

Georgia Bar Journal

February 2007 ■ Volume 12 ■ Number 5

Georgia's Evolving View on the Enforceability of Prenuptial Agreements



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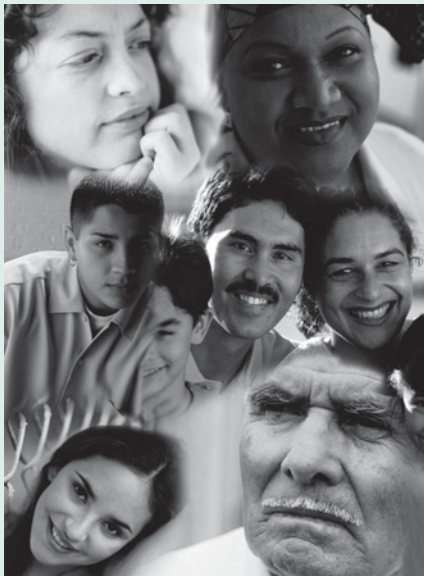


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The *Georgia Bar Journal* welcomes the submission of news about local and circuit bar association happenings, Bar members, law firms and topics of interest to attorneys in Georgia. Please send news releases and other information to: Sarah I. Coole,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

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by Jay Cook



Photo by Hollis Ellison

Do Not Back Away From the Fight

In October, Justice Samuel Alito, the newest member of the U.S. Supreme Court, told a group of New York judges and lawyers: “This is one of the times in our history when there are some real threats to the federal and state judiciary, and I don’t think I’m being too much of an alarmist to say that we could be not too far from the tipping point when an accumulation of things does real damage to these vital institutions. I hope that we all can work to prevent that from happening.”

The day before Justice Alito spoke, retired Justice Sandra Day O’Connor published a column in the *Wall Street Journal* decrying attempts by lawmakers and others to intimidate the judiciary. “The breadth and intensity of rage currently

“Do not back away from the fight. Do not cower in fear at attempts to intimidate you. Do not compromise your principles to save your seat. Stand up for judicial independence. Stand up for the rule of law. Stand up for the Constitution. Stand up for yourselves.”

being leveled at the judiciary may be unmatched in American history,” she wrote. “The ubiquitous ‘activist judges’ who ‘legislate from the bench’ have become central villains on today’s domestic political landscape. Elected officials routinely score cheap points by railing against the ‘elitist judges.’ Several jeremiads are published every year warning of the dangers of judicial supremacy and judicial tyranny. Though these attacks generally emit more heat

than light, using judges as punching bags presents a grave threat to the independent judiciary.”

Judicial intimidation wears many disguises: threats to impeach federal judges who make unpopular rulings; punitive cuts in state and federal judicial budgets;

judicial salary erosion; passing court-stripping laws that limit judicial jurisdiction; court packing; and running dirty campaigns to replace fair judges with those who can be bought by special-interest money.

As most of you know, they tried this recently in Georgia—but failed. They did not expect the legal community here to blow the whistle. They did not expect the incumbent to fight back. They did not expect to have their stealth funding schemes exposed. The tactics they used here have worked in plenty of other states, where lawyers and judges cowered in fear instead of showing courage. And lack of courage is what's gotten us to the tipping point, *where real damage can be done*, as Justice Alito says.

The battle in Georgia isn't over. Powerful special interests won flank-protecting "tort reform" in 2005, but failed to get their candidates elected to the high court in 2004 and 2006. Now they are sniffing the air for other ways to tip the

bench in their favor: adding two new seats to the Supreme Court (to "pack" the bench with cronies who will make business-friendly rulings) and returning to partisan judicial elections (to neuter judges and degrade public confidence in our judicial system).

Time and again, leading members of the judiciary have called upon the bar for help.


Justice Stephen Breyer observed at a 1998 conference in Philadelphia: "If the need for judicial independence is to be explained convincingly—given that we who have the obvious institutional self-interest have trouble delivering the message—I think it is up to others to do much of the explaining. If the bar, without the same self-interest, understands that need and explains it, then I think the message might get across."

Sandra Day O'Connor ended a talk in January by charging the lawyers in the audience with the task of protecting judicial independence. "There is no natural

constituency for judicial independence," she said, "except for a vibrant, responsible lawyer class. We can't just trust the courts to protect themselves."

No, we can't. And the State Bar of Georgia is committed to doing all it can to protect our judges and the independent judicial branch that our founding fathers made the final arbiter of our precious American liberties. But doing all we can includes asking judges to show courage in the face of these attacks.

Do not back away from the fight. Do not cower in fear at attempts to intimidate you. Do not compromise your principles to save your seat. Stand up for judicial independence. Stand up for the rule of law. Stand up for the Constitution. Stand up for yourselves.

And we promise to stand beside you. If we don't, everybody loses, especially the American people. 

Jay Cook is president of the State Bar of Georgia and can be reached at jaycook@mindspring.com.

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by Cliff Brashier



Preventive Care to Help Members and Clients

In 2004, John graduated from law school in Florida and decided to move to Atlanta. As a recovering alcoholic, he was looking for a recovery community to help him stay on the path of sobriety he had been on for two years. When filing his application to take the bar exam, his fitness to practice law was appropriately questioned because of his alcoholism, and he was given Steve Brown's name, director of Families First and the State Bar's Lawyer Assistance Program. Steve introduced him to a network of people, and John was able to draw from their experience and strength. John has been sober for four years now and has recently been approved by the Board to Determine Fitness of Bar Applicants to take the bar exam in July. "Without Steve and the Lawyer Assistance Program, this would not have been possible," he said. "The people and resources were a lifesaver, and thanks to them, my transition to Atlanta has been without incident." John has a good job working at a law firm as he awaits the upcoming bar exam. "I am very grateful for the LAP," he said.

The State Bar of Georgia offers preventive care to our members by offering many different programs—we want to help you before a client is harmed and before disciplinary or malpractice claims are filed. It's a win-win situation. If we help the lawyer who has a problem before any client harm is done, the client benefits and the lawyer avoids disciplinary action. Public confidence in the judicial system is also protected.

One of the Bar's most outstanding preventive care services is the Lawyer Assistance Program (LAP). It provides free, confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems, and mental or emotional impairment.

Confidentiality is stressed. The Bar gets no information about the identity of members who are in the program. Even the utilization reports use broad geographical areas so that the user's cities are not reported.

The Bar provides this service with Families First Employee Assistance Program, a service company that provides confidential counseling to thousands of employees at businesses and other organizations. Through the 24-hour, 7-day-a-week confidential hotline (800-327-9631), Bar members are offered up to three clinical assessment and support sessions, per issue, with a counselor during a 12-month period. All professionals are certi-

fied and licensed mental health providers, and are able to respond to a wide range of issues. Clinical assessment and support sessions include the following:

- Thorough in-person interview with the attorney, family members or other qualified persons
- Complete assessment of problem areas

"If we help the lawyer who has a problem before any client harm is done, the client benefits and the lawyer avoids disciplinary action. Public confidence in the judicial system is also protected."

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

All persons referred to the LAP also receive two years of continued monitoring by Families First.

The LAP Committee members are an important factor in this program. "The members are on this committee for one reason only," said Bob Thompson, vice-chair of the committee. "We are here to help people with their problems—one form or another. We are all in it together to fight something that kills people—addiction. The sooner you get to the problem, the less disastrous it will be, and the angst and tragedy that will be saved is tremendous." There are numerous resources available that the committee can share with those who seek help.

"Our services extend to much more than substance abuse and chemical dependency," said Steve Brown, director of Families First and the LAP. For example, the program assists lawyers who are looking for that work-life balance. In addition, the program also offers a searchable database with childcare providers, tutoring services for children, elder care, and more specific things like in-home assistance and assisted living information. Financial counseling services are also available.

"We have very effective professional services. What I really want to focus on now are peer support services," Brown continued. "I myself have been in recovery for 23 years. There's a saying that I learned from Alcoholics Anonymous, 'You can't keep it unless you're willing to give it away.' It is important to have peer support." The LAP committee is working to build a network of volunteers that are in recovery to serve as peers that have had problems or issues and would like to mentor other attorneys. Those who have gone through recovery are better


suited to help a person with addiction problems, which is why peer support is so beneficial. Currently, there is a strong network in Metro Atlanta and South Georgia, but the committee is looking to expand the list. If you are interested in volunteering, contact Brown at 404-853-2850 or Michael Chidester, chair of the LAP committee, at 478-956-1643.

Another new benefit of the LAP is the addition of the Lawyers Recovery Meeting. These recovery support meetings are specific to lawyers and are held every Tuesday night from 7-9 p.m. at the Families First main office (1105 West Peachtree St., Atlanta, GA 30357-0948). Eventually, the goal is to implement these meetings throughout the state.

There are many other programs at the Bar that aid lawyers as well. The Continuing Legal Education Program keeps lawyers current in their professional education. The Law Practice Management Program helps lawyers with any office problems and offers training to practice more efficiently. It also provides the extremely popular Casemaker, which solves at no cost the online legal research needs for many of our members. The Communications Department publishes the *Georgia Bar Journal* that contains scholarly articles, and maintains our website, www.gabar.org, with information for our members. The Consumer Assistance Program helps solve problems between lawyers and their clients before they escalate into serious disputes or unwarranted disciplinary complaints.

Our younger lawyers have special programs that specifically serve them. If you 36 and under or have been admitted to the Bar for less than five years, you are automatically a member of the Young Lawyers Division (YLD). The YLD encourages your active participation in its meetings, activities and committees. The opportunity for networking, professional growth and new friendships abounds in the YLD. Another resource for our younger members is the Transition

Into Law Practice Program, an educational program that assists beginning lawyers in their transition from student to professional, combining a mentoring component with a continuing legal education component. All new lawyers participate in this very helpful service.

These are just a few of the many resources offered by the Bar to help you. 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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by Jonathan A. Pope

Your Participation Makes a Difference

The Young Lawyers Division (YLD) was created on May 31, 1947, with the purpose of fostering among the members of the Bar the principles of duty and service to the public, and to encourage the interest and participation of younger members of the State Bar. The YLD has grown from a small group of lawyers to more than 8,800 lawyers 36 and under or in practice for five years or less. With 27 committees, the YLD provides both services to the public and to the Bar. The YLD has facilitated the inception of several hallmark programs for the Bar, including the Georgia Legal Services Program and the Georgia High School Mock Trial Competition.

Some of the YLD committees providing service to the public include the following:

Advocates for Students with Disabilities

The Advocates for Students with Disabilities Committee provides technical support and networking opportunities to the growing community of attorneys whose practice or passion includes students with disabilities and their families. The committee ensures the number of attorneys involved with families continues to grow and that these attorneys have excellent continuing legal education opportunities, as well as a network of colleagues. The committee also provides support on issues such as estate planning, civil rights, health care issues, power of attorneys, juvenile justice and guardianships.

Community Service Projects

The Community Service Projects Committee provides opportunities for young lawyers to participate in local, state or national service projects focused on various social issues, such as working with organizations that address the needs of underprivileged children, hunger, domestic violence and the environment.

“The High School Mock Trial Committee is always looking for volunteers for judges and evaluators. I would urge you to give just a few hours of your time by serving as a judge or evaluator at one of the trial or regional competitions.”

Elder Law

The Elder Law Committee is involved in the delivery of legal services to the elderly, monitoring legislation and other legal developments affecting the elderly community, and providing general information to older Georgians.

Juvenile Law

The Juvenile Law Committee is responsible for studying and recommending changes in the areas of juvenile law, facilities and rehabilitation. The committee encourages and celebrates excellence in juvenile law practice across Georgia through sponsorship of an annual CLE event and child advocate awards. The committee organizes and co-sponsors the Celebration of Excellence, a graduation ceremony for youth in the state foster care system. In addition, the committee is in the process of researching, drafting and editing recommended revisions to Georgia's Juvenile Code. The committee also promotes participation in and funding of juvenile representation through the Lawyers Challenge for Children Campaign.

Truancy Intervention

The Truancy Intervention Committee serves the Truancy Intervention Project of Georgia by assisting with the establishment of Truancy Intervention Projects throughout the state as well as with the recruitment of volunteer attorneys to work with the children served by each program.

The YLD also provides continuing education and many opportunities for networking and socializing to its members through numerous committees, including the Business Law, Litigation, Criminal, Minorities in the Profession, Women in the Profession, and Ethics & Professionalism committees.

As we approach the 60th anniversary of the creation of the YLD, it is appropriate to reflect on the progress, but we also continue to look to the future. This includes continuing to provide programs


that give meaningful assistance to the public and Bar, strengthening our active membership, and providing support and assistance to the Executive Committee, Board of Governors and the Bar as a whole when needed. As Justice George Carley reminds us at the swearing in, we must never forget our primary, yet unwritten goal, "to have a good time."

I would like to thank the co-chairs of the YLD Legislative Affairs Committee, Ben Vinson (McKenna Long Aldridge) and John Rogers (Carlock Copeland Semler & Stair) for hosting a wonderfully informative Legislative Affairs Luncheon on Feb. 1. The lunch was held at the Georgia Railroad Freight Depot. Both Ben and John have done an excellent job of continuing the efforts of this long-standing YLD committee.

In addition, this season of the Georgia High School Mock Trial Competition will begin in late February, in more than 16 cities throughout the state of Georgia, with the state finals competition being held in Lawrenceville on March 10-11. The committee is always looking for volunteers for judges and evaluators, so I urge you to give a few hours by serving as a judge or evaluator at one of the trial or regional competitions. It is truly amazing to watch these wonderfully talented high school students in action. You may also learn a thing or two! If you are interested, please contact Stacy

Rieke at stacyr@gabar.org or contact the mock trial office directly at 404-527-8779.

Finally, I want to remind you about the YLD Mardi Gras Casino Night on Fat Tuesday, Feb. 20, at Paris on Ponce's Le Moulin Rouge in Atlanta benefiting Tipitina's Foundation. The event is open to all members of the Bar and will feature good food and drink, casino action and a silent auction. All proceeds from this fundraiser will be donated to Tipitina's Foundation, a non-profit organization that has been helping rebuild music programs in public schools that were affected by Hurricane Katrina. To purchase tickets, find out about sponsorship opportunities, or donate for the silent auction, please contact Deidra Sanderson at deidra@gabar.org or 404-527-8778. You can find out more about Tipitina's Foundation by visiting www.tipitinasfoundation.org.

As always, if you have ideas for new programs, suggestions as to how we can improve YLD services, or if I can help you in any way, please do not hesitate to contact me. 

Jonathan A. Pope is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at jpope@hpb-law.com.

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Georgia's
Evolving
View on the
Enforceability
of Prenuptial
Agreements



In the last several decades, prenuptial agreements have become an increasingly important and visible feature of marriage in American society.¹ Traditionally, courts would enforce prenuptial agreements only when they met heightened standards of procedural and substantive fairness.² In recent years, however, a minority of states have started to move away from marital public policy considerations and toward procedural and substantive standards accorded ordinary contracts.³ This article examines the evolution of Georgia standards governing the enforceability of prenuptial agreements within broader national trends.

Issues of Procedural and Substantive Fairness of Prenuptial Agreements

Courts generally hold that a premarital agreement meets procedural fairness requirements if it was made voluntarily after full disclosure of all material facts bearing on the agreement (particularly each party's financial resources).⁴

The substantive fairness inquiry focuses on whether an agreement is unconscionable.⁵ The doctrine of unconscionability has generated significant debate in

by John C. Mayoue and Margaret G. Gorji

both the context of commercial and marital agreements. Indeed, even defining the term unconscionability has proven exceedingly difficult. As Professor Arthur Allen Leff commented in his landmark treatise, *Unconscionability and the Code—The Emperor's New Clause*, "[t]he word 'unconscionable' ... describes the emotional state of the trier."⁶ According to Leff, the determination of whether an agreement may be deemed unconscionable is "what may permissibly make the judges' pulses race or their cheeks redden, as so to justify the destruction of a particular provision."⁷ Leff concludes that there is "nothing clear about the meaning of 'unconscionable' except perhaps that it is pejorative."⁸ This "nebulous unconscionability standard" has been criticized as inviting "judges to patronizingly and paternalistically meddle in the proposed stipulations of presumptively competent divorcing adults, with very little guidance or principle other than our own personal sense of what feels fair and right."⁹

Further, where jurisdictions permit review of the substantive fairness of the agreement's terms at the time of enforcement, courts sometimes adopt a foreseeability approach to analyze the substantive fairness of the agreement at the time of divorce.¹⁰ Courts examine such agreements at the time of enforcement to determine whether facts and circumstances have changed such that enforcement of the agreement would fail the requirements of substantive fairness.¹¹ Most jurisdictions, however, now hold that if a change in circumstances was foreseeable at the time the agreement was entered into by the parties, such change will not render an agreement unconscionable.¹²

The concept of foreseeability is particularly vexing when applied in the context of prenuptial agreements. The attempt to determine what would or would not be foreseeable in a marriage is in effect to determine every life change or condition a spouse will endure during the

duration of marriage in an increasingly complex society. The list of eventualities is endless: adultery, children, lack of children, career changes, a mid-life crisis, unexpected wealth or sudden poverty, physical health conditions, mental health issues, a plane crash or even a cataclysmic terrorist attack. All are foreseeable but not always expected.¹³ At some level, everything is foreseeable in a marriage.¹⁴

The Evolution of Prenuptial Agreements in Georgia

The seminal Georgia case approving a prenuptial agreement is *Scherer v. Scherer*,¹⁵ a 1982 decision in which the Supreme Court first set forth a three-pronged test for determining the enforceability of such agreements: (1) whether the agreement was obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts; (2) whether the agreement is unconscionable; and (3) whether the facts and circumstances have changed since the agreement was executed, so as to make its enforcement unfair and unreasonable.¹⁶

In setting forth this test, *Scherer* required courts to analyze both the procedural and substantive fairness of prenuptial agreements. Significantly, *Scherer* specifically authorized courts to look at the substantive fairness of the agreement at the time it was executed and at the time of enforcement, which gave trial courts extremely broad discretion in determining the enforceability of prenuptial agreements.¹⁷

The Supreme Court of Georgia first limited the breadth of *Scherer* in 2004 in *Adams v. Adams*.¹⁸ There, two days before the parties were married, they entered into a prenuptial agreement that provided that the wife would receive \$10,000 for every year of marriage, with a cap of \$100,000.¹⁹ Also, the wife waived all claims to the husband's pre-marital property and all other claims she

may have growing out of the marriage and its dissolution; agreed not to make a "continued lifestyle claim"; and agreed to forfeit her rights if she engaged in "unforgiven adultery."²⁰ Both parties waived claims to separately titled property whether acquired prior to or during the marriage.²¹ At the time of the marriage, the husband's assets were valued at \$4,526,708 and the wife's at \$30,000.²²

The wife filed for divorce, and the husband moved to enforce the prenuptial agreement.²³ The trial court entered an order enforcing the prenuptial agreement and the wife appealed.²⁴ Because the wife did not dispute the trial court's findings regarding the first and third prongs of the *Scherer* test, the court focused on conscionability.²⁵ In upholding the trial court's order, the *Adams* court found that the fact that the parties' agreement may have reinforced the preexisting financial disparity between the parties was not sufficient in and of itself to render the agreement unconscionable where there was full and fair disclosure of the parties' assets prior to the execution of the agreement, and the wife entered into the agreement voluntarily and with full understanding of its terms after being offered the opportunity to consult with independent counsel.²⁶

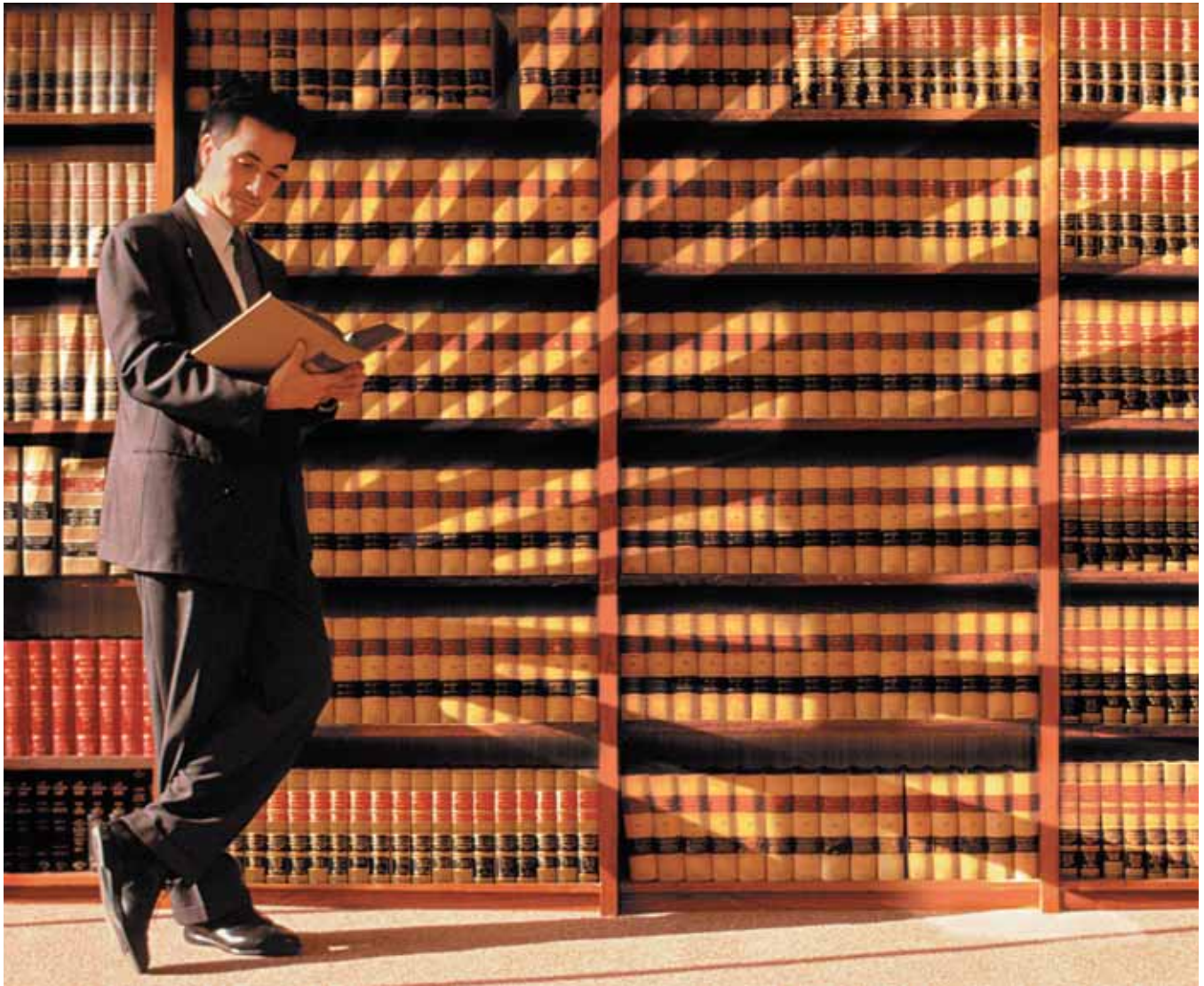
A year later in *Mallen v. Mallen*,²⁷ the Supreme Court of Georgia took a renewed look at the elements of enforceability. In that case, the parties had lived together unmarried for four years when the wife became pregnant.²⁸ While at the abortion clinic, the husband called the wife and asked her not to terminate the pregnancy and to marry him.²⁹ The wife agreed.³⁰ Nine or 10 days prior to their marriage, the husband asked the wife to sign a prenuptial agreement.³¹ The wife took the agreement to an attorney—whom she claimed the husband paid—who advised her he did not have time to read it.³² She nevertheless agreed to sign the agreement after certain provisions were modified to

her advantage.³³ At that time, the wife had a high school education, was working as a restaurant hostess, and had a net worth of approximately \$10,000, while the husband had a college education, owned a business, and had a net worth of approximately \$8,500,000.³⁴

After 18 years of marriage and the birth of four children, the husband filed for divorce.³⁵ The trial court held the agreement enforceable and incorporated it into the final judgment and decree of divorce. On appeal, the wife claimed that the agreement was unenforceable under *Scherer*.³⁶

Although the Supreme Court ruled, as it did in *Scherer*, that the agreement was enforceable, *Mallen* signaled a marked departure from *Scherer* and its progeny in several important respects. First, the court held that *Scherer* did not impose a duty upon persons engaged but not married to act in "utmost good faith."³⁷ Specifically, the wife in *Mallen* argued that her husband had fraudulently induced her to enter the agreement by asserting that it was just a formality and that he would "take care" of her.³⁸ According to the Supreme Court, however, while a majority of jurisdictions recognize the existence of a special relationship between persons engaged to be married,³⁹ Georgia law is more consistent with states that have rejected such a protective stance.⁴⁰ In finding that persons who have agreed to marry are not in a confidential relationship, the *Mallen* court placed them on the same footing as parties entering a commercial contract. Thus, procedural fairness is the same as that applied in the context of commercial agreements.

Second, *Mallen* arguably undermines the first prong of *Scherer*, which requires the disclosure of material facts. In *Mallen*, the wife had argued that the agreement was unenforceable because the financial statement attached thereto did not state the husband's income.⁴¹ The Supreme Court disagreed, holding that the absence of "precise income



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data” from the husband’s financial statement attached to the agreement did not constitute nondisclosure of material facts, as the financial statement showed that the husband was a wealthy individual with significant income-producing assets.⁴² In addition, the wife was aware, based on the standard of living they enjoyed, that her husband received substantial income from his business and other sources.⁴³ But Chief Justice Leah Ward Sears pointed out in her dissent that “whether a fact is material to a prenuptial agreement will depend on the property and alimony issues that are addressed in the agreement.”⁴⁴ She noted that the parties’ prenuptial agreement significantly limited the wife’s right to alimony and, because a parties’ income is critical to determining the appropriate amount of alimony, the husband’s income was material to the prenuptial agreement.⁴⁵

Third, *Mallen* appears to set a prohibitively high bar for demonstrating unconscionability under the second prong of *Scherer*. The wife in *Mallen* argued that she had entered into the agreement under duress—if she did not sign the prenuptial agreement, the husband would have left her pregnant and unmarried.⁴⁶ In response, the court pointed out that the wife had been willing to end the pregnancy and that she had requested changes to the agreement.⁴⁷ There was no fraud and the wife operated under no delusion in entering the agreement.⁴⁸ In other

words, the agreement was not unconscionable; rather, the wife entered into the agreement of her own free will.⁴⁹ In restricting the definition of unconscionability to an inquiry into the agreement’s procedural fairness, the *Mallen* majority thus effectively eliminated the second prong of *Scherer*.

Finally, *Mallen* significantly limits the concept of foreseeability. Over the course of the Mallens’ marriage, the husband’s net worth had increased by \$14 million.⁵⁰ Accordingly, the wife argued that it was unfair and unreasonable to enforce the agreement because the facts and circumstances had changed significantly since the parties had executed it.⁵¹ The *Mallen* court noted that the wife was familiar with the husband’s financial circumstances, and she must have anticipated that his wealth would grow over the ensuing years.⁵² In support of its conclusion, the court relied upon *Reed v. Reed*, wherein the Michigan Court of Appeals held that a significant growth of assets over many years “can hardly be considered an unforeseeable changed circumstance that justifies voiding the ... prenuptial agreement.”⁵³ The court also relied upon *Hardee v. Hardee*, where the Supreme Court of South Carolina held that the wife’s total disability was not a change in circumstance that rendered the prenuptial agreement unenforceable because “[t]he premarital agreement specifically noted Wife’s health problems [and it] was completely foreseeable to Wife that her health would worsen.”⁵⁴

The most recent Georgia prenuptial opinion is *Corbett v. Corbett*,⁵⁵ in which the Supreme Court sought to clarify the effect of non-disclosure on the enforceability of prenuptial agreements. In particular, the court held that the agreement was unenforceable under *Scherer*’s first prong because it did not disclose the husband’s income.⁵⁶ According to the *Corbett* court, the husband’s income was material to the agreement because the wife had waived her right to seek alimony—a decision she would have based in part on knowing what her husband’s income was.⁵⁷

The *Corbett* and *Mallen* cases require a clarification insofar as *Corbett* plainly requires the disclosure of income information, where *Mallen* does not. Is the distinction the imputed premarital knowledge of financial condition? If so, under what standards will this knowledge be imputed and under what circumstances? It should also be noted that the *Mallen* prenuptial agreement severely limited the wife’s alimony claim while the *Corbett* agreement eliminated it.

The Future of Prenuptial Agreements

While the viability of the *Scherer* test in Georgia remains unclear, *Mallen* is important for several reasons. First, *Mallen* highlights the conceptual difficulty of applying principles of commercial contract and tort law into analyses of prenuptial agreements. As one

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commentator observed, “[t]he reciprocal nature of a successful marriage gives it a superficial resemblance to a bargained-for exchange, which makes it easy to think that this apparent exchange is the basis of marriage’s legal obligations. But we must remain clear about the difference If lovers have bargains, they are complex emotional bargains, and they themselves may not easily identify the quids and quos.”⁵⁸

However, the very function of prenuptial agreements is to protect the individual assets of contracting parties, and to establish their respective property rights by contract in the event of divorce or death.⁵⁹ These agreements focus on property and support rights upon the end of marriage or death of a spouse and thus serve an important role in estate planning.⁶⁰ Prenuptial agreements “enable an individual to protect a family business or specific piece of property from possible claims by a former spouse” and further allow couples to manage the financially disadvantageous aspects of a divorce.⁶¹ As in commercial contracts, the very reason for entering such a prenuptial agreement is to avoid subjectivity and provide contracting parties with some degree of certainty.⁶² Such protections are particularly important in the context of marriage, where parties’ individual assets are made especially vulnerable as a result of the emotional intimacy and complexity of the marital relation.⁶³

Thus, it seems manifestly unfair to subject contracting parties to a test predicated on subjectivity where they sought to avoid such ambiguity through an agreement governing economic exchanges within the marital relationship. Further, if public policy allows couples to enter prenuptial agreements, then logically such agreements should be governed by the laws of contract rather than a quasi-contractual and uncertain regime. What is the purpose, after all, of allowing parties to enter prenuptial agreements where judges are

afforded the discretion to override the stated intent of the parties in entering such agreements?

A prominent alternative to the *Scherer* test is the standard for enforceability set forth in the Uniform Premarital Agreement Act (“UPAA”), promulgated in 1983 by the National Conference of Commissioners on Uniform State Laws.⁶⁴ The UPAA presents several advantages. First, it limits the substantive fairness inquiry, thus eliminating some of the potential for judicial activism.⁶⁵ Significantly, the UPAA limits judicial discretion to the extent that substantive unfairness alone is insufficient to void an agreement and, further, restricts judicial inquiry to the time of execution only.⁶⁶ Moreover, adoption of the UPAA helps promote the standardization of law regarding prenuptial agreements. The UPAA has now been adopted in more than half of the states.⁶⁷

It is significant, however, that the doctrine of unconscionability is not defined or modified in any significant way by the UPAA. To the contrary, the Comments to the UPAA suggest that judges are afforded significant discretion in making the determination as to whether the agreement is unconscionable.⁶⁸ The UPAA test is thus problematic to the extent that it continues to use the ill-defined and ephemeral unconscionability doctrine, thus leaving room for judicial subjectivity.

Another alternative to the *Scherer* standard would be simply to afford prenuptial agreements the same treatment afforded to commercial contracts. In *Simeone v. Simeone*, the husband and wife executed a prenuptial agreement the day before they married limiting the wife’s right to alimony in the event of divorce.⁶⁹ The wife later commenced divorce proceedings and filed a claim for alimony *pendente lite*.⁷⁰ The trial court found the agreement to be enforceable and denied the wife’s claim.⁷¹

In upholding the trial court’s judgment, the Pennsylvania

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Supreme Court noted that the rule permitting inquiries into the reasonableness of an agreement reflected a paternalistic view of women as the “weaker” party in marriage and society in general.⁷² The court found that the rule embodied substantial departures from traditional rules of contract law and, further, that principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation or duress.⁷³ Moreover, the court noted that by invoking inquiries into reasonableness and the related concept of foreseeability, the functioning and reliability of prenuptial agreements is severely undermined.⁷⁴ “Parties would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly enforced.”⁷⁵ According to the court, everyone who enters a long-term agreement knows that circumstances can change during its term, so that what initially

appeared desirable might prove to be an unfavorable bargain.⁷⁶ Such are the risks that contracting parties routinely assume.⁷⁷ The court thus concluded that prenuptial agreements should receive the same treatment as that afforded commercial contracts and, further, absent fraud, misrepresentation or duress, spouses should be bound by the terms of their agreements.⁷⁸

Conclusion

In the span of 25 years, Georgia has evolved from abject rejection of prenuptial contracts as contrary to public policy to limited, but sporadic, prenuptial agreement enforcement to a minimalist standard of review which favors enforcement. In so doing, Georgia has effectively eviscerated two major prongs of the *Scherer* test, foreseeability and unconscionability. While some subjectivity necessarily follows from the imputation of premarital financial knowledge in a non-confidential relationship, full disclosure of financial information free from unfair dealing will seemingly be sufficient for enforcement of prenuptial agreements.

In adopting standards markedly different from those announced in the *Scherer* case in 1982, the Supreme Court of Georgia has signaled a dramatic shift in public policy, one that now favors the enforcement of prenuptial agreements, focusing on procedural safeguards alone. 



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Torts, Privilege, and Privacy Rights, American Bar Association, (Second Edition, 2003.)



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Endnotes

1. Allison A. Marston, *Planning for the Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997). A principal cause of this growth is the increased enforceability of such agreements. Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 372 (2005-2006). Historically, courts refused to enforce prenuptial agreements on public policy grounds. *Id.* at 375. The mid-1970s witnessed a revolution in judicial attitudes towards prenuptial agreements, as courts shifted from routinely rejecting prenuptial agreements to sporadically enforcing them. *Id.* at 377. The advent of prenuptial usage is intimately connected to the shift from fault-based to no-fault divorces. *Id.* The fault regime “reflected and sought to enforce society’s sense of the proper moral relations between husband and wife.” Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809 (1985). The marital construct upon which divorce law was based “included duties of life-long mutual responsibility and fidelity from which a spouse could be relieved, roughly speaking, only upon the serious breach of a moral duty by the other spouse.” *Id.* The state’s power over the marital contract became curtailed through the availability of no-fault divorces and its authority to interfere with a couple’s premarital settlement of their economic obligations was similarly reduced. See Sherman, *supra* at 380. The increased use of prenuptial agreements has also been attrib-

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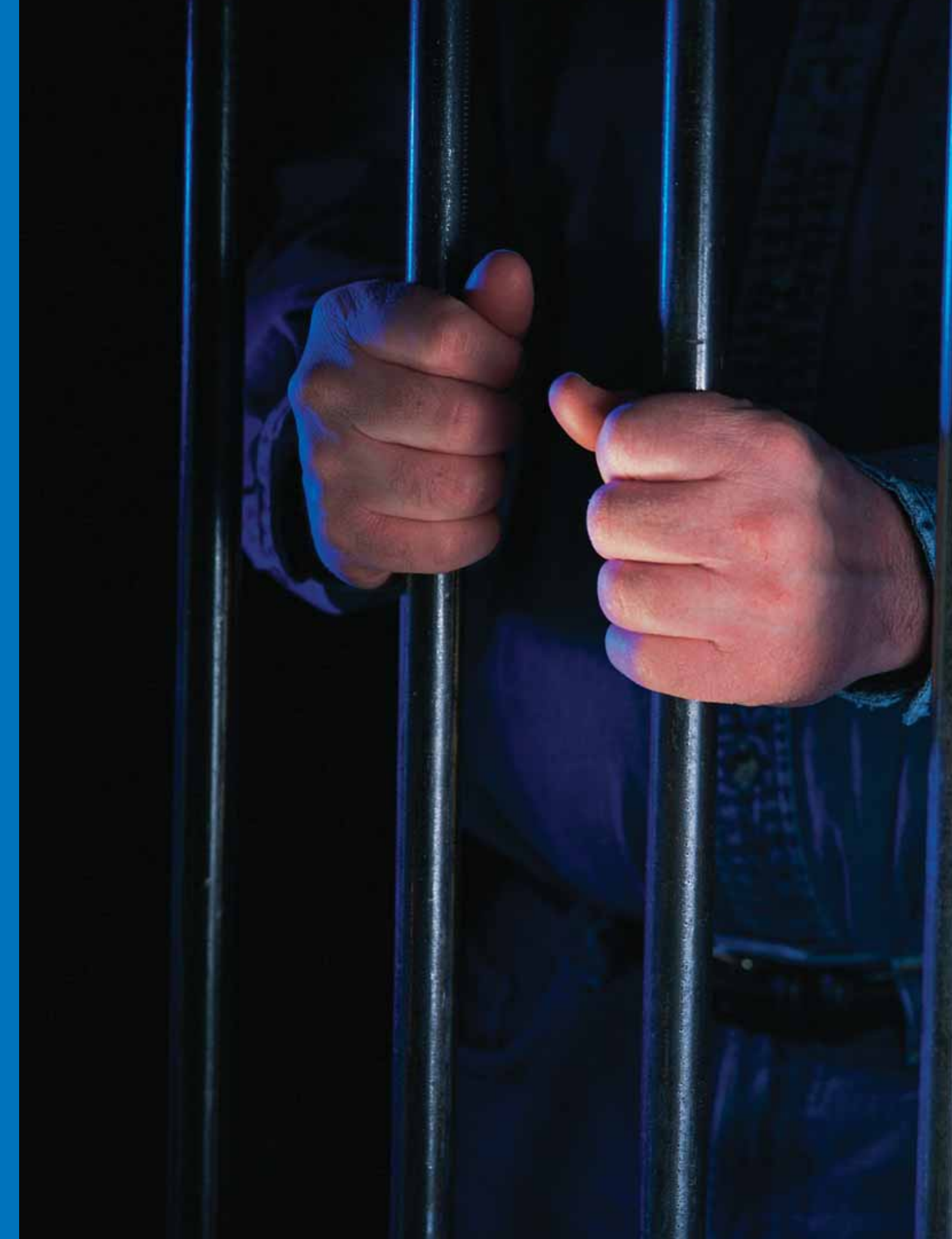
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- uted in part to rising divorce and remarriage rates in American society. *See id.* at 373–74.
2. Recent Developments, *Family Law – Prenuptial Agreements – Pennsylvania Supreme Court Rejects Substantive Review of Prenuptial Agreements – Simeone v. Simeone*, 581 A.2d 162 (Pa. 1990), 104 HARV. L. REV. 1399, 1399 (1991).
3. *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 76 (1998).
4. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 256 (1994).
5. *Id.* at 259–60.
6. Arthur Allen Leff, *Unconscionability and the Code – The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 516 (1967) (internal citations omitted).
7. *Id.*
8. *Id.*
9. *See* Crawford v. Crawford, 524 N.W.2d 833, 837 (N.D. 1994) (Neumann, J. dissenting).
10. *See, e.g.,* Blue v. Blue, 60 S.W.3d 585 (Ky. Ct. App. 2001); Hardee v. Hardee, 585 S.E.2d 501 (S.C. 2003); Curry v. Curry, 392 S.E.2d 879 (Ga. 1990).
11. In applying the concept of foreseeability in *Blue v. Blue*, the Court of Appeals of Kentucky reasoned, [P]arties entering into a prenuptial agreement at the beginning of a marriage are sometimes not as likely to exercise the fullest degree of vigilance in protecting their respective interests. Often there will be many years between the execution of a prenuptial agreement and the time of its enforcement. It is, therefore, appropriate that the court review such agreements at the time of termination of the marriage . . . to ensure that facts and circumstances have not changed since the agreement was executed to such an extent as to render its enforcement unconscionable.
Blue, 60 S.W.3d at 589.
12. *See, e.g.,* Hardee, 585 S.E.2d at 505; Curry, 392 S.E.2d at 879; Reed v. Reed, 693 N.W.2d 825 (Mich. App. 2005); *infra* text accompanying notes 53–54.
13. *See* Simeone v. Simeone, 581 A.2d 162, 166 (Pa. 1990).
14. *Id.*
15. 292 S.E.2d 662 (Ga. 1982).
16. *Id.* at 666.
17. *See id.*
18. 603 S.E.2d 273 (Ga. 2004).
19. *Id.* at 274.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 274–75.
27. 622 S.E.2d 812, 814 (Ga. 2005).
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 815.
38. *Id.*
39. *Id.* at 814–15.
40. *Id.*
41. *Id.* at 816.
42. *Id.*
43. *Id.*
44. *Id.* at 817–18 (Sears, C.J., dissenting).
45. *Id.* at 818.
46. *Id.* at 815–16.
47. *Id.* at 816.
48. *Id.*
49. *Id.*
50. *Id.* at 817.
51. *Id.*
52. *Id.*
53. Reed v. Reed, 693 N.W.2d 825, 836 (Mich. App. 2005).
54. Hardee v. Hardee, 585 S.E.2d 501, 505 (S.C. 2003).
55. 628 S.E.2d 585 (Ga. 2006).
56. *Id.* at 586.
57. *Id.*
58. Ira Ellman, *Why Making Family Law is Hard*, 35 ARIZ. ST. L.J. 699, 712 (2003).
59. Marston, *supra* note 1, at 890–91.
60. *Id.*
61. *Id.*
62. *Id.* at 895.
63. The Supreme Court of Georgia has expressly recognized this function, at least in the context of second marriages. In *Adams v. Adams*, 603 S.E.2d 273 (2004), the Court upheld a prenuptial agreement, reasoning that: Both parties previously had been married and divorced. It was reasonable, therefore, for both Husband and Wife to anticipate the possibility of divorce, to seek to protect their individual assets, and to establish their respective property rights by contract in the event of divorce.
Id. at 274–75.
64. UNIF. PREMARITAL AGREEMENT ACT (1983).
65. *Id.* § 6.
66. *Id.*
67. *See* Margaret F. Brinig, *Commentary: Feminism and Child Custody Under Chapter Two of the American Law Institute’s Principles of the Law of the Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 301, 301 n.3 (2001); Jennifer M. Stoller, *Comment, Disputing Frozen Embryos: Using International Perspectives to Formulate U.S. Policy*, 9 TUL. J. INT’L & COMP. L. 459, 474 (2001).
68. UNIF. PREMARITAL AGREEMENT ACT § 6 cmt. Specifically, the Comments provide:
In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and *any other relevant evidence* such as the conditions under which the agreement was made, including the knowledge of the other party.
Id. (emphasis added).
69. Simeone v. Simeone, 581 A.2d 162, 163 (Pa. 1990).
70. *Id.* at 164.
71. *Id.*
72. *Id.* at 165.
73. *Id.*
74. *Id.* at 155–56.
75. *Id.* at 166.
76. *Id.*
77. *Id.*
78. *Id.* at 167–68. Note, however, that the *Simeone* court found parties to a prenuptial agreement “do not quite deal at arms length” but rather “stand in a relation of mutual confidence and trust,” and thus require “full and fair financial disclosure” of financial resources “consistent with traditional principles of contract law.” *Id.* at 167. Such finding is not inconsistent with *Mallen*, as the *Mallen* court likewise required some form of financial disclosure and, further, the *Simeone* court reaffirmed the rule that contracting parties “are normally bound by their agreements, without regard to whether the terms were read and fully understood.” *Id.* at 165.



The Writ of Habeas Corpus in Georgia

by Donald E. Wilkes Jr.

It not only now is, but ever has been, since Georgia became a sovereign state, her will and intention to preserve the writ [of habeas corpus]¹ as beneficially and perfectly as it existed, or was known to her while in a state of colonial dependence, or as it existed in the mother country from which it is derived.²

Lauded as “the Great Writ”³ and praised as “one of the precious heritages of Anglo-American civilization,”⁴ the legal writ of habeas corpus marvelously triggers a judicial proceeding in which courts may release individuals from unlawful restraints on their liberty. Indeed, this writ has been a part of Georgia law even prior to the creation of the United States.⁵ Today Georgia habeas corpus proceedings commonly involve pretrial confinement on criminal charges,⁶ detention in a mental health facility,⁷ extradition⁸ and postconviction cases.⁹ Some of these habeas decisions have even taken on human rights landmark status.¹⁰

Historically, the Georgia Constitution of 1777 was the first state constitution to make habeas corpus a constitutional right.¹¹ At the 1787 Federal Constitutional Convention held in Philadelphia, Georgia’s delegation voted unanimously against ever permitting habeas corpus to be suspended.¹² Later, during the Civil War, opposition to the Confederate Congress’ suspension of habeas corpus statutes was strongest and most vociferous in Georgia, where the Supreme Court of Georgia went so far as to refuse to consider the writ suspended.¹³ During that era, the legislature enacted the Georgia Code of 1863, which included 23 sections on the writ of habeas corpus.¹⁴

Currently, the Code of Georgia’s codified habeas corpus statutes are located in Articles 1 and 2 of Chapter 14 of Title 9 of the Code of Georgia Annotated. Article 1, which is based on earlier codified habeas statutes dating back to the Georgia Code of 1863, focuses on proceedings where the custody complained of is not pursuant to a criminal conviction. Article 2, which governs postconviction habeas corpus proceedings, is derived principally from six statutes enacted since 1967. Other miscellaneous habeas corpus statutory provisions (including some further governing postconviction habeas proceedings) are codified outside both Articles 1 and 2.¹⁵

In Georgia, a writ of habeas corpus is applied for by submitting a written petition to the appropriate court. Such a petition must be signed under oath by the petitioner or someone else acting on his or her behalf.¹⁶ A habeas corpus petition prepared on behalf of an inmate held in a state or local penal or correctional institution must be completed on the model form promulgated by the Georgia Administrative Office of the Courts.¹⁷ In the case of a postconviction habeas corpus petition, all grounds for relief must be raised in the original or amended petition.¹⁸ There is no statute of limitations on habeas petitions filed by death row inmates. However, subject to certain exceptions, noncapital felony postconviction habeas petitions must be filed within four years of the date the conviction became final by the conclusion of direct review or the expiration of the time for seeking direct review.¹⁹

A petition for a writ of habeas corpus may be filed either in the superi-

or or probate court. If a petition for a writ of habeas corpus is filed in probate court, such a filing must be made in the county where the petitioner is detained.²⁰ In capital, extradition and postconviction cases, a petition for a writ of habeas petition may only be filed in the superior court.²¹ If a petition for a writ of habeas corpus is filed in a postconviction matter, such a filing must be made in the county where the petitioner is detained,²² and the habeas petition must be served upon the person having custody of the convicted person.²³ If the convicted person is in the custody of the Georgia Department of Corrections, a copy of the petition must be served by mail upon the state attorney general.²⁴ If the convicted person is not in the custody of the Georgia Department of Corrections, a copy of the petition must be served by mail upon the district attorney of the county in which the petition is filed.²⁵

Once the habeas petition has been filed, the procedural require-

ments that the parties must follow varies depending on whether the petition: (1) challenges for the first time state court proceedings that resulted in a death sentence,²⁶ (2) seeks postconviction relief, but does not involve a first time challenge to proceedings that resulted in a death sentence,²⁷ or (3) does not seek postconviction relief at all.²⁸ In postconviction habeas corpus proceedings, the court may receive proof by depositions, oral testimony, sworn affidavits or other evidence.²⁹ Absent a showing of prejudice or a miscarriage of justice, the court may deny relief on a claim that could have been raised in a procedurally correct manner on the direct appeal.³⁰ Subject to certain exceptions, relief may also be denied by a court if the habeas claim was previously rejected either on the habeas petitioner's direct appeal³¹ or in a habeas proceeding instituted by the same petitioner.³²

A habeas corpus is a civil action and, as such, the burden of persua-

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sion is on the petitioner to prove his or her case by a preponderance of the evidence.³³ Indigent habeas petitioners do not have a right to appointed counsel, even though a petitioner has a pending death sentence.³⁴ All postconviction habeas corpus trials shall be transcribed,³⁵ and the judge is required to make both written findings of fact and conclusions of law.³⁶ Although Georgia postconviction habeas relief was once limited to cases where the conviction or sentence was void for lack of jurisdiction,³⁷ it is now available if "in the proceedings which resulted in conviction, there was a substantial denial of [petitioner's] rights under the Constitution of the United States or of this state."³⁸

If a court finds legally sufficient cause to issue a writ of habeas corpus, it commands that the person restrained of his or her liberty be produced in court and that the cause of that person's detention be adduced.³⁹ If a court rules in favor of a petitioner in a postconviction habeas proceeding, it shall enter an appropriate order with respect to the judgment or sentence and appropriate supplementary orders as to arraignment, retrial, custody or discharge.⁴⁰ If a court rules in favor of a petitioner in a non-postconviction habeas proceeding, it shall discharge, remand or admit to bail the person restrained of his or her liberty or shall deliver that person to the custody of an individual entitled thereto.⁴¹ Disobedience of the writ is punishable by attachment for contempt of court.⁴²

A final judgment granting or denying habeas relief may be appealed as of right to the Supreme Court of Georgia. However, in a postconviction habeas case a denial of relief may only be appealed if the petitioner first obtains a certificate of probable cause to appeal from the Supreme Court of Georgia.⁴³ The issuance of such a certificate is discretionary.⁴⁴ Since 1916, the Georgia Court of Appeals has had no appellate jurisdiction whatsoever in habeas corpus cases.

Today, as in the past, the great Writ of habeas corpus "continue[s] to play an important role in preserving and protecting liberty in Georgia."⁴⁵ 



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Endnotes

1. "Habeas Corpus" is Latin for "You have the body." Prisoners often seek release by filing a petition for a writ of habeas corpus. The writ is a judicial mandate to a prison official ordering that an inmate be brought to the court so that it can be determined whether or not that person is imprisoned lawfully and whether or not he should be released from custody.
2. *State v. Philpot*, 1 Ga. Ann. (Dud. 46) 375, 377 (Super. Ct. Richmond County 1831).
3. *See, e.g., Fullwood v. Sivley*, 271 Ga. 248, 251, 517 S.E. 2d 511 (1999).
4. *Fay v. Noia*, 372 U.S. 391, 441 (1963).
5. *See* 1 DONALD E. WILKES, JR., *STATE POSTCONVICTION REMEDIES AND RELIEF* 948-49 (2005).
6. *See, e.g., Rainwater v. Langley*, 277 Ga. 127, 587 S.E. 2d 18 (2003).
7. *See, e.g., Hogan v. Nagel*, 276 Ga. 197, 576 S.E. 2d 873 (2001).
8. *See, e.g., Bradford v. Brown*, 277 Ga. 92, 586 S.E. 2d 631 (2003).
9. *See, e.g., John v. Smith*, 280 Ga. 235, 626 S.E. 2d 470 (2006).
10. *See, e.g., Nelson v. Zant*, 261 Ga. 358, 405 S.E. 2d 250 (1991).
11. Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part I)*, 8 GA. L. REV. 313, 314 (1974).
12. *Id.* at 313-14.
13. In *Andrews v. Strong*, 33 Ga. Supp. 164 (1864), for example, at a time when legislation enacted by the Confederate Congress was supposed to be suspended, the Supreme Court of Georgia affirmed a lower court's judgment granting habeas relief to a

citizen conscripted into the Confederate Army who claimed that as a justice of the peace he was exempt from military service.

14. Ga. Code §§ 3909-31 (1863).
15. *See, e.g., O.C.G.A. § 15-6-9(I)* (authorizing superior court judges to grant writs of habeas corpus within their respective circuits); *id.* § 9-10-14 (2005) (providing model forms, including model form of habeas corpus petition, required to be used by certain inmates).
16. *Id.* §§ 9-14-3 to -4, 9-14-44.
17. *Id.* § 9-10-14.
18. *Id.* § 9-14-51.
19. *Id.* § 9-14-42(c). In misdemeanor traffic offenses, the statute of limitations period is 180 days, *Id.* § 40-13-33(a), and in all other misdemeanor conviction cases, it is one year, *Id.* § 9-14-42(c).
20. *Id.* § 9-14-4.
21. *Id.* §§ 9-14-4, 9-14-40(b), 9-14-43.
22. *Id.* § 9-14-43.
23. *Id.* § 9-14-45.
24. *Id.*
25. *Id.*
26. *See id.* § 9-14-47(a)-(c); Rule 44, Ga. Sup. Ct. R.
27. *See* O.C.G.A. §§ 9-14-45 to -47, 9-14-47.1(d).
28. *See id.* §§ 9-14-5, 9-14-7 to -15.
29. *Id.* § 9-14-48(a).
30. *Id.* § 9-14-48(d).
31. *See, e.g., Hall v. Vargas*, 278 Ga. 868, 608 S.E. 2d 200 (2005).
32. *See, e.g., Stevens v. Kemp*, 254 Ga. 228, 327 S.E. 2d 185 (1985).
33. *See, e.g., Bruce v. Smith*, 274 Ga. 432, 553 S.E. 2d 808 (2001).
34. *See Fortson v. State*, 272 Ga. 457, 532 S.E. 2d 102 (2000).
35. O.C.G.A. § 9-14-50.
36. *Id.* § 9-14-49.
37. *See, e.g., Balkcom v. Parris*, 215 Ga. 122, 109 S.E. 2d 48 (1959).
38. O.C.G.A. § 9-14-42(a).
39. *Id.* § 9-14-6.
40. *Id.* § 9-14-48(d).
41. *Id.* § 9-14-19.
42. *Id.* § 9-14-23.
43. *Id.* §§ 9-14-22, 9-14-52.
44. *See* Rule 36, Ga. Sup. Ct. R.
45. Donald E. Wilkes, Jr., *A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II)*, 9 GA. L. REV. 13, 78 (1974).

No Time for Diversity Fatigue

by Marian Cover Dockery

Are you suffering from “diversity fatigue”? Have you attended three, six, nine, a dozen, diversity training seminars and feel that your firm or company fails to make significant progress in the hiring or retention of women and minority attorneys? If you are experiencing diversity fatigue, according to our speakers at the opening session of the State Bar of Georgia’s 14th Annual Diversity Program, it is much too soon for that.

During the opening session, “Meeting the Challenge of Advancing and Retaining a Diverse Law Office,” the panelists reported the dismal statistics relative to the representation of women and minority attorneys in law firms and corporations. These statistics were based on research conducted by the American Bar Association Commission on Women in the Profession, Catalyst, Inc., a nonprofit think tank based in New York and the American Institute for Managing Diversity. Some of those results will be discussed in this article.

One of the issues the panelists discussed was the low retention rate of women and minority attorneys in law firms. Why are women and minorities leaving in larger percentages than their white male peers? Why do women of color have the lowest retention rate of all the groups (white males, minority males and white females)?

There is a direct correlation between the low retention rates of women and minorities in law firms and the low percentage of women and minority partners.

Partners serve as role models, and their mere presence confirms the commitment of the firm to diversity and creates a more inclusive environment. Naturally, women and minority associates won’t feel as isolated where there are other women and minorities in power who can serve as mentors and role models.

What do the statistics show? Of all law firm partners, only 17 percent are women, which is roughly the same percentage it was almost a decade ago (14 percent in 1996); and only 4.6 percent of all partners were minorities in the same year.

Of all law firm partners in 2006, only 4.6 percent are minorities. Although this is slightly higher than the percentage of minority partners in firms in 1996 (2.9 percent), the problem is that the percentage lags behind the representation of minority law school graduates.

Percentage of Partners by Sex and Race in the U.S. 1996 vs. 2006		
Year	Women	Minorities
1996	14%	2.9%
2006	17%	4.6%

Source: Catalyst, Inc.

In the corporate law departments, which are often touted as much more diverse, the percentage of women and minorities who are general counsels continues to remain low. Of the total number of general counsels in Fortune 500 companies, women represent only 16.6 percent (2006) and minorities represent only 5.6 percent (2005).

Percentage of Women and Minority General Counsels at Fortune 500 Companies

Women in 2006	16.6%
Minorities in 2005	5.6%

Source: Catalyst, Inc.

As stated earlier, even more staggering are the high percentage of women of color attorneys who leave their jobs in private firms. The ABA Commission on Women in the Profession reported that in the late 1990s, more than 75 percent of minority female associates had left their jobs in private firms within five years of being hired. The percentage rose to 86 percent in 1998 and by 2005, 81 percent had left their firms within five years of being hired.

Percentage of Women of Color Associates Leaving Their Firms Within Five Years of Hire

1990	75%
1998	86%
2005	81%

Source: Catalyst, Inc.

What can be done to retain this talent at law firms? What type of initiatives have successfully boosted morale and productivity and lowered turnover in legal offices? What barriers must be removed to ensure the success of women and minorities in the profession?

Our panelists discussed some strategies that law firms have successfully implemented. The experts included: Arin Reeves, J.D., Ph.D., who co-chaired the ABA Research Commission on Women in the Profession, moderator; Paulette Brown, partner at Edwards Angell Palmer & Dodge and co-chair of the commission; Brande Stellings, senior director advisory services of Catalyst, Inc. (New York) and Melanie Harrington, executive director, American Institute for Managing Diversity (Atlanta).

Our panelists and other conference speakers also discussed several diversity initiatives which law firms and law departments are currently implementing to meet this problem head-on which are outlined below.



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Leadership by Management at Law Firms

The managing partner of the firm sets the tone for the direction and success of its diversity initiatives. This responsibility cannot be delegated. If the managing partner and other partners at the firm do not integrate diversity into the hiring, training, evaluations, compensation, retention and promotion of women and minorities at the firm, the diversity efforts will in all likelihood fail.

Reeves cites the firm's leadership as one of the most critical elements of its diversity program and says that this commitment needs to be explicit, visible and personal. Further, Reeves emphasizes that "diversity cannot work when it is separate from everything else; it has to be integrated into everything else and the managing partner must lead the firm in its commitment to integrating diversity into

all levels of the firm's personnel process."

How does the managing partner accomplish this? First, the managing partner must verbally communicate to his executive committee that the firm will not tolerate bigotry or bias, inappropriate communications of any type that insult a person because of his/her race, sex, religion, national origin or sexual preference. A zero tolerance of anyone failing to comply with the equal employment opportunity laws in all personnel practices is mandatory. That message must be communicated at staff meetings, executive meetings, orientation sessions and any other forum that management deems appropriate. All violations must be investigated promptly and sanctioned immediately.

Secondly, the managing partner must endorse and participate in educational diversity programs. Continuing education on diversity issues can help white male attorneys better understand the cultural

differences of persons with different backgrounds. That understanding can lead to a better work environment and enhance the work experience of all employees at the firm. Also, when the firm introduces internal diversity education programs, and the senior partners are participating, it sends a message to the women and minorities that says "we support diversity" and fosters a positive and inclusive work environment.

The American Institute for Managing Diversity led by Melanie Harrington and the Atlanta Large Law Firm Diversity Alliance (whose members are the 11 largest firms in Atlanta), launched a Diversity Leadership Academy to address diversity training and education among law firm partners and provide a forum to develop skills in managing diversity. Recognizing the problems of retaining women and minorities, the firms funded research and development for an education pro-

gram for law firm leaders and established a steering committee to oversee survey research on large law firm environments; approve a curriculum for law firm leaders and provide advice on program format. Today, the 11 firms require their partners to participate in the training program.

Mentoring Programs

Firms are successfully recruiting women and minorities but still struggle to retain and advance these talented groups of attorneys. How can this be achieved?

When Catalyst, Inc., asked women lawyers to identify the top barriers to women's advancement in the legal profession, Stelling's reports that lack of mentoring opportunities is a top barrier and recommends "developing a variety of mentors with different skill sets, strengths and perspectives to act as your own 'board of directors.'"

Why is mentoring important? A Catalyst, Inc., study of women

lawyers who graduated from Ivy League law schools reported that 53 percent of women versus 21 percent of men are excluded from informal networks within organizations and 52 percent of women in that same study reported a lack of mentoring opportunities versus 29 percent of all men.

Thus, if the majority of white male partners only mentor other male associates on an informal basis because they prefer to help those who "look like them," law firms lose talent, skills and money when women and minorities fail to get the same support and leave the firms.

It is essential that women and minorities get the same support. If there is no informal program, a structured and formal mentoring program must be designed to give all attorneys a chance to succeed in their organization.

Stelling's emphasizes that "mentors can help with many skills essential to a successful legal

career, including how to manage time wisely, develop business, delegate work or navigate the organizations' office politics."

How Should Firms Design Mentoring Programs?

There are three elements in this author's opinion of a successful mentoring program. First, successful mentoring programs should include all new associates. Programs targeted exclusively for women or minorities fail to fulfill the needs of the firm because excluding any groups e.g., white males, alienate those young associates who require the same guidance and feedback. And although some white males may informally get the mentoring that women and minorities do not, there are always some who "fall through the cracks."

Secondly, mentors must volunteer for the job. Anyone who is reluctant to meet the challenge should not assume the responsibility



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ity. Brown, who is one of three minority woman partners in the state of New Jersey says, "Mentoring is very serious and should not be taken lightly. Partners should not be 'forced' to be mentors, as when they are, they are less likely to be effective. Parenting is not suitable for everyone, nor is mentoring."

Third, mentoring programs must address the different needs of the entry-level associate, the junior associate and the senior associate. For example, the entry-level associate needs education regarding office politics, time management, the firm's economics and how to properly delegate work, as well as understanding who's who in the organization. The practice group mentor should be willing to evaluate the attorney's work and communicate a plan to correct any problems and provide this feedback before the first formal evaluation period.

Junior associates need more challenging assignments, including learning how to develop a book of business and start developing that business by networking outside of the firm. Mentors should continue to give honest feedback at the junior level as well and make any suggestions to help them with skill building to ensure their success. Giving them exposure to clients is important in building the mentee's confidence.

Senior associates may need help in developing clientele and should get even more exposure for the challenging assignments with clients who may seek their expertise in the future. Women and minority attorneys joining the teams to work for the key corporate clients at this stage is not only important for the mentees, but invaluable for the firm which needs to showcase its diverse talent for the many corporations now demanding diverse outside legal teams.

An effective mentor must be someone who his mentee can trust, with multiple people serv-

ing as mentors in the life of an attorney. Just a few examples are: the mentor who will help with one's professional development; the mentor that will help with one's social and emotional development; and the mentor who is the quintessential cheerleader, friend and fan.

Diversity Managers/Partners

More and more firms are hiring attorneys and non-attorneys to spearhead their diversity efforts. The Minority Corporate Counsel Association reported an increase in firms hiring diversity partners or managers to ensure implementation of diversity strategies created by members of the firm's diversity committee.

In order to design an effective diversity program, firms hiring diversity partners must ensure that the diversity partner reports to the managing partner to guarantee the respect of the position by other partners in the firm. Part-time diversity partners and those relegated to the human resources department of the firm are set up to fail.

The diversity partner's responsibilities include but may not be limited to:

- Mapping out recruitment strategies and identifying the best talent available for the firm;
- Monitoring the effectiveness of the firm's policies and updating what can and cannot work;
- Exploring and implementing work-life balance options and other personnel policies that will help, on a long-term basis, advance more talent;
- Serving as an ambassador for the firm's commitment to diversity by speaking on panels, presenting at diversity programs and doing other work in the community; and
- Attracting clients and increasing profits for the firm.

Diversity partners or managers must have the unwavering commitment and support of management and the members of the diversity committee to ensure success of the firm's diversity initiatives.


Affinity Groups

During the afternoon sessions, our panelists also discussed affinity groups formed and led by company employees. Affinity groups are employees of the same race, sex, sexual orientation or nationality who come together and discuss issues of concern and solutions for their problems and celebrate their heritage. Usually, affinity groups are open to all employees regardless of their race or background. They can become a powerful vehicle to educate majority employees who plead ignorance to different cultural backgrounds or beliefs. These groups also serve to educate majority employees about the unique challenges women and minorities face in their careers.

Affinity groups can serve several other purposes. They help reduce a feeling of isolation in the workplace by affording women and minority employees a platform to voice their concerns and discuss meaningful solutions, celebrate their differences, and identify additional mentors with similar backgrounds who can help them achieve success at their firms and companies. These groups can provide opportunities to meet peers with similar interests and backgrounds, especially in large firms and corporations where attorneys may only see those in their practice groups.

These groups are often the basis for the formation of long-term relationships that may contribute to the professional growth of the women and minority attorneys seeking guidance in handling the daily challenges of the workplace such as balancing work and family, effective rainmaking strategies as well as addressing racism, sexism and harassment.

Conclusion

Commitment to diversity is more than paying lip service. Effective leadership, effective diversity management, informal and formal mentoring programs, affinity groups and above all an education program that teaches attorneys to understand about cultural differences contribute to the economic success of a law firm and law office. Diversity is a process that must be inculcated into the culture of the workplace to ensure the continuing success, not of just the women and minority attorneys but the success of the law firms and corporations that employ these talented groups of attorneys. 



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

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

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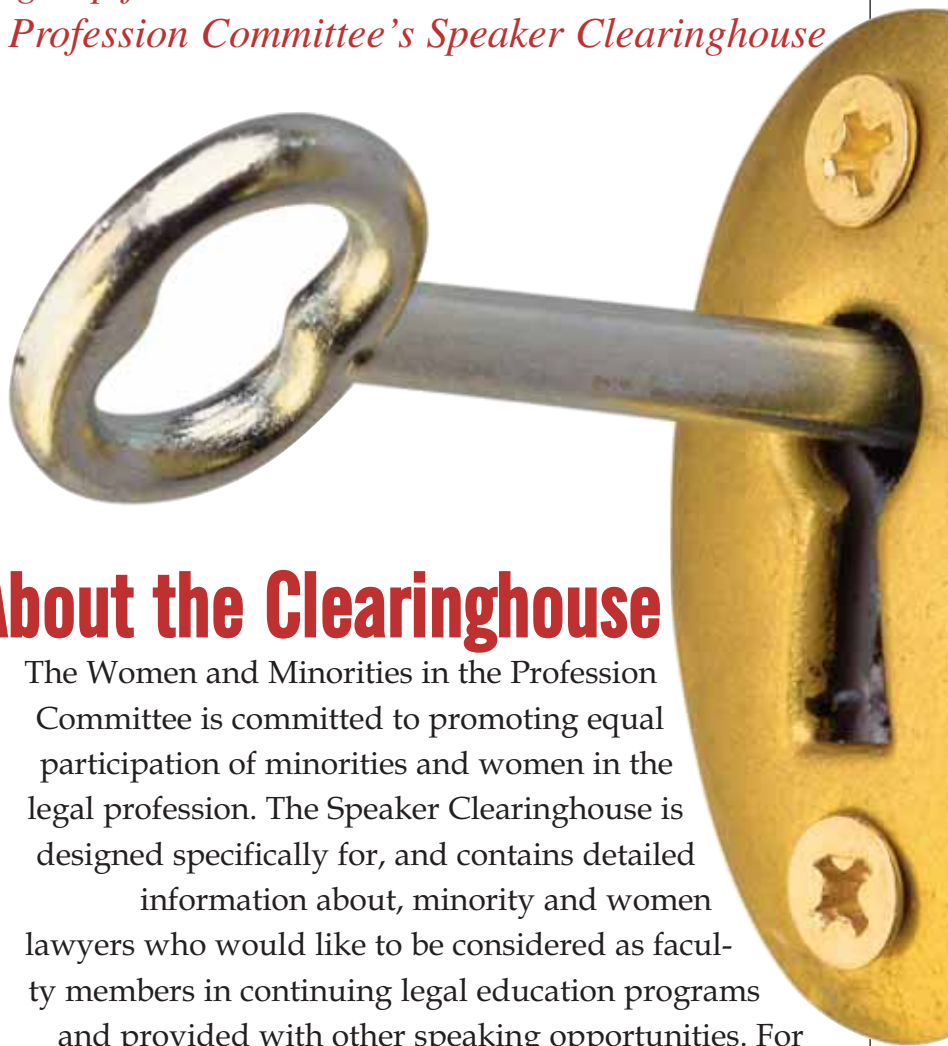
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To search the Speaker Clearinghouse, which provides contact information and information on the legal experience of minority and women lawyers participating in the program, visit www.gabar.org.

Foundation Holds Children at Risk Symposium

by Len Horton

On Dec. 5, 2006, the Georgia Bar Foundation held its first Children at Risk Symposium. Forty-three people representing 39 different organizations from throughout Georgia were present. The brainchild of newly reelected Georgia Bar Foundation President Rudolph Patterson, the meeting was created to bring together organizations dealing with the problems of children at risk.

"A number of non-profits in the state are focusing on the problems of children and how to keep them out of trouble with the judicial system. I wondered if we needed to start working with children even earlier, when they are most vulnerable to peer pressure," said Patterson. "My idea was to bring children's organizations together, grantees and non-grantees, to share ideas and do some brainstorming."

To give the attendees new ideas to mesh with their existing approaches to the problem, Patterson asked Ed Meniffee, the executive director of the highly regarded BASICS program, to detail an innovative approach to reaching youth and keeping them out of trouble. Meniffee is well known for his BASICS program and its ability to prepare about-to-be-released felons to find work and be good employees once released from prison. Based on his highly successful Southwest Atlanta Youth Business Organization (SWAYBO),



Photos by Len Horton

Rudolph Patterson, president of the Georgia Bar Foundation, Ed Meniffee, executive director of the BASICS program and Terry Walsh, partner at Alston & Bird, LLP.

Meniffee explained to the symposium his free enterprise approach to children. Few people who know about BASICS realize that it is based on Meniffee's work with children in SWAYBO.

Pens and pencils were moving rapidly as the attendees absorbed the ideas Meniffee presented. What if a child could make \$150 a day reselling donuts? What if a child could learn to see business opportunities everywhere and create a thriving business from an original idea implemented with passion? This is not impossible for a child to do, so why don't more children understand that hard work can take them to a



Tony R. Morrow, founder of The Pecan, a fine dining restaurant in College Park, was a guest speaker at the Georgia Bar Foundation's first Children at Risk Symposium.

successful place in the world? Because, as Meniffee says, you cannot do what the mind has never been exposed to. His program exposes the child to setting goals and finding ways to achieve those goals. With clear ideas about what is possible, children not only stay out of trouble but surprise parents, teachers, friends, and sometimes themselves, at their accomplishments.

A great way to show children what is possible is to show them someone who once was where they are now and who now is highly successful. One of Atlanta's most praised restaurateurs and the founder of The Pecan, a fine dining restaurant in College Park, Tony R. Morrow was a worthy illustrator that Ed Meniffee's ideas are a goldmine. In no time at all, Morrow proved to the attendees that he had learned SWAYBO's lessons well. Morrow mesmerized the group as he related how embracing SWAYBO's entrepreneurial ideas had transformed his life and the lives of everyone he touches.

Quickly it became apparent these ideas aren't just for children at risk, but they are for all Americans who want to take advantage of the free enterprise system that is America. It became apparent to attendees that this information should be taught


somewhere, whether in the schools, in other non-profit groups or in SWAYBO-like organizations everywhere.

"I am ready right now to start teaching this to the kids in my program," said Sam Kennedy, executive director of the South Atlanta Community Tennis Association. "I am proud of my program to help disadvantaged kids who have never played tennis before. Tennis teaches them self-discipline, improves their self-esteem and keeps them out of trouble. Ed Meniffee's entrepreneurial skills program will give them self confidence and the ability to take care of themselves and their families no matter what hand they may have been dealt in life."

The symposium reviewed the nature of the problem of children at

risk in Georgia. One child in five lives below the poverty line; a staggering 15 percent drop out of high school. More than 20,000 children need drug abuse treatment. Clearly anything that can be done to reduce those figures will make a big difference in their lives.

The Georgia Bar Foundation's Children at Risk Symposium is a first step in trying to stimulate thinking to solve this multifaceted problem. Already the group has decided to get back together after 90 days to review the progress made.

The symposium was held in the meeting rooms of the Alston & Bird law offices, thanks to the support and generosity of Terry Walsh, a well-known innovator in the field of child truancy. Georgia's lawyers and bankers, who through Interest On Lawyers Trust Accounts (IOLTA) under the direction of the Supreme Court of Georgia generate significant revenues to the Georgia Bar Foundation, made the symposium possible. Annually the Georgia Bar Foundation provides grants to Georgia organizations working to solve law-related problems throughout the state. 



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The Terrell County Courthouse at Dawson

The Grand Old Courthouses of Georgia

by Wilbur W. Caldwell

Terrell County had its beginnings in 1856, only three years before The Southwestern Railroad arrived on its way from Macon to Eufaula. A large frame courthouse was erected at the new county town of Dawson. Only 34 years later in 1890, when The Columbus Southern Railroad crossed The Southwestern at Dawson, the town boasted more than 3,000 residents, and saw herself as a rival to both Americus and Albany. Two years later in 1892, the most wildly eclectic courthouse ever built in Georgia rose in Dawson. This building presses hard against the outer boundaries of period architectural tastes, if not against the frontiers of the bizarre, just as the hope it symbolized pressed hard against the borders of reality.

Three factors influenced Dawson's selection of Atlanta architect William Parkins. First was the town's enthusiasm for prospects kindled by the new railroad. Second, only a few years before and only 32 miles away, neighboring Cuthbert had employed Parkins' old firm, Kimball, Wheeler and Parkins, to design a truly elegant court building, the 1886 Randolph County Courthouse. With the arrival of The Columbus Southern, it seems sure that Dawson was moved to attempt to out-do her neighbor. Third, Parkins, in association with Alexander Bruce, was the designer of what was at the time arguably the state's grandest court building, Atlanta's 1883 Fulton County Courthouse. Additionally, Parkins had just completed three courthouses that expressed wildly eclectic flights of fancy: the 1887 Oglethorpe County Courthouse at Lexington designed in association with Lorenzo Wheeler, the 1888 Gordon County Courthouse at Calhoun and the 1890 Dooly County Courthouse at Vienna. If there was an architect in Georgia in 1890 who could top the fantastically Picturesque edifice of the Randolph County Courthouse at Cuthbert, it was Parkins himself, a man about to be commissioned to out-do his own firm's best effort.

Some architectural historians consider the Picturesque Eclectic a codified style. This line of thinking is not without its problems, but however one chooses to classify the styles of the era, eclecticism marked the

beginning of the end for the romance of the Picturesque. Along with the Queen Anne and a kind of Free Classicism, the Picturesque Eclectic (or Free Eclecticism or Progressive Eclecticism as some scholars choose to call it) was the last voice of the Picturesque Movement. In America, as in England, it punctuated the end of the architectural era not with a whimper, but with a decided bang.

Parkins' details at Dawson comprise a smorgasbord of styles. The central entrance bay lends ample example. The great double arches of rough stone masonry are Romanesque to the core. Above, the two segmentally arched window openings, with the delicate beveled sashes and tiny panes are characteristic of the Queen Anne Style. The window grouping in the parapet is of a sort often referred to as "Palladian." It is typical of the broad span of the Renaissance Revival, or could flow just as easily from the Colonial Revival whose Georgian roots also lead back to the Renaissance. On top, the stepped parapet recalls the Northern European Renaissance, a favored motif of Lorenzo Wheeler, Parkins' former partner.

It would be a simple but exhausting matter to inventory each section of Parkins' fantasy at Dawson, but it is perhaps best to simply point out his eclecticism in a broader sweep. With the exception of the great square columnar corner piers with their Classical capitals and the Queen Anne oval window at the base, the central tower is fundamentally Romanesque with its stone banding and spired tourelles in the top quarter. The lower tower is similar to the small tower of Parkins' 1888 Gordon County Courthouse at Calhoun but for the addition of a wildly Romantic oriel

or turret, which becomes a narrow minaret with its pointed dome and miniature balcony. Also notably eclectic are the small tower's stylized urns, which serve as classical finials.


One of the fundamental weaknesses of the Picturesque was its tendency to bind design to a purely scenic agenda. The license of the



Terrell County Courthouse: Dawson, Ga., built in 1892. William Parkins, architect.

eclectic offered even more enticing temptations for architects to "paint pictures" with their buildings. With his design for the Terrell County Courthouse, Parkins fell into this uniquely picturesque trap. The results are at best questionable. Although striking, Parkins' heavy-handed design here in Terrell County does not come close to the graceful delicacy of his offering in

neighboring Randolph County. Yet it would be difficult to find another building better suited to illustrate the freedom incorporated in eclecticism and the dangers it presents. Here in Dawson, Parkins was apparently given both the mandate and the liberty to outdo his own firm's creation in neighboring Cuthbert. Only a great artist could avoid disaster in such a situation, and Parkins, although thoroughly competent, was not a member of that group. The results were predictable. Like Icarus, Parkins flew too near the sun. A little eclectic license had yielded success in Cuthbert, and the citizens of Dawson demanded more. The orgy of ornament they received passed well beyond the edges of good taste.

But in 1890, in the middle of cotton's sadly depressed kingdom, the citizens of Terrell County may have received exactly what they ordered: a grand symbol, like no other, for their desperate illusions of economic salvation created by the arrival of yet another steel highway. 

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.

Photo by Wilber W. Caldwell

Do Your Clients Have Blogging Policies? Maybe They Should.

by Mari L. Myer

This article originally appeared in two parts in the State Bar of Georgia's Technology Law Section's newsletter, Georgia Journal of Technology Law, in the summer and fall 2006 issues.

By now, an employer would have to be conducting business under a rock in order to be unaware of the explosion in Internet blogs, an online journal that is frequently updated. Some blogs have a single author while others contain contributions by a group of authors. It is possible to find Internet blogs covering virtually every aspect of life, including the workplace.¹

Although there are many issues surrounding blogging that we can expect the courts to address in the coming years, to date there have been no reported decisions by the state and federal courts sitting in Georgia regarding blogging. But, many of the issues raised by employee blogging can be analyzed within the framework of other caselaw.

Some Statistics on Blogs

One of the characteristics of blogs that makes them unique is that bloggers tend to make stream of con-



sciousness postings. They speak their minds in much the same way in which they use the spoken word. But, unlike the spoken word, blogs can be permanent. An angry tirade against an employer or co-worker made to a friend in the privacy of one's home—or in a bar—will leave no evidence behind except in the memories of the

parties to the conversation. An angry tirade in a blog will still be available for the entire world to read long after the anger has passed. Any policy regarding blogging must take this characteristic into consideration.

A survey conducted by the Employment Law Alliance (ELA) in January 2006 revealed that 5 percent of American workers maintain personal blogs, and that only 15 percent of American workers are employed by companies that have policies regarding blogs.² According to an April 11, 2006, posting at www.newdogtricks.blogspot.com/2006/04/executives-should-encourage-employee.html, IBM and Microsoft each have at least 2,000 employees who maintain blogs. We should expect the number of American workers who maintain personal blogs to grow rapidly.

Here are some statistics gathered by the ELA survey regarding those employers with blogging policies in place as of January 2006:

- 58 percent of those policies addressed all employee blogging.³
- 33 percent only addressed employer-related blogging.⁴
- 81 percent did not encourage promotion of the employer's business or reputation on the employees' blogs, and 18 percent encouraged such promotion—reflecting a diversity of views among employers that have considered such issues as to the appropriate role of a blog.⁵
- 49 percent distinguished between posting a blog using the employer's computer network and posting a blog from a non-workplace location.⁶
- 77 percent prohibited or discouraged the posting of specified employer-related information. Those restrictions included prohibitions against posting of (1) any employer-related information or material, including personal opinions (62 percent); (2) criticism or negative comments about the employer (60

percent); and (3) specified types of references to the employer, supervisors, co-workers, customers and clients (57 percent).⁷

- 23 percent placed no limitations on the information that an employee was authorized to post on a blog.⁸

Of the employers with blogging policies restricting the information that an employee was authorized to post on a blog, 79 percent specified in their policies the consequences of policy violations.⁹

Of the 5 percent of American workers who currently maintain a blog,¹⁰ the vast majority—84 percent—reported that they had never posted any employer-related information on their blog. However, the remaining 16 percent reported hav-

should be allowed to discipline or terminate employees posting damaging, embarrassing or negative information about their employers, but 23 percent believed that employees should be free to post criticism or satire of their employer, co-workers, supervisors, customers and/or clients on a blog without repercussion.¹³ Former employees of numerous companies, including an airline, a social networking site, and a technology company, are rumored to have been terminated as a consequence of blog postings that either criticized their employers and co-workers or contained personal information about themselves that their employers found embarrassing. These rumors have not, however, been confirmed.

By implementing a policy before blogging becomes entrenched in the company's culture, the employer can establish and enforce clear standards, including disciplinary procedures to follow when a policy is violated.

ing posted information that could be considered critical of their employer, supervisors, co-workers, customers or clients.¹¹

The ELA survey also inquired of American workers regarding their attitudes towards employer blogging policies. Surprisingly, only 59 percent of the workers who were polled agreed that employers should be allowed to discipline and/or terminate employees who had posted confidential or proprietary employer-related information on a blog.¹² This survey result raises a serious question regarding the attitudes of—and the need to educate—the remaining 41 percent concerning the importance of protecting confidential and proprietary information.

According to the ELA survey, 55 percent of those workers who were polled agreed that employers

Why Have a Policy?

With these statistics, it is easy to understand that employers need to implement thoughtful blogging policies sooner rather than later, because later may be too late. By implementing a policy before blogging becomes entrenched in the company's culture, the employer can establish and enforce clear standards, including disciplinary procedures to follow when a policy is violated.

What Kind of Policy Should the Company Implement?

The "why" question may be easily answered. The "how" question may not be. Companies that have considered blogging policies have struggled with many issues, all of which must be resolved with the

Companies have three general types of policies available to them: (1) allowing any and all employee blogs, with no restrictions; (2) forbidding all employee blogs that make any reference to the company, and disciplining personnel who violate the policy; and (3) the vast grey area in between these two extremes.

company's goals, the corporate culture, the nature of the company's product or service, and applicable laws in mind. Blogging ground rules used by a technology company may not be appropriate for an airline and vice versa.

Companies have three general types of policies available to them: (1) allowing any and all employee blogs, with no restrictions; (2) forbidding all employee blogs that make any reference to the company, and disciplining personnel who violate the policy; and (3) the vast grey area in between these two extremes.

What Happens When the Company Imposes No Restrictions on Employee Blogs?

Companies that allow blogs with no restrictions whatsoever may run the risk of having their employees use blogs to (1) identify themselves as employees of the company, naming the company in the blogs, without offering a disclaimer distinguishing personal opinions from company policies; (2) criticize the company, management, and/or co-workers; (3) embarrass the company or the company's clients or customers; or (4) disclose information that the company does not want to have disclosed to third parties.

The lack of any restrictions may make it difficult for the company to respond to any of this conduct, because the employee will be able to point to the lack of policies and also to any inconsistency by the company in its response to various blogs. As a consequence, a failure to

have any company policy regarding blogging can be risky for the company. But these are the same risks that companies lacking other personnel policies face, and the risks may not be insurmountable.

Even a company with no official blogging policy will have in its arsenal the entire body of statutes and caselaw that protect against violations of privacy, gender or racial harassment, defamation, tortious interference with employment and business relationships, terroristic threats, extortion, misappropriation of trade secrets and similar conduct. Thus, blog postings falling into any of these categories could—and should—be subject to discipline by the company in the same fashion that such comments would be disciplined if made orally or in a letter or memorandum.

For example, although there is a risk that the blogger may disclose confidential information and/or trade secrets belonging to the company or the company's clients or customers, it is not necessary to have a policy specific to blogging in order to protect against such disclosures, so long as all personnel with access to sensitive information are required to sign employment agreements containing a nondisclosure covenant cast in language broad enough to encompass disclosures made in a blog. In addition, the Georgia Trade Secrets Act¹⁴ should encompass the disclosure of trade secrets in a blog where the disclosure occurs within Georgia. The employer would be wise to periodically remind personnel who have access to confidential information and/or trade secrets that disclosure of such

information in a blog is just as bad as disclosure by any other method.

A larger concern is the fact that the absence of a policy forbidding specific categories of postings may leave the employer vulnerable to allegations by third parties who are targets of such postings that the company's lack of a policy was tantamount to condoning the postings. With these considerations in mind, the employer that chooses not to implement a policy specific to blogging should, at a minimum, note in its personnel handbook, and remind its personnel in other communications, that statements in blogs should be made with the same level of care as is expected with respect to all other types of work-related communications, and that such statements are no less subject to discipline when made in blogs than when made in any other format. The company will need to monitor blogging by its employees and consistently take appropriate disciplinary action with respect to any blogs that violate the law or company policy in the same fashion in which the company disciplines comparable violations in other formats.

What Happens When the Company Forbids all Employee Blogs That Make Reference to the Company?

On the opposite extreme from imposing no restrictions on employee blogging is a policy of forbidding all employee blogs that make any reference to the compa-

ny. A restriction this severe may create a variety of difficulties for the company. First, the company must enforce this policy uniformly. If the company implements such a policy and makes violation of the policy subject to specific discipline (which could mean termination), the company must be willing to enforce the policy by disciplining *all* violators uniformly, regardless of the content of the blog. Such a policy, while clear, may be difficult to enforce if a high percentage of the rank and file personnel are willing to risk their jobs to test (or protest) the policy. In this instance, such a policy may backfire on the company by forcing the company to discipline, or even terminate, multiple employees or risk eviscerating its policy by failing to enforce it. The company may also unnecessarily create a morale problem if personnel regard such a policy as overly draconian. Depending on the nature of the posting, Title VII, whistleblower or other legal protections for employees may be violated if the company disciplines the employee for the posting. And if the discipline imposed by the company is termination, a terminated employee will have no reason to keep quiet about the company and may be tempted to post even more negative blogs following termination. This can create a public relations problem, and potentially have an impact on the stock value of a public company, if not handled delicately.

Moreover, a company policy banning all blogs that make reference to the company presumes that any blog that refers to the company will contain negative comments about the company. Some blog postings can (1) make constructive suggestions for how the company may improve itself, and (2) drum up positive "press" for the company. An absolute ban on blogs that make reference to the company will prevent even such positive postings and deprive the company of a potential benefit.

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What About the Vast Middle Ground of Allowing Blogging Within Company-Imposed Guidelines?

Thoughtful guidelines regarding employee blogging, particularly those established with the input of some employees, can allow employees to post their thoughts without necessarily creating an adversarial atmosphere between management and the rank and file. Some guidelines available to employers—all of which should be implemented with the company's goals and culture in mind—include the following:

- Allow postings but require personnel to submit their blogs to the company for prior approval as to content, thereby placing

the company in the role of censor and potentially exposing the company to risk in the event that an inappropriate posting is not filtered out by the company.

- Allow only postings that place the company and its personnel in a positive light.
- Require that all postings be made using the blogger's personal e-mail address, with no information to be posted linking the employee to the company.
- Require that all postings be made using the employee's real name, rather than a pseudonym, to ensure accountability.
- Require that postings only be made on the employee's personal time.
- Allow postings to be made on company time using the company's computer equipment and Internet account.

- Embrace and encourage blogs as a mechanism to foster creativity, team-spirit and problem-solving, allowing personnel to make postings in their own names on company time and to link those postings to the company's website.

A company may enjoy a public relations benefit if its customers become convinced that the company is allowing its personnel to comment on the company in blogs without restriction and without using personnel as mouthpieces for the company. The thinking is that an employee who is not subject to any restrictions on his or her blogging is free to make both positive and negative comments about the company, and as a result customers are likely to regard the employee as very credible on matters pertaining to the company.

Microsoft, Novell, Hewlett Packard and Sun Microsystems all allow such uncensored blogs.¹⁵ Earthlink also has a blog linked to its website, with a single blogger responsible for content.¹⁶ Some company-sponsored blogs feature opportunities for employees to publicly troubleshoot and critique company products while building trust on the part of the company's customers, because the customers can be certain that the postings have not been censored by the company. In this context, the company has to be able to trust that its personnel will refrain from making any postings that may expose the company to claims of defamation, violation of privacy, tortious interference with employment or business relations, gender or racial harassment, and similar claims. The company also has to be able to trust that its personnel will refrain from disclosing confidential information and/or trade secrets.

Companies that officially sanction blogs must choose whether to set up a separate website for the blogs, or to link the blogs to the official company website. If the



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company sets up a separate website, it may choose to add a disclaimer (if true) that it exercises no control over content and that the opinions expressed are not necessarily those of the company.¹⁷

If the company chooses to link employee blogs to its official website, the company should consider whether and how to exercise control over content. One option is to require advance approval by the company of all such postings. At a minimum, the company should require employees to include with all postings a disclaimer that the opinions expressed in the blog are those of the blogger and not necessarily those of the company.

While allowing employees to offer constructive comments, the company that links its employees' blogs to its website may be exposed to some risks that necessitate the company's ability to either block or remove offensive or illegal blogs. For this reason, the company should establish a mechanism for either pre-approval of blogs (and blocking the posting of offensive or illegal blogs), the removal of offensive or illegal blogs, or both. Risks to the company include, but are not limited to, defamation of the company, co-workers and/or clients by the blogger; creation of a hostile work environment by making postings that are offensive to women, those more than 40 years of age, or particular religious, ethnic or racial groups; posting of obscenities; harassment of co-workers; violations of privacy; copyright infringement; misappropriation of trade secrets; and embarrassment. The blogging policy should establish penalties for any such inappropriate postings, and the company should enforce the penalties consistently. The manner in which the company anticipates and protects against inappropriate postings may have a bearing on the company's potential exposure in the event that the subjects of the postings pursue a claim against the company.

Conclusion

Blogging will likely be the subject of much litigation over the next several years. The wise employer will protect itself now by implementing a thoughtful blogging policy that reflects the company's culture and needs, and by consistently enforcing that policy. 



Mari L. Myer practices law with Friend, Hudak & Harris, LLP, in Atlanta. Her business and employment litigation practice focuses

on technology and intellectual property issues, including the protection of trade secrets and confidential business information, and the drafting, interpretation and enforcement of restrictive covenants in employment agreements. She earned her A.B. from Wellesley College, *cum laude*, and earned her J.D. from Boston University School of Law. She may be reached at 770-399-9500 or via e-mail at mmyer@fh2.com.

Endnotes


1. This article will focus on private-sector employees who are engaging in blogging activity that pertains to or impacts their workplace and is not protected by the National Labor Relations Act or other laws governing collective bargaining and related activities. To the extent that a blog may be protected as concerted activity for the mutual protection of employees or as a union organizing activity, the issues surrounding such protections are beyond the scope of this article. Blogs posted by public sector employees, and the impact of the First Amendment and other protections on those blogs, are also beyond the scope of this article.
2. Press Release, Employment Law Alliance, *Blogging and the American Workplace – As Work-Related Web Blogs Proliferate, New National Survey Finds Few Employers Are Prepared For the Impact*, at

<http://www.employmentlawalliance.com> (Feb. 6, 2006) (The ELA conducted a telephone survey of 1000 American adults over the weekend of Jan. 22, 2006. The ELA reports a confidence interval of +/- 4 percent.) [hereinafter *Press Release*].


3. *Id.*
4. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 1.
5. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 2.
6. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 3.
7. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 4.
8. *Id.*
9. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 5.
10. *Press Release, supra*, note 3.
11. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 6.
12. *Press Release, supra*, note 3, http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf at 7.
13. *Id.*
14. O.C.G.A. §§ 10-1-760-767 (1990).
15. *See, e.g.*, <http://scobleizer.com/>; <http://rollerweblogger.org/roller/>; <http://minimsft.blogspot.com/>; <http://blogs.msdn.com/>; and <http://blogs.sun.com/> (bearing the headline, "This space is accessible to any Sun employee to write about anything.").
16. *See* <http://blogs.earthlink.net/>. It is not clear how much control Earthlink exercises over the content of its blog.
17. Readers may be familiar with similar disclaimers expressed in printed publications to accompany editorials over which the publisher exercises no control.

Kudos

- > Three attorneys at the law firm of **Davis, Matthews & Quigley, P.C.**, were recognized among *Georgia Trend's* "Legal Elite" for 2006, featured in the magazine's December issue. **Baxter L. Davis, Elizabeth Green Lindsey** and **Richard W. Schiffman Jr.**, are among the attorneys being honored in the area of family law. Baxter L. Davis is a founding member and shareholder of Davis, Matthews & Quigley. Elizabeth Green Lindsey, shareholder, has been with the firm since 1989, practicing primarily in the firm's family law section. Richard W. Schiffman Jr., shareholder, has been with DMQ since 1988 practicing in the firm's family law section.

- >  **Stephan J. Frank** has been named **circuit court administrator** for the **Bell-Forsyth Judicial Circuit** and **Forsyth County courts**. Frank will assist the superior, state, probate, juvenile and magistrate courts. He is responsible for fiscal affairs, personnel management, and trial court administration.


- >   **Kilpatrick Stockton LLP**, announced that **Bill Dorris** and **Diane Prucino** have been selected as the firm's new **managing partners**. In January, they succeeded Bill Brewster who served as managing partner for the past six years. Prucino became the first female managing partner at a Southeastern-based AmLaw 100 law firm and she will share management of the firm with a focus on attorney development. She has been the chair of the firm's employee benefit, labor and employment department for 6 years, and has also served on the firm's executive committee. Dorris shares the management reins with a focus on client service and practice management. He works with the firm's department chairs and team leaders to continue the growth of the firm's national and international practice areas.

- >  The **Municipal Court of the city of Atlanta building** has been named in honor of the late **Judge Lenwood A. Jackson Sr.**—a longtime judge and active member of several judicial associations. A special ceremony took place in December, designating the complex as the **Lenwood A. Jackson Sr. Justice Center**. The dedi-

cation ceremony was attended by hundreds of judicial dignitaries and members of the Jackson family. Judge Jackson recognized the need for improved court facilities and was instrumental in bringing the new traffic court building to fruition. The Atlanta law offices of Head, Thomas, Webb & Willis have established and funded an annual academic scholarship in memory of Jackson and his commitment to achievement and excellence.

- > **Hon. Christopher N. Smith** was appointed **Honorary Consul of the Kingdom of Denmark** by Her Majesty, Queen Margrethe II. He also received the "Outstanding Foreign Relations" award from the Annual Georgia European Summit and was a finalist for the Governor's International Awards. He practices business, personal injury and international law at his offices in Macon. He also serves as a mediator for diplomacy mediation and arbitration.


- > As assistant secretary of labor for occupational safety and health, attorney **Edwin G. Foulke Jr.** heads the Occupational and Safety Health Administration (OSHA) and its staff of more than 2,200 safety and health professionals and support personnel. Named by President George W. Bush to head OSHA in September 2005, Foulke was confirmed by the Senate in March 2006, and sworn in as the head of the agency in April. Prior to his nomination, Foulke was a partner with the law firm of Jackson Lewis, LLP, in Greenville, S.C., and Washington, D.C., where he chaired the firm's OSHA practice group.


- >  **Edward M. Manigault**, a partner in the Atlanta office of law firm **Jones Day**, has been elected a **Fellow of the American College of Trust and Estate Counsel**. He is the only Georgia attorney so honored this year.

- > **Kilpatrick Stockton LLP** announced that **Brian Corgan, Anthony Smith, Susan Cahoon** and **Miles Alexander** were named to the *Lawdragon 3000*, a leading look at the lawyers who will define the future of the legal profession. Earlier this year, Cahoon was selected for the *Lawdragon 500*. Corgan, Smith and Cahoon are partners in the firm's litigation department. Alexander is a partner in the firm's intellectual property department.

- > The **National Republican Congressional Committee** announced that Atlanta attorney **Ben Shapiro** has been appointed to serve on the **Business Advisory Council**. Shapiro will serve the state of Georgia and is

expected to play a crucial role in the party's efforts to involve top business people in the process of government reform. Shapiro's practice areas are alternative dispute resolution, commercial litigation and construction law.

- >  After 36 years of public service working as the supervisory attorney/territory manager of the Estate & Gift Tax Central East Territory, Internal Revenue Service, **Jeffrey P. Jones** retired from federal service in November 2006. Jones was presented the **Albert Gallatin Award** by Aileen F. Condon, chief of Estate & Gift Tax Division, at a ceremony in Chicago in October 2006. Jones was selected Attorney, Estate Tax in 1978. He remained in Atlanta until 1997, where he then served as Supervisory Attorney, Estate Tax in Phoenix, Ariz. Jones returned to Atlanta in 2001, serving as Territory Manager for 13 south and central states, including Georgia. Jones will be practicing in the area of estate planning and probate in Atlanta and North Georgia.

- >  The **Huntington's Disease Society of America** announced that **Jamie Greene**, intellectual property partner at **Kilpatrick Stockton** in Atlanta has become a member of its board of trustees.


- > **Brian C. Vertz** has earned his designation as an **accredited valuation analyst**. This designation was conferred by the National Association of Certified Valuation Analysts, denoting proficiency in business valuation theory and practice. Vertz is a partner in the matrimonial law firm of Pollock Beggs Komar Glasser LLC in Pittsburgh, Pa. He is a fellow of the American Academy of Matrimonial Lawyers and Pennsylvania SuperLawyer for 2006.

- > **Needle & Rosenberg, P.C.**, announced that five of its intellectual property attorneys—**Robert A. Hodges**, **Gregory J. Kirsch**, **William H. Needle**, **Lawrence K. Nodine** and **David G. Perryman**—were selected by their peers to be listed in *The Best Lawyers in America*®, 2007 edition. Most notable is that both Needle and Nodine are among a distinguished group of national attorneys who have been listed in *Best Lawyers* for 10 years or longer. Hodges leads the firm's biotechnology practice and serves as patent counsel to technology companies and research institutions. Kirsch leads the firm's software, electronics and communications technology


patent practice. He serves as patent counsel to numerous technology companies, ranging from large multinational corporations to small start-ups. Needle is the founder of Needle & Rosenberg and has practiced patent, trademark, copyright and trade secret law exclusively over his entire 36-year career. Nodine is the managing shareholder of the firm and practices in intellectual property litigation and counseling and leads the firm's litigation practice. For more than 20 years, he has served as lead counsel on a wide variety of cases involving trademarks, copyrights and patents. Perryman practices biotech law and focuses on helping clients position their intellectual property in a manner consistent with their business goals so that costs are avoided and value is found or created.

Kirsch, Needle, and Nodine were also named as the **"Legal Elite"** by *Georgia Trend* magazine, along with fellow Needle & Rosenberg intellectual property attorneys **Jeffrey H. Brickman** and **Gwendolyn D. Spratt**. Brickman practices both intellectual property litigation and criminal defense and served as the district attorney of DeKalb County of Atlanta prior to joining Needle & Rosenberg. Spratt co-leads the firm's biotechnology patent practice. She serves as patent counsel for the National Institutes of Health, the Centers for Disease Control and Prevention, and numerous universities and biotechnology and pharmaceutical companies.

- >  **John J. "Jeff" Scroggin** has been appointed to the **Strategic Planning Committee** for the **National Association of Estate Planners and Councils (NAEPC)**. He has also been appointed **vice-chairman** of the **North Fulton Community Foundation**. In October 2006, the first edition of the *NAEPC Journal of Estate & Tax Planning* was published. The new journal is an Internet publication of the NAEPC and is the largest circulation estate planning publication in the United States, going to the NAEPC's 28,000 members, with Scroggin serving as founding editor.

- >  Atlanta attorney **Martin Han Clarke** appeared on the sixth season of NBC's *The Apprentice*. He is currently the senior assistant city attorney of Atlanta, handling real estate, communications, utilities and commercial transaction contracts and negotiations that affect millions of people.

>  **Kilpatrick Stockton LLP** announced that **Shyam Reddy**, an attorney on the firm's corporate team, has been selected by the German Marshall Fund to receive one of its prestigious **2007 Marshall Memorial Fellowships**. As a Marshall Memorial Fellow and an emerging leader in the political and corporate sector, Reddy will participate in a three- to four-week travel experience designed to strengthen the transatlantic relationship. In addition, fellows participate in a forum to share their learnings upon return. In the fall of 2007, Atlanta will be the host city for the annual Marshall Memorial Fellowship conference to celebrate the 25th anniversary of the program.

>  **Richard Herzog**, a partner of **Nelson Mullins Riley & Scarborough LLP**, and president of the Atlanta Bar Association, has been elected a **fellow** of the **American Bar Foundation**. Based in Atlanta, Herzog leads the Nelson Mullins debt finance and restructuring practice. He also chairs the firm's property, government and finance practice.

> **Emory Law School** announced that it has developed a speciality track for law students interested in practicing **transactional law**. Emory is already nationally noted for its litigation program, and now intends to provide interested students with guidance and the opportunity to develop more advanced knowledge and skills in transactional law. The Emory program as it now stands has a core of required courses that will assure a basic level of knowledge in corporate law, accounting, corporate finance, corporate tax and securities law, and offers an array of courses to suit student interests, including advanced workshops designed to introduce students to the analysis and drafting required in the practice of law.

> **Needle & Rosenberg, P.C.**, announced that four of its intellectual property attorneys—**Bruce H. Becker**, **Christopher L. Curfman**, **Miles E. Hall**, and **Scott D. Marty**—have been named "**Georgia Super Lawyers-Rising Stars**" in the annual survey produced by legal publisher *Law & Politics* and printed in the October 2006 edition of *Atlanta Magazine*. Named a rising star for the second year in a row, Becker has been engaged in all aspects of patent prosecution pertaining to biotechnology and biomedical devices. Curfman's practice focuses on all aspects of patent prosecution and litigation in chemical and biotechnology related tech-

nologies. Hall is an attorney in the biotechnology practice group. Marty is focused on biotechnology patent prosecution.



In connection with the firm's 25th anniversary, attorneys and staffers from **Parker Hudson Rainer & Dobbs LLP** worked on a Habitat for Humanity house in downtown Atlanta. Along with other participating area law firms, Parker Hudson attorneys and staff rolled up their sleeves to work alongside the proud homebuyer. The firm provided more than 850 volunteer hours of labor constructing the house, a financial contribution, a new dishwasher and gift cards for the family's use.

>   Congratulations to **Kilpatrick Stockton LLP** attorneys **Raj Natarajan** and **Kali Wilson Beyah** for being selected by the *Atlanta Business Chronicle* as among **Atlanta's Top 40 Rising Stars Under 40**.

Kilpatrick Stockton is proud to be the only law firm with two honorees.

On the Move

In Atlanta

> Atlanta attorneys **Jon W. Hedgepeth** and **Hannibal F. Heredia** announced the formal opening of their new law firm, **Hedgepeth & Heredia, LLC**, specializing in the practice of family law. Hedgepeth & Heredia offers a full range of client services in the field of family law, including issues relating to divorce, custody, child support, adoption, contempt, non-compliance of orders, modifications, prenuptial agreements, annulment, name change, paternity and legitimation actions, mediation and collaborative law. Hedgepeth is an experienced trial attorney, having worked at Davis, Matthews & Quigley, P.C., and, most recently, having been a partner with the law firm of Kessler, Schwarz & Solomiany, P.C. Heredia recently served as managing partner of Perrotta, Cahn and Prieto, P.C.,

in Cartersville, specializing in the practice of family law. The firm is located at 2964 Peachtree Road NW, Suite 450, Atlanta, GA 30305; 404-846-7025; Fax 404-846-7027; www.hhfamilylaw.com.

- > **Steven D. Henry** has joined the Atlanta office of **Smith Moore LLP**. As the newest member of the litigation practice team, Henry will concentrate his practice on commercial litigation and product liability matters. His previous work experience includes representing clients in hearings and trials in federal, state and administrative courts. The firm is located at One Atlantic Center, 1201 W. Peachtree St., Suite 3700, Atlanta, GA 30309; 404-962-1000; Fax 404-962-1200; www.smithmoorelaw.com.



- > **Kilpatrick Stockton LLP** announced that **Sharon Nixon** resumed her legal practice with the firm's corporate department. Nixon returns to the firm's Atlanta office after serving as in-house counsel with an Atlanta-based insurance company, rejoining Kilpatrick Stockton as counsel. She will continue to concentrate on securities and corporate finance matters, including the representation of clients in the areas of public and private securities offerings, Securities Exchange Act reporting compliance, corporate governance, mergers and acquisitions, venture capital financings and general corporate matters. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309-4530; 404-815-6500; Fax 404-815-6555; www.kilstock.com.



Thiry



Webb

- > **Matthew R. Thiry** and **Kelly R. Webb** have joined the Atlanta office of **Davis, Matthews & Quigley, P.C.**, in the firm's civil litigation practice. Most recently, Thiry was an associate attorney in the litigation department for Ekker, Kuster, McConnell and Epstein, LLP, a general practice firm in Sharon, Pa. Previously, Webb was a litigation associate for Finley & Buckley, P.C. The firm is located at 3400 Peachtree Road, Lenox Towers Two, 14th Floor, Atlanta, GA 30326; 404-261-3900; Fax 404-261-0159; www.dmqlaw.com.

- > **Robert T. Thompson Jr.** and the firm of **Thompson Law, LLC**, announced that **Seth N. Katz** and **Thomas M. Shepherd** have joined the firm as **associates**. Thompson Law practices in the areas of labor and employment, substance abuse and business law. The firm can be contacted at P.O. Box 53484, Atlanta, GA 30355; 404-816-0500.

YLD Follows Top Award With More Public Service

Habitat for Humanity Project Fulfills Another Opportunity to Serve, by Linton Johnson

Coming off a year in which it received national recognition for its work in the community, the Young Lawyers Division (YLD) of the State Bar of Georgia is at it again.

On Sept. 23, 2006, nine YLD members and one spouse gave a full Saturday of labor to help make adequate, affordable housing a matter of conscience and action when they volunteered for a Habitat for Humanity project in Atlanta.

Georgia's YLD had only a month earlier been named the Best Overall YLD in the nation in the American Bar Association's Awards of Achievement Program, which is designed to encourage project development by recognizing the time, effort and skills expended by young lawyers' organizations in implementing public service and bar service projects in their communities.


"The mission of Habitat for Humanity is to eliminate substandard housing and to provide the opportunity of home ownership to low-income families in need," said Terri Gordon, Assistant County Attorney in DeKalb County's Law Department and co-chair of the YLD's Community Service Committee.

Along with Gordon, other YLD members participating in the project were Cristen Freeman of the U.S. District Court, Macon; Gary Ross of Holland & Knight, Atlanta; Ashby Kent of Burr & Forman, Atlanta; Meredith Wilson of McGuire Woods, Atlanta; Tom Bosch of Troutman Sanders, Atlanta; Allie Fennell of Talley French & Kendall, Decatur; Michelle Thomas, Senior Assistant County Attorney, Decatur; and Jennifer Keaton (with her husband, Skip Keaton) of Elarbee Thompson Sapp & Wilson, Atlanta.



"Our attorneys spent a day painting, installing fixtures, laying sod, planting trees and shrubs and washing windows to help the family prepare their home for move-in," Gordon said. "At the end of the day, it was agreed that all had a great time and enjoyed meeting and working with the family, other volunteers from a local church and Habitat employees."




She explained that when a family seeks to obtain a Habitat home, they must contribute a specified number of hours to the building of their house, as well as to that of another Habitat recipient's house.

Gordon said the Community Service Committee had batted around the idea of doing a Habitat for Humanity project for about two years. "We will try to do this project next fall as well," she said, "with an even larger group of YLD participants."

>  **Allen Nelson**, of **Crawford & Company**, was promoted to **executive vice president** in October 2006. Nelson will retain the responsibilities of the company's general counsel and corporate secretary. He will continue to oversee the legal department and be responsible for all corporate legal issues for the company and its subsidiaries on a global basis. Immediately prior to joining Crawford in 2005, Nelson practiced law with BellSouth Corporation for eight years, most recently as chief compliance counsel. The firm is located at 100 Glenridge Point Parkway, Suite 100, Atlanta, GA 30342; 404-497-6545; Fax 404-497-6168; www.crawfordandcompany.com.

> **Page Perry, LLC**, announced that **Daniel I. MacIntyre**, formerly with Shapiro Fussell, has joined the firm as a **partner**. The office is located at 1040 Crown Pointe Parkway, Suite 1050, Atlanta, GA 30338; 770-673-0047; Fax 770-673-0120; www.pageperry.com.

>   **Parker Hudson Rainer & Dobbs LLP** announced **Nicole D. Bogard** as senior counsel and **Kasel E. Knight** as an associate, both in the firm's tax and employee benefits practice group. Bogard's practice focuses on employee benefits, including 401(k), pension, multiemployer and welfare benefit plans. Knight's practice focuses on corporate and tax matters. The 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.

>    The Atlanta office of **Parker, Hudson, Rainer, & Dobbs LLP** also announced that **Jason C. Hollis**, **Stephanie H. Philips** and **C. Keith Taylor** have joined the firm as associates. Philips' practice focuses on insolvency, creditors' rights and bankruptcy. Hollis' and Taylor's practice focuses on representing lenders in secured commercial loan transactions. The 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.

>  **James R. Schulz** has joined the firm of **Miller, Hamilton, Snider & Odom LLC** as a **partner** in the Atlanta office. Schulz specializes in commercial litigation, bankruptcy, claims against government officials and agencies, and personal injury. Before joining Miller Hamilton, he was a partner with the bankruptcy firm of Ragsdale, Beals, Hooper & Seigler LLP, and an Assistant U.S. Attorney. The office is located at 100 Colony Square, Suite 1920, 1175 Peachtree St. NE, Atlanta, GA 30361; 404-602-3700; Fax 404-602-3777; www.mhsolaw.com.

> **Womble Carlyle Sandridge & Rice, PLLC**, announced that **Jimmy F. Kirkland** has joined the firm's **environmental practice group** as a member in the Atlanta office. Kirkland is an environmental lawyer who has 16 years of experience in private practice and another 13 years as a manager of the Emergency Response Team of the Environmental Protection Division of Georgia's Department of Natural Resources. Kirkland joins Womble Carlyle from Atlanta's King & Spalding, LLP, where he worked since 1989 in King & Spalding's tort litigation and environmental team. The firm is located at One Atlantic Center, Suite 3500, 1201 W. Peachtree St., Atlanta, GA 30309; 404-872-7000; 404-888-7490; www.wcsr.com.

In Athens

>  **Janet E. Hill** announced she has formed the firm, **Hill & Associates, P.C.** Hill & Associates will continue to serve the Athens, Atlanta and Northeast Georgia communities in employment related matters by providing both legal representation and mediation services. The firm is located at 1160 S. Milledge Ave., Suite 160, Athens, GA 30605; www.attorneysforemployees.com.

In Columbus

> **Page, Scrantom, Sprouse, Tucker & Ford, P.C.**, announced that **Joseph A. Sillitto** has become a member of the firm. His practice consists of probate and estate planning, real estate, wills and trusts. **April H. Hocutt** and **Adam R. Pease** have joined the firm as associates. The firm is located at Synovus Centre, Third Floor, 1111 Bay Ave., Columbus, GA 31901; 706-324-0251; Fax 706-243-0417; www.columbusgalaw.com.

In Marietta



> **Andrew W. Jones** announced the opening of his own firm, **Andrew W. Jones, P.C.** Jones will continue to represent plaintiffs in significant matters involving personal injury, wrongful death, motor carrier liability, premises liability and product liability. His office is located at 701 Whitlock Ave. SW, Building J, Suite 44, Marietta, GA 30064; 770-427-5498; Fax 770-427-0010; www.awjoneslaw.com.

In Savannah

> **Wisembaker Law Offices**, a law firm specializing in real estate and creditor's rights, announced the addition of **Michael R. Tabarrok** to the firm. Tabarrok is an experienced trial attorney—having conducted 77 jury trials, handled more than 5,000 criminal cases and 1,000 bench trials, motions and probation revocation petitions. He will be heading up the litigation department, which includes creditors' rights and provide additional capabilities to the real estate prac-

tice. The firm is located at 327 Eisenhower Drive, Suite 200, Savannah, GA 31406; 912-927-7779; Fax 912-352-7811; www.wisenbakerlaw.com.

In Valdosta

> The law firm of **Coleman, Talley, Newbem, Kurrie, Preston & Holland, LLP**, announced that **C. Hansell Watt IV** and **Matthew E. Euztler** joined the firm as associates in its litigation section. The Valdosta office is located at 910 N. Patterson St., Valdosta, GA 31601-4531; 229-242-7562; Fax 229-333-0885; www.colemantalley.com.

> **Young, Thagard, Hoffman, Smith & Lawrence, LLP**, announced that **Charles A. Shenton IV** has become a **partner** and **Crystal Jones** has become **associated** with the firm. The firm also congratulates **Truman L. Tinsley IV** on his successful completion of his reserve service as an army judge advocate general at Fort Hood, Texas. The firm is located at 801 Northwood Park Drive, Valdosta, GA 31604; 229-242-2520; Fax 229-242-5040; www.youngthagard.com.

Consumer Pamphlet Series



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Law Means Never Having to Say You're Sorry

by Paula Frederick

"I'm sorry. It won't happen again."

Your words stop your client in mid-tirade. Instantly her furrowed brow clears. "Well!" she responds. "I don't think I've ever heard a lawyer admit to a mistake. Apology accepted. I really feel like we've cleared the air."

Your partner isn't so sure. "You apologized?" he shrieks. "I guess we can take bets on which will come first—the Bar complaint or the malpractice claim."

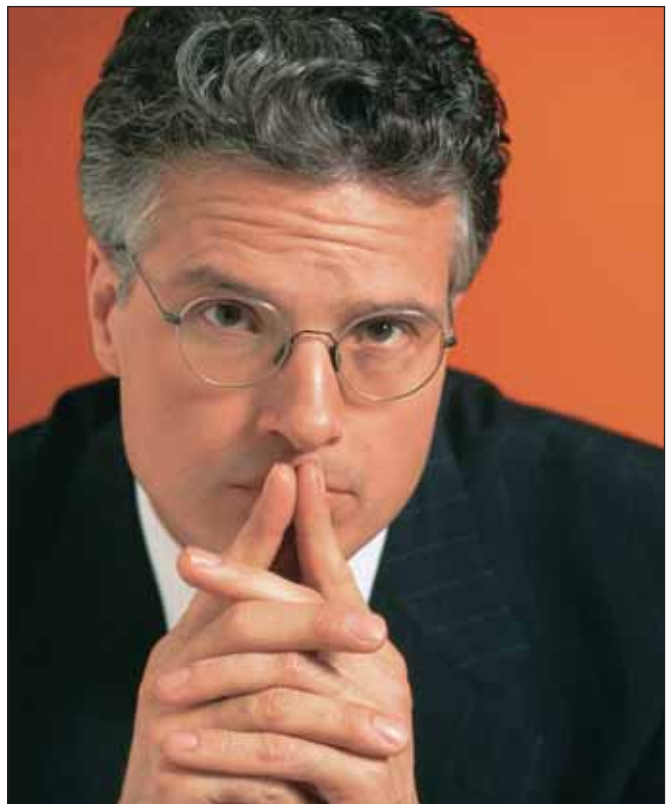
"Oh, please!" you respond. "We both know I haven't given Ms. Batten's case the attention it deserves. With my surgery and all those criminal cases on the trial calendar, I haven't been around to even answer her phone calls. All I did is promise her I'll be more responsive in the future."

"Yeah, but what she *heard* is that you screwed up. Right now you've kissed and made up, but if things don't go her way in court, she's going to be sure it's your fault."

"Well, it was the right thing to do," you insist. "I have an obligation to keep Ms. Batten informed about her case, but I haven't been prompt in communicating with her. She was threatening to fire me. Now she says I've restored her faith in lawyers."

It's true—sometimes a client just wants an apology. A frustrated client who believes she has been ignored or treated with arrogance may resort to the grievance process in order to get the lawyer's attention. In those cases an apology can go a long way towards mending the broken client/lawyer relationship.

But what about admitting to more serious lapses, like a blown statute? While recognizing the need to promptly notify the client, the folks at Minnesota Lawyers Mutual recommend that you talk to your carrier first—certainly before admitting liability or discussing possible damages with the client. Failure to do so could jeopardize your defense in any lawsuit and could even affect whether you have coverage at all.



In this case, you haven't committed malpractice. The unreturned phone calls don't yet amount to an ethics violation. Your apology probably won't backfire, and you've kept an important client. That's better than a grievance any day. 



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

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Discipline Summaries

(Oct. 20, 2006 through Dec. 13, 2006)

by Connie P. Henry

Disbarments/Voluntary Surrenders

James Glenn McElroy

Atlanta, Ga.

James Glenn McElroy (State Bar No. 490630) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 20, 2006. While a partner in a law firm, an employee that McElroy directly supervised solicited non-lawyer prospective clients for McElroy by telephone and through direct personal contact. McElroy knew of the employee's conduct at a time when the consequences of that conduct could have been avoided or mitigated, but he failed to take any remedial action. McElroy filed a Petition for Voluntary Surrender of License.

Suspensions

James A. Elkins

Columbus, Ga.

The Supreme Court of Georgia suspended James A. Elkins (State Bar No. 243200) from the practice of law for 90 days beginning Nov. 6, 2006. Although Elkins acknowledged service of the Notice of Investigation in this matter and filed a response, the response was not sworn in accordance with the Bar rules. The State Bar advised Elkins that the rules required a sworn response, but Elkins never filed a proper response. The State Bar then filed a Notice of Discipline, which was personally served on Elkins but which he failed to reject. In aggravation of discipline, the Court found that Elkins had five prior disciplinary infractions.

William C. Campbell

Stuart, Fla.

On Nov. 20, 2006, the Supreme Court of Georgia suspended William C. Campbell (State Bar No. 107150) from the practice of law pending termination of his

appeal of his criminal conviction on three counts of felony tax evasion.

R. Scott Cunningham

Dalton, Ga.

On Nov. 20, 2006, the Supreme Court of Georgia suspended R. Scott Cunningham (State Bar No. 202225) from the practice of law pending termination of his appeal of three federal felony convictions. Cunningham was convicted on one count of money laundering and two counts of conducting monetary transactions over \$10,000 in criminally derived property.

Review Panel Reprimands

Michael B. Syrop

Marietta, Ga.

On Nov. 6, 2006, the Supreme Court of Georgia ordered that Michael B. Syrop (State Bar No. 695720) be administered a Review Panel reprimand. The Court previously imposed a two-year suspension in this case. The State Bar, recognizing there was at least a procedural error in the Court's order, filed a motion for reconsideration and Syrop also filed a motion for reconsideration.

A client in California hired Syrop to represent him in Georgia on a claim for money damages arising from the storage of household furnishings and fine art allegedly lost or damaged during transport. Syrop filed the complaint and defendants removed the case to federal court. Syrop had no experience litigating in federal court and had trouble communicating with his client. As a result of problems on both sides, Syrop failed to respond to discovery requests in a timely manner or file proper mandatory disclosures. He also filed a dismissal without prejudice and a withdrawal of counsel that were not in compliance with federal rules. The State Bar originally misstated that the federal court

dismissed the action with prejudice and the Court suspended Syrop. The special master found that Syrop filed the dismissal without prejudice and believed he had his client's consent to do so. The federal court actually dismissed the action without prejudice and the client retained new counsel and refiled the case, ultimately being awarded \$12,000 from one of the three defendants. The Court found a Review Panel reprimand to be the appropriate discipline in this case because of the miscommunication between the State Bar and the Court that previously resulted in Syrop's seven-week suspension.

Stephen W. Adkins
Stone Mountain, Ga.


On Nov. 20, 2006, the Supreme Court of Georgia ordered that Stephen W. Adkins (State Bar No. 005404) be administered a Review Panel reprimand. Adkins received a retainer of \$3,000 to represent a

couple in a dispute with their homebuilder. Although Adkins filed the lawsuit, he subsequently sent a bill to the clients reflecting he also filed interrogatories to the defendants, which he had not done. When the clients brought the billing error to his attention, Adkins promised to correct the error but failed to do so. He also failed to inform the clients the defendant had served interrogatories and requests for production; failed to serve the defendant with a response to the interrogatories and requests for production; failed to respond to his clients' phone calls and e-mails; and failed to promptly return the unearned portion of the retainer after the clients terminated his services. Adkins has now made restitution to the clients for the full \$3,000 retainer.

The Court found in mitigation of discipline that Adkins had no prior discipline, had no dishonest or selfish motive, was dealing with per-

sonal problems during the time he represented the clients, and he was remorseful. The Court also noted that Adkins refunded the retainer and sought to improve his practice management.

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. 20, 2006, no lawyers have been suspended for violating this Rule, and one lawyer has been reinstated. 



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

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Ten Things You Can Do to Avoid Hurting (or Killing) Your Practice

by Natalie Thornwell Kelly

Call it sage advice or simple “no-brainers” that everybody should know—things you should avoid in the practice of law are sometimes not as clear as one would have it. In order to make sure you are abreast of some of the key factors for practice success, here are 10 things you can do to avoid hurting your practice.

Learn or Follow the Rules

We are often surprised at how many practicing attorneys are unaware of the Bar rules. We consistently advise not only reading the *Handbook*, but also making use of the Office of General Counsel’s Ethics Hotline to clear up any concerns (800-334-6865 or 404-527-8720). For a nice refresher of the rules that bind you in this profession, take some time to review the Bar rules. They are available in the *State Bar of Georgia Directory and Handbook* as well as online at www.gabar.org. A quick practice management tip is to have your staff read the rules too!

Plan Out Your Business on Paper

Written business plans are one of the first things we suggest to new Bar members. However, existing firms can also benefit from comprehensive plans that outline how the business is to be structured and operated. One layer of your overall plan could include a written poli-

cies and procedures manual along with job descriptions for every position in your firm. Writing out your plans is imperative, as they assist with clarification of processes and aid in prevention of possible mistakes.

Create a Disaster Recovery Plan

One of our first questions during office consultations is “do you have a backup.” Of course, we are talking about computer backups, but this is only a small part of a larger plan that should be in place in your practice. Make sure you have a written disaster recovery plan that is shared with everyone in your practice. There are many resources to aid in the development of a plan suitable for your practice. Your plan should be realistic and flexible; and in the event of a disaster, the plan should both be implemented and evaluated for effectiveness. Unfortunately, the only way to determine if your plan is effective is to experience some sort of disaster.

Monitor and Reconcile Your Bank Accounts

Keeping track of your finances should be one of those “no-brainers.” However, this important part of managing a law practice is somewhat overlooked. Delegating the task to staff without supervision can be a recipe for disaster. Make sure that if you are in a solo or small law practice that you have statements delivered to you unopened each month and that someone in the firm is responsible for reconciling all of your accounts. If your accountant is responsible for this task, then make sure you are receiving timely reports and that you conduct periodic checks on the reconciliation process. Remember, you are responsible no matter what.

Return Client Telephone Calls

The number one complaint of clients is that lawyers don't return their telephone calls. Don't let this be you. Set up a phone call policy and attempt to return all calls within a reasonable amount of time. We often suggest returning calls over a certain block of time each day. This can be an effective way of staying on top of this most important administrative task. Don't forget that your staff can handle calls without giving out any legal advice. Use them effectively by introducing them at the beginning of representation. Have the client understand what types of contacts can be handled by staff. Remember that the policy should be flexible to be effective. You do not want to have calls from the judge enforced under the "block time for returning calls" policy.

Don't Ignore Complaints Made to the Bar

We are amazed at how many attorneys citing reasons of a lack of time do not respond to complaints made against them to the Bar. Take the time to deal with any and all complaints. A disgruntled client can cause the best practitioners a great deal of trouble if ignored. Besides, human courtesy in the conflict resolution process can go a long way. Would you be happy if your complaints went unanswered? Prevention of problems can be as simple as making sure you have established some practice management guidelines that ensure proper handling and care of client concerns.

Have a Technology Budget and Plan

Technology and the law are now so intimately integrated that you cannot ignore the use of technology tools—hardware and software—in your practice. From the ever-

essential practice management software to the word processing system, you should create a written technology plan and budget to keep up with the fast-paced technology offerings for help in practicing law. The technology budget should always include appropriate training so that you maximize your return on investment with any tools you choose to use. Not having a plan and budget in place can lead you down a path of purchasing tons of stuff you don't need or even know how to use.

Don't Attempt to be or Think You are Alone in Practice

The Bar has many programs like ours that assist you with your life in the law. Take advantage and always remember that you are never alone. Networking with other lawyers and legal professionals can lead you to a lifetime of friendships as well as bring you new business.

Have an Exit Strategy


Just like the written plan for starting the practice, you should have a written plan for leaving the practice of law. Whether it is a retirement plan or one of transition into another profession, your exit strategy should be given some serious thought. By planning and writing this plan down, you are giving yourself direction. While not practicing may certainly not be in your immediate plans, you can gain perspective on where you are and where you want to go by engaging in this process. This valuable exercise can help you keep focus throughout your life in the law.

Don't Forget to Say Thank You

Not telling those who work for and around you "thank you" can breed feelings of their being unappreciated. Giving out sincere thanks to deserving staff and co-workers can help keep lines of

communication open. Your thanks could even boost morale, enhance productivity and foster loyalty. Thanks can be expressed in many ways, so don't just think it is about words. The bonuses, benefits and perks sometimes afforded staff are also forms of thank you. So remember to give due where deserved, and do it often and sincerely.

Conclusion

If you need help in developing any of the aforementioned policies or procedures, give us a call. We have several resources available to you and your staff at no cost. To learn more about our services, visit us online at www.gabar.org under programs, and "thank you." 



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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Take Advantage of Free Casemaker Training

by Jodi McKenzie

Do you know how to find a case by a citation number in Casemaker? Do you know what Casecheck is? Can you find the Uniform Rules of the Superior Court in Casemaker?

If not, or if you just want to learn more about Casemaker, then you should attend a free Casemaker training session. Casemaker training sessions are offered at the Bar Center in Atlanta four times a month. There's no cost to attend the class, and you will receive two general CLE credits. Each class lasts approximately two hours and covers the most important features of Casemaker: finding case law and finding statutes, plus much more.


During the class, you will learn the difference between a basic search and an advanced search. You will learn how to find cases using key words or phrases and how to refine your results to the most relevant matches. You will learn how to find a case using a citation or docket number, and also how to find a case with just one or both party's names. You will look at Casemaker's Casecheck feature and see how it compares to Sheperds. You will also discover the difference between the search and the browse features and how you can use both in the Georgia Codes and Acts to find the exact statute you are looking for.

The class also highlights the extensive access you have to Casemaker's Federal and State Libraries, which include not only court opinions, but also rules of court, the Administrative Code, Attorney General Opinions, Law Reviews and Journals, and various legal forms.



Here's what some past attendees have said about Casemaker and Casemaker training:

- "Excellent benefit. The best Bar benefit we have."
- "The class was very helpful. It greatly supplemented my knowledge of this program."
- "Casemaker has been a tremendous relief to me as a solo practitioner seeking to lower overhead costs."

You can find the current dates for Casemaker training on the Bar's homepage at www.gabar.org. A Casemaker trainer is also available to do training in your area at the request of a local or voluntary bar organization. For more information about Casemaker or Casemaker training, please contact Jodi McKenzie. 



Jodi McKenzie is the Casemaker coordinator for the State Bar of Georgia. She can be reached at 404-526-8618 or jodi@gabar.org.

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Send e-mail to casemaker@gabar.org.
All e-mail received will receive a response within 24 hours.



Bar Sections Gather South of the Border

The 2006 Southern Entertainment and Sports Conference/IP Institute took place at the Fiesta Americana Grand Coral Beach Hotel in Cancun, Mexico.





Photos by Johanna B. Merrill

Nearly 300 attorneys and guests traveled south of the border to the Fiesta Americana Grand Coral Beach Hotel in Cancun, Mexico, for the 18th Annual Southern Regional Entertainment & Sports Law Conference/12th Annual Intellectual Property Law Institute, Nov. 2-6, 2006.

Though much of Cancun's Hotel Zone still bears the marks of Hurricane Wilma, who roared onto the Yucatán Peninsula on Oct. 21, 2005, the Fiesta Americana Grand Coral Beach was ready to play host to the several hundred attorneys and guests who traveled from Georgia, Tennessee, Florida, New York, and as far away as Europe, to attend the conference and institute.

The sports and entertainment sections of The Florida Bar and the Tennessee Bar Association, in addition to the State Bar's Entertainment & Sports Law and Intellectual Property Law Sections, sponsor the annual four-day symposium; the 2006 event marked the seventh year the E&SL and IP Law sections have joined forces to host the dual-track event.

by Johanna B. Merrill

"There is a significant amount of crossover in subject matter between the [Entertainment and Sports Law and IP Law] sections and by having parallel programs the attendees have a wider selection of presentations, not to mention the networking opportunity that a combined event presents," said Griff Griffin, chair of the IP Law Section. "This conference provides a haven for our members to socialize in a setting away from the pressures of our daily jobs, placing people together in an environment that facilitates building relationships and friendships that might not otherwise occur."

A reception welcomed attendees on Thursday night where the attorneys and their guests gathered inside due to the rainy weather to sample everything from sushi to seafood appetizers to real Mexican margaritas. The education component of the conference began on Friday morning with a plenary session on the topic of "The Ethical Attorney," before mid-morning break out sessions focusing on both IP and entertainment law, including a break-out titled "The Other Side of Entertainment," which discussed legal issues in the adult entertainment industry, featuring speakers Joseph Habachy, Law Offices of Joseph Habachy; Jennifer Kinsley of the Cincinnati, Ohio, firm of Sirkin Pinales & Schwartz LLP; and Cary Wiggins, Cook, Youngelson & Wiggins, LLC.

The second day of the conference consisted of several different breakout sessions throughout the morning focusing on topics such as copyright law, corporate IP programs, "Hip Hop Representation Distinguished" and "The Indie Company Takeover: Creating the Beast," with moderator Scott Keniley, K5 Keniley Law Firm. Also on Saturday morning was a breakout session featuring speaker Yannis Skulikaris of the European Patent Office who traveled all the way to Mexico from The Hague, Netherlands, to present "The Current State of Software Patents in Europe." Chief Judge Edward J. Damich of the U.S. Court of Federal Claims in Washington, D.C., also traveled to Cancun for the conference, providing attendees with an insightful presentation on how patent cases are viewed from the


bench, with co-panelist Woody Jameson, Duane Morris, LLP.

On Saturday night the rain stayed away, allowing attendees and guests to travel off-site for a reception and group dinner to La Hacienda, a unique outdoor venue that featured a horse stable, resident monkeys and authentic Mexican cuisine.

Sunday morning's concluding panels and lectures featured topics such as trademark law updates, entertainment litigation, IP litigation in the Pacific Rim and a roundtable of rights. Attendees gathered one final time for a farewell dinner before adjourning to the infamous talent show, showcasing the fact that the practice of law isn't many of the attorneys' only talent.

If you have location suggestions for future SELAW Conferences/IP Institutes, contact organizer Darryl

Cohen at docohen@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's important to keep the Bar updated on your e-mail address. You may update your profile online at www.gabar.org. 



Johanna B. Merrill is the section liaison for the State Bar of Georgia and is a contributing writer to the *Georgia Bar*

Journal. She can be reached at johanna@gabar.org.

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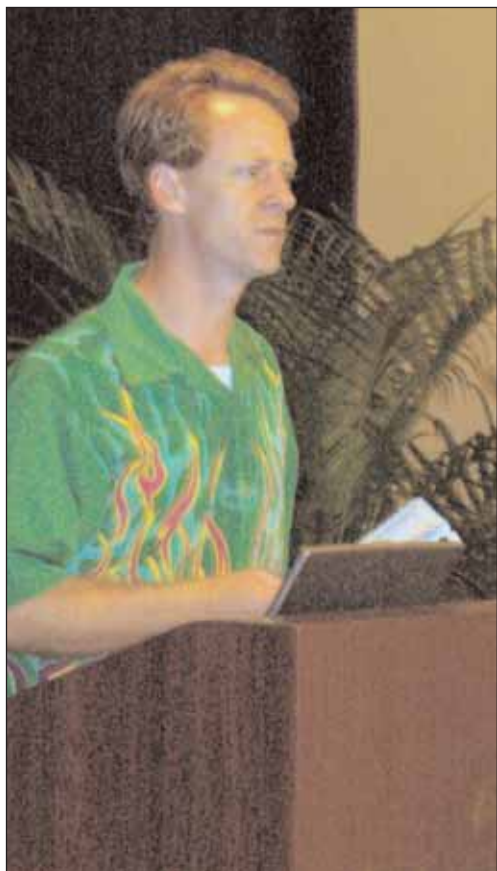
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Above Right: Darryl Cohen, Cindy Charles, Woody Jameson and Richard Nolen.

Right: Lei Fang, James Johnson, Vanessa Spencer and Jason Chang.





Top: Mike Hobbs, a past IP Law Section chair, speaks on the topic of trademark law. *Bottom:* Prof. Michael Landau, Georgia State University College of Law, performs at the talent show.



Top: Wab Kadaba, Brad Groff, Kerstin Groff and Philip Burrus. *Middle:* Bruce Siegal and Scott Horstemeyer. *Bottom:* Bakari Brock and Mike Breslin, both second-year associates at Kilpatrick Stockton, LLP, at the farewell dinner that took place Nov. 5.



Women's Impact on the Legal Profession

by Sally Evans Lockwood

The following article was adapted from remarks made in 2006 to the Women in the Profession Section of the Atlanta Bar Association and to the 11th Annual Judicial Luncheon Honoring Women of the Metropolitan Atlanta Judiciary, sponsored by the Georgia Association for Women Lawyers.

When Supreme Court of Georgia Justice Hugh Thompson learned that I was putting together remarks on women's impact on the profession, he said to me, "You have a lot to talk about." Indeed, there is a lot to talk about.

The most visible thing women have brought to the profession is numbers. According to the ABA Commission on Women in the Profession, almost 30 percent of the lawyers in the United States are women, projected to be 40 percent in 2010. Today, 48 percent of law students are women. Georgia law schools have already seen women make up more than 50 percent of the first year classes. Forty-four percent of tenure track faculty in law schools are women, as are 43 percent of associates in private practice and 23 percent of federal judges. While the numbers for women in some positions of leadership lag behind (19 percent of deans are women, 17 percent of law firm partners and 15 percent of general counsel), there is encouraging news in the judiciary: 28 states have had women as chief justices, and 16 states plus the District of Columbia currently have women chief justices.

Our own Chief Justice Leah Ward Sears is the first African American woman to head a state supreme court. In fact, the judicial branch of Georgia state government is headed by two women, for the presiding justice, next in line to become chief, is Justice Carol Hunstein. There are three women now on the Georgia Court of Appeals, and Judge Anne Barnes was recent-



ly sworn in as chief judge. The chief judges of the superior courts of the Appalachian, Atlanta and Stone Mountain circuits are women (Chief Judges Brenda Weaver, Doris Downs and Gail Flake, respectively). In fact, 17 percent of the superior court judges in Georgia are women, and of all state court judges, 30 percent are women. At the federal level, Judge Joyce Bihary is the chief judge of the Bankruptcy Court for the Northern District of Georgia, and, until recently, Judge Orinda Evans was the chief judge of the U.S. District Court for the Northern District of Georgia, which has three other women judges. Four women judges sit on the 11th U.S. Circuit Court of Appeals.

Another major area of women's impact on the profession is the substance of the law. Issues that just 20 years ago were said to be "women's issues"—childcare, domestic violence, health care and education reforms—are now on the national agenda. We have "seats at the table where the agenda is set," as Georgia Court of Appeals Judge Yvette Miller reminds us.

Yet what has been the impact of women on *how* law is practiced—on what it means to practice professionally? How have we shaped the model of lawyer professionalism? Research studies on how women are transforming the profession are scant at present, and my conjecture is that we are just now reaching the point where the number of women in the profession is sufficient for valid studies. This is a fertile field for investigation, and I predict that in the next few years, we will see some illuminating research.

I have observed at least four other significant trends in the legal profession that have coincided with the rise in the number of women in the profession. While I, for one, do not think this phenomenon is coincidental, I have no research to prove any correlation. One of these trends is the national professionalism movement. Another is the increasing number of minorities and diverse ethnicities in the profession, together with those from a broader range of backgrounds and experiences. Third is the growing acceptance of alternative forms of dispute resolution, and fourth is the attention being paid by the profession to widespread dissatisfaction with the practice of law. In reality, all of these are professionalism issues, for expanding the range of tools to settle disputes, promoting diversity and addressing life quality issues are all aspects of professionalism.

Women have brought gender diversity to the legal profession and have helped open the doors to other forms of diversity as well,

with the result that the profession is now more broadly representative of society. In the mid-1980s, when the professionalism movement was just getting off the ground, there were some who viewed it as a return to "the good old days of practicing law" in this country, when the model of professionalism was the middle-aged white male with courtly manners whose litigation and/or transactional work was in a world of like-minded lawyers with similar backgrounds who shared an unwritten code of "how things are done around here." This outmoded model of professionalism does not comport with reality, nor does it hold credence for the Chief Justice's Commission on Professionalism, the leaders of the State Bar of Georgia, or the national professionalism movement.

Embracing wholesale the historical models of professionalism would be counterproductive for the profession. My great aunt was admitted to the practice of law in Georgia in 1928, 50 years before me, in a lonely time for women in the profession, a time when she could not even have imagined what the profession—and women's prominent place in it—would look like in the 21st century. The professionalism movement in Georgia is trying to adapt the profession for effectiveness in the 21st century, and for that we need the differing gifts and talents that lawyers from different backgrounds and experiences can bring. We need models of professionalism such as Mary Ann Oakley, Tom Sampson and Leah Ward Sears; Rita Sheffey, Herbert Phipps, Carol Hunstein and Ray Persons; Lisa Chang, Damon Elmore, Mindy Simon, Lisa Vash Herman and Jack Ruffin; Tony DelCampo, Marva Jones Brooks, Jeanine Gibbs and Mary Margaret Oliver—as well as Harold Clarke, John Marshall, George Carley, Lewis Slaton, Stephen Bright and Steve Gottlieb. Diversity is one value under the broad umbrella of values that we call professionalism.

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Around the country—at the national, state and local bar levels—there are bar presidents and chief justices making the point that rude, overly aggressive, obnoxious, Rambo-like behavior does not constitute effective advocacy. A plethora of civility codes and professionalism guidelines also affirm this. Such conduct does not work with judges and juries; rather, it serves to increase litigation costs and fails to advance the client's lawful interests. Moreover, this type of behavior causes the public to lose faith in the legal profession and its ability to benefit society. Civility is essential to the administration of justice. These efforts to restore, reinforce or recreate a noble professionalism model have not just been a reaction to Rambo; instead, they have grown out of

A body of research is emerging on male/female differences in brain structure and approaches to problem solving. In broad terms, the research shows that men tend to solve problems by applying rules or principles, while women seek to preserve and reinforce relationships. Relating this difference to the legal profession, some researchers found some rather stereotypical results—that male lawyers tend to focus on competition and winning, while women lawyers favor cooperation and compromise; male lawyers see issues as conflicts of rights while women see them as conflicts of responsibilities. But the growing acceptance of the Alternative Dispute Resolution movement seems to defy this research, for the ADR movement has been

Another outmoded model of professionalism is that of the heroic lawyer who works heroic hours. Studies show that at all socioeconomic and professional levels, women workers bear the primary responsibility for children, families and households. When women entered the profession, they initially faced the struggle for work/life balance more dramatically than men. Though the struggle continues for both women and men, it can offer lessons in how to set limits, to guard our private lives, to insist on time to fulfill family and personal responsibilities and desires. Women and men have found that we do not have to settle for workaholic lives as lawyers. Men now join the conversations that women started about life quality issues, and the profession is tak-

The profession is poised for change, and open to it, as never before. The good news is that women are at the table, bringing their life experiences, talents, intellect and imagination. The profession needs all of us, men and women, to meet the challenges of the 21st century.

questions about what it means to be a professional, to serve clients and the public good, to do well while doing good. Together these efforts uphold the values of courtesy, integrity and responsibility for pro bono and community service. In short, they urge lawyers to aspire to conduct that transcends mere compliance with legal ethics rules. Women have been part of this questioning process and have helped redefine what it means to be professional in today's practice.


The legal community recognizes that you can represent your client vigorously and firmly without being on the offensive in an obnoxious way. Listening, asking what the client wants, examining the needs and interests behind the positions of opposing parties, figuring out what people are really fighting about: these are skills that have distinguished good lawyers for centuries.

embraced as readily by men as by women lawyers—and by their clients, from the Fortune 500 company intent on cutting litigation costs to the family in the agony of divorce. Retired Justice Sandra Day O'Connor has stated, "Personal relationships lie at the heart of the work that lawyers do." Whether or not the preservation of relationships is a value connected more often with women lawyers than men, civility and the role of the lawyer as problem solver have long been recognized as key professionalism values. For women and men alike, these values can be combined with either confrontation or cooperation, depending on what the situation requires. As former Supreme Court of Georgia Justice Hardy Gregory put it: "There's a time to take a stand and a time to find a way; good lawyering is knowing the difference."

ing notice. The organized bar is providing more support through programs such as Law Practice Management and Lawyer Assistance. Workplaces are changing to accommodate employees with family and personal responsibilities—some law firms are now ranked nationally on employee satisfaction. A recent *Daily Report* article highlighted how law firms are beginning to feature women-oriented events, such as an outing at the Atlanta Botanical Garden for lawyers, clients and families.

But there is still a disturbing number of lawyers, men and women, who find contemporary law practice stultifying, driven by the bottom line and demanding 12-hour days and six-day weeks to keep up with the competition and pressure. Not only are lawyers disappointed and disenchanted with the profession, but the public is

also losing confidence, not just in lawyers, but in the legal system itself, according to national studies. Most disturbing of all is the rise of attacks on the judiciary and general misunderstanding of the functions of the three branches of government. The profession is poised for change, and open to it, as never before. The good news is that women are at the table, bringing their life experiences, talents, intellect and imagination. The profession needs all of us, men and women, to meet the challenges of the 21st century.

Above the bench of the Supreme Court of Georgia in the Judicial Building, there is a Latin inscription in the marble: "FIAT JUSTITIA, RUAT CAELUM." "Let justice be done, though the heavens fall." When Court is in session and you look at the bench, where the chief justice sitting in the middle is a woman and another woman is the presiding justice, you sense the magnitude of the impact of women, not just on the legal profession, but on justice as well. These two women are indeed models of professionalism for the 21st century. 



Sally Evans Lockwood is the director of the Office of Bar Admissions. She can be reached at 404-656-3490.

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Augusta, Ga.
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Died February 2006



Gary Christopher Christy, 57, died in May. John Pridgen, chief judge for the Cordele Judicial Circuit, said Christy was a "wonderful lawyer and a good person. I admired him both personally and professionally." Christy, a native of Maple Shade, N.J., began practicing law in Cordele in the mid-1970s. He was soon cited as the first assistant district attorney in the circuit. He then served as district attorney from 1979-84. Preyesh K. Maniklal, Christy's law partner at Gregory, Christy, Maiklal & Dennis LLP, said he was an extraordinary lawyer. "He was nominated by the Georgia Supreme Court to the Judicial Qualifications Commission," said Maniklal, "a board made up of lawyers, judges and private citizens. He oversaw all judges in Georgia and was the vice-chair of that organization. "Christy co-authored a book on Georgia medical negligence law and was past vice president of the Georgia Trial Lawyers Association. He was asked to and spoke locally and nationally on trial skills and the law. He also published articles in legal journals locally and nationally." Maniklal said that Christy was a former member of the Prosecuting Attorney's Council of Georgia. From 1981-85, he was a member of the Governor's Organized Crime Prevention Council. In addition to this, Christy did seminars at Emory University and the University of Georgia. He was also a past president of the Middle District Federal Association. "We've been partners for 12 years," said Maniklal. "He devoted his life to helping injured people. His goal was to help these people right the wrongs that had occurred in their lives and hold people accountable for their actions. "Christy was a very kind person," said Maniklal. "He would always give money to the homeless when he saw them, and he would constantly help others. He never expected anything in return. He had a great outlook on life and was

always so optimistic about how your life was going." Christy is survived by his wife Barbara Saunders Christy, his daughter Casey Rushton, his sister Trish Gatti, his brother Craig Christy, his mother Teresa Wolff Christy and his stepchildren Julie Ann Busich, Joseph William Busich and Olivia Lee Saunders. 



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Confidential Hotline:
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click, click, click, click, click, click, click,
click, (sigh) click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, (oh, c'mon!) click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
(am I done yet?) click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, (ugh) click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, click, click, click, click,
click, click, click, (oh, for cryin' out loud!)
click, click, click, click, click, click, click.

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