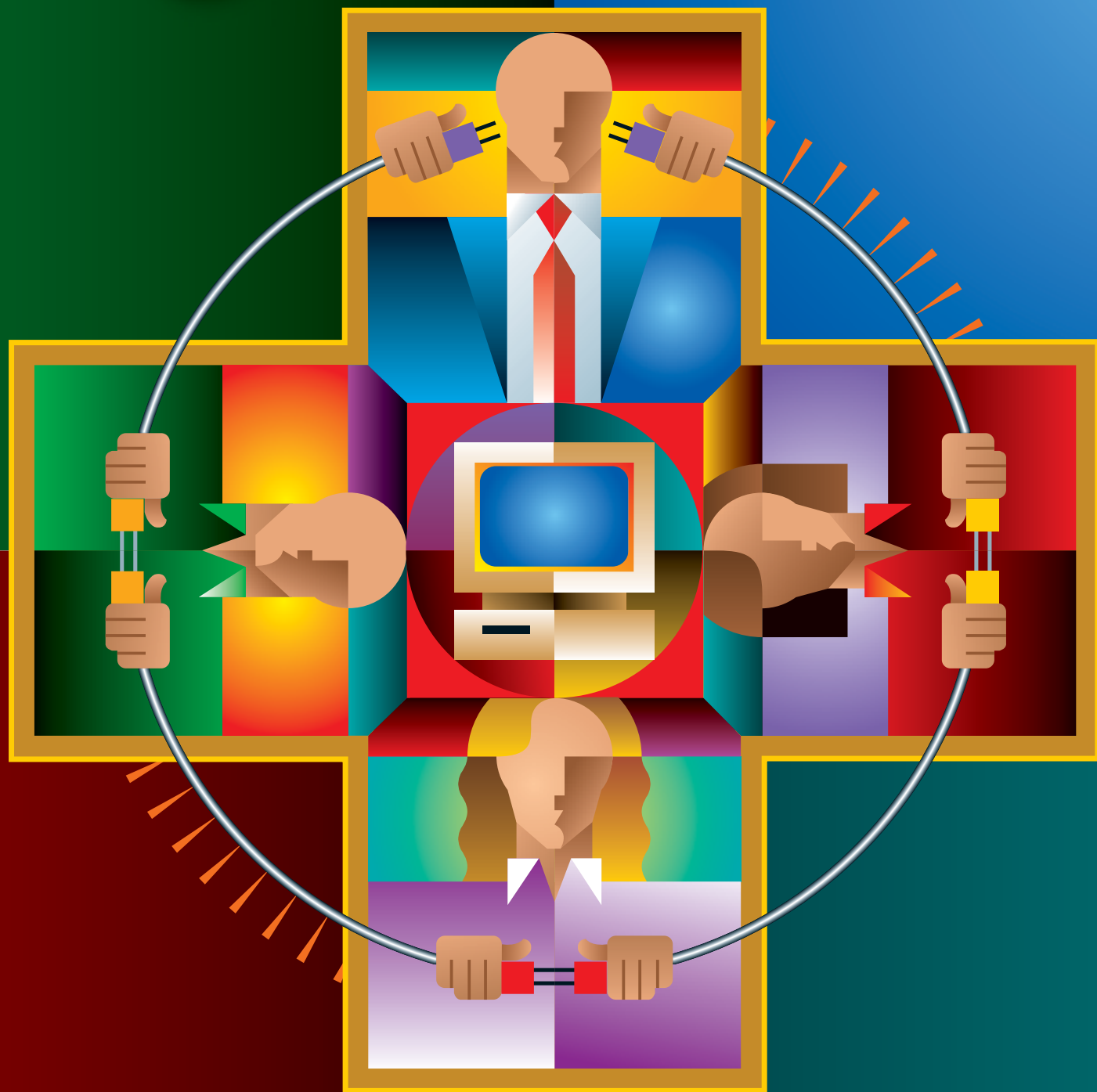


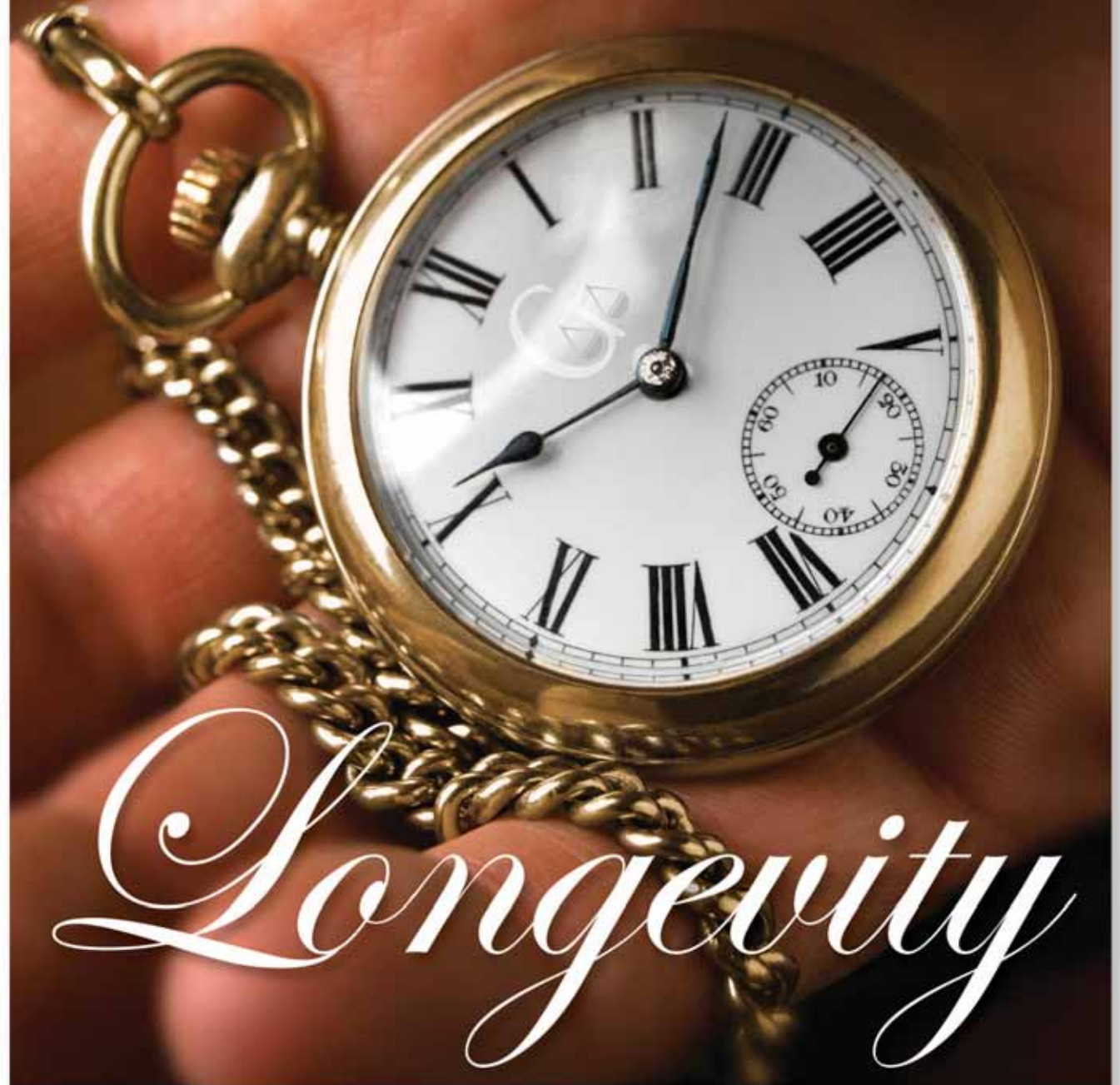


Georgia Bar Journal

February 2008 ■ Volume 13 ■ Number 5



Metadata: The Ghosts Haunting e-Documents



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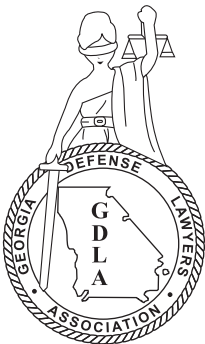


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Georgia Bar Journal

February 2008 ■ Volume 13 ■ Number 5



16



26

38



40

52



GBJ Legals

16

Metadata: The Ghosts
Haunting e-Documents

*by David Hricik and
Chase Edward Scott*

26

The Prosecuting Attorney in
Georgia's Juvenile Courts

by Charles C. Olson

GBJ Features

34

Lawyers Foundation
of Georgia 2007
Challenge Grants

by Lauren Larmer Barrett

38

Building a Lasting Legacy for
Justice: The Georgia Legal
Services Foundation Builds an
Endowment for the Georgia
Legal Services Program

by Jeanette Burroughs

40

The Butts County Courthouse
at Jackson: The Grand Old
Courthouses of Georgia

by Wilber W. Caldwell

Departments

6 From the President

10 From the Executive Director

12 From the YLD President

42 Bench & Bar

48 Office of the General
Counsel

50 Lawyer Discipline

52 Law Practice Management

54 South Georgia Office

56 Section News

60 Casemaker

64 Writing Matters

66 Professionalism Page

72 In Memoriam

76 CLE Calendar

82 Notices

86 Advertisers Index

87 Classified Resources

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D. Scott Murray, 00-01	James C. Gaulden Jr., 85-86
William Wall Sapp, 99-00	Jerry B. Blackstock, 84-85
Theodore H. Davis Jr., 97-99	Steven M. Collins, 82-84
L. Brett Lockwood, 95-97	Walter M. Grant, 79-82
Stephanie B. Manis, 93-95	Stephen E. Raville, 77-79
William L. Bost Jr., 91-93	

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by Gerald M. Edenfield



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Keep Those Cards and Letters Coming!

One thing you learn quickly as president of a diverse organization of more than 39,000 dues-paying members is how well

those members think you are doing your job. You hear a lot of nice things from people who agree with a certain action you have taken. As soon as you start to feel really good about yourself, though, you're brought back to Earth by others who disagreed with the very same action.

For example, last fall, I sent a blast e-mail to every Bar member that included editorial columns I had submitted to newspapers, commenting on some then-current news events. Naturally, I received several pats on the back from those who

agreed with those comments. But I also heard from an almost equal number who were just as strong in their disagreement.

One of our fellow lawyers even reported he had banished me to his "spam" folder and not to bother sending him any more e-mails. Another demanded that I contact him to become better educated before writing on certain issues in the future.

Well, I understand that there is a great diversity among Georgia lawyers, and plenty of differing viewpoints on what the State Bar president should or should not be doing. At least in the judicial branch of government, we don't reject dissent or free speech. We honor it, and I appreciate all feedback, both positive and negative.

Through the first eight months of my term in office, I have been committed to keeping you as well informed and involved in Bar activities as possible and will continue

to do so in the remaining months. In that spirit, I would like to take this opportunity to give you a progress report on several of the 2007-08 Bar initiatives that are under way.

"I can personally attest that there is significant public interest in the matter of lawyer advertising.... It is on their minds, and they are pleased to know the Bar is working to protect them from false and misleading ads."

Lawyer Advertising Task Force

At the beginning of the Bar year, I appointed a special task force—chaired by Mike Bagley of Atlanta—to rededicate and intensify our efforts to protect the public and the justice system by enforcing disciplinary rules against false and misleading lawyer advertising. This effort included the establishment of three-member committees in each judicial district to report false or misleading ads.

From July through November 2007, the Office of the General Counsel (OGC) received referrals from six committee members on television/radio ads, Yellow Pages ads, a bus stop ad, trade name issues and solicitation letters. Upon initial review, the attorneys addressed several of these matters

voluntarily after OGC staff contacted them. An additional advertising issue that came in as a regular grievance was resolved voluntarily. Almost all of the lawyers contacted by OGC cooperated fully and took prompt corrective action.

Seven law firms were running a total of 19 TV/radio ads. Of those, the investigative panel reviewed two series of ads and directed OGC to issue warning letters to the attorneys regarding possible rules violations. Both firms promptly made the suggested changes. Two additional TV ads are pending before the investigative panel. Of 10 solicitation letters that were reviewed, most had technical issues that needed correction. If the corrections were not made, the letters were to be presented to the investigative panel for consideration of initiating grievances.

In the previous six years, there were a total of 21 grievances involving an advertising/firm name issue. Thus, with OGC reviewing more than 30 advertising items in the first five months of this Bar year, the existence of the Lawyer Advertising Task Force and its local committees has clearly increased the Bar's attention to these issues.

I can personally attest that there is significant public interest in the matter of lawyer advertising. In numerous conversations with people, when they find out I am the State Bar president, I have not even had to bring up the subject. It is on their minds, and they are pleased to know the Bar is working to protect them from false and misleading ads.

As we continue to work to solve this problem, I encourage you to watch for and report for investigation any ads that appear to be false

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A major part of our effort to carry out the Foundations of Freedom mission this year is an enhanced television and radio advertising campaign.

or misleading. The committee members from each district are listed on page 7. Your support will ensure this problem receives the attention it needs as we move forward to improve the image of our great profession.

Foundations of Freedom

The mission statement of the Bar's Foundations of Freedom public education program is as follows:

The State Bar of Georgia believes that lawyers, as officers of the court and defenders of the Constitution, must reinvigorate their roles in redeeming the image of our justice system. Raising awareness of the American justice system and how it preserves and protects our democratic society is the mission of our Foundations of Freedom Program. It fulfills this mission by educating the public, opinion leaders and decision makers about the legal system and its promise to safeguard justice for all as a foundational American value. Our goal is to restore public confidence in the justice system by demonstrating how a robust and independent judiciary serves us all; why the justice system is worth defending, preserving and restoring; how Georgians can discern and confront efforts to compromise or dismantle the justice system; and why the struggle should matter to every American citizen.

A major part of our effort to carry out the Foundations of Freedom mission this year is an enhanced television and radio advertising campaign that has been in the planning stage for several months, is now almost "ready for prime time" and will be broadcast across the state beginning in February 2008 and

running for six months. These ads seek to convey the legal profession's role in upholding the system that protects our rights as Americans. Specific messages in this series address four fundamental concepts:

- The Constitution
- The Bill of Rights
- Trial by Jury
- Rule of Law

The campaign is the result of months of work by professional consultants and Bar leaders to develop appropriate messages, identify effective images and sounds and implement focus group feedback from across Georgia. Its funding comes from members' voluntary contributions and a foundation grant. You will see the final product soon, and I hope you will let me know your opinion of this initiative.

Jury Education Video

Also nearing completion is the Bar's production of an educational video that will be offered for presentation to citizens who report for jury duty in courthouses across the state. Among the topics covered in this video are:

- Why Americans have always cared about jury duty
- How citizens are selected to be called for jury duty
- How jurors are selected from among those who have been called
- What happens during the trial; who is present and why
- Deliberation and verdict
- Recapitulation of key ideas about why jury duty matters


A special feature of this presentation will be commentary from by U.S. Supreme Court Justice Samuel Alito, retired U.S. Supreme Court Justice Sandra Day O'Connor and

Chief Justice Leah Ward Sears of the Supreme Court of Georgia, all three of whom were interviewed specifically for this project. In addition, three Georgians who have served on juries will talk about what the experience meant to them. You might use portions of this video in speeches and presentations to civic clubs and other public groups.

The new television and radio ad campaign and completion of the jury education video are aimed at supplementing and complementing the other public education components of the Foundations of Freedom, including our "Journey through Justice" program at the Bar Center, promoting the education of Georgia students in the areas of civics and how the justice system works, and our ongoing message delivery through radio and newspaper editorial coverage.

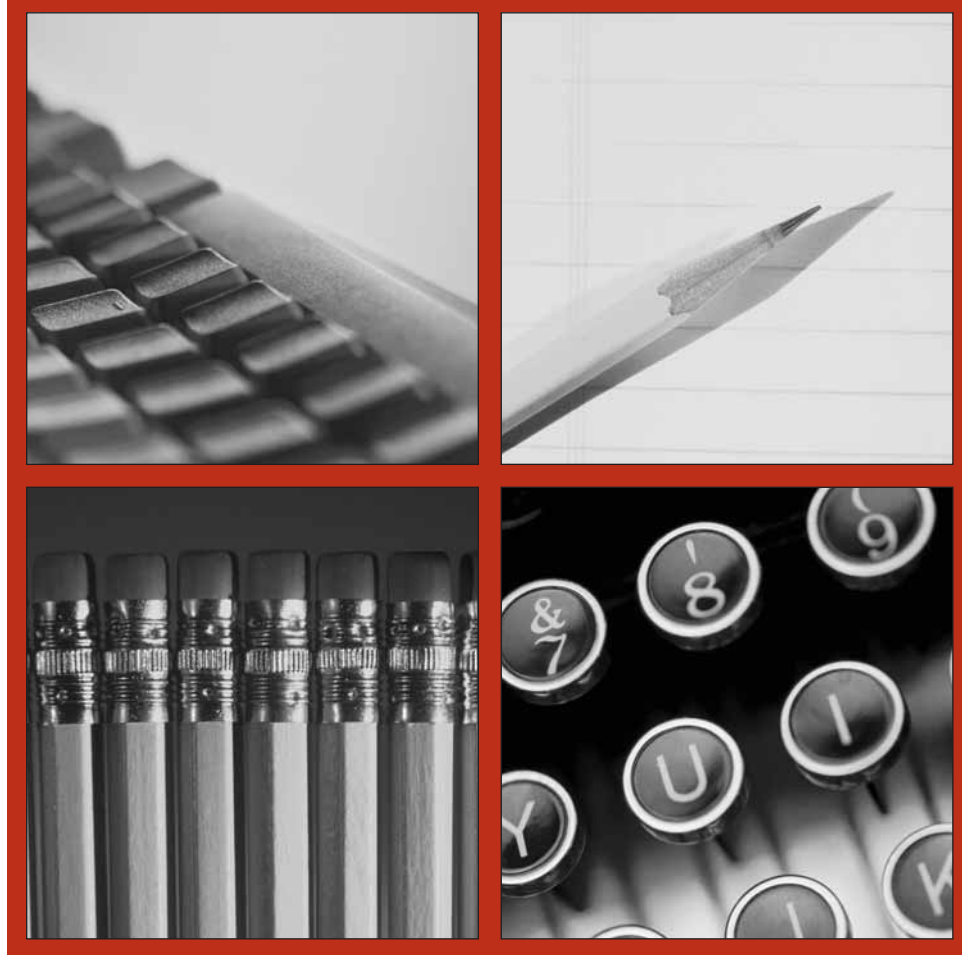
Bar leadership recognizes there is no quick solution to the threats against our justice system that have emerged over the past several decades. Restoring confidence in and strengthening our courts requires a consistent, long-term commitment.

The Lawyer Advertising Task Force, the Foundations of Freedom ad campaign and the jury education video are but three ways the State Bar of Georgia is helping protect a system that has protected the rights of all Americans for more than 200 years and continues to do so.

I encourage you to join this important effort by contributing to the Legislative and Advocacy Fund when you pay your dues and by personal delivery of these messages in your daily contacts with fellow Georgians. 

Gerald M. Edenfield is the president of the State Bar of Georgia and can be reached at gerald@ecbcpc.com.

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*Not all submitted articles are deemed appropriate for the Journal.
The Editorial Board will review all submissions and notify the author of their decision.

by Cliff Brashier



What Being a Georgia Lawyer Means to You

What does being a Georgia lawyer mean to you? The answer is likely different for all of us. Maybe it's meant a fulfill-

ing lifelong career. Maybe it's meant a way to help oth-

ers. Maybe it's meant pro-

viding for your family.

Maybe it's meant a way to

reach out to your commu-

nity. Maybe it's meant the

friendships you have made

with other members of our

honored profession. Or

maybe it's been a launch pad to a larger stage in the

form of elected office or national recognition.

I am interested in what it means to be a Georgia lawyer, so for this issue of the *Georgia Bar Journal*, we randomly selected several attorneys from our pool of 34

living past presidents and asked them: *What has being a Georgia lawyer meant to you?*

I hope you find their answers as enjoyable and inspirational as I did.

Irwin Stolz, 1970-71

Wow! For almost 50 years now it has been a major

focal point in my life. It has given me the chance to see opportunities and develop them: creating a law firm in Lafayette; being Walker County attorney; walking the streets with Jimmy Carter in 1966 and 1970, feeling his quality but never realizing how close I was to greatness—governor, president, Nobel Laureate, humanitarian and the finest man I have ever known; having a close friend and partner in Norman Fletcher, a great

former chief justice of the Supreme Court of Georgia; having great mentors like Judge Paul W. "Johnny" Painter, G.W. Langford, Fred Henry and Dr. Howard Derrick in Lafayette and Holcomb Perry, Will Ed Smith, David Gambrell and Frank Jones in State Bar activities; Chief Judge John Sammons Bell, Judges Robert Hall, Homer Eberhart and Sol Clark on the Court of Appeals;

"The most gratifying experience in those early days was something I never anticipated. My best source of business was referrals from other lawyers. I got to know most of them through working in the organized bar." —Stell Huie

serving as president of the State Bar of Georgia, the highest honor and greatest privilege any Georgia lawyer can have; being David Gambrell's partner and friend; coming to Athens in the latter part of my tenure at the Bar; having great partners in Norman Fletcher, Dennis Watson, David Gambrell, Linda Klien, Bob Brazier, Paul Anderson, Gene Mac Winburn and Lamar Lewis; working against great opponents like Frank Gleason, George Shaw, Bobby Lee Cook, Oscar Smith, Paul Hawkins, Ben Weinberg, Oscar Persons, Sidney Smith and Frank Jones. It is impossible to rank any one of the above ahead of the others. When you boil it all down, I believe it means the opportunity to serve the community, the profession, the administration of justice and the people and to have a good time doing so.

J. Douglas Stewart, 1981-82

Being a Georgia lawyer has meant to me being able to practice all over the state, unlike in some states where if you are not "from there" you cannot link to other lawyers who are. I believe that is because when I finished law school, most of the people who graduated at the same time graduated from one of the three university-connected law schools in Georgia, the student populations of which were so small that the graduates of one law school soon knew those of the others. Also, those graduates being mostly from Georgia tended to remain here and practice.

David H. Gambrell, 1967-68

The opportunity to practice law in Georgia during the past 56 years has been a wonderful blessing for my family and me. I have been able not only to make a good living but also to participate in, contribute to and enjoy a broad range of com-

munity life in our dynamic state in measures beyond reasonable expectation. And all of this has taken place in the company of a colorful and talented group of colleagues who have been my friends at the State Bar during these times. So I say, "thanks" to all.

Cubbedge Snow Jr., 1974-75

For this short essay, I am putting aside the usual thoughts about service and satisfaction in the practice of law. What I want to emphasize is a most unique and gratifying opportunity I have had in my practice. After being admitted in early 1952, my father Cubbedge Snow and I practiced together for 33 years until his death in 1985. We tried cases together and argued about the law. He never stopped urging, in fact demanding, that I "go to the library and find a case in point." To make it even better, my son Cubbedge Snow III joined our firm in 1981 and for four years there were three Cubbedges. Telephone calls could be a problem, but that was nothing compared to the bonds of our closeness. My son and I continued together until I retired in 1999. What an absolutely satisfying relationship for nearly 50 years.


Stell Huie, 1975-76

When I decided to set up my own practice, I considered several Georgia cities. It never occurred to me to look elsewhere. I concluded that I had better stay in Atlanta where I knew a few people and was known. The most gratifying experience in those early days was something I never anticipated. My best source of business was referrals from other lawyers. I got to know most of them through working in the organized Bar. Newell Edenfield, Baxter Jones Jr., Jimmy Rankin, John Strother Sr. and Philip Alston are some that come to mind. I have always been very proud of Georgia lawyers and the more experience I had with other

lawyers, the more I became convinced that ours is one of the finest bars in the country. The privilege of practicing my profession with Georgia lawyers as my colleagues and friends has been most rewarding.

Conclusion

Thomas Jefferson said, "The study of law qualifies a man to be useful to himself, to his neighbors and to the public." We thank these five lawyers, and the thousands of others like them, for proving Jefferson correct many, many times during their careers as Georgia lawyers.

As always, your thoughts and suggestions are welcome. 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 cliff@gabar.org.

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FREE PICKUP



by Elena Kaplan

Mo' Money!

Another new year; another raise for big firm associates. Many first-year Atlanta associates who were making an annual salary of \$130,000 in 2007 are making \$145,000 in 2008. These are associates who graduated from law school last May, took the bar exam in July, and were only admitted to practice last November.

Throughout my entire legal career, I have witnessed big firms throw more money in the direction of associates time and time again in an effort to attract and retain them. In the summer of 1997, I clerked at a large firm in Baltimore, Md. On the *first* day of the summer, the hiring partner announced to all the new summer associates that we had already received a raise. The pay we were promised in our offer letter was being increased by \$200 per week. While I wasn't about to turn down this found money, it did seem somewhat ridiculous that the firm would raise our summer salaries, as if we really could have gone to a competitor to get a better offer for our summer of "work."

I decided to move to Atlanta instead of to Baltimore, and the same thing happened at the firm for which I chose to work. Midway through the summer of 1998, I learned that when I started in August, rather than the \$64,000 salary stated in my offer letter, I would be paid \$72,000.

That's right! In 1998, first year associates in Atlanta made \$72,000; today, they make \$145,000. First year associate salaries in Atlanta have more than doubled in 10 years. By way of comparison, according to the U.S. Bureau of Labor Statistics, \$72,000 in 1998 had the same

buying power as \$92,838.92 in 2007.¹ Further, this doubling of compensation has not occurred in other occupations. In Atlanta during the period between 1998 and 2005, the salary for all occupations except sales rose by 22 percent, and the salary for white-collar occupations except sales rose by 48 percent (roughly one-quarter and one-half, respectively, the increase seen by associates).

One might assume that associates are thrilled with the strong acceleration in their relative worth over the past decade. Not exactly. The universal reaction to the latest raise from associ-

ates with whom I have talked is fear. I noticed the same reaction last year when there was another \$15,000 increase in first-year associate salaries. The fear stems from the fact that since first-year salaries

"Success is not now, nor has it ever been, the number of hours that an attorney is capable of billing in a single day or in a year. Success as an attorney is being respected for hard earned skills developed over time and the ability to help others with those skills."

initially crossed the \$100,000 mark in 2000, firms have steadily increased minimum billing requirements to make the economics work. Minimum billing requirements that were once 1,800 hours per year are now 2,000 hours.²

With the latest raise, associates wonder how much more can they be required to work. As it is, in order to meet the 2,000 hours, associates have to bill eight hours per day every business day of the year except for eight holidays and two days of CLE. So, 2,000 hours means that in order to take vacation, you either have to bill more than eight hours per day or work on weekends to make up for the vacation. Of course, things like office administration, recruiting, current reading, pro bono, business development, and civic/community involvement also have to be fit into the schedule.

Advent of the Billable Hour

How did we get here? It seems the rise of the billable hour relates all the way back to 1938 when Congress enacted the Federal Rules of Civil Procedure.³ The new rules broadened discovery, which resulted in an increase in the cost of some litigation and also created uncertainty about how much of a lawyer's time and effort might be required to litigate a case. At the time the new rules were introduced, fixed-fee billing was the norm. Fixed-fee billing came in the form of retainer arrangements, task-based billing and contingency fees. Interestingly, task-based billing was commonly determined by bar association standard fee schedules, which listed various legal tasks and minimum fees for each. The Supreme Court determined in 1975 that such fee schedules violated antitrust laws.

In the years following 1938, the Federal Rules were adopted by more and more states, thus increasing the amount of litigation subject to broadened discovery and increased uncertainty. Throughout the 1940s and 1950s, the increase in discovery and the failure of fixed-fee billing to fully compensate lawyers for the time and effort of the new breed of litigation resulted in an after-inflation net decrease in lawyer salaries and the practice of litigation becoming a loss leader for firms. The resultant economic pressure on lawyers caused lawyers to adopt hourly billing for litigation in the late 1950s and early 1960s. Transactional practices continued to use fixed-fee billing for a while longer. However, increased complexity of transactions due to changes in the tax code and the introduction of new laws (for example, environmental laws), along with pressure from clients who disliked the standard fee schedules, resulted in transactional practices moving to hourly billing in the late 1960s.

Growth of the Big Firm

After the movement to hourly billing, the legal profession saw a dramatic increase in the size of law firms. "In the late 1950s, only 38 law firms in the United States

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had more than 50 lawyers. In Atlanta in 1960, the largest law firm had 21 lawyers; the next largest had 16.⁷⁴ Today, there are several Atlanta firms that can boast a few hundred lawyers each and numerous others that have more than 50 lawyers.

There are likely multiple reasons for this growth. One may be that broader discovery and the increased complexity of transactions increased the need for larger firms with sufficient numbers of lawyers to staff the work. Another reason may be that with hourly billing, there are three ways you can increase your income: increase your hourly rate, increase the number of hours you work, or increase your leverage of associate and paralegal billing. The amount of your hourly rate is limited by client tolerance (although reportedly some lawyers have broken the \$1,000 per hour threshold). The number of hours you can work is limited by how many hours are in the day (and what your spouse will put up with). Leverage, on the other hand, while not entirely limitless, definitely provides great room for income growth.

Being a Successful Lawyer

Despite the vast changes in the legal profession over the past 50 years, at its core, what constitutes being a successful attorney has not changed. To be successful, an attorney must achieve two things. First, the attorney must be competent in a particular area of the law. Second, the attorney must find persons who are willing to pay for legal services in their particular area of competence, whether those persons are the ultimate clients or other attorneys who need to associate someone with the attorney's particular skills.

Success is not now, nor has it ever been, the number of hours that an attorney is capable of billing in a single day or in a year. Success as an attorney is being

respected for hard-earned skills developed over time and the ability to help others with those skills. There is no doubt that there is a correlation between the number of hours one bills and being a successful attorney. However, this correlation is a function of the fact that the more hours one invests in the practice of law, the more likely that person will develop hard earned skills with which to help others. The mere billing of hours does not guarantee that such skills are being developed. Further, the mere billing of hours is unlikely to result in the development of such skills where the hours are devoted to repetitive and unchallenging tasks.


What Associates Really Want

From my anecdotal experience, associates really want the opportunity to become successful lawyers. They want meaningful and challenging work, mental stimulation, guidance and training, client contact, and opportunity for advancement. In addition, they want to feel like what they do adds value to society, whether that is through their day-to-day billable work or through pro bono experiences. Finally, associates want a life. They want the time to pursue avocations, spend time with their family and friends, watch their children grow, and see the world.

So, the higher salaries and the increased billing pressure that comes with those salaries aren't necessarily what associates want. This is particularly true in the context of large litigation or transaction practices where the work done by associates feels less meaningful and challenging and may not provide them with sufficient opportunity to achieve competency in a particular area of the law. Of course, the dollars are very tempting; so they are reasonably effective for recruitment. However, they seem to be less effective for retention given that big firms tend to be revolving

doors for associates.⁵ Perhaps the attrition is okay from the firm's perspective. However, from the associate's perspective, it may mean that the associate did not find his or her niche and spent years treading water. And from the profession's perspective, we waste valuable talent because we fail to provide meaningful opportunities to be successful at the law.

In my last *Georgia Bar Journal* article ("Leveraging Your Mind," December 2007), I wrote that I did not think that debt was the only reason that the profession is faced with attorney dissatisfaction and attrition. The grind of the practice that results from the billing requirements and the lack of stimulating, meaningful work is, for some, another reason. In order to provide associates with the opportunity to become successful lawyers and assist the profession in retaining their talent, we all must take the long view and not limit

our definition of success to the billable hour. 

Elena Kaplan is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at ekaplan@phrd.com or 404-880-4741.

Endnotes

1. Admittedly, buying power may not be an appropriate comparison in discussing the salaries of attorneys (which presumably are linked in part to the cost charged to clients for the attorney's services). This is because buying power encompasses a variety of goods, the relative cost of some of which has either held constant or declined over time due to advances in technology and use of foreign labor. The cost of attorney time, on the other hand, is not likely to be impacted in such a manner. At present, attorney's services are very jurisdiction specific; therefore, inflation in attorney's fees is

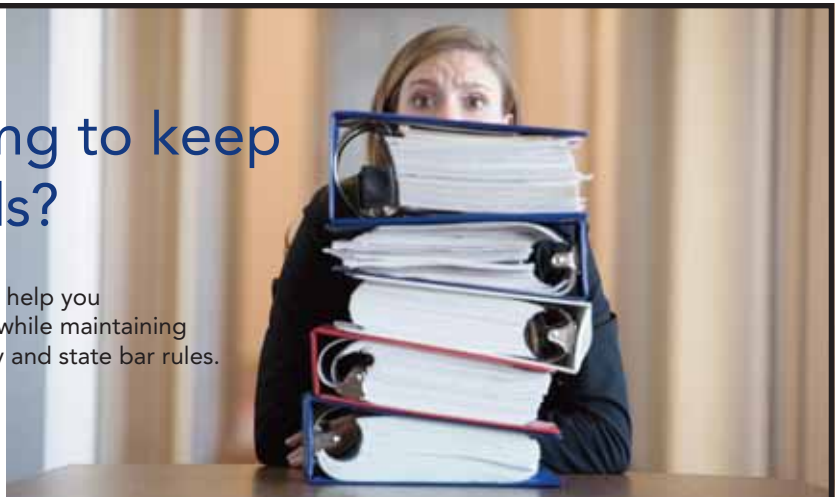
not currently held down by globalization. A similar relationship can be seen with the cost of higher education and medicine, two fields which are also not particularly susceptible to globalization.

2. In 1958, the American Bar Association opined that 1,300 billable hours per year was a reasonable expectation for lawyers absent working overtime. See Special Committee on Economics of Law Practice, *The 1958 Lawyer and His 1938 Dollar* (1958).
3. The discussion about the advent of the billable hour is drawn from George B. Shepherd and Morgan Cloud, *Time and Money: Discovery Leads to Hourly Billing*, 1999 U. Ill. L. Rev. 91 (1999).
4. *Id.* at 121.
5. In 1998, the National Association of Law Placement did a study involving 154 law firms and found that 43 percent of associates leave within three years. "[S]tudies show [firms] lose, on average, nearly a fifth of their associates in any given year." Alex Williams, *The Falling-Down Professions*, N. Y. Times, Jan. 6, 2008.

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Metadata: The Ghosts Haunting e-Documents

by David Hricik and Chase Edward Scott

Metadata is “data about data.”¹ Although it sounds quite modern, one form of metadata is no doubt familiar to every lawyer: the “fax band” on a document received by facsimile that shows the time and date the fax was received, the number from which it came, and the number of pages sent. Thus, a fax band is metadata because it is data about data. Even this simple form of metadata may reveal a lot. For example, it could be used to show that a party’s claim that she did not receive a document on a certain date is incorrect.

Metadata is not new, but it has become pervasive in the digital world in which lawyers (and their clients) live. Many programs commonly used in the office create data about data and then save that unseen information along with the visible text of the document in a sin-

gle file. Put simply, “invisible fax bands” normally accompany many of the electronic documents that we create on a daily basis. This unseen information is typically transferred along with the document in which it is embedded unless removed prior to transmission. Thus, generally, any time the file is transmitted, the invisible “fax bands” are also sent.

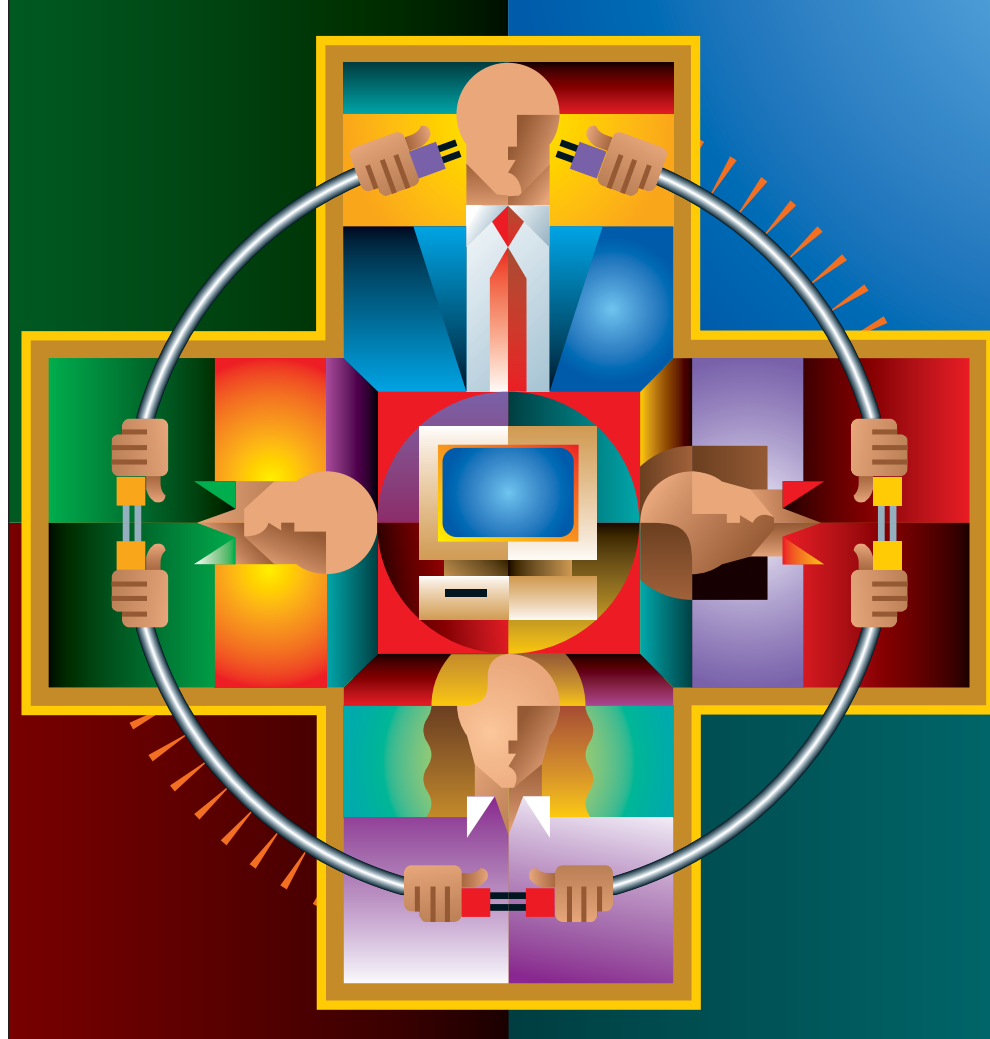
But rather than simply revealing seemingly innocuous information, such as the time and date the file was prepared, metadata often reveals much, much more. For example, many software programs permit an author to “track changes” to the text, to save “multiple undo’s” in case the author later decides to “undo” revisions made long ago, or even to insert “invisible” comments into the file. Such data could reveal a wealth of information to recipients of the electronic file, potentially resulting in a significant impact on negotiating positions, litigation strategies and numerous other sensitive scenarios.

Recently, a lawyer relayed a purportedly true story to one of the co-authors that demonstrates the potential risks of exchanging files with embedded data. He had been negotiating a contract against a well-known software maker, which, for purposes of this article, will be called “Macrosoft.” During negotiations, the lawyers for each side used a common word-processing program, Microsoft Word, to edit and propose revisions to

the contract, and they used the program's "track changes" feature to allow the lawyers to see the specific changes proposed. They e-mailed the electronic draft with this embedded information back and forth to each other between rounds of revisions. After receiving one such draft from Macrosoft's counsel, the lawyer made a few easy mouse clicks to reveal, without using anything but Microsoft Word's inherent functions, "hidden" internal comments from Macrosoft's business personnel concerning the terms of the contract, negotiating positions and bottom-lines. Thus, had Macrosoft subsequently insisted that a non-compete clause was extremely important to close the deal, the lawyer would have been able to tell if this were true or whether it was simply a negotiating ruse. Clearly, metadata is an important consideration in today's legal environment.

This article, the first of a two-part paper, explains how metadata is created and embedded in some popular programs and analyzes what obligations, if any, lawyers have to remove this embedded material from documents that they create or send on their clients' behalf. Did Macrosoft's lawyers, for example, violate duties to their client by sending embedded data along with the text of the contract to opposing counsel? This article also provides a number of useful tips on how lawyers can remove metadata from documents created in some of the more popular office software and avoid similar situations in their own practice.

The second installment (in the next issue of the *Georgia Bar Journal*) will analyze the recipient's duties. If a lawyer receives a file containing embedded data that reveals confidential or privileged information of an opposing party, is the lawyer bound by the same obligations that apply as when documents in a misaddressed envelope are received or, conversely, is the lawyer free to use and review the embedded information?



The Purpose of Metadata

Obviously, software does not embed hidden data into documents for the purpose of causing the disclosure of confidential information. Although the type and amount of embedded data stored will vary by the particular program used, the primary function of metadata is utilitarian: it is designed to help users revise, organize and access electronically-created files. Typical metadata includes, for example, information about the person who authored the document and the location (drive, folder) of where the file was saved. In addition, a file can include metadata records of past revisions. A person can, as a result, examine the changes that have been made to a file and compare them visually to any handwritten revisions to ensure that they have, in fact, been made. Thus, embedded data serves a useful and legitimate purpose.

Metadata in Microsoft Word

Microsoft Word has rightly been called the "ubiquitous" software program.² Lawyers commonly use Microsoft Word to create documents, and these files are regularly e-mailed in electronic form to clients, third parties and opposing counsel. Unfortunately in some respects, embedded data is ubiquitous in Word. Thus, the risk in electronically transferring sensitive metadata through these documents is substantial. The following outlines some of the most common embedded information that is found in Word documents.

File Properties Information

Some of the most basic metadata in a Word document can be viewed by looking in different menu items in Microsoft Word.³ A key location is in the "Properties" item, located in the "File" menu. The "Properties" for a particular document can reveal

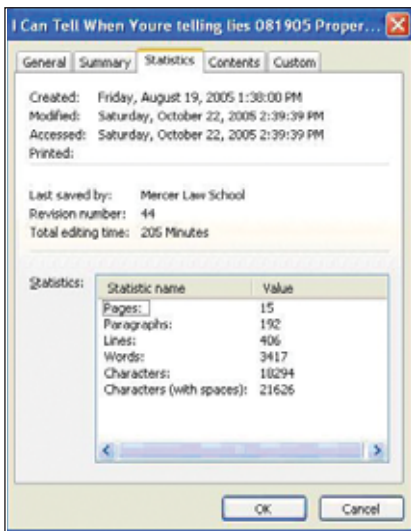


Figure 1

the author, creation dates and other information. For example, this particular article (as of about halfway through the writing process) contained the following information under File/Properties (see fig. 1).

The metadata on just that single screen reveals that the file was created in August and was still being worked on in October 2005. It also reveals that the document was in its 44th revision (meaning it had been opened and closed 44 times) and had been edited for a total of 205 minutes.⁴ Had this document been a work product for a client and had the author transmitted the file to the client in electronic form, the client would have been able to access this metadata to tell whether the lawyer had worked on the document for as long as indicated in the lawyer's fee statement. If it had been a report prepared by an expert witness sent to opposing counsel, the attorney could have discerned how long the expert had spent drafting the report. If it had been a brief prepared by an undisclosed attorney and forwarded to opposing counsel, the author's identity could have been revealed.⁵ Metadata matters.⁶

Track Changes Feature

More troubling than the basic metadata found in the File/Properties screen is the other unseen data that can accompany a Word file. Foremost, "track changes" is a feature within Word that creates a

record of every change made to a document. It has many uses: Lawyers who exchange drafts of contracts, as mentioned in the introduction, can turn on this feature to allow prior revisions of a proposed contract to be reviewed during negotiations; word processing personnel may enable "track changes" so that they can review and ensure that they have made each handwritten edit desired by a lawyer; and so on.⁷

Complications can occur, however, when the author or editor of the document does not know that the "track changes" feature was turned on. Such ignorance may be commonplace because, depending on the settings of the program, Word may not actually display the tracked changes on screen. In such a case, the user would have to specifically enable an option to view those changes. For example, this article was written with the track changes feature enabled.⁸ What you are reading now is the way the piece looked when we were finished editing it (i.e., even though "track changes" was turned on, Word did not reveal those tracked revisions on-screen). Here, though, is what the document looked like when the option to view tracked changes was enabled (see fig. 2).

If the file had been e-mailed to someone, the recipient could have easily revealed the changes and seen the revisions shown below. If

this document had been a contract instead of the present article, the metadata could have revealed to an opposing party the negotiator's mental process in working through revisions previously made to key proposed terms.⁹ Such information could clearly be valuable to the opposing party in deciding its own negotiating strategy.

Fast Saves Feature

Another form of embedded Word data is created by the use of "Fast Saves." This feature enables the user to quickly save the document without having to take the time to perform a full save. "Fast saves," however, only appends the changes to the end of the document file rather than replacing the actual edited material. In other words, fast-saved documents may retain information that the user believes has already been deleted. Thus, when "fast saves" is enabled, "deleted information remains hidden within the document."¹⁰ Opposing counsel who receives a file that has been created with "fast saves" enabled can easily open the document and recover all of the previous revisions.¹¹

Comments Feature

Embedded data can also be found in Word documents in the form of "comments." Comments is an incredibly useful feature for col-

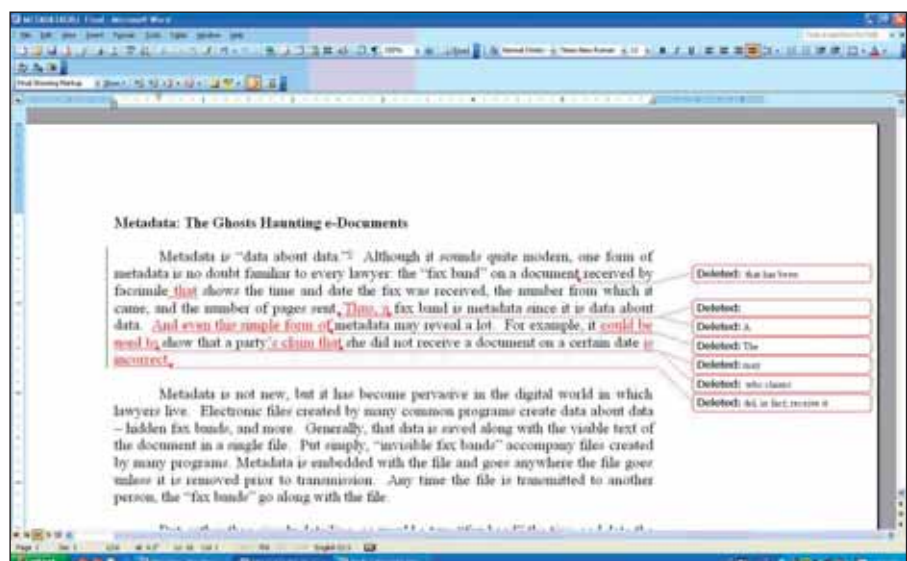


Figure 2

laboration. For example, the authors collaborated on writing this article. If one of the authors had wanted, he could have made a comment to the other to explain why he suggested a revision, included a certain concept or needed clarification on some passage. Those comments are embedded within the file and accompany it whenever it is exchanged. On the following page is a screen shot of a few lines from a chapter of a book that one of the authors co-wrote as seen in Word with the view set to show tracked changes and comments (see fig. 3).

Thus, like tracked changes, the “comments” feature of Word can leave hidden data within an electronic document that may be valuable to opposing counsel.

Versions Feature

A final example of a type of hidden metadata in Word is created by the software’s “versions” feature. If “versions” is enabled, each time the file is saved, a new version is created and stored, leaving prior

versions of the document intact. Thus, once again, if the file is transmitted to an opposing party, she could review every prior version of the document to see what changes had been made to the document.¹²

The Duty to Avoid Disclosing Embedded Confidential Information

All of the above-listed features from Word are useful to lawyers and their word processing personnel. Lawyers need to be aware, however, of the fact that these tools embed hidden data within the file. Further, they also need to recognize that their word processing staff may enable certain features without the lawyer’s knowledge.¹³ For example, if a lawyer is unaware that her secretary enabled “track changes,” and if the secretary failed to appreciate the problems created by transmitting the file with tracked changes still embedded, then disaster could strike.

The risk of unintended disclosure has always existed, however, just in a different form. Not too long ago, the primary risk was that a letter intended for a client would instead be mailed to opposing counsel.¹⁴ Similarly, a lawyer might have made handwritten comments on a contract proposal drafted by the other side, and, though intending to forward the document to the client for review, may have inadvertently mailed or faxed it to opposing counsel.

In the digital age, however, new methods for creating, editing and transmitting documents have increased the risk of unintended disclosures. Instead of misaddressing envelopes, for instance, today lawyers and their staff can inadvertently send e-mail intended for a client to opposing counsel or a third party, or may accidentally forward to opposing counsel an e-mail received privately from a client.¹⁵ And, as discussed above, electronic files can now reveal more information than drafts from

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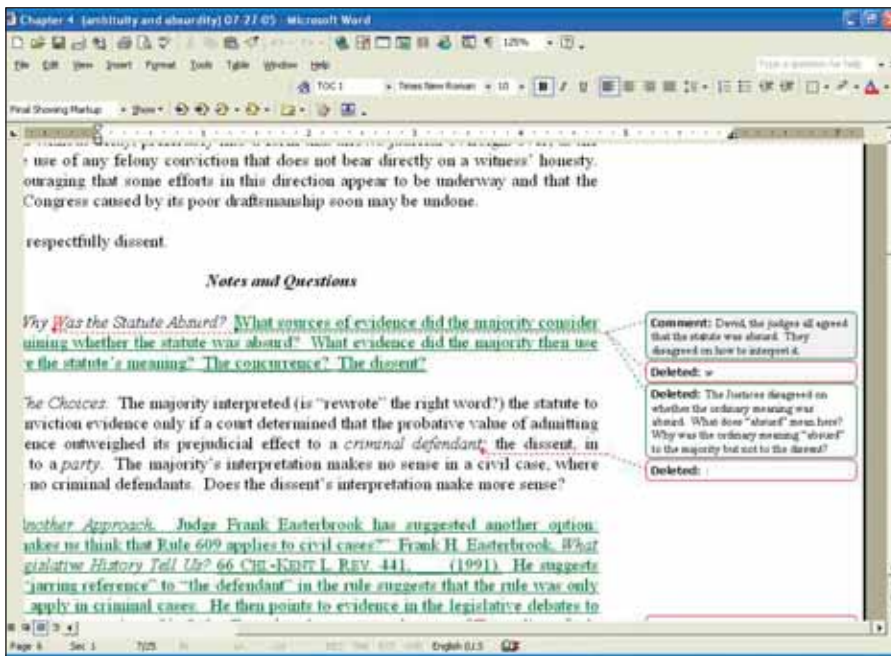


Figure 3

the past—they “can reveal a cache of information, including the names of everyone who has worked on . . . a specific document, text and comments that have been deleted, and different drafts of the document.”¹⁶ Thus, due to the inherent dangers involved with transmitting such metadata, it is important to discuss what professional duties lawyers owe to their clients to safeguard this information from disclosure.

To aid this discussion, it is helpful to emphasize the distinction between *confidential* information that a lawyer has a professional duty to keep in confidence and information that is *privileged* under the attorney-client privilege. The attorney-client privilege protects against the forced disclosure of communications between the lawyer and the client.¹⁷ The privilege is a qualified one, however, because only confidential communications *between the attorney and client* are protected from disclosure. Thus, the privilege does not apply to information learned by the lawyer from third parties or even to the lawyer’s conversations with the client if those conversations were conducted in the presence of others.¹⁸

Although the attorney-client privilege protects against the

forced disclosure of privileged communications by an opposing party, lawyers themselves are restricted, under duties of professionalism, from disclosing any “confidential information” unless authorized to do so by their client or judicial authority. Further, the “confidential information” covered by this duty is far broader than attorney-client privileged information because it encompasses all information “gained [by the lawyer] in the professional relationship with a client.”¹⁹ Given this broad definition, there is a substantial risk that metadata transmitted to a third party by an attorney will contain confidential information. Accordingly, a lawyer who knows that a document contains embedded information generally has a duty to remove it before transmitting the file.

But what about a lawyer who unknowingly transmits a document with embedded confidential information? Has that lawyer violated the duty of confidentiality? Some may argue that because “everyone knows” about metadata, any lawyer who fails to remove hidden confidential information has breached his or her professional duty.²⁰ In the authors’ experience, though, the opposite is true: The vast majority of the nearly

1,000 lawyers and Mercer faculty we have spoken to about this issue had never heard of metadata, let alone understood how to avoid creating such information or how to remove it. In further support of this less-than-scientific observation, documents that contain embedded data have routinely shown up on the web—some were even posted by large-firm lawyers who ostensibly should be the most educated about embedded data.²¹ In any event, the existence of metadata and the dangers it presents for unintended disclosure are becoming more widely known. As a result, lawyers will soon, if the time has not already arrived, be unable to avoid negligence claims or defend against bar complaints by pleading ignorance of the risks that embedded information creates. Thus, attorneys should take every effort to prevent the transmission of confidential information. Some simple methods to aid in this effort are detailed in the following section.

How To Avoid Creating And How To Remove Embedded Data

There are several approaches to addressing inadvertent transmission of metadata. This section surveys some of the means to do so.²²

Avoid Creating Embedded Data

Obviously, the easiest way to avoid the disclosure of embedded confidential information is not to create it in the first place. Microsoft and other developers have recognized the importance of maintaining the confidentiality of metadata in certain situations and in response have included in the programs options allowing users to alter the types and amount of embedded information stored in their documents. The following describes simple measures to avoid creating or to limit the creation of embedded data when using the more commonly used software.

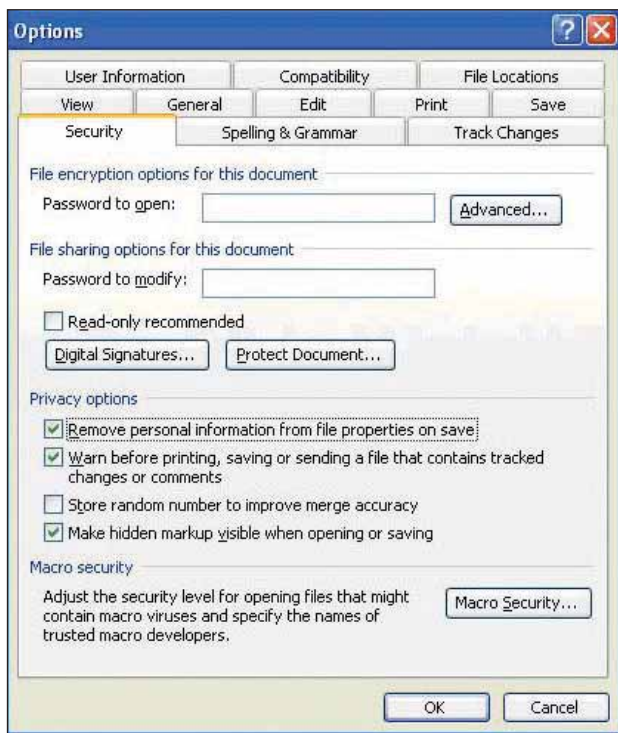


Figure 4

Microsoft Word

Under the “Tools” menu, select “Options” and click on the “Security” tab. The resulting dialog box allows the user to encrypt the file, edit privacy options, and change the level of macro security. Checking the box “remove personal information from file properties on save” prevents the personal information associated with your computer, network or registration information from attaching to the document. Thus, this option should be selected when the lawyer works on any potentially sensitive documents in Word that may be transmitted to outside parties (see fig. 4).

Other information, such as the author of the document, contained in the “Summary” tab under “Properties” within the “File” menu, may also be considered sensitive and inappropriate for opposing counsel to view. The lawyer can remove any of the offending information from the document by simply deleting the entries in the text boxes and clicking “OK” to save her revisions.²³

As noted above, use of the “fast saves” feature of Word can leave hidden data in the document. To turn off “fast saves,” go to the

“Tools” menu, select “Options,” and click on the “Save” tab. Under the “Save” tab, ensure that the “allow fast saves” box is not selected.²⁴

As also previously discussed, Word allows users to save multiple versions of the same document, thus increasing the risk for unintended disclosure of information contained in earlier versions. To determine whether any older versions of a file exist, go to the “File” menu and click on “Versions.” Any old versions attached to the document will

be listed by the date/time and creator of the saved version. To remove a version, simply click on the offending entry and select delete (see fig. 5).²⁵

Microsoft PowerPoint

Similar to Word, Microsoft PowerPoint will track, via normally hidden metadata, personal information such as the identity of the author of the document. To remove this metadata from a PowerPoint file, go to the “Tools” menu and select “Options.” Under the “Security” tab, ensure that

“remove personal information from file properties on save” is checked.²⁶ To delete the user name and initials associated with the file, click on the “General” tab in this same submenu. From here, the user can simply highlight and delete the unwanted information.²⁷

Finally, it is important to note that PowerPoint documents often contain embedded files from other programs which may, in turn, contain their own metadata. To ensure that the embedded objects are metadata-free, right click the object to be embedded and select “cut.” From there, select the desired slide, go to the “Edit” menu and select “Paste Special.”²⁸ This newly created image will be free from sensitive information concerning its source.

Microsoft Excel

Many of the same processes used to eliminate metadata from Word and PowerPoint files can also be used to eliminate personal data from Microsoft Excel. Excel, however, presents several unique methods for retrieving personal data that attorneys should be aware of prior to sending workbook files to opposing counsel. For instance, in Excel, users have the ability to hide from view individual cells, as well as rows and columns of cells. To view these hidden cells, hit Ctrl+Shift+Space Bar to select all of the cells in the workbook, then go to the “Format” menu and find the

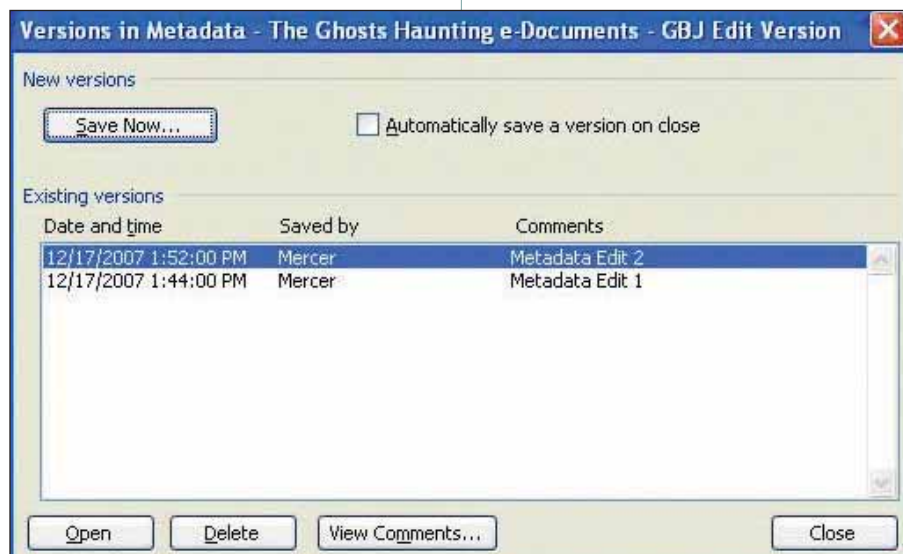


Figure 5

the information contained therein is found to be confidential (see fig. 6).²⁹ Excel users can also link formulas between multiple workbooks. Though a useful tool, these formulas may contain metadata concern-



ing the documents to which they are linked. To remove this potentially sensitive data, highlight the linking formula, right click, and select "Copy"; following this, go to the "Edit" menu and click "Paste Special"; select "Values" and click "OK." Note that this will result in the formula being deleted from the document; the resulting data, however, will remain in the workbook.³⁰

Although the above methods can help reduce the amount of metadata created and stored in electronic files, attorneys should also consider taking additional precautions to remove any other embedded information that has already made its way into a file before transmittal.³¹ There are a number of methods to accomplish this task. Because reasonable care is necessary to satisfy the lawyer's duty of confidentiality, the nature of the communication at issue will indicate what steps are required for particular communications or practices.

Large software makers know about the problems that unintentional transmission of metadata can create for lawyers, and no doubt others, and have updated their programs with additional functionality to avoid creating, to avoid transmitting, and/or to remove this embedded data. Microsoft created a free add-in, which can be downloaded from the company's website and which can effectively eliminate most sensitive information from documents created in Microsoft Office programs even where the document was drafted with a metadata-creating feature turned on.³² (Remember: metadata has utility!) The installation of this add-in will create an additional option to "Remove Hidden Data" within the "File" menu in your Microsoft Office programs (see fig. 7).

After selecting this option, the user will be asked to enter a file name for what will become the “clean” version

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of the document. Once a name is provided, the user will click next to start the scan (see fig. 8).

When the scan is complete, a text file will open that contains a summary of the scanning results.³³ The end result is an effective, easy and free solution to the problem of metadata transmission via Microsoft Office documents—you just have to remember to use it!

Saving a document in Portable Document Format (PDF) will also reduce the amount of metadata stored in the file. This process does not eliminate metadata entirely.³⁴ For many purposes, however, simply saving a document into PDF format may suffice. Documents in PDF format often cannot be easily modified, though, thereby reducing the efficiency and functionality of document exchanges using this method.


Additionally, there are also a number of commercial software “scrubbers” available for purchase.³⁵ Although these programs have differing degrees of functionality and integration with other software (such as Microsoft Outlook integration), they can all be used to scan files before they are transmitted and to remove the embedded metadata.

Unintended Disclosure Agreements

A final, less technical manner to avoid the problems associated with embedded data is to have an agreement in place with opposing counsel where the parties acknowledge beforehand that any transmission of confidential embedded data is unintentional and that any documents identified as containing such information should be deleted. Obviously, the efficacy of this option relies upon the trust of counsel, and where the mere viewing of the information would “let the cat out of the bag,” such agreements may be insufficient. Thus, either ensuring that embedded data is not created, or ensuring that it is stripped out before a file is sent, will normally be the only

effective way to address the problems of embedded data.

Conclusion

We hope that this article has educated the reader about what metadata is and how the lawyer should treat confidential embedded information, including some easy-to-use methods to reduce or eliminate metadata from documents created in the more popular office programs. The next installment of this article will address an issue that has split authorities: What happens if a lawyer fails to take the steps recommended in the current article and transmits a document to opposing counsel that contains metadata? Is the recipient free to look, or not? 



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Endnotes

1. *Definition of Metadata*, <http://wordnet.princeton.edu/perl/webwn?s=metadata> (last visited Dec. 4, 2007).
2. Andrew Beckerman-Rodau, *Ethical Risks from the Use of Technology*, 31 RUTGERS COMPUTER & TECH. L.J. 1, 32 (2004); Brian D. Zall, *Metadata: Hidden Information in Microsoft Word Documents and Its Ethical Implications*, 33 COLO. LAW. 53, 53 (Oct. 2004) (describing legal profession's widespread adoption of Microsoft Word).
3. Interestingly, most metadata is stored in the last blank space of a Word document. If, for example, you select all of a Word document

except its last space (which will appear to be blank) and then copy and paste that material into a new Word document, most metadata will not follow along. For a more technical discussion of how metadata is embedded in a Word document, see Zall, *supra* note 2, at 54.

4. To be clear, the file could simply have been open on the screen for 205 minutes. Thus, the amount of time indicated does not necessarily mean that the file was being worked on for all of those 205 minutes.
5. The kind and amount of information stored in the “Properties” file can be customized. To see whether your version has been customized, click on the “Custom” tab at the top of the “Properties” dialog box.
6. There are a number of other sources of metadata. For example, other tabs in the “Properties” dialog box depicted show where the file was stored on the author's hard drive and other information.
7. See generally James Veach, *Commutation Agreements: Drafting a Clear and Comprehensive Contract*, 854 PLI/COMM 43 (2003) (noting that track changes can be used to aid in the drafting process).
8. To turn on “track changes,” go to the “Tools” menu and to “track changes.” To see whether an open document contains tracked changes, turn on track changes and then ensure that you have selected the “final showing markup” on the “Review” toolbar that appears.
9. See Zall, *supra* note 2, at 55-56 (collecting hypotheticals on how metadata could harm clients and lawyers when transmitted to opposing counsel).
10. Toby Brown, *Special Handling: How Paper and Electronic Files Differ*, 21 GPSOLO 22, 23 (Sept. 2004). This is done by selecting “Save As” from the “File” menu, then selecting “Tools” and then “Save Options.” One option is “Allow Fast Saves.” Fast Saves is “very useful in the event of hardware failure because it reduces the chance of losing changes to a document.” *Id.*
11. *Id.*
12. See Zall, *supra* note 2, at 54-55.
13. Georgia Rule of Professional Conduct 5.3(b) requires lawyers with direct supervisory authority over a nonlawyer to “make reasonable efforts to ensure that the per-

son's conduct is compatible with the professional obligations of the lawyer[.]”

14. See generally ABA Standing Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (describing such scenarios), *withdrawn*, Formal Op. 05-437 (2005).
15. See generally Emily Eichenhorn, *Risks & Rewards: Resisting the Inclination to Abdicate to Technology*, 63 OR. ST. B. BULL. 39, 40 (2003) (describing hypotheticals); Steven L. Nelson & Jane C. Schlicht, *Upholding the Sanctity of the Attorney-Client Privilege*, 77 WIS. LAW. 8 (2004) (same).
16. Jason Krause, *Hidden Agendas*, 90 A.B.A. J. 26 (July 2004).
17. See *Bryant v. State*, 282 Ga. 631, 636, 651 S.E.2d 718, 725 (2007).
18. *Id.* at 636, 651 S.E.2d at 725.
19. GA. RULE OF PROF'L CONDUCT 1.6.
20. For example, Vincent Polley, then-chair of the ABA's Cyberspace Law Committee, has been quoted as saying that lawyers can no longer “plead ignorance when it comes to this stuff any more.” Krause, *supra* note 16, at 26.
21. See, e.g., Declan McCullagh, *AT&T leaks sensitive info in NSA suit*, <http://news.zdnet.com/2100-9588-6077353.html> (May 26, 2006) (reporting, ironically enough, on the inadvertent revelation of embedded data in a suit about improper government surveillance).
22. See generally Storm Evans, *How to Commit Malpractice With a Computer*, 29 LAW PRAC. MGMT. 56 (Mar. 2003) (“If you must e-mail or otherwise deliver a Word document, consider using macros or a utility program to strip away the metadata”); Carole Levitt & Mark Rosch, *Making Metadata Control Part of a Firm's Risk Management*, 28 L.A. LAW. 40 (Mar. 2005) (describing various means to remove metadata, including some of those discussed here).
23. *How to minimize metadata in Word 2003*, <http://support.microsoft.com/kb/825576/> (last visited Dec. 11, 2007).
24. For more information on “Fast Saves,” visit *Frequently Asked Questions About “Allow Fast Saves,”* <http://support.microsoft.com/kb/291181/>.
25. <http://support.microsoft.com/kb/825576/>.
26. *How to minimize the amount of metadata in PowerPoint 2002 presentations*, <http://support.microsoft.com/default.aspx?scid=kb;EN-US;314800> (last visited Dec. 12, 2007).
27. *Id.*
28. *Id.*
29. *How to minimize metadata in Microsoft Excel workbooks*, <http://support.microsoft.com/default.aspx?scid=kb;EN-US;223789> (last visited Dec. 12, 2007).
30. *Id.*
31. See Beckerman-Rodau, *supra* note 2, at 32-33 (suggesting that lawyers should consider removing metadata); Gerald J. Hoenig, *Technology Property*, 18 PROB. & PROP. 51 (Sept. 2004) (same).
32. To download this add-in, visit <http://www.microsoft.com/downloads/details.aspx?FamilyId=144E54ED-D43E-42CA-BC7B-5446D34E5360&displaylang=en> or search for “remove hidden data” on <http://www.microsoft.com/downloads>.
33. *Control metadata in your legal documents*, <http://office.microsoft.com/en-us/help/HA011400341033.aspx> (last visited Dec. 12, 2007).
34. See Jason Krause, *Guarding the Cyberfort*, 39 ARK. LAW. 24, 31 (2004). Suggestions, however, that pdf files contain *no* metadata are incorrect. See, e.g., 1 RONALD E. MALLIN & JEFREY M. SMITH, *LEGAL MALPRACTICE* § 2.26 (2005) (stating that conversion from Word to pdf “could eliminate meta-data information”); Hoenig, *supra* note 31. Most pdf files, however, do contain some metadata; thus, converting a Word file to a pdf file will simply result in *different* metadata being transmitted.
35. Numerous “scrubbers” can be found through Google, simply by searching for “metadata” and “scrubber.”

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The Prosecuting Attorney in Georgia's Juvenile Courts

by Charles C. Olson

Although the role of counsel for children in delinquency and other proceedings in juvenile court has been the subject of considerable discussion in legal publications in this state over the past several years,¹ the role of the prosecutor in juvenile court has not been the subject of similar discussion or debate.² There is an awareness in Georgia that children charged with a crime in juvenile court³ need access to an attorney, but little or no consideration has been given to the corresponding need to have a juvenile court prosecutor "participate in every proceeding . . . in which the state has an interest."⁴ Currently, Georgia law does not fully define the prosecutor's role or function in this state's juvenile courts. As a result, victims of crimes committed by juveniles receive significantly disparate treatment throughout the state.⁵

Article VI, Section VIII, of the Georgia Constitution creates the office of district attorney and prescribes the duties of the office. It also provides that the district attorney will "perform such other duties as shall be required by law."⁶ Thus, the role of the district attorneys vis-à-vis the juvenile courts is narrowly prescribed by Georgia law and the Constitution.⁷ Although the district attorneys have total responsibility for the conduct of criminal proceedings once a case is bound over,⁸ they do not have comparable responsibilities in juvenile court.⁹ The district attorneys' only clear mandate is to represent the state if an appeal is filed from the juvenile court.¹⁰

Prior to the enactment of the Juvenile Code in 1971, judges or probation officers conducted proceedings in juvenile court.¹¹ The 1951 Juvenile Court Act¹² did not provide for a prosecuting attorney. Although appellate court decisions indicate that the district attorneys represented the state in appeals from the juvenile court as early as 1932,¹³ generally, "no one was available to represent the state in delinquency proceedings in court . . . judge[s] . . . serv[ed] as both judge and prosecutor."¹⁴ It was not until 1967, when the U.S. Supreme Court decided in *In re Gault*¹⁵ that juveniles had a right to counsel in delinquency cases, that a need for lawyers, for either the prosecution or defense, was recognized.¹⁶ The need for a lawyer to present the case against an accused juvenile is still only partially recognized.

Although the 1971 Juvenile Code authorized defense counsel for juveniles in any case "alleging delinquency, unruliness and deprivation,"¹⁷ it did not include any provisions spelling out who was to represent the state in delinquency cases¹⁸ until 1974, when it was amend-

ed to authorize, but not require, the juvenile court to request the district attorney's office "to conduct the proceedings on behalf of the petitioner."¹⁹ If the district attorney's office declined to handle juvenile cases, the judge could appoint counsel for this purpose.²⁰

Because neither the Georgia Legislature nor local governments provided the district attorneys additional staff to handle juvenile cases,²¹ many district attorneys declined to routinely handle cases in juvenile court or only handled cases on a selective basis.²² Only the district attorney for the Atlanta Judicial Circuit is known to have assigned an assistant district attorney full-time to juvenile court prior to 1970.

Lacking a dedicated prosecutor, the assistant district attorney (or, in a few instances, the district attor-

ney) who went, often with little notice, to "handle" a case in juvenile court was in unfamiliar surroundings.²³ To begin with, the role of the prosecutor in juvenile court differed from the traditional role of a prosecutor in that the prosecutor was also expected to "consider the special interests and needs of the juvenile" ²⁴ Someone else, usually a non-lawyer probation officer, had prepared the charging instrument (petition),²⁵ and the rules of procedure bore only a slight resemblance to those in superior court.²⁶ Even the outcome of a successful prosecution, in terms of the sanctions imposed by the court, was considerably different from what was familiar in superior court.²⁷ This often led to frustrated crime victims who blamed the prosecutor.²⁸ For many prosecutors, the

call to go to juvenile court was something to be avoided if at all possible.

Although a few district attorneys began dedicating staff to support the juvenile court, beginning in 1972, juvenile judges in Clayton, DeKalb, Gwinnett and Hall counties used court orders to create separate juvenile court solicitor's offices.²⁹ The terms of these orders assigned responsibility for prosecuting delinquency cases to the juvenile solicitor, who was appointed by the juvenile court judges. This practice ended in 1991 when a trial court ruled that the procedures used to appoint and supervise the juvenile court solicitor's office in Gwinnett County were unconstitutional and violated the Canons of Judicial Conduct.³⁰

Since 1991, the number of district attorney's offices with either



juvenile divisions or assistant district attorneys assigned full-time to handle juvenile court has steadily increased. In 2007, 34 of the 49 district attorneys designated assistant district attorneys to prosecute in the juvenile court.³¹ In the larger offices, dedicated investigators, victim advocates and support staff may assist the attorneys.³² In a few counties, local lawyers serve as juvenile prosecutors either on a contract basis or through other arrangements.³³ In the remaining circuits, the district attorney's office handles delinquency cases on a case-by-case basis.³⁴

Juvenile court procedures create unique challenges for prosecutors. Unlike the situation in criminal cases,³⁵ the prosecuting attorney does not receive notice in every case when a juvenile is taken into custody for criminal conduct.³⁶ Only if the accused juvenile's conduct "would constitute a felony" is the district attorney supposed to be notified.³⁷

In criminal cases in superior or state court, Georgia law plainly imposes a duty on the prosecuting attorney to prepare the charging instrument.³⁸ In juvenile court, there is no comparable requirement that a prosecuting attorney participate in preparing or filing the charging document.³⁹ Any person having knowledge of the minor's crime may initiate a petition subject only to the requirement that "the court or a person authorized by the court has determined and endorsed upon the petition that the filing of the petition is in the best interest of the public and the child."⁴⁰ Although statutes give the court broad authority to designate the person who is to make this determination, the Uniform Rules of Juvenile Court limit this discretion to the intake officer.⁴¹ The intake officer also has the authority to "informally adjust, divert, or recommend dismissing the case, within guidelines established by the court."⁴² It is only if the alleged crime rises to the level of a designated felony that the district attor-

ney must receive written notice prior to the charges being "informally adjusted."⁴³ It is also a curious feature of the juvenile justice system that the district attorney technically represents the petitioner rather than the state in delinquency proceedings.⁴⁴

Although the recent trend has been to make "the juvenile system . . . increasingly adversarial based,"⁴⁵ to date the legislature continues to give the district attorney's office only a limited role in the adjudicatory process. For example, in 2003, the General Assembly added O.C.G.A. § 15-11-75, which provides for discovery in juvenile delinquency cases. Unlike its counterpart in Title 17,⁴⁶ this statute repeatedly refers to "the prosecuting attorney or the entity prosecuting the case,"⁴⁷ thus clearly indicating that the legislature recognizes the fact that district attorneys may not control juvenile court prosecutions.

In most delinquency cases, it is only after the petition has been filed that the court may direct the district attorney's office to conduct the proceedings.⁴⁸ In 1980, the legislature granted district attorneys the authority to move to dismiss a petition on the basis that there was insufficient evidence to support it.⁴⁹ Today, the juvenile court must dismiss a petition "upon the motion of the district attorney setting forth that there is not sufficient evidence to warrant the further conduct of the proceeding."⁵⁰ Since 1984, if the district attorney's office handles delinquency cases, it has "access to all court files, probation files, hearing transcripts, delinquency reports, and any other juvenile court records which may be of assistance to the district attorney or staff member in the conduct of such delinquency proceedings."⁵¹ In 2004, assigned juvenile prosecutors received access to non-privileged information in the Department of Juvenile Justice's Juvenile Tracking System.⁵²

District attorneys also interact with the juvenile justice system

through their ability to request that cases be transferred to another court. Although the original juvenile court act contained language giving the juvenile court exclusive jurisdiction over all children under the age of 17,⁵³ the superior courts retained jurisdiction over crimes committed by juveniles between the ages of 14 and 17 that are punishable by death or life imprisonment.⁵⁴ The 1971 Juvenile Code also provided that any delinquency case could be transferred to other courts for trial.⁵⁵ In 1994, dissatisfaction with the way that the juvenile justice system dealt with serious violent felonies⁵⁶ (murder, voluntary manslaughter, rape, aggravated sodomy, aggravated child molestation, aggravated sexual battery and armed robbery with a firearm), led the governor and General Assembly to strip juvenile courts of original jurisdiction over these offenses.⁵⁷ District attorneys could transfer these cases back to juvenile court prior to indictment only "for extraordinary cause."⁵⁸

Today it is not unusual for some district attorney's offices in those judicial circuits with designated juvenile prosecutors to be involved in the preparation of the complaint, notwithstanding the lack of clear legal authority. In some of these offices, the juvenile prosecutor functions more or less in the manner described in standards promulgated by the American Bar Association, the National District Attorneys Association and other organizations.⁵⁹ The ambiguity of the current juvenile code, however, leaves many district attorneys, juvenile prosecutors and judges unsure what their role is.⁶⁰ For the public, especially crime victims who look to district attorneys to represent their interest, the result is confusion, misunderstanding and distrust.⁶¹

The legislature may have the opportunity in the near future to clarify the role of the district attorney in juvenile court. For the past three years, several groups, includ-



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ing a 2005 legislative study committee,⁶² have undertaken critical reviews of the current Juvenile Court Code.⁶³ These groups should present their recommendations to the Georgia General Assembly after the 2008 session. It is hoped that these efforts will permit the General Assembly to resolve the ambiguities of the current law so that crime victims have a voice in juvenile court. 



Charles C. Olson is general counsel for the Prosecuting Attorneys' Council of Georgia. The opinions and comments con-

tained herein are those of the author and do not represent the official policy or position of the Prosecuting Attorneys' Council of Georgia. The author wishes to thank Cal Leipold III, a third-year law student at Georgia State University, for his assistance in the preparation and editing of this article. Olson can be reached at Suite 400, 104 Marietta St., Atlanta, GA 30303-2743.

End Notes

1. See, e.g., Sarah Gerwig-Moore & Leigh S. Schroepe, *Hush, Little Baby, Don't Say a Word: How Seeking the "Best Interests of the Child" Fostered a Lack of Accountability in Georgia's Juvenile Courts*, 58 MERCER L. REV. 531 (2007); Len Horton, *Foundation Holds Children at Risk Symposium*, 12 GA. B.J., Feb. 2007, at 30; Beth Locker & Melissa Dorris, *A Child's Right to Legal Representation in Georgia Abuse and Neglect Proceedings*, 10 GA. B.J., Aug. 2004, at 12; Christine A. Sullivan, *Statutory Reform in the Georgia Juvenile Court System: Juvenile Competency Issues Finally Addressed*, 15 GA. ST. U. L. REV. 879 (1999); Steven C. Teske & Melissa Dorris Carter, *The Next Generation of Child Advocacy*, 13 GA. B.J., Aug. 2007, at 22.
2. See Institute of Judicial Administration ("IJA") and American Bar Association ("ABA")

STANDARDS RELATING TO PROSECUTION OF JUVENILES (1977) [hereinafter "IJA/ABA"]. The exception is James C. Backstrom, *Trial Advocacy: The Role of the Prosecutor in Juvenile Justice: Advocacy in the Courtroom and Leadership in the Community*, 50 S.C. L. REV. 699 (1999).

3. Georgia considers crimes committed by children (those under 17 years of age) to be "delinquent acts" rather than criminal offenses, see O.C.G.A. § 15-11-2(6) (2005); In the Interest of D.T.C., 226 Ga. App. 364, 367, 487 S.E.2d 21, 24 (1997), unless the crime is punishable by "loss of life, imprisonment for life without possibility of parole, or confinement for life in a penal institution," *State v. Henderson*, 281 Ga. 623, 623, 641 S.E.2d 515, 516 (2007), or is transferred by the juvenile court to the superior or state court. See *J.G.B. v. State*, 136 Ga. App. 75, 77, 220 S.E.2d 79, 81-82 (1975).
 4. IJA/ABA, *supra* note 2, § 1.1A; see also Nat'l District Att'y Ass'n, NAT'L PROSECUTION STANDARDS. § 92.1(a) (2d ed. 1991) [hereinafter "NDAA"]; Nat'l Advisory Comm'n on Crim. Justice Standards & Goals, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 15.1 (1976).
 5. This problem is not unique to Georgia. According to a report from the U.S. Department of Justice, "[T]here is still a huge discrepancy between victims' rights in juvenile courts and adult courts. The great majority of victims of juvenile offenders feel excluded from the workings of the juvenile court." Katheryne M. Turman, U.S. Dept. of Justice, Office of Justice Programs, Office for Victims of Crime, *Victims, Judges, and Juvenile Court Reform Through Restorative Justice, Message from the Director (Katheryne M. Turman)*, at 1 (2000), available at http://www.ojp.usdoj.gov/ovc/publications/bulletins/vjj_10_2000_2/welcome.html (site visited Nov. 28, 2007) [hereinafter *Victims, Judges and Juvenile Ct. Reform*].
 6. GA. CONST. art. VI, § 8, ¶ 1(d); see also O.C.G.A. § 15-18-6 (2005).
 7. Under the rules of statutory construction that apply in this State, in particular the rule *expressum facit cessare tacitum*, because the legisla-
- ture has expressly given district attorneys only certain selected duties in juvenile court, "the inference is stronger that those omitted are intended to be excluded than if none at all had been mentioned." *Morton v. Bell*, 264 Ga. 832, 833, 452 S.E.2d 103, 104 (1995); see *Hackworth v. Bd. of Educ.*, 214 Ga. App. 17, 22, 447 S.E.2d 78, 82 (1994); Ga. Op. Att'y Gen. 2000-2; Ga. Op. Att'y Gen. 98-18. By comparison, the Uniform Juvenile Court Act, on which Georgia's Juvenile Code is based, see Forward to Title 24A, 9A GA. CODE ANN., p. 393 (Harrison 1976 ed.), specifically provides that the prosecuting attorney shall conduct all delinquency proceedings. UNIF. JUVENILE COURT ACT (U.L.A.) § 24(c). Legislation enacted in 2002 reinforces this position.
- In 2002 the General Assembly amended O.C.G.A. § 15-11-28(b)(2)(c) to specifically require the district attorney to "cause a petition to be filed in . . . juvenile court" if a SB 440 case is not going to be prosecuted in Superior Court. "[W]here the constitution creates an office and prescribes the duties of the holder thereof, and declares that other duties may be imposed on him by statute, he has no authority to perform any act not legitimately within the scope of such statutory and constitutional provisions." *Walker v. Georgia Ry.*, 146 Ga. 655, 656, 92 S.E. 57, 58 (1917); see O.C.G.A. § 45-6-5 (2002); *Boykin v. Martocello*, 194 Ga. 867, 870, 22 S.E.2d 790, 792 (1942).
8. *King v. State*, 246 Ga. 386, 389, 271 S.E.2d 630, 634 (1980) ("[A] Georgia district attorney is of counsel in all criminal cases or matters pending in his circuit. This includes the investigatory stages of matters preparatory to the seeking of an indictment as well as the pendency of the case."); *State v. Trice*, 150 Ga. App. 588, 589; 258 S.E.2d 270, 271 (1979) ("There is no provision of law allowing a private citizen to procure the services of a private practitioner to file appeals" in criminal cases.).
 9. O.C.G.A. § 15-11-64.1 (2005) ("In any delinquency proceeding in which a petition has been filed, the district attorney or a member of the district attorney's staff shall conduct the proceedings on behalf

- of the state if requested to do so by the juvenile court if the state is not otherwise represented by a solicitor of the juvenile court.”).
10. GA. CONST. art. VI, § 8, ¶ 1(d) (“It shall be the duty of the district attorney to represent the state . . . in all cases appealed from . . . the juvenile courts of that circuit to the Supreme Court and the Court of Appeals . . .”).
 11. See Comment to former Georgia Code § 24A-602, reprinted in 9A GA. CODE ANN., at 405 (Harrison 1976). “In 1967, the President’s Commission on Law Enforcement and the Administration of Justice (Task Force on Juvenile Delinquency and Youth Crime) discouraged the use of a public prosecutor in juvenile court on the basis that it would be too great a departure from the spirit of the court.” Nat’l Advisory Comm’n on Criminal Justice Standards & Goals, *Juvenile Justice and Delinquency Prevention*, at 505 (1976); see also former Georgia Code § 24-2420 (“probation officer’s investigation, along with other evidence submitted in court, may be used by the judge in reaching a decision . . .”).
 12. 1951 Ga. Laws 291, *repealed by* 1971 Ga. Laws 709.
 13. See, e.g., *Wages v. Morgan*, 174 Ga. 158, 162 S.E. 380 (1932). The 1877 and 1945 Constitutions provided that the district attorney was to represent the State in all cases appealed to the Supreme Court of Georgia and, after 1945, the Court of Appeals. GA. CONST. art. VI, § 11, ¶ 2 (1877); GA. CONST. art. VI, § 9, ¶ 2 (1945). District attorneys who were on the fee system would have been entitled to receive fees for appearing in juvenile court. See former Georgia Code § 24-2431.
 14. Justice Thomas O. Marshall, Speech, Governors Conference on Juvenile Justice “Building a System for the Future,” at 28-29 (Nov. 20, 1986); see also Barry C. Feld, *Criminalizing Juvenile Justice: Rules of Procedure for the Juvenile Court*, 69 MINN. L. REV. 141, 151 (1984) (“Because the important issues involved the child’s background and welfare rather than the commission of a specific crime, (juvenile) courts dispensed with juries, lawyers, rules of evidence, and formal procedures.”)
 15. *In re Gault*, 387 U.S. 1 (1967).
 16. See 1968 Ga. Laws 1013, 1027.
 17. GA. CODE ANN. § 24A-2001 (Harrison 1976).
 18. The 1971 Juvenile Code barred probation officers from acting as prosecutors for a child who was or could be supervised by the probation officer. GA. CODE ANN. § 24A-602(e) (Harrison 1976), (now O.C.G.A. § 15-11-24.2(5)).
 19. 1974 Ga. Laws 1126, 1131, enacting GA. CODE ANN. § 24A-1801(d) (Harrison 1976) (now O.C.G.A. § 15-11-41(c)). The “[i]n any proceeding” language in GA. CODE ANN. § 24A-1801(d) appeared to authorize district attorneys to handle unruly and deprivation cases, as well as delinquency cases. As a matter of routine practice this appears only to have occurred in the Eastern (Chatham), Middle, Oconee and Stone Mountain Circuits. Beginning in the mid-to-late 1970s, the Department of Law began designating special assistant attorneys general (SAAGs) to represent the Department of Family and Children’s Services in deprivation cases; by 1979 the four district attorney’s offices no longer handled deprivation cases.
 20. O.C.G.A. § 15-11-41(c) (2005); *K.G.W. v. State*, 144 Ga. App. 251, 252, 240 S.E.2d 755, 756-57 (1977). In 2006, the Court of Appeals cast doubt on the authority of juvenile courts to designate attorneys to prosecute juvenile cases. See *In re Tidwell*, 279 Ga. App. 734, 741, 632 S.E.2d 690, 696 (2006).
 21. Since the 1980s, the district attorneys have periodically requested that the General Assembly authorize additional state-paid personnel to deal with the increasing caseload in juvenile court. None of these efforts was successful. By contrast, when the legislature created the statewide public defender system in 2003, it required each public defender’s office to “establish a juvenile division.” See O.C.G.A. § 17-12-23(c) (Supp. 2007).
 22. See *K.G.W. v. State*, 144 Ga. App. at 252, 240 S.E.2d at 756-57. It should be noted that under former Georgia Code §§ 24A-3501 and 24A-3502, the district attorney’s office had to get permission from the juvenile court judge in order to obtain a copy of the case file prior to the adjudicatory hearing. It was not until 1989 that the legislature gave district attorneys access to juvenile case files and records that was comparable to their access to adult files. See O.C.G.A. § 15-11-64.1 (2005).
 23. The tendency of judges hearing juvenile cases (who were often superior court judges) to wait until the last minute (in some cases minutes before court was supposed to start) to notify the district attorneys that someone was needed to handle a juvenile case, led the district attorneys in 1980 to push the legislature for a provision that required the judge to make the request “at least 96 hours prior to the proceeding.” See GA. CODE ANN. § 24A-1801(e) (Harrison 1976)). The 96-hour advance notice requirement was removed in 1989. 1989 Ga. Laws 824.
 24. NDAA, *supra* note 4, § 92.1b.
 25. See *supra* note 11 and accompanying text.
 26. Karen L. Worthington, *Juvenile Court Practice Requires Special Skills*, 2 GA. B.J., Feb. 1997, at 43; Backstrom, *supra*, note 2, at 700-01 (advocating for more experienced juvenile prosecutors).
 27. Generally, juveniles face considerably reduced sanctions for even serious crimes compared to adults.
 28. For example, the 2002 Justice Department report, *Victims, Judges and Juvenile Ct. Reform*, found that “[v]irtually all victim participants found the juvenile court and justice system experience predominantly negative. Victim participants were also nearly unanimous in their dissatisfaction with the court process.” *Focus Group Findings*, http://www.ojp.usdoj.gov/ovc/publications/bulletins/vjj_10_2000_2/vjj_focus.html (site visited Dec. 13, 2007).
 29. In 1990, the solicitor of juvenile court in Clayton County merged with the district attorney’s office for that circuit.
 30. See *In the Interest of E.R.B. et al.*, Docket No. 067-91J-0283, Gwinnett County Juv. Ct. (July 12, 1991) (on file with author). The court held that the appointment of a full-time juvenile court solicitor by the juvenile court judge, who retained control over the solicitor’s continued employment and budget, violated the constitutional principle of separation of powers. The court held

- that, insofar as O.C.G.A. § 15-11-28(d) and (e) purported to authorize the judge of the juvenile court to appoint a full-time juvenile court solicitor, the statute violated GA. CONST. art. I, § 2, ¶ 3. The court further held that the appointment violated Canons 2 and 3 of the Code of Judicial Conduct and required the recusal of the juvenile court judge in any case brought by the solicitor. The state elected not to appeal this decision. Letter, Tom Lawler, District Attorney, Gwinnett Judicial Circuit to Chuck Olson, Prosecuting Attorneys' Council of Georgia (Jan. 9, 1992) (on file with author). As a result of the Gwinnett County court ruling, DeKalb County took action later that same year to make the juvenile court solicitor independent of the juvenile court by making the solicitor's office part of the district attorney's office.
31. The experience level of assistant district attorneys assigned to juvenile court varies widely. In some circuits, such as the Eastern, Cobb, Clayton and Flint Circuits, the juvenile divisions are staffed with attorneys who have specialized in juvenile court. In other circuits, attorneys are assigned on a short-term basis to get experience before being moved to superior court. With one exception, funding for juvenile prosecutors comes from county government, rather than the state. The exception is the Brunswick Judicial Circuit, where a state-paid assistant is assigned, full-time, to the juvenile court in that circuit.
 32. Funding for support staff for juvenile court prosecutors has to come from county government because the state only funds one investigator and two administrative positions in each district attorney's office. *See* O.C.G.A. §§ 15-18-17(a), 15-18-20, 15-18-20.1 (2005 & Supp. 2007); *Wilson v. Southerland*, 258 Ga. 479, 480, 371 S.E.2d 382, 383 (1988).
 33. In the Douglas Judicial Circuit, the county commission appoints a prosecutor for the juvenile court who is independent of the district attorney's office. In the Coweta Judicial Circuit there is a hybrid system. Carroll County and Coweta Counties have juvenile prosecutors who operate independent of the district attorney. In Troup County, a juvenile prosecutor is employed by the county but sworn as a special assistant district attorney and is basically autonomous. In addition, the Solicitor-General of Troup County serves as a special assistant district attorney in juvenile court. In the other counties, the district attorney's office handles delinquency cases.
 34. In 1998, the Prosecuting Attorneys' Council of Georgia established a juvenile section in order to facilitate training and communications on juvenile issues. At that time, the Council sought federal funds to establish a training program for juvenile prosecutors as well as funding under the Juvenile Accountability Incentive Block Grant program to hire additional juvenile prosecutors. Although the Council received a grant for \$665,154 in January 2000, special conditions on the grant specified that the 10 prosecutors hired under the grant had to concentrate on SB 440 cases that were being handled in superior court. After two years of funding, the grant expired and a proposal to have the funding continued by the state fell victim to budget cutbacks that resulted from the 2002 recession. *See generally* Gov. Sonny Perdue, State of the Budget Address (Jan. 15, 2003) http://gov.georgia.gov/00/article/0,2086,78006749_78042311_83366328,00.html (visited Dec. 13, 2007).
 35. *See* O.C.G.A. § 17-7-32 (2004).
 36. O.C.G.A. § 15-11-45 (2005). By comparison, O.C.G.A. § 17-7-32 requires the "warrant and all other papers" in criminal cases to be delivered to the prosecuting attorney.
 37. O.C.G.A. § 15-11-45(c) (2005). We would note that the statute does not require that the district attorney do anything, and there is evidence that this provision is often ignored.
 38. *See id.* § 15-18-6(4) ("The duties of the district attorneys within their respective circuits are . . . [t]o draw up all indictments or presentments, when requested by the grand jury . . ."); *id.* § 15-18-66(a)(3) ("The duties of the solicitors-general within their respective counties are . . . To file accusations on such criminal cases deemed prosecutable . . ."); *id.* § 17-7-71(a) (2004) ("In all misdemeanor cases in superior, state, or county courts, the defendant may be tried upon an accusation framed and signed by the prosecuting attorney of the court.").
 39. *See id.* § 15-11-38 (2005) ("Subject to Code Section 15-11-37, the petition alleging delinquency, deprivation, or unruliness of a child *may be made by any person*, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true.") (emphasis added); *see also* UNIF. JUV. CT. R. 6.3; *Garner v. Wood*, 188 Ga. 463, 465, 4 S.E.2d 137, 139 (1939); *Wingate v. Gornito*, 147 Ga. 192, 195, 93 S.E. 206, 207 (1917).
 40. O.C.G.A. § 15-11-37 (2005).
 41. Juvenile court rules provide that "the intake officer shall make a preliminary determination as to whether a petition shall be filed." UNIF. JUV. CT. R. 4.1(b). Over the past ten years, the Department of Juvenile Justice (DJJ) has indicated it wishes to reallocate intake staff to other duties "supervis(ing) youth in the community." Letter, Orlando L. Martinez to N. Stan Gunter (Apr. 15, 2002) (on file with author). This effort was thwarted when the Prosecuting Attorneys' Council issued a memorandum to the district attorneys that concluded that "[i]n the absence of any express provision in the laws of this State specifically authorizing district attorneys to prepare and file a petition in juvenile court, . . . district attorneys do not have sufficient legal authority to do so in an official capacity except for S.B. 440 cases." Memorandum, Prosecuting Attorneys' Council of Ga. to Stan Gunter, District Attorney, Enotah Judicial Circuit (May 2, 2002) (on file with author).
 42. O.C.G.A. § 15-11-69 (2005); UNIF. JUV. CT. R. 4.1(b); *see* O.C.G.A. § 15-18-80 to -82 (Supp. 2007) (allowing prosecuting attorneys to establish pretrial diversion programs).
 43. O.C.G.A. § 15-11-69(d) (2005). Subsection (d) became part of the Juvenile Code in 1997 as part of the "Juvenile Justice Act of 1997," 1997 Ga. Laws 1064, also known as "S.B. 440." During the legislative debate, the district attorneys attempted to get subsection (d)

amended so that it would prohibit informal adjustment of a designated felony without the consent of the district attorney. This change was vigorously (and successfully) opposed by both juvenile court judges and the Department of Juvenile Justice.

44. O.C.G.A. § 15-11-41(c) (2005).
45. NDAA, *supra* note 4, at 258; *but see* J.A.C. v. State, 134 Ga. App. 561, 562, 215 S.E.2d 324, 325 (1975) (judge may conduct proceedings without prosecutor and question witnesses).
46. O.C.G.A. § 17-16-1 to -23 (2004 & Supp. 2007).
47. *See id.* § 15-11-75(a), (b), (d)(1), (d)(2) (2005); In the Interest of E.J., 283 Ga. App. 648, 650, 642 S.E.2d 179, 182 (2007).
48. O.C.G.A. § 15-11-64.1 (2005).
49. 1980 Ga. Laws 416, 418-19 (codified at O.C.G.A. § 15-11-64.1). Initially this provision only provided that the court “may” dismiss the petition. *See* GA. CODE ANN. § 24A-1801(e) (Harrison 1976). It was amended in 1989 to require the court to dismiss the petition. 1989 Ga. Laws 824.
50. O.C.G.A. § 15-11-64.1 (2005). The Georgia Rules of Professional Conduct also place an ethical obligation on a prosecutor not to proceed on a petition where the evidence is “not supported by probable cause.” GA. RULES OF PROF’L CONDUCT 3.8(a); *see also* Walker v. State, 827 S.W.2d 637, 641 (Ark. 1992) (construing MODEL RULE OF PROF’L CONDUCT 3.8(a)).
51. O.C.G.A. § 15-11-64.1 (2005).
52. Letter, Albert Murray to Chuck Olson (Dec. 8, 2004) (on file with author).
53. *See* GA. CODE ANN. § 24-2408 (Harrison 1977).
54. *See* Jackson v. Balkcom, 210 Ga. 412, 414-15, 80 S.E.2d 319, 320-21 (1954). In 1972, the Georgia Constitution was amended in a manner that arguably could have given juvenile courts concurrent jurisdiction over offenses committed by juveniles that were punishable by death or life imprisonment. *See* GA. CONST. art. VI, § 4, ¶ 1 (1945); 1972 Ga. Laws 1544. The Juvenile Code, however, left the superior courts exclusive jurisdiction over crimes punishable by death or life imprisonment. *See* O.C.G.A. § 15-11-28(b) (2005).
55. Former GA. CODE ANN. § 24A-2501; O.C.G.A. § 15-11-30.2 (2005).
56. *See* 1994 Ga. Laws 1012, 1015-16.
57. O.C.G.A. § 15-11-28(b)(2)(A) (2005). These seven crimes collectively became known as the “SB 440 offenses” or “seven deadly sins,” so named after the 1994 legislation, *see* 1994 Ga. Laws 1012, that provided the Superior Courts with original jurisdiction over them. *E.g.*, Jennifer Burch Dempsey, *COURTS: Juvenile Proceedings, Parental Rights: Provide for Stay of Certain Proceedings Regarding a Child Who May Be Incompetent; Provide for Competency Hearings and Notice and Procedures Relating to Hearings; Provide for Plan Managers, Competency Plans, and Meetings; Provide for Commitment of Child to Certain Agencies; Provide for Continuing Jurisdiction Over Children Determined to Be Incompetent*, 16 GA. ST. U. L. REV. 44, 51-52 (1999).
58. O.C.G.A. § 15-11-28(b)(2)(C) (2005). Concern about the amount of time that the district attorneys were taking to get SB 440 cases indicted led the legislature to impose a 180-day time limit on getting the cases brought before the grand jury. *See* O.C.G.A. § 17-7-50.1(a) (Supp. 2007). If the case is not indicted within 270 days, it is automatically transferred to the juvenile court. *Id.* § 17-7-50.1(b).
59. *See* IJA/ABA, *supra* note 2, § 1.1; NDAA, *supra* note 4, § 92.1, 92.2; Nat’l Advisory Comm’n on Crim. Justice Standards & Goals, JUVENILE JUSTICE AND DELINQUENCY PREVENTION 15.1, 15.7, 15.8, 15.13, 15.15 (1976); Nat’l Council of Juvenile & Family Ct. Judges, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN JUVENILE DELINQUENCY CASES, at 29 (2005); Judicial Planning Comm’n of Ga., 1981 GA. COURTS PLAN 2(12)(e), at 17 (“All petitions alleging . . . a delinquent act . . . shall be countersigned and filed by the district attorney or an assistant district attorney.”)
60. One district attorney told the author that his office’s role in juvenile court was that of “a stage prop.”
61. *Victims, Judges and Juvenile Ct. Reform*, *supra* note 5. Although Georgia enacted a “Crime Victims’ Bill of Rights,” O.C.G.A. §§ 17-17-1 to -16, in 1995, the Georgia

Attorney General has held that its provisions do not apply to delinquency proceedings in the juvenile courts. *See* Ga. Op. Att’y Gen. U96-11.

62. 2005 Ga. Laws 856 created the Juvenile Law Commission. By the terms of that Act, it was abolished at the end of that year.
63. The other organizations include the Juvenile Law Committee of the Younger Lawyers Division, *see* http://gabar.org/young_lawyers_division/yld_committees/juvenile_law_committee/ (site visited Nov. 28, 2007); the Barton Child Law and Policy Clinic of the Emory University School of Law, *see* <http://www.childwelfare.net/> (site visited Nov. 28, 2007); Voices for Georgia’s Children, *see* <http://www.georgiavoices.org/>; and Georgia Appleseed, *see* <http://www.gaappleseed.org/> (site visited Nov. 28, 2007).



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Lawyers Foundation of Georgia 2007 Challenge Grants

by Lauren Larmer Barrett

In 2000, the Lawyers Foundation of Georgia (LFG) was just getting its feet on the ground.

Initially established in 1978 as the Public Service Foundation, it became dormant in the 1980s

and was revitalized in 1999.

While in the process of raising its profile and funds, the foundation still wanted to find a way to give to the profession and accomplish its mission of enhancing the system of justice, serving the public and assisting the profession.

The leadership of the foundation decided that issuing challenge grants to local and voluntary bar associations and other law related nonprofits was the best way to accomplish this goal. That wise decision paved the way for 50 grants so far. Including this year's grants, a total of more than \$250,000 has flowed from the Foundation for these grants. When you add in the matching funds raised by the recipients, that is more than \$500,000 coming from the legal profession to benefit the community.

The Foundation's thanks go to this year's Grants Committee, chaired by Jimmy Franklin. The committee members were: Donna Barwick, Barbara Bishop, Jeff Bramlett, Judge Melodie Clayton, Jim Durham, Paula Frederick, Walter Gordon, Patti Gorham, William Jenkins, Wyck Knox, Frank Love, Mary Prebula, Tina Roddenbery, Kevin Snyder, Martin Valbuena and Joel

Wooten. This committee put in many hours preparing for the decision making process and then carefully analyzing each grant to award the Foundation's funds where they could best be used to benefit the system of justice and the community.

2007 Awards

Atlanta Volunteer Lawyers Foundation

This organization will receive a \$10,000 grant to establish a Housing Resource Center. This courthouse-based program will offer free legal advice, direction and in some circumstances representation

to low-income tenants who are faced with the imminent loss of their home. The program will enhance the system of justice by giving legal direction and support to a group of individuals who would otherwise not have access to counsel at this critical time in their lives. It also provides the lawyers with a significant opportunity to provide pro bono service.

The housing market has become increasingly stressful and unyielding. While the news about homeowners is constantly in the media, less attention has been



The LFG has awarded the Rome Bar \$2,500 for a community service project. A Treehouse for Rome is a project organized by a group of community volunteers who are building an ADA compliant treehouse for children and adults with special needs.

focused on an equally challenged constituency, tenants. Many of the foreclosures have resulted in lenders taking possession of a home which may be rented to an unsuspecting tenant. These innocent bystanders then end up facing a dispossession that confuses, bewilders and scares them. The Housing Resource Center will assist renters by providing them some basic knowledge when they are at the courthouse trying to navigate the legal system. In doing so, the Resource Center will allow the public to see first hand what the pro bono efforts of lawyers can do to help.

Cobb County Bar Association

The Cobb County Community Service Fund will receive a grant in the amount of \$2,500. In 2001, the Cobb County Bar Association created a community service fund to provide financial assistance to individuals in the community who were in dire financial need. The

fund benefits school children and their families who find themselves stricken with financial difficulties due to illness, job loss, abandonment or catastrophe. The Community Service Board of the Cobb Bar works with the guidance counselors and social workers from the school system to determine which families are in need. This program is one that demonstrates the necessity and effectiveness of attorney organizations reaching out to the public and addressing an immediate need.

Georgia Appleseed Center for Law and Justice

Georgia Appleseed is collaborating with Voices for Georgia's Children and The Barton Child Law Policy Clinic in JUSTGeorgia, a project to promote a juvenile justice system that is fairer to children. The LFG is awarding them \$10,000 for this program.

JUSTGeorgia is committed to improving the outcomes for the at-

risk children that have entered the juvenile justice system due to delinquency or deprivation. It has as a main objective the comprehensive revision of Georgia's "broken" Juvenile Code. As a result of this commitment, they hope to secure a justice system that provides a higher quality of legal services for children and families.

Dozens of lawyers from around the state will be donating their time to this project that will initially result in a report that examines the status of the juvenile code, with input from each of the 10 judicial districts in Georgia. The ultimate goal of JUSTGeorgia is a new Juvenile Code by 2010.

Juvenile Justice Fund

The LFG has awarded \$5,000 to the Center to End Adolescent Sexual Exploitation (CEASE) program. CEASE works with the justice system by advocating for young victims of exploitation, providing case management and refer-

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rals. It also facilitates increased community awareness about commercial sexual exploitation of children. The efforts of the Juvenile Justice Fund have redefined child prostitution in metro Atlanta. It is now recognized as exploitation of children, and those minors caught up in the system are now treated as victims and counseled accordingly.

CEASE works with the Department of Children & Family Services, the Department of Juvenile Justice and probation officers to obtain appropriate counseling, treatment and services for the underage victims of sexual exploitation.

The Juvenile Justice Fund (JJF) collaborates with other groups, including the Children's Advocacy Center to solve the problem of sexual exploitation. Created in 2001, the JJF has helped hundreds of children break out of the downward spiral created by their situation.

Rome Bar Association

The LFG has awarded the Rome Bar \$2,500 for a community service project. A Treehouse for Rome is a project organized by a group of community volunteers who are building an ADA compliant treehouse for children and adults with special needs. These individuals are often confronted with barriers to traditional recreation in their daily lives. The treehouse will be built in the North Georgia community of Rome, along the banks of the Oostanaula River. It will be adjacent to a new River and Environmental Education Center, and it will be incorporated into educational tours at the center. The Rome Bar Association will participate in the project both through raising funds and participating in the construction.

Supreme Court of Georgia Committee on Civil Justice

A grant in the amount of \$4,000 has been awarded to the Committee on Civil Justice for a Comprehensive Georgia Legal Needs Survey. The last such survey was conducted 13 years ago by the State Bar. Since that

time, the state's demographic composition has changed, the federal poverty guidelines amount have risen, and revisions in the law and the role of the courts have also changed the legal needs of the low income population. The hypothesis is that more and more low income citizens are not having their civil legal needs met. Therefore, it is essential to obtain an updated survey to allow the Supreme Court Committee on Civil Justice to formulate a long term strategic plan for the funding and successful delivery of legal services. The data will also be shared with other organizations, agencies and the government to ensure the states' citizens' civil legal needs are met. The specific goals of the survey are to: identify and quantify met and unmet needs for civil legal services; obtain data to help guide policy and advocacy efforts to increase financial, human and in-kind resources for civil legal aid; and obtain data to help guide policy decisions regarding the wise and efficient use of all available resources.

This grant will assist the profession in its efforts to serve the civil legal needs of all Georgia citizens.

Pro Bono Partnership of Atlanta

This organization will receive an \$8,000 grant, which will be used to hire a part-time attorney to assist in screening potential clients, matching nonprofit clients with volunteer attorneys and monitoring legal matters through completion. The Pro Bono Partnership (PBP) matches nonprofit organizations with volunteer attorneys for assistance with legal issues. The partnership has been in existence since 2005 and has assisted 200 nonprofits by matching them with 360 volunteers.


PBP works to serve two constituencies: nonprofits and transactional attorneys. It locates nonprofits that request legal services, and it also seeks out transactional attorneys who wish to do pro bono work in their area of expertise. The grant from the LFG will provide the funds to hire a part-time attor-

ney to assist the current executive director with meeting all the objectives of PBP.

Congratulations to all grant recipients. Your dedication to the system of justice is admirable and inspiring. We look forward to hearing more from you in the future.

One of the objectives of the Challenge Grant Program of the LFG is to provide information about projects that can be undertaken by local and voluntary bar associations. Many of the programs that are being awarded grants this year can be duplicated with the assistance of the LFG. In addition, the previous awardee programs can also be replicated by bar associations. The LFG will work with bar associations in determining what programs they could duplicate. This type of outreach program results in immeasurable benefits for the profession and the community. Please work with your local or voluntary bar association and take on a service project in the coming months. We will be glad to help.

These challenge grant awards are only possible through the assistance of the many attorneys who volunteer their time and money. The efforts of the Lawyers Foundation of Georgia are supported by our Board of Trustees, our other volunteers, and of course, our contributors. The contributors to the LFG include many attorneys and judges from across the state, law firms who honor their partners, associates and counsel with donations to the foundation, and the corporate sponsors of the Foundation.

For more information, please contact Lauren Larmer Barrett, 104 Marietta St., NW, Suite 630, Atlanta, GA 30303; 404-659-6867. 



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Congratulations

to the winners of the 2007

Keenan's Kids Foundation Law Student Closing Argument Competition

Pictured above from L to R: Don C. Keenan, Founder; Jamie Flowers, Jr, Mercer - 3rd Place; David Lockhart, John Marshall, - 2nd Place; Keith Hayasaka, GSU - 1st Place, & Meg Robinson, GSU - 4th Place



The Keenan's Kids Foundation sponsors annual Law Student Closing Argument Competitions to introduce students to areas of the law protecting children's rights. This year's competition took place on November 17, 2007.

Founded in 1993, the Keenan's Kids Foundation works to raise awareness on child safety issues and to prepare a future generation of attorneys for child advocacy litigation.

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Building a Lasting Legacy for Justice

The Georgia Legal Services Foundation Builds an Endowment for the Georgia Legal Services Program

by Jeanette Burroughs, CFRE

We know that justice for all is one of the bedrock principles of our nation. It is also a core value for the Georgia Legal Services (GLS) Foundation, now in its 12th year of building and preserving an endowment for the Georgia Legal Services Program—our state’s largest legal services organization. The program provides critical civil legal services free-of-charge to eligible low-income residents in 154 counties outside metro-Atlanta. Incorporated in 1971 by members of the Younger Lawyers Section of the State Bar of Georgia, the program’s mission is to provide access to justice and opportunities out of poverty for low-income Georgians.

The leaders of the Georgia Legal Services Program had a dream of creating an endowment as a permanent source of support almost since the organization was founded in 1971. In 1996, an opportunity arose to begin establishing the endowment that the program’s leaders had envisioned. In a decision that was a national prece-



dent because of its size, U.S. District Judge Marvin Shoob awarded a \$1 million *cy pres* award to the Georgia Legal Services Program from a national antitrust case involving a number of airlines.

On Dec. 13, 1996, the GLS Foundation was incorporated as an independent 501(c)(3) nonprofit organization. Walter Jospin served as board president from 1997-99. Board members were appointed by the Georgia Legal Services Program and by the GLS Foundation itself and included Alice Ball, Aaron Buchsbaum, Jean Bergmark, the Hon. Harold G. Clarke, Paula Frederick, Melita Easters Hayes, Mary Mendel Katz, the Hon. Mary Margaret Oliver and Michael Terry.

“The original mission of the GLS Foundation was to be a ‘bedrock’ for the Georgia Legal Services Program: a hedge against the fluctuations of funding that con-

stantly threaten all non-profit organizations," says Paul T. Carroll III, GLS Foundation president from 1999 to 2007 and Georgia Legal Services Program president from 1995 to 1998.

The GLS Foundation builds and preserves endowment funds contributed by individual lawyers and law firms from across the state. A capital gift to the GLS Foundation helps to ensure the work of the Georgia Legal Services Program continues for generations to come. "Most people in the state share the goal of providing legal services to needy Georgians and believe in investing in the future so that the Georgia Legal Services Program can continue. But envisioning the future of the program is not enough. We have to be prepared to fund it, and that is the goal of the Foundation," says GLS Foundation President Edward J. Hardin.

The GLS Foundation made its first gift to the Georgia Legal Services Program in 1999, to help support a massive technology upgrade for the program. The program faced the millennium with aging hardware and software that might not withstand the threatened disaster scenarios. A gift of \$110,000 from the GLS Foundation was leveraged into almost \$1 million from other sources, enabling the program to embrace the 21st century with a new Windows-based operating environment. The program's website at www.glsp.org was created, and legal workers were equipped with desktop access to Internet resources and the ability to communicate with advocates around the state and nation. Improvements were made in services to clients, program effectiveness, administrative efficiency and new collaborations.

In 2000, the GLS Foundation supported the Georgia Legal Services Program's capital campaign in Macon with a gift of \$100,000. Led by a group of 11 energetic lawyers in Macon, the capital campaign, "Catch the Vision," had a goal to raise

\$830,000 to purchase and renovate the historic Eagles building in downtown Macon for the program's local office. For two decades, the office had been operating out of inadequate and unsuitable space for staff, case files and law books. The gift from the GLS Foundation was leveraged with contributions and grants from other local, state and national supporters, enabling the campaign to reach its goal. The Georgia Legal Services Program purchased the Eagles building outright in 2001.

A gift of \$4,300 from the GLS Foundation in 2002 was leveraged with a variety of other sources to launch the Georgia Legal Services Program's statewide public education campaign, "Bringing Justice Home." The campaign involved stakeholder committees of bar leaders, donors, legal aid managers, volunteer lawyers and staff attorneys to heighten the level of awareness within the legal community of the mission of the program and the need for sustaining support of that mission.

With a gift of \$100,000 in 2005, the GLS Foundation supported the Georgia Legal Services Program's technology upgrade to deploy a Wide Area Network (WAN). In today's high-tech legal culture, the WAN offers new opportunities and more flexibility for staff to achieve efficiencies in case handling, grant management, personnel functions and more through technology. The program's work on newer websites, www.legalaid-GA.org and www.georgiaadvocates.org reflects these new uses and a growing effort to provide legal information to the public online. The Georgia Legal Services Program purchased workstations for all staff and professional services for installation and training.

"Our donors have told us that it is truly gratifying to make a contribution to the GLS Foundation; it is a totally different feeling from making a contribution to the program's annual operating fund. They understand that the GLS

The Georgia Legal Services Foundation, Inc. Founding Board of Directors, 1996


Alice Ball
Jean Bergmark
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Foundation will be the bedrock to support the Georgia Legal Services Program far into the future," says Phyllis J. Holmen, the program's executive director.

To make a gift to the GLS Foundation or to explore giving options, please contact: Development Department, Georgia Legal Services Foundation, Inc., 104 Marietta St., Suite 250, Atlanta, GA 30301; 404-463-1611.

Please consult your attorney or tax advisor before making your gift to the GLS Foundation. 



Jeanette Burroughs is the director of development and communications for the Georgia Legal Services Program, Inc.

The Butts County Courthouse at Jackson

The Grand Old Courthouses of Georgia

by Wilber W. Caldwell

In 1849, in his *Statistics of the State of Georgia*, George White described Jackson as village of about 300 inhabitants with a courthouse, a jail, two churches and three stores. The courthouse, a two story brick vernacular structure, had been built in 1828 to replace the log court building erected in 1825 when Butts County had been cut from Monroe and Henry counties. Jackson was roughly treated by Federal forces in 1864 owing to scattered resistance in the area, and to large quantities of Confederate supplies warehoused there. The old courthouse had been used to store grain for the Rebel Army and was burned to the ground.

A second brick vernacular court building was erected in 1870. When The East Tennessee, Virginia and Georgia Railroad arrived in 1882, Jackson still counted only about 300 residents and not much had changed

since White's visit. The Middle Georgia *Argus* described the town on the eve of the railroad's arrival: "...an old dilapidated town with only about half a dozen business houses, and they doing a very small business, and but a few decent dwelling houses...." As was usually the case, the arrival of steel rails created a frenzy of expectation and excess. The *Argus* heralded the arrival of the railroad as "the greatest day to remembrance for the people of Butts County," and spewed forth myths lifted verbatim from the New South's catechism of progress.

For a brief moment, the New South's promises for the enduring prosperity of the industrial age appeared real, but all of this amounted to little. In fact, Jackson's boom had included no real industry at all. By 1890, although the town's population had more than doubled since the arrival of the railroad, Jackson's economy still rested on the upward spiral of cotton production and the downward spiral of cotton prices. In 1891, Jackson shipped 18,000 bales (compared to 8,000 reported by Sholes' *Gazetteer of Georgia* in 1886). A list of Jackson's "industries" in 1890 reveal only the shaky infrastructure of cotton: gins and a cotton seed oil plant, factors and fertilizer dealers; a livery stable, two small planing mills, a carriage manufacturer plus a handful of merchants, professionals and bankers to serve the vast rural economy of cotton. Nonetheless, the people of Jackson saw in the town's fine new brick

buildings the glorious beginnings of the long promised New South. Sadly, these facades concealed little more than the utter hopelessness of the same old economic treadmill of cotton.

Nonetheless, believing that the riches of a New South were at hand, leaders in Jackson proposed a new courthouse for Butts County, but met a solid wall of resistance from rural factions who perceived none of the mythical progress that Jackson flaunted like the Emperor and his new clothes.

Although the spirit of progress that was first created by the railroad and later by the Pepperton Cotton Mill, added fuel to the fires of the new courthouse movement in Jackson, in the final analysis, it was a highly competitive local pride which won the day for those in favor of a new court building in Butts County. Local newspapers had been quick to point out the gleaming towers of new courthouses in nearby Zebulon in 1895 and in neighboring Forsyth in 1896. In March 1897, only a few weeks after neighboring Henry County accepted James W. Golucke's plan for a new courthouse at McDonough, the Butts County grand jury recommended a new courthouse. A building committee was appointed, and in April, after a survey of new court buildings in Laurens, Douglas and Monroe counties, the committee selected the Atlanta firm of Bruce and Morgan as architects. The selection was probably made on the strength of the firm's recent work at Forsyth which, although still Romanesque in form, was adorned with Neo-Renaissance detail that foreshadowed the emerging Neoclassical Revival. By May, the old courthouse had been demolished and the project opened for bids.

Not only did courthouse building in neighboring counties hasten the construction of a new court building in Jackson, it also influenced the county's choice of architects and the style of the building. Indeed, the 1898 Butts County




Photo by Wilber W. Caldwell

Built in 1898, Bruce and Morgan, architects.

Courthouse owes a considerable stylistic debt to Bruce and Morgan's earlier work at Forsyth. Although Alexander Bruce, the principle designer, returned to a more Picturesque, asymmetrical silhouette in Jackson, his design here, like his earlier work in Forsyth, flaunts a profusion of Classical decoration. Bruce's earlier Queen Anne courthouses can not be overlooked in this context. The broad classical entablature above the arched entrance at the west side of the building is a dominant feature. Likewise, the balustrades decorating the large open arches of the tower, and the rusticated quoining

of the northeast corner pavilions are of Classical origin as are the Ionic capitols of the many brick pilasters and the rather formal decoration surrounding the clocks which crown the high tower. Further, the central mass of the building, with its domered roofline terminated in bold pediments, appears Classical in proportion, despite the picturesque addition of the tower and pavilions that break the silhouette.

This was Alexander Bruce's last courthouse in Georgia before his retirement in 1904. Although a number of Romanesque courthouses would rise in Georgia after the turn of the century, Bruce's "swan song" here at Jackson reflects the beginning of the end for the Romanesque Revival. 

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

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Henn



Greene

Kilpatrick Stockton announced that **Charlie Henn**, a partner in the firm's intellectual property department, was selected to serve on the **board of directors of Theatrical Outfit**. This non-

profit organization operates as a small professional theater and produces classic and contemporary theater with an emphasis on work indigenous to the culture of the American South. Henn concentrates his practice in the area of intellectual property litigation.

IP partner **Jamie Greene** was elected to serve on the **board of Childspring International**, a children's medical charity that provides opportunities for a better life to children around the world. Her practice concentrates in domestic and foreign biomedical patent prosecution, particularly in the areas of biotechnology, diagnostics, isolation and purification methodology, pharmacology and immunology.

Adria Perez was elected to serve on the **board of Reach for Excellence**, a non-profit, classroom-based academic and leadership enrichment program. Perez is an attorney in the firm's litigation department, where she focuses her practice on complex commercial litigation.

Firm attorneys **Bill Boice**, **Susan Cahoon** and **Steve Clay** were singled out as **Georgia "Litigation Stars,"** in the 2008 edition of *Benchmark: Litigation*, the definitive guide to America's leading business litigation firms and attorneys. This distinction denotes that these attorneys are recognized as top litigation practitioners by their clients and peers. Kilpatrick Stockton was also named a recommended firm for its leading litigation practice.

The firm also announced that partners **Alfred Lurey** and **Jim Coil** were named by Legal Media Group to its most recent series of prestigious "Guides to the World's Leading Lawyers." Lurey, a partner in the litigation department in Atlanta, was named one of the **"World's Leading Insolvency & Restructuring Lawyers."** Lurey is a member of the firm's bankruptcy & financial restructuring team. Coil, also a partner in the litigation department in Atlanta, was named one of the **"World's Leading Lawyers for Labor & Employment."** Coil is a member of the firm's labor & employment team.

Additionally, the following Kilpatrick Stockton attorneys were selected as **2007 Georgia "Rising Stars"** by *Georgia Super Lawyers*: **Hayley R. Ambler**, **Blair Andrews**, **Frank L. Bigelis**, **Jessica D. McKinney**, **Chad V. Theriot** and **Thomas P. Wilson** (construction litigation); **Chintan K. Amin**

and **Gary R. Sheehan Jr.** (environmental); **Kali W. Beyah** and **Cindy D. Hanson** (class action/mass torts); **Seth A. Cohen**, **Shyam K. Reddy** and **James W. Stevens** (business/corporate); **Michael J. Delaney** (securities & corporate finance); **Audra A. Dial**, **Burleigh L. Singleton** and **Jason McLarry** (business litigation); **Joseph J. Fucile** and **Tanya N. Hairston Whitner** (real estate); **R. Charles Henn Jr.** (intellectual property litigation); **Wab P. Kadaba** and **Camilla C. Williams** (intellectual property); **Naho Kobayashi** (banking); and **Jennifer Stobie Schumacher** (employee benefits/ERISA).



Kirby Mason, partner at the law firm of HunterMaclean in Savannah, was recognized as a leader in alternative dispute resolution law by being **selected as an author** in the newly released book, *Alternative Dispute Resolution Client*

Strategies, published by Aspatore Books. Mason is an experienced trial lawyer who advises and represents clients in contracts, employment and business disputes, and premises liability.



A consortium of leading maritime attorneys recently launched the **Maritime Arbitration Association (MAA)** of the United States, a national organization offering arbitration and mediation services to the maritime industry. The MAA will help resolve disputes at 25 major active ports and boating centers nationwide. MAA arbitrators and mediators are practicing lawyers who serve clients in both commercial and recreational sectors of the industry and have significant experience in maritime law.



Morris Hardwick Schneider partner **Howell Haunson** was recognized as the Metro South Association of Realtors® (MSAR) **Affiliate of the Year 2007**. Haunson, who serves as director of education for Morris Hardwick Schneider, has been practicing real estate law for more than 25 years.



Hunton & Williams LLP received the inaugural **Fannie Mae Bridge Builder award** for the firm's commitment to diversity. The award was presented during the second annual Diversity and Inclusion Conference hosted by Fannie Mae for its outside counsel. Hunton & Williams was the only firm to receive the award.



Brian N. Smiley of **Smiley Bishop & Porter, LLP**, of Atlanta was selected **vice president/president-elect** of the **Public Investors Arbitration Bar Association**

(PIABA). The announcement was made at PIABA's annual meeting held in Amelia Island, Fla., in October 2007. PIABA, founded in 1990, is an international bar association of approximately 500 attorneys which is dedicated to promoting the interests of investors who are subject to mandatory arbitration of disputes against securities brokerage firms.


- > For the fifth consecutive year, **Brian Casey**, a partner in the corporate, financial services and insurance practice groups of the Atlanta office of **Locke Lord Bissell & Liddell LLP**, was selected as one of **Insurance Newscast's 100 most powerful people** in the insurance industry. Casey focuses his practice on corporate, mergers and acquisitions, secondary life insurance and other insurance securitization and derivatives transactions, multi-state insurance regulation and e-commerce and technology matters for insurance companies, insurance agencies, third party administrators and financial services firms.

In addition, **Paul T. Kim**, a litigation partner in the Atlanta office, has been elected to the national board for the National Asian Pacific American Bar Association as the **Regional Governor for the Southeast Region** for 2008-10. Kim will represent all the Asian bar associations in the southeast region, including those in Washington, D.C., Virginia, Maryland, Florida, Georgia, North Carolina and Tennessee.

- > **The University of Georgia School of Law** won the first annual **Emory National Civil Rights and Liberties Moot Court Competition** in October 2007, and the **William W. Daniel National Invitational Mock Trial Competition**, a first for the law school in this tournament. Additionally, the School of Law finished as a finalist in a National Moot Court Competition regional tournament, qualifying the team to advance to the national round of the tournament, which was held in New York during late January.
- > The **Savannah Bar Association** is working to organize a local chapter of **Homeless Experience Legal Protection (HELP)**. HELP is a rapidly growing national organization providing a platform for local lawyers to donate their time and talents to provide legal assistance to the homeless. The Savannah HELP program will be the first in the state of Georgia.
- > **Greenberg Traurig** was selected as "**USA Law Firm of the Year.**" The Chambers Global Awards Program honors excellence in legal services in

jurisdictions around the world. The award was presented at the 2007 Chambers Global Awards ceremony in London in November 2007.

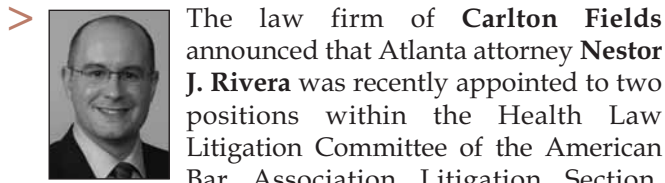
- > **Hollowell, Foster & Gepp, P.C.**, partner **Patrise Perkins-Hooker** was a 2008 inductee into the **Gate City Bar Association Hall of Fame**. Perkins-Hooker is the third member of the firm inducted. Previous firm inductees include Donald Hollowell and Hon. Marvin S. Arrington.

- >  **Nancy K. Peterson** was elected **president** of the **Nebraska Criminal Defense Attorneys Association** for the 2007-08 term. Peterson recently established her own practice focusing solely in criminal defense law. Previously, Peterson was employed with the Nebraska Commission on Public Advocacy. Prior to working for the Commission, she was an assistant public defender in DeKalb County.

- >   **Fisher & Phillips LLP** partner and chair of the firm's hospitality industry practice group **Andria Ryan**, has received the **Chairman's Award** for the Greatest Contribution by an Allied Member to the Association from the Colorado Hotel & Lodging Association. Ryan received the award in 2007. Ryan was also nominated for Hospitality Lawyer.com's Marshall Award, given each year to someone who has made pioneering and lasting contributions to the field of hospitality law. The winner will be announced Feb. 12, 2008, during the Sixth Annual Hospitality Law Conference in Houston, Texas.

In additional firm news, partner **E. Jewelle Johnson** has added to her long list of civic duties. The current president of the Georgia Association of Black Women Attorneys has been elected secretary of the Board of Directors for the Metropolitan Boys & Girls Clubs, West End Cluster, and has been appointed to the Georgia Committee on Access & Fairness in the Courts by Supreme Court of Georgia Presiding Justice Carol W. Hunstein.

- > **Hunton & Williams** partner **Joseph Alexander Jr.** was chosen by *Diversity & The Bar Magazine* as one of 10 "**Rainmakers.**" This award showcases successful minority attorneys with demonstrated achievement in business development. Alexander is also co-head of the firm's private equity practice group.



The law firm of **Carlton Fields** announced that Atlanta attorney **Nestor J. Rivera** was recently appointed to two positions within the Health Law Litigation Committee of the American Bar Association Litigation Section.

Rivera will hold the position of **website editor** and will be the **co-chairperson** of the **Licensing and Peer Review Subcommittee**.

The firm was **ranked 18th** in the October issue of *The National Jurist's Best Law Firms to Work For* survey. Law students from across the country were polled on what they are looking for in a law firm and the No. 1 answer was quality of life. The publication looked at what makes a law firm a great place to work as well as what firms have a work-life balance, solid retention programs, a commitment to training, and who is leading the charge and challenging the status quo.

Also, the firm announced that they were ranked **29th** in *The American Lawyer's* national **Summer Association Survey**. The annual nationwide survey measures summer associates' job satisfaction. The survey is based on the responses from over 7,300 summer associates from 195 firms throughout the country.



Redler

Scott

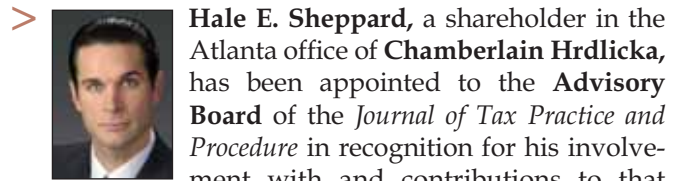
Williams

Lester

Pro Bono Partnership of Atlanta held its second annual **Volunteer and Donor Appreciation Reception** in October 2007 at the new World of Coca-Cola. The event also celebrated the second anniversary of Pro Bono Partnership of Atlanta. **Matt Drain** and **Dara Redler** received the 2007 Corporate Volunteer of the Year. The recipients of the 2007 Law Firm Volunteer of the Year were **Andy Scott** and **Rebecca Williams**. **Charlie Lester** of Sutherland, Asbill & Brennan LLP was honored with the 2007 Special Recognition Award.

Powell Goldstein LLP partners **Tom McNeill** and **Scott Killingsworth** were selected as BTI Consulting Group's 2008 Client Service All-Stars. The 2008 BTI Client Service All-Stars is an exclusive group of 148 attorneys from 113 law firms. This elite group was identified by corporate counsel for delivering exemplary client service. To create this list, BTI interviewed more than 250 corporate counsel at large and Fortune 1000 companies on the subject of client relationships.

The Atlanta office of **Smith Moore LLP** has earned **membership** in **MSI Global Alliance**, a prestigious global association of independent law firms and accounting firms. MSI provides a way for member attorneys to work collaboratively with other MSI lawyers from countries around the world for clients whose legal needs are international in scope.



Hale E. Sheppard, a shareholder in the Atlanta office of **Chamberlain Hrdlicka**, has been appointed to the **Advisory Board** of the *Journal of Tax Practice and Procedure* in recognition for his involvement with and contributions to that publication.

In this role, Sheppard will not only continue to write articles for the *Journal*, but also will be responsible for outreach to other members of the legal community to encourage them to write about their areas of experience. He will also play a key role in steering the direction of the publication.

Sheppard was also recently named an adjunct professor of tax at Atlanta's John Marshall Law School. As a professor, he will help educate the next generation of Atlanta tax attorneys by teaching an intense course on the complexities of federal income tax law.


In April 2007, the DeKalb County Board of Commissioners voted unanimously to name the new \$40 million juvenile court, the **Gregory A. Adams Juvenile Justice Center**; thereby, making him the first judge to have a building named in his honor in the history of DeKalb County, which was founded in 1922. The Gregory A. Adams Juvenile Justice Center was dedicated in June 2007.



(Left to right) Hon. Herbert E. Phipps, Patrise Perkins-Hooker, Harold Franklin Jr., Teri McClure, Avarita Hanson, Charlie Lester

The **Gate City Bar Association** inducted four members of the Bar into its prestigious **Hall of Fame** at its gala in November 2007. As in previous years, the Association inducted into its Hall of Fame attorneys who have overcome precipitous challenges and

who support a shared belief that diversity and unity make our community and nation stronger. The honorees included: the **Hon. Herbert E. Phipps**, judge of the Georgia Court of Appeals, **Avarita L. Hanson**, executive director of the Chief Justice's Commission on Professionalism, **Patrise Perkins-Hooker**, partner with Hollowell Foster & Gepp, P.C., and **Charlie Lester**, partner with Sutherland, Asbill & Brennan LLP.

- >  **Gerald Spencer Mullis**, a true patriarch of the Macon Bar Association, announced his **retirement** from the practice of law at the end of 2007. Mullis successfully served the Macon and middle Georgia community for more than 57 years. He is credited with directly assisting many among the Macon Bar in getting their law practices and legal careers off the ground and has mentored countless others. In honor of Mullis' service to the legal community, Malcolm G. Lindley, J.A. Powell Jr. and Sam C. Rumph III hosted a reception in November 2007 at their office in Macon.

On the Move


In Atlanta

- >  The firm also launched a **special investigations & white collar crime team** which is led by new partner, **Scott Marrah**. Marrah recently joined the firm after serving as an **assistant U.S. attorney** for the southern district of New York. His practice will concentrate on the areas of white collar criminal defense, internal, criminal and SEC investigations, and complex commercial litigation. The firm's Atlanta office is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatrickstockton.com.
- Kilpatrick Stockton** announced the addition of **Susan F. Motter** to the firm's employee benefits team in the corporate department. She joined the firm as **counsel** in the Atlanta office. Motter brings over a decade of extensive experience in ERISA and employee benefit matters to Kilpatrick Stockton. Prior to joining the firm, Motter served as senior counsel-benefits for Georgia-Pacific LLC.


- > **Gilbert H. Deitch** and **Andrew T. Rogers** announced the formation of **Deitch & Rogers, LLC, The Crime Victim Law Group**. Deitch and Rogers will continue their representation of victims of violent crime and sexual assault in civil cases involving

inadequate security, premises liability and intentional tort liability. The firm is located at 5881 Glenridge Drive, Plaza 400, Suite 160, Atlanta, GA 30328, 770-394-9000; 770-394-8840; www.victimattorneys.com.

- > **Elarbee, Thompson, Sapp & Wilson, LLP**, announced that **John C. Stivarius Jr.** joined the firm as a **senior trial partner** in the firm's corporate litigation practice group. Stivarius has significant experience in complex litigation, focusing primarily on employment, torts, malicious prosecution defense, products liability, fiduciary liability (corporate and directors' and officers' liability), environmental and business litigation (restrictive covenants and contracts), as well as class action and collective cases. He was previously with Epstein Becker & Green's Atlanta office. The firm is located at 800 International Tower, 229 Peachtree St. NE, Atlanta, GA 30303; 404-659-6700; Fax 404-222-9718; www.elarbeethompson.com.

- >   **Parker, Hudson, Rainer & Dobbs LLP** announced that Atlanta attorneys **David B. Darden** and **Harrison J. Roberts** were elected to the **partnership**. Darden is a member of the firm's litigation department and his practice focuses on business litigation. Roberts is a member of the firm's commercial finance department and his practice focuses on the documentation and closing of syndicated and non-syndicated commercial loan transactions. The firm's Atlanta office is located at 285 Peachtree Center Ave., 1500 Marquis Two Tower, Atlanta, GA 30303; 404-523-5300; Fax 404-522-8409; www.phrd.com.

- > Attorney **Derick C. Villanueva**, announced the formation of **The Villanueva Law Firm, LLC**. The firm will provide legal counsel and representation in the areas of residential and commercial real estate transactions, general business law, immigration and naturalization law, DUI and family law. The firm is located at 165 W. Wieuca Road NE, Suite 314, Atlanta, GA 30342; 404-252-8889; Fax 404-252-8891; www.vlawfirmllc.com.

- >  **Schulten Ward & Turner, LLP**, added **Thomas Richelo** as **of counsel** as the result of a merger with Richelo Law Group, LLC. Richelo's practice areas include construction and design law, surety law, commercial and business litigation, employment contract and civil litigation,


mediation and arbitration. He will provide alternative dispute resolution and dispute avoidance services for construction industry clients as well as other business entities. The firm is located at 260 Peachtree St. NW, Suite 2700, Atlanta, GA 30303; 404-688-6800; Fax 404-688-6840; www.swtlaw.com.

> **Seyfarth Shaw LLP** announced that Atlanta partner **Mark A. Block** was appointed **chair** of the firm's real estate practice group. Block's practice specializes in commercial real estate development and finance. The firm's Atlanta office is located at One Peachtree Pointe, 1545 Peachtree St. NE, Suite 700, Atlanta, GA 30309-2401; 404-885-1500; Fax 404-892-7056; www.seyfarth.com.



> **Audra M. Doyle** joined **Banta Immigration Law Ltd.** as an **associate** specializing in business immigration law. The firm is located at 1175 Peachtree St. NE, 100 Colony Square, Suite 700, Atlanta, GA 30361; 404-249-9300; Fax 404-249-9291; www.bantalaw.com.

> **Marlan B. Williams** and **Ty M. Bridges** announced the formation of **Wilbanks & Bridges, LLP**, formerly Harmon, Smith, Bridges & Wilbanks LLP. The firm represents whistleblowers filing cases on behalf of U.S. taxpayers seeking to recover monies that have been fraudulently billed to the government. The firm is located at Monarch Plaza, 3414 Peachtree Road, Suite 1075, Atlanta, GA 30326; 404-842-1075; Fax 404-842-0559; www.wilbanks-bridgeslaw.com.

In Albany

>  **Langley & Lee, LLC**, announced that **Lauren L. Mock** joined the firm as an **associate**. Mock's practice focuses on litigation, health care law and banking, with an emphasis on creditor representation. The firm is located at 1604 W. Third Ave., Albany, GA 31707; 229-431-3036; Fax 229-431-2249; www.langleyandlee.com.

In Columbus

>   **Hatcher, Stubbs, Land, Hollis & Rothschild, LLP**, announced that **Melanie V. Slaton** joined the firm as a **partner** and **Kristin R. Strunk** joined as an **associate**. Slaton's practice consists of general civil litigation and includes a focus on labor and employment law matters. Strunk's practice focuses on medical malpractice litigation. The firm is located at 233 12th St., Suite 500,


Columbus, GA 31901; 706-324-0201; Fax 706-322-7747; www.hatcherstubbs.com.

In Dahlonega



> **Steven Leibel** announced the opening of **Steven Leibel, P.C.** Leibel's practice concentrates on serious personal injury, medical malpractice and wrongful death cases. He was formerly with Casey Gilson, P.C. The firm is located at 199 Mountain Drive, Suite 201, Dahlonega, GA 30533; 706-867-7575; Fax 706-867-0186; www.leibel.com.

In Marietta

> Marietta attorneys **Russell D. King** and **Stephen A. Yaklin** formed **King & Yaklin, LLP**, a law firm specializing in civil litigation and arbitration. **Matthew Wilkins** joined them as an associate. King was formerly a partner with Dupree, King & Kimbrough, LLP. Yaklin was a partner at Brock, Clay, Calhoun & Rogers in Marietta. Wilkins was previously an associate with Brock Clay. The firm is located at 840 Roswell St., Marietta, GA 30060; 770-424-9235; Fax 770-424-9239; www.kingyaklin.com.

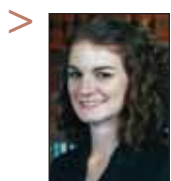
>  **Cobb Mediation, LLC**, announced that **Tom Cauthorn** joined its panel of mediators. Cauthorn will mediate complex civil matters. Cobb Mediation is located at 65 Whitlock Ave., Marietta, GA 30064; 770-693-3470; Fax 770-419-4464; www.cobbmediation.com.

In Savannah

>   **Oliver Maner & Gray LLP** announced that **Douglas E. Herman** and **Jacob D. Massee** joined the firm as **associates** in the litigation department. Herman's practice focuses on professional liability defense litigation, commercial and contract litigation, municipal law, professional licensure and administrative litigation and real estate matters. Massee works primarily in the areas of municipal liability, personal injury, products liability, professional negligence and business litigation. The firm is located at 218 W. State St., Savannah, GA 31412; 912-236-3311; Fax 912-236-8725; www.omg-law.com.

> **Alan S. Lowe** announced the formation of **Alan S. Lowe & Associates, PC**. **Ellen L. Schoolar** joined the firm as an associate. The firm is located at 311 W. Broughton St., Savannah, GA 31401; 912-234-2581; Fax 912-234-4190.

In Valdosta



> **Langdale Vallotton, LLP**, announced that **Jessica Rentz Young** joined the firm as an **associate**. Young plans to practice transactional law. The firm is located at 1007 N. Patterson St., Valdosta, GA 31601; 229-244-5400; Fax 229-244-0453; www.langdalevallotton.com.

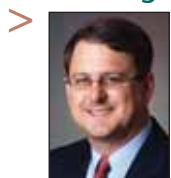
> **Young, Thagard, Hoffman, Smith & Lawrence, LLP**, announced that **Crystal Jones** and **J. D. Dean** joined the firm as **associates**. The firm continues its practice focused on civil defense litigation and general litigation throughout South Georgia. The firm is located at 801 N. Wood Park Drive, Valdosta, GA 31602; 229-242-2520; Fax 229-242-5040; www.youngthagard.com.

In Arlington, Va.



> The **Student Press Law Center** named **Frank Daniel LoMonte** as its new **executive director**. Previously, he was an associate attorney with Sutherland Asbill & Brennan LLP, Atlanta, where he had a diverse commercial practice focusing on energy and telecommunications litigation. The Center is located at 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; 703-807-1904; Fax 703-807-2109; www.splc.org.

In Birmingham, Ala.



> **Kirk D. Smith** has rejoined the litigation practice group of **Haskell Slaughter Young & Rediker, LLC**, after a five-year tenure with a Birmingham litigation specialty firm. Smith primarily represents clients in the defense of civil litigation, including the representation of businesses in commercial litigation and the defense of tort claims, including product liability, fraud, dram shop and personal injury matters. Smith also represents insurance clients in coverage matters. The firm's Birmingham office is located at 1400 Park Place Tower, 2001 Park Place North, Birmingham, AL 35203; 205-251-1000; Fax 205-324-1133; www.hsy.com.

In Charleston, S.C.



> The **Law Office of John A. Jackson, P.C.**, a general law practice, announced the opening of a new office in Charleston. The firm accepts many types of cases including personal injury, wrongful death, social security disability, bad faith insurance denials, consumer concerns, faulty credit reporting and small business issues.

Georgia Bar Foundation Receives \$50,000 Cy Pres Award



Judge John D. Allen (right) presents a \$50,000 check to Len Horton for support of civil legal services for low-income Georgians.

Hon. John D. Allen, judge of the Superior Courts of the Chattahoochee Judicial Circuit in Columbus, presented a check for \$50,000 to the Georgia Bar Foundation to be used to support civil legal services for low-income Georgians. The check represents a donation from the American General Assurance Company Credit Insurance Remainder Fund.

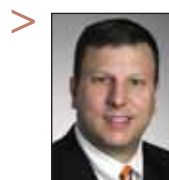
In making the award, Judge Allen said, "Thank you for the good work being done by your organization in providing legal services to the underserved in our state."

Accepting the award for the Georgia Bar Foundation, Executive Director Len Horton said, "The Georgia Bar Foundation thanks Judge Allen and is pleased that he thought of us and our support for civil legal services when he made his award decision. There are several civil legal services projects needing support beyond the \$3 million we have already awarded to Atlanta Legal Aid and Georgia Legal Services this year. This \$50,000 donation will make an important difference to Georgia's efforts to support civil legal services for the underserved."

More than \$20 million has been awarded by the Georgia Bar Foundation to both Georgia Legal Services and Atlanta Legal Aid since the mid 1980s. The Georgia Bar Foundation is the 501(c)(3) that is the named recipient of Interest On Lawyer Trust Accounts (IOLTA) by the Supreme Court of Georgia.

The firm's Charleston office is located at 535 Stinson Drive, Charleston, SC 29407; 843-278-2444; Fax 412-894-7917; www.lawofficeofaj.com.

In Houston, Texas



> **McGlinchey Stafford PLLC** announced that **Lance A. Bowling** has returned to the firm, joining the commercial litigation team in Houston, Texas. Bowling previously practiced for five years in the firm's New Orleans office before accepting an

in-house counsel position with a major Fortune 500 energy company, where he handled labor and employment law matters, benefits, general litigation, commercial contracts and mergers and acquisitions. The firm's Houston office is located at 1001 McKinney St., Suite 1500, Houston, TX 77002; 713-520-1900; Fax 713-520-1025; www.mglinchey.com.

Don't Tell a Soul:

What To Do About Secrets Between Multiple Clients

by Paula Frederick

Your client lowers his voice as soon as his wife leaves the room. "I've got a confession to make," he whispers. "I don't want my wife to know. . . ."

In the time it takes his wife Suzy to powder her nose, Joe fills you in on the raunchy details of his secret extramarital affair. "And that's where you come in," he finishes. "I need to make some changes to my will. . . ."

Later you pace your partner's office and try to work through your options. "What do I do now? I've been handling their legal work since I started practicing. I would never have guessed that Joe has been seeing another woman—and for 20 years, no less! How can he make her a beneficiary in his will? He's a deacon in the church!"

Your partner isn't sure there's a problem. "What's the big deal? You have to keep all of Joe's secrets anyway, right? He has already set aside some stock for the bequest. Suzy won't know unless Joe dies before she does, and apparently that's a gamble he's willing to take."

"But I represent *both* of them! If I don't tell Suzy about this, I'll feel like *I'm* cheating on her! I owe her more than that—I'm supposed to look out for her interest and give her the benefit of my best judgment."

"Maybe you do have to withdraw from representing Suzy," your partner concedes. "But there's no reason you can't keep representing Joe."

Or is there?

Lawyers must keep their clients' secrets. Clearly the information that Joe has imparted is confidential pursuant to Bar Rule 1.6, and you can't reveal it to Suzy without Joe's permission.

Bar Rule 1.7 prohibits multiple representation where there is a significant risk that the lawyer's duties to another client will materially and adversely affect the representation. Although clients may waive the risks involved in multiple representation, the waiver must be "knowing."


Can you square your obligation to keep Joe's dirty secret with your duties to Suzy? Probably not,



because you are not able to give Suzy the information she needs to make an informed decision about waiving the conflict.

Formal Advisory Opinion 03-2 provides further guidance. A lawyer who represents multiple clients usually may not keep secrets between them. The opinion recommends that a lawyer discuss the need for sharing confidences among jointly represented clients at the outset of representation, and such discussion is probably required under Rule 1.4 (Communication) as well.

Finally, since you were hired to do joint estate planning for Joe and Suzy you can't solve the problem by sending Suzy to another lawyer. Your continued representation of Joe violates Rule 1.9—Joe's interests are now materially adverse to those of your former client Suzy.

There's one chance to salvage the relationship with these clients—you will have to convince Joe to confess his indiscretions to Suzy. Not likely. 



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

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Discipline Summaries

(Oct. 20, 2007 – Dec. 14, 2007)

by Connie P. Henry

Disbarments

William Alexander Byars

Columbus, Ga.

Admitted to Bar in 1975

On Oct. 29, 2007, the Supreme Court of Georgia disbarred Attorney William Alexander Byars (State Bar No. 100450). The following facts are deemed admitted by his default:

The State Bar was notified that a check was presented against insufficient funds on Byars's attorney escrow account. Byars's banking records showed repeated mishandling of trust account funds, including counter withdrawals and numerous checks written to Byars without a client-related purpose. Byars improperly designated his trust account and his operating accounts as "Alex Byars Attorney at Law IOLTA Account" and "Practice Account" respectively.

In another case, Byars was the executor of his mother's estate and he wrote a check on the estate's checking account to a client for \$8,815.45 designated as "settlement proceeds." Byars had converted the client's settlement funds to his own use. Byars misused the funds and breached his fiduciary duty to the other heirs of the estate.

As noted above, Byars settled a claim for a client but failed to notify her of the settlement. The client made several attempts to contact Byars, but he failed to respond. She learned of the settlement check after contacting the opposing attorney. Byars deposited the settlement check into his trust account without the client's endorsement and then converted the funds for his own use. He subsequently gave the client a check that was drawn on the account for the estate of Byars' mother for which he was the executor.

The Court found in aggravation of discipline a dishonest or selfish motive, a pattern of misconduct, multiple offenses, and refusal to acknowledge the wrongful nature of the violations and the aggravating factors involved.

Walter Ryan Dogan

Jamaica, N.Y.

Admitted to Bar in 1992

On Oct. 29, 2007, the Supreme Court of Georgia disbarred Attorney Walter Ryan Dogan (State Bar No.

224755). The following facts are deemed admitted by his default: In 2005 the Georgia Department of Human Resources filed a child support case against Dogan. Dogan produced paycheck stubs that were fabricated and reflected weekly earnings substantially less than Dogan actually received. The trial court found that Dogan fabricated the documents to deceive the court, found him in contempt, and sentenced him to 20 days in jail. Based on these facts, the Supreme Court of Georgia held that disbarment is the appropriate sanction where a lawyer, with the intent to deceive and to harm another party, falsifies documents and relies upon those documents in a court proceeding.

W. Grady Pedrick

Waycross, Ga.

Admitted to Bar in 1974

On Oct. 29, 2007, the Supreme Court of Georgia disbarred Attorney W. Grady Pedrick (State Bar No. 570050). The following facts are deemed admitted by his default:

A client hired Pedrick in September 2003 to represent her in an employment discrimination case and paid him \$500 in attorneys' fees and \$150 for filing costs. Pedrick filed the suit in Ware County Superior Court but it was removed to the United States District Court, Southern District of Georgia in January 2004. The court ordered Pedrick to confer with the defendants' counsel, develop a discovery plan, and submit a joint written report. After he failed to comply, one of the defendants filed a motion to dismiss in February 2004 and a unilateral report in May 2004. In June 2004 the court entered an order finding Pedrick had not made a single filing, had failed to respond to the motion to dismiss, and had failed to participate in the ordered conferences. The order required him to show cause within 15 days as to why the action should not be dismissed for want of prosecution. Pedrick again failed to respond and the court dismissed the client's action with prejudice. Pedrick did not communicate with his client and did not respond to her attempts to contact him. After agreeing to meet the client in Dec., he did not show for the meeting and he failed to return the client's file and money.

In another case Pedrick filed a notice of appearance as associate counsel for a client in November 1999 after the client's attorney became ill. The client only learned of Pedrick's involvement in March 2000 when Pedrick attended a pre-trial hearing in the case. In March the court placed the case on the civil suspense file and ordered it deleted from the roll of pending cases with leave for the case to be reopened if not settled. Although Pedrick told the client on several occasions that the case was still active and that he would prosecute the case, he did not do so and in Oct. 2000 the court warned the attorneys that the case would be dismissed if counsel took no action. He still failed to take any action and failed to inform the client of the orders.

Tara Gail McNaull

Roswell, Ga.

Admitted to Bar in 1993

On Nov. 5, 2007, the Supreme Court of Georgia disbarred Attorney Tara Gail McNaull (State Bar No. 498367). Although personally served with the Notices of Investigation, McNaull failed to respond. She also failed to file a Notice of Rejection despite being properly served with the Notice of Discipline.

According to the Notice of Discipline, which covers 26 separate matters, McNaull forged signatures on documents, including the signature of a notary public and a sheriff's deputy; lied to or misled clients and opposing counsel as to the status of cases and actions she allegedly had taken in those cases; failed to follow through on promises made to clients, opposing counsel and the court; misled clients as to the progress of their cases and hearing dates; failed to return clients' and opposing counsel's phone calls and e-mails; failed to prepare documents and pleadings needed for the cases; advised clients and opposing counsel that delays were attributable to others when in reality the fault for the delays rested with her; created false documenta-

tion after the fact to support her misrepresentations; failed to provide clients with information about their cases; failed to return unearned fees; removed pertinent documents from clients' files before returning the files; and placed "manufactured" documents into a client's file before returning it in order to mislead the client about the work that had been done in the case. Her actions caused some of her clients to lose their right and forced others to hire new counsel.

In aggravation the Court noted that McNaull's actions showed a pattern of client neglect and attorney misconduct. The Court found no mitigating factors other than her lack of a prior disciplinary history.

William O. Key Jr.

Augusta, Ga.

Admitted to Bar in 1983

On Oct. 29, 2007, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of William O. Key Jr. (State Bar No. 416911). Key pled to guilty in federal court to a felony conspiracy charge in connection with real estate closing fraud.

Richard O. Smith

Columbus, Ga.

Admitted to Bar in 1974

On Oct. 29, 2007, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of Richard O. Smith (State Bar No. 662637). Smith entered a guilty plea in the Superior Court of Harris County to five counts of felony child molestation.

Andrew E. Wolf

Atlanta, Ga.

Admitted to Bar in 1986

On Oct. 29, 2007, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of Andrew E. Wolf (State Bar No. 773262). Wolf entered a guilty plea in the United States District Court for the Northern District of Georgia to violating 18 USC § 371, a felony violation of the

United States Code.

William C. Campbell

Stuart, Fla.

Admitted to Bar in 1977

On Nov. 6, 2007, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of William C. Campbell (State Bar No. 107150). Campbell was sentenced in the U.S. District Court, Northern District of Georgia, Atlanta Division, on a conviction of three counts of tax evasion.

Suspensions


Anson Andrew Adams

Augusta, Ga.

Admitted to Bar in 2006

On Oct. 29, 2007, the Supreme Court of Georgia accepted the petition for voluntary suspension of license of Anson Andrew Adams (State Bar No. 143095) pending the outcome of an appeal of his criminal conviction. Adams was convicted of two felonies and four misdemeanors in the Superior Court of Richmond County.

Interim Suspensions

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since Oct. 19, 2007, five lawyers have been suspended for violating this Rule, and one has been reinstated. 



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

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

Tricks, Shortcuts and Good Things to Know when Using Technology

by Natalie Kelly



Using a legal-specific practice management, document management, time billing and accounting program, or even Microsoft Word and WordPerfect, can be daunting with the programs' many features. Technology can easily become overwhelming; it is often the small tip or trick that helps most with making technology bearable. Here are some tricks, shortcuts and lesser-known facts about law office and general business technology that can help you get to another level with technology—or at least save you a little time on the keyboard!

Beyond Edit/Paste Special/Unformatted Text

Even though we have favored this tip over the years to paste unformatted text, another option is to use Notepad. For example, simply copy and paste text from a website's contact information screen into Notepad. This rids the text of complicated formatting before you paste into your word processor program. This can save a lot of re-formatting time when Paste Special just isn't enough.

Expanding QuickWords and AutoText

Expanding a few characters into larger amounts of text can be a real time saver, i.e., on my computer, “\lpm” expands to “Law Practice Management Program—State Bar of Georgia.” You can even use abbreviations, also known as tokens, to draft several clauses from just a few characters in Word and WordPerfect. The real trick to this tip is to try to accommodate your more commonly used phrases, closings, etc. into Quick Words or AutoText entries as much as possible. Give it a try right now, and see how doing just one or two little phrases will help. In Word, select Insert/AutoText from the drop-down menu and in WordPerfect choose Tools/QuickWords.

Publish to PDF in WordPerfect

I recently learned that some people had not realized that you are able to publish to PDF in WordPerfect. (You choose File/Publish to PDF.) This can be helpful when you do not want to invest in the latest version of Adobe Acrobat or are afraid to rely on other PDF generators. For a comprehensive list of additional PDF generators, visit www.grants.gov/agencies/software.jsp.

Signature Block

You can use your signature block in your e-mail program to create standard replies for e-mail. If you find yourself constantly sending out the standard "nothing is going on in your case at this time" message, you can create a message block that includes not only your normal closing signature block information, but your standard language for file inactivity as well. After you save this new signature block, you can save a lot of time when responding to messages that need the same answer.

Discount Programs

Dell, IBM, Sprint and many other ABA Discount Program vendors extend their savings programs to all lawyers regardless of whether they are ABA members or not. Staff may also be able to take advantage of some of the discounts just for the asking.

ABA Legal Technology Resource Center

The ABA Legal Technology Resource Center can help you decide which software and other legal technology to use in your office, as well as research products and services for you. You may even be chosen to participate in the ABA's Annual Legal Technology Survey and contribute to one of the only national surveys on the use of technology in modern law practice. Check out all of the wonderful services offered via the ABA LTRC at www.lawtechnology.org.

Surveys as Reference Materials

The ABA Annual Legal Technology Surveys are kept in the reference area of the LPM Resource Library. Many other pertinent surveys are also available as reference materials in our office. If you ever have legal economics or service related questions, you may ask to receive some useful background information from some of the surveys in our library.

Practicing Law on a Mac

Biting commercials aside, firms now have the option of running their offices on Macintosh computers. There are also online listings of tools that can be used to enhance the legal Mac experience. Visit www.macattorney.com for more information. You should also check out www.ilounge.com to get a breakdown on accessories for everything Mac. Give us a call to learn more about practicing law on a Mac.

Convert PDFs

Zamzar, despite its funny sounding name, can convert PDF documents into Word and Excel document formats. You go to www.zamzar.com, upload your document, enter your e-mail address for receiving the document and voila, you receive your former PDF file in Word or Excel. You can convert other file formats too, including conversions for URL and videos like those at YouTube for easier accessibility and adaptability of documents/files.

Built-in Marketing Tools

Most practice management software systems have built-in marketing tools. For instance, you are able to use contact records in the practice manager to identify sources for your referrals. This feature lets you see where your referrals are coming from and makes it easy to get out that thank-you note.

Vendors' Help Sites


You should not overlook the help sites for vendors. Most will not only have knowledgebase information online, but also training documents, white papers and even user forums that allow users to ask questions about the products they are using. Always visit the websites of vendors you use on a regular basis to see if they provide online assistance. It could be a great time and money saver when there's a problem or concern.

Send Large Attachments

If you ever find yourself fighting with your servers and bounced messages that are too large to send via your e-mail system, you should check out www.yousendit.com. This site is great for sending secured messages up to 100 MB, and is free in its Lite version. We use it regularly to send large sets of CLE program materials, etc.

Law Practice Management Blogs

I love practice management blogs, and may get to do my own blogging in 2008. Until then, our friends, Dennis Kennedy, Jim Calloway, Reid Trautz and Ellen Freedman have got you covered when it comes to practice management blogging. Check out their respective blogs at www.denniskennedy.com/blog/, jimcalloway.typepad.com/, reidtrautz.typepad.com/, and www.palawpracticemanagement.com/. If that's not enough, check out www.technorati.com—a great blog directory!

If you have some good tech tips, sites or tricks, give us a call. We love making additions to our growing list of tech goodies! 



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

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The “Less Than High Museum” Rises to the Occasion

by Bonne D. Cella

Artisans, authors and keepers of the Earth have a friend and advocate with a generous spirit who lives in Southwest Georgia.

His name is Spencer Lee. Born in Macon, William Spencer Lee IV arrived in Albany as a small child when his FBI agent father was transferred to the “Good Life City.” Luckily for those in Dougherty County, Spencer loved the area and made it his home.

This “Double Dog” graduate of the University of Georgia began his law practice in 1971 and serves as county attorney—a position he’s held since 1979. He’s an environmental activist who served on the National Board of Scenic America to ensure that billboard advertising did not destroy the trees and beauty along our nation’s highways. He championed the cause in Washington, D.C., bringing national media attention to

the problem and received the national award from Scenic America for his efforts. At home in Dougherty County, he started and chaired the Keep America Beautiful Campaign that garnered him the first National Chair Person Award of Excellence.

His love and passion for the arts and environment is equally shared with his affable wife, Lacy Lee, the director of Volunteer Services for Phoebe Putney Hospital in Albany. When Spencer converted their carport into a sleek exhibit area to showcase local artists’ paintings, pottery, woodturning objects, woven baskets and the like, Lacy did not complain. In fact, she actively supports Spencer’s efforts to encourage artists. She is a most gracious hostess—even when Spencer gives her very short notice for an art event.

Their converted carport space, christened the “Less Than High Museum,” is also where authors experience book-signing events that rival those given in any large metropolitan area. Greg Haynes, an inactive member of the State Bar, and author of *The Heeey Baby Days of Beach Music*,¹ relates his experience: “During the course of the last year, we had quite a few book signings that took my wife Nora and me from Myrtle Beach, S.C., to Manchester, England, but none felt more like being at home than the



Spencer and Lacy Lee outside their “Less Than High Museum.”




Nora and Greg Haynes winning the independent publisher’s award in New York City.



Derek Taylor, an artist originally from Albany.

one in Albany hosted by Spencer and Lacy Lee. I sort of felt like I was back at my fraternity house in Athens as so many of my brothers from the good old days—the *heeey baby days* were there. Nora and I drove from Atlanta to Albany with a car and trunk full of books and came back empty. I think Spencer rounded up most everyone in Southwest Georgia that knew how to shag or bop and had them in attendance!”

According to Spencer’s good friend Ed Lightsey, “Spencer Lee is generally acknowledged as the greatest shag dancer in the history of the world.” His smooth moves on the dance floor inspired Nora Haynes on her musical stage adaptation of *The Heeey Baby Days of Beach Music*, now in production.

Artist Derek Taylor,² originally from Albany, also experienced a successful premiere at the “Less Than High Museum” when he sold a number of his paintings and was commissioned for more! Derek offers these words: “Spencer Lee is one of the bright lights working to illuminate the arts in Southwest Georgia. He tirelessly works to promote all facets of creativity that are within his reach. His personal involvement with the artist is second to none. I know a scant few that will do what he does for the arts on this pro bono basis. All of this considered, Spencer Lee is a patron of the arts in the truest sense of the word.” Thank you Spencer for all that you do—you are an inspiration for all of us! 



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

Endnotes

1. “The Heeey Baby Days Of Beach Music” received the Independent Publisher’s Bronze Medal Award at a ceremony in New York City.
2. Derek Taylor’s gallery, *The Quirky Crow* is located in Chattanooga, Tenn.

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

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Sections Travel to Puerto Rico For Annual Conference

by Johanna B. Merrill



Monica Ewing of Law Offices of Monica E. Ewing, Esq., Ivory Brown of Ivory T. Brown, P.C., and Darryl Cohen of Cohen Cooper Estep & Mudder at the group dinner in Puerto Rico's Revealing Rainforest on Nov. 8.

The State Bar's Intellectual Property Law Section and Entertainment & Sports Law Section (along with attorneys from Tennessee, Florida and New York), gathered at the Gran Melia Puerto Rico Resort & Spa on Puerto Rico's northeast coast for the 19th annual Southern Regional Entertainment and Sports Law Conference (SELAW) and the 13th Annual IP Institute, Nov. 7-11.

2007 marked the eighth year the two sections have joined forces to host the dual-track conference, as nearly 300 attorneys and their guests traveled to the south Caribbean island for the event.

An evening beachside reception welcomed attendees and their guests on Thursday night, before programming kicked off on Nov. 8. Conference organizers Darryl Cohen, Scott Keniley, Todd McClelland, IP Law Section chair; Lisa Moore, Entertainment & Sports Law Section chair; and Howard Wiener, chair-elect of the Florida Bar's Entertainment, Arts and Sports Law Section, welcomed attendees at the first plenary session of the conference. Following their remarks, Supreme Court of Georgia Presiding Justice Carol Hunstein moderated a panel discussion titled "The Ethical



(Top) Darryl Cohen of Cohen Cooper Estep & Mudder, Charlie Feldman of BMI and Michael Mason of Gardner Groff Greenwald & Villanueva PC.

(Top Left) Mary Jo Schrade of Microsoft and Alison Danaceau of Carlton Fields presented a copyright law update.

(Top Right) Greg Kirsch of Needle & Rosenberg PC speaks to attendees at a panel discussion of "Update and Discussions of New Patent Legislation and Patent Office Rules."

(Right) Steven Hetcher, a law professor at Vanderbilt University School of Law, Steve Wigmore of King & Spalding and John Renaud of Turner Broadcasting.



(Left) An islander trumpeter entertained guests during a pre-dinner reception in the Revealing Rainforest. (Below) John Harbin and Pamela Tremayne



Attorney” with panelists Superior Court Judge J. Stephen Schuester, Superior Court Judge Mary Staley and Van Pearlberg, Cobb County assistant district attorney.

Other panels that day consisted of discussions on recording agreements, patent plaintiffs, distribution deals and a patent law update.

On Thursday night, attendees traveled to the Revealing Rainforest (Puerto Rico boasts the only rainforest in the United States and its territories), where a *Survivor*-like short trek down a tiki torch lined path led to a reception and dinner. The sounds of rushing waterfalls were drowned out when guests were entertained with island music played on bongos and trumpets. As the musicians transitioned into the theme from *Indiana Jones*, Justice Hunstein surprised everyone as she arrived to the party via zip line.

The panels continued on Nov. 9 as a group of family law and entertainment law attorneys, including Family Law Section Chair Kurt Kegal, presented a discussion titled


“Death, Divorce and Disorderly: Celebrity Clients—Ignore the Tears.” (Other attorneys on the panel included: Becca Crumrine, Lawrence Cooper, Giti Khalsa, Richard Nolen, Randy Kessler, Howard Wiener and Ivory Brown.) Panels that day included an entertainment case law update, discussions on sports representation, patent rules, user-generated website issues and piracy in the recording industry, as well as the infamous panel discussing the adult film industry.

Friday night was free for attendees to travel to Old San Juan for dinner and sight-seeing or to simply stay at the resort and enjoy one of the five restaurants or pool-side dining.

The three days of legal education programming concluded on Saturday, Nov. 10, with panels on copyright law update, trademark law update, as well as a legislative update and the annual “State of Performing Rights” presented by BMI attorneys Charlie Smith and Alison Smith from New York City.

As always, the social aspect of the conference wrapped up with a beachside dinner and reception.

The 2008 conference will return to its 2004 location at the Fiesta Americana Grand Resort in Cabo San Lucas, Mexico. If you have location suggestions for future SELAW Conferences/IP Institutes, contact Darryl Cohen at dcohen@coco-law.tv. For more information on past conferences, or to stay informed of future planning, please visit www.selaw.org.

Reminder: As most sections move toward electronic-only delivery of meeting announcements, section business and newsletters, it is important to keep the Bar updated on your e-mail address. You may update your profile at www.gabar.org. 



Johanna B. Merrill is the section liaison for the State Bar of Georgia and can be reached at johanna@gabar.org.

Browsing the Georgia Code in Casemaker

by Jodi McKenzie

The number one request we've had to improve Casemaker has been to include the titles on the chapters and subsections of the Georgia Code. I'm happy to say that we are now able to provide these titles for our members. To avoid proprietary issues, Casemaker has written more than 30,000 titles for Georgia. You can now view these titles in the "Browse" mode of the Georgia Code library. In this article we'll take a closer look at how the "Browse" mode works and how the new titles appear in the Georgia Code library.

When you are in the Georgia Casemaker Library, you will find the link to the Georgia Codes and Acts at the bottom of the content screen. Here, you will see that you have the option to enter the library using either a "Search" mode or a "Browse" mode. The "Search" mode will allow you to search the code by Code Section numbers or key words or phrases. The "Browse" mode allows you to see a table of contents. Click on the browse button on the Georgia Codes and Act bar to begin this option (see fig. 1).

When you first click on the browse button, you will be taken to a screen that has the title "Statutes and Session Law" highlighted in blue and underlined. The fact that it is highlighted in blue and underlined lets you know that it is a link to more information (see fig. 2). Click on the title to further open the Statutes and Session Law library.

You will now have the table of contents page for the Statutes and Session Law open. You can see that the Statutes are arranged in numerical order with their appropriate titles. You will also notice that each Statute title is blue and underlined, again letting you know that it is a link to more information. Click on any of the titles to see more information about it. For our example, we will click on Title 9, Civil Practice (see fig. 3).

When you click on the title, you will get an additional table of contents that displays the chapter numbers with the chapter titles. This is where the titles that Casemaker created come into play. Initially, while Casemaker was able to provide the chapter numbers, it was not able to provide the chapter titles. This has been resolved by Casemaker creating their own relevant chapter titles.

You will also see that the chapters are also blue and underlined letting you know that you can click on them to see even more information. For our example, we will click on Chapter 9-10, Civil Practice and Procedure—General Provision (see fig. 4).

Clicking on the chapter allows you to see a further table of contents for the subsections. Casemaker has also created the subsection titles. You will also notice that the subsections are blue and highlighted and include a doc-

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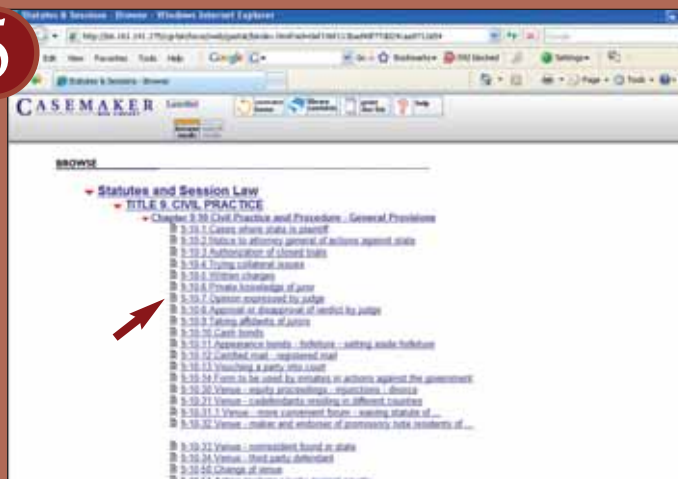
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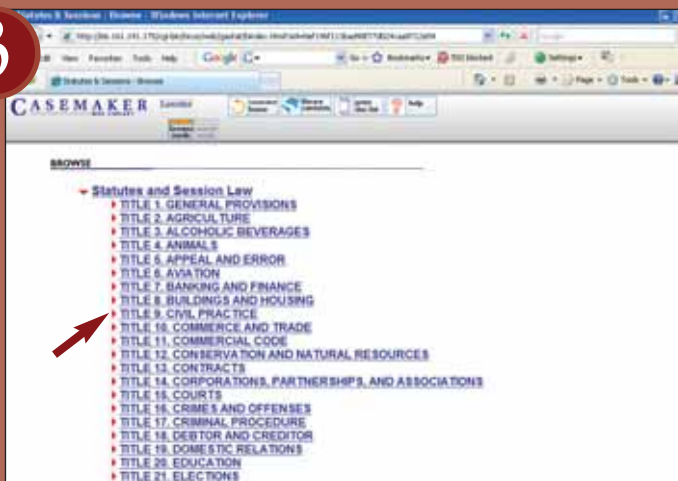
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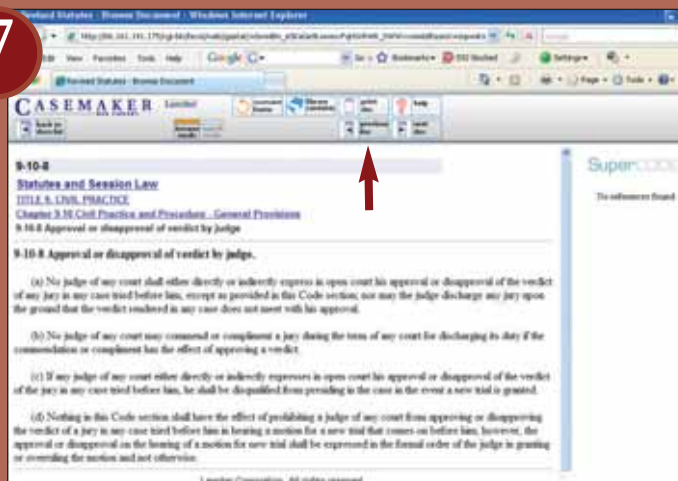
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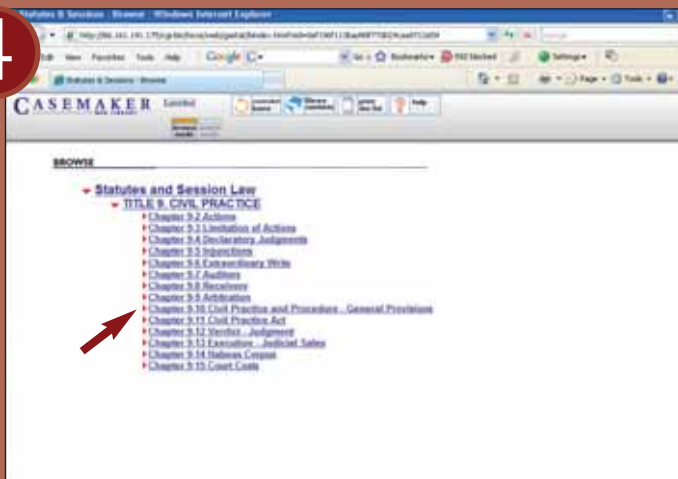
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ument icon next to them. The document icon lets you know that when you click on a subsection you will open the actual document for that Code Section. In our example, we will click on 9-10-7, Opinion Expressed by Judge (see fig. 5).

Now you are able to view the content of the Code Section. You can click on any of the highlighted and underlined titles in the heading of the Code to go back to that starting point. Clicking on Chapter 9-10 Civil Practice and Procedure will take you back to the table of contents with that heading. Clicking on Title 9, Civil Practice will take you back to Title 9, Civil Practice table of contents and so on (see fig. 6).

The "Browse" mode also allows you to scroll through the code with "Previous Doc" and "Next Doc" buttons located in the right hand side of the Casemaker toolbar. These buttons will take you forward or backwards through the code as if you were flipping through the pages of a book. The "Next Doc" button will take you to 9-10-8. The "Previous Doc" button will take you back to 9-10-7 (see fig. 7).

The "Print Doc" button is located above the "Previous" and "Next

Doc" buttons. This button gives you a printable view of the Code Section. The printable view takes out any Casemaker specific formatting such as highlighted search terms or the SuperCode field. It is important to note that the "Print Doc" button only gives you a printable view of the document. It does not tell your printer to print the document. To print this view of the document, you will still have to click on your printer icon or go to file, print on your toolbar (see fig. 8).

Casemaker is continually adding new content and features to make it one of the most valuable benefits the Bar offers its members. Adding the titles to the chapters and subsections of the Georgia Code has made Casemaker an even more convenient and comprehensive legal research tool. Please contact us if you have any suggestions or questions regarding Casemaker. 



Jodi McKenzie is the member benefits coordinator for the State Bar of Georgia and can be reached at jodi@gabar.org.

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Common Comma Conundrums (Part I)

By Karen J. Sneddon and David Hricik

Punctuation dates back at least to the Ancient Greeks.¹ Conventions of punctuation (as well as virtually all aspects of grammar, including even capitalization), have changed over time, swinging from paucity to prevalence and back again. Writers in the 21st century prefer less punctuation.² (And with the rise of email and text messaging, the punctuation pendulum may continue to swing toward paucity, and perhaps past it!)

Though it is the second most frequently used punctuation mark (trailing only the period in popularity), the humble comma inspires uncertainty. Although our fingers are often drawn to the comma key, they sometimes hover with a slight air of uncertainty as to whether to press down. This and the next two installments of *Writing Matters* examine common comma conundrums.

We are going to come at this issue the way lawyers do: what must you do with a comma, what may you do with a comma, and what you may not do with a comma. Commas must be used under a few circumstances, such as before a coordinating conjunction that joins two independent clauses. Commas may direct the musical flow, rhythm, or tone of a sentence; they tell us when to pause. No one, for example, would write: *The court, held that the prisoner, who was innocent should be released.* They cannot, among other things, perform the same function as a period, however.

This installment will address what you must and must not do with a comma. What you may do with a comma, including a discussion of the bewildering difference between a restrictive and a nonrestrictive clause,



will be addressed in the next two installments of *Writing Matters*. But first, the (relatively) bright line rules.

Comma Must

A comma must be used when it will change the substantive meaning of a sentence or lead to unintended ambiguity. As one court noted, a “comma, often a matter of personal style, is a very small hook on which to hang a change in the law of substantial proportions.”³ Even so, as we saw in our last column, commas also can convey substantive meaning. (In a gift to “A, B and C” is it three even shares, or two?) Commas must be placed to convey the proper substantive meaning.

Grammar also requires that a comma be used, but only rarely. A comma must be used before a “coordinating conjunction” that joins two independent clauses. To follow this principle, you must recall back to your junior high days. You have to know when you’re using a “coordinating conjunction” and when you’re using it to join two “independent clauses” rather than a dependent clause with an independent one. Don’t worry, though, it’s not as hard as it sounds.

There are only seven coordinating conjunctions: for, and, nor, but, or, yet, so. They can be memorized by the mnemonic “FANBOYS.”

A clause is “independent” if it expresses a complete idea on its own—if it could serve as a complete sentence. Let’s use this as the example: *The attorney was stunned by the ruling and she immediately filed an appeal.* The word

“and” is a coordinating conjunction. The two clauses are independent, complete thoughts—“the attorney was stunned by the ruling” and “she immediately filed an appeal” could each be a separate sentence. Thus, a comma should be used.

In contrast, a comma should not be used before a coordinating conjunction that joins an independent clause with a dependent clause. *The attorney was stunned by the ruling, and immediately filed an appeal.* While “the attorney was stunned by the ruling” is an independent clause—it’s a complete sentence—“immediately filed an appeal” is a dependent clause because it is not a complete sentence, since it lacks the subject (who filed the appeal?).

This is *not* a matter of style, but of grammar. A comma should join two independent clauses with a coordinating conjunction.

Comma Cannot: The Comma Splice


A comma cannot serve as a period or semicolon. A period, not a comma, separates complete sentences, or what you’ll recall from junior high as “independent clauses.” When writers put a comma where a period or semicolon must be, the result is a “comma splice.” An example: *The plaintiff resides in Georgia, the defendant resides in Alabama.* In that “sentence” a comma is attempting to join (or splice—hence the name) two independent clauses.

There are four ways to fix comma splices:

- Change the comma to a period. *The plaintiff resides in Georgia. The defendant resides in Alabama.*
- Add a coordinating conjunction (see above). *The plaintiff resides in Georgia, and the defendant resides in Alabama. The plaintiff resides in Georgia, but the defendant resides in Alabama.*
- Change the comma to a semicolon. (The semicolon can replace a period). *The plaintiff resides in Georgia; the defendant resides in Alabama.*

- Change an independent clause to a dependent clause. *Although the plaintiff resides in Georgia, the defendant resides in Alabama.*

Practice Problems

1. Joella drove from Paideia to Decatur but she wanted to drive to Macon.
2. Abby could not raise the personal jurisdiction defense, she had waived it. 



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 consistently rated as one of the top two legal writing programs in the country by U.S. News & World Report.

Endnotes

1. For a more in-depth consideration of punctuation in legal writing, see Richard C. Wydick, *Should Lawyers Punctuate?*, 1 SCRIBES J. LEG. WRITING 7 (1990).
2. For an educational and humorous discussion of punctuation, see Lynne Truss, *EATS, SHOOTS & LEAVES: THE ZERO TOLERANCE APPROACH TO PUNCTUATION* (2003). For a pictorial representation of the impact of commas on meaning, see Lynne Truss’s wonderful children’s book about commas. Lynne Truss & Bonnie Timmons, *Eats, Shoots & Leaves: Why, Commas Really Do Make a Difference!* (2006). (For those of you puzzling over our use of “Truss’s,” we’ll consider the apostrophe later in *Writing Matters*.)
3. *In re Newbury Cafe, Inc.*, 841 F.2d 20, 22 (1st Cir. 1988).

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Georgia's Mentors—

Professionalism in Action

by Douglas Ashworth

When I opened my own law practice as a sole practitioner in 1992, I would have dearly loved to have a mentor.

As I moved forward in law practice as a first generation lawyer, I benefited from experienced lawyers who acted professionally, and I suffered from the experienced lawyers who acted unprofessionally. My personal transition from law student to competent practitioner was a tough one.

After 16 years—and plenty of fire baptisms—I became the inaugural director of the State Bar of Georgia's Transition Into Law Practice Program (TILPP) when it debuted on Jan. 1, 2006. When asked about her experience in Georgia's Transition Into Law Practice Program, a beginning lawyer answered succinctly, "This program has given me a safe place to ask a stupid question." TILPP demonstrates professionalism in action by giving beginning lawyers that safe place to ask stupid questions.

Georgia's one-of-a-kind program is making a significant difference over time in the level of professionalism among members of our State Bar by equipping beginning lawyers with the practical skills, seasoned judgment, and sensitivity to ethical and professionalism values necessary to practice law in a highly competent manner. More than 1,700 beginning lawyers and 1,600 mentors have benefited from mentoring activities since TILPP's inception.

"Georgia is the first to require mandatory mentoring tied to CLE, and our Bar is being closely watched by other states. As I present professionalism programs around the country, I routinely field questions from bar officials in other states—and other countries—about Georgia's Transition Into Law Practice


Program," said Avarita Hanson, executive director of the Chief Justice's Commission on Professionalism.

"More than 30 other state bar organizations have contacted us for detailed program information. Further, we replied to requests for information about our mentoring program from bar leaders in the countries of Brazil, Canada, Portugal, Scotland and the People's Republic of China," said John Marshall, who has chaired the Standards of the Profession Committee since its inception in 1996.

As the program director, I am particularly pleased with the overwhelmingly positive evaluations from beginning lawyers and mentors who have completed the program. More than 90 percent of the evaluations recommended that the program be continued for future beginning lawyers.

The marvelous success of the program thus far is due to the willingness of experienced lawyers to demonstrate professionalism in action by committing the time to serve as mentors. An appointment by the Supreme Court of Georgia as a mentor is both a high calling and a great responsibility—serving in this capacity is in keeping with the best traditions of the legal profession.

"The State Bar of Georgia as an arm of the Supreme Court and individual members of the Bar have an obligation to the new members of the profession, to the courts, and to the public to assist beginning lawyers as they move from student to practitioner. I believe that members of the State Bar of Georgia are up to this challenge. I have volunteered myself, and I urge others to consider serving as well," said State Bar President Gerald Edenfield.

For more information about the Transition Into Law Practice Program, contact my office at 404-527-8704, or by e-mail at tilpp@gabar.org. 



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

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Decatur, Ga.
Admitted 1974
Died December 2007



The Hon. **Duross Fitzpatrick** died in January 2008. He was married to Beverly O'Connor Fitzpatrick. Together, they have two grown children, Mark and Devon.

Fitzpatrick graduated from the public schools in Cochran, Ga., attended The University of the South at Sewanee, Tenn., 1953-54, and graduated from the University of Georgia with a B.S. in Forestry in 1961 and received a LL.B. from the University of Georgia School of Law in 1966. He was a member of Sigma Alpha Epsilon.

He served in the United States Marine Corps from 1954-57 and was discharged as sergeant. Fitzpatrick was, from 1961-63, a forester with Royal Wood, Inc., and in 1963, a forester with the U.S. Forest Service, Prineville, Ore.

Fitzpatrick was admitted to practice law in Georgia in 1965, practicing law in Macon from 1966-67 as an associate with Elliott & Davis and in private practice in Cochran 1967 through 1985. From 1983-86, he was a senior partner at Fitzpatrick & Mullis in Cochran. He was nominated Nov. 13, 1985, by President Ronald Reagan and sworn in on Dec. 31, 1985, as United States District Judge for the Middle District of Georgia. He presided as Chief Judge of the Middle District from February

1995 to February 2001 and served as Senior Judge from February 2001 to until his death.

Fitzpatrick was a member of the State Bar of Georgia, 1965 to present; president of State Bar of Georgia 1984-85; Life Fellow American Bar Foundation and Georgia Bar Foundation, 1984; a member of Georgia's Chief Justice's Commission on Professionalism, 1992-98; member of Board of Directors Federal Judges Association, 1998-2001; and Master William Augustus Bootle Inn of Court. He was also a member of State Bar of Georgia, Board of Governors, 1976; Executive Committee of Board of Governors 1979; and president-elect 1983-84.

Fitzpatrick was a member of Christ Episcopal Church and was a student of American History, especially the post Revolutionary and Civil War Eras. He enjoyed hunting, photography and travel and was a member of Palaver. He also served as president of the Richland Restoration League, Inc.



Chief Judge **Stephen L. Jackson** of Blackshear died in December 2007. Jackson, the son of the late Dr. Joseph M. Jackson and Mrs. Anne Lewis Jackson of Folkston, was born in July 1947 in Waycross.

Jackson graduated from Charlton County High School in 1965. He received his B.B. from Mercer University in 1969, and his J.D. from the Walter F. George School of Law at Mercer University in 1974.

Jackson was admitted to the Bar in 1974 and was admitted to practice in all trial courts in the State of Georgia, the Georgia Court of Appeals, the Supreme Court of Georgia, the U.S. District Court for the Southern District of Georgia, the U.S. District Court for the Middle District of Georgia and the U.S. Court of Appeals for the Eleventh Circuit. He was a past president of the Waycross Bar Association. Jackson served on the Board of Governors for the State

Bar of Georgia from 1986 to 1994 and was a member of the Budget Committee.

Jackson practiced law in Waycross for 22 years and served as the Judge of Recorder's Court for the City of Waycross for 15 years, from 1981 to 1996. He also served as the Chapter 7 Trustee for the U.S. Bankruptcy Court for the Southern District of Georgia, serving 14 counties in Southeast Georgia under the auspices of the U.S. Department of Justice for approximately six years. Jackson was an instructor of Business Law at Waycross College for nine years.



Thomas Bailey Murphy was born in March 1924 in Bremen, a west Georgia railroad town. His father, the mayor, was a railroad telegrapher and agent during the week, a Primitive Baptist preacher on weekends. As a red-haired youth, Murphy worked as a soda jerk at a drugstore and delivered newspapers. Nicknamed "Cotton," his sport was baseball. As a teenager, he played catcher on the town team, with the adults.

Murphy graduated from Bremen High School in 1941 at age 16, then attended North Georgia College in Dahlonega, where he was a boxer. From there, he went into the Navy and spent the remainder of World War II in the Pacific. He rarely spoke of the experience.

Murphy left the military with \$400

in his pocket, which funded law school at the University of Georgia and marriage to Agnes Bennett.

Murphy and his older brother, James, crippled by rheumatoid arthritis, practiced law together after Tom's graduation, and in 1960, Tom Murphy took over his brother's seat in the Legislature.

He began his career when segregation held the upper hand in state politics, and he served as floor leader for segregationist Gov. Lester Maddox, who took office in 1967. In the complicated world of racial politics, the Murphy family was considered moderate on segregation. Despite his rural roots, Murphy likely had a greater hand in shaping modern metro Atlanta than any other figure in state politics.

As speaker, Murphy became one of the architects of an alliance between urban African-Americans and rural whites that kept Democrats in control of state government in the decades that followed the demise of Jim Crow.

By the time Murphy cleaned out his office, that alliance was cracking. The same night in 2002 that Murphy was defeated, the state elected Sonny Perdue its first Republican governor in 130 years. Two years later, the GOP finally won control of Murphy's House.

The Haralson County native was a Roosevelt Democrat whose reign spanned five Democratic governors, from Jimmy Carter to Roy Barnes. He lived long enough to see that power collapse and

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Republicans take control of both chambers of the Legislature and the governor's office.

During nearly three decades as House leader—1974 to 2002—Murphy pushed through funding for MARTA and suburban freeways, and he sponsored construction of the Georgia World Congress Center and the Georgia Dome.

Murphy presided over the House with an iron fist, but there was always a soft spot just behind his bulldog growl, especially for children's issues and the disabled. He was a child of the Depression, and the hungry people he saw in his youth forever shaped his political thinking. As a young lawyer he often carried his crippled brother up the stairs of the Haralson County Courthouse, where the two practiced law.

But he also could play hardball with the most grizzled politicians, and often he seemed to relish the fight. When Zell Miller, then lieutenant governor, was running for governor, Murphy backed Miller's opponent. Suddenly, Miller's bill to create a state lottery stalled. An outraged Miller complained the bill was being buried in "Murphy's mausoleum." Murphy responded that if he had a mausoleum, Miller would be a candidate for interment.

Murphy seemed to take particular delight in shredding the small but growing number of Republicans in the state House, often ridiculing them from the speaker's podium, high above the House floor.

In the end, it was an upstart Republican, Bill Heath, who ended Murphy's career in 2002, defeating the old warhorse in his own backyard. Metro Atlanta and its GOP-dominated suburbs had inched into Murphy's once-rural legislative district, and an era had ended.

By the time he left office, Murphy was the longest-serving statehouse speaker in America—so well-known that the University of West Georgia announced plans to re-create his cluttered office as part of a campus museum.

In the spring of 2005, all 180 members of the House voted to hang a portrait of Murphy in the state Capitol.




Judge W. Glenn Thomas Jr. passed away in July 2007. He was born in August 1932 in Jesup. Thomas was the Municipal

Court Judge for the cities of Jesup and Screven. He was a retired District attorney serving over 29 years in the Brunswick Judicial Circuit. He also served two terms in the Georgia Legislature beginning in 1964. Thomas was the Salutatorian at Jesup High School in 1950. He was also a graduate of Capitol Radio & Engineering Institute in Washington, D.C., Georgia Teacher's College and Atlanta Law School.

In civic affairs, Thomas was a national director for the Jaycees, past president of the Jesup Jaycees, Rotary Club, Jesup Touchdown Club and the Jesup Shrine Club, where he served three times; member of the Jesup Masonic Lodge #112, Savannah Valley of the Scottish Rite Mobile Unit and the Royal Order of the Jesters. He was a charter member of the Jesup Elks Club, and a National Guardsman.

Thomas was past president of the Jesup Bar Association and vice president of the Brunswick Bar Association. He was an active member of Calvary Baptist Church, the Jesup Kiwanis Club and the Jesup Liar's Club.

Thomas received Distinguished Service Awards from the Jesup Jaycees, the Baxley Exchange Club, the Hazlehurst V.F.W. Club, the District Attorney's Association of Georgia, and the Georgia Child Support office in Atlanta. In 1994, he was named Georgia's District Attorney of the year, by the Georgia District Attorney's Association and served as president of the Prosecuting Attorneys Council. He had over a 90 percent trial conviction rate during his lengthy tenure as district attorney.

Upon retirement in 1997, he set up a private law practice in Jesup and was later appointed judge of the Municipal Court in Jesup and Screven. In recent years, he spent numerous hours as chairman on fund raising projects to benefit the Alee Shrine Center and the Shriner's Hospital for Children. Thomas devoted the majority of his career to public service, representing the victims of violent crime. He was an avid hunter, hunting in numerous states and several foreign countries. He was known to fish until the next hunting season. 



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FEB 1 ICLE
Residential Real Estate Practice & Procedure Satellite
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Update on Georgia Law
 Park City, Utah
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 12 CLE Hours

FEB 7 NBI, Inc. (Formerly National Business Institute)
Eminent Domain-Key Trial Tactics
 Atlanta, Ga.
 6 CLE Hours

FEB 7 ICLE
Residential Real Estate Practice & Procedure Satellite Rebroadcast
 Multi-Site, Ga.
 See www.iclega.org for locations
 6 CLE Hours

FEB 7 ICLE
Law Practice Management 2008
 Atlanta, Ga.
 See www.iclega.org for locations
 6 CLE Hours

FEB 7 ICLE
Electronic Discovery
 Atlanta, Ga.
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 6 CLE Hours

FEB 8-9 ICLE
53rd Annual Estate Planning Institute
 Athens, Ga.
 See www.iclega.org for locations
 9 CLE Hours

FEB 8 ICLE
White Collar Crime Conference
 Atlanta, Ga.
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 6 CLE Hours

FEB 8 ICLE
Abusive Litigation
 Atlanta, Ga.
 See www.iclega.org for locations
 6 CLE Hours

FEB 8 ICLE
Trial of Leo Frank
 Satellite Broadcast-Live
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 4 CLE Hours

FEB 8 ICLE
Georgia Auto Insurance
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FEB 8 *Practicing Law Institute*
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February-March

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First Publication of Revised Proposed Formal Advisory Opinion No. 05-1

Formal Advisory Opinion No. 87-6, issued by the Supreme Court of Georgia on July 12, 1989, provides an interpretation of the Standards of Conduct and Directory Rules (DRs). On June 12, 2000, the Supreme Court of Georgia issued the Georgia Rules of Professional Conduct, which became effective on January 1, 2001, replacing the Standards of Conduct. The Canons of Ethics, including Ethical Considerations and Directory Rules, were deleted in their entirety.

It is the opinion of the Formal Advisory Opinion Board that the substance and/or conclusion reached under Formal Advisory Opinion No. 86-7 has changed due to the Georgia Rules of Professional Conduct. Accordingly, the Formal Advisory Opinion Board has redrafted Formal Advisory Opinion No. 86-7. Proposed Formal Advisory Opinion No. 05-1 is a redrafted version of Formal Advisory Opinion No. 86-7. Proposed Formal Advisory Opinion No. 05-1 addresses the same question presented in Formal Advisory Opinion No. 86-7; however, it provides an interpretation of the Georgia Rules of Professional Conduct.

Proposed Formal Advisory Opinion No. 05-1 was treated like a new opinion and appeared in the April 2005 issue of the Georgia Bar Journal for 1st publication in compliance with Bar Rule 4-403(c). Four (4) comments regarding the proposed opinion were received from members of the Bar. After reviewing the proposed opinion in light of the comments, the Formal Advisory Opinion Board amended Proposed Formal Advisory Opinion No. 05-1, and determined that the amended version should be placed in the Georgia Bar Journal for 1st publication.

The amended version of Proposed Formal Advisory Opinion No. 05-1 appeared in the April 2007 issue of the Georgia Bar Journal for 1st publication. Four (4) comments regarding the amended proposed opinion were received from members of the Bar. After reviewing the amended proposed opinion in light of the comments, the Formal Advisory Opinion Board revised the amended version of Proposed Formal Advisory Opinion No. 05-1, and determined that the revised version should be placed in the Georgia Bar Journal for 1st publication.

As such, the Formal Advisory Opinion Board has made a determination that the following revised proposed opinion should be issued. **State Bar members only** are invited to file comments to this revised proposed opinion with the Formal Advisory Opinion Board at the following address:

State Bar of Georgia
104 Marietta Street, N.W.
Suite 100
Atlanta, Georgia 30303
Attention: John J. Shiptenko

An original and twenty (20) copies of any comment to the proposed opinion must be filed with the Formal Advisory Opinion Board, through the Office of the General Counsel of the State Bar of Georgia, by March 15, 2008, in order for the comment to be considered by the Board. Any comment to a proposed opinion should make reference to the number of the proposed opinion. After consideration of comments received from State Bar members, the Formal Advisory Opinion Board will make a final determination of whether and opinion should be issued. If the Formal Advisory Opinion Board determines that an opinion should be issued, final drafts of the opinion will be published, and the opinion will be filed with the Supreme Court of Georgia.

REVISED PROPOSED FORMAL ADVISORY OPINION NO. 05-1

QUESTION PRESENTED:

Ethical propriety of a lawyer interviewing the officers, employees, or other constituents of an organization without consent of the organization's counsel when that organization is the opposing party in litigation.

SUMMARY ANSWER:

An attorney may not ethically interview an employee or other constituent of an organization which is an opposing party in planned or pending litigation without the consent of the attorney representing the organization in the matter where the employee or constituent is either:

- (1) a person having managerial responsibility on behalf of the organization; or
- (2) a person whose acts or omissions may be imputed to the organization in relation to the subject matter of the case for the purpose of civil or criminal liability; or

(3) a person whose statement may constitute an admission on the part of the organization in the sense that the statement will bind the organization.

OPINION:

Correspondent asks when it is ethically proper for a lawyer to interview the officers and employees of an organization, when that organization is the opposing party in litigation, without consent of the organization's counsel.

The question involves an interpretation of Rule 4.2 of the Georgia Rules of Professional Conduct that provides as follows:

A lawyer who is representing a client in a matter shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by constitutional law or statute. The maximum penalty for a violation of this Rule is disbarment.

The no-contact rule's restriction on a lawyer directly communicating with persons represented by other counsel about the matter that is the subject of the representation serves important public interests as set out in Comment [7] to Georgia Rule 4.2. These interests include:

(a) protecting against misuse of the imbalance of legal skill between a lawyer and a layperson; (b) safeguarding the client-attorney relationship from interference by adverse counsel; (c) ensuring that all valid claims and defenses are raised in response to inquiry from adverse counsel; (d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and (e) maintaining the lawyers [sic] ability to monitor the case and effectively represent the client.

At the same time, there are important competing considerations. These include permitting a lawyer to meet his or her obligation to conduct a reasonable inquiry before asserting a claim, defense, or position in litigation as mandated by O.C.G.A. § 9-15-14 or Federal Rule of Civil Procedure 11. These interests weigh against interpreting the no-contact rule so broadly that it blocks all access to information helpful to the litigation from employees or constituents of a represented organization except with the consent of the organization's counsel or through formal, costly discovery. See Niesig v. Team 1, 76 N.Y.2d 363, 372, 558 N.E. 2d 1030, 1034, 559 N.Y.S. 2d 493, 497 (1990) (Foreclosing all direct, informal interviews of employees of a corporate party "closes off avenues of informal discovery of information that may serve both the litigants and the entire

justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes.").

Comment [4A] to Georgia Rule of Professional Conduct 4.2 seeks to balance these interests and sets the parameters for applying Rule 4.2 to a represented organization. It prohibits communications by a lawyer for another person or entity concerning the matter in representation with an employee or other constituent of the organization who is either:

- (1) A person having a managerial responsibility on behalf of the organization;
- (2) Any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability; or
- (3) A person whose statement may constitute an admission on the part of the organization.

As Comment [4A] sets out, persons "having a managerial responsibility on behalf of the organization" should not be contacted. This includes officers of the organization as well as those lower-ranking employees who have managerial responsibility on behalf of the organization. Comment [4A] should be read in conjunction with Comment [4B], which explains that prior to beginning an interview, an interviewing lawyer may not possess sufficient information to determine whether a lower ranking employee who is not an officer of the organization falls into the "represented" category. In assessing whether the employee exercises managerial responsibilities, the interviewing lawyer should consider the employee's title and job description.

It is important to note that in this respect Georgia Comment [4A] differs from the current Comment [7] to the American Bar Association's Model Rule 4.2. The revised language of ABA Comment [7] places off limits a person "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter." The American Law Institute's Restatement (Third) of the Law Governing Lawyers § 100 similarly limits contact with a current employee or other agent "if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has the power to compromise or settle the matter." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 (2000). Thus, in recent years, both the ABA and ALI have narrowed the scope of the no-contact rule to only those managers who have close, regular, or supervisory contact with the organization's counsel. Because the language of Georgia Comment [4A] does not mirror that used in ABA Comment [7], it should not be read as narrowly as the ABA's Model Rule. Unlike ABA Model Rule 4.2,

Georgia Rule of Professional Conduct 4.2 applies to a wider group of persons having “managerial responsibility on behalf of the organization” and is not limited just to those officers or managerial personnel who supervise, direct, and have close contact with the organization’s lawyer.

Consistent with both Model Rule 4.2 and Restatement (Third) § 100, Comment [4A] also places off limits an employee or agent whose act or omission may be imputed to the organization for the purposes of liability, such as under a theory of *respondeat superior*.

The third type of constituent who should not be contacted according to Comment [4A] is any person “whose statement may constitute an admission on the part of the organization.” Courts around the country have differed over whether the “admission” language should be construed broadly, by reference to Federal Rule of Evidence 801(d)(2)(D), or more narrowly, as is the modern trend, to include only those persons whose statements bind the organization in the matter in the sense that the admissions cannot be impeached, contradicted, or disavowed at trial. The so-called “managing-speaking agent test,” adopted by the New York Court of Appeals in *Niesig supra*, has been endorsed by the Restatement (Third) of the Law Governing Lawyers. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100, Reporter’s Note, cmt. e (2000). It does not apply the no-contact rule to any employee of the organization whose statement may be admissible in evidence. Instead, it applies the no-contact rule to “those officials, but only those, who have the legal power to bind the corporation in the matter.” 76 N.Y.2d at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

Broadly interpreting the phrase in Georgia Comment [4A] of “person whose statement may constitute an admission” to mean any employee whose statement may be admissible in evidence as an exception to the hearsay rule goes beyond the purpose of protecting the client-lawyer relationship of a represented person and prevents informal inquiries of potential fact witnesses who are employees of an organization. Hence, the admissions language should be understood to protect against uncounseled “admissions” from those who can obligate or bind the organization. This interpretation is consistent with the ALI’s position in Restatement (Third) § 100(2)(c), which states that a “represented non-client includes...a current employee or other agent of an organization represented by a lawyer...if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 (2000).

According to the Reporter’s Note to the Restatement (Third), binding statements are those to which “no evi-

dence contrary to the admission may be offered” in court. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100, Reporter’s Note, cmt. e (2000).

If the employee or constituent of an organization does not fall into any of the foregoing categories, a lawyer may contact and interview the employee without the prior consent of the organization’s counsel.

Before a lawyer conducts any interview with a constituent of the opposing party presumably permitted under Georgia Rule of Professional Conduct 4.2, the lawyer should heed the guidance of Comment [4B], which provides,

[I]t should be anticipated that in many instances, prior to the beginning of the interview, the interviewing lawyer will not possess sufficient information to determine whether or not the relationship of the interviewee to the entity is sufficiently close to place the person in the “represented” category. In those situations the good faith of the lawyer in undertaking the interview should be considered. Evidence of good faith includes an immediate and candid statement of the interest of the person on whose behalf the interview is being taken, a full explanation of why that person’s position is adverse to the interests of the entity with which the interviewee is associated, the exploration of the relationship issue at the outset of the interview and the cessation of the interview immediately upon determination that the interview is improper.

Even after establishing that the person being interviewed may be contacted *ex parte*, there remain limitations on what the attorney may ask the constituent during the course of the interview. Although the constituent is not covered by Georgia’s no-contact rule, the interviewing attorney should not inquire about any conversations the constituent may have had with the organization’s attorneys regarding the matter. Confidential communications between the corporation’s counsel and an employee who is not covered by the no-contact rule can nevertheless be protected by the organization’s attorney-client privilege. See generally *Upjohn v. United States*, 449 U.S. 383, (1981); *Marriott Corp v. American Academy of Psychotherapists, Inc.*, 157 Ga. App. 497, 277 S.E. 2d 785 (1981). As a result, care and restraint must be exercised when questioning any constituent of a represented organization.

This opinion only addresses contacts with *current* employees of a represented organization. Formal Advisory Opinion No. 94-3 allows a lawyer to contact and interview *former* employees of an organization represented by counsel without the consent of the organization’s lawyer.

Supreme Court Issues Formal Advisory Opinion No. 05-7 Pursuant to Rule 4-403

The second publication of this opinion appeared in the August 2007 issue of the Georgia Bar Journal, which was mailed to the members of the State Bar of Georgia on or about August 7, 2007. The opinion was filed with the Supreme Court of Georgia on August 15, 2007. On September 5, 2007, the State Bar of Georgia filed State Bar of Georgia's Petition for Discretionary Review with the Supreme Court of Georgia, asking the Court to review Formal Advisory Opinion No. 05-7 and adopt it as the replacement for Formal Advisory Opinion No. 93-2. On November 26, 2007, the Supreme Court of Georgia issued an Order granting review of Formal Advisory Opinion No. 05-7 and approving Formal Advisory Opinion No. 05-7 as the replacement for Formal Advisory Opinion No. 93-2. In accordance with Bar Rule 4-403(e), this opinion is binding upon all members of the State Bar of Georgia, and the Supreme Court shall accord this opinion the same precedential authority given to the regularly published judicial opinions of the Court.

**STATE BAR OF GEORGIA
FORMAL ADVISORY OPINION NO. 05-7
Approved And Issued On November 26, 2007
Pursuant To Bar Rule 4-403
By Order Of The Supreme Court Of Georgia
Thereby Replacing FAO No. 93-2
Supreme Court Docket No. S08U0023**

QUESTION PRESENTED:

Ethical considerations of an attorney representing an insurance company on a subrogation claim and simultaneously representing the insured.

SUMMARY ANSWER:

A lawyer representing an insurance company on a subrogation claim should not undertake the simultaneous representation of the insured on related claims, unless it is reasonably likely that the lawyer will be able to provide adequate representation to both clients, and only if both the insurance company and the insured have consented to the representation after consultation with the lawyer, have received in writing reasonable and adequate information about the material risks of the representation, and have been given the opportunity to consult with independent counsel. Rule 1.7, Conflict of Interest: General Rule.

OPINION:

This inquiry addresses several questions as to ethical propriety and possible conflicts between the rep-

resentation of the client, the insurance company, and its insured.

Hypothetical Fact Situation

The insurance company makes a payment to its insured under a provision of an insurance policy which provides that such payment is contingent upon the transfer and assignment of subrogation of the insured's rights to a third party for recovery with respect to such payment.

Question 1: May the attorney institute suit against the tortfeasor in the insured's name without getting the insured's permission?

Pursuant to the provisions of Rule 1.2(a), a lawyer may not institute a legal proceeding without obtaining proper authorization from his client. The ordinary provision in an insurance policy giving the insurance company the right of subrogation does not give the lawyer the right to institute a lawsuit in the name of the insured without specific authority from the insured. The normal subrogation agreements, trust agreements or loan receipts which are executed at the time of the payment by the insurer usually give the insurance company the right to pursue the claim in the insured's name and depending upon the language may grant proper authorization from the insured to proceed in such fashion. Appropriate authorization to bring the suit in the insured's name should be obtained and the insured should be kept advised with respect to developments in the case.

Question 2: Does the attorney represent both the insured and the insurance company, and, if so, would he then have a duty to inform the insured of his potential causes of action such as for diminution of value and personal injury?

The insurance policy does not create an attorney/client relationship between the lawyer and the insured. If the lawyer undertakes to represent the insured, the lawyer has duties to the insured, which must be respected with respect to advising the insured as to other potential causes of action such as diminution of value and personal injury. Rule 1.7(b); see also, Comment 10 (assuring independence of counsel) and Comment 12 (common representations permissible even with some differences in interests).

Question 3: Is there a conflict of interest in representing the insured as to other potential causes of action?

In most instances no problem would be presented with representing the insured as to his deductible, diminution of value, etc. Generally an insurance company retains the right to compromise the claim, which would reasonably result in a pro-rata payment to the insurance carrier and the insured. The attorney representing the insured must be cautious to avoid taking any action, which would preclude the insured from any recovery to which the insured might otherwise be entitled. Rule 1.7, Conflict of Interest: General Rule, (b); see also, Comment 10 (assuring independence of counsel) and Comment 12 (common representations permissible even with some differences in interest.) to Rule 1.7.

A much more difficult problem is presented in the event an attorney attempts to represent both an insurance company's subrogation interest in property damage and an insured's personal injury claim. In most cases the possibility of settlement must be considered. Any aggregate settlement would necessarily have to be allocated between the liquidated damages of the subrogated property loss and the unliquidated damages of

the personal injury claim. Any aggregate settlement would require each client's consent after consultation, and this requirement cannot be met by blanket consent prior to settlement negotiations. Rule 1.8(g); see also Comment 6 to Rule 1.8. Only the most sophisticated of insureds could intelligently waive such a conflict, and therefore in almost all cases an attorney would be precluded from representing both the insurer and the insured in such cases.

In conclusion, a lawyer representing an insurance company on a subrogation claim should not undertake the simultaneous representation of the insured on related claims, unless it is reasonably likely that the lawyer will be able to provide adequate representation to both clients, and only if both the insurance company and the insured have consented to the representation after consultation with the lawyer, have received in writing reasonable and adequate information about the material risks of the representation, and have been given the opportunity to consult with independent counsel. Rule 1.7(a) and (b).

2007-08 Directory Errata



The following are corrections to the 2007-08 State Bar of Georgia Directory & Handbook.

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Advertisers Index

AAA Attorney Referral Service.....	53
ABA Retirement Funds	13
Arthur T. Anthony.....	41
Bull Darity Hopson & Worley Court Reporters	14
Daily Report	65
Executive Collection Services, LLC	65
Gallery 63.....	11
Georgia Domestic Solutions	14
Georgia Lawyers Insurance Co.....	IFC
Gilsbar, Inc.	15
Guaranteed Subpoena	23
Imbordino Polygraph Examinations	55
Insurance Specialists, Inc.	1
Intelligent Office.....	35
Keenan's Kids Foundation.....	37
Minnesota Lawyers Mutual.....	19
Mitchell Kaye Valuation	73
National Legal Research Group, Inc.	55
Norwich Document Laboratory	55
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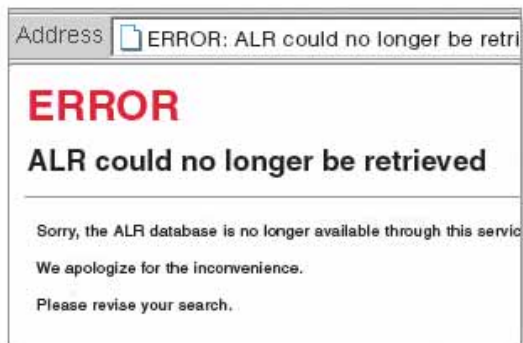
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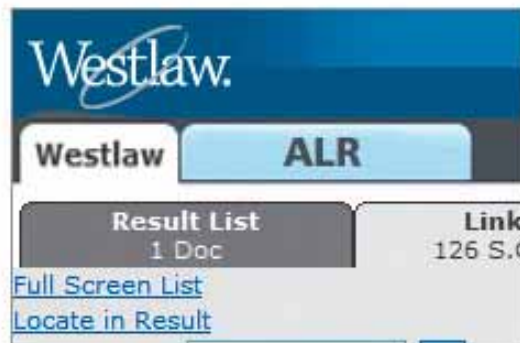
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