

The background of the cover is a photograph of the Georgia State Bar Center, a large, modern building with a light-colored, textured facade. The building features several large, rectangular windows and a prominent entrance. The words "STATE BAR OF GEORGIA" are visible on the building's facade. The sky is overcast, and some trees are visible in the background.

Georgia
Bar

Journal

February 2005 ■ Volume 10 ■ Number 5

**United States Supreme Court
Justice Anthony M. Kennedy
Headlines Bar Center Dedication**

A close-up, low-angle shot of a hand pressing a button on a telephone keypad. The background is a soft, out-of-focus blue and white, suggesting a window or a bright light source. The hand is in the foreground, slightly blurred, while the keypad buttons are in focus.

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The Consumer Assistance Program has a dual purpose: assistance to the public and attorneys. CAP responds to inquiries from the public regarding State Bar members and assists the public through informal methods to resolve inquiries which may involve minor violations of disciplinary standards by attorneys. Assistance to attorneys is of equal importance: CAP assists attorneys as much as possible with referrals, educational materials, suggestions, solutions, advice and preventive information to help the attorney with consumer matters. The program pledges its best efforts to assist attorneys in making the practice of law more efficient, ethical and professional in nature.

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This free program provides 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.

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On the Cover

The State Bar of Georgia Bar Center Building Dedication took place Jan. 15. The Bar Center is the professional gathering place for all Georgia attorneys.

Cover photo by C. Tyler Jones.

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Publisher's Statement

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The *Georgia Bar Journal* welcomes the submission of unsolicited legal manuscripts on topics of interest to the State Bar of Georgia or written by members of the State Bar of Georgia. Submissions should be 10 to 12 pages, double-spaced (including endnotes) and on letter-size paper. Citations should conform to A UNIFORM SYSTEM OF CITATION (17th ed. 2000). Please address unsolicited articles to: Marcus David Liner, State Bar of Georgia, Communications Department, 104 Marietta St. NW, Suite 100, Atlanta, Ga., 30303. Authors will be notified of the Editorial Board's decision regarding publication.

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: C. Tyler Jones, Director of Communications, 104 Marietta St. NW, Suite 100, Atlanta, Georgia 30303; phone: (404) 527-8736; tyler@gabar.org.

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"Bar leaders have long fostered the ambition of a Bar Center dedicated to promote the professional association of our members.."

A Bar Center Salute

By Rob Reinhardt

One geographical truth about practicing law in south Georgia and serving as State Bar president—plenty of road time between Tifton and Atlanta. And if you turn off the cell phone there is time for reflection. This trip I am headed north for the Midyear Meeting and Bar Center Dedication.

Jan. 15, 2005, will be a historic day for the State Bar of Georgia. It will mark the official end of a historic pilgrimage taking our magnificent Bar Center facility from concept to reality. The Bar Center was conceived and delivered as a "home for all Georgia lawyers.". The road has been long and often detoured around daunting obstacles. But every problem was overcome by Georgia lawyers equal to the task and determined to deliver on the promise of the Bar Center. For most of the journey I was a benchwarmer, but I saw the dedication and the generosity and the commitment of our leadership, and I want to pay tribute.

Bar leaders have long fostered the ambition of a Bar Center dedi-

cated to promoting the professional association of our members. This flame was kindled by **Harold Daniel** (president 1994-95). Hal is a visionary. He and Cliff Brashier attended the dedication of the North Carolina Bar Center, and Hal recognized the great promise of a similar facility for Georgia lawyers. He returned to North Carolina with the Executive Committee to generate enthusiasm for a "home" for Georgia lawyers. Hal also recruited Frank Jones to quarterback the project. I salute him.

By the time Hal passed the torch to **Bobby Chasteen** (president 1995-96), the idea was picking up steam. President Chasteen made the concept of a Bar Center a focus of his presidency. In a President's Page published December 1995, Bobby, with characteristic humor, laid out a compelling case for the State Bar to acquire its own building; he also appointed a Bar Center Committee. Beyond maintaining the momentum of the project, Bobby galvanized support of lawyers out in the state for the establishment of a Bar Center in Atlanta. I salute him.

On **Ben Easterlin's** watch (president 1996-97), the purchase of the Bar Center property was realized. Ben came through the ranks as treasurer, you remember, and recognized the financial challenges of acquiring or building a Bar Center. In fact, Ben initially suggested that

the Bar Center Committee consider the Federal Reserve Building on Marietta Street after noting its listing as surplus property in the Atlanta newspaper. Your Board of Governors authorized the purchase of the building at the 1997 Midyear Meeting for a price that translated into \$27 per square foot. The land alone is worth that amount. Moreover, a condition of the purchase was that the Federal Reserve would lease the building from the State Bar for approximately four years while its new facility was constructed. Great decision, well implemented. I salute him.

All Georgia lawyers have a direct stake in the Bar Center by virtue of the assessment that we have all contributed to bring the Bar Center to reality. **Linda Klein** (president 1997-98) worked through the logistics of arranging financing for the project. In a climate of falling interest rates, Linda promoted and negotiated a refinancing of the purchase money indebtedness being serviced by these member assessments, realizing significant interest savings while beginning the process of strategic planning for utilization of the building. Good stewardship, President Klein. I salute her.

Bill Cannon (president 1998-99) overcame early reservations to enthusiastically continue this strategic planning as we began to consider and refine engineering studies and cost estimates. The courtroom and Wilson exhibit were suggested and explored. The leasing market was strong and prospects promising. Much work was done under the leadership of President Cannon. I salute him.

Addressing the myriad of details required by a project of this magnitude challenged **Rudolph Patterson** when he took the helm in the 1999-

2000 Bar year. Faced with an easement on the back of the Bar Building initially granted in the mid-1800s at a "wagon's width," Rudolph diplomatically presided over negotiations with the *Atlanta Journal-Constitution* and the Turner group building Philips Arena. The result: the State Bar received an easement of improved quality and the Turner group paid the Bar \$100,000 and our attorney fees for representation in the negotiations. Well done, President Patterson. I salute him.

When Rudolph passed the baton to **George Mundy** (president 2000-01), prospects for retrofitting of the Bar Center looked great. George's year was busy gearing up for construction, lining up financing, selecting a general contractor, etc.. All planning targeted groundbreaking in August 2001. Negotiations were ongoing with switching tenants who were offering rental figures in excess of those we had projected as sufficient to drive the project. At the sunset of the Mundy presidency, the issue of the trees appeared on the horizon. But that did not compromise the progress crafted by President George. I salute him.

President **Jimmy Franklin** (2001-02) ascended to the leadership of our Bar just as all hell broke loose. At one

time, we hoped to dedicate the Bar Center during Jimmy's year. Instead the national tragedy of Sept. 11, 2001, hobbled an economy already beginning to falter (the Atlanta leasing market seriously deteriorated), the "dot.com" bubble burst (no more premium offers from switching tenants), and we faced litigation on the issue of tree removal from the footprint of an improved parking deck. President Franklin remained steady at the helm and brought to bear the sort of seasoned and wise leadership needed to successfully work through these problems. The tree litigation was resolved. We lost before the Atlanta Tree Board, but we won our appeal before the Fulton Superior Court and sustained that ruling before the Georgia Court of Appeals. Recognizing that our basic strategy required rethinking, Jimmy refocused our efforts on phased development that responded to our changed circumstances. In addition, Jimmy undertook a massive campaign to raise the four million dollars necessary to complete our Bar Center. Bar staff moved into the new Bar Center and saved rent the Bar was paying at the Hurt Building. Inspired leadership, President Franklin, in tough times. I salute him.

Jim Durham (president 2002-03) also came through the ranks as treasurer and had seen the financial

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In addition to a terrific commitment of time during the year they served as president, each of these Past Presidents has remained hands-on and actively supportive of the Bar Center project.

thunderclouds on the horizon. Jim invested tremendous time in studying the Bar Center budgets and projections and served as an able and skilled financial advisor as the Bar faced unattractive options. Jim orchestrated continued success with fundraising. The conclusion of the tree litigation and generosity of our friends put the project back on all cylinders. Hard work made for much progress, President Durham. I salute him.

Bill Barwick (president 2003-04) continued leasing space and oversaw the construction of the parking deck. Financing, leasing and building permits—all had to be redone. We tackled the retrofitting of the third floor conference center. A lot was accomplished under the leadership of President Barwick. I salute him.

In addition to a terrific commitment of time during the year they served as president, each of these Past Presidents has remained hands-on and actively supportive of the Bar Center project. They have been out front, they nurtured the vision and they provided the stability to stay the course. Again, I salute them.

In addition to the leadership of our Past Presidents, there are two people whose contribution to our Bar Center has been immeasurable:

Frank Jones was enthusiastically and unanimously targeted as head of the Bar Center Committee at the outset of the

project. Frank understood the tremendous benefits a Bar Center would bring to our members; and he has given unstintingly of his formidable skill at marshaling support and charting the appropriate direction. I salute him.

Cliff Brashier has in reality performed two demanding jobs on behalf of the Bar for the greater part of a decade. In addition to ensuring the smooth day-to-day operations of our 35,000 member organization year after year after year, Cliff made time to work closely with each of our Presidents, our Bar Center Committee, our architects and building consultants and contractors and leasing people. Cliff stayed on top of every construction complication—large and small—from working through problems with the parking deck (from foundations to supervising construction and then operation) to monitoring the placement of marble on the entry arch. A project of this scope presents countless decisions that have to be considered and understood and coordinated. Unfailingly, everyone involved with this project recognizes the great work he has done on our behalf and marvels at his ability to keep so many balls in the air. I salute him.

Our **Bar Center Committee** is composed of people that I am

proud to stand with as lawyers. From the outset of the project they have addressed the myriad of policy and construction decisions that have seen the Bar Center to successful completion as a facility for all Georgia lawyers. They kept the vision in front of us and showed us how it would work. We owe them a great debt. I salute them.

Your **Board of Governors** remained diligent and supportive of the project from the outset. Through the good times and the bad times, the Board kept our perspective on long-term benefit and refused to be frustrated by short-term problems. The unfailing support of the Board was crucial to our leadership when hard decisions had to be made. I never saw the Board falter in its commitment to bring the Bar Center to completion. I salute them.

Finally, the Bar Center would have remained a cherished but unfulfilled dream without the broad support of the **lawyers of Georgia**. This year, as I am privileged to represent you at meetings of the Southern Conference of Bar Presidents and the National Conference of Bar Presidents, I invariably return to Georgia convinced that the Georgia version of the practice of law is the best in the country. Your financial support of the Bar Center was critical. Your long-term commitment to the acquisition and retrofitting of the Bar Center was crucial. Georgia lawyers understood the great promise of this Bar Center and stood solidly behind it. I salute you.

It is a great point of undeserved pride for me to be able to participate as your President on the occasion of the dedication of the Bar Center. I mentioned this is the second run we have taken at a dedication ceremo-

The dedication of the Bar Center is a triumph we have all had a hand in. It is an accomplishment that binds all the lawyers of Georgia, and the experience of working with the people that made it happen is something I will take away from this year and treasure.

ny. When we hoped to dedicate the Bar Center during Jimmy Franklin's presidency, Frank Jones invited United States Supreme Court Justice Anthony Kennedy to keynote our ceremony; but our timeline was extended as we had to work through unanticipated problems. Now the time is right, and as he has done throughout this project, Frank has crafted a worthy ceremony to mark the completion of the 10-year effort to bring the Bar Center on line. Justice Kennedy graciously accepted Frank's second invitation and has arranged his demanding schedule to appear with us to mark this great occasion.


The Bar Center will stand for decades—I hope for generations—as an active facility to promote the professional and personal collegiality that characterizes the State Bar of Georgia. The building is not fully leased. We are pursuing some exciting possibilities, which we hope will work out. But the promise of a Bar Center for Georgia lawyers has been fulfilled. It stands in tribute to the grand profession of the law. It stands in tribute to our past leaders who gave of their energies and talents toward the protection and improvement of our grand profession. It stands in tribute to lawyers who in years to come will come before the Bar to accept and continue that noble charge. My firm belief is that the Bar Center will bridge this heritage.

While I do not claim to provide leadership of the caliber of my predecessors, I have been in a unique position to observe the

progress of our Bar Center project. As we got started I was serving on the Finance Committee, and we watched the Bar Center budget closely, both as to the construction process and relative to the operating budget. During some of these years I served as treasurer and was standing at alert as we were wrestling through cost overruns, leasing revenues below projections due to the deterioration of the leasing market and other unpleasant realities. To give you an example of the inspired construction expertise I brought to the table, I remember a meeting that Jimmy Franklin, Jim Durham, Cliff Brashier and myself attended during the planning phase of the parking deck. We assembled at the office of our architects and the entire construction group was present—our building consultants, contractors, project managers, etc. We had requested the meeting because we were alarmed at the rising construction cost estimates. Having done research among my construction clients, I remember bellying up to the table and saying, "Gentlemen, what part of the message that this parking deck is costing too much are we not clearly communicating to you? My information is that parking deck construction is often quoted by the cost per space and I understand that a parking deck can be delivered for half of what this parking deck is costing us."

After exchanging several glances across the table, the group gently

brought me to understand the scope of our project. In fact, I remember the communication going something like this: "Mr. Reinhardt, you are correct that if you directed us to a field somewhere and we constructed for you a plain vanilla parking deck we could bring it in for approximately half the cost of this project. However, when you want that parking deck constructed in the middle of downtown Atlanta with the use of a sky crane, when construction will require that one lane of Spring Street be closed for half a year and when you want a parking deck to match the character of a historic building, it is going to cost you more." It was at that meeting that I came to understand that our Bar Center Committee had selected top-notch people who knew what they were doing, and I refrained from giving further construction recommendations for the remainder of the project. So perhaps in some small way I may have contributed.

In truth, the journey has been a pleasure. The dedication of the Bar Center is a triumph we have all had a hand in. It is an accomplishment that binds all the lawyers of Georgia, and the experience of working with the people that made it happen is something I will take away from this year and treasure. All that is left to fulfill the mission of the Bar Center is for all lawyers to frequently utilize its facilities and cherish it as a home we share with our legal brethren. 



"It is my hope, and the hope of the Bar Center Committee, that this space will become the professional gathering place for all Georgia attorneys for many decades to come."

If You Renovate It, They Will Come

By Cliff Brashier

"If you build, it they will come." This line, made famous in the movie *Field of Dreams*, has

been going through my head the last few years. Well actually the phrase, "If you renovate it, they will come" is more accurate, as the Bar leadership's decade-long vision of the Bar Center came to fruition in January with the building dedication.

It is my hope, and the hope of the Bar Center Committee that this space will become the professional gathering place for all Georgia attorneys for many decades to come. All members are strongly encouraged to use the Bar Center. Offices, meeting areas and conference rooms will be available daily on a first reservation basis. In addition, all members, along with their families and clients, are invited to visit and tour the Bar Center whenever possible.

Following are some of the highlights of the Bar Center.

Public Educational Programs

The Bar Center provides exceptional facilities for the education

of students, as well as the general public, regarding the judicial process and the importance of the rule of law in the United States and Georgia.

Mock Courtroom

The courtroom will offer a hands-on demonstration of the fairness of trials and the role of public juries. It will also be used for ADR, mock trials, meetings, school tours and other appropriate uses.

Museum of Law

The museum will exhibit historic Georgia and national trials, such as the *Brown v. Board of Education* case that established important rights now enjoyed by all citizens.

Authentic 19th Century Law Office

The Woodrow Wilson law office display will offer a visual representation of a law office found in downtown Atlanta in 1882. Most of the artifacts came from the original office.

Conference, CLE and Training Center

The third floor will be devoted primarily to professional meetings, legal/judicial conferences, continuing legal, judicial, and law staff education, and other professional functions for lawyers and judges.

Lawyers' Lounge


The third floor conference center will include a lawyers' lounge with telephones and refreshments for the exclusive use of lawyers and their guests during normal business hours.

Receptions

When not in use for professional activities, members may reserve the Bar Center for receptions, dinners, weddings, parties, and other private functions at published overhead charges and the direct expenses required by the use.

This classic, historic building will become a symbol of the Bar and the legal profession, just as capitol buildings symbolize government and courthouses represent the justice system. The Bar Center is our legacy to future generations of lawyers. No other bar building in the United States has the facilities to provide anything comparable when it comes to public law-related educational opportunities and professional conferences.

It is our goal to make your visit to the Bar Center a pleasant experience. For that reason there will be a staffed welcome center located on the third floor to greet you and assist you with directions and information, including a brochure with a map and summary of the services available in the Bar Center.

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

Bar Center Building Facts and Information

- The State Bar of Georgia moved into the building in 2001.
- Previously, this site was home to the First Presbyterian Church of Atlanta (1848 to 1916) and the Federal Reserve Bank of Atlanta (1916 to 2001). Both the State Bar and the Federal Reserve Bank moved here from the Hurt Building.
- The site consists of 1.73 acres including approximately .4 acres of green space and 373 feet of frontage on Marietta Street. The building has 252,067 square feet of office space with a basement and sub-basement.
- The State Bar purchased the building in 1997. It was leased back to the Federal Reserve Bank for four years while its new building was being constructed.
- The new parking deck, completed in 2004, has 500 spaces.
- The Federal Reserve Bank constructed the building in three phases (1960, 1964 and 1968).
- The building is located on the eastern continental divide.
- Nearby points of interest include: Centennial Olympic Park, the new Atlanta Aquarium, Five Points Marta station, The Georgia World Congress Center, The Georgia Dome, Philips Arena, The Eleventh Circuit Court of Appeals, the Richard B. Russell and Sam Nunn Federal Buildings, Georgia State University, Underground Atlanta, the State Judicial and Capitol Buildings, the Fulton County Courthouse, Atlanta City Hall, numerous hotels, restaurants and the proposed site of the multimodal transportation station.

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"I am honored to be associated with an organization that gives so much back, both during the holidays and throughout the year."

YLD Brightens the Holidays for Others

By Laurel Payne Landon

One of the primary purposes of the YLD is to serve the communities in which we live and work.

The committees listed below exemplified this purpose, and the holiday spirit, by helping those less fortunate during the holiday season.

I am honored to be associated with an organization that gives so much back, both during the holidays and throughout the year. As we enter a new calendar year, I am challenged by their example to find ways to give back to my community and my profession and I hope you will be too.


Community Service Projects Committee: On Dec. 11, 2004, the Community Service Projects Committee partnered with the Fulton County Department of Family and Children Services to sort and wrap holiday presents donated to foster children for Christmas. This generous donation of time is especially appreciated during the busy holiday season.

The committee also held its annual clothing and cell phone drive in conjunction with the State Bar of Georgia's Midyear meeting in January. Business attire for men and women who are trying to move into the workforce was donated at several collection sites around the state, then sorted and prepared for delivery to various charities and shelters. Cell phones were also collected at the sites and then activated to call emergency

phone numbers and distributed to those in danger of domestic violence.

Truancy Intervention Committee: Each year for the past 13 years, local attorneys have brightened the holiday season for dozens of children by donating gifts to the Truancy Intervention Project for their annual Holiday Adoption program. Each child in the project and their siblings fill out a wish list, which is then passed on to attorneys and legal staff throughout the Atlanta area, who donate clothes, toys and educational games to the children in need. This year, the YLD committee adopted a family with 12 children!

Women in the Profession: The Women in the Profession Committee participated in the Grandparent/Relative Caregiver Adoption Project by adopting a family in need through the Atlanta Legal Aid Society. The families in the program often have special needs because in many situations the grandparents are living on a fixed income. The children and the grandparents give the Atlanta Legal Aid Society a wish list of things they would like for Christmas. The committee fills the wish lists by collecting contributions from members and also gives the family grocery store gift certificates.

Minorities in the Profession: The Minorities in the Profession Committee partnered with Aid to Children of Imprisoned Mothers, Inc., (AIM) to buy holiday gifts for the children involved with the organization. The committee hosted a holiday party that included salsa dancing (lessons provided), networking and socializing for members, and an opportunity to raise money for the AIM project. 

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A Look at the Law

Government Contracting in Georgia

By J. Matthew Maguire Jr.

With very limited exceptions, federal, state and local laws require government entities to award contracts through competitive processes, such as Requests for Quotation and Requests for Proposals. In theory, these procedures ensure that the purchaser, i.e., the government agency, obtains the best value for the taxpayers' money.¹ In practice, these procedures

work with varying degrees of success. Unfortunately, in many instances the best offeror is passed over due to the agency's arbitrariness or bias or the offeror's simple confusion as to the agency's specifications.

This article is written for general practitioners who represent firms that provide goods or services to government agencies in Georgia. The first section provides a general overview of typical procurement processes and some tips for a smooth procurement process. The second section of the article discusses administrative and judicial remedies for the unsuccessful offeror contemplating a challenge to an adverse agency decision. The article is not designed to be a "how to" litigation manual, rather, it provides a general overview of what to expect once the decision is made to challenge an agency's decision regarding a government contract.



NAVIGATING THE PROCUREMENT PROCESS

General Overview of Procurement Process

The procurement process typically begins with a Request for Quotation (RFQ) or a Request for Proposal (RFP). The government agency will typically use an RFQ to obtain the most competitive price for commodities like a fleet of previously specified automobiles. The agency will use an RFP, by contrast, for service contracts, such as advertising, information technology consulting and engineering because those contracts contain more variables than just price and delivery date.

Before bids or proposals are due, the agency will typically allow offerors to ask questions either in a formal question and answer session or in writing. If the latter is used, the agency will furnish its written response to all questions to all offerors. Any other contact with the agency by the offeror is usually forbidden.

RFQ bids are usually opened publicly, the lowest responsive bidder is announced, and the contract is awarded on that basis. Once the bid is accepted, a court will not relieve a bidder who, through ignorance, submits a bid that is too low.² Because RFPs usually contain more variables and require more subjective analysis, agencies typically designate a team of staff members and consultants to evaluate each proposal against the selection criteria set forth in the RFP. Most agencies require the evaluation team to complete evaluation forms for each proposal. The evaluation team ranks the offerors in order of preference and then the agency notifies all offerors of its intent to enter into negotiations with the top-ranked offeror. The negotiation phase is the final opportunity for the agency and the top-ranked offeror to resolve any contingencies and formalize the contract. The agency should not substantially modify the terms of the RFP during the negotiation phase without allowing all offerors the opportunity to propose modified terms.

If the agency and top-ranked offeror reach a meeting of the minds, a contract is executed. If they do not reach a meeting of the minds, the agency will enter into negotiations with the second-ranked offeror, and, if necessary, all other qualified offerors until a contract is finalized.

Tips for a Successful Procurement

1. Read and Understand the RFP and Applicable Rules

The importance of reading and understanding the RFP and procurement rules cannot be overemphasized. This would seem to be an obvious point, but countless offers are rejected because the offeror failed to adhere to the requested format or missed the submission deadline—in some cases by a matter of minutes.³

While most RFPs typically reference the issuing agency's rules, other state or federal rules might also apply. For example, if you are bidding on a contract for "public works construction"⁴ in Georgia, and the value of the contract exceeds \$100,000, the competitive

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award process will be governed by the Georgia Local Government Public Works Law, O.C.G.A. § 36-91-1, *et seq.* If the state or local agency accepts federal funding, federal procurement regulations will apply, but you will also be required to satisfy state or local rules that do not conflict with the federal regulations.⁵ In the remaining cases, you should be able to find the procurement rules at the agency's Web site.

Failure to understand the applicable rules could lead to missed opportunities. For example, if a provision in the RFP unfairly hampers your client's ability to compete or gives another firm an unfair competitive advantage, most agencies will require that a protest of the RFP be filed on a very short time frame.⁶ If you wait until the bid is rejected and then protest the award to the winning bidder, you will have waived your objections to the terms of the RFP itself.⁷

2. Understand Rules Pertaining to Lobbyists

If your client decides to use a lobbyist to help secure a government contract, remember that he is acting as your client's agent. A lobbyist cannot do anything with respect to the procurement that his client could not otherwise do.

Also be aware that a vendor who employs a lobbyist to lobby a Georgia state agency "shall cause such lobbyist to register with the State Ethics Commission and to file the [appropriate] disclosures."⁸ Those disclosures include the specific contract for which the lobbyist has been hired and the compensation to be paid to the lobbyist.⁹ Please keep in mind that some agencies prohibit payments to lobbyists from funds received from the agency.¹⁰

3. Use the Open Records Act Wisely

Many bidders and attorneys fail to take full advantage of the Georgia Open Records Act to obtain competitors' proposals and the agency's evaluations of all proposals.¹¹ In Georgia, those documents become public records upon the award of the contract except to the extent they contain protected trade secrets.¹²

Have your records request drafted and ready to file *before* the agency announces the award so that you can file the request on the day of the announcement if your client does not win the contract. You will likely need these documents to prepare a protest, which will be due within days of the announcement.¹³ Request the complete procurement file, including, without limitation, all offerors' questions and agency responses, evaluation factors, agency evaluation forms, the winner's proposal, all correspondence between the winner and the agency, and all minutes, notes, and audio or videotapes from meetings between the winner and the agency. You will be surprised at what you find. In several unreported cases, unsuccessful offerors have learned through open records requests that their proposals received the highest score by the agency evaluation team. In another unreported case, an open records request uncovered evidence suggesting that agency officials shared confidential pricing information from sealed proposals with another bidder in violation of the applicable procurement rules.

4. Disadvantaged Business Enterprise Requirements

Most government contracts have a Disadvantaged Business

Enterprise (DBE) component to them.¹⁴ DBE programs seek to increase contracting opportunities for firms that are at least 51 percent-owned by women or members of certain ethnic groups presumed to be "socially and economically disadvantaged."¹⁵ Certified DBEs and non-DBE firms that satisfy DBE goals (by subcontracting or partnering with DBE firms) typically receive additional points in the proposal scoring process or additional compensation from the agency.¹⁶

A typical program sets a DBE participation goal for a particular contract, expressed as a percentage of the total contract amount, to be performed by qualified DBE firms.¹⁷ Non-DBEs that are unable to satisfy the DBE goal must demonstrate "good faith efforts" to do so by, for example, reaching out to DBE subcontractors through minority contracting groups or offering assistance and even financing to DBE firms.¹⁸ Your good faith efforts will be compared against the other offerors, which might put you in the unenviable position of having to explain why you were the only offeror who failed to satisfy DBE goals.¹⁹

Although many state and local governments have formulated their own DBE-type programs,²⁰ if they accept federal road, transportation or airport funding, they must adhere to U.S. Department of Transportation DBE rules.²¹ Fortunately, the U.S. D.O.T., the Georgia D.O.T. and the Georgia Department of Administrative require only one application and one certification.²²

If your client is not eligible to be a DBE, it may satisfy DBE goals by forming a joint venture with a DBE or by subcontracting with DBEs.²³ The non-DBE partner in a joint ven-

ture must be prepared to demonstrate that the DBE partner is a bona fide participant in the work and the risks and rewards of the contract.²⁴ If a non-DBE firm chooses to subcontract to DBE firms, all of the goods and services necessary to fulfill the contract that are purchased from DBEs will count towards the DBE participation goal.²⁵

REMEDIES FOR THE UNSUCCESSFUL BIDDER

Protests

1. Filing a Protest


A protest is a formal, written objection to an agency's action in connection with a solicitation. This

is your chance to tell the agency why you think they made the wrong decision. You may protest a provision in an RFP, the award of a contract or even the decision to not competitively bid a business opportunity so long as you can show that you are harmed by that decision.

Although protests begin informally with a letter, that letter has some very significant consequences. First, if it is not filed on time (usually within five to 10 days of the adverse decision), the agency is authorized to deny your protest on that basis alone.²⁶ Second, your protest letter must raise all claims and describe the evidence supporting those claims with some degree of specificity. Any claims that you do not raise or support are waived.²⁷ Simply telling the agency that you think you had a stronger proposal without any fur-

ther explanation is not sufficient. Moreover, your claims may not always be that the agency did not properly evaluate the proposals. You might argue, for example, that an action taken by the agency is void because it exceeds the authority delegated to the agency by the General Assembly.²⁸

If you protest a provision in the RFP and succeed, the agency will either amend the RFP or cancel it and issue another one. If you succeed in protesting the award of a contract, the agency will probably terminate the contract with the successful offeror and execute a contract with you. As discussed below, there are some circumstances in which the successful protestor does not win the contract. In those cases, you would be entitled to recover bid preparation costs, but lost profits under the disputed contract



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The difficulties with protests might lead one to consider avoiding that process and simply suing the agency in court. This is not advisable. In almost all cases, an aggrieved bidder must “exhaust administrative remedies” before seeking relief from a court, and a protest procedure is an administrative remedy.

would not be available.²⁹ In addition, if you are able to prove that the agency “has acted in bad faith, has been stubbornly litigious or has caused [you] unnecessary trouble and expense,” you can recover your attorneys’ fees and expenses.³⁰

2. Protest Hearings

In some—but not all—instances, the agency will hold an evidentiary hearing on your protest. The City of Atlanta, for example, allows a hearing but does not provide litigants with compulsory process.³¹ The Department of Administrative Services (DOAS) and the Georgia Technology Authority (GTA), which together administer most state agency procurements, give the protest decision maker sole discretion on whether to hold a hearing.³² If a hearing is not granted, the protest will probably be decided based upon the written documents submitted to the decision maker.

Do not expect to win your protest at the agency stage, because the agency serves as the judge, jury and litigant. In essence, you are asking the agency officials to find that their co-workers made a mistake. If a hearing is held, your primary goal should be to create a record for appeal by asserting all arguments and tendering all supporting witnesses and evidence available to you.

The difficulties with protests might lead one to consider avoid-

ing that process and simply suing the agency in court. This is not advisable. In almost all cases, an aggrieved bidder must “exhaust administrative remedies” before seeking relief from a court,³³ and a protest procedure is an administrative remedy.³⁴ That remedy will be exhausted when the agency issues a final decision on the protest.

3. Take Steps to Stay the Contract

When you protest a contract award, the agency will usually stay the contract with the successful offeror until your protest is adjudicated. This prevents the agency and successful contractor from expending time and money on a contract when there is still some uncertainty as to whether it was awarded to the proper party. Most agencies have the discretion, however, to go forward with the contract if doing so is determined to be in the agency’s interest.³⁵ You should take every action possible to prevent the agency and contractor from going forward up to and including filing a temporary restraining order in superior court. If you do not take these steps, a court could very likely determine that you won the protest, but that you “sat on your rights” by allowing the agency and other party to perform the contract during your protest.³⁶ The more money and effort that is spent in the furtherance of the contract, the more diffi-

cult it will be to wrest it from the contractor initially selected.³⁷ Even if your efforts to stay the contract are ultimately unsuccessful, the fact that you took all reasonable steps to stay the contract should defeat a claim that you sat on your rights.

Appeals from Protest Denials and Alternative Remedies

What do you do if the agency denies your protest? You have the right to appeal, but determining where and how to appeal can be tricky. If you had the right to a hearing, whether or not one was held, you must file a petition for writ of certiorari to the superior court in the county in which the hearing was held.³⁸ In a writ of certiorari, you are asking the court to function in an appellate capacity to review the record below and correct errors of law made by the protest decision maker. The court in certiorari is limited to the evidence presented to the agency; if you discover the smoking gun document that proves your case after your protest hearing, you are out of luck,³⁹ which is why it is so important to use the Open Records Act effectively to develop your evidence. Your burden is to prove that the agency’s decision (i.e., the denial of your protest) is not supported by “substantial evidence.”⁴⁰ This is a difficult, but not impossible, burden.⁴¹

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If you did not have the right to a hearing on your protest, your remedy is to file a declaratory judgment action in superior court seeking a declaration that the agency exceeded its authority in rejecting your bid. As a part of that action, you should request a preliminary and permanent injunction to restrain the agency from awarding the contract to anyone but you.⁴² As is the case with a certiorari proceeding, the court will not substitute its judgment for that of the agency (which is presumed to have expertise in its area of operations), but it will enjoin a contract if the award violates the agency's procurement rules.

To obtain preliminary or permanent injunctive relief, you will have to show that you do not have an adequate remedy at law.⁴³ Because a frustrated bidder is not entitled to recover lost profits under the contract,⁴⁴ you should argue that you cannot be made whole unless the court uses its equitable powers to award the contract to you.⁴⁵

A court will enter a preliminary injunction to maintain the status quo pending a final decision on the merits if the equities weigh in favor of the party seeking the injunction and there is no adequate remedy at law.⁴⁶ A court will enter a permanent injunction to prevent an illegal act that will cause irreparable injury to a property right or protected interest, for which there is no adequate remedy at law.⁴⁷

CONCLUSION

While the vast majority of government solicitations are administered fairly and efficiently, the involvement of human beings in the process will always give rise to some exceptions. Protests are difficult to win because of the discre-

tion our courts give to public officials, but they are an essential component to the integrity of any solicitation process. The most important ingredient to a successful protest is preparation, which requires a thorough understanding of the agency's rules, the selection criteria for the solicitation and the offers themselves, all of which are within the public domain. 



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Endnotes

1. *City of Atlanta v. J.A. Jones Construction Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990).
2. Although generally a bid is treated as an offer that cannot be revoked or amended once it is accepted, courts will allow revocation if based upon an unintentional unilateral miscalculation and (1) enforcement of the mistake would be unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) the other party has not been prejudiced. *First Baptist Church v. Barber Contracting Co.*, 189 Ga. App. 804, 807-808, 377 S.E.2d 717 (1989). On the other hand, agencies enjoy almost unfettered discretion to reject any and all bids, so long as they do not abuse that discretion by rejecting a compliant bid in favor of a noncompliant bid. *Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101, 103 (N.D. Ga. 1990).
3. In *City of Atlanta v. J. A. Jones Constr. Co.*, 195 Ga. App. 72, 77-78,

392 S.E.2d 564, *rev'd on other grounds* by 260 Ga. 658, 398 S.E.2d 369

(1990), for example, the Court of Appeals held that the City had no discretion to accept a low bid that was submitted three minutes late.

4. "Public works construction" is defined as "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property.... Such term does not include the routine operation, repair, or maintenance of existing structures, buildings or real property." O.C.G.A. § 36-91-2(10).
5. In fact, O.C.G.A. § 36-91-22(d) requires state and local agencies to comply with Georgia law and federal law if federal funds are implicated. If state law conflicts with federal law, then federal law will control. *Id.* This is consistent with the constitutional doctrine of federal preemption, which requires that federal law take precedence over state law when: (1) the federal statute expressly pre-empts state law; (2) "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boyes v. Shell Oil Products Co.*, 199 F.3d 1260, 1267 (11th Cir. 2000).
6. The Georgia Technology Authority, for example, requires that any protest of any aspect of the solicitation be filed within five days of when the grounds for the protest were discovered or should have been discovered. Ga. Comp. R. & Regs. r. 665-2-11-.07(c)(1). In contrast, the Georgia Department of Administrative Services ("DOAS"), which administers procurements for most state government agencies, specifies that protests to anything occurring during the solicitation must be filed at least two days prior to the proposal due date. See GEORGIA VENDOR MANUAL, § 3.8(2).
7. GEORGIA VENDOR MANUAL, § 3.8(2).
8. See Executive Order signed by Georgia Governor Sonny Perdue on October 1, 2003.

9. *Id.*
10. The Georgia Department of Community Health ("DCH"), for example, has recently asked contractors to execute a contract amendment certifying that "[n]o portion of funds paid under this Contract shall be used for lobbying purposes." While the First Amendment prevents a government agency from banning lobbying outright, it would likely permit government contractors to demonstrate that payments to lobbyists were not made from the same account that receives contractual payments from that agency. *See generally*, *Rust v. Sullivan*, 500 U.S. 173, 197-198 (1991) (statute conditioning federal funds on a ban of abortion-related activity was constitutional as long as grantees were not precluded from engaging in abortion-related activities with private funds, in a separate capacity). DCH offers little guidance on how to comply with such a restriction. Compliance may be a simple matter of accounting that requires the maintenance of separate accounts for revenue derived from the agency and other revenue. Perhaps the safer alternative would be to create a separate legal entity that derives no revenue from the agency, but that makes all payments to lobbyists.
11. *See, e.g.*, O.C.G.A. § 50-18-70, *et seq.*, known as the Georgia Open Records Act. *See also* *McFrugal Rental of Riverside v. Garr*, 262 Ga. 369, 418 S.E.2d 60 (1992) ("The very purpose of the Open Records Act 'is to encourage public access to government information and to foster confidence in government through openness to the public'").
12. O.C.G.A. § 50-18-72(a)(6)(B); *see also* *Georgia Department of Human Resources v. Theragenics Corp.*, 273 Ga. 724, 545 S.E.2d 904 (2001) (government agency has an affirmative duty to prevent the disclosure of another entity's trade secrets, even if not specifically marked as such).
13. In Georgia, the agency has three days from receipt of an open records request to locate the records and advise the requestor of when they will be made available. O.C.G.A. § 50-18-70(f). Some agencies, like the Georgia Technology Authority, require that protests of contract awards be filed within five days of the announcement of the award. Ga. Comp. R. & Regs. r. 665-2-11-.007(c)(1). The protest must include "a specific detailed statement of all legal and factual grounds relied upon by the Protestor in filing its Protest," and any grounds not asserted are irrevocably waived. Ga. Comp. R. & Regs. r. 665-2-11-.007(b)(4)(v). Thus, an unsuccessful offeror contemplating a protest does not have much time to obtain the relevant supporting documents from the agency to support a protest.
14. DBE programs have been the subject of significant litigation because they treat members of one racial group or gender differently from members of other groups or genders. While a discussion of the constitutional implications of DBE programs is beyond the scope of this paper, the general rule is that race-based classifications are subject to strict scrutiny, which means that they must be narrowly tailored to serve a compelling government interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097 (1995). General societal discrimination is not sufficient to support a race based classification; there must be evidence of past discrimination by that particular government entity. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 106 S. Ct. 1842 (1986). Absent such evidence, a DBE program is unconstitutional. *Id.*
15. *See* 49 C.F.R. 26.1 (U.S. Department of Transportation's statement of objectives for the DBE program).
16. 49 C.F.R. 26.55.
17. *Id.*
18. 49 C.F.R. Part 26, Appendix A.
19. *Id.*
20. The City of Atlanta, for example, has an Equal Business Opportunity program, which provides for additional consideration by the City for firms that are majority-owned and controlled by women and members of certain racial groups and women. *See* *Atlanta Procurement & Real Estate Code*, § 2-1441, *et seq.* Certification under this program is not contingent upon a presumption or showing of economic disadvantage.
21. 49 C.F.R. 26.3.
22. The application is called the Georgia Uniform Certification Application. It may be downloaded from the Georgia Department of Transportation website, found at www.dot.state.ga.us/dot/eo-div/documents/pdf/dbeapplication/dbe-application-1-13-04.pdf.
23. 49 C.F.R. 26.55.
24. 49 C.F.R. 26.5 defines the term "joint venture" as "an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest."
25. 49 C.F.R. 26.55(e).
26. For example, the Georgia Technology Authority requires that any protest of any aspect of the solicitation be filed within five days of when the grounds for the protest were discovered or should have been discovered. Ga. Comp. R. & Regs. r. 665-2-11-.07(c)(1). In contrast, the Georgia DOAS specifies that protests to anything occurring during the solicitation must be filed at least two days prior to the proposal due date. *See* *GEORGIA VENDOR MANUAL*, § 3.8(2).
27. For example, the Georgia DOAS rule states that "[i]ssues not raised in the initial protest may at the discretion of the State be deemed waived with prejudice by the protestor." *GEORGIA VENDOR MANUAL*, § 3.8(2).
28. A state agency or a municipality has only those powers expressly granted or necessarily implied by a statute. *See* *Beazley v. DeKalb County*, 210 Ga. 41, 43, 77 S.E.2d 740 (1953) (counties and municipal corporations can exercise no power except those that are expressly given or are necessarily implied from express grant of other powers, and a reasonable doubt of the existence of a particular power is resolved in the negative). The contours of this rule are sometimes difficult to determine. In *Hunnicut v. Georgia Power Co.*, 168 Ga. App., 525, 526, 309 S.E.2d 862 (1983), the court held that the Public Service Commission had no jurisdiction to

- require a party to exhaust administrative remedies prior to asserting a tort claim because "[w]e find no statute from which it might be inferred that the PSC has exclusive or even primary jurisdiction over disputes which are premised upon the alleged wrongful termination of utility service." *But see* *Floyd County Board of Commissioners v. Floyd Co. Merit System Bd.*, 246 Ga. 44, 268 S.E.2d 651 (1980) (statutory grant of authority to provide "necessary office space, equipment, and employees to the board for accomplishment of its duties" necessarily implies the power to hire and fire employees).
29. *City of Atlanta v. J. A. Jones Constr. Co.*, 260 Ga. 658, 659 (1990) ("To permit the recovery of lost profits would unduly punish the tax-paying public while compensating the plaintiffs for effort they did not make and risks they did not take. Limiting recovery to reasonable bid preparation costs is in keeping with the legitimate governmental objective of rewarding the lowest qualified bidder and guarding against public officials shirking their duties while, at the same time, preventing unwarranted waste of taxpayers' money."); *Amdahl Corp. v. Georgia Dep't of Admin. Servs.*, 260 Ga. 690, 697, 398 S.E.2d 540 (1990).
 30. O.C.G.A. § 13-6-11 (authorizing recovery of litigation expenses when the defendant acts in bad faith, with stubborn litigiousness, or causes plaintiff unnecessary trouble and expense); *see also* *S & W Mechanical Co. v. Homerville*, 682 F. Supp. 546, 549 (M.D. Ga. 1988) (frustrated bidder's only means of recovering litigation expenses is through O.C.G.A. § 13-6-11).
 31. *See Atlanta Procurement & Real Estate Code*, § 2-1166(b)(2).
 32. *GEORGIA VENDOR MANUAL*, § 3.8(2) & Ga. Comp. R. & Regs. r. 665-2-11-.07(i)(2).
 33. Georgia courts will not use equitable powers to award a contract to a low bidder unless the low bidder exhausted administrative remedies. *See, e.g., Curelean Companies v. Tiller*, 271 Ga. 65, 516 S.E.2d 522 (1999) ("Long-standing Georgia law requires that a party aggrieved by a state agency's decision must raise all issues before that agency and exhaust available administrative remedies before seeking any judicial review of the agency's decision"). One exception is if the bidder can prove that it would be impossible or improbable to obtain adequate relief through the administrative process (*e.g.,* if the hearing is before the same person or persons who made the decision in the first place). *See Glynn County Bd. of Educ. v. Lane*, 261 Ga. 544, 546, 407 S.E.2d 754 (1991). Alternatively, if a frustrated bidder can show that violation of procurement rules deprived the bidder of a constitutional right it may, in some cases, circumvent the administrative process by filing a civil rights lawsuit under 42 U.S.C. § 1981 or § 1983. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (Section 1983 trumps state administrative exhaustion of remedy requirements). Some bidders have argued under § 1983 that an agency's noncompliance with bidding procedures deprived the bidder of a property interest without due process of law. *See Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101, 103 (N.D. Ga. 1990), *aff'd*, 969 F.2d 1047 (11th Cir. 1992). Other bidders have successfully argued under § 1981 or 1983 that an agency's award of a contract pursuant to a minority business program violated the Equal Protection Clause of the U.S. Constitution because it discriminated on the basis of race. *See generally, Webster v. Fulton County*, 44 F. Supp. 2d 1359 (N.D. Ga. 1999) (white contractor successfully challenged Fulton County's Minority and Female Business Enterprise program as being racially discriminatory). In those cases, the adequacy of the protest procedure is not at issue, and the bidder is not required to demonstrate that it exhausted that remedy. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 516 2557 (1982).
 34. *See Hilton Construction v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 539 (1980).
 35. *See, e.g., GEORGIA VENDOR MANUAL*, § 3.8(2) (DOAS); Ga. Comp. R. & Regs. r. 665-2-11-.07(j) (GTA); and *Fulton County Code of Ordinances*, § 2-324(c).
 36. *See, e.g., Hilton Construction*, 245 Ga. at 537 ("If construction were not well underway, Hilton might well be entitled to be awarded the contract under the facts of this case once the administrative appeal reached the courts. But at this late date, equity will not intervene where Hilton's failure to post bond and exhaust administrative remedies has rendered equitable relief draconian.").
 37. *Id.*
 38. O.C.G.A. § 5-4-1 and § 5-4-3. This is the sole remedy available to the aggrieved bidder unless the bidder can prove that the agency decision maker did not exercise "judicial functions." *See Mack II v. City of Atlanta*, 227 Ga. App. 305, 489 S.E.2d 357 (1997) (rejecting frustrated bidder's equitable action seeking contract award because bidder's sole remedy was a petition for certiorari). If the parties are entitled to notice and a hearing, and they have the right to present evidence under "judicial forms of procedure," the decision maker will be found to have exercised a judicial function. *Id.*; *Cf. What It Is, Inc. v. Jackson*, 146 Ga. App. 574, 246 S.E.2d 693 (1978) (certiorari did not lie for party seeking to challenge board's revocation of its liquor license because the hearing that was held was administrative rather than judicial, and it was not available as a matter of right).
 39. *Bell v. City of Valdosta*, 47 Ga. App. 808, 171 S.E. 572 (1933).
 40. O.C.G.A. § 5-4-12(b). Because the Supreme Court has held that "in Georgia the substantial-evidence standard is effectively the same as the any-evidence standard," the any-evidence standard is more frequently referenced in certiorari proceedings. *See, e.g., City of Atlanta v. Smith*, 228 Ga. App. 864, 493 S.E.2d 51 (1997).
 41. For example, in *Hilton Construction*, 245 Ga. at 537, the court ruled that a government entity had abused its discretion in selecting a higher bidder as "the responsible bidder submitting the lowest acceptable bid" because "[w]hatever may be meant by the word 'responsible,' we are certain that being 'unknown' does not show the bidder was not 'responsible'". The court also ruled that the board did not have discretion to reject a low bid because the bidder

was late on another unrelated project without investigating whether the delay was the fault of the bidder. *Id.* at 538.

42. Many unsuccessful bidders make the mistake of filing an action for mandamus to compel the agency head to award the contract to that bidder. In that context, Georgia courts have consistently denied mandamus because it "is not the proper remedy to compel 'the undoing of acts already done or the correction of wrongs already perpetrated, and . . . this is so, even though the action taken was clearly illegal.'" *Id.* at 540; *Mark Smith Construction Co., Inc. v. Fulton County*, 248 Ga. 694, 696, 285 S.E.2d 692 (1982).
43. *See, e.g., Amdahl Corp. v. Georgia Dep't of Admin. Servs.*, 260 Ga. 690, 697-98 (1990). In *Amdahl*, the court held that a frustrated bidder was entitled to seek equitable relief but remanded the case to the trial court for a determination on whether the recovery of bid costs – the sole remedy to a frustrated bidder under Georgia law – was an adequate remedy at law. *Id.*
44. *See supra* text accompanying note 29.
45. This argument has had some only limited success in Georgia courts. In *Amdahl*, 260 Ga. at 697-98, for example, the Supreme Court remanded the case to the trial court to determine whether the recovery of bid costs was an adequate remedy. In *Hilton Construction*, 245 Ga. at 540, the Supreme Court remanded the case back to the trial court for a finding on the appropriateness of injunctive relief.
46. *Garden Hills Civic Association v. MARTA*, 273 Ga. 280, 281, 539 S.E.2d 811 (2000). As a part of the balancing of the equities, the court may consider the plaintiff's likelihood of success on the merits. *Id.*
47. *See Cantrell v. Henry County*, 250 Ga. 822, 824, 301 S.E.2d 870 (1983) (inadequate remedy at law); *Clark's Valdosta, Inc. v. Valdosta*, 224 Ga. 331, 161 S.E.2d 867 (1968) (injury to property right or protected interest); *Reeves v. Du Val*, 214 Ga. 630, 106 S.E.2d 797 (1959) (irreparable harm).

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Plain English Drafting

By Lenné Eidson Espenschied

Legal drafting is one of the most fundamental skills required of transactional lawyers, yet it is perhaps the single skill for which lawyers are least prepared. Although legal writing is a required course at most law schools, legal drafting is not widely offered and seldom, if ever, required. Where legal drafting is taught, it is usually offered in a symposium format to a handful of students who tackle assignments involving drafting a contract, a will and a statute.

Most of us learned what we know about legal drafting from the attorneys who hired us out of law school. Our drafting styles have evolved based on their instruction and what we have absorbed as a result of continual exposure to the

good, bad or indifferent works drafted by others. There are few opportunities for formal instruction in legal drafting techniques, and practicing attorneys rarely have time for perusing hornbooks on legal drafting.

WHAT'S SO DIFFERENT ABOUT LEGAL DRAFTING?

Legal drafting (contracts, wills and statutes) deals with future behavior, while legal writing (pleadings and briefs) typically focuses on historical events. Legal drafting may have a very long shelf life and must anticipate a myriad of circumstances that may arise. Briefs and pleadings usually focus on a particular event and its known ramifications and are quickly forgotten. Mistakes in legal drafting can be crucial, and each word may have great significance (e.g., “one month” or “30 days”? “no later than” or “within”?). In pleadings, individual words are less important.¹

A notable difference between legal drafting and legal writing is

that legal drafting may ultimately be subjected to an adversarial reading. A legal drafting scholar credited Oliver Wendell Holmes with observing that a well-drafted agreement must be precise enough to endure courtroom attacks by a highly-trained intellectual whose objective is to pervert its meaning.² Under the canon of *contra proferentem*, ambiguities in legal drafting are construed against the drafter who selected the language.³ This canon motivates us to ensure that the language we select is as clear and concise as possible.

The most significant difference between legal drafting and legal writing in a transactional setting may be the intended audience. Briefs and pleadings are generally intended to be read by judges and other lawyers from start to finish. Contracts are intended to be read and used by lay persons who consult specific provisions sporadically throughout the term of agreement.⁴ Although lawyers sometimes pride themselves on creating highly complex language that requires a J.D. degree to decipher, logic dictates that the people using the docu-



ments should be able to understand them. The measure of a drafter's success is the utility of the document to its users.⁵ Any difficulty in understanding legal documents should arise from the substance rather than the syntax.⁶

Another significant difference between legal drafting and legal writing is that legal drafting is a collaborative process⁷ in at least two major respects. First, lawyers rarely draft documents completely from scratch. Most drafting begins with a "standard form" or excerpted language used in previous agreements. In drafting a "new" agreement, the attorney creates original verbiage, cuts and pastes language from other sources, adds, deletes and revises until the form fits the current transaction. Specific language in most forms is compiled over time through the edits of many lawyers in a chain of those who have worked with earlier variations and permutations of the forms. The true genealogy of most language in any "standard form," and the purpose for which it was originally intended are seldom, if ever, known. Second, legal drafting is a collaborative process in the sense that during the course of negotiation, all involved parties typically contribute language to be included in the agreement. The terms of most agreements evolve as each party reviews, edits and refines the language to suit its objectives. Because drafting is a collaborative effort, many documents suffer from poor organization, lack of consistency, misuse or even conflicting use of defined terms and redundant language.

THE TREND TOWARDS PLAIN ENGLISH DRAFTING

In 1977, President Jimmy Carter issued an executive order requiring that each government regulation must be "written in plain English and understandable to those who must comply with it."⁸ Many state legislatures have also passed statutes requiring that consumer contracts be written in plain English.⁹ Over five years ago, the Securities and Exchange Commission required that disclosure documents must be written in plain English. Virtually all of today's scholars on legal drafting decree that, to the extent possible, documents should be phrased in common, everyday language. Even so, the call for simple language did not begin in modern times. George Coode, the leading authority on drafting over 150 years ago, urged that most legal documents should be written in common, popular usage, plain English.¹⁰

Beware that plain English drafting is not simple and requires great discipline. It is a much more difficult endeavor and therefore a higher accomplishment to craft language that is clear, concise and understandable to non-lawyers.

The current shift towards plain English drafting requires even the most experienced lawyers to brush up on and refine their drafting techniques. This article discusses basic, hornbook drafting techniques for organizing documents; replacing archaic customs; simplifying sentence structure by eliminating unnecessary words and breaking bad habits; using defined terms correctly; and shortening average sentence length. These techniques can be adopted instantly to improve, clarify and simplify the language in most contracts, and whenever the language is improved, the substance is necessarily improved as well.

1. Have a Plan for Organizing Documents Logically.

After negotiation, the terms and conditions of a contract are put in writing to memorialize the promises, rights and obligations the parties agreed to as of the date the contract was signed. One primary function of the written contract is to serve as a reference material that can be consulted from time to time during the term of the agreement. When the contract is consulted, the parties rarely intend to read it from start to finish; rather, they consult specific provisions related to the



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information sought at the time.¹¹ A well-drafted contract should be arranged logically to assist the readers in finding the needed information.¹²

Most experienced transactional attorneys have a good understanding of the types of provisions that should be included in a written contract. But attorneys often fail to have a clear plan for organizing topics and provisions within the contract, and this problem is exacerbated as language is added from various sources.

To the greatest extent possible, all related ideas in a contract should be grouped together. The ideas should then be organized from the most important to the least.¹³ After topics are grouped into sections in logical order of importance, the terms within each section should also be organized from the most important to the least. The general concept should precede specific rules, and provisions with broad applicability should precede those with narrow applicability.¹⁴ Exceptions should appear after the concept and the rules are identified.¹⁵ Events should be ordered chronologically.¹⁶ Housekeeping items such as an arbitration clause and typical “boilerplate” provisions should appear last.¹⁷

Sometimes, a contract term may be applicable to more than one topic within the agreement. For example, if a contract provides for a termination fee, this information could logically appear in both the compensation and payment section and the termination section of the agreement. In this situation, the drafter should describe the termination fee in the compensation and payment section, but also include a

cross reference in the termination section. The provision in the termination section should simply state that upon termination, a fee must be paid according to the provisions of Paragraph #.#. Avoid drafting the same information into multiple sections to eliminate the possibility of inadvertent, internal inconsistencies that can occur when one section is revised but not the other. All of the relevant information should be grouped within the same paragraph, and the cross-reference should merely direct the reader where to find the information. Even so, strive to minimize cross-references within an agreement because they can be distracting and confusing to readers.¹⁸

After the topics have been arranged in a logical order, implement a simple numbering system that is easy to follow. Avoid a confusing, multiple decimal numbering system, as in “1.1.1.1.2.” Use no more than one decimal. Use subparts only if there are at least two corresponding concepts. Use hanging indents to reveal the structure clearly, like this:

- 1. Concept
 - 1.1 Section
 - (A) Paragraph
 - (1) Subparagraph
 - (2) Subparagraph
 - (B) Paragraph
 - 1.2 Section
- 2. Concept

2. Eliminate Archaic Customs.

The next step in plain English drafting is to eliminate archaic customs.¹⁹ Many standard forms

and agreements still contain archaic language such as “witnesseth” and “in witness whereof I have hereunto set my hand and seal.” These legal customs must have fulfilled some purpose at the time they arose, but few, if any, of us know now what that purpose was. Most attorneys believe that the word “witnesseth” is a sort of command, kind of like “listen up!” In actuality, verb forms like “witnesseth” were used only briefly in a small region of England in the Middle Ages.²⁰ These verb forms were also used by famous authors such as John Donne, John Milton, Christopher Marlowe and William Shakespeare to match the rhythm and meter of certain poetry. Hence, “rhyme” became “rhymeth” and the iambic pentameter was saved! The word “witnesseth” actually means “witnesses” in the third-person singular verb form, as in “this agreement witnesses that” The word “witnesseth” is seldom used correctly in legal documents, but even if it were, query whether it is commonly used in everyday language, or whether it adds anything significant to the document. Instead of using “witnesseth” with a long string of “whereas” and “now, therefore” recitals, opt for a simpler, more concise Statement of Purpose paragraph at the beginning of the document. Many other archaic customs can be eliminated without substitution, such as “know all men by these presents,” or “further, affiant sayeth not.”

3. Avoid These Words in Contracts.

To write in plain English, to the extent possible eliminate words and phrases used only by lawyers. Avoid phrases like “on the ground

Fig. 1, Eliminate words and phrases used only by lawyers.

Instead of this:	Use this:
a large number of	many
pursuant to the provisions of	under
at this point in time	now
notwithstanding the fact that	even though, although
prior to	before
subsequent to	after
until such time as	until
by reason of the fact that	because
give rise to	cause
due to the fact that	because
in consideration of the agreements herein contained, the parties hereto agree	we agree, the parties agree

that," "notwithstanding the foregoing," and "in the event that" and replace them with everyday English equivalents, like "because," "even so," and "if." See Figure 1 for more examples.²¹

Technical terms can be used where necessary, but drafters should avoid legal jargon and phraseology that serves no real purpose.

Some commonly used words are inherently imprecise and should never appear in contracts. These include:

- b and/or**—This phrase is consistently condemned by courts yet many lawyers persist in using it.²² It is inherently imprecise because the reader is unable to determine whether all items in a list are required (and) or whether any one of them is sufficient (or). Replace this taboo phrase with "or both" as in "1 or 2 or both."²³
- b provided that**—Provisos are also regularly maligned by most legal drafting scholars and some judges as being both inherently imprecise and *prima facie* evidence of poor drafting, yet experienced attorneys regularly use them.²⁴ "Provided

that" is generally used in legal drafting to signal a limitation, and exception, or an additional requirement—but which? The phrase is inherently imprecise because it can be and has been construed by the courts to mean "if," "except," and "also."²⁵ Provisos are also imprecise because it is usually unclear how far back in the text the proviso applies. Legal drafting scholars complain that use of the phrase "provided that" almost invariably signals that the drafter has failed to organize the sentence properly, and may have misled the reader in the process.²⁶ And most sentences that contain the words "provided that" are too long by plain English drafting standards. (See Drafting Technique No. 8 below.) Replace "provided that" with a conditional phrase such as "if . . . then" or break the sentence into subordinate clauses.

- b herein**—This word is inherently imprecise because the reader cannot determine whether the drafter means "in this subsection," "in this section," or "in this document."²⁷ Either of the

phrases just listed is preferable.

"Therein" is equally imprecise.

Other forms of legalese also should be avoided in drafting contracts. Stuffy, pompous language creates a barrier between the drafter and the reader.²⁸ Save this language for communications with judges and other lawyers, but opt for modern, plain language in drafting contracts for use by non-lawyers. Here are some additional words and phrases to avoid in contracts:

- b legalese not used in normal conversation**—Compound words that begin with here- there- and where, such as hereinabove, heretofore, thereabout, thereunto, wheresoever, whereupon and so on should not be used in contracts except as a last resort to avoid unwieldy phrasing.²⁹ Legalese to be avoided also includes words like aforementioned, behoove, forthwith, henceforth, thence, hitherto, whence, and so on, which legal drafting scholars call "gobbledygook."³⁰
- b such, said, and same**—Standup comedy routines and diatribes roasting lawyers are filled with these words. Take the hint! Replace these offending words with "the," "this," "that," or "these."³¹
- b foreign phrases**—Foreign phrases such as *ad hoc*, *arguendo*, *caveat emptor*, *et al*, *ex post facto*, *id*, *in personam*, *inter alia*, *non sequitur*, *res gestae*, *res judicata*, *supra*, and so on should not be used in contracts.³² These phrases are unfamiliar to non-lawyers.

4. Use the Word "Shall" Consistently.

Words that impose a duty or obligation must be used consistently within the document. Within

Fig. 2, Convert hidden verbs.

Instead of this:	Use this:
Notice shall be given	Licensee will notify
an application will be submitted	Seller will apply
provide a response	Company will respond
the failure of any party	If any party fails
require performance	Licensor must perform
upon the occurrence of	If this occurs
provide indemnification	indemnify
result in a violation of	violates
commencement of any action	any action commences
cessation of business	business ceases
constitutes misappropriation	misappropriates
impose any penalty or limitation	penalize or limit

any document, there should be one word per meaning, and one meaning per word.³³ The risk in using more than one word per meaning is that using different wording will create a presumption that a difference in meaning is intended. Conversely, using the same word to have many different meanings will confuse as to which meaning applies to any given usage. “Shall” is chronically misused in legal drafting to mean many different things interchangeably, often within the same paragraph, by even the most experienced attorneys.³⁴ Even in otherwise well-written documents, it is not uncommon to find the word “shall” used as often as 20 times per page of text, with a rate of misuse as high as 90 percent. If the word “shall” is used when “may” is meant, the word could be construed to mean “may” when a duty is intended. In almost any contract, the word “shall” can be found:³⁵

- b to impose a duty on the subject of the sentence;
- b to impose a duty on an unnamed party, such as “notice shall be given”;
- b to impose a duty requiring further action on an unnamed sub-

ject, such as “Defective products shall be examined”;

- b to mean “may,” as in “the deadline shall be further extended”;
- b to mean a conditional duty, as in “changes to the proposed specifications shall be submitted.” (If the changes are optional, the “shall” in this example is really a conditional duty.);
- b to be used as a modal verb, such as “notice shall have been given when...”;
- b to express an entitlement, as in “Licensor shall be reimbursed for expenses”; and
- b to mean “should.”

“Shall” should be used only to impose a duty on a named party.³⁶ If the word “shall” can be replaced with “must” or “has a duty to” and the sentence still makes sense, it is probably being used correctly. Even so, query how often the word “shall” is used today in non-legal conversation. Chronic misuse of the word “shall” has led some drafters to eliminate the use of the word “shall” in its entirety.³⁷ The word “must” is substituted where a duty is actually intended, and other words are used where it is not. Most proponents of plain English drafting prefer “must” to “shall” as well.³⁸

Fig. 3, Legal doublets and triplets.

aid and abet
appropriate and proper
by and between
cancel, annul and set aside
cease and desist
covenant and agree
deem and consider
demise and lease
due and payable
final and conclusive
full faith and credit
give, devise, bequeath
grant, bargain, sell
have and hold
indemnify and hold harmless
legal and valid
liens and encumbrances
make and enter into
name, constitute and appoint
null and void
over and above
part and parcel
perform and discharge
power and authority
rest, residue and remainder
right, title and interest
sale or transfer
sole and exclusive
successors and assigns
terms and conditions

5. Convert Hidden Verbs.

Lawyers are fond of transforming action verbs into nominal (noun-based) constructions with helping verbs, articles and prepositions,³⁹ but we can eliminate a few words, replace weaker verbs with stronger ones, and force the text to focus on “who” is required to do “what” by converting these nouns back to verb form. Noun forms of verbs often end in -tion, -sion, -ment, -ity, -ure, or -ance.⁴⁰ Legal drafting scholars recommend that words like: deci-

sion, response, application, acceptance, occurrence, violation, cessation, failure, performance, etc., should be replaced with their verb forms, like: decide, respond, apply, accept, occur, violate, cease, fail, perform, and so on. See Figure 2 for a few examples.⁴¹

6. Eliminate Redundant Compound Language.

Another source of redundancies in legal drafting arose during the Middle Ages where drafters drew from English, French and sometimes Latin words to explain a single idea.⁴² From that era, legal doublets and triplets emerged that are still commonly used in legal drafting today. Drafters use phrases like "null and void" where either word alone would be sufficient.⁴³ If there is no distinction between the words, the drafter has merely dou-

bled the words the reader must read.⁴⁴ Yet in interpreting contracts, judges endeavor to give each word meaning and may strain to find distinctions between words where none were intended. If the legal doublet comes from a statute or case law, then it may be necessary to use it in the same form.⁴⁵ Absent some compelling reason to include the extra words, it is better to eliminate clutter by removing the redundant language typically included in contracts by habit.

See Figure 3 for a few common legal doublets and triplets.⁴⁶

7. Use Defined Terms Correctly.

Defined terms are used in a contract to minimize repetitive language, to limit or expand meaning, and to ensure that the parties are using a term to mean the same

thing, but all sorts of problems arise when defined terms are not used correctly. First of all, attorneys can get so carried away defining things that they create definitions for terms that are not even used within the document. The opposite also occurs, and often, capitalized terms are used in a contract as if they were defined terms, but there is no corresponding definition. Sometimes, as a result of cutting and pasting verbiage from other sources and poor editing, a contract will include the same word or phrase in different sections defined to have differing, inconsistent meanings. Many attorneys "stuff" definitions with substantive provisions that should be included in the text of the document.⁴⁷ Many contracts include a glossary of defined terms, but the list often fails to include all of the defined terms used in the contract.



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Most attorneys are surprised to learn that legal drafting scholars recommend that defined terms should be used sparingly, if at all.⁴⁸ Do not use a defined term where the meaning is obvious. In defining terms, when the stipulated meaning is complete within the definition, use the word “means.”⁴⁹ When the stipulated meaning within the definition is not intended to be complete, use the word “includes.”⁵⁰ Do not use the phrase “means and includes,” because that would indicate that the stipulated meaning is both complete and incomplete.⁵¹

Unless the agreement contains more than five defined terms, the definitions should appear in the text where the term is first used. When there are more than five defined terms, drafting scholars vary as to whether the glossary should be at the end or beginning of the document. The argument for putting defined terms at the end of the document is based on organizing topics within the document in order of importance. This author’s preference is to put the terms at the beginning of the document so the reader knows where they are and is familiar with the defined terms before reading the text to which they relate.

Here are some additional tips on using defined terms:

- b Proofread carefully to ensure that defined terms are used, are used correctly and consistently, and that all terms used as defined terms are, in fact, defined.
- b When using a list or glossary, make sure it contains all defined terms used in the text.
- b Make sure that the part of speech in the definition matches

the defined term—when the defined term is a noun, the definition should describe a noun, not a verb.

- b Unless a word is used at least three times in a document, it is usually a waste of ink to create a defined term for it.
- b Do not use defined terms where the meaning is obvious—for example, Congor Corporation (“Congor”),⁵² or first transfer notice (“First Transfer Notice.”)
- b Avoid using defined terms for ordinary legal words that do not need definition, such as “litigation,” unless a specific alternative meaning is intended.
- b Avoid using defined terms differentiated only by a couple of letters, such as “Employer” and “Employee.”
- b Avoid “Alice in Wonderland” type definitions, such as “‘black’ means white,” and stick to intuitive meanings.⁵³
- b Do not put substantive provisions in definitions.⁵⁴
- b Cut the clutter—use “means” as opposed to “shall mean,” “shall have the following meaning,” “shall mean and refer to,” “is when,” or “is where.”⁵⁵

8. Shorten Average Sentence Length.


Lawyers sometimes seem to measure their ability on how long a sentence they can create. Separate, shorter sentences and clauses state the same topics with greater clarity and are much easier to comprehend.⁵⁶ Strive for shorter sentences averaging 25 to 30 words.⁵⁷ Indented or bullet-pointed phrases ending with colons and semicolons can be counted as separate sentences and should be used liberally to simplify complex provisions. To shorten

lengthy sentences, keep revising the text to:

- b eliminate clutter by removing unnecessary words as discussed in this article;
- b break long, compound sentences into separate sentences;
- b set off lists of items, qualifications, or conditions with bullet points, paragraphs, or subparagraphs; and
- b use more transitional words like “if . . . then” and “but.”

CONCLUDING COMMENTS

Most legal drafting scholars advocate the use of the basic drafting techniques included in this article, yet few transactional attorneys have incorporated these techniques into day-to-day drafting projects. Many scholars interpret this as an indication that transactional attorneys dispute the advisability of simplifying contract language.⁵⁸ In fact, a minority of attorneys still believe that documents should “sound legal” to impress clients and judges, despite the results of studies to the contrary.⁵⁹ It is probably more likely that most transactional lawyers fail to incorporate these techniques simply because they are unaware of them. For those who have read this article, ignorance is no longer an excuse! Lawyers who master these techniques may find themselves more frustrated by language that violates principles of good legal drafting. Even so, these techniques should first be incorporated into documents we control before we undertake to submit them as edits to documents prepared by opposing counsel. Not all attorneys follow these techniques (though, of course, they should), and they will

not take kindly to our making all of these plain English edits in a document they have created. 



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3. United States v. Seckinger, 397 U.S. 203 (1970).
4. GARNER, *supra* note 2, at 3.
5. Maurice B. Kirk, *Legal Drafting: Curing Unexpressive Language*, 3 TEX. TECH L. REV. 23, 52 (1971).
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7. GARNER, *supra* note 2, at 3.
8. Exec. Order No. 12044, 43 Fed. Reg. 12661 (1977), at Section 1(d)(5).
9. These include at least the following states: Arizona, Arkansas, Connecticut, Florida, Hawaii, Indiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin, which are all cited in CHILD, *supra* note 1, at 68-69.
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23. Haggard, *supra* note 23, at 169-71.
24. CHILD, *supra* note 1, at 173; DICKERSON, *supra* note 21, at 128-29.
25. See, e.g., *Obsen v. Grosshans*, 71 N.W. 2d 90, 97 (Neb. 1955) (provided means "and" or "but"); *Burgwyn v. Whitfield*, 81 N.C. 261, 263 (1879) (provided means "unless"); and *Millard v. McFadden*, 57 N.Y.S. 2d 594, 596 (1945) (provided is a limitation or exception).
26. Irving Younger, *Symptoms of Bad Writing*, 8 SCRIBES J. LEGAL WRITING 121 (2001-02).
27. *Id.* at 122; GARNER, *supra* note 2, at 40.
28. OATES, ET AL., *supra* note 19, at 687.
29. DICKERSON, *supra* note 21, at 217; GARNER, *supra* note 2, at 39.
30. OATES, ET AL., *supra* note 19, at 700.
31. *Id.* at 704; DICKERSON, *supra* note 21, at 217.
32. OATES, ET AL., *supra* note 19, at 701.
33. *Id.* at 635; DICKERSON, *supra* note 21, at 213-216; CHILD, *supra* note 1, at 49-52.
34. CHILD, *supra* note 1, at 49-52; DICKERSON, *supra* note 21, at 213-216; CHARROW & ERHARDT, *supra* note 19, at 116-17.
35. GARNER, *supra* note 2, at 13-14; DICKERSON, *supra* note 21, at 213-16.
36. CHILD, *supra* note 1, at 51;
- DICKERSON, *supra* note 21, at 214.
37. GARNER, *supra* note 2, at 15; CHARROW & ERHARDT, *supra* note 19, at 116.
38. CHARROW & ERHARDT, *supra* note 19, at 116-17.
39. Mark Mathewson, *Law Students, Beware*, 8 SCRIBES J. LEGAL WRITING 142 (2001-02); CHILD, *supra* note 1, at 55; CHARROW & ERHARDT, *supra* note 19, at 109; OATES, ET AL., *supra* note 19, at 642.
40. CHILD, *supra* note 1, at 152.
41. *Id.* at 51; CHARROW & ERHARDT, *supra* note 19, at 109; OATES, ET AL., *supra* note 19, at 684-85.
42. CHARROW & ERHARDT, *supra* note 19, at 127-28; OATES, ET AL., *supra* note 19, at 689.
43. CHARROW & ERHARDT, *supra* note 19, at 127-28.
44. OATES, ET AL., *supra* note 19, at 690.
45. *Id.*
46. For more exhaustive lists of common doublets and triplets, see GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 163 (2002); DICKERSON, *supra* note 21, at 207-08; CHARROW & ERHARDT, *supra* note 19, at 128.
47. DICKERSON, *supra* note 21, at 151.
48. *Id.* at 148.
49. *Id.* at 147; Thomas Haggard, *Definitions*, 8 SCRIBES J. LEGAL WRITING 165 (2001-02).
50. DICKERSON, *supra* note 21, at 147; Haggard, *supra* note 50, at 165.
51. DICKERSON, *supra* note 21, at 147; CHILD, *supra* note 1, at 240.
52. Note that use of a defined term would be entirely appropriate if "Congor" is intended to include successors, assigns, subsidiaries, or affiliates of Congor Corporation, but the definition must so state.
53. CHILD, *supra* note 1, at 240.
54. DICKERSON, *supra* note 21, at 151.
55. GARNER, *supra* note 2, at 85-86; CHILD, *supra* note 1, at 234-35.
56. CHARROW & ERHARDT, *supra* note 19, at 95; OATES, ET AL., *supra* note 19, at 604.
57. OATES, ET AL., *supra* note 19, at 645.
58. Reed Dickerson, *Clear Legal Drafting: What's Holding Us Back?*, 2 ALI-ABA CLE REV., No. 16 at 3 (1980).
59. OATES, ET AL., *supra* note 19, at 700.

United States Supreme Court Justice Anthony Kennedy Headlines Bar Center Dedication Ceremony

By C. Tyler Jones

United States Supreme Court Justice Anthony M. Kennedy delivered an inspiring keynote address during the State Bar of Georgia's Jan. 15 Bar Center Dedication Ceremony. More than 400 State Bar members and their guests were on hand to witness one of the most significant events in the Bar's 122-year history.

Kennedy told attendees, "It's a very special pleasure to see a State Bar deciding to put its headquarters in the middle of a city to reflect the law's centrality." He encouraged Bar leaders to use the Bar Center to "invite young people to come inside the law" to help them realize that "democracy is not transmitted through genes. Law must live in the consciousness of people." Kennedy added, "We try to bring order to a disorderly reality. And kids don't understand that... we must explain to our young people that this nation was built by great people who took serious risks."

Kennedy reminded Bar members that the first duty of a lawyer is to counsel honesty, decency and ethical principles to all clients. He went on to commend lawyers for their willingness to face problems head on. Instead of running away from problems, Kennedy said that lawyers "enter the chaos in order to bring order... into an imperfect world."

Among the other speakers were: Chief Justice of the Supreme Court of Georgia Norman Fletcher; City of Atlanta Mayor Shirley Franklin; Dr. George B. Wirth, Pastor, First Presbyterian Church of Atlanta; Harold D.



Photos by C. Tyler Jones

U.S. Supreme Court Justice Anthony M. Kennedy delivers the keynote address during the State Bar of Georgia's Jan. 15 Bar Center Dedication Ceremony.

Melton, Executive Counsel to Gov. Sonny Perdue; State Bar of Georgia President Rob Reinhardt and Bar Center Committee Co-chairs and Past Presidents Frank C. Jones and Harold T. Daniel Jr.

Jones and Daniel reflected on how the concept of a Bar Center was only a dream 10 years earlier, but through persistence and hard work, the dream became a reality. Daniel explained how he and Cliff Brashier approached Jones about heading up the ambitious Bar



The Bar presidents who took the Bar Center from conception to reality are: (left to right) Rob Reinhardt, William D. Barwick, James B. Durham, James B. Franklin, George E. Mundy, Rudolph N. Patterson, Linda A. Klein, Ben F. Easterlin IV, Robert W. Chasteen Jr., Harold T. Daniel Jr. Not pictured is 1998-99 Bar President William E. Cannon Jr.

Center project. As a courtesy, Daniel picked up the tab for the group's lunch. When Jones approached the podium to speak, he told attendees that after 10 years working on the project, this reinforces the saying about "there being no such thing as a free lunch."

One of the highlights of the meeting was when Chief Justice Fletcher presented Reinhardt with a resolution honoring the Bar leadership's vision of creating a Bar Center.

State Bar Executive Director Cliff Brashier explained that the State Bar of Georgia has come a long way since a small group of Georgia lawyers met on an August day in 1883 and took the first steps toward creating the Georgia Bar Association.

There were fewer than 1,500 lawyers in the state when the voluntary Georgia Bar Association was created. By March 11, 1963, when Gov. Carl Sanders signed the

Unified Bar Bill, which led to the creation of the State Bar of Georgia, there were more than 5,000 attorneys in Georgia. Since its founding, the State Bar of Georgia has grown to more than 35,000 members.

Today, the State Bar of Georgia is the seventh largest unified bar association in the country, with arguably the best Bar Center. Brashier contends that "no other bar building in the United States

has the facilities to provide anything comparable when it comes to public law-related educational opportunities and professional conferences."

The State Bar of Georgia headquarters was located in Macon until 1973, when it moved to Atlanta. Prior to purchasing the Bar Center, the State Bar of Georgia leased space in three different buildings in Atlanta: The Fulton National Bank Building, The


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Flatiron Building and The Hurt Building.

The State Bar of Georgia occupies the first and third floors, with the other floors (2, 4, 5 and 6) available for lease. Current tenants of the Bar Center include: the Prosecuting Attorneys' Council of Georgia, the Georgia Public Defender Standards Council, Georgia Legal Services, the Georgia Bar Foundation, the Lawyers Foundation of Georgia, the Chief Justice's Commission on Professionalism and the Georgia Association of Black Women Attorneys. 



Members of the Supreme Court of Georgia: (left to right) Justice Robert Benham, Justice Hugh P. Thompson, Justice George H. Carley, Justice P. Harris Hines, Justice Carol W. Hunstein and Presiding Justice Leah Ward Sears attend the ceremony.



Frank Jones, U.S. Supreme Court Justice Anthony M. Kennedy, Hal Daniel, Mayor Shirley Franklin and Harold Melton sing along to *America*.



More than 400 attorneys and their guests participate in the dedication ceremony.



Twenty-two of the Bar's past presidents who attended the dedication pose for a picture in the Courtroom.

(Left) President-elect Robert Ingram talks to Justice Kennedy following the ceremony.



State Bar President Rob Reinhardt watches as Supreme Court of Georgia Chief Justice Norman S. Fletcher reads a resolution signed by himself and the other justices.

The Supreme Court of the State of Georgia

Whereas: the State Bar of Georgia was created by the Supreme Court of Georgia in 1963 to foster among its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of law; and

Whereas: in 1995 the leadership of the State Bar recognized the need for an adequate facility to enhance the fulfillment of those important purposes; and

Whereas: the officers, members of the Board of Governors, committee members, and staff of the State Bar have enthusiastically donated their time and expertise to meet that need; and

Whereas: every Georgia lawyer has contributed financially to this important project; and

Whereas: like many other laudatory human endeavors, this has been far from easy to accomplish and required a full decade of effort; and

Whereas: today the State Bar Center is visible proof that the goal has been accomplished beyond anyone's original hope,

Now therefore be it resolved that the Justices of the Supreme Court are pleased:

To congratulate the State Bar of Georgia for its vision and commitment to acquire this facility that will serve the lawyers of Georgia, and the public whose rights they protect, for many generations to come; and

To formally dedicate the State Bar Center so that it may enhance the administration of justice in the highest traditions of the legal profession. Ordered this 15th day of January, 2005.



Frank Jones shares the story of the 10-year Bar Center odyssey with attendees.

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Georgia Attorneys Help Make Adoption Dreams Come True

By C. Tyler Jones

For many of us, our fondest memories revolve around time spent with family—birthdays, holidays and vacations. Unfortunately, tens of thousands of foster care children awaiting adoption in the United States do not always celebrate these special occasions, at least not with families they can call their own. On Nov. 20, 2004, thanks to the efforts of judges, attorneys and child advocates in Georgia and around the country, more than 3,000 children found permanent homes through National Adoption Day.

Like in other communities, Chief Presiding Judge Sanford Jones of the Fulton County Juvenile Court finalized more than 60 adoptions that day. Among the people responsible for these successful Georgia adoptions are Bar members Ina Johnson Cook and Saunders P. “Sandy” Jones IV.



Cook, who has been involved with National Adoption Day for the past two years, explains that although the special day is celebrated all over the United States, Fulton County is the only county in Georgia whose participation she is aware of. She believes National Adoption Day is impor-

tant because it honors adoptive families and the selfless nature of parents who choose to adopt. According to Cook, most adoption cases are heard in the privacy of a judge’s chambers, and children are not usually aware of what is happening. “With National Adoption Day there are

balloons, clowns, magic shows and cake—reinforcing what an important day it is for them.”

Jones, who has been involved since 2002, said National Adoption Day gives him a chance to experience “the other side” of his normal practice in juvenile court. In his everyday practice, Jones usually represents parents whose children are taken by DFCS (Department of Family and Children Services). For Jones, part of the satisfaction of participating in National Adoption Day is that “the adoption process brings closure—happy endings to some of the tragedies seen in juvenile court.”

It also allows Jones to see “the best that people can be.” He said, “I have been the attorney for a particular DeKalb family who adopts extremely special needs kids—children who cannot walk, are blind and deaf, with feeding tubes, etc. Being with them, in their home, and seeing the care the children receive, has had a strong impact on me—reinforcing my faith in the good that can be found in people’s hearts.”

National Adoption Day hits especially close to home for Cook, who is a foster mother waiting to adopt a child of her own. Cook said that “seeing the look of relief on the adoptive family members’ faces when they know they have finality is amazing. There is a lot of fear and uncertainty for adoptive parents. They love their children, but until the adoption is finalized they always think someone can take their child away. Many of them cry when they know that the cause for worry is over.”

According to Cook, many of her clients become family friends, setting up play dates and dinners. Because of National Adoption Day, Cook said she has met countless individuals who have positively impacted her life. She said, “I am able to serve and get to know some of the most selfless and pure-hearted people in the world—people who adopt children that many other people would not. That encourages me.” Because of the positive experiences she has had with Adoption Day, Cook said it is her hope that other Georgia counties will participate in the future, to help match deserving children with deserving families.

The goals of National Adoption Day are to:

- b Finalize adoptions from foster care coast-to-coast
- b Celebrate and honor all families who adopt
- b Raise awareness about the 129,000 children in foster care waiting for adoption
- b Encourage others to adopt children from foster care

Debunking The Myths: The Facts About Foster Care Adoption

Information courtesy of National Adoption Day Web site.

MYTH:

All foster care children have some kind of physical, mental or emotional handicap; that’s why they are classified as “special needs.”

FACT:

The term “special needs” is somewhat misleading, because it can mean that the child is older, a minority, or requires placement with his/her siblings. While some children are dealing with physical or emotional concerns, just like other children, they need the nurturing and support that a permanent family can provide. Many foster children are in the “system” because their birth parents weren’t protective and nurturing caretakers—not because the children did anything wrong.

MYTH:

There’s too much red tape and bureaucracy involved in adopting a child from foster care.

FACT:

Congress has streamlined the foster care adoption process through enactment of the Adoption and Safe Families Act of 1997. This law ensures that children in foster care, who cannot be reunited with their birth parents, are freed for adoption and placed with permanent families as quickly as possible.

MYTH:

There are not enough loving families available who want to adopt a foster child.

FACT:

Many prospective adoptive parents may initially want to adopt an infant, often because they are unaware that there are older children who also need families. When they learn about an older child available for adoption, they often “fall in love” and realize the enormous impact they can have on that child’s life. Older children can share their feelings about joining a new family, helping to make the adoption and transition process successful.

Four in 10 American adults have considered adoption, according to a National Adoption Attitudes Survey funded by the Dave Thomas Foundation for Adoption. That translates into 81.5 million Americans. If only one out of 500 Americans adopted out of the foster care system, these children would have homes.

continued on page 30


- b Build collaboration among local adoption agencies, courts and advocacy organizations

- b Communicate availability and need for post-adoptive services

National Adoption Day events are sponsored by a coalition dedicated to improving the lives of children, including The Alliance for Children's Rights, Casey Family Services, Children's Action Network, The Congressional Coalition on Adoption Institute, Dave Thomas Foundation for

Adoption, Freddie Mac Foundation and Target Corporation. In Georgia, The Fulton County Juvenile Court, in collaboration with the Georgia Department of Human Resources, Division of Family and Children Services, Fulton County DFCS, and CASA, helped make National Adoption Day in Georgia a reality.

According to the National Adoption Day Web site, there are approximately 532,000 foster care children in the United States, and

129,000 of them are available for adoption. Since 1987, the number of children in foster care has nearly doubled, and the average time a child remains in foster care has lengthened to nearly three years. Each year, approximately 20,000 children in foster care will age out of the system without ever being placed with a permanent family. 

C. Tyler Jones is the director of communications for the State Bar of Georgia.

MYTH:

Adoptive parents must be a 2004 version of Ozzie and Harriet.

FACT:

Prospective adoptive parents do not have to be rich, married, own a home, or be of a certain race or age to become an adoptive parent. (One-third of adoptions from foster care are by single parents.)

Patience, a good sense of humor, a love of children, and the commitment to be a good parent are the most important characteristics.

MYTH:

Adopting a child from foster care is expensive.

FACT:

Many prospective parents do not know that adopting children from foster care is virtually free, while private or international adoptions can cost anywhere from \$4,000 to \$30,000 or more. A growing number of companies and government agencies offer adoption assistance as part of their employee benefit packages, including time off for maternity/paternity leave, financial incentives and other benefits. In addition, Congress has made federal tax credits available for foster care adoptions to help offset required fees, court costs, legal and travel expenses. In June 2001, the President signed a revised adoption tax credit, which took effect in January 2003, to increase the amount of the credit to \$10,000 for all adoptive families. Benefits such as these are enabling more families to adopt foster children into their homes. More information is available in the IRS Publication 968 "Tax Benefits for Adoption," which can be obtained by calling 1-800-829-3676 or visiting www.irs.ustreas.gov.

MYTH:

Families don't receive support after the adoption is finalized.

FACT:

Financial assistance does not end with the child's placement or adoption. The vast majority of children adopted from foster care are eligible for federal or state subsidies that help offset both short- and long-term costs associated with post-adoption adjustments. Such benefits (which vary by state) commonly include monthly cash subsidies, medical assistance and social services. More information about federal and state subsidy programs is available from the National Adoption Assistance Training, Resource, and Information Network helpline at 1-800-470-6665.

MYTH:

Children in foster care have too much "baggage."

FACT:

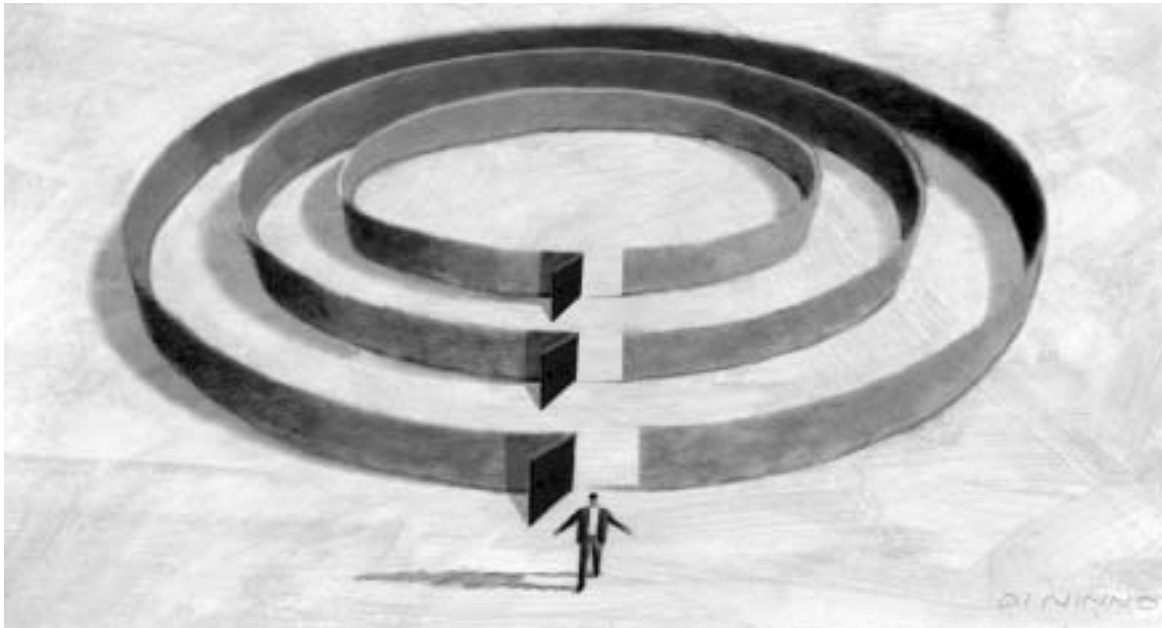
This is perhaps the biggest myth of all. Foster children—just like any children—have enormous potential to thrive given love, patience, and a stable environment. Just ask U.S. Senator Ben "Nighthorse" Campbell, Minnesota Viking Dante Culpepper, Washington, D.C. Mayor Anthony Williams, or Miss USA 2000 Lynette Cole. They were all once foster children who were adopted by caring adults.

MYTH:

It's too difficult to find information on how to adopt.

FACT:

There are resources available to help potential parents take the first step towards adopting out of foster care. For more information log on to www.nationaladoption-day.com, www.davethomasfoundation.org, www.adoptUSkids.org, or simply call 1-800-TO-ADOPT.



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Law School Debt Can Limit Options

Loan Repayment Assistance Is a Valuable Tool to Promote Public Interest Practice

By Eleanor Crosby

THE PROBLEM: RISING COST OF LAW SCHOOL EDUCATION

Tuition at our nation's law schools has risen dramatically over the last two decades, and so has the amount of debt shouldered by law school graduates. In fact, the problem of law school debt is of such concern that the American Bar Association issued a report on the situation last year.¹ The study, "Lifting the Burden: Law School Debt as a Barrier to Public Service," noted that in the 10-year period between 1992 and 2002 the cost of living rose 28 percent, while the cost of tuition in a public law school rose 134 percent for residents and 100 percent for non-residents.

During the same period, the cost of tuition in private law schools

rose 76 percent.² As a result, it is typical for a new lawyer entering the workforce to have loans in excess of \$80,000 and to have monthly debt obligations of \$1,000 a month or more—an amount equal to or greater than his or her housing costs.³

On the one hand, borrowing money for law school is a powerful investment in one's future. But it can be frightening to begin one's career with high debt obligations. A primary concern for many recent graduates is how to live within their means after graduation. This problem is shared by both younger graduates who may have undergraduate debt in addition to their law school loans, and older, non-traditional graduates who may have family and other responsibilities as well as law school debt.

A CONSEQUENCE: LAW SCHOOL DEBT RESTRICTS CAREER OPTIONS FOR NEW LAWYERS

Furthermore, debt loads carried by recent law school graduates limit options for employment, because students must find work

that enables them to make their monthly loan payments. Huge student debt has begun to force law graduates to base employment decisions purely on economics, rather than on their interest in a particular area of law or firm. Large monthly school loan payments limit the ability of students to work in the public sector in particular. Public interest salaries have never been high, and the 1970s salaries for law jobs in the public sector have not grown at the same rate as salaries in the private sector. Of course, public interest law positions have always paid significantly less than private sector jobs. However, over the last 30 years, this gap has widened. The median starting salary for public interest legal work was \$36,000 in 2002, while the corresponding figure in the private sector was \$90,000.⁴

This is also true in Georgia, where starting public interest salaries are typically under \$40,000 a year, well under half of what is paid by large private law firms. As a result, public interest and government employers such as legal aid, legal services and indigent defense programs often find it difficult to attract and retain high quality lawyers.

A FURTHER CONSEQUENCE: NEGATIVE IMPACT ON PUBLIC SAFETY AND WELFARE

An additional result is a negative impact on the courts and on the administration of justice. Former Gov. Roy Barnes noted that turnover in legal positions in our criminal justice system can make the public less safe, because this system relies upon well-trained and talented prosecutors and public defenders. Based on these concerns, in 2001 Barnes established the Georgia Legal Loan Forgiveness Task Force. The task force concluded that high law school debt prevents many service-minded law graduates from pursuing positions as prosecutors, defenders and with other public interest law firms and that a state funded program to mitigate the effects of school debt was needed to protect the public safety.

A WAY TO RESOLVE THE PROBLEM

One successful approach to mitigating the effect of large law school debt has been the creation of loan repayment assistance programs (LRAPs), under which a new lawyer is reimbursed for part of his or her monthly student loan payment. Current LRAPs are available in a few states, from a number of law schools and through some public interest employers.

In Georgia, the University of Georgia and Emory University

offer partial assistance to students with loan repayment through a law school-sponsored LRAP.

Unfortunately, both these programs are limited. According to Emory Career Services Director Carolyn Bregman, "While we are thrilled that we have been able to raise funds to provide some assistance to lower the debt burden for these graduates, our fundraising efforts remain a priority. Salaries



Adrienne Ashby, an attorney with the Atlanta Legal Aid Society's Senior Citizens Law Project.

for new graduates in some public interest positions, and in, for example, state court clerkships outside the metropolitan Atlanta area, can range from the low to mid-thirties. Educational debt burdens, without the benefit of loan repayment assistance, can prevent new graduates from taking positions for which they have gotten direct work and academic experience and for which they have a passion." Georgia Legal Services and Atlanta Legal Aid also offer limited loan repayment assistance to employees with law school debt, but this benefit is paid out of the general budgets of these already under-funded programs.

Without the current available assistance, many who have made contributions to public interest work would not be able to choose a career in the public sector. Adrienne Ashby, an attorney with the Atlanta Legal Aid Society's Senior Citizens Law Project, puts it this way. "In college, when I decided to attend law school, I knew that I wanted to use my intellectual gifts to represent people just like the people in my old neighborhood. I just needed to figure out how I could represent the people that I wanted to represent *and* pay for my law degree at the same time. Before coming to Atlanta Legal Aid, I was an associate at a pri-

I knew that I wanted to use my intellectual gifts to represent people just like the people in my old neighborhood. I just needed to figure out how I could represent the people that I wanted to represent and pay for my law degree at the same time.

vate law firm. When I decided to leave that position to pursue a career in public interest, I worried about not being able to afford to repay my law school loans. However, I learned that Atlanta Legal Aid had a loan forgiveness program that would help me pay back my loans. I then felt that I could pursue my public interest law career and remain in good standing on my loans."

Not everyone is so fortunate, however. Programs like those offered by Atlanta Legal Aid and Georgia Legal Services should be available to recent law graduates interested in all aspects of public service and should not be dependent on employer funding.


The Georgia Legal Loan Forgiveness Task Force determined that only \$3 million of state funding would have a dramatic effect on the ability of students to work in the public interest—hardly a great price to pay for such a significant problem.

Most who have studied the issue agree that a state LRAP which reimburses payments made by new lawyers on their student loans is the most comprehensive, promising and effective way to allow law students to choose public interest jobs despite high student debt.⁵

ADDITIONAL ACTION NEEDED

The Georgia Legal Loan Forgiveness Task Force appointed by Gov. Barnes ultimately recommended that Georgia create such a state funded loan repayment assistance program for students who wish to become prosecutors, defenders or legal aid lawyers. While the program has been created,⁶ it has not been funded. The task force determined that only \$3 million of state funding would have a dramatic effect on the ability of students to work in the public interest—hardly a great price to pay for such a significant problem. The Bar supports funding for this effort.

The Governor's Task Force Report concludes: "Loan Repayment Assistance Programs and scholarship programs are perhaps the most important means to address educational debt burdens faced by law school graduates wanting to do public interest work."⁷ In fact, this conclusion

echoes that of the ABA Commission, which determined that state and federal government, bar associations, employers and law schools must do more to help new lawyers manage debt. There are numerous reasons to support a state program, and realizing access to justice is one of the most important. As the ABA report puts it, "The legal profession cannot honor its commitment to the principle of access to justice if significant numbers of law graduates are precluded from pursuing or remaining in public service jobs."⁸ A fully funded and operational LRAP in Georgia would strengthen our legal system and therefore benefit all Georgians. 



Eleanor Crosby is a private attorney and mediator in Athens, Ga. She has spent most of her legal career working in the

public interest sector, including positions as a staff attorney at the Georgia Legal Services Program and as a managing attorney for the Atlanta Legal Aid Society. She earned a J.D. from Emory University School of Law in 1986, an M.A. from the University of Georgia in 1983, and a B.A. from Vassar College in 1980.

Endnotes

1. AMERICAN BAR ASSOCIATION COMMISSION ON LOAN REPAYMENT AND FORGIVENESS, *LIFTING THE BUR-*

DEN: LAW SCHOOL DEBT AS A BARRIER TO PUBLIC SERVICE (2003).

2. *See id.* at 10.
3. *See id.* at 9.
4. *See id.* at 10.
5. *See* ABA Task Force Final Report, *and* GEORGIA LEGAL LOAN FORGIVENESS TASK FORCE FINAL REPORT, 2003. *See also* NATIONAL ASSOCIATION FOR PUBLIC INTEREST LAW, 2000 *Report on Law School Loan Repayment Assistance and Public Interest Scholarship Programs*.
6. *See* O.C.G.A. 20-3-387 et. seq.
7. *Supra* note, at 5.
8. *See* ABA Task Force Final Report at page 9.

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What Can We Do About Domestic Violence in the Workplace?

Lawyers' Leadership is the Answer!

By Georgia Attorney General Thurbert Baker and Linda T. Muir

Domestic violence in the workplace is taking an increasing toll on both employees and employers. Millions of employees each year are the victims of domestic violence crimes, including harassment, threats, assault, battery, rape, sexual assault, stalking and murder, in which either the crime or its resulting fallout spills over into the workplace. In addition to the price victimized employees pay, employers also incur tremendous direct and indirect costs as a result.

Domestic violence in the work environment continues virtually unabated despite broad public concern, increasing attention on the devastation it wreaks, and pleas from community groups for businesses to respond to the urgency of the situation. Repeatedly, government and

private studies, focus groups and articles tell us the same story. Cross-functional teams come together to analyze the basics of the problem and to offer creative solutions—guidelines, model programs, policies and procedures—that companies can and should adopt. These proposed solutions routinely focus on reducing the occurrence of domestic violence in the workplace, as well as reducing the resultant damage to intended and incidental victims when it does occur. While there is a general acknowledgement of the serious nature of the problem of domestic violence in the workplace, and a realization that proposed solutions properly implemented can work to the advantage of employers and employees alike, businesses by and large continue to operate without any strategy in place for addressing the problem or for implementing the potential solutions.

This article summarizes the consensus on the frequency and costs



of domestic violence in the workplace and the solutions generally recommended to combat it, but it goes beyond the facts, figures and recommendations to suggest a new approach. The key ingredient missing from the prescribed solutions and recommendations is the *LEADERSHIP* that is necessary to implement them. In our view, lawyers are in a unique position to

provide that leadership. From a professional as well as a practical standpoint, our profession is perfectly situated to advise both corporate and small business clients about how best to counter domestic violence in the workplace. The Georgia Corporate Domestic Violence Initiative, to be launched in February 2005 by the Office of the Georgia Attorney General, can provide lawyers the opportunity to address this issue with their clients and to help them avoid not only future human trauma and tragedy, but potential corporate costs and liability as well.

WHAT IS "DOMESTIC VIOLENCE IN THE WORKPLACE"?

For our purposes, domestic violence is "violent behavior that is controlling, coercive, and/or abusive, including physical, sexual, psychological, and economic abuse; it is committed by one individual against another in a domestic/intimate relationship."¹ Domestic violence does not always stay at home. When it spills into the workplace, the violent behavior and its effects become "domestic violence in the workplace."

The American Institute on Domestic Violence reports often-cited statistics confirming the epidemic proportions of domestic violence in the workplace.² Although both men and women are victims of domestic violence, 90 percent of the victims are women, and 75 percent of them face some sort of harassment from intimate partners while at work. Domestic violence is the leading cause of injury to women; between 3 and 4 million

are battered each year. Homicide is the leading cause of death to women in the workplace.

Symptoms of abuse include absenteeism, tardiness, leaving work early, impaired work performance, anxiety and low self-esteem. While 1 out of every 3 women will be affected by domestic violence at some point in her life, at any given time approximately 10 percent of the employees in a workplace will be dealing with domestic violence.³ Victims use the emergency room more often, visit physicians more often, and use more prescription drugs than persons without violence.⁴

DOMESTIC VIOLENCE IN THE WORKPLACE IMPOSES COSTS AND LIABILITY ON EMPLOYERS

Domestic violence in the United States costs billions of dollars every year. Employers absorb a significant part of those costs as a result of domestic violence in the workplace. Employers' health insurance premiums reflect that a domestic violence victim incurs, on average, \$1,775 more in annual medical costs than a non-victim.⁵ It is widely reported that employers lose between \$3 and \$5 billion every year in lower productivity, higher turnover and health and safety costs associated with battered workers, and they incur another \$100 million in lost wages, sick leave and absenteeism.

Beyond these costs, employers may have contingent or actual liability as a result of domestic violence in the workplace. Domestic

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violence in the workplace manifests itself as criminal behavior that also creates civil liability. Occupational safety laws impose a duty to maintain a safe workplace.⁶ The "General Duty Clause" of the Occupational Safety and Health Act requires employers to have a workplace that is "free from recognized hazards."⁷ Failure to protect a victim of domestic violence in the workplace could cause the employer to be found liable for the victim's injuries or death, especially if the employer was aware of the circumstances of abuse and threats of violence. Adding safety and security precautions may be necessary to provide protection. An employer who knowingly or negligently hires or retains an employee who is a perpetrator of domestic violence may be liable for negligence in the hiring or retaining of that employee; that risk is magnified if the employer also employs the victim of the perpetrator. Employees injured as innocent bystanders in a workplace domestic violence incident may have a gross negligence claim against their employer, if it can be shown that the employer failed to remove a perpetrator from the workplace even though the employer knew or should have known that the perpetrator-employee posed a threat of violence. These cases can result in liability stretching well over seven figures.⁸

In addition to being exposed to the actual and contingent liability associated with domestic violence in the workplace, employers also have an obligation to treat employees fairly and not to discriminate against an employee who is the victim of domestic violence in the workplace.⁹ Employers may have obligations under the Americans With Disabilities Act and the Family and

Medical Leave Act or similar state laws that protect employees from discrimination for illness or injuries incurred as a result of a workplace domestic violence event.¹⁰

EMPLOYERS ARE AWARE THAT DOMESTIC VIOLENCE IN THE WORKPLACE IS A BUSINESS ISSUE, BUT FEW TAKE ACTION TO ADDRESS IT

Surveys of corporate executives in Fortune 100 companies indicate a significant awareness of the incidence of and costs associated with domestic violence in the workplace:

- b 66 percent of senior executives agreed that their company's financial performance would benefit from addressing the issue;
- b 94 percent of corporate security directors rank domestic violence as a high security risk;
- b 78 percent of human resource directors identify domestic violence as a substantial employee problem;
- b 49 percent of senior executives said that domestic violence has a harmful effect on their company's productivity;
- b 47 percent acknowledge that employee attendance is affected; and
- b 40 percent of corporate leaders are personally aware of specific employees who are affected by domestic violence.¹¹

Yet, according to a Liz Claiborne, Inc., study that was released at a major national conference on domestic violence aware-

ness in 2002, although 91 percent of corporate leaders believe that domestic violence affects both the private and working lives of their employees, only 12 percent feel that businesses have a responsibility to address the crime and its impact on the workplace.¹²

Both a coalition of corporations and certain states have promulgated model policies and programs to address domestic violence in the workplace.¹³ Model programs, policies and procedures designed by experts and practitioners in the field have been widely disseminated to enable employers to protect employees and themselves from domestic violence in the workplace.¹⁴ Nevertheless, most employers do not avail themselves of these resources and do not follow the recommendations for solving the problems.

It is difficult to imagine that a senior executive would be aware of the problems but not be supportive of a solution that would better protect employees, reduce costs to the company, and limit risk of loss and liability. Four focus groups conducted in Atlanta on Oct. 18, 2001, explored this issue to determine how to engage employers in prevention.¹⁵ Altogether, 25 health benefit managers representing employers from a range of regions, industries, and sizes discussed domestic violence in the workplace. The results of the focus groups shed some light on the views of employers regarding their role in domestic violence prevention. Although general workplace safety was important to the participants, most of the companies participating in the discussions did not have a specific and defined domestic violence in the workplace prevention policy.

These groups revealed that, while a better understanding of possible solutions and the costs to implement them might be helpful, the employers viewed domestic violence primarily as a personal and private issue in which the employer should not be involved. Participants stated that it is not socially acceptable to discuss domestic violence openly in the workplace. Most important, the participants said that the ultimate role of employers depends largely on senior management. Although the focus groups are not scientifically conclusive, they are consistent with the observation of many of the commentators, who note that the critical first step is having senior management's support, as well as awareness, of the need to develop an action plan for domestic violence in the workplace.¹⁶ If senior management doesn't "get it," then it is difficult for anyone else in the company to take the lead.

CORPORATE AND BUSINESS LAWYERS CAN AND SHOULD PROVIDE THE LEADERSHIP THAT IS MISSING

Reports abound on the significance of domestic violence in the workplace issues and problems, and they routinely conclude with a multiplicity of recommendations and solutions that companies should adopt to address and solve the problems. Some of these are: adopting policies and procedures; instituting training; involving community agencies; complying with local, state and federal laws; and improving safety and security measures. It is typical for the reports and recommendations to

acknowledge that the solution will require a team effort within a company, involving: human resources, the director of the employee assistance program, inside and outside security personnel, the safety coordinator, the training coordinator, legal, and anyone else who will be involved in developing and implementing the program.¹⁷

These reports are directed to "the employer" as the consumer of the report and the entity to devise and implement a response to domestic violence in the workplace. Of course, "the employer," considered generically, is actually many people across many departments. In speaking generically, these reports do not speak to anyone in particular. If the problems belong to all of the members of the multifaceted team, no member of the team owns the problem with a mandate to implement the solution. It is easy to imagine that

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everyone on the team expects to follow someone else's lead, especially with a problem that no one wants to talk about in the first place. Two key ingredients appear to be missing from the otherwise valid recommendations contained in these definitive reports. First, a clear statement that the informed and committed buy-in at the most senior level of management is the critical, necessary first step toward solving domestic violence in the workplace. Second, that getting that buy-in and mounting the "team effort" to achieve a solution will require dedicated leadership imbued with the authority of senior management.

Often domestic violence in the workplace is seen as a human resources issue since employees are involved. Security and risk management may be seen as the appropriate repository of this "hot potato" issue. Contrary to conventional wisdom, we submit that the best and most appropriate player on the cross-functional team, both to precipitate the buy-in of senior management and to lead the team in developing and implementing a preventive program, is the company's corporate or business lawyer. As a general matter, unlike some of the other leaders in the company, the company's lawyers have a professional responsibility to proactively advise the client on all sorts of matters that could result in adverse consequences for the company, including domestic violence in the workplace (among many others). The lawyer's duty includes keeping the senior management of the corporate client informed regarding the vagaries of compliance with legal requirements, the existence of real and

potential liability, and the continuum of risks and costs associated with the adverse consequences that could flow from failure to take precautions or to be in compliance. Providing this sort of advice and counsel and following up with appropriate action has always been the way that business lawyers have contributed to the corporate client's bottom line.


As a result, the company's lawyers are in the best position to educate senior management about the real costs of domestic violence in the workplace and to help them understand the full implications it poses for the company, just as they would about any other real or potential harm to the company. Lawyers are the ones who can demonstrate that the costs and liabilities associated with domestic violence in the workplace will persist if the company does nothing in the face of the realities and, on the other hand, also demonstrate the relative benefits of implementing well-conceived policies and programs designed to address the problems affecting the company. It is consistent with the role of the company's lawyer to advise the client and to lead it to the right conclusions, regarding what is in its best interest and what will promote its security and welfare. Lawyers have always been the leaders in this country to address and shape changes needed for the betterment of society. In this proud tradition, lawyers can and should lead the senior management of their corporate and business clients to be more enlightened regarding domestic violence in the workplace and to reap the benefits of being the champion of constructive change within their companies.

Beyond their professional responsibility, lawyers have a practical opportunity to be the agents of change. In most companies, all roads lead to the legal department or to outside counsel. Lawyers routinely work with a cross-section of employees throughout the company, particularly in the various functional departments that need to be represented on the domestic violence in the workplace team or task force. With the clear direction of senior management to proceed, the lawyer will be able to provide leadership to the effort. Consequently, once the missing ingredients of senior management buy-in and team leadership are in place, committed employers should be able, at last, to respond in greater numbers to the urgency of domestic violence in the workplace and to take advantage of the many helpful recommendations and solutions available to them.

ATTORNEY GENERAL'S INITIATIVE WILL BE A CATALYST FOR LAWYERS TO FILL THE LEADERSHIP GAP

In February 2005, in association with a consortium of agencies and non-profit resources who provide domestic violence services to the community,¹⁸ Attorney General Thurbert Baker will launch the Georgia Corporate Domestic Violence Initiative. With funds and support provided by Cox Enterprises, Inc., educational DVDs will be sent to the

presidents and CEOs of over 400 companies located throughout Georgia. In letters individually addressed to each corporate leader, Attorney General Baker will emphasize the urgency of the problems associated with domestic violence in the workplace and challenge each business to help eradicate this societal problem. Through this initiative, corporate leaders across the state will have valuable information about the problems of and the solutions for domestic violence in the workplace. This information will arrive complete with the listings of the service providers in their respective areas with whom they can partner to assist their employees. Of course, whether or not they adopt a preventive program will be up to the company leaders to decide.

The Georgia Corporate DV Initiative will open the door for corporate and business lawyers across the state to assume a leadership role in taking the initiative forward with their clients. As we have seen with so many other worthy efforts to combat domestic violence in the workplace, on-the-ground leadership will be required for the initiative to succeed. The leadership of Georgia's lawyers can make all the difference. 



Thurbert E. Baker has served as Georgia's attorney general since June 1, 1997. As attorney general, Baker was a lead sponsor of the groundbreaking legislation that made it a crime in Georgia to commit an act of domestic violence in front of a child. He has served as co-chair of the Violence Against Women Committee for the

National Association of Attorneys General and as an advisor to the Harrell Center for the study of domestic violence at the University of South Florida. Attorney General Baker is an Emory School of Law graduate (J.D., 1979).



Linda T. Muir, a corporate and business attorney for over 20 years, has served large corporate clients in her practice with major law firms and corporations. Since founding The Muir Law Firm LLC in Atlanta in 2001, she has served small and mid-sized companies. A leader and advocate for women, Muir has served as the facilitator of the Ad Hoc Committee for the Georgia Corporate Domestic Violence Initiative. Muir is an Emory School of Law graduate (J.D., 1982).

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Legal Humor Contest

Sharing the Wit and Wisdom of the Bar

By George E. Butler II

On an otherwise glorious morning, do you sometimes find yourself muttering to the mirror in unconscious paraphrase of Shakespeare: “How weary, stale, flat, and unprofitable seem to me all the uses of the law?”¹

What’s the matter? Is the practice just not as much fun as it used to be or as you’d like it to be? If so, maybe you are just out of practice. Seriously, cultivating a sense of humor or ironic detachment from the stresses of our workaday world takes practice. The Bard understood this: “Assume a virtue, if you have it not,” he admonished.² The old voluntary Georgia Bar Association understood this. The highlight of its annual meetings from 1884 to 1920 was a humorous address by one of its more distinguished members, who was also known as a gifted raconteur. The honoree was asked to try to distill the humor out of a lifelong career that might otherwise appear too dry to the layman for distillation.

Often, these well-attended addresses amounted to essays in

support of the proposition that humor constitutes the one “indispensable survival tool” in the law trade. Collected and bound together into the annual Georgia Bar Association Reports, these speeches helped the lawyers of that time bond with one another “through a shared literary canon of ‘war stories’”³—and encouraged them to “pursue the Muse [themselves] by crafting and exchanging amusing stories of their own.”⁴

If the Law has a depressing historical tendency to produce earnest and staid professionals who saw-saw between feelings of self-importance (or stressful exhilaration) and personal inadequacy (or tedious drudgery), the antidote offered up by the old Bar was cultivating a sense of humor and developing, in the process, the philosophical bent of mind to view the Law—as Oscar Wilde did life—as a thing “too important to be taken seriously.”⁵

Today, changing demographics have helped exacerbate a perceived crisis in professionalism.

The numerical majority of most bars are young people who do not have lawyers for parents or role models and who were turned loose on a lawscape already dominated by larger firms, onerous law school debt, extreme specialization, high billable-hour expectations, etc.

Meanwhile, law schools have largely abdicated responsibility for serving *in loco parentis* and increasingly serve as glorified hiring halls for the bigger firms. Arguably, no one is providing the cultural glue necessary to hold the profession together. Anecdotes and shared personal memories are what typically hold such groups together, despite our own self-deprecating tendency to dismiss them as “war stories.”

Anecdotes, with their proper combination of humor, pathos, and wisdom, are an essential part of the identity, tradition, or cultural myth of any profession like the law; they are supposed to make us feel better about being lawyers, give us models to admire and emulate, and help us look beyond the bottom line and make personal sacrifice for the collective good.

To be sure, many bars are attempting to redress the current situation by sponsoring mentoring programs that provide young lawyers with personal role models, who by story and example can indoctrinate them with the enduring professional values. But given the undeniably more hectic pace of professional life today, a more efficient vehicle may be needed for retailing simultaneously to a wider audience what used to be called the

“wit and wisdom” of the bar.

That is why the Georgia Legal History Foundation (GLHF)⁶ is sponsoring the Legal Humor Contest described in the box on Page 51. Winning submissions will be publicized in the *Journal of Southern Legal History* and/or in the *Georgia Bar Journal*.

What type of humor is being sought? It could be a short humorous essay along the lines of that penned in 1916 by one annual speaker, who noted that a sense of humor helps gird a lawyer against the not infrequent, but ever exasperating, encounters with that “bovine, dew-lapped incumbent of the bench, who chews a cud, and after one carefully presents the results of hours of study, vaguely inquires in a far-off, detached voice, goat-like in its pathos, ‘What is the contention about?’”⁷

Be careful what you ask for! A fully engaged judge may not be a lawyer’s best friend. That point is made by an anecdote related by the 1915 annual speaker to the Georgia Bar Association. It seems that a mountain lawyer had his case removed to U. S. district court in Atlanta from the local superior court, where he was given considerable license to operate by the aforementioned passive “incumbents of the bench.” By contrast, the federal jurist gave the country lawyer all the attention that he could stand:

[The lawyer] pitched in, and was letting off on a high key, ranging and cavorting around close up in the face of the jurors, when his honor intervened as follows: Mr. _____, the Court is not deaf, nor do I believe the jury is. It is not necessary to talk so loud. Neither is it necessary for you



to hem the jury in; they will not get away. The bailiff is here and will not allow them to escape. Proceed with your argument.⁸

True anecdotes⁹ are the preferred form that a contest submission may take; and the preferred format for such anecdotes can be seen in the example taken from a previous issue of the *Journal of Southern Legal History* and contained in the box on Page 50.

So the GLHF is looking for humorous essays or anecdotes. But what sort of humor? Despite the examples just given, the point is not one-upmanship or trading licks between bench and bar. The real purpose is to puncture pretence wherever it exists and to humanize our entire legal enterprise. One

judge who used humor in that fashion was Logan Bleckley, who served as Chief Justice of the Georgia Supreme Court from 1887 until 1894.

“Often in his private conversation and in social intercourse,” as one historian has noted, “Judge Bleckley lauded the indulgence of wholesome fun in speech and conduct as among the best of virtues.”¹⁰ Not all southern judges have shared Bleckley’s philosophy, but it appears to reflect both a traditionally southern attitude and a key aspect of the same Anglo-American tradition that gave us the jury-centric common law.

In the sixteenth century, “humour” denoted an unbalanced mental condition or mood—or a vice or folly—and thus became the

Sample Anecdote

Writ in Water:

Anecdotes from the Practice

Raconteur Hamilton Lokey (1910-1996); lawyer; Atlanta

Dates of Occurrence: 1932-1934

Places of Occurrence: Atlanta and Decatur, Ga.

The Baboon

Allen Post told me in late 1932 about a damage suit he had just filed for Mrs. M. L. Smith against Asa C. Candler, Jr., the Coca-Cola magnate, in the City Court of Decatur (DeKalb County). Candler maintained a private zoo on his estate on Briarcliff Road in the Druid Hills section of Atlanta. One day a baboon escaped from the zoo and finally arrived at the premises of Mrs. Smith. When she came out to get in her car, she opened the door and found the car was already occupied by Candler's baboon. Mrs. Smith fled in terror, with the baboon in hot pursuit. As Mrs. Smith ran to the front door of her house, she tripped over the doorsill and fell, hurting her leg. Her greatest complaint, however, was the mental pain and suffering resulting from her encounter with Candler's wild animal. Candler claimed the animal was only a monkey, but monkey or baboon, the case got a lot of newspaper publicity.

Back in those days the courts of our state used common law pleadings, where the facts of a case had to be pleaded in full, and the pleadings were construed against the pleader, just the opposite of what we now have in Georgia under the Civil Practice Act. Allen Post, a top-flight trial lawyer, knew he had pleaded a case that would withstand a general demurrer, but his opponent, William Schley Howard, who represented Mr. Candler, duly filed a demurrer to

test Allen's pleadings. Allen obviously felt confident of his pleadings, for he offered to let me, a senior in law school, argue the demurrer issue before Judge Frank Guess, the judge of the City Court of Decatur, if Judge Guess agreed. Judge Guess did agree, and Mr. Howard made no objection, so I set to work to prepare for my maiden voyage on the sea of litigation.

The principle issue in the case was the status of the baboon. Clearly, he fit the classification of "animal *ferae naturae*," a wild animal as distinguished from a domesticated animal such as a dog, a horse, or a cow. My research took me back to the law of the Medes and Persians, then into early English law, laced with Latin phraseology. I even dabbled into the civil law of the Napoleonic Code. My memorandum of authorities was replete with citations from textbooks and from early United States Supreme Court cases. I even cited Georgia authorities predating the Georgia Supreme Court, which did not exist prior to 1846. All these authorities were traced down to present-day decisions to show the court an unbroken line of authorities making Mr. Candler liable for the actions of his "animal *ferae naturae*."

At the demurrer hearing Judge Guess patiently sat and let me trace the law from antiquity, through the Middle Ages, and on down to 1933. Then, as all the lawyers in the case knew would happen, Judge Guess overruled the general demurrer, complimenting me for my thorough preparation. As Allen got into his car to drive back to downtown Atlanta, I thanked him for letting me, a law school student, have such an exciting experience. I then crossed the street

at the corner where the old Candler Hotel stood and thumbed a ride back to Athens, the way all Georgia students made the trip in those days.

Smith v. Candler came on for trial in March of 1934. By that time I was practicing law with the firm of Harold Hirsch & Marion Smith, but I got permission to attend the trial in Decatur. The consensus of the bar was that the plaintiff would get a verdict, but a small one. They reckoned without the trial ability of Allen Post. I recall to this day Allen's cross-examination of Mr. Candler, where Allen skillfully forced from the defendant the "no win answer."

Mr. Howard, a great trial lawyer himself, had called Candler as his only witness for the defense and had him testify that he had developed the zoo because of his great love for wild animals and also to enrich the educational experience of the children in DeKalb County schools. On cross-examination Allen asked a number of gentle questions to put Mr. Candler at ease, then developed the theme that Mr. Candler had traveled extensively. Next he got Mr. Candler to acknowledge that he was a big-game hunter, having hunted wild animals on three different continents. Then Allen dropped the axe. After reminding Mr. Candler of his direct testimony that he had a great love for wild animals, Allen posed this question: "Mr. Candler, would you tell the jury whether you love wild animals because you hunt 'em and kill 'em, or do you hunt 'em and kill 'em because you love them?"

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subject of comedy writers. England produced a wealth of such comical characters, which helped turn the diversity of local “humours” into a source of national pride:

[The English] began to claim that this richness of the comic stage derived from the richness of their national life, which abounded in men of varied humours. England had long been known as the home of individualists, peculiar men, even madmen, so that when young Hamlet put his antic disposition on he was packed off to England where it would not be noticed.¹¹

As part of the Whig tradition that is synonymous with the Revolution of 1688, the English concluded that their tradition of personal liberties and free enterprise had “ushered into the world their genuine offspring, True Humour.”¹² Later, John Stuart Mill insisted that eccentricity in a society is proportional to genius, originality, mental vigor, and moral courage.¹³

Humor welled up from the life of a character; and unlike wit, a mere form of intellectual quickness, which could be sharp and severe, humor appealed to both the head and the heart of the listener. Rather than a curiosity or oddity, humor came to be valued as the endearing and characteristic trait of a generous nature:

Benevolence, in one of its forms, giving free rein to inner impulse and trusting that spontaneous expression of personal feeling was good for both the individual and society, even if it seemed excessive or foolish or ludicrous by cool-headed standards, had a near relationship with humour.¹⁴

Contest Rules

The Georgia Legal History Foundation (GLHF), together with the Bench & Bar Committee of the State Bar of Georgia, is pleased to announce an annual legal humor contest to see what lawyer licensed to practice in Georgia can submit the best new unpublished legal anecdote, essay, or fictional story. A \$1000 prize will be given for the best non-fiction anecdote and a \$500 prize will be given for the best essay or fictional story. Runners-up will receive honorable mention and free GLHF memberships. While it is recognized that any story worth telling may be worth embellishing, in the case of anecdotes entrants will be expected to vouch for the authenticity of the basic events and to identify the time and the place, assuming they participated, or to give the source and any other relevant bona fides of a story that they may have heard second-hand. Judges for the contest will include Griffin Bell, Marion Pope, Bob Hicks and others, all of whom will have been rigorously qualified on the basis that “they know humor when they see it” and recognize the best to contain wit, wisdom, and pathos in varying proportions.

The winning entries and those that receive honorable mention will be published in the *Journal of Southern Legal History* in its “Writ in Water” section. As a condition of submission all applicants must certify that any copyright or other protected interest in the material being submitted belongs to them and that they are abandoning any and all such claims so that the material may enter the public domain, assuming it is selected for publication by the *Journal of Southern Legal History* or the *Georgia Bar Journal* or for use in CLE programs. Submissions should not exceed 1,000 words in length and should be designated in the title as either “Non-Fiction Anecdote” or “Essay/Fiction,” as the case may be. Multiple submissions are allowed. They should be submitted in typescript and on disc in either Word or Word Perfect format and mailed to:

George E. Butler II
132 Hawkins Street
Dahlonega, GA 30533

All submissions must be postmarked by Sept. 1, 2005.

Likewise, humor was related to sympathy and pathos, because it provided relief from the sadness and stress of life, which seem to weigh heaviest on those with the keenest sensibilities.

That is the type of humor that Mark Twain practiced and perfected and that Judge Bleckley championed; and it is the kind of good-natured, self-deprecating humor

that southern lawyers can claim as a birthright—as reflected by the lapsed traditions of the Georgia Bar Association and its other southern counterparts. That is the kind of humor that the best trial lawyers have always used to connect with a jury: “Ladies and gentlemen, that reminds me of a story... .”

That is the kind of humorous essay or “war story” that the

Georgia Legal History Foundation seeks for publication in its *Journal of Southern Legal History*. It is not the kind of canned joke or breezy one-liner that speakers often recite today to break the ice at legal presentations. That is often mere wit—or worse.


Of course, during the 18th century, philosophers noted that spontaneous humor does not tend to flourish among well-bred, institutional types, who have learned to suppress their impulses, generous and otherwise; whereas, “among the lower orders . . . nature appears in all its charming, unsophisticated diversities.”¹⁵

The advent of larger firms with their sophisticated billing, hiring, and management practices and their rigid specialization has had a pronounced cultural impact on the practice of law in the South. Many have forgotten that the cultural legacy of the South is one of smaller firms—and that even today solo and small firm practitioners make up the overwhelming majority of the state bars. But as with so much of modern life, size has become a matter of prestige. And from that standpoint, bigger firms—with their more bureaucratic ways—have arguably won cultural hegemony. Fortunately, some very good “country lawyers” still work inside those bigger firms as a potential fifth column.

Perhaps the new overtures by the institutional bar to solo and small firm lawyers and to young associates in those bigger firms should include the restoration of a prominent place on its annual programs for humorous lawyers’ stories of the classical variety—of the leisurely sort told by the self-styled “country lawyer.” Also, perhaps limited CLE credit should be given

for programs devoted to a carefully selected and presented canon of such humorous stories and essays. And perhaps all attorneys need to offer more grateful praise and recognition to any and all latterday judicial practitioners of Judge Bleckley’s art, lest modern judges be allowed to succumb to the obvious pressures to become humorless case administrators.

Fortunately, under the heading “life imitates art,” it turns out that the Bench & Bar Committee of the State Bar of Georgia is ahead of the game. Under the capable leadership of Co-Chairs Robert Ingram of Marietta, President-Elect of the Bar, and Judge Mel Westmoreland of the Fulton County Superior Court, the Bench & Bar Committee has instituted a series of “War Stories with a Point” seminars at the Annual Meeting of the State Bar, offering CLE credits in the areas of both professionalism and trial practice.

The GLHF has now joined forces with the Bench & Bar Committee in this worthy effort to retail the accumulated Wit & Wisdom of the Bar to the practitioner in the trenches as a seminar co-sponsor, and it is pleased to announce that the Bench & Bar Committee has agreed to be the co-sponsor of the Legal Humor Contest. Accordingly, winning entries may wind up being told and retold in seminars across the state—with proper attribution to the authors, of course. So roll up your sleeves and get started! Perhaps professional immortality awaits. Or, at worst, a little regional notoriety—and a collegial good time! 

Endnotes

1. Hamlet, I, ii, 133-134.
2. Id., III, iv, 160.
3. J. Richard Neville, “Appreciating Humor: Anecdotes of the Georgia Judiciary,” 1884-1920, III J.

Southern Legal History, 241 (1994).

4. Id.
5. *Lady Windermere's Fan*, Act I (1892): “Life is too important a thing ever to talk seriously about.”
6. Founded in 1985 by a group appointed by the Supreme Court of Georgia and the Georgia Court of Appeals, the Georgia Legal History Foundation, Inc. became one of the first organizations in the nation to be chartered to promote the study and preservation of the legal history of an individual state. The Foundation publishes the *Journal of Southern Legal History* in conjunction with the Walter F. George School of Law of Mercer University; it sponsors seminars for which professional attendees receive continuing legal education credit; it has held a series of annual dinners featuring speeches by distinguished American lawyers and legal historians; and it sustains the Nestor Awards program, which seeks to honor the accomplishments of leading Georgia lawyers, and other activities designed to contribute to the implementation of the innovative professionalism programs in Georgia originated by former Chief Justices Harold G. Clarke and Thomas O. Marshall, both of whom, along with former Chief Justice Harold N. Hill, Jr., have been deeply involved in the activities of the Foundation. The Foundation has also recreated the Atlanta law office of Woodrow Wilson and underwritten the preservation of Wilson memorabilia.
7. Ellis, “Interesting and Humorous Experiences,” 33 *Georgia Bar Assn. Reports* (1916), 178, 180, quoted in Neville, *supra*, at 247.
8. Henley, “Practice of Law in the Georgia Mountain,” 32 *Georgia Bar Assn. Reports* (1915), 180, 186, quoted in Neville, *supra*, at 243.
9. Of course, any story worth telling is worth embellishing.
10. Franklin M. Garrett, II *Atlanta and Its Environs*, 516 (1954).
11. *Encyclopedia Britannica*, s.v. “humour” (1972 ed.).
12. Id.
13. Id.
14. Id.
15. Id.

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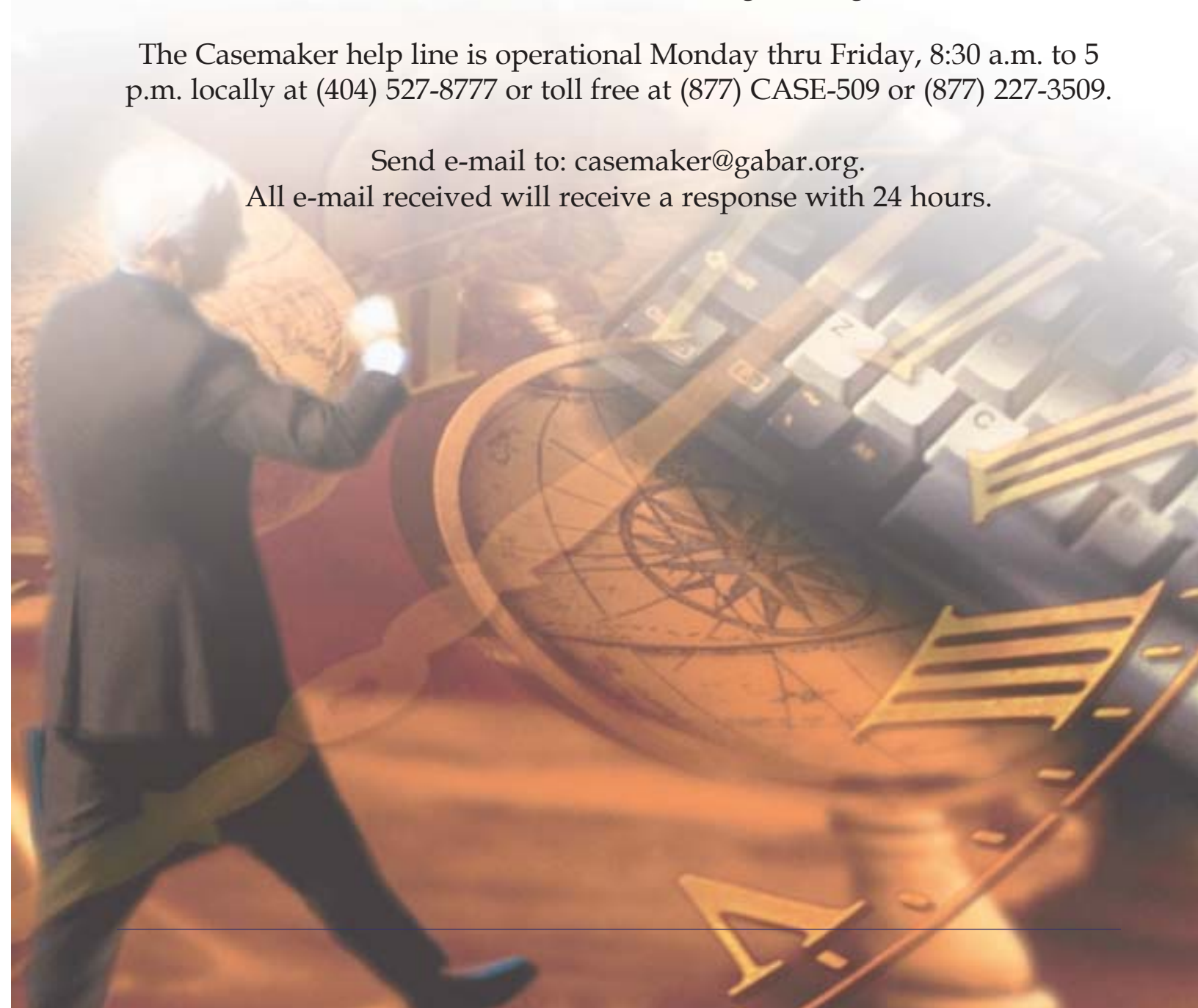


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The Bulloch County Courthouse at Statesboro

The Grand Old Courthouses of Georgia

By Wilber W. Caldwell

In 1904, *The Statesboro News* published a letter that recalled the Statesboro of 1890 as a town of “three or four old dilapidated wooden stores and an old frame courthouse.” The frame court building of this recollection was erected shortly after the end of the Civil War to replace the crude country courthouse at Statesboro, which had been burned by Federal forces in 1864.

There are no detailed records regarding Bulloch’s early court buildings. By one account, the county’s first courthouse was a log structure, built on the square at Statesboro before 1806. Another recalls a frame court building built in 1800 and a later antebellum brick courthouse. It is not known which building was burned by Sherman’s troops, but whatever the Yankees burned, it must have been a rude

affair, for only three families resided in Statesboro in 1864.

In 1889, the completion of a tiny railroad spur from Statesboro to Dover on the central of Georgia’s main line sparked almost immediate agitation for a new courthouse at Statesboro. By the spring of 1894, the Bulloch County grand jury had recommended a new courthouse, and county officials had completed an inspection of new court buildings at Vienna, Oglethorpe and “several other county seat towns.” There can be little doubt that one of these “other towns” was Talbotton, where Atlanta architect Alexander Bruce’s fine 1892 Talbot County Courthouse had just been completed. In a matter of only a few weeks after this inspection tour, an invitation to



Photo by Wilber W. Caldwell

Built in 1894, remodeled 1914. Bruce and Morgan, architects; Ed C. Hosford, remodeling architect.

contractors was published in *The Statesboro Star*, and Bruce and Morgan’s 1894 Bulloch County Courthouse began to rise on the square at Statesboro. The building was an almost exact copy of the firm’s 1892 court building at

Talbotton. Bulloch's new courthouse was complete before the end of 1894, and citizens marveled at "its dimensions and magnificence."


In 1894, New World adaptations of Norman Shaw's English Queen Anne Style were tailor-made for the American South. The region was hesitant to embrace the exuberant classical excesses that were sweeping the nation after the success of the buildings of the 1893 Columbian Exposition at Chicago. Nonetheless, Southerners sought modern symbols of their own in the quest for the riches of the mythical New South. At the same time, they fought any idiom that might ignore cherished references to the past. The Queen Anne in its "free classical" phase supplied the perfect answer to this uniquely Southern dilemma, for it looked forward to the Neoclassical and backward to the Picturesque at the same time.

Between 1887 and 1898, Bruce and Morgan designed 13 Romanesque courthouses in Georgia. Six of these incorporate predominantly Queen Anne detail. This building at Statesboro and its almost identical sister at Talbotton are arguably Bruce's best Queen Anne court buildings. Like all of the Atlanta architect's Queen Anne courthouses, the building projected a rather fundamental Romanesque form with hints of Richardsonian influence. Overlaid is an array of classically inspired decoration. Most notable are the broken based pediments that crown the large tower and the distinctive Classical pediments in the side elevations above the courtroom windows. The bell shaped low tower roof was also typically Queen Anne, as was the extensive use of terra cotta decoration.

By 1910, Statesboro boasted 2,500 citizens. Here, as in so many Georgia towns tempted by the gleaming wares of the New South myth, believing made it so. Bolstered by her railroads, the growing town reveled in shining new symbols of New South progress: a new water works in 1901, a new ice plant in 1902 and the miracle of electric lights in 1904. The 1907 acquisition of one of the state's regional agricultural colleges would eventually prove the city's crowning glory.

Clear testament to Statesboro's growth was heard in 1914 when, only 20 years after its completion, Bruce and Morgan's new courthouse proved too small for the blossoming needs of Bulloch. Architect Ed C. Hosford of Eastman was commissioned to enlarge the building. Great Classical porticos obscured the original Romanesque entrance arches; the fine Queen Anne lower tower with its distinctive bell-like dome was covered in a blocky attempt to achieve symmetry by matching the lower section of the main tower; and altogether featureless corner pavilions were added. It was an obvious and clumsy attempt not only to enlarge the structure, but also to bring it up-to-date by draping it in the popinjay's finery of American Beaux-Arts Classicism. The result is unfortunate. No longer the Queen Anne gem of Alexander Bruce's vision, or an appealing statement of the new American Classicism, the enlarged Bulloch County Courthouse had become an architectural jumble. A coat of white paint has further obscured the original Picturesque polychromy, masking the contrasting textures of brick, terra cotta and stone. Today

the building retains distinction and power primarily through the enduring vehicle of Bruce's grand tower, which was thankfully untouched by Hosford's well-meaning but nonetheless brutal bastardization.

Shinning through all of this architectural butchery is the clear voice of history. In 1914, the new Classicism was the well-established bearer of the torch of American progress. Even in the back eddies of the Deep South, the Picturesque had run its course, and the Queen Anne Style suddenly appeared old and out-of date. Places like Statesboro were still desperately trying to grasp the ring of a fading New South myth, but the new century brought new architectural symbols for the same old dilemmas. 

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.

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KUDOS

Sixty-six **Kilpatrick Stockton** attorneys were honored by their peers in "The Best Lawyers in America® 2005-2006." The Best Lawyers lists are compiled through a peer review survey in which 16,000 leading attorneys in the United States cast more than a half million votes on the legal abilities of other lawyers in their specialties. Of the 66 Kilpatrick Stockton attorneys honored, 44 are Georgia Bar members: **Harold E. Abrams, Miles J. Alexander, Anthony B. Askew, Rupert Barkoff, Joseph M. Beck, W. Stanley Blackburn, William H. Boice, Richard R. Boisseau (Labor and Employment Law), R. Alexander Bransford Jr. (Tax Law), William H. Brewster, Susan Cahoon, Tim Carsow, Raymond G. Chadwick Jr., Richard R. Cheatham, A. Stephens Clay IV, James H. Coil III, W. Randy Eaddy, James L. Ewing IV, Daniel T. Falstad, Candace L. Fowler, Jamie L. Greene, Randall F. Hafer, Richard A. Horder, James D. Johnson, Hilary P. Jordan, Wyck A. Knox Jr., Larry D. Ledbetter, Colvin T. Leonard III, Alfred S. Lurey, Dennis S. Meir, John S. Pratt, Diane L. Prucino, Dean W. Russell, Stephen M. Schaetzel, George Anthony Smith, James D. Steinberg, David A. Stockton, Phillip H. Street, Jerre B. Swann, G. Kimbrough Taylor, Virginia S. Taylor, Michael H. Trotter, William J. Vesely Jr., Craig B. Wheaton and David M. Zacks.**



Fred Chaiken, a partner at **Chaiken Klorfein, LLC**, was honored by the University of Florida as its **2004 Outstanding Alumni of the Year** from the Department of Religion. Chaiken has been a trial lawyer in Atlanta for nearly 25 years.



Jennifer Morgan DelMonico has been elected partner of **Murtha Cullina LLP** in New Haven, Conn. DelMonico joined Murtha Cullina in 2000 as an associate in the litigation department. Before joining Murtha Cullina LLP, she was an associate at King & Spalding in Atlanta, Ga.

The December issue of *AmLaw Tech Magazine* ranks **Kilpatrick Stockton's Technology Training Department No. 1 in the nation** and the firm's **Information Technology Department seventh overall**, out of 148 firms ranked. This survey is completed by mid-level associates at law firms from all over the country and is the premier source for information about big-firm technology trends. Respondents ranked their firms' technology on a

scale of 1 (low) to 5 (high) in a total of six categories: how well they were trained; how happy they were with technical support; how successfully they deployed technology on behalf of clients; how effectively their firm blocked unsolicited e-mail; and how much they were encouraged to deploy technology, even if it meant fewer hours billed.

Attorneys **Bill Needle, Greg Kirsch, Tina McKeon** and **David Perryman** of **Needle & Rosenberg P.C.**, an Atlanta-based intellectual property law firm, were selected by their legal peers to be among *Georgia Trend's* "Legal Elite" for 2004. The business magazine polled thousands of Georgia attorneys for nominations of professionals in 10 recognized practice areas. The attorneys at N&R were selected in the area of intellectual property law and were featured in the magazine's December 2004 issue. **Needle**, co-founder of Needle & Rosenberg, has practiced patent, trademark, copyright and trade secret law exclusively for 34 years and is also an adjunct professor of licensing law at Emory University School of Law and an adjunct professor of patent law at Georgia State University College of Law. This is his second consecutive year to be recognized as one of Georgia's "Legal Elite." As head of the firm's software, electronics and communications technology patent practice, **Kirsch** represents clients ranging from small start-ups to large multinational technology companies, as well as a number of universities across the United States. **McKeon** first came to Needle & Rosenberg as a law clerk in 1995, then returned to the firm full-time in 1997, after clerking for the Hon. Stanley Birch at the U.S. Court of Appeals for the Eleventh Circuit. **Perryman** leads the firm's biotechnology practice. He serves on the board of directors for several biotechnology companies and is a charter member of the biotechnology committee of the American Intellectual Property Law Association.

Kilpatrick Stockton LLP had 21 attorneys earning recognition as *Georgia Trend's* "Legal Elite." The firm leads with the number of attorneys listed in both the intellectual property and bankruptcy categories. Congratulations to the following **Kilpatrick Stockton** attorneys, who were recognized in the December 2004 issue of the publication. In business litigation: **William Boice** and **Stephens Clay**; in personal injury: **Raymond Chadwick Jr.** and **David Zacks**; in labor and employment: **Richard Boisseau, James Coil** and **Diane Prucino**; in tax, trusts, estates: **Lynn Fowler** and **Suzanne Mason**; in corporate: **Stanley Blackburn**; in bankruptcy: **Alfred Lurey, Dennis Meir, Todd Meyers** and **Joel Piassick**; in intellectual property: **Miles Alexander, Anthony Askew,**

William Brewster, Jim Ewing, Jamie Greene and John McDonald; and in pro bono: **Debbie Segal.**

Cozen O'Connor member **David L. Ladov** presented at the **Pennsylvania Bar Institute's Eighth Annual Family Law Update.** Ladov served as a course planner for the CLE conference, held in Philadelphia on Oct. 15, in Pittsburgh on Oct. 19 and was simulcast live via satellite to over 31 locations on Oct. 27. He presented on equitable distribution and pending legislation on divorce code changes for each in the series of CLE conferences. Ladov is a fellow of the American Academy of Matrimonial Lawyers, a member of the Montgomery and American Bar Associations, and serves as the first vice chairperson of the Pennsylvania Bar Association Family Law Section.

Supreme Court of Georgia Chief Justice **Norman S. Fletcher** was the unanimous choice of the board of directors of the Georgia First Amendment Foundation to receive the **2005 Charles L. Weltner Freedom of Information Award**, given each year to the Georgian who has done the most for freedom of information. He was honored at GFAF's Weltner Freedom of Information Banquet Jan. 29 at the Westin Buckhead Hotel. Justice Fletcher put the capital letters in Georgia open government, "...If there is the slightest doubt, or any question whatsoever, as to whether a matter can be the subject of a closed meeting, DO NOT CLOSE," Justice Fletcher wrote in *Steele v. Honea*, concurring in Charles L. Weltner's majority opinion in 1991. "Public access protects litigants and society," Fletcher wrote. Justice Fletcher becomes the fourth Weltner honoree, joining Eason Jordan, CNN newsgathering chair; Thurbert Baker, attorney general of Georgia, and Roy Barnes, former governor of Georgia.

ON THE MOVE

In Atlanta



Attorney **Leigh Ann Dowden** has joined the Atlanta office of **Counsel On Call** and will focus on candidate screening and placement. Dowden brings over 17 years of legal experience to the company.

She practiced with the law firm of King & Spalding LLP in Atlanta, Ga., and served as law clerk to Judge Mary Staley in the Cobb County State and Superior Courts. The office is located at 1230 Peachtree St. NE, Promenade II, Suite 1800, Atlanta, GA 30309; (404) 942-3525; Fax (404) 942-3780.



Peter G. Stathopoulos has joined the Atlanta office of **McGuireWoods LLP** as a partner in the firm's taxation and employee benefits department. He will focus his practice on state and local tax controversy, and complex multistate tax planning issues associated with mergers, acquisitions and business reorganizations. Prior to joining McGuireWoods, he led the state and local tax practice of Morris, Manning & Margin, LLP, in Atlanta, Ga. Previously, Stathopoulos was a principal consultant in the state and local tax consulting practice of PricewaterhouseCoopers, LLP, also in Atlanta. The firm's Atlanta office is located at 1170 Peachtree St. NE, Atlanta, GA 30309; (404) 443-5500; Fax (404) 443-5599; www.mcguirewoods.com.

The Law Office of Sanford A. Wallack, P.C. announced the opening of their offices in early 2004. The firm's focus is criminal defense, trials and appeals, in federal and state court. The firm also maintains a small civil trial practice in federal and state court with an emphasis in civil rights violations and animal law. The office is located at 729 Piedmont Ave., Atlanta, GA 30308; (404) 522-1701; Fax (404) 872-5340; www.wallacklaw.com.

In Camilla



William F. Tyson Jr. and Patrick N. Millsaps announced the formation of a new partnership, **Tyson & Millsaps, LLP.** This firm is a general practice representing clients in real estate, trust and estate, corporate and litigation matters. The new office is located at 76 E. Broad St., P.O. Box 107, Camilla, GA 31730; (229) 336-8831; Fax (229) 336-9105; www.camillalaw.com.

In Clayton

Mitchell L. Baker Jr. has become an associate with **C. Davis Bauman, P.C.**, a general practice firm in Clayton that focuses primarily on civil litigation. He will assist established clients in the areas of commercial litigation, local government law, personal injury, construction litigation and workers' compensation. The firm is located at 89 Falcon St., Clayton, GA 30525-0041; (706) 782-7500; Fax (706) 782-7900.

In Columbus

The firm of **Hatcher, Stubbs, Land, Hollis & Rothschild, LLP**, announced that **Sarah E. Hart** has become an associate of the firm. The office is located at 233 12th St., Suite 500 Corporate Center, Columbus, GA 31901; (706) 324-0201; Fax (706) 324-7747.

Page, Scrantom, Sprouse, Tucker & Ford, P.C. announced that **Blake N. Melton** has become an associate in the firm. The firm is located at Synovus Centre, Third Floor, 1111 Bay Ave., Columbus, GA 31901; (706) 324-0251; Fax (706) 323-7519.

In Macon

Frank C. Jones, formerly of **King & Spalding** in Atlanta, became of counsel to **Jones, Cork & Miller, LLP**. Jones practiced at the firm for 27 years prior to joining King & Spalding. The office is located as 435 Second St., Suite 500, Macon, GA 31201; (478) 745-2821; Fax (478) 743-9609.

In Savannah

Robin and Weiss, P.A. and **Van Reynolds, PC** announced the merging of their firms. The newly formed professional association is named **Reynolds, Robin, Smith and Weiss, P.A.** The firm will maintain offices in Savannah, Metter and Marietta. It will continue its statewide focus on retail, medical and commercial collections, creditors' rights and creditor bankruptcy representation. The firm also announced the addition of **Michael H. Smith** as a member. Smith is a member of the State Bar of Georgia, the Savannah Bar Association, the Commercial Law League of America and the National Association of Retail Collection Attorneys. The main office is located at 313 W. Broughton St., P.O. Box 9541, Savannah, GA 31412; (912) 236-9271; Fax (912) 236-0439.

In Montgomery, Ala.

Sabel & Sabel, P.C., announced that **Maricia Bennekin Woodham**, former Racial Justice Fellow

with the Lawyers' Committee For Civil Rights Under Law in Boston, Mass., has become associated with the firm. Offices are located at 2800 Zelda Road., Suite 100-5, Montgomery, AL 36106; (334) 271-2770; Fax (334) 277-2882.

In Orlando, Fla.

Kamal Jafarnia joined **CNL Financial Group, Inc.**, as **vice president of compliance and chief compliance officer** of its subsidiary, **CNL Institutional Advisors, Inc.** Before taking on this new role, Jafarnia had worked as president and chief compliance officer of a boutique wealth management firm providing multi-disciplinary financial services in Las Vegas, Nev. Jafarnia began his career as an attorney in private practice in Houston, Texas, with a focus on civil litigation. He later transitioned his career to financial services and has held meaningful positions with Prudential Financial, PFPC Worldwide Inc., Merrill Lynch and Metropolitan Life Insurance Company. The office is located at CNL Center at City Commons, 450 South Orange Ave., Orlando, FL 32801-3336; (407) 650-1000; (800) 522-3863.

In Waynesville, N.C.



Bill Cannon was admitted to the **North Carolina State Bar** and has joined the firm of **Brown, Ward & Haynes, P.A.** located at 370 N. Main St., Suite 300, Waynesville, NC 28786; (828) 456-9436; Fax (828) 456-4069.

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I am pleased to have this opportunity to tell you about the Georgia Law-Related Education (LRE) Consortium, and to invite you to consider joining our organization.

The Consortium is an association of institutions, agencies, organizations, and individuals who believe law-related education is essential to the development

of productive, law-abiding citizens. To that end, it:

- initiates, encourages, develops, and supports LRE programs in Georgia;
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- collects and disseminates information about state and national LRE programs and resources.

Members of the Consortium include primary and secondary school educators; those in higher education; the legal community; the judiciary; and those in government (including law enforcement), business, and community organizations.

Formally, the Consortium meets one time each year; however, most of its work is conducted through committees which meet more often. Annual projects include a newsletter, *The LRE Circuit*; promotion of LRE Week activities; a poster contest; awards for outstanding LRE teachers, supporters, and students; teacher training; curriculum development; and support of other LRE activities throughout the state. The Consortium also has a long-standing partnership with the Young Lawyers Division of the Bar, having collaborated on 20 annual teacher workshops and the publication of a law-based high school textbook.

As you can see, the Consortium is an active, multi-faceted organization with a worthy mission, and we need your help. Please consider joining us. I believe you will be greatly rewarded.

Sincerely,

A handwritten signature in black ink that reads "Anna B. Boling".

Anna Durham Boling, Executive Director
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The Good Kind of Escrow Problem

What to Do When There's Too Much Money in Your Trust Account

By Paula Frederick

How could there possibly be a problem with our trust account?" you squeal, your blood pressure rising with every word.

"We're always so careful!"

"No, not *that* kind of a problem," your partner assures you. "We're not overdrawn. In fact, we've got *too much* money in there. There's \$8,500 that doesn't appear to belong to any of our clients."

After combing through years of bank statements and escrow account records, you are able to show your partner just where the problems arose. "We never paid ourselves the balance of our retainer for the work that we did for Norm Thompson," you announce. "Looks like we put the whole \$30,000 in escrow year before last, and we intended to draw it down as we earned it. I don't see that we ever took out the last \$3,500."

"Oh, no!" your partner moans. "Didn't we violate Bar rules by placing fees in escrow in the first place?"

"Nope," you respond. "Remember, those fees were paid in advance. Since they weren't earned when Norm paid us, technically the money wasn't ours. Back then we thought that it *had* to go into escrow, and that we could only take it out as we earned it. We've stopped doing things that way




since we discovered that the Bar has a formal advisory opinion allowing lawyers to place fees—even unearned fees—directly into the operating account.¹ So I think we cure this part of the problem by just transferring that \$3,500 over to the operating account.”

“The other \$5,000 is that settlement in Mrs. Winners’ case. Remember her? She gave us authority to settle her accident claim but disappeared before we could disburse her share of the proceeds. That was over five years ago and we’ve never heard a peep out of her.”

“Do we have to keep her money in our escrow account forever?” your partner wonders. “Maybe we can pay it to ourselves since Mrs. Winners must not want it!”

A quick call to the Bar’s Ethics Hotline clarifies things. A lawyer who receives settlement funds is obliged to deliver them to the client “promptly.”² When the lawyer can’t find the client, Formal Advisory Opinion 98-2 provides some guidance.

The formal advisory opinion requires a lawyer to “exhaust all reasonable efforts”³ to locate the client. If those efforts fail, the lawyer may dispose of the funds pursuant to Georgia’s Disposition of Unclaimed Property Act.⁴ A lawyer may never appropriate unclaimed funds for his or her personal benefit, and the funds must remain in the lawyer’s trust account until delivered to the state pursuant to the act. 



Paula Frederick is the deputy general counsel for the State Bar of Georgia.

Endnotes

1. Formal Advisory Opinion 91-2 states that a lawyer “need not place any fees into a trust account absent special circumstances necessary to protect the interest of the client.” “Special circumstances” may include the length of time the matter will take or the amount of the fee.
2. Bar Rule 1.15(l)(b).
3. What is “reasonable” will vary depending on the circumstances. At the very least, the lawyer should attempt to reach the client by telephone, regular and certified mail, and contact with family members or friends of the client (if known to the lawyer, and if this can be done without revealing confidential or secret information). Although
4. The Act can be found at O.C.G.A. § 44-12-190ff. It deems “abandoned” funds that have been unclaimed for over five years, and provides that such funds may be delivered to the Georgia Commissioner of Revenue for payment into the general fund of the State of Georgia.

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(Oct. 16, 2004 through Dec. 8, 2004)

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J. Malik Abdullah Frederick
Queens Village, N.Y.

J. Malik Abdullah Frederick (State Bar No. 225110) has been disbarred from the practice of law in Georgia by Supreme Court order dated Oct. 25, 2004. Frederick was hired to represent a client for injuries she and her daughters sustained in an automobile accident. Frederick settled the suit but failed to reimburse the clients' medical care providers from the settlement proceeds. Frederick has been suspended since July 16, 2001, awaiting the outcome of his appeal from a felony criminal conviction.

Elizabeth Rebecca Palmer
Asheville, N.C.

Elizabeth Rebecca Palmer (State Bar No. 560114) has been disbarred from the practice of law in Georgia by Supreme Court order dated Nov. 22, 2004. Palmer was adjudged guilty on March 3, 2004, by a North Carolina jury on five felony counts of embezzlement and four felony counts of uttering a forged document in violation of North Carolina law.

Jerry Wayne Frazier
Riverdale, Ga.

On Nov. 22, 2004, the Supreme Court of Georgia accepted the Voluntary Surrender of License of Jerry Wayne Frazier (State Bar No. 274687). Frazier pled guilty on June 16, 2004, to violating 18 USC § 371 (conspiracy to commit mail fraud, wire fraud, bank fraud and interstate transportation of money obtained by fraud) in the U.S. District Court for the Northern District of Georgia, Atlanta Division.

SUSPENSION AND PUBLIC REPRIMAND

Tyrone Nathaniel Haugabrook
Valdosta, Ga.


On Nov. 22, 2004, the Supreme Court of Georgia suspended Tyrone Nathaniel Haugabrook (State Bar No. 337970) for one year from Aug. 9, 2004, and also ordered the imposition of a public reprimand. Haugabrook pled guilty to two felony counts of filing false tax returns in 1993 and 1994. In mitigation of discipline, the Court noted that Respondent was punished through the criminal justice system and accepted responsibility for his mistakes. The Court also took into consideration Haugabrook's extensive service to the community and the fact that he had no disciplinary record.

REVIEW PANEL REPRIMAND

Lecora Bowen
Fairburn, Ga.

On Nov. 22, 2004, the Supreme Court of Georgia accepted the Petition for Voluntary Discipline of Lecora Bowen (State Bar No. 071252) and ordered the imposition of a Review Panel reprimand. In September 2001 Bowen was retained to close a real estate loan. She received a check for \$37,500 from the bank. The loan did not close as scheduled but she failed to return the money to the bank until January 2002 after a grievance was filed.

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. 16, 2004, two lawyers have been suspended for violating this Rule. 

ABA TECHSHOW 2005

Why You Need to Be in Chicago Next Month

By Natalie R. Thornwell

Imagine Chicago in early spring. What could make you go there? Well next month it's not going to be the shopping or city attractions. It's way more than that. You have to be there for a conference—but not just any conference. Here are 10 very good reasons why you just can't miss ABA TECHSHOW 2005:

1) To be a part of the world's premiere legal technology conference. TECHSHOW 2005 will be held at the Sheraton Chicago Hotel and Towers in Chicago, Ill., from March 31 to April 2, 2005. The ABA TECHSHOW is now in its 19th year and is still the number one legal technology conference in the world.

2) To attend over 50 educational sessions presented by the country's top legal technologists. TECHSHOW's three days are packed with programs across several tracks, which focus on specific areas of legal technology. The tracks are designed to address in-depth issues in technology from the one-person law practice to the IT department's concerns at the world's mega-firms. Tracks for 2005 will include: General Practice and Solo; Tools and Tips; e-Discovery; Family Law; Applications; Internet; Tech University; Litigation; Malpractice Prevention; Advanced IT; Security; Interest Group Roundtables; and Hot Topics.

3) To visit over 100 Exhibitors and see firsthand the technology tools and services that you can use in your law office. With a laundry list of the top vendors in the legal indus-

try, you will be hard pressed not to have an opportunity to meet face to face with the vendor whom you have wanted to ask a specific question about their product or service. You will also be treated to learning about new technology tools and services that are being offered to lawyers. The conference's schedule is designed to accommodate quality time for you to visit the exhibit area.

4) To receive continuing legal education credit as you learn about legal technology and related issues in modern law practice. CLE credit is attainable by attending the top-notch educational sessions that take place at TECHSHOW. Credit is attainable for every state in the United States.

5) To get a view of and discuss the future of technology as it will likely impact the practice of law. By providing access to leaders in both IT and law, you can expect to see and hear what developments are becoming a reality in the legal industry. TECHSHOW provides several venues for futuristic and fantasy legal office situations. Keynote presentations from world leaders in legal technology often predict what will be happening and what challenges will be present in the law office of the future.

6) To lead and participate in the newly developed Technology Roundtables. These small group sessions will focus on the implementation and feasibility of leading legal technologies. The small group format will allow you a greater opportunity to help with the practical aspects of technology in your law practice. Facilitators will guide you and other roundtable participants in discussions about the technology issues you are facing and reveal some real-world solutions to your concerns.

7) To participate in the Technology Training Institute and learn directly from the

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7 vendors how to use their software applications. You will be instructed to bring your laptop computers to the conference so you will be able to participate in hands-on, vendor-led training. The rubber meets the road as you put into practice the technology you just learned about for your law firm. This opportunity is perfect for helping your practice analyze and even meet its technological needs.


8) To network with some of the world's leading technologists and other attorneys interested in law office technology. People from all over the world will be attending TECHSHOW 2005, and it will be almost impossible not to meet someone who shares an interest in

some issue or concern you are facing in your own law firm. The relationships that form at TECHSHOW can last a lifetime and are often thought to be the main reason people won't miss a single year attending the conference.

9) To obtain invaluable resources to further the technology efforts in your practice when you return home. From actual technology planning and forecasting to access to the world's best consultants, you will be able to move your law office technology to the next level after attending TECHSHOW.

10) To start an annual trend as thousands of others have done. Visit the TECHSHOW Web site at www.techshow.com and register for

10 next year's conference. At this very helpful site, you can also sign up for a monthly e-update to keep you abreast of new information and the ongoing plans for the conference. You might also want to check out the TECHSHOW Survival Guide.

Don't forget that the State Bar of Georgia is a TECHSHOW Program Promoter and you will receive \$100 off the registration fee when you use the State Bar's Program Promoter Code: **PP12**. Now you can't say you don't have a reason to attend. Don't get left behind! Don't miss ABA TECHSHOW 2005! 

Natalie R. Thornwell is the director of the State Bar of Georgia's Law Practice Management Program.



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Conference Draws Section Members to Mexican Paradise

Johanna B. Merrill

Los Cabos, Mexico is almost Disney-like in its perfection—as if Walt himself crafted the azure blue of the sea, the pink of the flowers that flourish in the rocks and the green of the cacti that fill the desert sands with spots of color. It is as if you are in someone’s perfected idea of what a beachside paradise should be.

And so it was that Mexico and its lush landscape of color served as the backdrop when the **Entertainment & Sports Law** and **Intellectual Property Law** sections met at the Fiesta Americana Grand Resort during the weekend of Nov. 12-16 for the 16th annual Southern Regional Entertainment & Sports Law Conference/10th annual Intellectual Property Law Institute.

The conference, which began in 1987 with only a handful of sports and entertainment attorneys, has grown each year. The group meets every fall in locations like Puerto Vallarta, Costa Rica, Jamaica and now Los Cabos, to earn a year’s worth of CLE credit and to socialize and network with colleagues and friends. In 2000 the conference expanded to include the Intellectual Property Law Section. Darryl Cohen, organizer of the event and past chair of the Entertainment and Sports Law Section, reported that there were



Photos by Johanna B. Merrill

The 16th annual Southern Regional Entertainment and Sports Law Conference and 10th annual Intellectual Property Law Institute was held at the Fiesta Americana Grand Hotel in Los Cabos, Mexico, Nov. 12-16, 2004.

approximately 250 attorneys and guests in attendance at the 2004 event.

The long weekend kicked off on Friday night with a welcome cocktail reception on Whales Terrace, named for the animals that make an annual pilgrimage to the tip of the Baja peninsula, whose waters speak of pirates and explorers.

In his welcome letter, Cohen noted that the conference is two-sided, CLE and social, and that both keep getting “better and better.” Both agendas were evidence of this.

The conference began early on Saturday morning with sessions on applied ethics, IP litigation, sports licensing and “trademark practice for the entertainment attorney.” Over the course of the three-day conference, panelists presented on topics such as case law updates in both entertainment and intellectual property, minors and estate representation, deals with the film, TV and video industry, negotiating contracts for television, athletes’ rights, technology and IP and computer game software. The days were structured so that sessions recessed in early afternoon to allow participants time to enjoy everything Cabo had to offer, from world-class golf, to deep-sea fishing, to simply relaxing by any one of the property’s four pools.

Group dinners were held both Sunday and Monday nights for all attendees and their guests. For the first event, attendees traveled from the resort to the Cabo San Lucas harbor where they boarded a yacht for a sunset cruise. The boat sailed around the incredible rock formations at the tip of the peninsula, where sea lions bask and flocks of pelicans gather, proving that the only wildlife in Cabo is not located on the downtown strip. After being entertained onboard by local salsa dancers, drummers and singers, the attendees docked and enjoyed a dinner sponsored by Morgan Keegan at Mi Casa Del Mar in Cabo San Lucas.



(Left to right) Richard Siegmeister, Jodi Siegmeister, Markie Cohen and Darryl Cohen, organizer of the conference, attend the farewell reception and dinner on the beach.



Members of the Entertainment and Sports Law Section Executive Committee gather during the group dinner at Mi Casa del Mar in Cabo San Lucas on Nov. 14. (Left to right) Mark Lindsay, secretary/treasurer, J. Martin Lett, vice-chair of entertainment, Lisa Kincheloe, chair, Bruce Siegal, vice-chair of sports, and Alan S. Clarke, immediate past chair.



(Left to right) Mike Krause, Charlie Henn, Stacy Silverstone, Michael Turton and Laura Fahey spend time together at a reception during the three-day conference in Los Cabos, Mexico.



(Left to right) Art Gardner and Shane Nichols, both members of the Intellectual Property Law Section's Executive Committee and Jewel Nichols.



(Left to right) Jeff Kolokoff, Claude Davis, Sasha Coxeff and Hope Demps in Cabo San Lucas, Mexico, during the annual Entertainment and Sports and IP Law Conference.



(Left to right) Lisa Kincheloe, chair of the Entertainment and Sports Law Section, and Alan S. Clarke, immediate past chair of the section, hang out with six-time Tour de France winner Lance Armstrong in Cabo San Lucas, Mexico.

The annual farewell reception and banquet was held at the resort overlooking the Sea of Cortez on the final night of the conference. A cocktail hour was held on the terrace before attendees moved over to the lavish Mexican buffet set up on the beach.

Michael Hobbs, chair of the Intellectual Practice Law Section, gave his opinion regarding the time spent in Cabo: "Although the seminars are uniformly excellent, I find the greatest relevance for me in the conference is the opportunity to get to know colleagues from other firms in a more relaxed setting away from the office, cell phones, BlackBerrys and voice mail. In Atlanta I never seem to have the time to sit down and talk, and I think the same goes for others. However, at the institute, it's not uncommon to get just that chance at every meal. I think that really helps support the continued professionalism and collegiality of the section."

If you have suggestions for future locations or events, contact Darryl Cohen at dcohen@coco-law.tv. For more information on past conferences, or to stay abreast of future planning, visit www.selaw.org.

NEWS FROM THE SECTIONS

Appellate Practice Case Law Update

By Christopher McFadden


The Supreme Court has extended its domestic relations pilot project through Dec. 16, 2005. Under the terms of the pilot project, the Supreme Court grants all timely applications for discretionary appeal filed in divorce and/or alimony cases unless it finds the application to be frivolous. Applications filed under the pilot project must be accompanied by

certificates of counsel affirming a good-faith belief that the appeal has merit and that it is not filed for the purpose of delay, harassment or embarrassment.

Benefield v. State, 278 Ga. 464, 466, 602 S.E.2d 631, 634 (2004).

In a criminal case, when the jury is polled to ensure that each member of the jury assented to the verdict in the jury room, and still assents to it, a negative response to either question imposes on the trial court a duty to *sua sponte* return the jury to the jury room for further deliberations. “[I]t was not incumbent upon counsel to move the court for further deliberations.”

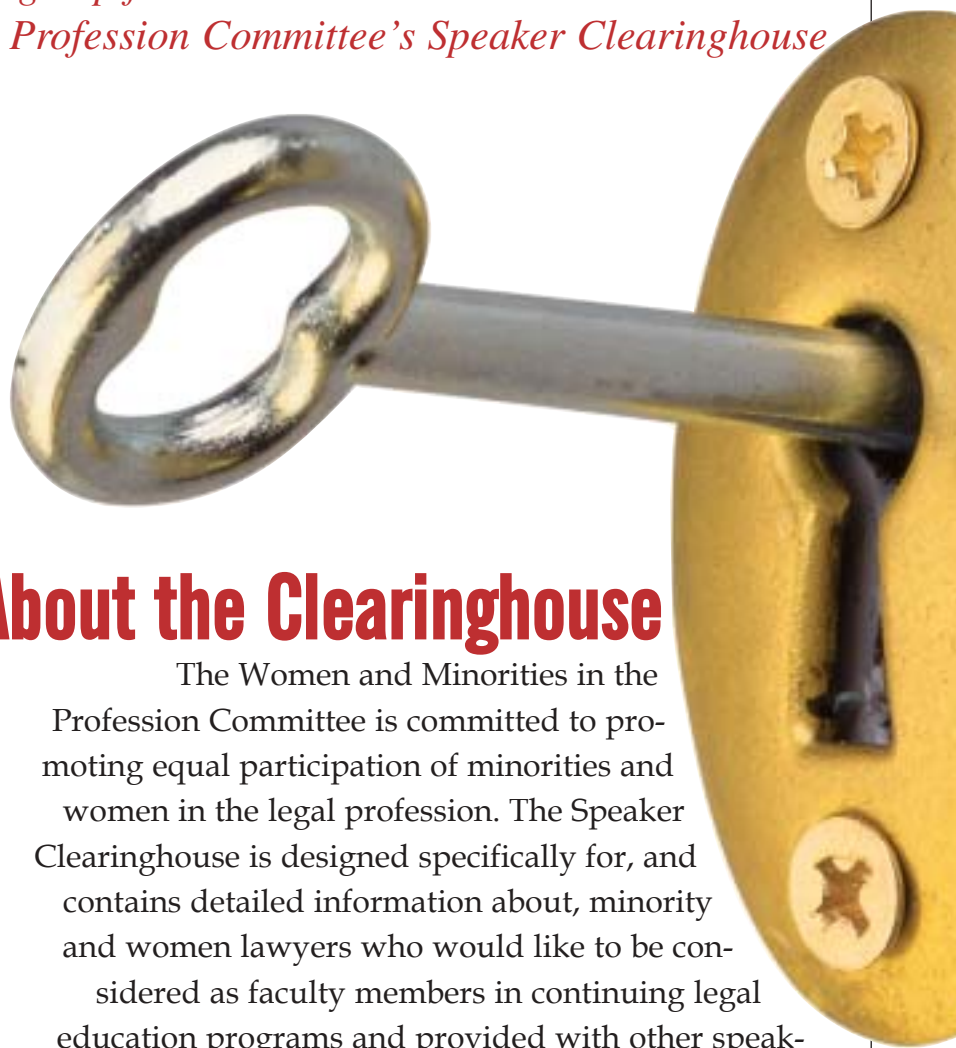
State v. Martin, 278 Ga. 418, 603 S.E.2d 249 (2004).

On interim review in a death penalty case, the Supreme Court does not have jurisdiction to review the denial of motion to recuse filed by the state. In so holding, the Supreme Court reaffirmed “that the statutes providing for appeals by the state in criminal cases should be construed strictly against the state and liberally in favor of the interests, including the interest in a speedy trial, of defendants” and “explicitly h[eld] that OCGA § 5-7-2, which authorizes both direct and discretionary appeals by the state, does not expand the list of matters appealable by the state under OCGA § 5-7-1 but, instead, merely describes which of those matters are appealable by direct appeal and which are appealable by discretionary appeal.” The Supreme Court further held that the death penalty “interim review procedure was not intended to expand the scope of matters over which the state may appeal in death penalty cases.” 

Johanna B. Merrill is the section liaison for the State Bar of Georgia.

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John Vinson Harper
Americus Ga.
Admitted 1985
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Kenneth R. Hilyer
Tifton, Ga.
Admitted 1970
Died November 2004

Donald Lee Hollowell
Atlanta, Ga.
Admitted 1952
Died December 2004

Harold Karp
Atlanta, Ga.
Admitted 1935
Died November 2004

Brince H. Manning III
Decatur, Ga.
Admitted 1973
Died November 2004

Nancy Pat Phillips
Atlanta, Ga.
Admitted 1955
Died December 2004

Helen H. Porter
Cartersville, Ga.
Admitted 1982
Died December 2004

Preston Nickerson Rawlins Jr.
McRae, Ga.
Admitted 1964
Died February 2004

Eva L. Sloan
Milledgeville, Ga.
Admitted 1952
Died October 2004

Timothy Sweeney
Atlanta, Ga.
Admitted 1969
Died November 2004

Robert S. Whitelaw
Hiawassee, Ga.
Admitted 1950
Died November 2004



Donald Lee Hollowell, 87, of Atlanta, died Dec. 31, 2004. Hollowell was born in Wichita, Kan., and attended Lane College before serving two tours of duty in the Army. After completing his military duty, he returned to Lane College and graduated with honors. He then earned a juris doctorate degree from Loyola University. In 1952 Hollowell opened his law practice in Georgia. He represented such notables as Horace T. Ward, Charlayne Hunter and Hamilton Holmes in their respective lawsuits seeking admission to the University of Georgia Law School and the University of Georgia undergraduate program, respec-

tively. In 1966, he was appointed regional director of the United States Equal Employment Opportunity Commission by its first chairman, Franklin Delano Roosevelt Jr. Hollowell transferred to the position of regional attorney 10 years later, which he held until his retirement in April 1985. He served most recently as a retired partner of the law firm of Hollowell, Foster & Gepp, PC, in Atlanta. Hollowell has been a noted civic and church leader, serving on numerous institutional boards and commissions for such organizations as Spelman College, the Interdenominational Theological Center and the Atlanta University Center. At Butler Street CME Church, he was a steward, trustee and former superintendent of Sunday School. He was the recipient of over 100 awards for his legal and community service. Hollowell is survived by his wife, Miss Louise E. Thornton.



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

One Man's Castle

Clarence Darrow in Defense of the American Dream

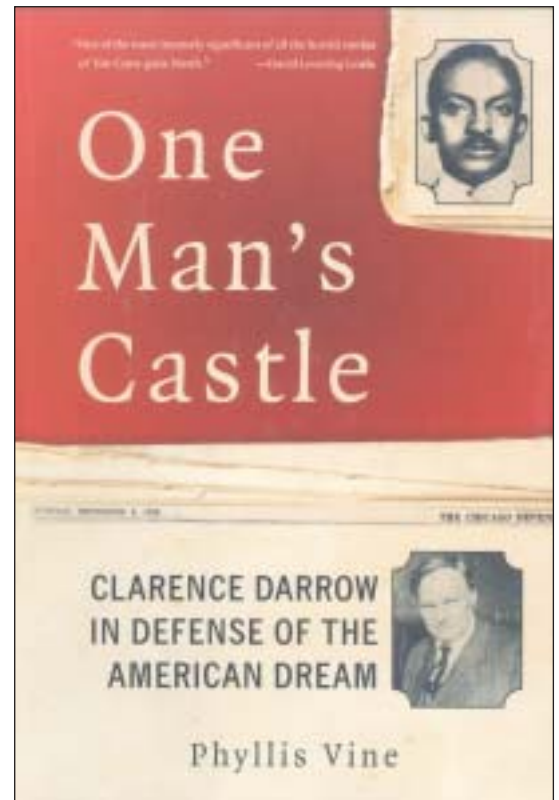
By Phyllis Vine, Amistad (2004), 337 pages

Reviewed by Kristin H. West

Few events embody the ideal of the American dream as much as the purchase of a home. Saving for a down payment, searching for the right home in the perfect neighborhood, and carefully selecting new home furnishings are events that are deeply ingrained in many Americans' life experiences.

When the home in question is in an all-white Detroit neighborhood in 1925, a time of increased Ku Klux Klan activity, and the home buyers are a young African-American couple, the stage is set for the American Dream to turn into a deadly nightmare. This moving-day tragedy and the legal drama it engendered is vividly recounted by American historian Phyllis Vine in her recent book, *One Man's Castle: Clarence Darrow in Defense of the American Dream*.

One Man's Castle tells the story of Dr. Ossian Sweet and the events that linked his fate as the accused in a murder case to celebrated trial attorney Clarence Darrow and the NAACP's legal strategy for challenging racially restricted housing. Phyllis Vine describes Sweet's middle-class roots in a small segregated town in central Florida, including his witnessing of a lynching when he was only seven years old. She then chronicles his tenure at the best African-American educational institutions in the United States, his medical training in Europe, and his successful establishment of a medical practice in Detroit. In doing so, she demonstrates how



Sweet's life exemplified the rise of the African-American middle-class that took place during the years after World War I, and the migration of African-Americans from the rural south to the urban north. Vine also describes how this trend in black migration parallels a concurrent rise in the popularity and prevalence of the Ku Klux Klan organizers and activities in the northern cities into which African-Americans were moving.

In the first half of the book, Vine suspensefully recounts the events leading up to Sweet's move in September 1925 into a house in the Waterworks Park area of Detroit's East Side, a neighborhood that had seen little, if any, African-American homeowners. African-American professionals like Dr. Sweet often had difficulty finding quality housing in

Detroit in the 1920s because many of the homes carried racially restrictive covenants in their deeds. White homeowners, urged on by the Ku Klux Klan, formed “neighborhood improvement associations” to enforce these covenants through the use of intimidation and violence directed at any African-Americans who tried to move into white neighborhoods. During the summer months of 1925, mobs of white citizens had attacked African-Americans who had moved into other non-integrated Detroit neighborhoods. The Sweets were well aware of these events and of the formation of the Waterworks Improvement Association, which held meetings to rally property owners against integration of the Waterworks Park neighborhood.

With the threat of mob violence being all too real, Dr. Sweet and his wife planned the timing and circumstances of their move in a way that they hoped would not attract attention. Fearing, however, that the all-white Detroit police force would provide little protection in the event of an attack, Dr. Sweet prepared for the worst by buying guns and ammunition with which to defend his family.


Unfortunately, the worst did happen. Despite the stationing of police near the Sweet home in anticipation of possible violence, a crowd began to gather around the Sweet’s home on their first night of occupancy. The next day the Sweets heard rumors that the crowd was going to “take care” of the black family later that night. That evening, Dr. Sweet’s brother Henry and other family friends came to the house for dinner. As the night progressed, the group noticed the thickening crowd around the house, followed by the gathering of a few hundred people at the school across the street. The

crowd began yelling slurs and pelt-ing the Sweets’ house with rocks. Police who were positioned throughout the neighborhood offered no assistance to the Sweets.

Seeing the intensity of the crowd, Ossian and Henry Sweet gathered the guns and ammunition and went to the second story of the house. There, shortly after a rock crashed through a window into the house, Henry Sweet grabbed a rifle and fired from a window. More shooting from inside and outside the house followed, along with breaking glass and a hailstorm of rocks. Outside of the Sweet home, one person was wounded by a gunshot and another was killed, but the actual source of the shots was never accurately determined. The Detroit police converged upon the Sweet home and, denying that any crowd or commotion had even existed, arrested Dr. Sweet, his wife and the other nine persons who were in the house. The defendants were charged with “conspiracy, ‘malice aforethought’ and murder in the first degree.”

After portraying the events of this fateful evening, Vine presents a well-researched narrative of the NAACP’s defense of the Sweets, which began by recruiting Clarence Darrow to represent all of the defendants in the murder trial. Vine provides an outstanding analysis of the way in which legal strategy decisions in the case were heavily influenced by the public perception of the case that the NAACP was trying to create. Though the press had depicted the Sweets as starting the violence, the NAACP believed that if the case was handled correctly, the Sweets’ actions would be viewed as self defense in the face of an angry mob. The NAACP further believed that the Sweets’ status as upstanding, hardworking, well-educated cit-

izens, who were prevented from living peacefully in a home they had purchased just because of their race, would focus Americans’ attention on the insidious nature of residential segregation. The NAACP leadership thought it was essential that the defendants be represented by white counsel. Vine recounts the difficulties that the NAACP encountered among African-American attorneys in pursuing this strategy, as well as in recruiting a white attorney. Darrow, 69 years old and weary from his recent appearance in the famous Scopes trial, initially hesitated when the NAACP asked him to take the case. Vine reports that Darrow agreed to assume the defense only after he learned that the Sweets had fired their weapons, stating, “[i]f they had not had the courage to shoot back in defense of their own lives, I wouldn’t think they were worth defending.”

The remainder of the book is a riveting account of the trial itself. Vine’s detailed accounts of Darrow’s questioning of witnesses; his interactions with the prosecution and judge; and the publicity that his presence at the trial engendered leaves the reader with an excellent sense of just what a legal superstar he was. Readers who like to jump to the end of murder mysteries to see “whodunit” may similarly find themselves wanting to peek ahead to the verdict. Don’t do it! One of the great pleasures of this wonderful book is its page-turning prose that will keep you reading until the jury comes back. 

Kristin H. West is the director of the Office of Research Compliance for Emory University and a member of the Editorial Board for the *Georgia Bar Journal*.

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