Georgia Bar Journal

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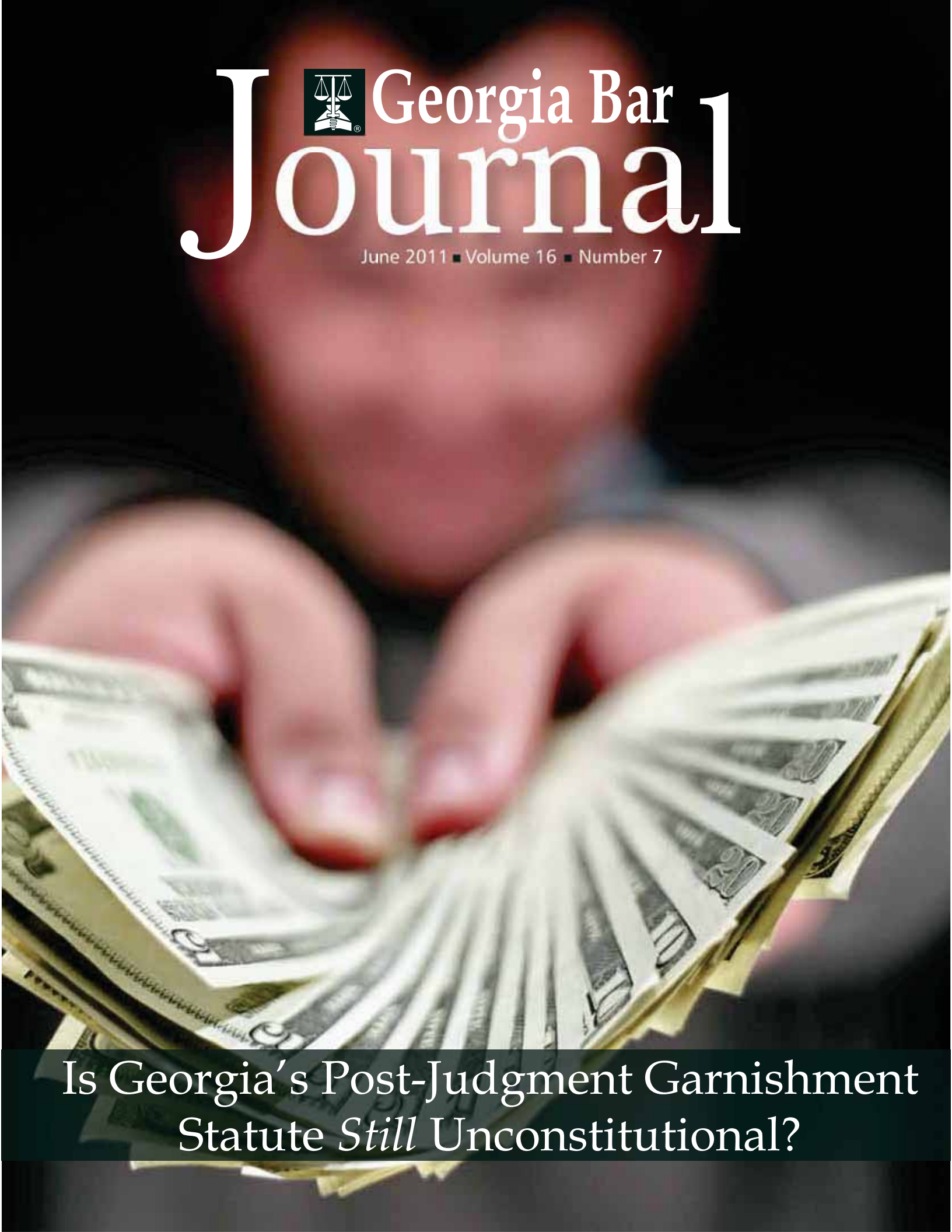

# Is Georgia's Post-Judgment Garnishment Statute *Still* Unconstitutional?

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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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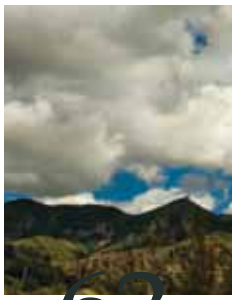




## GBJ Legal



## GBJ Features



## GBJ Fiction



## Departments

by Lester Tate

# I'm the One Who Should Be Saying Thanks!

Throughout the past 12 months, I have had countless opportunities to travel into all corners of our great state and give speeches to local bar associations, civic clubs, student groups and other places where two or more were gathered on behalf of and with the authority of the office of president of the State Bar of Georgia.

> "Since taking office one year ago, I have had a wealth of opportunities to do things I'd never done, which otherwise would not have come my way."

Following each of these engagements, people have come up to me and expressed their appreciation for my visit and my remarks.

But as my term comes to an end and I prepare to hand the gavel over to Ken Shigley during our Annual Meeting at Myrtle Beach, I can tell you that I am the one who should be saying thanks—not only for the honor of being elected to serve as president of the State Bar, and not only for the incredible hospitality you showed me when I visited your communities.

I owe you a debt of thanks, not the other way around. Since taking office one year ago, I have had a wealth of opportunities to do things I've never done, which otherwise would not have come my way. Just to name a few, I was able to:

- Meet the attorney general of the United States.
- Appear on national television to discuss the importance of adequate judicial funding.
- Travel to destinations like Toronto, Canada and Panama to meet with fellow lawyers and discuss the issues we have in common.
- Deliver a Baccalaureate address.
- Meet the former prime minister of Canada.
- Establish a President's Advisory Council of non-lawyer leaders as our advisers and advocates.
- Throw out the first pitch at a baseball game.
- Negotiate commercial leases for the Bar Center.
- Participate like never before in our state's legislative process.

For a country lawyer from a small town in north Georgia, that's quite a "bucket list."

During my high school football career with the Cedartown Bulldogs, I played in the defensive secondary. This year, you gave me the chance to play quarterback for the first time in my life. And because of the amazing talent, dedication and hard work of literally thousands of Georgia lawyers, our team was able to have a winning season.

It was a year of many accomplishments, and I will hold off on a comprehensive review until the Annual Meeting and final report for the *Bar Journal*. I would like to mention two significant projects that came to fruition this year but were started by Bar leaders many years ago. They illustrate the fact that most of the good things the State Bar of Georgia achieves do not occur overnight; rather, they are the end result of many years of vision, continuity of purpose and perseverance often spanning several presidencies.

For example, when I was a 34-year-old "freshman" member of the Board of Governors in 1997, the first vote I cast was in favor of buying the former Federal Reserve Bank building at 104 Marietta St. in downtown Atlanta as our new headquarters. Today, our Bar Center is the finest such facility in the nation, serving as a central office, conference venue and educational complex—one that all Georgia lawyers can use with pride for generations to come.

Because of the keen financial decisions made nearly 15 years ago and the exemplary stewardship of Bar resources since that time, we were able last August to hold a note-burning ceremony and retire the debt on the Bar Center five years ahead of schedule—significantly strengthening the Bar's financial flexibility for the future. The effects of good decisions tend to outlast the terms in office of those who make them.

Also, there is the Bar's most meaningful of several legislative achievements during the 2011 session of the Georgia General Assembly: enactment of House Bill 24, which modernizes the rules of evidence used in our state's courts for the first time since the Civil War. Technically the work product of a legislative committee that began its work three years ago, this bill was meticulously vetted by the many constituent groups who availed themselves of numerous opportunities for input.

Our legislative advocacy team was able to obtain the written support of a diverse group of organizations for HB 24, including the Georgia Chamber of Commerce, the Georgia Trial Lawyers Association, the Georgia Association of Criminal Defense Lawyers, the Council of Superior Court Judges and the Judicial Council of Georgia, along with an assurance from the Prosecuting Attorneys Council that it would not oppose the legislation in its final form. This widespread support was incredibly valuable during the Senate floor debate on the 40th and final day of the legislative session, when the bill's fate was still unknown, and was integral to its ultimate passage.

Most Bar members know that this process actually began more than two decades ago, when the first proposal to align Georgia's rules of evidence with the federal rules was introduced by a state senator from Gainesville named Nathan Deal. This long and difficult journey finally came full circle on May 3 of this year when Gov. Nathan Deal came to the Bar Center to sign HB 24 and several other measures affecting the judicial branch into law.

This has been a very enjoyable year and, I believe, a year of accomplishment—only because I was able to stand on the shoulders of Cliff Brashier and a Bar staff that is both tremendously gifted and devoted to excellence, the numerous past presidents who are my role models and trusted advisers, the 160 members of the Board of Governors who represent their communities and our profession with distinction and my fellow members of the Executive Committee, who have shown me what Bar leadership is all about.

From the bottom of my heart and to all of you, for giving me the experience of a lifetime as well as for all you do to promote the cause of justice and uphold the integrity of the legal profession in Georgia, I prepare to leave you with two simple words: Thank you! GBJ

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

by Cliff Brashier

# A Tough Decision, But the Right Decision

*Beginning with John Houstoun of Savannah in 1778 and continuing through J. Nathan Deal of Gainesville today, 35 of Georgia's 82 governors, or 43 percent, have been attorneys. While all have made important contributions to our state and profession, one of these leaders, Gov. Carl E. Sanders, played a critical role in the creation of the State Bar of Georgia. Since many lawyers today know little of the Executive Branch's role in our professional organization's beginning, Gov. Sanders graciously agreed to share the following history with us.*

Not long after his inauguration in 1963, Georgia Gov. Carl E. Sanders was visited by two Atlanta lawyers, Harry Baxter and Gus Cleveland, who had been appointed by leaders of the 80-year-old voluntary Georgia Bar Association to approach the governor and ask him to throw his support behind legislation that would create a unified State Bar.

> "Supporting passage of the legislation creating a unified State Bar of Georgia was neither the first or last time Gov. Carl Sanders took progressive action to benefit the state."

Their assignment turned out to be, Sanders recalls today, "easier than they thought it was going to be." At 37 years old, the nation's youngest governor was well aware of the need for an organized Bar to enforce academic and professional standards for would-be attorneys, along with a disciplinary process to protect the public from lawyer misconduct.

"Up until that time, while a fairly rigorous written Bar exam was required of every applicant, it was not nearly as comprehensive and onerous as the one we have today, and there was no multistate component," Sanders said in a recent interview. "Also, the Bar association at the time was a toothless tiger, unorganized, with no right to discipline its members."

The governor told Baxter and Cleveland (who later served as State Bar president in 1971-72) that his administration would indeed support the unified Bar proposal. He directed his House of Representatives floor leader, future Attorney General Arthur Bolton, and the lieutenant governor, future Supreme Court

Justice George T. Smith, to head up the legislative effort.

The harder task was actually passing the bill.

"Any time you seek to change something that has been in existence for that many years, it's going to be difficult," Sanders said. "Like many other lawyers, I knew there were going to be some who would not be able to meet the requirements." He recalls there was vigorous opposition to the proposal under the Gold Dome.

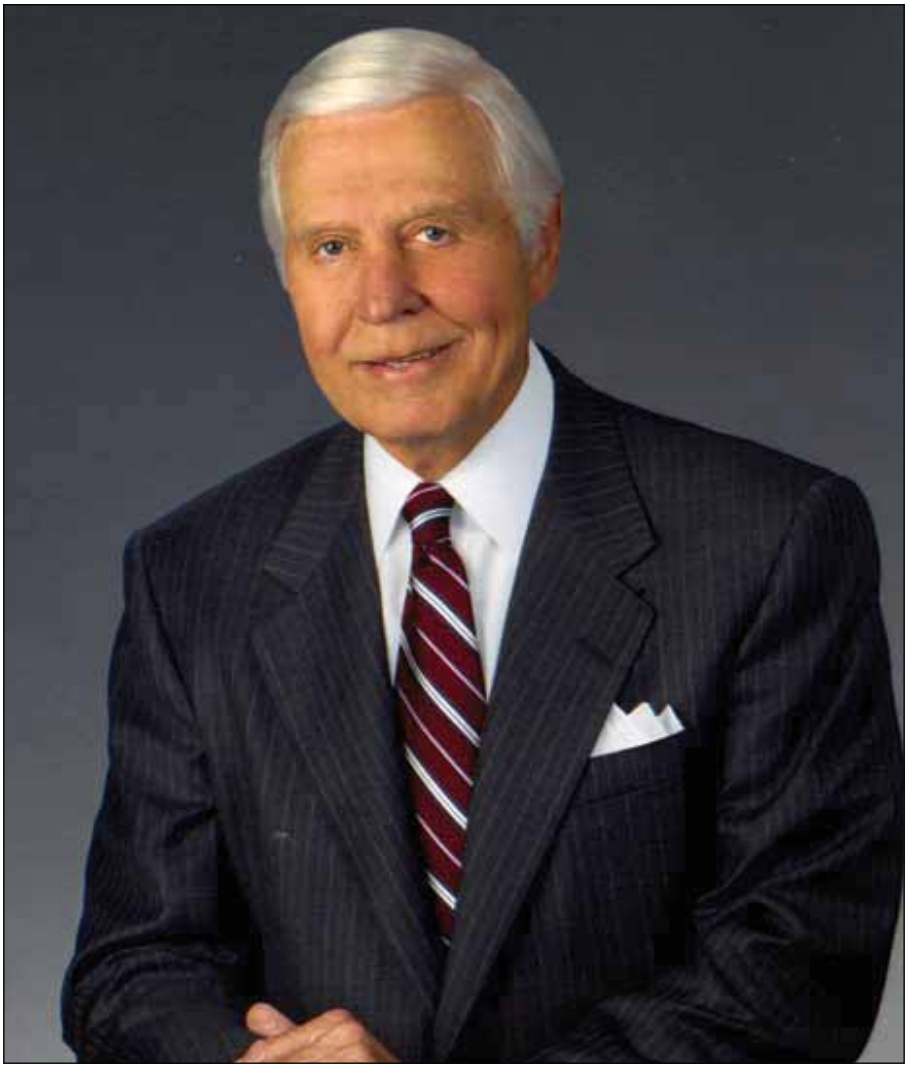
"I remember Johnnie Caldwell (who later served as the state's insurance commissioner) making a long speech in the House about Abraham Lincoln having read the law by candlelight in a log cabin in Illinois," Sanders said. "He said if that was good enough for Abe Lincoln, it was good enough for Georgia."

But the opposition was overcome, and the legislation was adopted, thanks in large part to the governor's support. The Supreme Court thereafter established the State Bar of Georgia in 1964.

"It was a major victory, a signal victory for the lawyers in this state who conducted themselves as they should," Sanders said. "It was a tough decision, but the right decision because it eliminated a number of people who had no business being lawyers, yet they held themselves out as well-qualified attorneys. If I hadn't agreed to get behind it, it never would have passed."

Nearly a half century later, Sanders says a unified Bar has served the justice system, the legal profession and the public well.

"Over the years, it has elevated the qualifications of individuals who want to practice law," he said. "Having a Bar that represents itself properly, lawyers in all corners of the state know what the rules and regulations are. We have a much improved administration of attorneys who, after having gone through a rigorous academic examination, are better prepared to represent their clients. They also know that if they commit an act of professional misconduct, they are going to have to face justice as handed down by the State Bar."



Gov. Carl E. Sanders

Supporting passage of the legislation creating a unified State Bar of Georgia was neither the first or last time Gov. Carl Sanders took progressive action to benefit the state. A native of Augusta, he was a gifted athlete who attended the University of Georgia on a football scholarship. During World War II, he put his academic and football careers on hold to serve as a B-17 pilot. After the war, he returned to Athens to complete his undergraduate degree and earned his law degree from UGA in 1948.

Having established a successful law practice back in Augusta, Sanders entered politics in 1954. He was elected to the Georgia House, where he served two years before a successful campaign for the state Senate. As a senator, he was floor leader for Gov. Ernest Vandiver and served as president pro-tem from 1960 until his election as governor in 1962.

While at least one neighboring governor was gaining notoriety for standing in the school house door to prevent integration, Sanders became known as the first "New South" governor. Under his leadership, Georgia moved from a segregated society lawfully and largely without the turmoil experienced in Alabama and Mississippi. As a result, Georgia and especially Atlanta became the center of the South's economic prosperity that followed.

Sanders made education the No. 1 priority of his administration, directing nearly 60 cents of every tax dollar and bringing noteworthy improvement to Georgia's public schools and, especially, the

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*A report released by the Committee on Civil Justice – Supreme Court of Georgia Equal Justice Commission indicates "60% of low and moderate income households in Georgia experience one or more civil legal needs per year." (June 2009)

University System, as Georgia's colleges and university enrollment doubled during his term. And when he left office in 1967, an unprecedented surplus of $140 million remained in the state treasury.

Upon his return to the private sector, Sanders concentrated on building the Troutman Sanders law firm. Based in Atlanta, Troutman Sanders now has more than 650 lawyers in 16 offices around the country and the world. At 86, Sanders is the firm's chairman emeritus and serves as an ex-officio member of its executive committee.

"I enjoyed my practice, and I still go to the office every day and spend three to four hours there," he said. "I want to continue what I do and be aware of what's going on in the firm."

Sanders' commitment to giving back to the legal profession is illustrated nowhere more vividly than through an ongoing connection with his alma mater. In 2002, the former governor gave $1 million to the University of Georgia School of Law to create a new endowed professorship, the Carl E. Sanders Chair in Political Leadership, which has enabled students to learn from individuals who have distinguished themselves as leaders in politics or other forms of public service. Scholar/Lecturer appointments to date, representing both sides of the political aisle, have included former U.S. Attorney General Griffin B. Bell, former U.S. House Speaker Newt Gingrich, former U.S. Sens. Max Cleland and Wyche Fowler Jr., former U.S. Deputy Secretary of Commerce Theodore W. "Ted" Kassinger, former Supreme Court of Georgia Justice George T. Smith, former Georgia Lt. Gov. Pierre Howard, former Georgia Secretary of State Cathy Cox and nationally known political consultant and commentator Paul E. Begala.

When he was governor, Sanders was instrumental in providing state funding to build a new law library and also secured $1 million in state funds to buy books for the library. Over the years, he has made additional personal contributions and donated his gubernatorial papers, photographs and other memorabilia to the library, whose main reading room is named for Sanders. He is a past president of the law school's alumni association, served on the school's Board of Visitors and headed a fundraising campaign for its Dean Rusk Hall.

When Sanders presided over the groundbreaking ceremonies for the law library in 1964, he said, "The people of Georgia want and deserve nothing but the best." It is in that spirit that one can point to the establishment of the unified State Bar of Georgia and raising the standards of the legal profession as a major achievement of his administration.

"I think that has been a tremendous benefit to those who practice law, as well as the companies and individuals who use the services of lawyers here in Georgia," Sanders said. "We wouldn't have a very good situation if we didn't have an organized Bar, one that could not enforce the rules and regulations. It's made a heck of a difference, and it's a wonderful history when you consider from where we started and where the State Bar is today.

"I am glad I have seen the Bar grow and become more effective. Those of us who are in the field of law ought to be proud we've got an organization we can support and one that can discipline anyone who doesn't abide by the regulations. I'm proud of what I did then, and I'm proud of what the State Bar has become."

***

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

# YLD's Disaster Relief Hotline:

## Georgians Helping Georgians

While serving this past year as president of the Young Lawyers Division, I have come to more fully appreciate what a professional, friendly and caring State Bar we have here in Georgia. From Covington to Blakely and beyond, members of the legal community attend to the needs of their clients and settle disputes in a manner befitting Georgia's history, culture, reason and good law.

> "In addition to this well-orchestrated official response, attorneys all over the state have lent a hand to family, strangers and towns that they love and call home."

The foundation of our great organization is a product of and a tribute to all the people who shaped our state, from famous Georgians such as James Oglethorpe and Rev. Dr. Martin Luther King Jr. to cult figures like Goat Man and Okefenokee Joe. Our State Bar remains grounded and distinctly Georgian. We take pride in great social traditions like the Macon YLD Christmas Party, the Savannah Boat Ride and an outdoor feast at Mrs. Eunice Mixon's in Tifton. We strive to raise the standards of law practice by teaching basics, technique, and updates over and over through the great work done by my good friends Larry Jones and Steve Harper at the Institute of Continuing Legal Education and other CLE providers.

Having an opportunity to visit with other state bars has been a real eye-opening experience. I am not trying to disparage any of our sister organizations in other states, but I can tell you that here in Georgia we enjoy an unmatched level of both camaraderie and sophistication within our Bar. Many smaller states' bars are very congenial, and lawyers treat each other and the bench with respect and kindness. But those states

lack the commerce and opportunity for growth we have, thanks to Atlanta's position as a business hub, along with the prominence of the Savannah Harbor and our other midsize cities.

Other larger states have opportunities for successful lawyers to build large practices, and new lawyers have many jobs available. But because of the sheer size of those bars, discipline can be unmanageable, and unprofessional conduct often results in few consequences. Georgia is unique in that we have a Bar where any local civic organization is able to have a Supreme Court justice as a lunch speaker, and a young solo practitioner like me doesn't have to call more than five attorneys for some advice before he gets an answer. Yet our largest firms compete on a national level and represent America's best multinational companies. I realize now how truly blessed we are.

One of the best examples of our Bar's greatness is the assistance given to fellow Georgians in a time of need. As we witnessed the night of April 27, parts of Georgia were torn apart by some of the worst tornadoes this state has ever seen. In response, the State Bar of Georgia YLD, in conjunction with the American Bar Association YLD, the Georgia Legal Services Program and the Atlanta Volunteer Lawyers Foundation, set up a Disaster Relief Hotline to assist victims of the storms. People who can't afford legal representation and live in one of the counties in the disaster area were and still are encouraged to call the toll-free number at 866-584-8027. Callers can receive assistance with issues such as landlord/tenant disputes, family law, consumer law, housing law, food stamps, Medicaid, unemployment benefits issues and identification replacement. Volunteer attorneys will return messages left at the toll-free number; callers may request a Spanish-speaking attorney return their call. This hotline is run by volunteer attorneys who donate their time to help.

Tyronia M. Smith is the State Bar of Georgia's YLD representative for the ABA. She has worked tirelessly to help us coordinate our efforts with the ABA YLD and the Federal Emergency Management Agency (FEMA). The hotline is run by our co-chairs Matt Crowder of Dublin and DeAngelo Norris of Atlanta, both of whom volunteered to help assign and return all calls within 48 hours, no matter what else was going on with their practice or personal life.

These leaders, along with individual volunteers like Dylan Littlejohn of Atlanta, make a difference. Littlejohn responded to a call when a Dade County woman was injured in the tornado and was not physically able to visit all the offices she needed to get assistance from various federal, state and local agencies. He helped her get a power of attorney so that her mother could help complete forms and find assistance.

In addition to this well-orchestrated official response, attorneys all over the state have lent a hand to family, strangers and towns that they love and call home. My friend McCracken Poston of Ringgold, one of our hardest-hit communities, used his Facebook page as a virtual community outreach, posting information on contacting FEMA, warning of bogus contractors, helping with individual housing needs and sharing in the emotional healing of children saying goodbye to their school, which was wiped out by the tornado. This type of personal outreach is just as important as the official response.

As my term as YLD president comes to an end, I am honored to be part of the State Bar of Georgia, a big organization, but also one that cares about all fellow lawyers and all fellow Georgians. 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.

# Is Georgia's Post-Judgment Garnishment Statute *Still* Unconstitutional?

by Timothy H. Lee

The Supreme Court of Georgia once described the litigation challenging the constitutionality of Georgia's garnishment statutes as a seemingly continuous "legal saga."[1] In 1975, the U.S. Supreme Court ruled in *North Georgia Finishing, Inc. v. Di-Chem, Inc.* that Georgia's statutory scheme for *pre*-judgment garnishments was unconstitutional.[2] The next year, the Supreme Court of Georgia ruled that Georgia's statute governing *post*-judgment garnishments, too, violated the Constitution.[3]

Prompted by these findings, the Georgia General Assembly overhauled the garnishment statutes in 1976 but to no avail. Shortly after the 1976 amendments, the Supreme Court of Georgia held that "the post-judgment garnishment procedure as set forth in the 1976 Act . . . fails to meet the requirements of judicial supervision and notice, and is therefore constitutionally inadequate."[4] In 1977, the Georgia General Assembly responded by completely transforming the statutory scheme. This time, the Supreme Court of Georgia ruled that the statutes met constitutional muster.[5]

The garnishment procedures resulting from the 1977 amendments have remained largely undisturbed, and the legality of Georgia's garnishment statutes has generally been assumed in recent years. But, if federal case law is any indication, the Georgia post-judgment garnishment statute's constitutionality remains highly doubtful. In fact, as this article explains below, a lawsuit challenging the constitutionality of Georgia's post-judgment procedures could succeed in federal court.

## Georgia's Post-Judgment Garnishment Procedures

Garnishment is a "judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party [the garnishee] who is indebted to or is bailee for the debtor to turn over to the creditor any of the debtor's property."[6] There are two primary types of garnishments. A pre-judgment garnishment is essentially a seizure of a defendant's property that occurs while a lawsuit is pending in court in order to facilitate the collection of a judgment in the event that the court renders a judgment in favor of the plaintiff.

A post-judgment garnishment, in contrast, facilitates the collection of a judgment that the judgment creditor has already obtained in court. This article primarily addresses Georgia's post-judgment garnishment procedures.

Under Georgia law, a prevailing plaintiff is entitled to the process of garnishment following any money judgment. To begin the process, the plaintiff (now a judgment creditor) must present an affidavit—made under judicial supervision—to a clerk of any court having jurisdiction over the garnishee (often a bank or an employer of the judgment debtor), indicating the amount due on the judgment and the name of the judgment-rendering court.[7] The clerk then must direct a summons of garnishment to the garnishee. Within three days of the service of the summons on the garnishee, the judgment creditor is required to send "written notice" of the garnishment to the judgment debtor. Under Georgia law, "written notice" consists of:

> a copy of the summons of garnishment or of a document which includes the names of the plaintiff and the defendant, the amount claimed in the affidavit of garnishment, a statement that a garnishment against the property and credits of the defendant has been or will be served on the garnishee, and the name of the court issuing the summons of garnishment.[8]

A judgment debtor receiving notice of the garnishment then has the opportunity to challenge the garnishment by filing a traverse. If the judgment debtor chooses to file a traverse, a hearing must be held within 10 days of its filing, and until such a hearing is held, "no further summons of garnishment may issue nor may any money or other property delivered to the court as subject to garnishment be disbursed. . . ."[9] However, the garnishee must still deliver the debtor's garnished money or property to the court pending the hearing, unless the debtor files a bond in favor of the plaintiff.[10]

## Due Process Challenges to Garnishment Statutes

Because garnishment proceedings usually involve state officers—such as judicial or law enforcement personnel—acting jointly with a creditor to reach a debtor's property, garnishments typically involve the 14th Amendment to the U.S. Constitution,[11] which prohibits states from depriving "any person of life, liberty, or property without due process of law." The question, then, for courts considering due process challenges to post-judgment garnishment statutes has been, what sort of legal procedures—or more specifically, what sort of notice and hearing—must be made available to a judgment debtor during a garnishment?

The U.S. Supreme Court has addressed this question in five seminal cases. In the 1924 decision of *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, the Court held that due process does not entitle a post-judgment debtor to notice or a hearing prior to the issuance of a writ of garnishment.[12] The Court reasoned that in a post-judgment garnishment setting, the underlying case on the merits provides sufficient notice and opportunity for a hearing, such that no additional notice or hearing is necessary during the garnishment. In four subsequent decisions—*Sniadach v. Family Finance Corp.*, *Mitchell v. W.T. Grant Co.*, *Fuentes v. Shevin*, and *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[13]—the Supreme Court considered four separate pre-judgment garnishment statutes and reached a substantially different conclusion, albeit without explicitly overruling *Endicott-Johnson*. Collectively, the four cases indicate that garnishment statutes must make available some sort of notice and hearing to judgment debtors.[14] The Court further explained that the precise type of notice and hearing required by due process must be determined on a case-by-case basis through a balancing of the parties' respective interests.[15] Although the Supreme Court stopped short of announcing a uniform test, as one federal appellate court has noted, the Supreme Court's decisions suggest that the constitutionality of a garnishment statute depends on whether the statute in question "represents a fair accommodation" of "the creditor's interest in enforcement" of a judgment debt and the debtor's competing "interest in the continued use and possession of her property."[16]

Although *Sniadach*, *Fuentes*, *Mitchell* and *Di-Chem* each involved pre-judgment garnishment statutes, lower courts addressing the constitutionality of post-judgment garnishment statutes have generally applied the balancing test articulated in those cases, rather than simply following *Endicott-Johnson*.[17] Indeed, many federal courts considering the issue have expressed serious doubt that *Endicott-Johnson* remains valid in light of the legal reasoning underlying *Sniadach*, *Fuentes*, *Mitchell* and *Di-Chem*.[18]

## Binding Precedent?

Neither the U.S. Court of Appeals for the 11th Circuit nor the former 5th Circuit has addressed the constitutionality of the current version of the Georgia post-judgment garnishment procedures. In *Brown v. Liberty Loan Corp. of Duval*,[19] however, the former 5th Circuit considered a due process claim against Florida's post-judgment garnishment statute, which is somewhat similar to that of Georgia. There, Liberty Loan obtained a writ of garnishment against Brown, who later claimed that her wages were exempt from garnishment proceedings under Florida law. A county court found in Brown's favor and eventually dissolved the garnishment. Brown nonetheless claimed that Florida's garnishment procedure—by temporarily depriving her of her wages without notice—

violated her constitutional right to due process.

The 5th Circuit applied an interest-balancing test consistent with *Sniadach*, *Fuentes*, *Mitchell* and *Di-Chem* and determined that due process did not entitle a judgment debtor to notice of a garnishment proceeding.[20] The court reasoned that notice of the garnishment was not required because the judgment debtor had two protections against wrongful garnishments. First, the court noted the "apparent availability of prompt judicial determination of the debtor's claim of exemption."[21] Under Florida law, a judgment debtor could challenge the garnishment by filing an affidavit of exemption. The judgment creditor then had two days "to contravene" the debtor's affidavit by filing its own affidavit stating that the debtor is not entitled to any exemption, and if the judgment creditor failed to contravene, the garnishment proceeding was immediately and automatically dissolved.[22] In *Brown*, the judgment debtor had filed an affidavit claiming an exemption, to which Liberty Loan responded with its own affidavit, and a hearing was held about two weeks after the garnishment proceedings began.[23] According to the 5th Circuit, this prompt post-garnishment hearing weakened the argument for requiring notice.[24]

Second, the court noted how in the context of a post-judgment garnishment, the underlying judgment on the merits alerts the debtor that a garnishment may be forthcoming. Because a party that loses in a case knows that "further legal action may be taken to satisfy the judgment," the court concluded that the "significance of actual notice of the issuance of the writ of garnishment carries a lesser significance."[25]

Although the 11th Circuit has not overruled *Brown*, *Brown* may have limited precedential value in a case challenging Georgia's post-judgment procedure. That judgment debtors could promptly challenge a wrongful garnishment under Florida law was crucial to the 5th Circuit's holding.[26] Georgia's garnishment procedures guarantee a hearing on a debtor's traverse within 10 days, which would certainly fall under the 5th Circuit's notion of promptness. Florida law, however, also provided an abbreviated dissolution procedure—if the judgment creditor failed to respond to a debtor's affidavit challenging the garnishment with its own affidavit within two days, the garnishment was automatically and immediately dissolved.[27] Given that it is often quite clear to most sophisticated parties when an exemption does or does not apply, a substantial number of judgment creditors—once notified by a debtor's affidavit that an exemption legitimately precludes garnishment—would presumably allow the garnishment to expire without resorting to a subsequent judicial hearing. Georgia law does

not provide for the possibility of a similar abbreviated process.

The 5th Circuit also relied heavily on its finding that the underlying judgment on the merits effectively provides notice that a subsequent garnishment proceeding to collect the judgment will be forthcoming.[28] Nearly every federal court since *Brown* that has heard a due process challenge to a garnishment statute, however, has rejected this rationale rooted in *Endicott-Johnson*.[29] Although an underlying judgment may put debtors on notice of a subsequent garnishment proceeding to some extent, the judgment on the merits and the garnishment involve two entirely different proceedings. The underlying lawsuit establishes a debtor's liability to a creditor. The garnishment proceeding, in contrast, concerns the creditor's right to particular property in the debtor's possession. This determination of whether a creditor is entitled to particular property through a garnishment is not a mere formality: a debtor, even after losing a lawsuit, may successfully defeat a creditor's right to particular property "with any of a number of defenses not adjudicated in the action on the merits, such as . . . a claim of exemption."[30] As a result, most courts since *Brown* have found that the underlying judgment does not constitute notice of a garnishment proceeding.[31]

Thus, because Georgia's garnishment statute is distinguishable from the one considered in *Brown* and because *Brown*'s legal reasoning rooted in *Endicott-Johnson* has since been roundly rejected by other courts that have addressed the issue, *Brown*'s precedential weight in the event of a constitutional challenge to Georgia's post-judgment statute in federal court is highly questionable.

## Persuasive Authority

The only meaningful disagreement among other courts has concerned not *whether* due process necessitates notice, but *what kind* of notice due process requires.[32] A substantial number of federal courts[33] have followed the logic of the 3rd Circuit's opinion in *Finberg v. Sullivan*, which held that due process requires that notice of post-judgment garnishment list "all available exemptions" that might be available to the judgment debtor.[34] The *Finberg* court explained that knowledge of the plethora of statutory exemptions to garnishment "is not widespread, and a judgment debtor may not be able to consult a lawyer before the freeze on a bank account begins to cause serious hardships."[35] The court further reasoned that "[t]hese problems are probably most acute for those judgment debtors who have few immediate sources of necessary funds. . . ."[36] Because "[n]otice of these matters can prevent serious, undue hardship for the judgment debtor whose lack of information otherwise would cause delay or neglect in filing a claim for exemption," the court concluded that mere notice of the fact of garnishment is insufficient and that failure to provide such notice was a violation of due process."[37]

Other courts have held that notice must include some information about applicable exemptions, but does not necessarily need to list all of them. The 4th Circuit's opinion in *Reigh v. Schleigh* typifies this view.[38] There, the 4th Circuit recognized the importance of informing the debtor that exemptions are available but ultimately concluded that "due process does not mandate that the notice to the judgment debtor of the attachment should include a list of all the exemptions possibly available to the judgment debtor."[39] The court reasoned that listing all of the exemptions could do more harm than good—a catalog of every single exemption, some of which are exceedingly complex, could be confusing and may actually discourage a debtor from pursuing remedial action. In light of that consideration, the court concluded that "a notice which advises the judgment debtor that there are state and federal exemptions that may be available to him, coupled with notice of the right to contest the attachment, meets the requirements of due process."[40]

## The Unconstitutionality of Georgia's Post-Judgment Garnishment Statute

Georgia's post-judgment garnishment procedure requires only that "written notice" be sent to the judgment debtor. As explained, written notice consists of

> a copy of the summons of garnishment or of a document which includes the names of the plaintiff and the defendant, the amount claimed in the affidavit of garnishment, a statement that a garnishment against the property and credits of the defendant has been or will be served on the garnishee, and the name of the court issuing the summons of garnishment.[41]

Thus, Georgia garnishment law does not require that judgment debtors be provided any information regarding exemptions or available remedial measures.

Under *Brown*, which stated that due process requires no pre-garnishment notice at all, Georgia's statute could be found constitutional.[42] In light of more recent cases addressing due process challenges to garnishment statutes, however, the 11th Circuit may very well decline to follow *Brown* if Georgia's statute is challenged on due process grounds.

Opinions from other courts indicate that the relevant inquiry is not whether notice is necessary, but what kind of notice is constitutionally mandated. As explained, in addressing what kind of notice due process requires, courts have reached two different conclusions: some courts have held that a statement explaining that exemptions to garnishment are available and may be pursued is sufficient notice, while others have concluded that

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notice is adequate only if it states all of the exemptions available to a judgment debtor. Under either standard, Georgia's post-garnishment procedure is likely unconstitutional.

As a result, the Georgia legislature should consider amending the post-judgment garnishment statute. Specifically, the "written notice" that must be sent to judgment debtors should include (1) a statement informing debtors that exemptions may apply and that remedial procedures are available and/or (2) a list of all exemptions to garnishments available under Georgia and federal law. Aside from addressing the serious constitutional questions surrounding the statute, the amendment is simply good policy. Statutory exemptions to garnishments, such as the exemption for Social Security benefits, are designed to protect the most economically vulnerable members of society. Those persons who most need the benefit of such exemptions often include those who are least likely to have a sophisticated understanding of their rights during garnishment proceedings. Providing some basic notice of the legal protections available thus furthers the policy goals of the exemptions available under state and federal law. Moreover, providing such notice comes with few, if any, drawbacks. Requiring a single additional statement in a "written notice" to judgment debtors or mandating that judgment debtors be provided with a standardized list of available exemptions would entail a minimal administrative burden.

## Conclusion

More than 30 years ago, courts repeatedly held that Georgia's garnishment procedures violated the due process clause of the Constitution. Since then, however, the constitutionality of Georgia's post-judgment garnishment procedures has been largely assumed. Nonetheless, most federal courts, with the notable exception of the 5th Circuit, have consistently held that statutory schemes similar to Georgia's are unconstitutional. The Georgia legislature should thus consider amending the notice provisions of the post-judgment garnishment statute in order to ensure that garnishments in Georgia are conducted in a way that sufficiently—and constitutionally—protects judgment debtors. Otherwise, Georgia's garnishment procedures could soon give rise to yet another constitutional "legal saga." GBJ

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## Endnotes

1. Easterwood v. LeBlanc, 240 Ga. 61, 61, 239 S.E.2d 383, 383 (1977).
2. 419 U.S. 601 (1975).
3. *See generally* Coursin v. Harper, 236 Ga. 729, 225 S.E.2d 428 (1976).
4. City Fin. Co. v. Winston, 238 Ga. 10, 231 S.E.2d 45 (1976)).
5. *See Easterwood*, 240 Ga. at 62, 239 S.E.2d at 384.

6. BLACK'S LAW DICTIONARY 702 (8th ed. 2004).
7. O.C.G.A. § 18-4-61 (2004).
8. O.C.G.A. § 18-4-64(c) (2004).
9. O.C.G.A. § 18-4-93 (2004).
10. O.C.G.A. § 18-4-81 (2004).
11. *See* Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 932-33 (1982).
12. 266 U.S. 285, 288 (1924).
13. Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W.T. Grant. Co., 416 U.S. 600 (1974); N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).
14. *See* Mitchell, 416 U.S. at 611.
15. For an example of the application of the balancing test, *see* Mitchell, 416 U.S. at 616-20 (stating that Louisiana's garnishment procedures provided a "constitutional accommodation of the respective interests of buyer and seller" *Id.* at 610.).
16. Finberg v. Sullivan, 634 F.2d 50, 58 (3d Cir. 1980).
17. *See, e.g.,* Dionne v. Bouley, 757 F.2d 1344, 1351-52 (1st Cir. 1985) ("As respects the judgment debtor's rights in property which the law specifically exempts from the judgment creditor's grasp, the district court correctly looked to the balancing approach of Mathews . . . ."); Finberg, 634 F.2d at 56-58; Brown v. Liberty Loan Corp., 539 F.2d 1355, 1365 (5th Cir. 1976); McCahey v. L.P. Investors, 593 F. Supp. 319, 327 (E.D.N.Y. 1984) ("The broad issue presented in this case . . . is how much process is due debtors by a state's post-judgment garnishment proceeding. To make that determination, we must first review the competing interests present in this action."); Clay v. Edward J. Fisher, Jr., M.D., Inc., 584 F. Supp. 730, 732 (S.D. Ohio 1984) (noting that "recent post-garnishment cases have adopted the balance of interests test . . . ."); Harris v. Bailey, 574 F. Supp. 966, 969 (W.D. Va. 1983) ("[T]his court holds applicable to a post-judgment deprivation of property the recent Supreme Court cases that balance the various interests of the creditor, the debtor, and the state in order to determine the amount of due process required.");
18. *See, e.g.,* Duranceau v. Wallace, 743 F.2d 709, 711 (9th Cir. 1984) ("In Endicott . . . the Supreme Court held that 'the established rules of our system of jurisprudence' do not entitle a judgment debtor to 'further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment.' However, since 'the established rules of our system of jurisprudence' have changed since 1924, we will follow the suggestion of Mathews . . . and weigh the relevant factors to determine whether the Washington procedures violate due process.") (internal citations omitted); Clay, 584 F. Supp. at 732 ("Instead of rigidly applying due process as was done in Endicott-Johnson . . . recent post-garnishment cases have adopted the balance of interests test promulgated in Mathews v. Eldridge, 424 U.S. 319."); Dreary v. Guardian Loan Co., Inc. 534 F. Supp. 1178, 1185 (S.D.N.Y. 1982) ("[T]he Supreme Court's more recent opinions in cases involving pre-judgment seizure demonstrate that due process jurisprudence has developed away from the categorical analysis reflected in Endicott-Johnson . . . towards an approach which balances competing interests to determine the appropriate level of procedural protections before one may be deprived of the use of property.").
19. 539 F.2d 1355 (5th Cir. 1976).
20. *Id.* at 1365.
21. *Id.* at 1368.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* (explaining that underlying judgment "serves at least to alert the debtor that further legal action may be taken to satisfy the judgment").
29. Finberg, 634 F.2d at 56-57 (declining to follow Endicott and noting "a series of more recent decisions by the Supreme Court adopts a different line of reasoning"); McCahey, 593 F. Supp. at 327 (noting that recent Supreme Court decisions "have determined that the presence of a judgment does not alter the conclusion that, in both pre-judgment cases and post-judgment cases involving exempt property, attachment must be considered a provisional measure during which the debtor retains a protectable interest in the use of his property."); Harris, 574 F. Supp. at 969 ("[T]he fact that a judgment has already been rendered in favor of a creditor only represents an adjudication of . . . liability . . . on the underlying debt. The judgment does not entitle the [creditor] to any particular assets of [the debtor] out of which satisfaction can be made."); Dreary, 534 F. Supp. at 1185 ("While notice of and an opportunity to be heard on the merits is directed to the question whether the debt is actually owed, the attempt to enforce the judgment raises the distinct issue whether particular property of the judgment debtor is available to satisfy the judgment. Thus, regardless of whether the debtor wishes to be heard on the merits or not, he or she has a distinct interest in being informed of and having an opportunity to challenge specific attempts to satisfy the judgment.").
30. Finberg, 634 F.2d at 58.
31. *See supra,* note 30.
32. Reigh v. Schleigh, 784 F.2d 1191, 1194 (4th Cir. 1986).
33. *See id.* (listing court decisions following *Finberg*); *see, e.g.,* McCahey, 593 F. Supp. at 328 ("Weighing the interests, we conclude that judgment debtors in this context are entitled to notice of both the creditor's actions and exemptions to which they may be entitled. . . ."); Clay, 584 F. Supp. at 731 ("We conclude that the Ohio statutory scheme and defendants' practices under the statutes fail to provide judgment debtors with notice of a right to claim exemptions or an opportunity for a hearing on any such claim, and are, therefore, in violation of the due process clause of the 14th Amendment to the United States Constitution . . . .").
34. *Id.* (noting, however, that the court in *Finberg* did not explicitly hold that every exemption must be listed).
35. Finberg, 634 F.2d at 62.
36. *Id.*
37. *Id.*
38. Reigh, 784 F.2d at 1196.
39. *Id.*
40. *Id.* at 1197.
41. O.C.G.A. § 18-4-64(c) (2004).
42. Brown, 539 F.2d at 1368 (finding that "due process of law does not require notice and an opportunity for a hearing before the writ of garnishment issues").

# 2010 Georgia Corporation and Business Organization Case Law Developments

by Thomas S. Richey

*This is an overview of the 2010 survey of Georgia corporate and business organization decisions. For the full survey, including an extended discussion of each of these cases, you may download or print the document at the following link: http://www.bryancave.com/2010-ga-survey/. This article is not intended as legal advice for any specific person or circumstance, but rather a general treatment of the topics discussed. The views and opinions expressed in this article are those of the author only and not Bryan Cave LLP. The author would like to acknowledge and thank Ann Ferebee and Vjollca Prroni for their assistance with the article.*

This article surveys case law developments involving corporate and business organization law issues that have been handed down by the Georgia state and federal courts during 2010. A few of the decisions decide matters of first impression or appear to have significant precedential value. Others illustrate and confirm settled points of law, are instructive for the types of legal issues that arise in a corporate law practice, or are typical of claims and defenses that are asserted in business organization disputes.

The article is divided into two parts—first, this Introduction and Overview, which catalogs the 2010 Georgia business organization decisions covered in the article with a brief description of its principal rulings and, second, a Discussion of Case Law Developments, which discusses the decisions in more detail, with some analysis where warranted.

In both parts, the decisions are organized in sections, first, by entity type—decisions that focus on corporations, limited liability companies and partnerships—and, second, by business transactions and litigation issues that are generally common to all forms of business organization. A final section covers selected decisions handed down in 2010 by the Georgia Business Court. Following is a brief summary of these developments.

## Duties and Liabilities of Corporate Directors, Officers and Employees

*Holmes v. Grubman*, 286 Ga. 636, 691 S.E.2d 196 (2010), was probably the year's most far-reaching decision. In that case, the Supreme Court of Georgia, responding to a certified question from the U.S. Court of Appeals for the 2nd Circuit, held that Georgia common law recognizes "holding claims," claims for fraud and negligent misrepresentation by shareholders who forbear selling stock in public companies in reliance on misrepresentations. The Court also established the parameters and requirements for public company holding claims, namely that the misrepresentation must be "directed at" the plaintiff through a "direct communication," and the plaintiff must plead and prove "specific reliance" consisting of actions indicating that the plaintiff actual-

ly and justifiably relied on the misrepresentation. In response to other certified questions, the Court also addressed the issue of proximate cause in the public company holding claim context and the limited fiduciary duties that a stockbroker owes its customer.

Several decisions in 2010 addressed various aspects of standing with regard to claims against corporate officers and directors. In *Barnett v. Fullard*, 306 Ga. App. 148, 701 S.E.2d 608 (2010), the Court of Appeals of Georgia reaffirmed that claims for misappropriation of corporate assets are derivative, not direct claims. The Court also ruled in that case that claims to enforce shareholder inspection rights must be asserted against the corporation, not against directors and officers. In *In re Integrity Bancshares, Inc.: Lubin v. Skow*, 382 Fed. App'x. 866 (11th Cir. 2010), the U.S. Court of Appeals for the 11th Circuit, also addressing the distinction between direct and derivative claims, ruled that the Federal Deposit Insurance Corporation as receiver is the exclusive owner of claims against officers of a failed bank. The trustee in bankruptcy of the bank's holding company can assert claims against the holding company's officers only for distinct holding company level conduct. In *Heard v. Perkins*, 441 B.R. 701 (N.D. Ala. 2010), the U.S. District Court for the Northern District of Alabama held that deepening insolvency claims are not cognizable under current Georgia law, because duties to creditors in Georgia are limited to a prohibition against self-preferential conduct. The court also held that under current federal pleading standards, the business judgment rule may be considered on a motion to dismiss breach of fiduciary duty claims.

## Decisions on Personal Liability of Corporate Officers for Corporate Conduct

The courts in 2010 addressed officer liability issues under Georgia common law and federal and state statutes in a variety of contexts. In *Barrs v. Acree,* 302 Ga. App. 521, 691 S.E.2d 575 (2010), the founder and registered agent of a company was held not liable for an employee's conduct through agency by implication or ratification. In *Alexander v. Hulsey Environmental Services, Inc.*; *LHR Farms, Inc. v. Alexander*, 306 Ga. App. 459, 702 S.E.2d 435 (2010), the Court of Appeals of Georgia confirmed that corporate officers may be held personally liable for the corporation's conduct constituting a nuisance when they direct or participate in that activity. The 11th Circuit reaffirmed in *Goolsby v. Gain Technologies, Inc.*, 362 Fed. App'x. 123 (11th Cir. 2010), that officers cannot be held personally liable for a corporate tort without directing or participating in the act. As to statutory liabilities, in *Joe Hand Promotions, Inc. v. Blanchard*, 2010 WL 1838067 (S.D. Ga. May 3, 2010), the court found personal liability for pirating of sports broadcasts under the Communications Act of 1934 based on a bar owner's right and ability of supervision and financial interest; *Ojeda-Sanchez v. Bland Farms, LLC*, 2010 WL 3282984 (S.D. Ga. Aug. 18, 2010), holds that personal liability for violations of the Fair Labor Standards Act requires operational control; and in *In re Haysman: Haysman v. State of Georgia,* 432 B.R. 336 (N.D. Ga. June 28, 2010), the chief executive officer and 50 percent shareholder of a corporate taxpayer was held not liable for unpaid state sales and withholding taxes when his actual role, authority and duties were inconsistent with his corporate titles.

## Corporate Stock Ownership and Rights

*Rakusin v. Radiology Associates of Atlanta, P.C.*, 305 Ga. App. 175, 699 S.E.2d 384 (2010), considered the statutory requirements for the valuation and redemption of stock of a deceased shareholder of a Georgia professional corporation under O.C.G.A. § 14-7-5(c), which utilizes dissenting shareholder procedures from the Georgia Business Corporation Code. Strictly construing the statutes, the Court of Appeals of Georgia held that under GBCC § 14-2-1325(c), the deceased shareholder's estate was not deemed to have accepted the corporation's required offer of payment when the executrix failed to respond within 30 days, because the offer was not contemporaneously accompanied by required financial information and was thus invalid. In an unpublished decision, *Graphic Packaging Holding Co. v. Humphrey*, 2010 WL 4608775 (11th Cir. Nov. 16, 2010), the 11th Circuit held that a corporation failed to show that it committed a mistake when it valued the restricted stock units of its retired president as of the date of his retirement, rather than the date of payment, because there was no past practice of valuing restricted stock units of key employees who were subject to a six-month holding period under § 409A of the Internal Revenue Code. The Court of Appeals of Georgia in *Ansley v. Ansley*, 307 Ga. App. 388, 705 S.E.2d 289 (2010), held that O.C.G.A. § 14-2-732(b)(3), which now imposes a 20-year limit on duration of shareholder agreements in non-publicly held corporations, does not apply retroactively to a pre-existing shareholder agreement with no expiration date. The court also ruled that the four-year limitations period for breach of oral contract to devise stock to surviving shareholders began to run when the shareholder died intestate and that an oral agreement among the shareholders resulted in a waiver of the right to enforce buyout provisions under a prior written agreement. In *Vidalia Outdoor Products, Inc. v. Higgins*, 305 Ga. App. 836, 701 S.E.2d 217 (2010), the Court of Appeals of Georgia ruled that whether a stock purchase agreement was materially breached and could be unilaterally rescinded by the purchaser for the company's failure to issue a stock certificate was an issue of fact, given the silence of the agreement on that point. In *In re Value Family Properties-West Atlanta, LLC: Value Family Properties-West Atlanta, LLC v. Harrison*, 2010 WL 2025592 (Bankr. N.D. Ga. March 30, 2010), the court rejected an effort by a former shareholder to characterize his claim for default under a buy-out agreement as an unsecured debt of the bankrupt issuer, even when the shareholder limited his claim to unpaid past due interest under the agreement. The court held that his claim retained its character as an equity claim and was thus subject to subordination under 11 U.S.C. § 510(b).

## Nonprofit Corporations

In *Bailey v. Stonecrest Condominium Association, Inc.*, 304 Ga. App. 484, 616 S.E.2d 462 (2010), the Court of Appeals of Georgia held that a decision by a condominium association board of directors to prohibit members from leasing their units, that was allegedly motivated by racial discrimination, could constitute a breach of fiduciary duty under established standards for judicial review of corporate decisions, namely whether the exercise of corporate decision-making authority was procedurally fair and reasonable and whether the substantive decision was made in good faith and was reasonable, not arbitrary and capricious.

## Limited Liability Company Developments

In *Giacomantonio v. Romagnoli*, 306 Ga. App. 26, 701 S.E.2d 510 (2010), the Court of Appeals of Georgia held that a merger clause in an LLC operating agreement barred all tort claims based upon pre-contract misrepresentations, whether characterized as fraud or breach of fiduciary duty. The court in *Kim v. First One Group, LLC*, 305 Ga. App. 861, 700 S.E.2d 729 (2010), held that an LLC manager's oral resignation was effective where the LLC operating agreement did not establish a procedure for resignations. LLC members' request for judicial dissolution of an LLC in *Simmons Family Properties, LLLP v. Shelton*, 307 Ga. App. 361, 705 S.E.2d 258 (2010), was held not to be subject to an arbitration clause in the operating agreement. The court found the failure to conduct meetings to be evidence of deadlock sufficient to support a finding under O.C.G.A. § 14-11-603 that the LLC was unable to carry on business in conformity with the operating agreement.

## Partnership Law Developments

In *Valone v. Valone*, 2010 WL 4437076 (N.D. Ga. Nov. 1, 2010), the U.S. District Court for the Northern District of Georgia held that a limited partnership could not be judicially dissolved because it was able to fulfill the purpose for which it was organized. The court rejected a claim of deadlock where a majority of partners acting as a bloc effectively controlled the partnership. *Winchester v. Newlin*, 436 B.R. 236 (M.D. Ga. 2010), illustrates the difficulties involved when a partner, in an ongoing professional practice that is embroiled in disputes between the partners, files for bankruptcy. The court upheld an assignment by the bankruptcy trustee of a turnover claim against the debtor under 11 U.S.C. § 542(a) for partnership payments allegedly based on pre-petition operations when the assignment was part of the trustee's sale of the debtor's partnership interest to his former partner.

## Transactional Cases

In *Trawick Construction Company, Inc. v. Georgia Department of Revenue*, 286 Ga. 597, 690 S.E.2d 601 (2010), the Supreme Court of Georgia held that given the interplay of Georgia and federal tax laws provisions, a Subchapter S corporation would not be liable for tax when selling shareholders are able to avoid tax liability by electing to treat their sale of stock as a deemed sale of all corporate assets. This decision was promptly overruled by the Georgia Legislature. In a case involving the sale of the Atlanta Hawks and Atlanta Thrashers professional sports franchises, *Turner Broadcasting System, Inc. v. McDavid*, 303 Ga. App. 593, 693 S.E.2d 873 (2010), the Court of Appeals of Georgia held that an expired letter of intent that conditioned an asset purchase transaction on execution of formal documentation did not preclude a subsequent binding oral contract for the sale of the teams. The court also rejected arguments that the agreement was barred by the statute of frauds.

Two 2010 transactional decisions involve statutes rarely considered by the courts. In *Deutsche Bank National Trust Company v. J.P. Morgan Chase Bank, N.A.*, 307 Ga. App. 307, 704 S.E.2d 823 (2010), the Court of Appeals of Georgia interpreted O.C.G.A. § 14-5-7, a statute concerning corporate authority required in transactions involving property interests. It held that, unlike the requirements for a deed, under O.C.G.A. § 14-5-7(b) a release of a lien can be executed by any corporate officer. *Walker v. Amerireach.com*, 306 Ga. App. 658, 703 S.E.2d 100 (2010), dealt with claims under Georgia's Sale of Business Opportunities Act, which was enacted to prevent and prohibit fraudulent and deceptive practices in the marketing and sale of business opportunities and which is enforceable in part through Georgia's Fair Business Practices Act; among other things the court held that the Fair Business Practices Act itself creates separate and distinct causes of action, independent of other possible theories of recovery.

## Litigation Issues

### Jurisdictional Issues, Administrative Dissolution and Access to the Courts by Foreign Business Organizations

In *GC Quality Lubricants, Inc. v. Doherty, Duggan & Rouse Insurors*, 304 Ga. App. 767, 697 S.E.2d 871 (2010), the Court of Appeals of Georgia reconciled two provisions of the GBCC, O.C.G.A. § 14-2-1422(d), which provides for retrospective reinstatement of a corporation administratively dissolved by the secretary of state upon its registration and payment of fees and § 14-2-1410, which bars a corporation's assertion of all claims that have not been brought within two years of dissolution. The court held that § 14-2-1422(d) cannot revive claims barred under § 14-2-1410. *Hall v. Sencore, Inc.*, 302 Ga. App. 367, 691 S.E.2d 266 (2010), held that a single Georgia transaction by a foreign corporation does not trigger the registration requirement under O.C.G.A. § 14-2-1501. By contrast, *Westmoreland v.*

*Jordan Partners, LLLP*, 306 Ga. App. 575, 703 S.E.2d 39 (2010), held that, under O.C.G.A. § 14-8-54(a), a foreign limited liability partnership that is transacting business in Georgia could not maintain an action without obtaining a certificate of authority to do business in the state. In *Cashatt v. Merrimac Assoc., Inc.*, 2010 WL 3906856 (N.D. Ga. Sept. 30, 2010), the Court of Appeals of Georgia examined the contacts that a foreign corporation made in its efforts to explore business opportunities within the state, including its representation by the plaintiff who was suing it for compensation, and held that it was transacting business for purposes of Georgia's long arm statute.

## Director and Officer Liability Insurance Decisions

In *Cox Communications Inc. v. National Union Fire Insurance Co. of Pittsburgh, Pa.,* 708 F. Supp. 2d 1322 (N.D. Ga. 2010), *on motion for reconsideration,* 2010 WL 5092282 (N.D. Ga. Dec. 8, 2010), the court ruled in favor of the insureds, holding that each lawsuit was a separate "claim" for purposes of determining whether it was "first made" within the policy period, that the prior notice exclusion was not triggered by another company's giving notice under its policy, and that an exclusion in the outside directors coverage provisions for claims "by" the outside entity did not apply to a creditors' committee that obtained the outside entity's claims by assignment. In *Southwest Georgia Financial Corp. v. Colonial American Casualty and Surety Co.*, 397 Fed. App'x. 563 (11th Cir. 2010), D&O coverage for a lead lender's settlement payments to participating banks was held barred by loan carve-out from the definition of "loss." *MedAssets, Inc. v. Federal Insurance Company*, 705 F. Supp. 2d 1368 (N.D. Ga. 2010) held that an intellectual property exclusion in a D&O policy does not bar coverage for claims for misappropriation of confidential information; an insured may obtain judgment against an insurer in excess of policy limits as consequential damages for the insurer's breach of the contractual duty to defend without establishing bad faith.

## Derivative Action Procedure

In *Pounds v. Brown*, 303 Ga. App. 674, 695 S.E.2d 66 (2010), the Court of Appeals of Georgia held that a court-approved derivative action settlement prevents a corporation's board from taking action inconsistent with the terms of the settlement agreement.

## Nondischargeability of Breach of Fiduciary Duty Claims

The U.S. Bankruptcy Court for the Middle District of Georgia in *In the Matter of Conner: Davis v. Conner*, 2010 WL 1709168 (Bankr. M.D. Ga. April 23, 2010), determined that intentional breaches of fiduciary duty by a partner were nondischargeable in the partner's bankruptcy proceeding under 11 U.S.C. § 523(a)(6), but not under § 523(a)(4) because that provision requires a technical trust fiduciary relationship not satisfied by the fiduciary relationship among partners. Similarly, in *In re Robustelli: Lou Robustelli Marketing Services, Inc. v. Robustelli*, 430 B.R. 709 (N.D. Ga. 2010), a debtor's misappropriation of corporate assets was held nondischargeable under 11 U.S.C. § 523(a)(6).

## FDIC Receivership Decisions

The Court in *Silverton Mortgage Specialists, Inc. v. Silverton Financial Services, Inc.*, 2010 WL 2490955 (N.D. Ga. June 15, 2010), permitted a bridge bank, formed by the FDIC to acquire a failed bank's assets and liabilities, to open a default in a trademark infringement action; the court also permitted the FDIC as receiver to be substituted for the failed bank. *McClelland v. First Georgia Community Bank*, 2010 WL 3199349 (M.D. Ga. Aug. 12, 2010), addresses at length judicial review of the FDIC's receivership administrative claim procedures in the context of the FDIC's denial of a former bank director's claims for compensation for loss of his bank-owned life insurance policy.

## Alter Ego, Piercing the Corporate Veil and Other Forms of Secondary Liability

In *Guarantee Insurance Co. v. Merchants Employer Benefits*, 2010 WL 3937325 (M.D. Ga. Sept. 30, 2010), the U.S. District Court for the Middle District of Georgia found evidence sufficient to find that a company's owner used the company as an *alter ego* without regard for its separate corporate entity. The Court of Appeals reached the opposite result in *Ramcke v. Georgia Power Co.*, 306 Ga. App. 736, 703 S.E.2d 13 (2010), finding that a parent corporation could not be held liable for negligence of subsidiaries because there was insufficient evidence to pierce the corporate veil or show that the parent acted as subsidiaries' *alter ego*.

## Professional Liability Claims in Business Organization and Transactional Context

In *Alston & Bird LLP v. Mellon Ventures II, L.P., et al.,* 307 Ga. App. 640, ___ S.E.2d ___, 2010 WL 5116611 (Dec. 16, 2010), a venture capital investor's claims for legal malpractice in drafting a tag-along clause was held subject to a comparative negligence defense where the investor and its attorney reviewed the clause prior to closing. In *Kitchen v. Hart*, 307 Ga. App. 145, 704 S.E.2d 452 (2010), the Court of Appeals of Georgia ruled that an attorney's alleged negligence in drafting a collateralization agreement with respect to his clients' obligations on three promissory notes was not a proximate cause of their joint and several liability on entire debt; the clients also failed to adduce expert or fact evidence sufficient to raise an issue of fact on their claim for lost profits.

# 2010 Decisions From the Georgia Business Court

Selected decisions handed down by the Georgia Business Court during 2010 are reported at http://digitalarchive.gsu.edu/col_

businesscourt/. The following decisions concern issues within the scope of topics covered by our review of the decisions by the Georgia appellate courts and the federal courts discussed above:

*Payless Car Rental Systems, Inc. v. PRG Group, LLC*, Civil Action No. 2007-CV-129218, Superior Court of Fulton County (Jan. 7, 2010, Bonner, J.)—Summary judgment granted dismissing veil piercing and fraudulent transfer claims against sole managing member of LLC for lack of evidence.

*ING USA Annuity and Life Insurance Company v. J.P. Morgan Securities Inc*, Civil Action No. 2007-CV-135490, Superior Court of Fulton County (Aug. 11, 2010, Bonner, J.)—A disclaimer in a private placement memorandum and the investor's extensive due diligence were held not to preclude reliance on alleged misrepresentations. In a separate order, the court found issues of fact on elements of plaintiffs' fraud claims, ruling that rescission was unavailable against an investment banker under the former Georgia Securities Act of 1973 and that the plaintiff would thus have to prove causation of damages.

*Cannon v. H&R Block Inc.; Cain v. H&R Block Inc.*, Civil Action Nos. 2007-CV-137010 and 2009-CV-162592, Superior Court of Fulton County (Feb. 24, 2010, Bonner, J.)—Minority shareholder claims for breach of fiduciary duty and fraud were held not to be barred by exclusive, binding valuation provisions of shareholders agreement; claims by option holders allegedly fraudulently dissuaded from exercising options were allowed to proceed over arguments that the options were too contingent and the claims for damages too remote and speculative to support a claim.

*SCS Fund, LP v. Odom,* Civil Action No. 2008-CV-152062, Superior Court of Fulton County (April 23, 2010, Long, J.), *aff'd.*, Appeal No. A-10A-2161 (Ga. App. Mar. 4, 2011)—Claims for fraud, negligent misrepresentation and securities fraud in exchange of assets for stock and holding claims failed for lack of actionable misrepresentations, material omissions or a duty to disclose.

*Hawk v. Odom,* Civil Action No. 2009-CV-162588, Superior Court of Fulton County (April 23, 2010, Long, J.), *aff'd.*, Appeal No. A-10A-2213 (Ga. App. Feb. 24, 2011)—Claims for fraud, negligent misrepresentation and securities fraud in sale of stock failed where plaintiffs could not prove reliance on misrepresentations and defendant owed no duty to disclose because it was an arms-length business transaction.

*An v. Hanna,* Civil Action No. 2009-CV-178060, Superior Court of Fulton County (Aug. 16, 2010, Long, J.)—Limited discovery permitted in derivative action where defendants filed a motion to dismiss under O.C.G.A. § 14-2-744(a) based on decision of special litigation committee not to pursue claim.

*Ragland v. Sevex North America, Inc.*, Civil Action No. 2008-CV-153555, Superior Court of Fulton County (Jan. 25, 2010, Long, J.)—Dispute resolution process in stock purchase agreement held not to bar suit.

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# Lawyers Without Rights:

## Jewish Lawyers in Germany under the Third Reich

by Jeanney Kutner

In April, the State Bar of Georgia hosted an extraordinary exhibit created by the German Federal Bar: Lawyers Without Rights—Jewish Lawyers in Germany under the Third Reich, an exhibition that provides the historic account of the lives and fates of Jewish lawyers during Nazi rule in Germany, highlighting the need to protect lawyers and the rule of law around the world.

Three receptions of Bar-related groups, a Board of Governors dinner and the attendees of the Spring Meeting of the Board of Governors all enjoyed the exhibit that was available April 13-22. During this time, it was also available to any interested members of the public.

"We are indebted to the German Federal Bar, the American Bar Association and its Section of International Law, whose immediate past chair is Georgia's own Glenn Hendrix, and ABA State Delegate Allan Tanenbaum, for bringing 'Lawyers Without Rights' to the Bar Center," State Bar President S. Lester Tate III said in a press release. "This compelling exhibition consists of a series of stories about how Nazi Germany dealt with a huge percentage of German lawyers—those who happened to be Jewish. Prior to the release of this collection, the details of these attacks and how they enabled the Holocaust to continue were largely unknown."

Photo by Sarah I. Coole

Vice President of the German Federal Bar, Norbert Westenberger.

At the opening reception, sponsored by Arnall Golden Gregory LLP, Norbert Westenberger, vice president of the German Federal Bar, delivered the following remarks:

*Ladies and gentlemen, it is a great honor and a pleasure for me to open this exhibition on behalf of the Bundesrechtsanwaltskammer, the German Federal Bar, here in Atlanta.*

*I first of all want to express my deep appreciation to all those who made it possible to show this exhibition here in Atlanta.*

*It is a milestone in the history of German advocacy. It took a long time after 1945, more than 50 years, until the German lawyers became more and more conscious of their own history, so they started to clear off the past of their history.*

*The initiative of this exhibition has to be mentioned, as it was a lawyer from Tel Aviv who gave the first idea for this work. It was my dear friend Joel Levi who asked the Bundesrechtsanwaltskammer in 1995 for a list of the Jewish Rechtsanwälte who were excluded from exercising their profession during the Nazi regime. Just a list of names. And he was right to ask, because such a list, if I may quote Joel, "would have been a sign that the expulsed and murdered Jewish colleagues had not been forgotten."*

*And that is how it all began, because there was not such a list.*

*Research work was started by the bar, and the result was a very informative and professional book about the situation of Jewish lawyers in the Third Reich in Berlin. This documentation was the basis of our exhibition.*

*The Bundesrechtsanwaltskammer started this exhibition to go around Germany. And wherever this exhibition was shown, there was some research done and published, and mostly new information became part of this exhibition.*

*This research brought a lot of facts and information, but we are afraid, we are sure, that also a lot of facts have been lost forever.*

*The Holocaust, the greatest tragedy of the 20th century, destroyed the outstanding cultural elite of Europe. Looking at the German and Austrian Jewry at the end of the 19th century and the beginning of the 20th century, with people like Martin Buber, Fritz Haber, Gustav Mahler, Sigmund Freud, Kurt Eisner, Max Liebermann, Albert Einstein and Stefan Zweig, we see that this group was the essence of Modernism in all aspects of cultural life – sciences and arts, engineering, banking, theatre, music, journalism and, last but not least, law.*

*The number of Jewish lawyers in Germany was relatively high in the '20s and continuously increasing. In 1933, almost half of the practicing lawyers in Germany were Jewish. In big cities like Berlin, the ratio was even higher: Out of 3,400 lawyers, about 2,000 were Jewish.*

*(Just to give you an idea how it was outside Germany: In Canada in 1931, there were 350 Jewish lawyers; in Paris, 400 out of 2,500 lawyers.)*

Rechtsanwalt Dr. Fritz Glaser and family, 1925. Glaser was a lawyer in Dresden. On account of his faith and various clients he had represented, he was prohibited to practise after 1933. Glaser survived. After 1945 he was re-admitted as a lawyer. Later, in the GDR, Glaser was again ostracized from society because he represented the interests of a Nazi judge. *(Taken directly from the exhibit.)*

*But after the Nazis came to power, Jews were excluded from all areas of social life. Already in March 1933, Jewish lawyers, judges, law professors and civil servants throughout the German judiciary system were disbarred and stripped of their right to practice law.*

*One would have expected most of the disbarred Jewish lawyers to leave Germany immediately. But surprisingly enough to us today who know about the outcome of the Holocaust, they did not. Some of them believed all this to be a temporary state of affairs, some feared emigration, and there was also a financial aspect to the new situation: Not all lawyers were wealthy enough to live without any professional income for a longer period of time abroad.*

*And finally, don't forget the difficulty of being welcomed in other countries.*

*This exhibition reflects this time in Germany when individual rights and the rule of law were utterly neglected. Many non-Jewish German lawyers in those days kept silent. They did not say a word. There was no real resistance. Most of them did not even try to help their colleagues. Why? We do not know, and this exhibition does not give an answer to this question, either. They failed to act, and so did the lawyers' organizations.*

Journey to death: Dr. Stern, photographed during the deportation of 9 May 1942. (The photographs were taken on official order for a photographic chronic of the city of Eisenach, documenting the events between 1935 and 1942. The pictures of the deportation—taken by an unknown photographer—are part of a series of 20 photographs entitled "Die Exmittierung der Juden" (The eviction of the Jews) which is part of the chronic. *(Taken directly from the exhibit.)*

Munich lawyer Dr. Michael Siegel (1882-1979) had complained to Munich Police Headquarters in early April 1933, when one of his clients was taken into 'protective custody'. He had the legs of his trousers cut off and was led through Munich's inner city streets barefoot with a board around his neck that read: "I will never complain to the police again!" Siegel managed to flee to Peru as late as 1940, where he died in 1979. *(Taken directly from the exhibit.)*

*What the exhibition does, however, is remind us to raise this question again and again.*

*And there's another question left unanswered: Why did it take more than 50 years after the Holocaust before this exhibition was first displayed, before German lawyers became conscious of their own history? All attempts to justify or excuse this delay are feeble. It simply is a disgrace! So it was the task of my generation to do the necessary research work on the individual fate of our Jewish colleagues.*

*(Some years ago, I was member of a delegation of German lawyers visiting Israel, and among many other places, we also visited Yad Vashem. It was a deeply moving experience. Yad Vashem confronts us with a feeling of deep shame about what mankind is able to do – and pretended to do in the name of the German people. This must never be forgotten, especially at a time when in many parts of the world the Holocaust is increasingly denied and its significance is played down. The central message of Yad Vashem is simple but all-important: remember. And this exhibition is dedicated to be part of the process of remembrance. Never, ever forget the burden of responsibility of our own country's history. The exhibition shows what happens if lawyers fail in their job.)*

*This exhibition is the same as we have shown in Jerusalem, in Tel Aviv, Haifa, New York, Los Angeles, Toronto, Montreal, Vancouver, Mexico City, London, Rome and other places in the world. It exists now in English, Spanish, French and German.*

*It is a documentation of the faith of individual lawyers, giving us a very strong impression of their lives. It is not first of all an exhibition about well-known persons, about prominent lawyers known to everybody. No, it is a documentation to learn their names, learn their history, that is preserving the memory of these colleagues; they shall not be forgotten this way.*

*The exhibition has also the task, the duty, the object to give a sign that we want to give back dignity to all the Jewish lawyers of German origin who were discriminated against during the Nazi regime.*

*And finally let me mention another purpose of this exhibition, and I think it should help us for the future: It is a chance for us to build and deepen friendship between lawyers in other countries.*

*We all need this network of personal friendship. So let us see this exhibition also as a messenger of friendship to build and improve our network, to come together and to become friends. Because as lawyers, we are committed to the principle that society must be ruled by law, not by the passion of the mob, nor by the ambitions of powerful leaders, nor by the terror of dictators.*

*We have learned through painful experience, and this exhibition is a very impressive reminder, that societies not governed by the rule of law are more likely to engage in tragic violence. So we must do what we can to protect and advance human rights and freedom trough the rule of law, so never happens again what was the case in Germany between 1933 and 1945.*

*And let me end with a last remark: I do believe that any attack on the independence of the legal profession in any country is an attack on the legal profession in all countries. And any harm to the people of one country because of the failure of the rule of law is harm to all of humankind. We all must therefore stand united to combat these attacks so that never again will exist any lawyer without rights.*

Amazingly, 20 years ago, on April 12, 1991, the late Charles L. Weltner, then an associate justice of the Supreme Court of Georgia, delivered a speech at the Holocaust Remembrance Day at the State Capitol that encapsulated the message of this remarkable exhibit:

*Yom Hashoa is a solemn observance, and I shall not diminish it by a multitude of words. It is a day of remembrance – so that by recalling the savagery of the past we may come closer to avoiding it in the future. The world needs to remember the Holocaust. As much as it may prefer to look the other way, the world needs to force itself to remember.*

*I cannot think of Yom Hashoa without thinking of the Yad Vashem museum, outside the Old City of Jerusalem. Many of you have been there. It is a place of sadness and of anguish, and many of you have wept there. I am sure that everyone who visits it comes away with differing recollections. I remember the iron-grey statue on the grounds that seems like a three-dimensional Guernica. I remember a pile of tiny shoes that I saw inside the museum. There were other things – frightening things. But one thing I saw there I will never forget. It was neither art nor article, but the enlargement of a photograph.*

*The subject of this photograph was a group of German judges, perhaps as many as eight. The three that appear in the foreground are seen clad in their velvet-paneled robes of office. They are wearing braided judicial caps, and each holds up his right hand. Each displays on his robe the chilling eagle symbol. These judges (the caption says) are "swearing an Oath to the Führer."*

*That picture is burned into my memory.*

*When the judicial system of any government is sworn to uphold the will (or caprice) of a single leader, it has become desperately corrupt, and there is no health in it. No longer is there any right that is to be protected, or any immunity to be preserved. The Law is not, then, the handmaiden of justice, nor the bulwark of liberty, nor the shield of freedom. It is not the protector of constitutions, or the defender of public interests, or the preserver of public precepts – not even of bad precepts. The Law has become nothing more than the will of the Führer. A heritage forged through centuries of labor by scholars, artists and theologians has been surrendered to madness.*

*What follows in the train of that utter corruption is the horror of Auschwitz, of Buchenwald and of Treblinka.*

*As that haunting photograph reminds, the judges of the Third Reich looked not to their learning or their lawbooks. They ceased to consult their common experience and their wisdom. Instead, they relied only upon the military power of the German state; they consulted only the will of the Führer. Among the things that came in the wake of their tragic surrender is that pile of tiny shoes, kept for a remembrance at Yad Vashem.*

*Yom Hashoa speaks to the world today, as the prophet Isaiah spoke to Jerusalem:*

*Woe to those who go down to Egypt for help and rely on horses, who trust in chariots because they are many and in horsemen because they are very strong, but do not look to the Holy One of Israel or consult the Lord! (Is. 31:1.)*

*Charles L. Weltner*
*Yom Hashoa Observance*
*April 12, 1991*
*State Capitol*

Weltner's moving speech was read by Jeanney Kutner, his law clerk from 1985 until his death in 1992, at two of the receptions held at the Bar Center, and read by Supreme Court of Georgia Chief Justice Carol Hunstein at the Board of Governors dinner.

Since it was first displayed in 2000, "Lawyers Without Rights" has been shown in more than 70 cities in Germany and all over the world, including San Francisco, Boston and Chicago. The State Bar of Georgia was honored to have been able to host this very important exhibit. GBJ

**Jeanney M. Kutner**, a graduate of Emory University School of Law, is a practitioner of family law and a mediator. She served as a judicial officer with the Family Division of Fulton County Superior Court from its inception in 1998 through 2008.

# 2011 Legislative Session: One for the Record Books

by Tom Boller

The Georgia General Assembly adjourned sine die on April 14, bringing down the curtain on a very productive session for the legal profession and the administration of justice. While diminished state revenues continued to present severe challenges for the judicial branch and all areas of state government, substantial progress was made on a number of key initiatives affecting our courts and the practice of law.

Most notable was passage of landmark legislation modernizing Georgia's evidence code, improvements in the governance and accountability of our statewide public defender program and important revisions to Georgia's statewide jury selection system.

Nearly 25 years ago, the State Bar began the process of updating Georgia's evidence code by drafting legislation that proposed a new evidence code, using the federal rules as a model. This multi-year effort resulted in many hours of public hearings and legislative committee meetings, consultations and negotiations with a wide variety of interest groups and revisions to perfect the legislation. On the final day of the 2011 session, the Senate gave final approval of HB 24 by a vote of 50-3. The House of Representatives had approved the measure on Feb. 28 by a vote of 162-5.

Photos by Sarah I. Coole

Before signing important legislation into law at the Bar Center on May 3, Gov. Nathan Deal and State Bar President Lester Tate address those in attendance.

"This was truly a statewide, inclusive process that involved the Georgia Chamber of Commerce, judges, health care professionals, the public safety community and attorneys reflecting all areas of criminal and civil practice," said State Bar President Lester Tate. "This

success demonstrates what can be achieved when we all work together for the common good."

While the State Bar, led by Tom Byrne, chair of the Bar's Evidence Study Committee, and Paul Milich, reporter for the committee, was the catalyst for modernizing the evidence code, the "heavy lifting" of bringing all stakeholders together and resolving difficult issues was done by our elected leaders in the General Assembly. No one deserves more credit for his dedication and leadership than Rep. Wendell Willard (R-Sandy Springs), chair of the House Judiciary Civil Committee, who worked tirelessly on this project. Willard, with the support of Speaker David Ralston (R-Blue Ridge), Rep. Ed Lindsey (R-Atlanta), Rep. Mary Margaret Oliver (D-Decatur), Rep. Rich Golick (R-Smyrna) and many others, guided the new rules through the House. Senate Judiciary Chair Bill Hamrick (R-Carrollton), Lt. Gov. Casey Cagle, President Pro Tem Tommie Williams (R-Lyons), Sen. George Hooks (D-Americus), Sen. John Crosby (R-Tifton), Sen. Ronald Ramsey (D-Decatur) and many others led the effort in the Senate. Additionally, Gov. Nathan Deal, who as a state senator had sponsored the original version of the new rules more than 20 years ago, encouraged and supported this successful effort in 2011. We owe them all our sincerest thanks and appreciation.

Two other very important measures affecting the administration of justice were passed in the 2011 session. HB 238 revises the operation and governance of the Georgia Public Defenders Standards Council. In 2010, Golick, chair of the House Judiciary Non-Civil Committee, created a working group with representatives of the State Bar, the county commissioners, the Georgia Public Defenders Standards Council and public defenders to develop proposals for his consideration that addressed the governance, operations and handling of conflict cases in the statewide public defender system. Those proposals, many of which were included in the adopted version of the legislation, will bring needed improvements to the indigent defense system in Georgia and will enable our state to meet its constitutional responsibilities in providing legal representation for indigent criminal defendants. The State Bar thanks Golick for including us on the working group, as well as the Bar members who served on the working group, Past President Bryan Cavan and Henry Walker, for their hard work and valuable contributions.

Gov. Nathan Deal signs into law the Evidence Code Bill of 2011 (HB 24), the Indigent Defense Bill of 2011 (HB 238) and the Jury Composition Bill of 2011 (HB 415).

Working with a broad-based committee of the judicial branch, Justice Hugh Thompson spearheaded the development of legislation to update and modernize the jury selection process in Georgia. HB 415, sponsored by Rep. Alex Atwood (R-Brunswick) and Sen. Bill Cowsert (R-Athens), requires the superior court clerks to establish and maintain a statewide master jury list. This system will expand the eligible jury pool, eliminate "forced balancing," be more economical and ensure that Georgia juries appropriately reflect Georgia's diverse citizenry.

In addition to these three important legislative accomplishments, the State Bar successfully worked on passage of legislation that reduced the copying fee for records on appeal from $10 per page to $1 per page, increased funding for the JQC, maintained funding for other vital judicial branch programs and worked on many other legislative issues. For a complete review of all Bar-endorsed legislation and other legislative issues of interest to attorneys in the 2011 session, visit the State Bar's website at www.gabar.org/programs/legislative_program/.

Numerous members of the General Assembly, especially the lawyer-legislators, are to be commended for their service and leadership in supporting our courts and the judicial branch of government and for making the 2011 session a very successful one for the State Bar. Their efforts in representing the best interests of their constituents and those of the entire state epitomize the ideal of lawyers serving the public. Likewise, the State Bar is appreciative of the support of local bar associations across the state, attorneys who voluntarily give their time and expertise to serve on the Advisory Committee on Legislation and legislative committees of the various sections and all attorneys who support the Bar's legislative advocacy program. GBJ

Tom Boller serves as one of the State Bar's lobbyists. He can be reached at tom@gacapitolpartners.com or 404-872-0335.

# Celebrating Its Past and Looking to the Future:

## Committee to Promote Inclusion in the Profession

by Jessica Wang

Today, more than 20 years after its inception, the State Bar Committee to Promote Inclusion in the Profession is celebrating its past and looking forward to an exciting future.

In 1988, the State Bar created a special committee on the Involvement of Women and Minorities in the Profession and charged it with a twofold task: analyzing the role of gender and race in the practice of law and making recommendations on how to improve the status of women and minority attorneys.

In May 1989, one of the committee's first major undertakings was a landmark survey of Georgia lawyers, conducted in three parts, to examine the effects of race and gender on the practice of law. With the assistance of the Survey Research Center of the University of Georgia, whose personnel conducted the survey and prepared the results, the committee solicited information regarding the subjective observations and beliefs of respondents as well as objective evidence of any overtly differential or discriminatory treatment.

The results, released in 1991, covered topics ranging from hiring and advancement to visibility in bar associations and professional organizations to judicial bias against women and minorities. Seventy percent of white men and more than 50 percent of white women reported working in law firms or legal organizations that employed no minority attorneys. Respondents also reported observing sexual jokes or

innuendo, references to women as "sugar" or "sweetheart" and even inappropriate touching of women at law firms or other legal organizations. White men reported the highest incomes, followed by minority men, then white women and minority women, even when taking into account a respondent's years in practice. These findings and others reiterated the need for the committee and shaped its continued work.

Over time, the committee took on new tasks, such as creating its own programming to address the needs of women and racial minorities. The Women and Minorities in the Profession Committee, as it became known, provided a space for lawyers who traditionally were marginalized because of their race or gender.

Recently, the committee formally expanded and restated its purpose, which is to facilitate, analyze and present for consideration initiatives and programs which increase participation, retention and representation of diverse attorneys in the legal profession in Georgia that accurately reflects the makeup of our state. To reflect its dedication to attorneys from all underrepresented populations, including the LGBT community, the committee has also chosen a new name: the State Bar Committee to Promote Inclusion in the Profession.

Chaired by Javoyne Hicks White, the Committee to Promote Inclusion in the Profession is a diverse group of attorneys, women and men, representing various races and backgrounds, and working in a variety of legal settings. To further its purpose, the committee has also restated its goals, with emphasis on supporting both law students and lawyers from underrepresented populations: (1) to ensure that students from underrepresented populations are prepared to pursue a legal career; (2) to increase the number of law school graduates from underrepresented populations; and (3) to increase retention and advancement of lawyers from underrepresented populations.

To further these goals, the committee has a number of activities on its agenda. For law students, the committee is planning a Judicial Clerkship Seminar for law students and recent graduates, and it is exploring opportunities to present the seminar at Georgia law schools. Similarly, the committee is planning a Bar Exam Workshop for area law students and graduates.

For practicing attorneys, the committee recently held a well-received CLE on issues affecting LGBT attorneys, and similar future initiatives are in the works. Likewise, the CLE presented at the 2010 Annual Meeting, entitled "Diversity in a Down Economy: Is There a Point?" was a rousing success and generated enthusiastic audience participation. There will be a CLE presented at the 2011 Annual Meeting as well.

Finally, the 2011 Commitment to Equality Awards held in February were a great success. These awards recognize the efforts of lawyers and legal employers who are committed to providing opportunities that foster a more diverse legal profession for members of underrepresented groups in the state of Georgia. The three awardees were Avarita L. Hanson, of the Chief Justice's Commission on Professionalism; Charles T. Huddleston, of Baker Donelson; and Seth David Kirschenbaum, of Davis Zipperman Kirschenbaum & Lotito. Each of the recipients has demonstrated the same spirit that drives the committee to continue its work.

Through these and other activities, the Committee to Promote Inclusion in the Profession is working to achieve just that—inclusion in the profession. If you are interested in learning more about the committee's work or opportunities to become involved, please contact Sharon Bryant at sharonb@gabar.org or 404-527-8776. GBJ

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## 20th Annual Fiction Writing Competition

The Editorial Board of the *Georgia Bar Journal* is proud to present "Old Friends," by Greg Grogan of Douglasville as the winner of the *Journal's* 20th Annual Fiction Writing Competition. In addition, the *Journal* would like to recognize the contest's runner-up, "How She Set Him Up," by Stacey Leigh Malloy of Wrentham, Mass.

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

# Old Friends

by Greg Grogan

Ike watched as the jury trudged out of the courtroom to begin their deliberations. He looked at the clock and saw that the time had reached 4:15 p.m. Years of experience had taught him that the odds of a jury decision being reached tonight were slim, especially when Judge Botch liked to be at home by 5:30 p.m. He packed his papers into his ancient black briefcase and winked at the court clerk. He stole a glance at the plaintiff's table and saw the three attorneys huddled as if some last-second strategy had crossed their collective mind. Ike walked over and cleared his throat to gain their attention. When they looked up from their chairs, he smiled and stuck out his hand.

"I know it's the custom to wait until after the jury comes back, but I like to go ahead and congratulate my opponent for a hard-fought battle. When the decision comes back, we'll be busy digesting it. I wanted to say you all did a nice job."

Ike went down the table shaking their hands as they mumbled back their appreciation. When he reached the end, he saw the plaintiffs shooting him daggers with their eyes.

He smiled his brightest smile and said, "You picked three very good attorneys. They did a great job with your case, and you should feel very satisfied with their services. I doubt you could have found better representation anywhere else in the city. I just hope my client didn't see their performance, or I may be on the street looking for work."

Photo by Frank Fullard

Ike then turned and walked up to the court clerk. She was shuffling her papers and jumped when she looked up to see him so close to her desk. He gave her his best smile.

"Lucy, it was good to see you again. How's the family?"

"We're all doing well, Ike. It was good to see you again, too. How's your wife doing?"

"We're fine. She's in full retirement mode now and keeps encouraging me to join her. I guess I haven't had my fill yet."

Lucy smiled, and Ike looked up at the judge. Judge Botch was looking down from his throne and over his bifocals at Ike. His black robe and black hair would have made him invisible against the dark black backdrop except for his pale white skin. He and Ike had known each other for years. They had taught at seminars together and had dinners with their wives many times since Ike began practicing law.

The judge asked, as always, "How many years have you been entertaining juries in my courtroom? Mind you, it's always a pleasure."

"I lost count once I passed forever, your Honor."

"I remember you and Dillard just getting started. You two court hounds were always making me work too hard. Quoting laws and cases to me. I spent more time in the library than I did during my school days. Now I know to make the attorneys put their arguments in writing if it's that complicated. Either that or get a clerk to do the research for me. The wisdom of experience."

"I understand. We have paralegals, new attorneys and other workers who do things by computer these days that I don't understand."

The judge smiled and said, "I heard you mention earlier that you don't have many cases heading to trial in the near future. Are you slowing down?"

Ike had been talking to Lucy earlier about the lack of cases heading to trial, but the judge had not been on the bench. Judge Botch loved to leave his microphone activated, and he had a speaker in his office. He could hear everything being said about him by the lawyers. Ike had learned this lesson when he witnessed a criminal defense attorney pay for some of his less than flattering comments.

"No, not slowing down at all. I just have clients unwilling to risk what a jury might say."

Judge Botch gave a nod and excused himself from the courtroom. Ike grabbed his briefcase and walked out the oversized front door. He began the short trek to his office, but after just a few steps he heard a familiar voice.

"Blake, you old war horse. I snuck in the back to watch your summation. I think it was just like I trained you."

"If it isn't my old partner, Dillard Barnes, slumming around the courthouse. It probably was just like you taught only I did it with style."

Both men enjoyed a laugh before Dillard asked, "Did you go over and shake hands with opposing counsel?"

"Absolutely. Best lesson you ever taught."

"And?"

"They looked nervous. They were whispering and planning like the trial was just beginning. Not a smile among the three of them."

Dillard smiled. "Could you smell the stench of defeat?"

"Like the socks in a men's locker room."

"You didn't fall for Botch's old microphone trick, did you? I got chewed out for popping off about a poor ruling. He came tearing out

of his chambers and blasted me in front of the whole courtroom for that."

"No, I always remember it."

Dillard slapped Ike on the back, and they continued walking. Ike looked over at his old partner. He was taller than Ike and had more hair. He still had that little inflated gut but dressed nicely to cover it. Dillard was about 10 years older than Ike, but they behaved more like brothers than business partners.

Ike asked, "Are you free for a celebration drink?"

"Sure, let's go."

"I need to go to the office for a minute so I'll meet you. Twenty minutes at the usual spot?"

"Sure. See you there."

They had reached Ike's office building, so they parted company there. Ike climbed the one flight of stairs and looked at the entry door. Barnes and Blake it read. The firm the two of them had started many years before. Ike pushed open the door and found the office buzzing. He passed the receptionist whose name he could never remember and headed to his office. They had started the firm with just the two attorneys and one secretary and now they had more than 50 attorneys. He couldn't even guess how many people were on staff. As he walked, he received nods and waves. He knew most of the people but not all.

As he neared his door, he heard his name and turned. He looked down the hall and saw Chad Proctor, an attorney who had been with the firm for about 12 years, walking with several other people. One of the others was Rachel Frock, the firm's accountant. Proctor walked up and shook Ike's hand.

"How did court go today?"

Ike flinched and withdrew his hand. He always resented being asked that question by an attorney who never went to court. Proctor was a transactional attorney. He dealt with businessmen and families, but he had never stood before a judge or jury. Ike respected Proctor's work. Respected it enough not to pry, and now Ike felt that Proctor was not returning that same level of respect.

"It went well. I think we're a winner, but you never know. I expect a decision sometime tomorrow around lunch."

"Mr. Blake, it's been a while. I'm Rachel Frock."

"Of course I remember our accountant. You're the one that keeps us out of trouble with the IRS and lets us know if we can pay our staff. I always pay special attention to the person handling the money."

Proctor turned to the third member of his group and said, "Ike, this is Barkley Price. He's a consultant we are bringing in to help us with some future plans. I'd like to talk with you about those plans tomorrow if you have time."

Ike looked at Mr. Price. Price didn't smile or offer his hand. Ike, not quite up to average height, was taller and thicker. Price wore thick glasses and had a pointed nose that led to a thin pair of lips. His demeanor was about as pleasant as a coroner, and he seemed to regard Ike with nothing more than the warmth a scientist might regard a specimen. Ike finished his inspection and nodded to Proctor.

Proctor flashed a phony smile and said, "I won't keep you, Ike. Good luck in court."

Ike put his briefcase on his office table and then walked on down the hall. He came to Dillard's office and looked inside. There were a couple of books and old files on the desk, but otherwise things looked about the same as the day he retired. Ike missed his best friend and mentor being around on a daily basis. He closed the office door and headed for the front door. As he approached it he could hear Proctor talking. He was keeping his voice to a whisper, but it was still loud enough for Ike to hear. He made a detour and walked softly to the side of Proctor's door. He stood on tiptoes and listened.

It was Proctor's voice that said, "I tell you, it's going to come back and bite us. We need to nip this in the bud."

Ike stuck his head in the door. "What's going on? That sounds serious from out here."

Proctor looked up and said, "Not at all. Just an ethics problem we have to address. It's fine now, but I want to tackle it before it spreads. It's part of what I want to talk to you about tomorrow."

Ike nodded and said, "That will be fine. I'm heading out. We'll see you here tomorrow."

Proctor waved and then asked, "Hey, you ever hear from Dillard?"

Ike answered, "Sure, talked to him today. He's the same as always."

Proctor nodded. "If you see him again tell him we think about him all the time around here."

"I'll do it."

Ike walked out and headed down to the bar that sat only four blocks from the office. He spotted Dillard occupying their usual spot. It was where they could look out the window and watch the pedestrians. Dillard ordered wine while Ike had a beer. They toasted to another victory. Ike mentioned it might be premature, but Dillard assured him it wasn't. They discussed the firm, and Ike told Dillard about his conversation with Proctor. Dillard frowned.

"You better watch him. I sometimes think hiring that little snake was one of the worst moves we ever made."

"He's brought in business and handled the personnel. We always hated that."

"He also handles the daily operations and finances. That worries me. We've given him a lot of power, and he enjoys it."

"No arguing that. He's pretty good at it though, and we have never had trouble with his decisions."

"Not yet. He was cautious when we first hired him. He may not be that way now."

Ike threw up his hands. "I get it. I need to double check him. I guess the retired guy can't be bothered?"

Dillard shook his head. "I wouldn't know where to begin. That was always your area."

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They discussed the trial that just concluded and then moved on to other upcoming cases and clients. Ike stayed about an hour before excusing himself to go home. Dillard also rose and told Ike to send Maria his love. Ike promised to do so and headed home. On the short drive home he picked up a bundle of flowers. When he walked in, he smelled a pot roast and vegetables. He put the flowers in a vase on the table and found Maria in the kitchen. She spotted the flowers and smiled.

"I know two things when I see the flowers. You had a good court day, and you had a drink to celebrate. Flowers are both a victory present and an apology for not including me in the party."

Ike rubbed her shoulders as she dipped food on a plate and said, "You know me too well."

"So, did you get the verdict yet?"

"No, but I feel confident. I had a good plan, and the client actually listened to me on this one. I presented everything we wanted, and the jury seemed to be with me. I would be mildly surprised if we didn't win. I try not to be too shocked by juries, but I feel good about this one."

They sat down to eat, and Ike looked around. He listened, but didn't hear anything. His house was normally occupied by two teenagers. Julie, now 19, was a freshman in college who commuted to Atlanta each day. Brendan was 16 and, like most boys his age, never missed a meal. If at home they were usually on the phone talking so energetically they could be heard throughout the house. Ike hated cell phones and was the last holdout, but he eventually succumbed to the pressure and bought his whole family a set.

"Where are the kids?"

"Julie is studying with some classmates. She'll be home around 9 o'clock," she said. "Brendan is at a basketball game. He is still planning on playing next year."

Brendan had broken his leg in a fluke skateboard accident. His spot on the basketball team had been secure but now was assigned to another student. He planned on taking it back during the summer camps. Ike, who loved watching him play, was hoping he might turn more energy to the academic side of school. Ike never considered himself the top student in the class, but he did make good enough grades to go to law school. Times were tougher now, and Brendan wasn't on the best path. Julie he didn't worry about. She was more driven and had big plans for medical school. He was the family's only attorney and probably forever would be.

Maria took her place at the table, and they enjoyed a quiet meal together. They lounged and slowly picked through two helpings while drinking a bottle of their favorite wine. Maria moved over and let Ike continue his earlier rub of her shoulders.

"Well, you haven't mentioned it. Did Dillard show up for court? He usually drops in on you during a trial."

"He did. He says hello. He thinks I've been a little too lax in controlling the firm. I assured him I'd look into it. I also told him it's easy for him to make that complaint while he does nothing."

"What's he complaining about? Isn't everything at the firm going well?"

"Seems to be. He just thinks Proctor is too sneaky. He had this consultant roaming around today, and I overheard Proctor telling him about needing to take care of a problem as quickly as possible. Proctor told me he wants to have a meeting tomorrow. The accountant was there too. It seemed a little strange. I guess I've been a little too busy with the trial to pay enough attention to things. Proctor sure seems to think he's the top dog now."

"Whose name is on the door?"

Ike chuckled. "Right to the bottom line, huh?"

They had a comfortable quiet night and went to bed at an unusually early hour. They read for a little while before Maria put down her book. She squirmed next to him and closed her eyes.

"I hate to tell you this, but I really thought you and Dillard were crazy when you started that firm. You both had pretty good jobs. You made it work though and made it very successful. Don't doubt your instincts if they tell you something's wrong."

Ike nodded and looked up at the ceiling. A consultant, an accountant and a lawyer were all in a room conspiring. It sounded like the start of a bad joke. He turned over all that he knew, but nothing made sense. The firm was bringing in plenty of money, and he had kept a fairly tight watch over expenses. He considered that Proctor mentioned an ethical problem, so it must involve someone's work. He didn't know of any trial or any negotiation that had gone badly. He would have heard about it since most of the clients were his or Dillard's. Some new ones had been brought in with the new attorneys, but everyone knew who made it rain. Clients had never been shy about calling his home to complain about some perceived slight, and he knew that hadn't changed. He tossed around until he decided to sneak downstairs. He listened and heard Maria's steady breathing telling him she was in a deep sleep. He treaded lightly across the floor and avoided all the known spots where it would pop. He turned on his computer and did a search on Barkley Price. He managed to find a biography of the man. He was not an attorney, or at least the biography didn't say he was. He was an efficiency expert who liked dealing with small companies. Ike turned off the computer and opened a drawer with faded sheets of legal pad paper. It was the original agreement he and Dillard had drawn up when they started the firm. It was a laughable four pages, and he wondered why they had never gone to a true expert to have it redone. He read through it for the thousandth time and went

back to bed. He mulled over the possibilities until he finally drifted off to sleep.

When he awoke the next morning, Ike looked around to find Maria had already slipped out for a breakfast meeting with her garden club. She had left him a biscuit and poached egg. He ignored those and drove to the diner that was near the office. He ordered eggs, a biscuit and gravy, and grits. While waiting, he downed a cup of coffee and thumbed through the local paper. His food came, and he put down the paper to eat. As he took his first bite, he looked across the tables and realized that Barkley Price was also in the diner. The two men made eye contact, but Barkley didn't return Ike's nod. Ike turned his attention back to his food but would sneak peeks over to Price. Ike never saw food delivered to the consultant and no one ever joined him. Ike took his time finishing his meal and then wandered over to Price.

"This is one of my favorite haunts. Are you a regular here?"

"No, this is my first time here."

Ike noticed that there was still no sign of food having ever been at the table. He looked Price over again while Price held his gaze steady on Ike's face. After an awkward moment, Ike said it was time for him to get to the office. Price made no move or comment, so Ike turned and walked out. He took a few steps down the sidewalk and decided to duck into the Western Auto store that had been around since he was a kid. He pushed open the glass door and moved quickly behind a floor model of a very fancy go-cart. After a moment he saw Price come walking down the sidewalk. Price was raised up on his toes and straining his neck to see ahead. He also was turning from side to side quickly and walking a pace which was difficult for his short legs.

Ike stayed in his hiding spot for five full minutes past his last view of Price. He then went to the office at a very casual pace. He looked over his shoulder more than a few times, and he ducked into stores he thought might give him a chance to think. He was staring out into the street from the safety of a bakery window when a tap on the shoulder sent him into a frantic scream that would embarrass a second-grade girl. The employees at the bakery all broke in laughter as the customer who needed the creamer Ike was blocking apologized.

Ike made his way to his building and quietly opened the front door to the firm. As he was being greeted by the receptionist, he put his finger to his lips. She smiled and did the same. He then tiptoed down to his office and closed the door behind him. He sat at his desk and looked at the mementos from over the years. He thought about all the cases he'd handled and the ones he currently was handling. The current concerns must be about a current case. Proctor mentioned ethics. The consultant was watching him, and the accountant had been called in for something. They couldn't possibly believe he was stealing money from his own firm, but something was up. He opened his door, peeked out, and walked down to Dillard's office on the off chance of catching him. The door, to his surprise, was open. He looked in and saw Dillard sitting at his desk. He was flipping through some old mail. Ike closed the door behind him and plopped down in the familiar leather chair directly across from his old partner. Dillard looked at him wearily but with a slight smile.

"What's eating you? You look like you're seeing ghosts."

"Something is going on. Proctor is acting strange, and he wants to have a meeting today. There is some consultant skulking around, and I could swear the man is following me. The accountant is here."

Dillard listened intently, thought about what he had heard, and then said, "I told you Proctor was a mistake. He's a worm. What are you going to do?"

"Me, huh? Not a team anymore?"

"I'm retired. I couldn't help even if I wanted. I've totally lost touch with the daily life of this place, and I was never good at it. Just remember who started this place. You started it, and you can end it."

"I don't think the paperwork really works that way anymore. We let in more partners, and we signed agreements. I'd need time to have an attorney update me on our corporate rights."

Dillard sat silent for a moment before saying, "I never thought our firm could turn into something this complicated. I'm only here for a moment. I need to answer this e-mail and get out of here."

Ike took the hint. He started to get up when he heard a sound from the hallway. Not a loud noise, but enough to get his attention. He turned but saw no one in the doorway. He looked back at Dillard who seemed oblivious. Ike rose and quietly walked to the door. He leaned forward and looked out and saw Price walking quickly down the hall. He started down the hall in the same direction and then heard his name being called. It was Proctor.

"Ike, can you join me in my office?"

Ike tried to find a reason for not complying, but could come up with nothing. "Sure, I need to stop by my office for a moment." Ike scampered into his office and sat down at his desk. He checked his five phone messages, but none were from the courtroom. He looked at his cell phone but no one had called him on that either. He looked at his active files. Some were worth big money, but most were not worth nearly enough for a comfortable retirement. He logged onto his computer and checked the company bank accounts. All looked good. He then switched back over to the company system to look at the lawsuits being handled by the firm. He was very proud of the system they had installed and their use of technology. Clients could go online to look at progress being made on their cases and to ask questions. Lawyers

were required to update the case file with every passing event. The paralegals scanned documents into the system and put notes in the file showing court dates, deadlines and timelines. It had been slow developing but a great success. Today, however, Ike was denied access. He tried his password at least five times until the screen told him he had used up his allotted number of incorrect login attempts and that he would have to contact the technology department to gain access to the system.

Ike sat there for five minutes trying to decipher the meaning of this. He never forgot his password. He had never so much as needed two tries to log in. Only someone with authority could cut off his access to the information. He could still see the bank accounts, and he considered that much more confidential information. He realized that Proctor would come looking for him if he didn't move soon, so he got up out of his seat. He walked the hallways nodding to the other workers and slowly made his way to Proctor's door.

When he arrived, he saw Price and Proctor sitting in chairs and waiting. Ike's blood rose to his cheeks as he looked at Price, but the small seated man merely returned his glare with a dispassionate look. Ike stood behind an empty seat.

Proctor said, "Ah, there you are. Have you heard from the courthouse?"

"No, I'm expecting it any minute."

"Have a seat."

"I'll stand."

Proctor looked over at Price and then took a deep breath. He pulled out a folder and cleared his throat. He was about to start talking when another person entered the room. Ike had his back to the door so he jumped at the sound of the voice behind him.

"Excuse me, sir. You wanted to see me?"

Ike turned to see a young man, maybe 25 years old, standing in a nice blue suit with an empty legal pad in his hand. His skin looked almost white washed, and he had thick red hair. He stood so straight that Ike considered the possibility he was a cardboard cutout except that his mouth moved.

Proctor looked relieved. He smiled and said, "Yes, please come in."

The young man walked around Ike and stood next to the seated Price. They exchanged a look that Ike took to mean they didn't know each other but didn't like each other. Both then looked expectantly at Proctor who was now digging for another file. Once he found it, he flipped it open and flashed another small smile.

"Ike, I'd like you to meet Bill Newcastle. He is the newest attorney. He comes highly recommended by the professors at his law school and by Tony across the street at Smith and LaCross. He'll be a big help in some of our transactional work. Bill, this is Ike Blake. I'm sure you don't need any background information on him."

Ike stuck out his hand. Bill took his hand and gave a tender shake. He looked like he might get physically sick, so Ike took his hand back quickly. They stood in awkward silence for a moment before Ike decided Proctor wanted them to talk.

"So, Bill, how do you like it so far? Everyone treating you well?"

"Yes sir. I'm trying to dig in and get started."

"Good. Don't let anyone haze you. If you have any questions, come see me. You have any interest in litigation?"

Bill exchanged a look with Proctor who nodded. "Yes sir. I believe I could handle myself in a courtroom. Mr. Proctor assures me I'll get my chance."

Proctor stood and shook Bill's hand. "Thanks Bill. I just wanted you to meet with Ike. He's a legend around here and the mentor of many attorneys you'll meet. A good one to know."

Bill smiled and walked out. Proctor resumed his seat, and Ike could see that Price was growing a little agitated at something. Ike didn't mind since he had reached that same condition. He watched Proctor put up the personnel file of "Bill" and then open up the same one he had taken out before the interruption. Proctor had a look of discomfort which Ike didn't trust.

"What going on?" Ike began. "Since when am I not included in decisions to hire someone for the litigation side of things? Why is my access to our company files disabled and who authorized it? Why is Price following me?"

Proctor looked surprised by the sudden barrage of questions and shocked by the last bit of information. He stammered for an answer but only coughed. He looked at the standing Ike Blake and nodded to the chair.

"Don't you want to sit down? This conversation may take a few minutes," Proctor finally sputtered out.

Ike shook his head. "I'll stand, and I don't know how much time I have. If you want to say something then say it."

Proctor held up his hands to protest his innocence. "Ike, I'm not alone on this. Please sit so we can have a rational discussion. I want to start by finding out about Price following you. I wasn't aware of this."

Price leaned forward with a smile and answered, "I do my homework. He needed following so I could confirm my suspicions. You have an obligation now, Proctor. I expect you to act."

Proctor's face turned red. "I know my obligations, my responsibilities and my loyalties. If you think I don't, then you are sadly mistaken."

Ike could tell that Proctor was just getting started, but Ike's cell phone interrupted. It was Judge Botch's clerk calling to say that all parties were needed back at the courtroom. Ike stormed out of the office without looking back. He grabbed his briefcase and walked out of the firm's lobby without speaking to anyone. As he walked, he buttoned up his coat and

straightened his tie. He took about 10 steps before he realized he still never had an answer from Proctor on any of his questions. He was nearing the courthouse when he heard a familiar voice catching up. He turned to see Dillard huffing his way up the sidewalk. He slowed to let Dillard catch up and catch his breath.

"Dinner tonight says that the jury comes back for you right now."

"Phone call didn't sound that way. You're on."

"So, what happened back at the office? I caught a glimpse of that fellow you were telling me about. He looks like a snake."

"Something's up. Proctor was about to dredge something up when the judge called. I guess I'll find out later."

"Might be sooner than that."

Both men turned to see Proctor and Price following them to the courthouse. Ike ignored them and kept walking. Dillard did the same. They kept walking up to the door of the building. Dillard suggested that he keep going to see which of them was being followed. Ike agreed, and they made their plans for the night.

Ike climbed the stairs and walked into the courtroom. The judge was sitting on the bench but no other parties or clients had arrived. He called Ike up to the front.

Judge Botch asked, "Ike, how long have we been in this business? It seems like 50 years."

"Been a long time, Judge. The earth was just learning to spin I think."

"The jury has three questions. We'll wait for everyone before bringing them out."

Ike's client walked in and Ike informed him of the situation. They took their seat as the plaintiffs walked in and were informed of the jury's request. Before the jury entered, the judge looked out and a frown crossed his face. He looked over at Ike and then nodded to the deputy. Ike turned to see Proctor and Price sitting toward the back of the courtroom. Otherwise, the room was empty.

The jury entered the courtroom while everyone stood. After they were seated, everyone else was allowed to sit back down. The jury read their questions to the judge. Two concerned evidence and one concerned damages. Judge Botch met with the attorneys to provide the jury an answer all sides could stomach, and then the jury was so instructed. Afterward they were sent back to their deliberations. Ike had to assure his client that questions meant very little and that to guess the meaning was pointless. They talked for about 10 minutes before Ike was summoned back to court. All the while Price and Proctor sat watching.

Judge Botch called Ike up to his bench and turned on a rarely used static barrier that prevented anyone else in the courtroom from hearing what he said. He leaned forward anyway.

"Mr. Blake, do you know that man seated with Mr. Proctor?"

"Yes, your Honor. His name is Barkley Price. He is a consultant who helps companies run efficiently. He also helps with mergers and that sort of thing. Proctor has brought him in for some reason."

The judge leaned even more forward. "That's his biography you're reading me. Do you know why he's somewhat infamous?"

Ike just looked back and said nothing. He hated to admit he had never heard of the man until just yesterday. The judge held his gaze for a moment and then told Ike to follow him to his chambers. They left the courtroom and disappeared while Price and Proctor watched.

Once inside his chambers the judge took off his black robe. He sat down and motioned for Ike to do the same. They began talking and didn't stop until they were interrupted by the court clerk. She let them know the jury had reached a decision. The judge slid back into his robe, and they walked back to their positions in the courtroom. Ike wasn't surprised to see Proctor and Price still in the courtroom, but was surprised to see them talking to his client. He didn't have time for a confrontation, so he motioned for his client to join him. He could see that all three men were unsatisfied with the conversation, but when his client sat down, no words were exchanged. There would be time later.

The plaintiffs and the defendant remained stoic as the jury announced they found in favor of the defense. Ike turned and shook hands with his client who was immediately on a cell phone reporting the news. He gave Ike the thumbs up as he walked away from the table. The plaintiffs slowly moved out the doors, and he heard their attorneys mentioning appeals. That would be someone's problem for some other day. He looked over at Proctor and Price who were making their way to his table. He stood and waited.

Proctor walked up and shook his hand. Ike accepted his congratulations while Price stood by silently. Price always looked like he had swallowed a particularly sour lemon. Ike held his gaze on him for only a moment before beginning to shuffle papers into his briefcase. His mind was racing with the information the judge had provided him, the jury verdict and the presence of these two men. Ike knew the confrontation was coming, and he hated waiting.

"So, what was it we needed to talk about?"

Proctor's smile faded away. "Don't you want to wait until we're back at my office?"

Ike waved around the empty courtroom. "We're alone. This is as good as my office. Let's talk."

Proctor looked around to verify what Ike was saying. "Ike, we're worried about you. You have carried this firm for so long, but I don't think you're the same guy you were before. The partners and I have decided to cut back on your role at the firm. You should seriously think about a full retirement. Enjoy the success you've had. We'll buy you out. Rachel Frock has put together a package that is very substantial. She will have it finalized today, and we were going to make you a formal offer. I really hate to have this situation."

Ike looked over and could tell Proctor was struggling. He really did seem to hate talking about this. Good. Proctor also adequately explained why Rachel had been around. Ike still wanted to know about the weasel named Price who seemed to be rather enjoying himself at this moment.

Ike looked at Proctor with his best eye contact. "What is Price's role in this?"

Price raised himself as tall as he could muster. He gave Ike a patronizing smile and said, "I'm a corporation consultant called in to see what could be done to make this a smooth transition. The partners were given certain powers, by your and Mr. Barnes' original agreement that will enable them to buy you out and continue this firm with no glitches. If you've read the agreement, they can vote together and oust you without any recourse on your part."

Proctor reacted like he'd been kicked. "Price, don't act like that. The man's a legend around here, and I owe him. Give him respect."

Price shrugged and said, "Old news. He's lost it." He turned to Ike. "Seeing Dillard today? Is he in the courtroom? He died about six years ago, you know, so no one sees him but you."

Ike stood still and tried to remain as calm as he could. Dillard's death had been hard. His mentor and best friend dying of a sudden heart attack was shocking to the entire county. It took the firm several months to find a means to cover the clients and cases Dillard handled, but the good will had never been the same. Ike was getting ready to respond when the side door to the courtroom opened. Judge Botch walked out and directly to them. He was smiling and approached with a confidence that said he didn't care if he was interrupting or not.

He faced Ike as he said, "Mr. Blake, another fine piece of work today. I trust your client is satisfied with your efforts."

Ike answered, "We haven't talked since the verdict. He ran out of here on his cell phone. I'll follow up with him tomorrow, but I don't see how he can be unhappy."

The judge put his hand on Ike's shoulder and said, "Only when he sees your bill." He turned to Proctor and stuck out his hand. "Good to see you again. What brings you over to the courthouse? I thought you stayed tied down in contracts and other transactions."

Proctor took the offered hand and shuffled his feet. "I came to talk a little business with Ike."

"Oh," was all the judge said at first. Then, after a moment of silence he said, "Keep Ike happy if you can. He's one of the best litigators around, and I've seen quite a few."

Ike, Proctor and Price all stood silent. Price looked like he wanted to take a punch at someone. Ike liked seeing the other two becom-

ing uncomfortable and thought about how to make matters worse. It then dawned on him the opening the judge had given him.

"Well, to tell the truth, these men were telling me how I'm not needed anymore at my firm."

Price responded. "We didn't say that. I pointed out that you may not be as mentally balanced as you need to be when serving the firm's clients. I have read the original agreement, and the partners have every right to consider you a risk and vote you out of the firm if they're willing to pay you a package that is legally sufficient."

Proctor, now emboldened, said, "We don't want him out. I feel that we have an obligation to our clients, and I'm not sure he is mentally capable of handling his responsibilities. The current case is closed with a good result, but what if it had gone badly? What if the client knew that Ike still sees and talks to a very deceased Dillard Barnes?"

Ike looked to see what reaction the judge would have. He had none. He slowly pulled out a faded purple rag from his jacket pocket and displayed it over his hand. He let the three other men look at it for a moment before smiling.

"Do you know what this is?"

All three shook their head.

"It's my lucky hanky. I was given this purple rag by my father when I was in law school. He told me it had brought him luck in the war since my mother had given it to him. I never come to work without it. Some people might think I'm a little crazy."

Price held up a hand to protest but the judge cut him off. "I know a criminal attorney who is very good at his job. I would want him to represent me if I was ever in a criminal problem. He eats peanuts every night before a trial. He has a slight allergy to them and he gets sick as a dog all night. He doesn't feel right if he doesn't go through that ritual though. I know another litigator that has to wear black shoes on odd numbered days of the month. There is also an attorney who wears a fraternity pin he found on the street. He was never a member of the fraternity, but he wears that pin every time he's in court. Swears it's his good luck charm. Shall I go on?"

Both Proctor and Price stood silent. The judge looked over at Ike. "Do you see Dillard when you're not having a trial?

"No sir."

"Does he show up when you're on vacation?"

"No sir."

The judge turned back to Proctor and Price. "I don't see a mental problem. The man had a mentor who died. He uses the memory of his mentor and old friend as a way of bouncing ideas around in his head. I've seen much worse."

With that the judge walked out of the courtroom and left the three standing there. Ike could hear the air conditioner running and could see the sweat breaking out on Price's head. Proctor was looking at his shoes like they were strange new things that demanded attention.

Ike said to Price, "How many hours have you put in on this situation?"

"About three weeks worth."

Ike started laughing. "I'm sorry to inform you that you have wasted your time. I actually have read that original agreement. In fact, I read it again last night. Did you read the part where the partners have to agree to bring in a consultant for the purpose of fundamentally changing the firm? The partners have to agree unanimously. I don't remember agreeing to that. I think forcing the founding partner to leave the firm counts as a fundamental change. I bet I can convince a judge and jury of that too, so I'm going to be a partner for a while."

Price turned another shade of red and turned to Proctor. Proctor just shrugged. Ike began laughing again and started walking to the courtroom door while the other two began to argue. He waited for someone to call his name but no one did. He pulled open the courtroom's heavy oversized door and found the judge waiting on the other side in the hallway. The judge was leaning back on the wall but stood up straight when Ike walked near.

The judge asked, "Well, did you tell them off, or are you still an owner?"

"I don't know. I haven't decided. Thanks for coming to my defense out there."

"My pleasure. The microphones picked up very nicely, and I couldn't stand what I was hearing. What we talked about still stands. If you feel like leaving I would strongly consider leaving the bench and starting something new."

"Just the two of us old guys starting up a new firm?"

The judge smiled. "Yes, just the two of us. What do you think Dillard will say about it?"

Ike shrugged. "I'll let you know." GBJ

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## 2011 Fiction Contest Runner-up:

# How She Set Him Up

by Stacey Leigh Malloy

**Chapter 1**

**Client:** "She set me up! I am telling you, she set me up."

**Attorney:** "Unfortunately, the law will not protect you under your circumstances from being set up since you did in fact kill her."

**Client:** "But she was going to die anyway. Can't they look at it like suicide or something?"

**Attorney:** "Again, unfortunately, no, the law will not interpret someone killing another as suicide."

**Client:** "So I am going to go to jail for the rest of my life, without the possibility of parole, because she made me kill her?"

**Attorney:** "Yes."

And this is how she did it.

**Chapter 2**

"I am sorry you have stage IV cancer. You have three to four months to live if you do not take medical measures to try and slow it. I know you have been against treatment options since we discovered this two years ago, but I strongly suggest you start treatment unless you want to die. Perhaps you could try chemotherapy and it could give you more time, but it is no cure and you need to know that. If you do not want to take treatment measures, I suggest you get your affairs in order and enjoy what time you have left with your friends and family."

It was as matter of fact as that when her doctor told her. She was alone with no family members to support her, but that was the way she would have preferred it. Now it was like her doctor said. It was time to get her affairs in order.

Her name was Cybil, and she needed him in a place he couldn't hurt her children when she was gone. She needed to be sure that happened before she died. Making sure her children were safe when she was gone would be all that consumed her every minute of thought until her mission was accomplished. They would be safe as long as they weren't under her husband's sole guardianship. Cybil knew if she did nothing they would die by his hand or at least come close to it. Up until now Cybil had been able to protect them and get in his way and become the object of his abuse and tirades when he became enraged, but when she was gone, she knew there would be no one to protect them. Her husband would certainly get custody since he was their natural father and they were married and the world outside their home assumed that everything was wonderful and fine. But that wasn't the case at all.

Cybil always felt ashamed that she was so weak and hadn't left him. She thought about it every second. It was probably all the stress in her marriage that brought on the cancer that was now running rampant through her body. But none of that could be changed now. Cybil had to come up with a plan—get her affairs in order.

Cybil was tired now, and she was ready. She had been hiding her cancer diagnoses for two years with the hope that through prayer she would be healed—if it was God's will. But now it was certain her getting better wasn't going to happen. She would miss her children, and she knew they would miss her, but perhaps

now she could truly protect them from him when she was in heaven. She knew God worked in mysterious ways. She believed God knew she would obey his wishes and accept what he bestowed upon her as her fate. She believed in heaven and God and therefore killing him herself wasn't an option. She had to plan now; plan carefully to obey God and the law, and time wasn't on her side.

Her husband didn't know she was sick. She wouldn't share that information with him. He wouldn't have cared, and furthermore he would make certain he hurt her with that information. There were so many things he didn't know about her, but that too didn't matter anymore. All she could think about was she had to make a plan to keep her children safe when she was gone. Get her affairs in order, doctor's orders.

Her husband was as cruel to her as cruel could be. He was completely unaccountable for the way he treated her and the children—the way he would beat her and then think just saying he was sorry was acceptable, and she should be able to move on from that because he said sorry. He wouldn't be concerned she couldn't eat because he crushed her jaw or smashed her head so hard on the ground she would fear for her life or strangled her so hard she lost consciousness. He'd come close to killing her many times. She was simply ashamed she just couldn't leave him. But now she was leaving him. She would be dying soon, and he would never be able to hurt her again.

In her defense, Cybil was truly stuck. If she had attempted to leave, he would have made it impossible for her to see or come near the children. She knew this with an absolute certainty. He also made it impossible for her to ever have enough money to get anywhere far away. He controlled everything. He wouldn't even let her see her mother. She hadn't seen her mother in four years because of him. He told her he couldn't stand her

mother, and he wouldn't allow her to take the children to visit with her. She knew she couldn't leave them with him, and her mother wasn't welcome to come and stay at "his" house.

However, in some crazy way, even after all the abuse she incurred from him for many years, she still wanted him to love her and for her life to have included a happy marriage. That dream was gone now. She knew there was no way he loved her. He couldn't possibly love her by the way he treated her. She knew long ago she would die heartbroken. She would endure that pain, but she would die in peace knowing her children would be safe from him.

### Chapter 3

They had two children together. The children were now seven and five—Paul and Gracie. Both children feared their powerful father and knew even at their young ages there was nothing they or their mother could do to free themselves from his grip. Cybil's mother, Ruth, would have him killed for her. Ruth, too, knew what a bastard he was, but Cybil begged and pleaded with her mother not to intervene. Cybil both believed in heaven and in Christ and wanted everyone she loved to one day be in heaven together—to rest in eternal peace. Killing him was never an option. Cybil also wanted them all to live a blessed life here on earth, not in fear of him or his ways, and not to live in fear after she was gone that she or anyone else would be imprisoned for committing acts to rid the world of an evil man.

He thought he had it all figured out, but Cybil got cancer, and with that came perhaps the one good thing about having cancer—you don't hold back anymore. You can put it all on the table and let the cards fall as they may. Protecting her children from him after she was gone was all she had to hold onto now. She didn't want to go to her grave with blood on her hands. Cybil still needed to find a way, and after deep thought and strategizing, she was able to come up with a plan to keep her children safe from him. She knew she had one—and only one—chance to get it right. She knew she needed to be brave enough to follow through. She would find the courage for her children. It only took a second for one of hundreds of bad memories of all the abuse from him to pop into her mind to give her that courage….

"Shut up you stupid, silly, bitch!" he shouted as he shoved her face down into the dinner she had made him.

"I don't want to hear your excuses. I *told* you I hate your pathetic chicken and stuffing! Can't you make anything else? You eat it, eat it all!" he said as he kept her face hovered over her plate and his strong hands on her neck. Her nose and lip were bleeding from the violent shove he gave her into the plate of food he flung over at her.

She knew she was in for a long night the second he got home. She tried to be what he wanted because she wanted peace for her children and for them not to have images of his violence, but there really was no way to combat his temper. The first sign was always a snap, like a fuse box switch. No fuse, no trigger, out of nowhere he shoved his plate towards her, knocking over a glass of milk, and at the same time came towards her like an enraged lion. Yes, it would always happen that quickly.

The children were silent at the table and did not watch. They just moved their eyes to their laps. They knew not to move suddenly or say anything for it would be too dangerous. If they did that, then their mother—whom they adored—would only suffer more.

She bent over the plate and ate the food like a dog. She knew he wouldn't let up until she was finished with it. Then he gave her head one final shove into the plate and called her a terrible name that the children had never even heard before.

She spoke with her children often about not fighting back with him. He was too strong and there would never be a way for them to stop him without getting hurt.

Her husband was simply a star to the entire community. He was handsome, smart, successful, athletic and even a decorated war veteran, but most importantly, he was a good ole' boy, with very deep Georgia roots. A domestic violence call by her to the police was useless and the repercussions not worth it. She never placed a domestic violence call. She knew better than to believe in that false protection. He'd known every cop in town since elementary school and was drinking buddies with both the sheriff and the best lawyer in the county. Outside themselves, the good ole' boys were like a steel trap and would protect their own.

### Chapter 4

Cybil knew something was wrong with her, she just didn't know what. Then there were more and more signs, and she couldn't ignore them anymore and eventually made an appointment with her doctor. A few days after her initial doctor's appointment, Cybil received the call explaining she had a very high white blood cell count which was often associated with cancer that had made its way into the bloodstream. She made a decision right then and there to not fight it—she had no fight left in her. It was in God's hands now, and she accepted that.

Cybil could have gotten treatment for the cancer to prolong her life, but that would be all that it would do, prolong her abused life. It wouldn't cure her cancer, and it would make her weak. She couldn't be weak around him in order for her plan to protect her children to work. She had to be able to fight back enough to provoke him.

When she devised her plan, the worst part would be the final goodbye to her children. Yes, that would be unbearable, and she needed to make sure she didn't tip off her children too much. She needed to

make certain they were safe and away from him when she put her plan into motion. He was so violent and angry when he was set off. She didn't want her children to also be the subject of his abuse or anywhere near the episode she chose for her departure.

He would never hurt her or her children again. It would be the last time. The beating from him that killed her would be worth saving her precious children. Her plan was ready. She thought through how to lure him in, play into her hand and make him kill her with no means of denial or good ole' boys to cover up for him. Now that she had her plan, she would spend her last few days with her children in special ways. She wanted to spend that time in a way they would never forget, and they would know she loved them and would do anything for them.

She went and checked her son, Paul, out of school early one day so they could go and have lunch together, and then she took him to a movie. Paul watched the movie, and she watched Paul enjoy it. She made him swear to secrecy that they did that. She bought him his first pocket knife and had his initials engraved on one side and on the other side it said, "To my best boy, Love, Mommy." It was a great day. Paul asked if they could do it again soon, and she lied to him fighting back tears and said yes.

The next day her daughter, Gracie, was, as usual, a little sleepy when it was time to get up for school, so Cybil took the opportunity to put the idea in Gracie's head she was sick and should stay home from school and rest. Gracie was not sick, but she was thrilled to not be forced to head to school.

When everyone was gone and it was just Cybil and Gracie in the house, Cybil went up to Gracie's room and asked her to come and make cookies with her. Gracie immediately got renewed energy. They made chocolate chip cookies from scratch and ate almost half the batter before they cooked any of them.

Cybil asked Gracie if she wanted to paint her fingernails and toenails. When they were done with the nail-painting, she did nice French braids in Gracie's hair. Gracie adored having her hair and nails done. They had a great day and even drank fruit smoothies from martini glasses just like Gracie had seen in a movie.

Before they took a late afternoon nap, she let Gracie play with her small collection of jewelry. Cybil didn't own anything substantial, just simple pieces, but she knew they would someday be important to Gracie. Gracie chose a silver cross and chain that seemed to call to her. Cybil told Gracie she could wear it close to her heart, and her mom would always be with her and she could think of this special day they had, with no yelling or crying or fighting. Cybil told Gracie it would protect her. And if she ever needed to pray to God to ask for help to hold it in her fingers, and He would hear her. They fell asleep in each other's arms.

When Gracie awoke she said, "I feel a lot better Mommy," and asked "can we do this again, Mommy, when I am sick?" Cybil again had to lie, and again had to hold back her tears and say yes.

Cybil's mother was a widow who never remarried or even dated anyone after her father died. As her mother put it, Cybil's father was the love of her life and nothing could ever come close or replace that relationship for her, and she was fine with that. Her father died when Cybil was just five years old. Cybil didn't remember him much. Her mother was an extremely strong person and knew what a bastard her daughter's husband was and hated him almost as much as Cybil did. Even though Cybil's children rarely saw their grandmother, they did speak often and she knew the kids would do well with her mother. Paul and Gracie both adored their Gram. His parents were both dead. Neither her husband nor she had siblings. When he killed her, in a way, he



Law-Related Education Program

The Law-Related Education Program of the State Bar of Georgia wishes to recognize the following individuals for their support of Early County High School's Journey Through Justice on April 22:

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would kill himself. Not literally, but freedom-wise, and that was her plan. Her timing had to be perfect, and she would only get one chance. Luckily, or unluckily, depending on how you wanted to look at it, he was very predictable to her now after so many years of abuse and beatings. She knew under Georgia law, if her plan worked, that he would go to jail for life without the possibility of parole, and most importantly, if he was stuck in jail, her children would be safe. She would be in heaven watching her children from above.

## Chapter 5

For some reason, he hated when she was on the computer. She wasn't allowed to be on the computer when he was home. She had to be doing something else domestic—raising the children, tending to the house, preparing a meal or a dessert. She had learned the hard way from him.

When she would hear him come down the driveway or the grind of the garage door opening, which thankfully alerted her of his arrival, she would rush off the computer. Always. The computer was truly her only source to the outside world, and she wasn't going to let him take that from her. He would if he knew she relied on it. He would take anything away from her she liked or gave her a link to the outside. When he was in one of his vile moods, he would take her car keys, purse and mobile phone, and often he'd back his car behind hers so she couldn't get away—leaving Cybil with no way to communicate or escape. He thought he was so smart and powerful, and she had wanted to leave for years, but the problem was the children. Being school-aged made it virtually impossible for her. You just can't run with school-age children without support, and he'd find her. Another beating.

Her computer had a small web cam in it that wasn't even noticeable if you didn't know to look for it. It was built right into the computer. How neat, she thought! The web cam would help her show the world, and he wouldn't be able to deny it. Equally important, his good ole' boy cronies couldn't cover it up. Once she got him to kill her online, there would be irrefutable evidence. Thousands of people, possibly even millions, would end up seeing the unprovoked hell that she lived in and was subjected to on a whim. They would all see she was living in an abusive household. There was no way he would get custody of the children when she died. She just wanted her children to have a full, happy, healthy life, without fear of him, without him as a role model. When she thought about this she breathed a sigh of relief despite the horror she was about to broadcast to the community in which she and her children lived. Her mind was made up. She was going to be strong, knowing her precious children would be safe. That thought, and him remaining in jail for the rest of his life, were the most important things. She was putting it all on the table. Getting her affairs in order.

The website she chose was an online exercise site called Cybercise-24/7/365.com, which allowed users to participate in classes online and show routines to others. It was run by instructors who rotated in and out 24 hours a day, 7 days a week, 365 days a year to accommodate the lifestyles of busy people across the world and give them a place to sign on and join in an exercise class. Cybil loved it before she got sick. It seemed to her she was more apt to work out harder and longer if not doing it alone. The key factor now of course wasn't the exercise, it was that it could be viewed at any time of the day. There was always coverage, so that others could and would see what she wanted them to see. Cybil had only asked the online community a few times to critique her technique. She would get comments from 25 to 100 people, and it was enough to tweak her position in her living room in order to get the angle she needed to be certain the world saw him kill her. No one would think she planned it, except her mother. Her mother would know instantly, but she would understand it was her decision and that she in some way did finally win her battle against her husband, and that Cybil got the last word in. Her mother hated him almost as much as she did. Almost.

## Chapter 6

He decided to leave after she finished most of the food on the plate. He gave her face one final shove into the plate, smothering her. She was just grateful he hadn't broken her tooth. Funny, she thought, how that still mattered to her even though she was dying. She was again so ashamed her children saw this.

"I am going to go get a steak at Larry's Restaurant," he said as he turned and walked out the door.

She nodded her head and looked up at her children who were devastated, seemingly in shock that their mother again had to endure his wrath.

After he was gone, she just smiled and said, "Anyone want dessert?" as she wiped her face clean. They both said no in unison not feeling in the mood for dessert, understandably.

She only had so much time left with them, and she wasn't going to spend it crying about him in front of them. He was gone for a few hours, and she would enjoy her time with her children. She cleaned up quickly and prepared a bath for them. They had fun in the tub, and she got them in warm cuddly pajamas, right out of the dryer. She read to them for more than an hour. Paul and Gracie loved the attention and no one missed him. They both fell asleep while she read to them.

They were so special, priceless. She felt blessed to even have them for the short time she did. She was so ready to die for them and for their safety. They only thing she said to the children about the night was she asked Paul to promise her to never ever hurt a girl. She was proud when he looked her square in the eyes and said, "I promise, Mommy,"

and then said, "Why would I ever do that?" with big curious eyes.

She also asked Gracie to promise her to never let herself be hurt by a man, and Gracie sweetly replied, "I promise, Mommy," and then asked, "Is Daddy a man?"

Cybil just smiled at her without a way to answer, so proud of her daughter's insightfulness at five years old. Neither child asked why Daddy hurt Mommy or treated Mommy so badly. She was grateful for that because she didn't have a better answer than she was too weak to fight back and she was too scared to leave.

Both children were asleep on either side of her when she heard the phone ring. She knew it was him without looking. He started to leave a message, as usual. She didn't answer the call, as usual. She would just say she was in the shower or something. He would never think she would ignore her master's call.

"I am sorry we got in a fight," he started off. She just shook her head as she listened to his ignorance and denial. Yeah, fight my ass, she thought. It's all just abuse, criminal.

"I don't want to fight," he went on.

Blah, blah, blah. She had heard it all before. She just walked away as he left her the same message he always left after he overdid it. She took a shower and got dressed in her pajamas. She had been in bed about one minute when she heard the noise from his car in the driveway and then the garage door opening. She got that familiar giant sinking feeling, he's back. She used to try and pretend to be asleep. He would come in, turn on all the lights, and say, "I would like to talk with you," until she woke up. He would shove her and/or raise his voice to a scream, depending on the foulness of his mood, how badly he had hurt her, and how much he had been drinking.

"I would like to talk with you," really meant: "Listen to me or else." Once Cybil was sufficiently pretending to listen, he would clear his throat and again say he was sorry *we* had a fight. She had learned to nod her head and say "me too." If she didn't, then the ordeal would go on and on. Cybil learned quickly after marrying him that he had no conscience, and she was setting herself up for another beating if she didn't go along with when he wanted the "fight" to end.

He asked her if he could come over and give her a kiss. He repulsed her, and it was the last thing in the world she wanted, even though she said sure, only because it was the lesser of two evils. A kiss or a punch, a kiss or a punch, what shall I have?

He came over and gave her a kiss. She was too tired to fight him and mostly just too scared. She needed to be patient now more than ever. She had prepared so carefully and couldn't jeopardize it all now. She could tell from his breath and the sting on her lips after he kissed her he had been drinking as usual when he would take off, no mistaking Jack Daniels.

He got in her face and said to her again, "I am sorry we got into a fight." She thought to herself, wow, he really is very handsome for such a bastard. To take her mind off what was coming, she asked herself if maybe that was why she stayed with him all these years.

She knew not to contradict anything he said when he had been drinking. She put her own feelings aside many years ago. He did not and would not hear it when he had been drinking.

"Can I have you?" he asked next.

It wasn't really a question or a proposition or anything she really had a say in. If she said no, then he would grab her and shove her into the wall and call her a dead fish. If she said yes, then it would be less painful physically, but then there was the emotional train wreck of enduring the rape. She sighed out of pure reflex for now she knew she was to be raped, and there wasn't a thing she could do about it. Not yet anyway. His eyes darkened when he heard the sigh, and she knew she had better contain that or her entire plan would be jeopardized. She instinctively decided to be raped tonight instead of a fight. She managed some semblance of a smile and rolled over so he wouldn't see her cry, signaling he could start.

"That's my girl," he said.

She cried and bit her lip the entire time. When he was finished with her, he said not even a single word, just rolled over and fell into a deep sleep. She laid still and realized she had cried a bucket full of tears in silence from the wet pillow she was now lying on. When she felt safe to get up, she went straight to the downstairs bathroom to take a shower to get him off of her. She looked in the mirror and slapped her face and punched herself in the head until she almost passed out.

You are a silly, stupid bitch, she thought. She hated this life. She couldn't do it anymore. She knew she would be better off dead and was grateful God gave her cancer so she could see the end. She dragged herself to the shower and washed him away. The warm water gave her some relief, but she was done. Done with this life.

She didn't want to go back and sleep in the bed next to him. She even hated how he breathed. Arrogant even in his sleep, she thought. She fell asleep wrapped in towels on the rug on the bathroom floor where she made up her mind that tomorrow would be the day she would die. She was ready. All of her affairs were just about in order.

## Chapter 7

The next morning he left and said nothing to her but, "I need my shirts back from the cleaners."

She nodded her head OK and smiled the best she could. She couldn't let him think anything was unusual.

Next, she had to get the kids off to school. She made Paul and Gracie their favorite breakfast of pancakes and sausage and let them eat in the family room while watch-

ing television as a special treat. She sat and watched them enjoy their breakfast and the show on television. They were so handsome and pretty, she thought. She would miss them, but she needed to keep her strength to do what she had to do to keep them safe.

The kids got off to school. She gave them extra long hugs and looked at each deeply in their eyes and said she loved them more than anything and would do absolutely anything for them, even die.

They said in unison, "Love you too, Mommy."

Cybil said, "Thank you, angels," and waved goodbye to them for the last time.

She held back the tears the best she could until the bus drove off. She took a deep breath and headed back to the kitchen. For some reason, she felt the need to tidy up. Then she got down on her knees and prayed to God that her children would have blessed lives on this earth and that she was doing God's will.

She then went and made the children's rooms up and left them each a new stuffed animal—little bunnies she had gotten at the local card store with the few extra dollars he allowed her to have as petty cash. She knew this would be hard on them. The kids would know she left them. No one else would. Cybil knew they would someday understand why she did what she did.

Next, Cybil dropped a letter in the mail to her mother saying she loved her and she would like for her to take guardianship of the children should anything happen to her and her husband. "Mom, I love you. You have been the best mother in the world." She added a P.S., "You should know it was my choice, and I got the final word in. I had cancer, and it was the only way to keep the kids safe."

She took a deep breath as she walked back from the mailbox. The letter would be picked up within minutes and on its way. Her mother would most likely receive it tomorrow.

God had decided it was her time, and she was doing what she believed to be God's will. She truly believed if God didn't agree with her plan, then he wouldn't let her husband kill her. That's how she got through the tasks of her day that would make her plan happen. God's will.

Cybil would call her husband, which she did from time to time, knowing full well he wouldn't answer, nor return a phone call—unless of course it was in his best interest. She couldn't honestly remember the last time he picked up the phone when it was her. He had caller ID and made certain she didn't get through to him.

It was 10 a.m. and the kids would be home at 2:50 p.m. She needed to get her husband home and have him kill her long before her children were due to arrive home. With the killing happening online, there would be a response, and she wanted the scene to be over.

He typically wouldn't come home for anything. However, she did know one thing that would get him home and that was his 1967 Lincoln Continental convertible. His stupid car. It was perfect to him, and it was the only thing he truly loved other than himself. He almost broke Paul's arm one day for trying to open one of those huge suicide car doors. No one was good enough to touch that car except him. She had wanted to pound and dent that car so many times, but in her situation, she knew better. Today was different however, and today her patience would pay off.

The car was kept in their garage year round. It barely fit. Cybil went under her kitchen sink and retrieved her yellow rubber cleaning gloves. She casually put the gloves on and cleaned them with some bleach under warm water and she then dried them with a towel. She then went to the garage where the big gold slab slept under cover.

She had a slight smirk as she walked over and slowly pulled back the cover on both sides. I bought the jerk this cover for Christmas, she thought. She popped the hood and carefully unlatched it. She spied a black tube near the radiator that looked fun to pull and, as she expected, it caused liquid to pool onto the floor—just enough of an excuse to call him.

She carefully closed the hood and restored the covering. She knew he had his handprints all over the outside and inside of the Lincoln from him tinkering and cleaning and grooming it. She knew that hers weren't on it, and she would make sure she left none.

It was satisfying to hurt the car, and she thought to herself for someone who knows they are about to get beaten to death by their husband, she was certainly pleased. Cybil smiled at her work and then turned and started nonchalantly upstairs, but then she saw from the side of her eye Paul's baseball bat in the corner.

Hmmm, why not? She went over, grabbed the bat and walked back towards the Lincoln. She knew he would come through the garage door on the right and see the passenger side doors first, so she chose that as her target. She removed the cover again. She handled the bat in her rubber gloved hands for a few moments and then wound up.

She pictured her evil husband's face, shut her eyes and swung as hard as she could. She felt ripples through her body from the smashing of the bat onto the steel door of the old the car, but there was a nice dent, no doubt about it. She again carefully replaced the cover. He would eventually know she did it and that would make him beyond enraged. With that thought, she walked away even more content and headed back to her kitchen. She washed the yellow rubber cleaning gloves under the bleachy water again and put them back under the sink.

Cybil next went to the phone and called her husband's cell phone. "Hi, I think your car has a problem," she said. "I, of course, didn't touch anything, but there is a big puddle under it of some type of greenish liquid," she continued.

Cybil knew he would erase her

message the second after he listened to it. He was so predictable like that, at least that part would be taken care of, and even if he didn't erase it, the message was innocent enough. As she suspected, he called back two minutes later. She was home and listened to his message. "I am coming home to look at the car. Do NOT touch it!" and then he abruptly hung up.

She deleted the message he just left with a simple push of a button. No one would know he was lured in. She did a few last minute chores to make it look as if everything was in place and then went to get into her workout clothes. Cybil estimated she had about 15 more minutes until he got home. She chose a simple outfit, making sure to not make it seem like she was trying to go out in style like suicidal people often do. She wasn't suicidal. She was dying, and she was planning for the future of her children. There was a clear difference to her.

Cybil logged onto the website. She would just be a spectator of the classes for the first few minutes —not engaging the camera to be an instructor.

She heard his car pull up. The breaks squeaked as he stopped abruptly in the driveway. She took a deep breath. She logged on to speak and plugged in the headphones so he couldn't hear the volume, but the spectators could hear just fine on their end.

"Cybil!...Cybil!!!....Cybil!!!!!" He had seen the car.

She had the words typed and her name and where she was from and was ready to push SEND. When she heard he was heading up the stairs, she clicked SEND, not a nanosecond too soon. She was ready. She took another deep breath. One of her last.

A voice on the other end said, "Now ladies, and those few gents out there, we have Cybil Foxx coming to us live from Richmond Hill, Georgia." She was streaming.

"What the hell happened to my Lincoln!" he screamed as he stormed into the room. She was on the computer, and she didn't look up. He yelled her name, and she pleasantly said, "Just a second," which she knew would cause her harm any other day, but today was her day. Today was different.

Cybil was streaming live on the Internet now and the volume was on for her to speak. He was clueless to this fact. He did as she suspected he would, and she was ready. She had been saying the Rosary nonstop all day, saying it for the strength to let him kill her, for her plan to be the last course of action for her children to be safe from him, and that she would die knowing her affairs were all in order.

She was confident that help would get to their residence quickly for they were in a small rural town, and in it she was the only Cybil Foxx. The viewers were watching and listening as he grabbed her by the hair and said some of his favorite lines. "I don't have a damn second. Don't you make me wait a second you silly, stupid bitch."

He dragged her to the floor right behind the computer chair she had been sitting on, the perfect location for the viewers to see her being beaten to death. She fought back as much as she thought she should. She knew she had to push him as far as she could, but not too far to mistakenly hurt him. If she did and he didn't kill her, then she would win nothing.

She needed for him to kill her. She needed to protect her children. She had planned between one to two minutes before someone who was watching the live stream called the police and another five to seven minutes before they arrived at the residence. If things went as she planned, he would have no idea, and he would condemn himself if he tried to play anything a different way when the police showed up.

He screamed again, "What happened to my Lincoln!?!?"

She thought, as he choked her, what a perfectly ambiguous thing for him to say. "I don't know," she managed to get out while he pinned her head between his legs and squeezed her neck and lifted her head by her hair with his other hand, before he would smash it back down on the tile floor. She was starting to lose consciousness.

The viewers all saw the scene unfold. They could even hear what was said, but her husband couldn't since she strategically plugged in the headphones. A couple hundred people were watching, at least, maybe even in the thousands. The Richmond Hill phone lines jammed with calls but enough got through and the police were on their way. They knew they couldn't cover this one up and had better act diligently.

CNN was now broadcasting the scene. With every single ounce of everything she had, she took a deep breath as best she could, and then she did what she knew would make him kill her. She spit in his face.

He paused for a moment in what appeared to be surprise. He looked at her then with his eyes black and mean. She knew he was going to kill her. She stared right back and thought with relief, I win, and with that, he twisted her head and broke her neck.

Cybil was instantly dead. He sat on her, then spit back on her and said out loud, "Nothing a shovel and some lime can't get rid of."

The world continued to watch. There was a loud thud as the police smashed through the front door. Her husband was confused initially. Then it occurred to him as he looked down at her dead body.

"She set me up!" he said. GBJ

**Stacey Leigh Malloy** is licensed to practice law in Georgia, Massachusetts and the District of Columbia. This is her first published work of short fiction. Malloy currently resides in Massachusetts with her husband and their four children. Malloy may be contacted at staceymalloy@aol.com.

## Kudos

**Duane Morris** partner **William D. Barwick** was selected to receive the **2011 Atlanta Bar Association Leadership Award.** This honor is presented to members who "inspire by their example, challenge by their deeds and remind us all of our debt to our profession and our community." The award was presented to Barwick in March.

**Ford & Harrison LLP** announced that the **Minority Corporate Counsel Association** honored the firm for its diversity initiatives with the **2011 Thomas L. Sager Award** for the South/Southwest region. This award is given to law firms that demonstrate a sustained commitment to improving the hiring, retention and promotion of minority attorneys.

**Smith Currie & Hancock LLP** announced that partner **G. Scott Walters** was appointed **legal counsel** to the **Associated Builders and Contractors of Georgia, Inc.,** a construction trade association representing the commercial and industrial markets with more than 285 member companies and more than 2,500 individual participants throughout the state of Georgia. Walters' practice areas include construction law, government contracts, environmental law, arbitration, litigation and dispute resolution.

**Christian F. Torgrimson** spoke on two panels, **"Strategic Discovery"** and **"How the Case Was Won,"** at the national **6th annual ALI-ABA Seminar,** "Condemnation 101: Making the Complex Simple in Eminent Domain" in Coral Gables, Fla. Torgrimson is a partner with **Pursley Lowery Meeks LLP** specializing in eminent domain litigation. Torgrimson and **Angela Robinson,** an associate at Pursley Lowery Meeks LLP, co-authored the article, **"The Case for Recovery of Business Loss in the Taking of Real Property,"** for the *Annual Review* published by the ABA Section of Litigation Condemnation, Zoning & Land Use Litigation Committee, Winter 2011 edition.


Coil


White


Williams

**Kilpatrick Townsend & Stockton LLP** announced that the firm was recently honored as **Law Firm of the Year** at the **Pro Bono Partnership (PBP) of Atlanta's** annual awards reception. The firm was honored for its work on behalf of PBP and the client organizations it serves.

**Jim Coil,** partner on the labor & employment team, was recognized as one of five **Volunteers of the Year** for providing more than 200 hours of labor and employment advice to 10 different organizations referred to him by PBP.

**Wilson White,** associate in the firm's intellectual property department, was recently elected to serve on the **Board of Pathways Community Network**. Pathways Community Network was founded in 1995 as a collaboration of 28 nonprofit and local government agencies in metropolitan Atlanta, committed to providing their clients with greater access to, and more effective care.

**Tiffany Williams,** an associate in the intellectual property department, was appointed to the **Metropolitan Counseling Service's (MCS) Board of Directors**. MCS is a nonprofit center that provides quality, affordable counseling services and psychotherapy to Atlanta area residents.

**Miller & Martin PLLC** announced that associate **Laura Gary** was selected to the **2011 Young Lawyers Division Leadership Academy** of the State Bar of Georgia. The program is designed for young lawyers who are interested in developing their leadership skills as well as learning more about their profession, their communities and their state. Gary is an associate with the litigation department of Miller & Martin's Atlanta office.

**William Paul Rodgers Jr.** authored ***United States Constitutional Law: An Introduction.*** The book aims to provide a basic understanding of constitutional law, addressing both the history of the U.S. Constitution and each of its individual clauses. Rodgers is the former executive director of the National Association of Regulatory Utility Commissioners and commissioner of the President's Commission on Critical Infrastructure Protection.


Davis


Martinez

**Elizabeth B. Davis** and **Z. Ileana Martinez** were named Atlanta office **co-chairs** of **Thompson Hine LLP's diversity & inclusion initiative.** Davis is a partner in the environmental and product liability litigation practice groups. Martinez is a partner in the firm's product liability litigation, life sciences and business litigation practice groups.

**S. Wade Malone,** a **partner** in **Nelson Mullins Riley & Scarborough's** Atlanta office, received the firm's **2011 Sheryl Ortmann Diversity Award** for his significant achievements in promoting diversity in the legal profession. Malone was one of four Atlanta lawyers who founded the Atlanta Bar Association Summer Law Internship Program in 1993 for students from Therrell High School.

**Bouhan, Williams & Levy, LLP,** announced that **John B. Manly** was selected to the **2011 Young Lawyers Division Leadership Academy** of the State Bar of Georgia. The six-month program for young lawyers, interested in developing their leadership skills and learning more about their profession, their communities and their state. Manly is an associate with the firm, practicing primarily in the areas of insurance defense, medical malpractice defense and commercial litigation.

The **2013 Atlanta Basketball Host Committee** announced that **John Yates, partner** with **Morris, Manning & Martin, LLP,** will preside over the committee for the **NCAA Men's Basketball Final Four Tournament's** return in 2013. Yates heads the technology practice at Morris, Manning & Martin, and as a volunteer, he will organize and administer Atlanta's 2013 efforts as chair of the Atlanta Basketball Host Committee and the Local Organizing Committee, which both work closely with the NCAA to organize and execute the tournament.

**Carlton Fields** announced that Atlanta associate **M. Derek Harris** was selected to the inaugural class of the **Fellows Program of the Leadership Council on Legal Diversity (LCLD).** The LCLD Fellows Program is a mentoring program intended to help diversify the legal professional by championing select attorneys with strong leadership and networking skills who also enjoy relationships with industry leaders, and who are committed to fostering diversity within their individual institutions.

**Steve O'Day,** partner and head of the environmental and sustainability practices at **Smith, Gambrell & Russell, LLP,** will receive the **Ogden Doremus Award for Excellence in Environmental Law** which will be presented at the GreenLaw Environmental Heroes Celebration in October. GreenLaw established the Ogden Doremus Award for Excellence in Environmental Law in 2006. The late Doremus, a pioneer in environmental law in Georgia, was co-founder of GreenLaw and one of the first trustees of the Georgia Conservancy in the 1970s. This award recognizes the role that lawyers play in protecting Georgia's natural resources.

**Joy Lampley Fortson** was selected to serve as a **program chair** for **Leadership Georgia 2011.** As a program chair, she planned and executed a three-day program in LaGrange, Ga., for 200 state leaders in March. Additionally, she was selected to become a member of the Leadership Atlanta Class of 2012. Lampley Fortson is an assistant chief counsel with the U.S. Department of Homeland Security.

## On the Move

### In Atlanta

**Holland & Knight LLP** announced that **Overtis "O.V." Brantley,** former Fulton County attorney, joined the firm's Atlanta office as **of counsel.** Brantley practices in the firm's litigation practice group and also assists with the firm's representation of its many local government clients. The firm is located at 1201 W. Peachtree St., Suite 2000, Atlanta, GA 30309; 404-817-8500; Fax 404-881-0470; www.hklaw.com.

**Miller & Martin PLLC** announced that **Isidor J. Kim** joined the Atlanta office as **of counsel** to the firm's litigation practice group. For the seven years prior to his lateral move to Miller & Martin, Kim founded and developed his own law office, which focused on the Asian-American community, particularly Korean-Americans. The firm is located at 1170 Peachtree St. NE, Suite 800, Atlanta, GA 30309; 404-962-6100; Fax 404-962-6300; www.millermartin.com.

**Harris Penn Lowry, LLP,** announced that, following his resignation from the DeKalb County State Court, **Hon. J. Antonio DelCampo** became a named **partner** at the boutique trial firm which has been renamed **Harris Penn Lowry DelCampo.** The firm is located at 1201 Peachtree St. NE, Suite 900, Atlanta, GA 30361; 404-961-7650; Fax 404-961-7651; www.hpllegal.com.


Kadaba


Hodges

**Kilpatrick Townsend & Stockton LLP** announced that partner **Wab Kadaba** was named the firm's Atlanta office **managing partner**. Kadaba concentrates his practice on litigation related to intellectual property as well as strategy and management of intellectual property and technology issues. **Charles E. Hodges II** joined the firm as **partner** and chair of the firm's tax controversy and litigation practice. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatricktownsend.com.

**Smith, Gambrell & Russell, LLP,** announced that **Aasia Mustakeem** joined the firm as **partner** and **Crystal Wells Cook** joined the firm as an **associate.** Mustakeem is a member of the firm's commercial real estate practice. Cook's practice focuses on financial products, real estate law and corporate law. The firm is located at 1230 Peachtree St. NE, Suite 3100, Atlanta, GA 30309; 404-815-3500; Fax 404-815-3509; www.sgrlaw.com.

**Brock, Clay, Calhoun & Rogers, LLC,** a Marietta-based law firm, announced the opening of its Atlanta office. The firm is located at 400 Galleria Parkway, Suite 1440, Atlanta, GA 30339; 770-422-1776; Fax 770-426-6155; www.brockclay.com.

**Scoggins & Goodman, PC,** announced the addition of **Martin A. Shelton** as a **partner.** Shelton's practice focuses in the areas of environmental law and environmental litigation. The firm is located at 2800 Marquis One Tower, 245 Peachtree St. NE, Atlanta, GA 30303; 404-659-1000; Fax 404-659-3021; www.sgpc.com.

The Atlanta office of **Thompson Hine LLP** moved to Two Alliance Center in Buckhead's business district. The firm is located at 3560 Lenox Road, Suite 1600, Atlanta, GA 30326; 404-541-2900; Fax 404-541-2905; www.thompsonhine.com.

**Ranse Partin,** formerly with King & Spalding, announced the opening of **Partin Law Firm, P.C.,** a litigation firm handling plaintiffs' and defense cases, with expertise in health care litigation, business litigation and qui tam "Whistleblower" cases, including the representation of individuals and businesses. The firm is located at 1380 W. Paces Ferry Road, Suite 2100, Atlanta, GA 30327; 404-220-9703; www.partinlaw.com.

**BB&T** promoted **Bryan Koepp** to **senior vice president.** Koepp is a group financial planning strategist for BB&T Wealth Management's Georgia team and is BB&T Wealth Management's lead business transition planning strategist. BB&T is located at 3520 Piedmont Road NE, Atlanta, GA 30305; 404-261-0700; Fax 404-237-3214; www.bbt.com.

**Alexander P. Woollcott** joined **Morris, Manning & Martin, LLP,** as a **partner** in its **global sourcing and technology transactions practices.** Woollcott formerly chaired the global sourcing and procurement practice at Thompson Hine, where he was a partner. 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.

**Gideon, Cooper & Essary, PLC,** announced the opening of a satellite office in Atlanta that will be managed by **Lisa York Bowman, of counsel**. The trial boutique specializes in medical and hospital malpractice litigation, peer review and credentialing proceedings, restrictive covenants and health care administrative litigation. The office is located at 400 Perimeter Center Terrace NE, Suite 900, Atlanta, GA 30346; 770-392-4266; Fax 770-392-4291; www.gideoncooper.com.

**James A. Harvey** joined **Alston & Bird LLP** as a **partner** in the firm's **intellectual property and technology transactions group.** His practice revolves around enterprise-wide sourcing transactions and data privacy and security. The firm is located at 1201 W. Peachtree St., Atlanta, GA 30309; 404-881-7000; Fax 404-881-7777; www.alston.com.

**Weissman, Nowack, Curry & Wilco, P.C.,** announced that **John (Jack) Horne** and **Marlo Orlin Leach** joined the firm's litigation practice group as **partners,** and **Elizabeth Roberts** joined the firm's commercial real estate group as an **associate.** All three attorneys were formerly with Yoss LLP. The firm is located at 3500 Lenox Road, 4th Floor, Atlanta, GA 30326; 404-926-4530; Fax 404-926-4730; www.wncwlaw.com.

**Hunton & Williams LLP** announced the promotion of **Christopher C. Green** to its **partnership.** Green is a member of the firm's real estate capital markets team. The firm is located at 600 Peachtree St. NE, Suite 4100, Atlanta, GA 30308; 404-888-4000; Fax 404-888-4190; www.hunton.com.

**Enan Stillman** joined **Nelson Mullins Riley & Scarborough, LLP,** as an **associate.** He practices in the areas of transportation and logistics, mergers and acquisitions, debt and equity financing, fund formation and investment management, land use and general corporate law and governance. The firm is located at 201 17th St. NW, Suite 1700, Atlanta, GA 30363; 404-322-6000; Fax 404-322-6050; www.nelsonmullins.com.

**James Bates Pope & Spivey LLP** announced that **Vivian B. Fisher** joined the firm as an **associate.** Fisher practices in the commercial litigation, environmental, and banking and financial institutions groups. The firm is located at 3399 Peachtree Road NE, Suite 810, Atlanta, GA; 404-997-6020; Fax 404-997-6021; jbpslaw.com.

Shiver

Hamilton

**Jeff Shiver** and **Alan Hamilton** announced the formation of **Shiver Hamilton, LLC.** Shiver Hamilton focuses on personal injury trial work. The firm is located at 400 Colony Square, 1201 Peachtree St., Suite 900, Atlanta, GA 30361; 404-593-0020; Fax 404-961-7651; www.shiverhamilton.com.

**Rich Wyde** announced the opening of the **Law Offices of Rich Wyde, P.C.** His practice focuses on information technology and telecommunications, including issues of licensing, outsourcing, development, Internet and e-commerce, state and local government procurement, and business law for technology-based companies. The firm is located at 3782 Montford Drive, Atlanta, GA 30341; 404-862-3737; www.richwyde.com.


Hoipkemier


MacPherson

**Carlton Fields** announced that **Adam L. Hoipkemier** and **Christy MacPherson** joined the firm as **associates.** Hoipkemier practices in the firm's business litigation and trade regulation practice group. MacPherson practices in the firm's insurance litigation 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.


Holland


Roddenbery


Hollopeter

**Gwenn Dorb Holland** and **Tina Shadix Roddenbery,** formerly name partners in the Atlanta law firm Holland Schaeffer Roddenbery Blitch, LLP, formed **Holland Roddenbery LLC,** a trial practice firm specializing in divorce, family law, will, trust and estate disputes and business litigation. **Jamie Hollopeter** joined the firm as an **associate.** Hollopeter focuses on family law, business litigation and employment litigation. The firm is located at 3475 Piedmont Road NE, Suite 1550, Atlanta, GA 30305; 404-658-9550; Fax 404-589-8580; www.hollandroddenbery.com.

**Crowley & Clarida, LLP,** of Atlanta and **Hall, Bloch, Garland & Meyer, LLP,** of Macon announced the merger of the two firms. The firm will now be known as **Hall, Bloch, Garland & Meyer, LLP,** and will maintain offices in both Macon and Atlanta. The firm also announced that **Rick Pilch** became a **partner** and **Keith M. Hayasaka** joined the firm as an **associate.** Pilch practices in the area of commercial real estate, and Hayasaka practices general litigation. The firm is located at 900 Circle 75 Parkway, Suite 500, Atlanta, GA 30339; 678-888-0036; Fax 678-888-0045; www.hbgm.com.



## In Augusta

**Hull Barrett, PC,** announced that **Brooks K. Hudson** joined the firm as an **associate.** Hudson focuses primarily on commercial litigation matters, including prosecuting and defending claims in complex business disputes, health care litigation, First Amendment litigation, construction litigation and class actions. The firm is located at 801 Broad St., 7th Floor, Augusta, GA 30901; 706-722-4481; Fax 706-722-9779; www.hullbarrett.com.

## In Brunswick

**Gilbert Harrell, Sumerford & Martin, P.C.,** announced the addition of **Laura Peel Roberts** and the formation of the family law practice group. Roberts joined the firm as **of counsel** in the litigation practice and focuses in the area of family law. The firm is located at 777 Gloucester St., Suite 200, Brunswick, GA 31520; 912-265-6700; Fax 912-264-3917; www.gilbertharrelllaw.com.

## In Columbus

**Butler, Wooten & Fryhofer, LLP,** announced that **Brandon L. Peak** was named a **partner** in the firm. Peak focuses his practice on the representation of plaintiffs in catastrophic personal injury, business tort and consumer class action cases. The firm is located at 105 13th St., Columbus, GA 31901; 706-322-1990; Fax 706-323-2962; www.butlerwooten.com.

**Page, Scrantom, Sprouse, Tucker and Ford** announced that **Stephen G. Gunby** joined the firm as a partner. Gunby represents clients in the areas of general litigation, creditors' rights, workouts and business bankruptcy. The firm is located at 1111 Bay Ave., 3rd Floor, Columbus, GA 31901; 706-324-0251; Fax 706-243-0417; www.columbusgalaw.com.

**Day Crowley, LLC,** announced the addition of four attorneys. **J. Barrington Vaught** joined the firm as **partner.** He focuses on commercial and residential real estate, municipalities and commercial litigation. **Elizabeth W. McBride** also joined the firm as **partner.** She practices in the areas of family law, bankruptcy and general litigation. **Joshua Robert McKoon** joined the firm as **partner.** He practices in the areas of health law and litigation. **Heather Joy Harlow** joined the

firm as an **associate.** She practices in the areas of real estate, health law and general litigation. The firm is located at 233 12th St., Suite 200, Columbus, GA 31901; 706-324-4375; Fax 706-322-9535; daycrowley.com.

## In Gainesville

**Stow, Garvin & Glenn** announced that former Administrative Law Judge **William A. (Tony) Murray** joined the firm. Murray specializes in the areas of workers' compensation and Social Security law. The firm is located at 119 Bradford St., Gainesville, GA 30501; 770-534-5265; Fax 770-534-5266.

## In Jackson

**Douglas R. Ballard Jr.** announced the relocation of his practice **Doug Ballard, P.C.** Ballard's primary areas of practice are residential and commercial real estate, bankruptcy, appellate practice, wills and estates and general civil litigation. The firm is located at 250 McDonough Road, Jackson, GA 30233; 770-775-5000; Fax 770-775-2494.

## In Kennesaw

**Nelson Goss Turner,** announced the relocation of **The Turner Firm, P.C.** The firm is now located at 738 Creek Trail NW; Kennesaw, GA 30144; 770-708-3393; Fax 770-926-6502; www.theturnerlawoffice.com.

## In Macon

Carr

Downey

**G. Morris Carr** and **Jason E. Downey** merged their practices to form **Carr Downey, Attorneys at Law, LLC.** Carr continues to practice in the area of domestic relations, and Downey handles personal injury matters as well as civil and domestic mediations. The firm is located at 1044 Washington Ave., Suite 100, Macon, GA 31201; 478-743-4771; Fax 478-743-4772; www.carrdowney.com.

**Crowley & Clarida, LLP,** of Atlanta and **Hall, Bloch, Garland & Meyer, LLP,** of Macon announced the merger of the two firms. The firm will now be known as **Hall, Bloch, Garland & Meyer, LLP,** and will maintain offices in both Macon and Atlanta. The firm is located at 577 Mulberry St., Suite 1500, Macon, GA 31201; 478-745-1625; Fax 478-741-8822; www.hbgm.com.

## In Marietta

**Brock , Clay, Calhoun & Rogers, LLC,** announced that **Michael S. Goode** joined the firm in the trust and estate and corporate practice groups. Goode's practice focuses primarily on representing privately owned businesses and individuals in the estate planning, tax and corporate practice areas. The firm is located at 49 Atlanta St., Marietta, GA 30060; 770-422-1776; Fax 770-426-6155; www.brockclay.com.

## In Savannah

**Brannen, Searcy & Smith, LLP,** announced that **Robert C. Hughes III** was elected to its **partnership.** Hughes' practice areas include construction litigation, business/commercial litigation and personal injury in both Georgia and South Carolina. The firm is located at 22 E. 34th St., Savannah, GA 31401; 912-234-8875; Fax 912-232-1792; www.brannenlaw.com.

Pedigo

Manly

**Ellis, Painter, Ratterree & Adams LLP** announced that **Jason C. Pedigo** was elected as a **partner** of the firm. As a civil litigator, Pedigo has represented businesses, financial institutions and individuals in contractual disputes, breach of fiduciary duty claims, lender liability, member and shareholder claims and personal injury suits. **Megan Usher Manly** joined the firm as an **associate.** The firm is located at 2 E. Bryan St., 10th Floor, Savannah, GA 31401; 912-233-9700; Fax 912-233-2281; www.epra-law.com.

**Gregory G. Sewell** joined the firm of **Bouhan, Williams & Levy LLP** as an **associate.** Sewell engages in a predominately civil litigation practice. His practice focuses on medical malpractice defense, insurance defense and commercial litigation including covenants not to compete and nondisclosure issues. The firm is located at 447 Bull St., Savannah, GA 31401; 912-236-2491; Fax 912-233-0811; www.bouhan.com.

**Johnson & Associates,** a boutique intellectual property law firm, announced the addition of **William O. Isaacs** as **partner** and **Robert E. Richards** as **senior counsel.** With these additions, the firm now offers expertise in areas including aerospace, computers, mobile communications, medical lasers, lithotripters, optical systems, and semiconductor lasers and amplifiers, as well as increases its breadth of knowledge in the area of chemistry. Both Isaacs and Richards were formerly with King & Spalding in Atlanta. The firm is located at 317A E. Liberty St.,

Savannah, GA 31401; 912-257-4864; Fax 678-947-9798; www.johnsonbiopatent.com.

**Savage, Turner, Kraeuter, Pinckney & Madison** announced that **William K. Otto** joined the firm as an **associate.** His areas of practice include general civil trial practice, business litigation, product liability, personal injury and wrongful death. The firm is located at 304 E. Bay St., Savannah, GA 31401; 912-231-1140; Fax 912-232-4212; www.savagelawfirm.net.

## In Valdosta

**Moore, Clarke, DuVall & Rodgers, PC,** announced that **M. Drew DeMott** became a **partner** of the firm. DeMott primarily practices business law with an emphasis on commercial and banking litigation. The firm is located at 2805 N. Oak St., Suite A, Valdosta, GA 31602; 229-245-7823; Fax 229-245-7825; www.mcdr-law.com.

## In Chicago, Ill.

**Shaw Gussis Fishman Glantz Wolfson & Towbin LLC** announced that **S. Jarret Raab** was elected as a **member** of the firm. Raab practices with the firm's commercial litigation group, focusing on complex business disputes and related litigation matters. The firm is located at 321 N. Clark St., Suite 800, Chicago, IL 60654; 312-541-0151; Fax 312-980-3888; www.shawgussis.com.

## In Dallas, Texas

**Constangy, Brooks & Smith, LLP,** expanded its presence with the addition of a Dallas office, its second office in Texas. The firm is located at 100 Crescent Court, Suite 700, Dallas, TX 75201; 214-646-8625; Fax 214-459-8165; www.constangy.com.

## In Los Angeles, Calif.

Atlanta-based labor and employment firm **Fisher & Phillips LLP** announced the opening of a new office in Los Angeles. The firm is located at 444 S. Flower St., Suite 1590, Los Angeles, CA 90071; 213-330-4500; Fax 213-330-4501; www.laborlawyers.com.

## In New York, N.Y.

**Seyfarth Shaw LLP** announced that real estate lawyer **Eric L. Sidman** joined the firm as a **partner** in its New York office. Sidman was previously with Sutherland, Asbill & Brennan LLP. The firm is located at 620 Eighth Ave., New York, NY 10018; 212-218-5500; Fax 212-218-5526; www.seyfarth.com.

## In San Diego, Calif.

**Hunter Yancey,** formerly with Troutman Sanders LLP in Atlanta, recently joined **Qualcomm, Inc.,** in San Diego. He will continue his broad intellectual property practice in his role as patent counsel. Qualcomm, Inc., is located at 5775 Morehouse Drive, San Diego, CA 92121; 858-587-1121; www.qualcomm.com.

## In Sewanee, Tenn.

**The University of the South** announced that **Johann (Chip) Manning** was appointed **director** of the university's **Babson Center for Global Commerce.** Manning, a Sewanee alumnus, was formerly senior vice president and general counsel for Central Parking System. The University of the South is located at 735 University Ave., Sewanee, TN 37383; 931-598-1000; www.sewanee.edu.

## In Washington, D.C.

**The National Center for Victims of Crime** announced the election of **Melvin L. Hewitt Jr.** to its **board of directors.** Hewitt, a distinguished Atlanta-based civil trial attorney, joined 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. The Center is located at 2000 M St. NW, Suite 480, Washington, DC 20036; 202-467-8700; Fax 202-467-8701; www.ncvc.org.

**Jackson & Campbell** announced that **Michele L. Dearing** was promoted to **senior counsel.** Dearing is a member of the employment law practice group and the insurance coverage practice group. The firm is located at One Lafayette Centre, South Tower, 1120 20th St. NW, Washington, DC 20036; 202-457-1600; Fax 202-457-1678; www.jackscamp.com.

**Braden Cox** joined **Amazon.com** as **associate general counsel and director of public policy.** In this new position, Cox will direct Amazon's public policy efforts at the state level for all 50 states, including e-commerce, privacy and tax policies. Amazon is located at 126 C St. NW, Washington, DC 20001; 202-347-7390; Fax 202-347-7388; www.amazon.com.

# You've Got the Power

by Paula Frederick

"What's this?" your new client asks, pointing to a provision in your retainer agreement.

"It's a Power of Attorney," you explain. "It gives me the authority to make decisions on your behalf when you are not around. I use it in all of my retainer agreements. It's really for your convenience—you won't have to drive all the way downtown to sign documents."

"But I get to make all the decisions about the case, right?" your client asks.

"Of course! I'm not going to do anything without checking with you. This is just to make things go faster."

"Then why does it say that I endorse any action you take on my behalf?"

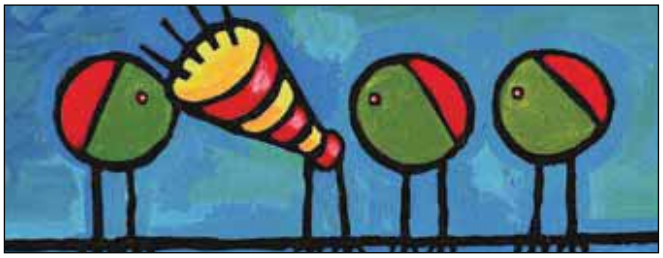
Why, indeed?

When is it appropriate for a lawyer to get a Power of Attorney from a client, and how should it be used?

Most often a lawyer uses a Power of Attorney to endorse settlement checks. The lawyer signs her name as Power of Attorney, or the client's name with some indication that the signature was made by the lawyer pursuant to the Power of Attorney (*signature/by lawyer as power of attorney*). This use is fairly standard and typically does not pose problems for the lawyer or client.

At the other end of the spectrum a lawyer may not, by use of a Power of Attorney or otherwise, usurp the client's authority to make decisions about his own case. It is well settled in Georgia that a lawyer may not settle a matter without specific authority from the client.

Between these two extremes there is very little authority on appropriate use of a Power of Attorney within the lawyer/client relationship. The Investigative Panel of the State Disciplinary Board has imposed confidential discipline in a number of cases that can provide some guidance. Specifically, the panel frowns on the following types of conduct:



- signing the client's name without any additional clarifying language; *i.e.,* with no indication that the signature is not that of the client
- using the Power of Attorney to do more than endorse checks—particularly to sign releases and other settlement documents that probably should be signed by the client
- including the Power of Attorney in a lengthy retainer agreement, where it is unlikely that the client has read or understood it
- using a Power of Attorney months or years after its execution, without timely notice to the client

Most often the panel has found that the conduct outlined above violates Rule 8.4(a)(4), and that the lawyer has engaged in professional conduct involving dishonesty, fraud, deceit or misrepresentation. Occasionally a lawyer violates Rule 1.4 (Communication) by his failure to appropriately communicate with the client about the settlement and its terms, or about the receipt of settlement checks.

If you use a Power of Attorney be sure that it is in the interest of the client to do so. GBJ

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

# Discipline Summaries

## (Feb. 16, 2011 through April 15, 2011)

by Connie P. Henry

### Voluntary Surrender/Disbarments

**Brooks E. Blitch III**
Homerville, Ga.
Admitted to Bar in 1961

On Feb. 28, 2011, the Supreme Court of Georgia disbarred Attorney Brooks E. Blitch III (State Bar No. 063400). On Dec. 1, 2009, Blitch, a member of the Bar since 1961 and a superior court judge for 27 years, pled guilty to Honest Services Fraud Conspiracy. He was sentenced to three years of probation and fined $100,100.

**Pamela V. Dada**
Atlanta, Ga.
Admitted to Bar in 1993

On Feb. 28, 2011, the Supreme Court of Georgia disbarred Attorney Pamela V. Dada (State Bar No.374401). On Oct. 28, 2009, Dada pled guilty to one felony count of financial identity fraud.

**Jack Tarpley Camp**
Newnan, Ga.
Admitted to Bar in 1975

On Feb. 28, 2011, the Supreme Court of Georgia accepted the Voluntary Surrender of License of Attorney Jack Tarpley Camp (State Bar No.105850). In November 2010, Camp pled guilty to aiding and abetting a felon's possession of a controlled substance, possession of a controlled substance and embezzlement/theft of public property.

**Lecora Bowen**
Riverdale, Ga.
Admitted to Bar in 1986

On March 7, 2011, the Supreme Court of Georgia disbarred Attorney Lecora Bowen (State Bar No. 071252). The following facts are admitted by default: Bowen was paid $4,000 by a client to file a medical malpractice action. Bowen filed the suit but failed to prosecute it or otherwise protect her client's interests, and the court dismissed the case with prejudice. Bowen was also paid $4,000 by another client to file suit on the client's behalf in an employment matter. After the federal district court ruled against her client, Bowen filed a notice of appeal, but the 11th Circuit Court of Appeals dismissed the appeal for failure to file the appellate brief timely.

In aggravation of discipline, the Court found that Bowen failed to cooperate during the investigation and was suspended in March 2011 for failure to respond in another disciplinary matter. Additionally, in 2004 the Court imposed a Review Panel reprimand based on her failure to timely return funds she had received in connection with a real estate loan that failed to close.

**Kendra Lynn Weathington**
Lithia Springs, Ga.
Admitted to Bar in 2002

On March 25, 2011, the Supreme Court of Georgia disbarred Attorney Kendra Lynn Weathington (State Bar No. 743117). The following facts are admitted by default: Weathington represented a couple in their bankruptcy case and, although she filed the petition, she did not communicate with her clients and failed to update her contact information. She abandoned her clients and failed to withdraw properly from their case. Although Weathington had not paid her Bar dues, she requested that her status be changed to inactive, while she still represented this couple.

Weathington was also retained to represent a client in a divorce case. Although she filed the complaint for divorce, she then failed to communicate with her client. The court dismissed the case without prejudice after neither party appeared for a hearing.

In another case, Weathington was retained by a couple to defend them in a civil action and she also represented their co-defendants. Weathington failed to discuss the potential conflict with her clients and obtain their consent to the representation. Weathington failed to communicate with her clients, including failing to inform them of their trial date, and she failed to properly and competently prepare for trial.

In aggravation of discipline, the Court found that Weathington had not paid her Bar dues in two years.

## Suspensions

**Jennifer Dawn LeDoux**
Mobile, Ala.
Admitted to Bar in 2003

On March 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Jennifer Dawn LeDoux (State Bar No. 443103) and imposed an indefinite suspension of no less than one year pursuant to Bar Rule 4-104 (mental incapacity and substance abuse) with conditions for reinstatement.

In 2006 LeDoux represented a client in two matters: a spring 2006 loan refinance and a submission of a property loss claim to an insurance company based on a house fire. The client filed a lawsuit against her in November 2006 relating to these two matters that has now been settled. In connection with the refinance, LeDoux failed to verify the existing loan's payoff and, as a result, the loan was not completely paid off in the refinance transaction. The original loan has now been paid off through the settlement of the lawsuit.

As to the other representation, after the real estate closing, the client retained LeDoux to perform legal work in connection with the property loss claim and other issues. The work was covered by a written retainer agreement which allowed LeDoux to pay outstanding legal fees first out of any property settlement fees received from the insurance company. After she encountered difficulties in getting timely payments on her client's claim from the insurance company, she issued her client a check (from her earned fees) which was meant to provide the client with liquid funds while the client awaited further payment from the insurance company. Later she issued her client a check from her trust account that was returned for insufficient funds. Shortly thereafter, LeDoux was hospitalized for psychiatric treatment due to an acute mental health episode and sedative-hypnotic dependence and was not allowed any type of outside communication. While she was hospitalized, the client sent an e-mail terminating the representation, at a time when the client owed LeDoux more than $75,000 in legal fees.

In mitigation of discipline, the Court found that LeDoux had no disciplinary history; that the conduct occurred at a time when she was suffering from mental health issues that resulted in her hospitalization in two different mental health facilities; that she is taking steps to address her mental health and substance abuse issues; that she has not practiced law since July 2006; that she accepted responsibility for her misconduct; and that she is sorry for any harm she may have caused.

## Review Panel Reprimand

**Haasan Hussein Elkhalil**
Atlanta, Ga.
Admitted to Bar in 2002

On Feb. 28, 2011, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Attorney Haasan Hussein Elkhalil (State Bar No. 243192) and ordered that he be administered a Review Panel reprimand. Elkhalil was retained to represent a client and his secretary on charges of identity fraud. The client signed a written fee agreement but nevertheless filed a grievance against Elkhalil, saying he was not advised properly of the fee and that the fee was excessive. The client filed a petition for fee arbitration seeking a refund of $30,999.88. The arbitrators found that the client was due $10,279.94. Elkhalil paid the award in full.

## Interim Suspensions

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Feb. 15, 2011, three lawyers have been suspended for violating this Rule and one has been reinstated.

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

For the most up-to-date information on lawyer discipline, visit the Bar's website at **www.gabar.org/ethics/recent_discipline/.**

# Kickin' Around in the Cloud: Lawyers and Cloud Computing 101

by Natalie R. Kelly

Cloud computing has become one of the big things for lawyers as of late—even though it's been around for years. (Just check out the follow-up to the recently held ABA TECHSHOW.) You are most likely, whether knowingly or unknowingly, practicing in the cloud to some degree.

Common examples of law firms using cloud computing include accessing bank information online and using Internet based e-mail accounts. (Early adoption: raise your hand if you had an AOL e-mail account back in the day where you accessed and sent e-mails over the Internet. See, you've probably been working in the cloud for years.) So what's with all of the "new fuss" around cloud computing for lawyers?

Well, first, what exactly is cloud computing? Cloud systems can generally be described as those systems where some component of the technology is either accessed or resides on an external server or servers; or the computing process happens wholly or in part and is accessed over the Internet. The idea that information does not natively reside on your "home" system means the information is in or accessed from the "cloud." Key terms describing cloud services and variations are "SaaS"—software as a service; "PaaS"—platform as a service; and "IaaS"—infrastructure as a service. For the purposes of this article, we will use a very broad description of cloud. It will refer to any services generally accessed over the Internet.

Photo by Carrie Patterson

For lawyers, a re-emergence of cloud systems means more efficient ways of dealing with client data and maintaining technology setups. Cloud services are typically subscription-based, relatively low-cost and easy to access. Most provide bank-grade levels of security. The need for law firms to operate a traditional computer network changes. Accessing software applications online and not having to worry about local updates is beneficial on many fronts. Lawyers can allow clients and other parties to access some or all of their matter informa-

tion over the Internet using cloud programs. In fact, the adoption of delivering legal services entirely online via a virtual law office finds its home in the cloud.

The normal level of overall care and healthy plans for securing confidential client data you don't have immediate control over becomes imperative with cloud adoption on any level. Lawyers have to be very concerned with the security of their client's confidential data. From an ethical standpoint (and you should discuss plans you are not sure about with the Ethics Helpline run by our Office of the General Counsel), you will need to take precautions similar to those undertaken when you utilize any third-party service vendor dealing with your clients' confidential information.

The Internet has become a double-edged sword as the main vehicle for delivering and accessing information. Lawyers using cloud-based technology can not overlook the risks of access and security. Concerns range from the simple inability to access systems when the Internet is down to much larger concerns when infrastructure services are down in multiple zones or there are data breaches at vendor sites. Recent cases of breakdowns in the cloud and cloud services have occurred, and lawyers should not ignore their need to set up procedures beforehand to address these concerns with thorough disaster recovery and business continuation plans.

Below is a general checklist to get you started with "cloud-based" systems in your practice, and some of the leading cloud products and services used by lawyers. Again, this list will need to be implemented in such a way that you do not overlook your obligation to safeguard your client's confidential information.

## Basic Cloud Checklist for Lawyers

1. Check local network setup (or have your IT company provide this for you) for setup and security settings
2. Configure your network Internet access to ensure the most efficient and secure levels of access
3. Understand rules and practices of your ISP (Internet Service Provider) especially regarding security and data storage and management
4. Understand the rules and general practices of your cloud vendors' ISPs
5. Review and regularly monitor your SLA (Service-Level Agreements) with cloud vendors
6. Keep an updated list of cloud services and vendors' main contact information with alternate means of contact where available
7. Create internal office policies and procedures for accessing and using cloud systems in your office
8. Incorporate your cloud usage into the overall firm disaster recovery plan and business continuation models
9. Perform regular (daily preferred) backups and run regular test restores of all data
10. Request a sample retrieval from the cloud vendor (ask for your data back in the way you'd get it in the event you discontinued the service or there were other occasions where you need your data back)

Exactly what cloud systems are lawyers using? Here are some key examples we know about, but the list seems to grow daily, and ranges from very narrowly defined cloud services to full cloud law office operations. This list is by no means exhaustive.

**Data Storage and File Synchronization and Collaboration**
Box.net, Dialawg, DropBox, JungleDisk, LiveMesh, SugarSync

**Practice Management/Litigation Management**
AdvologixPM, Clio, Credenza, Legal Workspace, LexisNexis Firm Manager, Livia, MyCase, NextPoint, RealPractice, RocketMatter

**Virtual Law Office Platforms**
DirectLaw, Total Attorneys

**Accounting and Billing Programs**
Bill4Time, FreshBooks, Time59, TimeSolv

**Word Processing/Document Management**
Adobe Buzzword, GoogleDocs, NetDocuments, Zoho Writer

**Project Management Software**
Basecamp, PBWorks, Zoho

These are some basics regarding lawyers and cloud computing. However, if you are operating in the cloud or considering doing so, please feel free to contact the Law Practice Management Program for additional information and resources. Lawyers and cloud computing is likely to be a relevant practice topic for some time, and you need to have a basic understanding of the systems and concerns. 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.

# The Southwestern Circuit: A Study in Perseverance

by Bonne D. Cella

Picture a Georgia map with a triangle drawn between Albany, Columbus and Macon. In the center of that triangle lies Americus, the county seat of Sumter, and a part of the Southwestern Judicial Circuit.[1] Americus (the masculine form of America) and the Southwestern Circuit play an important role in Georgia's history and offer excellent examples of perseverance and resilience in the face of difficult times. It seems fitting that the national operational headquarters for Habitat for Humanity is located in Americus.

The Sumter County Courthouse was the venue for two major disturbances in the early days. The Panic of 1837 (due in part to the collapse in crop prices) caused Sumter County farmers to rise in revolt to stop the foreclosures and public sale of their land. Joining forces, the farmers abducted the deputy sheriff (who was conducting the sale), and then they destroyed the land records. It would be 100 years before farmers received any help from the government with the creation of the Federal Crop Insurance Corporation in 1938.[2]

In 1844, a presidential election year, Sumter County Whigs and Democrats gathered to show support for their candidates—lawyers Henry Clay and James Polk. Their infectious enthusiasm flowed outside to the courthouse square and accounts vary as to who threw the first punch, a Whig or Democrat. However, both parties received serious injuries before calmer minds prevailed.

Photos by Bonne D. Cella

Supreme Court of Georgia Chief Justice Carol Hunstein and Southwestern Judicial Circuit Chief Judge R. Rucker Smith at the dedication of the new Sumter County Courthouse.

During the Civil War, the central business district of Americus served as a Confederate hospital. In 1864, a fire engulfed the town and residents evacuated the sick and injured soldiers to homes and farms. Thousands of Confederate soldiers were cared for in tents and temporary structures. Ten miles away in Andersonville was Camp Sumter, a prisoner of war camp. In the 15 months the camp operated, 12,913 Union prisoners died from malnutrition and disease. Today, these Union soldiers, along with thousands of American veterans from other wars, rest at the National Cemetery in Andersonville—an honored and sacred burial place. Also located there is The National Prisoner of War Museum that opened in 1998. This solemn reminder of the sacrifices of war is dedicated to all American prisoners of war.

The Windsor Hotel, a Victorian gem in the heart of Americus, was built in 1892. William Jennings Bryan stayed there in 1896 while on his presidential campaign through Georgia, and Franklin D. Roosevelt spoke from the veranda of the hotel in 1928. Nefarious guest Al Capone posted an armed guard at the foot of the staircase while he stayed there. After almost 80 years of operation, the hotel fell on hard times and closed its doors in 1972. The Windsor seemed destined for the wrecking ball, but the city of Americus rallied to rescue their landmark, giving it a $6.5 million dollar facelift. Actors Hume Cronyn, Jessica Tandy and Ester Rolle stayed at the Windsor in 1993 to film the television movie, *To Dance With The White Dog,* based on the novel by Georgia author Terry Kay. The Windsor underwent another extensive update in 2010 with Sumter County residents, President and Mrs. Jimmy Carter, helping to host the grand re-opening.

Other brushes with fame came to Sumter County in 1908, when Booker T. Washington spoke at the Americus Institute,[3] and in 1923, when Charles Lindbergh made his first solo flight at nearby Souther Field. During World War II, Royal Air Force Cadets trained at Souther Field, and in 1944, it housed German prisoners of war who worked on local farms. In 2009, Souther Field was officially renamed Jimmy Carter Regional Airport.

Another structure dear to the hearts of locals is the beautifully restored Rylander Theatre, built in 1921. Like the Windsor, the Rylander closed operations and faced an uncertain future until saved from the brink of destruction. Thanks to the city of Americus and countless volunteers, it has reclaimed its title as "The Finest Playhouse South of Atlanta."

On March 1, 2007, at approximately 9 p.m., an F3 tornado cut through Americus. The fierce, mile-wide storm killed two people, destroyed hundreds of homes and businesses and unearthed 100-year-old oak trees. The Sumter Regional Hospital's roof was blown off and strangely reminiscent of the event 143 years before, when patients were evacuated from the Confederate hospital, patients from Sumter Regional were taken to M.A.S.H. style tents and temporary facilities. The tornado demolished a row of doctors' offices and wiped out Sumter HealthPlex, a new 8,000-square-foot, $3.1 million facility. Patient records, hurled and tossed in the storm, ended up as far as 40 miles away. Southwest Georgians look ahead to the opening of Phoebe Sumter Medical Center, to be completed by the end of 2011.


National operational headquarters for Habitat for Humanity is located in Americus.

The new Sumter County Courthouse, dedicated on April 29, 2011.

April 29, 2011, marked the judicial dedication of the new Sumter County Courthouse. Chief Judge R. Rucker Smith introduced the keynote speaker, Chief Justice Carol Hunstein. She congratulated Sumter County officials on their perseverance in seeing the courthouse project through to completion in these difficult economic times. She continued by saying in part, "The building we celebrate today is a bridge spanning the past, present and future. This courthouse is a new, state-of-the-art facility, yet it is at home among the historic buildings of Americus. This courthouse also carries forward a proud tradition of justice in Sumter County dating back to the very founding of the county in 1831."

Smith offered his remarks and ended by saying, "I hope that 100 years from now, you can say that wise and compassionate judges fairly administered justice and resolved disputes and that all people—all people, as it was not at one time—but that all people were treated equally with the dignity and respect that they deserve."

At the close of the ceremony, Smith invited everyone to tour the impressive new facility that stands strong and firm—much like the people of the Southwestern Circuit. GBJ

**Bonne D. Cella** is the office administrator at the State Bar of Georgia's South Georgia Office in Tifton and can be reached at bonnec@gabar.org.

## Endnotes

1. Sumter, Lee, Schley and Macon counties
2. USDA website
3. A secondary school for African-Americans that was founded by Rev. Dr. Major W. Reddick and operational from 1897-1932.

# Pro Bono Honor Roll




The Pro Bono Project of the State Bar of Georgia salutes the following attorneys who demonstrated their commitment to equal access to justice by volunteering their time to represent the indigent in civil pro bono programs during 2010.

** denotes attorneys accepting 3 or more pro bono cases in 2010*

**GEORGIA LEGAL SERVICES PROGRAM**

**ALBANY**

**Albany**

Glenn M. Booker
Jimmie H. Brown
Valerie Brown-Williams
Walter H. Burt III
Greg A. Clark *
Alfred N. Corriere
Cawthon H. Custer *
Gail D. Drake *
Thomas V. Duck III
James N. Finkelstein
Gregory L. Fullerton *
William H. Gregory II
Michael C. Hall
Thomas G. Ledford *
Karen R. McWhite
William E. Mitchell IV
John Moorhead *
Alvin J. Newton Jr.
Larry B. Owens
Ralph Patterson
Mark Pickett
Gail S. Pursel *
W. Ralph Rodgers Jr.
William F. Underwood III
William F. Underwood Jr.

**Ashburn**

Cheryle T. Bryan
Stephen L. Ivie

**Colquitt**

Danny C. Griffin *

**Dawson**

W. T. Gamble

**Macon**

K. Joy Webster

**Tifton**

Melinda B. Phillips

**Whigham**

Joshua C. Bell

**AUGUSTA**

J. Patrick Claiborne
Henry "Hank" Crane III
John A. Donsbach
Matthew J. Duncan *
J. Edward Enoch
John Flythe *
Randolph Frails *
Robert W. Hunter III
Jennie M. Hyatt
David S. Klein
Dana E. Niehus *
Richard T. Pacheco,II
Evita A. Paschall *
Myrna Serrano
H. William Sams Jr.
D. Clay Ward

**Evans**

Sue Reimer
Carl G. Schluter

**Grovetown**

Melissa Kaufman *

**Martinez**

Stephen H. Hagler

**COLUMBUS**

**Americus**

Justin Arnold

**Fulton**

Walter Fortson *

**Columbus**

Gary Abell
Tom Affleck
William Arey *
Jacob Beil *
Gary Bruce
Richard Childs
Catherine Coppedge
Stephanie Crosse *
Marc D'Antonio
Pete Daughtery
Michael Eddings *
Gregory Spencer Ellington
Richard Flowers
Larry Gordon
Maxine Hardy
Sherry Goodrum *
Tricia Hargrove
Russell Hinds
Susan Henderson
Ronald Iddins
Benjamin Land
James Lamb
Lori Leonardo
Cynthia Maisano
Lauren Mescon
Elizabeth McBride
Joshua McKoon
William D. NeSmith III
M. Linda Pierce
Pedro Quezada *
David Rayfield
Kathryn Rhodes
Alan F. Rothschild Jr.
Richard T. Tebeau *
Raymond Tillery
William Tucker
Robert Pate Turner III
Jorge Vega
Alfonza Whittaker
Joseph Wiley
Dorothy Williams *
Robert Wilson

**LaGrange**

W. Luther Jones

**Greenville, GA**
Tina Dufresne

**Montezuma**
G. Leonard Liggin

**Thomaston**
Donald Snow *

**DALTON**
Joy Baker
William Bell
Lindsay H. Bennett III
Virginia Boemanns *
Steven Bolding *
Valerie Brantley
Rick Brown
Nancy Burnett
Brian Cahn
Paul Todd Carroll
Robert Cowan
Timothy Crouch
Lee Daniel
R. John Emmett
Floyd Farless
Fuller & McKay
Terry Haygood *
Michael Hurtt *
Christina Jenkins
Anna Johnson
David Johnson
Todd Johnson *
Hugh Kemp
Thomas Lindsay
Nancy Maddox *
Dustin Manning
Edwin Marger
Tom Minor IV
Katherine O'Gwin
Mark S. Perry
John Rhyne
Horace Sawyer
Lyndsay Sneckenberger
Lawrence Stagg
Matthew Thames
W. David Wallace
James E. Wilbanks *

**GAINESVILLE**
**Athens**
Arthur Archibald
Jason Braswell
Adam Cain
Thomas Camp
Brian Carney
Donarell Green
Kent Silver

**Blairsville**
Robbie Colwell Weaver

**Buford**
Marion E. Ellington Jr.

**Clarkesville**
Douglas L. Henry

**Cleveland**
Raymond L. Crowell

**Dawsonville**
David Wallace

**Gainesville**
Thomas Calkins

**Suwanee**
John V. Hogan

**Tucker**
Donald Dotson

**Woodstock**
Steven Campbell

**MACON**
**Atlanta**
Sabrina Hassanali *

**Dublin**
Edward B. III Claxton
Verna L. Smith

**Eastman**
Steven H. Hurwitz

**Hawkinsville**
James E. Turk *

**Macon**
David F. Addleton *
Christopher J. Arnold
Nancy Atkinson
Stephen N. Barnes
Sean A. Bewick
Andrene Brown *
Larry Brox *
R. Tyler Bryant
G. Morris Carr
Christy Childers
J. Roger Davis
Joy H. Fisher
John P. Fox *
Emmett Goodman
Kathleen Hall
Timothy K. Hall *
Sarah Harris *
Thomas F. Jarriel
Jane M. Jordan *
A.G. Knowles *
Walter E. Leggett
Michael Lemon
Robert Mock Jr.
Ann Parman
James E. Patterson
Arthur L. Phillips
Kristen Quinton *
Thomas F. Richardson *
Renate D. Riley
Rhonda Roell-Taylor
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# Change is Good

by Derrick W. Stanley

Do you ever get the feeling that you have done something before, but now it does not work right? Well, you are not losing your mind. Some minor changes have been made at www.gabar.org and some features are just different enough to make you second guess yourself.

The most noticeable change is now you are required to log in to begin some processes. Take the meetings tab for instance. In the past, you were able to see the meeting description for upcoming events. Now, you must log in first to get information about each event. The screen may also appear slightly different as well.

You may begin your Internet session by logging in to the website first and then opening the e-mailed meeting notice with the link to the event, or you can click the link from the e-mail and then log in to see the details and register (see fig. 1).

The process to register for a meeting is outlined below and assumes that you have already logged in to the website. Section members will receive an e-mail with a link to the meetings page; however, that link is not required to register for the meeting. Simply go to https://www.members.gabar.org/Core/Events/Events.aspx (see fig. 2) to see a list of events and register for an upcoming section meeting.

Select the event you would like to attend by clicking the select link next to it (see fig. 3).

Once you have selected the event, a description will appear on the screen. If this is the event you would like to attend, click the register button (see fig. 4). Please note that if the register button is grayed out, you will need to log in.

On the next screen, you will need to verify your information and click the next button. Please note that changes made on this page will not update your information in the database. If this information is incorrect, please click on the "My Account" button in the upper right hand corner of the website to update your member record.

After clicking the next button, you will need to select the event for which you would like to register. Nonmember rate is for those who are not a member of the section.

The next screen is simply a summary of what has been registered for and the amount that will be charged. By clicking the next button, you will be taken to the credit card payment screen. After entering your information and clicking the "next" button, you will be shown a confirmation screen. You will also be provided with an e-mail receipt.

There are several different places on the website where you can log in. If you are having trouble logging in, you can reset your password. This process has been streamlined as well and the passwords have also been simplified.

The "Join a Section" link on the website has been disabled through the dues payment cycle. You can join a section by checking the appropriate box on your dues statement or by downloading the form at www.gabar.org/sections and submitting it with payment to the Bar.

Should you have any questions, please do not hesitate to contact me. GBJ

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


figure 1

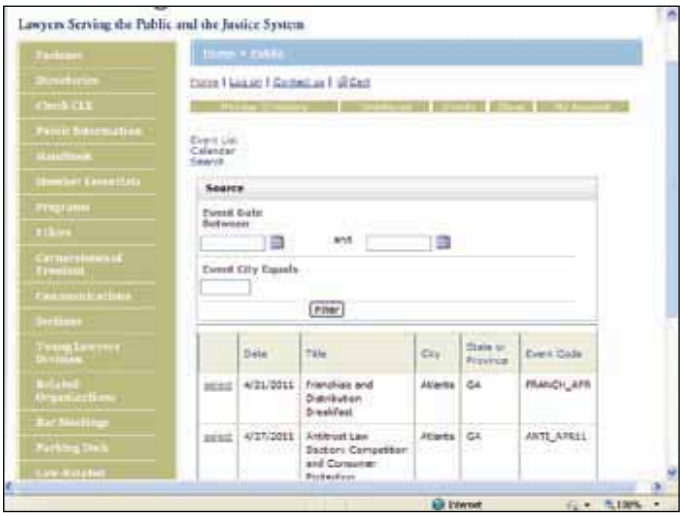


figure 2


figure 3


figure 4


figure 5

# Fastcase: Faster Smarter

by Sheila Baldwin

Fastcase bills itself as the "Smarter Alternative for Legal Research." Several features combine to make this slogan more than a marketing gimmick: a personalized start page, the Quick Caselaw Search feature, customizing features within search results; the library with its saved document feature and a print queue with batch printing options are just a few highlights.

## Personalized Start Page

Your research begins on a personalized start page, called the Quick Caselaw Search page. On this page, you will find your recent search history, hyperlinks to all integrated search options as well as the Fastcase customer support and training resources. It is possible to log on, enter a few choice key words, select your last customized jurisdiction and, with the click of the mouse, retrieve a relevant list of results. You can always navigate back to this page by selecting "My Research Home" from the "Start" menu (see fig. 1).

## The Quick Caselaw Search

Quickly pull up a case you already have in mind using Quick Caselaw Search. This type of search works best with unique case identifiers such as reporter citations, docket numbers or unique party names. You may want to select one of the previous searches in the list of 10 displayed on the start page under the heading "Last 10 Searches." This enables you to immediately pick up the trail on your previous search. If you click on the any of the listed searches, you will be taken directly to the corresponding search results that include the original jurisdiction, search terms and results filters.

## Customizable Search Results

Fastcase gives you control over the way your case law search results are displayed. You can filter your results six different ways by simply clicking on column headings. Sort by jurisdiction, relevance, case name, date, cited generally and cited within terms (see fig. 2). The jurisdiction dropdown menu enables you to easily filter results to cases from one jurisdiction. Choose how much summary information will be displayed about each case using the three settings: case name, first paragraph or most relevant paragraph (see fig. 3).

## My Library

Within "Recently Viewed Documents," Fastcase automatically tracks the last 10 documents that you have viewed and automatically stores them in your personalized library for easy access. To retrieve the 10 most recent documents you viewed, select "Go to Recent Documents" from the "My Library" menu.

Within "Favorite Documents," Fastcase allows you to save up to 10 documents for later reference. This can be any viewable document such as a case, code or a court rule, anything that you frequently need to access. To save a document, click the "Add to My Library" link on the toolbar at the top right (see fig. 4). To retrieve your saved documents, select "Go to Favorite Documents" from the menu.

## Print Queue and Batch Printing

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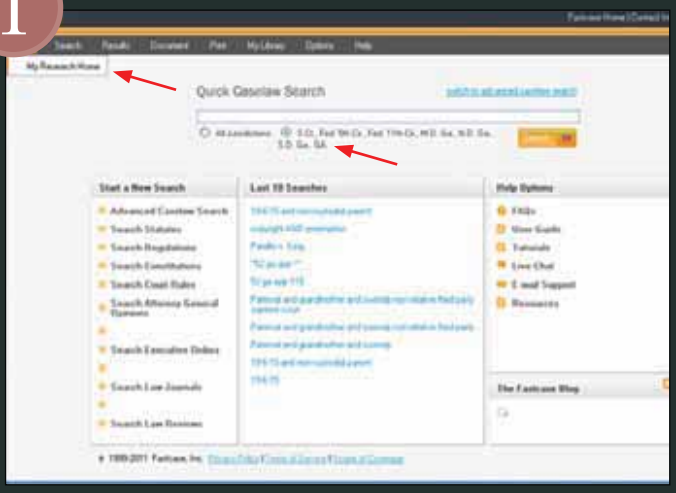
**Sheila Baldwin** is the member benefits coordinator of the State Bar of Georgia and can be reached at sheilab@gabar.org.

1

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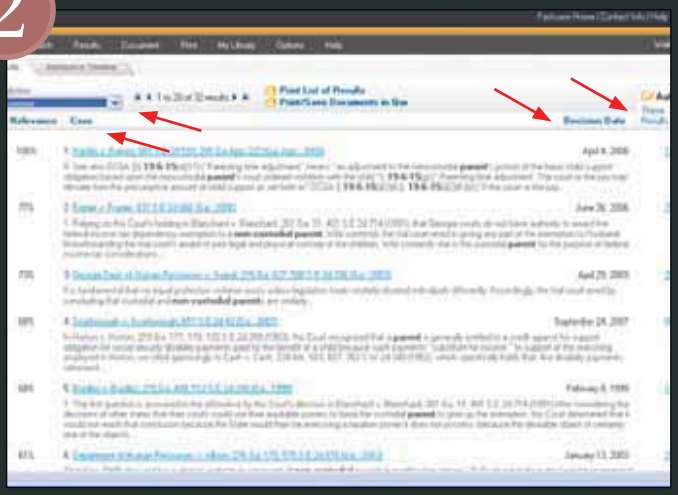

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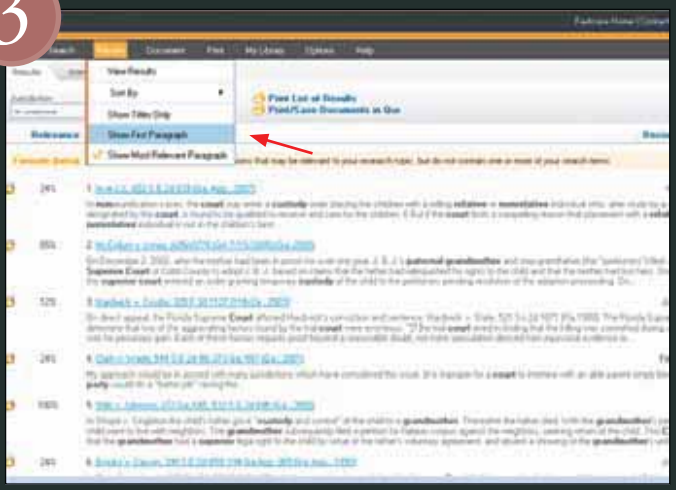

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# Be Inelegant

by Karen J. Sneddon and David Hricik

We seldom let ourselves rant about writing, but in this installment we will. The hotter weather must be getting to us, so forgive us this transgression.

But our rant has a purpose. Legal concepts are often difficult, and fact patterns are often complex. The goal of a good lawyer is to write so that the reader can understand those concepts and fact patterns accurately and efficiently. At minimum, the writing should not make difficult legal concepts and complex fact patterns harder to grasp.

One key and simple way to achieve that goal, or at least do no harm, is to be precise and consistent in terminology.[1] If you are a transactional lawyer, the importance of using defined terms and using other terminology should be second nature to you by now. Because courts generally assume that different words have different meaning, using the word "late" in one place and "tardy" in another can create ambiguity or uncertainty. Although elegant variation is prized for energizing other forms of writing, such as fiction, elegant variation should be avoided in the legal writing.[2] As one court wrote,

> Besides Arabic script, we all learn in school a penchant for "elegant variation," *i.e.,* a reluctance to repeat even a single word more than once in a paragraph. If San Francisco is named once, on the next reference it becomes "the Pacific Coast port above mentioned," or even more elegantly, "the City of the Golden Gate." This is how we learn to write. [The attorney] naturally found it tiresome to repeat so many times what he calls "complicated concepts" and so preferred what he calls "shorthand." A… legal document[] is likely to have its intentions defeated by "elegant variation," which should be reserved for less mundane documents.[3]

Creating ambiguity and uncertainty is seldom the goal of good legal writing. Be inelegant.

The same principle applies to court documents. If you are litigating a contract, for example, give the document a name the first time you mention it, then use that name throughout. For example, you might write: "The parties' contract to sell the boat is dated October 5, 2010, and is attached as Exhibit A. (The 'Boat Contract')." For the rest of the writing, refer to the contract as the "Boat Contract" and not the "October Contract" or the "contract in issue" or any other term. Consistency ensures that the reader is not distracted by term use.[4] Consider, if writing about *res judicata*, don't

use "*res judicata*" in one place and "claim preclusion" in another.

Yet (rant warning), lawyers violate these easy directives. Much contract litigation arises because of inconsistent use of terminology, and no doubt many disputes that result in ill will but not full-blown litigation also arise. In briefs, when the writers use different phrases to refer to the same thing, legal concepts are harder to grasp and fact patterns become hazier. Perhaps this is so because writers often fail to realize that they have spent more time with the subject matter than the reader will have available. In other words, while it may be clear to you, the writer, that the "Boat Contract," the "October Contract," and the "contract at issue" are one and the same, that elegant variation may distract the reader and undermine your effectiveness. Be consistent. You will be precise, and you will make reading easier.

A similar way to achieve the goal is to use parallel terms when comparing facts of a client's case to facts in case law. For example, if you are representing a client in a divorce case and are comparing the facts of your case to a precedential case, use "husband" and "wife" to refer to the parties in the other case, unless there is a reason to refer to them as plaintiff and defendant or appellant and appellee. The more descriptive characterization of "husband" and "wife," conveys the nature of the relationship to the parties, which isn't conveyed with the use of the litigation roles.

Likewise, if you are writing about a procedural issue, a similar approach will help. For example, if you are arguing about the burden of proof in a summary judgment motion, refer to the parties in the precedential cases by using procedural names—movant and opponent—rather than plaintiff and defendant. Using parallel terminology often will make it easier for the reader to analogize your facts to the facts of the precedent you rely upon. Which parallel terminology is most effective will depend on what issue the writing addresses.

Another key way to be concise and precise is to reduce the number of pronouns. When attempting to avoid inconsistent terminology, writers sometimes fall into the trap of littering prose with "it," "he," "she" and "they." So, for instance, consistently refer to the movant as the "movant"—not the plaintiff or the husband—and not "he" or "she." While pronouns are not the root of all evil, they can deceive and confuse a reader. Using pronouns sparingly and using more descriptive, consistent terms help the reader and, thus, your clients.

Here are a couple of problems to try:

1. Defendant failed to deliver the funds on the date agreed in the contract. His failure to provide the agreed upon sums resulted in great harm to Plaintiff when he did not receive it on time.

2. Unlike these facts here, in the case the defendant relies upon in its motion for summary judgment, *Smith,* the evidence showed that the defendant did not regularly maintain her car. Thus, while summary judgment for the defendant was properly denied in *Smith*, it should be granted here. GBJ

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

**David Hricik** is a professor at Mercer Law School who has written several books and more than a dozen articles. The Legal Writing Program at Mercer Law School is currently ranked as the nation's No. 1 by *U.S. News & World Report*.

## Endnotes

1. Another phrasing of this rant is the following:

   > It is the second-rate writers, those intent rather on expressing themselves prettily than on conveying their meaning clearly, & still more those whose notions of style are based on a few misleading rules of thumb, that are chiefly open to the allurements of elegant variation.

   William Panneill, *Litigator's Bookshelf: Fowler's Modern English Usage* 30 No. 2 Litigation 63 (Winter 2004).
2. *E.g.,* Megan McAlpin, *Silencing the Novelist Within*, 69 Or. St. B. Bull. 11 (Oct. 2008).
3. *Burlington Industries, Inc. v. Dayco Corp.*, 849 F.2d 1418, 1421-22 (Fed. Cir. 1988).
4. The same advice applies to oral communication. *See, e.g.,* Allison C. Blakley, LITIGATION THE EMPLOYMENT TORT CASE § 9.08 (2001) ("Avoid elegant variation. There is no excuse for leaving a juror wondering why one person made 'errors' and another made 'mistakes.'").

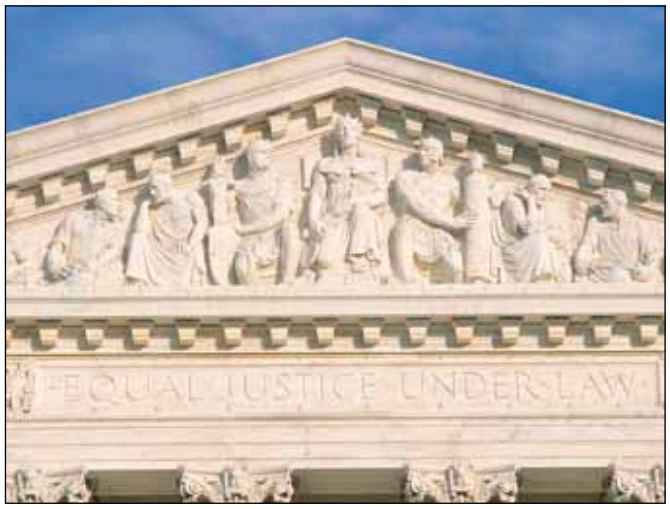
# Access to Justice: Fair and For All

by Leah Ward Sears

Ten years ago, the human race finally arrived at the door of the year 2000 to keep its date, and inaugurate its fate, with the 21st century. But as excited as I was about seeing a new century begin with more opportunities for people like me—women and minorities—I was, nevertheless, anxious, because I knew that the courts were still laboring under a debilitating, devastating image crisis. And today, they still are.

Imagine you are a single mother with three children seeking relief from a violent live-in boyfriend. You petition the courts for relief. A hearing on your petition is scheduled. When that date comes, you walk into the courtroom and the black-robed judge ascends the bench. The judge sits up high, and he (or she) is older, conservative and affluent. The job of this person is to manage an unbelievable parade of the walking wounded, folks who are floundering through another system that they cannot possibly understand.

As a former Supreme Court of Georgia chief justice with more than 25 years of service in the judiciary, I spent much of my career examining the American ideal




of justice from the perspectives of my own values and political philosophy. And a significant question continues to plague me, even now after I have retired from the bench. And that question is: Is justice being served?

For me, this is an issue of personal importance and national conscience. As a judge, I saw firsthand how ill-equipped and unprepared defense counsel, through no fault of theirs, can distort the entire system.

It is the task of defense counsel, especially public defenders, to work between two "nations," nations between which there is little intercourse and little sympathy; nations that, for the most part, are ignorant of each other's habits, concerns, values, thoughts and feelings. These distinctions aren't based so much on gender, race, or national origin as they were in the past. But, as I see

it now, what sets these two nations apart are money and access to opportunity, which includes access to justice.

There is one class from whom comes the rules and the lawmakers, those who decide what is legal or illegal. They are legislators, appointed and elected officials, lawyers, probation officers and, of course, judges. This class is generally characterized by being convention-conforming, authority-respecting, family-raising, debt-paying, product and service consuming, literate and non-poor. These people are the "haves."

The other class are people who are poor; many do not work (although some work very hard with very little to show for it). They are not well-educated at all. Many are illiterate, convention-upsetting, defying of the authority of church and state. They are sometimes debt-dodging, law-breaking individuals and, above all, distracting to the "haves" because they aren't like them and don't understand their values.

The "haves," as a rule, on one hand, will not find it difficult to observe the conventions, strive for the goals and conform to the restrictions of society. "Have-nots," on the other hand, often find it very difficult.

The "haves" in power, in most cases, will see the good of the community, the good of mankind, and even sometimes God's purpose as being served by those who act like they do and believe as they do. "Have-nots" will be seen as irreverent and uncooperative.

The money-bail system, in an institutional sense, is an example of class bias. The Supreme Court has pronounced that the only legitimate purpose for bail is to ensure the appearance of a defendant at trial. Notwithstanding this rule, the poor are routinely either denied bail or granted bail that they simply cannot afford. So you have a large class of people, almost all "have-nots," whose presumption of innocence has been done away with, and who are behind bars for substantial periods of time prior to ever being convicted of a crime.

The system is supposed to operate on the presumption that everyone is entitled to bail in noncapital cases. It does not in the case of the poor. There is something very wrong with this disparity. What used to turn me cold when I was a judge was seeing hundreds of people who neither had money, experience nor friends. That's why they stayed warehoused in our jails, waiting for trial. Many of these people became embittered, vengeful, hopeless . . . and some were even ruined.

This happened often in our juvenile courts. In these courts, "have-not" children stand before judges often because they do not act like the truant officers, case workers or probationer officers think they ought to act. They ought to like school and be willing to put up with teachers who esteem them lowly. They should work hard to master an irrelevant curriculum that assumes a different cultural background and a "haves'" life expectancies and goals. They should never become influenced by the things they see on the streets, even though they may observe that sometimes crime does pay, and that work, when available, does not pay all that much.

Let me give you another example. In traffic court, where I first started my judicial career, the "have-nots" do not even start out with a presumption of innocence. The unspoken but very clear official assumption is that the police would not bother anyone who was not guilty of some offense. The harried judge with 200 cases or so to hear in one day has heard all the excuses and evasions. If she has to spend too much time with any one defendant's excuses, she'll never get through the calendar. Besides, those fines, penalties and costs collected at traffic courts are needed by city budgets.

In small claims and magistrate courts, almost all of the defendants are "have-nots." They are tenants behind in rent, obligees to payday lenders, installment purchasers behind in payments to finance companies or vendors of furniture, food, clothing, autos or some other necessary item.

Small claims courts were, when first set up, created to satisfy the need for a court where average citizens could have a place designed to offer them an inexpensive, fast and simple means of settling disputes where money damages could be had by one side over the other. But these courts are now too often used as devices where creditors have a cheap and almost sure-fire method of collecting valid, as well as doubtful or spurious claims against "have-nots."

Imagine the impact of the receipt of a summons and complaint at the home of a "have-not." He returns home from work or wherever and finds "the papers." He reads the words on the summons littered with jargon that cannot possibly be fully understood by someone even with a college degree. Therefore, many defendants, for reasons known only to them, elect to do nothing and to stay away from court, perhaps reasoning that no good can come to him from participation in this law suit, and perhaps that if he ignores it, the trouble will simply go away.

Many folks distrust a system that they cannot understand and that they feel will not understand them. Moreover, many have lost confidence in their ability to get fair treatment. Perhaps this explains why so many of the poor surrender to what they perceive to be preordained defeat.

So, what is to be done? In order to fulfill the promises of *Gideon*[1] and *Gault*,[2] we need the engagement of partners at the federal, state and local levels, both within and outside of government. Much good work has already gone into developing model standards for public defense systems. But obviously more resources are needed.

This and many of the other remedies for the relief of "have-nots" must come from the legislature. But I further suggest that each one of us ought to examine our prejudices periodically and, if we find them, end them. In order for changes to occur in the basic inequity of power about which I speak, we must every day challenge the belief that the imbalance is somehow right, natural or unavoidable. Class-based stereotypes, myths and biases must be eliminated in every American social institution and profession, with the justice system being an important priority. Our institutions must periodically undergo critical self-evaluation of the prejudices embedded in their structural features and that manifest in the attitudes of the individuals who participate in them. And we must reject any and all impulses that we might have to facilitate a climate of condescension, indifference and downright hostility to human beings who may be uneducated, illiterate and even ill-mannered, however we may define that latter term. We must act on the notion that we really are all of one blood, and that belief must become the foundation for the building of a true, genuine and lasting community among all people, one that arises above race and clan, one that extends beyond all tongues and nations, one that supplants any and all skin color, ethnicity and class difference and that embraces the whole human family.

Justice is supposed to be blind. It is supposed to treat all individuals alike. It's time to remove the blindfold that gives the illusion of fair treatment. We need to expose to the full glare of reality the inequities superimposed in that great unrealized objective. We need to see its errors, to identify its prejudices and to expose those who pervert just laws with unjust penalties.

The problems I just mentioned are all man-made problems. They are, therefore, susceptible to man-made solutions. A new system of justice as to all people, the "haves" and the "have-nots," is waiting to be ushered in, a condition to pierce the gray clouds of indifference and even sometimes hate. From this premise and understanding, we must rebuild our attitudes, redesign our strategies, redefine our goals and reorder our priorities to make justice available to everyone, regardless of the circumstances of their lives. GBJ

**Leah Ward Sears** is a partner in the Atlanta office of Schiff Hardin LLP, where she is head of the firm's national appellate practice team. She served as the chief justice of the Supreme Court of Georgia. This article is an adaptation of a speech she delivered at the 2010 Annual Conference of the National Legal Aid & Defender Association, "Delivering on the Dream: Marching Toward 100 Years of Justice," Atlanta, and may include unreferenced materials used for the keynote speech.

## Endnotes

1. *Gideon v. Wainwright*, 372 U.S. 335 (1963), established an indigent criminal defendant's right, under the 6th Amendment of the U. S. Constitution, to counsel in state criminal trials.
2. *In Re Gault*, 387 U.S. 1 (1967), established that juveniles should be provided with most of the procedural protections afforded to adults in criminal prosecutions, including the right to counsel.

## 2011 LAW SCHOOL ORIENTATIONS ON PROFESSIONALISM

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| Emory | Fri., August 19 | Emory does not need volunteers at this time | | TBD |
| □ Georgia State | Tues., August 9 | 3:00 - 5:45 p.m. | 5:45 - 7:00 | TBD |
| □ John Marshall | Sat., August 13 | 9:00-11:30 a.m. | 11:30 - 12:30 | TBD |
| □ Mercer | Fri., August 12 | 1:30 - 3:30 p.m. | 3:30-4:30 p.m. | Judge Marc Treadwell |
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Died April 2011

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Admitted 1988
Died May 2010

**David Funk,** one of the founders of Ellis Funk, P.C., passed away in January 2011 from complications arising from a tragic accident suffered several years ago. Funk was born in Atlanta in November 1947 to Charles and Helen Funk. He grew up in the Morningside neighborhood of Atlanta, was a member of the first graduating class of the Greenfield Hebrew Academy in Atlanta and graduated from Grady High School. Funk then attended college at Emory University, where he was a proud member of Alpha Epsilon Pi fraternity, graduating in 1969. Funk moved away from Atlanta in 1970 when he ventured to Athens to attend law school at the University of Georgia from which he graduated in 1973.

Following his graduation from law school, Funk served as a clerk to Supreme Court of Georgia Justice William Gunter. While he started out as a litigator, Funk spent the majority of his legal career focusing his practice on business and transactional law. In 1984, Funk earned an LL.M. in tax from the Emory University School of Law.

From the completion of his clerkship with the Supreme Court of Georgia until 1991, Funk practiced with several Atlanta law firms. In 1991, he, with his law school classmate Don Ellis, founded the firm which still bears their names, Ellis Funk, P.C.

He practiced with Ellis Funk until the night before Labor Day, 2005. On that night, Funk suffered a grievous injury, falling down a flight of stairs in his home. The fall severed his spine and he was rendered a total quadriplegic, with no movement below his neck. Despite living in this condition for the remaining five years of his life, Funk did so with incredible grace, dignity and bravery.

After his accident, Funk and his family were surrounded and supported by a score of old and dear friends and family members. Funk also received a great deal of support from the legal community. Since his condition required nearly round the clock nursing, in 2006 more than 350 lawyers responded to a plea for help and raised more than $50,000 to assist with nursing expenses.

While the accident may have robbed him of his physical ability to do many things, Funk was able still to enjoy some of his favorite pastimes. Foremost was visiting with his friends and family; the Funk house was regularly filled with visitors. These visits often included sitting on the deck in the hot sun watching the birds feeding at their bird feeder. Other times they included watching University of Georgia football—Funk was a lifelong dedicated Bulldog fan—while he drank his favorite scotch and smoked a cigar.

**Mike Sheffield** died in February 2011. He was born in November 1949 in Atlanta to Walter and Lucy Sheffield. He graduated from North Fulton High School in 1967. Sheffield graduated *cum laude* from Wake Forest University in 1971 and received his law degree from Emory University School of Law in 1974.

Sheffield's legal experience included nine years as assistant district attorney for DeKalb County. He became a sole practitioner in 1999 and spent more than 20 years specializing in criminal law, DUI, traffic violations, felonies and juvenile criminal law. In 2004 and 2008, he ran unsuccessfully for open seats on the Court of Appeals of Georgia. He thought he had made it to the runoff in his 2004 bid, but third-place candidate Howard Mead sued when he learned his name had been listed incorrectly on more than 400 ballots in Laurens County. The Supreme Court of Georgia ordered a new election; in that race, Sheffield lost the runoff.

He was also past president of the Gwinnett County Bar Association (2004-05) and the DeKalb Bar Association (1995-96). Sheffield served on the State Bar of Georgia's Board of Governors (1997-2001), was a fellow of the Lawyers Foundation of Georgia and was a member of the Georgia Association of Criminal Defense Lawyers. He was active in his community as past president of the Decatur Lions Club, member of the Norcross Rotary Club and an active member of Perimeter Church in Johns Creek.

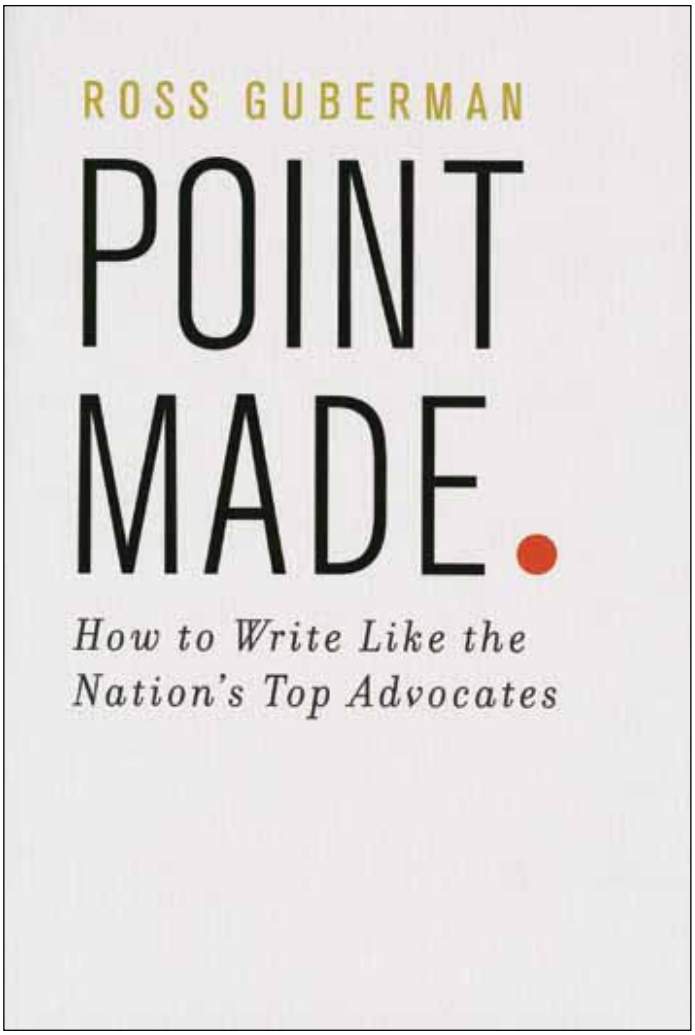
**Michael Stewart Thwaites** died in February 2011. Born in December 1952 in Evanston, Ill., he was the son of Joel Stewart and June Jones Thwaites of Jacksonville, Fla. He received a B.A. from Mercer University and his J.D. from Duke University School of Law in 1980. Thwaites was admitted to practice in Georgia in 1981. He practiced many years in Atlanta with the firms of Smith, Currie & Hancock, King & Spalding and Hamberg & Thwaites, LLC. He was admitted to practice in South Carolina in 1990. Thwaites was in private practice in Greer, S.C., focusing on employment law, environmental law and estate litigation.

# Point Made: How to Write Like the Nation's Top Advocates

## by Ross Guberman, Oxford University Press, 311 Pages

reviewed by Karen J. Sneddon

*Point Made: How to Write Like the Nation's Top Advocates* isn't just another book that decries the current state of legal writing and recaps often-repeated, generalized maxims. The book, with its slick cover and crisp typeface, highlights 50 techniques to improve persuasive writing and grounds each technique with examples from 50 nationally recognized advocates.




The book is highly structured, as befits a deliberate exploration of legal writing, one of the most structured forms of written communication. Fifty techniques are presented to help the writer "write the perfect brief." Each technique is divided into five main parts: (1) the theme, (2) the tale, (3) the meat, (4) the words, and (5) the close. The book also features four appendices with brief biographies of each featured advocate, a list of the 50 techniques, 20 quotes from judges about effective legal writing and annotated models that put the techniques into action.

From structural issues, such as headings, to mechanics, such as explanatory parentheticals and punctuation, the book showcases 50 techniques to strengthen persuasive writing. Each of the techniques has a descriptive, humorous title, such as "Once

Upon a Time: Replace dates with phrases that convey a sense of time" and "Mince Their Words: Merge pithy quoted phrases into a sentence about your own case." The description of each technique, including examples, range from three to 11 pages.

The examples are the great strength of the book. The 50 advocates represent the spectrum of law practice and include advocates with backgrounds in private practice, corporate counsel, U.S. attorneys, solicitors general and directors of not-for-profit organizations. The featured examples also include work written by President Barack Obama, Justice Elena Kagan and Justice John Roberts. The examples are placed in grey shaded text blocks that serve to visually separate the examples from the accompanying description of the technique. The use of the technique in each example appears in bold to capture the reader's attention and reinforce the description of the technique. Moreover, the book resists the temptation to simply cram in numerous examples. The examples are chosen with care to ground the technique in real world applicability.

For instance, technique number 37, titled "Size Matters: The pithy sentence," reminds the reader of the persuasive punch of a short sentence. One of the showcased examples is from Chief Justice Roberts' work as an advocate in *Alaska v. EPA*. The example reads, "Substituting one decision maker for another may yield a different result, but not in any sense a more 'correct' one. So too here." The text integrates the examples to illustrate the techniques in an accessible manner that doesn't overwhelm the reader. After reading the description of the technique and the examples, the reader can recognize the opportunity to similarly inject a persuasive punch in his or her own writing.

Interspersed among the techniques are five "interludes." Although interesting to consider the ability of "readability statistics" on Microsoft Word or the option to place citations in footnotes, these asides to the reader are a little distracting and work to slow the overall momentum of the text and consideration of the featured techniques.

Like many books with writing strategies, the techniques and examples are best absorbed in small doses, such as while one is waiting for the computer to restart or for a conference call to begin. Guberman manages to provide helpful strategies without embarking on rants or tirades, and without assuming a condescending or know-it-all voice. In fact, his light, humorous written voice increases the enjoyment of the book. (In so doing, he illustrates technique number 33, "What a Breeze: Confident Tone.") The "can do" voice of the text is rather infectious and makes the reader feel that he or she will become a better writer simply by reading the book.

One of the great things about writing is the variety of choices available to the writer. Some choices are better than others. Some choices are just different. Guberman's book highlights great techniques to remind the reader of practical strategies that add a sophisticated polish to persuasive writing. The techniques are grounded by the use of many examples drawn from the work of nationally recognized attorneys to help the reader, as stated in the title, "Write Like the Nation's Top Advocates." By using examples from actual documents, this book takes a different spin on the typical list of the do's and don'ts of legal writing. In so doing, the book presents an enjoyable, informative read. GBJ

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

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# Notice of Filing Formal Advisory Opinion in Supreme Court

**Second Publication of Proposed**
**Formal Advisory Opinion No. 08-R5**
**Hereinafter known as**
**"Formal Advisory Opinion No. 11-1"**

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

Proposed Formal Advisory Opinion No. 08-R5 appeared in the April 2010 issue of the Georgia Bar Journal for first publication. Two (2) comments were received. The Formal Advisory Opinion Board reviewed the proposed opinion in light of the comments. After careful consideration and discussion, the Board made three (3) changes to the language of the opinion. The changes are red-lined for ready reference. Both the first change, found in the 3rd paragraph under Section 3, and the third change, found in the 7th paragraph under Section 3, add language to sentences to make each sentence express more completely the views already contained in the opinion. The second change, located in the 4th paragraph under Section 3, corrects a grammatical error. The Board did not consider the changes to be substantive and made a final determination to approve the proposed opinion for 2nd publication and filing with the Supreme Court.

Rule 4-403(d) states that within 20 days of the filing of the Formal Advisory Opinion or the date the publication is mailed to the members of the Bar, whichever is later, **only the State Bar of Georgia or the person who requested the opinion may file a petition for discretionary review thereof with the Supreme Court of Georgia**. The petition shall designate the Formal Advisory Opinion sought to be reviewed and shall concisely state the manner in which the petitioner is aggrieved. If the Supreme Court grants the petition for discretionary review or decides to review the opinion on its own motion, the record shall consist of the comments received by the Formal Advisory Opinion Board from members of the Bar. The State Bar of Georgia and the person requesting the opinion shall follow the briefing schedule set forth in Supreme Court Rule 10, counting from the date of the order granting review. A copy of the petition filed with the Supreme Court of Georgia pursuant to Rule 4-403(d) must be simultaneously served upon the Board through the Office of the General Counsel of the State Bar of Georgia. The final determination may be either by written opinion or by order of the Supreme Court and shall state whether the Formal Advisory Opinion is approved, modified, or disapproved, or shall provide for such other final disposition as is appropriate.

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

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

# Second Publication of Proposed Formal Advisory Opinion No. 08-R5, Hereinafter known as "Formal Advisory Opinion No. 11-1"

**STATE BAR OF GEORGIA**
**ISSUED BY THE FORMAL ADVISORY OPINION BOARD**
**PURSUANT TO RULE 4-403 ON APRIL 14, 2011**
**FORMAL ADVISORY OPINION NO. 11-1**

**QUESTION PRESENTED:**

Ethical Considerations Bearing on Decision of Lawyer to Enter into Flat Fixed Fee Contract to Provide Legal Services.

**OPINION:**

Contracts to render legal services for a fixed fee are implicitly allowed by Georgia Rule of Professional Conduct (Ga. R.P.C.) 1.5 (a)(8) so long as the fee is reasonable. It is commonplace that criminal defense lawyers may provide legal services in return for a fixed fee. Lawyers engaged in civil practice also use fixed-fee contracts. A lawyer might, for example, properly charge a fixed fee to draft a will, handle a divorce, or bring a civil action. In these instances the client engaging the lawyer's services is known and the scope of the particular engagement overall can be foreseen and taken into account when the fee for services is mutually agreed. The principal ethical considerations guiding the agreement are that the lawyer must be competent to handle the matter (Ga. R.P.C. 1.1) and the fee charged must be reasonable and not excessive. See Ga. R.P.C. 1.5(a).

Analysis suggests that the ethical considerations that bear on the decision of a lawyer to enter into a fixed fee contract to provide legal services can grow more complex and nuanced as the specific context changes. What if, for example, the amount of legal services to be provided is indeterminate and cannot be forecast with certainty at the outset? Or that someone else is compensating the lawyer for the services to be provided to the lawyer's client? It is useful to consider such variations along a spectrum starting from the relatively simple case of a fixed fee paid by the client who will receive the legal representation for a contemplated, particular piece of legal work (e.g., drafting a will; defending a criminal prosecution) to appreciate the growing ethical complexity as the circumstances change.

**1. A Sophisticated User of Legal Services Offers to Retain a Lawyer or Law Firm to Provide It With an Indeterminate Amount of Legal Services of a Particular Type for an Agreed Upon Fixed Fee.**

In today's economic climate experienced users of legal services are increasingly looking for ways to curb the costs of their legal services and to reduce the uncertainty of these costs. Fixed fee contracts for legal services that promise both certainty and the reduction of costs can be an attractive alternative to an hourly-rate fee arrangement. A lawyer contemplating entering into a contract to furnish an unknown and indeterminate amount of legal services to such a client for a fixed fee should bear in mind that the fee set must be reasonable (Ga. R.P.C. 1.5(a)) and that the lawyer will be obligated to provide competent, diligent representation even if the amount of legal services required ultimately makes the arrangement less profitable than initially contemplated. The lawyer must accept and factor in that possibility when negotiating the fixed fee.

This situation differs from the standard case of a fixed-fee for an identified piece of legal work only because the amount of legal work that will be required is indeterminate and thus it is harder to predict the time and effort that may be required. Even though the difficulty or amount of work that may be required under such an arrangement will likely be harder to forecast at the outset, such arrangements can benefit both the client and the lawyer. The client, by agreeing to give, for example, all of its work of a particular type to a particular lawyer or law firm will presumably be able to get a discount and reduce its costs for legal services; the lawyer or law firm accepting the engagement can be assured of a steady and predictable stream of revenue during the term of the engagement.

There are, moreover, structural features in this arrangement that tend to harmonize the interests of the client and the lawyer. A lawyer or law firm contemplating such a fixed fee agreement will presumably be able to consult historical data of the client and its own experiences in handling similar matters in the past to arrive at an appropriate fee to charge. And the client who is paying for the legal services has a direct financial interest in their quality. The client will be the one harmed if the quality of legal services provided are inadequate. The client in these circumstances normally is in position to monitor the quality of the legal services it is receiving. It has every incentive not to reduce its expenditures for legal services below the level necessary to receive satisfactory representation in return. Accordingly, such fixed-fee contracts for an indeterminate amount of legal services to be rendered to the client compensating the lawyer for such services are allowable so long as the fee

set complies with Ga. R.P.C. 1.5(a) and the lawyer fulfills his or her obligation to provide competent representation (Ga. R.P.C. 1.1) in a diligent manner (Ga. R.P.C. 1.3), even if the work becomes less profitable than anticipated.

**2. A Third-Party Offers to Retain a Lawyer or Law Firm to Handle an Indeterminate Amount of Legal Work of a Particular Type for a Fixed Fee for Those the Third-Party Payor is Contractually Obligated to Defend and Indemnity Who Will Be the Clients of the Lawyer or Law Firm.**

This situation differs from the last because the third-party paying for the legal services is doing so for another who is the client of the lawyer. An example of this situation is where a liability insurer offers a lawyer or law firm a flat fee to defend all of its insureds in motor vehicle accident cases in a certain geographic area. Like the last situation, there is the problem of the indeterminacy of the amount of legal work that may be required for the fixed fee; and, in addition, there is the new factor that the lawyer will be accepting compensation for representing the client from one other than the client.

Several state bar association ethics committees have addressed the issue of whether a lawyer or law firm may enter into a contract with a liability insurer in which the lawyer or law firm agrees to handle all or some portion of the insurer's defense work for a fixed flat fee. With the exception of one state, Kentucky,[1] all the other state bar associations' ethics opinions have determined that such arrangements are not *per se* prohibited by their ethics rules and have allowed lawyers to enter into such arrangements, with certain caveats.[2] It should be noted that all of the arrangements approved involved a *flat fee per case*, rather than a set fee regardless of the number of cases.

Although the significance of this fact was not directly discussed in the opinions, it does tend to reduce the risks arising from uncertainty and indeterminacy. Even though some cases may be more complex and time-consuming than the norm, others will be less so. While the lawyer will be obligated under the contract to handle each matter for the same fixed fee, the risk of a far greater volume of cases than projected is significantly reduced by a fixed fee per case arrangement. The lawyer or law firm can afford to increase staff to handle the work load, and under the law of large numbers, a larger pool of cases will tend to even out the average cost per case.

In analyzing the ethical concerns implicated by lawyers entering into fixed-fee contracts with liability insurers to represent their insureds, several state bar association ethics opinions have warned of the danger presented if the fixed fee does not provide adequate compensation. An arrangement that seriously under-compensates the lawyer could threaten to compromise the lawyer's ability to meet his or her professional obligations as a competent and zealous advocate and adversely affect the lawyer's independent professional judgment on behalf of each client.

As Ohio Supreme Court Board of Commissioners Opinion 97-7 (December 5, 1997) explains it:

> If a liability insurer pays an attorney or law firm a fixed flat fee which is insufficient in regards to the time and effort spent on the defense work, there is a risk that the attorney's interest in the matter and his or her professional judgment on behalf of the insured may be compromised by the insufficient compensation paid by the insurer. An attorney or law firm cannot enter into such an agreement.

The same point was echoed in Florida Bar Ethics Opinion 98-2 (June 18, 1998) in which the Florida board determined that such flat fixed-fee contracts are not prohibited under the Florida Rules but cautioned that the lawyer "may not enter into a set fee agreement in which the set fee is so low as to impair her independent professional judgment or cause her to limit the representation of the insured."

In addition to the Georgia Rules referenced above, a Georgia lawyer considering entering into such an agreement should bear in mind Ga. R.P.C. 1.8(f) and 5.4(c) as well as Ga. R.P.C. 1.7(a) and its Comment [6].

Rule 1.8(f) cautious that "A lawyer shall not accept compensation for representing a client from one other than the client unless. . . (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship. . .[3]

Ga. R.P.C. 1.7(a) provides that:

> A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client, except as provided in (b) [which allows client consent to cure conflicts in certain circumstances].

Ga. R.P.C. 1.7(c) makes it clear, however, that client consent to cure a conflict of interest is "not permissible if the representation . . . (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients."

When a lawyer agrees to handle an unknown and indeterminable amount of work for a fixed fee, inadequate compensation and work overload may result. In turn, such effects could not only short-change competent

and diligent representation of clients but generate a conflict between the lawyer's own personal and economic interests in earning a livelihood and maintaining the practice and effectively and competently representing the assigned clients. See Comment [6] to Rule 1.7: "The lawyer's personal or economic interests should not be permitted to have an adverse effect on representation of a client."

As other state bar ethics opinions have concluded, this situation does not lend itself to hard and fast categorical answers. Nothing in the Georgia Rules of Professional Conduct would forbid such a fee agreement per se. But "it is clear that a lawyer may not accept a fixed fee arrangement if that will induce the lawyer to curtail providing competent and diligent representation of proper scope and exercising independent professional judgment." Michigan Bar Ethics Opinion RI-343 (January 25, 2008). Whether the acceptance of a fixed fee for an indeterminate amount of legal work poses an unacceptable risk that it will cause a violation of the lawyer's obligation to his or her clients cannot be answered in the abstract. It requires a judgment of the lawyer in the particular situation.

A structural factor tends to militate against an outsized risk of compromising the ability of the lawyer to provide an acceptable quality of legal representation in these circumstances just as it did in the last. The indemnity obligation means the insurer must bear the judgment-related financial risk up to the policy limits. Hence, "the duty to indemnity encourages insurers to defend prudently."[4] A liability insurer helps itself—not just its insured—by spending wisely on the defense of cases if it is liable for the judgment on a covered claim. Coupled with the lawyer's own professional obligation to provide competent representation in each case, this factor lessens the danger that the fixed fee will be set at so low a rate as to compromise appropriate representation of insureds by lawyers retained for this purpose by the insurer.

**3. A Third-Party Offers to Retain a Lawyer or Law Firm to Provide an Indeterminate Amount of Legal Work for an Indeterminate Number of Clients Where the Third-Party Paying for the Legal Service Has an Obligation to Furnish the Assistance of Counsel to Those Who Will Be Clients of the Lawyer But Does Not Have a Direct Stake in the Outcome of Any Representation.**

A situation where a third party that will not be harmed directly itself by the result of the lawyer's representation is compensating the lawyer with a fixed fee to provide an indeterminate amount of legal services to the clients of the lawyer may present an unacceptable risk that the workload and compensation will compromise the competent and diligent representation of those clients. Examples might be a legal aid society that contracts with an outside lawyer to handle all civil cases of a particular type for a set fee for low-income or indigent clients or a governmental or private entity that contracts with independent contractor lawyers to provide legal representation to certain indigent criminal defendants.

In contrast to the earlier sets of circumstances, several structural factors that might ameliorate the danger of the arrangement resulting in an unmanageable work load and inadequate compensation that could compromise the legal representation are absent in this situation. First, and most obviously, there is a disconnection between the adequacy of the legal service rendered and an impact on the one paying for the legal representation. The one paying for the legal services is neither the client itself nor one obligated to indemnify the client and who therefore bears a judgment-related risk. While the third-party payor is in a position to monitor the adequacy of the legal representation it provides through the lawyers it engages and has an interest in assuring effective representation, it does not bear the same risk of inadequate representation as the client itself in situation No. 1 or the liability insurer in situation No. 2.

Second, and perhaps less obviously, this last situation is fraught with even greater risk from indeterminacy if there is no ceiling set on the number of cases that can be assigned and there is no provision for adjusting the agreed-upon compensation if the volume of cases **or the demands of certain cases** turns out to far exceed what was contemplated. Sheer workload can compromise the quality of legal services whatever the arrangement for compensation. But, where the payment is set at a fixed annual fee rather than on a fixed fee per case basis, the ability of the lawyer to staff up to handle a greater-than-expected volume with increased revenue is removed.

Accordingly, as compared to the other examples, the risk that inadequate compensation and case overload may eventually compromise the adequacy of the legal representation is heightened in these circumstances. A lawyer entering into such a contract must assess carefully the likelihood that such an arrangement in actual operation, if not on its face, will pose significant risks of non-compliance with Ga. Rules of Professional Conduct 1.1, 1.3, 1.5, 1.8(f) ~~and~~ or 1.7.

In this regard, a fee arrangement that is so seriously inadequate that it systematically threatens to undermine the ability of the lawyer to deliver competent legal services is not a reasonable fee. Ga. R.P.C. 1.5 Comment [3] warns that:

> An agreement may not be made, the terms of which might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required. . . .

And Comment [1] to Ga. R.P.C. 1.3 reminds that "A lawyer's work load should be controlled so that each matter can be handled adequately."

A failure to assess realistically at the outset the volume of cases and the adequacy of the compensation and to make an informed judgment about the lawyer's ability to render competent and diligent representation to the clients under the agreement could also result in prohibited conflicts of interest under Ga. R. P.C. 1.7(a). If an un-capped caseload **or under-compensation** forces a lawyer to underserve some clients by limiting preparation[5] and advocacy in order to handle adequately the representation of other clients or the fixed fee systematically confronts the lawyer with choosing between the lawyer's own economic interests and the adequate representation of clients a conflict of interest is present. Ga. R. P. C. 1.7 (c) makes it clear that a conflict that renders it "reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the effected clients" cannot be under-taken or continued, even with client consent.

It is not possible in the abstract to say categorically whether any particular agreement by a lawyer to provide legal services in this third situation violates the Georgia Rules of Professional Conduct. However, arrangements that obligate lawyers to handle an unknown and indeterminate number of cases without any ceiling on case volume or any off-setting increase in compensation due to the case volume carry very significant risks that competent and diligent representation of clients may be compromised and that the lawyer's own interests or duties to another client will adversely affect the representation. Lawyers contemplating entering into such arrangements need to give utmost attention to these concerns and exercise a most considered judgment about the likelihood that the contractual obligations that they will be accepting can be satisfied in a manner fully consistent with the Georgia Rules of Professional Conduct. A lawyer faced with a representation that will result in the violation of the Georgia Rules of Professional Conduct must decline or terminate it, Ga. R. P. C. 1.16(a)(1),[6] unless ordered by a court to continue.[7]

## Endnotes

1. Kentucky Bar Association Ethics Opinion KBA E – 368 (July 1994). This opinion prohibiting *per se* lawyers from entering into set flat fee contracts to do all of a liability insurer's defense work was adopted by the Kentucky Supreme Court in American Insurance Association v. Kentucky Bar Association, 917 S.W.2d 568 (Ky. 1996). The result and rationale are strongly criticized by Charles Silver, Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Lawyers, *4 Conn. Ins. L. J. 205* (1997-98).
2. Florida Bar Ethics Opinion 98-2 (June 18, 1998) (An attorney may accept a set fee per case from an insurance company to defend all of the insurer's third party insurance defense work unless the attorney concludes that her independent professional judgment will be affected by the agreement); Iowa Supreme Court Board of Professional Ethics and Conduct Ethics Opinion 86-13 (February 11, 1987) (agreement to provide specific professional services for a fixed fee is not improper where service is inherently capable of being stated and circumscribed and any additional professional services that become necessary will be compensated at attorney's regular hourly rate.); Michigan Bar Ethics Opinion RI-343 (January 25, 2008) (Not a violation of the Rules of Professional Conduct for a lawyer to contract with an insurance company to represent its insureds on a fixed fee basis, so long as the arrangement does not adversely affect the lawyer's independent professional judgment and the lawyer represents the insured with competence and diligence.); New Hampshire Bar Association Formal Ethics Opinion 1990-91 | 5 (Fixed fee for insurance defense work is not *per se* prohibited; but attorney, no matter what the fee arrangement, is duty bound to act with diligence.); Ohio Supreme Court Board of Commissioners on Grievances and Discipline Opinion 97-7 (December 5, 1997) (Fixed fee agreement to do all of liability insurer's defense work must provide reasonable and adequate compensation. The set fee must not be so inadequate that it compromises the attorney's professional obligations as a competent and zealous advocate); Oregon State Bar Formal Ethics Opinion No. 2005-98 (Lawyer may enter flat fee per case contract to represent insureds but this does not limit, in any way lawyer's obligations to each client to render competent and diligent representation. "Lawyer owes same duty to 'flat fee' clients that lawyer would own to any other client." "Lawyers may not accept a fee so low as to compel the conclusion that insurer was seeking to shirk its duties to insureds and to enlist lawyer's assistance in doing so."); Wisconsin State Bar Ethics Opinion E-83-15 (Fixed fee for each case of insurance defense is permissible; attorney reminded of duty to represent a client both competently and zealously.)
3. Rule 5.4(c) similarly commands that: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."
4. Silver, note 1 at 236.
5. Ga. R. P. C. 1.1 requires that a lawyer "provide competent representation to a client." Comment [5] spells out the thoroughness and preparation that a lawyer must put forth, noting that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. **It also includes adequate preparation.** (emphasis added).
6. *See* ABA Formal Opinion 06-441 (May 2006) titled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation," suggesting that if a caseload becomes too burdensome for a lawyer to handle competently and ethically the lawyer "must decline to accept new cases rather than withdraw from existing cases if the acceptance of a new case will result in her workload becoming excessive."
7. ". . . When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Ga. R. P. C. 1.16(c).

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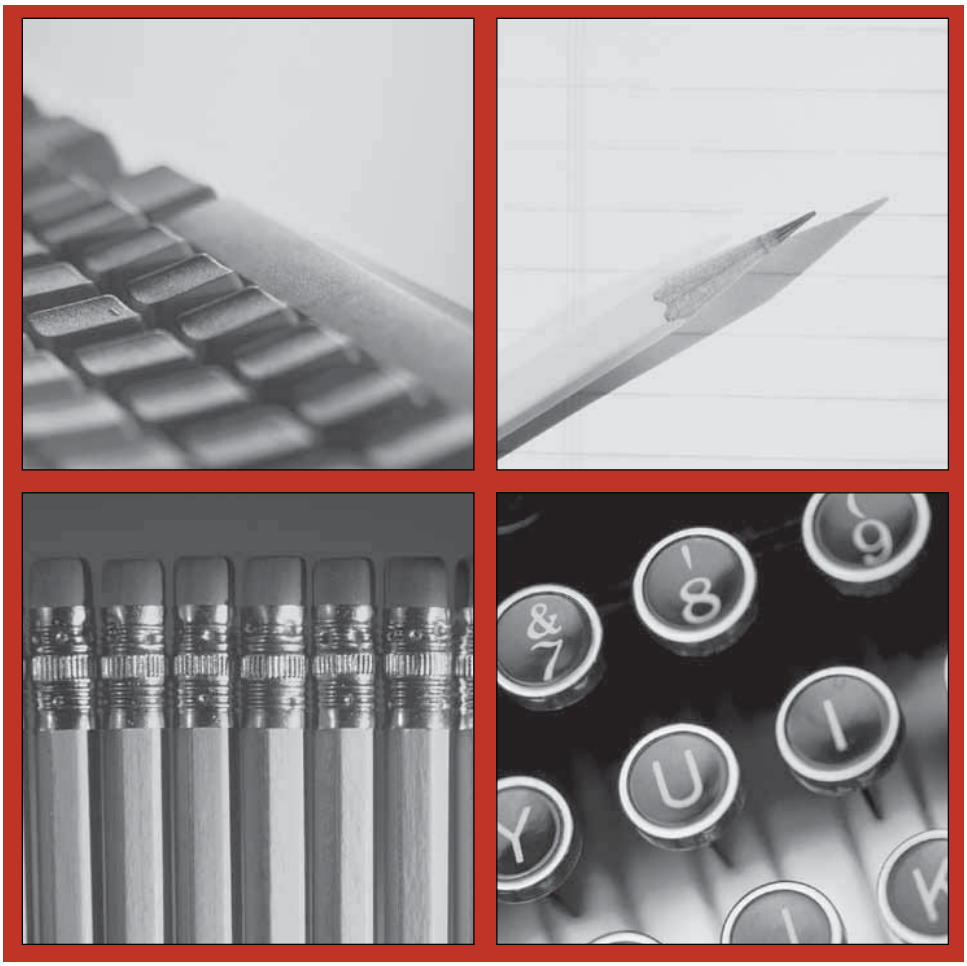

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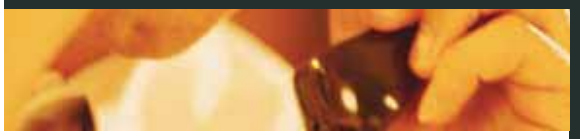

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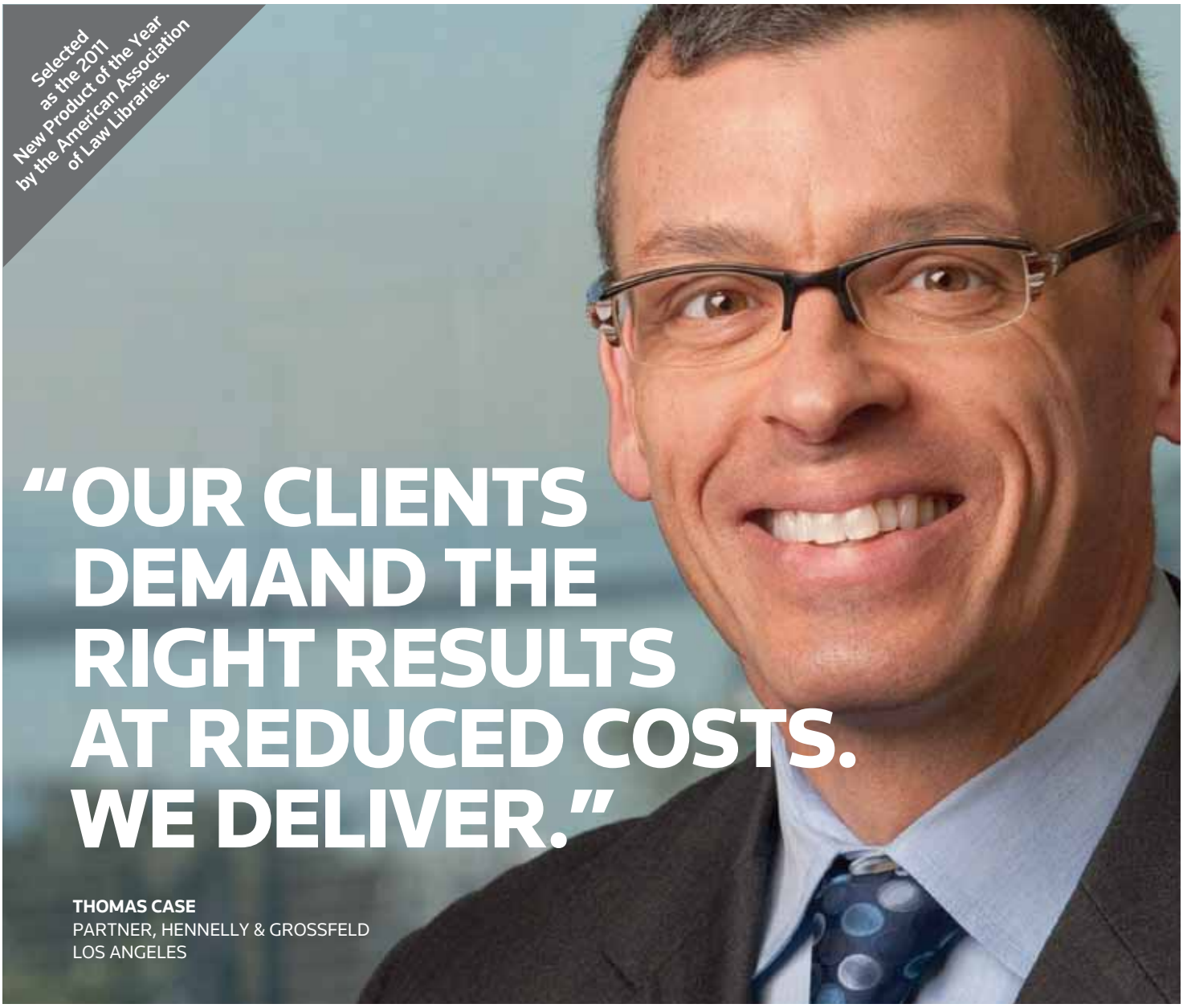


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