

The background of the cover is a painting of several umbrellas in various shades of green, teal, and brown, set against a textured, yellowish-gold background. The umbrellas are of different sizes and are scattered across the frame, some fully open and others partially visible. The overall style is painterly and somewhat abstract.

# Georgia Bar Journal

June 2009 ■ Volume 14 ■ Number 7

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# Georgia Bar Journal

June 2009 ■ Volume 14 ■ Number 7



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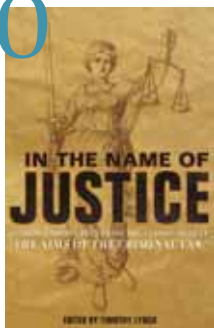
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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Sarah I. Coole,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

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## Publisher's Statement

The *Georgia Bar Journal* (ISSN-1085-1437) is published six times per year (February, April, June, August, October, December) with a special issue in November by the State Bar of Georgia, 104 Marietta St. NW, Suite 100, Atlanta, Georgia 30303. ©State Bar of Georgia 2009. One copy of each issue is furnished to members as part of their State Bar dues. Subscriptions: \$36 to non-members. Single copies: \$6. Periodicals postage paid in Atlanta, Georgia and additional mailing offices. Opinions and conclusions expressed in articles herein are those of the authors and not necessarily those of the Editorial Board, Communications Committee, Officers or Board of Governors of the State Bar of Georgia. Advertising rate card will be furnished upon request. Publishing of an advertisement does not imply endorsement of any product or service offered. POSTMASTER: Send address changes to same address.

by Jeffrey O. Bramlett



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# Prosecutors Must Serve the People, Not Politics

All lawyers are called to serve the interests of both their clients and the public. For government lawyers, there is no distinction between the two callings.

Their clients are the people of their community, their state or the nation. I have the utmost respect for these lawyers who pursue careers in public service, given that the choice to do so usually imposes the cost of income limitations unfamiliar to the private sector.

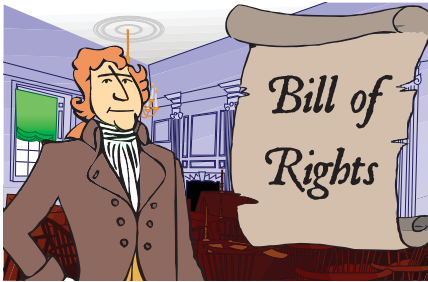
This is especially true of our fellow Bar members who serve as attorneys general, U.S. attorneys, district attor-

**“The people of Georgia should be proud of the individuals we have enforcing the law in our courts.”**

neys, solicitors general or any other prosecutorial role. They represent their clients—the *people* of the United States, the state of Georgia or a particular jurisdiction—without fear or favor. They are unable to pick and choose their cases on personal or political preferences. Their only consideration is the high standard of justice in each and every case. When they decide to prosecute, they must do so wholeheartedly and with every resource available.

During the 2009 session of the General Assembly, I heard from a number of Georgia prosecutors who felt strongly that the State Bar was unfairly neglecting to include district attorneys’ offices in our legislative advocacy efforts for adequate judicial funding. Their offices were already experiencing staff furloughs and facing additional budget cuts. These prosecutors could not understand why the Bar was singling out other programs like the Public Defender Standards Council, the Georgia Appellate Practice and Education Resource Center and legal services for victims of domestic violence in our lobbying efforts but not their offices.

# Trial By Jury: What's the Big Deal?

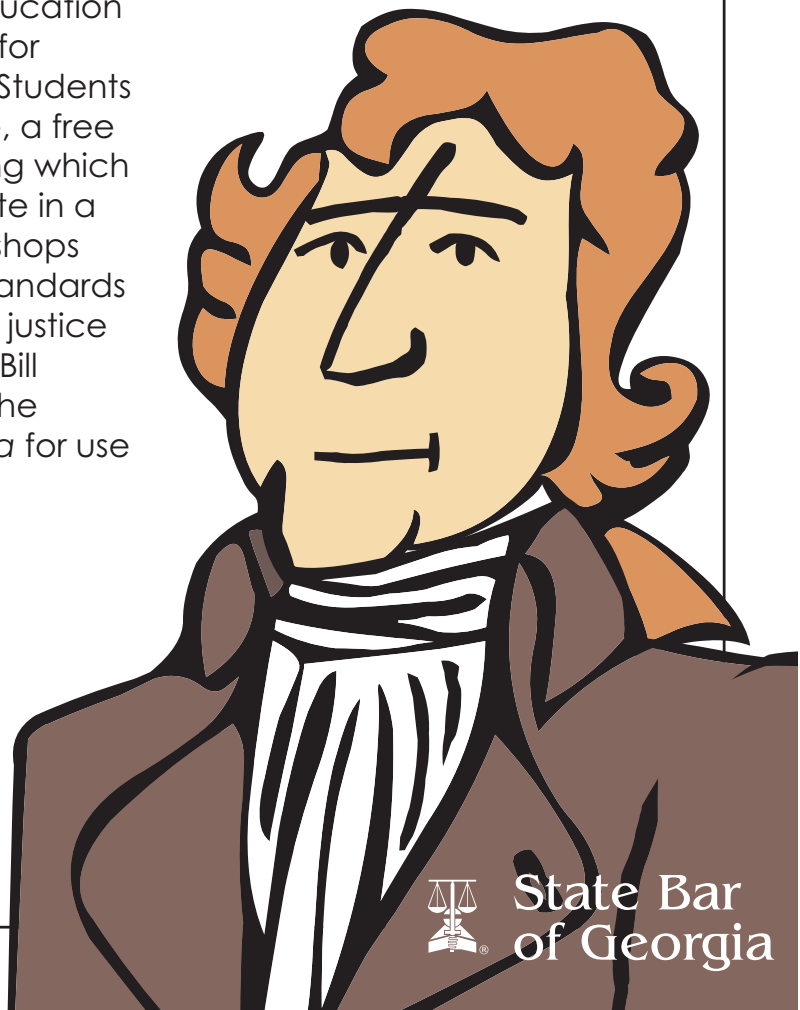


"Trial By Jury: What's the Big Deal?" is an animated presentation for high school civics classes in Georgia to increase court literacy among young people. This presentation was created to be used by high school civics teachers as a tool in fulfilling four specific requirements of the Social Studies Civics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

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

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

**You may view "Trial By Jury: What's the Big Deal?" at [www.gabar.org/cornerstones\\_of\\_freedom/civics\\_video/](http://www.gabar.org/cornerstones_of_freedom/civics_video/). For a free DVD copy, e-mail [stephaniew@gabar.org](mailto:stephaniew@gabar.org) or call 404-527-8792. For more information on the LRE Program, contact Deborah Craytor at [deborahcc@gabar.org](mailto:deborahcc@gabar.org) or 404-527-8785.**



The fact is that while the State Bar was asked by representatives of those programs to advocate for their budget requests, the lobbyists for the Prosecuting Attorneys Council did not ask and in the past specifically requested that we not participate in their efforts. We complied with that request, but it should be noted that the Bar's legislative and public awareness initiatives on behalf of adequate judicial funding, including Bar-sponsored public service announcements on television, are intended to reflect support for the budgetary requests of our courts and all agencies involved, certainly including our district attorneys' offices.

The people of Georgia should be proud of the individuals we have enforcing the law in our courts. Cases of prosecutorial misconduct have been remarkably few and far between in our state. While their decisions and actions are not and never will be universally popular, the dedicated professionals serving us in these offices clearly understand their roles in the justice system.

In his 2000 *Fordham Law Review* article, "The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit," H. Richard Uviller wrote, "In the American model of criminal justice—in contrast to the British, for example—the prosecutor is not just a lawyer assigned to represent the interests of the government in the trial of a criminal case. The American prosecutor, state or federal, is a public official, elected or appointed to exercise executive authority. The prosecutor doesn't have a client; he has a constituency. The local prosecutor is not responsible to the state government but to the people directly."

On two occasions in the last 40 years, the principle of prosecutorial neutrality has found itself on shaky ground at the federal level.

At the height of the Watergate scandal, a chain of events that occurred on Oct. 20, 1973, earned that date its place in history as

the "Saturday Night Massacre." Special Watergate prosecutor Archibald Cox refused to comply with the order of President Richard M. Nixon to cease further efforts to obtain White House tapes or other presidential documents. Nixon instructed Attorney General Elliot L. Richardson to fire Cox. Richardson refused, costing him his office. The president then went through the same exercise with Deputy Attorney General William D. Ruckelshaus.

Finally, Nixon turned to Solicitor General Robert H. Bork, who by law had become acting attorney general, writing to Bork: "Clearly the government of the United States cannot function if employees of the executive branch are free to ignore in this fashion the instructions of the President." Bork complied with the president's directive. The special prosecutor's office was abolished. For the Justice Department and its political independence, the damage had been done.


In the wake of Watergate, the restoration of public trust and confidence at the department fell to Georgia's own Griffin Bell, who served as attorney general under President Jimmy Carter. Bell set out to restore faith in the agency and is widely credited with restoring its reputation for independence and excellence. As attorney general, Bell published a daily log of whom he met with and spoke to on the telephone and gave it to the media.

"Trust is a coin of the realm, and if the public doesn't trust the Justice Department, we're in trouble," Bell told NPR's Nina Totenberg in a conversation not long before his passing five months ago. "You have to be transparent." Although he served in a democratic administration, Bell earned bipartisan respect while attorney general and became a trusted friend and adviser to the 41st president, George Herbert Walker Bush.

The taint of political interference at justice reared its head again during the last administra-

tion, however. The 2008 Inspector General's report on the Department of Justice concluded there is "significant evidence that partisan political considerations were an important factor in the removal of several U.S. Attorneys" and that former Attorney General Alberto Gonzales, among others, failed "to provide accurate and truthful statements about the removals and their role in the process."

New Attorney General Eric H. Holder Jr. has pledged to remove politics from the department's practices. In dropping the indictment against former Sen. Ted Stevens (R-Alaska), whose conviction on corruption charges helped topple him from office in last year's election but was later overturned, Holder sent a signal that he will insist upon prosecutorial standards of a higher caliber.

Further challenges await Holder. Criticism is guaranteed from one side or the other in the debate over prosecuting those involved in the matter of enhanced interrogation tactics. But it is a decision he must make regardless of the political consequences. Earning the public's trust and confidence is never easy, but it is something we all need to work toward and, when successful, celebrate. 

**Jeffrey O. Bramlett** is the president of the State Bar of Georgia and can be reached at [bramlett@bmelaw.com](mailto:bramlett@bmelaw.com).

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by Cliff Brashier



# Bar Offers Assistance to Job-Seeking Lawyers

**A**nyone who believes the legal profession is a recession-proof business has been proven wrong in recent months.

The most significant economic decline since the Great Depression has taken its toll on law firms across the nation—large, medium-sized and small—over the past year.

Georgia lawyers have felt the impact of staff reductions, and the job market for new graduates has never been tighter. According to the *Fulton County Daily Report*, more than 300 lawyers made initial claims for unemployment benefits with the Georgia Department of Labor between October 2008 and April 2009.

When Executive Committee member Tom Stubbs saw an opportunity to help our members, the State Bar

of Georgia responded by launching a series of monthly lunch-and-learn programs at the Bar Center for attorneys who are out of work. The inaugural session in April drew a full house.

Stubbs said he thought the Bar should step up to the plate after having numerous conversations in recent months with lawyers who were having trouble finding employment. Because of his familiarity with the services the Bar offers its members, he said it seemed only natural to connect these attorneys with the Law Practice Management and Lawyer Assistance programs.

The purpose of these monthly meetings is to provide guidance on job seeking and career development, as well as tips on dealing with the stresses

**“The purpose of these programs is to provide guidance on job seeking and career development, as well as tips on dealing with the stresses and strains of unemployment.”**

and strains of unemployment.

Additionally, attorneys have the opportunity to network, share experiences and learn about navigating the legal employment landscape.

Many lawyers deal every day with clients whose personal emotions and family lives are crumbling under financial pressures exacerbated by joblessness. Our fel-



low attorneys are not immune from those same pressures. These lunch-and-learn sessions are a proactive means of delivering help where it is needed.

The Lawyer Assistance Program and the Law Practice Management Program are in charge of the sessions, which are continuing on the fourth Wednesday of each month. The luncheon is free but is limited to the first 40 lawyers who register in advance.

The April 22 program, sponsored by the General Practice and Trial Section, taught attendees how to utilize existing Bar programs in their search for employment or their plans to "hang a shingle."

Natalie R. Kelly, director of the Law Practice Management Program, discussed the wealth of resources available to members, including consultations, practice management forms, helpful articles, software and "tip of the week" and "website of the week" on the Bar's website. Other sources of help can be found in the program's resource library, including hundreds of books, video and audiotapes and CD-ROM presentations on a variety of topics related to law office management and technology. These items can be checked out for up to two weeks.

All of these services are free of charge, except for on-site consulting, which is very low-cost. The program also offers Casemaker training, information on court-appointed work opportunities, a vendor directory and office start-up kit.

Asked for advice on making the change from one practice area to another in order to improve one's employment prospects, Kelly suggested offering services part-time, on a low-fee contract basis, to sole practitioners or boutique firms as a means of gaining experience in other areas. Another question dealt with securing professional liability insurance, to which Kelly responded the Bar maintains a list of admitted carriers of that coverage.

The April group also heard from Steve Brown, clinical director of the Lawyer Assistance Program, which offers a full spectrum of free, confidential counseling for lawyers. Overseen by the Bar's Lawyer Assistance Committee, the program contracts the services of Family First Assistance Program, a Georgia-based counseling agency. It provides a 24-hour, seven-day hotline (800-327-9631), which is answered by a live operator. Referrals are handled by a statewide network of 190 counselors, including 90 in metropolitan Atlanta.

During this financial crisis, the program has seen a rise in family counseling needs and cases involving behavioral issues, anxiety, depression and substance abuse. "Marital issues are off the chart," Brown said. "Our careers may be fluid, but home should be the refuge."

The Lawyer Assistance Program helps members deal with life's difficulties through a broad range of services. In addition to the hotline, individuals can avail themselves of in-person counseling sessions, scheduled phone counseling and a work/life program for unlimited assistance with child care, elder care, legal counseling and financial advice.

"It's OK to have problems," Brown said. "Don't suffer in silence, and don't suffer alone."

I want to thank Tom Stubbs, Natalie Kelly, Steve Brown and others who have worked to establish these lunch-and-learn sessions. The Institute of Continuing Legal Education is recording the programs on video for future presentations at our South Georgia Office in Tifton and Coastal Georgia Office in Savannah. Our State Bar sections are sponsoring these lunches, and they all deserve our thanks for wanting to help fellow lawyers.

The reaction to this initiative has been positive from every corner of the profession. The chairs of various Bar sections have rallied to




Photo by Sarah I. Coole

Executive Committee Member Tom Stubbs introduces the newly created monthly lunch-and-learn series to those in attendance.

offer support. Managers of large law firms have been very receptive to the idea, and the affected attorneys who came to the first luncheon were most appreciative. Hopefully sooner, rather than later, the economy will improve and law will again be a fruitful market for job seekers. In the meantime, the State Bar of Georgia will continue to lend a hand to those who need it, serving you, our members.

If your career is now on a different path because of the economic situation, I encourage you to attend the next session. Advance registration is required, and space is limited to the first 40 registrants. To register, contact Pauline Childress at 404-526-8635 or 800-334-6865, extension 635, or by e-mail at [paulinec@gabar.org](mailto:paulinec@gabar.org).

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

**Cliff Brashier** is the executive director of the State Bar of Georgia and can be reached at [cliffb@gabar.org](mailto:cliffb@gabar.org).



by Joshua C. Bell

# All Good Things...

**W**hen I was sworn in as the president of the Young Lawyers Division, I was very excited. My excitement was only matched with my apprehension of the year to come.

I was scared that the division wouldn't respond to my lofty goals. I was scared that my requests for action would not be met. Looking back on those feelings of fear, I smile and even laugh. I laugh at how wrong I was. The Young Lawyers Division of the State Bar of Georgia has exceeded my expectations. Your YLD is simply the finest in the nation. The young lawyers that make up this division continue to give more of themselves all the time. There have been thousands of hours that the young lawyers of this state have given to this division and the State Bar.

Maybe the highest praise that was received by the YLD this year was in March in the great city of Savannah. The Executive Committee of the State Bar and the Supreme Court of Georgia were together for their annual retreat. At the retreat, the president of the YLD is asked to give a report of the year's activities. After I gave the report (written and oral) one of the justices of the Supreme Court said, "Why doesn't the Bar write about this?" Can you imagine how proud I was of the YLD at that moment? The point was well taken.

I won't be able to report everything we have done this year, but I can certainly share some of the highlights.

Our Aspiring Youth Committee developed a new project this year known as the "Great Debaters Project." Young lawyers trained several young men incarcerated in the DeKalb Regional Youth Detention Center in the art of debate. This culminated in a Great Debate Competition in February, where the debaters were recognized for their hard work and participation in the program. This is a wonderful program that will be used for years to come.

Our Community Service Projects Committee continues to work tirelessly for the State Bar. Some of the activities included a "Zoo Day" event with foster children.

The committee also held a backpack and school supplies drive for foster children, staffed concession stands at the PGA tour event in Atlanta for the benefit of the Georgia Center for Child Advocacy, volunteered at the Atlanta Community Food Bank, held their annual suit and cell phone drive that benefited the Atlanta Union Mission and The Women's Resource Center to End Domestic Violence, and attended a Hawks game with foster children from the Atlanta area. This committee *never* stops working for the State Bar. For

everyone who volunteered your time on this committee, you are all heroes.

In response to Hurricane Katrina and other natural disasters, FEMA solicited GEMA to assist with a model comprehensive disaster relief plan. Both agencies searched for help in planning the relief efforts that were needed from the legal community. Our Disaster Legal Assistance Committee stepped up and drafted a model and will continue to work with these agencies to perfect the model.

"I was scared that the division wouldn't respond to my lofty goals. I was scared that my requests for action would not be met. Looking back on those feelings of fear, I smile and even laugh."



Our Women in the Profession Committee had a resurgence this year. An event was sponsored that was attended by over 150 YLD members to listen to many of the highest ranking women in judiciary. Supreme Court of Georgia Presiding Justice Carol W. Hunstein and Court of Appeals of Georgia Chief Judge M. Yvette Miller, along with many other women leaders, were on hand to answer questions on topics ranging from career paths to work/life balance. It was a great event for all.

The YLD held its signature fundraiser in January, with all the proceeds from the event going to Kids Against Hunger, a non-profit organization that uses volunteers to package specially formulated meals which are distributed in the United States and around the world to starving children. Through the hard work and generosity of hundreds of Georgia lawyers, businesses and individuals throughout the state, the YLD was able to provide


over 191,000 meals. If that isn't impressive, I don't know what is.

One of the finest achievements of the YLD was the joint project with the Texas Young Lawyers Association (TYLA). Through this partnership, the YLD was able to show the DVD "Vote America!" to more than 30,000 high school students in Georgia, educating them about the heroic efforts made for equality and democracy. I'm so thankful to all the great people in Texas for being such an outstanding partner. A special thank you goes to the president of TYLA, Sylvia Cardona, who didn't get scared when the guy from Georgia kept calling every day.

The one person involved in all of this is Mary McAfee. I can promise that the YLD would not be as successful as it is without her. She is a tireless, relentless champion of the YLD. Thank you, Mary.

Finally, I want to thank a few people who have helped me. I can't thank everyone by name, this

*Journal* article is not long enough. I want to thank the late Susette Talarico who taught me how to fight for what you believe. To Professors Anne Dupre and C. Ronald Ellington from the University of Georgia School of Law who believed in me when others did not, and they still do. To my parents who sacrificed so much to put me where I am today. To my beautiful children, Finn and McCartney, who make life better each and every day. To my wife Deana who has worked harder than us all. Thank you for all that you give and all that you do.

It has been my honor and privilege to be the president of the YLD. But as all things it must . . . come to an end. 

**Joshua C. Bell** is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at [joshbell@kirbokendrick.com](mailto:joshbell@kirbokendrick.com).

## Congratulations to the 2009 State Mock Trial Team from Henry W. Grady High School in Atlanta!

The Grady mock trial team placed 8th in a field of 41 teams during the 2009 National High School Mock Trial Championship in Atlanta in May and student team member Gus Rick was named an "Outstanding Witness" in three of the four preliminary competition rounds.

A special thanks to all those financial donors for the 2009 season, including the:

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# Georgia's "Bring Your Gun to Work" Law May Not Have the Firepower to Trouble Georgia Employers After All

by Thomas A. Cox Jr. and Sonya Madison

**H**ailed by some Georgia employers as an example of dangerous and possibly harmful public policy, while praised by others as a way to prevent crime, in the end, Georgia's "Bring Your Gun to Work" law<sup>1</sup> may not pack the firepower that its drafters originally intended. The new Georgia law prohibits searching an employee's vehicle and permits employees to have licensed guns in parking lots. The law is riddled with loopholes that may actually aid Georgia employers in preventing employees from bringing firearms onto an employer's property. A question remains as to whether the existence of the statute in and of itself raises additional implications regarding the duty of Georgia employers to provide a safe workplace.





## General Overview of the Law

Formally known as the “Business Security and Employee Privacy Act,” the law allows holders of concealed weapons to carry firearms in all parks, historic sites, recreational areas and wildlife management areas in Georgia.<sup>2</sup> The law is of particular interest to Georgia employers because it allows employees to bring concealed weapons onto an employer’s property as long as the weapons are stored out of sight in a locked trunk or glove box within a motor vehicle, and the employee possesses a valid Georgia firearms license.<sup>3</sup> An employer’s property would include the parking lots of Georgia employers. The law also prevents an employer from searching an employee’s or invited guest’s motor vehicle for a firearm.<sup>4</sup>

## Georgia is Not Alone

Several other states have passed laws that prohibit employers from banning the possession of licensed firearms in employee-owned vehicles parked on employer premises. The state laws regarding employer restrictions on firearm possession in employee automobiles are generally summarized and divided into two categories. The first category includes those states with laws that constitute a severe restriction on employer regulation of firearms in parking lots. The second category, which includes Georgia, comprises those states whose laws contain significant exceptions that weaken the law’s actual impact on employers.

## States with Severe Restrictions

### Florida

Florida prohibits employers from asking employees whether they have a firearm inside a vehicle on the employer’s parking lot, searching a vehicle in a parking lot for a firearm, prohibiting access to a parking lot because of the presence of a firearm in a

motor vehicle, taking any action against an individual because of a firearm in a motor vehicle, terminating employment of an employee for possession of a firearm in a vehicle or discriminating against an employee who exhibits a gun in the parking lot if the exhibition was for lawful defensive purposes.<sup>5</sup> The law only applies where the employee in question has a concealed weapons permit.

### Kentucky

Kentucky prevents employers from prohibiting any person legally entitled to possess a firearm from possessing such firearm in a vehicle on the employer’s property. The law also provides that a firearm may be removed from the vehicle or handled in the case of self-defense, defense of another or defense of property.<sup>6</sup>

### Louisiana

Louisiana prevents private employers from prohibiting any person from transporting or storing a firearm in a locked, privately-owned motor vehicle in any parking lot, parking garage or other designated parking area. Employers may require that any such firearm be hidden from plain view or held within a locked case or container within the vehicle.<sup>7</sup>

### Minnesota

Minnesota provides that “the owner or operator of a private establishment may not prohibit the lawful carry or possession of firearms in a parking facility or parking area.”<sup>8</sup> The law does allow employers to ban possession of firearms in buildings or other structures and provides for criminal fines for individuals who refuse a property owner’s request that firearms not be brought into an establishment.<sup>9</sup>

### Oklahoma

In 2005, Oklahoma passed a parking lot gun law that prevented employers from establishing

“any policy or rule that has the effect of prohibiting any person, except a convicted felon, from transporting and storing firearms in a locked motor vehicle, or from transporting and storing firearms locked in or locked to a motor vehicle on any property set aside for any vehicle.”<sup>10</sup>

## States with Significant Exceptions

In addition to the Georgia statute, the Mississippi statute is also recognized in the category of states with significant exceptions to their “bring your gun to work” laws, thus allowing employers to restrict employees from bringing firearms to work.

### Mississippi

Mississippi prevents employers from adopting policies prohibiting a person from transporting or storing a firearm in a locked vehicle in any parking lot, parking garage or other designated parking area. The Mississippi law also allows private employers to prohibit the storage of firearms in vehicles in parking areas to which access is restricted or limited through the use of a gate, security station or other means. The law does not provide any civil penalties for violation.<sup>11</sup>

Although similar to Georgia in that these laws would not prevent an employer from banning weapons in the actual workplace, they do place other restrictions on employers’ efforts to regulate the possession of firearms in employer parking lots.<sup>12</sup> Georgia’s law also includes significant exceptions that weaken its actual impact on employers.

## Loopholes for Employers

The prospect of employees in the workplace with ready access to firearms is not likely to be favorably viewed by most employers. A closer examination of the Georgia law reveals that the statute may not actually promote a likelihood of

firearm-related violence in the workplace as might have been originally feared. There are various steps that an employer can take to limit the availability of weapons to its employees in the workplace.

The statute recognizes that any employer that owns or leases its parking lot has a right to control the access to the property. Therefore, Georgia employers can ban guns on their legal property, including all parking lots. Employers, however, are not free to ensure that employees are complying with such bans.<sup>13</sup> In other words, employers are not free to search vehicles owned by employees in company parking lots absent probable cause.<sup>14</sup> The most effective way to implement the “parking lot ban” would be through the issuance of a policy prohibiting employees from bringing firearms onto the employer’s property, including the parking lot. Additionally, if an employer offers its employees a secure parking area that restricts public access, the employer may adopt a policy permitting the search of all vehicles entering the parking lot. Such a policy would have to be applied frequently and uniformly.<sup>15</sup> It would be important to distribute the policy to all employees and, in some cases, obtain acknowledgments of receipt.

The law does not prevent Georgia employers from prohibiting the storage of concealed firearms in company vehicles, and employers may conduct searches of company-owned vehicles. Law enforcement personnel may also conduct reasonable searches of employee-owned vehicles in situations where a reasonable person would believe that the search of a locked vehicle would be “necessary to prevent an immediate threat to human health, life or safety.”<sup>16</sup> Finally, law enforcement officers are authorized to search vehicles as a matter of law, based on a search warrant or warrantless search, as long as there is probable cause.<sup>17</sup>

The new Georgia law also allows an employer to restrict an employee from carrying or possessing a firearm on the employer’s premises, including the parking lot, when the employee has a “completed or pending disciplinary action.”<sup>18</sup> An employer may also restrict an employee from transporting a firearm on the premises of the employer if prohibited by “state or federal law or regulation.”<sup>19</sup> For example, Georgia law prohibits the possession of a firearm on school grounds.<sup>20</sup>

The Georgia law further provides that no employer shall be liable in any “criminal or civil action” for damages arising out of an occurrence involving the “transportation, storage, possession or use of a firearm,” including the theft of a firearm from an employee’s automobile, unless the employer “commits a criminal act involving the use of the firearm or unless the employer knew that the person using such firearm would commit such criminal act on the employer’s premises.”<sup>21</sup> As a further liability deterrent for employers, the statute provides that an employee may incur the employer’s legal costs if the employer successfully defends a lawsuit brought by an employee based upon an occurrence involving a concealed firearm.<sup>22</sup> The law does not apply to employees of penal institutions, companies responsible for organizing public gatherings and places where firearms are prohibited by federal law.<sup>23</sup> For example, employees of federal facilities may not possess a firearm on the premises.<sup>24</sup>

### **Special Considerations for Employers Engaged in Organizing Public Gatherings and Operating Public Transportation Systems**

The new Georgia law provides additional limitations for employers engaged in organizing public gath-

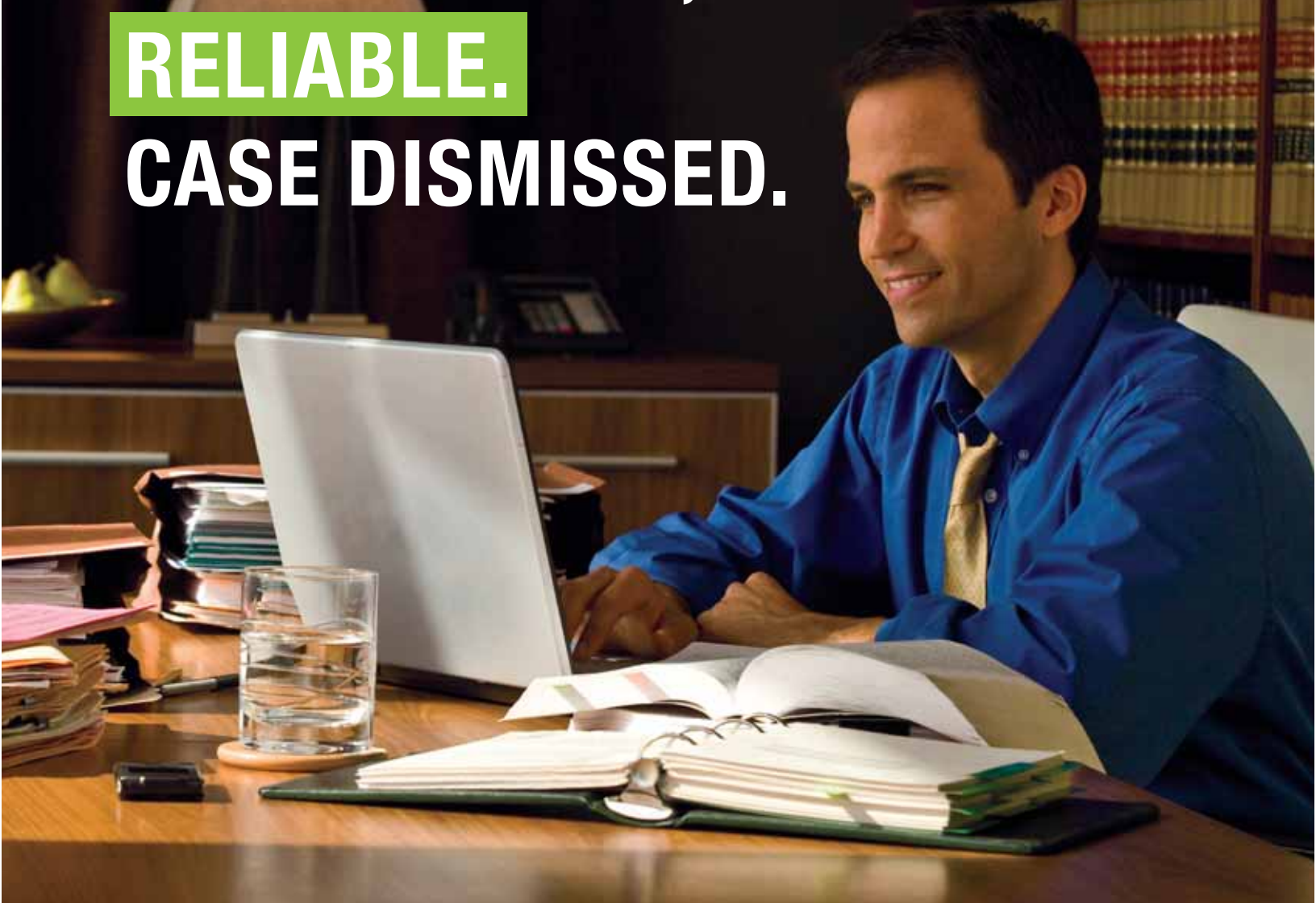
erings and operating public transportation systems. Specifically, the new Georgia law makes it a misdemeanor for any person, including an employee, to possess “any explosive compound, firearm or knife” at a public gathering.<sup>25</sup> This prohibition includes athletic or sporting events, churches or church functions, political rallies or functions, as well as publicly-owned or publicly-operated buildings and establishments at which alcohol is sold, but that do not derive at least 50 percent of their annual gross revenue from the sale of prepared meals or food.<sup>26</sup> Employers in these settings should be mindful of the additional possibilities for restricting employees from transporting firearms in their vehicles on company property.

For Georgia employers engaged in the management and operation of public transportation systems, the new Georgia law appears to allow the public to carry concealed weapons onto public transportation. This particular provision appears to be aimed more at users of public transportation and will likely have little additional impact on the employees of these organizations other than as set forth above. At least one public transportation system in metropolitan Atlanta has adopted a policy advising patrons to inform police of any “suspicious activity” related to the possession of a firearm.<sup>27</sup> This policy response appears to be otherwise consistent with existing state law. Additionally, this transit system has adopted work rules that prohibit all employees, whether licensed or not, from possessing a firearm when on company property. This prohibition applies to employees’ vehicles while parked on property designated as a “secured employee parking area.”<sup>28</sup>

### **Potential Challenge to Employers**

Although the new statute does not in and of itself place any additional duties on Georgia employ-

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ers, the very existence of the statute may raise questions about the duty of an employer to provide a safe workplace.<sup>29</sup> In Georgia, employers are statutorily obligated to implement policies and to make reasonable efforts to protect employees from known dangers at work.<sup>30</sup> These efforts are measured by the reasonably prudent person standard.<sup>31</sup> Based on the adoption of this new Georgia statute, the issue of whether the statute imposes additional duties and responsibilities for Georgia employers to provide a safe workplace is uncertain. One federal judge reviewing the applicability of this law to Atlanta's Hartsfield-Jackson International Airport has concluded that there is a significant question as to whether permitting the carrying of firearms in the common non-secured areas of airports poses a threat to public safety and welfare.<sup>32</sup> Arguably, this same threat would exist for employees working at the airport.

Additionally, at least one district court, evaluating a similar state statute, has held that the presence of firearms on company property might implicate the employer's duty to provide a safe workplace. In *ConocoPhillips Co. v. Henry*,<sup>33</sup> a suit was brought by various employers challenging the Oklahoma state statute prohibiting property owners from imposing any ban on the storage of firearms locked in or to vehicles. The employers' request for a permanent injunction against enforcement of the statute was granted. Plaintiffs argued that the general duty to provide a workplace free of safety hazards and violence directly conflicted with the statute because they could no longer enforce policies prohibiting weapons on the employers' property. In addressing this conflict, the trial court held that "gun-related workplace violence and the presence of unauthorized firearms on company property qualify as 'hazards that are causing or are likely to cause death or

serious physical harm.'"<sup>34</sup> The trial court ultimately found that the statute was a "material impediment" to compliance with an employer's duty to provide a safe workplace under one portion of federal law.<sup>35</sup>

The U.S. Court of Appeals for the 10th Circuit later reversed this decision in *Ramsey Winch Inc. v. Henry*.<sup>36</sup> The 10th Circuit relied on the Occupational Safety and Health Administration's refusal to promulgate a standard banning firearms from the workplace as a pivotal fact. This pivotal fact refuted the claim that the statute was preempted by federal law, since the federal administration refused to recognize a conflict with the existing state statute.


## The Restraining Order as a Means to Curb Potential Firearm Violence

Under Georgia law, employers are already authorized to seek a restraining order to curb incidents of workplace-related violence, including incidents involving the actual or threatened use of a firearm.<sup>37</sup> Current Georgia law authorizes employers to seek a temporary restraining order if an employee or other person is the victim of or is being threatened by violence at the workplace. The ability to obtain a restraining order provides a measure of significant and immediate protection for employers facing the prospect of responding to acts of both actual and reasonably anticipated violence in the workplace. Of course, a restraining order should only be sought in severe cases and should not be used in place of adopting sound policies to minimize or eliminate the threat of violence in the workplace. Sound policies and vigilant observation are far superior deterrents for reducing the potential for firearm-related workplace violence when compared with the prospect of obtaining a restraining order.

## Policies, the Employer's Ultimate Weapon

At the end of the shootout surrounding the controversy of an employee's ready access to firearms in the workplace, employment policies will ultimately prove to be the "silver bullet" for those Georgia employers seeking to eliminate the prospect of employees bringing guns into the actual workplace or accessing them from a locked vehicle on the company's parking lot. Specifically, with the exceptions contained in the new Georgia statute, Georgia employers wishing to limit or restrict employees from bringing guns to work should articulate workplace violence policies and adopt gun policies. These policies should be placed where employees have easy access to them and should be included in employee handbooks. The policies will also need to be clearly communicated to all employees and may involve scheduling employee meetings and providing additional training. An acknowledgement form might also prove necessary and helpful in certain instances.

## Conclusion

The Georgia "Bring Your Gun to Work" law arguably should not prevent most Georgia employers from providing a safe workplace. Through diligent observation by management and human resources, as well as sound policies, employers will be more than adequately prepared to respond to the potential for firearm-related workplace violence, even in the face of the implications raised by the new statute. 



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## Endnotes

1. Business Security and Employee Privacy Act, 2008 Ga. Laws 1199 (codified at O.C.G.A. §§ 16-11-113 to -135 (2007 & Supp. 2008), 51-1-29.2 (2000 & Supp. 2008)).
2. O.C.G.A. § 16-11-126 (2007 & Supp. 2008).
3. *Id.* § 16-11-135(a)-(b) (Supp. 2008).
4. *Id.*
5. FLA. STAT. § 790.251 (Westlaw through 2009 1st Reg. Sess.).
6. KY. REV. STAT. ANN. § 237.106 (West Supp. 2008).
7. LA. REV. STAT. ANN. § 32:292.1 (Westlaw through 2008 Reg. Sess.).

8. MINN. STAT. § 624.714(17)(c) (Westlaw through 2009 Reg. Sess.).
9. *Id.* § 624.714 (Westlaw through 2009 Reg. Sess.).
10. OKLA. STAT. tit. 21, § 1289.7a(A) (Westlaw through 2009 1st Reg. Sess.).
11. MISS. CODE ANN. § 45-9-55(2) (West 1999 & Supp. 2008).
12. *See* ALASKA STAT. § 18.65.800 (Westlaw through 2008 2d Reg. Sess. & 2008 4th Special Sess.); FLA. STAT. § 790.251 (Westlaw through 2009 1st Reg. Sess.); KY. REV. STAT. ANN. § 237.106 (West Supp. 2008); LA. REV. STAT. ANN. § 32:292.1 (Westlaw through 2008 Reg. Sess.); MINN. STAT. § 624.714(17)(c) (Westlaw through 2009 Reg. Sess.); MISS. CODE ANN. § 45-9-55(2) (West 1999 & Supp. 2008); OKLA. STAT. tit. 21, §§ 1289.7a, 1290.22(B) (Westlaw through 2009 1st Reg. Sess.).
13. *See* O.C.G.A. § 16-11-135(k) (Supp. 2008).
14. *See id.* § 16-11-135(c)(3), (4) (exception where necessary to prevent harm or loss to employer property).
15. *See id.* § 16-11-135(d)(1).
16. *See id.* § 16-11-135(c)(3).
17. *See id.* § 16-11-135(c)(1).
18. *See id.* § 16-11-135(d)(5).
19. *See id.* § 16-11-135(d)(6).
20. *Id.* § 16-11-127.1(b) (2007 & Supp. 2008).
21. *Id.* § 16-11-135(e) (Supp. 2008).
22. *Id.* § 16-11-135(g).
23. *Id.* § 16-11-135(d)(2), (d)(6) (Supp. 2008); *see id.* § 16-11-127(a), (b) (2007 & Supp. 2008).
24. 18 U.S.C.A. § 930 (West 2000 & Supp. 2008).
25. O.C.G.A. § 16-11-127(a) (2007 & Supp. 2008).
26. *Id.* § 16-11-127(b) (2007 & Supp. 2008).
27. Press Release, Metropolitan Atlanta Rapid Transit Authority, MARTA Prepares Customers for Implementation of Georgia's New Gun Law on July 1st (June 20, 2008), [http://www.itsmarta.com/newsroom/press\\_releases/rel.asp?id=275](http://www.itsmarta.com/newsroom/press_releases/rel.asp?id=275).
28. *Id.*
29. *See* O.C.G.A. § 34-7-20 (2008); *Smith v. Ammons*, 228 Ga. 855, 855, 188 S.E.2d 866, 867 (1972) (duty of employer to keep workplace premises safe and protect employees from known dangers).
30. O.C.G.A. § 34-7-20. Although not the focus of this article, OSHA also

- encourages employers to reduce occupational safety and health hazards and to initiate policies that increase workplace safety. 29 U.S.C.A. § 651(b)(1) (West 2008).
31. *See Strickland v. Howard*, 214 Ga. App. 307, 308, 447 S.E.2d 637, 639 (1994); *Miss Ga. Dairies, Inc. v. McLarty*, 114 Ga. App. 259, 261, 150 S.E.2d 725, 727 (1966).
  32. R. Robin McDonald, *Shoob Rejects Gun Group's Bid to Bring Guns in Airport*, FULTON COUNTY DAILY REP., Aug. 12, 2008.
  33. 520 F. Supp. 2d 1282 (N.D. Okla. 2007), *rev'd sub nom. Ramsey Winch Inc. v. Henry*, 555 F.3d 1199 (10th Cir. 2009).
  34. *Id.* at 1328.
  35. *Id.*
  36. 555 F.3d 1199 (10th Cir. 2009).
  37. *See* O.C.G.A. § 34-1-7(b) (2008).

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# What Does ERISA Have To Do With Insurance?

by Michael J. Hannan III

**E**RISA is the Employee Retirement Income Security Act of 1974.<sup>1</sup> Congress enacted this law in order to create uniform standards of conduct, responsibility and obligation for fiduciaries in employer-provided benefit plans, such as insurance-funded retirement, health, life/AD&D and disability plans, and to provide appropriate remedies, sanctions and access to federal court for claimants.<sup>2</sup>

With regard to claims filed under such plans, ERISA takes issues that used to be governed by insurance and contract law and places them in the context of trust law. Employers who sponsor and/or administer ERISA plans, third-party plan administrators (TPAs), insurers, reinsurers and

reinsurance managers who insure and/or have the discretion or responsibility to administer ERISA plans (and decide claims) are no longer subject to the remedies provided under common law contract principles should they breach their duties.<sup>3</sup> Instead, they are plan fiduciaries (the trustees) for the administered ERISA plans (the trusts) and are given a variable level of discretion to administer their duties. Thus, insurers are held accountable as fiduciaries to an ERISA plan, not as parties to a contract.

The degree of scrutiny given decisions made by ERISA fiduciaries has been the subject of enormous litigation, with a significant U.S. Supreme Court decision having been handed down last year.<sup>4</sup> In addition, the regulations placed upon ERISA fiduciaries by the Department of Labor for reviewing claims and providing claimants with fair notice of a decision have been tightened in recent years. By contrast, the remedies available to a claimant who is denied benefits under an ERISA plan have been well-settled since the 1980s.

This article is an overview of how ERISA affects the aggrieved insurance claimant. The lawyer who takes the case

may think that there is a state law claim for breach of contract, when often this is not the case. The lawyer has to determine whether the claim is preempted and governed by ERISA.

## Read the Policy or Certificate of Coverage

The first step in this regard is to check to see whether the policy is a group policy issued to a private employer. This should be on the face of the group policy, a certificate of coverage or a plan booklet that is distributed by the employer at the time of enrollment. ERISA governs only private employers or employee organizations. Any governmental organization, such as a state agency, is exempt from ERISA.<sup>5</sup> Likewise, any church or religious organization that offers group benefits is exempt from ERISA.<sup>6</sup>

Make sure that it is not an individual or supplemental policy, such as when an independent insurance agent arrives at the place of employment to take individual and voluntary applications for supplemental benefits not routinely provided by the employer. To determine whether such a plan is exempt from ERISA, one must check to see whether the plan satisfies ERISA's "safe harbor" provisions.<sup>7</sup> If the employer-purchased insurance does not satisfy the safe harbor provisions, and the employer is a true "plan sponsor,"<sup>8</sup> confirm that the policy satisfies the requirements of an "employee welfare benefit plan."<sup>9</sup> If so, ERISA governs the claim. Next, the lawyer must check the status of the claim.

## Make Sure That Administrative Remedies Have Been Exhausted Before You File Suit

Read the claim denial letter from the insurer. It has to comply with ERISA's statutory and regulatory

requirements concerning a full and fair review.<sup>10</sup> It should also have been sent within 15 to 90 days of receipt of the claim, depending on what kind of insurance and claim are involved, e.g., healthy vs. urgent care, or life vs. disability.<sup>11</sup> In appropriate cases, the insurer can obtain an extension in order to issue a decision.<sup>12</sup> If the letter is procedurally proper in content and timeliness, a claimant has 60 to 180 days to "appeal" the decision to the insurer, again depending on the type of insurance involved.<sup>13</sup> If you file suit before the appeal has been pursued, your case will likely be dismissed without prejudice or remanded by the trial court to the employer/administrator/insurer to re-review the case.<sup>14</sup> If you need time to gather more information to submit to the administrator or insurer, ask for additional time. Absent unusual circumstances, an insurer/claims administrator must decide appeals of denials of claims within 45 to 60 days, again depending on the kind of insurance and type of claim involved.<sup>15</sup> Claimants should know that they are entitled to submit new information not available at the time that they initially submitted their application.<sup>16</sup>

During the administrative appeal, your client has the right to demand certain information from the employer/administrator/insurer, including a complete copy of the claim file maintained for your client, a copy of the pertinent policy provisions being applied to that claim and any internal guidelines, manuals and procedures used to assist the employer/administrator/insurer in administering the claim.<sup>17</sup> If you do not receive any such requested information, such as the claim file, you may be able to recover a statutory per diem penalty for any delay in receiving such information.<sup>18</sup> Seasoned ERISA claimants' lawyers have learned to submit as much as they can on appeal so that it becomes part of the "administrative record." Building up the "administrative record" will be important for your client

because, in many cases, it will provide the sole foundation for the trial court's review of a denial of the claim on appeal.

## What To Do When the "Uphold" Letter on Appeal is Received

Such a letter, whether it be from the employer, TPA, insurer, etc., will advise you that it is unable to reverse the decision on appeal. At that point, you have exhausted your administrative remedies, and you can now file suit. If the insurer does not reach a decision on the appeal within the prescribed time limits, even after requesting extensions, this can be a constructive denial of the appeal, which used to be called a "deemed denial."<sup>19</sup> If this occurs, or the claimant otherwise feels that she did not receive a full and fair review of her claim, you can file suit.

You do not have to file suit initially in federal court. ERISA confers "concurrent jurisdiction" on claims for benefits under ERISA upon both federal courts and state courts, with equal original jurisdiction.<sup>20</sup> ERISA allows civil actions to establish your clients' rights to benefits under the plan (declaratory relief), to obtain payment of previously denied benefits (injunctive relief) and to compel plan fiduciaries to act accordingly.<sup>21</sup> For these reasons, you can file suit in the superior courts of Georgia because they have equity jurisdiction.

## What Remedies are Available?

If you wish to avoid a motion to dismiss your complaint in whole or in part, you should plead only those remedies specifically allowed under ERISA's civil enforcement statute, 29 U.S.C. § 1132. These remedies are payment of accrued benefits through date of judgment,<sup>22</sup> any injunctive or declaratory relief needed to enforce your client's rights<sup>23</sup> and attorney's fees and expenses of litigation.<sup>24</sup>

Recovery of pre-judgment interest on benefits under ERISA has been a topic of recent decisions. ERISA itself has no pre-judgment interest provision. Although the U.S. Court of Appeals for the 11th Circuit initially left such an award to the discretion of the trial court, it subsequently held that, in general, pre-judgment interest is not recoverable unless it is expressly specified as a benefit under the plan.<sup>25</sup> In response, some district courts have allowed such a recovery on claims for benefits because the courts may award "other equitable" relief under 29 U.S.C. § 1132(a)(3).<sup>26</sup> Indeed, the 11th Circuit has left the door open to recovery of interest under that specific theory.<sup>27</sup> In a case where interest is awarded, state law provisions for the amount of interest to be used can be "borrowed" to fashion ERISA "common law."<sup>28</sup>

Remedies under state law, such as punitive damages or other extra-contractual damages, are preempted. There are two kinds of ERISA preemption: (1) "complete" or "super" preemption; and (2) "conflict" or "defensive" preemption.<sup>29</sup> Complete preemption creates the federal subject matter jurisdiction for the federal courts under 28 U.S.C. § 1331, which is why the usual defense practice is to remove the case to federal court. The 11th Circuit has established a four-part test to determine whether complete preemption exists.<sup>30</sup> Defensive preemption is what leads to the limitation of remedies.<sup>31</sup>

## Why are the Remedies So Limited?

This is because of ERISA's preemption of all state law claims that could be considered an "alternative enforcement mechanism,"<sup>32</sup> e.g., O.C.G.A. § 33-4-6 and common law claims for breach of contract. ERISA's broad preemption was specifically intended by Congress. ERISA's preemption clause provides that its provisions "shall supersede any and all state laws in

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so far as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and are not exempt under section 1003(b) of this title.”<sup>33</sup>

Congress did not define the phrase “relate to” in this statute. As the 11th Circuit has pointed out, “it has fallen to the courts to deduce Congress’ intent and to apply this interpretation into the facts of each case that arises.”<sup>34</sup> The U.S. Supreme Court and the 11th Circuit have consistently given “relate to” a broad, common-sense meaning: A state law claim having any “connection with” or “reference to” an employee benefit plan gives rise to ERISA preemption.<sup>35</sup> A state law may “relate to” a benefit plan, and thereby be preempted, even if the law is not specifically designed to affect such plans, provided that the insurance company is a “fiduciary” under ERISA.<sup>36</sup> Although over 20 years ago the 11th Circuit’s position was that, “if a state law claim arises out of the administration of benefits under a plan, the claim is preempted,”<sup>37</sup> it later noted “a sea change in courts’ willingness to apply the preemption doctrine expansively.”<sup>38</sup>

ERISA does have a “savings clause,” which states that ERISA does not preempt state laws dealing solely with the “business of insurance.”<sup>39</sup> The business of insurance, however, is not the same as the administration of an ERISA claim, even if insurance is involved. The savings clause will not affect section 1132’s operation as the exclusive remedy for a claim denial. Instead, the savings clause has been interpreted to apply to state laws and regulations that address the operation of insurers and affect the risk pooling arrangement between insurer and insured.<sup>40</sup>

If you get creative and want to assert a claim under Georgia RICO, you might allege that the insurer took the premium and engaged in fraud because it never intended to pay the benefits in the

first place. Such a claim is also preempted by ERISA.<sup>41</sup>

With regard to claims for punitive or extra-contractual damages of any kind, the law has been clear for quite some time that they are not recoverable in an action brought under ERISA for the denial of a claim for benefits.<sup>42</sup> Only when there has been absolutely egregious conduct, such as the bamboozling of all employees out of their entire pensions, will such relief be granted.<sup>43</sup>

## **Surely I Can Demand a Jury Trial, Right?**

You can demand one, but most of the time you will not get one. ERISA has been interpreted as an equitable statute under the Seventh Amendment. Based on this analysis, the courts have held that no Seventh Amendment right to a jury trial exists in actions brought pursuant to ERISA.<sup>44</sup>

## **I Can Rely on the Fact That if I Prevail on Behalf of My Client, I Will Recover My Fees and Expenses From the Court, Correct?**

Not necessarily—it is within the discretion of the court. Section 1132(g)(1) of Title 29 provides, in pertinent part, that “the Court in its discretion may allow a reasonable attorney’s fee and cost of action to either party.” Unlike other fee-shifting provisions, which give the court discretion to award fees to a prevailing party,<sup>45</sup> 29 U.S.C. § 1132(g) allows a court to award fees to either party.<sup>46</sup> The law provides no presumption in favor of granting attorney’s fees to a prevailing claimant in an ERISA action.<sup>47</sup> With that in mind, in deciding whether to award fees and costs in an ERISA action, the 11th Circuit has enumerated certain factors for a court to use, which have been almost universally applied.<sup>48</sup>

## **Once I File Suit, I Can Keep Building Up My Case by Deposing Treating Physicians and Hiring Expert Witnesses, Right?**

That depends *completely* on which one of the two standards of review is to be applied to the claim denial.<sup>49</sup> The short answer is: if the standard of review is *de novo*, then you can submit evidence outside the administrative record and conduct discovery as you would in any civil case.<sup>50</sup> If the standard of review is abuse of discretion, called the “arbitrary and capricious” standard, however, the scope of discovery and the court’s review historically have been limited to the “administrative record” (the plan documents and the claim file).

With insurance companies, however, there is usually an inherent conflict of interest, because they render claims decisions and pay claims out of their own assets. Therefore, even in an arbitrary and capricious case, this conflict of interest may or may not be explored through discovery if the parties agree, or if the district court orders that discovery outside the administrative record is permitted.<sup>51</sup> Several district court decisions have disagreed, limiting the scope of review to the administrative record if the conflict is readily apparent from the fact that the decision maker also pays the benefits out of its own assets.<sup>52</sup>

## **How Do I Know What Standard of Review Applies (For Purposes of the Scope of Discovery)?**

ERISA itself provides no standard for reviewing decisions of ERISA plan or claim administrators.<sup>53</sup> Therefore, to answer this question in this context (as the actual degree of scrutiny to be applied will be discussed below), courts generally have taken principles from trust law and held that the standard of review

depends on the degree of discretion that the plan documents give to the administrator.

This requires a review of the terms of the plan documents. The terms of the plan documents control the management of the plan.<sup>54</sup> A court looks for language specifically conferring on the claims administrator discretion to interpret the terms of the plan document or to determine a claimant's eligibility for benefits.<sup>55</sup>

If the terms of the plan document (which can be (1) a summary plan description (SPD) booklet, (2) an insurance policy or (3) basically any document that conforms with 29 U.S.C. § 1102 (setting forth the requisites of the "plan document")) expressly grant this discretion, then the "arbitrary and capricious" standard of review will apply. A *de novo* standard of review does not apply.<sup>56</sup> If the plan document does *not* contain this express grant of discretion, then a *de novo* review standard does apply.<sup>57</sup>

What if more than one document describes the plan? In that case, *all* of the plan documents are examined.<sup>58</sup> What if the plan document(s) is/are amended during the coverage period? Most circuits have agreed that the plan document in effect at the time of the claim denial is the controlling plan document for purposes of analyzing whether discretionary language is present.<sup>59</sup>

## The Level of Scrutiny to Be Applied to an ERISA Claim Denial

In 2004, the 11th Circuit devised a six-step analysis to be applied across the board in ERISA claim denial cases. It encompassed the analysis shown above, but only if needed. The six steps were as follows:

(1) Apply the *de novo* standard to determine whether the claim administrator's benefits denial decision is "wrong" (*i.e.*, the court disagrees with the

administrator's decision); if it is not, then end the inquiry and affirm the decision;

(2) if the administrator's decision in fact is "*de novo* wrong," then determine whether he was vested with discretion in reviewing claims; if not, end [the] judicial inquiry and reverse the decision;

(3) if the administrator's decision is "*de novo* wrong" and he *was* vested with discretion in reviewing claims, then determine whether "reasonable" grounds supported it (hence, review his decision under the more deferential arbitrary and capricious standard);

(4) if no reasonable grounds exist, then end the inquiry and reverse the administrator's decision; if reasonable grounds do exist, then determine if he operated under a conflict of interest;

(5) if there is no conflict, then end the inquiry and affirm the decision;

(6) if there is a conflict of interest, then apply [a] heightened arbitrary and capricious review to the decision to affirm or deny it.<sup>60</sup>

The 11th Circuit described its "heightened arbitrary and capricious review" as somewhere between the *de novo* and "mere" arbitrary and capricious standards, but never stated where that "somewhere" was.<sup>61</sup> The court admitted that it awaited guidance from the U.S. Supreme Court regarding the level of deference to be applied to a decision made by a conflicted claims administrator who had the necessary discretion under the plan or policy.<sup>62</sup>

Then, on June 19, 2008, the U.S. Supreme Court decided *Metropolitan Life Insurance Co. v. Glenn*,<sup>63</sup> which answered that question. The Court confirmed that an ERISA plan sponsor or insurer who both makes benefit decisions and funds the payment of benefits has a conflict of interest, but held that this should only be considered

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as a factor. The Court advanced a “totality of the circumstances” test for assessing the effect of that conflict on any discretionary review.<sup>64</sup> The Court candidly admitted that it was not providing a guide to district courts as to how to weigh the effect of a conflict of interest. All that it did was provide a few examples to consider.

Glenn, however, expressly eliminated any burden-shifting evidentiary rules, leading to the 11th Circuit’s 2008 decision in *Doyle v. Liberty Life Assurance Co. of Boston*,<sup>65</sup> which acknowledged that Glenn eliminated step six, the “heightened arbitrary and capricious” standard of review that had existed in the 11th Circuit for 18 years.<sup>66</sup> What previously had been a six-step analysis of ERISA claim denials in the 11th Circuit has been reduced to five steps.<sup>67</sup> It bears asking though, whether the 11th Circuit’s retention of step one, a de novo review, is contrary to the intent of the Supreme Court in *Glenn*.

## Conclusion

The above is by no means an exhaustive summary of all ERISA statutory and case law applicable to insurance claim denials. It should, however, alert the lawyer to the basic areas with which one should be familiar if one is considering filing a lawsuit under a group life, health, disability or accidental death insurance policy. 

*Reprinted in part with express written permission from ICLE of Georgia from the author’s “What is ERISA?” ICLE of Georgia LTD Claims Seminar, March 2007, ICLE of Georgia.*



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## Endnotes

1. 29 U.S.C. §§ 1001-1461 (2006).
2. 29 U.S.C. § 1001(b).
3. An insurance company comes within this preemption because, under ERISA, an insurance company is an ERISA fiduciary if it decides claims. Whether an entity is a fiduciary under ERISA is a functional test. There are two kinds of administration of an ERISA plan. “Plan administration” is generally the provision of information to employees, coordinating enrollment, collection of premiums where warranted and other employer-specific duties. Usually these tasks are performed by the employer. *See* 29 *id.* § 1002(16). The second kind of administration is “claims” administration, which can be performed by an insurer. *Id.* § 1002(21)(A)(iii) (defining a “fiduciary” as any person or entity that has “any discretionary authority or discretionary responsibility in the administration of [an employee benefit] plan”); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004) (“Classifying any entity with discretionary authority over benefits determinations as anything but a plan fiduciary would thus conflict with ERISA’s statutory scheme.”). For an excellent discussion of this, see *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1353 n.4 (11th Cir. 1998).
4. *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).
5. 29 U.S.C. §§ 1002(32), 1003.
6. *Id.* §§ 1002(33), 1003.
7. 29 C.F.R. § 2510.3-1(j) (2008); *see* *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1213 (11th Cir. 1999).
8. 29 U.S.C. § 1002(16).
9. *Id.* § 1002(1); *Donovan v. Dillingham*, 688 F.2d 1367, 1371-

- 73 (11th Cir. 1982) (seminal case on issue).
10. 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1.
11. 29 C.F.R. § 2560.503-1(f).
12. *Id.*
13. *Id.* § 2560.503-1(h).
14. *Bickley v. Caremark Rx, Inc.*, 461 F.3d 1325, 1330 (11th Cir. 2006); *Springer v. Wal-Mart Assocs. Group Health Plan*, 908 F.2d 897 (11th Cir. 1990).
15. 29 C.F.R. § 2560.503-1(i).
16. *Id.* § 2560.503-1(h)(2)(ii).
17. *Id.* § 2560.503.1(g)(v), (h)(2)(iii), (m)(8).
18. 29 U.S.C. § 1132(c). The maximum per diem penalty is \$110. 29 C.F.R. § 2575.502c-1.
19. 29 C.F.R. § 2560.503-1(l). The original regulation, the former 29 C.F.R. § 2560.503-1(e)(2), contained the precise words “deemed denied.” This regulation was modified in 2001 to remove that phrase, which was replaced with “a claimant shall be deemed to have exhausted the administrative remedies . . . .” *Torres v. Pittson*, 346 F.3d 1324, 1332 n.10 (11th Cir. 2003). This has been interpreted to be a distinction without a difference by more than one district court. *See* *McDowell v. Standard Ins. Co.*, 555 F. Supp. 2d 1361, 1367 (N.D. Ga. 2008).
20. 29 U.S.C. § 1132(e).
21. *Id.* § 1132(a)(1)(B).
22. *Id.* In cases where benefits are paid over time, such as with monthly long-term disability (LTD) benefits, future benefits are not recoverable at trial because LTD policies are considered installment contracts. Only when the insurer rescinds the coverage and commits an “anticipatory breach” of an installment contract is the entire value of the policy recoverable at trial. *N.Y. Life Ins. Co. v. Viglas*, 297 U.S. 672 (1936).
23. 29 U.S.C. § 1132(a)(1)(B), (a)(3).
24. *Id.* § 1132(g).
25. *Green v. Holland*, 480 F.3d 1216, 1223-26 (11th Cir. 2007); *Flint v. ABB, Inc.*, 337 F.3d 1326, 1329-30 (11th Cir. 2003).
26. *E.g.*, *Cheal v. Life Ins. Co. of N. Am.*, 330 F. Supp. 2d 1347 (N.D. Ga. 2004).
27. *Green*, 480 F.3d at 1226 n.6.
28. *E.g.*, *Kinser v. The Plans Admin. Comm. of CitiGroup, Inc.*, No. 4:05-cv-86 (CAR), 2008 WL 762200, at \*1 (M.D. Ga. Mar. 18, 2008).



29. *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211-12 (11th Cir. 1999).
30. *Id.* at 1212.
31. *Id.*
32. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658-59 (1995).
33. 29 U.S.C. § 1144(a).
34. *Morstein v. Nat'l Ins. Servs., Inc.*, 93 F.3d 715, 718 (11th Cir. 1996) (en banc).
35. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1351-52 (11th Cir. 1998).
36. *Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1277-91 (11th Cir. 2005); *Morstein*, 93 F.3d at 718-24; *Sanson v. Gen. Motors Corp.*, 966 F.2d 618, 621 (11th Cir. 1992).
37. *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987).
38. *Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1333 (11th Cir. 1998) (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), and *Morstein*).
39. 29 U.S.C. § 1144(b)(2)(A).
40. *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003) (for a state law to be deemed a "law which regulates insurance" under § 1144(b)(2)(A), the state law must (1) be specifically directed toward entities engaged in insurance; and (2) substantially affect the risk pooling arrangement between the insurer and the insured).
41. *Jones v. LMR Int'l*, 351 F. Supp. 2d 1308, 1315 (M.D. Ala. 2005); *Dist. 65 Ret. Trust v. Prudential Secs., Inc.*, 925 F. Supp. 1551, 1561-62 (N.D. Ga. 1996).
42. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985) ("Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefits claims.")
43. *Varity Corp v. Howe*, 516 U.S. 489, 515 (1996).
44. *Stewart v. KHD Deutz of Am. Corp.*, 75 F.3d 1522, 1527 (11th Cir. 1996); see also *Blake v. Union Mut. Stock Life Ins. Co. of Am.*, 906 F.2d 1525, 1527 (11th Cir. 1990) (noting "overwhelming authority" on this point). Although this rule applies to benefits claims brought by or on behalf of an individual participant or beneficiary under 29 U.S.C. § 1132(a)(1)(B), it is unsettled whether a plaintiff bringing a lawsuit for restoration of funds to (and on behalf of) an ERISA plan itself under 29 U.S.C. § 1132(a)(2) and 29 U.S.C. § 1109 is entitled to a jury trial. *Chao v. Meixner*, No. 1:07-0595-WSD, 2008 WL 2691019, at \* 2-4 (N.D. Ga. July 3, 2008).
45. See, e.g., FED. R. CIV. P. 54(d).
46. *Freeman v. Cont'l Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993).
47. *Id.*
48. A court should consider "(1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorney's fees; (3) whether an award of attorney's fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorney's fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; (5) [and] the relative merits of the parties' positions." *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1344-45 (11th Cir. 2001).
49. *Wells v. Unum Life Ins. Co. of Am.*, 593 F. Supp. 2d 1303, 1305 (N.D. Ga. 2008).
50. *Moon v. Am. Home Ins.*, 888 F.2d 86, 89 (11th Cir. 1989).
51. *Doyle v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1352, 1363 n.5 (11th Cir. 2008) (interpreting *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008)); *Adams v. Hartford Life & Accident Ins. Co.*, 589 F. Supp. 2d 1366, 1367 (N.D. Ga. 2008).
52. E.g., *Sanders v. Unum Life Ins. Co. of Am.*, No. 3:08-cv-03 (CDL), 2009 WL 902046, at \*1 (M.D. Ga. Mar. 30, 2009); *Everson v. Liberty Mut. Ins. Co.*, No. 1:05-cv-2459-RWS, 2009 WL 73140 (N.D. Ga. Jan. 2, 2009); *Wells*, 593 F. Supp. 2d at 1305-06; *Bell v. Shenandoah Life Ins. Co.*, 589 F. Supp. 2d 1368 (M.D. Ga. 2008); *Franklin v. Hartford Life Ins. Co.*, No. 8:07-cv-1400-T-23MAP, 2008 WL 5110836 (M.D. Fla. Dec. 4, 2008); *Cassanese v. United Healthcare Ins. Co.*, No. 8:08-cv-373-T-26MAP, 2008 WL 4642292 (M.D. Fla. Oct. 20, 2008); *Miller v. The Prudential Ins. Co. of Am.*, No. 07-60882-CIV-HURLEY, 2008 WL 4540998 (S.D. Fla. Oct. 9, 2008); *McDaniel v. Hartford Life & Accident Ins. Co.*, No. 5:07-cv-7 (CAR), 2008 WL 4426087 (M.D. Ga. Sept. 25, 2008).
53. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989); *Doyle*, 542 F.3d at 1355.
54. 29 U.S.C. § 1104(1)(D) (stating that a plan fiduciary must administer the plan in accordance with the terms of the plan documents).
55. *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994).
56. *Firestone*, 489 U.S. at 111.
57. *Id.* at 115.
58. *Shaw v. Conn. Gen. Ins. Co.*, 353 F.3d 1276, 1282-84 (11th Cir. 2003).
59. See, e.g., *Hackett v. Xerox Corp. Long-Term Disability Income Plan*, 315 F.3d 771, 774 (7th Cir. 2003); *Smathers v. Multi-Tool, Inc.*, 298 F.3d 191, 197 (3d Cir. 2002).
60. *Williams v. BellSouth Telecomms., Inc.*, 373 F.3d 1132, 1138 (11th Cir. 2004) (implied overruling recognized by *Doyle v. Liberty Life Assurance Co. of Boston*, 542 F.3d 1352 (11th Cir. 2008)).
61. *Id.*
62. *Id.* The "heightened arbitrary and capricious" standard of review, first created in 1990 in *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), did contain a burden-shifting factor: The claims administrator had to show that its decision was not tainted by self-interest. Thus, a wrong but apparently reasonable decision was arbitrary and capricious if it advanced the conflicting interest of the claims administrator at the expense of the claimant. *Id.* at 1566-67.
63. 128 S. Ct. 2343 (2008).
64. *Id.* at 2351-52.
65. 542 F.3d 1352 (11th Cir. 2008).
66. *Id.* at 1359 (recognizing the implicit overruling of, among other cases, *Brown* and *Williams v. BellSouth Telecomms., Inc.*, 373 F.3d 1132 (11th Cir. 2004)).
67. See *Brannon v. Bellsouth Telecomms.*, No. 08-14005, 2009 WL 567234, at \*1 (11th Cir. Mar. 6, 2009); *White v. Coca-Cola Co.*, 542 F.3d 848, 853-54 (11th Cir. 2008); *Sanders v. Unum Life Ins. Co. of Am.*, No. 3:08-cv-03 (CDL), 2009 WL 902046, at \*1 (M.D. Ga. Mar. 30, 2009).

# State Bar Active in 2009 General Assembly

by Mark Middleton

**T**he State Bar was extremely active in the 2009 General Assembly. Each year, the State Bar brings a legislative agenda that is initiated by its various sections. This year, in addition to the typical improvements to the law initiated by the Fiduciary Law, Business Law and other sections, the State Bar took positions on several matters that arose outside the ACL process.

Prior to the session, the State Bar's Advisory Committee on Legislation (ACL) met to review the work of the sections and committees that had formulated legislation for consideration. The ACL recommended, and the Board of Governors approved, initiatives to modernize the evidence code, revise the limited liability code, rewrite the trust code and support appropriations for domestic violence representation and the Resource Center.

The State Bar also reviewed and adopted positions on several matters that were raised by the Legislature. Many of the issues were raised in the context of the appropriations process, which was one of the toughest in years. For example, the State Bar took a position in favor of HB 283 that removed the state's responsibility for collecting and appropriating the fee charged to take the bar exam. This allows the court to set the fee and administer the test without the need for a state appropriation.

Attorneys and other supporters in the legislature supported the State Bar's initiatives. In the Senate, Sen. Preston Smith (R-Rome) again served as chairman of the Senate Judiciary Committee, and provided leadership and support on a number of State Bar positions, including HB 283, the bar exam fee issue. Smith also served as the Senate Appropriations subcommittee chair, and worked diligently on the judicial budget.

Sen. John Wiles (R-Marietta) served as the chairman of the Senate Special Judiciary Committee. Sen. Bill Cowser, (R-Athens), now a Floor Leader for Gov. Sonny Perdue, carried the business law section bill in the Senate. Sen. Bill Hamrick (R-Carrollton) sponsored the successful passage of the fiduciary law section's trust code revision through the Senate.



In the House of Representatives, Rep. Wendell Willard (R-Dunwoody) and Rep. Rich Golick (R-Smyrna) provided the leadership as chairmen for the two House Judiciary Committees. Willard authored evidence code revision. Rep. Chuck Martin (R-Alpharetta) served as the Appropriations Subcommittee chair for judicial funding, and authored HB 283. The House also had two excellent subcommittee chairs, Rep. Mike Jacobs (R-Dunwoody) and Rep. David Ralston (R-Blue Ridge).

The State Bar leadership was also very active and supportive during this legislative session. Section leaders such as John Taylor, Tom Byrne, Mark Williamson, Lee Lyman and Andy Immerman devoted numerous hours presenting their section's bills to the legislative committees. ACL Chair Patti Gorham and Vice Chair Dwight Davis skillfully managed the ACL process and joined President Jeffrey O. Bramlett and President-Elect Bryan Cavan in representing the

State Bar at various legislative functions during the session.

## Bills and Appropriations Supported by the State Bar

The State Bar supported five bills. Three of the bills passed the entire process, one passed the Senate and the fifth received a "do-pass" recommendation from the House committee. Also, the Bar-supported appropriations were maintained in a year when across-the-board cuts were the norm.

- **HB 308:** The Business Law Section's proposal for technical amendments to the LLC statute, authored by Rep. David Ralston (R-Blue Ridge) passed and awaits the governor's signature.
- **HB 283:** The State Bar supported the language in the bill that allows bar exam fees to cover the costs of the exam, and allows the fees to go directly to

the Board of Examiners. The bill now goes to the governor for his signature.

- **HB 126:** The State Bar supported the Clerk's Authority initiative, authored by Rep. Ed Lindsey (R-Atlanta), known as the "Uniform Electronic Transactions Act." It passed and awaits the governor's signature.
- **SB 131:** The Fiduciary Law Section's proposal for Trust Code Revisions passed the Senate, and will be debated in the House during the 2010 session.
- **HB 24:** This legislation, by Judiciary Chairman Willard, to conform the Georgia rules of evidence to the federal rules of evidence, passed the House Judiciary Committee. This bill will be held over until the 2010 session.
- **Georgia Appellate Practice Resource Center Funding Request:** The Resource Center's \$580,000 appropriation was retained in full in the FY '10 budget as requested.
- **Victims of Domestic Violence Funding Request:** An appropriation of \$2 million was requested in the FY '10 budget to maintain the current funding level. The House and Senate passed the FY '10 budget with \$2,006,548 for legal services for victims of domestic violence.
- **Georgia Public Defender Standards Council (GPDSC):** The FY '10 budget passed by the House and Senate has \$41,489,395 for public defenders, an increase of approximately \$6 million over the original recommendation. The State Bar supports adequate funding for the GPDSC.

## Legislation Opposed by the State Bar

The State Bar opposed seven bills and none of these passed.

- **SB 41:** Would provide regulations and conditions on attorney television advertising. The




State Bar opposes this bill on grounds of separation of powers and constitutionality.

- **SB 42:** Would revise the appointments process to the Georgia Public Defenders Standards Council (GPDSC) and make that council an advisory body; passed the Senate. The House Judiciary Non-Civil Committee held several lengthy hearings and passed a substitute that creates an "Office of Alternative Defense Counsel," to handle conflict cases, and basically keeps the Senate provisions intact. The matter did not come to the full House for a vote. The State Bar opposed the effort to make the GPDSC an advisory council and worked diligently to reach a compromise on the matter. The bill will be eligible for further consideration in the 2010 session.
- **SB 101:** Would have provided protection to pharmaceutical

or medical device companies against lawsuits on drugs or devices that have FDA approval provided the company 1) has corporate headquarters in Georgia, 2) employs over 200 Georgia citizens or 3) has Georgia as its principal place of research and development. After failing in the Senate Economic Development Committee, the measure moved no further.

- **SB 108:** Which originally would require plaintiffs who have their claim dismissed to pay attorney fees and costs to the defendant, was amended to allow for a stay of discovery when a motion to dismiss is filed.
- **SB 138:** Limits a right to private action to situations where there is specific statutory language allowing a cause of action. The bill did not pass out of committee.

- **HR 73:** A constitutional amendment that would remove the Court of Appeals' and Supreme Court's individual decisions from binding other courts as precedents. The matter did not receive a hearing.
- **HR 74:** A constitutional amendment that would give the General Assembly the power to remove and discipline judges. This did not receive a hearing.

2009 was an extremely active and important legislative year for the State Bar, whose legislative effort depends upon the participation and dedication of its members. To get involved, contact the State Bar's lobbyists. 

**Rusty Sewell, Mark Middleton, Tom Boller, Hunter Towns and Charlie Tanksley** serve as the State Bar's lobbyists. They can be reached at [mark@gacapitolpartners.com](mailto:mark@gacapitolpartners.com) or at 404-872-1007.

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The Lawyers Foundation of Georgia furnishes the *Georgia Bar Journal* with memorials to honor deceased members of the State Bar of Georgia.

A meaningful way to honor a loved one or to commemorate a special occasion is through a tribute and memorial gift to the Lawyers Foundation of Georgia. An expression of sympathy or a celebration

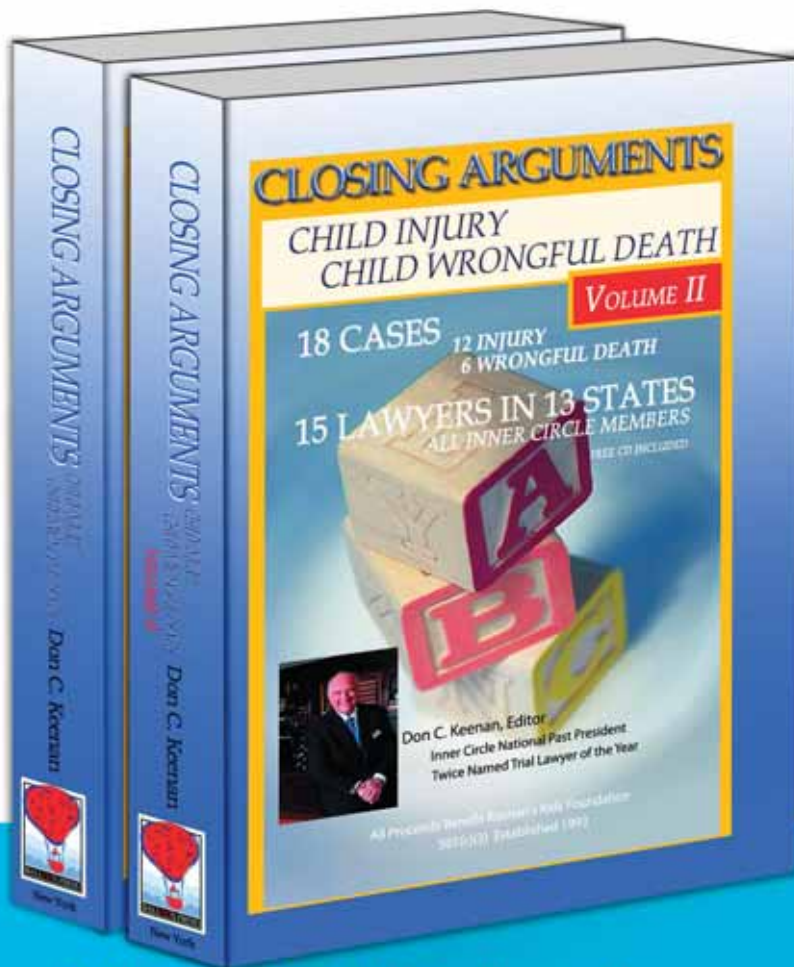
of a family event that takes the form of a gift to the Lawyers Foundation of Georgia provides a lasting remembrance. Once a gift is received, a written acknowledgement is sent to the contributor, the surviving spouse or other family member, and the *Georgia Bar Journal*.

### Information

For information regarding the placement of a memorial, please contact the Lawyers Foundation of Georgia at (404) 659-6867 or 104 Marietta St. NW, Suite 630, Atlanta, GA 30303.

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# Lawyers Helping People Honored with Justice Benham Community Service Awards

by Avarita L. Hansen

**T**he State Bar of Georgia and the Chief Justice's Commission on Professionalism (CJCP) presented the 10th Annual Robert Benham Awards for Community Service on March 10 at the Georgia-Pacific Center auditorium.

The awardees and their guests were welcomed to the event by Tye C. Darland, senior vice president and general counsel, Georgia-Pacific. Patrise Perkins-Hooker, chair of the awards committee, introduced returning emcees Bill Liss, financial and legal editor for Atlanta's WXIA-TV News (11 Alive) and Avarita Hanson, executive director of the CJCP. Liss and Hanson were joined by special guest H. Thomas Wells Jr., president, American Bar Association. Wells' inspirational remarks about the importance of community service preceded the awards presentation, underscoring the hard work and dedication of each recipient in serving both their career and their community (remarks reprinted on page 31).

The Hon. Griffin B. Bell, retired partner, King & Spalding, Atlanta, was honored posthumously with the Lifetime Achievement Award.

The 72nd attorney general of the United States, Bell was a major figure in the legal profession in the last half of the 20th century. After graduating from Mercer University Law School in 1948, he practiced in Savannah and Rome before joining Spalding Sibley Troutman & Kelly (later renamed King & Spalding) in 1953. Bell was named chief of staff to Gov. Ernest Vandiver in 1958,



Photos by Derrick W. Stanley

chaired John F. Kennedy's 1960 presidential campaign and was appointed judge of the U.S. Court of Appeals of the 5th Circuit in 1961. While on the bench, he was an active participant with a moderate voice in the implementation of school desegregation orders throughout the South.



After 15 years on the bench, Bell returned to King & Spalding only to resume public service as President Jimmy Carter's nominee for U.S. district attorney. He again returned to his corporate practice with King & Spalding in 1979, but remained prominent in local and national affairs throughout his career.

One of Georgia's greatest statesmen, Bell has honored the legal profession and his roots by his long and meaningful record of public service. Bell's son and grandson, Griffin B. Bell Jr. and Griffin B. Bell III, accepted the award on his behalf.

Deserving community service awards were presented to two judges and eight Georgia attorneys.

David L. Cannon Jr., Solicitor-General of Cherokee County, Canton, serves on the Chamber of Commerce and volunteers with the Morningstar Montessori School, meeting the needs of autistic children. He is a 10-year coach of the Cherokee County High School mock trial team. Cannon has held leadership roles with the Blue Ridge Circuit Bar Association and has been a member of the State Bar Board of Governors since 2002.

Denise Cleveland-Leggett, Baudino Law Group, PLC, Atlanta, has made her mark on the greater Atlanta community while serving on the boards of the Atlanta History Center, Margaret Mitchell House & Museum, Literacy Action, Inc., and True Colors Theater Company. She also serves or has served on the Georgia Commission for Women, State Ethics Commission, Personnel Oversight Commission and as co-counsel for the Council for the Hearing Impaired Clinic.

Rebecca R. Crowley, managing attorney, Georgia Legal Services Program, Waycross, spearheads the Waycross Bar Association service projects and works with civic organizations including the Kiwanis Club, American Red Cross and the Waycross Community Theatre.

Tomieka R. Daniel, consumer law fellow/senior staff attorney, Georgia Legal Services, Byron, is

## H. Thomas Wells Jr., President American Bar Association

*(reprinted remarks from the 10th Annual Justice Robert Benham Awards for Community Service)*

It's an honor to be here, especially as we celebrate the 20th anniversary of the Chief Justice's Commission on Professionalism. The American Bar Association is keenly aware that the Commission is a national model for lawyer professionalism programs across the country.

Community service—the reason we're here this evening—is a crucial aspect of lawyer professionalism. Lawyers work to improve our communities in countless ways: serving on local councils and nonprofit boards, donating our services as teachers, mentors and coaches, and providing leadership and support to civic, religious and philanthropic organizations.

The call to service has deep historical roots in the American legal profession. As early as 1865, Alexis de Tocqueville observed that lawyers "assume a responsibility for the common good through public life" and that they were particularly well suited to this role by their "training and cast of mind." When Louis Brandeis gave his famous speech in 1905 on The Opportunity in the Law to the Harvard Ethical Society, he said that "the paramount reason why the lawyer has played so large a part in our political life is that his training fits him especially to grapple with the questions which are presented in a democracy."

As our nation faces innumerable economic and social ills, it is lawyers who most naturally and frequently offer the talents, skills and leadership necessary to strengthen our communities, improve the lives of our children and families, and help others in need. To understand the importance of this, imagine a world without any volunteers. Based on government and academic research:

- Roughly 30 percent of hospital support services would disappear;
- Virtually all places of worship and the services they provide would cease to exist;
- Roughly 60 percent of fire and emergency services would disappear;
- After-school activities and tutoring programs would be drastically curtailed; and
- Neighborhood nutrition programs, housing, and other social services for the underserved would diminish by roughly half.

Our commitment to community service benefits not only those who receive the service, but also—quite frankly—the lawyers, legal employers, bar associations and law schools that support these opportunities. Studies have shown that volunteering has significant health benefits and contributes to higher occupational prestige. By freeing up time for community service work, legal employers can improve job satisfaction and retention rates for the lawyers in whose recruitment and training they have made such a substantial investment. Law firms can also build stronger relationships with their clients by collaborating on community service projects of mutual interest. And, they can enhance their reputation and prestige within their communities and the overall image of lawyers and the legal profession.

This evening's award recipients embody the best of our profession. Their actions remind me not only why I'm so proud to be a lawyer, but also why I so much enjoy representing our profession as ABA president. It is the example our honorees set that illustrates something I always point out with lawyers, law students and community audiences: at times we lawyers can be good at making a dollar, but we're at our dead-level best when we're making a difference. Thank you for making a huge difference through community service.



Photo provided by the ABA

most active working with low-income, at-risk youths through her graduate chapter sorority, Alpha Kappa Alpha, Inc., leading pregnancy prevention and stay-in-school programs. She works with the Boys and Girls Clubs of Central Georgia, Harriet Tubman African American Museum and with the Fellowship Bible Baptist Church.

Laverne Lewis Gaskins, university attorney, Valdosta State University, Valdosta, is a leader in the bar community, serving on the State Bar Board of Governors and numerous committees. She sits on the boards of several organizations, including Florida State College of Law, Valdosta State Alumni, Salvation Army and American Red Cross. Her service to south Georgia includes serving with the American Association of University Women, working to empower women and girls through education.

Hon. James E. Hardy, Superior Court Judge, Southern Judicial Circuit, Thomasville, has advanced many causes to uplift children, including the Terrific Kids Program through the Kiwanis Club, Angel Tree Program and Children's Advocacy Center. Hardy, a deacon of Thomas First Presbyterian Church, also serves the American Red Cross, Halcyon Home for Battered Women, Thomas County Family Connection, Hands On Thomas County and Habitat for Humanity.

David E. Hudson, Hull Towell Norman Barrett & Salley, P.C., Augusta, has served as a Mercer University trustee for more than 25 years, and is a trustee, deacon and Sunday school teacher at the First Baptist Church of Augusta. Hudson is also trustee of the Richard B. Russell, National Science Center and Walter F. George Foundations and has served with Leadership Georgia, Leadership Augusta, East Georgia Easter Seals and the Georgia First Amendment Foundation.

J. Kevin Moore, partner, Moore Ingram Johnson & Steele, LLP, Marietta, has worked with Keep Cobb Beautiful, the American Cancer Society, Cobb Chamber of




(Back row, left to right) Griffin B. Bell III, H. Thomas Wells Jr., David E. Hudson, Laverne L. Gaskins, Tomieka R. Daniel, Steve Gottlieb (for Judith A. O'Brien), Patrise Perkins-Hooker and Hon. James E. Hardy; (middle row, left to right) Griffin B. Bell Jr., Avarita L. Hanson, Denise Cleveland-Leggett, Rebecca R. Crowley, Hon. Johnny N. Panos and David L. Cannon Jr.; (front row, left to right) Tye C. Darland, Justice Robert Benham and J. Kevin Moore.

Commerce's East Cobb Area Advisory Council and the Cobb Center for Family Resources. He is also chair of the Board of Trustees at First Baptist Church Marietta.

Judith A. O'Brien, partner, Sutherland, Atlanta, is currently serving as the chair of Sutherland's Pro Bono and Community Service Program. She's a past president and board member of the Atlanta Legal Aid Society. O'Brien also works with the Atlanta Volunteer Lawyers Foundation Domestic Violence Project, Men Stopping Violence, Communities in Schools and the Georgia Asylum & Immigration Network.

Hon. Johnny N. Panos, State Court, DeKalb County, Decatur, can be found serving hands-on throughout the community. Forging a partnership with DeKalb County's school system, the CEO and a commissioner, Panos initiated the Project Achieve Program to reduce youth offenders' recidivism by rewarding youths who pass the GED Exam. He is a member and chanter of the Greek Orthodox Church of the Annunciation, DeKalb Council of the Arts and many other organizations.

The State Bar and the CJCP, through the Justice Robert

Benham Community Service Awards program, cast a wide net each year to find worthy recipients for these awards. Any person who is not a member of the selection committee or staff may submit a nomination. Judges and lawyers meet the criteria if they have combined a professional career with outstanding service and dedication to their communities through voluntary participation in community organizations, government-sponsored activities, or humanitarian work outside of their professional practice. Contributions can be made in any field, including but not limited to: social service, education, faith-based efforts, sports, recreation, the arts or politics. Nominations will be sought for the 11th annual awards this fall. For more information, contact Nneka Harris-Daniel at [nneka@cjcpga.org](mailto:nneka@cjcpga.org). 



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

[Ahanson@cjcpga.org](mailto:Ahanson@cjcpga.org).



**State Bar of Georgia  
Committee on Professionalism**



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Demonstrating that professionalism is the hallmark of the practice of law, the Law School Orientations have become a central feature of the orientation process for entering students at each of the state's law schools over the past 16 years. The Professionalism Committee is now seeking lawyers and judges to volunteer to return to your alma maters or to any of the schools to help give back part of what the profession has given you by dedicating a half day of your time this August. You will be paired with a co-leader and will lead students in a discussion of hypothetical professionalism and ethics issues. Minimal preparation is necessary for the leaders. Review the provided hypos, which include annotations and suggested questions, and arrive at the school 15 minutes prior to the program. Pair up with a friend or classmate to co-lead a group (Please note, if you are both recent graduates we will pair you with a more experienced co-leader).

Please consider participation in this project and encourage your colleagues to volunteer. You may respond by completing the form below or calling the Chief Justice's Commission on Professionalism at (404) 225-5040; fax: (404) 225-5041. Thank you.

**ATTORNEY VOLUNTEER FORM  
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(Mr./Ms./Judge) \_\_\_\_\_

Nickname (for name badge) \_\_\_\_\_

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\_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

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Area(s) of Practice: \_\_\_\_\_

Year Admitted to the Georgia Bar: \_\_\_\_\_

Bar#: \_\_\_\_\_

Please pair me with: (optional) \_\_\_\_\_

**(Please check appropriate box)**

<u>LAW SCHOOL</u>	<u>DATE</u>	<u>TIME</u>	<u>RECEPTION/LUNCH</u>	<u>SPEAKER</u>
Emory*	Fri., August 21	*Emory does not need anymore volunteers*		TBD
<input type="checkbox"/> Georgia State	Tues., August 11	3:30-5:30 p.m.	5:30-6:30 p.m.	Hon. Alan Baverman
<input type="checkbox"/> John Marshall	Sat., August 15	9:00-11:30 a.m.	11:30 - 12:30	TBD
<input type="checkbox"/> Mercer	Fri., August 14	1:30-3:30 p.m.	3:30-4:30 p.m.	TBD
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# The Morgan County Courthouse at Madison

## The Grand Old Courthouses of Georgia

by Wilber W. Caldwell

**T**he old brick Morgan County courthouse at Madison, built in 1807, burned in 1844 and was replaced by another brick court building more or less in the American Federal Style. The 1844 court building burned in 1917, but it had served the county well until 1907 when it was replaced by the Beaux Arts splendor of James Wingfield Golucke's new Morgan County Courthouse.

James Wingfield Golucke was the son of an Austrian immigrant cabinet-maker. With no connections, little money and no formal training he fashioned a remarkable architectural career. The law creating a state board for the examination and registration of architects was not enacted by the Georgia Legislature until 1919, but by 1890, there was a small, tight cadre of trained architects in Atlanta who were members of The American Institute of Architects. No doubt men like Golucke, without academic credentials, were considered impostors by this group. Nonetheless, it was James Wingfield Golucke who proved the most prolific designer of the mythical mansions with their foundations of dreams and dust that were the courthouses of the fledgling New South era. Golucke designed 26 courthouses in Georgia, four in Alabama, and numerous churches, jails and other public buildings between 1895 and 1907.

Mythical mansions well-describes the neoclassical behemoths that began to dominate the squares of so many Georgia towns just after 1900. The idea that



Photo by Wilber W. Caldwell

Built in 1907, James Wingfield Golucke, architect

architecture is, at its very heart, not only a question of style, trend and fashion, but also a reflection of human aspirations and self-image is clear in the work of Golucke. In this regard, his courthouses built in Georgia during the last third of the 19th century and the first decade of the 20th century are compelling. The

architecture of these buildings is a remarkably direct reflection of the mind of these rural places.

Golucke's offering here in Madison is fitting. The usual symbolism attached to the Neo-classical Revival and to Beaux-Arts Classicism which dominated American public architecture at the turn of the century is that it celebrated the forces of Wall Street and the Industrial East. Its popularity was thought to represent the victory of Eastern industrialism over the values of American individualism in the West. Perhaps such an interpretation was appropriate for the country at large, but for Madison, and for the South, this symbolism was unacceptable.

The South had already experienced the triumph of the forces of the East in 1865, and after the war, the Southern mind was balanced on a razor's edge. The bitterness of the Lost Cause and the nostalgic romance of the Old South beckoned on one hand, and the promise of the new American dream sang seductively on the other. Sadly for the South, both concepts would prove mythical. Perhaps the new Neoclassicism represented the myth of turn-of-the-century American prosperity to some Georgians, but its columned facades and airy porticos could not help but call to mind the myth of the Greek democracy and the Old South for most. Surely this dichotomy of aspiration was at the heart of Madison's persona in 1907, and J.W. Golucke's grand 1907 Morgan County Courthouse offered the perfect dual symbol.

There were 40 neoclassical courthouses built in Georgia between 1894 and 1910. J.W. Golucke designed 12 of them. The courthouse at Madison is not typical. The usual four-sided symmetry of the "monument in the square" is not found here. Instead, we are confronted by a great Corinthian portico and dual wings heading off at 45 degree angles. If the portico confronts us, the tower assaults us with its enormous masonry presence, a squared dome beneath a

crowning belfry. The design and scale of the tower announce Beaux-Arts Classicism in the mold of Richard Morris Hunt's Administration Building at the 1893 Columbian Exposition, which was itself modeled after the Renaissance dome of the Florence Cathedral. But in Georgia in 1905, there were other models closer at hand. Only two years before, Frank Milburn had designed a similar Beaux-Arts tower for his Lowndes County Courthouse at Valdosta.

Whatever Golucke's models for Madison's *palais de justice*, it is certain that the site plays a large part in his design. Most of Golucke's grand Neoclassical courthouses are situated in the center of open squares: Eatonton, Cartersville and Newnan, for example. Their monumentality owes much to the great, voluminous, open spaces that surround their classical grandeur and complex ornament. They compete only with sky and clouds, and are the greater for this backdrop. Here in Madison the courthouse occupies a corner lot facing a corner of the town square. The sidewalks hug the building. Street traffic runs all too close by, and despite Golucke's clever angling of the grand entrance to face the square, the scale of the building suddenly may seem wrong for the site.

This is not a surprising phenomenon. Certainly a grand site is best for a grand building. Still the Morgan County Courthouse shines more brightly than many Neoclassical courthouses in Georgia built without the advantage of a great square: Monticello, Hamilton, Summerville and Baxley for example. Most importantly, its dual symbolism shines for the people of the county that built it. Like the legion of neoclassical courthouses built in Georgia after 1900, the portico of the Morgan County Courthouse is supported by both the columns of the Old South and the New. GBJ

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



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# Death Tax Holiday

## 18th Annual Fiction Writing Competition Winner

by Lawrence V. Starkey

### 18th Annual Fiction Writing Competition

The Editorial Board of the *Georgia Bar Journal* is proud to present "Death Tax Holiday," by Lawrence V. Starkey of Atlanta, as the winner of the 18th Annual Writing Competition.

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

10:00 p.m.

Thursday, Dec. 30, 2010

**M**y name is Winston Brickley. I am 83 years old and have been a widower for almost 20 years. Until I began transferring assets to my foundation, I was, according to a study performed by the School of Business of the University of South Carolina, the third richest man in South Carolina. That statistic struck me as more embarrassing than satisfying. Well, I'll just admit it: it made me wince. On the one hand, I guess I am proud of what I have accomplished in business, but really, the third richest man in South Carolina? Hardly Forbes 400 material and politically incorrect to boot. It took no imagination to picture my colleagues at The Cosmopolitan Club smirking at my discomfort.





Despite my transfer of assets to The Brickley Foundation and other charities, I plead guilty to remaining wealthy by most any standard. Ever since I sold my company some nine years ago, it has been my goal to enjoy my wealth and to enjoy being in a position to affect good and to revel in the power game of selective charitable giving. I love creative charitable giving. It is a very heady experience to be shamelessly courted by college presidents, museum directors, artists of every stripe, brilliant researchers and a parade of others. I wish I had done more of this while my wife was still alive as there is no more effective entree into high society than well-placed charitable donations. I say this without a scintilla of cynicism as many of my most satisfying and genuine friendships have been those made through my gifts to charity.

My wife, Sally, and I had three children. Our youngest son, Scott, was killed in a boating accident when he was 22. He left a pregnant

girlfriend, Ann Hudson. My wife and I became very close to Ann, especially after our grandson, Brett, was born. As for my other two children, Richard and Michele, I am afraid I spoiled them with any indulgence their hearts desired. So it was somewhat of a shock to me when I came to the realization that they are trying to murder me.

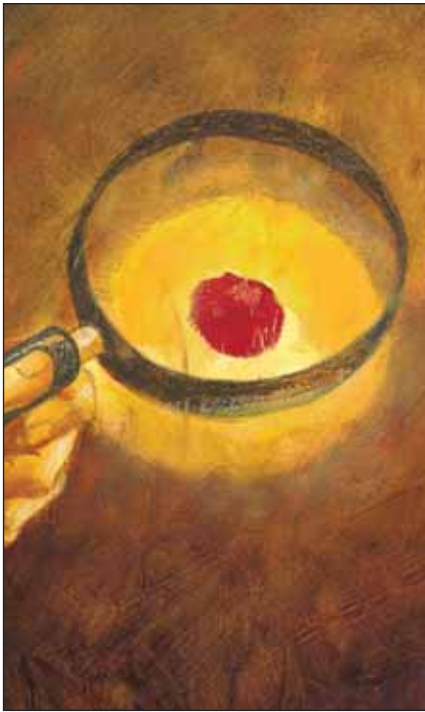


Let me explain how I got into this mess. About five years ago, doctors detected a blockage in two of my arteries and I had a procedure known as angioplasty. This is where a small balloon is inserted in the diseased artery and when inflated, unblocks the accumulated plaque. The procedure was successful but on a routine check-up two weeks ago, a further blockage was discovered. This time it was decided to place a medical stent in the affected artery and I arranged to have this done two days after Christmas. My son Richard insisted that I recuperate at his home,

which used to be mine and is where Richard was raised. The house was way too large for me after Sally died, and I gladly transferred it over to Richard several years ago.

I thought Richard's insistence that I recuperate in my former bedroom suite was unusual, but nevertheless touching and when he invited my daughter, Michele, to assist in the process, I was moved, if somewhat annoyed that I was to be housebound with my children when I would rather be elsewhere.

While a stent is no big deal these days, I decided to humor my son and daughter until I noticed that the shape of my Warfarin tablet was different than before and that my daughter became very nervous when asked about it. I told her just to leave the medicine and I would take it later. A few moments later, I heard the two of them arguing in the anteroom. My son burst into my room and angrily demanded that I take my medicine for my own good. I thought it strange that



there were no servants around and this added to my concern. I made a decision to take the medication, but to try to keep from swallowing it. Miraculously, I was able to pull this off with limited success and after a few minutes managed to spit the remainder of the two now soggy tablets into the hem of my pillow. The excited but muffled voices of my son and daughter continued for some time in the upstairs library which adjoined my suite.

**3:00 a.m**

**Friday, Dec. 31**

At 3 a.m. I decided it was safe to make my move. I stealthily moved toward the upstairs hallway and found the door locked. I began to taste real panic, but pulled myself together enough to review in my mind the floor plan of this house which I knew so well, this house in which each of my children celebrated every birthday until they left for college; this house in which my sons built model boats and played football on the lawn; this house in which my daughter was married. This is the very room in which each of them was conceived. This is the very room in which Richard shattered the glass of a French door with an errant baseball.

But of course! The French doors. I walked across the room and tested the handle. Locked. If my son could break the window with a baseball, I could with the base of a table lamp. I wrapped a hand towel around the marble base and broke the glass. To my surprise, the muffled sound was minimal. I was able to reach through the broken pane and try to open the door to the balcony by turning the knob from the outside. No luck. It was stupid of me not to realize that if the locked door would not open from the inside, it would certainly not open from the outside. I was not thinking clearly and I needed to be. Then I remembered the detective ploy of slipping a credit card between the doors to trigger the lock. Again, no luck.

Frustration comes much easier at age 83 than for a younger man, but I had to think clearly. Was it possible I was mistaken about my son and daughter? Was the door locked just for my protection? They knew I was not a senile old man, but perhaps they thought I was confused after the surgery and were afraid I would wander off. What was really going on?

And then, an epiphany. It hit me like a ton of bricks. Today's date is Dec. 31, 2010. All of this was about The Economic Growth and Tax Relief Reconciliation Act of 2001. Yes, good old Public Law 107-16. As a person of some wealth, I have been made fully aware of all of the intricacies of this rather bizarre law designed by the last administration and passed by Congress that gradually phased out federal estate taxes between 2001 and 2010. No estate taxes at all in 2010. How great for us who are wealthy and how bad for the tax attorneys of the world.

Good news, of course, but incredibly the same law fully restores estate taxes to their original distasteful levels beginning Jan. 1, 2011. Of course, anyone in my position was frustrated that Congress had not lived up to its pledge to correct the problem by repealing the estate tax permanent-

ly or at least implementing a generous exemption on each estate. Unfortunately, democrats insisted on the exemption and the republicans insisted on total repeal. Both were stubborn and there were not quite enough democrats in the Senate to cut off debate. Very possibly Congress will correct the problem in January and the solution will be retroactive. But apparently, that prospect was not good enough for my children.

No time for recriminations. And if there were time, then self-recrimination would probably be in order. It was not the smartest thing in the world to give my children a copy of my last will. Even with further testamentary gifts to my foundation, the difference between my dying in 2010 as opposed to Jan. 1, 2011, would, they have doubtlessly figured out, mean a difference of \$200 million and change to each of them.

If I were to die today, and not of natural causes, would it be murder or suicide? How foolish I was to set myself up in this manner. It is no comfort to wonder if other wealthy men or women of advanced age are hiding out or getting ready to do so all across the land.

I don't know whether to blame myself, the president, Congress or only my children for placing my life in jeopardy. It's clear that neither the president nor Congress switched my heart medication from Coumadin, which in the prescribed dosage is designed to prevent a heart attack, to a mystery drug which I am willing to bet my Augusta National membership is almost guaranteed to cause one. On second thought, scratch the Augusta National bet. Some things are sacrosanct.

Now I need to address the serious business of saving my life. I take the marble lamp base and towel and systematically break five more window panes in the French doors as quietly as I can. When I have six panes broken, it is really no problem to knock out the wood fretwork which supported the glass and slither out of the opening



onto the balcony. One does not think of an 83-year-old man slithering, but slither I did, and to good effect. The balcony off my bedroom suite also shared French doors with the upstairs library and the doors into the library were happily unlocked. I quietly entered the library and from there was able to steal downstairs and out onto the front lawn. But before I left the library, I saw something which chilled my spine: on the rosewood library table was an open copy of Public Law 107-16!



#### 4:35 a.m.

Although glad to finally be out of the house, Winston Brickley was apprehensive as he walked deliberately across the expansive lawn of his former home toward the street. He had no cell phone, no identification and no money. He had not hitchhiked since college days, but knew it was now his best hope of getting clear of danger. He knew he made an odd spectacle and wondered if anyone would really stop for an elderly man in a bathrobe, pajamas and slippers.

#### 7:30 a.m.

"He's gone!" screamed Michele Brickley-Jones as she stormed into her brother's bedroom.

"Who's gone? And don't you ever knock?"

"Dad, that's who. The bastard broke out the French door and escaped. I wish I had never let you talk me into this harebrained scheme. We're cooked. We've lost everything. We're going to jail."

"Just calm down and try not to be any more hysterical than you ordinarily are. No one is going to jail. He could not have gotten far. How long ago did he leave?"

"How should I know when he left? Are you totally stupid? No telling when he left or where he is or who he is talking to this very minute. He's probably talking to the police."

"The police are the last people he would talk to. You know how he hates any hint of family scandal and how he detests publicity. He will not be talking to the damn police. And he won't go home. He'll be worried that's the first place we will look. He'll just be trying to lay low until midnight."

"We have to find him. I want to tell him that I'm sorry I let you talk me into this. I want out of this whole messy business. I am not going to take the blame for any part of this. I love my father."

"Yes, you loved him well enough to want to assist in his early demise when it meant \$200 million dollars to you. And are you ready to kiss that \$200 mil-

lion goodbye? Michele, just try to think clearly. Dad is 83 years old with a bad heart. We all know he doesn't have long to live anyway. We'd probably be doing the guy a favor."

"Oh, Richard. What are we going to do? I'm scared."

"What we are going to do is find the old coot and try to bring him back here."

"But how? Maybe we should call the police and report him missing."

"Now who is being stupid? We can't call the police for obvious reasons. We are going to call Max Meyer."

"Who the hell is Max Meyer?"

"He's the best private detective in town. We used him to spy on dad 10 years ago when he had that affair with the 30-year-old flight attendant. He's expensive, but he's good. And most of all, he's discreet."

"Well, certainly someone would notice an old man in his pajamas wandering along the highway. Do you think someone may have stopped and taken him to a hospital?"

"I hope the hell not, because if he suspects what we are up to with those pills, he may ask for a blood analysis, which may or may not show something suspicious. He did take the damn pills, didn't he?"

"Only two. We were going to give him two more in the morning."

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"Damn it! Two would be enough to show up in a test but not enough to be fatal. Where are the rest of the pills?"

"I have them."

"Thank God. At least he doesn't have the pills as evidence. We need to start getting things together for Max Meyer. You go make a list of every friend of dad's you can think of, especially women he has been with in the past 10 years. Oh yes, and put our dear nephew, Brett, on the list too. He's the only family member other than ourselves, and they seem to get along all too well for my taste. I can see Dad calling Brett. Come to think of it, that might be the very first name we want to head up Max's list. Now go! I've got a call to make."

Richard lights a cigarette and inhales deeply as he reaches for his cell phone. He carefully dials a number he knows by heart.

"Hello, Max? I've got a job for you."

## Two Hours Earlier

Harry Shingler couldn't sleep. When Harry couldn't sleep, he had a routine. He would get in his car and drive. Anywhere, just so he was driving. He didn't know why, but this seemed to relax him. No matter what direction he started out, he somehow always managed to wind up at the open-all-night Krispy Kreme Donuts. When the "hot now" sign was on, he got what could best be described as a mellow rush. And in recent months, the "hot now" sign seemed to always be on. Harry needed comfort tonight. Both his boss and Angie, his sometime girlfriend, were giving him signals that all was not right in his job or his love life, if one could call it that. Harry decided on a dozen glazed. After all, he was still less than 300 pounds and he had every intention of going on a strict diet the first of January. Well, actually, it would be the 10th of January. He had to be able to snack during the bowl games. He would start the diet the day after the national champi-

onship game. That would be a great time to start.

Today he decided to drive down Ribbon Road over to Oak Street and then to Church Street and the aforementioned Krispy Kreme. He liked to drive through the mansions of Ribbon Road and wonder what life was like behind the tall hedges and stone walls. It was a life that seemed very far indeed from his own, but yet not impossible. He could not conceive of what unlikely circumstance could enable him to be a part of this mysterious world of the wealthy, but there was always hope and always imagination.

Plotting his route, he realized he would pass by yet another icon near and dear to him: Krystal hamburgers. He pondered whether or not Krystal would be open yet, and if so, whether he would stop. Maybe he should buy just a few Krystals too. All that sugar in a dozen donuts was certainly not good for him. Perhaps the healthier move would be just half a dozen Krispy Kremes and four or five Krystals.

Just as he was about to work out the right ratio of burgers to donuts, his eyes locked on a strange but imposing figure on the side of the road—a man with neatly cropped white hair and wearing what appeared to be a white bathrobe, navy blue pajamas and bedroom slippers. The figure looked eerily familiar, but he could not place him or where he may have seen him. Whoever he was, there was no doubt about it: the man had a certain bearing and looked like he belonged here among the Ribbon Road mansions. But why was he walking in his pajamas at 5:30 in the morning? He did not look to be particularly distressed or confused, but as Harry's car approached, the old man raised his arm as if hailing a cab.

Harry never stopped to pick up strangers or hitchhikers, but something told him that this was different and he began to slow the car. What the heck, he thought. This old gentleman looked to be no threat and he was really not averse to helping someone who may need it.

He certainly had plenty of time and this may even be interesting. He might have a story to tell Angie.

"Do you need help, sir?"

"Yes. I seem to have a bit of a problem. Could I impose upon you for a lift?"

"Where are you heading?"

"Anywhere. Just out of the neighborhood. I'm sorry to be so vague, but I have a problem I really can't share with anyone. Please don't be concerned. I'm not dangerous—or contagious."

"Jump in."

Winston stepped into the ancient Volvo as Harry brushed Coke cans and candy wrappers onto the floor.

"Sorry it's so messy," he said, "but I really didn't expect company. Where can I drop you?"

Winston's mind raced. He needed clothes, a shave, a cell phone and some money, but his cash, ATM card and ID were in his wallet and that was now in the possession of Richard and Michele. Hotels may be one of the places they would look for him. The very first places would be his townhouse or his nephew's apartment.

He had to trust someone. He thought of Robert, the concierge at The Mayfair, where he had rented an apartment for a year after Sally's death.

I could trust Robert, he thought, but The Mayfair would surely be another place high on the list for Richard or his minions to search.

"You look cold, sir."

"Actually, I am, but your heater seems to work nicely and I'm thankful for that."

"I have an old overcoat I keep in the trunk. You are welcome to borrow it. In fact, you are welcome to have it if you like."

"You are very kind. I may take you up on that. But please don't stop the car. Let's wait until we get out of the neighborhood."

Harry turned onto Oak Street, wondering if he had made a mistake in picking up this man. He was beginning to look more and more like a nut case. At the moment he seemed to be in a trance.

He leaned toward Winston and said, "Sir, I don't want to push you, but have you decided where you would like to go? What if I took you to the hospital?"

"No, no. I'm not sick. Really, I'm not. And I appreciate so much your kindness. Young man, would you mind terribly if I used your cell phone?"

"Be my guest," said Harry, picking up the phone from the dashboard and handing it over to Winston.

Brickley flipped open the phone and dialed his grandson's number.

### 5:55 a.m.

Brett Brickley was in a deep sleep. He had partied with his law school friends and others the night before and he felt as if his mouth was full of cotton. He also had a splitting headache. The last thing he needed was to be awakened by the shrill ring of the bedside phone. Now he realized that he had made a bad mistake in opting for that cheap phone at Walgreen's. Maybe he could adjust the ring.

"OK," he mumbled. "This had better be good."

"Brett, this is your grandfather."

"Brick-Pop! What's up? This is early, even for you."

"I have a favor to ask of you. In fact, several favors. And I must swear you to the strictest confidence and ask that you not ask questions right now. I may or may not explain why to you later, but for right now, let me ask, is that girlfriend of yours with you now? Is it Lisa?"

"Lisa was two girlfriends ago, Brick-Pop. It's Pam, and no, she's not here. Why?"

"Good. For the time being, not a word of this to Pam or anyone else, particularly your Aunt Michele or Uncle Richard."

"Now you're really freaking me out. Not that it would make any difference, but I need to ask, are you in trouble with the law?"

"No, nothing like that. I wish it were that simple."

"Where are you?"

"I'm riding down Oak Street with a young man who was kind enough to pick me up."

"You hitched a ride with a stranger? Are you sure you're OK?"

"Yes, I'm OK, but here's what I need you to do. Do you remember Robert, the concierge at the Mayfair?"

Winston lowered his voice and spoke right into the receiver.

"Of course."

"Call Robert and have him reserve a large room or small suite for me. And this is very important: It must be reserved in a fictitious name."

You can tell him it's for me, but it must not be listed in my name and he must tell no one that I am there. We can trust Robert."

"When are you going to tell me what this is all about?"

"In due time. But please let me continue with my instructions. You had better make the arrangements with Robert by telephone rather than in person. You may be followed for the next few hours. I don't want to sound paranoid, but it's a possibility."

"Brick-Pop, are you in danger?"

"I may be, but, I don't believe you are. I just don't want you unwittingly leading them to me."

"Who is 'them'?"

"We don't need to get into that. Just trust me."

"I trust you more than anybody in the world. You know that."

"OK. Let's move on because I am on this young man's cell phone and he is going to become very perturbed if we don't wind this up. Speaking of cell phones, I think it best if you make the call to Robert on a phone which is not your own. Is there a pay phone nearby?"

"A pay phone? This is not 1988. You know there are almost no pay phones anymore, but I can borrow a cell phone to make the call. What else?"

"I need for you to get me a couple of outfits, some shoes, a cell phone and about \$300 in cash. When all that's done, meet me at my suite at

The Mayfair. Robert will tell you how to come in the back way. And be sure you are not followed."

### 7:40 a.m.

Winston Brinkley was settled in a small suite in The Mayfair. It had a fireplace and Robert had already arranged for a fire to be built before he arrived. The suite was not near as spacious as the suite he had rented several years ago, but it would do. Best of all, Brett and Robert had performed splendidly. Young Harry Shingler had dropped him at the coffee shop and the overcoat he had borrowed from Harry had served its purpose. No one in the coffee shop gave him a second look or noticed that those snazzy slacks showing a couple of inches below the overcoat were really pajamas or that he was wearing bedroom slippers.

What a strange man this Harry Shingler was, but he had been a godsend. Winston would be sure Harry got his overcoat back when this was all over. If he made it through this, he would be sure to do something very nice for Harry. All he knew about Harry was his name, but he was sure it would be no problem to locate him.

Winston began to feel the exhaustion of the ordeal he had been through. Brett had come by a few minutes ago with the cell phone and cash, but had left again for the clothes. It had been decided to buy new outfits rather than have Brett go by Winston's house as it was likely someone would be staked out at that location.

I must get some rest, thought Winston. He was, in a way, afraid to fall asleep here by himself, but also afraid not to. He would be no good for the rest of the day if he did not get at least a couple of hours of sleep. He was sure that there had not been enough time for anyone to figure out where he was and he knew he could trust Robert not to tell anyone. Brett would be back in a few hours. He would not trust the bed, but that was a most inviting sofa, he thought, as he lay back with a luxurious feeling of

release. He was asleep before he could think of how hungry he was.

### 8:20 a.m.

As soon as Harry Shingler dropped Winston at the coffee shop, he had realized who his passenger had been. It had been bugging him ever since he picked up the guy. He knew he had seen him somewhere before. Now he realized where. He had seen him everywhere—on TV, in the business section of the newspaper as well as in the society pages. He was ubiquitous. It was, he was positive, Winston Brickley, one of the city's true celebs. Harry realized he was on top of a dynamite story. He wondered if *The Daily Herald* still paid \$100 for news tips that resulted in usable stories. This story may be worth more than \$100, he thought, but at least \$100 was something. He wished Brickley had not spoken in such a low voice when he made the telephone call. Harry did get the fact that he was speaking to his grandson, and that he was in some kind of trouble, but beyond that he could not piece it all together. Maybe a reporter could, and maybe he would be more generous than \$100 if the story turned out to be a good one. He dialed information to get the number of the newspaper and elected to have the information operator connect him immediately.

"*The Daily Herald*," said a voice at the other end of the line.

### 9:15 a.m.

Richard was feeling pretty good about the explanation he had given Max. He had, after all, planted the seed that his father was ill, that he suffered from dementia, that he was taking all kinds of medication and that he may be suicidal. This would serve him well if his father should meet an untimely and mysterious death in the hours ahead. He had a cup of hot coffee in front of him on the coffee table and a Bloody Mary in his hand and, despite his father's escape, he was feeling reasonably satisfied with where things stood.

His reverie was interrupted by the ring of the telephone.

That must be Max, he thought. If so, that is pretty fast work.

"Richard Brickley here."

"Mr. Brickley, this is David Crowe at *The Daily Herald*."

Richard didn't feel so great anymore. In fact, his heart was in his throat. Had his father, in fact, gone to the press after all? Had Brett?

He steeled himself. He did not know what the reporter knew or what he was after, but he had to handle this very carefully.

"What can I do for you, Mr. Crowe?" Richard said in as calm a voice as he could muster.

"I'm sorry to bother you, sir, but do you know the whereabouts of your father?"

"Why do you ask?"

"Well, I just had a call from a man who says he picked your father up in his pajamas and delivered him to a coffee shop on Elm Street. He said your father appeared to be in some sort of predicament, but he could not determine the nature of the problem. We just wondered if there is anything we should know or that our readers might be interested in. Your father is an important public figure in this city and people are interested in any news about him."

Richard's mind raced. "My dear Mr. Crowe," he said, "your informer was dead wrong. I don't know who the gentleman was that he gave a lift to, but it was certainly not my father. As we speak, my father is spending a couple of days of relaxation at his place at Sea Island. May I ask who the man is who gave you this so-called tip? I would be glad to call and set him straight."

"I'm sorry, Mr. Brickley, but we cannot give out the names of our sources. When do you expect your father to return?"

"We don't expect him to stay long. You may know he had a minor heart procedure a few days ago and this was just a get-away for him. He should be back soon. And Mr. Crowe, do I need to remind you that my father has not been well and that both my father and I are on

the board of directors of your newspaper, and we would be less than delighted if some unfounded rumor concerning my father were to appear in your paper."

"I understand, sir. Sorry to have bothered you."

Richard hung up the phone and immediately dialed Max Meyer.

"Max, some information just fell into my lap. It looks like I'm doing your work for you. You need to locate every coffee shop on Elm Street and question the proprietors and everyone who was there early this morning. I just had a call from a *Herald* reporter named David Crowe. He claims a man picked up my father this morning and dropped him at a coffee shop on Elm Street. As I recall, there is a coffee shop very close to The Mayfair, so start with that one. I believe my father may be staying there. We may be getting close. Remember, if you find my father, bring him here immediately, but you must not call attention to yourself or my father. Understood?"

"Yes, Mr. Brickley, but that may be easier said than done. If necessary, may I sedate him?"

"Yes, yes. Of course. But be careful. We don't know what other drugs he may have taken and we certainly don't want anyone to see you carrying him out in a condition that will arouse suspicion. Do the best you can."

### 11:17 a.m.

There was a light tap on the door. Winston awoke in confusion but quickly got his bearings and quietly approached the door. He was glad this old building had peepholes. It had been a long time since he had seen or utilized a peephole, but he thought about what an imminently useful little invention it was. As he peered through the tiny opening into the hallway, he was relieved to see Brett's smiling young face looking back at him. He opened the door to admit Brett who was carrying two large shopping bags and two containers from Starbuck's.





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"I got everything," he said, as he peeled off his overcoat and scarf and placed the Starbucks on the coffee table and arranged the clothes on the divan. "I had to bribe the tailor at Brooks Brothers to cuff the pants while I waited. I went for sweaters and slacks. I didn't think you wanted coats and ties under the circumstances. And by the way, Brick-Pop, just what are the circumstances? I think it's time I knew."

"Well, sit down and let's have some of that coffee. We have a lot to talk about."

## 2:20 p.m.

Robert Littlejohn had been concierge at The Mayfair for 26 years. There was little about the city that he did not know. He knew which buttons to push, whether it was obtaining the toughest theater or sports tickets, chartering a limousine, scoring last minute reservations in the toniest restaurants, providing guests with just the right doctor, dentist, lawyer, real estate broker, masseuse, tutor, veterinarian, escort (without sexual favors, of course) or babysitter. If a guest wanted to see the menu of the day in three different restaurants before deciding where to dine, Robert was up to the task. He was also known to accomplish the nearly impossible, sometimes on very short notice.

Robert genuinely enjoyed a challenge and the awe or delight on the faces of the beneficiaries of his efforts was for him reward enough, although he was always appreciative of gratuities, of which there were many.

He was proud of his discretion and of the fact he had never to his knowledge broken any laws in helping his clients with their needs. He had a pleasant way of deflecting any illegal or improper request by steering the discussion toward a more acceptable way of helping a guest accomplish his goal.

As Robert sat at his concierge desk during a rare lull in activity, he looked up from his newspaper to see Max Meyer approaching. He

broke into a smile as Max neared the desk. The two had known each other for years and had always enjoyed each other's company.

"Uh oh. Here comes trouble," said Robert.

"Trouble? When did I ever cause you trouble?"

"Never, my friend. How are you?"

"Fine, but I need your help. Have you seen this man recently?" he said, handing Robert a photograph.

Robert glanced at the likeness in the photo and his heart stopped. It was Winston Brickley whom he had just registered under the name of Larry Timmons. While under ordinary circumstances, he would like to help Max, he had no intention of betraying the confidence of Mr. Brickley. He did not like to lie to anyone, much less Max, but the only thing that pained him more than lying was betraying a confidence.

"Are you joking, Max? That's Winston Brickley. And no, I haven't seen him recently, and no one is registered under that name in The Mayfair."

"Is it possible that he is registered under another name? I need to tell you that Mr. Brickley may be depressed or under medication, and his family is worried about him."

"I'm sure I would know if Winston Brickley was staying at The Mayfair," said Max, rather uncomfortably.

"Sorry. Just asking. I have a few more leads to follow. It's good to see you, Robert. When do you get off work? I'll buy you a drink."

"No can do. I get off at 6 and I promised to take the wife to a New Year's Eve party at Villa Luigi. What are your plans for the big night?"

"Work on this case, I'm afraid, and maybe get home in time to see the big apple drop on Times Square. But I'll call you in the next couple of weeks about that drink."

Max walked away convinced that Robert was holding back. There was something in his eyes that betrayed him. Poor Robert.

Some people just can't lie, he thought. No doubt a tribute to their character, but it sure made Max's job easier. Max had learned long ago that an unconvincing liar was just as useful to him as a person who told the truth. Maybe more so, because an obvious lie offered the opportunity of figuring why the person was lying and this was valuable information which helped a good detective get what he was after. Each clue was just another piece of the puzzle and once he had enough pieces before him, all he had to do was mentally arrange them before everything started to fall into place. God, I love this work, thought Max.

And now at least I know Robert leaves the building at 6, he thought. I'll be back.

## 4:03 p.m.

The fugitive, as Winston had begun to consider himself, was settled in. Brett had stayed with him for over three hours, but had left with Winston's blessing to pick up Pam from her last class and explain to her that they would not be going to their New Year's Eve party as planned, but would spend it in a hotel suite with his grandfather.

The slacks, shirt and sweater that Brett had purchased for him were comfortable and well coordinated. The boy has good taste, thought Winston. Even the loafers fit him perfectly, although he had changed to the slippers provided by The Mayfair. He had kept the fire in the suite's small fireplace going all day and had enjoyed a large room service breakfast with Brett of eggs benedict. No one made eggs benedict better than the kitchen staff at The Mayfair. He had been sorely tempted to order up Bloody Marys as well, but he knew he had to stay sharp just in case. So he reluctantly eschewed the Bloody Marys.

He had decided not to tell Brett the whole story. He had simply explained this stupid law that made him hundreds of millions of dollars more valuable to the family dead than alive until one minute after

While they may have thought their initial plan was well-conceived, it had really turned out to be rather comical so far, at least, but he had no intention of letting his guard down in the hours that lay ahead.

midnight, when the threat would be over. His explanation to Brett was that he was acutely and intensely paranoid because of this, although, he lied, he had no reason to believe that Brett's aunt and uncle or anyone else was actually planning to murder him. He just wanted to stay away from everyone but Brett until midnight. He knew that Brett would have to live on this planet and probably in this city for many years as would Richard and Michele, and he did not want to put a strain in their relationship for the rest of their lives. The only order of business was staying out of harm's way until midnight. He was beginning to feel better about his prospects. He was beginning to think that, sharp as his children were, they may just be first class bunglers when it came to murder. While they may have thought their initial plan was well-conceived, it had really turned out to be rather comical so far, at least, but he had no intention of letting his guard down in the hours that lay ahead.

For now, he felt safe. Robert could be counted upon not to give him away and he had asked Brett and Pam to return before 8 p.m. He wondered what Richard and Michele were up to.

### 6:45 p.m.

Max Meyer and his young associate, George Osteen, walked across the lobby with purposeful strides and entered the elevator. Max enjoyed working with George, whom he felt had a knack for detective work.

Armed with photographs of Winston Brickley, they divided the floors with George covering floors two through nine and Max covering 10 through 18.

As in many hotels, there was no 13th floor.

It took over an hour, but they finally hit paydirt. After a \$40 tip and Max's explanation that Winston was a victim of dementia, the 12th floor chambermaid had been more than willing to talk. In fact, once she started talking about the guests on her floor, it was hard to stop her. The gist of her conversation was that she had delivered a bathrobe and slippers to a gentleman who fit the description of Winston Brickley a couple of hours ago.

Max dialed Richard's number. By now it was almost eight o'clock.

### 7:55 p.m.

Richard Brickley had been busy. He knew his father had suspected what he was up to but hoped that there was a chance of regaining the old man's confidence. For the past hour, he had been dissolving Warfarin tablets in an almost full bottle of bourbon. He had read somewhere that Warfarin, the heart medication, was basically rat poison in small quantities. He was sure he had loaded in enough of the medication to kill a dozen rats. He only hoped that it was enough to kill a human. He knew that his father's drink of choice was Wild Turkey on the rocks, but could he talk his father into voluntarily having a couple of drinks to celebrate the New Year? He thought maybe he had a chance since he had a bottle of Wild Turkey 101, a premium version of Wild Turkey which he was not sure his father had tried. Richard would drink his customary single malt scotch and soda and pour his father bourbon. But first he had to find the old buzzard.

His plan sucked. He knew it, but if only he could persuade his father to have a drink or two. If not, he had an ace in the hole: his father's pistol. Whether he would have the nerve

to use it, he had no idea. It could certainly be believable, he thought, even by the most skeptical, that a despondent old man in failing health could take his own life. Richard wished he had planned this a little better. Maybe he could have involved others to handle the matter for him, but he had not been willing to take that chance.

Just how big a risk was he willing to take to save a few hundred million dollars? Could he follow through with his plan? He admitted that he had no earthly idea, but somehow had to let the plan play out.

Richard was on his third scotch and soda when the phone rang. He was becoming despondent at the lack of news. How had Michele allowed his father to just walk out of the house? And despite his engagement of the hotshot detective Max Meyer, why had he not heard a word? He knew a lot of the blame went to his own lack of planning. His plan had really been pathetic and Michele had been a drag rather than a help.

The shrill ring of the telephone shook him out of his recriminations.

"Brickley here. Who's calling?"

"Rich, this is Max Meyer. We've located your father. He's in suite 1202 of The Mayfair. What do you want us to do?"

"Don't do a thing. I'm on my way. I'll meet you in the lobby bar in 30 minutes. Can you get us in the suite if my father does not open the door?"

"Richard, I can get you into the suite."

"I know you can. Sorry. Stay right there, Max. I'll call you on your cell if I'm delayed."

As soon as Richard hung up, he knew he had made a mistake. What was he thinking? Did he really want Max Meyer, or anyone for



that matter, involved from here on out? And did he want to place himself on the scene if his father met some violent end? How stupid of him. He was not thinking clearly. This had all the earmarks of a disaster. He dialed Max back.

"Max, I've been thinking. What my father really needs is a good night's sleep without any interference from his family or anyone else. Let's just let him be and I'll check on him tomorrow. I'm relieved to know he's safe and in a good place and I really appreciate your help in finding him. I think I can take it from here. Just send me your bill. And Max, I might say the family is very happy with your service."

"Fair enough, Mr. Brickley. Just let me know if you need anything else." Well, that was a pretty abrupt end to a case that was supposed to be super urgent, thought Max. Very strange. Don't think I'll ever figure out clients. I'll grab George and see if there's time for a beer before the New Year's Eve crush on Elm Street, he thought to himself.

### 9:25 p.m.

Richard Brickley was seething. He had been stuck in New Year's Eve traffic for 40 minutes and he was still two miles from The Mayfair. What annoyed him most is that he seemed to be the only one who was unhappy. Even though it was in the high 30s outside, revelers were in the streets between the line of stopped traffic, hanging out the windows, wielding their libations of beer in bottles, beer in oversized plastic cups, cocktails in hurricane glasses, crystal highball glasses, and there were those who would never make it until midnight taunting him with half empty whiskey bottles. Everyone seemed to be wearing paper hats emblazoned with 2011. Many had whistles and noisemakers. It seemed eerily more like 1971 than 2011. Three girls, not unattractive, tapped on his car window. One of them cried, "He's cute!" Richard could not think straight. He knew he should not have had that last

scotch and soda. But he did know he had to get to The Mayfair somehow and this was obviously not likely to happen at this pace.

This was impossible. He would have to walk. He looked for a parking lot. All full. He could not just abandon the car in the street. He glimpsed a space to his right that had a sign "Taxi Only" and whipped into it. There would be no taxis tonight on this street, at least until after midnight. He did not want to have his car towed or even to get a ticket because he did not want any record of his being in this neighborhood tonight, but he would have to take a chance.

### 10:17 p.m.

Richard was not a happy camper as he walked into the lobby of The Mayfair. He was cold, out of breath and out of sorts. The long walk had affected his trick knee and he was beginning to feel real pain as he walked. He had been trying to conceal the fifth of Wild Turkey in his overcoat and had succeeded in doing so at the expense of his appearance and his dignity. The bottle and the handgun had stretched the pockets of his coat and he realized he looked like a middle aged wino with a bottle in his pocket. He hoped he did not see anyone he recognized and that he would not be stopped by hotel security as he limped toward the elevator on his way to suite 1202.

### 10:18 p.m.

Robert Littlejohn looked across the table at his wife of 29 years. He had just finished the last of the bottle of 1998 Brunello di Montalcino, their favorite Italian red and he was considering ordering another. It was still early. After all, it was a special evening and he knew his wife wanted to enjoy the full experience of New Year's Eve in the city. They had savored every morsel of an antipasti of finocchione, mortadella and prosciutto cotto with truffles and were anticipating the agnello di bosco, which was the grilled lamb

chops with mint pesto, balsamic syrup and risotto.

Robert was in heaven, yet something was bothering him and he could not quite figure out what. Had he forgotten some unfinished business at the hotel? He mentally checked off the various projects and favors he had promised to do for hotel guests and could think of nothing he had left undone. He reviewed the day and the meeting with his friend, Max Meyer. Maybe what was bothering him was that he had found it necessary to lie to Max. No! It hit him like a bolt of lightning: He should have called Winston Brickley and told him that a private detective had made inquiries about him. As distasteful as it was to compound the betrayal of Max, he probably had a duty to call Mr. Brickley, particularly since he had told Robert he did not want anyone to know he was in residence. Well, nothing Robert had done had in any way revealed that secret and still no one knew that Brickley was at The Mayfair. Or did they? Max was smart and intuitive and there was a hint of something in his eyes that may have indicated that he did not believe Robert's denial that Brickley was there. Excusing himself, Max walked down the corridor toward the bar and dialed The Mayfair.

"Suite 1202," Robert said, without identifying himself to the hotel operator.

### 10:21 p.m.

"Grab your coats. We have to go," said Winston to Brett and his girlfriend. Brett and Pam had been there since shortly after 7 and the three had watched one interminable bowl game after another. It was one of those years where they were all blowouts, only adding to the public pressure for a national playoff system for college football.

"Where are we going?" asked Brett.

"I don't know. I just know we need to get out of here and keep moving until midnight. I've just

learned that someone has been asking questions about my whereabouts and may know that I'm here, and I don't like that. Trust me, kids, we need to get going."

Brett and Pam didn't need any more encouragement. Their coats were on within seconds and they helped Winston on with his. Within minutes they were in the elevator headed down to the lobby. What they did not know, but Winston suspected, was that Richard was close on their trail.

### 10:22 p.m.

Richard stood outside Suite 1202. As he was about to knock, he heard voices coming from the suite. He was dismayed to learn that his father was not alone. Not only that. There were at least two other people with him. He listened more carefully. Damn, he thought, it's Brett and that confounded girlfriend of his. This will never do. I need to figure a way to get dad alone. Just as he was trying to think

of a plan, the door began to open. He virtually dove for the nearest open door and crouched beside the ice machine until he heard the three pass by. Richard was not sure where this would lead, but decided to follow.

### 10:24 p.m.

The three walked briskly through the lobby and out into the cold December night. It had begun to snow.

"Quick, trade coats with me and give me your hat," said Winston to a startled Brett. "You kids go left and I'll go right. I'll meet you back in the suite a little after midnight."

There was an urgency in Winston's voice and Brett and Pam did as they were told. Winston started to turn right, but then noticed people entering the Episcopal church just across the street. Ah, the New Years Eve midnight service, thought Winston, remembering that he and his wife had attended many of these servic-

es over the years and had always enjoyed them. It was a much more civilized way to welcome in the New Year than sitting in some hotel ballroom.

Winston glanced back toward The Mayfair as he crossed the street in the middle of stopped traffic and entered the church with the yuletide crowd. He was almost sure he saw someone looking at him from across the street, someone about 6 feet 4 inches tall. Someone named Richard Brickley. Damn, he thought. Well, on the other hand, what better place could I be than a church? What could happen? As he entered the sanctuary, he decided the most prudent plan was to get as close as he could to the front, and he took a seat in the middle of the third row.

The first two rows had already begun to fill up with a decidedly young crowd.

He looked at the program. The service would begin at 11 p.m. Eighty-one minutes until midnight.



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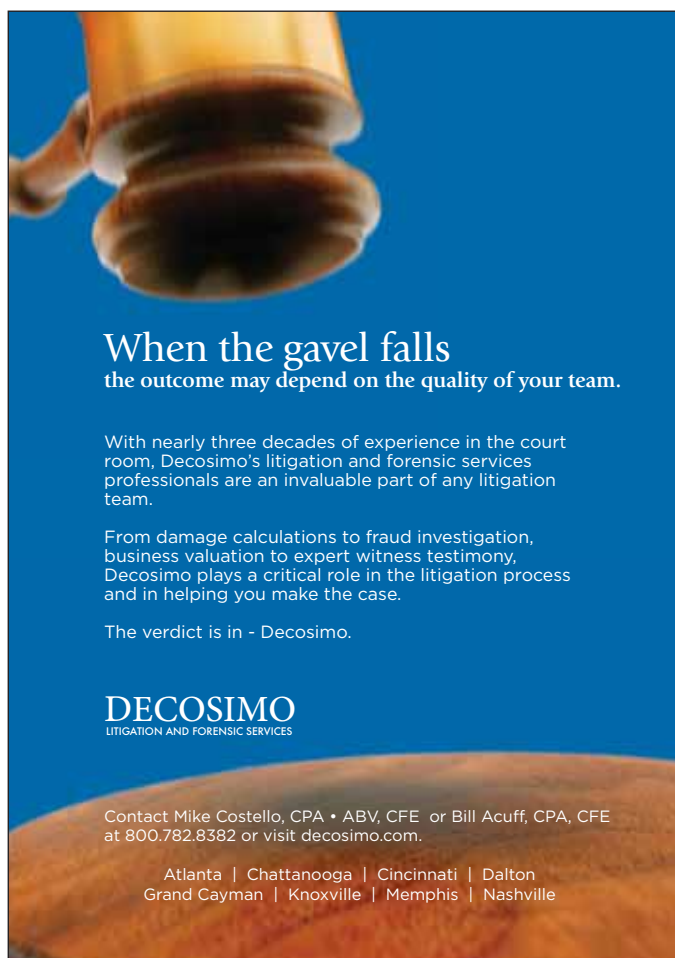
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## 10:44 p.m.

Richard had seen his father go into the church. After a few minutes of reflection, he too entered the sanctuary without much hope of implementing his plan. In fact, he admitted to himself, there was very little likelihood that circumstances could change to allow him any opportunity to even get his father alone. Time was running out and he knew it, but he was still driven by a mysterious desire to stay close to his father until midnight.

With a furtive glance around the congregation to be sure there was no one he knew, he sat down on the last pew and tried to be as unobtrusive as possible. As he removed his overcoat to place it next to him on the pew, to his horror, the bottle of Wild Turkey fell out of his coat pocket and rolled between the pews. The sound was unmistakably that of a whiskey bottle rolling on a wooden floor. Although the service had not yet started, Richard prayed hard. If only the bottle would stop rolling. If only it would hit a leg or support of one of the pews and end its embarrassing journey. But the bottle kept rolling until the church

floor leveled out and it stopped of its own accord. There was suppressed laughter by some of the parishioners, a murmur of disapproval by others. People were looking around to determine the guilty party.

Richard frowned and looked around as well. Could anything else possibly go wrong? Oh, my God, the gun, he thought. He tucked his overcoat against his hip and vowed to be extra careful with his coat after the service.

## 10:59 p.m.

The service was about to begin. Winston remembered Episcopal services as giving the congregants quite a workout, going from the sitting position to the kneeling position and then from standing to sitting to kneeling. He really did like the formality of it all, but hoped the service would not require him to kneel too much just a few days from his medical procedure. Of course, he knew he was not absolutely required to kneel, but he had no intention of being the only one on his pew to sit while others knelt.

The church was not quite full, but the rows around Winston

were absolutely packed. Shortly after he had sat down, more young people had come in and they all seemed to be congregated on the first five rows. He had nodded amiably to those to his left and right and they had responded with a smile, but he sensed some puzzlement on the part of those around him. Maybe this was the in place for young singles and he was infringing on their territory, he thought.

Not long after the service began, Winston no longer had to speculate about his choice of seating. The minister announced: "Tonight's offertory hymn will be sung by our youth choir." Everyone on the first five pews stood. Winston wanted to disappear, but he reluctantly followed suit. Then the group turned around to face the congregation. Winston sheepishly followed suit. The choir began to sing a hymn totally unfamiliar to Winston. He tried to mouth the words. He could not remember ever being so uncomfortable; although he was sure he had—perhaps in his teenage years. A young man to his right, sensing his predicament, shared his music with Winston. Diffident at first, he gradually





became more comfortable and by the final verse, he was singing with enough confidence to attract the attention of the puzzled youth choir director, who had just spotted him.

He was beginning to actually enjoy the absurdity of the situation. So what if he looked like an old fool? There was no safer place he could be for the next 45 minutes. The word “sanctuary” took on an entirely new meaning for him.

He relaxed and absorbed every nuance of the scripture readings, the music, the common lectionary reading and began to appreciate as never before the beauty of the Episcopal service. The next hymn, which was sung by both the congregation and the youth choir, was one that he was familiar with and, with the protection of a booming organ, he bellowed with admirable volume for a man his age, “A MIGHTY FORTRESS IS OUR GOD, A BULWARK NEVER FAILING.”



Richard, on the other hand, was decidedly not enjoying the service. He was bored. His knee was killing him. The church was too hot and he was starving to boot. The priest was reading from Ecclesiastes: “A time to be born, a time to die; a time to kill, and a time to heal.”

Although the church was chilly, Richard was perspiring.

## 11:55 p.m.

Winston was becoming absolutely jaunty. Five minutes until midnight and the youth choir was about to sing again. This time he did not have to build up his courage. It was a melody he knew well. As the choir reached the chorus, the church bells began to ring. It was midnight!!

Winston sang with enthusiasm the well-known refrain from “Angels We Have Heard on High” “GLOO!O!OO!O!O!O!O!OO!O!O!O!O!O!O!O!O!RIA!IN EXCELSIS DEO!”

As the bells struck midnight, Winston caught Richard’s eye and winked. Richard’s shoulders

slumped, but not before he involuntarily smiled at his father.

That wink of his father unnerved Richard. What did it mean? Did it mean that his father knew, yet forgave him? Or was his father taunting him for his ineptitude in failing to carry out his stupid plan? Or was it—could it possibly be—that his father did not know? Whichever it was, Richard would not run. He would act as normal as possible in front of his father. To do otherwise would betray himself.

## 12:08 a.m.

Jan. 1, 2011

After the service, Winston made his way to the rear of the sanctuary. He had had to stop and joke with the other members of the youth choir about the events of the evening and speak to a few of the worshipers who recognized him.

When he reached the vestibule, Richard was waiting for him. “Happy New Year, dad,” he said as he sheepishly extended his hand. Winston replied, “Happy New Year, son,” and converted the handshake into a brief embrace.

## Epilogue


Jan. 14, 2011

It has been two weeks since my harrowing experience. I still do not honestly know whether my children would have followed through on their plan had things gone more smoothly for them. I cannot even be sure if they had a plan or whether the whole affair was born out of my overreaction or imagination. Remember the two strange pills that I managed to keep from swallowing on that first night at my son’s house?

Well, I saved them with the intention of having them analyzed. That would have answered the question, but I tossed the pills more than a week ago. I really did not want to know.

That may seem strange, but I believe my reasoning is sound. If I knew beyond the shadow of a doubt that my children were trying

to murder me, it would make my life miserable and theirs as well. It would bring embarrassment to the family and possible criminal actions against my children. If greed makes men and women do things that they would not do ordinarily, then it would be the rare person who would not be tempted by the prospect of \$200 million dollars. If they were guilty of attempting to carry out such a plan, which I suspect they were, then surely they worry that I may suspect them, and for this reason I have made every effort to be more attentive to my children and they have reciprocated in kind. In a strange way, the events of late December have brought us closer together.

Through communications which I have carefully orchestrated between my lawyer and theirs, I have made sure my children are aware that I have made changes to my will. What they do not know is the extent to which they are beneficiaries and I plan to keep it that way for the time being. Perhaps some day I will tell them that the estate will be equally divided between Richard, Michele, Brett and the Brickley Foundation, each to get a fourth after the payment of estate taxes. Who knows what estate taxes will be? Congress is still fighting over that, and for now Public Law 107-16 is still in effect. 



**Lawrence V. Starkey** is an Atlanta attorney specializing in probate, estate and trust law.

Starkey graduated from Clemson University and

the University of South Carolina School of Law. Before entering private practice, he was with the Internal Revenue Service in Washington, D.C., and Atlanta where he served as chief of the Estate and Gift Tax Section. Starkey also holds a masters degree in public administration from the Maxwell School of Syracuse University. He can be contacted at [lvstarkeypc@bellsouth.net](mailto:lvstarkeypc@bellsouth.net).


## Kudos


> **Common Cause Georgia** announced the addition of Cornelia attorney **B. Chan Caudell** to the **state board of directors**. Common Cause has been a national non-partisan government watchdog group since its founding by John Gardner in 1970. The Georgia chapter has been active in state issues for over 20 years, and currently works on a wide array of reform issues for state and local government.

> **The Anti-Defamation League** honored **Michael Mears** with the **Elbert P. Tuttle Jurisprudence Award**. Mears currently serves as associate dean for academic affairs and associate professor at Atlanta's John Marshall Law School. He is the former director of the Georgia Public Defender Standards Council and was the founder of the Multi-County Public Defender Office, Georgia's first statewide death penalty public defenders' office.

> **Casey Gilson P.C.** announced that managing shareholder **James E. Gilson** and shareholder **George P. Shingler** were selected to **Georgia Trend's Legal Elite**.

> **The Saylor Law Firm LLP** announced that **C. Murray Saylor Jr.** was recognized as one of **Georgia Trend's Legal Elite 2008** in the category of taxes, estates and trusts.


>  **Polly J. Price**, professor of law and associate dean of faculty at Emory University School of Law, has published **Judge Richard S. Arnold: A Legacy of Justice on the Federal Bench**. Richard Arnold served on the 8th U.S. Circuit Court of Appeals from 1980 to 2004. This biography, published by Prometheus Books and released in April, includes a foreword by U.S. Supreme Court Justice Ruth Bader Ginsburg.

>  **Alvah O. Smith**, a founding member of the law firm of Levine & Smith, LLC, was recently elected **president** of the **Georgia chapter of the American Academy of Matrimonial Lawyers (AAML)**. Fellows in the AAML are generally recognized as leading practitioners in the field of family law with a high level of knowledge, skill and integrity. Smith practices exclusively in the area of family law litigation, including divorce and child custody matters.

> **Denise Cleveland-Leggett** was a recipient of the **Justice Robert Benham Award for Community Service** at the 10th Annual Ceremony, presented by the State Bar of Georgia and the Chief Justice's Commission on Professionalism. The award honors Georgia lawyers and judges who have made significant contributions to their communities. Cleveland-Leggett works as of counsel with Baudino Law Group.

> **John P. Sinnott**, of counsel with **Langdale Vallotton, LLP**, had his 2009 revision of **A Practical Guide to Document Authentication** published. The publication provides an up-to-date desktop reference containing the most current consular legalization requirements, explaining legalization procedures for 219 foreign jurisdictions and all 50 states plus territories. Entries in this publication include complete consular and Secretary of State contact information and signature requirements, documents to be submitted, turn-around time, with fee and payment methods.

> **Georgia Appleseed Center for Law and Justice** announced its inaugural Good Apple Award recipients were **Teri P. McClure**, UPS senior vice president and general counsel, and **Frank S. Alexander**, professor of law at Emory University School of Law. The Good Apple Award recognizes distinguished pro bono leadership that exemplifies the values and goals expressed in Georgia Appleseed's mission, seeks to effect change by addressing difficult social justice problems with systemic solutions, and levels the playing field for children, the poor and the marginalized.

>  **The Atlanta Business League** named Fisher & Phillips LLP partner **E. Jewelle Johnson** to "**Atlanta's Top 100 Black Women of Influence**." This is the second time that Johnson has received this honor. The Atlanta Business League is an organization whose members come from successful businesses owned, operated and managed by African-Americans in metropolitan Atlanta.

>  **The Stanford Institute for Economic Policy and Research** at Stanford University named **John F. "Sandy" Smith** to its **advisory board**. Smith is a senior partner in the corporate and securities groups at Morris Manning & Martin, LLP, in Atlanta.

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Alexander



Lurey

**Kilpatrick Stockton** announced that partners **Miles Alexander** and **Al Lurey** were honored at Best Lawyers 25th Anniversary Event in Atlanta for being listed in the prestigious

publication since its inception 25 years ago. Alexander practices in the intellectual property and alternative dispute resolution areas. Lurey practices in the bankruptcy and financial restructuring group.

The firm also announced that *World Trademark Review* named **Miles Alexander** and **Chris Bussert** as “trademark experts’ experts”—the leading trademark professionals in the United States. Only 20 attorneys were chosen for this distinction. Kilpatrick Stockton is the only firm to have two Georgia attorneys included on this prestigious listing.

Both *IP Law & Business* and the *National Law Journal* recognized Kilpatrick Stockton for record-breaking, high-profile intellectual property case wins in 2008. Kilpatrick Stockton was the only law firm in the United States to have two wins in the *IP Law & Business* “**Top 10 Litigation Wins of 2008**.” The Adidas verdict, which achieved international recognition from media and legal experts, also was ranked No. 8 in the *National Law Journal*’s listing of the “**Top Verdicts of 2008**,” which is a compilation of the year’s overall largest plaintiff verdicts and significant defense wins without regard to subject matter. This recognition follows Kilpatrick Stockton being named “North America’s Top IP Firm” for 2008 and “North America’s Top Trademark Firm” for 2008 at the *World International IP Awards* in London.

> **David A. Cole** and **Katie W. Barber**, attorneys at Freeman Mathis & Gary, LLP, were named **officers** of the **Cobb County Bar Association Young Lawyers Division**. Cole, an associate in the firm’s labor and employment law section, was named president. Barber, an associate in the firm’s construction and design law section, was named treasurer.

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**H. Mitchell Dunn Jr.**, a partner in HunterMaclean’s Savannah office, was honored in April 2009 by **Best Lawyers**, the country’s original and most well-respected lawyer-rating directory, during its 25th Anniversary Event in Atlanta. The event celebrated the distinguished careers of the 1,397 lawyers who have been listed in the publication since it began rating lawyers in 1983. Dunn practices in the areas of taxation, health care, estates and trusts.

> **Thomas William Baker**, a shareholder in the Atlanta office of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, was named an **Outstanding Physician Practice Lawyer** by *Nightingale’s Healthcare News*, a newsletter for health care executives and professionals serving the health care industry. Baker is among 10 attorneys nationwide that were named to the list, which is published annually by *Nightingale’s*.

## On the Move In Atlanta

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Butler



Hiers



Lee



French

**Ford & Harrison LLP** announced that **Christopher P. Butler**, **William N. Hiers Jr.** and **Donald R. Lee** were named **partner** and **Thomas C. French** was added as **partner**. Butler focuses his practice primarily on employment litigation matters with an extensive background in tort defense practice. Hiers represents clients in the airline industry. Lee represents management in labor law matters with a focus on collective bargaining, union organizing campaigns, arbitrations, union avoidance training and defending claims of unfair labor practices. French will practice both traditional labor and employment law with the firm’s Airline Group. The firm’s Atlanta office is located at 1275 Peachtree St. NE, Suite 600, Atlanta, GA 30309; 404-888-3800; Fax 404-888-3863; [www.fordharrison.com](http://www.fordharrison.com).

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Sugarman



Dishun



Ojeda



Williams

**The Bloom Law Firm** announced that **F. Skip Sugarman** was named **partner**, **R. Kyle Williams** joined the firm as **counsel** and **Alexandra Dishun** and **Jennifer Ojeda** joined the firm as **associates**. Sugarman focuses his practice on sophisticated business litigation in a variety of areas. Williams focuses his practice on zoning, land use and general litigation matters. Dishun focuses her practice on litigation of disputes involving commercial contracts, business torts, real estate, products liability



and employment matters. Ojeda focuses her practice on complex commercial litigation, construction litigation, real estate litigation, employment disputes and appellate representation. The firm is located at 100 Peachtree St., Suite 2140, Atlanta, GA 30303; 404-577-7710; Fax 404-577-7715; [www.bloom-law.com](http://www.bloom-law.com).

> **Ogletree, Deakins, Nash, Smoak & Stewart, P.C.**, announced that **Natalie N. Turner** joined the Atlanta office as an **associate**. She formerly was an associate at Epstein, Becker & Green, P.C. Turner focuses her law practice on employment litigation and administrative proceedings involving race, gender, age and religious discrimination, sexual harassment and retaliation. The firm's Atlanta office is located at 191 Peachtree St. NE, Suite 4800, Atlanta, GA 30303; 404-881-1300; Fax 404-870-1732; [www.ogletreedeakins.com](http://www.ogletreedeakins.com).

> **Casey Gilson P.C.** announced that **Jonathan R. Granade** became a **shareholder**. His practice focuses on business and commercial disputes, personal injury claims, insurance coverage disputes, government liability defense and transportation litigation. The firm is located at 6 Concourse Parkway, Suite 2200, Atlanta, GA 30328; 770-512-0300; Fax 770-512-0070; [www.caseygilson.com](http://www.caseygilson.com).


> **Shannon J. DeRouselle** announced the opening of **DeRouselle Legal Advisors LLC**. DeRouselle, formerly with Siavage Law Group, will continue to concentrate his practice on corporate and business transactional matters. The firm is located at 1201 Peachtree St., 400 Colony Square, Suite 200, Atlanta, GA 30361; 404-348-4207; Fax 404-551-5380; [www.sjdlegal.com](http://www.sjdlegal.com).

> The Byers Hooper Group LLC announced that it has changed its name to **Hooper & Honoré, LLC**. This name change is to recognize that **Alcide L. Honoré** joined the firm as a **partner**. The firm is located at Overlook II, 2839 Paces Ferry Road, Suite 850, Atlanta, GA 30339; 404-798-3146; Fax 678-401-8862; [www.hooperhonore.com](http://www.hooperhonore.com).




> **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, announced that **Thomas "Tom" William Baker** and **Charles T. Huddleston** joined the firm as **shareholders**. Baker is a member of the firm's health law group. Huddleston works in the labor and employment department and business litigation and public policy groups. The firm's Atlanta office is located at Monarch Plaza, Suite 1600, 3414

Peachtree Road NE, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501; [www.bakerdonelson.com](http://www.bakerdonelson.com).

> **Holland & Knight** Managing Partner Steven Sonberg has appointed **Robert Highsmith** to serve as **executive partner** of the firm's Atlanta office. In this new role, Highsmith will be responsible for management of the office, attorneys and professional staff. The firm is located at 1201 W. Peachtree St. NE, One Atlantic Center, Suite 2000, Atlanta, GA 30309; 404-817-8500; Fax 404-881-0470; [www.hklaw.com](http://www.hklaw.com).

>  **Hunton & Williams LLP** announced the election of **Emily Burkhardt Vicente** to its **partnership**. Vicente's practice encompasses the full range of labor and employment litigation and advice, with significant experience representing major corporations in the financial services and pharmaceutical industries. The firm's Atlanta office is located at Bank of America Plaza, Suite 4100, 600 Peachtree St. NE, Atlanta, GA 30308; 404-888-4000; Fax 404-888-4190; [www.hunton.com](http://www.hunton.com).

> **Holly A. Pierson**, formerly a partner with Nelson Mullins Riley & Scarborough, joined **Morris, Manning & Martin, LLP**, as **of counsel** in the firm's Atlanta office. Pierson's practice is focused on special litigation, which includes health care fraud, whistleblower actions, identity theft, mortgage fraud, environmental issues and public corruption as well as internal investigations and white collar defense. 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](http://www.mmmlaw.com).


>    **Mark S. Lange, Emily C. Crosby and Larry A. Slovensky** rejoined the Atlanta office of **McKenna Long**

**& Aldridge LLP** following brief stints in other firm and corporate law departments. Lange and Crosby returned to the corporate department, as partner and associate, respectively, to focus on the health care industry, while Slovensky rejoined the litigation department as partner. The firm's Atlanta office is located at 303 Peachtree St. NE, Suite 5300, Atlanta, GA 30308; 404-527-4000; Fax 404-527-4198; [www.mckennalong.com](http://www.mckennalong.com).

> **Heninger Garrison Davis, LLC**, a Birmingham, Ala., law firm with a focus on complex litigation, announced the opening of its Atlanta office. The office is managed by **Doug Bridges** whose practice focuses on patent infringement litigation. The firm is located at 1 Glenlake Parkway, Suite 700, Atlanta, GA 30328; 678-638-6148; [www.hgdllawfirm.com](http://www.hgdllawfirm.com).

>  **Dominick M. Moore** joined **Stites & Harbison's** Atlanta office as an **associate**. Moore serves clients in the areas of business law, securities and finance and general corporate law. The Atlanta office is located at 303 Peachtree St. NE, 2800 SunTrust Plaza, Atlanta, GA 30308; 404-739-8800; Fax 404-739-8870; [www.stites.com](http://www.stites.com).



### In Cartersville

>  **Brandon L. Bowen** became a shareholder with **Jenkins, Olson & Bowen, P.C.**, formerly Jenkins & Olson, P.C. The firm continues to provide legal services from both its Cartersville and Savannah offices in the areas of local government law, zoning, land use and condemnation, serious personal injury, civil trial and appellate work and insurance defense. The firm's Cartersville office is located at 15 S. Public Square, Cartersville, GA 30120; 770-387-1373; Fax: 770-387-2396; [www.jnlaw.com](http://www.jnlaw.com).

### In Macon


> **Baker, Donelson, Bearman, Caldwell & Berkowitz, PC**, announced that **Gina Ginn Greenwood** joined the firm as **of counsel**. Greenwood splits her time between Baker Donelson's Atlanta and Macon offices. She concentrates her practice on a wide range of health care related matters. The firm's Macon office is located at 923 Washington Ave., Macon, GA 31208; 478-750-0777; Fax 478-750-1777; [www.bakerdonelson.com](http://www.bakerdonelson.com).

### In Norcross

>   **Glen Rubin** and **Peter Lublin** established the law firm of **Rubin Lublin, LLC**. Rubin has been practicing law since 1989 and focuses his practice on both consumer and corporate bankruptcy, real estate foreclosure, litigation and collections. Lublin's primary areas of practice include business litigation, construction and banking litigation, real estate litigation, contract disputes, lender

liability defense, financial institution litigation and title insurance claims litigation. The firm is located at 3740 Davinci Court, Suite 100, Norcross, GA 30092; 770-246-3300; Fax 770-921-9046; [www.rubinlublin.com](http://www.rubinlublin.com).

### In Savannah


>  **Brennan & Wasden, LLP**, announced that **Elizabeth A. Yarbrough** joined the firm as an **associate**. She will assist the firm in representation of disputes arising in the areas of general business matters, corporations, banking, contracts, partnerships, bankruptcy, real estate, probate and estate matters and the defense of professionals in malpractice cases including hospitals, nursing homes, physicians, realtors, architects, attorneys and engineers. The firm is located at 411 E. Liberty St., Savannah, GA 31401; 912-232-6700; Fax 912-232-0799; [www.brennanandwasden.com](http://www.brennanandwasden.com).

>   **McCorkle & Johnson, LLP**, announced that **Robert L. McCorkle III** became a **partner** and **Colby E. Longley** joined the firm as an **associate**. McCorkle's practice is concentrated in the areas of commercial real estate, corporate law, condominium and association law and landlord/tenant law. Longley's practice is concentrated in the areas of construction litigation, real property litigation and lien law. The firm is located at 319 Tattnall St., Savannah, GA 31401; 912-232-6000; Fax 912-232-4080.


>   **Jenkins, Olson & Bowen, P.C.**, announced that **Frank E. Jenkins III** and **Erik J. Pirozzi** are **resident** attorneys in the new Savannah office. The firm will continue to provide legal services from both its Savannah office and Cartersville offices in the areas of local government law, zoning, land use and condemnation, serious personal injury, civil trial and appellate work and insurance defense. The firm's Savannah office is located at 24 Drayton St., Suite 1000, Savannah, GA 31401; 912-443-4061; Fax 912-236-7250; [www.jnlaw.com](http://www.jnlaw.com).

## In Valdosta

> **Langdale Vallotton, LLP**, announced that **William C. Nijem Jr.** became a **partner** of the firm. Nijem's practice focuses on business/corporate, real estate and trusts and estates. The firm is located at 1007 N. Patterson St., Valdosta, GA 31601; 229-244-5400; Fax 229-244-0453; [www.langdalevallotton.com](http://www.langdalevallotton.com).

>  **Coleman Talley LLP** announced that **Mark A. Gilbert** joined the firm as a **partner** and continues his practice representing creditors in debt collection and bankruptcy matters. The firm's Valdosta office is located at 910 N. Patterson St., Valdosta, GA 31601; 229-242-7562; Fax 229-333-0885; [www.colemantalley.com](http://www.colemantalley.com).

## In New Orleans, La.

>  **Lacreia G. Cade** joined the firm of **Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC**, in New Orleans, as an **associate** in the employment law and commercial litigation practice groups. The firm is located at 1100 Poydras St., Suite 3100, New Orleans, LA 70163; 504-585-3800; Fax 504-585-3801; [www.carverdarden.com](http://www.carverdarden.com).

## In Washington, D.C.

> **Raymond J. Ho** joined **Morris, Manning & Martin, LLP**, as **of counsel** in the firm's intellectual property and Asia practices. Ho, formerly of Hogan & Hartson LLP, will practice in the firm's expanding Washington, D.C., office and lead the firm's Taiwan Practice. The Washington, D.C., office is located at 1333 H St. NW, Suite 820, Washington, DC 20005; 202-408-5153; Fax 202-408-5146; [www.mmmlaw.com](http://www.mmmlaw.com).

## In Beijing, China

> **Morris, Manning & Martin, LLP**, opened an office in the heart of Beijing, China. The firm's Asia practice includes over a dozen Mandarin speakers with deep connections to China, Taiwan and Hong Kong. The practice is primarily focused on representing Chinese, Taiwanese and other Pacific-rim-based companies and institutions with their operations in the United States. The Beijing office is located at Suite 1223 China Resources Building, 8 Jianguomenbei Ave., Dong Cheng District, Beijing 100005, P. R. China; +86-10-5811-1881; Fax +86-10-5811-1999; [www.mmmlaw.com](http://www.mmmlaw.com).

## In Taipei, Taiwan

> In April, **Morris, Manning & Martin, LLP**, which is regarded as having one of the leading Asia-focused practices in the Southeast, opened an office in Taipei, Taiwan. The firm's Taiwan office is located at 37 F, Taipei 101 Tower, 7 Xin Yi Road, Sec.5 Taipei 11049, Taiwan; +886-2-8758-272; Fax +886-2-8758-2999; [www.mmmlaw.com](http://www.mmmlaw.com).

## Georgia Rising Stars

This list recognizes the top up-and-coming attorneys in the state—those who are 40 years old or younger, or those who have been practicing for 10 years or less.\*

### Casey Gilson P.C.

Joyce Gist Lewis

### Fisher & Phillips LLP

E. Jewelle Johnson

### Freeman Mathis & Gary, LLP

Mary Anne Ackourey

Bradley T. Adler

William H. Buechner Jr.

Sun S. Choy

Neil L. Wilcove

### Hunter, Maclean, Exley & Dunn, P.C.

Thomas S. Cullen

Brad Harmon

Shawn Kachmar

Adam Kirk

Bates Lovett

Colin McRae

Christopher Smith

Tim Walmsley

### Kilpatrick Stockton LLP

Hayley R. Ambler

Chintan K. Amin

Blair Andrews

Frank L. Bigelis

Audra A. Dial

Kristin J. Doyle

Cindy D. Hanson

R. Charles Henn Jr.

Wab P. Kadaba

Steven D. Moore

Shyam K. Reddy

Gary R. Sheehan Jr.

Burleigh L. Singleton

James W. Stevens

Chad V. Theriot

Michael J. Turton

### Langdale Vallotton LLP

William C. Nijem Jr.

### Womble Carlyle

### Sandridge & Rice, PLLC

Jonathon A. Fligg

Jessie C. Fontenot Jr.

Richard T. Hills

Adam S. Katz

George Kurlyandchik

John G. Perry

Dana E. Stano

*\*This is not a complete list of all State Bar of Georgia members included in the publication. The information was compiled from Bench & Bar submissions from the law firms above for the June Georgia Bar Journal.*



## Georgia Super Lawyers

In selecting attorneys for Super Lawyers, *Law & Politics* employs a rigorous, multiphase process. Peer nominations and evaluations are combined with third party research. Each candidate is evaluated on 12 indicators of peer recognition and professional achievement. Selections are made on an annual, state-by-state basis.\*

### **Bovis, Kyle & Burch, LLC**

John V. Burch  
Steven J. Kyle

### **Casey Gilson P.C.**

Robert E. Casey Jr.  
James E. Gilson  
George P. Shingler

### **Fellows LaBriola LLP**

James M. Deichert  
Henry D. Fellows Jr.\*\*\*  
Steven M. Kushner\*\*  
Stephen T. LaBriola\*\*  
Henry M. Quillian III\*\*

### **Holland & Knight LLP**

Alfred B. Adams III  
Thomas B. Branch III  
Raymond P. Carpenter  
Harold T. Daniel Jr.  
Laurie Webb Daniel  
Gregory J. Digel  
Sara L. Doyle  
A. Summey Orr III  
William M. Rich  
James H. Rollins  
R. Douglas Wright

### **Hunter, Maclean, Exley & Dunn, P.C.**

LeeAnn W. Aldridge  
T. Mills Fleming  
Robert S. Glenn Jr.  
Wade W. Herring II  
Frank S. Macgill  
Christopher W. Phillips  
Janet A. Shirley  
W. Brooks Stillwell III  
John M. Tatum  
Harold B. Yellin  
Arnold C. Young

### **McKenna Long & Aldridge LLP**

John G. Aldridge Sr.  
David L. Balser  
Steven K. Bender  
Wayne N. Bradley  
Bruce P. Brown  
Charles E. Campbell  
F.T. "Tread" Davis Jr.  
L. Craig Dowdy  
Deborah S. Ebel  
J. Randolph Evans  
Jeffrey K. Haidet  
R. William "Bill" Ide  
David M. Ivey

Margaret M. Joslin  
Mark S. Kaufman  
Clay C. Long  
Gary W. Marsh  
Charlene L. McGinty  
Stefan C. Passantino  
Kathlynn B. Polvino  
James C. Rawls  
Charles K. Reed  
R. Todd Silliman  
Jeremy C. Silverman  
William F. Stevens  
William F. Timmons  
Dennis Zakas

### **The Saylor Law Firm LLP**

C. Murray Saylor Jr.  
Jacquelyn H. Saylor

### **Womble Carlyle Sandridge & Rice, PLLC**

Robert R. Ambler Jr.  
Steven S. Dunlevie  
T. Clark Fitzgerald III  
John D. Hopkins  
Nisbet S. Kendrick III  
Kelly Amanda Lee  
G. William Long III  
William M. Ragland Jr.\*\*

Clinton D. Richardson  
James F. Vaughan  
Richard H. Vincent

*\*This is not a complete list of all State Bar of Georgia members included in the publication. The information was compiled from Bench & Bar submissions from the law firms above for the June Georgia Bar Journal.*

*\*\* Submitted as Top 100. The Top 100 list reflects a listing of lawyers who received the highest point totals in the 2009 Georgia Super Lawyers nomination, research and blue ribbon review process.*

*\*\*\*Submitted as Top 10. The Top 10 list reflects a listing of lawyers who received the highest point totals in the 2009 Georgia Super Lawyers nomination, research and blue ribbon review process.*

**If you have information you want to share in the Bench & Bar section of the *Georgia Bar Journal*, contact Stephanie Wilson at [stephaniew@gabar.org](mailto:stephaniew@gabar.org).**

# This Isn't Your Father's Legal Ad

by Paula Frederick

"I've beefed up the website," your new office administrator announces as he steps into your office. "Take a look!"

Warily you turn to the computer and pull up your site. "I'd be the first to admit that the site needed an overhaul," you admit. "But *Bankruptcy Specialists?*" you ask, reading the banner headline. "I've done as many bankruptcies as the next general practitioner, but I don't claim any expertise in the area."

"Bankruptcy is really hot right now," Joe replies. "I've gotten a couple of buddies to go to your profile on AVVO and rate your bankruptcy services," he confides. "They will rave about what a good job you did with their cases. Just wait! New clients will come rolling in!"

"Buddies?" you wonder. "AVVO profile?"

"Yeah, we reference it in your blog!" Joe explains, pointing to a link on the side of the webpage. "We also encourage current and former clients to join the FeinFirm family on Facebook. You've already got 242 friends! Yesterday I set up an account with Twitter so everyone can follow your daily..."

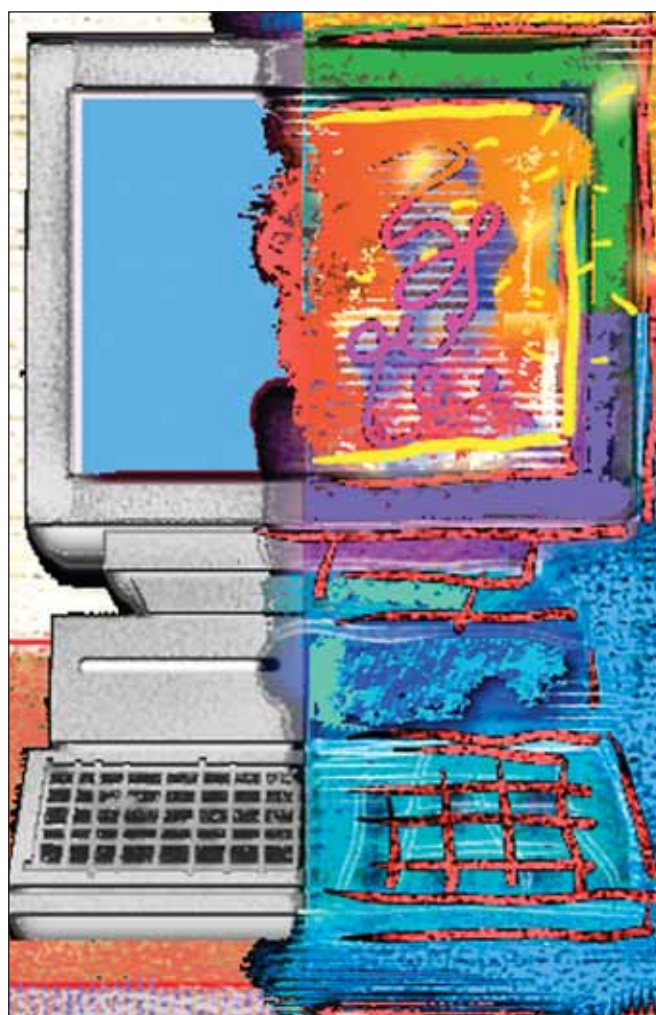
"Your pocket is chirping," you interrupt.

"Another tweet!" Joe announces proudly as he checks his BlackBerry. "This guy is looking for a bankruptcy lawyer—he wants to know if a Chapter 13 filing will eliminate his child support obligation."

"Turn that thing off," you sigh wearily, "and let's call the Bar before you get me into trouble."

For many lawyers, new technology has blurred the lines between personal and professional communication. As a result, at times it is unclear when and how the Rules of Professional Conduct apply.

Georgia's rules on lawyer advertising purport to "govern the content of all communications about a lawyer's services."<sup>1</sup> A communication might involve a myriad of ethics issues, but the first is whether it actually constitutes advertising.




In making that determination, the Office of the General Counsel considers whether the communication is made for the purpose of obtaining business. If it is sent directly to a potential client, it is likely an advertisement. It is less likely to be an ad if a potential client has to seek out the information on the web.

So you may tweet about office politics, blog about the latest blockbuster trial or use your professional sta-

tus to attract a love interest on a dating site without being accused of advertising.

You probably *are* advertising if your Facebook contacts are potential clients and not just friends or family. If your firm website has a link to your MySpace page, where you brag about your latest courtroom victory, if you post a copy of your latest TV ad on YouTube or if you let the folks on Craig's List know that you are available to handle their DUIs, your communication must comply with the rules regulating lawyer advertising.<sup>2</sup>

Finally, don't forget about Joe. Be sure he understands that your obligations under the Rules of Professional Conduct apply to his actions on your behalf. As the lawyer, you are responsible for all promotional communications about your firm. At a minimum you should review those communications before they are disseminated. 



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

## Endnotes

1. Rule 7.1, Comment (1), Georgia Rules of Professional Conduct.
2. The advertising rules are at Part VII of the State Bar of Georgia Bar Rules. Generally, they require that lawyer advertisements be true and not misleading (Rule 7.1). An ad must contain the name of a lawyer responsible for its content (Rule 7.1(a)(4)). It is misleading to call yourself a specialist unless you have the experience, training or professional certification to back it up (Rule 7.4). If you use "testimonials," they should be from actual clients who have given you permission to reveal any confidential or secret information contained in the communication. Knowingly submitting a fraudulent "testimonial" to a reputable website would violate Bar rules as well as the rules of the host site.

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If you have any questions regarding the Vendor Directory, please contact Natalie Kelly at [nataliek@gabar.org](mailto:nataliek@gabar.org) or 404-527-8770.

 State Bar of Georgia



# Discipline Summaries

(Feb. 14 – April 10, 2009)

by Connie P. Henry

## Disbarments

### **Pierce Winningham III**

Kennesaw, Ga.

Admitted to Bar in 1994

On March 9, 2009, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of Pierce Winningham III (State Bar No. 770875). Winningham represented a client in a personal injury case on a contingency basis, but without a written fee agreement. He settled the case for \$15,000 and \$1,400 was paid directly to the medical provider by the insurance company. He received a check for \$13,600 and paid his client \$8,050 after deducting a 33 percent fee and withholding an additional \$2,000 for a medical bill he agreed to pay from the proceeds. He did not provide his client with a settlement statement. He failed to pay the medical bill and converted the \$2,000 for his own use.

In another matter, Winningham represented a client in a divorce case and accepted \$28,000 in disputed marital funds to be held in escrow. Winningham commingled the client funds with his personal funds and spent funds belonging to the client for his personal use.

Winningham was disbarred in 1971 by the Supreme Court of Tennessee for misappropriation of funds. He was reinstated to the Tennessee Bar in 1994 and thereafter became a member of the State Bar of Georgia.

The Court noted in mitigation of discipline that Winningham attempted to enter into payment plans with the clients, but that he was unable to make full restitution. He is extremely remorseful for the harm he caused and his prior disciplinary offense was over 35 years ago. He also exhibited a cooperative attitude towards these proceedings. In aggravation, the Court noted Winningham's history of prior discipline and that he has not made restitution to either client.

## Suspensions

### **Richard R. Harste**

Savannah, Ga.

Admitted to Bar in 1986

On Feb. 23, 2009, the Supreme Court of Georgia accepted the petition for voluntary discipline of Richard R. Harste (State Bar No. 333333) for a one-year suspension with conditions for reinstatement. Harste was an agent for Old Republic Title Insurance Company and was entrusted with numbered title insurance policy forms for possible issuance of title insurance policies and sharing of policy premiums he issued. Harste terminated his relationship with ORTIC but kept the unissued policy forms. He did not return those forms nor did he otherwise account for forms that may have been lost, misplaced or destroyed. Harste issued policies but did not promptly report that to ORTIC, did not notify

ORTIC of the receipt of premiums he collected and did not promptly remit portions of the premiums he collected that were owed to ORTIC. Harste failed to properly account for premiums he collected and deposited into his trust account for policies he issued. He also commingled personal funds with funds in his trust account and withdrew trust funds without accounting for them.

Prior to readmission to the Bar Harste must file a petition with the Review Panel showing that he has complied with the following conditions.

Harste must submit to a complete audit by ORTIC of his title insurance policy records and make every effort to determine the location of all title insurance policy forms entrusted to him, and to determine the amounts of all title insurance policy premiums owed to ORTIC. He will remit to ORTIC all portions of all policy premiums he collected on all policies he issued or committed to be issued. He will cooperate with ORTIC regarding all title insurance policy forms entrusted to him, including making a diligent search of his records for policy forms and policies. He will meet with representatives of ORTIC, and he will promptly furnish documents and information reasonably requested by those representatives, including lost policy affidavits. He will promptly surrender unissued forms and policies. He will promptly provide closing files to ORTIC so unissued policies may be issued by ORTIC, and he will promptly remit monies owed to ORTIC on policies he issued.

**Christine M. Livingston**  
Milner, Ga.

Admitted to Bar in 2000

On March 9, 2009, the Supreme Court of Georgia suspended Christine M. Livingston (State Bar No. 205595) for a period of one year. Livingston failed to file a Notice of Rejection to the Notice of Discipline, so the following facts

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

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*An Attorney's Attorney*

are deemed true by default: Livingston was the closing attorney representing a mortgage company in a 2005 residential real estate closing. She failed to file the deed filings necessary to complete the closing and abandoned the legal matter the mortgage company entrusted to her without cause, and to her client's detriment. In addition to failing to reject the Notice of Discipline, Livingston failed to respond to the Notice of Investigation in this proceeding. Justices Sears, Hunstein and Thompson dissented.

### Public Reprimands

**Ashutosh S. Joshi**  
Atlanta, Ga.

Admitted to Bar in 1996

On Feb. 23, 2009, the Supreme Court of Georgia accepted the petition for voluntary discipline of Ashutosh S. Joshi (State Bar No. 405375) and ordered that he be administered a public reprimand. In addition, he must attend the next session of ethics school. After representing the state in its criminal prosecution of a defendant, Joshi spoke with the defendant's family and agreed to represent the defendant on appeal. During those discussions Joshi stated that certain witnesses at the defendant's trial had testified falsely. He later declined the representation. Joshi is remorseful and accepts responsibility for his conduct; he has no prior discipline; and he submitted letters from attorneys and judges attest-


ing to his general good character and reputation.

**Gregory E. Stuhler**  
Atlanta, Ga.

Admitted to Bar in 1973

On March 9, 2009, the Supreme Court of Georgia accepted the petition for voluntary discipline of Gregory E. Stuhler (State Bar No. 690150) and ordered that he be administered a public reprimand and attend ethics school. In addition, for a one-year period beginning March 9, 2009, he is required to submit to quarterly evaluations of his case management procedures by the Law Practice Management Program. Stuhler failed to supervise a paralegal and failed to meet with clients before undertaking representation.

### Interim Suspensions

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Feb. 14, 2009, no lawyers have been suspended for violating this Rule, and two lawyers have been reinstated. 



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

# 12 Things You Can Do If You Are an Unemployed Lawyer

(or Know a Lawyer Who Is)

by Natalie R. Kelly

**G**eorgia lawyers have not been immune to the number of lawyer layoffs that are happening at an unprecedented pace around the country. So what if you or someone you know loses his or her legal position?

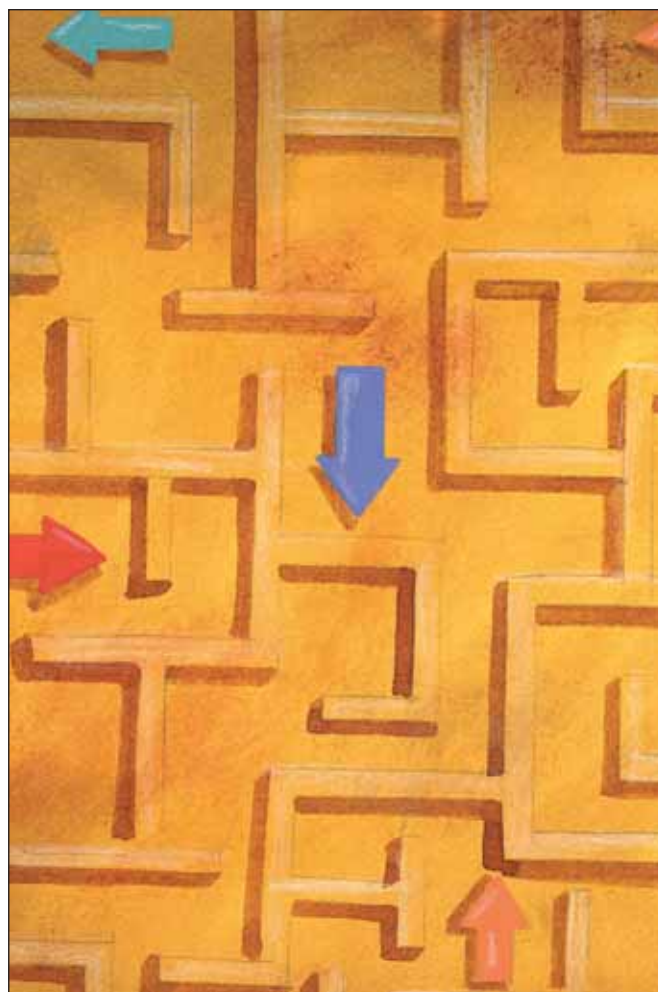
While these are definitely not the only things that you can do, these tips may help you or another out-of-work attorney starting today.

## Brush Off Your Resume and Touch Up Your Interview Skills

With help from various online resources, books from the Bar's Law Practice Management Resource Library and other career development and advancement sources, you should make writing your professional resume job number one. Don't forget to outline what you learned from past interviews and other situations such as internships and prior jobs that can help you fine-tune your marketable skills.

## Make a Written Personal Marketing Plan, Including a Mission Statement

It is most important that you map out where you want to go. If you don't, you are putting yourself in





a situation where it can become easy to panic. You must realize that you are a professional and that you have certain goals that you want to achieve. For now, you simply have to write it down! There should be no limit to what you describe for yourself; you just need to make sure that any plan you work on is attainable or can be worked on realistically.

## Go to “Work” Every Day

Keep a normal schedule as best you can. This includes waking up every day and going to your “office.” This might be the space where you map out your job search, your kitchen table or even the loaned office where you strategize for some existing clients. Do your best to keep hours that you would normally keep if you were working. Structure your day so that it would be very similar to one at the office instead of at home or some other location. Keep a calendar and indicate when you would be going to lunch or even relaxation time in the afternoon.

## Organize Your Job Search

With so many available resources for assistance with finding a job, you will need to make sure that you organize your approach in reviewing the various sources. Aggregate job search engines like [www.indeed.com](http://www.indeed.com) and others should be the first place you look. For more personalized searches, you may choose to set up lunch appointments or specific times to meet with key job search assistance individuals.

## Organize Both Professional and Personal Contacts

You should not discount who you already know. In your job search, keep a list of everyone you know and organize them in such a way that it is easy for you to call upon them as needed. A practice

management system or Microsoft Outlook’s contacts feature can help track this information easily.

## Attend Relevant CLE Programs During the Time You Are Without Work

You may be able to stay abreast of the latest developments in the areas of law that interest you. Attending CLEs and other educational events are items that can also fill up additional time on your job search calendar.

## Enhance Your Technology Skills and Tools

Take a look at the hardware and software you currently utilize or have been exposed to, and determine how it can best be used to your benefit. Write out a plan for acquiring training and set up a technology budget and plan for any systems you may be able to readily acquire.

## Get Casemaker Training

Take advantage of the free, monthly Casemaker training classes at the State Bar. Sign up at [www.gabar.org](http://www.gabar.org).

## Reach Out to the Bar’s Lawyer Assistance Program

Review the many resources for members beyond the aid provided to impaired lawyers. Financial budget assistance and the like are available for free or at a low-cost through the Lawyer Assistance Program.

## Get an Office Start-Up Kit

If you intend to open your own practice, be sure to get an office start-up kit from the Law Practice Management Program. It contains key information on getting a practice up and running in Georgia.


## Attend One of the State Bar’s Lunch-and-Learn Programs for Lawyers Seeking Employment

Sign up for one of the monthly lunch-and-learn programs being broadcast around the state. Led by the State Bar’s Lawyer Assistance and Law Practice Management programs, and sponsored by the State Bar sections and ICLE, these luncheons provide attendees with tips and guidance on job seeking and career development, as well as on dealing with the stresses and strains of unemployment. Visit [www.gabar.org](http://www.gabar.org) for more information on upcoming programs.

## Check Out the State Bar’s Resources for Unemployed Attorneys Webpage

This site covers how to file for unemployment, provides a county-by-county listing of court-appointed work resources and more. You may access this information at [www.gabar.org/news/resources\\_for\\_unemployed\\_attorneys/](http://www.gabar.org/news/resources_for_unemployed_attorneys/).

Being unemployed is not a pleasant situation, and can sometimes even seem insurmountable. However, by being persistent and using all available resources, you will be able to weather this temporary phase in your career and prepare yourself for an exciting, new future.

If you have any questions, feel free to contact the Law Practice Management Program. 



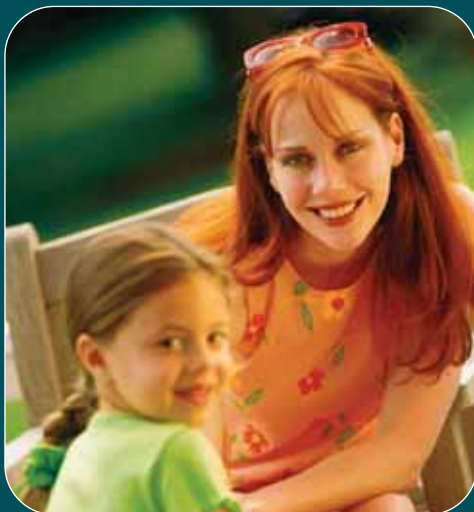
Natalie R. Kelly is the director of the State Bar of Georgia’s Law Practice Management Program and can be reached at

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

# 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 2008.

*\*denotes attorneys with 3 or more cases*



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**Albany**

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James Finkelstein  
William H. Gregory II  
Walter Kelley  
Thomas Ledford

**Ashburn**

Stephen L. Ivie

**Bainbridge**

Josh Bell\*

**Colquitt**

Danny C. Griffin

**Dawson**

W. T. Gamble

**Macon**

Joy Webster

**AUGUSTA**

DaCara S. Brown  
Debra M. Bryan  
J. Patrick Claiborne  
Randolph Frails  
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# Sections Host Multiple Lunch-and-Learn Programs

by Derrick W. Stanley

**E**ach month, different sections have one hour lunch-and-learn programs at the State Bar or restaurants and law firms around the city. Many of these programs are co-sponsored with ICLE and carry one hour of CLE credit for the attendees. The program topics are usually about current events that are relevant to the section members. While some of the programs are brown bag lunches and some are catered, the content is always valuable and pertinent to the attendees.

The following are programs that have taken place over the past few months.

The **Franchise and Distribution Section** held a roundtable discussion titled “Damages on Franchise Termination” on Jan. 29 at Troutman Sanders LLP. The discussion was facilitated by Mark VanderBroek of Troutman Sanders and Chris Bussert of Kilpatrick Stockton LLP.





On Feb. 26, the **Technology Law Section** held the program "Drafting and Enforcing NDAs and Covenants Not to Solicit: Tools Your Technology Clients Need to Protect its Investment in its Workforce." Mari L. Myer, Friend, Hudak & Harris, LLP, spoke to a capacity crowd at the Ravinia Club. This event provided the section with an opportunity to network with members while discussing an important topic that directly affected their practice.

Troutman Sanders LLP hosted the **Environmental Law Section** for their luncheon and annual meeting on Feb. 13. After conducting section business, the program, "A New Direction for the Department of Natural Resources?" began and Chris Clark, incoming commissioner of the Department of Natural Resources, discussed the changes of the department and how practices will be affected.

"Ethical Considerations of the Outsourcing of Legal Services" was presented by the **International Law Section** on March 10 at the law offices of Smith, Gambrell & Russell LLP. Markus Bauer, partner at Rittershaus in Frankfurt, Germany, discussed the latest trends in the global outsourcing industry as it pertains to law firms.

The **Intellectual Property Law Section** presented "Litigating IP Cases in Fast Track Jurisdictions" on March 19 at Kilpatrick Stockton LLP. Chief Judge James Spencer, U.S. District Court for the Eastern District of Virginia; John Childs, Georgia Pacific; David Stewart, Alston & Bird LLP; and Mitch Stockwell, Kilpatrick Stockton LLP, discussed various issues related to litigating IP cases in fast track jurisdictions.

On April 16, the **Health Law Section** presented "Breakfast Briefing: Update on the Grady Health System" at Grady Hospital. Leon L. Haley Jr. and Michael A. Young of Grady


Health System and A.D. "Pete" Correll, chairman of the Board of Grady Health System, provided insightful information on the current state of affairs of Grady. After the program and discussion, the attendees toured the hospital facility.

The **Franchise and Distribution Section** discussed "Successful Mediation in Franchise Disputes" on April 21 at Paul, Hastings, Janofsky & Walker LLP. Panelists included: Rick Asbill, retired, Paul, Hastings, Janofsky & Walker LLP and John Sivertsen, Kaufman, Miller & Siversten, P.C. The moderator was Les Wharton, Epstein Becker & Green, P.C.

Three different section events were held simultaneously on April 30. The **Appellate Practice Section** met at the State Bar where Adam Hames, The Hames Law Firm LLC, presented "An Introduction to Habeas Corpus Law and Why Every Appellate and Criminal Lawyer Should Pay Attention." Down the hall, the Environmental Law Section was having a brown bag luncheon "The Good, the Bad and the Ugly: Environmental Legislation in the 2009 Georgia General Assembly." Will Wingate, of the Land Conservation and Legislative Director of the Georgia Conservancy, directed the discussion. At the offices of Nelson Mullins Riley & Scarborough LLP, the **International Law and Corporate Counsel Law sections** held a joint luncheon to discuss "U.S. and Global Privacy Issues—New Developments, Global Harmonizing and Practical Approaches (Yes—Ethics Too!)." Panelists Peggy Eisenhower, Margaret P. Eisenhower, P.C.; Donna Lewis, Jon Neiditz, and Amada Witt, Nelson Mullins Riley & Scarborough LLP; led by Patricia Marcucci, moderator, AT&T; discussed an array of topics that related to both sections.

The **Intellectual Property Law Section** met on May 13 for the program "*Adidas v. Payless*: Lessons Learned from the Largest

Trademark Verdict in History." During the program, William H. Brewster, Kilpatrick Stockton LLP, discussed the outcome of this case. Alyson Wooten, Kilpatrick Stockton LLP, moderated the lively discussion with this large crowd.

These types of meetings are a great benefit to section members. Belonging to the section ensures that you will receive notification of upcoming meetings and events. You will also have the opportunity to network with your peers before and after the meetings. For more information on how to join a section, please visit [www.gabar.org/sections](http://www.gabar.org/sections) or contact Derrick Stanley at 404-524-8774 or [derricks@gabar.org](mailto:derricks@gabar.org). 



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

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## FREE PICKUP

# Basic Searching With Casemaker 2.1

by Natalie R. Kelly

**W**hile a majority of Bar members grow accustomed to the new navigation of Casemaker 2.1, there are still many who do not know how to use this free online legal research tool. Some of the initial steps in performing basic legal research with Casemaker 2.1 are outlined below.

## Starting a Basic Search

Enter the Casemaker database by going to [www.gabar.org](http://www.gabar.org) and logging in to the members only area. When you access Casemaker through the appropriate link, you will be taken directly to the Georgia library under the “State Libraries” tab. Here one can select case law and begin a basic search (see fig. 1).


Casemaker’s new navigation screens do not utilize the old basic and advanced search tabs. Instead, users are provided with one entry screen for all searches (see fig. 2). With only a few minor changes based on what portion of the library is being searched, users

will find that this basic search screen is the same throughout Casemaker 2.1.

It is also all-important to note that the “Browse” tab has now been placed inside of this new search module. This means that users are able to both search and browse from the same screen (see fig. 3).

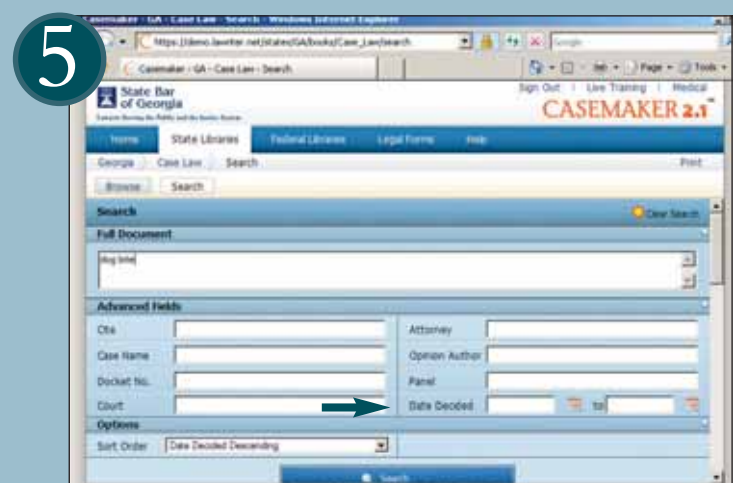
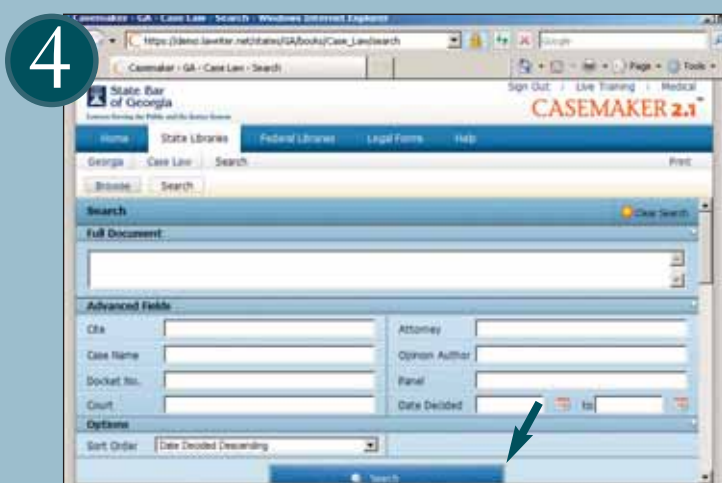
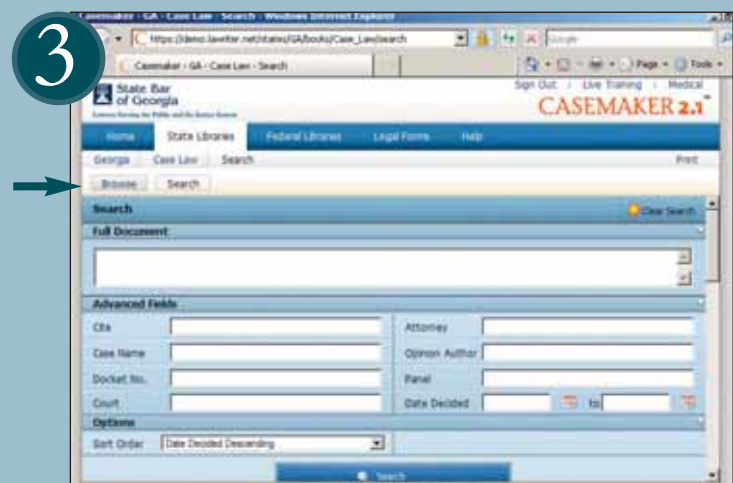
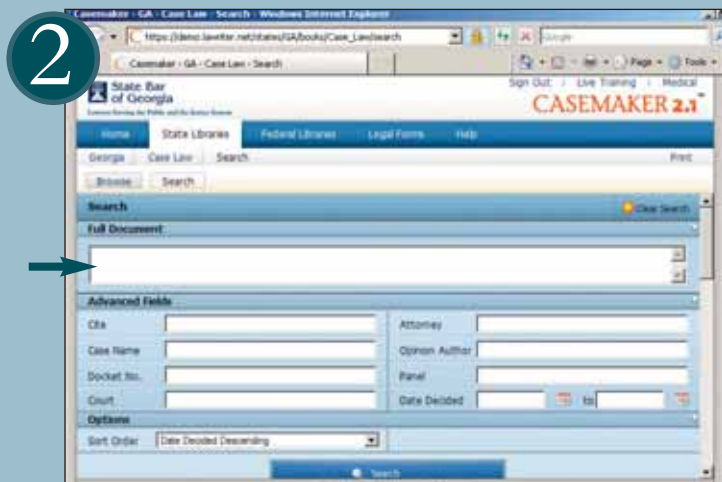
Under the full document section of search screen, members are able to enter terms and click on “Search” to get the results (see fig. 4). As noted in the options area, results are shown in date decided descending order (see fig. 5).

This simple search of the phrase “dog bite” shows exactly how easy it is to navigate the Casemaker 2.1 database (see fig. 6). In future issues, we will explore the various ways to perform advanced searches.

For more assistance with Casemaker, call the Casemaker Helpline at 877-227-3509/404-526-8608, or e-mail [casemaker@gabar.org](mailto:casemaker@gabar.org). You can also sign up for free training at [www.gabar.org](http://www.gabar.org). 



**Natalie R. Kelly** is the director of the State Bar of Georgia’s Law Practice Management Program and can be reached at [nataliek@gabar.org](mailto:nataliek@gabar.org).



We offer Casemaker training classes four times a month. Upcoming training classes can always be found on the State Bar of Georgia's website, [www.gabar.org](http://www.gabar.org), under the News and Events section. Onsite Casemaker training can also be requested by local and specialty bar associations.



# Pondering Passive Voice

by Karen J. Sneddon and David Hricik

**W**e hear it all the time: Avoid passive voice.<sup>1</sup> But exactly what it is and why using it is so problematic can be lost in the cloud of grade school chalk dust. This installment defines passive voice, identifies tips for spotting passive voice and explores the pitfalls and benefits of using passive voice.

## Passive Voice Defined

The best way to define passive voice is to contrast it with active voice. Using active voice, the writer constructs the sentence so that the subject of the sentence (sometimes referred to as the actor of the sentence) performs an action that is received by the object of the sentence. For example:

*Jody signed the contract.*

The subject (Jody) performed the action (signing) and the object (the contract) received the action.

Using passive voice, the writer essentially flips the sentence so that the object of the sentence becomes the subject of the sentence. For example:

*The contract was signed by Jody.*

The actor is now distanced from the action.

## Spotting Passive Voice

Spotting passive voice can be elusive. Because passive voice is grammatically correct, grammar checking software may not detect all uses of passive voice. Thus, the writer needs to be vigilant for the use of pas-



sive voice. At least one of the following accompanies passive voice:

- A form of the “to be” verb (*i.e.*, am, are, is, was, were, been)
- A past participle (*e.g.*, filed, argued, written)
- The word “by.”

While software will not always catch passive voice, it can help you spot it. For instance, you can use the “find” command to search for the words am, is, are, was, were, be, by. This can focus your attention on likely troublesome sentences.

Once spotted, passive voice can easily be eliminated by starting the sentence with the actor, rather than the object. But this begs the question of why passive voice is problematic.

## Pitfalls to Passive Voice

The common criticisms of passive voice are that it renders sentences ambiguous, wordy and monotonous.

### Ambiguity

Because passive voice distances the actor from the action being performed, it can be difficult for the reader to identify who or what is the actor of the sentence. In fact, with passive voice constructions,

the actor of the sentence may be omitted entirely. (*The contract was signed.*). As a result, not only can it make sentences hard to follow, as one court noted, the “passive voice can be ambiguous.”<sup>2</sup>

Ambiguity in legal documents is seldom a good thing, and it can often create costs and uncertainty.<sup>3</sup> You should pay particular attention to the use of passive voice in affidavits. In affidavits, it can be problematic to remove the actor from the sentence.<sup>4</sup> Likewise, in contracts, if it is unclear *who* has the obligation to act, litigation or expense may result.<sup>5</sup> Because it can create ambiguity, passive voice should be avoided.

### Wordiness

“The settlement of the case was reached by the parties” has twice as many words than “the parties settled the case.” Yet both convey precisely the same thought.

Passive voice attracts words. In our busy world, brevity is typically a benefit. Passive voice should be avoided for that reason as well.

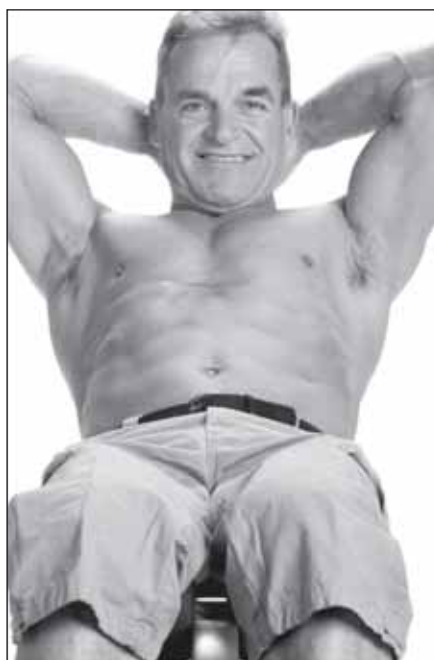
### Monotony

Passive voice can instill a flat, monotonous tone in writing. When the rather dull “to be” verbs permeate writing, the reader faces countless sentences where things “are” or “were.” “The car wreck was seen by the woman,” may make the point that “the woman saw the car wreck,” but the use of the “to be” verb makes the sentence flatter, longer and less interesting.

When strong verbs are desired, passive voice should be ignored. The active voice is better able to engage the reader with entrancing images.

## Benefits of Passive Voice

While passive voice has pitfalls, strategic use of passive voice may actually improve your writing.



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## Deemphasizing Flaws

The lack of clarity that passive voice creates can sometimes be a tool in persuasive writing. Consider the ubiquitous example of passive voice:

*Mistakes were made.*

In a brief written by counsel for the defendant, passive voice for this sentence would be preferred if the active voice were:

*The defendant made mistakes.*

## Obvious, Unimportant or Unknown Actor

In some circumstances, the identity of the actor may not be necessary for understanding. The actor of the sentence may be obvious, not important to the meaning of the sentence or unknown. For example:

*Bail was denied.*

## Break Up the He/She and His/Her

Using gender neutral language is a good thing in writing. However, sometimes the pervasive use of “he or she” and “his or her” can be overwhelming to the reader. Strategic injection of a passive voice sentence can deliver a reader respite without reverting to gender specific language.

For example, in a paragraph about completing a bar application, the following sentence might appear:

*An applicant is required to include his or her complete work history.*

This sentence could be rewritten to read:

*A complete work history must be included.*

## Conclusion

Having a heightened awareness of passive voice can strengthen your writing, both by allowing you to eliminate passive

## Try It Problems

Determine whether the following sentences should be revised. If so, revise using active voice.

1. The assessment of the defendant’s brain activity was made by doctors at the Medical Center.
2. The subpoena was served.


## Possible Answers

1. Doctors at the Medical Center assessed the defendant’s brain activity.

Fifteen words in the original sentence became 10 words with the help of active voice. In this version, the actors of the sentence (the doctors) clearly perform the action of the sentence (assessed).

2. The subpoena was served.

Actually the passive voice may best remain in this sentence. While it depends on context not provided in this example, it could be the fact that the subpoena was served is the point to be emphasized in the analysis, not who served it. Then, the passive voice construction focuses the reader’s attention on the object (the subpoena) rather than the actor.

voice when it is unhelpful, but to use it when it serves a purpose. To test your passive voice savvy, try the problems above. 



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



**David Hricik** is an associate professor at Mercer Law School who has written several books and more than a dozen articles. Mercer’s

Legal Writing Program is currently ranked as the number one legal writing program in the country by *U.S. News & World Report*.

For more readings on passive voice, see Bonnie Trenga, “The Tantalizing Tale of Passive Voice,” in *The Curious Case of the Misplaced Modifier: How to Solve the Mysteries of Weak Writing* 8-17 (2006); Richard C. Wydick, *Plain English for Lawyers* 27-32 (5th ed. 2005); C. Edward Good, *A Grammar Book for You and I . . . Oops, Me!: All the Grammar You Need to Succeed in Life*, 226-37 (2002); Robert C. Farrell, *Why Grammar Matters: Conjugating Verbs in Modern Legal Opinions*, 40 Loy. U. Chi. L.J. 1 (2008); Mark Cooney,

*Stay Active (Part 1)*, 84 Mich. B.J. 48 (May 2005); Mark Cooney, *Stay Active! (Part Two)*, 84 Mich. B.J. 38 (June 2005).

## Endnotes

1. Every style book advocates use of the active voice. See, e.g., Richard C. Wydick, *PLAIN ENGLISH FOR LAWYERS* 27-32 (5th ed. 2005).
2. *Exxon Corp. v. Alaska*, 34 P.3d 786, 794 (Alaska 2001).
3. See, e.g., *California v. Ybarra*, 166 Cal. App. 4th 1069, 1085-86 (2008) (analyzing the impact of a statute’s use of active voice in the phrase “intentionally killed the victim” rather than the passive voice “the victim was killed”).
4. See, e.g., *Ohio v. Armstead*, No. 06CA0050-M, slip op. at 5 (Ohio Ct. App. 2007) (stating that the use of passive voice made it unclear whether the affiant had first hand knowledge of the facts in the affidavit).
5. See e.g., M.H. Sam Jacobson, *A Checklist for Drafting Good Contracts* 5 J. ALWD 79 (2008) (admonishing to “use active voice to express the responsibilities of the parties” in a contract so that “[t]he drafter should eliminate all passive voice absent an express reason for leaving it, such as when the parties to the contract do not know or do not want to disclose who the actor will be, or when the recipient of a representation or warranty wants it in passive voice, depending on the risk allocation desired”).



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# 20 Years of Professionalism:

## The Chief Justice's Commission on Professionalism Celebrates with a Historic Roundtable CLE and Other Events

by Avarita L. Hanson

**A**fter 20 years of institutionalized professionalism, is there a discernable difference in Georgia lawyers' interactions with each other, our clients, the courts and the public? This issue was debated at the historic CLE roundtable discussion in March, presented by the Chief Justice's Commission on Professionalism (the Commission) in celebration of its 20th anniversary.

In March of 1988, the Supreme Court of Georgia signed the order creating the Commission, the first entity of its kind. In partnership with the Institute of Continuing Legal Education in Georgia (ICLE), the Commission presented its 20th anniversary commemorative CLE. With more than 100 bench and bar members in attendance at a grand luncheon, the following topic was addressed: "20 Years of Professionalism: Raising the Bar on Lawyer Conduct." To share the Commission's history and reflect on its effects over two decades, American Bar Association President W. Thomas "Tommy" Wells Jr. joined Commission founders Harold G. Clarke, retired Supreme Court jus-



Photos by Derrick W. Stanley

(Left to right) Hulett "Bucky" Askew and Justice Harold Clarke respond to questions during the 20th Anniversary commemorative CLE.

tice, and A. James Elliott, Emory Law School associate dean, along with past and present executive directors of the Commission, Hulett "Bucky" Askew, Sally Evans Lockwood and Avarita Hanson.

Founders of the Commission included the late Supreme Court of Georgia Justice Charles Weltner and former Emory University President James Laney, two extraordinary men who were both philosophers and theologians, joined by Justices Thomas O. Marshall and

Harold Clarke, and past State Bar President A. James Elliott. Justice Weltner is credited with being the philosopher and moral authority behind the Commission's creation. As related by Askew, Justice Weltner would say, "The law is always the servant, but the client's not the master." As Askew explains, "You are responsible to your client, but you have other duties as well."

The primary purpose for the Commission was to address the then growing concerns with the increase in incivil approaches to the practice of law within the stresses of the recessionary economic climate of the late 1980s. According to Justice Clarke, the founders decided that the Commission "ought to be a product of the Supreme Court, and that it needs to be institutionalized." Was that a good decision? It was, according to ABA President Wells who said, "I can't tell you how important it is to have the leadership of the Supreme Court of the state establishing a commission on professionalism. Whatever lawyers do, they usually listen to judges. And they certainly listen to the highest court of your state."

The first act of the Commission was to write and adopt a statement of professionalism rules, standards and aspirational goals. The next act was to hire the first executive director, Hulett "Bucky" Askew, and it then added assistant director Sally Evans Lockwood who went on to serve as executive director for 16 years. Working with ICLE, they shaped professionalism CLE programs to meet the newly-mandated requirement effective January 1990: that all active Georgia attorneys annually earn one CLE credit in professionalism, along with the required one credit in ethics. Lockwood said, "At the point at which I came, we really needed to put flesh on that institutional framework that was created. We had to figure out how we were going to make the Commission a resource, a support and a catalyst for the lawyers and judges of

## Atlanta's John Marshall Law School Presents "Diversity and Professionalism" CLE

Atlanta's John Marshall Law School held its CLE to celebrate the Commission's anniversary in March. "Excellence Against the Odds: A Retrospective Dialogue on Professionalism and Diversity" explored many issues of diversity and professionalism in Georgia. Presenters included Prof. Melinda Marbes and Court of Appeals of Georgia Judge Herbert Phipps. Other participants included Atlanta attorneys Patrise Perkins-Hooker, Sonja Natasha Brown and Harold Franklin Jr. The law school honored its graduate, Louise Thornton Hornsby, presently the oldest living female African-American attorney in Georgia. After the presentation by her daughter Avis Hornsby, also an attorney, Hornsby recanted her experiences of studying, learning and practicing law throughout Georgia since 1966. The law school also honored noted civil rights attorney Donald L. Hollowell, for whom its chapter of the Phi Alpha Delta Fraternity is named and heard from Hollowell's widow, Louise Thornton Hollowell.

## UPCOMING ANNIVERSARY EVENT

### Service Juris Day—Lawyers Serving the Community

To culminate the activities during this Bar year, the Commission will partner with the Lawyers Foundation of Georgia, the Young Lawyers Division and numerous law firms and bar associations on Service Juris Day, Saturday, June 25. Hands On Atlanta will coordinate a service project at which we expect more than 1,000 volunteers. To participate or for more information, contact Lauren Larmer Barrett at [lfg\\_lauren@bellsouth.net](mailto:lfg_lauren@bellsouth.net), 404-659-6847, Lawyers Foundation of Georgia, 104 Marietta St. NW, Suite 610, Atlanta, GA 30303.

Georgia. We also had to figure out how to communicate what this new role would be."

Did the Commission meet its challenges? During the roundtable discussion, participants explored the impact of the Commission in its 20-year existence. The first challenge was to provide professionalism CLE program approval, after ICLE did so for the first 18 months after the professionalism CLE requirement was adopted. Lockwood admitted that she assumed an "old schoolmarm" posture and seriously performed her duties in shaping the content and form of professionalism CLE programming. She said, "Professionalism CLE is supposed to provide a forum where lawyers and judges can discuss and explore professionalism issues in contemporary legal practice and go away

with some way of addressing the challenges." In the early 1990s, after ICLE helped to conduct convocations on professionalism and town hall meetings were held around the state, Lockwood said, "The resounding two concerns that came back from those meetings were lack of civility and the economic pressures of law practice." As a result, in 1993, the State Bar established the Law Practice Management Program and then State Bar President Paul Kilpatrick encouraged the initial professionalism orientation programs in the Georgia law schools.

What was the starting point from which the impact of the Commission on professionalism in the Georgia bench and bar can be measured? "One mistake we made back at the beginning of this is that we didn't do some sort of survey or





(Left to right) Patrise Perkins-Hooker and former Atlanta Bar President W. Seaborn Jones during the historic roundtable CLE.

establish a benchmark of what attitudes were, what the culture was like, or what was happening in the practice in 1990,” said Askew, the first director of the Commission. “As we moved along, we didn’t have anything we could measure and say, ‘Has this had an effect? Has there been a change? Are attitudes different now?’” Yet, as the first Commission on professionalism, there was simply “no template. There was no other commission in the country, much less a staffed commission,” Askew added. Thus, some legal pundits might say there has been little or no change, while others could say there have been changes in some areas, and most would agree that challenges still exist and there are new challenges to meet.

Federal Judge Willis Hunt, former Supreme Court of Georgia chief justice, sees the issue from his position on the bench. He said, “Lawyers are generally most civil and professional individuals when they’re in front of the court and in front of juries. The problems lie in everything that leads to the courtroom.” To Hunt, professionalism is important. He said, “I think the character of lawyers comes out

when they’re dealing behind the scenes with other lawyers.”

Former Atlanta Bar Association President W. Seaborn Jones said, “If you look at public complaints about lawyers, civility really isn’t on their list. Their complaints about lawyers are mostly in the integrity category. Lawyers will make misrepresentations not just to you and the other lawyers, but to the court.” Emory Law School Assistant Dean A. James Elliott agreed and added two points. First, the Commission and the Bar need to look seriously at what the public perceives in terms of lawyers’ integrity and self-interest and whether there are other professionalism issues that need to be addressed. Second, Elliott said that considering the Carnegie Report on legal education’s views that law schools do not adequately teach legal skills and values, the Commission and Bar need to encourage and assist legal education “so that when those students leave, their moral compass they arrived with has been strengthened during those three years they spend at our law schools.” Lockwood said there are areas to be addressed by the Commission,

as other new challenges are presented, such as multi-jurisdictional and international practice issues.

There are many successes, however, that the Commission has achieved in its brief 20 years. Current Executive Director Avarita Hanson, who has served for three years, states that there is surely a “heightened awareness” of professionalism—through the thousands of lives touched by the numerous and varied Commission programs and those spawned through its actions, such as the Law School Orientation, Diversity, Consumer Assistance, Law Practice Management and Transition Into Law Practice programs. Hanson says that most of Georgia’s bench, bar and even law students are aware of the four pillars of professionalism as capsulized by former Chief Justice Robert Benham: (1) competence; (2) civility; (3) community and public service; and (4) pro bono service and ensuring access to justice.

Lockwood agreed, “In Georgia, the word ‘professionalism’ has carried a lot of meaning and you don’t have to spend a lot of time in explaining that. If you want to be an honorable practitioner in Georgia, you want to be associated with professionalism activities.” Lockwood added that “awareness has been achieved to the extent that money has flowed to this effort.” She explains, “A federal judge in the Middle District of Georgia, Judge Hugh Lawson, in a consent settlement directed that millions of dollars would be devoted to professionalism, \$2.5 million to each of the then ABA law schools in Georgia to endow chairs in Ethics and Professionalism.” Endowing chairs for professorships and annual symposia on ethics and professionalism, these funds help address what had been a somewhat neglected area in the law school curriculum.

Today there is perhaps a better understanding that professionalism is more than civility, although that is a component of it and was part of the impetus for creating the

Commission. ABA President Wells agreed, as illustrated in his comment: "Lord knows that we in the South are probably more adept at insulting someone while we are doing it very civilly. I mean if you begin a sentence with 'bless his heart,' you can say just about anything after that and it's perfectly civil, but perhaps not very professional." Wells reminds lawyers that "you have to remember that the law is not a trade, it is a profession. Indeed it is referred to here in the South as a calling. We are called to the bar. If you think about that for a second, the only other profession that is referred to as a calling is the clergy. So, while clergymen minister in the realm of the spirit, we have to minister in the realm of justice."


Hanson said that the ABA sends people to the Commission for resources on professionalism issues. Even other countries, like Canada, where she was invited to address professionalism, are looking to Georgia for guidance and

assistance. Wells agreed, saying the Georgia Commission "really has been the model." After Georgia started its commission, Wells noted, the ABA added "a Consortium on Professional Initiatives that's hosted at the ABA Center on Professional Responsibility which is a great organization that deals not only with professionalism issues but also with ethics issues."

Yes, after 20 years of the Chief Justice's Commission on Professionalism, some areas have seen change; there has been little or no change in other areas; and certainly, current challenges still exist while new challenges are awaiting on the horizon.

Commission Founder Justice Clarke concluded the CLE and summed it up most aptly. "Ethics is a standard required of all lawyers, when on the other hand professionalism is a standard expected of all lawyers," he said. "Until you embed that idea of what's expected

of you, that's when you really get to the point of accomplishing something. Who's expecting us? Everyone is expecting us. That's what really counts. You don't try to do it by advertising. Do it by action. Do it by conduct and make a difference so that folks look around and say, 'Lawyers are the people that help people, and not the people who hurt people.'"

The measure of the effectiveness of the Commission may ultimately rest in the actions, character and demeanor of every Georgia lawyer. There is still work to be done. Georgia has the committed and capable bench and bar to continue to lead the professionalism movement. We are still at work. 



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

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Admitted 1977  
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**Frank Swift**

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University of Georgia School  
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Admitted 1935  
Died March 2009

**Mary Pauline Womack**

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Woodrow Wilson College of Law  
(1984)  
Admitted 1988  
Died March 2009

**J. W. Yarbrough**

Chatsworth, Ga.  
Atlanta Law School (1957)  
Admitted 1959  
Died January 2009



**Hon. C. Cloud Morgan**, died in March 2009. Cloud was born in Kentucky in 1917 and had been a resident of Bibb

County since September 1937 when he entered the freshman class at Mercer University. Morgan graduated with his class in 1941 with a Bachelor of Arts degree. In September of that year, he entered the freshman class at Mercer's School of Law.

Following the attack on Pearl Harbor three months later, Morgan enlisted in the U.S. Naval Reserves and was assigned to duty as Navy liaison in the Army Aircraft Warning Center in Charleston, S.C. In August 1942, he was commissioned as ensign in the U.S. Naval Reserves and assigned to duty as the security officer of the Executive Office of the Secretary of the Navy in Washington, D.C. In March 1943, Morgan was ordered to report to the commander of the



Southwest Pacific Service Forces, who was then located in Sidney, Australia. From there he was assigned to a U.S. Navy small ship repair base at Cairns, Australia, where he met his future wife, Joyce. They were married in August 1944. That December, Morgan was ordered to join the staff of the commander of the 7th Fleet as a public information officer. He was in several combat operations, including the invasion of Luzon in the Philippine Islands.


Morgan was discharged from the Navy in 1945, and re-entered Mercer Law School in January 1946, graduating *cum laude* in 1948. While still a student in 1947, he was admitted to the State Bar of Georgia and opened an office for the private practice of law in the old First National Bank building. Morgan continued to practice law in Macon for 19 years.

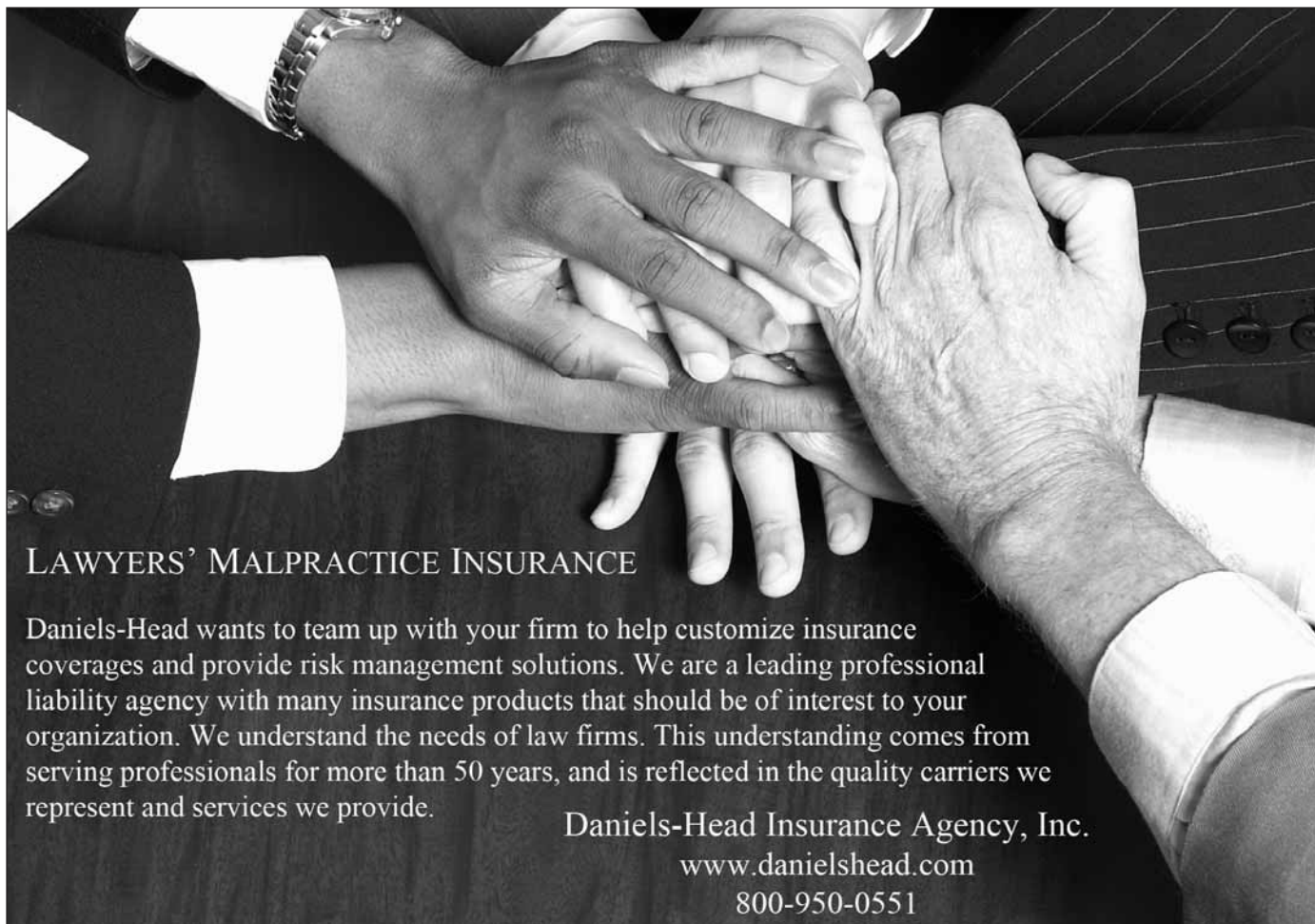
In 1953, he was elected city attorney by the mayor and council of

the city of Macon, which was then a part-time position; he served in this capacity for six years. In 1966, Morgan won election as a superior court judge of the Macon Judicial Circuit, a position he held until he retired in 1990. After retirement, Morgan received a lifetime appointment as a senior superior court judge of Georgia. In 1974, he was appointed by Gov. Jimmy Carter to serve as chairman of the Courts Section of the Georgia Commission on Criminal Justice Standards and Goals. In 1993, Morgan received the Meritorious Service Award from Mercer University Walter F. George School of Law.

Morgan was a member and former president of the Council of Superior Court Judges of Georgia and was a former member of the Judicial Council of Georgia. He was a member of the Macon Bar Association, the State Bar of Georgia and a former member of

the American Bar Association. In the late 1950s, Morgan served as an assistant coach for the Ocmulgee Little League baseball teams and he also served in many capacities with the Boy Scouts of America.

Morgan was a member of the Kappa Sigma Social Fraternity, Blue Key Honor Fraternity and Phi Alpha Delta Law Fraternity, where he served as justice of the chapter and two terms as an officer of the fraternity's national organization. He also served two terms as a trustee of Mercer University and had been a member of the President's Council. He was a member and inactive deacon of the First Baptist Church in Macon and a former member, deacon, Sunday school teacher, superintendent of the adult department of the Sunday school and president of the Men's Brotherhood of the Tattnell Square Baptist Church. Morgan was also a 32nd degree mason and a member of the Exchange Club of Macon. 

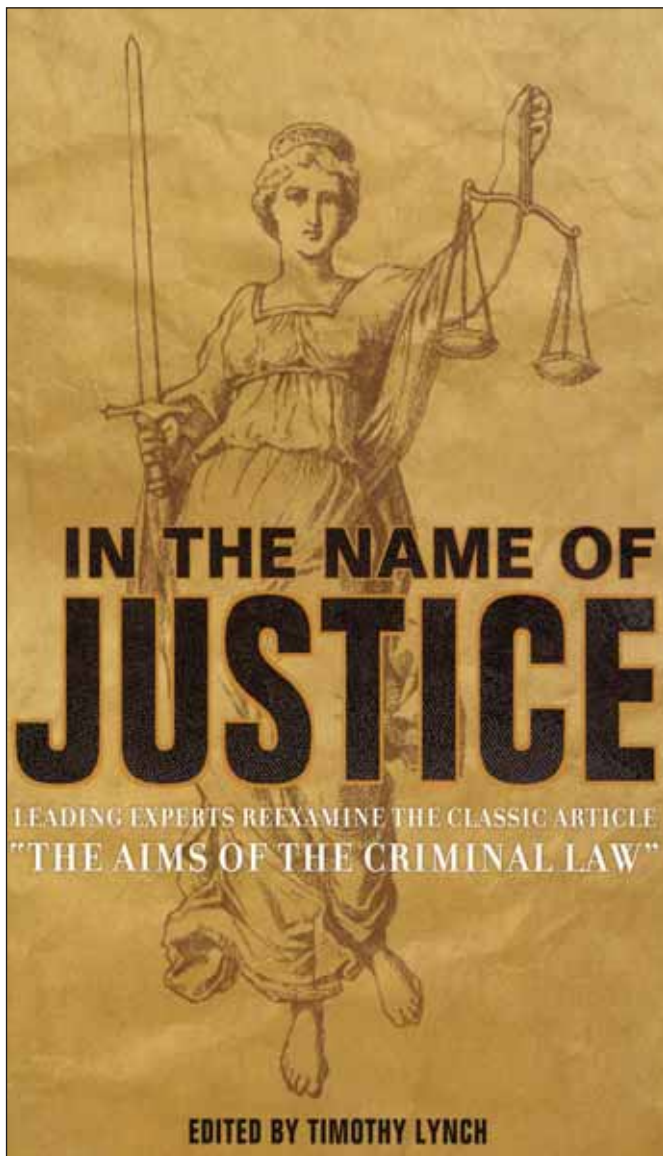


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# Non-fiction and Fiction Summer Reads



## In the Name of Justice: Leading Experts Reexamine the Classic Article "The Aims of the Criminal Law"

edited by Timothy Lynch, Cato Institute,  
200 pages

reviewed by Stephen A. Shea

**A**lmost 15 years have passed since authorities discovered the bloody bodies of Nicole Brown Simpson and Ron Goldman, victims of violent stabbings. Well over 10 years have passed since a California jury acquitted O.J. Simpson of their double homicide. And nearly a decade has passed since a civil jury returned a verdict against Simpson in the civil wrongful death case, based on essentially the same facts.

Yet some of the issues raised by this extremely well-publicized example remain: Why are there varying aims, processes and guarantees in the criminal and civil justice systems? Does it, or should it even, say something different that O.J. Simpson was innocent in the eyes of criminal law and liable in the civil arena? Criminal and civil systems have different burdens of proof, true, and racial divisions may continue to impact individual answers to these questions, but one can still pull back only a tiny bit and see some of the questions

that motivated Timothy Lynch of the Cato Institute to collect the essays for this book. What exactly does it mean to say that somebody is a criminal? Why should we care?

Lynch's collection sets out to examine the gap between the civil and the criminal systems by using a classic article from the middle of the last century as its overarching focus and uniting theme. Then, more than a legal generation ago, budding lawyers fed on an intellectual diet of the likes of Professor Henry Hart. Hart, who taught at Harvard Law School, was a preeminent legal scholar of his time, and his influence lives still.

Among the mimeographed handouts that Hart chose to publish was an essay titled, *The Aims of the Criminal Law*.<sup>1</sup> This essay, first published in 1958 for distribution outside of his classes, discussed the end goals of the criminal justice system from various perspectives, including constitution makers, legislators, police, courts and prosecuting attorneys. He argues that there is one vitally important reason why we should all care about what makes the criminal justice system unique: Marking someone as a criminal is a special brand of community condemnation. Thus, society must exercise caution and sound judgment in what it chooses to criminalize because otherwise both the stigma of the brand and the legitimacy of the legal system are diminished. Hart's article goes on to explicate, analyze and bolster this assertion.

First, Lynch reproduces the article as it originally appeared in *Law and Contemporary Problems*. This operates as either a refresher or an introduction, depending on your familiarity with Hart's work (being a recent law school graduate, I admit that this was my first reading of the classic article). Then, the reader is treated to a total of eight essays that all relate to Hart's essay. Written by such eminent contemporary legal scholars as Richard Posner and Alex Kozinski, each of the essays is the individual author's effort to shake the dust off of Hart's article, trot out his analyses, hold them up to the

light of modern day, and critique, update or praise the premises as the author sees fit. If the test of a classic is how well it stands up to the passage of time, how has his article fared?

A challenge in editing any anthology, but especially one concerned with matters of legal philosophy, is being cohesive without being single-note. The latter would be as interesting as California chardonnays once were—appealing to the unsophisticated and already converted, but lacking complexity or depth. To be sure, Lynch's book faces particularly tough choices in this regard because the entire work is so thematically unified around the one article and because he himself has outspoken ideological views, even clearer due to his affiliation with the Cato Institute. An important consideration in assessing the quality of his work is thus whether a variety of voices are included. Otherwise, like any symposium, it runs the risk of being predictable and repetitive; the reader would need only to read the title of the article to divine its content and viewpoint. When reading a collection of scholarly essays, unity of voice would all too often equal monotony, a flat and uninteresting result.

Fortunately, Lynch has done a nice job of including viewpoints that criticize his own, and some that even criticize Hart's article as well, all the more impressive given the veneration that many still hold for that name. If a disadvantage in assembling a scholarly symposium is that the subject matter may be dry and abstract to those outside the fold, a great advantage is that the inclusion of different authors can allow for a possibly infinite variety in viewpoint, tone and writing style, which is the stuff of debate and stimulation.

The articles that Lynch collected and edited make a great representation of arguments that clash with, interweave over, contest and ultimately complement each other. While Hart's article has quite a dry tone and convoluted structure, and Lynch had no choice in allowing that to remain if he was to

reproduce it as originally published, the contemporary essays display greater stylistic constraint and are all readable, thorough and interesting. The reader can tell that the contributors enjoyed paying their respects, and some of the articles elicit chuckles at turns. If you enjoy criminal law philosophy, you will surely enjoy this work. But even if you are devoted wholly to civil matters, you should enjoy the varied writing styles, the ample food for thought and the debate that keeps a lawyer's mind alive.

Ultimately, both the blessing and the curse of a legal philosophy anthology are that more questions are raised than answered. Lynch's book is no different in this regard, but that is a hallmark of success for the mission that he set out to accomplish—to stimulate debate and to present viewpoints, including his own but accommodating criticisms. The criminal justice system, and indeed the entire legal system, is the better for being reminded that lawyers work within a framework that encourages ongoing and vital support for the rule of law, all in the name of justice.



**Stephen A. Shea** is a 2007 *cum laude* graduate from the University of Georgia School of Law. During law school, he compet-

ed on moot court, edited for the *Journal of Intellectual Property Law*, served as vice president of the American Constitution Society and was awarded the Tara Baker Memorial Scholarship. Now, he enjoys reading biographies, doing pro bono litigation for civil rights, cooking, and playing with his dog, Apollo. Shea is a member of the State Bar of Georgia and can be reached at SAShea@gmail.com.

## Endnote

1. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).



## The Activist: John Marshall, *Marbury v. Madison*, and the Myth of Judicial Review

by Lawrence Goldstone,  
Walker & Company,  
304 pages

reviewed by John C. Bush

As the confirmation hearings for [U.S. Supreme Court nominee \_\_\_\_\_]<sup>1</sup> approach, Lawrence Goldstone's *The Activist: John Marshall, Marbury v. Madison, and the Myth of Judicial Review* presents a timely examination of the Court's development. Along the way, Goldstone treats the book's titular character, John Marshall, as one player in a larger cast from which the Court's most powerful tool—judicial review—eventually emerges.

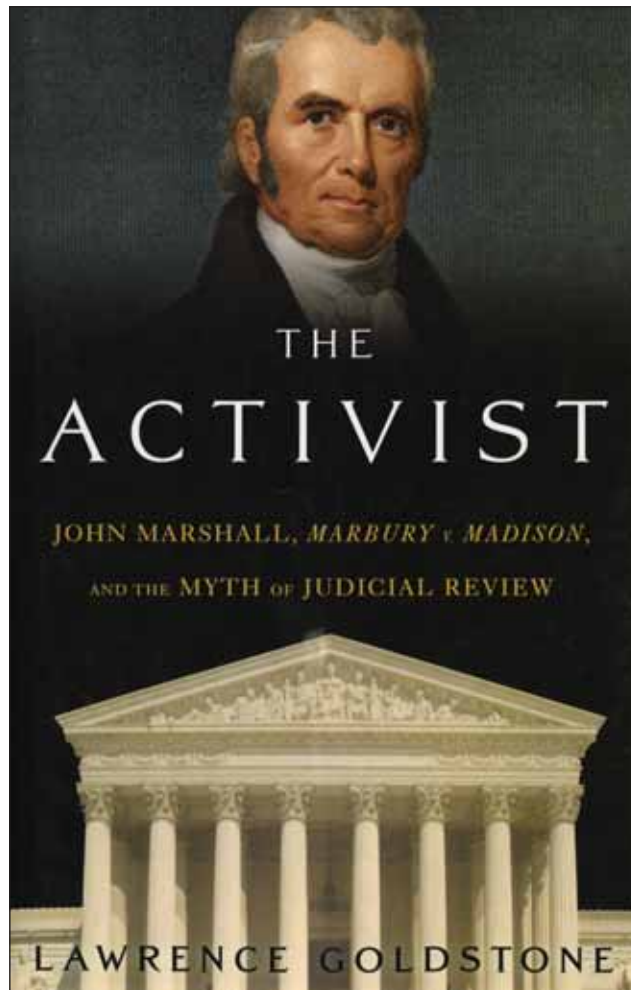
Goldstone examines the judiciary through a political lens, in which the Court's very existence is often in question. During the Constitutional Convention, delegates debated whether a distinct federal court system was even necessary. Anti-Federalists noted that each state already had its own court system in place, and some viewed potentially inconsistent application of federal law through those systems as a positive reinforcement of state sovereignty. The concept of judicial review—that courts have power to invalidate actions of the legislative and executive branches—went almost entirely unmentioned at the convention and was only mentioned briefly afterward in the *Federalist Papers*. Overall, concerns about the judiciary were secondary to more pressing ratification issues, and therefore, Article III left much of the judiciary's structure and authority to Congress.

Once the Constitution was ratified, nominating justices to the Supreme Court necessitated more immediate political considerations. Many revolutionary-era figures lobbied to be chief justice, but George Washington, Goldstone writes, needed someone who would help enforce the Treaty of Paris that had ended

appointments. The job was a difficult one with few rewards. Justices faced difficult travel by horseback throughout their assigned circuits, and legislation somewhat marginalized the Court to clerical duties. Meanwhile, the supposed security of lifetime appointment was tenuous, given the belief that justices could be impeached upon power changes in Congress.

The first such power change occurred in 1801, when Thomas Jefferson's Republicans displaced Federalists from the presidency and Congress. Federalists were left in control of only the Supreme Court, and that control seemed short-lived. Goldstone presents John Marshall as an able Federalist politician and administrator who became chief justice with two competing priorities: to promote Federalist policies and to avoid overreaching that would prompt his impeachment. Goldstone identifies a series of decisions in which Marshall balanced these competing interests by asserting a general legal principle consistent with Federalist views of the Constitution while ultimately ruling in favor of the Republican-leaning side.

Goldstone interprets *Marbury v. Madison*<sup>2</sup> as the ultimate political balancing act that would have far-reaching effects. To rule in favor of the Federalist claimant seeking redress against the Republican administration would risk retaliation by that administration, including Marshall's impeachment. Conversely, ruling for the administration, which was actively undoing Federalist policies, would further marginalize the remaining Federalist and Supreme Court power. The Marshall Court navigated these



the Revolutionary War, particularly the treaty's provisions that required American debtors to repay their British creditors. Washington ultimately chose John Jay, Goldstone argues, because Jay's experience as a diplomat provided reassurance that the Federalist position on the treaty would be enforced.

The political allure of the Supreme Court, however, would fall dramatically over the next decade. Some nominees even refused President John Adams's

obstacles by asserting the Court's power to review Republican legislative and executive acts while, on questionable intellectual grounds, denying the Federalist claimant's suit. From that point forward, the Court would assert the power to invalidate actions by the other two branches, and this authority would elevate the Court to prestige that it had not previously held.

Goldstone concludes that Marshall "was more than willing to subordinate law to politics. But rarely if ever did he subordinate politics to the law." Goldstone argues that the judicial branch, in carefully asserting Federalist principles, was as political as the executive or the legislative branches during Marshall's time, and that, further, politics still envelop the Court. Nonetheless, Goldstone does not argue that the Court's

use of judicial review is misplaced or inappropriate. Instead, he sees it as a power somewhat envisioned by the founders but that the founders would have provided greater checks and balances to its modern application.

Although interesting, Goldstone's book occasionally lacks cohesion and focus. For instance, Goldstone presents non-judicial issues that the Constitutional Convention debated to provide historical context, but his excessive discussion of them often overshadows the judiciary as the book's focus. Similarly, this broad background discussion makes Marshall more of an important recurring character than the titular focus. Ironically, this tack also reinforces the judiciary's relatively minor role at the country's founding.

As Washington, D.C., prepares for confirmation hearings on a new

justice, Goldstone's book reminds us how much has changed since figures turned down presidential appointments to the Supreme Court and why groups will now spend millions of dollars to influence those hearings.



**John C. Bush** is an associate at Bryan Cave Powell Goldstein, where his practice focuses on technology and intellectual prop-

erty issues. He received his undergraduate degree from Duke University and his law degree from Vanderbilt University. Bush is a member of the *Georgia Bar Journal* Editorial Board.

## Endnotes

1. Alternatively: "David Souter's replacement"
2. 5 U.S. (1 Cranch) 137 (1803).

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## The Associate

by John Grisham,  
Doubleday, 384 pages

reviewed by Seth Jason Sabbath

*The Associate* by John Grisham examines the choices that a first-year associate makes between right and wrong while working at a distinguished law firm in New York City. The twist is that he is being black-mailed by a very powerful force into making the wrong choices.

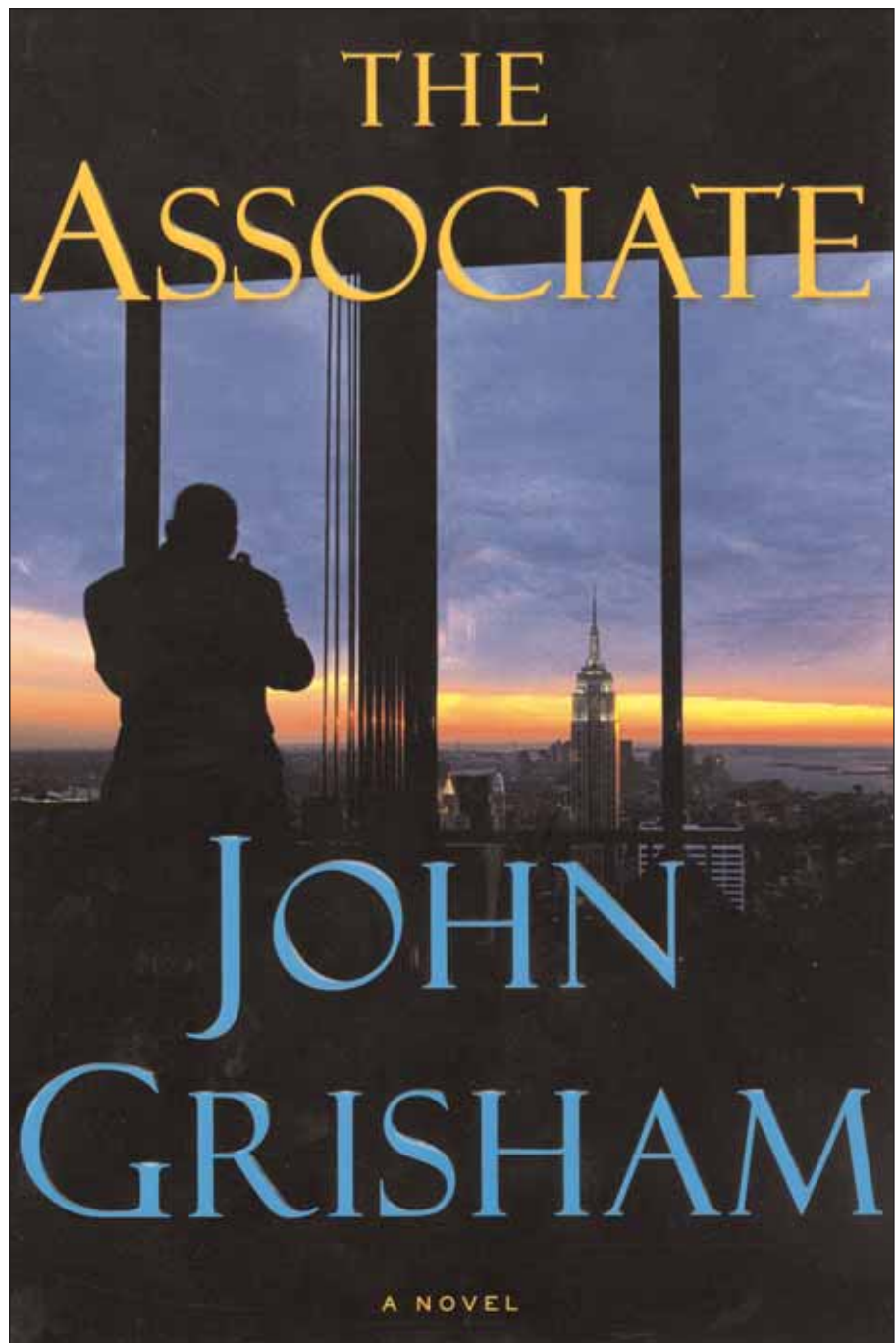
The associate is Kyle McAvoy. His father is a small-town lawyer, and Kyle grew up working in his office, helping out. Kyle's father is an honest, decent man and stands as a symbol of what a lawyer should be and what Kyle aspires to be.

Kyle graduated high school with honors, where he was a star athlete and an Eagle Scout. He then attended Duquesne University on a basketball scholarship. At Duquesne, he also graduated with honors, was a member of a number of student organizations and was president of a fraternity.

After college, Kyle was accepted into Yale Law School where he held the prestigious job of editor-in-chief of the *Yale Law Journal*. He had a wonderful girlfriend and was well-respected by his classmates and teachers. His life was going exactly as planned—that is, until he was visited by a ghost from his past.

While in college Kyle was involved in an alleged incident at a fraternity party. He and several of his fraternity brothers were accused of the rape of a fellow student, Elaine Keenan. To complicate matters, there had always been a rumor that someone had taken a video of the alleged rape, showing two of Kyle's fraternity brothers with Elaine while Kyle himself was passed out in the room. Kyle remembers very little from the night of the alleged rape and does not know whether an actual video of the incident exists.

The Pittsburgh Police Department investigated the



alleged crime. It was discovered that Elaine was known as a wild child and a “groupie” who had spent a lot of time at Kyle's fraternity house sleeping with many of the brothers. She was determined to be an unreliable witness, and the alleged video was never found. The Pittsburgh Police eventually ended their investigation, and no charges were filed. At the time, Kyle and his fraternity brothers believed that the whole situation was behind them, forever to be buried in the past.

About to graduate from Yale, Kyle is deciding whether to take a public service job with Piedmont Legal Aid, his preferred choice, or a private-sector job with the law firm of Scully & Pershing, where he would be working for corporate clients and earning \$200,000 a year, when he is approached by several men claiming to be FBI agents.

The agents have a copy of the missing video, confirming the events of that evening. The agents tell Kyle that although he was not a perpetrator, he could still be



charged as an accessory to rape. Kyle sees his future disintegrate before his own eyes.


The story takes yet another unexpected turn when Kyle learns that the men harassing him are not agents; they are job recruiters, hired to ensure he takes the job at Scully & Pershing. If he refuses, the video will find its way to the police. Kyle sees no way out, so he takes the job, disappointing his family, friends and teachers, none of whom know that he has been blackmailed. Even more important, he disappoints himself.

After taking the job at Scully & Pershing, Kyle is asked to steal privileged information regarding a pending lawsuit that is gearing up for trial. The lawsuit involves two powerful defense contract firms that are in competition with each other. The opposing firms are also in competition with each other. Billions of dollars are at stake. Both contract firms and both law firms will do anything to win. As Kyle finds out, they are willing to cheat, steal and even kill.

Kyle was chosen by the agents because he is a very intelligent and personable young man who has the ability to quickly interject himself deep into the case. He begins as a first-year associate with little access to information, but earns the partners' trust and is

given more responsibility and therefore more access to the sensitive information.

As Kyle becomes more and more involved in the pending lawsuit, he begins to examine himself as he is forced to make difficult ethical decisions. On the one hand, he understands that what he is doing is wrong; on the other hand, he feels that he has no choice, as his life can be forever changed by his blackmailers.

Grisham, a former attorney, does a superb job of illustrating not only Kyle's inner struggle, but also the struggle that all attorneys go through when their job requires them to make tough ethical decisions, whether large or small. As always, Grisham's writing style is easy to read, and the book takes some very interesting plot turns. *The Associate* can be summed up as a classic Grisham legal thriller. 



**Seth Jason Sabbath** is an associate who practices primarily in the workers' compensation section at Constangy, Brooks & Smith. He attended college at the University of the South in Sewanee, Tenn., and law school at Mercer University in Macon.

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<b>JUN 24</b>	NBI, Inc. <i>Types of Damages—Overview and Update</i> Atlanta, Ga. 1.5 CLE Hours	<b>JUL 16-18</b>	ICLE <i>Fiduciary Law Institute</i> St. Simons Island, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 12 CLE Hours
<b>JUN 24</b>	Practicing Law Institute <i>Audit Committee Workshop 2009</i> Atlanta, Ga. 6 CLE Hours	<b>AUG 5-6</b>	ICLE <i>Real Property Law Institute—Replay</i> Atlanta, Ga. See <a href="http://www.iclega.org">www.iclega.org</a> for location 12 CLE Hours
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<b>JUN 26-27</b>	ICLE <i>Southeastern Admiralty Law Institute</i> New Orleans, La. See <a href="http://www.iclega.org">www.iclega.org</a> for location 9 CLE Hours	<b>AUG 12</b>	Lorman Education Services <i>Medical Records Law</i> Savannah, Ga. 6 CLE Hours

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# Notice of Filing Formal Advisory Opinion in Supreme Court

## Second Publication of Proposed Formal Advisory Opinion Request No. 06-R1 Hereinafter known as “Formal Advisory Opinion No. 09-1”

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, 2009.

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 or 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 Formal Advisory Opinion 09-1

STATE BAR OF GEORGIA  
ISSUED BY THE FORMAL ADVISORY OPINION  
BOARD  
PURSUANT TO RULE 4-403 ON APRIL 3, 2009  
FORMAL ADVISORY OPINION NO. 09-1

### QUESTION PRESENTED:

Is it permissible for an attorney to compensate a lay public relations or marketing organization to promote the services of an attorney through the advertising

means listed in Rule 7.2 of the Georgia Rules of Professional Conduct?

### SUMMARY ANSWER:

Yes. An attorney may utilize a lay public relations or marketing organization to promote the services of the attorney through the advertising means listed in Rule 7.2 of the Georgia Rules of Professional Conduct if:

- (1) The attorney pays a flat or fixed fee (unrelated to the actual number of people who contact or hire

the attorney and unrelated to a percentage of the fee obtained for rendering legal services) for the rights to receive communications from potential clients generated by the marketing;

(2) The communication of the lay public relations or marketing organization is not false, fraudulent, deceptive or misleading;

(3) The fees paid by the attorney to the organization are the usual and reasonable fees charged by the organization; and

(4) The organization does not go beyond the ministerial function of placing callers in contact with participating attorneys based upon the attorney's geographical location.

#### **OPINION:**

Rule 7.3(c) of the Georgia Rules of Professional Conduct addresses the permitted role of lay public relations or marketing organization in promoting an attorney's services. The Rule provides in part:

(c) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client; except that the lawyer may pay for public communications permitted by Rule 7.1 and except as follows:

...

(4) A lawyer may pay the usual and reasonable fees charged by a lay public relations or marketing organization provided the activities of such organization on behalf of the lawyer are otherwise in accordance with these Rules.

It is sometimes difficult for an attorney to discern the line between payment for legal advertising that is permitted under Rule 7.1 and payment for a referral that is prohibited under Rule 7.3(c), especially in the context of television and internet media. Rule 7.3 outlines the exception for an attorney to advertise utilizing a lay public relations or marketing organization; however, the role of a lay public relations or marketing organization is not defined by the Georgia Rules of Professional Conduct. Group advertising such as provided by lay public relations or marketing organizations has been addressed by the American Bar Association and several states with regard to certain television group advertising "800" numbers (e.g. "Injury Helpline").

Opinion 2001-2 of the Supreme Court of Ohio's Board of Commissioners on Grievances and Discipline draws the distinction between a payment for an advertisement and a payment for a referral by analyzing the services provided by the organization.



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When an attorney pays an entity to perform only the ministerial function of placing the attorney's name, address, phone number, fields of practice, and biographical information into the view of the public that is considered payment for an advertisement, not payment for a referral, unless the context suggests otherwise. When an attorney pays an entity for activities that go beyond the ministerial function of placing an attorney's name, address, phone number, fields of practice, and biographical information into the view of the public, the attorney may be paying for referral services.

The case of *Alabama State Bar Assn. v. R.W. Lynch Co., Inc.*, 655 S. 2d 982, 984 (1995) is insightful, as it articulates some of the distinct characteristics of group advertising as compared to a referral service. Gleaning from a 1989 report drafted by the American Bar Association Standing Committee on Lawyer Referral and Information Service, the Alabama Supreme Court noted that group advertising commercials have several distinct characteristics and they are as follows:

- (1) The commercial expressly informs the public that it is a paid advertisement for the listed attorneys;
- (2) The calls are in no way screened by the answering service;
- (3) The caller's potential legal needs are not evaluated in any way, shape or form;
- (4) No representation is made to the caller regarding an attorney's experience or skill;
- (5) A caller is forwarded to an attorney only on the basis of the geographical area in which the caller lives;
- (6) The attorney is contractually obligated to provide a consultation to the caller who resides in the attorney's geographical area;
- (7) The attorneys who pay for the advertisement are the only persons who speak with the caller concerning the caller's legal situations; and
- (8) The attorneys who participate in the advertising program pay a flat-rate fee for the advertising which is unrelated to the number of calls or types of calls that are forwarded to the attorney.

The 7.3(c)(4) "usual and reasonable fees" charged by a lay public relations or marketing organization must be unrelated to the number of calls actually submitted to

the attorney or fees generated in that the organization is paid by the attorney for the right to receive all calls from potential clients who live in a designated area.

Further, the lay public relation or marketing organization must not screen calls in an effort to make any judgment or evaluation of the needs of the caller so that all the organization does is perform the ministerial function of providing the contact information to the attorney and potential client.

Therefore payments for services that go beyond the ministerial function would be improper unless the entity is a lawyer referral service pursuant to Rule 7.3(c) of the Georgia Rules of Professional Conduct. Additionally, payments to a lay public relations or marketing organization based upon the actual number of people who contact/hire the attorney or payments based upon a percentage of the fee obtained from rendering legal services are considered payment for a referral and as such are prohibited.

Essentially, there is no real difference between a lawyer placing an advertisement on a billboard, in a phonebook or on television which lists the attorney's area of practice and contact information (as permitted by Rules 7.1 and 7.2) from a lawyer using a marketing organization to assist in the lawyer's advertising effort; however, the fees paid must not be dependent upon the actual number of potential clients forwarded to the attorney or fees generated and the organization must have no discretion in sending potential clients to the attorney which is generally based upon the geographical location of the attorney. Whenever a law-related marketing or advertising company offer services that go beyond merely a ministerial function of providing the attorney's information and/or requires payment calculated on a per call or volume-based formula, the attorney should be aware that payment to the company will be considered an improper referral fee under Rule 7.3(c).

## Endnote

1. Some of the states which have addressed this question are Alaska, North Carolina, Texas, Washington, Florida and Ohio. With the exception of Florida, all of these states, as well as, the American Bar Association, have concluded that such advertising is group advertising and is permissible.

**PLEASE NOTE:** 2009-10 dues notices were mailed May 22, and payments are due by July 1, 2009. Payments can now be made online with a credit card or you can print an invoice online for mailing a check. Visit [www.gabar.org/news/pay\\_bar\\_dues\\_online\\_or\\_print\\_invoice/](http://www.gabar.org/news/pay_bar_dues_online_or_print_invoice/). Please note that membership is unable to process credit card payments via fax. If you have any questions, please contact the membership department at 404-527-8777.





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