jordan also serves as chair of Sutherland's retail team and devotes a substantial portion of his time to retail development and leasing matters. He has experience representing developers and retailers in retail product types ranging from freestanding facilities to neighborhood and power-center developments to enclosed regional malls. Jordan also has experience in real estate transactions in foreign jurisdictions, most notably Mexico.



Justin Lischak Earley is an associate in Sutherland's real estate practice group. He maintains a diverse practice involving

nearly all of the real estate group's practice areas, particularly those involving Georgia law. His representative experience includes counseling clients in timber acquisitions and dispositions, office and commercial leasing and real estate finance and secured lending. Earley also works in the area of distressed real estate. His representative experience includes commercial foreclosures, foreclosure-related litigation, loan workouts and entity restructuring. Before joining the firm, Earley clerked for the Hon. James C. Dever III of the U.S. District Court for the Eastern District of North Carolina.

Endnotes

1. Congressional Oversight Panel of the Emergency Economic Stabilization Act of 2008, *February Oversight Report: Commercial Real Estate Losses and the Risk to Financial Stability*, at 2 (Feb. 10, 2010), available at <http://cop.senate.gov/documents/cop-021110-report.pdf> (last visited Mar. 2, 2010) [hereinafter "TARP Report at ____"].
2. There are other options, such as purchasing the property in bankruptcy, that are beyond the scope of this article.
3. See generally O.C.G.A. § 44-14-160 et. seq. (2002 & Supp. 2010).
4. See *id.* § 44-14-162.
5. *Id.* § 9-13-140 (2006).
6. See *id.* § 9-8-1 (2007); *id.* § 9-8-3 (2007).
7. See, e.g., *id.* § 9-8-3 ("The terms on which a receiver is appointed shall be in the discretion of the court."); *id.* § 9-8-4 (2007) ("The power of appointing receivers should be prudently and cautiously exercised and except in clear and urgent cases should not be resorted to."); *Popham v. Yancey*, 284 Ga. 467, 468, 667 S.E.2d 353, 354 (2008) (noting that a trial court's decision to appoint or not appoint a receiver is reviewed only for manifest abuse of discretion). No known case addresses what happens when a security deed provides for a receiver as a matter of right, though the caselaw strongly

- implies that a judge may accept or reject such a contractual provision at his or her discretion. See, e.g., *Lemans Assocs. Ltd. P'ship v. Lemans Apartments*, 268 Ga. 396, 396, 489 S.E.2d 831, 832 (1997) (standard of review still abuse of discretion even where certain loan documents impliedly authorized receiver by stating that lender was entitled to any "other equitable remedy"); *Kruzel v. Leeds Bldg. Prods., Inc.*, 266 Ga. 765, 767, 470 S.E.2d 882, 884 (1996) (noting the "oft-repeated rule[s] that the power of appointing receivers should be prudently and cautiously exercised" (quotation omitted)); *Irwin v. Willis*, 202 Ga. 463, 478, 43 S.E.2d 691, 700 (1947) ("The appointment of a receiver is recognized as one of the harshest remedies which the law provides for the enforcement of rights, and is allowable only in extreme cases, and under circumstances where the interest of creditors is exposed to manifest peril." (quotation omitted)). Indeed, blind acceptance would be failure to exercise discretion, and discretion unexercised is discretion abused. See, e.g., *Chatham County v. Mulling*, 248 Ga. 878, 881, 286 S.E.2d 735, 738 (1982).
8. O.C.G.A. § 9-13-161 (2006).
 9. See *id.* § 13-1-11(a) (2010) (permitting collection of attorneys' fees of up to 15% of the principal and interest due).
 10. See *id.* § 9-13-166 (2006).
 11. See *id.* § 23-2-114 (1982) ("Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed and shall be fairly exercised."); *Brown v. Freedman*, 222 Ga. App. 213, 214-16, 474 S.E.2d 73, 75-77 (1996) ("'Good faith' in conducting the sale is not necessarily limited to the provisions of the [security] deed."); *Kennedy v. Gwinnett Commercial Bank*, 155 Ga. App. 327, 330-31, 270 S.E.2d 867, 872 (1980) ("In determining whether this duty under a power of sale has been breached the focus is on the manner in which the sale was conducted and not solely on the result of the sale."). Whether or not any particular action or inaction "chilled the bidding" is a question for the trier of fact. See *Smith v. Citizens & S. Fin. Corp.*, 245 Ga. 850, 852-53, 268 S.E.2d 157, 159-60 (1980).
 12. O.C.G.A. § 44-14-161(a).
 13. *Id.* § 44-14-161(b) & (c).
 14. If the court finds in a confirmation proceeding that the property did not bring in "true market value," then confirmation is denied and the entire deficiency is lost, even if the winning bid was only \$1 under "true market value." Further, the court may order that the property be re-sold for "good cause shown." See *id.* Since the central issue in a confirmation proceeding is the value of the property, any contested proceeding can quickly become a "battle of appraisers," and the outcome is difficult to predict.
 15. See, e.g., NOLO'S PLAIN ENGLISH LAW DICTIONARY, Definition of "short sale," <http://www.nolo.com/dictionary/short-sale-term.html> (last visited Mar. 2, 2010).
 16. This is true not only as prudent business practice, but also because (as discussed below) a short sale is vulnerable to being unwound in certain circumstances if the borrower later files for bankruptcy, and the value received will be an issue in bankruptcy court.
 17. "[A] power of sale foreclosure, properly conducted, serves to terminate the interests of the holder of the equity of redemption and all interests which are junior to the interest being foreclosed." Frank S. Alexander, *GEORGIA REAL ESTATE FINANCE & FORECLOSURE LAW* § 10:1 (2009-10 ed.).
 18. Heavily paraphrased, a property transfer is vulnerable as a bankruptcy preference if it was to or for a creditor on account of a pre-existing debt, was made within 90 days of the bankruptcy petition while the debtor was insolvent, and enabled the creditor to collect more than it would have in bankruptcy liquidation. See 11 U.S.C. § 547 (2006). Heavily paraphrased, a property transfer is vulnerable as a fraudulent conveyance if it occurred within two years before the bankruptcy petition, was for less than "reasonably equivalent value," and was related to the debtor's financial distress. See *id.* § 548 (2006). These risks can no longer be mitigated by title insurance, as title insurance companies will no longer issue "creditors' rights" coverage. E.g., Am. Land Title Ass'n, Policy Forms News, <http://www.alta.org/forms/formsnews.cfm> (last visited Mar. 2, 2010) (noting that ALTA endorsement 21-06 is now discontinued).
 19. See 11 U.S.C. § 362 (2006). However, if the lender can prove that the borrower meets the "single asset real estate debtor" rules, then the lender may be able to obtain expedited relief from the automatic stay. See *id.* § 362(d) (3); see also Alfred G. Adams, Jr. & Jason C. Kirkham, *The Real Estate Lender's Updated Guide to Single Asset Bankruptcy Reorganizations*, 8 DEPAUL BUS. & COM. L.J. 3-6 (2009).
 20. See O.C.G.A. § 9-13-140 (2006) (requiring the advertisement to include "the name[s] of the plaintiff," i.e., the foreclosing creditor); see also *Cummings v. Anderson* (In re *Cummings*), 173 B.R. 959, 963 (Bankr. N.D. Ga. 1994) (finding that foreclosure did not comply with state law where creditor advertised for foreclosure and then assigned the security documents to buyer hours before foreclosure sale; thus "[t] his foreclosure was conducted by a party and an attorney who did not advertise for foreclosure and gave no notice to anyone prior to foreclosure").
 21. See footnote 17.
 22. It is not entirely clear under Georgia law as to whether a foreclosing party may structure a foreclosure so as to "pick and choose" which subordinate leases will be terminated by the foreclosure and which will not. No reported case squarely answers this question. See *Trust Co. Bank v. Atlanta Speedshop Dragway, Inc.*, 208 Ga. App. 867, 868, 432 S.E.2d 608, 610 (1993) (suggesting that "pick and choose" is possible).
 23. See, e.g., *Clark v. West*, 196 Ga. App. 456, 457, 395 S.E.2d 884, 886 (1990) ("There exists a statutory duty upon a mortgagee to exercise fairly and in good faith the power of sale in a deed to secure debt. O.C.G.A. § 23-2-114 (1982). Although arising from a contractual right, breach of this duty is a tort compensable at law.>").
 24. The presence of certain "bad boy" carveouts to recourse liability

(such as personal liability on the borrower where the borrower contests the lender's exercise of remedies) may also provide an incentive for the borrower to cooperate and execute a deed in lieu of foreclosure.

25. Conveying to an affiliate of the lender and not to the lender itself may preclude the argument that the conveyance was not a true conveyance at all, but rather an "equitable mortgage" in which the property was conveyed as security for debt which continues to exist.
26. Title insurance companies may require this structure to facilitate resolution of claims where the encumbrance arises after the security deed (and is thus inferior thereto) but before the deed-in-lieu (and is thus superior thereto). By leaving the security deed in place, the security deed can be foreclosed, and such intervening claims are wiped out, preventing the title company from having to pay a claim on the policy insuring the deed-in-lieu.
27. See footnote 18.
28. See, e.g., 2 Stuart M. Saft, COMMERCIAL REAL ESTATE WORKOUTS § 17:27 (3d. ed. 2009).
29. Cf. Textile Rubber & Chem. Co. v. James Talcott, Inc. (In re Apex Carpet Finishers, Inc.), 585 F.2d 1323, 1325 (5th Cir. 1978).
30. See footnotes 17 & 22.
31. E.g., Calhoun First Nat'l Bank v. Dickens, 264 Ga. 285, 285-86, 443 S.E.2d 837, 838 (1994). Even in such a case, equity would protect a good-faith purchaser of the property at a foreclosure sale in one form or another. See O.C.G.A. § 23-1-19 (1982) ("If one with notice sells to one without notice, the latter shall be protected."); cf. id. § 44-14-189 (2002) ("A purchaser at a void or irregular judicial sale under the foreclosure of a mortgage shall succeed to all of the interests of the mortgagee.").
32. See, e.g., Little v. Fleet Fin., 224 Ga. App. 498, 500-04, 481 S.E.2d 552, 556-58 (1997) (holding that the lender-financing scheme described above did not invalidate the foreclosure in question). "What is forbidden is a prior agreement or understanding that is in any manner *outcome determinative*, i.e., impacts on the amount of the highest bid or the identity of the

successful bidder so as to chill either the bidding or the sale's price" *Id.* at 502, 481 S.E.2d at 557. Of course, what is "outcome determinative" depends on the facts at hand, and litigation costs will accrue whether or not a claim is meritorious.

33. See footnotes 6-7.
34. *Id.*
35. See O.C.G.A. § 9-8-3 (2007) ("Equity may appoint a receiver to take possession of and hold, subject to the direction of the court, any assets charged with the payment of debts where there is manifest danger of loss, destruction, or material injury to those interested."). The statute does not expressly authorize sales—only taking possession and holding. Some sources seem to imply that sales are permissible with court approval. See, e.g., *id.* § 9-8-6 ("Unless otherwise provided in the [court's authorizing] order, liens upon the property held by any parties to the record, shall be dissolved by the receiver's sale and transferred to the funds arising from the sale of the property."); Alexander, *supra* n.17, at § 4:3 ("The receiver may be directed by the court to sell the underlying property, and such a sale has the effect of eliminating all liens from the property and transferring the liens to the funds received." (citing O.C.G.A. § 9-8-6)). Nevertheless, a close analysis suggests that O.C.G.A. § 9-8-6 is not on point and no sale is permissible without borrower consent—otherwise, the sale would essentially take the property from the borrower without giving that party its one last chance to redeem to collateral from the debt, thereby clogging the equity of redemption that is the essence of foreclosure.
36. See O.C.G.A. § 9-8-6; cf. Jones v. Staton, 78 Ga. App. 890, 896, 52 S.E.2d 481, 484 (1949) ("Prior to the act of 1939 [establishing a procedure for intervention bar orders currently codified in O.C.G.A. § 23-2-97 (1982)], there was existing a pernicious evil, first, that a receiver could not with any security sell property free of liens No one would want to buy property not knowing what liens were against it").
37. E.g., Denny v. Broadway Nat'l Bank, 118 Ga. 221, 223, 44 S.E. 982,

983 (1903) ("[A]s the Broadway National Bank was not a party to any of the proceedings in the case . . . wherein the receiver was appointed and the order of sale obtained, the bank was not bound thereby. The sale by the receiver did not and could not divest the lien of the bank's judgment.").

38. Generally, a REMIC cannot make a new loan to a borrower because that would be a contribution to the REMIC made after the startup day, and would accordingly be subject to a 100% tax as a prohibited transaction. See 26 U.S.C. § 860G(a)(3) (2006); *id.* § 860G(d) (2006).
39. O.C.G.A. § 23-4-35 (1982) ("Sales under decrees in equity shall be subject to confirmation by the judge, who has a large discretion vested in him in reference thereto. Such sales shall not be consummated until confirmed by him."). Indeed, the winning bidder at a receiver's sale "is merely a preferred proposer, until confirmation of the sale by the court." Leggett v. Ogden, 248 Ga. 403, 405, 284 S.E.2d 1, 3 (1981) (quotation omitted).
40. Under any of these structures, the lender sells the property to the purchaser but also enters into an agreement with the purchaser requiring the purchaser to pay to the seller a portion of any future profits that might result if the purchaser subsequently sells the property to another party within a certain period of time. The basic premise here is that the seller-lender attempts to share in the appreciation of the property and thereby hedge itself against losses or bad market timing.
41. TARP Report at 137.

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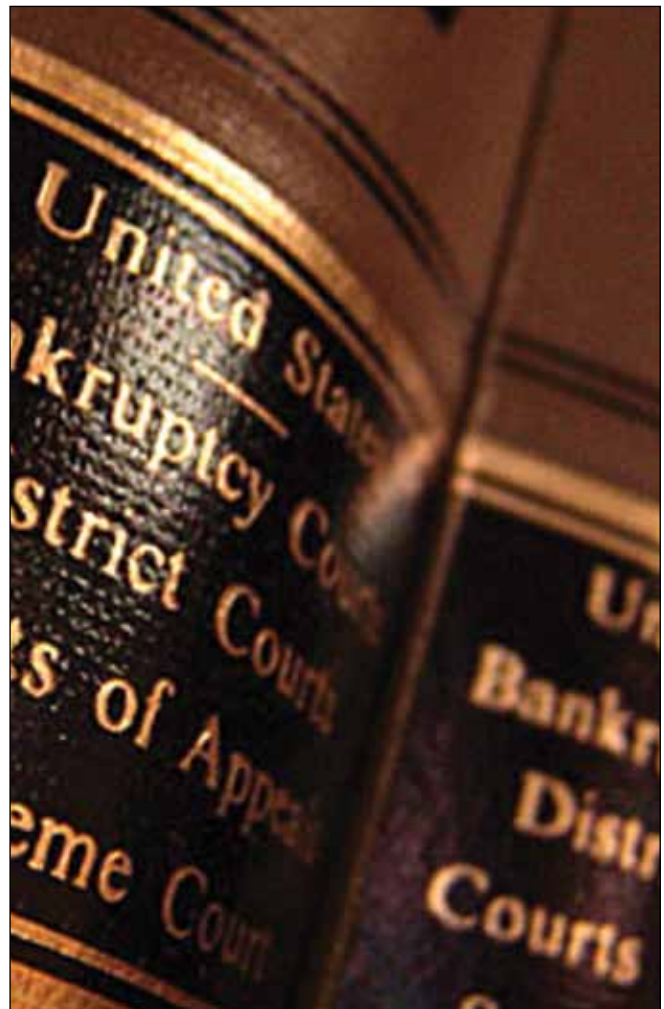
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What Happened to Real Estate Bankruptcies?

by Alfred G. Adams Jr. and Jason C. Kirkham

In prior recessions, real estate borrowers routinely sought refuge in Chapter 11 of the Bankruptcy Code¹ to avoid foreclosure and to modify defaulted mortgage loans. Chapter 11 provides many benefits to borrowers not available outside of bankruptcy. For example, the mere filing of a Chapter 11 petition constitutes an automatic stay enjoining virtually all acts against the debtor or the debtor's property, including foreclosure.² Further, unlike a Chapter 7 liquidation, where a trustee is appointed immediately upon filing, the borrower in a Chapter 11 reorganization generally remains in control of its assets as a "debtor-in-possession."³

Virtually all business entities may seek Chapter 11 relief, and insolvency is not a requirement.⁴ Chapter 11 also provides the owner of a real estate project the opportunity to restructure its mortgage and other debts and to retain ownership of the project by confirming a plan of reorganization. The plan does not



have to be consensual, as even without uniform creditor consent, a debtor may “cramdown” a plan over the objections of some creditors so long as at least one class of impaired creditors votes for it and the plan complies with certain fundamental requirements.⁵

Despite these attractions, the current “Great Recession,” unlike prior downturns, has not generated widespread Chapter 11 filings by single-asset real estate borrowers. In fact, there have been very few. Why is this the case? What has reduced the flood of Chapter 11 real estate filings that accompanied prior recessions to a mere trickle in the current downturn?

Three fundamental changes in the world of commercial real estate finance since the last real estate recession have severely curtailed the ability of borrowers to utilize Chapter 11 as an effective mechanism to restructure mortgage debt: (1) the increasingly widespread use of so-called “springing,” “exploding” and “non-recourse carve-out” guaranties in commercial real estate loans; (2) the impact of the Bankruptcy Abuse and Consumer Protection Act of 2005⁶ (BAPCPA) on bankruptcies by single-asset real estate entities; and (3) case-law which has virtually eliminated the ability of borrowers to confirm cramdown plans reducing the mortgage lender’s debt to the current fair market value of the project while leaving the borrower in place as owner of the project in consideration for the borrower’s contribution of (typically modest) “new value” to the project. Together, these changes make it very difficult for borrowers to use bankruptcy to restructure their secured debt.

Springing, Exploding and Non-recourse Carve-out Guaranties

Following the recession of the early 1990s, lenders increasingly insisted that loans be structured with the borrower as a single-purpose, “bankruptcy remote” entity

(SPE), which would own no assets other than the mortgaged property and which would therefore be insulated from economic problems unrelated to that property. The market in commercial mortgage-backed securities also encouraged the use of SPEs, as the rating agencies which “rated” those securities required their use.

Because, by definition, the SPE has no assets other than the real property (and personal property used in connection with its operation), the lender almost always insists that a creditworthy person or entity, typically a principal of the borrowers, enter into a “non-recourse carve-out guaranty.” That guaranty, which is sometimes referred to as an “exploding” or “springing” guaranty, makes the guarantor liable for certain “bad acts” – typically intentional acts that would diminish the value of the collateral (*e.g.*, fraud, waste or misappropriation of insurance proceeds and rents).⁷ In addition, and most important for a borrower contemplating a bankruptcy filing, the guaranty typically makes the guarantor liable for the *full* amount of the loan if the borrower files a voluntary bankruptcy petition or does not resist an involuntary petition.⁸

The automatic stay does not enjoin creditor actions against third parties, such as individual guarantors of the debtor’s obligations. Guarantors who control bankrupt debtors sometimes seek discretionary stays on the grounds that warding off collection suits diverts management from the reorganization effort. Courts, however, rarely grant those requests.⁹

This threat of personal liability against the warm bodies who control the typical real estate borrower is a serious deterrent against those borrowers filing for bankruptcy protection. Guarantors may challenge enforceability of these guaranties on a number of grounds, both directly (when lenders attempt to enforce the guaranties) and indirectly (by ask-

ing bankruptcy courts to enjoin enforcement of the guaranties). Guarantors can argue that by encouraging the guarantor to put its personal interest ahead of the rest of its partners, these guaranties foster breaches of fiduciary duty and are, therefore, void as a matter of state law public policy. Further, guarantors may also claim that such guarantees violate federal bankruptcy policy by effectively precluding access to the bankruptcy courts, and are therefore unenforceable. Guarantors are also likely to ask bankruptcy courts to use their equitable powers to enjoin collection efforts against guarantors. The few reported cases dealing with the enforcement of non-recourse carve-out obligations have upheld the lender’s position.¹⁰ Of course, as in the recent case of General Growth Properties, where the guarantor itself is insolvent, a springing guaranty is no deterrent.

Insider springing guarantees are probably the most important impediment to borrower bankruptcies. At bottom, the central debate will be balancing state and federal public policy concerns against the realities that (1) the actual debtor is not a party to the guaranty, and (2) assuming a court is willing to refuse enforcement on some ground, drawing principled distinctions between which agreements should be upheld and which should not will be very difficult. Given the ubiquity of these guaranties in the last real estate cycle, more cases are certain to arise.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The BAPCPA, while best known for its provisions making it more difficult for consumer debtors to discharge their debts under Chapter 7 of the Bankruptcy Code, also removed the \$4 million cap that formerly applied to the Bankruptcy Code’s special provi-

The threat of a bankruptcy petition was a significant leverage point for borrowers in prior recessions (especially that of the early 1990s), and the loss of that leverage is one of the most important reasons that this downcycle differs from its predecessors.

sions for single-asset real estate entities. As modified, the requirements applicable to single-asset real estate debtors make it quite difficult for many real estate borrowers to utilize Chapter 11.

In recognition of the abuse of bankruptcy by real estate borrowers during the recession of the early 1990s, Congress enacted Section 362(d)(3) of the Bankruptcy Code in 1994, which requires the court to grant relief from the automatic stay to a secured creditor of a single-asset real estate entity unless, within 90 days after the order for relief (such as filing of a voluntary petition) or 30 days after the court determines that the debtor is a single-asset real estate entity, whichever is later: "(A) the debtor has filed a plan that has a reasonable possibility of being confirmed within a reasonable time; or (B) the debtor has commenced payments that . . . are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate."¹¹ In addition to removing the \$4 million ceiling (which had exempted a great number of projects from the statute's reach), the BAPCPA provides that interest payments must be at the nondefault contract rate of interest.¹²

Although courts have described the legislative history of Section 362(d)(3) as "meager,"¹³ they have recognized that Congress intended to correct the "relative unfairness of lengthy delay" in single-asset cases and that "where the case does not early kick forward toward confirmation, a debtor must compensate its mortgagee for the time-value of the mortgagee's debt-investment, by the payment of interest at the original contractual rate."¹⁴

The Bankruptcy Code defines "single asset real estate" as:

[R]eal property constituting a single property or project, other than residential real property with fewer than four residential units, which generates substantially all of the gross income of a debtor who is not a family farmer and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental.¹⁵

Although some cases have discussed the circumstances under which multiple properties constitute a "single project,"¹⁶ most cases have turned on whether the debtor conducts substantial business on the property other than the business of operating the real property and incidental activities, especially when the property in question is operated as a hotel.¹⁷

If the mortgaged property qualifies under the statute, a debtor can still avoid foreclosure if it files a reorganization plan that has a "reasonable possibility of being confirmed within a reasonable time."¹⁸ In addressing whether a plan filed by a debtor meets that threshold, courts have looked to the case law that has developed since the Supreme Court's decision in *United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd.*,¹⁹ in which the Court announced a very similar standard for deciding whether to grant motions for relief from the stay if the debtor does not have equity in the property and the property is not necessary to an effective reorganization.²⁰

If the debtor has not filed a plan as required under Section 362(d)(3), it can still avoid relief from the automatic stay by commencing to pay interest to the lender. While the interest must be at the nondefault contract rate, the interest need only be paid on the value of the lender's interest in the collateral, not the full amount of the debt. Thus, if the lender is undersecured, it will be entitled to less than the interest provided for under the loan. Furthermore, the debtor can (notwithstanding the Bankruptcy Code's restrictions on the use of cash collateral²¹) pay the interest from pre- and post-petition rents without court or lender consent.²²

The policy of the single-asset real estate rules is to stop the use of bankruptcy simply as a means to unnecessarily delay foreclosure; now debtors must prove that they can feasibly restructure or must pay the mortgagee for the time value of its money vis-à-vis the value of the collateral. Given the sputtering market conditions, generating a feasible restructuring plan will be a difficult task for most single-asset real estate borrowers, and the new payment requirement means that a bankruptcy petition is no longer a free ride for borrowers.

Virtual Elimination of the New Value Exception to the Absolute Priority Rule

Under the "absolute priority rule," codified by Section 1129(b)(2) of the Bankruptcy Code, holders of equity interests in the debtor may not receive or retain *any* interest in the project "on account of" their existing equity interests unless all

dissenting classes of creditors are paid in full under the plan. This does not require a cash payment at confirmation, but the creditors must receive either cash or deferred payments over time, which have a "present value" equal to the full amount of their claims.


Invoking a doctrine articulated prior to the enactment of the *Bankruptcy Code* in *Case v. Los Angeles Lumber Products Co.*²³ and its progeny, some courts continue to recognize a so-called "new value" exception to the absolute priority rule. This exception allows the debtor to retain ownership of the project, despite its failure to pay objecting creditors in full, in exchange for a contribution of "new value" which is both substantial and necessary to the debtor's reorganization.²⁴

The Supreme Court, in *Bank of America National Trust & Savings Association v. 203 North LaSalle Street Partnership*,²⁵ declined to extinguish the new value exception once and for all. The Court did, however, limit the scope of the exception, holding that a bankruptcy court should not have confirmed a plan over the mortgage lender's objection where the plan gave the debtor's pre-bankruptcy equity holders the exclusive right to contribute new capital in exchange for ownership interests in the reorganized entity.²⁶ The Court held that absent a "market test" (such as an opportunity to offer competing plans or a right for outsiders to outbid the insiders), decisions about whether a plan provided sufficient new equity would be measured "by the Lord Chancellor's foot" and that "an absolute priority rule so variable would not be much of an absolute."²⁷ Given the extensive analysis in *LaSalle*, many courts continue to assume that this exception exists,²⁸ and these courts will permit equity holders in bankruptcy debtors to utilize it—provided that there are sufficient market safeguards in place to protect creditors.²⁹

But even where courts are inclined to recognize a new value

exception, the need to expose the equity position to the market makes this route significantly less attractive to the owners of the borrower. Counterparties are unlikely to allow the debtor to allow owners a free pass for minimal new equity if the project is viable, and non-viable projects will likely have been weeded out by this stage in the bankruptcy process. Without the ability to keep competitors on the sidelines, the "new value" exception is of significantly less use to the owners of the borrower.³⁰

Conclusion

The current dearth of Chapter 11 filings by single-asset real estate borrowers results from impediments laid both before and during the bankruptcy process. Few cases are filed due to the presence of exploding / springing / carve-out guarantees, those that are filed may not make it past the new single-asset rules, and even then the principals of borrowers have significantly less incentive to place the borrower in bankruptcy anyway without the ability to maintain control over the entity post-bankruptcy through the new value exception to the absolute priority rule. The threat of a bankruptcy petition was a significant leverage point for borrowers in prior recessions (especially that of the early 1990s), and the loss of that leverage is one of the most important reasons that this downcycle differs from its predecessors. 

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The authors gratefully acknowledge the valuable contributions to this article made by their colleagues, Thomas M. Byrne and Justin Lischak Earley.



Alfred G. Adams Jr. is a partner in the Atlanta office of Sutherland Asbill & Brennan LLP.



Jason C. Kirkham is a member of the State Bar of Georgia who formerly practiced with Sutherland Asbill & Brennan LLP, and is currently corporate counsel at Amazon Corporate LLC.

Endnotes

- 11 U.S.C. § 1101 et seq., or its predecessor, Chapter XII of the former Bankruptcy Act. See 1 Collier on Bankruptcy ¶ 20.01[2][d][i] (16th ed. 2010).
- Id.* §§ 301, 362(a). An award of sanction damages may result from "willful" violations of the automatic stay. See *id.* § 362(k); *In re Atl. Med. Mgt. Servs. Inc.*, 387 B.R. 654, 661-67 (Bankr. E.D. Pa. 2008).
- 11 U.S.C. § 1107.
- See, e.g., *Fields Station LLC v. Capitol Food Corp of Fields Corner (In re Capitol Food Corp. of Fields Corner)*, 490 F.3d 21, 25 (1st Cir. 2007) (noting that "some type of financial distress" is required (citation omitted)). In an involuntary case, however, the peti-

- tioning creditors must be able to demonstrate that the debtor is not paying its debts as they come due if the debtor contests the involuntary petition. *See* 11 U.S.C. § 303(h).
5. *See* 11 U.S.C. § 1129.
 6. Pub. L. No. 109-8, 119 Stat. 23.
 7. Depending on the negotiations between the lender and borrower, the guarantor might be liable for only actual losses suffered by the lender because of the borrower's bad acts, or the loan might become fully recourse to the guarantor. Full recourse provisions are a potential minefield for borrowers. *See, e.g., Blue Hills Office Park LLC v. JPMorgan Chase Bank*, 477 F. Supp. 2d 366, 380-83 (D. Mass. 2007) (illustrating loan that became fully-recourse where provisions of guaranty breached).
 8. Typically, but not always, the guarantor will directly or indirectly control the borrower. In mezzanine debt structures, however, it is possible that the mezzanine lender could foreclose on its interest in the borrower entity. Once in control of the borrower, the mezzanine lender then could threaten to file a voluntary bankruptcy petition, making the loan fully recourse to the guarantor, even though the guarantor no longer controls the borrower. It goes without saying that borrowers and their counsel need to consider seriously this possibility when negotiating any sort of guaranty triggered by a borrower bankruptcy.
 9. *See, e.g., In re M.J.H. Leasing*, 328 B.R. 363, 368-69 (D. Mass. 2005) (collecting cases). The court has the authority under Section 105 to issue orders that are necessary and appropriate to carry out the provisions of the Bankruptcy Code. 11 U.S.C. § 105. A debtor can (in some bankruptcy courts) obtain a discretionary stay protecting a third party guarantor if it can demonstrate "unusual circumstances" that justify the injunction. *See, e.g., Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.)*, 280 F.3d 648, 658 (6th Cir. 2002) (establishing factor-based test for courts to use in determining "unusual circumstances"); *Nev. Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 412 (S.D.N.Y. 2007) (affirming bankruptcy court's section 105(a) injunction staying litigation between creditor and debtor's surety bond guarantor because such litigation would require a significant time drain on a key debtor employee whose technical knowledge was essential); *Homestead Holdings, Inc. v. Broome & Wellington (In re PTI Holding Corp.)*, 346 B.R. 820, 831-32 (Bankr. D. Nev. 2006) (enjoining civil action by creditor to collect debt from guarantors where litigation would place a significant drain on the manager-guarantors' time and resources). But *see, e.g., In re Nat'l Staffing Servs., LLC*, 338 B.R. 35, 38 (Bankr. N.D. Ohio 2005) (noting that "a garden-variety surety relationship" does not constitute the sort of "unusual circumstances" sufficient to justify a section 105(a) injunction).
 10. *See FDIC v. Prince George Corp.*, 58 F.3d 1041, 1046 (4th Cir. 1995) ("Under the clear terms of the note, [Prince George Corp.] is not entitled to escape liability for a deficiency judgment if it 'voluntarily' becomes part of a case, action, suit, or proceeding . . ."); *CFSB 2001-CP-4 Princeton Park Corp. Ctr., LLC v. SB Rental I, LLC*, 410 N.J. Super. 114, 121-24, 980 A.2d 1, 5-7 (N.J. App. Div. 2009) ("Having freely and knowingly negotiated for the benefit of avoiding recourse liability generally, and agreeing to the burden of full recourse liability in certain specified circumstances, defendants may not now escape the benefit of their bargain."); *First Nationwide Bank v. Brookhaven Realty Assocs.*, 637 N.Y.S.2d 418, 421 (N.Y. App. Div. 1996) ("The appellants are bound by the terms of the contract and enforcement of the bankruptcy default clause is neither inequitable, oppressive, nor unconscionable." (citations omitted)).
 11. 11 U.S.C. § 362(d)(3).
 12. *See id.* Before the BAPCPA's passage, the interest charged only had to be at the "current fair market rate," thereby allowing courts to approve lower interest rates. *See, e.g., In re Cambridge Woodbridge Apts., L.L.C.*, 292 B.R. 832, 836, 840 (Bankr. N.D. Ohio 2003) (holding that debtor's monthly adequate protection payments of \$19,250 were "in an amount equal to interest at a current fair market rate," even though this amount was less than the \$20,000 monthly debt service).
 13. *Condor One v. Archway Apts., Ltd. (In re Archway Apts., Ltd.)*, 206 B.R. 463, 465 (Bankr. M.D. Tenn. 1997).
 14. *In re Heather Apt. Ltd. P'ship*, 366 B.R. 45, 49-50 (Bankr. D. Minn. 2007).
 15. 11 U.S.C. § 101(51B).
 16. *E.g., In re Philmont Dev. Co.*, 181 B.R. 220, 223-25 (Bankr. E.D. Pa. 1995).
 17. In deciding whether the debtor engaged in substantial business other than the business of operating the real property, courts look to whether the debtor has significant revenue other than "the passive collection of rent from tenants." *Ad hoc Group of Timber Noteholders v. The Pac. Lumber Co. (In re Scotia Pac. Co. LLC)*, 508 F.3d 214, 221 (5th Cir. 2007) (holding that actively-managed timberlands do not qualify as single asset real estate); *see also Centofante v. CBJ Dev., Inc. (In re CBJ Dev., Inc.)*, 202 B.R. 467, 472-73 (B.A.P. 9th Cir. 1996) (rejecting single asset real estate status where debtor's hotel included gift shop, restaurant, and bar, which qualified as "substantial other business"); *In re Whispering Pines Estate, Inc.*, 341 B.R. 134, 136 (Bankr. D.N.H. 2006) (holding that a hotel which maintained a swimming pool, provided phone and internet service, and served continental breakfast was not a single asset real estate debtor, even though it did not operate any bar, restaurant, or gift shop).
 18. 11 U.S.C. § 362(d)(3).
 19. 484 U.S. 365, 382 (1988)

20. See, e.g., *In re Windwood Heights*, 385 B.R. 832, 837-38 (Bankr. N.D. W. Va. 2008); *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 Bankr. Lexis 1090, at *39-*41 (Bankr. M.D.N.C. Mar. 14, 2005) (unpublished); *In re Harwood Hideout, Inc.*, No. 04-31494, 2005 Bankr. Lexis 670, at *5-6 (Bankr. D.N.D. Mar. 4, 2005) (unpublished); *In re 68 West 127 Street, LLC*, 285 B.R. 838, 846-48 (Bankr. S.D.N.Y. 2002).
21. See 11 U.S.C. § 363(c)(2).
22. *Id.* § 362(d)(3)(B).
23. 308 U.S. 106 (1939).
24. See 11 U.S.C. § 1129(b)(2)(B) (a plan is "fair and equitable" only if the allowed value of each claim in an impaired, dissenting class is paid in full, or if "the holder of any claim or interest that is junior to the claims of such [impaired, dissenting] class will not receive or retain under the plan on account of such junior claim or interest in any property").
25. 526 U.S. 434 (1999).
26. *Id.* at 458. In *LaSalle*, the Court considered whether a single asset real estate debtor could, over the objection of its impaired mortgage lender, confirm a reorganization plan that afforded certain of the debtor's partners the exclusive opportunity to contribute \$6.125 million in new capital in exchange for ownership interests in the reorganized debtor. *Id.* at 437-40. Extensively analyzing the case law and policy justifications for the purported new value exception, *id.* at 444-54, the Court ultimately held that, regardless of whether the new value exception in fact exists under the Bankruptcy Code, a plan that allows old equity the exclusive right to contribute new capital and thereby retain an equity interest in the reorganized debtor violates the absolute priority rule and, therefore, cannot be confirmed over the objection of impaired creditors. *Id.* at 458. Under the court's holding in *LaSalle* it is now clear that even if the new value exception remains valid, it will not apply in cases in

which the existing equity holders are given "exclusive opportunities free from competition and without benefit of market valuation." *Id.*; cf. *Coltex Loop Cent. Three Partners, L.P. v. BT/SAP Pool C. Assocs., L.P.* (In re *Coltex Loop Cent. Three Partners, L.P.*), 138 F.3d 39, 46 (2d Cir. 1998) ("Where no other party seeks to file a plan or where the market for the property is adequately tested, old equity may be able to demonstrate that it can meet the requirements of 11 U.S.C. § 1129 . . ."); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1010-12 (Bankr. D. Mass. 1991) (upholding a cram-down plan by which the equity holders were given a non-exclusive right to acquire equity interests in the reorganized debtor in exchange for new capital).

27. 526 U.S. at 450.
28. See, e.g., *In re OCA, Inc.*, 357 B.R. 72, 89 (Bankr. E.D. La. 2006) (noting continuing debate about whether the new value exception exists and assuming, without deciding, that it does).
29. See, e.g., *In re MJ Metal Prods., Inc.*, 292 B.R. 702, 705 (Bankr. D. Wyo. 2003) ("[T]he debtor retains many options which may result in a confirmable plan. The debtor can expose the sale of the reorganized share to the market . . ." (citing *LaSalle*, 119 S. Ct. 1411, 1422-24 (1999))).
30. Some recent caselaw, however, may be very helpful to debtors. Two recent appeals court cases have held that secured creditors do not have an absolute right to credit bid their outstanding loan amount at an asset sale where the sale is conducted under a plan of reorganization proposed under 11 U.S.C. § 1129(b)(2)(A) (iii), which permits a plan to give creditors the "indubitable equivalent" of their security interest. See *In re Philadelphia Newspapers, LLC*, 599 F.3d 298, 304-05 (3d Cir. 2010); *Bank of N.Y. Trust Co., NA v. Official Unsecured Creditors' Comm.* (In re *Pacific Lumber Co.*), 584 F.3d 229, 246 (5th Cir. 2009). Under some circumstances, there-

fore, the debtor may be able to "expose" the collateral to the market in unique ways, which need not necessarily include allowing the creditor the opportunity to offset its bid against its outstanding loan amount. For example, in *Pacific Lumber*, the court suggested (without deciding) that the plan satisfied *LaSalle's* market exposure rule because the bankruptcy court conducted a judicial hearing and judicially set the value of the collateral—notwithstanding the secured creditors' inability to credit bid under the plan. See 584 F.2d at 247-49 ("Whatever uncertainties exist about indubitable equivalent, paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral."). The appeals court did note, however, that the objecting creditors had not objected to the valuation procedure in the court below and had therefore failed to preserve the issue for appeal. *Id.* at 247.

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2011 State Bar Legislative Preview

by Tom Boller

Elections are over and the people of Georgia have chosen their elected leadership. The State Bar congratulates the winners and expresses appreciation to all those who offered themselves for public service and who participated in the democratic process. We particularly congratulate attorney and Governor-elect Nathan Deal. The governor-elect and the General Assembly have our support and assistance in promoting the effective and efficient administration of justice for all the citizens of our state.

During this election season, many State Bar sections and committees have been working on and developing legislative proposals for the upcoming General Assembly session. The Advisory Committee on Legislation and the Board of Governors approved the following five legislative proposals for inclusion in the State Bar legislative package for 2011. For a more detailed discussion of each proposal, go to www.gabar.org/programs/legislative_program/.

■ **Support Funding for the Victims of Domestic Violence Grant Program.** This program, designed



to provide funding for legal services for victims of domestic violence, was proposed by the State Bar and approved by the General Assembly in 1998. This very popular and effective program has had Bar and legislative support every year since


it began in 1998. The judicial branch has proposed a budget request of \$1.9 million for the 2012 budget and the Board of Governors supports and endorses that request.

- **Support Funding for the Georgia Appellate Resource Center.** The State Bar and the Georgia courts recommended the creation of the Resource Center many years ago to provide legal support and assistance in all post-conviction appeals of death penalty cases. State funding support peaked at \$800,000 several years ago and fell to \$565,000 in FY 2011. Georgia is the only state that does not fully fund legal counsel for post-conviction death penalty appeals. The judicial branch budget for FY 2012 proposes restoring state funding for the Resource Center to \$800,000 and the Board of Governors supports and endorses that request.
- **Support Adoption of the New Rules of Evidence.** The Georgia House of Representatives adopted the new Rules of Evidence last session, but time ran out before the Senate could consider that legislation. The Board of Governors renewed its support and endorsement of the adoption of the new Rules of Evidence.
- **Support Prohibition of Re-sale Fees.** The Real Property Section has proposed legislation that prohibits the inclusion in real estate contracts of declarations of covenants that require payment of re-sale fees to developers or builders. This practice has developed over the last several years and has been prohibited in many states. The Board of Governors supports and endorses adoption of this proposed legislation.
- **Oppose Sales Tax on Legal Services.** While no formal proposal to tax legal services has been introduced, the General Assembly did create the Special

Council on Tax Reform and Fairness for Georgians to undertake a comprehensive review of state tax policy and to recommend changes. With that in mind, the Board of Governors renewed their opposition to imposing sales tax on legal services.

In addition to these approved proposals, Rep. Rich Golick, Chair of the House Judiciary Non-Civil committee, has asked representatives of the State Bar, the Association of County Commissioners of Georgia and others to develop recommendations for improving the funding and governance of the Georgia Public Defenders Standards Council. I anticipate those recommendations will be finalized for consideration by the Board of Governors at the Midyear Meeting, along with additional legislative proposals being developed by Bar sections and committees.

Keep up with all the action during the 2011 legislative session by regularly visiting the State Bar website, www.gabar.org/programs/legislative_program/. On this site, you'll find weekly legislative updates, detailed descriptions of Bar-endorsed legislation and direct links to introduced bills and resolutions, legislators' e-mail addresses, committee meeting notices and more. Finally, the most effective legislative advocate is an interested and informed constituent. So please, communicate with your legislators on these issues and encourage your law partners, friends and colleagues to do the same.

Should you have any questions or need information, don't hesitate to call or e-mail. 

Tom Boller, Mark Middleton, Rusty Sewell, Charlie Tanksley and Hunter Towns are the State Bar's professional legislative representatives. They can be reached at 404-316-1411, or e-mail at tom@gacapitolpartners.com.

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Mentoring Program Wins National Award

by Douglas Ashworth

Georgia's innovative mentoring program for beginning lawyers, the Transition Into Law Practice Program, was the recipient of the prestigious 2010 E. Smythe Gambrell Award for Professionalism, presented by the American Bar Association Standing Committee on Professionalism. This award was established in 1991 and is named for E. Smythe Gambrell, ABA and American Bar Foundation president from 1955-56. Gambrell practiced law in Atlanta from 1922 until his death in 1986. More information about the award is available on the American Bar Association website at www.abanet.org/cpr/awards/gambrell.

The award was formally presented to representatives of the State Bar of Georgia on Aug. 6, during a joint meeting of national bar presidents and bar executives at the American Bar Association Annual Meeting in San Francisco, Calif. "The Standing Committee on Professionalism was particularly impressed with the success, the strength and the detail of Georgia's mentoring program, contrary to the conventional wisdom that



Photo by Sarah I. Coole

State Bar President Lester Tate and Past President David H. Gambrell celebrate the State Bar's receipt of the cash award that accompanied the 2010 E. Smythe Gambrell Award for Professionalism during the 2010 Summer Board of Governors meeting in Atlanta.

statewide mentoring programs are impossible," said Melvin Wright of North Carolina, committee chair.

In addition to the national recognition afforded by the Gambrell Award, a \$3,500 check from the American Bar Association Fund for Justice and Education accompanies the award. Doug Ashworth, director of the Transition Into Law Practice Program, formally presented the check to State Bar President Lester Tate at the Board

of Governors meeting on Aug. 12. David Gambrell, past president of the State Bar of Georgia and son of E. Smythe Gambrell, was present at the meeting and shared remarks about the background of the award.

"Many people over many years had a hand in our State Bar receiving this award and this cash prize," said John T. Marshall, chair of the Standards of the Profession Committee, which oversees the mentoring program. "But we should remember that it was our Executive Director Cliff Brashier and Past President Ben Easterlin who were instrumental in pushing for the formation of the Standards Committee back in 1995."

As we celebrate the national recognition of our mentoring program, we are pleased to recognize each member of the Standards Committee and to once again salute them for their years of volunteer service. (See sidebar.) "Sally Lockwood, Ron Ellington, Larry Jones and Avarita Hanson are to be particularly commended for the yeoman work they did above and beyond the call of duty to bring our mentoring program along," said Marshall.

"Mentoring is professionalism in action, and our program continues to serve as a model for many other states that are testing pilot projects based upon what we have been doing in Georgia for the past five years," said Avarita Hanson, executive director of the Chief Justice's Commission on Professionalism.

Since its inception in January 2006, 3,954 beginning lawyers have completed the mentoring program and an additional 928 are currently enrolled. Mentors are formally appointed by the Supreme Court of Georgia, with 2,734 mentors having been appointed to date.

The success of mentoring in Georgia is due to the professionalism of the bench and bar—pure and simple. The support and vision of the Standards of the Profession Committee, the Commission on Continuing Lawyer Competency, the Board of Governors, the Executive Committee and Officers and ultimately the Supreme Court

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* The Committee acknowledges with gratitude contributions of the late Hon. Ross J. Adams as liaison from the Young Lawyers Division of the State Bar.



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Annual Fiction Writing Competition

Deadline January 21, 2011

The editorial board of the *Georgia Bar Journal* is pleased to announce that it will sponsor its Annual Fiction Writing Contest in accordance with the rules set forth below. The purposes of this competition are to enhance interest in the *Journal*, to encourage excellence in writing by members of the Bar and to provide an innovative vehicle for the illustration of the life and work of lawyers. For further information, contact Sarah I. Coole, Director of Communications, State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303; 404-527-8791.

Rules for Annual Fiction Writing Competition


The following rules will govern the Annual Fiction Writing Competition sponsored by the Editorial Board of the *Georgia Bar Journal*:

1. The competition is open to any member in good standing of the State Bar of Georgia, except current members of the Editorial Board. Authors may collaborate, but only one submission from each member will be considered.
2. Subject to the following criteria, the article may be on any fictional topic and may be in any form (humorous, anecdotal, mystery, science fiction, etc.). Among the criteria the Board will consider in judging the articles submitted are: quality of writing; creativity; degree of interest to lawyers and relevance to their life and work; extent to which the article comports with the established reputation of the *Journal*; and adherence to specified limitations on length and other competition requirements. The Board will not consider any article that, in the sole judgment of the Board, contains matter that is libelous or that violates accepted community standards of good taste and decency.
3. All articles submitted to the competition become the property of the State Bar of Georgia and, by submitting the article, the author warrants that all persons and events contained in the article are fictitious, that any similarity to actual persons or events is purely coincidental and that the article has not been previously published.
4. Articles should not be more than 7,500 words in length and should be submitted electronically.
5. Articles will be judged without knowledge of the author's identity. The author's name and State Bar ID number should be placed on a separate cover sheet with the name of the story.
6. All submissions must be received at State Bar headquarters in proper form prior to the close of business on a date specified by the Board. Submissions received after that date and time will not be considered. Please direct all submissions to: Fiction Writing Competition, Sarah I. Coole, Director of Communications, State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, GA 30303. The author assumes all risks of delivery by mail. Or submit by e-mail to sarahc@gabar.org.
7. Depending on the number of submissions, the Board may elect to solicit outside assistance in reviewing the articles. The final decision, however, will be made by majority vote of the Board. Contestants will be advised of the results of the competition by letter. Honorable mentions may be announced.
8. The winning article, if any, will be published. The Board reserves the right to edit articles and to select no winner and to publish no article from among those submitted if the submissions are deemed by the Board not to be of notable quality.



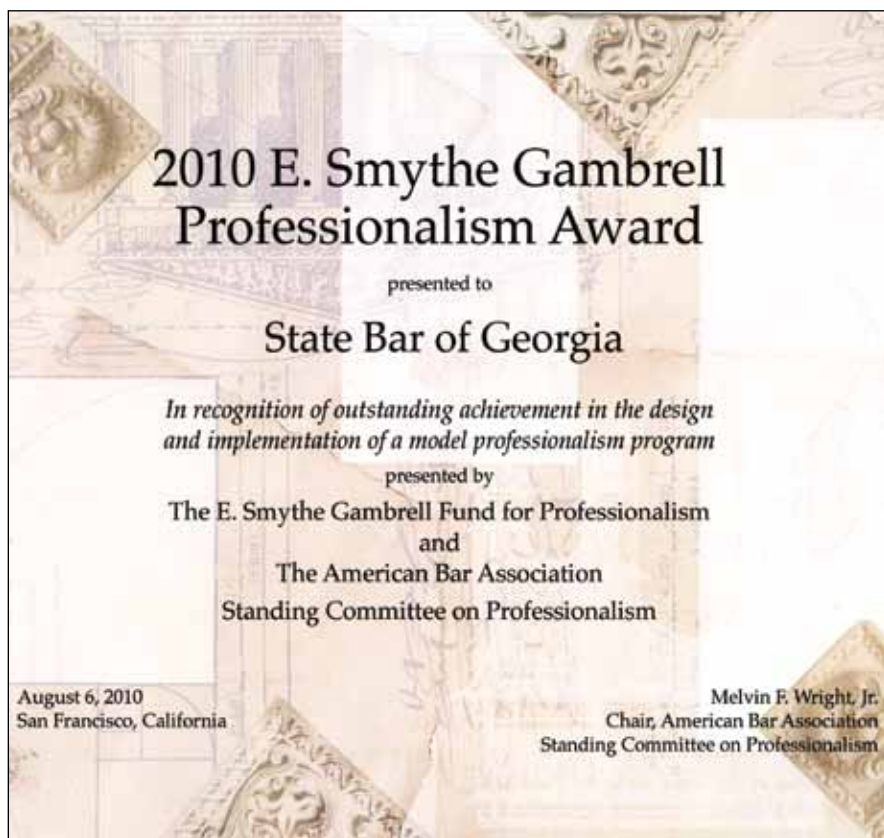
(Left to right) Bryan M. Cavan, immediate past president; Melvin Wright, chair, ABA Committee on Professionalism; Ken Shigley, president-elect; Douglas Ashworth, director, Transition Into Law Practice Program; Avarita L. Hanson, executive director, Chief Justice's Commission on Professionalism; Lester Tate, president; and Cliff Brashier, executive director, State Bar of Georgia, at the ABA's Annual Meeting in San Francisco, Calif., Aug. 6, where the Transition Into Law Practice Program was the recipient of the 2010 E. Smythe Gambrell Award for Professionalism.

of Georgia, have all contributed to this success. But, in the end, the program remains dependent upon the professionalism of our mentors. Perhaps an evaluation comment made by a beginning lawyer who received mentoring while she hung out her own shingle truly says it all: "This program gave me a safe place to ask a stupid question."

Are you interested in serving as a mentor to a beginning lawyer? Get full information on our website, www.gabar.org/programs/transition_into_law_practice_program/, or contact the TILPP office at 404-527-8704 or tilpp@gabar.org. 



Douglas Ashworth is the director of the State Bar of Georgia's Transition Into Law Practice Program and can be reached at tilpp@gabar.org.



The Case for Diversity in a Down Economy

by Marian Cover Dockery

The 18th annual State Bar of Georgia Diversity CLE focused on the impact of the economy on diversity in law schools, law firms and corporate and government law offices; provided tips from an expert on how diverse attorneys must chart their own course; and presented a roundtable of Georgia judges who explored the positive impact of diversity in the courtroom.

Members of the first panel, moderated by Lori Garrett, Southeast Regional Director of the Minority Corporate Council, discussed the recession's negative impact on the placement rate of students in law schools and the hiring and retention of diverse attorneys in law firms. Panel members included Dean Richardson Lynn, Atlanta's John Marshall Law School; Rick Deane, partner, Jones Day; Robin Sangston, vice-president, legal affairs, Cox Communications; and Lisa Chang, DeKalb County attorney. Lynn observed that at John Marshall, the placement rate for graduates declined from 96 percent in 2008 to 92 percent in 2010. Other panelists observed that a large number of associates have left law firms, and women and minorities, who typically have the least seniority, were



Photos by Marian Cover Dockery

State Bar President Lester Tate addresses the attendees of the State Bar of Georgia Diversity CLE during the luncheon sponsored by Troutman Sanders and Jones Day.

adversely impacted, e.g., among the first to be fired. Sangston stated that because corporate law offices have limited opportunities, they also are under pressure and create fewer opportunities to hire new attorneys. Companies like Cox are now focusing on development and retention and designing in-house programs to strategically advance their attorneys to become leaders. In order to motivate outside counsel to retain diverse attorneys, many companies track the outside counsel who work on their legal matters by sex and race as well as the hours and rates that these law firms charge. By demanding transparency, Cox and other corporations can determine if a law firm retained to work on company legal matters is committed to utilizing and developing diverse attorneys.

Municipalities are also cutting back. Budget cuts at DeKalb in 2009 and 2010 resulted in closing job openings as well as layoffs in the legal departments. Many firms are not creating new opportunities for women and minorities. Deane shared with the audience that Jones Day's class of 2010 hired 100 diverse associates and 23 diverse summer associates. In 2011, the firm projects hiring 32 diverse attorneys. Because Jones Day is committed to its core values and continues to build and strengthen its existing diversity partnerships, it has successfully increased the number of diverse associates in the firm's pipeline. The firm also has a partnership with Morehouse and Spelman juniors and seniors who wish to attend law school. One Morehouse graduate who joined the firm as an intern recently made partner in the Atlanta office.

Chang advised diverse attorneys to be more proactive and more flexible and pointed out that although diverse attorneys in private practice are always needed, they still must sell themselves, prove their competence and patiently build relationships to successfully secure work.



(Left to right) Members of the first roundtable included Dean Richardson Lynn, Atlanta's John Marshall Law School; Lisa Chang, DeKalb County attorney; Robin Sangston, vice-president, legal affairs, Cox Communications; Lori Garrett, Southeast Regional Director MCCA; and Rick Deane, partner, Jones Day.



(Left to right) J. Marbury Rainer, partner; Rylan Smith and Raj Shah, associates of Georgia Diversity Program member Parker Hudson Rainer & Dobbs, at the Diversity Luncheon.

Tips for Achieving Career Growth in a Down Economy

Werten Bellamy, president and founder of "Chart Your Own Course" and CEO of Stakeholders, Inc., spoke to the attendees on the topic of survival in a down economy.

Bellamy emphasized that among other things, attorneys cannot confuse commitment with reliance and tenure does not equal value in the way it once did. Diverse lawyers must demonstrate their value to the marketplace and routinely assess their value. Technical competence is important in the profes-



(Left to right) Members of the judges panel included Hon. J. Antonio DelCampo, Hon. Michael Johnson, Hon. Henry Newkirk, Hon. Cynthia J. Becker and Hon. Kimberly Esmond Adams.

sion, but also a positive experience of working with people is critical to one's success as well. Bellamy emphasized that although people respect differences, they ultimately invest in "likeness" where it is easier to build trust through shared experiences.

The Positive Impact of Diversity in the Courtroom

The final session showcased a diverse panel of judges; moderator, Hon. Kimberly Esmond Adams, Fulton County Superior Court; Hon. Cynthia J. Becker, Superior Court, Stone Mountain Circuit; Hon. J. Antonio DelCampo, State Court of DeKalb County; Hon. Michael Johnson, Superior Court, Fulton County; and Hon. Henry M. Newkirk, Superior Court, Fulton County. Statistics confirm that an increased number of women and minorities are serving on the bench in Georgia. These numbers are consistent with what is happening nationwide. In Georgia's superior courts, once dominated by white males, there are now 42 women and as of 1995, 14 African-Americans and

one Native American. Newkirk pointed out that this shift was due to the appointments made by Zell Miller and Roy Barnes who made an effort to diversify the bench. The public wants diverse judges because Georgia's citizens continue to elect more diverse lawyers to judgeships. Becker observed that in 1984, when Chief Justice Carol Hunstein ran for superior court and Hon. Anne Workman ran for state court, the environment began to change through the elective process. In addition, there has been a visible shift in age in the makeup of the court where now 43 percent of judges are between the ages of 50 and 60 and 40 percent are over the age of 60. Johnson, who trained under Newkirk, stated that he brought his own generational perspective and experience to the bench which is much different from a judge who is 55 or 65 years old. In his opinion, older judges appreciate this different perspective. The most diverse courts in Georgia are in DeKalb County where there are now two Hispanic judges and two Asian-American judges on the bench in addition to the African-American jurists. The judges all agreed that

the new environment in the court system created by a more diverse panel of judges is positive for the next generation of lawyers.

Diversity on the court has also positively impacted the future of first-time, misdemeanor defendants. Judges recognize their responsibilities to a diverse population which includes assisting immigrants and young minority male defendants who have dropped out of school (16–21 years old). Creative strategies implemented by diverse judges on the bench work to get drop-outs back in school and perform community service when the defendants have no priors and have committed misdemeanors. If the defendants accept the offer to return to school and graduate or earn a GED, their cases are dismissed. One defendant returned to DelCampo's court and reported that he not only got his GED, but had enrolled in Perimeter College.

Adams closed the discussion stating that because judges serve at the pleasure of the people, it is the responsibility of judges to interact with people in the community and change their perspectives regarding race and sex. Diversity works when people meet you and see who you are and for that reason, Adams makes an effort to give the public an opportunity to meet her by accepting multiple speaking engagements throughout the state of Georgia.

18th Annual Luncheon

After welcoming the participants, State Bar President Lester Tate shared that he became more sensitive to the issues of discrimination after his daughter was born. He emphasized that our profession must continue the conversation regarding diversity and make concerted efforts to meet the challenges of this century with diverse legal staffs.

Keynote speaker, Paul Lancaster Adams, associate general counsel of litigation and chair, Microsoft, Inc., Diversity Outreach Program, stated that the most powerful nations commit to diversity and


since the global economy is increasingly interdependent, our diversity is key in persuading other nations on any number of topics. The legal profession, despite its increase of minorities in the United States, has experienced a decline in the enrollment of African-Americans and Hispanics in law schools despite their rising GPAs and LSAT scores. Consequently, the pool of diverse attorneys has decreased during the last decade, with the problem exacerbated by the recession. For each ethnic group, the percentage of Asian-Americans, Hispanics and African-Americans practicing law continues to decline by 10 percent for Asians, 13 percent for Hispanics and 16 percent for African-Americans.

Microsoft's diversity strategy, in place to help stem the decline of minority attorneys in the workplace, ties the bonuses of its most senior attorneys to their respective success in motivating outside counsel to increase their diversity. They desire their outside counsel to be as diverse as Microsoft and uses a "pay for performance" approach to hold its managers accountable. Their goal is to increase their outside counsel's percentage of minorities. To do so, the last 5 percent of the bonuses of the most senior Microsoft lawyers are tied to the success of the law firms they manage. When law firms fail to increase their percentages of minority attorneys, Microsoft does not reward its most senior lawyers that last 5 percent of their bonus. Unapplied bonus money is added to a pool for minority scholarships for students in Seattle and Washington, D.C. A point system was developed to gauge the success of firms in hiring, promotion and retention of diverse attorneys. There is still much work to be done, but Microsoft's effective strategy can be replicated by other companies to motivate their in-house counsel. Fifty-two percent of Microsoft's staff are women or minorities. By Microsoft requiring transparency of its outside counsel, it is working to motivate its outside



(Left to right) Charles Huddleson, Baker Donelson Bearman Caldwell & Berkowitz PC; Aja Diamond, Yoss LLP; Paul Lancaster Adams, Microsoft, Inc.; and Marian Cover Dockery, director, State Bar of Georgia Diversity Program, after presenting Adams with a token of appreciation for his willingness to serve as luncheon keynote speaker.

counsel to become just as diverse as Microsoft.

Creative corporate diversity initiatives which 1) require a diverse team of attorneys; 2) monitor the utilization of these attorneys on legal assignments; and 3) not only hold the senior corporate counsel accountable if the firms do not adhere to the company's diversity goals for their outside counsel, but reduce their bonuses accordingly, may be the only way most law firms will retain their diverse attorneys. No firm wishes to lose a client, so the retention of diverse attorneys becomes a business decision. Additionally, diverse attorneys must continue to demonstrate their value to the marketplace, develop their leadership talents and learn to focus on the similarities with their peers to guarantee they are selected when opportunities cross their paths. 



Marian Cover Dockery is an attorney with a background in employment discrimination and the director of

the State Bar of Georgia Diversity Program. For more information on the Diversity Program, go to www.gabar.org/programs.

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Kudos



Kilpatrick Stockton attorney **Jay Sullivan** was elected to the **Board of Trustees for Theatrical Outfit**, an Atlanta-based professional theatre company. Sullivan was also selected to join the **Arts Leaders of Metro Atlanta's (ALMA) Class of Fall 2010**. ALMA is an organization that encourages business and arts leaders to unite in order to take an active role in learning about the issues and challenges faced by local and state arts and cultural organizations.

Intellectual property partner **Chris Bussert** received the **2010 University of Toledo College of Law Distinguished Alumnus Award**. The award was presented by the University of Toledo Law Alumni Affiliate and the University of Toledo College of Law.


Partner **Allen Garrett** was appointed to serve on the **Board of the Southern Center for Human Rights**. The Southern Center for Human Rights provides legal representation to people facing the death penalty, challenges human rights violations in prisons and jails, seeks through litigation and advocacy to improve legal representation for poor people accused of crimes and advocates for criminal justice system reforms.


Associate **Yendelela Neely** was named to the **Jumpstart Atlanta Advisory Board**. Jumpstart cultivates a child's social, emotional and intellectual readiness by bringing college students and community volunteers together with preschool children for year-long individualized tutoring and mentoring. Since 1993, more than 70,000 preschool children across America have benefited from millions of hours of Jumpstart service.

Kilpatrick Stockton received the **Outside Counsel Diversity Award** from **General Electric's (GE) Legal Department**. The award has been given to two law firms each year, starting in 2008, in recognition of a firm's overall diversity efforts and the gender and ethnic diversity of its lawyers who work on GE matters.


> **Nelson Mullins Riley & Scarborough LLP** announced that partner **Kathy Solley** was elected as **treasurer** of the **Southern Employee Benefits Conference**. The Conference was incorporated in

1969 to function exclusively as an educational organization in the field of employee benefits. It provides a forum for benefits professionals of all disciplines to share information, cultivate relationships and pursue their educational development.

>  **Morris, Manning & Martin, LLP**, of counsel **Greg Chafee** was named **vice chair** of the **American Bar Association Carbon Trading and Energy Finance Committee**. The committee focuses on energy transactions and trading, finance and environmental compliance. In his new role, Chafee will bring a particular focus to the technology emerging from the convergence of these areas.

>  **Hull Barrett** announced that **James B. Ellington** was selected to serve as **chair** of the **State Bar of Georgia's Formal Advisory Opinion Board**. Ellington is a senior member of the firm's labor and employment law group. His general civil litigation practice emphasizes employment litigation, governmental liability and public employment litigation, civil rights litigation and media and communications law.

>  **Neil C. Gordon**, a partner in the bankruptcy, creditors' rights and workout practice group at **Arnall Golden Gregory LLP** in Atlanta, was elected **president-elect** of the **National Association of Bankruptcy Trustees (NABT)**. NABT is a nonprofit association formed in 1982 to address the needs of bankruptcy trustees and to promote the effectiveness and integrity of the bankruptcy system. Membership is open to trustees and their staff, judges, employees of the Office of the U.S. Trustee and associated professionals and businesses.

>  **Keith R. Blackwell**, a partner with **Parker, Hudson, Rainer & Dobbs LLP**, was appointed by Gov. Sonny Perdue as a **judge** to the **Court of Appeals of Georgia**. At Parker, Hudson, Blackwell focused his practice on complex commercial litigation, including in contract, real-estate, insurance and business-tort cases. His practice also included the representation of crime victims in connection with criminal investigations and prosecutions and counseling businesses and nonprofit organizations with respect to trade secrets, computer crimes, the privacy of nonpublic personal information and other data security issues.

- >  **Nelson Mullins Riley & Scarborough** partner **Taylor T. Daly** was named the **2011 Atlanta Alternative Dispute Resolution Lawyer of the Year** by *Best Lawyers*. Daly practices in the areas of commercial litigation, product liability, dispute resolution and collaborative law.
- >  **Elizabeth Green Lindsey**, shareholder with **Davis, Matthews & Quigley P.C.**, was inducted as a **fellow** of the **American College of Trial Lawyers**. Founded in 1950, the college is composed of the best of the trial bar from the United States and Canada. Fellowship in the college is extended by invitation only and after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of 15 years trial experience before they can be considered for fellowship.
- >  **Oliver Maner LLP** announced that partner **William P. Franklin Jr.** was named as the **2011 Savannah Medical Malpractice Lawyer of the Year** by *Best Lawyers*. Franklin's practice concentrates in the areas of medical malpractice defense, professional liability defense and trial practice.
- >  **Hartman Simons & Wood LLP** announced that partner **Lori E. Kilberg** was awarded the **Career Advancement Impact Award** from the **Commercial Real Estate for Women (CREW)**. This award highlights a CREW Network member who has consistently exemplified the Network's commitment to elevating the status of women in commercial real estate. It honors the member who has made significant contributions to the advancement of women in commercial real estate. Kilberg was recognized for her work as the inaugural chair of Atlanta's CREW National Network Liaison Committee.
- > **HunterMaclean** announced that partner **Harold B. Yellin** was named **2011 Savannah Real Estate Lawyer of the Year** and partner **David F. Sipple** was named the **2011 Savannah Maritime Lawyer of the Year** by *Best Lawyers*. Yellin practices in the areas of commercial real estate, zoning/land use and commercial leasing. Sipple practices in the areas of admiralty law and insurance law.
- > **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**, announced that founding shareholder **Homer Deakins** was named **2011 Atlanta Labor and Employment Lawyer of the Year** by *Best Lawyers*. Deakins, a fellow in the College of Labor and Employment Lawyers, has specialized in labor relations and employment law since beginning his professional career more than 50 years ago.
- >  **Freeman Mathis & Gary, LLP**, announced that partner **Dana K. Maine** was appointed as **chair** of the **Defense Research Institute's Governmental Liability Committee**. The committee is comprised of professionals who devote a substantial amount of their time working with governments and their employees. Membership includes attorneys in private practice and in the public sector, as well as insurance industry representatives involved in underwriting and in adjusting public entity claims.

On the Move

In Atlanta

- >   **Hunton & Williams LLP** announced the promotion of **Trevor K. Ross** to **counsel** and the addition of **Kristen M. Nugent** as an **associate**. Ross is a member of the firm's real estate capital markets practice. Nugent joined the firm's public finance practice. The firm is located at 600 Peachtree St. NE, Suite 4100, Atlanta, GA 30308; 404-888-4000; Fax 404-888-4190; www.hunton.com.
- >  **Craig Pendergrast** joined **Taylor English Duma LLP** as a **member** of the **litigation and dispute resolution practice group**. His practice includes a specialization in environmental law and commercial litigation. The firm is located at 1600 Parkwood Circle, Suite 400, Atlanta, GA 30339; 770-434-6868; Fax 770-434-7376; www.taylorenglish.com.
- >  **Miller & Martin PLLC** announced that **Curtis J. Martin II**, president-elect of the Gate City Bar Association, joined the firm as **of counsel**. Martin was previously a partner with Mozley, Finlayson & Loggins LLP where he practiced in the areas of commercial litigation, product liability, premises liability and trucking litigation. He will continue to represent businesses in litigation mat-

"Invaluable" Business Court Turns Five

The Fulton Superior Court Business Case Division, which marked its fifth anniversary in October, has grown into an "invaluable resource" for Atlanta's business community.

Fulton's Business Court, recognized in 2009 as the most innovative business court in the nation by the National Association of County Executives, has enhanced Atlanta's position as a business hub in the Southeast.

Since October 2005, the Business Court has dealt with litigation involving more than 400 Atlanta area businesses and has drawn praise for the dispatch with which complicated business disputes are resolved. The Business Court also has freed up the Superior Court judges' civil case calendars by handling these time-consuming, complicated cases.

Through September of this year the Business Court had resolved 21 of the 64 cases it has handled in 2010.

The Fulton County Business Court was the state's first specialized venue for complex commercial and business litigation. A Rule Amendment approved by the Supreme Court of Georgia in June 2007 that made transferring cases to the Business Court easier has more than doubled its caseload.


Eligible cases involve contractual disputes, commercial litigation, securities or questions of corporate, limited liability company or partnership law. Eligible cases involve multiple issues and/or parties and complex questions of substantive law that require additional judicial resources to manage and adjudicate.

The court uses a high-tech courtroom with document cameras, projectors and an evidence display system. Teleconference hearings can be arranged to further reduce time and costs associated with complex cases.

Currently, cases are heard by Superior Court Judge Melvin K. Westmoreland and Senior Superior Court Judges Alice D. Bonner and Elizabeth E. Long.

The Superior Court of Fulton County is Georgia's largest and busiest trial court and is a national leader in innovations that increase access to justice for all citizens. Access court programs and information on the Internet at www.fulton-court.org.

ters and also counsel clients on issues related to the workplace. The firm is located at 1170 Peachtree St. NE, Suite 800; Atlanta, GA 30309; 404-962-6100; Fax 404-962-6300; www.millermartin.com.


>  **Cozen O'Connor** announced that **Nanette L. Wesley** joined the firm's Atlanta office as a **member of the global insurance group**. She was previously a partner with Fields, Howell. Wesley focuses her practice on property insurance coverage and defense of first-party litigation for the London market of insurers. The firm is located at 303 Peachtree St. NE, Suite 2200, Atlanta, GA 30308; 404-572-2000; Fax 404-572-2199; www.cozen.com.

>   
Allen Maxson Miller

Morris, Manning & Martin, LLP, announced that associate **Scott L. Allen**, of counsel **James W. Maxson** and associate **Duncan W. Miller** were elected **partners**. Respectively they represent the firm's corporate, insurance and real estate practices. The firm is located at 1600 Atlanta Financial Center, 3343 Peachtree Road NE, Atlanta, GA 30326; 404-233-7000; Fax 404-365-9532; www.mmmllaw.com.

> **Howick, Westfall, McBryan & Kaplan, LLP**, announced that **Bappa Basu** joined the firm as an **associate in the commercial litigation and bankruptcy practice groups**. The firm is located at Suite 600, One Tower Creek, 3101 Towercreek Parkway, Atlanta, GA 30339; 678 384-7000; Fax 678 384-7032; www.hwmklaw.com.

> **Holly K. O. Sparrow** was selected as **clerk/court administrator** of the **Court of Appeals of Georgia**. She is a fellow of the Institute of Court Management and a member of the National Conference of Appellate Court Clerks. Sparrow has worked in court administration for more than 25 years. The court is located at 47 Trinity Ave., Suite 501, Atlanta, GA 30334; 404-656-3450; www.gaappeals.us.

>  **O. V. Brantley** announced the opening of **Overtis Hicks Brantley**, a private mediation firm specializing in local government and public policy issues. Brantley was formerly with Henning Mediation and Arbitration Service. She

is a former Fulton County attorney and deputy city of Atlanta attorney. The firm is located at 505 Stonebriar Way, Atlanta, GA 30331; 404-444-3231; www.overtishicksbrantley.com.



McCalla Raymer, LLC, announced the appointment of **Susan Reid** as **general counsel**. During her tenure with Fannie Mae, Reid focused on origination and default related issues for the multi-family and single family businesses including underwriting, foreclosure, bankruptcy, loss mitigation, mediation, title litigation and REO sales. The firm is located at 6 Concourse Parkway NE, Suite 3200, Atlanta, GA 30328; 678-281-6500; www.mccallaraymer.com.

In Alpharetta



M. Gokare



S. Gokare



Sikal

Gokare Law Firm and Sikal & Associates announced their merger and the formation of **Gokare & Sikal, LLC**. Partners **Manjunath Gokare**, **Shilpa Gokare** and **Ramesh Sikal** continue to serve clients in the areas of immigration law, corporate law and estate planning needs. The firm is located at 5755 North Point Parkway, Suite 24, Alpharetta, GA 30022; 770-619-2884; Fax 678-867-9390; www.gokaresikal.com.

In Athens



Timmons, Warnes & Anderson welcomed **Deborah Gonzalez** as of counsel to head their new **intellectual property practice**. Her practice areas focus on copyrights, trademarks, music, art and entertainment. The firm is located at 244 E. Washington St., Athens, GA 30601; 706-621-4665; Fax 706-546-8017; www.classiccitylaw.com.

In Duluth



Andersen, Tate & Carr, P.C., announced that **R. Matthew Reeves** was elected as a **member** of the firm. Reeves' practice areas include business litigation, real estate litigation, eminent domain and zoning and land use. The firm is located at 1960 Satellite Blvd., Suite 4000, Duluth, GA 30097; 770-822-0900; Fax 770-822-9680; www.atclawfirm.com.

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Jonesboro (2/11-12), Lawrenceville
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(2/12) and Savannah (2/11-12)

State Finals

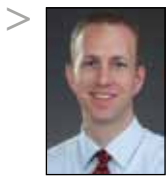
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Contact the Mock Trial Office with
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334-6865 ext. 779
E-mail: stacyr@gabar.org



In Macon



> **Ryan D. Dixon** joined **James Bates Pope & Spivey LLP** as an **associate**. He practices with the firm's litigation group, focusing on complex business and corporate issues. The firm is located at 231 Riverside Drive, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; jbpslaw.com.

In Savannah



> **HunterMaclean** announced that partner **Timothy R. Walmsley** was named the new **leader** of the firm's **arbitration and mediation practice group**. Before joining HunterMaclean, Walmsley

acted as a sole practitioner in the Walmsley Law Firm, P.C., in Savannah and served as chief counsel to the Chatham County Board of Tax Assessors.

Daniel R. Crook joined the firm's **corporate law practice group** as an **associate**. Crook focuses on all aspects of general business representation including formation, operation and disposition issues, private equity and venture capital investments, mergers and acquisitions, employment issues, contract negotiation and taxation matters. The firm is located at 200 E. Saint Julian St., Savannah, GA 31401, 912-236-0261; Fax 912-236-4936; www.huntermaclean.com.

In Smyrna



> **Richard V. Merritt**, formerly a senior litigator at Weinstock & Scavo, P.C. in Buckhead, announced the opening of **The Law Office of Richard V. Merritt, LLC**. Merritt, a former prosecutor, assistant attorney general for the State of Georgia and private firm litigator, concentrates his practice in the areas of personal injury, premises liability, wrongful death and catastrophic injury, professional negligence, DUI and criminal defense and business litigation. The firm is located at 1265 W. Spring St., Suite A, Smyrna, GA 30080; 770-433-9345; Fax 770-433-9346; www.rvmlaw.com.

In Tucker



> **Autry, Horton & Cole, LLP**, announced that **Mark Hanrahan** joined the firm's **construction litigation section**. Hanrahan's practice focuses on construction transactions and disputes. The firm is located at 2100 E. Exchange Place, Suite 210, Tucker, GA 30084; 770-270-6968; Fax 770-270-6974; www.ahclaw.com.

In New York, N.Y.

> **Robins, Kaplan, Miller & Ciresi LLP** announced that partner **Marla R. Butler** joined the firm's New York office. Butler is a member of the firm's intellectual property litigation group. She is a member of the firm's Executive Board and chair of the Diversity Committee. The firm is located at 601 Lexington Ave., Suite 3400; New York, NY 10022; 212-980-7400; Fax 212-980-7499; www.rkmc.com.

Consumer Pamphlet Series



The State Bar of Georgia's Consumer Pamphlet Series is available at cost to Bar members, non-Bar members and organizations. Pamphlets are priced cost plus tax and shipping. Questions? Call 404-527-8792.

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The 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 problem 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.

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Don't Let Your Chitchat Cross the Line

by Paula Frederick

Whaddya mean, ex parte communication?" you glare at the telephone receiver, astonished. "The judge's clerk called me! What was I supposed to do, hang up on her?"

"You should have tried to get me on the telephone," your adversary replies.

"It was just a call about scheduling! The law clerk wanted to confirm that we are still on for tomorrow," you explain. "I told her we have a couple of sticking points that are getting in the way of settlement, so it looks like we'll have to proceed."

"And then you told her exactly what those 'sticking points' are, didn't you? She left me a message saying that based upon a conversation with you, she would like me to focus on the property division issue during tomorrow's hearing."

"It was just chitchat with the law clerk," you insist. "That's not ex parte communication....is it?"

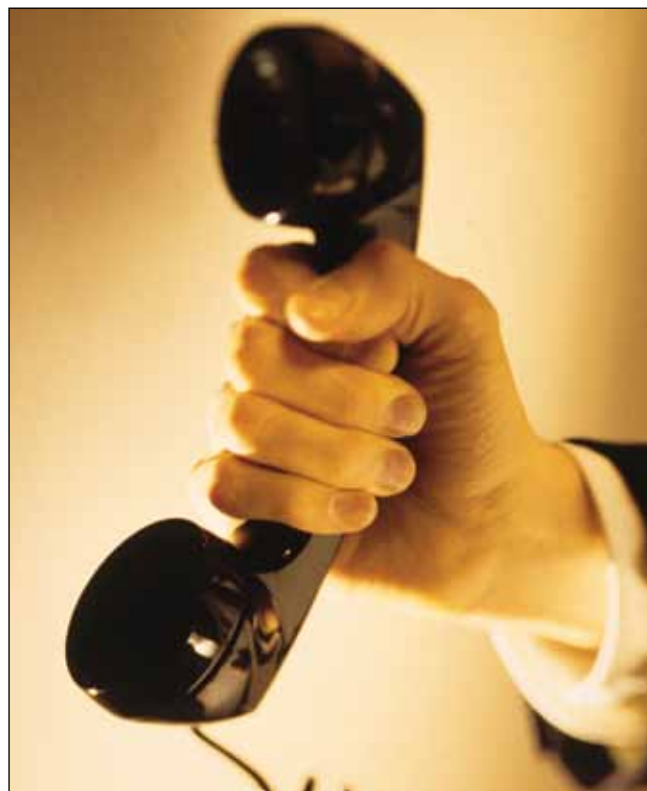
It sure is.

Every lawyer knows not to discuss a pending matter with the judge unless all parties have been notified. A lawyer should not try to influence a judge by means prohibited by law, so Bar Rule 3.5 prohibits ex parte communication with a judge under the theory that ex parte communication is one of the easiest ways to gain influence.


But what about a conversation with a law clerk?

The Georgia Code of Judicial Conduct requires that "staff and court officials observe the standards of fidelity and diligence that apply to judges," (Canon 3C(2)). The commentary to Canon 3 requires judges to make "reasonable efforts, including the provision of appropriate supervision, to ensure that [the rule prohibiting ex parte communication] is not violated through law clerks or other personnel on their staff."

The Code makes sense. No lawyer should expect a law clerk to keep secrets from the judge for whom she works. For purposes of the Rules of Professional Conduct, a conversation with the law clerk is governed by the same rules as a conversation with the judge.



Of course, neither the Rules of Professional Conduct nor the Code of Judicial Conduct prohibits communication with the court for scheduling, administrative or other authorized matters. If the purpose of the conversation is unclear, the question is whether the conversation gave you a procedural or tactical advantage in the matter before the court.

It's easy for a conversation that begins as a legitimate scheduling inquiry to turn into a discussion of the merits of the case. Be sure that your chitchat does not cross the line. 



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

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Discipline Summaries

(Aug. 15, 2010 through Oct. 15, 2010)

by Connie P. Henry

Voluntary Surrender/Disbarments

Pamela Gordon

Atlanta, Ga.

Admitted to Bar in 2003

On Sept. 20, 2010, the Supreme Court of Georgia disbarred attorney Pamela Gordon (State Bar No. 302377). Having failed to file a Notice of Rejection to a Notice of Discipline, the following facts are admitted by default:

A client hired Gordon on a contingency basis in an automobile accident case where the client was struck by an automobile while walking across the driveway of a gas station. The client required medical treatment. In October 2008, Gordon settled the case with the driver's insurance company for \$26,000. Gordon did not deposit the funds into her attorney trust account. Gordon kept \$7,540 as her contingency fee and initially paid the client \$7,000 by personal check. Gordon told her client that she reserved the remaining \$11,460 to pay outstanding bills from medical service providers and that she had paid, or soon would pay, those bills with the remaining funds. The gas station's insurance company paid \$5,000 directly to the medical service providers. Unpaid medical bills totaled \$10,630.04. Subsequently, Gordon paid \$2,973 to the client as her share of the settlement proceeds, but she did not pay any medical bills with the remaining \$8,487, and kept the money for her personal use. Gordon did not tell her client that she did not pay the medical bills and after the client continued to receive bills from medical service providers, she discharged her.

Gary Allen Moss

Chamblee, Ga.

Admitted to Bar in 1988

On Sept. 20, 2010, the Supreme Court of Georgia disbarred attorney Gary Allen Moss (State Bar No. 002650). Having failed to file a Notice of Rejection to a Notice of Discipline, the following facts are admitted by default:

The client, a collection agency, retained Moss to represent the agency in collection matters on an ongoing basis. Moss received money on behalf of the

company through garnishment actions and directly from individuals and was to remit the company's portion of those collections on a monthly basis. Even though Moss continued to collect money on behalf of the company, he ceased remitting the company's portion around September 2008 and failed to account for the funds collected since that time. Moss commingled the company's funds with his own and converted company funds to his own use, he failed to respond to calls made by the president and other employees of the company and he failed to return the company's files as requested.

Jeffrey L. Levine

Atlanta, Ga.

Admitted to Bar in 1977

On Oct. 4, 2010, the Supreme Court of Georgia accepted the Voluntary Surrender of License of Jeffrey L. Levine (State Bar No. 448600). Levine pled guilty to a felony violation of 18 U.S.C. §§1005 (Fraud and False Statements—Bank Entries Reports and Transactions) and two (Principals) in the U.S. District Court for the Northern District of Georgia, United States of America v. Jeffrey L. Levine, Case Number 1:09-cr-00544-JTC.

William F. Hinesley III

Savannah, Ga.

Admitted to Bar in 1984

On Oct. 4, 2010, the Supreme Court of Georgia disbarred William F. Hinesley III (State Bar No. 356360). Hinesley was personally served with four Notices of Discipline but did not file a Notice of Rejection with regard to any them. Accordingly, the following facts are admitted by default:

Hinesley settled a client's personal injury case for \$25,000. He delivered a check to the client for \$3,000, but failed to provide a settlement statement or an accounting regarding the use of the funds. Additionally, he failed to pay third-party medical providers even though he falsely told the client he had paid them. He also commingled the settlement funds with his own and converted the settlement

funds to his own use. He failed to communicate with the client.

In another matter, Hinesley was retained to represent a client in an adversary proceeding filed against the client in a bankruptcy case. Hinesley filed an answer on the client's behalf but failed to file the client's portion of the consolidated pre-trial order despite the bankruptcy court's order, did not respond to the opposing party's attorney with regard to the pre-trial order, and told his client he had filed it, although he did not file his portion until after the bankruptcy court ordered him to do so. Thereafter, Hinesley failed to communicate with his client. Additionally, after failing to respond to a Notice of Investigation, he was placed on Interim Suspension, but he continued to actively engage in the practice of law on behalf of other clients in the bankruptcy court.

Suspensions

Jay Harvey Morrey
Norcross, Ga.

Admitted to Bar in 2002

On Sept. 20, 2010, the Supreme Court of Georgia suspended attorney Jay Harvey Morrey (State Bar No. 523494) for a period of 18 months. Morrey filed a Petition for Voluntary Discipline after the State Bar filed Formal Complaints against him in two separate matters.

Morrey was retained in February 2007 to represent a client regarding injuries sustained in an automobile accident. In July 2007 he sent the client an e-mail informing her of a \$3,000 settlement offer, discussing his demand letter for \$43,953.40 and advising her to file a lawsuit. Morrey filed the lawsuit in July 2007 but did not meet with her prior to filing. He did not prepare his client for her deposition and did not keep her informed about the case. Morrey dismissed the action without prejudice in October 2007 but did not discuss the dismissal with his client before filing it and did not obtain her permission. Morrey never filed a motion to withdraw from the representation. In November 2007 he

"He who is his own lawyer has a fool for his client."

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sent a letter to the client telling her he would withdraw and dismiss the case without prejudice because he saw no factual basis to support continued prosecution. The defendant moved for fees and expenses; Morrey filed a response on his behalf but not on his client's behalf. He did not advise her to hire new counsel or file a response. Morrey did not inform his client about the hearing on the motion and she did not attend. The trial court entered an order awarding fees against Morrey

and the client for \$5,238, but Morrey did not advise his client about the order. He filed an appeal from the order but only on his own behalf. The Court of Appeals denied the application; Morrey did not advise the client about the appeal or its resolution. The defendant served the client with post-judgment discovery requests. Ultimately, Morrey's firm paid the judgment.

In another case, a couple retained Morrey to review a leasing cap at a condominium unit, which they

purchased as an investment, and to provide an opinion as to the effect of the cap on their qualification for treatment under Internal Revenue Code Section 1031. Morrey reviewed the documents and several of the condominium rules and regulations provided to the couple, but he did not obtain a copy of the declaration of condominium rules and regulations. At the time Morrey had practiced law for two years and two months and had no significant experience in real estate law or transactions, so he was not aware that any changes to the bylaws of a condominium association must be filed with the county before taking effect. No one had filed changes to implement the leasing cap and it was not in place when Morrey filed litigation. Morrey told his clients that the leasing cap was enforceable and that they could not use the property as rental property or as a Section 1031 exchange, so they sold the unit. The clients hired Morrey to file a lawsuit seeking to hold the sellers and condominium association liable for their loss on the unit, the loss of the tax advantage and other costs of the transaction. The trial court found the litigation frivolous as to three of the nine defendants and awarded fees under OCGA § 9-15-14.

Morris P. Fair Jr.

Atlanta, Ga.

Admitted to Bar in 2000

On Oct. 4, 2010, the Supreme Court of Georgia ordered that Morris P. Fair Jr., (State Bar No. 581019) be suspended with conditions for reinstatement. On July 27, 2010, the Court vacated its previous order disbaring Fair, temporarily suspended him from the practice of law, and remanded the matter to the Investigative Panel to make certain findings. Prior to any further action, Fair filed a Petition for Voluntary Discipline in three separate matters wherein he admitted that he currently is physically, mentally and emotionally impaired.

Kota Chalfant Suttle

Atlanta, Ga.

Admitted to Bar in 2002

On Oct. 4, 2010, the Supreme Court of Georgia ordered that Kota Chalfant Suttle (State Bar No. 693483) be suspended from the practice of law in Georgia for two years and meet conditions for reinstatement. Suttle pled guilty to one felony count of residential mortgage fraud, and was given a misdemeanor sentence of six months probation as a first offender.

Public Reprimands

Jefferson Lee Adams

McDonough, Ga.

Admitted to Bar in 2000

On Sept. 20, 2010, the Supreme Court of Georgia ordered that attorney Jefferson Lee Adams (State Bar No. 003523), be administered a Public Reprimand with conditions. The State Bar filed four formal complaints.

In Docket No. 5394, a client retained Adams to represent him in a divorce case. Adams filed the complaint but failed to appear at the calendar call on Nov. 6, 2006. Adams faxed a conflict letter, but the trial court found it untimely because it included no dates other than Nov. 6, 2006. The next day neither party nor Adams appeared for trial, and the court dismissed the case for failure to prosecute. Adams ceased communicating with his client and did not respond to the Notice of Investigation.

In Docket No. 5477, a client paid "The Georgia Law Group of Hurley" \$500 to represent her in a civil case. Thereafter, Adams assumed responsibility for the firm and renamed it "The Georgia Law Group of Adams," but he did not perform any services on the client's case. No one at the firm communicated with the client or handled her case. Adams responded to the Notice of Investigation, stating that while the firm was in his name, the office manager maintained control over the bank accounts, and Adams had no access to them.

In Docket Nos. 5478 and 5479, a couple retained "The Georgia Law Group of Hurley" to represent them in a civil case and paid a \$500 fee before Adams took over responsibility for the firm. The couple consulted with the office manager, who "assigned" them to Adams. No one returned the fee they paid or their client file, which contained pictures and paperwork. Adams responded to the Notice of Investigation, stating that only the office manager had control over the firm's accounts.

The Court ordered that Adams receive a public reprimand conditioned on his providing evidence to the State Bar within two weeks of the Supreme Court order that he fully refunded the fees to the clients in Docket Nos. 5477, 5478, and 5479. In addition, the Court ordered Adams to provide the State Bar with quarterly updates concerning his substance abuse treatment for a period of one year commencing on the date of the order.

Felicia Prudence Rowe

Stone Mountain, Ga.

Admitted to Bar in 1995

On Sept. 20, 2010, the Supreme Court of Georgia ordered that attorney Felicia Prudence Rowe (State Bar No. 341468), be administered a Public Reprimand with conditions. The State Bar filed six formal complaints.

Six separate clients whom Rowe represented in domestic relations matters became dissatisfied with Rowe's representation and level of communication. Rowe's conduct caused negative repercussions for three of the six clients. The most serious consequence occurred when Rowe failed to confirm that an answer had been filed on the client's behalf by his former lawyer and as a result a default was entered against the client. In representing another client, Rowe failed to appear at a scheduled hearing and failed to ensure that her client would appear. In another matter, Rowe, who had a scheduling conflict, had associate counsel appear at a

court hearing on a client's behalf, but failed to adequately instruct the associate counsel to ensure that the new temporary support order mandated that the father continue payment of the child's health insurance premiums.

The Court ordered Rowe to receive a Public Reprimand with the following conditions: (1) Rowe must submit quarterly evaluations to the Law Practice Management Department for one year; (2) Rowe must not accept any new domestic relations cases for the next two years; (3) Rowe must limit her caseload to 20 new cases per year for the next two years; (4) Rowe must take a minimum of 18 hours of Continuing Legal Education per year for the next two years; and (5) if, upon the State Bar's motion, it is shown that Rowe has failed to comply with any of the foregoing conditions, the Court may order that Rowe be suspended until she is in full compliance.

Review Panel Reprimand

Melvin Robinson Jr.

Atlanta, Ga.

Admitted to Bar in 1973

On Sept. 20, 2010, the Supreme Court of Georgia accepted the petition for voluntary discipline of attorney Melvin Robinson Jr., (State Bar No. 610650), and ordered that he be administered a Review Panel reprimand. Robinson filed a Petition for Voluntary Discipline after the issuance of a formal complaint.

A client retained Robinson in 2006 to represent her in filing a Chapter 13 bankruptcy case. Robinson filed the bankruptcy complaint in February 2007 and a notice of leave of absence on Feb. 8, 2007, for March 10-28, 2007. The meeting of creditors with the bankruptcy trustee was scheduled for March 15, 2007. Robinson's paralegal appeared on Robinson's behalf and informed the bankruptcy trustee of the previously filed leave of absence. However,


Robinson did not reschedule the meeting of creditors, and no meeting of creditors was held prior to the date set for the confirmation hearing. Rather than requesting that the bankruptcy court dismiss the complaint, the trustee agreed to allow Robinson to reschedule. Robinson duly called the trustee's office and obtained new dates for the meeting of creditors and the confirmation hearing. However, Robinson then failed to file and serve the required notices. Consequently, the trustee recommended dismissal of the bankruptcy complaint, and the bankruptcy court dismissed the complaint on May 3, 2007.

On May 7, 2007, Robinson filed a Notice to Reset Confirmation Hearing and Objection to Order of Dismissal seeking to reinstate the case along with a Motion to Set Aside the Order of Dismissal. On July 12, 2007, the bankruptcy court ordered Robinson to schedule a hearing on the notice and motion, but Robinson failed to do so. The client wrote to the bankruptcy court, which scheduled a hearing for Sept. 12, 2007. On receipt of the notice, Robinson informed the client that she needed to be present. Robinson, however, was not present at the calendar call, and he appeared at the hearing only after court staff called his office to ask where he was. When he finally appeared, he was not prepared to represent his client. After the hearing, the bankruptcy court terminated Robinson's representation of the client and reinstated the client's bankruptcy complaint. The bankruptcy court subsequently entered an order regarding Robinson's conduct and referred the matter to the State Bar.

The Court found that Robinson's conduct demonstrated a lack of reasonable diligence in representing his client, and it exposed her to potential injury. In mitigation of discipline the Court found that although the client ultimately lost her home in 2009 for failure to make payments,

Robinson's misconduct in 2007 did not cause this outcome. The Court also found that Robinson had practiced bankruptcy law for more than 15 years, he had no history of discipline, and since the filing of this grievance, he has filed numerous bankruptcy complaints without objection.

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 Aug. 13, 2010, two 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.

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Your Year-End Practice Management Checklist (AGAIN)

by Natalie R. Kelly

This article previously appeared in the December 2003, Volume 9, No. 3, issue of the Georgia Bar Journal. It is reprinted here as the final installment celebrating the Law Practice Management Program's 15th anniversary.

At the end of last year, I wrote a Year-End Practice Management Checklist for your firm. It's hard to believe that a whole year has gone by already. But it has, and with changes in the economic fabric of our country and the legal market as a whole, I think it is once again time to consider how you are managing your firm.

Whether you are a sole practitioner, small-firm, corporate, government or large-firm attorney, you can benefit from taking a look at the way you have been doing things with an eye towards improving. Use the following year-end checklist to help you get a head start on improving your law office.

Year-End Office Management Review

- Do you have a written policies and procedures manual?
- Do you have enough staff for the workload of your firm?
- If not, have you planned on hiring additional staff?
- Do you need to hire an office manager or administrator?
- Have you reviewed your salaries and benefits offerings recently?
- Do you need to open a branch office?
- If you are in a partnership, do you have a written partnership agreement?
- Do you have an associate training and review program?



- Do you have regular (monthly at least) meetings for partners and/or associates?
- Have all employees signed employment agreements with the firm?
- Does every position (not person) in your firm have a written job description—including yourself?

- Do you have proper malpractice insurance coverage?
- Do you have written and signed fee agreements for every client you represent?
- Do you perform a conflict of interest check on every new client?
- Do you use file opening and closing checklists for each client file?
- Do you have a detailed disaster recovery plan that you have shared with everyone in your office?
- Have you reviewed your filing and storage procedures lately?
- Is your vendor list up-to-date with all of the correct contact, taxpaying identification and product/service-specific information?
- Are all of your legal research products/services up to date?
- Have you recently completed an inventory of your law office library for completeness and relevancy to your current practice areas and needs?

Year-End Technology Checks

- Do you have up-to-date computer systems for the entire office?
- Are the computers in your office networked together so you and your staff can easily share work product and network devices like printers and copiers?
- Is your network reliable?
- Do you have the latest service releases, fixes and patches needed for your hardware and software systems?
- Is your Internet connection reliable?
- Have you prepared a technology budget for the coming year(s)?
- Does your current technology budget include funds for training?
- What are the training methods you have used for keeping you and your staff up on the software tools you are using in your law practice?
- Do you have or need a network administrator in-house or can you use an outside vendor?
- Are all of your technology vendor contracts current and relevant to your present technology situation?
- Are your monitors adequate, especially for staff, if they are in front of the monitor all day?
- Do you have a regular backup and restore routine for your daily work product?
- Do you keep backups both off and on site?
- Are you in need of a smart-phone — (Blackberry, iPhone, etc.), Pocket PC or netbook for working while away from the office?
- Can your office fax from the desktop?
- Do you know how to use PowerPoint and other presentation software tools?
- Are your telephone, voicemail and other communication systems up-to-date?

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- Do you have computerized case management, time and billing and accounting systems that are appropriate for a firm of your size and practice area?
- If you are in a firm that litigates, are your litigation support tools adequate for the courtroom?
- Do you have a firewall set up for your office (and home) networks?
- If you are striving to become paperless, do you have a high-end or volume appropriate sheet fed scanner with appropriate OCR scanning software?
- Does your technology promote firm "knowledge management?"

Year-End Financial Checks

- Are you billing monthly or as soon as you complete a matter or major parts of a matter?
- Do you review your accounts receivable monthly and have staff follow-up with non-paying clients?
- Do you track and bill for all expenses incurred on behalf of your clients?
- Have you been charging interest on past due account balances?
- Do you have a merchant account that allows clients to pay your fees via a credit or debit card?
- Do you have your books up-to-date?
- Do you track time for all matters regardless whether you are charging by the hour or charging a flat fee?
- Is time-tracking required of all employees?
- Are your operating and trust accounts balanced and reconciled through last month?
- Have you paid all of your required quarterly and annual taxes for the year?
- Do you have an accountant or bookkeeper?
- Have you met with your accountant or bookkeeper to go

over your chart of accounts and reporting needs for the coming tax year(s)?

- Have you developed a budget for your firm?
- Is your payroll processed on time and with the appropriate withholdings?
- Does your payroll service send you regular reports on your account?
- Are you and your associates bringing in the amount of revenue you budgeted for over the past year?
- Have you written off uncollectible accounts for the year?
- Have you reached your billable hours goals for the year?
- Have all shareholders in the firm received current profit and loss statements?
- Do you share firm financial information with staff to enhance productivity?


Year-End Marketing Assessment

- Did you bring in new clients in the past year?
- Is your written marketing plan up-to-date?
- Have you met recently with your lowest-paying clients?
- Have you been in your own reception area lately?
- Are you getting feedback on your service from your existing clients via a client satisfaction survey?
- Do you have a website that invites new business?
- Have you changed/do you need to change your firm brochure?
- Are client-focused newsletters offered via e-mail?
- Are all of your practice areas covered in your client newsletter marketing?
- Do you accept online or credit card payments?
- Are you in the habit of creating and sharing with your clients a case plan and budget?
- Does your file closing letter invite repeat and new business?

- Does your advertising set you apart from the competition?
- Do you carry high-quality business cards?
- Have you developed an "electronic business card" and marketing message for all of your e-mail correspondence?
- Are you getting the best deal on your Yellow Pages advertising?
- Have you developed a marketing script for use by your staff when asked, "What does your firm do?"
- Have you monitored how and why clients chose you as their attorney?
- Have you been fired by any of your clients?
- What do you say when someone asks, "What do you do?"
- Does your firm "brand" really fit the firm?

Resources for the New Year

You may find that you desperately need to improve certain areas of your practice after completing the above checklist. The Law Practice Management Program will gladly assist you with materials from our resource library; an e-mail query response, a no-cost telephone consultation or low-cost, in-person consultation to help with any of your specific practice management needs. In fact, your first New Year's resolution should be: contact the Bar's Law Practice Management Program at 404-527-8770, visit the Law Practice Management Program online at www.gabar.org or e-mail nataliek@gabar.org to help improve your practice management skills.

The Law Practice Management Program wishes you a happy and prosperous New Year! 



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.

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Sections Award Those Who Advance the Profession

by Derrick W. Stanley

Sections are a way for members of the State Bar of Georgia to network with others who practice in the same areas as well as take advantage of educational programs. Several sections have created prestigious awards that honor individuals who advance not only the section, but also the profession.

The General Practice and Trial Section created the Traditions of Excellence Award, which honors four outstanding members of the Bar, one plaintiff lawyer, one defense lawyer, one general practice lawyer and one judge. Its nominating process is open to attorneys and guides the application process with six suggestions to ensure the recipient is of the highest caliber. The requirements are: 1) a Georgia resident; 2) 20 years of outstanding achievement as a trial lawyer, general practitioner or judge 3) 50 years or older; 4) have made a significant contribution to CLE or Bar activities; 5) have a record of community service; and 6) have a personal commitment to excellence. The recipients of this award are honored at a breakfast presentation and an evening reception during the State Bar Annual Meeting.

The Family Law Section, in conjunction with the Convocation on Professionalism, established the Family Law Section Professionalism Award in 1995. The award is given in recognition of the person who the section deems to have most exemplified the aspirational qualities of professionalism in their practice as a lawyer and/or judge. In 1999, the award was officially named the Joseph T. Tuggle Jr. Professionalism Award.

Additionally, the section presents the Jack P. Turner Award to recognize outstanding contributions and achievements in the area of family law. Criteria for this award include a career devoted to the practice of family law with substantial and significant contributions


to improve and advance the practice of family law in Georgia. This award is not given annually. Eleven members have received the award since its inception.

The Real Property Law Section created the George A. Pindar Award to honor a member of the Real Estate Section of the Bar who unselfishly gives of him or herself for the benefit of the bar. The executive committee of the Real Estate Section determines annually if the award shall be granted and votes to give the award to a person or persons whom the executive committee thinks represents the ethics and ideals of George A. Pindar.

Other sections offer awards to members of the section and Bar and some have partnered with outside organizations to offer prestigious awards. Most recently, the Intellectual Property Law Section co-sponsored the 2010 Intellectual Property Community Service Awards on Oct. 14 with Georgia State University College of Law, Georgia State University J. Mack Robinson College of Business and the Intellectual Property Section of the Atlanta Bar. The awards presentation was held over lunch at the Commerce Club. The recipients were presented a crystal award as their achievements were highlighted to the audience. The 2010 honorees were:

- **Bill Brewster, Kilpatrick Stockton**, for his service on the Board of Directors of the Glenn Pelham Foundation, as past president of the Board of Directors of Special Olympics Georgia, as a long-time supporter of the United Way of Metro Atlanta and Down Syndrome Atlanta and as a member of the firm's Pro Bono Committee for several years.
- **Ann Fort, Sutherland Asbill & Brennan**, for her devotion of more than 1,000 hours of pro bono service representing a death row inmate who was granted clemency and sentenced to life without parole 2.5 hours before his scheduled execution, as well as her service as a volunteer for Hagar's House, a program of Decatur Cooperative Ministry that provides up to 90 days of emergency shelter and support services for women and children.

- **Michael Hobbs, Troutman Sanders**, for his pro bono service to community organizations including Georgia Lawyers for the Arts, Imagine It! The Children's Museum of Atlanta and Top Hat Soccer Club, as well as service on the Board of Trustees for the Hammonds House Museum, the Board of Central Presbyterian Church and Outreach Center and as chair of the Trinity Early Learning Center.
- **Dr. Judy Jarecki-Black, global head of the IP Department at Merial Limited**, for her pro bono work helping children in guardianship, custody and deprivations issues, including serving as a guardian ad litem in juvenile cases and representing children as an advocate before school tribunals.
- **Frank Landgraff, senior IP counsel for GE Energy**, for his service on the Advisory Board of the Atlanta Volunteer Lawyers Foundation (AVLF) for the past five years, as a founding member of the Pro Bono Partnership of Atlanta, as a Saturday Lawyer for AVLF and for handling more than 30 cases related to consumer and housing for low-income individuals over the past 20 years.

Awarding members of the Bar and sections are a way that good work and advancement of principles for attorneys can be honored and acknowledged. There are many awards that define what it is to be an attorney and sections help perpetuate the positive images of attorneys throughout the state. These awards are bestowed on the most deserving among the profession. 



Derrick W. Stanley is the section liaison for the State Bar of Georgia and can be reached at derricks@gabar.org.



Photo by Carolyn Richardson, GSU

(Left to right) Recipients of the 2010 Intellectual Property Community Service Award include: Ann Fort, Sutherland Asbill & Brennan; Michael Hobbs, Troutman Sanders; Frank Landgraff, senior IP counsel for GE Energy; Bill Brewster, Kilpatrick Stockton; and Dr. Judy Jarecki-Black, global head of the IP Department at Merial Limited.

Atlanta Provides a Warm Welcome to the U.S. Court of Appeals for the Federal Circuit

by Steve Wigmore, chair, Intellectual Property Law Section

The Federal Circuit Bar Association, the Atlanta Chapter of the Federal Bar Association, the Atlanta Bar Association, the State Bar of Georgia and several Georgia law schools were both proud and pleased to welcome the U.S. Court of Appeals for the Federal Circuit to Atlanta the first week in November. The court convened hearings on actual cases at several locations including Atlanta's John Marshall Law School, Georgia State University College of Law and Emory University School of Law.

The court also convened cases at the U.S. District Court for the Northern District of Georgia. The respective bar organizations planned a series of activities which were centered on the court's visit. The activities included a free briefing seminar at the Northern District that described the cases being addressed by the court that day. The bar organizations also directed a cross-discipline afternoon CLE program on Nov. 3, that featured segments addressing Veteran and Military Affairs Law and Intellectual Property Law and a segment with several members from the court: Hon. Randall Rader, Hon. Arthur Gajarsa and Hon. Timothy Dyk. This portion of the CLE addressed oral advocacy and appellate advocacy issues.

A formal dinner welcoming the court to Atlanta and honoring the recipient of a pro bono award followed the CLE program, both of which were held at the Four Seasons Hotel. The CLE program had more than 100 lawyers in attendance while the dinner had in excess of 200 people in attendance.

Fastcase: Your New Member Benefit

by Sheila Baldwin

Beginning on Jan. 1, 2011, the State Bar of Georgia will make Fastcase the newest benefit to its members, putting its comprehensive online law library at your fingertips for free. Hopefully, you will find the time-saving, intuitive features of Fastcase to be an asset to your practice.

Fastcase launched in 1999 to democratize the law and to make legal research easier, smarter and faster. Twenty state bar associations and dozens of specialty and local bar associations offer free access to Fastcase to their members—making legal research free for more than 500,000 lawyers in the United States. Fastcase makes legal research more efficient with new tools like best case first sorting, integrated citation analysis and a visual mapping tool that makes the most important cases jump off the page.

To use the service as of Jan. 1, 2011, begin at the State Bar of Georgia's website at www.gabar.org. Log on to the members area on the right side of the home page and click Fastcase. (If you have any trouble logging in, contact the State Bar at 800-334-6865 or 404-526-8608.)

Once you've logged in, begin your research at the Fastcase "Start Page" which is customized for you with recent searches and recently searched jurisdictions. At the top of the page, run a simple "Quick



Caselaw Search"—type in your search (using keywords, Boolean expressions or natural language) and click "Search." Getting started is that easy.

For more advanced case law research, click "Advanced Caselaw Search." Here, search any combination of jurisdictions and narrow to any date range. The Fastcase keyword search operates using standard terms and connectors and the Fastcase smart search technology makes analyzing results faster and easier than ever before.

Sort Your Search Results

The old way to search for cases online is to search broadly and then “focus” the search, a technique that produces both over-inclusive and under-inclusive results. This wastes time and exposes researchers to the risk of losing helpful cases in the narrowing of results. Like Google, Fastcase allows members to search broadly—returning as many as 10,000 cases—and to sort those cases by selected criteria (relevance, date, authoritative value) and bring the best cases to the top of the results list.

Find the Most Authoritative Case

Fastcase makes it easy to find authoritative cases. On the results screen, use “Entire Database” to sort cases based on how often they are cited overall or “These Results” to sort cases based on how often they are cited within your search results. Use this feature to find the seminal case on any issue.

Visualize Search Results

The Fastcase “Interactive Timeline” visually maps search results making it easy to see—at


a glance—which cases are most important. With the “Interactive Timeline,” even if a search returns thousands of results, the most helpful cases will jump off the page. This speeds research and often highlights a case that might otherwise have been missed. Plus, the “Interactive Timeline” makes it easy to see trends in the law that would otherwise be obscured in a long list of cases.

Unique Intuitive Feature

Forecite, a new addition to the Fastcase research tools, uses an intuitive process to ensure that you don’t miss seminal cases. For example, if you were researching the Miranda Doctrine under the Fifth Amendment, you would want your search to retrieve the seminal case, *Miranda v. Arizona*, 384 U.S. 436 (1966). The trouble is that if you search for “Miranda Doctrine” using most legal research engines, the Miranda decision will not be in your search results because that phrase does not appear anywhere in the decision. This is where Forecite comes in—at the top of your search results screen you will see a banner indicating that Forecite has identified additional decisions that may be relevant to your research topic, but do not

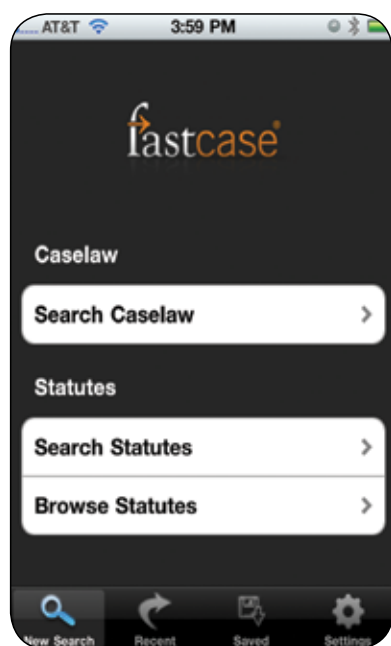
contain your search terms. Click “View Results,” and the first suggested case is *Miranda v. Arizona*.

Members of the State Bar of Georgia have free and unlimited access to Fastcase training and research support. Resources—from online webinar training to on-demand video tutorials and user guides—are always available under “Help Options” on the Fastcase website at www.fastcase.com. Members can contact Fastcase directly Monday–Friday from 8 a.m. to 8 p.m. for help getting started. Call 866-773-2782 or e-mail support@fastcase.com.

In addition to the resources on Fastcase’s website, I will continue to offer monthly training sessions at all three State Bar offices, or at local or voluntary bars who request training for their members. To find out about CLE credit or if you have questions about Fastcase, please contact me at the information listed below. 



Sheila Baldwin is the member benefits coordinator for the State Bar of Georgia and can be reached at sheilab@gabar.org or 404-526-8618.



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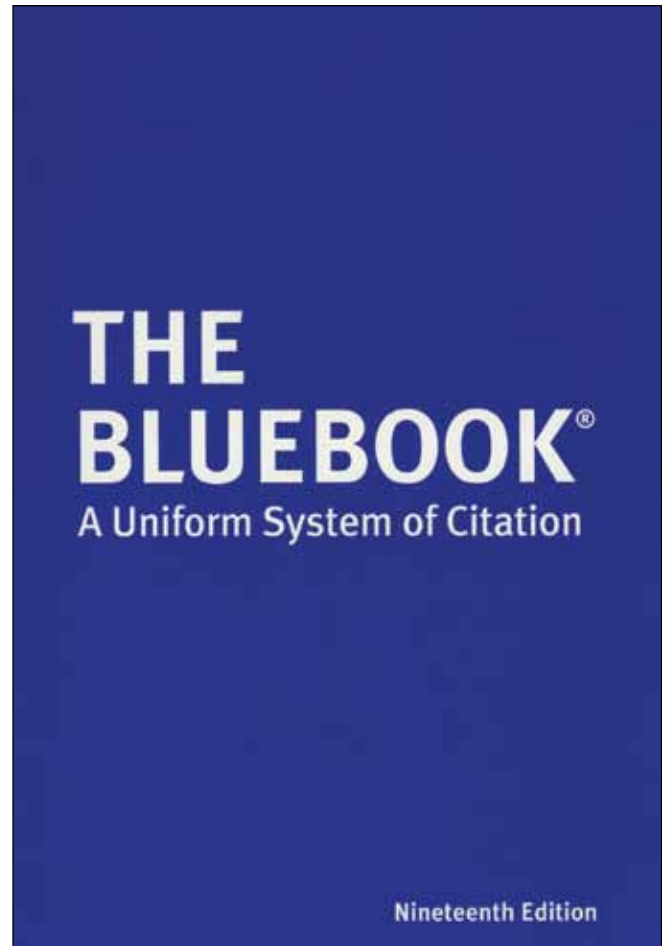
Updates to Citation Manuals

by Karen Sneddon and David Hricik

“Citing is power.”¹ Lawyers use citations to establish credibility, bolster arguments and communicate vital information. While substantive mistakes are obviously more likely to undermine those goals than are errors in citation format, poorly formatted citations may cause the reader to question the underlying substantive work. Questions over form can raise questions over substance.

Just as new cases come out, so do new citation manuals. New editions of the two widely used citation manuals appeared in 2010. *The Bluebook*² is in its nineteenth edition; *Association of Legal Writing Directors (ALWD)*,³ its fourth. Both new editions clarify rules in previous editions and add new rules to reflect changing practices. This installment of “Writing Matters” describes some basic changes to the manuals and some of the increased coverage of modern sources, including international and electronic materials.

Much like Windows and the Apple operating systems are becoming similar, the two manuals are, too. The editors of *ALWD* have enhanced the *ALWD* index so it is nearly as extensive and helpful as that of *Bluebook*.



Similarly, the format of *Bluebook* continues to become more user friendly with the addition of eight pages to the practitioner-focused *Bluepages*⁴ and the new subdivisions of the lengthy Table 1, which describes abbreviations and citation formats for U.S. jurisdictions.⁵ Both manuals now use secure wire spiral binding to hold their ever-increasing mass.⁶ However, *ALWD* might be keeping a step ahead here. It now includes annotated examples, called "Snapshots," of commonly used sources⁷ and now also includes reusable tabs to let the user customize the manual.

Other harmonizations are not as earth shattering, but they are helpful. The new edition of *ALWD* now lets us use "United States" rather than the "U.S." in a case cite when United States is a party. We now have freedom of choice under both manuals on this critical issue!⁸


Other changes, such as presentation order of multiple explanatory parentheticals in a single citation, may receive little fan-

fare except from the most devoted of citation fans.⁹ However, other changes will gather more immediate attention because they guide how to cite sources that are becoming increasingly used in practices.¹⁰ *Bluebook* has increased its coverage of administrative materials.¹¹ *ALWD* now includes guidance on how to cite live performances, such as plays, operas, concerts and ballets.¹²

The most extensive rule expansions and clarifications relate to electronic resources.¹³ New media has developed and gained widespread use since the previous editions. Both new citation manuals include expanded rules relating to the citations of blogs, podcasts,¹⁴ audio recordings of court proceedings, YouTube videos, Twitter, Facebook, MySpace, webcasts, text messages and instant messages.¹⁵ There are also changes in GPO access¹⁶ and E-annotations for American Law Reports. The differences between PDF files and HTML documents are highlight-

ed.¹⁷ Updates also reflect changing practices in research so that citations can be made to digital scans of a source, even when the source is also available in print.¹⁸ The manuals now detail citation format for electronic case filings.¹⁹

The global nature of the practice of law is also reflected in the new editions. *ALWD* has expanded abbreviations for legal periodicals to include journals from the United Kingdom and Australia.²⁰ *Bluebook* has updated descriptions of United Nations materials and proceedings from the International Criminal Court.²¹

In sum, not only are both manuals becoming similar, they are both providing greater guidance on how to cite materials that are increasingly important to legal practice. Law clerks and judges who will be reading your briefs will know these rules, and whether the brief uses proper cite form. Doing it right will not just help the reader find the source, but will give greater power to your writing. 

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



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

Writing Program at Mercer Law School is currently ranked as the nation's no. 1 by *U.S. News & World Report*.

Endnotes

1. Gerald Lebovits, *Tanbook, Bluebook, and ALWD Citations: A 2007 Update*, 79 N.Y. St. B.J. 64 (Oct. 2007). For a humorous look at citation, see Michael Coenen, *An Ode to the Bluebook*, 12 GREEN BAG 2d 115 (2008). But see Mary Whisner, *The Dreaded Bluebook*, 100 LAW LIBR. J. 393 (2008).
2. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010). The first edition was published in 1926.
3. ALWD & Darby Dickerson, *ALWD Citation Manual* (4th ed., Aspen Publishers 2010). Its first edition was published in 2000.
4. Although user friendly, this does mean a slight renumbering of the rules in the Bluepages.
5. The four divisions are Federal Judicial and Legislative Materials (T1.1), Federal Administrative and Executive Materials (T1.2), States and the District of Columbia (T1.3), and Other United States Jurisdictions (T1.4).
6. For PDFs of all editions of the Bluebook, including the First Edition, see *Eighty Years: The Uniform System of Citation*, <http://www.legalbluebook.com/Public/Introduction.aspx> (last visited Oct. 23, 2010).
7. See, e.g., ALWD R. 24 (A.L.R. Annotation).
8. ALWD R. 12.2(g). Likewise, you can find comfort in your new freedom to abbreviate "Government" as "Gov't" or "Gov't." ALWD App. 3(E).
9. BB. R. 1.5(b). In case you are wondering which order to present multiple parentheticals in a single citation, here's the example from *Bluebook*:
(date) [hereinafter short name] (en banc) (Lastname, J., concurring) (plurality opinion) (per curiam) (alteration in original) (emphasis added) (footnote omitted) (citations omitted) (quoting another source) (internal quotation marks omitted) (citing another source), available at <http://www.domainname.com> (explanatory parenthetical), prior or subsequent history.
BB. R. 1.5(b). The need to provide such a rule does demonstrate the increased sophistication of citation format and citation users.
10. For an examination of the meaning of changes in the previous edition of the *Bluebook*, see Christine Hurt, *The Bluebook at Eighteen: Reflecting and Ratifying Current Trends in Legal Scholarship*, 82 Ind. L.J. 49 (2007).
11. BB R. 14, T. 1.2
12. ALWD R. 30. In case you are wondering, the following is one of

the published examples of citation of live performances: Giachino Rossini, Opera, *The Barber of Seville* (Wash. Natl. Opera, Kennedy Ctr., D.C. Sept. 12, 2009) (Michele Mariotti conducting). ALWD R. 30.3(a).

13. Internet sources are increasingly appearing in all manner of legal writing. See, e.g., Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999-2005*, 9 J. APP. PRAC. & PROCESS 387 (2007).
14. Looking for some great podcasts? Check out Grammar Girl's podcast, <http://www.quickanddirtytips.com> (last visited Oct. 23, 2010).
15. See generally BB R. 18; ALWD R. 33, R. 34, R. 40. The much used, and now frequently cited Wikipedia is featured in ALWD R. 40.5. One author found that from 2004 to 2009, Wikipedia was cited in over 400 judicial opinions. Leo F. Peoples, *The Citation of Wikipedia in Judicial Opinions*, 12 Yale J. L. & Tech. 1 (2009-2010).
16. ALWD R. 15. GPO is the U.S. Government Printing Office. The office provides a variety of information on its website, including Congressional Reports and the Code of Federal Regulations. <http://www.gpoaccess.gov/>
17. ALWD R. 38.1(b)(4). In case you are wondering, a PDF file is an electronic copy of a hard copy source, complete with original page numbers. A HTML document is an electronic copy that is not necessarily a duplicate of the hard copy source because page breaks and page numbers may be different.
18. BB R. 18.2.1(a). See also ALWD R. 5.7, 42.3 (addressing citations to e-readers).
19. BB. B7.1.4.
20. ALWD App. 5. For example, the Oxford University Commonwealth Law Journal (Oxford U. Cmmw. L.J.) and the Sydney Law Review (abbreviated Sydney L. Rev.) are included in Appendix 5.
21. BB R. 20, R. 21. Table 2 (Foreign Jurisdictions) also includes references to jurisdictions new to the Nineteenth Edition, such as Egypt and South Korea.

The Lawyer Assistance Program of the State Bar of Georgia

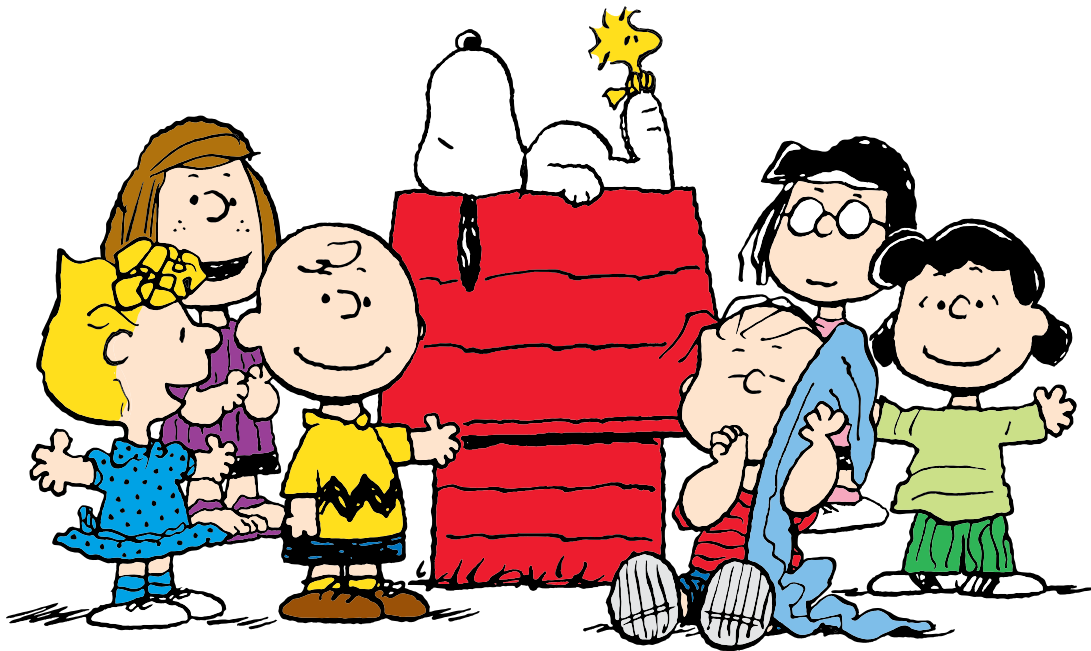
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Some Thoughts About Lowering Costs of Incarceration in Georgia

by Seth Kirschenbaum

The Mission of the Chief Justice's Commission on Professionalism (the Commission) is "to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts and the public and to fulfill their obligations to improve the law and the legal system and to ensure access to that system." The Commission carries out this mission by first, considering efforts by lawyers and judges to improve the administration of justice and second, by examining ways of making the system of justice more accessible to the public. Commission member Seth Kirschenbaum offers an insight as to how this can be ensured.

—Avarita L. Hanson, executive director, Chief Justice's Commission on Professionalism

The state of Georgia currently spends \$1 billion each year incarcerating people. One billion! Does anyone really think that, in the midst of the greatest economic crisis our country has faced in 80 years, we can sustain that kind of spending? Isn't it time we started looking at ideas and programs that cut the number of people we send to prison at the front end and reduce recidivism rates at the back end while saving lives and making our communities safer?

The Georgia Justice Project is a group which takes an expansive approach to criminal defense. Not only does the Georgia Justice Project provide defense lawyers, it gets involved in the lives of its clients. It has social workers on its staff and offers jobs and training to its clients to help them develop skills needed to become productive members of society. Courts should look at the models presented by groups like the Georgia Justice Project and come up with new ways to use the criminal justice system to help people caught up in the process, not just by punishing them with costly and ineffective incarceration.

Drug courts are an example of the creative use of the criminal justice process to reduce inmate populations



Photo by James Myers

and save lives instead of simply throwing them in the dustbin of society. There are a number of drug courts operating in Georgia already. We need more.

Between 1982 and 2002, the total number of people in Georgia's prisons more than tripled and so did the cost of imprisoning them.¹ Of the nearly 54,000 current

prisoners in Georgia, tens of thousands were imprisoned for property crimes and drug offenses.² In 2002, 35 percent of those incarcerated in Georgia were in prison for property crimes, while 28 percent were in prison for drug offenses, for a total of 63 percent of all prisoners. Many of these people could benefit from treatment, community service and other remedial forms of punishment in lieu of prison. Creative alternatives to incarceration could save the state millions of dollars each year while giving offenders the opportunity to pay their debts to society in a way that builds them up and at the same time, helps the community.

Texas has a prisoner reduction initiative which “avoided a huge prison population gain and \$2 billion in expected prison costs by investing in residential and community-based treatment and diversion programs. That state spent \$241 million to create the programs—a fraction of the cost of incarceration.”³

At the back end of the system, Georgia’s recidivism rate demonstrates that incarceration alone is a failed public policy. What is the overall benefit to society of a criminal justice system which in 2000 returned at least 36 percent of released prisoners to prison within three years? Doesn’t the increased crime suggested by that statistic ultimately make our streets less safe?

One of the best programs to combat recidivism has been operating in Georgia for the past 34 years. The State Bar of Georgia has sponsored this program, BASICS (Bar Association Support to Improve Correctional Services). Created in 1976 in response to a challenge to lawyers by Chief Justice Warren Burger to do something to combat high recidivism rates, BASICS offers a voluntary 10-week training program to inmates who are within six months of release from prison. Led from its inception by Ed Menifee, BASICS has had more than 10,000 graduates. By all accounts, BASICS graduates have lower recidivism rates than prison-


ers who have not had the benefit of the training.

The BASICS program teaches practical skills—like how to write a resume and apply and interview for a job. It teaches its students how to do things—such as how to balance a checkbook and, in some instances, how to read and write. It also teaches self-esteem.

Going to a BASICS graduation is one of the most inspirational experiences one can have. The graduates don caps and gowns. Their families are invited and there is a graduation exercise. For many of these participants, it is the first time they have ever graduated from anything. The graduation is quite an emotional experience; and that goes for the spectators as well as the graduates.

One of the amazing things about BASICS is how much bang you get for the buck. While it costs approximately \$16,500 on average per year to house an inmate in a prison,⁴ it costs just \$500 per student for the BASICS training. So, for every person who doesn’t re-offend because of BASICS, there is a huge cost-benefit to the state. At the same time, a life has been saved and the community has been made safer because of less crime.

Former Speaker of the House Newt Gingrich recently wrote in an article co-authored with Mark Earley, former attorney general of Virginia, that “celebrating taking criminals off the street with little thought to their imminent return to society is foolhardy.”⁵ They spoke out in support of raising public awareness of the need to rehabilitate prisoners and to provide resources, education and training for former inmates.⁶ In the current economic climate, BASICS is the kind of program that should receive direct support from the state. Such an investment will save much more money than it costs because of lower recidivism rates, will make a huge difference in the lives of its participants and will make our communities safer because of reduced crime.

Our political leaders are grappling with the challenges of running our state with dwindling resources. There have been drastic budget cuts in support for our parks, public safety, government services and education. The list goes on and on. In this climate, can we afford to keep throwing money at our prison system at a rate of \$1 billion a year without looking at proven alternatives to high incarceration and recidivism rates in Georgia? The answer is obvious. The time is right. 



Seth Kirschenbaum is a partner in the Atlanta firm Davis, Zipperman, Kirschenbaum & Lotito, LLP, and a

member of the Chief Justice’s Commission on Professionalism. For more about the BASICS Program, go to www.gabar.org/programs/basics/.

Endnotes

1. Except where otherwise noted, statistics cited in this article are from the 2004 study “Prisoner Reentry in Georgia” by Nancy G. La Vigne and Cynthia A. Mamalian of the Urban Institute, Justice Policy Center. The authors relied on data provided by the Georgia Department of Corrections.
2. Georgia Department of Corrections, Offender Information, available at: <http://www.dcor.state.ga.us/InmateInfo/InmateInfo.html> (last accessed Oct. 21, 2010).
3. Carrie Teegardin, “Georgia Prison Population, Costs on Rise,” ATL. J. & CONST. (Apr. 4, 2010), available at: <http://www.ajc.com/news/georgia-prison-population-costs-429757.html> (last accessed Oct. 21, 2010).
4. *Id.*
5. Newt Gingrich and Mark Earley, “Cutting Recidivism Saves Money and Lives,” ATL. J. & CONST. (Mar. 23, 2010), available at: <http://www.ajc.com/opinion/cutting-recidivism-saves-money-397952.html> (last accessed Oct. 21, 2010).
6. *Id.*

In Memoriam

The 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.

Laurence R. Arnold

San Francisco, Ca.
Emory University School of Law
(1976)
Admitted 1976
Died June 2010

Steven Douglas Brower

Snellville, Ga.
University of Georgia School
of Law
Admitted 1997
Died May 2010

Edward M. Buttimer Jr.

Savannah, Ga.
University of Georgia School
of Law (1996)
Admitted 1996
Died September 2010

Wallace C. Clayton

Austell, Ga.
Woodrow Wilson School of Law
(1973)
Admitted 1973
Died January 2010

Warner S. Currie

Atlanta, Ga.
Emory University School of Law
(1949)
Admitted 1949
Died September 2010

James Philip Edee

Marietta, Ga.
University of Nebraska College
of Law (1954)
Admitted 1958
Died October 2010

Robert Jon Erb

Savannah, Ga.
University of Georgia School
of Law (1972)
Admitted 1973
Died September 2010

Charles R. Floyd Jr.

Peachtree City, Ga.
Suffolk University Law School
(1981)
Admitted 1981
Died October 2010

Patrick A. Fridell

Atlanta, Ga.
Atlanta Law School (1949)
Admitted 1950
Died August 2010

T. Cullen Gilliland

Atlanta, Ga.
University of Virginia School
of Law (1968)
Admitted 1968
Died September 2010

Holliday Holt Osborne Gordon

Atlanta, Ga.
Emory University School of Law
(1992)
Admitted 1992
Died October 2010

J. Hugh Gordon

Tifton, Ga.
University of Georgia School
of Law (1976)
Admitted 1976
Died October 2010

Hon. Jerry Clinton Gray

Commerce, Ga.
Atlanta Law School (1977)
Admitted 1979
Died October 2010

Martha K. Helppie

Kennesaw, Ga.
Loyola Law School Los Angeles
(1991)
Admitted 1993
Died September 2010

Donald Paul Hensel

Atlanta, Ga.
Harvard Law School (1995)
Admitted 1995
Died October 2010

Stephen C. Hunt

Ft. Lauderdale, Fla.
Seton Hall University School
of Law (1991)
Admitted 2007
Died April 2010

Roy E. May

Claxton, Ga.
University of Georgia School
of Law (1949)
Admitted 1949
Died May 2010

Jeffrey G. Morrow

Albany, Ga.
University of Georgia School
of Law (1988)
Admitted 1988
Died September 2010

Eloise W. Newhard

Stone Mountain, Ga.
Emory University School of Law
(1977)
Admitted 1977
Died August 2010

Joel Griffin Patrick Jr.

LaGrange, Ga.
Woodrow Wilson School of Law
(1955)
Admitted 1955
Died August 2010

Charles Peterson

Athens, Ga.
University of Georgia School
of Law (1973)
Admitted 1973
Died May 2010

Gerald J. Rachelson
Alpharetta, Ga.
University of Georgia School
of Law (1962)
Admitted 1961
Died January 2010

Steven John Richey
Leesburg, Fla.
Mercer University Walter F.
George School of Law (1974)
Admitted 1974
Died August 2010

Michael L. Shepherd
Atlanta, Ga.
Columbia University School
of Law (1978)
Admitted 1978
Died October 2010

John L. Tison III
Wichita Falls, Texas
University of Georgia School
of Law (1970)
Admitted 1971
Died August 2010

Jennifer Gartrell Williams
Atlanta, Ga.
Emory University School of Law
(1996)
Admitted 1996
Died January 2010

John L. Williams Jr.
Sandy Springs, Ga.
Emory University School of Law
(1959)
Admitted 1959
Died September 2010

Judge Debra Halpern Bernes. . . A Friend's Perspective

by Nancy Ingram Jordan

I first met Judge Debra Bernes when we were both young prosecutors in the Cobb County District Attorney's Office. Debbie was a "seasoned" prosecutor at the ripe old age of 29, after having been a trial prosecutor since age 23. She soon became the quintessential working mom and began handling all the appeals in our office. In 1986, I joined Debbie in the appeals section of the district attorney's office and we became the infamous Mom Squad/Appellate Team.

That partnership brought lots of hard work, flexible hours, cases of first impression, difficult death penalty cases and more importantly, resulted in a lasting friendship. During our run at the district attorney's office, we received several nicknames from office colleagues, police officers, trial and appellate judges. A few memorable ones that I recall were the "Dynamic Duo," "Tom and Jerry," "Mutt and Jeff," the "A Team," the "Tiny Avengers," the "Cobb County girls" and the "Pigeon Sisters" (think, "The Odd Couple"—yes, we also acted on stage at the local theatre in our spare time).

Debbie and I worked together in the district attorney's office for 13 years. We became an incredible team, mastering the art of appellate advocacy through our brief writing and oral arguments. We finished each others' sentences and our families would know when we called each other at home because our phone conversations never began with a friendly "Hello," but instead launched immediately into dissecting legal issues. We would also debate legal issues with such intensity and emotion, that a stranger to the office would often mistakenly think that Debbie and I were actually mad at each other and embroiled in a cat fight.

Quite the contrary, our motto was get it right, deliver the message to our target audience and try not to look "stupid" along the way. When we would appear in court together, we always decided who would wear the red suit or the black suit, for example, because we did not want to look like the Bobsey twins.

In 1999, I left the district attorney's office to begin a solo practice; my partner Deb was not far behind. We spent another four years together in our legal practice before she decided to run for the Court of Appeals of Georgia in 2003.

To say that I felt privileged to work with this amazing woman would be an understatement. Our professional relationship allowed me to observe first hand Debbie's analytical and legal skills. Debbie was highly respected by her peers, as a colleague, as a frequent lecturer at statewide as well as local seminars, as a mentor to lawyers in her profession and

for the last six years as the smartest Court of Appeals judge in Georgia. (I guess I am a little biased.)

In 2003, Debbie decided to run for an open seat on the Court of Appeals. She won election to the Court in November 2004 and took office Jan. 1, 2005. Many may recall it was a hard fought election that actually took four "rounds" for Debbie to reach her dream of becoming a judge. For Debbie, "the fourth time was a charm."

Throughout her career, Debbie dedicated herself to serving a wide array of professional organizations. She played an active role in teaching and lecturing on a host of legal topics, including criminal law and appellate practice. In addition to her professional service, Debbie volunteered her time and energy to a broad spectrum of civic and charitable organizations.

But most importantly, she was a devoted daughter, sibling, mother and wife. Debbie loved her family.

I presented Debbie the Bobby Cleveland Award in 2009 at the Cobb County Bar Association's Law Day Luncheon. This award, given annually by the Cobb Bar, recognizes a bar member who exemplifies the highest level of professionalism in the practice of law. In presenting the award, I stated that Debbie possessed impeccable qualities as an articulate, dedicated, intelligent and ethical lawyer and jurist.

I also shared at that Law Day that my dear friend and colleague was now facing another campaign (her cancer diagnosis in the summer of 2008), one which I alluded to only to the extent that she faced that challenge with courage, humility, determination and hopefulness. I told her then that I was inspired by her love of the law, her love for her family and most importantly, her love for life.

Unfortunately, Hon. Debra Halpern Bernes lost her battle to cancer on July 20, 2010. However, just before her death, the Cobb County Bar Board of Trustees graciously created a scholarship fund in her name. The purpose of the fund will be to assist worthy college students who are Georgia residents who want to attend one of the public law schools in Georgia.

I am honored to have shared with you my thoughts on the passing of my dear friend. I knew Debbie for more than 20 years and really she was more than my friend, she was my "sister."

Nancy Ingram Jordan is currently the president of the Cobb County Bar Association. She is the head of the Family Law Department at Brock, Clay, Calhoun & Rogers, LLC, in Marietta and also handles civil and criminal trial and appellate litigation at the firm.

The Story of Georgia's Boundaries:

A Meeting of History and Geography

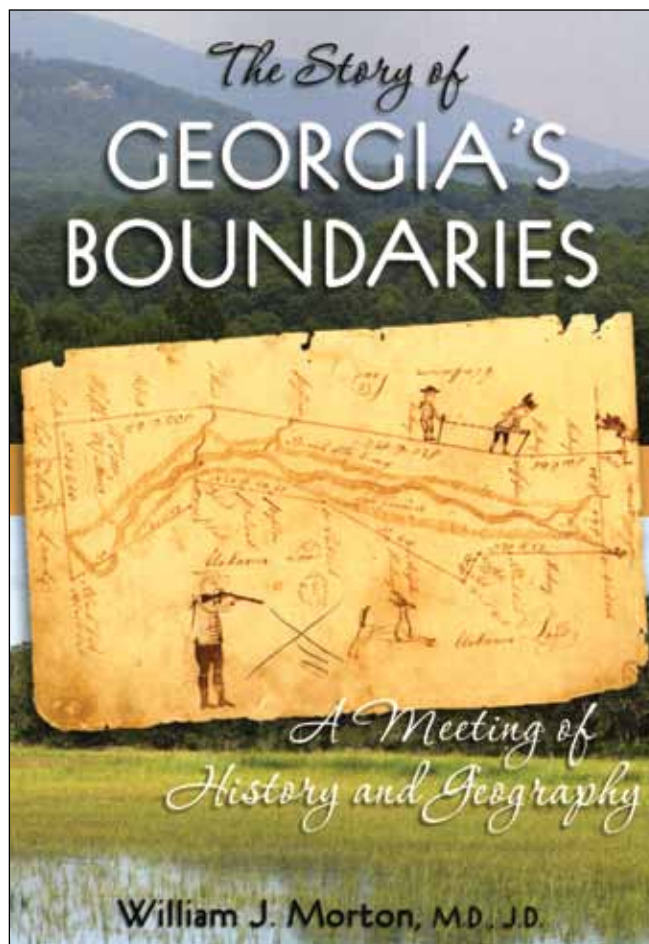
by William J. Morton, M.D., J.D., Georgia History Press, 159 pages

reviewed by Robert J. Stubbs

The *Story of Georgia's Boundaries* is a detailed analysis of the evolution of the boundary lines of Georgia written by William J.

Morton. While this book focuses on the development of the present boundaries of Georgia, it also presents a brief history of the state. As Morton notes, in order to understand the development of Georgia's boundaries, one must go back to the earliest period of European exploration. These explorers often came in conflict with the Native Americans who were no doubt perplexed to find out that they had been "discovered."

When Georgia's charter was initially granted by King George II, the boundaries of the state were two parallel lines drawn from the headwaters of what was then perceived to be the headwaters of the Altamaha and Savannah Rivers west to South Seas, i.e., the Pacific Ocean. From this rather audacious start, Georgia began to take shape. During much of the colonial period, the colony served as a buf-



fer between territory claimed by Spain and France and the more populated and prosperous English colonies to the north. Georgia's boundaries changed during this period but, as Morton points out, such changes had no appreciable effect since the area was largely unexplored by Europeans.

Morton then goes on to discuss the effect of the period surrounding the Revolutionary War on the delineation of Georgia's boundaries. It is interesting to note how little was known about the interior of much of what became the United States. This is especially true of the land west of the Appalachians as well as most of Georgia. Early settlement of the western part of Georgia, which was later to become most of Mississippi and Alabama, was driven more by profit and land speculation than anything else.


The first attempt to precisely define one of the boundaries of Georgia dealt with the Beaufort Convention of 1787 in which the

boundary with South Carolina was supposedly established. Of course, even this early attempt was subject to later litigation and was not finally resolved until 1999.

Morton goes on to discuss many intriguing situations and characters involved in establishing Georgia's boundaries including the early surveyors Andrew Ellicott and James Camak, Montgomery's Corner, the Yazoo land fraud and the first Walton County, which led to an altercation between residents of Georgia and North Carolina that became known as the "Walton War."

It is these early surveys that have created problems that until recent times did not seem to be important. However, now with water supply issues brought about by the recent drought and court decisions, the fact that the location of Georgia's northern boundary has apparently been in error is of significant importance. Disputes between not only South

Carolina, as described above, but also Alabama, Florida and now Tennessee are part of this historical record.

This book will place the disputes in proper historical context and, although not dispositive of the ultimate resolution on terms favorable to Georgians, will at least explain how our boundaries have come to exist in fact even though the factual boundaries conflict with those that were originally established. It will be of interest not only to real estate practitioners but a much wider audience given recent developments in the ongoing litigation between Georgia and its neighbors. 



Robert J. Stubbs is the editor-in-chief of the *Georgia Bar Journal*. He can be reached at rstubbs@tishmanspeyer.com.

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JAN 21 ICLE
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 Atlanta, Ga.
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 Albany, Ga.
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Selected Replay: TBD
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ADR at Workers' Compensation Board
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JAN 28 ICLE
Recent Developments
 Statewide Rebroadcast #2
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*Tax and Forensic Accounting Issues
 in Divorce Cases*
 Atlanta, Ga.
 3.5 CLE Hours

JAN 28 Lorman Education Services
Construction Lien Law
 Atlanta, Ga.
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Criminal Defense Section
 Marietta, Ga.
 6 CLE Hours

FEB 2 Atlanta Bar Association
*PLI Groupcast – Advising Non-Profit
 Organizations*
 Atlanta, Ga.
 6 CLE Hours

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Franchise Law
 Atlanta, Ga.
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 6 CLE Hours

FEB 3 ICLE
Trials, Tips and Tactics
 Atlanta, Ga.
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 6 CLE Hours

FEB 3 ICLE
Electronic Discovery
 Atlanta, Ga.
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 6 CLE Hours

FEB 3 The Seminar Group
*Keys and Strategies to Successful
 Mediation*
 Atlanta, Ga.
 5.8 CLE Hours

FEB 4 ICLE
Abusive Litigation
 Atlanta, Ga.
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FEB 4 ICLE
Secured Lending
 Atlanta, Ga.
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 6 CLE Hours

FEB 4 ICLE
Defense of a Personal Injury Case
 Statewide Broadcast
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 6 CLE Hours

FEB 4 ICLE
Georgia Auto Insurance
 Savannah, Ga.
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Immigration and Related Employment Issues
Atlanta, Ga.
6.5 CLE Hours

FEB 4 Lorman Education Services
Medical Records Law
Mason, Ga.
6 CLE Hours

FEB 6-9 ICLE
Update on Georgia Law
Jackson Hole, Wyo.
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12 CLE Hours

FEB 8 Atlanta Bar Association
PLI Groupcast – Current Developments in Federal Civil Practice
Atlanta, Ga.
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FEB 10 ICLE
Georgia Foundations and Objections
Atlanta, Ga.
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Statewide Rebroadcast
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3 CLE Hours

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Atlanta, Ga.
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6 CLE Hours

FEB 11 ICLE
Residential Real Estate
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6 CLE Hours

FEB 11 Atlanta Bar Association
Family Law
Atlanta, Ga.
6 CLE Hours
**tentative*

FEB 11 NBI, Inc.
Real Property Foreclosure – A Step by Step Workshop
Atlanta, Ga.
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Athens, Ga.
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FEB 15 The Seminar Group
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6.3 CLE Hours

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 6 CLE Hours

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Criminal Practice
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FEB 18 Atlanta Bar Association
Advanced Workers' Compensation
 Atlanta, Ga.
 7 CLE Hours

FEB 19 Atlanta Bar Association
Breaking Away: Crafting the Career
You Want Beyond the Traditional
Practice of Law
 Atlanta, Ga.
 4 CLE Hours

FEB 22-23 ICLE
Collaborative Law in Georgia Civil
Training
 Atlanta, Ga.
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 12 CLE Hours

FEB 24 ICLE
Advanced Debt Collection
 Atlanta, Ga.
 See www.iclega.org for location
 6 CLE Hours

FEB 24 ICLE
Law Office Technology
 Atlanta, Ga.
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 6 CLE Hours

FEB 24 ICLE
Banking Law
 Statewide Rebroadcast
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 6 CLE Hours

FEB 24 Atlanta Bar Association
Bankruptcy
 Atlanta, Ga.
 3 CLE Hours

FEB 25 ICLE
Employers' Duties and Problems
 Atlanta, Ga.
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 6 CLE Hours

FEB 25 ICLE
Georgia Appellate Practice
 Atlanta, Ga.
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 6 CLE Hours

FEB 25 ICLE
Thurgood Marshall's Coming!
 Statewide Rebroadcast
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 6 CLE Hours

Notice of Filing of Formal Advisory Opinion in Supreme Court

**Second Publication of Proposed
Formal Advisory Opinion No. 09-R3
Hereinafter known as
“Formal Advisory Opinion No. 10-2”**

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has issued the following Formal Advisory Opinion, pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia approved by order of the Supreme Court of Georgia on May 1, 2002. This opinion will be filed with the Supreme Court of Georgia on or after Jan. 15, 2011.

Proposed Formal Advisory Opinion No. 09-R3 appeared in the June 2010 issue of the *Georgia Bar Journal* for first publication. Three (3) comments were received. The Formal Advisory Opinion Board reviewed the proposed opinion in light of the comments. After careful consideration and discussion, the Board made a final determination to approve the proposed opinion for 2nd publication and filing with the Supreme Court.

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

briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through the Office of the General Counsel of the State Bar of Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

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

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

Update Your Member Information

Keep your information up-to-date with the Bar's membership department. Please check your information using the Bar's Online Membership Directory. Member information can be updated 24 hours a day by visiting www.gabar.org/member_essentials/address_change/.

Second Publication of Formal Advisory Opinion 10-2

STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY OPINION
BOARD
PURSUANT TO RULE 4-403 ON OCT. 14, 2010
FORMAL ADVISORY OPINION NO. 10-2

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."¹

This question also involves Rule 1.2, Scope of Representation, and Rule 1.7, governing conflicts of interest.² 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."³

Finally, this situation implicates Rule 3.7, the lawyer as a witness, to the extent that the guardian ad

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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.⁴ 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.⁵ 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.⁶

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."⁷ 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]."⁸

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.⁸

Discussion

The child's attorney's first responsibility is to his or her client.¹⁰ 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.¹¹ Rule 1.14 requires the attorney to maintain, "as far as reasonably possible...a normal client-lawyer relationship with the [child]."¹² 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.¹³ 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.¹⁴ 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."¹⁵

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.¹⁶ This contrasts with the attorney's ability to disclose such information to the court in service of the child's wishes.¹⁷

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.¹⁸

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.¹⁹

This conclusion is in accord with many other states.²⁰ For instance, Ohio permits an attorney to be appointed both as a child's counsel and as the child's guardian ad litem.²¹ 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.²² Court rules and applicable statutes require the court to appoint another person as guardian ad litem for the child.²³ 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.²⁴ 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.²⁵

Connecticut's Bar Association provided similar advice to its attorneys, and Connecticut's legislature subsequently codified that position into law.²⁶ 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."²⁷ 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."²⁸ 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."²⁹ 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.³⁰

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.³¹ This "hybrid" approach "necessitates a modified application of the Rules of Professional Conduct."³² 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.³³ The attorney under this approach is bound by the client's best interests, not the client's expressed interests.³⁴ The attorney must present the child's wishes and the reasons the attorney disagrees to the court.³⁵

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.



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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; *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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