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February 2011 • Volume 16 • Number 5

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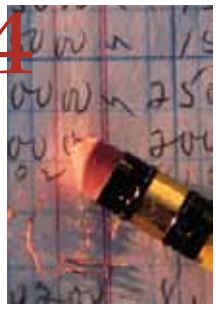

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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Sarah I. Coole,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

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by Lester Tate

Time for a Statewide Criminal Justice Solution

In the wake of the unspeakable tragedy that claimed the life of Georgia State Trooper Chadwick LeCroy in Fulton County on Dec. 27, 2010, a number of public officials, to their credit, stepped forward in an effort to scrutinize and correct policies that might have led to the release of the individual charged with murdering the trooper.

I commend Fulton County Superior Court Chief Judge Cynthia Wright, District Attorney Paul Howard, Atlanta Mayor Kasim Reed, Police Chief George Turner and others who recommended and implemented changes in Fulton County's Non-Complex Criminal Court Division in hopes of preventing such tragedies in the future.

At the same time, all Georgians should be concerned about the state of our criminal justice system as a whole. Fulton County is by no means the only jurisdiction where law enforcement and probation officers are overworked, where court calendars are backlogged or where jails are overcrowded.

Looking at this single, widely publicized incident in a vacuum would be a grave mistake. In the current environment, overburdened courts in most of Georgia's 159 counties are vulnerable to similar breakdowns, putting all citizens at risk every day.

> "If we do not take the initiative to ensure that the judicial branch of government is able to function effectively from this point forward, then that also will be a tragedy."

In a situation like this, it is much easier to discuss in hindsight how the system might have failed in the case of one out of thousands of accused offenders than it is to actually apply that analysis on the front end. When considering bond requests, all judges—whether elected or appointed—are bound by the law.

It is not sufficient or practical to simply say "lock 'em all up." Clearly, we do not have the jail space to do that. The courts' duty is to find the proper balance between protecting the public and protecting the constitutional rights of those accused—a duty made all the more difficult when economic conditions and budget cuts shrink resources and cause office staff reductions and furlough days for our judges, prosecutors and public defenders.

For the past several years, the State Bar of Georgia has joined the state's top judges in an effort to inform the public about the consequences of an underfunded justice system, which on the criminal side can range from a high-profile police shooting to an unpublicized case of family violence resulting from no judge being available to issue a protective order.

Our state has some finite choices to make. We can devote more resources to and seek greater efficiency in our public safety, courts and corrections systems. Or, we can keep deciding which suspected offenders we can keep in jail with the resources we have and continue to live with the consequences.

This is not a time for pointing fingers or rushing to conclusions, but rather a time to realize we have a serious public safety problem in our state and that we can no longer afford to ignore the important role of the justice system in our lives.

We have many hard-working law enforcement officers, prosecutors, public defenders and judges doing their jobs to the best of their ability under the system that currently exists. But we have just witnessed a sad example of what can happen in spite of the best efforts of the individuals who hold these positions of authority and trust in our criminal justice system.

As difficult as it might be, solving these problems will require policy decisions that go deep enough to deal with them in a systemic, rather than piecemeal, fashion. I submit that it is time for all parties—policymakers at the local and state levels, judges, lawyers and law enforcement leaders—to come together and closely evaluate each problem with the system we have now and work toward effective solutions.

Now is the time to put our differences aside and look at these issues in their entirety from a statewide perspective. These problems are not unique to one county. Any such examination needs to be wide-ranging and without limitations. There is also a danger of a short-sighted solution if we do not effectively use all the resources available to undertake such an effort.

Georgia's legal community stands ready to engage in such a discussion. The 42,000-plus members of the State Bar include many outstanding judges, prosecutors and criminal defense attorneys who are willing to work with members of the executive and legislative branches of state government, city and county officials and public safety leaders to help in any way we can to address these problems.

Over the years, the State Bar has been involved in criminal justice reform through our support of the Bar Association Support to Improve Correctional Services (BASICS) offender rehabilitation program. BASICS is aimed at addressing criminal recidivism by assisting participants in being able to stay out of jail by legitimate means once they are released by providing effective instruction, guidance and employability counseling.

BASICS was initiated in 1976 as the American Bar Association's answer to then-U.S. Chief Justice Warren Burger's challenge to attorneys to take a more active role in criminal reform. I am pleased to report that our Board of Governors, at the Midyear meeting last month, acted to reaffirm the Bar's continued support of this valuable program.

It was also encouraging to hear Gov. Nathan Deal, in his inaugural address on Jan. 10, calling for changes in our corrections system with regard to nonviolent offenders, especially those with drug addictions, through expanded probation and treatment options, along with Day Reporting Centers, Drug, DUI and Mental Health Courts. I concur with our new governor's declaration that "as a state, we cannot afford to have so many of our citizens waste their lives because of addictions. It is draining our state treasury and depleting our workforce."

Gov. Deal was also right when he said, "Breaking the culture of crime and violence is not a task for law enforcement officials alone. Parents must assume more responsibility for their children. Communities must marshal their collective wills; civic and religious organizations must use their influence to set the tone for expected behavior."

The loss of Trooper LeCroy, which we all mourn, is a stark reminder of what can happen when the justice system breaks down. If we do not take the initiative to ensure that the judicial branch of government is able to function effectively from this point forward, then that also will be a tragedy. GBJ

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

by Cliff Brashier

Bar Center Expansion Accommodates Education Programs' Growth

Because of tremendous growth in the two most popular uses of the State Bar of Georgia headquarters in downtown Atlanta—Continuing Legal Education (CLE) seminars for Bar members and the Law-Related Education (LRE) Program's Journey Through Justice experience for Georgia's school groups—the competition for conference space at the Bar Center has intensified over the past several years.

About 70 percent of the 160 live ICLE seminars offered each year are held at the Bar Center, which is a convenient location and greatly decreases the need for renting conference rooms at hotels or other outside facilities. This helps keep the registration fees for Bar members among the least expensive in the nation.

Meanwhile, LRE has hosted a Journey Through Justice class every school day for the past two years, including a total of 192 such sessions in 2010-11. The program is already reserving dates for both the 2011-12 and 2012-13 school years.

> "In order to accommodate the growth of the valuable CLE and LRE programs, we recently built out another large auditorium and a conference room in the building's sub-basement."

As a result, the Bar Center's third-floor conference facilities—which are also used on a regular basis for Bar leadership, section and committee meetings as well as lawyer/client sessions—were simply outgrown. In order to accommodate the growth of the valuable CLE and LRE programs, we recently built out another large auditorium and a conference room in the building's sub-basement.

The new space has been a godsend for its primary user, according to both LRE Director Deborah C. Craytor and Curriculum and Activities Director Marlene E. Melvin, a retired educator who coached the 1995 National Champion Mock Trial team at South Gwinnett High School. She has been with the Journey Through Justice program since its inception in 2006.

Accommodating classes of up to 70 students, the program is designed for students from grades 4 through 12. The most gifted students as well as those in special education classes are able to benefit from the lessons and mock trials, which are customized for each specific grade and learning level.

"The state Department of Education has established standards for every grade level, and we teach everything that those standards require," Craytor said. "The teacher doesn't have to cover these lessons again back in the classroom."

Of the new sub-basement facility, which also includes expansive storage space for the many different lesson plans and materials needed for each class, Melvin said, "It has just been wonderful. The children are so impressed that the Bar has done this for them."

The LRE Program was previously operated at the University of Georgia Law School. The decision to house LRE at the Bar Center was inspired by U.S. Supreme Court Justice Anthony M. Kennedy on the day the building was dedicated in 2005.

"One of the greatest duties of any generation, and particularly of its Bar, is to transmit the idea of freedom and the rule of law to the next generation," Kennedy said, urging Bar leaders to use the Bar Center to "invite young people to come inside the law."

While Journey Through Justice is the biggest part of LRE, serving approximately 10,000 students every year, the LRE staff also develops curriculum material for Georgia schools and administers the Georgia Law Honor Society for high school juniors and seniors. The program has grown mostly by word of mouth among Georgia educators who have participated in LRE's free teacher workshops on teaching about the law in their classes. Once they bring a group of students to the Bar Center for a Journey Through Justice program, educators often ask about the next opportunity for a return visit.

Craytor, who has served as director of the LRE program for three years, following more than 20 years in private law practice, also takes Journey Through Justice on the road to schools around the state where teachers are unable to make the arrangements to bring students to Atlanta. The law lessons and mock trials can be replicated to some extent in the classroom setting, but students miss out on the Law Museum, Woodrow Wilson's law office and the benefits of traveling to Georgia's capital city.

On Dec. 17, the final school day before their Christmas break, 45 students and four teachers met at West Chatham Middle School in Savannah at 3:30 a.m. to board a chartered bus for their trip to Atlanta. The buses are funded by the Marshall Fund, which provided $30,000 in transportation money for the Journey Through Justice program in 2010.

By the end of the day, the eighth-graders understood the difference between compensatory and punitive damages and were comfortable using terms like "cause of action," "assumption of risk" and "tortfeasor,"

thanks to a whirlwind of activities that achieves the normally impossible objective of capturing a teenager's attention for four hours:

9 a.m. — The students and teachers arrive at the new, dedicated bus group entrance on the back side of the Bar Center, leading directly into the sub-basement level.

9:10 a.m. — The group is introduced to their tour guide for the morning, former U.S. First Lady Edith Galt Wilson (portrayed in dramatic and entertaining fashion by Marlene Melvin), who tells them the life story of her husband, President Woodrow Wilson, including vivid descriptions of his time practicing law in downtown Atlanta, as well as his disappointment over Congress' failure to ratify U.S. membership in his brainchild, the League of Nations.

9:25 a.m. — Melvin, still in character as Edith Wilson, convenes the "Woodrow Wilson School of Law," in which the students take in a lesson on civil procedure through the scope of a case involving the destruction of a valuable rose bush by a driver who ran off the road. She calls on individual students to be a part of the case as plaintiff's and defense attorneys and witnesses, and a slide presentation brings both visual perspective and humor to the lesson.

10:15 a.m. — The students are administered a 10-question Bar exam based on the case they have just heard. They pass with flying colors and then board the elevators for the third-floor courtroom to prepare for their own mock trial.

10:45 a.m. — The case of *B.B. Wolf v. Curly Pig* goes to trial. Craytor represents the plaintiff, Melvin the defendant. One of the teachers serves as presiding judge, and all other roles are played by the middle-school students—including the litigants, co-counsel, bailiff, jurors and witnesses named Prunella Prune, Sylvester Cat, Miss Piggy Muppet and Pinocchio Puppet. The scripted testimony and arguments are performed with passion and precision. There are two sets of jurors, one finding for the defendant, and the other panel hung. A spirited post-verdict discussion continues for a full 30 minutes, with multiple students still raising their hands and waiting to give their analysis of the case.

12:15 p.m. — After a brief tour of the President's Boardroom, the students head over to the Law Museum for a screening of "Reel Justice," a fast-paced, 12-minute compilation of 75 courtroom scenes from movies ranging from "To Kill A Mockingbird" to "My Cousin Vinny." Then, they are treated to a presentation by Melvin about some of the most famous criminal trials in American and Georgian history, including the Lizzie Borden and Lindbergh baby cases and the Atlanta child murders.

1 p.m. — The final stop on the Journey Through Justice is the authentic replica of Woodrow Wilson's 19th century law office on the first floor, after which the students and teachers travel back to the sub-basement level, say their goodbyes and board the buses for lunch in the city and then the afternoon trip back to Savannah.

Jacquelin Harden, eighth-grade social studies teacher at West Chatham Middle School, has brought numerous student groups to the Journey Through Justice program over the years and says she will continue to do so.

"It's an exceptional program, not only because it achieves the required educational standards, but also because Ms. Craytor and Ms. Melvin do a fabulous job in working with the students on their level," Harden said. "The students enjoy the way the information is presented to them, so they are able to grasp it and understand it. It's very beneficial, and they talk about what they learned when we get back to school for quite a while. My students have scored the highest on the new performance standards requiring them to analyze Georgia's judicial branch as a result of this experience. They are already two or three steps ahead."

There are other benefits that make the journey worthwhile, according to Harden.

"Being from an inner-city school, many of these kids have already had some experience in the juvenile justice system. This shows them a different side of the law and really turns the light on for them," she said. "And some of these children will never leave Savannah, so the trip itself is a learning experience."

One problem caused by the current economy is that schools have had to reduce their educational field trips to save transportation expenses. Many local bar associations, including Gainesville-Northeastern, Henry County, DeKalb County and Dougherty Circuit, have helped tremendously with donations to cover the bus and driver used by their local schools. If your bar association needs a worthwhile project, we welcome your help.

For more information on LRE and Journey Through Justice, contact Deborah Craytor at 404-527-8785 or deborahcc@gabar.org.

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). GBJ

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

by Michael G. Geoffroy

Personal Stories, Professional Impact

There are so many great stories of the people and places in Georgia history that many of them are forgotten or lesser known than others. One such great story is of a trial that occurred not far from my hometown of Sparta in Hancock County.

The case, *Smith v. Dubose*, 78 Ga. 413 (1887), and its companion cases were national news at the time, written about in the newspapers as far away as Cleveland, Ohio. The case concerned caveat of the will of David Dickson, a wealthy plantation owner who left his half-million-dollar plantation and fortune to his half-African American daughter, Amanda America Dickson. The inheritance stood to make her the richest woman of color in the United States. It was fiercely contested by many of David Dickson's relatives on several grounds, including the contention that leaving property to a daughter of an interracial couple, at the time a crime in Georgia, was against public policy. More than a dozen attorneys, including governors and members of Congress, represented the two parties.

"The many personal stories that make up the history of law enrich the practice and educate both its practitioners and the public."

The story of Amanda America Dickson is beautifully captured in the book *Woman of Color, Daughter of Privilege*, written by Oglethorpe College Prof. Kent Anderson Leslie and later made into a movie. I had the privilege of hearing Prof. Leslie speak about her book and this fascinating story at the first YLD Leadership Academy. In addition to telling of a woman's triumph over bigotry and hatred, it is also a tremendous story of the practice of law in our state and the professionalism, loyalty and sense of justice of Georgia attorneys and judges in the face of injustice.

Charles Dubose, a Sparta attorney and friend of David Dickson, executed both of those positions valiantly. David Dickson must have known the problems his daughter would have inheriting his estate in the racially divided post-Civil War Georgia. Together, Dickson and Dubose drafted a will, carefully wording it to show intent and choosing witnesses above reproach, including local Judge Frank Lightfoot Little. When Dickson passed away Feb. 18, 1885, Dubose held up his professional obligation and promise to his friend by probating the will. This was likely an unpopular action that made him put his own sense of justice, professionalism and obligations above the easy and popular path.

Seventy-nine of Dickson's family members caveated the will, stating that leaving his plantation to his half

Photo by Wilber W. Caldwell

Hancock County Courthouse at Sparta, built, 1881-83. Perkins and Bruce, architects.

black daughter was "in its nature and tendencies illegal and immoral contrary to the public policy of the state and of the law and is destructive and subversive to the interest and welfare of society." The *Atlanta Journal* published on Aug. 1, 1885, "It is asserted that Dickson had no right to give this mulatto woman, although she was his child, his landed estate, amounting to 17,000 acres of the best land in middle Georgia, as it will injure those owning lands adjoining." The caveators hired nine attorneys, including U.S. Rep. N.J. Hammond and future Georgia Gov. Nathaniel E. Harris. Amanda Dickson hired five attorneys, including Charles Dubose, the will's witness Judge Little and Seaborn Reese, a former congressman.

Despite living in an age of segregation and burgeoning Jim Crow laws, the lawyers for Amanda Dickson and judges who ruled in the case upheld the laws of our state and her rights as beneficiary of a lawfully made will. Probate Judge R.H. Lewis ruled first to uphold the will. Then, Superior Court Judge Samuel Lumpkin and a jury heard a trial between the parties and returned a verdict also upholding the will and finding for Amanda Dickson.

The case was appealed to the Supreme Court of Georgia, where oral argument was heard. On June 13, 1887, Justice Samuel Hall wrote for the Supreme Court in a 30-page opinion, *Smith v. Dubose*, 78 Ga. 413 (1887). The long prose was full of words to guide every attorney's career. Lawyers, he said, "should not give themselves up to the guidance and direction of their feelings and sentiments, for this would unquestionably lead to excessive irregularities, fluctuations and doubt."

Justice Hall stated that the 14th Amendment means that "all distinctions as to the rights pertaining to citizenship between the two races are abolished, and as to their civil rights, they stand upon the same footing." He continued, "Therefore, whatever rights and privileges belong to a white concubine or to a bastard white woman and her children, under like circumstances, and the rights of each race are controlled and governed by the same enactments and principles of law."

Now, I am no constitutional scholar or Georgia historian. I can give no context as to where this opinion fits in the history or evolution of civil rights of our state or southern culture. I can only say that I was taken aback by the scope of this trial, so close to my hometown. But I don't think that takes away from the remarkable story of this trial, its appeal and the participants, attorneys and judges who put equality and justice over the bigoted social norms in this case. I put a strong caveat (ironic, I know) that I know little to nothing of the biographies of the people involved and cannot attest to their overall character, only their action with regard to the Dickson will.

One current attorney who told me this case was a great influence on him was former U.S. Rep. George "Buddy" Darden. Buddy grew up in Sparta and attended Hancock County High School. He told me that verdict rendered by an all-white, all-male, all-landowning jury to rule in favor of the female, half-black Amanda Dickson was an enunciation of the rule of law and statement of the power of the jury system to overcome societal bias.

There is much great history in our state beyond those few cases and stories that currently occupy the textbook and the collective memory; it is up to all of us to remember those great moments in our local history and share them with the Bar. The many personal stories that make up the history of law enrich the practice and educate both its practitioners and the public. GBJ

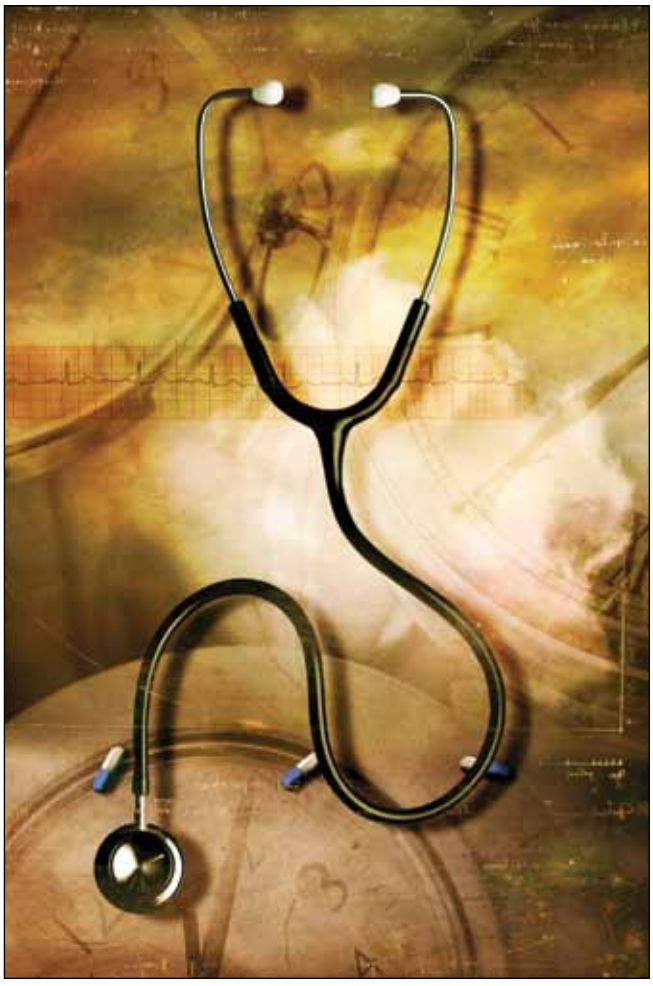
Michael Geoffroy is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at michael@thegeoffroyfirm.com.

Misdiagnosis Law in Georgia:

Where Are We Now?

by Gregory G. Sewell

The path traveled by misdiagnosis law in Georgia over the past few years has been an indecisive and circuitous one indeed. The path began just before Halloween 2007, when the Supreme Court of Georgia issued its opinion in *Kaminer v. Canas*.[1] At first blush, *Kaminer* stood as a watershed case in the application of the statute of limitations and statute of repose in medical malpractice actions premised upon alleged misdiagnosis. As time passed, however, the would-be watershed nature of *Kaminer* began to dwindle under the weight of exceptions; exceptions as to context and exceptions to the rule.



As the appellate courts of this state continue to pigeon-hole *Kaminer*, it will become increasingly important for the medical malpractice practitioner to more fully explore both the intricacies of the case law reviewing *Kaminer*'s interpretation of O.C.G.A. § 9-3-71 as well as the nature and interplay of the medical

malpractice statute of limitations and statute of repose in the context of misdiagnosis actions. A thorough understanding of these areas will assist the medical malpractice practitioner in protecting their clients' interests most effectively in this uncertain climate of medical misdiagnosis law in Georgia.

Interaction Between the Statute of Repose and the Statute of Limitations

The statute of limitations and the statute of repose for medical malpractice actions are contained at O.C.G.A. § 9-3-71, which provides, in pertinent part:

> (a) Except as otherwise provided in this article, an action for medical malpractice shall be brought within two years after the date on which an injury or death arising from a negligent or wrongful act or omission occurred.
> (b) Notwithstanding subsection (a) of this Code section, in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.
> (c) Subsection (a) of this Code section is intended to create a two-year statute of limitations. Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.[2]

The express language of this statute provides guidance as to its scope. O.C.G.A. § 9-3-71(a) prescribes a two-year statute of limitations for medical malpractice actions premised upon an alleged failure to diagnose as calculated from the "date on which an injury or death . . . occurred." It is at this point in time when a prospective plaintiff may maintain an accrued cause of action against the alleged tortfeasor. Further, it is for this reason that a statute of limitations may not begin to run on the date the negligence occurred.[3] By contrast, the statute of repose relates not to the accrued cause of action—both an act or omission and an injury—but instead, only concerns the alleged negligent act or omission itself.

These two periods of limitations will run separately or concurrently. For instance, a negligent act or omission sufficient for the accrual of the statute of repose may not cause an injury sufficient for the accrual of an action, and the running of the statute of limitations, until more than five years after the act or omission. In many instances the negligent act or omission and the injury caused thereby occur in close time proximity. Thus, from this perspective, the statute of ultimate repose acts as a procedural penumbra within which, but never beyond, the statute of limitations may move in accordance with the various tolling provisions contained in the Georgia Code.

Kaminer v. Canas: The 'Would-Be' Watershed Decision

On Oct. 29, 2007, the Supreme Court of Georgia issued an opinion which stood to provide the ever-elusive bright line of demarcation as it relates to the computation of the periods of limitation in medical malpractice actions based on medical misdiagnosis.[4] While ostensibly a case which would change the direction of medical misdiagnosis law in Georgia, the Supreme Court's opinion in *Kaminer* has been pigeon-holed by subsequent cases from both the Court of Appeals and the Supreme Court such that it remains a shadow of its former self; more an exception rather than the rule.

In *Kaminer*, a patient who became infected with the Human Immunodeficiency Virus (HIV) as an infant brought a medical malpractice action against, among others, two physicians, claiming that the physicians negligently failed to diagnose the plaintiff's pediatric Acquired Immune Deficiency Syndrome (AIDS) based on evident symptoms. The two physician defendants allegedly misdiagnosed the plaintiff's condition in May 1991 and May 1993, respectively, but the plaintiff did not file suit until 2001. The defendant physicians moved for summary judgment, which the trial court denied on "claims where the injury occurred within 2 years of the date of [the] action was filed and the negligent or wrongful act or omission that caused injury occurred within 5 years of the date [the] action was filed."[5] The Court of Appeals of Georgia affirmed and the defendants applied for certiorari to the Supreme Court of Georgia.

At issue before the Supreme Court was "whether the Court of Appeals erred in holding that, if a plaintiff in a misdiagnosis case presents with additional or significantly increased symptoms of the same misdiagnosed disease, the medical malpractice statute of limitations and statute of repose do not bar the plaintiff's claims."[6] In considering this issue, the Supreme Court noted that, pursuant to O.C.G.A. §§ 9-3-71(a) and (b), "[t]his is a case of misdiagnosis."[7] 'In most such cases . . . [t]he misdiagnosis itself is the injury and not the subsequent discovery of the proper diagnosis' . . . in most misdiagnosis cases, the two-year statute of limitations and the five-year statute of repose begin to run simultaneously on the date that the doctor negligently failed to diagnose the condition and thereby, injured the patient."[8]

In support of this conclusion, the Supreme Court reasoned that "[w]ith regard to [the plaintiff's] claim for the misdiagnosis of his AIDS condition, he was injured and, consequently, the statute of limitations began to run, on the date that [the defendants] first failed to diagnose it."[9] The Supreme Court then acknowledged and dismissed the lone exception to this general rule in the context of cases alleging negligent misdiagnosis, the new injury exception.[10] In this regard, the Supreme Court acknowledged the

"line of Court of Appeals cases in which the patient was held to have suffered a new injury subsequent to the initial diagnosis."[11] But the Court also opined that the cases in which application of the new injury exception are appropriate "involve only 'the most extreme circumstances . . . in which the plaintiff remains asymptomatic for a period of time following the misdiagnosis.'"[12]

In reversing the partial denial of summary judgment to the defendants, the Supreme Court held that the statute of limitations and, by extension, the statute of repose began to run as to the plaintiff's claim against each defendant physician in 1991 and 1993, respectively; thus, making the plaintiff's 2001 lawsuit barred under O.C.G.A. § 9-3-71.[13]

What's in a Name: "Failure to Warn" Versus "Failure to Diagnose"

At present, the *sine qua non* of the inquiry is whether the case is one of alleged failure to diagnose and treat or a case of alleged failure to warn and advise. To be sure, the two are mutually exclusive and the delineation can likely become the deciding factor in the grant or denial of a dispositive motion. The Supreme Court recently enunciated the legal significance of the difference between an alleged failure to warn and advise and an alleged failure to diagnose and treat in *Schramm v. Lyon*.[14] In *Schramm*, the Supreme Court affirmed the Court of Appeals' holding that the case was not one of medical misdiagnosis, that *Kaminer* did not apply and, thus, the period of repose as to "each separate claim of professional negligence began to run within the statutory five-year period" notwithstanding the fact that the first alleged failure to warn and advise occurred outside the statutory period.[15]

Clearly, the Court of Appeals and Supreme Court's respective holdings render the description of the negligence at issue all too important in the calculation of the statute of limitations and the statute of repose. However, the Supreme Court did not provide specific guidance as to when a case is one of alleged failure to warn as opposed to alleged failure to diagnose. The Court further failed to address whether the delineation of a cause of action as one or the other in the complaint would end the inquiry. In this connection, this author expects the form of complaints to evolve such that the inclusion of an allegation as to some failure to warn and advise will emerge as ubiquitous. When this occurs, the relevant inquiry *should* proceed to the substantive nature of the underlying facts and the emergence of the condition at issue.

To this end, it can be argued that one "diagnoses and treats" a condition which *already* exists, whereas one "warns and advises" relative to a condition which has yet to be acquired. By the converse, one cannot "diagnose and treat" something which does not yet exist, just as one cannot "warn and advise" as to a condition which someone already has.[16] As implicitly acknowledged by the Court of Appeals in *Howell v. Zottoli,*[17] this distinction becomes self-evident after a brief comparison of the facts at issue in *Kaminer* with those at issue in *Schramm*.

In *Schramm*, the plaintiff alleged that the defendants failed to appropriately warn her and advise her as to a complication of her splenectomy (spleen removal)—overwhelming post-splenectomy infection (OPSI).[18] At the time of the alleged failures to warn and advise at issue in *Schramm*, the plaintiff had not yet developed the condition which she ultimately acquired and which caused the complained of harm, OPSI.[19] By contrast, in *Kaminer*, the plaintiff already suffered from the condition that was allegedly misdiagnosed, pediatric AIDS.[20] This factual distinction substantiates and underscores the logical deduction explained above: that one "diagnoses and treats" a condition which already exists; whereas, one "warns and advises" relative to a condition which has yet to be acquired. Indeed, the Supreme Court in *Schramm* impliedly endorsed this distinction in the first footnote of its opinion when it noted that *Schramm* was not a case of misdiagnosis and that the plaintiff did not contract OPSI until after the defendants' alleged failure to warn and advise her that OPSI was a possible complication of her splenectomy.[21]

Regardless of a plaintiff's inclusion of the allegation "failure to warn and advise" in a complaint, this factual distinction leaves available an additional inquiry into whether the case is truly one of misdiagnosis which falls within the holding of *Kaminer* in regards to the statute of limitations and statute of repose. Of course, such a position would require a showing that the underlying condition about which the plaintiff claims he or she was not warned and advised, in fact, was a condition from which the plaintiff already suffered when he or she began treating with the defendant; thus, rendering the alleged negligent act one of a failure to diagnose and treat, and the case one of alleged misdiagnosis governed by the Supreme Court's holding in *Kaminer*.[22]

The New Injury Exception

In cases of alleged misdiagnosis, the "new injury exception" must necessarily be a consideration of the medical malpractice practitioner irrespective of the party represented. The Supreme Court in *Kaminer* opined that the new injury exception involves only "the most extreme circumstances . . . 'in which the plaintiff remains asymptomatic for a period of time following the misdiagnosis.'"[23] In this connection, in reversing the lower courts to hold that the plaintiff's claims against the physicians were time-barred, the Supreme Court in *Kaminer* noted that "[t]he injury at the time of the misdiagnosis was that [Canas] continued to suffer from an undiag-

nosed and untreated [AIDS condition] that continued to slowly progress and worse . . . the fact that these symptoms worsened . . . does not lead to a different result, as the subsequent [worsened condition] was directly related to the initial symptoms and misdiagnosis."[24]

Since *Kaminer,* the Supreme Court has applied the new injury exception in misdiagnosis when two elements are met: (1) the patient suffered a "new and more deleterious underlying condition" in addition to the condition allegedly misdiagnosed, and (2) the patient suffered symptoms of the "new injury" following an "asymptomatic period." The two cases in which the Supreme Court found the existence of both elements are the sister cases of *Amu v. Barnes*[25] and *Cleaveland v. Gannon*.[26]

Amu is a Supreme Court case involving the application of the new injury exception to the context of metastatic colon cancer.[27] In *Cleaveland*, the Supreme Court again applied the new injury exception to the context of metastatic kidney cancer.[28] *Amu* serves as the factual basis for the *Cleaveland* Court's holding relative to the application of the new injury exception to cases which involve allegedly misdiagnosed localized cancer which became metastatic, spread to other parts of the body, and became terminal.[29]

In both *Amu* and *Cleaveland*, the issue before the Supreme Court concerned the application of the new injury exception to the general rule in a misdiagnosis case that the "injury" for purposes of the statute of limitations occurs at the point of initial misdiagnosis, the application of which would toll the statute of limitations.[30] In adjudicating this issue in favor of the application of the new injury exception, it is important to note the way in which the Supreme Court reconciles its holdings in *Amu* and *Cleaveland* with its holding in *Kaminer*. The Supreme Court opined:

> The holdings in *Kaminer* and *Amu* are not inconsistent . . . *Kaminer* . . . clearly noted that the "new injury" exception did not apply under the facts of that case. *Instead, the patient there continued to suffer from exactly the same AIDS condition that his doctors originally failed to diagnose . . . he did not develop any new and more deleterious underlying condition in addition to AIDS*, and only experienced symptoms that were attributable to the worsening of that same condition . . . . There is a significant legal distinction between a patient's development of an entirely new medical condition . . . and his experiencing the proximate symptomatic consequences of the original misdiagnosis. *"If [the patient's subsequent] symptoms were symptoms of the same injury that existed at the time of the alleged misdiagnosis, then the claim is barred by the two-year limitation[s] period."*[31]

With this reconciliation, the Supreme Court in both *Cleaveland* and *Amu* continued by explaining that the importance of the necessary "asymptomatic period":

> the "new injury" exception is not predicated on the patient's discovery of the physician's negligence. Consistent with O.C.G.A. § 9-3-71(a), the trigger for commencement of the statute of limitations is the date that the patient received the "new injury," which is determined to be an occurrence of symptoms following an asymptomatic period.[32]

Ultimately, the Supreme Court held that the metastatic cancer at issue in both *Amu* and *Cleaveland* constituted a "new injury" which originated out of, but was distinct from the localized cancer because, in each case, the cancer spread to affect "other internal organs that were unaffected at the time of misdiagnosis."[33] Further, the Supreme Court specifically found that there existed an "asymptomatic" period in *Amu* and that there remained an issue of fact as to whether there existed an "asymptomatic" period in *Cleaveland*.[34]

Subsequent to the publication of the Supreme Court's opinion in *Cleaveland*, the Court of Appeals and Supreme Court issued opinions further articulating the Supreme Court's holding in *Amu* and *Cleaveland* and bringing the law relative to the new injury exception seemingly up to date. In November 2008, the Court of Appeals issued its opinion in *Smith v. Harris*.[35] In *Smith*, the plaintiff patient brought a medical malpractice action against the defendant physician and defendant clinic alleging that the physician's negligent administration of an antibiotic caused the plaintiff to suffer inner ear and renal damage.[36] The *Smith* Court reversed the trial court's conclusion that the new injury exception applied to toll the statute of limitations.[37] In denying the new injury exception's application, the Court of Appeals opined:

> *The [new injury] exception cannot apply* when (1) *a patient has the "same condition" as at the first misdiagnosis* and "experienced only symptoms otherwise attributable to the worsening of that condition," *or* (2) *the patient did not "remain asymptomatic for a period of time* following the misdiagnosis."[38]

This language and the Court of Appeals refusal to apply the new injury exception to salvage the plaintiff's stale action in *Smith* demonstrates that the applicability of the new injury exception is *only* appropriate if the plaintiff makes a conjunctive showing that the new injury is not attributable to the same underlying condition allegedly misdiagnosed *and* that there existed an "asymptomatic period." Failure to make both prerequisite showings is fatal to the application of the "new injury" exception.[39]

On Oct. 19, 2009, the Supreme Court issued its opinion in *McCord v. Lee*.[40] In *McCord*, the plaintiff, who was diagnosed with prostate cancer, sued the defendant radiation oncologist alleging medical malpractice in connection with allegedly improperly placed radioactive "seeds" which were designed to treat the plaintiff's cancer.[41] At the Court of Appeals level, that Court applied the new injury exception to toll the statute of limitations.[42] The Supreme Court, however, reversed the Court of Appeals' application of the new injury exception, holding that an appropriate consideration of the applicable law relative to the new injury exception "makes it clear that the 'new injury' rule is limited to misdiagnosis cases involving a very discreet set of circumstances.[43] Therefore, the Court of Appeals erred by grafting the 'new injury' rule onto all malpractice actions."[44]

To the extent that the Court of Appeals' opinion in *Smith* can be read as entertaining the application of the new injury exception outside the context of a case of alleged medical misdiagnosis, *McCord* likely overrules the *Smith* opinion by implication. However, as it relates to the Court's further articulation of the conjunctive showing that must be made by a plaintiff seeking the application of the new injury exception, the *Smith* opinion likely remains very informative to the misdiagnosis litigant.

Most recently, on Feb. 24, 2010, the Court of Appeals of Georgia in *Howell v. Zottoli* reaffirmed that uniqueness of circumstances in which the new injury exception might appropriately apply and provided some guidance as to the way in which the new injury exception and the statute of repose may, or may not, coexist.[45] In *Howell*, the surviving spouse of the decedent filed suit in April 2003 against a family practice physician alleging medical malpractice in the physician's alleged failure to properly diagnose and treat the decedent's underlying cardiovascular condition beginning in October 1996, which failure, the plaintiff claimed, resulted in the decedent suffering a life-ending heart attack in April 2001.[46]

In affirming the trial court's grant of summary judgment relative to the statute of repose, the Court of Appeals in *Howell* further elucidated the distinctive factual circumstances in which the new injury exception might apply. The Court in *Howell* observed that "the pre-existing treatable kidney cancer in *Cleaveland* had metastasized into an untreatable cancer and now affected new and different organs" thereby constituting a new and separate injury which justified the application of the new injury exception.[47] This language underscores the truly unique nature of those circumstances that represent the "the most extreme circumstances" in which the new injury exception can apply.

As it currently stands, the only factual context in which the Supreme Court and/or the Court of Appeals have held that the new

injury exception properly applies is the context of misdiagnosis cases involving metastatic cancer. Further, in each of these metastasis cases, the plaintiff or the plaintiff's decedent suffered a primary tumor which was misdiagnosed and subsequently became metastatic, spreading to affect "other internal organs that were unaffected at the time of misdiagnosis" after an asymptomatic period.[49] Thus, at least at present, Georgia's appellate courts have ostensibly held true to *Kaminer's* decree that the new injury exception only involves "the most extreme circumstances."[50]

Additional Considerations

How does the new injury exception differ in its application between the statute of limitations and the statute of repose for medical malpractice actions premised upon alleged misdiagnosis? While the concurrence in *Howell* ostensibly sheds light upon the answer to this question, an argument that the new injury exception can operate to toll the statute of repose in a misdiagnosis case will be made. The question will be whether permitting the statute of repose to "recommence" upon each failure to diagnose subsequent to the initial misdiagnosis is tantamount to applying the continuing treatment doctrine to toll the statute of repose in cases of misdiagnosis.

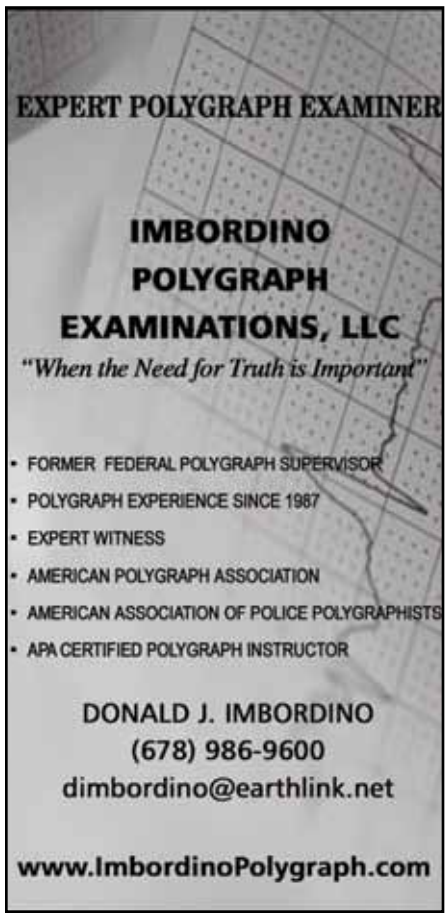
Under Georgia law, once a cause of action resulting from a negligent act has accrued, a failure to correct the negligence does not constitute a new breach of duty for which a new cause of action will arise; rather subsequent acts of negligence are nothing more than a failure to mitigate damages.[51] *Kaminer* interpreted and applied this rule in the context of an alleged misdiagnosis. There, both the statute of limitations and statute of repose begin to commence with the initial misdiagnosis and any subsequent failures to diagnose constitute "a failure to avoid the ultimate effect of the[] earlier breach[es] and a failure to mitigate damages."[52]

In *Schramm*, the Supreme Court opined in Division 3 of its opinion that its holding "is not the adoption of the continuing treatment doctrine so as to allow for the tolling of the statute of repose."[53] This terse conclusion begs the question of whether a simple statement can be made relative to a similar holding in the context of alleged misdiagnosis such that the statute of repose may be permitted to "recommence" upon each alleged failure to diagnose a patient subsequent to the initial misdiagnosis. An argument can be made that such a position would necessarily result from flawed reasoning as the statute of repose in misdiagnosis cases commences upon the initial misdiagnosis, and *only* upon the initial misdiagnosis.

The distinction between a failure to warn and a failure to diagnose is central to the Court of Appeals' holding in *Lyon v. Schramm* and the Supreme Court's affirmation thereof in *Schramm v. Lyon*.[54] This distinction provides the *only* cognizable reconciliation between Supreme Court's caveat in Division 3 of its opinion in *Schramm* and its holding in *Kaminer* as it relates to the computation of the repose period.

"A statute of repose stands as an unyielding barrier to a plaintiff's right of action. The statute of repose is absolute; the bar of the statute of limitations is contingent."[55] In this connection, to hold that subsequent acts of misdiagnosis recommence the period of repose is tantamount to holding that the continuing treatment doctrine can apply in the context of alleged misdiagnosis to *toll* the repose period; a circumstance *expressly* prohibited by Georgia law.[56] Division 3 of the *Schramm* opinion is an implicit recognition of this reasoning.[57]

This conclusion is consistent with new injury cases (*Cleaveland* and *Amu*) which attribute the "new injury" to the original act of misdiagnosis.[58] Further, the



Appreciation of the path traveled by misdiagnosis law in Georgia over the past few years can certainly be an academically daunting task for the practitioner. The fate of the law in this area still seems to be suspended somewhere in the vast expanse of legal interpretation.

Supreme Court in *Kaminer* explicitly observes that the new injury exception applies when the patient "was held to have suffered a new injury subsequent to the initial diagnosis."[59] Moreover, the new *injury* exception, by definition, cannot apply to the statute of repose in a misdiagnosis case because the statute of repose relates not to an "injury" comprising the accrual of a claim, but rather to the "negligent act."[60] Thus, in misdiagnosis cases, the statute of repose commences upon the initial misdiagnosis and all subsequent acts of misdiagnosis constitute failures to mitigate damages which cannot appropriately operate within their own independent repose periods.[61] In short, the new injury exception has no effect, tolling or otherwise, upon the statute of repose in cases of alleged misdiagnosis.

As noted above, the Court of Appeals in *Howell* provided the first step down the path which finds the statute of repose and the new injury exception interacting in the context of alleged misdiagnosis. Ironically, this step seems to present alternative conclusions from the Court of Appeals.

In discussing why the new injury exception could not apply, the majority opinion of the Court of Appeals in *Howell* observed that any act of misdiagnosis which would begin a new statute of repose would have to occur *after* the onset of the "new injury."[62] However, this conclusion is an academically daunting one to reconcile with the Supreme Court's observation in *Kaminer* that "in most misdiagnosis cases, the two-year statute of limitations and the five-year statute of repose begin to run simultaneously on the date that the doctor negligently failed to diagnose the condition and thereby, injured the patient."[63] Under *Kaminer*, the development of a new condition would not be the actionable injury; rather, the misdiagnosis of the new condition would constitute both the act and injury for purposes of the statute of repose and statute of limitations, respectively.[64] In this connection, what the majority in *Howell* seems to allude to as the factual circumstances which would provide the appropriate application of the new injury exception to the statute of repose in cases of alleged misdiagnosis, in fact, describes a new cause of action under *Kaminer* which is separate and bears no relation to the original misdiagnosis or the cause of action arising therefrom. To conclude otherwise presents a situation in which one is left to ponder how an actionable injury can be caused by a negligent act which has yet to occur?

By contrast, the concurring opinion in *Howell* provides a more sensible and simplistic approach which seems to appreciate the legal paradox posed by the situation which arises when one considers how an actionable injury can be caused by a negligent act which has yet to occur. In concurring with the majority's conclusion that the statute of repose barred the plaintiff's claim, Judge Barnes noted simply that "[t]he statute of repose imposes an absolute limit on the time within which an action may be brought."[65] In this connection, Judge Barnes' concurrence commends the majority's "thoughtful and scholarly" analysis; however, Judge Barnes holds,

> As former Chief Justice Sears noted in her concurrences in *Amu*, 283 Ga. 554, 662 S.E.2d 113 and *Cleaveland*, 284 Ga. at 383, 667 S.E.2d 366, "no meaningful distinction" exists between those two cases and *Kaminer* except that the first two cases involved men with cancer and *Kaminer* involved a child with AIDS. *Fortunately, this court need not sort through this confusion here because the defendant's negligent act occurred more than five years before suit was filed, and thus the statute of repose applies.*[66]

This concise holding that the Court need not consider the new injury exception due to the application of the statute of repose is consistent with the analysis and conclusion reached by this author above—that the new injury exception does not have any effect, tolling or otherwise, on the statute of repose. Further, in misdiagnosis cases, the statute of repose commences upon the initial misdiagnosis, with all subsequent acts of misdiagnosis constituting failures to mitigate damages that cannot appropriately operate with their own independent repose periods when the new injury exception is applied.

Conclusion

Appreciation of the path traveled by misdiagnosis law in Georgia over the past few years can certainly be an academically daunting task for the practitioner. The fate of the law in this area still seems to be suspended somewhere in the vast expanse of legal interpretation. The continued pigeonholing of the *Kaminer* rule seems to be a harbinger for a future holding relative to *Kaminer* espousing an isolated exception rather than the bright-line rule in a body of medical malpractice law. In this

connection, a foreseeable path to *Kaminer*'s demise could present itself in the identity of the act of misdiagnosis itself. However, a complete understanding of the progression of misdiagnosis law, to date, as well the various implications and remaining questions which will inevitably need to be addressed can significantly assist the medical malpractice Bar in preparing arguments of substance which might assist the judiciary of this state in venturing down a path of judicial precedent which stands in logical harmony with existing law and the public policy of this state.

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Endnotes

1. 282 Ga. 830, 653 S.E.2d 691 (2007).
2. O.C.G.A. § 9-3-71 (2007).
3. Quinn v. Stafford, 257 Ga. 608-09, 362 S.E.2d 49, 50 (1987).
4. *See Kaminer*, 282 Ga. at 830, 653 S.E.2d at 691; *see also* O.C.G.A. § 9-3-71(b).
5. *Kaminer*, 282 Ga. at 830-31, 653 S.E.2d at 693.
6. *Id.* at 831, 653 S.E.2d at 693
7. *Id.* at 831-32, 653 S.E.2d at 691.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 837, 653 S.E.2d at 697.
12. *Id.* at 837, 653 S.E.2d at 697 (quoting Burt v. James, 276 Ga. App 370, 374, 623 S.E.2d 223, 226-27 (2005)).
13. *Id.*, at 838, 653 S.E.2d at 697.
14. 285 Ga. 72, 673 S.E.2d 241 (2009).
15. *Id.* at 74, 673 S.E.2d at 243.
16. MERRIAM-WEBSTER COLLEGIATE DICTIONARY, 1332 (10th ed. 1993) (defining "warn" as "to give notice to *beforehand* esp. of danger or evil" and identifying "advise" as a synonym for warn) (emphasis added).
17. 302 Ga. App. 447, 480 691 S.E.2d 564, 567 ("Moreover, the absence of the spleen was not a condition that in and of itself was causing damage or injury to the plaintiff in Schramm; thus, there was nothing for the physician to misdiagnose or mistreat. Rather, there was only the physician's failure to warn of a possible condition or injury that could result or occur *in the future*.") (emphasis in original).
18. 291 Ga. App. 48, 48, 661 S.E.2d 178, 79 (2008).
19. *Id.*
20. *Kaminer*, 282 Ga. at 830-31, 653 S.E.2d at 693.
21. *Schramm*, 285 Ga. at 73, 673 S.E.2d at 242.
22. *Kaminer*, 282 Ga. at 832-33, 653 S.E.2d at 694; O.C.G.A. § 9-3-71(a)-(b).
23. *Kaminer*, 282 Ga. at 837, 653 S.E.2d at 696 (quoting Burt v. James, 276 Ga. App. 370, 374, 623 S.E.2d 223, 224-25 (2005)).
24. *Id.* at 833, 653 S.E.2d at 694 (emphasis added).
25. 283 Ga. 549, 662 S.E.2d 113 (2008).
26. 284 Ga. 376, 667 S.E.2d 366 (2008).
27. *Amu*, 283 Ga. at 549, 662 S.E.2d at 113.
28. *Cleaveland*, 284 Ga. at 376, 667 S.E.2d at 366.
29. *Amu*, 283 Ga. at 552, 662 S.E.2d at 115-16; *Cleaveland*, 284 Ga. at 377-79, 667 S.E.2d at 367-69.
30. *Amu*, 283 Ga. at 552, 662 S.E.2d at 115-16; *Cleaveland*, 284 Ga. at 377-79, 667 S.E.2d at 367-69.
31. *Cleaveland*, 284 Ga. at 378, 667 S.E.2d at 369 (emphasis added).
32. *Amu*, 283 Ga. at 553-54, 662 S.E.2d at 117-18; *Cleaveland*, 284 Ga. at 378, 667 S.E.2d at 369-70.
33. *Amu*, 283 Ga. at 552-53, 662 S.E.2d at 117; *Cleveland*, 284 Ga. at 379, 667 S.E.2d 369;
34. *Id.*
35. 294 Ga. App. 333, 670 S.E.2d 136 (2008).
36. *Harris*, 294 Ga. App. at 333-34, 670 S.E.2d at 136.
37. *Id.* at 334, 670 S.E.2d at 138.
38. *Id.* at 338, 670 S.E.2d at 136 (emphasis added).
39. *See* Id.
40. 286 Ga. 179, 684 S.E.2d 658 (2009).
41. McCord v. Lee, 286 Ga. 179, 684 S.E.2d at 659; *see also* Lee v. McCord, 292 Ga. App. at 707, 665 S.E.2d 414, *reversed sub nom.* McCord v. Lee, 286 Ga. 179, 684 S.E.2d 658.
42. *Lee*, 292 Ga. App. at 713-714, 665 S.E.2d 414.
43. *Lee*, 286 Ga. at 182, 684 S.E.2d at 661.
44. *Lee*, 286 Ga. at 182, 684 S.E.2d at 661.
45. 302 Ga. App. 477, 691 S.E.2d 564 (2010).
46. *Id.* at 477, 691 S.E.2d at 565.
47. *Id.* at 479, 691 S.E.2d at 566.
48. *Id.*; *see also* Kaminer v. Canas, 282 Ga. 830, 837, 653 S.E.2d 691, 697 (2007) (quoting Burt v. James, 276 Ga. App. 370, 374, 623 S.E.2d 223, 224-25 (2005)).
49. Cleaveland v. Gannon, 284 Ga. 376, 379, 667 S.E.2d 366, 369 (2008); Amu v. Barnes, 283 Ga. 549, 553-54, 662 S.E.2d 113, 116 (2008).
50. *Kaminer*, 282 Ga. at 837, 653 S.E.2d at 697 (quoting *Burt* 276 Ga. App. at 374, 623 S.E.2d at 224-25.
51. Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 807, 273 S.E.2d 16, 19 (1980).
52. *Kaminer*, 282 Ga. at 835, 653 S.E.2d at 697 (quoting *Jankowski*, 246 Ga. at 807, 273 S.E.2d at 19).
53. Schramm v. Lyon, 285 Ga. 72, 75, 673 S.E.2d 241, 243 (2009).
54. Lyon v. Schramm, 291 Ga. App. 48, 52, 661 S.E.2d 178, 181 (
55. Simmons v. Sonyika, 279 Ga. 378, 379, 614 S.E.2d 27, 29 (2005).
56. *Id.* at 380, 614 S.E.2d at 29-30.
57. Schramm v. Lyon, 285 Ga. at 75, 673 S.E.2d at 243.
58. *See* Cleaveland v. Gannon, 284 Ga. 376, 667 S.E.2d 366 (2008); Amu v. Barnes, 283 Ga. 549, 662 S.E.2d 113 (2008).
59. *Kaminer*, 282 Ga. at 837, 653 S.E.2d at 697 (citations omitted).
60. *Id.* at 831, 653 S.E.2d at 693; O.C.G.A. § 9-3-71(b) (2007).
61. 282 Ga. at 835, 653 S.E.2d at 695-96; Jankowski v. Taylor, Bishop & Lee, 246 Ga. 804, 807, 273 S.E.2d 16, 19 (1980).
62. Howell v. Zottoli, 302 Ga. App. 477, 691 S.E.2d 564 (2010).
63. *Kaminer*, 282 Ga. at 831-832, 653 S.E.2d at 691.
64. *Id.* at 831-32, 653 S.E.2d at 693-94.
65. *Howell*, 302 Ga. App. at 481, 691 S.E.2d at 568 (Barnes, J., concurring specially).
66. *Id.*

Holmes v. Grubman:

The Supreme Court of Georgia Balances Financial Advisor Common Law Liability and Investor Protection

by Robert C. Port and Jason R. Doss

It is no surprise that the stock market has a long history of volatility that can send wild speculators to yacht dealerships and conservative retirees back to the workforce. The recent downturn of 2008 is no different. In 2008 alone, America suffered a historic loss in wealth totaling approximately $10.2 trillion.[1] Over $6 trillion of that amount was attributed to losses in the stock market.[2]

Typically, American investors hire financial professionals (commonly referred to as stockbrokers or financial advisors) to make sound investment decisions. The nature of the relationship between a stockbroker and a client is one based on a trust in that professional's perceived financial acumen. In fact, brokerage firms aggressively market themselves as skilled advisors competent to handle every aspect of their clients' financial life, from investments to mortgages, life insurance, long-term care, estate planning and charitable giving.[3] Furthermore, brokerage firms often advertise that their financial advisors will monitor investments after a recommendation to purchase a security to ensure that the investor meets his or her long term investment goals.

Studies in behavioral finance demonstrate that securities brokers are highly motivated to cultivate their clients' trust and allegiance, and clients have powerful incentives to believe that such advisors are trustworthy and acting solely in the client's best interests.[4] Obtaining a client's trust and confidence, and convincing the client that he or she should rely upon the investment advice given, is at the heart of the broker-client relationship.

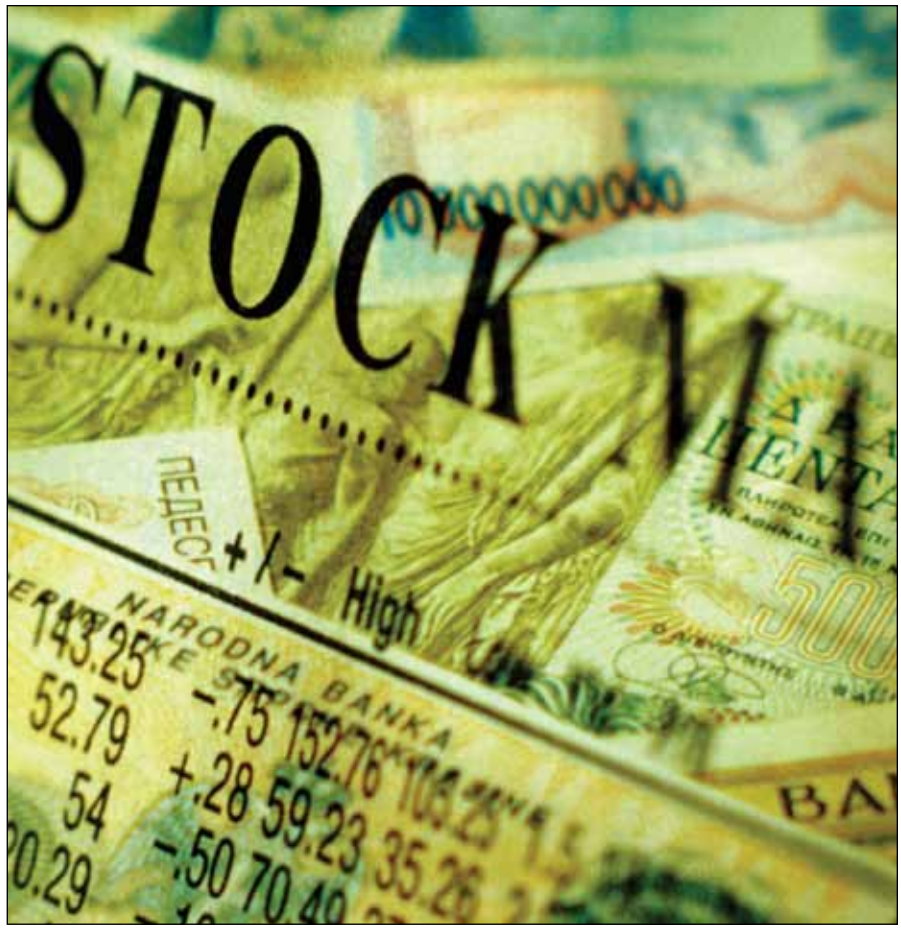
As a result, Georgia courts have long held that under Georgia common law, a stockbroker's duty to account to its customer is fiduciary in nature, so that the broker is obligated to exercise the utmost good faith. Requirements of good faith demand that in the principal's interest, it is the agent's duty to make known to the principal all material facts that concern the transactions and subject matter of his agency.[5]

In an attempt to limit these common law fiduciary obligations and limit liability for unsuitable or inappropriate investment advice, the financial services industry created discretionary and nondiscretionary accounts for its retail investor customers. A discretionary account is one in which the financial advisor has full discretion to make investment decisions without obtaining prior approval from the customer.[6] A nondiscretionary account, which is by far the most common type of investment account, is one in which the

financial advisor is required to get prior approval from the customer before making a trade in an investment account.[7] By implementing this approval process, a brokerage firm argues that in a nondiscretionary account, it does not owe a fiduciary duty to the customer and that the firm is merely an "order taker" because the customer—who had the right to follow or reject the broker's recommendation—was the one who actually made the investment decision. Furthermore, even though the brokerage firm may advertise to the contrary, it will typically argue that it has no continuing legal duty to monitor its customers' portfolios in nondiscretionary accounts and that its legal duty (if any) does not extend beyond the recommendation to purchase the security.

Investor advocates have long criticized the use of nondiscretionary accounts to limit liability. Studies have shown that investors are not aware of the distinction between discretionary and nondiscretionary accounts and also believe that their financial advisor is acting in a fiduciary capacity.[8] After all, the type of account does not change the trust relationship that typically exists between financial professional and investor customer. As a result, the approval process described above is in large part meaningless to the investing public because a trusting investor typically does not have the ability to evaluate independently the broker's recommendations, and will simply follow the stockbroker's investment recommendation without question with the belief that it is appropriate.[9]

Stock market crashes like the one in 2008 are often sudden and dramatic. For example, the S&P 500 Index, a stock index comprised of 500 large cap common stocks actively traded in the United States, fell more than 52 percent between October 2007 and November 2008, which was the largest decline since the Great Depression.[10] When these types of events occur, retail investors frequently contact their



financial advisors looking for advice on how to stem the losses. The typical response by the financial professional is to hold on and "stay the course" and wait for the stock prices or investment values to come back. This recommendation to "hold" is often made without any analysis by the financial advisor regarding whether a customer's investment portfolio is suitable for their current investment objectives and risk tolerance.

Indeed, recommendations to hold sometimes may be the correct and suitable course of action. After all, the stock market has proven to be resilient and with every downturn there is typically an equally large, if not larger, upturn.[11] On the other hand, these statistics represent the performance of the broad-based stock market over time and do not reflect the performance of individual stocks. There are certainly a large number of individual stocks that have not bounced back. Furthermore, it is certainly possible for an investment to be suitable at the time of purchase and then become inappropriate for that investor due to a change in circumstance for the investor (e.g. health problems, death of a spouse, etc.), or change of circumstance for the investment (e.g., loss of a large contract, a product recall or change of investment strategy for a mutual fund). As a result, the recommendation to hold may not be appropriate.

When does the recommendation to hold become the wrong investment recommendation? Does a financial advisor have a duty to monitor investments after a recommendation to purchase to ensure that the investor meets his or her long term investment goals? What legal claims and remedies are available to investors to recoup losses stemming from an improper recommendation to hold a particular stock or overly risky portfolio?

With regard to federal securities laws, the answer to the last question is that there is no viable claim or remedy. This is because Section

10(b) of the Securities Exchange Act affords investors a securities fraud claim based on misrepresentations or omissions made only in connection with the *purchase or sale* of a security, not a recommendation to hold a security.[12]

Without a remedy under the federal securities laws, does an investor have a viable claim under Georgia common law against a stockbroker or the brokerage firm for an improper recommendation to hold a security? As described in more detail below, the Supreme Court of Georgia recently addressed this issue in *Holmes v. Grubman*, and held that aggrieved investors, subject to some limitations, can maintain common law tort claims such as fraud and negligent misrepresentation based on an improper recommendation to hold a security.[13] The Supreme Court of Georgia also re-affirmed that the relationship between a financial professional and customer is fiduciary in nature and that the brokerage firm and the investment professional will owe a heightened duty to the holder of a security even if the account is nondiscretionary.[14] Each of these holdings furthers the protection of public investors who rely upon brokerage firms to provide them sound investing advice and recommendations.

Factual Background and Procedural History of *Holmes v. Grubman*

Appellant William K. Holmes and his four entities controlled by him (Holmes) had nondiscretionary accounts with Citigroup Global Markets, Inc. f/k/a Salomon Smith Barney & Co., Inc. (SSB).[15] As of June 1999, Holmes "owned 2.1 million shares in Worldcom, Inc., the major telecommunications company which went bankrupt after the revelation of massive accounting fraud in 2002."[16] Holmes brought an action against SSB as well as its well-known telecom analyst, Jack Grubman, alleging that Holmes verbally ordered his broker at SSB to sell all shares in Worldcom stock, which was at that time trading at approximately $92 per share. Holmes further alleged that his SSB broker convinced him not to sell, based on recent research reports by SSB's Grubman. The suit further alleged that SSB and Grubman were operating under a conflict of interest because they promoted Worldcom, although knowing that it was grossly overvalued, in order to retain Worldcom's lucrative investment banking business. Instead of selling, Holmes purchased additional shares as the stock price declined. In October 2000, Holmes was forced to sell all WorldCom shares in order to meet margin calls, resulting in an alleged loss of nearly $200 million.[17]

In 2003, Holmes filed for bankruptcy and brought this action for damages under Georgia law. The case was transferred to the U.S. District Court for the Southern District of New York and the district court dismissed the complaint, which brought claims based on fraud, negligent misrepresentation, negligence in making disclosures, and breach of fiduciary duty. On appeal, the U.S. Court of Appeals for the Second Circuit certified the following questions to the Supreme Court of Georgia that are pertinent to this article:[18]

> 1. Does Georgia common law recognize fraud claims based on forbearance in the sale of publicly traded securities?; and
> 2. Under Georgia law, does a brokerage firm owe a fiduciary duty to the holder of a nondiscretionary account?[19]

Georgia Common Law Recognizes Holder Claims and that a Brokerage Firm Owes a Fiduciary Duty to the Holder of a Nondiscretionary Account

In answering the first certified question, the Supreme Court of Georgia held that aggrieved investors can bring viable common law fraud claims based on a recommendation not to sell or to hold a security.[20] In doing so, the Court stated that, "although this Court has never specifically addressed such claims, it is well settled that one of the elements of the tort of fraud in Georgia is an intention to induce the plaintiff to act or refrain from acting."[21] The Supreme Court of Georgia also approved of the approach taken by the Restatement (Second) of Torts §525 (1977), which states that "induced forbearance can be the basis for tort liability."[22]

The Supreme Court of Georgia also went beyond the scope of the certified question and stated that "[w]e see no reason why our authorization of common-law fraud claims based on forbearance in the sale of publicly traded securities . . . should not extend to . . . other common-law tort claims" such as negligent misrepresentation."[23]

The Court did, however, articulate limitations on these types of claims and held that a plaintiff bringing a holder claim must prove specific reliance on the defendants' representations.[24] The plaintiff must allege actions "as distinguished from unspoken and unrecorded thoughts and decisions" that would indicate actual reliance on the misrepresentations.[25]

With regard to the second certified question as to whether, under Georgia law, a brokerage firm owes a fiduciary duty to the holder of a nondiscretionary account, the Court answered affirmatively, approving the analysis of prior decisions of the Court of Appeals of Georgia that "recognized that a stockbroker and his customer have a fiduciary relationship as principal and agent pursuant to O.C.G.A. § 23-2-58," and accordingly, "a stockbroker has limited fiduciary duties towards a customer who holds a nondiscretionary account."[26]

The Court's decision recognized that the essence of the broker-client relationship is that of principal (customer) and agent (brokerage firm). By statute, such a relation-

ship "of mutual confidence . . . requires the utmost good faith."[27] The *extent* of the broker's fiduciary duty may vary under differing factual circumstances, but the Court's decision makes clear that the *existence* of the duty cannot reasonably be questioned.[28] Accordingly, the obligations of a broker handling a nondiscretionary account are more than simply being an "order taker" who executes a securities transaction.[29] The duties undertaken by a broker handling a nondiscretionary account—such as the duty to recommend an investment only after sufficient investigation of the investment, the duty to avoid self-dealing, and the duty to inform the customer of the risks of an investment—impose upon the broker a higher duty of care than would otherwise be found in the garden variety agent-principal relationship.[30]

Moreover, finding that a stockbroker is a fiduciary is entirely consistent with both the statutory and regulatory environment in which brokers operate. Securities laws reject the concept of *caveat emptor* as it applies to securities transactions.[31] Instead, as a matter of public policy, the rule is "Let the seller beware." Thus, under Georgia's current and former legislative scheme, it is the seller who has the burden of proof to show that he or she did not know, and in the exercise of reasonable care could not have known, of material misstatements or omissions made in connection with the sale of securities.[32]

Securities regulators also have recognized that the special and distinct role of a securities broker in securing the trust and confidence of his or her clients imposes fiduciary responsibilities upon the broker. Under the so-called "Shingle Theory" of liability developed from the law of agency by the Securities & Exchange Commission (SEC), a broker who solicits and accepts orders from the public implicitly represents that he will deal fairly with his customers.[33] According to the SEC, it is a "basic principle" that by holding itself out to the public as a broker-dealer, a firm represents that it will act in the customer's best interest.[34] The SEC has therefore concluded that the law of agency, coupled with the rules of such "self-regulatory organizations" (SROs)[35] as the Financial Industry Regulatory Authority (FINRA), also give rise to a fiduciary duty owed by brokers.[36]

Ramifications of *Holmes v. Grubman*

The brokerage industry annually spends tens of millions of dollars attempting to convince the investing public that they are skilled and competent advisors able to counsel clients successfully through the labyrinth of investment choices available. The average investor who has relied on his or her broker for investment advice is therefore shocked and dismayed when the brokerage firm thereafter claims that it owes no duty to its clients other than to faithfully execute the trade its broker

had recommended. By specifically finding that a brokerage firm owes a fiduciary duty to the holder of a nondiscretionary account, the Supreme Court of Georgia not only reaffirmed the law on this point, but also confirmed that the legal relationship of investors and brokers is consistent with what the public expects, and what both the legislative and regulatory schemes demand.

Holmes makes clear that financial advisors can be held liable under Georgia common law for thoughtless or inappropriate recommendations to stay the course in the face of downturns in the market. The recommendation to hold should be a well-informed decision by the financial advisor after a complete analysis of the customer's current investment objectives and risk tolerance. In addition, coupled with the Court's finding that "holder claims" are viable under Georgia law, there is now substantial support for the argument that brokerage firms have a continuing duty to monitor their customers' nondiscretionary accounts to ensure that the investments selected continue to be suitable and appropriate for the investor.

That positive result for the public investor cannot be dismissed at a time when many investors are losing faith in the financial system.[37] Although the decision in *Holmes* will not, by itself, calm Georgia investors' anxiety caused by news of massive Wall Street frauds, lax enforcement by regulators, and disclosure of Wall Street's conflicts of interest, it does, in some small measure, encourage investor faith and confidence in the financial industry by reaffirming that a brokerage firm and its broker owe their public investors a duty of utmost good faith and loyalty in handling their nondiscretionary accounts. GBJ

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Endnotes

1. http://www.businessinsider.com/2009/2/america-lost-102-trillion-of-wealth-in-2008.
2. *Id.*
3. *See, e.g.*, the web site of Merrill Lynch, http://www.totalmerrill.com/TotalMerrill/pages/WhatMattersMostToYou.aspx (suggesting that "a Merrill Lynch Financial Advisor [can] help you align your portfolio with your personal goals," including "Balancing Today's Expenses & Future Goals," "Caring For My Family," "Preparing for Retirement," "Pursuing My Dreams," "Estate Planning & Philanthropy," and "Growing My Business.").
4. Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics about Stockbrokers and Sophisticated Customers*, 84 Cal. L. Rev. 627 (May 1996).
5. Glisson v. Freeman, 243 Ga. App. 92, 99, 532 S.E.2d 442, 449 (2000), citing Minor v. E.F. Hutton & Co., 200 Ga. App. 645, 647, 409 S.E.2d 262 (1991) and E.F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 445, 304 S.E.2d 420 (1983).
6. Webster's New World Finance and Investment Dictionary (2010).
7. *Glisson*, 243 Ga. App. at 99, 532 S.E.2d at 449.
8. A recent study found that more than 60 percent of investors believed that brokers have a fiduciary duty. *See, e.g., Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice (2008) at 31, (commissioned by the U.S. Securities and Exchange Commission) (citing 2006 survey of 1,000 investors by TD Ameritrade).
9. *See, e.g.*, Mihara v. Dean Witter & Co., 619 F.2d 814, 821 (9th Cir. 1980) (investor routinely followed the recommendations of the broker); Carras v. Burns, 516 F.2d 251, 258-59 (4th Cir. 1975) ("The issue is whether or not the customer, based on the information available to him and his ability to interpret it, can independently evaluate his broker's suggestions.").
10. http://www.cnbc.com/id/27826038, Stocks Plunge, Leaving Dow Below 7600.
11. For example, the annualized growth rate for the S&P 500 was a decline of -37.00% in 2008, followed by a 26.47 percent increase in 2009 The Callan Periodic Table of Investment Returns, *Annual Returns for Key Indices (1990-2009) Ranked in Order of Performance* (2010), http://www.callan.com/research/download/?file=periodic/free/360.pdf.
12. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).
13. 286 Ga. 636, 691 S.E.2d 196 (Feb. 8, 2010), reconsideration denied March 15, 2010.
14. *Id.* at 643.
15. *Holmes*, 286 Ga. at 636.
16. *Id.*

17. *Id.*
18. 286 Ga. at 636-37.
19. The Second Circuit certified a third question to the Supreme Court of Georgia, which is as follows:

    > With respect to a tort claim based on misrepresentations or omissions concerning publicly traded securities, is proximate cause adequately pleaded under Georgia law when a plaintiff alleges that his injury was a reasonably foreseeable result of defendant's false or misleading statements but does not allege that the truth concealed by the defendant entered the market place, thereby precipitating a drop in the price of the security?

    Holmes, 286 Ga. at 637. This issue is not relevant to this article because the fact patterns addressed here involve misrepresentations or omissions by financial professionals that do not affect the price of a security. In *Holmes*, the plaintiff was asserting that Jack Grubman's fraudulent research reports caused the price of WorldCom to be artificially inflated. Put another way, when the truth about Jack Grubman's research reports came to light, the price of WorldCom precipitously dropped. This theory of liability is known as a "fraud on the market." As described by the U.S. Supreme Court, "[t]he fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements." Basic, Inc. v. Levinson, 485 U.S. 224, 241–42 (1988) (omission in original) (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). The Supreme Court of Georgia held that in fraud on the market cases, a plaintiff must prove at trial that the truth concealed by the defendant entered the marketplace, causing a drop in the price of the security. *Holmes*, 286 Ga. at 642. The

"fraud on the market" analysis has no application to the large segment of claims, typically brought by individual public investors, which do not allege a widespread dissemination of false information that does not enter the marketplace. In those instances, the claim is not that there has been a "fraud on the market," because there was no widespread dissemination of false information; instead, the claim is that "but for" the misrepresentation or omission specifically directed at and relied upon by the individual investor, the stock purchase or sale never would have occurred. Rather, in those cases, the sufficiency of a pleading alleging proximate cause need only meet the requirements of notice pleading required by the Civil Practice Act. As a result, this certified question will not be discussed any further.

20. Holmes v. Grubman, 286 Ga. 636, 637.
21. *Id.*, quoting Stiefel v. Schick, 260 Ga. 638, 639, 398 S.E.2d 194 (1990) (internal quotations omitted; emphasis omitted).
22. *Id.* at 637.
23. 286 Ga. at 640-641.
24. *Id.* at 640.
25. *Id.*, quoting Small v. Fritz Cos., 30 Cal. 4th 167, 184, 132 Cal.Rptr.2d 490, 65 P.3d 1255 (2003).
26. 286 Ga. at 643, approving the analysis of *Glisson v. Freeman*, 243 Ga. App. 92, 532 SE 2d 442 (2000). In support of its decision, the Court also relied upon *Minor v. E.F. Hutton & Co.*, 200 Ga. App. 645, 647, 409 SE 2d 262 (1991) ("A stock broker's duty to account to its customer is fiduciary in nature, so that the broker is obligated to exercise the utmost good faith. Requirements of good faith demand that in the principal's interest it is the agent's duty to make known to the principal all material facts which concern the transactions and subject matter of his agency.") (citations and internal quotations omitted); E.F. Hutton & Co. v. Weeks, 166 Ga. App. 443, 445, 304 S.E.2d 420, 422 (1982) (same); *see also* Tigner v. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 716, 411 S.E.2d 800, 802 (1991) (finding of fiduciary relationship in which broker exercised a "controlling influence" over the customer and the customer relied on the relationship).
27. O.C.G.A. § 23-2-58 (1982); s*ee also* Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 314, 105 S. Ct. 2622, 2630 (1985) (a broker-dealer "owes a duty of honesty and fair dealing toward his clients."); Koch v. Cochran, 251 Ga. 559, 560, 307 S.E.2d 918, 919 (1983) ("The relationship of principal and agent . . . demands of the agent the utmost loyalty and good faith to his principal.").
28. *In re* Merrill Lynch Sec. Litig., 911 F.Supp. 754, 768 (D.N.J. 1995) ("The fiduciary duty is fundamental to the broker/client relationship."), *rev'd on other grounds*, 135 F.3d 266 (3rd Cir. 1998).
29. *See, e.g.*, Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 461 F. Supp. 951, 953 (E.D. Mich. 1978), aff'd, 647 F.2d 165 (6th Cir. 1981); s*ee also* Glisson v. Freeman, 243 Ga. App. 92, 99, 532 S.E. 2d 442, 449 (2000) ("With respect to a nondiscretionary account, . . . the broker owes a number of duties to the client, including the duty to transact business only after receiving prior authorization from the client and the duty not to misrepresent any fact material to the transaction."); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng, 901 F.2d 1124, 1128 (D.C. Cir. 1990) (basic agency law establishes fiduciary duties in nondiscretionary accounts, including duties (1) not to make unauthorized trades, (2) to inform client of right to reject unauthorized trades, and (3) generally, to disclose "information which is relevant to affairs entrusted to him of which he has notice."); Gochnauer v. A.G. Edwards & Sons, Inc., 810 F.2d 1042, 1049 (11th Cir. 1987) (citing *Leib* with approval as to the duties of broker in a nondiscretionary account). These duties are mirrored in Rule 2310 of the National Association of Securities Dealers, ("NASD"), the largest independent regulator for all securities firms doing business in the United States. Entitled *Recommendations to Customers (Suitability)*, and also known as the "Know Your Customer" or "Suitability" Rule, it provides that, "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs." FINRA MANUAL, *NASD Rules* (August 20, 1996), http://finra.complinet.com/en/display/display.html?rbid=2403&record_id=4315&element_id=3638&highlight=2310#r4315.
30. *See, e.g.*, Opper v. Hancock Sec. Corp., 250 F. Supp. 668, 676 (S.D.N.Y. 1966) ("the duties of a securities broker are, if anything, more stringent than those imposed by general agency law."), *aff'd per curiam*, 367 F.2d 157 (2d Cir. 1966). As a result, a securities broker is required to adhere to a standard of more than ordinary care in its handling of a client's account. The broker is judged against the standard of prudence and care expected of a trained and experienced financial professional:

    > [I]t is normally not sufficient for a broker to exercise ordinary care and judgment in discharging his duties, he must employ such care, skill, prudence, diligence and judgment as might reasonably be expected of persons skilled in his calling. If his customer's money is lost because the broker undertakes his duties without possessing the requisite skills, or because of his negligence, the broker is liable for the loss.

    NORMAN S. POSER, BROKER-DEALER LAW & REGULATION, § 2.03[A][1] 2-50, (3rd ed, 2002 Supp).
31. In the words of the U.S. Supreme Court, a "fundamental purpose [of the securities laws is] . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor*, and thus to achieve a high standard of business ethics in the securities industry." SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186, 84 S. Ct. 275, 280 (1963); *see also* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 151, 92 S. Ct. 1456, 1471 (1972).

32. O.C.G.A. § 10-5-14(a)(2) (1973 Securities Act) (2009); O.C.G.A. § 10-5-58(b) (Georgia Uniform Securities Act of 2008).
33. Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir. 1943); *see also* Kahn v. SEC, 297 F.2d 112, 115 (2d Cir. 1961) (Clark, J., concurring).
34. *In re* D.E. Wine Investments, Inc., Admin. Proceeding File No. 3-8543 Release No. ID-134, 1999 WL 373279 (June 9, 1999).
35. Pursuant to Sections 15A and 19 of the Securities Exchange Act of 1934, Congress authorized the establishment of "self-regulatory organizations" (SROs), which have promulgated rules which are, *inter alia*, "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest . . . ." 15 U.S.C. § 780-3(b)(6) (October 5, 2010).
36. *See, e.g.*, *In re* E.F. Hutton & Co., Exchange Act Release No. 25,887 [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,303 (July 6, 1988). FINRA Conduct Rules impose upon a brokerage firm and its members the obligation to make only suitable investment recommendations to their clients after learning the essential facts concerning those clients. FINRA Conduct Rule 2310. Recognizing that the broker-investor relationship is fundamentally different from a garden variety consumer relationship, the Conduct Rules of the FINRA also require that its member firms, for both discretionary and nondiscretionary accounts, "shall observe high standards of commercial honor and just and equitable principles of trade." FINRA Conduct Rule 2110. Indeed, both the current Chairwoman, as well as the past two Chairmen of the SEC, have recognized that brokerage firms act in a fiduciary role with respect to their clients. For example, Harvey L. Pitt, Chairman from 2001 to 2003, observed that "[r]egulation can never substitute for people doing their jobs honestly, dedicated to serving their customers *as the fiduciaries they are*." Securities Industry and Financial Markets Association, *Remarks of Harvey L. Pitt, Chairman, SEC, at the Securities Industry Association Annual Meeting* (November 8, 2002), http://archives2.sifma.org/speeches/html/pitt02.html (emphasis added). During the recent "credit crisis," Chairman Christopher Cox affirmed that "[n]ow more than ever, companies need to take a long-term view on compliance and realize that *their fiduciary responsibility requires a constant commitment to investors*." U.S. Securities and Exchange Commission, *Speech by the SEC Chairman, Address to the 2008 CCOutreach National Seminar* (November 13, 2008), http://www.sec.gov/news/speech/2008/spch111308cc.htm (emphasis added). And the current Chairwoman, Mary Schapiro, testified before Congress that "*all* financial service providers that provide personalized investment advice about securities *should owe a fiduciary duty to their customers or clients*." U.S. Securities and Exchange Commission, *Testimony Concerning SEC Oversight: Current State and Agenda, Before the U.S. House of Representatives Committee on Financial Services` Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises* (statement of Mary L. Schapiro, SEC Chairwoman) (July 14, 2009) http://www.sec.gov/news/testimony/2009/ts071409mls.htm (emphasis added).
37. A May 2010 poll found 58% of respondents no longer believe the markets are fair and open. NBC News/Wall Street Journal Survey, Hart/McInturff Study # 10316, at 19 (May 6-10, 2010), http://online.wsj.com/public/resources/documents/wsjnbcpoll-05122010.pdf.

Georgia v. Pennsylvania Railroad

A Retrospective

by James M. Thomas

Georgia v. Pennsylvania Railroad, filed 66 years ago in the highest court of the land, was laden with consequences—social, political and economic.[1] Its genesis lay in long-standing public denouncements of rate-making practices in the railroad industry. Allegations of wrongdoing set forth in the original jurisdiction bill of complaint, and the U.S. Supreme Court decision that followed, loudly reverberated in the federal bureaucracy and in the halls of Congress.

Industry and commerce—in the state and region—benefitted from the litigation that exemplified professional excellence at the apex of American practice and procedure. Lead counsel Ellis Gibbs Arnall, then sitting as Georgia's progressive governor, later became one of the South's most successful lawyers and a founding partner of a prominent Atlanta firm that remains in existence today. This article offers a retrospective.

The Setting

In the 1940s, Georgia was largely rural, poor, undeveloped and heavily dependent upon agriculture and its allied industries. Farmers and farm laborers constituted one-third of the work force.[2] At the turn of the decade, per capita income was 57 percent of the national average.[3] Salaries of public school teachers were half the national average.[4]

Economies of the state and much of the region were characterized by exportation of raw materials and importation of finished goods, practically all by rail—an arrangement known as an "extractive economy." The industrialization that had occurred mainly consisted of low-wage, low-value-creating industries that generated little impact on per capita income of Southerners.[5]

Poverty was pervasive. Homeowners resided in 30 percent of occupied housing units, of which only 35 percent were equipped with indoor plumbing. Merely half of all housing had electricity.[6] Travelers, and the few tourists who jostled across the state's defective rural roads, reported a landscape of abject backwardness.[7]

Since Reconstruction, shippers, manufacturers, Southern governors and others blamed Georgia's economic plight on the railroads. They claimed discriminatory freight rates for hauling cargo into, out of and across the region were obstructing commercial expansion. Georgia Gov. Eurith D. Rivers, elected in 1936, and acting through the Southern Governors Conference, became the principal spokesman of this regional crusade.[8]

Rivers was not alone. Gov. Bibb Graves of Alabama declared, "This freight business is the heart of the whole Southern problem."[9] Likewise, Frank Dixon, a former governor of Alabama and chairman for two years of the Southern Governors Conference, concluded in 1944, "Of all the outstanding and inexcusable messes which a policy of laissez faire has brought on an innocent people, the freight rate structure is about the worst."[10]

On Feb. 2, 1939, Gov. Rivers appointed Ellis G. Arnall, a young lawyer from Newnan, Ga., state attorney general. Three years later, Arnall defeated Eugene Talmadge to become the 69th governor and the youngest in America, at age 35. A proponent of economic growth as the path out of poverty, Arnall was sensitive to the issue of discriminatory freight rates.[11]

The Freight Rate Controversy

Before the Civil War, each fledgling railroad set its own rates. In the post-war period, excessive competition and rate cutting prompted Congress to pass the Interstate Commerce Act and create the Interstate Commerce Commission (the ICC). The congressional intent in 1887 was to prohibit excessive and discriminatory rates. The ICC was empowered to enforce the Act.[12]

Within the railroad industry, two key developments converged to create the anticompetitive rates

that plagued the South. First, the rail lines organized trade associations, *e.g.*, the American Railroad Association and the Southern Railway and Steamship Association. Second, the lines established geographic "territories" for purposes of setting rates.[13] The Southern Territory encompassed Kentucky and most states in the old Confederacy. The Official Territory included northern states east of the Mississippi and the greater part of the Virginias. Other territories were divided among the remaining states and regions.[14] The Southern Territory contained less than 20 percent of the nation's population, and only slightly more than 12 percent of the work force was laboring in factories. Per capita income was the lowest in the country. The Official Territory, enclave of northern industry, by contrast, contained 51 percent of the population, the greatest number of workers engaged in industrial production, and the highest per capita income.[15]

In 1937, John Alldredge of the Tennessee Valley Authority submitted a freight rates report to the 75th Congress. He disclosed that shippers of manufactured goods by class rates (*i.e.*, rates on finished products, as distinguished from raw materials) paid, on average, 39 percent more in the Southern Territory than their counterparts in the Official Territory, quantities and distances being about the same.[16]

During Gov. Arnall's administration, these rate distortions persisted. He famously cited figures showing that cargo from the West en route to ports on the North Atlantic, *e.g.* from Alton, Ill., to Baltimore or New York Harbor, paid a first class rate of $1.68 per hundred pounds; but to the port in Savannah the rate was $2.39, though roughly of equal distance. On a carload of work clothes bound for Chicago from Macon—819 miles—the rate was $1.56 per one hundred pounds, as compared to $1.12 for a shipment from Philadelphia to Chicago—816 miles.[17]

Conspirators, Collusions and the Southern Governors' Case

The rates were rigged. The conspirators, it was believed, colluded to set the discriminatory rates through trade associations. Their misdeeds were achievable because the ICC granted the lines broad powers in rate-making. Each railroad was free to promulgate a schedule of rates and file it with the Commission. The rates then became effective—unless within 30 days some interested party intervened with a written request for suspension, or unless the Commission *sua sponte* instituted suspension.[18] Gov. Arnall claimed that more than 90 percent of all rate filings became effective without suspension, investigation or other Commission initiatives.[19]

Railroad officials agreed among themselves on rates suitable for ICC filing. Economic coercion was the wrench employed for holding uncooperative rail lines in line. A Southern line that balked was guaranteed to learn that it was bad for business.[20] The governor elaborated:

> As a part of the pattern of this unlawful private rate-making machinery there exists what may be termed "economic coercion." This coercion is a subtle thing. It is something apart from physical threats against a railroad which is friendly to the South. Rather it involves meetings of railroads at times and places, where and when it is simply understood that, under the peculiar circumstances, it would not be good for business for a Southern railroad to fail or refuse to conform to the wishes of those present; economic sanctions, such as diversion of business, can be applied too readily.[21]

Arne C. Wiprud, special assistant to the U.S. attorney general, described the collusion even more bluntly:

> In no other field of private or semi-public enterprise has such a vast scheme of price-fixing been so boldly conceived and executed. The over-all conspiracy has succeeded in eliminating virtually all competition in the making of rates within and between all forms of public transportation. The ability to manipulate prices arbitrarily is the essence of monopoly power . . . .[22]

At the ICC, regulatory challenges of freight rates began as early as 1925.[23] In 1937, the Southern Governors' Conference filed its complaint on behalf of eight Southern states.[24] It became known as the Southern Governors' Case. The complainants averred that existing rates were discriminatory on 14 products; were in violation of the Interstate Commerce Act; and forced southern manufacturers to absorb higher shipping costs in order to compete in Northern markets, thus placing them at an economic and market disadvantage. Counsel for the governors asserted that higher inter-territorial rates were set and intended to protect the markets of Northern firms. They further contended that Northern lines dominated the rate-making process and that higher rates in the South were unjustified when based on higher costs of service in the South.[25]

On Nov. 22, 1939, in a five-to-four vote, the ICC found for the Southern Governors' on 10 of the 14 products in question. Moreover, the Commission conceded that, "The desirability of rate structures providing reasonably uniform levels of rates from adjacent producing sections of the country to common markets is not open to question . . . ."[26] Down south politicians were encouraged.

During pendency of the Southern Governors' Case, Congress joined the fray. Hearings were held, legislation was introduced and the Transportation Act of 1940 became law. It ordered a general investigation of rates on manufactured products, agri-

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Pictured above from L to R: Don C. Keenan, Foundation Founder and Chairman; First Place winner Louise Smith (3L, Mercer); Second Place winner Danielle Long (3L, John Marshall); Third Place winner Elizabeth Bennett (2L, Georgia State); Fourth Place Honorable Mention Tie Winners Dylan Bess (2L, Georgia State) and Trevor Maitland (2L, University of Georgia)

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Photo from Georgia Capitol Museum, Office of Secretary of State

Ellis Gibbs Arnall, former Georgia governor and cofounder of Arnall, Golden & Gregory.

cultural commodities, and raw materials within the various territories.[27] The Act, however, came after the Commission's announcement on July 29, 1939, of its own Class Rate Investigation.[28]

The ICC, however, was dilatory. It was June 1941 before the Commission began rate hearings that dragged on for three years.[29] Delay caused the rate reform movement to lose momentum and falter. Gov. Arnall, who had become the section's principal spokesman regarding freight rates, became convinced legal action was mandatory.

The Lawsuit

The governor entered an Executive Order on May 27, 1944, directing Attorney General T. Grady Head to file a bill of complaint in the U.S. Supreme Court.[30] He perceived the dispute as one of diversity—an action between the state of Georgia and defendant railroads, that were citizens of other states. Accordingly, he believed the Court would grant jurisdictions under Article III, Section 2, of the Constitution.[31]

Supreme Court precedent supported the exercise of original jurisdiction. Most notably, in 1907, Georgia succeeded in invoking the Supreme Court's jurisdiction in *Georgia v. Tennessee Copper Co.*[32] There, the Court exercised its original jurisdiction and enjoined Tennessee manufacturers from discharging noxious gas plumes that drifted across the state line and settled on Georgia lands.

Consistent with that authority, Georgia initiated the freight rate case by filing its complaint on June 12, 1944. It named the Pennsylvania Railroad Company and 19 additional lines as party-defendants. The state alleged a continuing conspiracy among the defendants to fix rates in violation of the antitrust laws and sought money damages and an injunction to halt the practice.[33] Georgia alleged inquities previously described, but added some with more specificity, namely: (1) the rates were instigated to grant preferential shipping costs to parts of other states over those of the complainant; (2) in their scheme of price fixing, the conspirators utilized some 60 bureaus, committees, conferences, associations and other private rate-fixing agencies; (3) the mechanics employed by the conspirators were unsanctioned by the Interstate Commerce Act, were prohibited by the antitrust acts and put control of rates in the hands of the defendants; and (4) Southern defendant lines were so dominated and coerced by the Northern railroads that, to the extent they desired to publish through rates between Georgia and the North to which the Northern defendants objected, they would be precluded from publishing such rates.[34] Further—and a critical point—Georgia averred that the ICC had no authority to afford relief against a continuing rate-fixing conspiracy.[35]

In response, defendants maintained the complaint did not demonstrate a justiciable controversy and failed to state a cause of action.[36]

On Jan. 2, 1945, the U.S. Supreme Court heard arguments in the case.[37] After a week of preparation in Washington, partly among helpful lawyers at the Department of Justice, Arnall argued the case for Georgia—the first and only sitting governor to do so in the history of the United States.[38] Joining him at counsel table were Georgia Attorney General Head, U.S. Attorney General Francis Biddle and assistant attorneys from both offices.[39]

Defense counsel argued that no damages could flow from a conspiracy, only from the rates themselves. Moreover, the defendants asserted that the state had failed to exhaust its administrative remedies before the Commission. Arnall's rebuttal was that the ICC had no authority to curb conspiracies. Pointing to averments in the complaint, he maintained that the

basic issue was the illegal conspiracy, not the legality or reasonableness of freight rates themselves. Absent collusion, he argued, each railroad could set its rates—"free from the restraining hands of monopoly."[40]

The governor's oral argument before the Supreme Court attracted interest and commendation. Complimentary articles appeared in *The Atlanta Journal, The Atlanta Constitution* and *The Atlanta Historical Journal*.[41] In his letter to Arnall, President Franklin D. Roosevelt wrote, "I hear from all sides your appearance was excellent in the presentation of the case, and that it created a profound impression."[42]

In a five-to-four opinion, the Court found for Georgia on March 26, 1945. Among other things, the Court held: (1) the state was a proper party; (2) the controversy was justiciable; and (3) the complaint stated a cause of action allowing for a trial on the merits.[43] Writing for the majority, Justice Douglas stated:

> Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a state as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a state or put it at a decided disadvantage in competitive markets.[44]

No trial on the merits was ever held, nor would it matter. On May 15, 1945, in the aging Class Rate Investigation, on a seven-to-two vote, the ICC issued a decision nearly 300 pages in length. It adopted virtually every plank of the Southern platform, instigated reform, and proved decisive.[45] The ruling called for uniformity in rates, after concluding that those in place east of the Mississippi were unjust and violated the Interstate Commerce Act. The Commissioners acknowledged a time factor was unavoidable in implementing uniformity but proceeded with immediate adjustments. Class rates available to shippers in the Southern, Southwestern and Middle Western Territories were lowered by 10 percent; those in the Official Territory were raised 10 percent.[46]

Arnall, joined by others, was confident the Supreme Court decision hastened the ICC's action and that without it the Commissioners would have delayed indefinitely. Among them were editors of *The Birmingham News*. They wrote, "Perhaps the apples were ready to fall from the tree . . . . Perhaps not. The Supreme Court action gave the tree a strong shake."[47]

The Aftermath

Despite setbacks, the railroad industry continued efforts on Capitol Hill to gain exemption for rate-making from antitrust prohibitions. The industrialists mounted support for legislation reintroduced in 1945 by Congressman Alfred L. Bulwinkle of North Carolina. It authorized railroads to enter into rate agreements among themselves, free of antitrust impediments.[48] After a five-year slog through Congress, the bill reached President Truman's desk on June 12, 1948, and was vetoed, but Congress overrode the president's veto.[49]

As Arnall pointed out, however, Congressional action came *after* the Class Rate ruling providing freight rate equality, which remained steadfastly in place. In May 1946, a New York federal district court sustained the ICC ruling.[50] Thereafter, the Supreme Court affirmed the district court and agreed with the ICC's conclusions that class rates in place prior to 1945 were adverse to business growth in the South and West.[51] The final rail line hurdle to parity and equity had fallen, causing the governor of Georgia to declare "that the South is well on its way to readmission to the Union!"[52]

Five years after his appointment, four years after holding two months of hearings and three years after Gov. Arnall's term in office, Special Master Lloyd K. Garrison submitted his report in *Pennsylvania Railroad* to the Supreme Court. He concluded there was insufficient evidence of conspiracy to warrant a trial. With no fanfare, the Georgia freight rate case was duly dismissed.[53]

Conclusion

It is debatable the extent to which the *Pennsylvania Railroad* litigation affected business growth and industrial expansion. The naysayers, however, are in the minority. Two of the most conspicuous were Duke University Professors Calvin B. Hoover and B. U. Ratchford. They contended that Southerners used the freight rate issue as a means of absolving themselves for lack of industrial development.[54]

The prevailing view, however, is that, over time, the litigation produced profound benefits for the South. Among the journalists and historians with this opinion are James F. Cook Jr. author of *Governors of Georgia*; E. Merton Coulter in *Georgia: A Short History*; Numan V. Bartley in *A History of Georgia*; Thomas Elkins Taylor in a master's thesis study of Ellis Arnall; and Harold Paulk Henderson in his biography of Arnall.[55]

From the vantage point of the author, physical evidence attributable to the outcome—at least in part—is there for all to see. For where mule-drawn wagons were still plodding along rutted roads as late as the 1940s, new highways began speeding goods and travelers.

Where cotton fields once dominated the landscape, there were now factories, warehouses, terminals, vibrant and growing towns and cities, office parks, restaurants full of patrons and skyscrapers along the Peachtree Corridor.

Georgia v. Pennsylvania Railroad did not redress grievances per se, nor did it terminate the controversy. Nevertheless, the Supreme Court agreed the state had standing to assert its grievances. That, in itself, seemed to spur action. Indeed, just *two months* after the Supreme Court's decision, the ICC acted on the Class Rate Investigation, which had been pending before it for years, by approving freight rate relief for the American South—an action the U.S. Supreme Court thereafter affirmed. The state stood unshackled from the inequitable, detrimental costs of the rail lines.

All meritorious lawsuits bear a measure of importance. Gov. Arnall's case in the Supreme Court bore extraordinary importance.

Epilogue

The one-term governor held no other elected office. For a brief period during the Truman Administration he acted as director of the Office of Price Administration. He declined the president's offer of appointment as solicitor general and returned to Georgia and private practice.[56]

On Feb. 1, 1949, he, Sol. I. Golden and Cleburne E. Gregory Jr. founded the Atlanta firm of Arnall, Golden & Gregory. The corporate clientele soon included numerous national names and organizations, among them Walt Disney Productions, Eastman Kodak, National Distributors, the Motion Picture Association of America, the Canada Pacific Railroad, the National Frozen Food Association and General Foods Corporation. Arnall was also active in the insurance industry, where he was a cofounder and president of Dixie Life Insurance Company.[57] He commuted daily from his home in Newnan.

Arnall lost a final bid for office in the 1966 gubernatorial race and died in 1992, age 85.[58] But his professional and political life affirmed the aged axiom, to wit: "The best thing that can happen to an American lawyer is to get himself elected governor of a state." GBJ

James M. Thomas is of counsel to the Dublin firm of Nelson, Dixon & Poole, LLC. He is a graduate of the University of Georgia and Emory Law School.

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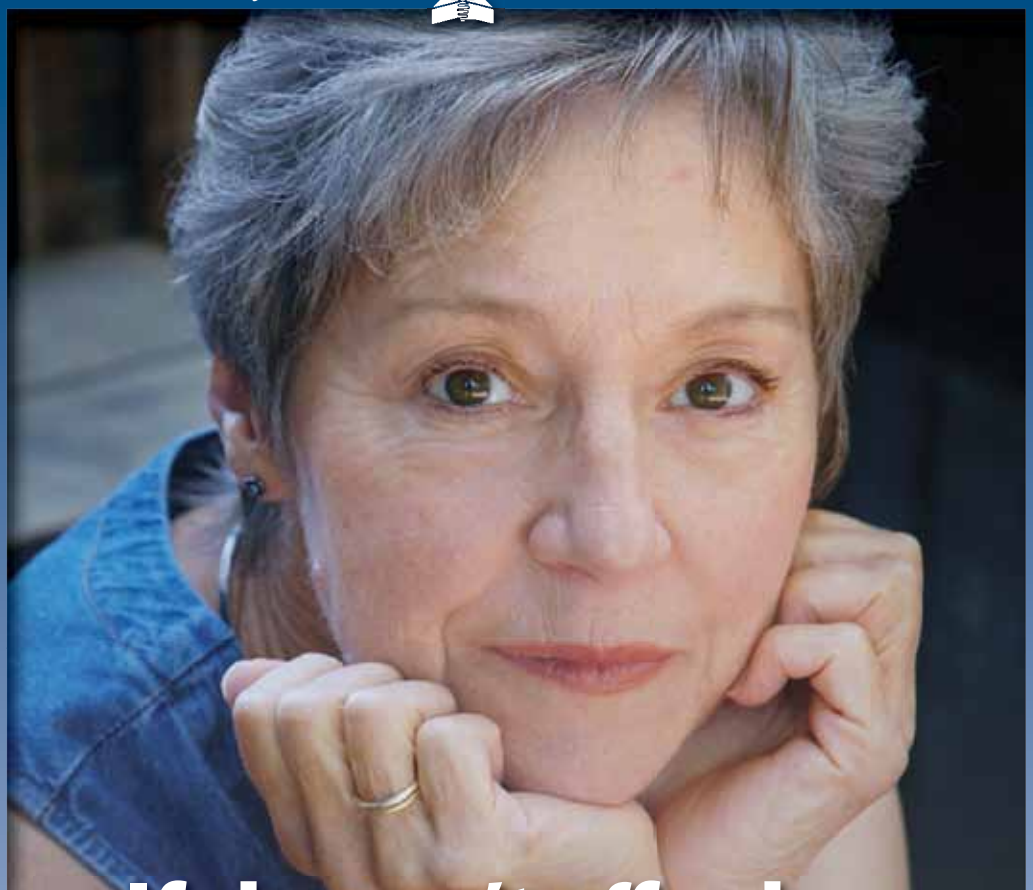

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The Brooks County Courthouse at Quitman:

The Grand Old Courthouses of Georgia

by Wilber W. Caldwell

In the years just before the Civil War, The Atlantic and Gulf Railroad carved its narrow arching path from Savannah south and then westward through that seemingly endless monotony of pine known as the Wiregrass region of South Georgia. Almost magically it created counties and towns in the wilderness.

Just as the new road was being surveyed west of Valdosta, Brooks County was split off from Lowndes, and the new county seat of Quitman was laid out on the line of the proposed railroad. Where the rails entered Brooks County the landscape subtly changed. Graceful stands of long leaf pine began to appear, and the marginal sandy soil of the Pine Barrens darkened. Here was cotton, the fickle lover that would at once become both the salvation and the undoing of the postbellum South.

That there was wealth here in 1860 is clear, for in that year the citizens of the newly established Brooks County began a fine brick court building unlike any built along The Atlantic and Gulf between Savannah and Quitman before 1875. As county historian Folks Huxford so accurately puts it, "The undertaking to build such a pretentious and costly edifice in that day and time excited much surprise with some of the citizens . . . especially in the adjoining counties. Most courthouses were small frame affairs of rough lumber and unpainted."

To design their centerpiece, the Brooks County Commissioners turned to John Wind of Thomasville, one of the first architects to practice in South Georgia. A native of England, Wind had been brought to Thomasville by a wealthy planter, and in addition to the courthouse there, he had designed several large plantation houses. Although it is doubtful that John Wind had any formal architectural training, he, like Elam Alexander in Macon, may deserve the title "architect" based on the quality of the structures he designed, a few of which stand today in Thomas County in testament to Wind's artistry.

Sadly, we will never know the true extent of John Wind's vision here in Quitman for his design for the building was drastically altered during construction. This is one of only two courthouses in Georgia built during the Civil War, and owing to extreme shortages of materials and skilled labor, substantial omissions to Wind's original design were necessary. Again according to county historian Folks Huxford, the "parapet, cupola, balustrade on the roof and certain ornate columns in the court room and porticos on the ends of the building were dispensed with on account of the war."

A temporary frame court building was erected, and the work stretched on through the war years. Although not fully completed, the county accepted the building with its familiar cross-like footprint in 1864. One sketch of the building survives from 1869, and the presence of the balustrade, parapet and elaborate cupola lead one to suspect that this is not a copy of the "as built" structure, but rather a copy of one of Wind's

Photo by Wilber W. Caldwell

The Brooks County Courthouse at Quitman, built 1860-65. John Wind, architect. Remodeled in 1892. Bruce and Morgan, remodeling architects.

drawings. Either way, the original structure bore a notable resemblance to both Wind's 1858 Thomas County Courthouse at Thomasville and Elam Alexander's 1829 Bibb County Courthouse at Macon. All were examples of the force of the brick vernacular style inspired, at least in part, by builder's guides of the era, in this case almost surely by Asher Benjamin's *American Builder's Companion*.

Quitman's progress in the years immediately following the war was unusual. By 1872, the town, although smaller than the older and well-established Thomasville to the west, was keeping pace with the upstart Valdosta to the east. With a population of about 1,500, 35 stores and a new three-story cotton mill, Quitman seemed blessed. Kerosene streetlights were added in 1873 and concrete sidewalks added a most modern touch in 1875.

But such progress was proven temporary, and by 1890, Quitman's population had reached only 1,800. With no crossing rails to import hopeful creeds and her 1871 cotton mill failing for a second time, Quitman had little faith in the kind of New South mythology, which inspired late-century courthouse building. The old court building, with its simplifications and omissions of wartime construction, did little to lift sagging spirits in Brooks County. Finally, in 1892, leaders in Quitman were able to muster enough civic spirit to remodel the old pile, and the Atlanta partnership of Alexander Bruce and Thomas Henry Morgan was engaged. The result was stunning.

Bruce and Morgan designed 16 courthouses in Georgia between 1882 and 1898. Twelve of these buildings were Romanesque in form, and many incorporated elaborate Queen Anne detail. Here in Quitman, the massive twin arches of the main entrance are clearly Richardsonian, while much of the fenestration suggests Queen Anne influence. Interestingly, here we also find the clear mark of the Italian Renaissance Revival.

Many labor under the mistaken assumption that the stone monument in the building's façade, which declares that the building was "remodeled 1882," correctly dates the remodeling. The actual remodeling took place 10 years later, nonetheless, the design still represents an early example of Renaissance Revival elements in the architecture of the American South. Notable in this regard is the delicate garland that spans the entire façade, and the elaborate pediments above the central windows of the second stage. With respect to public architecture in Georgia in the last two decades of the 19th century, this is one of the only significant examples of the Italian Renaissance Revival apart from post offices and other buildings commissioned by the federal government.

Although "Renaissance" may have been what the region needed, in the late 19th century, "Renaissance" spirit was hard to find in the devastated back eddies of rural Georgia and Alabama. Even after the turn of the century, when the voices of academic design were finally heard in Georgia, it was a stricter more pure Neoclassicism that was most often embraced. To be sure Renaissance elements had eventually crept in, but at the bottom of it all, it was the simplicity of the Greek Revival, not ornate Italian finery, that was so close to the Southern soul.

Nestled between the Old South success story at Thomasville and the New South wonder at Valdosta, Quitman was not destined for greatness. However, by 1910, with her mill up and running again, her population was approaching 4,000. GBJ

Excerpted by **Wilber W. Caldwell**, author of *The Courthouse and the Depot, The Architecture of Hope in an Age of Despair, A Narrative Guide to Railroad Expansion and its Impact on Public Architecture in Georgia, 1833-1910*, (Macon: Mercer University Press, 2001). Hardback, 624 pages, 300 photos, 33 maps, 3 appendices, complete index. This book is available for $50 from book sellers or for $40 from the Mercer University Press at www.mupress.org or call the Mercer Press at 800-342-0841 inside Georgia or 800-637-2378 outside Georgia.

Kudos

ORT America honored **Joel A. Katz** with the organization's **Commitment to Education Award**. As chair of the global entertainment & media practice of Greenberg Traurig LLP, Katz represents some of the world's best-known entertainers, music producers, record companies, concert promoters and Fortune 500 companies. Katz also serves as general counsel for The Recording Academy, special counsel to the Country Music Association and general counsel/board member for Farm Aid Inc.


Barkoff


Tyler


Eaddy

Kilpatrick Townsend & Stockton LLP announced that partner **Rupert Barkoff** received the **Lew Rudnick Lifetime Achievement Award** from the **American Bar Association's Forum on Franchising** at the Association's annual conference. The award is given for lifetime contribution to the field of franchise law and to the Forum.

Partner **Michael Tyler** was inducted into the **2010 Gate City Bar Association Hall of Fame** in November at Gate City's annual gala. Established in 1948, the Gate City Bar Association is the oldest African-American bar association in Georgia. The Hall of Fame is the Gate City Bar's highest award.

W. Randy Eaddy, a senior partner in the firm's corporate department, was inducted into **Furman University's Political Science Hall of Fame** for his achievements and many significant contributions to Furman University's Political Science Department.

Michael Scott Carlson, DeKalb County deputy chief assistant district attorney, was selected to become a **master** in the **Joseph Henry Lumpkin American Inn of Court** associated with the University of Georgia School of Law. Masters are judges and lawyers of great experience who are recognized as being among the ablest in the profession and who themselves exhibit the excellence in professionalism, ethics, civility and legal skills that the Inn seeks to foster.

State Rep. Wendell Willard (R-Sandy Springs) was honored with a **2010 Association County Commissioners of Georgia (ACCG) Legislative Service Award**. ACCG presents the awards to recognize lawmakers who have demonstrated distinguished leadership and interest in working with county governments for the benefit of Georgia's citizens. Presented annually, the award has gained recognition among elected and appointed officials as a prestigious way to acknowledge Georgia lawmakers for exemplary leadership.

Caryl Greenberg Smith, a partner in the public finance practice at **Hunton & Williams LLP**, was elected a **fellow** of the **American College of Bond Counsel**. The college was created in 1995 to recognize lawyers distinguished for their skill, experience and high standards of professional and ethical conduct in the practice of bond law, who will contribute substantially to the accomplishments, achievements and good fellowship of the college and to the best interests of the bar and the general public through the fulfillment of college objectives.

Michael H. Smith, of the **Law Office of Smith Barid, LLC**, joined the **National Academy of Elder Law Attorneys, Inc. (NAELA)**. Established in 1987, the NAELA is a nonprofit association that assists lawyers, bar organizations and others. Membership in the academy is open to licensed attorneys who are practicing in the area of elder law or who are interested in legal issues pertaining to the elderly.

Baker Donelson, Bearman, Caldwell & Berkowitz, PC, announced that shareholder **Linda A. Klein** was inducted into the **Order of the Coif**. The Order of the Coif is an honorary scholastic society, the purpose of which is to encourage excellence in legal education by fostering a spirit of careful study, recognizing those who as law students attained a high grade of scholarship, and honoring those who as lawyers, judges and teachers attained high distinction for their scholarly or professional accomplishments.

Hon. Velma Tilley, Bartow County Juvenile Court, received the **2010 Big Voice for Children Award** from **Voices for Georgia's Children**. Tilley was one of six Georgians honored for her compassionate leadership ensuring children and caregivers in Northwest Georgia have access to timely and appropriate interventions and support that help children function normally in their families and communities. Her leadership extends through-

out the state including her active involvement with the pending Proposed Model Juvenile Code.

> **John E. Hall Jr.** of **Hall Booth Smith & Slover, P.C.**, in Atlanta, was elected **chair** of **USLaw Network**. The network is an international organization made up of 64 independent member firms covering 48 states and Latin America with more than 4,000 attorneys.

> 

Hull Barrett, PC, announced that member **James S. V. Weston** was elected to serve as **vice chair** of the **Professional Liability Committee** for the **Georgia Defense Lawyers Association (GDLA)**. GDLA was founded more than 40 years ago by a group of civil defense attorneys who wanted to create a forum for networking outside of the office, courtroom and arbitration table.

> **Thomas M. Cole**, partner, **Whelchel, Dunlap, Jarrard & Walker, LLP**, was inducted as a **fellow** of the **American College of Trial Lawyers**. Fellowship in the college is extended by invitation only to 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.

> 

John Yates, chair of **Morris, Manning & Martin, LLPs,** technology practice, was selected to **chair** the **Development Committee** for the **Duke Law School Board of Visitors**. In this role, he will help the law school's dean and associate dean craft fundraising strategies and provide leadership for ongoing development efforts. Yates was named to the law school's Board of Visitors last year.

> 

Morgan Adams announced that his book chapter **"Trucking Accident Litigation"** was published by West Publishing, the nation's largest legal publisher. The chapter is available in the multi-volume set ***Handling Motor Vehicle Accident Cases*, 2d**.

> **FHLBank Atlanta** announced that member institutions elected **Henry Gary Pannell**, special counsel with **Jones, Walker, Waechter, Poitevent, Carrere and Denegre, LLP**, to a one-year term as an **independent director**. FHLBank Atlanta offers competitively priced financing, community development grants and other banking services to help member financial institutions make affordable home mortgages and provide economic development credit to neighborhoods and communities.

> 

Benjamine Reid, chair of the Board of Directors of **Carlton Fields, P.A.**, was honored with the **Greater Miami Chamber of Commerce Salute to Miami's Leaders Award** in the field of law. He also received the **Hon. Theodore Klein Award** by the Florida Association for Women Lawyers for dedication to the advancement of women in the legal profession, and was honored by the Florida Supreme Court in January as a recipient of the **Florida Bar President's Pro Bono Service Award for 2011** from the 11th Judicial Circuit.

> **Lance J. LoRusso**, founder of LoRusso Law Firm, P.C., announced the release of the eBook, ***Raising the Bar in Your Law Practice: Ten Ways to Change Your Results Right Now***. LoRusso, the books co-author, uses his legal expertise to address potential legal/ethical issues. He also provides guidelines to ensure compliance with the Rules of Professional Conduct as listed by the State Bar of Georgia.

> 

Swift, Currie, McGhee & Hiers, LLP, announced that **M. Diane Owens** was unanimously elected as the first female to chair **Mercer University's Board of Trustees**. Owens specializes in products liability, employment discrimination, premises liability, environmental and toxic torts.

> 

Constangy, Brooks & Smith, LLP, announced that partner **W. Melvin Haas** was reappointed as **vice chairman** of the **U.S. Chamber of Commerce's Labor Relations Committee**. This is Haas' second term.

> 

Coleman Talley LLP announced the appointment of partner **Wendy Butler** to the **Metropolitan Atlanta Rapid Transit Authority (MARTA) Board of Directors** by the DeKalb County Board of Commissioners. The MARTA Board is responsible for setting policy and making decisions on matters ranging from system operations, service planning, fare structure, finance and customer service.

> **The National Center for Victims of Crime** announced the election of **Melvin L. Hewitt Jr.** to

its **board of directors**, joining a dynamic leadership team in guiding the future of the National Center for Victims of Crime. Hewitt concentrates his efforts on the representation of victims of serious physical and sexual assaults, batteries and child molestations and of families of murder and wrongful death victims.

On the Move

In Atlanta

Sarah Loya joined **Nelson Mullins Riley & Scarborough LLP** as an **associate**. Loya focuses her practice on corporate law with an emphasis in the areas of mergers and acquisitions, venture capital and financing transactions. The firm is located at 201 17th St. NW, Suite 1700, Atlanta, GA 30363; 404-322-6000; Fax 404-322-6050; www.nelsonmullins.com.

Coleman Talley LLP announced that **Mary Margaret Kurrie** joined the firm as an **associate**. The firm is located at 7000 Central Parkway NE, Suite 1150, Atlanta, GA 30328; 770-698-9556; Fax 770-698-9729; www.colemantalley.com.

Abena Sanders joined **Fisher & Phillips LLP** as an **associate**. Her practice focuses on labor and employment matters, including litigation.

The firm opened its **new national headquarters** in midtown Atlanta in November. After 22 years in Buckhead, the firm relocated to a new building in the 12th & Midtown development near the Federal Reserve Bank of Atlanta. The firm is now located at 1075 Peachtree St. NE, Suite 3500, Atlanta, GA 30309; 404-231-1400; Fax 404-240-4249; www.laborlawyers.com.

Burr & Forman LLP announced that **Amanda E. Wilson** joined the firm as an **associate** in the general commercial litigation practice group. The firm is located at 171 17th St. NW, Suite 1100, Atlanta, GA 30363; 404-815-3000; Fax 404-817-3244; www.burr.com.

Davis, Matthews & Quigley, P.C., announced that **Rebecca L. Crumrine** was named a **shareholder** in the firm. Crumrine practices in the firm's family and domestic law section. The firm is located at 3400 Peachtree Road NE, 14th Floor, Atlanta, GA 30326; 404-261-3900; Fax 404-261-0159; www.dmqlaw.com.

Baker

Caughman

Kirby

Freeman Mathis & Gary, LLP, announced that **Robert B. Baker Jr.** joined as a **partner**, **C. Whitfield Caughman** joined as an **associate** and **Seth F. Kirby** joined as **of counsel**. Baker's practice focuses on strategic and regulatory advice and representation of clients with an emphasis on energy and technology issues. In addition, he will handle appellate and mediation matters. Both Caughman and Kirby practice in the firm's business liability and insurance law practice group. The firm is located at 100 Galleria Parkway, Suite 1600, Atlanta, GA 30339; 770-818-0000; Fax 770-937-9960; www.fmglaw.com.

Thompson Hine LLP announced that **Russell Rogers**, a partner in the business litigation and product liability litigation practice groups, assumed **leadership** of the firm's **Atlanta office**. The firm is located at 1201 W. Peachtree St., Suite 2200, Atlanta, GA 30309; 404-541-2900; Fax 404-541-2905; www.thompsonhine.com.

Morris, Manning & Martin, LLP, announced that **Jason K. Cordon**, formerly of Paul Hastings, joined the firm as **of counsel** in the tax, real estate, capital markets and corporate practices. **Kristie E. Piasta,** formerly of HunterMaclean, joined the firm's health care practice as an **associate**. **Nicole C. Ibbotson**, formerly of Paul Hastings, joined the firm's corporate technology practice as an **associate**. **Adriana Mitchell**, also formerly of Paul Hastings, joined the firm's capital markets practice as an **associate**. The firm is located at 1600 Atlanta Financial Center, 3343 Peachtree Road NE, Atlanta, GA 30326; 404-233-7000; Fax 404-365-9532; www.mmmlaw.com.

JAMS announced the addition of former Supreme Court of Georgia **Chief Justice Norman S. Fletcher** to its panel. Fletcher is based in the JAMS Atlanta Resolution Center, where he specializes as a mediator, arbitrator and discovery master for disputes in a variety of areas including business/commercial, construction, insurance, real estate and family law. The Atlanta Resolution Center is located at 1201 W. Peachtree St. NW, Suite 2650, Atlanta, GA 30309; 404-588-0900; Fax 404-588-0905; www.jamsadr.com.

Carlton Fields welcomed **Daniel R. Weede** to the firm as a **shareholder**. Weede practices in the firm's real estate and finance practice group. The firm is located at 1201 W. Peachtree St. NW, Suite 3000, Atlanta, GA 30309; 404-815-3400; Fax 404-815-3415; www.carltonfields.com.

Pamela L. Tremayne and **Lauren Larmer Barrett** announced the formation of **Tremayne & Barrett, LLP**. Barrett joined Tremayne from the Lawyers Foundation of Georgia, where she served as executive director for 12 years. Their practice will continue to focus on family law and general civil litigation. The firm is located at 730 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303; 404-523-2800; Fax 404-523-2806.

Ford & Harrison LLP announced the addition of **Cullen Stafford** as an **associate**. Stafford focuses his practice on the representation of employers in labor and employment disputes. He represents and advises employers on matters involving the ADA, ADEA, Title VII, FMLA, FLSA, OSHA and related state statutes. The firm is located at 271 17th St. NW, Suite 1900, Atlanta, GA 30363; 404-888-3800; Fax 404-888-3863; www.fordharrison.com.

Nall & Miller, LLP, announced that **Laura D. Eschleman** was named **partner**. Her practice focuses on medical malpractice, professional licensing, medical board matters and hospital privileging issues. The firm is located at 235 Peachtree St. NE, Suite 1500, Atlanta, GA 30303; 404-522-2200; Fax 404-522-2208; www.nallmiller.com.

Hall

Hurley

Lewis Brisbois Bisgaard & Smith LLP announced that **Christine Hall** and **Kathleen Hurley** joined the firm as **partners**. Hall is special counsel in the firm's general liability group. Hurley focuses her practice on transportation law, premises and general liability. The firm is located at 1180 Peachtree St. NE, Suite 2900, Atlanta, GA 30309; 404-348-8585; Fax 404-467-8845; www.lbbslaw.com.

Debra Schwartz and **James "Jay" Rollins** announced the formation of **Schwartz Rollins LLC**. The firm provides broad-based employment advice and representation to individuals and small businesses in every facet of employment and discrimination law. The firm is located at 945 E. Paces Ferry Road, Suite 2270, Atlanta, GA 30326; 404-842-7262; Fax 404-842-7277; www.gaemploymentlawyers.com.

Miller & Martin PLLC announced that **Leah J. Knowlton** joined the firm as **of counsel** in the litigation and environmental departments. Knowlton comes to Miller & Martin from Epstein Becker & Green, P.C. The firm is located at 1170 Peachtree St. NE, Suite 800, Atlanta, GA 30309; 404-962-6100; Fax 404-962-6300; www.millermartin.com.

DeFrank

Harris

Swift, Currie, McGhee & Hiers, LLP, announced that **Steven J. DeFrank** and **Charles E. Harris IV** were named to the firm's partnership. DeFrank practices in the property litigation section of the firm. Harris concentrates his practice in the area of workers' compensation defense. The firm is located at 1355 Peachtree St. NE, Suite 300, Atlanta, GA 30309; 404-874-8800; Fax 404-888-6199; www.swiftcurrie.com.

RobbinsFreed announced that **Jason S. Alloy** and **Josh Belinfante** were elected as **members** of the firm. Alloy is involved in a broad spectrum of business litigation and arbitrations. Belinfante's practice includes commercial litigation as well as advising on governmental and health care law matters. He joined RobbinsFreed after serving as executive counsel for Gov. Perdue. The firm is located at 999 Peachtree St. NE, Suite 1120, Atlanta, GA 30309; 678-701-9381; Fax 404-856-3250; www.robbinsfreed.com.

Pope, McGlamry, Kilpatrick, Morrison & Norwood, LLP, announced that **M. Gino Brogdon** joined the office as **partner**, and **Michael J. "M.J." Blakely** and **Jill L. Cassert** joined as **associates**. Brogdon, formerly a state and superior court judge in Fulton County, will focus his practice on the litigation of the firm's large, individual negligence actions. Blakely is currently engaged in the firm's complex and business litigation cases. Cassert's practice is focused on the areas of mass torts and class action litigation. The firm located at 3455 Peachtree Road NE, Suite 925, Atlanta, GA 30326; 404-523-7706; Fax 404-524-1648; www.pmkm.com.

Parker, Hudson, Rainer & Dobbs LLP announced that **Trishanda L. Treadwell** was elected to the **partnership**. Treadwell is a member of the firm's litigation practice group, and her practice focuses primarily on disputes involving commercial and banking litigation, franchising, employment and other complex business litigation, including securities arbitrations. The firm is located at 1500 Marquis Two Tower, 285 Peachtree Center Ave. NE, Atlanta, GA 30303; 404-523-5300; Fax 404-522-8409; www.phrd.com.

In Augusta

Cosper

Driver

Hull Barrett, PC, announced the addition of **Christopher A. Cosper** and **Chris Driver** as **members**. Cosper's practice focuses in the area of general civil litigation with an emphasis in commercial litigation, construction litigation, class actions and medical malpractice. Driver practices in the areas of construction and real estate law, both transactional and litigation. The firm is located at 801 Broad St., Seventh Floor, Augusta, GA 30901; 706-722-4481; Fax 706-722-9779; hullbarrett.com.

In Columbus

Matthew N. Massey joined **Hatcher, Stubbs, Land, Hollis & Rothschild, LLP**, as an **associate**. He practices with the firm's litigation group focusing on medical malpractice and employment defense. The firm is located at 233 12th St., Suite 500, Columbus, GA 31901; 706-324-0201; Fax 706-322-7747; www.hatcherstubbs.com.

In Decatur

Adriana de la Torriente and **Elizabeth Marum** announced the launch of **Torriente Marum, LLC**. Their firm will focus on family and juvenile law issues including divorce, child support, custody, legitimations/paternity and temporary protective orders. The firm is located at 910 Church St., Suite 203, Decatur, GA 30030; 404-997-3428 or 404-981-2587; www.torrientemarum.com.

In Macon

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announced the addition of **Kathryn S. Willis** to its Macon office as an **associate**. Willis focuses her practice on eminent domain and business litigation. The firm is located at 300 Mulberry St., Suite 201, Macon, GA 31201; 478-750-0777; Fax 478-750-1777; www.bakerdonelson.com.

Stephens

Fuller

Chambless Higdon Richardson Katz & Griggs, LLP, announced the addition of **Joseph D. Stephens** and **Robert G. Fuller** as **associates**. Stephens and Fuller practice in the area of civil litigation. The firm is located at 577 Walnut St., Suite 200, Macon, GA 31201; 478-745-1181; Fax 478-746-9479; www.chrkglaw.com.

Greenwood

Cummo

James, Bates, Pope & Spivey, LLP, announced that **G. Grant Greenwood** was named **partner** and **Alissa L. Cummo** joined the firm as an **associate**. Greenwood's practice areas include business/commercial litigation, construction law and employment law. Cummo's practice concentrates in representing a diverse range of clients in the areas of commercial real estate and secured lending. The firm is located at 231 Riverside Drive, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; jbpslaw.com.

J. Chase Wilson joined **Shaffer, Raymond & Dalton** as an **associate**. His areas of practice include divorce, child custody and general family law. The firm is located at 3618 Vineville Ave., Macon, GA 31204; 478-471-1112; Fax 478-471-7853; www.divorcelawyerga.com.

In Savannah

Clark

McFarland

Bacon

HunterMaclean announced that **C. Troy Clark** joined the firm as an **associate** with the business litigation practice group, **Jennifer T. McFarland** joined the corporate law practice group as an **associate** and **Carson Bacon** joined as an **associate** with the employment law practice group. Clark assists in the representation of corporations and individuals in cases involving business torts, contract disputes, bankruptcy, foreclosure and other commercial disputes. McFarland assists in litigating clients' interests, negotiating business and financial contracts and offering counsel on corporate compliance issues and a wide range of business logistics. Bacon's practice areas include providing counsel on a wide range

of employment law issues, conducting employment audits and training, and drafting employment policies and handbooks to help clients achieve their business goals. The firm is located at 200 E. Saint Julian St., Savannah, GA 31412; 912-236-0261; Fax 912-236-4936; www.huntermaclean.com.

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Oliver Maner LLP announced that **Benjamin M. Perkins** became a **partner** of the firm. Perkins' primary areas of practice are municipal liability, zoning and land use litigation, professional negligence, commercial litigation, construction litigation, products liability and personal injury. The firm is located at 218 W. State St., Savannah, GA 31401; 912-236-3311; Fax 912-236-8725; www.olivermaner.com.

> 

Gray & Pannell LLP announced the addition of **Kandice N. Harvey** to its **partnership**. Harvey's practice focuses in the areas of municipal finance and commercial real estate. The firm is located at 24 Drayton St., Suite 1000, Savannah, GA 31401; 912-443-4040; Fax 912-443-4041; www.graypannell.com.

In Valdosta

> **Coleman Talley LLP** announced that **Emily E. Macheski-Preston** joined the firm as an **associate**. The firm is located at 910 N. Patterson St., Valdosta, GA 31601; 229-242-7562; Fax 229-333-0885; www.colemantalley.com.

In Chattanooga, Tenn.

> 

Grant, Konvalinka & Harrison, P.C., announced that **Kathleen Van Pelt Gibson** joined the firm as an **associate**. Her practice areas include criminal defense, litigation and dispute resolution and domestic relations. The firm is located at 633 Chestnut St., 9th Floor, Chattanooga, TN 37450; 423-756-8400; Fax 423-756-6518; www.gkhpc.com.

In Washington, D.C.

> **The National Labor Relations Board (NLRB)** announced that **David A. Kelly** was appointed **deputy assistant general counsel** in the Division of Operations-Management of the Office of the General Counsel in Washington. In his new position, Kelly will assist the acting general counsel in managing the 32 regional offices of the NLRB and provide programmatic support for the national enforcement and administration of the National Labor Relations Act. The board is located at 1099 14th St. NW, Washington, DC 20570; 202-273-1000; www.nlrb.gov.

WANT TO SEE YOUR NAME IN PRINT?

How to Place an Announcement

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

We All Make Mistakes

by Paula Frederick

"I just got the draft order you sent," your client announces as you pick up the telephone. "Did Patty's lawyer screw up? I thought I was going to have to pay twice this amount in child support!"

"Hmmmm . . . looks like Patty's lawyer forgot to add your annual bonus to the child support worksheet," you realize.

"Woohoo!" your client exclaims. "Maybe I'll be able to afford that motorcycle after all!"

"Slow down," you caution. "I'm going to have to let opposing counsel know he made a mistake in the support calculations."

"You've got to be kidding," your client sputters. "We didn't do anything wrong! Why should *I* pay for *his* mistake?"

"I guess you don't have to," you admit. "But what's the point? We agreed to this, and it's child support for *your* kids! Besides, Patty and her lawyer will figure it out as soon as she gets the first payment, and we'll be back in court."

"I don't care! She deserves to suffer after all she's done to me!"

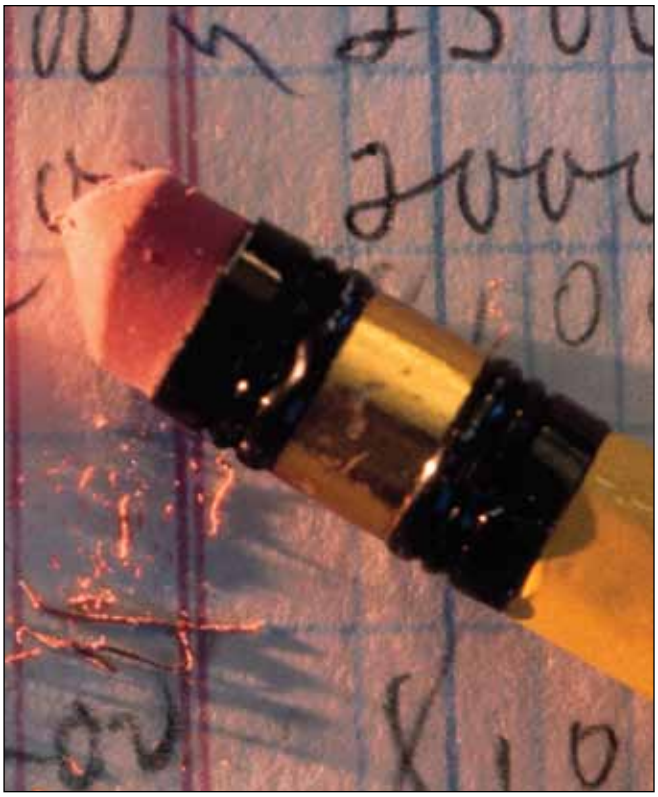
"Well, I don't do business that way, so if you insist on taking advantage of this mistake you're going to need another lawyer."

Now what?

The Georgia Rules of Professional Conduct require that a lawyer treat opposing parties and counsel fairly. The prohibitions and requirements of Rule 3.4 exist to ensure a level playing field for both sides in a case; Rule 3.3 even requires a lawyer to disclose adverse legal authority that has not been disclosed by opposing counsel.

But there is nothing in the Rules of Professional Conduct that requires a lawyer to correct the other side's mistakes.

Even so, most lawyers recognize that attempting to capitalize on an error made by opposing counsel can be foolhardy—especially when the error is in an order drafted at the direction of a judge. For the client, there's the risk of costly, extended litigation as the error comes to light. The lawyer risks losing the respect of the judge and opposing counsel; the lawyer may also be accused of helping the client mislead the court.



So—what about our scenario? Can you reveal the mistake despite the client's opposition?

It's not clear under the Georgia Rules. The question is whether the mistake is "confidential information" protected by Rule 1.6, or whether the decision to notify opposing counsel is a "legal tactical issue" left to the discretion of the lawyer under Rule 1.2. The American Bar Association addressed this issue in an informal opinion (86-1518) and found that the error was "appropriate for correction between the lawyers without client consultation."

Since there is no authority on the question in Georgia, your best bet is to try to persuade the client to do the right thing. If your efforts fail, withdrawal may be your best option.

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

Oct. 16, 2010 through Dec. 8, 2010

by Connie P. Henry

Voluntary Surrender/Disbarments

Karen T. White
Norcross, Ga.
Admitted to Bar in 1994

On Oct. 18, 2010, the Supreme Court of Georgia disbarred attorney Karen T. White (State Bar No. 754445). This matter was before the Court on a Notice of Discipline in two cases. The following facts are admitted by default:

In Docket No. 5795, White was retained by a client to represent her in a divorce case. Although White filed the complaint, she failed to appear in at least one hearing and failed to return unearned fees to the client.

In Docket No. 5796, a client paid White $1,000 to assist her in starting a new corporation. White failed to communicate with the client and failed to return the unearned fees.

In aggravation of discipline, the Court noted that White was under an interim suspension for failing to respond to a Notice of Investigation in another case and she did not cooperate with the Investigative Panel.

Jennifer Rebecca Dolezal
Jefferson, Ga.
Admitted to Bar in 2003

On Nov. 1, 2010, the Supreme Court of Georgia disbarred attorney Jennifer Rebecca Dolezal (State Bar No. 220244). Dolezal failed to answer two formal complaints. The following facts are deemed admitted by default:

A client paid Dolezal $3,000 to represent her in a child custody modification and support matter. Dolezal failed to communicate with the client, and failed to return the unearned fees.

Another client retained Dolezal to represent her in a post-divorce matter. Dolezal provided minimal legal services and did not resolve her legal issue.

David Harrison Smith II
Rincon, Ga.
Admitted to Bar in 2005

On Nov. 1, 2010, the Supreme Court of Georgia disbarred attorney David Harrison Smith II (State Bar No. 142534). Smith failed to file a Notice of Rejection to a Notice of Discipline. The following facts are deemed admitted by default:

A client retained Smith in early 2009 to represent her in an uncontested divorce and paid him $580. Smith cashed the check and led the client to believe that her divorce would be concluded shortly after the 30-day waiting period. The client made repeated efforts to contact Smith. In August 2009 the client contacted the clerk of court and learned that no divorce had been filed on her behalf. The client sent a certified letter to Smith requesting an explanation, the return of her file, and a refund of the fee. Smith did not sign for the letter and the client had no further communication from him. Smith became ineligible to practice law on Sept. 1, 2009, for failing to pay his State Bar dues. He failed to respond to the Office of the General Counsel or the Investigative Panel and he did not provide a current address to the State Bar.

In aggravation of discipline the Court found that Smith acted willfully and dishonestly and that he failed to respond to the disciplinary proceedings.

Iyabo Onipede
Suwanee, Ga.
Admitted to Bar in 1990

On Nov. 1, 2010, the Supreme Court of Georgia accepted the voluntary surrender of license, *nunc pro tunc* to May 1, 2008, of Iyabo Onipede (State Bar No. 553825). On Aug. 5, 2010, Onipede pled guilty in the Superior Court of DeKalb County to four counts of theft by taking and one count of common law theft by taking by a fiduciary.

Michael J.C. Shaw
Mableton, Ga.
Admitted to Bar in 1999

On Nov. 22, 2010, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of Michael J.C. Shaw (State Bar No. 638601). While employed as an associate attorney at a law firm in bankruptcy and commercial-foreclosure litigation, Shaw performed work for clients, submitted invoices to the firm's accounting department, received checks, endorsed checks over to himself and deposited the funds into his personal checking account. From 2003-09 Shaw performed skip traces or other investigative services for clients himself, but submitted invoices in the name of a Clayton County investigator who also performed those services for the firm. Those invoices were in the approximate amount of $90,000. From 2005-09 Shaw performed title-examination services for clients himself, but submitted invoices in the name of a fictitious vendor. Those invoices amounted to approximately $403,000. A client's billing review caused the firm to discover Shaw's misconduct, and he was terminated from the firm on June 22, 2009.

Carl W. Wright
Loganville, Ga.
Admitted to Bar in 1979

On Nov. 22, 2010, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of Carl W. Wright (State Bar No. 777712). Wright pled guilty to conspiracy to commit mail and wire fraud and to engaging in a money laundering transaction.

Suspensions

Ricardo L. Polk
Decatur, Ga.
Admitted to Bar in 2004

On Oct. 18, 2010, the Supreme Court of Georgia accepted the petition for voluntary discipline of Ricardo L. Polk (State Bar No. 001354), and suspended him from the practice of law for three months with conditions for reinstatement. This matter was before the Court on four disciplinary matters.

In Docket No. 5575, Polk was retained by Lucian Ilardi in connection with three traffic citations Ilardi received in three different Georgia counties and was paid $500. Polk filed documents in two of the counties, resolved one of those cases a month later and the following month submitted a proposed plea agreement in the second. Polk did not file any documents in the third county. Before he filed the grievance, Ilardi asked Polk to refund his fees and pay costs that Ilardi incurred in reinstating his driver's license. Polk agreed to pay Ilardi $708.50 but because of his financial condition and administrative suspension for failure to pay child support, he has not repaid Ilardi. He proposes to pay Ilardi $50 per month until he has repaid the full amount.

In Docket No. 5643 Polk was retained to represent a client in a domestic relations case and was paid $1,500. Despite work performed and attempts to communicate with his client, the client became frustrated with the level of communication and the pace of her case. Following termination of the representation, Polk made the file available to the client's replacement counsel. Polk believes he earned the fees he received from this client. During the representation Polk was suspended from practice for failure to pay State Bar dues before Sept. 1, 2008 and, although the State Bar received a check from Polk on Oct. 7, 2008, the bank did not honor that check. Polk subsequently paid his dues and was restored to good standing.

In Docket No. 5690, a client retained Polk on a contingency basis regarding a vehicular collision. The client was in another accident a few months later and wanted Polk to represent him in that case. The client believed Polk was representing him in the second case. Polk failed to act with reasonable diligence and failed to make reasonable efforts to expedite the litigation consistent with the client's interests.

In Docket No. 5691, Polk was retained to represent a client in a criminal case and received $3,500. Among the discovery materials Polk received from the state was a video recording. Despite work per-

Let CAP Lend a Helping Hand!

What is the Consumer Assistance Program?

The State Bar's Consumer Assistance Program (CAP) helps people with questions or problems with Georgia lawyers. When someone contacts the State Bar with a problem or complaint, a member of the Consumer Assistance Program staff responds to the inquiry and attempts to identify the problem. Most problems can be resolved by providing information or referrals, calling the lawyer, or suggesting various ways of dealing with the dispute. A grievance form is sent out when serious unethical conduct may be involved.

Does CAP assist attorneys as well as consumers?

Yes. CAP helps lawyers by providing courtesy calls, faxes or letters when dissatisfied clients contact the program.

Most problems with clients can be prevented by returning calls promptly, keeping clients informed about the status of their cases, explaining billing practices, meeting deadlines, and managing a caseload efficiently.

What doesn't CAP do?

CAP deals with problems that can be solved without resorting to the disciplinary procedures of the State Bar, that is, filing a grievance. CAP does not get involved when someone alleges serious unethical conduct. CAP cannot give legal advice, but can provide referrals that meet the consumer's need utilizing its extensive lists of government agencies, referral services and nonprofit organizations.

Are CAP calls confidential?

Everything CAP deals with is confidential, except:

1. Where the information clearly shows that the lawyer has misappropriated funds, engaged in criminal conduct, or intends to engage in criminal conduct in the future;
2. Where the caller files a grievance and the lawyer involved wants CAP to share some information with the Office of the General Counsel; or
3. A court compels the production of the information.

The purpose of the confidentiality rule is to encourage open communication and resolve conflicts informally.

Call the State Bar's Consumer Assistance Program
at 404-527-8759 or 800-334-6865 or visit www.gabar.org/cap.

formed by Polk, the client became frustrated with the level of communication and the pace of the case, and terminated the representation. After termination Polk made the file available to the client but was unable to locate the video recording. Polk believed he earned all the fees he received from this client.

The Count found in mitigation of discipline that Polk did not have a dishonest or selfish motive; that he suffered emotional distress bordering on depression from his personal child support case and financial circumstances; that he sought counsel from a Clinical Law Enforcement Chaplain and Georgia Department of Corrections Clinical Chaplain, who wrote a letter attached to Polk's petition stating that he met with Polk twice a week and that Polk was trying to focus on his career and balance time with his daughter; that he made a good faith effort to rectify the consequences of his actions (and agreed to repay Ilardi); that he cooperated with the State Bar; and that he acknowledged the wrongful nature of his conduct. Polk must repay Ilardi $50 per month until he has repaid $708.50.

Clifford E. Hardwick IV
Stone Mountain, Ga.
Admitted to Bar in 1976

On Oct. 18, 2010, the Supreme Court of Georgia suspended attorney Clifford E. Hardwick IV, for a period of six months. Hardwick was retained in 2005 by clients to represent their minor son in connection with a federal lawsuit regarding copyright infringement for downloading music. The clients paid Hardwick a $5,000 retainer, but there was no written representation agreement. Although retained in June 2005, Hardwick did not file an Entry of Appearance until November 2005 at which time he also filed a response to a show cause order on a pending Motion to Compel. The Motion to Compel was renewed in January 2006, but Hardwick did not comply with discovery or respond to the renewed Motion to Compel. The Court granted the Motion to Compel and ordered a response to the discovery requests, but Hardwick did not timely respond to the Order or comply with the discovery requests. The Court struck the answer and entered a default judgment against the clients in the amount of $18,000, with an award of $330 in costs to plaintiffs. Hardwick never informed his clients of the default judgment and he told the State Bar that the litigation was resolved through a settlement of all claims against his clients. Hardwick admitted the above facts but alleged that he periodically spoke with the clients; that he met with the clients' son and friend, who had participated in the illegal downloading; that he spoke to opposing counsel and the judge regarding the status of the case and a possible resolution of it; and that, after the default judgment had been entered, he spoke to opposing counsel who advised that the plaintiffs had no intention of collecting the damages awarded because the primary purpose of the litigation had been to prevent the downloading of their music.

The Court found in mitigation the absence of a selfish motive; that Hardwick was attempting to cope with significant personal and family issues at the time of this infraction; and that he paid full restitution to his clients and agreed to indemnify them against further financial harm.

In aggravation the Court noted that Hardwick received letters of admonition in 1994 and 2008, and the fact that he made a false statement during the disciplinary process.

Craig Steven Mathis
Leesburg, Ga.
Admitted to Bar in 1991

On Nov. 22, 2010, the Supreme Court of Georgia suspended Craig Steven Mathis (State Bar No. 477027) until such time as he appears for the Review Panel reprimand that the Court ordered on March 15, 2010. Mathis admitted violation of State Bar rules and requested the reprimand. Although he was notified of the date and time of the reprimand, he failed to appear.

Public Reprimands

Leighton Reid Berry Jr.
Atlanta, Ga.
Admitted to Bar in 1994

On October 18, 2010, the Supreme Court of Georgia ordered that Attorney Leighton Reid Berry Jr. (State Bar No. 055545) be administered a public reprimand. Berry acknowledged service of a Notice of Discipline, but did not file a rejection. Therefore, the following facts are admitted by default:

Berry represented a client from March 2004 through March 2005, when the client entered a plea in his criminal case. Despite the client's requests, Berry failed to provide him with a copy of his file until after a Notice of Investigation was served on him. Berry's response to the Notice of Investigation was not sworn as required by Bar Rules.

The Court found in aggravation of discipline that Berry received an Investigative Panel reprimand in 2001, and that he failed to cooperate with the Investigative Panel at that time. The Court also found that Berry did not appear to understand the seriousness of the disciplinary process.

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. 16, 2010, four lawyers have been suspended for violating this Rule and one has been reinstated. GBJ

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

Portable Law

by Natalie R. Kelly

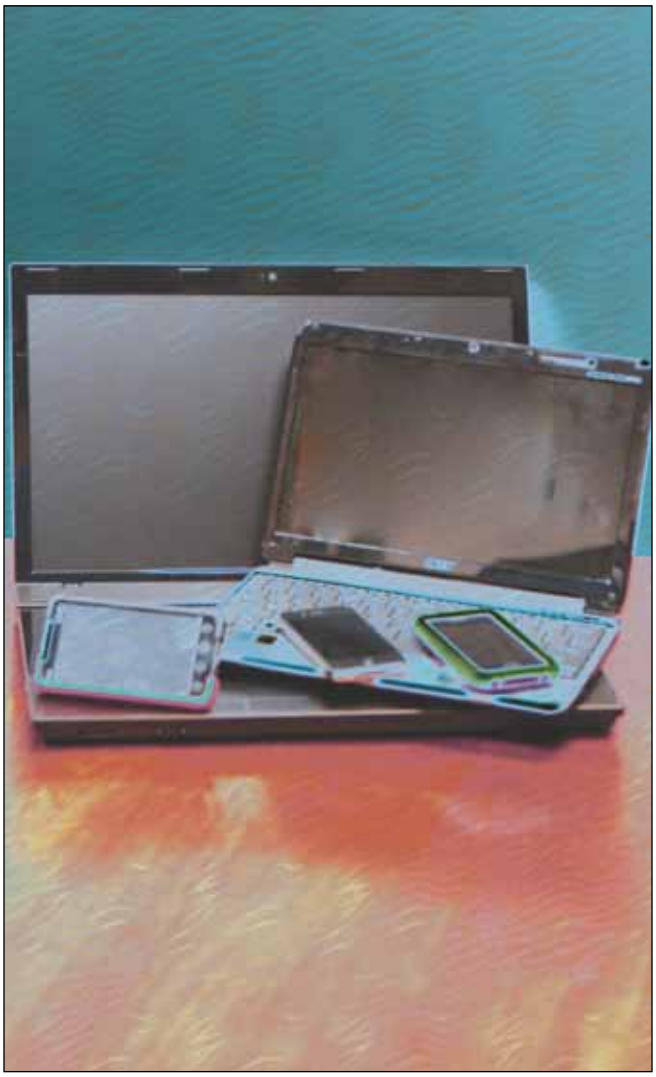
As the practice of law evolves, the use of handheld products and devices is on the rise. With a growing marketplace that is cluttered with many options, we have compiled a quick review of some available devices.

The general breakout of portable devices include:

- Smart phones—cell phones with computer-like features and the ability to run applications.
- Tablets—devices that offer mobility with a layout similar to a "note tablet." These devices usually do not have a physical keyboard.
- E-readers—tablet-sized devices designed specifically for reading digital books and material.
- Netbooks—laptop-based computers that have limited peripherals to make them lighter and more compact. Netbooks are suited for surfing the net, responding to e-mails and document editing and creation.
- Laptops—portable computers that have full computer functionality.

Today's smart phone and emerging tablet marketplace is divided mainly by device operating system. The key mobile device operating systems in use are:

- iOS—Apple platform for iPhones and iPads
- Android—Google operating system for phones and tablets



- Blackberry—Research in Motion operating platform
- WebOS—Palm system
- Windows Mobile—Microsoft system

The major cellular providers carry devices with operating systems that are compatible with their network and have data plans that allow the use of their networks for delivery of information to and from the devices. The main providers are Verizon, Sprint, AT&T and T-Mobile. Due to customer loyalty and subscriptions, your choice of devices will be limited to the provider you are using or choose to use.

On the other hand, the decision might be based on the type of device that is desired. For instance, if you want an iPhone, you will be limited to AT&T or Verizon, and if you choose the HTC EVO, you will be limited to Sprint. Blackberry devices and Android-based phones are available in some form on all major networks. Your choice of cellular provider may need to change based upon which device you choose. There are many additional factors that may influence your choice (i.e. size, weight, comfort in hand, e-mail capability and content management to name a few).

Features to consider include: Internet access speed; wi-fi availaibity; phone options; e-mail access and service; camera capabilities (replay, recording and still); audio playback; links to social media outlets such as Facebook, Twitter and others; links to calendars and other office information via synching; and associated applications or "apps."

It seems there are apps for everything, and they can be downloaded on certain devices to expand functionality. Some apps to review and use for law offices include: time and expense capture; legal research; document management and client communication. You can find app stores on your device—just look for the icon on your display.

As you can see, even a general run-down on mobile devices can be complicated by what type of device you need and sometimes for extras you require.

Portable devices are becoming more and more powerful as their features and app selections grow. To determine what device may best suit your needs will require research on your behalf. You can start online and then travel to retail outlets to test drive the items you are considering. You can also start with your current cellular provider to review the options available. Whatever your choice, a portable device can enhance your productivity by providing apps that allow you to manage your clients and practice. GBJ

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

Co-counsel With a Public Interest Lawyer

by Michael Monahan and Douglas Ashworth

In presentations we make to local bar associations around the state, we often urge the members in attendance to reflect on their role as mentor and guardian—mentor of new or inexperienced lawyers and guardian of the keys to the courthouse. That obligation goes beyond seeing that new lawyers are technically prepared for their work. Our profession has very specific and dearly held values about professionalism and pro bono service, and it is these values that must also be preserved and shared with succeeding generations of lawyers, including lawyers who are committed to public interest work.

Consider co-counseling on a pro bono basis with new or inexperienced public interest lawyers as a way to pass along the skills and professional values you have developed. (See side bar on page 53.)

Public interest programs lack training resources, yet the programs' attorneys need nurturing. At times, public interest lawyers are insulated, yet need to seek networking and professional growth opportunities. Many newly admitted attorneys are already veterans of a

world in which information is only a wireless hot-spot—or even a tweet—away. Ironically, they still enter into a legal profession where experience and knowledge cannot be e-mailed, clicked to or tweeted instantaneously. Thus, despite ongoing and breath-taking technological advances, the need, and the opportunity for meaningful mentoring, remains as constant as the ages.

For their part, public interest lawyers can offer you very valuable insights into the law as it affects low-income families and marginalized populations here in Georgia. They also practice some very specialized areas of the law that you may never have had the chance to learn.

Georgia's innovative mentoring program for newly admitted attorneys—the Transition Into Law Practice Program—recognizes the win-win syn-

ergy between mentoring and pro bono opportunities.

The mandatory mentoring program (which replaced the Bridge the Gap program as of Jan. 1, 2006) is operated under the auspices of the Standards of the Profession Committee of the Commission on Continuing Lawyer Competency and offers beginning lawyers a mentoring experience, including pro bono opportunities, during their first 12 months of practice.

The opening provision of the Model Mentoring Plan developed by the Standards Committee and widely used by beginning lawyers and their mentors, is titled *Introduction to the Legal Community* and notes in part: "[Mentors] should acquaint the beginning lawyer with Legal Aid, Georgia Legal Services, and opportunities for lawyers in private practice to engage in pro bono activities."

We need strong and visible professionalism and pro bono leaders in every generation of lawyers. Set aside some time now to reflect on the skills you have to offer and the message you would like to share with a public interest lawyer and then make a call to set up a lunch date with a lawyer.

To locate and contact a public interest program in Georgia, go to www.georgiaadvocates.org/oppsguide. To become a mentor with the State Bar of Georgia Transition Into Law Practice Program, contact Ebony Smith, ebonys@gabar.org. GBJ

Michael Monahan is the director of the Pro Bono Project for the State Bar of Georgia and can be reached at mikem@gabar.org.

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

Profile of Thomas Richardson

by Michael Tafelski

One case cannot fully define the distinguished career of trial attorney Thomas "Tom" Richardson of the Macon-based litigation firm Chambless, Higdon, Richardson, Katz & Griggs. One case did not earn him the 2004 Macon Bar Association's "Lawyer of the Year" award, membership in the American Board of Trial Advocates and the Bootle Inn of Court or his frequent listing as a *Georgia Super Lawyer.* One case alone did not secure the respect of countless opposing counsel, judges and the communities in which he has served across Georgia. Richardson earned this well-deserved success, not in one case, but over a 35-year career based on integrity, compassion and a commitment to justice for all people.

However, in one case, I had the opportunity to co-counsel with Tom Richardson and witness his unique formula for success through his 150 hours of pro bono representation of an elderly and disabled couple in their quest for justice.

This case began in September 2007 with an elderly couple who both retired due to their disabilities. I was 25 years old and a recent law school graduate awaiting my bar results when they arrived at the Georgia Legal Services Program (GLSP) office in Macon. I may not have been exactly who they were looking for, but they offered me the opportunity to meet with them and listen to their story.

A few months after my initial encounter, we filed a lawsuit on their behalf. In the spring of 2010, my first jury trial was quickly approaching against a well-counseled national bank. Our team of GLSP lawyers thought it best to seek outside trial counsel to assist and mentor me in preparation for trial and we chose Tom Richardson.

After discussing the case, Tom not only agreed to co-counsel but also to work entirely pro bono. Over the next seven months, with the full support of his firm, Tom and his staff dedicated more than 200 hours of pro bono service (150 of which came directly from Tom) to help this couple.

Tom worked tirelessly and passionately on the case, foregoing a summer vacation and paying expenses out of pocket. Similar to his work with the Central High School Mock Trial Team, which he has successfully coached for 15 years, Tom mentored me and ensured that we were prepared for trial. We traveled as far as West Virginia to defend a deposition, and he thoughtfully responded to my countless questions sent in midnight e-mails. Tom willingly read and re-read hundreds of pages of documents and enthusiastically prepared witness examinations. The clients and I were frequently put at ease by his wit and kindness, even during the most stressful situations. His legal brilliance and trial strategy made working with him an incredible experience for me as a rookie lawyer. A day into the trial, the parties amicably and confidentially settled their dispute.

Recently Chief Justice Carol Hunstein wrote a letter to Georgia lawyers in support of National Pro Bono Celebration Week. She encouraged us to contribute our skills and expertise to people who could not otherwise afford them so that all people have access to justice. Tom's commitment to this couple is an example of pro bono service which must be celebrated, even though his humility would prefer otherwise. He is an example for all of the positive impact that one attorney can have in an individual's life and how that helps to improve our communities on a broader scale. I am proud and privileged to have been given the opportunity to work with and learn from such a fine attorney and person.

Sometime during our preparation for trial, Tom told me that he wrote poetry and customarily wrote poems for his children on their birthdays or other special occasions. This reminded me of when I graduated from high school and my parents gave me a copy of "Success" by Ralph Waldo Emerson. The poem concludes by saying "To know even one life has breathed easier because you have lived. This is to have succeeded." I can say with certainty that for a couple in Middle Georgia, and all of us who witnessed Tom's commitment to their cause, one case is all we need to measure his success.

Sections Update

by Derrick W. Stanley

A major benefit of section involvement is the ability to attend section meetings, ranging from social happy hours to CLE lunch programs to Institutes sponsored by ICLE. Information about past section events is below. For a full list of future programs offered by ICLE, please visit www.iclega.org.

July

Since our last update, the Entertainment and Sports Law Section held their annual meeting on July 15 at the State Bar where members listened to several guest speakers and held an election for new officers. A list of current officers can be found at www.gabar.org/sections.

On July 21, the Intellectual Property Law (IP) Section held a lunch and learn program at Alston & Bird titled "Bilski v. Kappos and Its Practical Impact." This well-attended program covered the Supreme Court decision that was passed down on June 28, 2010.

August

The Franchise and Distribution Law Section had a roundtable lunch on Aug. 26, on "Distressed Franchisees: Bankruptcy and Other Alternatives." This program was held at the Atlanta offices of Troutman Sanders and provided the attendees an opportunity to network and participate in an interactive discussion.

September

The IP Section held a section open house Sept. 21, at the offices of Kilpatrick Stockton, LLP. This social event gave participants the ability to learn about the various committees within the section and to volunteer for upcoming events.

On Sept. 28, the Appellate Practice Section had a Supreme Court Update. Robert Schapiro, constitutional law professor at Emory University School of Law and former law clerk to Justice John Paul Stevens, moderated the discussion at the Capital City Club.

October

On Oct. 8, the Taxation Law Section held a general section meeting at the Bar Center.

The International Law Section continued their CLE series with "The Global Movement of Technology" on Oct. 11. Clif Burns of Bryan Cave-DC, focused on deemed export, country restrictions and compliance and enforcement involved with the sale and license of technology.

A large number of attorneys attended the Labor and Employment Law Section Breakfast Briefings Program at the Bar Center on Oct. 19. The topic was

"What Labor and Employment Lawyers Should Know About Health Care Reform" and was presented by Seth T. Perretta of the Washington, D.C., office of Davis & Harman LLP.

The Creditors' Rights Section had their annual luncheon on Oct. 29, at Maggiano's Little Italy in Buckhead. The featured speaker was Hon. Pamela South of the State Court of Gwinnett County, Division 5.

November

On Nov. 2, the Appellate Practice Section held a planning meeting to coordinate its yearly events. Members who attended also signed up for committees.

The IP Section presented "Berne and Beyond" on Nov. 8, at Kilpatrick Stockton, LLP, with Dr. Axel Nordemann of Boehmert & Boehmert in Berlin, Germany. This presentation explained the basic principles of the international conventions relating to copyright law and issues that U.S. practitioners should consider when seeking to enforce copyrights in other jurisdictions. The lunch and learn program was sponsored by the IP Section of the State Bar, the Southeast Chapter of the Copyright Society and ICLE.

On Nov. 16, the Franchise and Distribution Law Law Section held a roundtable discussion at Kilpatrick Stockton, LLP, on "Do Franchises Ever Win?" The program was moderated by Cary Ichter of Ichter Thomas LLC, and John Parker of Paul, Hastings, Janofsky & Walker LLP. The IP Section also held a lunch event titled "IP Law: Navigating Damages Issues in IP Litigation" and was held at Holland & Knight. The panelists discussed emerging issues in the determination of damages awards in IP litigation cases. Particularly, they explored questions regarding reasonable royalty calculations, apportionment, the role and use of expert witnesses on damages issues, and proper valuation of

Photo by Derrick W. Stanley

(Front row, left to right) Hon. Mark Anthony Scott, Stone Mountain Judicial Circuit; Hon. Lawton E. Stephens, Western Judicial Circuit; and Hon. Gail S. Tusan, Atlanta Judicial Circuit *(Back row, left to right)* Hon. Brian J. Amero, Flint Judicial Circuit; Hon. Kathy S. Palmer, Middle Judicial Circuit; and Hon. Horace J. Johnson Jr., Alcovy Judicial Circuit, at the Family Law Professionalism CLE at the Capital City Club.

Professional Liability Section Formed

On Jan. 15, during the Midyear Meeting of the State Bar at the Gaylord Opryland Hotel and Convention Center in Nashville, Tenn., the newest section of the Bar was created.

As defined by the bylaws of the section:

> The general purpose of the section shall be the promotion of the objectives of the State Bar of Georgia within the fields of professional liability and malpractice.

As the Health Law Section presently assists the profession in the fields of medical and health liability and malpractice, the section's emphasis shall be upon liability in fields other than medical or veterinary professions, including but not limited to:

Architects;
Attorneys at law;
Certified public accountants;
Land surveyors; and
Professional engineers.

The purposes of this section shall be to provide a medium through which practitioners in the fields of professional liability can organize, concentrate and coordinate their activities to enhance the practice and understanding of professional liability law.

The section obtained the required number of signatures and approval from the existing sections. You can join the Professional Liability Section by downloading an application at www.gabar.org/sections or checking the appropriate box on your 2011-12 dues notice.

intellectual property assets. The panel was moderated by Jennifer Liotta of Alston & Bird LLP and the panelists included: Charlie Henn, Kilpatrick Stockton LLP; Bob Lee, Alston & Bird LLP; and J. Donald Fancher, Deloitte Financial Advisory Services LLP.

December

The Technology Law Section held its quarterly lunch at King and Spalding on Dec. 7. Bob Neufeld and Sarah Shalf provided a 2010 Federal and State Technology Law Update.

Dec. 16 was a busy day for sections as both IP and Environmental Law held their annual holiday celebrations. The Environmental Law reception was held at the State Bar where the Award for Service to the Profession of Environmental Law was presented to Mary J. Wilkes. The IP section reception was held in conjunction with the IP Section of the Atlanta Bar at the Four Seasons in Atlanta. Additionally, the International Law Section held the fourth CLE in its Global Movement series, "Global Movement of Money" at Kilpatrick Stockton, LLP, followed by a reception.

January

Prior to the Midyear Meeting of the State Bar, the Family Law Section held their midyear CLE on Professionalism at the Capital City Club in Atlanta. Panel members included: Hon. Brian J. Amero, Flint Judicial Circuit; Hon. Horace J. Johnson Jr., Alcovy Judicial Circuit; Hon. Michael C. Clark, Gwinnett Judicial Circuit; Hon. Robert E. Flournoy III, Cobb Judicial Circuit; Hon. Kathy S. Palmer, Middle Judicial Circuit; Hon. Mark Anthony Scott, Stone Mountain Judicial Circuit; Hon. Lawton E. Stephens, Western Judicial Circuit; and Hon. Gail S. Tusan, Atlanta Judicial Circuit. After the discussion, the section held its election for new officers and enjoyed a reception.

Sections offer a wide array of events for their members. From meetings to newsletters, Lunch and Learn programs to Annual Institutes, social networking to ListServs, membership in one of the State Bar's 44 sections will help you grow your skills and enhance your practice.

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

Fastcase Basics

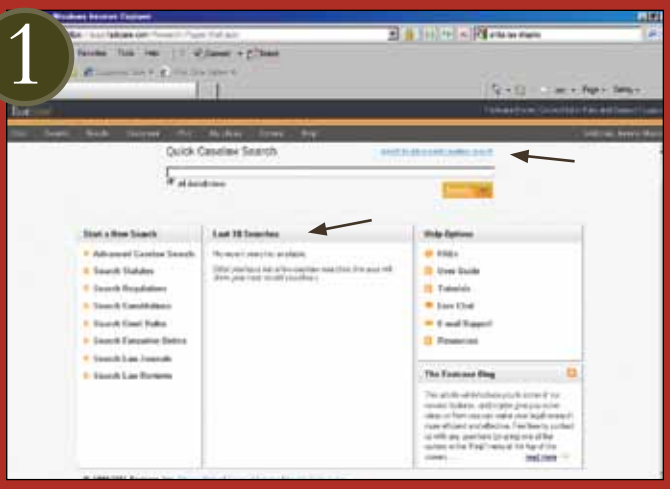
by Sheila Baldwin

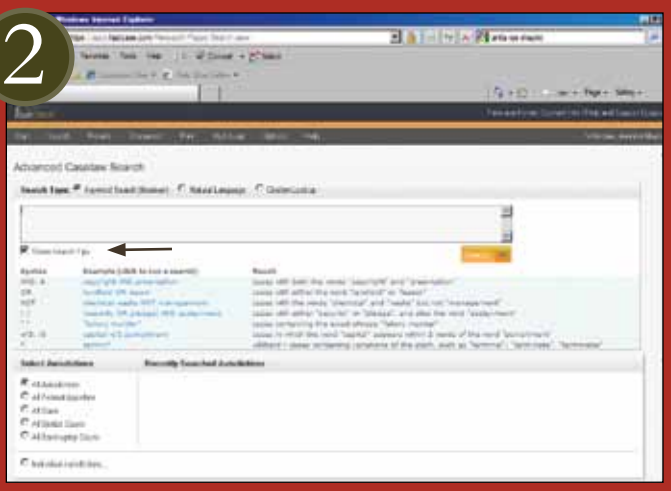
Since Jan. 1, Fastcase had been the legal research tool that the State Bar of Georgia provides to its members as one of their member benefits. Fastcase's libraries include primary law from all 50 states, as well as deep federal coverage going back to 1 U.S. 1, 1 F.2d 1, 1 F.Supp. 1, and 1 B.R. 1. The Fastcase collection includes cases, statutes, regulations, court rules and constitutions. Georgia case law reaches back to 1 Ga. 1 (1846) and Georgia Appeals decisions back to 1907. The Georgia Code is searchable by keyword as well as by browsing in the outline view. This article will take you through the basic steps to find a Georgia case using the advanced search method.

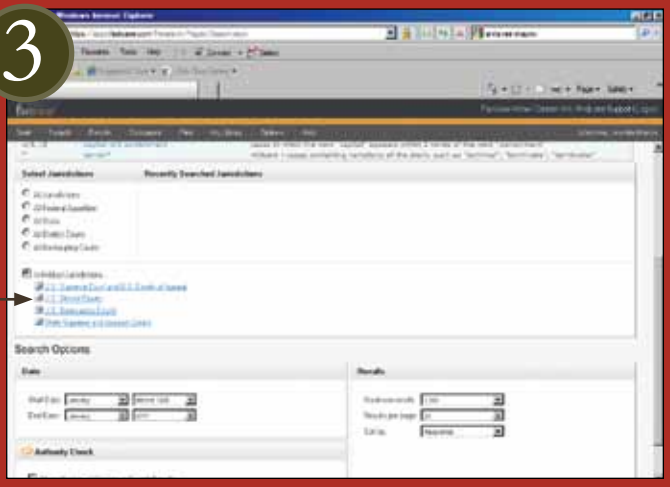
Fastcase is accessed through the State Bar website in the same way that members previously accessed Casemaker. The opening page has a navigation tool bar with drop down tabs titled "Start," "Search," "Results," "Document," "Print," "My Library," "Options" and "Help." This navigation bar will remain accessible from most pages within Fastcase. The top of the opening page offers a "Quick Caselaw Search" option. From this view you have two possible options on jurisdiction, "all jurisdictions" and whichever one you last used. Select jurisdiction by choosing a radio button below the search box. As a new user, you will need to perform your initial search by choosing the "Advanced Caselaw Search" because you have no jurisdictional history for the system to display (see fig. 1). Notice the middle column; this list contains the last 10 searches you performed and remembers them even after your session is complete (see fig. 1).

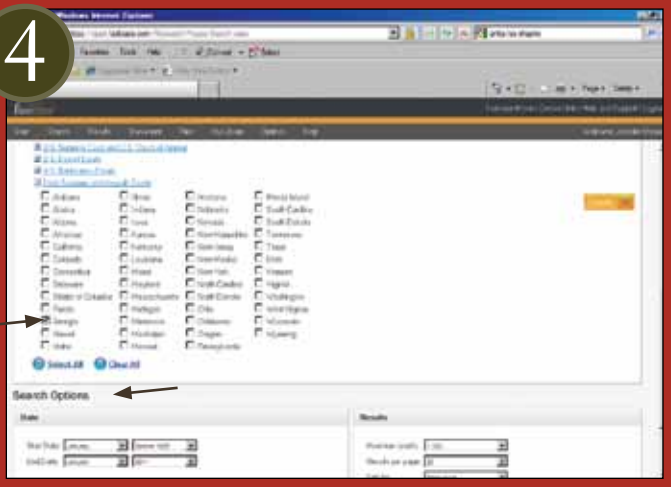
The "Advanced Caselaw Search" screen contains a search field with three search type options. Enter terms using the search tips under the search box as a guide (see fig. 2). "Keyword Search" (Boolean) is the default so remember to change the selection if you are going to use "Natural Language" or "Citation Lookup," otherwise, you will get a *no results found* error message. If this does happen, take a minute to read possible reasons that your search contained no results and make modifications.

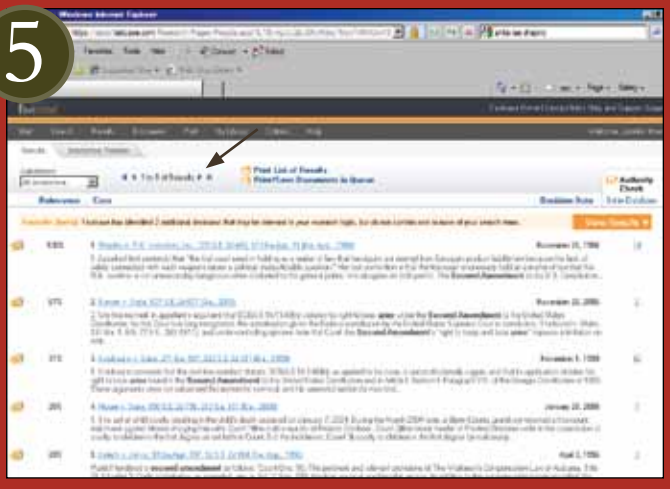
Next, move down the screen to select the jurisdiction. It is designed like a menu, with expandable and retractable "+" and "-" symbols. Select entire caselaw











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

need help?

Lawyer Assistance Program Confidential Hotline

800-327-9631

Lawyers Recovery Meetings: The Lawyer Assistance Program holds meetings every Tuesday night from 7 p.m. to 9 p.m. For further information about the Lawyers Recovery Meeting please call the Confidential Hotline at 800-327-9631.

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 problems areas;
- Collection of supporting information from family members, friends and the LAP Committee, when necessary; and
- Verbal and written recommendations regarding counseling/treatment to the person receiving treatment.

2010-11 Lawyer Assistance Committee

Chairperson
Robert T. Thompson Jr., Atlanta

Vice Chairperson
Charles B. Pekor Jr., Atlanta

Members
*Michael D. Banov, Marietta
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Frederick Victor Bauerlein, Marietta
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Michael G. Geoffroy, Covington

Advisor
*George W. Martin Jr., Atlanta

Staff Liaison
*Sharon L. Bryant, Atlanta

**denotes non-attorney*

jurisdictions by court level, or conveniently select from the last four jurisdictions you used. If this is your first search, then you will want to scroll down the screen until you get to the "Individual Jurisdiction" section. Using the radio button to select this option, the following four choices are available: "U.S. Supreme Court" and "U.S. Courts of Appeal," "U.S. District Courts," "U.S. Bankruptcy Courts" or "State Supreme and Appeals Courts" (see fig. 3). Each of these blue highlighted and underlined links opens up to specific jurisdictions; just choose the particular jurisdictions you are interested in within any or all of these areas. By clicking the box you make your choice, no save button necessary (see fig. 4).

Once you have nailed down the exact jurisdictions, move down to the "Search Options" to select your "Date Range," "Results Preferences" and the "Authority Check Preference" (see fig. 4). "Authority Check" pulls the cases that cite *your* case and displays them in an easy to view report. You can choose to "Show Number of Citations in Search Results," meaning cases that cite your case using your search terms or "Show Number of Citations in Entire Database," meaning those that cite yours generally. This feature is particularly helpful when viewing results in the "Interactive Timeline," a visual map of your results. We will save a complete discussion about the "Timeline" for the next article, however.

Now that you know how to set jurisdiction and other filters, try searching using the terms "second amendment" and "arms" using the state of Georgia, State Supreme and Appeals Courts as our jurisdiction. Click on "Search" and see that nine Georgia cases result (see fig. 5). You will also see the following items about each case: relevancy rating, case name and citation as well as a short description of the case, the date and if the case is cited as indicated by a number under a column entitled "Authority Check." Click on the number to view cases citing the case in the "Authority Check Report" (see fig. 6). The interactive timeline view is available as a tab behind the text view of results. You are able to reset how cases display by simply clicking on any of the column headings underlined and in blue font: "Relevance," "Case," "Decision Date" or "Entire Database."

There are many easy-to-use features you will discover as you become familiar with Fastcase and which will be covered in future articles. Don't forget to take advantage of all the help options available at www.fastcase.com. Please e-mail sheilab@gabar.org with any comments or questions.

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

Document Design for Lawyers:

The End of the Typewriter Era

by Linda Berger

You've written the perfect brief. The research was thorough; the arguments are imaginative and well-supported, appealing to both logic and emotion. You've revised, edited, proofread and revised again. It's the complete, persuasive product.

But it looks like it was produced on a last-century Smith Corona: the text appears in double-spaced 12-point Courier with ALL CAPS and underlining for headings. As Bryan Garner notes, the *only* reason to use Courier anymore is if the judge to whom you are writing requires it.

Lawyers today are not only authors, but also self-publishers. Even when court rules restrict lawyers' choices, word-processing programs free lawyers to design their documents to achieve several purposes:

1. Document design can pull the reader in and keep them engaged by enhancing the accessibility and readability of your document.
2. Document design can boost your credibility by conveying a knowledgeable and professional image of the lawyer and the lawyer's firm or company.
3. Document design can support the persuasiveness of your arguments by making your client's story easier to understand and your legal positions harder to dismiss.

The remainder of this article will discuss simple design rules that you can follow in documents that need not comply with court rules and some that you may use even in documents that must comply. Book and magazine publishers apply these tested graphic design principles to skillfully engage readers and amplify their publications' editorial content. As self-publishers, lawyers should make similarly thoughtful

choices about the key visual elements of their printed documents. The suggestions here apply primarily to choosing and using fonts, the visual framework of printed document design.

In *Painting with Print*, Ruth Anne Robbins argues persuasively that the application of principles of typography, headings and subheadings, white space and the spatial relationships between them is as "critical an element of persuasion as proper grammar and adherence to the codes of court and citation form." Judge Frank Easterbrook of the U.S. Court of Appeals for the

7th Circuit has written that "[d]esktop publishing does not imply a license to use ugly or inappropriate type and formatting," specifically criticizing the use of the commonly used default font Times New Roman as "utterly inappropriate" for long documents such as briefs. Legal writing expert Bryan Garner devotes a chapter of *The Redbook: A Manual on Legal Style* to document design. Derek Kiernan-Johnson has argued that typography might be used not only to reinforce meaning, but also to independently create it.

Choosing Typefaces (or Fonts)

"Typography is what language looks like," Ellen Lupton states on the opening page of her book *Thinking With Type*. Given typography's significant role in the communication of ideas, the choice of how best to visually capture our carefully honed words should not be left to the default settings on our word processors.

Your choice of a typeface from the hundreds readily available should take into account maximum legibility (how easy is it to distinguish discrete letters that make up words) and readability (how easy is it to rapidly comprehend whole words and sentences).

Typefaces fall into two major categories: serif and sans serif. Serif faces are distinguished by the delicate chiseled flourishes at the end of each letter's main strokes. Serif faces are easier to read in longer print documents than their sans-serif cousins, which lack the thin end strokes. Experts suggest that serifs help lead the eye to the next letter or word. The text of most nonfiction books and business documents (where the ability to read quickly with comprehension is a key goal) is set in serif typefaces.

Because word-processing software often used Times New Roman as the default typeface, it emerged as the predominant serif typeface. But Times New Roman was designed for narrow newspaper columns and is less desirable than other serif typefaces when producing lengthy single-column business and legal documents.

The rules of the Georgia courts narrow your ability to use document design concepts in briefs filed with the courts, but they appear to allow some flexibility. While both the Supreme Court of Georgia and the Court of Appeals require double spacing and fixed margins, rules that affect line spacing and line length principles, they give lawyers some leeway to choose among fonts. The Supreme Court specifies that the font be no smaller than 12-point Courier or 14-point Times New Roman, and the Court of Appeals allows either 14-point Times New Roman or a font no smaller than 10 characters per inch.

Suggesting that rigid court rules undermine lawyers' design choices, Kendall Gray, *Nerdlaw* blogger, recently wrote:

> I received an e-mail from a friend and superstar appellate colleague the other day. Like me he is a fan of the elegant looking brief, and he was bemoaning the appearance of a brief that he was filing in a jurisdiction with rule-mandated ugliness.
>
> The jurisdiction, which shall remain nameless . . . required double spaced Times New Roman everything. . . . No chunking, no emphasis or de-emphasis. Nothing to help the reader organize the information, wasted white space [that is] no easier to read or understand.
>
> My modest proposal would be to eradicate all the typewriter era rules in which length and content were controlled by page count, double spacing, typewritten default margins and font sizes.

Practice Tip

- Consider one of the popular alternatives to Times New Roman. These include Baskerville, Bembo, Caslon, Century Schoolbook (a Century font is required by the U.S. Supreme Court), Garamond, Jenson, Minion, Palatino, Sabon or one of the typefaces (such as Georgia and Constantia) designed to be legible both on paper and on a computer monitor.

Choosing Type Size

Type size describes the height and width of the individual characters. Type is measured from the bottom of the descending stroke to the top of the ascending stroke. The so-called "x-height" is a measure of the lowercase "x" or the typeface's height excluding ascenders and descenders. In smaller sizes, typefaces with a larger x-height may appear larger and be easier to read than another face of the same point size with a smaller x-height. But be cautious when specifying a typeface with a disproportionately large x-height, especially in larger sizes. The extreme central roundness in certain letters may actually hinder readability.

Practice Tip

- Choose typefaces no smaller than 10 points and no larger than 13 points, depending on the x-height and line length.

Setting Line Length and Justification

When working with a single-column layout, choose your line length carefully. If the line is too short and

the type too large, reading will be uncomfortable, requiring many eye movements. A long line of small type may force the reader to work hard to stay on a smooth linear track. Long lines, too, will require narrow margins, causing the page to appear crowded.

Practice Tips

- Pick a shorter line length. Robbins suggests a line length of just under six inches, which will mean increasing the standard one-inch margins for court documents. Others have suggested an even shorter line. One standard guide for evaluating a readable line length (or measure) in a specific type size is to make the line 2 to 2.5 times the typeface's alphabet length: 52 to 65 characters.
- Use ragged-right justification. Ragged-right settings allow readers to smoothly move from line to line. The sawtooth right edge also helps achieve consistent and regular word spacing and minimizes awkward hyphenation at the end of the line.
- Match line spacing to line length. For line spacing, remember that the longer the line you choose, the more spacing you will want to insert between lines to aid the eye's movement across the page. Robbins suggests that you choose line spacing between 1 and 5 points larger than the type size—or larger than a single-space setting but slightly less than 1.5 lines.

Using Subheadings to Provide Guideposts and Markers

Consider subheadings as guideposts that let the reader know where she is and where she is going. These essential markers should work closely with horizontal and vertical white space and optimal-reading line lengths and type sizes—all in the interest of reducing the mental workload required of the reader.

Practice Tips

- Choose sans serif faces for subheadings. This choice creates emphasis through a pleasing contrast with the serif body text. Try Arial, Century Gothic, Trebuchet and Corbel.
- Avoid ALL CAPS, large and small caps, and underlining. These are unattractive and slow down readers.
- Align subheadings flush left with the left margin. Avoid centering, which results in unbalanced alignment.
- Insert extra space just before each subheading. This links the heading to the related text: the heading appears to move away from the previous section and closer to what it introduces.

Design, Test, Decide

Matthew Butterick, a lawyer and trained designer, shares his passion for effective typography at www.TypographyforLawyers.com. A recent post suggested a simple process for visually evaluating new font choices. This final recommendation for putting the best face on your documents borrows liberally from his post:

1. Choose several current documents as samples.
2. "Publish" the samples in two or three new typefaces that appear to improve overall design and readability.
3. Mix in several sans-serif subheading options.
4. Produce different options using the same typeface while varying line length and spacing.
5. Post the samples where your colleagues and you can study, review and live with them for a week or so. Solicit opinions, asking for the whys behind their preferences.
6. Pick one or two on the basis of (a) which are the most legible and readable and (b) which best convey your firm's image and identity.
7. Finally, build a straightforward style guide for your firm's self-publishers, detailing in word and example the accepted typefaces, page designs and logo usage. This guide will help build the consistency and repetition that good design requires and your audiences will come to expect and appreciate.

Suggested Resources

- Matthew Butterick, www.TypographyforLawyers.com.
- Bryan A. Garner, "The Redbook: A Manual on Legal Style 77-88" (2d ed. West 2006).
- Kendall Gray, http://www.appellaterecord.com/articles/nerdlaws/.
- Derek H. Kiernan-Johnson, "Telling Through Type: Typography and Narrative in Legal Briefs," 7 J. ALWD 87 (2010) (available at www.alwd/JALWD/archives.html).
- Ruth Anne Robbins, "Painting With Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents," 4 J. ALWD 108 (2004) (available at www.alwd/JALWD/archives.html).
- Wayne Schiess, www.Legalwriting.net.
- Robin Williams, "The Non-Designer's Design Book" (3d ed. Peachpit Press 2008).
- Where to shop for fonts: adobe.com/type/; www.fontbureau.com; fontshop.com; www.linotype.com; www.fonts.com.

Linda Berger, guest columnist, has been a Professor of Law at Mercer University School of Law since July 2008; she previously taught at Thomas Jefferson School of Law in San Diego. Her interest in document design began when she was a reporter for the Associated Press, continued while she was writing briefs for a law firm and became serious during her eight years as editor of the peer-reviewed *Journal of the Association of Legal Writing Directors* (J. ALWD).

Law Practice 2010 and Beyond:

Challenges and Opportunities

by Avarita L. Hanson and Aimee L. Pickett

The 2010 Convocation on Professionalism, held at the Bar Center on Nov. 30, addressed the theme, *Law Practice 2010 and Beyond: Challenges and Opportunities.* This program covered important issues facing the profession including increased competition, fee structure changes, intergenerational practice, the economic climate for lawyering today and tomorrow, the use and ethics of technology and future trends for the practice of law.

With this Convocation, the Chief Justice's Commission on Professionalism (the Commission) revived its tradition of engaging the bench and bar in timely and important professionalism issues with discussion led by national and local experts. Participants had the opportunity to suggest activities and programs that the State Bar of Georgia, the Commission, courts and other entities could consider to meet current and future needs and concerns.

The State of the Profession– Nationally and in Georgia

Justice Robert Benham moderated the first session on the state of the profession with panelists Linda Klein, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, current chair of the ABA House of Delegates; and State Bar President Lester Tate.

Photos by Terie Latala

Moderator Damon Elmore addresses the audience during the *Technology: How Can We Use It to Practice Law and Do So Ethically* panel at the 2010 Convocation on Professionalism.

Klein touched on such issues as the trend toward unbundling legal services and other non traditional arrangements, the increase in in-house counsel, the need for alternative legal business structures and increased competition within the United States from foreign law firms. She also stated that diversity is "good for business" but it has been better achieved by clients in their in-house departments than in law firms. Klein concluded that law firms know there is a need to change their current strategy, but they may not be doing what needs to be done and that there is a lot of opportunity for improvement.

Tate commented on the state of the legal profession in Georgia. He identified a Georgia trend toward increased accountability within the profession given the instantaneous nature of information. He also touched on technology and the advantages it presents, such as the opportunity for greater independence, noting that the challenge is to maintain perspective. He cautioned lawyers to not let technology distract them from the true purpose of legal practice—service. Tate said that the changed nature of judicial power, coupled with the decline in trial lawyers, presents both challenges and opportunities for peaceful and equitable dispute resolution.

Generations of Lawyers: New Opportunities for Practice and Mentoring

With four generations of lawyers now practicing law, participants looked at age as an important aspect of diversity and inclusion. Douglas Ashworth, director of the Transition Into Law Practice Program, moderated a unique dialog, "Generations of Lawyers: New Opportunities for Practice and Mentoring." The session's panelists included Prof. Susan Daicoff, Florida Coastal School of Law, author, *Lawyer, Know Thyself: A Psychological Analysis of Personality Strengths and Weaknesses*; Dr. Robert Obst, Psy. D, Atlanta psychologist; John T. Marshall, Bryan Cave, LLP, who serves on the Supreme Court of Georgia's Board to Determine Fitness and founded the Transition Into Law Practice Program; and Michael Geoffroy, State Bar YLD president.

The current legal profession reflects four different generations: Traditionalists (born around 1925-42); Baby Boomers (born around 1943-60); Generation X (born around 1961-81); and Generation

Tribute Luncheon in Honor of Former Chief Justice Harold G. Clarke

(Left to right) John Marshall, Dean A. James Elliott, Chief Justice Carol Hunstein, former Chief Justice Harold Clarke, Nora Clarke, Prof. Patrick E. Longan, Avarita L. Hanson, Sally Evans Lockwood and Hon. Carolyn Hall.

During the Convocation on Professionalism, a special tribute luncheon was held in honor of former Chief Justice Harold G. Clarke, a founder of the Chief Justice's Commission on Professionalism. Justice Clarke was accompanied by several family members, including his wife, Nora. Commission Executive Director Avarita L. Hanson presented him with the Founders Award.

A video tribute chronicled Justice Clarke's career through photos and dialogue, presented by Prof. Patrick E. Longan of Mercer University Law School. Special personalized tributes were given by Chief Justice Carol W. Hunstein, former Chief Justice Leah Ward Sears, John T. Marshall, Dean A. James Elliott and Sally Evans Lockwood.

While on the bench during the 90s, Justice Clarke not only focused his attention, he focused the Bar's leaders and members, on professionalism. He wrote about professionalism, he spoke about professionalism and he epitomized professionalism. Justice Clarke's commitment to professionalism and leadership is legendary—not only in Georgia but throughout the country. He coined the phrase "ethics is a minimum standard which is *required* of all lawyers while professionalism is a high standard *expected* of all lawyers." This definition of professionalism is what makes professionalism in Georgia and beyond as distinguished as our own former Chief Justice Harold G. Clarke.

J. Thomas Morgan and Paula J. Frederick participate in the roundtable discussion on how to ethically and professionally use technology and the ethical boundaries and enforcement of the rules when technological use may cause a lawyer to overstep boundaries.

Y or Millennials (born around 1982-2003). The panel addressed issues relevant to each generational group and intergenerational approaches to successful coexistence in the practice of law. The Millennial Generation (Gen Y) and Gen X demand more work-life balance. Millennials have the facility and familiarity with technology to work remotely. Geoffroy, who has spent time speaking with law students, said that the students indicate they are aware of the uphill battle they face to enter the legal profession, so they reject "kiddie college" treatment and prefer to be given the same information practicing attorneys receive. And the younger generations' biggest challenge, according to Prof. Daicoff, is the increasing use of just in time learning or information acquired from technology *just in time* for its use. It may be necessary to increase one's depth of knowledge and Millennial and Gen X professionals should be knowledgeable about when just in time learning is not enough.

Similarly, the panel focused on the older generations' needs: aging gracefully within the profession, recognizing diminished capacity and second season careers or retirement. Obst, who provides fitness examinations for State Bar entrants, noted that the old adage "with age comes wisdom" is true. Although there is unavoidable age-associated impairment brought on by environmental factors, there is also significant development for lawyers as they age. And then when it is time to retire, Marshall advised attorneys not to "retire *from* law practice; retire *to* something." He suggested retiring to law-related activities, such as becoming a mentor, because it is our positive relationships that are at the core of our lives and profession.

The Economic Climate for Lawyering Today and Tomorrow

Where are lawyers needed? How can new lawyers enter the profession given their law school debt loads? What is the responsibility of law schools and the profession to incoming students and new lawyers with debt loads? These are some of the questions tackled by this panel moderated by A. James Elliott, associate dean and professor of law at Emory University School of Law. Panelists included: Gregory L. Riggs, associate dean for student services and community engagement at Emory University School of Law; Prof. Charlotte Alexander, Georgia State University School of Law; and Allan J. Tanenbaum, general counsel and managing partner of Equicorp Partners LLC.

Tanenbaum encouraged participants to look seriously at how the bar and law schools are helping students and new lawyers face challenges to finance their education and enter the profession. Riggs said the profession is experiencing a significant change, client demands are changing and "costs for large businesses require legal services to be applied more efficiently." The change in client demand has a direct negative impact on attorney pay and the number of attorneys that some of the larger firms choose to employ. Statistics show an increase in law school applications, despite the economic crises and although jobs are diminishing, law schools are producing 43,000 to 45,000 graduates per year.

The debt load of recent graduates influences their practice choices which may deter lawyers from serving low and moderate income individuals. Prof. Alexander provided ideas for an incubator practice based on the City University of New York Law School's model and a lo bono legal referral service for modest means citizens based on the Oregon State Bar model. The experts agreed that it is vital to give incoming students a more realistic picture of the economic reality of attending law school and continue to introduce alternative means of law practice that include serving low and moderate income clients.

Technology: How Can We Use It to Practice Law and Do So Ethically

The second half of the Convocation showcased a diverse group of experts on the various aspects of technology and its ethical and professional use in the legal profession. The session, moderated by Damon Elmore, VP for Human Resources, NAPA Rayloc Division of Genuine Parts, was a highly technical presentation of the intricacies of virtual law practice and social media platforms. Panelists included Stephanie Kimbro, owner of the web-based virtual law office, Kimbro Legal Services and author of *Virtual Law Practice: How to Deliver Legal Services Online;* and Catherine Sanders Reach, director of the ABA's Legal Technology Resource Center.

Kimbro stated continued unbundling of legal services is a key to a successful virtual practice. Virtual practices include a completely web-based practice and others that integrate a web-based practice with a traditional one to reach a broader base of customers. The web-based practice option may be useful for attorneys who seek more work-life balance, want to expand an existing client base, want to eliminate or reduce overhead expenses or may need flexibility for other reasons. Not just for the young or new lawyer, a virtual practice may be attractive to a partially retired lawyer who wants to travel and practice, or a lawyer who is a caretaker.

From the client's viewpoint, virtual practice is a great resource for people with low to modest means to obtain legal services. But there are challenges, including information protection and establishing the type of relationship with online clients that is the hallmark of the legal profession. To meet these challenges, Kimbro advised the group to maintain the same level of reasonable precaution required by ABA Model Rule 1.6(a) as would be expected from a brick and mortar firm and establish enough traditional contact to make the client feel comfortable that "[she] is a real person," such as phone calls and face to face virtual meetings.

Reach spoke about social media, defining it loosely as "any tool or service that uses the Internet to facilitate conversations." Platforms such as blogs, Linked In, Facebook and Twitter can be powerful tools for the legal profession. Social media can be used as an inexpensive marketing opportunity and is a way to reach the consumer in real time and in larger numbers. She also warned of the dark sides of social media and the potential dangers that could arise when attorneys or judges expose their personal lives to potential professional critique or share professional or confidential information in their personal profiles.

The second technology session was a roundtable discussion on how to ethically and professionally use technology and the ethical boundaries and enforcement of the rules when technological use may cause a lawyer to overstep boundaries. Hon. Steven K. Leibel, moderated the panel comprised of Paula J. Frederick, general counsel, State Bar of Georgia; Michael B. Terry, Bondurant, Mixson & Elmore, LLP, Atlanta Bar president and chair, Standing Committee on the Unauthorized Practice of Law for the Supreme Court of Georgia; and J. Thomas Morgan, J. Tom Morgan Law Firm.

The progression of technology and its uses makes Internet dissemination of legal advice and service more common, since this is the most accessible form of legal information for a large portion of the population. Morgan has pioneered communication with teens through the use of Facebook as a platform to answer legal questions. Notably, providing free access to legal information online is both a great community service and a challenge to the profession as the ethical rules have not caught up to the realities. Terry presented information regarding unlicensed practice of law and cross-border practice, important issues considering the anonymity of the Internet and ability to reach people globally and across state lines. Frederick added that attorneys must be vigilant in their online dealings as the virtual world is not in an ethics vacuum.

The program ended with an interactive session using audience response technology to engage the audience in gauging the trends, needs and concerns of the legal profession going forward.

The Convocation was co-sponsored by ICLE of Georgia and also received sponsorships from Schiff Hardin, LLP, and the *Daily Report.* The Convocation Committee contributed to its success and included: Chief Judge Yvette Miller, Avarita L. Hanson, ICLE Director Larry Jones, Damon E. Elmore, Hon. Melvin Westmoreland and Commission staff, Assistant Director Terie Latala, Administrative Assistant Nneka Harris-Daniel, Intern Sharon Obialo and Coordinator Aimee Pickett. GBJ

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

Aimee L. Pickett is a project attorney with King & Spalding LLC and served as the coordinator for the Convocation on Professionalism.

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Walter D. Burke
Warner Robins, Ga.
University of Georgia School of Law (1949)
Admitted 1949
Died November 2010

Jack E. Cline
Dunwoody, Ga.
John Marshall Law School (1977)
Admitted 1977
Died November 2010

Clinton Raymond Fitts
Amarillo, Texas
Emory University School of Law (1986)
Admitted 1987
Died April 2010

Margaret C. Franklin
Lawrenceville, Ga.
Atlanta Law School (1946)
Admitted 1946
Died March 2010

David K. Holliday
Gainesville, Ga.
John Marshall Law School (1958)
Admitted 1958
Died October 2010

G. Arthur Howell Jr.
Atlanta, Ga.
Harvard Law School (1942)
Admitted 1943
Died November 2010

Gary Alan Hughes
Columbus, Ga.
University of Georgia School of Law (1975)
Admitted 1975
Died November 2010

Peter Krebs
Decatur, Ga.
Woodrow Wilson College of Law (1973)
Admitted 1973
Died December 2010

Robert J. Lipshutz
Atlanta, Ga.
University of Georgia School of Law (1943)
Admitted 1943
Died November 2010

James R. Marietta
Atlanta, Ga.
University of Georgia School of Law (1977)
Admitted 1977
Died March 2010

Reginald Moore McDuffee
Pooler, Ga.
University of Georgia School of Law (1959)
Admitted 1959
Died November 2010

Howard S. McKelvey
Saint Simons Island, Ga.
Woodrow Wilson College of Law (1974)
Admitted 1974
Died May 2010

John H. Mobley II
Atlanta, Ga.
University of Georgia School of Law (1953)
Admitted 1952
Died October 2010

John Henry Murphy
Savannah, Ga.
American University Washington College of Law (1954)
Admitted 1968
Died June 2010

Laura Lewis Owens
Atlanta, Ga.
University of Georgia School of Law (1985)
Admitted 1985
Died October 2010

Mary Dozier Pallotta
Atlanta, Ga.
Emory University School of Law (1961)
Admitted 1945
Died May 2010

Stephanie Ann Paulk
Atlanta, Ga.
Emory University School of Law (2001)
Admitted 2002
Died November 2010

Joseph Saia
Fayetteville, Ga.
John Marshall Law School (1977)
Admitted 1977
Died December 2010

Elizabeth Shepherd
Atlanta, Ga.
Atlanta Law School (1949)
Admitted 1949
Died October 2010

John Wright Smith
Macon, Ga.
Mercer University School of Law
Admitted 1943
Died September 2010

Thomas Miller Witcher
Gainesville, Ga.
University of Georgia School of Law (1971)
Admitted 1972
Died December 2010

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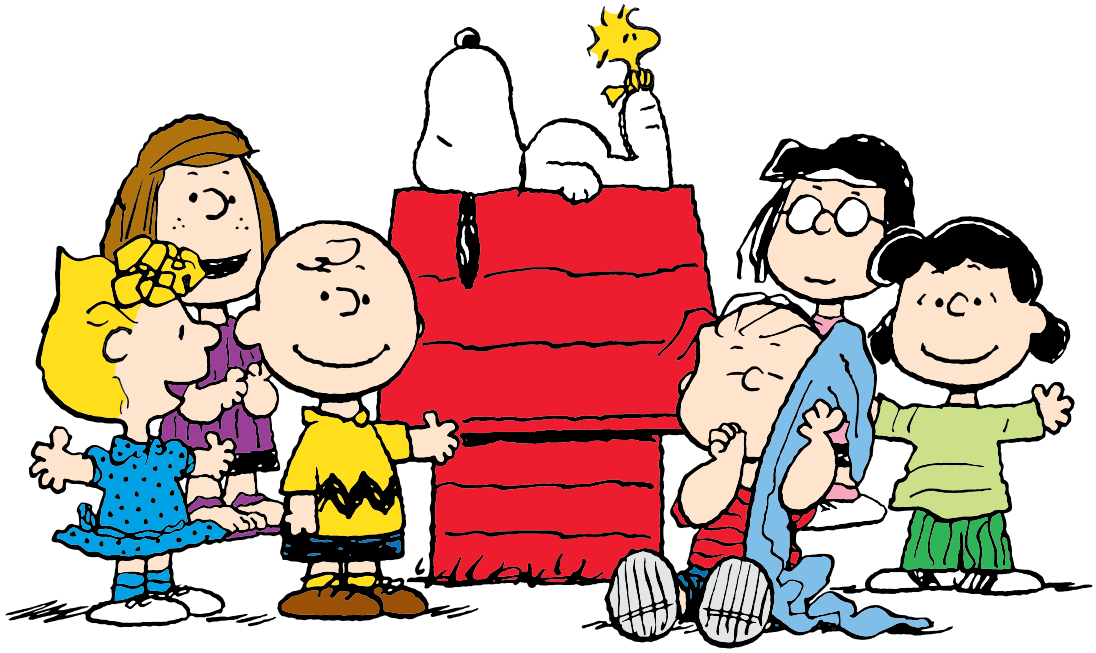

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Atlanta Bar Association
PLI Groupcast – Keys to Brand Development and Using Social Media
Atlanta, Ga.
3 CLE Hours

FEB 11
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FEB 11
ICLE
Residential Real Estate
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FEB 11 (tent.)
Atlanta Bar Association
Family Law
Atlanta, Ga.
6 CLE Hours

FEB 11
NBI, Inc.
Real Property Foreclosure – A Step by Step Workshop
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6 CLE Hours

FEB 11-12
ICLE
Estate Planning Institute
Athens, Ga.
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9 CLE Hours

FEB 15
The Seminar Group
Greenhouse Gas Regulation
Atlanta, Ga.
6.3 CLE Hours

FEB 16
The Seminar Group
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5.8 CLE Hours

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FEB 18
ICLE
Criminal Practice
Atlanta, Ga.
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6 CLE Hours

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.
See www.iclega.org for location
6 CLE Hours

FEB 24
ICLE
Banking Law
Statewide Rebroadcast
See www.iclega.org for location
6 CLE Hours

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

FEB 25
ICLE
Employers' Duties & Problems
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

FEB 25
ICLE
Georgia Appellate Practice
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

FEB 25
ICLE
Thurgood Marshall's Coming!
Statewide Rebroadcast
See www.iclega.org for locations
6 CLE Hours

FEB 26
ICLE
Bar Media & Judiciary Conference
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

FEB 28
ICLE
Beginning Lawyers
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR (dates TBD)
Atlanta Bar Association
Pro Bono March Madness
Atlanta, Ga.
CLE Hours vary by seminar
See www.atlantabar.org for details

February-March

MAR 3
ICLE
Product Liability
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 3
ICLE
Fundamentals of Health Care Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 3
ICLE
Crimes, Causes…Thomas Moore
Statewide Rebroadcast
See www.iclega.org for locations
6 CLE Hours

MAR 3
Atlanta Bar Association
PLI Groupcast – Green Real Estate Summit
Atlanta, Ga.
6 CLE Hours

MAR 3
NBI, Inc.
Your Family Law Practice in the 21st Century
Atlanta, Ga.
6.6 CLE Hours

MAR 4
ICLE
Integrity
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 4
ICLE
Proving Damages
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 4
ICLE
Theory to Verdict
Statewide Broadcast
See www.iclega.org for locations
6 CLE Hours

MAR 8
ICLE
Group Mentoring
Atlanta, Ga.
See www.iclega.org for location
3 CLE Hours

MAR 10
ICLE
Metro City County Attorneys
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 10
ICLE
Entertainment Law Boot Camp
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 10
ICLE
Theory to Verdict
Statewide Rebroadcast
See www.iclega.org for location
6 CLE Hours

MAR 11
ICLE
Post Judgment Collection
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 11
ICLE
Workouts, Turnarounds & Restructurings
Atlanta, Ga.
See www.iclega.org for location
4 CLE Hours

MAR 11
ICLE
Professionalism & Ethics Update
Statewide Broadcast
See www.iclega.org for locations
2 CLE Hours

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

MAR 14
ICLE
Selected Video Replays
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 15
ICLE
Selected Video Replays
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 17
ICLE
Workers' Compensation for the General Practitioner
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 17
ICLE
Employee Benefits
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 17
ICLE
Professional & Ethics Update
Statewide Rebroadcast
See www.iclega.org for locations
2 CLE Hours

MAR 17
Atlanta Bar Association
Advanced Employment Law
Atlanta, Ga.
6 CLE Hours

MAR 17-19
ICLE
General Practice & Trial Section Institute
Amelia Island, Fla.
See www.iclega.org for location
12 CLE Hours

MAR 18
ICLE
Complex Personal Injury Cases
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 18
ICLE
Trial and Error
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 18
ICLE
Mediation Advocacy
Statewide Broadcast
See www.iclega.org for locations
6 CLE Hours

MAR 21
Atlanta Bar Association
PLI Groupcast – Hot Topics in Advertising Law
Atlanta, Ga.
6 CLE Hours

MAR 22
ICLE
Beginning Lawyers
Statewide Rebroadcast
See www.iclega.org for locations
6 CLE Hours

MAR 23
ICLE
Basic Fiduciary Practice
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 23
ICLE
Selected Replay: TBD
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

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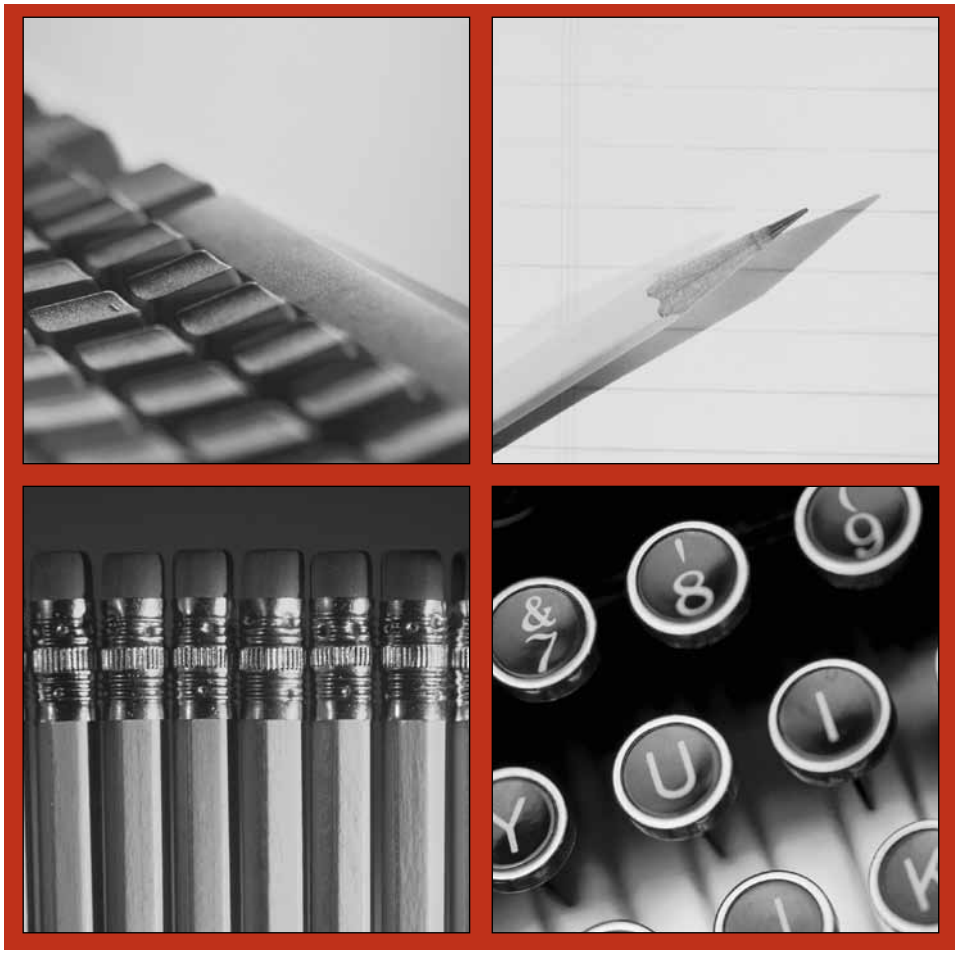

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If you have additional questions, you may call 404-527-8791.

*Not all submitted articles are deemed appropriate for the Journal.
The Editorial Board will review all submissions and decide on publication.

MAR 23 NBI, Inc.
May it Please the Court – Effective Case Presentation at Trial
Atlanta, Ga.
6.7 CLE Hours

MAR 24 ICLE
Mediation Advocacy
Statewide Rebroadcast
See www.iclega.org for locations
6 CLE Hours

MAR 24 ICLE
Georgia Law of Torts
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 24 ICLE
Consumer Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 25 ICLE
Jury Trial
Statewide Rebroadcast
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6 CLE Hours

MAR 25 ICLE
Carlson on Evidence
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 25 ICLE
Advanced Securities Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 28 ICLE
Plaintiff's Personal Injury
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 28 ICLE
Internet Legal Research
Duluth, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 29 ICLE
Article 9, UCC
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 30 ICLE
Animal Rights
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 30 ICLE
Selected Replay: TBD
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 31 ICLE
Trials of the Century
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

MAR 31 ICLE
Post Settlement
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6 CLE Hours

MAR 31 ICLE
Non-Profit Law
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6 CLE Hours

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

No earlier than thirty days after the publication of this Notice in the *Georgia Bar Journal*, the State Bar of Georgia will file a Motion to Amend Part IV of the Rules and Regulations for the Organization and Government of the State Bar of Georgia pursuant to Part V, Chapter 1 of said Rules, *2010-2011 State Bar of Georgia Directory and Handbook,* p. H-6 (hereinafter referred to as "*Handbook*").

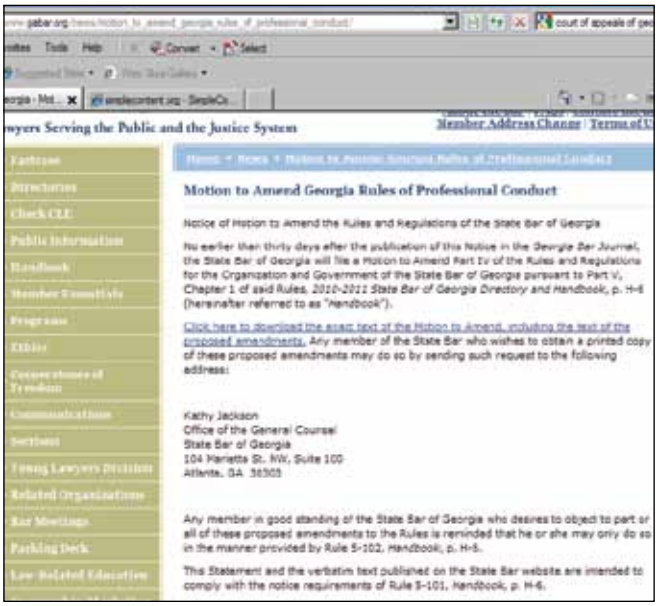
The exact text of the Motion to Amend, including the text of the proposed amendments, can be found on the State Bar of Georgia's website at www.gabar.org/news/motion_to_amend_georgia_rules_of_professional_conduct. Any member of the State Bar who wishes to obtain a printed copy of these proposed amendments may do so by sending such request to the following address:

Kathy Jackson
Office of the General Counsel
State Bar of Georgia
104 Marietta St. NW, Suite 100
Atlanta, GA 30303

Any member in good standing of the State Bar of Georgia who desires to object to part or all of these proposed amendments to the Rules is reminded that he or she may only do so in the manner provided by Rule 5-102, *Handbook*, p. H-6.

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

Cliff Brashier
Executive Director
State Bar of Georgia



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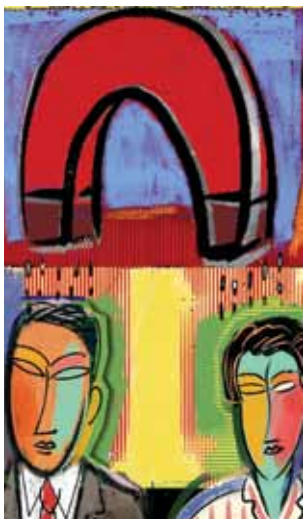

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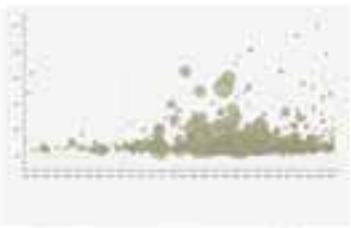
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