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The Sophisticated User Defense: It's Not Just for Drug Companies Anymore
by Andrew M. Thompson

The Confirmation Resale Conundrum
by Justin Lischak Early and James B. Jordan

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by Norman E. Zoller

Cover Photo: State Bar President Kenneth L. Shigley pictured with lawyer-legislators in the Georgia General Assembly.

A third of a century trekking between Georgia courts, first in a single rural circuit and then more or less statewide, has made me a minor connoisseur of courthouses, the most visible physical infrastructure of the judicial system. I have tried cases in a courthouse across the street from a railroad track where cross-examination was frequently interrupted by passing freight trains. In courthouses where birds flew through open windows and found perches near the high courtroom ceiling and in courthouses that would have been a great movie set for “To Kill a Mockingbird.” I have tried cases in courthouses that resembled a poorly designed 1950s motel; in a “law mall” resembling an enclosed shopping center and in an architectural gem that could be a post-modern capitol of a small state.

The centrality of courts in American life is obvious when you drive down a two-lane backtop into the typical county seat town. On a square near the intersection of main roads stands a Neoclassical/Greek Revival/Colonial/Victorian/Romanesque/Beaux-Arts/Classical structure built in the 19th or early 20th century. A few burned and were replaced by structures for which surely no architect would claim credit, but many old courthouses have been beautifully renovated. In a number of growing counties the historic courthouse on the square has become a museum, replaced by a larger and more efficient “justice center” several blocks away. However, the centrality of the courthouse is still marked by the historic placeholder.

Before the American Revolution, when power resided with distant officials in London, the functions of local bailiffs (who sometimes acted as judges then rather than security guards), magistrates and justices of the peace—often illiterate and lacking even rudimentary legal training—were carried out in the informal settings of homes, taverns, churches or meeting halls. In the older colonies to the north small brick county courthouses began to appear in the early 18th century. In the younger colony of Georgia, where both lawyers and rum were initially prohibited, a year after the 1733 founding of Savannah a one room “Tabernacle and Court House” was included in the town plan. By the time of the Revolution a brick courthouse was built at Wright Square, while our other 11 colonial parishes apparently had no more than a crude
In 1777, the first Georgia constitution created eight counties and provided for erection of a “court-house and jail” in each of them, symbolic of the transfer of political sovereignty from a distant king to the local people. Over the next several generations of rapid growth, settlers and surveyors spread westward, filling the land they took from the native inhabitants and dividing it into a multitude of counties. In Georgia, the idea was that every farmer with a horse and wagon should be able to get to the county seat and back in a day. New counties proliferated until we hit a maximum of 161 before the merger of Fulton, Campbell and Milton in 1931, after which the constitution was amended to limit us to a mere 159 counties.

Wherever a new county was formed, construction of a courthouse was one of the first public acts, along with the basic “hard infrastructure” improvements of mulescaped dirt roads, wooden bridges, and eventually railroads, telephones, rural electrification and paved roads. Scattered across rural Georgia today are a few century-old courthouses that stand almost alone among the fields and pastures, monuments to the aspirations of the founders of a newly formed county that was bypassed by railroads and major highways.

In the years after Alexis de Tocqueville described lawyers as America’s “natural aristocracy” that served as a conservative restraint on the excesses of temporary majorities, the increased professionalization of law and architecture led to construction across the country of hundreds of courthouses, proud structural symbols of democracy, law, aspiration, free enterprise and prosperity. Courthouses were the core of infrastructure around which were built train depots, cotton gins, factories, warehouses, schools, churches, libraries and eventually hospitals. Upon such foundations many Georgia communities were built.

Political discussions of public infrastructure usually focus on “hard infrastructure” required to support commerce and quality of modern life—highways, bridges, seaports, airports, rails, dams, reservoirs, water and sewer systems, the electric power grid, natural gas and petroleum pipelines, telecommunications, waste management systems and so forth.

However, “soft infrastructure” is just as important. The services of education, health care and financial systems are key components of the “soft infrastructure.” For example, without a world-class system of education for all our youth, our nation cannot preserve its pre-eminent role in the global economy of the 21st century. It is imperative that our state and local communities place priority on making our public schools competitive with the best in Shanghai, Singapore and Helsinki, equipping our children and grandchildren with competencies in math, science and creativity to be able to excel in the “flat world” of a global economy knit together through technology. Losing our edge in education, we are vulnerable to economic decline.
Investments in high quality, independent courts can promote a “virtuous cycle” where relatively modest expenditures on court improvements enhance economic growth.\(^6\)

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sion of judicial power remains true.

While surprisingly few judg-
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does affect both judicial morale and
the talent pool from which judges
are drawn. In the 1950s, two-thirds
of federal judicial appointees came
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than 60 percent coming from the
public sector. 11

Certainly there are many superb
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One wag even suggested that the
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ries is to require that judicial aspirants “marry rich.”13 In any event, life experience in the trenches of private law practice—taking entrepreneurial risks, representing paying clients and making payroll—is a different and valuable form of preparation for judging than a career spent primarily in the public sector.

A more subtle impact may be that, at least in the federal system in major metropolitan areas, lawyers who are willing to accept huge pay cuts from lucrative partnerships at major law firms in order to become judges may be ideologically motivated. There must be a strong motivation for an equity partner at a top law firm to take a staggering pay cut in order to become a judge.14 Some contend that, at least for those for whom judicial office would involve the greatest lost opportunity cost due to disparity with fairly secure private practice income in a large firm, such motivation may be, at least in part, driven by the opportunity to indoctrinate. Judges ought not be “minor league politicians” seeking to make law rather than apply the law. While this does not appear to be a major problem in Georgia today, it is a potential concern to be addressed.15

Beyond the core issue of funding, there are many other issues that a 21st century judicial system must address regarding organization, structure, case flow management and court technology. Last spring I had a conversation with Hon. David Emerson in Douglas County, currently president-elect of the Council of Superior Court Judges, about electronic court filing. He commented that we ought to step back and ask what we want the court system to look like in 20 years. Following up on that suggestion when I became president of the State Bar, I appointed a Next Generation Courts Commission,16 chaired by Hon. Lawton Stephens of Athens. It includes judges, clerks and administrators representative of every class of courts in the state, legislators and practicing lawyers. The commission is divided into five hard working subcommittees, each of which has a meaty agenda of issues to address: business process improvement, technology, education & outreach, program improvements & expansion and funding. I expect that they will help determine the path to improve the judicial infrastructure for Georgia’s future.

A judicial branch of government that is independent, adequately funded and compensated and equipped for efficiency is essential infrastructure for both the liberty of our citizens and the growth of our economy. Money allocated to support a strong and independent judicial branch is money well invested. As Alexander Hamilton put it, “[t]he independence of the judges once destroyed, the constitution is gone, it is a dead letter; it is a vapor which the breath of faction in a moment may dissipate.”17

Kenneth L. Shigley is the president of the State Bar of Georgia and can be reached at ken@carllp.com.

Endnotes
2. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1963) (1835) (“[In America, lawyers] form the highest political class and the most cultivated portion of society…. If I were asked where I place the American aristocracy, I should reply without hesitation that it occupies the judicial bench and the bar.”).


11. Id., at 2 (warning that the decline in the percentage of judges drawn from private practice will change the nature of the federal judiciary). See also, Jonathan L. Entin, Getting What You Pay For: Judicial Compensation And Judicial Independence, 2011 Utah L. Rev. 25 (2011).


16. The State Bar of Georgia Next Generation Courts Commission includes: Kenneth L. Shigley, president, State Bar of Georgia; Sharon L. Bryant, chief operating officer, State Bar of Georgia; Tracy J. BeMent, court administrator, Tenth JAD; Bart W. Jackson, clerk, Jones County Superior Court; Sen. Curt Thompson, District 5, Tucker; Hon. Grant Brantley, Senior Judge, Superior Courts; Greg G. Allen, Clerk, Forsyth County Superior Court; Sen. Jason Carter, District 42, Decatur; Hon. Louisa Abbot, judge, Eastern Judicial Circuit; Margaret Washburn, Margaret Gettie Washburn, P.C.; Marla Moore, director, Administrative Office of the Courts; Patty Baker, clerk, Cherokee County Clerk of Court; Hon. Walter (Jim) Clarke, judge, Gwinnett County Probate Court; Hon. Lawton E. Stephens, chair, chief judge, Western Judicial Circuit; Hon. Ben Studdard, chief judge, Henry County State Court; Carolyn Sullivan, clerk, Houston County Superior Court; Dena M. Adams, clerk, White County Superior Court; Hon. Greg Poole, judge, Cobb County Juvenile Court; Hon. Harold Benefield, chief judge, Clayton County State Court; Julius A. Powell Jr., Lindley, Powell & Rumph, PA; Hon. Michael Cielenksi, chief judge, City of Columbus Municipal Court; Peter Canfield, Dow Lohnes Attorneys at Law; Hon. Robert E. Turner, judge, Houston County Magistrate Court; Hon. Alec Glenn Dorsey, judge, Wilcox County Magistrate Court; Hon. John Ellington, judge, Court of Appeals of Georgia; Hon. Kathy Gosselin, judge, Northeastern Judicial Circuit; Kevin Weiner, Fellows LaBiola LLP; Linda Pierce, clerk, Muscogee County Superior Court; Melanie Wilson, clerk, DeKalb County Magistrate Court; Rhonda Payne, clerk, Douglas County Clerk of Court; Hon. Robert V. Rodatus, judge, Gwinnett County Juvenile Court; Hon. Ron Ginsberg, senior judge, Chatham County State Court; Sandy Lee, executive director, CSCJ; Rep. Stephanie Benfield, District 85, Atlanta; Hon. Brenda S. Weaver, chief judge, Appalachian Judicial Circuit; Carter Brown, clerk, Walker County Superior Court; Hon. Charles Auslander, judge, Clarke County State Court; Cindy Mason, clerk, Columbia County Superior Court; Daniel W. Massey, clerk, Chatham County Superior Court; Eric Joseph John, executive director, CJCJ; Hon. Robin Shearer, judge, Athens-Clarke County Juvenile Court; Hon. Sara Doyle, judge, Court of Appeals of Georgia; Hon. Susan Tate, judge, Clarke County Probate Court; Sen. Bill Harnick, District 30, Carrollton; Daniel Hauck, Bryan Cave LLP; Hon. David Emerson, judge, Douglas Judicial Circuit; David Wall, clerk, Habersham County Superior Court; Hon. Diane Bessen, judge, Fulton County State Court; Rep. Edward Lindsey, District 54, Atlanta; Hon. Harold Melton, justice, Supreme Court of Georgia; Hon. J. Stephen Schuster, judge, Cobb Judicial Circuit; Jeffrey Ray Kuester, Taylor English Duma LLP; Hon. Lynwood D. Jordan Jr., judge, Forsyth County Probate Court; Hon. Nelly Withers, judge, DeKalb County Recorders Court; Prof. Sarah Shaf, Emory University School of Law; Sheila Studdard, clerk, Fayette County Clerk of Court; Hon. Steve Schuster, judge, Cobb Circuit Superior Court; Tee Barnes, clerk, Supreme Court of Georgia; William M. Ragland Jr., Womble Carlyle Innovators at Law.
As the community service arm of the State Bar, the Young Lawyers Division (YLD) is excited to be a partner in the inaugural Georgia Legal Food Frenzy, taking place April 23 – May 4, 2012. Georgia Attorney General Sam Olens is leading the initiative. Both Bill Bolling, founder and CEO of the Atlanta Community Food Bank and chairman of the Georgia Food Bank Association, and Danah Craft, executive director of the Georgia Food Bank Association, are supporting the initiative. The program allows Georgia’s legal community to team up with food banks across Georgia to provide food and other critical resources for low-income Georgians who suffer from hunger.

The Georgia Food Bank Association is comprised of seven regional Feeding America food banks serving all 159 counties with the help of more than 2,500 agency partners. Its members share food, resources and best practices to maximize the fight against hunger throughout the state. Information about local food banks can be found at georgiafoodbankassociation.org.

Georgia’s food banks rely on volunteers to fulfill their mission. Currently, more than 1.6 million Georgians are in need of food assistance. A large number of those in need are children, senior citizens and working families. The high unemployment rate in this state continues to drive a record high demand for food assistance as those who have lost their jobs struggle to put food on the table. Last year, Georgia’s seven regional food banks distributed more than 77 million pounds of food through a network of partner agencies and pantries. But more work is needed; there is a 35 to 40 percent increase in demand for food each year.

Due to demand, the need for food donations is important throughout the year, but food donations traditionally slow in late spring and early summer as families focus on end-of-school activities and summer vacations. At the same time, food banks and partner agencies see an increased demand for food during this time because more than 702,000 children who depend on access to breakfast and lunch at school are home for the summer months. The

“The Legal Food Frenzy will provide food assistance to low-income Georgians at the most critical time of year.”

Help Nourish Your Community

by Stephanie Joy Kirijan
Legal Food Frenzy will provide food assistance to low-income Georgians at the most critical time of year.

The Legal Food Frenzy is modeled after a similar program in Virginia started by the Norfolk & Portsmouth Bar Association in 1991. Virginia held its first statewide event in 2007 and raised 600,000 pounds of food for the Federation of Virginia Food Banks. Over the next four years, the event raised a total of 5.4 million pounds of food through more than 180 participating firms across the state. Georgia has the potential to exceed these totals with nearly 250 law firms in major cities across the state. To reach our goal, the YLD encourages each and every law firm, legal department, law office, law school and court in Georgia to participate.

The Georgia Legal Food Frenzy is a partnership between the Office of the Attorney General, the State Bar of Georgia Young Lawyers Division, under the leadership of event co-chairs Kristi Wilson and Deepa Subramanian, and the Georgia Food Bank Association. More than 30 young lawyers around the state are serving as city representatives to help make this event a success—and the YLD is still recruiting volunteers. This two week food and fund drive is a competition among all Georgia law firms and legal organizations. In this friendly competition, the law firm or legal organization that raises the most food will be awarded the Attorney General’s Cup. Other awards will be given in small, medium and large size firm categories.

The contest begins April 23 and ends May 4. Firms can register for and find the rules of the competition online at georgialegalfoodfrenzy.org. Awards are based on pounds collected per employee, so firms of all sizes are competitive. Food items will be weighed at the food bank and the results tabulated in pounds with one point given for each pound of food donated. Each dollar contributed will count as four pounds of food or four points.

The YLD is honored to be a part of Georgia’s inaugural Legal Food Frenzy. Olens has encouraged the legal community to rise to the challenge and help reduce hunger in Georgia. It is as simple as picking up extra items while food shopping. The most needed items are: peanut butter, canned tuna, beans, fruits, vegetables and soups, pastas, macaroni and cheese, low sugar cereals and 100 percent fruit juice. Please consider donating these items and becoming a part of the Legal Food Frenzy.

Stephanie Joy Kirijan is the president of the Young Lawyers Division of the State Bar of Georgia and can be reached at skirijan@southernco.com.
The Sophisticated User Defense: It’s Not Just for Drug Companies Anymore

by Andrew M. Thompson

The sophisticated user defense, also known as the learned intermediary doctrine, has been widely used by drug manufacturers in defending against failure to warn claims in products liability lawsuits.1 Although less well known, Georgia courts have also applied the sophisticated user defense outside the pharmaceutical drug context. Recently, in Parker v. Schmiede Machine & Tool Corp.,2 the U.S. Court of Appeals for the 11th Circuit relied on the sophisticated user defense in affirming a district court’s grant of summary judgment to the defendants in a case in which employees at Lockheed Martin’s Marietta, Ga., facility alleged that they developed illnesses as a result of exposure to beryllium.

This article will discuss the origins of the sophisticated user defense in Georgia cases outside the pharmaceutical drug context, the application of the defense by the federal district court and 11th Circuit in the Parker case and the use of the defense in future toxic tort cases. Based upon the decisions of the district court and the 11th Circuit in Parker and the well-recognized basis for the sophisticated user defense in Georgia law, it is expected that practitioners will increasingly use the sophisticated user defense in defending toxic tort claims against manufacturers and suppliers of allegedly hazardous products.

The Origins of the Sophisticated User Defense Under Georgia Law

In products liability and toxic tort lawsuits, plaintiffs frequently allege that the manufacturer of a product
failed to properly warn the end user of the product's risks or hazards. For a plaintiff to prevail on a claim for failure to warn under Georgia law, a plaintiff must show that the defendant had a duty to warn, that the defendant breached that duty and that the breach proximately caused the plaintiff's injury. The "sophisticated user" or "learned intermediary" defense relieves a product supplier of the duty to warn an ultimate consumer or user of a known hazard if there is an intermediary with knowledge of the hazard. In the pharmaceutical drug context, the rationale for the defense is that a patient's treating physician is in a better position than the manufacturer to warn the patient of a drug's risks. Similarly, in the toxic tort context, the rationale for the defense is that a sophisticated employer with a history of using a particular product or substance and specific knowledge of how the particular product or substance will be used in the employer's production process, is likewise in a better position than the product manufacturer to warn its employees of the product's dangers. If a learned intermediary has actual knowledge of the dangers of a product or substance, yet would have taken the same course of action even with the information the plaintiff contends the manufacturer should have provided, then courts typically conclude that the sophisticated user or learned intermediary defense applies and the plaintiff cannot recover.

The defense appears to have been first recognized in Georgia outside the pharmaceutical drug context in Eyster v. Borg-Warner Corporation, in which residents who were injured in a house fire brought a lawsuit against the manufacturer of an HVAC unit, alleging that the manufacturer failed to warn the installer/distributor of the HVAC unit of the risks associated with an aluminum-copper connection in the unit. In affirming the trial court's grant of a directed verdict in favor of the manufacturer because the danger of an aluminum-copper connection was com-
mon knowledge to those engaged in the installation of HVAC units, the Court of Appeals of Georgia held that “[w]here the product is vended to a particular group or profession, the manufacturer is not required to warn against risks generally known to such group or profession.”17

Twenty years ago, in Stuckey v. Northern Propane Gas Company,8 the U.S. Court of Appeals for the 11th Circuit issued its first decision addressing the scope of Georgia’s sophisticated user/learned intermediary defense outside the pharmaceutical drug context. In Stuckey, a plaintiff who was burned in a propane gas explosion at a house owned by his parents sued a supplier that had distributed propane to a company that then sold and delivered the propane to the house. The plaintiff alleged that the supplier failed to warn him about the tendency of the odorant added to propane gas to fade over time. In appealing the trial court’s denial of its motion for directed verdict, the propane supplier argued that the seller’s actual knowledge of odor fade satisfied the supplier’s duty to warn. Although the 11th Circuit affirmed the trial court’s denial of the supplier’s directed verdict motion because the propane supplier was unable to establish that the seller of the propane had actual knowledge of odor fade, the court in Stuckey explained the scope of the learned intermediary defense under Georgia law.9 Relying on comment to the Restatement (Second) of Torts § 388 (1965), the 11th Circuit held that “[a] supplier’s duty to warn a consumer does not turn on whether a warning was actually given to an intermediary, but on whether the intermediary’s knowledge was sufficient to protect the ultimate consumer.”10 In other words, and as explained by subsequent courts, if a learned intermediary “has actual knowledge of the substance of the alleged warning and would have taken the same course of action even with the information the plaintiff contends should have been provided, courts typically conclude that the learned intermediary doctrine applies or that the causal link has been broken and the plaintiff cannot recover.”11

Since Eyster and Stuckey, federal courts in Georgia have granted summary judgment to manufacturers based on the sophisticated user defense and those decisions have been affirmed by the 11th Circuit. For example, in Argo v. Perfection Products Company,12 the district court applied the sophisticated user defense in a lawsuit by the intermediary’s employees who were injured in an explosion relating to an industrial heater. In granting summary judgment to the heater manufacturer and a component-part manufacturer, the court found that the plaintiffs’ employer was a sophisticated industrial user that knew or should have known how to operate and maintain the product it purchased and, “[u]nder Georgia law, when a product is sold to a particular group or profession, a manufacturer has no duty to warn against the risks generally known to that group or profession.”13

In addition, although the sophisticated user defense is usually based upon an intermediary’s actual knowledge, the defense can also be applied to protect a supplier or manufacturer from liability for failure to warn if the intermediary is charged by law with knowledge of the hazards of a particular substance or product. For example, in Stiltjes v. Ridco Exterminating Company,14 the resident of an apartment complex sued the manufacturer of a pesticide that had been supplied to a licensed pest control operator for application at the plaintiff’s apartment complex. The Court of Appeals of Georgia held that the pesticide manufacturer had no duty to warn the plaintiff because the manufacturer was entitled to rely on the laws charging licensed commercial applicators with knowledge of pesticide toxicity and safe methods of application.15 Thus, in Georgia, if an intermediary is charged by law with knowledge that a supplier would otherwise have a duty to communicate to the eventual consumer or user, then the supplier need not communicate the warning to the consumer or user, can rely on the learned intermediary and any failure to warn claim against the supplier is barred by the sophisticated user defense.16

The Lengthy Saga of the Parker and Berube Beryllium Cases

In 2004, a number of current and former employees of Lockheed Martin’s Marietta, Ga., facility filed a putative class action against eight defendants alleging that the plaintiffs and members of the putative class had developed beryllium sensitization and/or “sub-clinical, cellular and sub-cellular damage” from exposure to beryllium-containing products utilized at the Lockheed facility for more than 40 years.17 In two orders issued in March 2005 and March 2006, the federal district court dismissed the plaintiffs’ claims for alleged sub-clinical, cellular and sub-cellular damage, dismissed plaintiffs’ claims for emotional distress and for medical monitoring costs, and concluded that the plaintiffs’ claims for beryllium sensitization did not constitute an actionable injury under Georgia law.18 The plaintiffs appealed the district court’s rulings to the U.S. Court of Appeals for the 11th Circuit and in an April 2007 opinion, the 11th Circuit affirmed the district court’s dismissal of the plaintiffs’ claims for “sub-clinical, cellular and sub-cellular damage” and for emotional distress and medical monitoring costs, but reversed the district court’s grant of summary judgment on the claims of the plaintiffs who alleged beryllium sensitization.19 Based on the 11th Circuit’s 2007 opinion, the plaintiffs’ class allegations were defeated and the Parker case was limited to four plaintiffs alleging beryllium sensitization and/or chronic beryllium disease. In 2008, the Parker case was consolidated for discovery purposes with Timothy Berube v. Brush Wellman, Inc., a very similar case involving eight additional plaintiffs alleging beryllium sensitization and/or chronic...
beryllium disease from exposure to beryllium-containing products at Lockheed’s Marietta facility.

After the close of over a year-and-a-half of extensive discovery in the Parker and Berube cases, the claims of the 12 remaining plaintiffs were limited to failure to warn claims against four remaining defendants who were alleged to have supplied beryllium-containing products used at the Lockheed Martin facility. In September 2010, the district court granted summary judgment to the four remaining defendants based upon (1) the record evidence that the plaintiffs’ employer Lockheed Martin was a sophisticated user of copper-beryllium and aluminum-beryllium alloys and thus the plaintiffs’ failure to warn claims were barred under Georgia law; and (2) exclusion of the plaintiffs’ causation expert because the expert’s opinions were scientifically unreliable under the prevailing standard for admissibility of expert testimony and without expert causation testimony, the plaintiffs’ claims failed as a matter of law.21

The 11th Circuit’s October 2011 Decision

In an Oct. 21, 2011, opinion, the 11th Circuit affirmed the grant of summary judgment to the defendants, discussed its prior decision in Stuckey and the Georgia law applying the sophisticated user and learned intermediary defense and explained that “the ‘sophisticated user’ or ‘learned intermediary’ doctrine relieves a product manufacturer or supplier of this duty to warn the ultimate user where there is an intermediary with knowledge of the hazard.”22 The 11th Circuit declined to decide the specific standard to apply in evaluating the record evidence on sophisticated user, but rather assumed arguendo that the following standard proposed by the plaintiffs was a correct statement of the law:

if the plaintiffs here adduce evidence from which the jury could conclude that (1) the defendants possessed information, which Lockheed did not possess, regarding a particular danger associated with beryllium, and (2) the defendants failed to warn Lockheed of that danger, then summary judgment based on the sophisticated user or learned intermediary doctrine would be inappropriate.23

The 11th Circuit concluded that the plaintiffs “fail to adduce any evidence to satisfy this standard” and that “the defendants have established that Lockheed is a sophisticated user of beryllium and a learned intermediary between its employees and the manufacturers of beryllium products.”24 Specifically, the court explained that the Lockheed facility had produced aircraft containing beryllium parts for almost 60 years, had utilized a 1966 Department of Defense

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In addition, the 11th Circuit expressly declined the plaintiffs’ invitation to rely on the decision in Generex v. American Beryllia Corp., in which the 1st Circuit relied on Massachusetts law in concluding that a court considering a sophisticated user defense “must analyze ‘the particular dangers to be guarded against’” and engage in a detailed fact-specific analysis of whether the intermediary had sufficient knowledge of each and every particular danger of the allegedly hazardous substance. In contrast, Georgia law regarding the sophisticated user defense requires that an intermediary possess only general knowledge of the dangers associated with a product’s use.

In another important aspect of its decision, the 11th Circuit concluded that a plaintiff cannot avoid application of the sophisticated user defense simply by showing that the intermediary failed to take measures to protect adequately against a certain hazard; rather, plaintiffs must show that the intermediary lacked actual knowledge of the hazard. Thus, the inquiry is focused on the intermediary’s knowledge, not on the adequacy of the intermediary’s implementation of its knowledge or the intermediary’s failure to act on its knowledge.

The Future of the Sophisticated User Defense in Toxic Tort Cases

The decisions by the district court and 11th Circuit in Parker demonstrate the continuing viability of the sophisticated user defense in toxic tort cases in Georgia in which plaintiffs allege that the supplier or manufacturer of a product failed to sufficiently warn the end user of the hazards of the product. Although the applicability of the defense is frequently very fact- and case-specific, Georgia courts have made it clear that it is an issue that is appropriately resolved at the summary judgment stage based upon the record evidence. In addition, by (1) reiterating the principle that an intermediary need possess only general knowledge of the hazards associated with a product, and (2) making it clear that the relevant inquiry is focused on the intermediary’s actual knowledge and not on the adequacy of the supplier’s warnings or on the intermediary’s failure to act on its knowledge, the decisions by the 11th Circuit and the district court in Parker foreclose two relatively common means by which plaintiffs may seek to create disputed factual issues and avoid applicability of the sophisticated user defense.

Although not expressly addressed by the courts in the Parker decisions, the case also demonstrates how the timing of when an intermediary obtained its knowledge can impact the application of the sophisticated user defense in a case involving a lengthy alleged exposure period. In Parker, the plaintiffs alleged that they were exposed to beryllium for more than a 40-year period and the state of the art of knowledge of beryllium and its health risks had evolved over that time, but the record evidence was clear that Lockheed was always at the forefront of possessing knowledge regarding beryllium and its health risks. Nevertheless, it is not difficult to imagine a scenario in which a plaintiff could attempt to create a fact issue in regard to the sophisticated user defense by arguing that a particular intermediary was not a sophisticated user of a hazardous product during the early portion of the plaintiff’s alleged period of exposure to the product and thus the intermediary’s subsequent sophistication should not bar the plaintiff’s failure to warn claim against the suppliers of the product. In such a scenario, it will be important for courts to compare the respective knowledge of the industry and the intermediary at comparable time periods and not fall into an “apples to oranges” comparison of the current state of the art regarding a product’s hazards to what was known about the product during earlier time periods.

Parties seeking to avoid application of the sophisticated user defense may also attempt to limit the impact of the Parker decision by arguing that the learned intermediary at issue in the case was Lockheed Martin, one of the world’s largest defense contractors who employed a team of toxicologists, industrial hygienists and PhDs. However, the Georgia sophisticated user cases relied on by the 11th Circuit and the district court in the Parker decisions involved significantly smaller intermediaries with substantially less obvious sophistication, including the installer/distributor of an HVAC unit in Eyster and the installer of residential kitchen tiles in Whirlpool. Thus, the sophisticated user defense is by no means limited to cases involving large intermediaries.

Conclusion

In light of the fact that employees allegedly exposed to toxic substances or hazardous products in the workplace are barred by the Georgia’s Workers’ Compensation Act from recovering damages from their employers, it is commonplace for such employees to name manufacturers, suppliers and distributors of allegedly hazardous products as defendants in toxic tort and products liability lawsuits. However, as demonstrated by the 11th Circuit’s decision in Parker and the Georgia cases cited therein, summary judgment is available to manufacturers and suppliers based upon the sophisticated user defense when the plaintiffs’ employer possessed general knowledge of the hazards associated with the substance or product at issue and thus any alleged failure
to warn by the manufacturer/supplier would not constitute the proximate cause of the plaintiff’s injury. It is reasonable to expect that the use of the sophisticated user defense will increase as society becomes more regulated, which imputes knowledge to the regulated community and creates more “learned intermediaries,” and information regarding hazardous substances and products becomes more readily available leading to more sophisticated users of hazardous products.

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Endnotes
1. See Dietz v. Smithkline Beecham Corp., 598 F.3d 812, 816 n.2 (11th Cir. 2010) (affirming summary judgment in products liability case against pharmaceutical company based on “Georgia’s long-recognized, unwavering use of the learned intermediary doctrine”).
5. Wheat, at 1363.
7. Id. at 670 (citing a New York case and two treatises on products liability and tort law).
8. 874 F.2d 1563 (11th Cir. 1989).
9. Id. at 1568-1569.
10. Id. at 1568 (emphasis added).
13. Id. at 1118-1119 (emphasis added) (citing Eyster); see also Powell Duffryn Terminals, Inc. v. Calgon Carbon Corp., 4 F. Supp. 2d 1198, 1203 (S.D. Ga. 1998) (“There is no duty to warn when the person using the product ‘should know of the danger, or should in using the product discover the danger’ . . . . Ordinarily, there is no duty to give warning to the members of a profession against generally known risks.”)(citations omitted), aff’d, 176 F.3d 494 (11th Cir. 1999).
15. 343 S.E.2d at 719.
17. Beryllium is a light metal with extreme hardness and a high melting point that makes it very desirable for use in a number of industries, particularly the aerospace industry and in the production of nuclear energy and weapons. In certain individuals, exposure to beryllium can result in beryllium sensitization, which is similar to an allergy and can be a precursor to the development of chronic beryllium disease, a respiratory illness.
20. Out of the eight original defendants, three were voluntarily dismissed by the plaintiffs and Brush Wellman entered into a confidential settlement. Lockheed Martin was one of the original defendants, but once the plaintiffs’ class claims were defeated and the only plaintiffs were employees of Lockheed Martin, the plaintiffs voluntarily dismissed Lockheed Martin because their claims against Lockheed were barred under the Georgia Workers’ Compensation Act, O.C.G.A. § 34-9-11.
23. Id. at *3.
24. Id.
25. Id.
26. 577 F.3d 350 (1st Cir. 2009).
28. See Powell Duffryn Terminals, Inc. v. Calgon Carbon Corp., 4 F. Supp. 2d 1198, 1203-04 (S.D. Ga. 1998) (holding that, if a user knows or should know of a general danger, then it is incumbent upon that user to investigate more particular dangers); Whirlpool Corp. v. Hurlibut, 166 Ga. App. 95, 101, 303 S.E.2d 294, 288 (1983) (“It is not important whether he knew the precise, physical nature of the hazard presented by his ‘use’ of the product; it is sufficient if he is aware generally that the ‘use’ being made of the product is dangerous.”) (emphasis added).
29. Parker, 2011 WL 5025135 at *5 n.8 (“Even if the Plaintiffs could prove that Lockheed did not employ the proper [beryllium] control devices, that proof would not be enough to rebut the evidence that Lockheed had actual knowledge of the need for such controls.”).
The Confirmation Resale Conundrum

by Justin Lischak Earley and James B. Jordan

The hangover from the Great Recession continues to drag more and more Georgia properties into foreclosure. As it does so, it has also worn away the veneer covering numerous rifts in the law that have long been buried just beneath the surface—some of them in existence since the Great Depression of the 1930s. One of those rifts, deriving from the so-called “confirmation statute” of 1935,1 has become of increasing importance to legal practitioners and real estate investors (both commercial and residential alike) as the markets seek to clear away their distressed inventories. It involves the most basic question of all property transactions: Is title marketable? Unfortunately, when it comes to foreclosures, the answer (unlike the question) is not so simple.

This article challenges the existing assumptions about what it means to have marketable title to a foreclosed property in Georgia. Although we propose that the problem is more pervasive than most have heretofore recognized, we also propose that the problem has solutions. The basic premise of this article is that the law should encourage the acquisition of distressed property so as to normalize the real estate markets and promote the transition of distressed properties back into healthy, productive properties.
The (Title) Standard Answer

In 1935, with the nation mired in the midst of the Great Depression, the general assembly passed what is now codified at O.C.G.A. § 44-14-161. The statute provides, in relevant part:

When any real estate is sold on foreclosure, without legal process, and under powers contained in security deeds, mortgages or other lien contracts and at the sale the real estate does not bring the amount of the debt secured by the deed, mortgage, or contract, no action may be taken to obtain a deficiency judgment unless the person instituting the foreclosure proceedings shall, within 30 days after the sale, report the sale to the judge of the superior court of the county in which the land is located for confirmation and approval and shall obtain an order of confirmation and approval thereon.2

In determining whether to confirm a sale and permit a deficiency judgment action against the debtor, “[t]he court . . . shall not confirm the sale unless it is satisfied that the property so sold brought its true market value on such foreclosure sale,”3 and further, “the court shall also pass upon the legality of the notice, advertisement and regularity of the sale.”4 The statute provides the judge faced with a confirmation action three possible choices: he/she may (1) confirm the foreclosure and permit the lender to pursue a deficiency judgment; (2) deny the confirmation and thereby preclude a deficiency judgment; or (3) “order a resale of the property for good cause shown.”5 It is this last choice—the ability to order the property to be reforeclosed—that creates the issue that this piece explores.

Because the pronounced economic downturn that began in 2007 has dabbled property val-
a person could weigh the risk of a filing, how is it possible to determine ahead of time whether a (to be determined) judge would thereafter order resale? The discount that third-party buyers at foreclosure auctions would demand for assuming such risks would be very steep indeed, and would risk driving down prices even further in a negative feedback loop.

In addition to being what seems like the underpinning of the title standard’s choice to limit unmarketability to situations where a confirmation action is currently pending or subject to appeal, this unacceptable policy result has led many to conclude that a court lacks the authority to order a resale where a third party (other than the foreclosing lender) has taken title to the property at the foreclosure auction. The basis of this theory seems to be a sort of mootness argument; the notion being that the court cannot grant effective relief because the lender (and not the property) is what is before the court in a confirmation action, and because the lender no longer has title to the property, there is no way to conduct a reforeclosure.

There are theoretical problems with this mootness argument but they are not worth exploring fully here because there is an even bigger problem with the mootness notion: it is not supported by the caselaw. In Davie v. Sheffield, the Court of Appeals of Georgia stated in language worth setting forth in full:

> In considering how courts, lenders, borrowers, guarantors and title insurers should approach the problem, it is worth bearing in mind that courts should seek to do equity, and what equity abors is not necessarily a divestiture, but rather a forfeiture. With that in mind, what happens when a court orders a reforeclosure after property has come into the hands of a third party? The simplest solution, of course, is that the court should simply order the lender to return the sales proceeds to the third-party purchaser. There is some statutory analogy for this approach in that the law permits a foreclosing lender to “undo” its foreclosure within 30 days of the auction in certain enumerated circumstances, as long as the lender returns the purchase price to the auction winner, with interest. With appropriate interest representing the lost time value of the third-party purchaser’s money and non-economic costs (time, energy, etc.), there is no forfeiture of the purchaser’s investment.

Unfortunately, in this age of financialism, the fact patterns are rarely so simple. What happens when (as is common with large-scale commercial foreclosures) the “lender” is a single-asset shell entity that immediately funnels the foreclosure sale proceeds up through an entity chain where numerous parties (including perhaps government entities such as the FDIC) may have interests, rendering the funds difficult (or perhaps impossible) to recoup or trace? Further, it seems that there is now a small cottage industry of confirmation-claim buyers who acquire loan documents at a discount from lenders and then pursue confirmation and deficiency claims against debtors and guarantors. In such cases, both the property and the loan documents can end up in the hands of third parties who had no part in the original transaction giving rise to the debt! In light of such fact patterns, how can anyone justifiably take title to property at a foreclosure auction?

There are at least two analogical hooks in the law that should protect third party buyers from this catastrophic forfeiture risk. First is the ancient principle of subrogation. The idea that a third-party buyer can be subrogated to the rights of the foreclosing lender dates back at least 100 years, before the security deed and the nonjudicial power of sale became enshrined as the universal method of real estate lending in Georgia, and the idea in fact remains a part of the Georgia code. According to O.C.G.A. § 44-14-189, “A purchaser at a void or irregular judicial sale under the mortgage shall succeed to all of the inter-
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ests of the mortgagee.” This statute simply codifies the application of the equitable subrogation doctrine from the late 19th century.20

It is worth pointing out, of course, that the statute expressly deals with judicial sales under mortgages, while the universal modern practice is that foreclosure is conducted nonjudicially under a security deed. On the one hand, the distinction between the security instrument (mortgage vs. deed to secure debt) does not make a difference. Even the musty old authorities recognize that the principle (and thus the statute) should apply equally to security deeds and to mortgages.21 But with respect to the form of foreclosure (judicial vs. nonjudicial), the distinction does matter. The subrogation statute was written before the confirmation statute was written, and therefore does not deal with the added wrinkle of who (if anyone) is entitled to the deficiency judgment if confirmation is granted. If the third-party buyer was subrogated to all the rights of the lender in the event of a reforeclosure, then the third-party purchaser is not only entitled to conduct the reforeclosure, but is also entitled to the deficiency judgment if confirmation is granted. This is an unfair windfall to the third-party purchaser and would essentially mean that every foreclosure auction in which the court subsequently orders a resale was actually a public sale of the loan documents, not simply the collateral property.

The equitable solution to this should be that the third-party purchaser is partially subrogated to the rights of the foreclosing lender, up to the amount of money that the third-party purchaser paid for the property. The result is that, if the court orders a reforeclosure at confirmation, the third party who acquired the property should be the one entitled to conduct and hold the reforeclosure auction. Such third-party purchaser should be entitled to “credit bid” the amount that it has previously paid for the property, along with all of its costs and expenses in conducting the reforeclosure. If no one outbids the original third-party purchaser at the reforeclosure auction, then there is no forfeiture as regards the original third-party purchaser, because it still acquires the property, this time as the “de facto lender.” In the unlikely event that another third party chooses to outbid the original third party at the reforeclosure auction, there is no forfeiture as regards the original third party because it is entitled to collect the proceeds from the auction up to the original price together with its costs of conducting the reforeclosure, with the excess going to the original lender (which accordingly reduces the borrower’s potential deficiency judgment).

Although subrogation is a fine tool for protecting third-party purchasers against the forfeiture risk of acquiring foreclosed property, it is not perfect. First, the costs of conducting the reforeclosure become “baked in” to the remedy and cannot be recovered unless someone outbids the original third-party purchaser at the reforeclosure auction.22 Further, the reforeclosure remedy does not protect a third-party purchaser against the risk that the borrower goes into bankruptcy (whether voluntarily or involuntarily) after the original foreclosure, but before the reforeclosure. In such an instance, it could be a significant period of time before the third-party purchaser can obtain relief from the automatic stay. Indeed, it is possible that in some circumstances the bankruptcy court will approve a plan of reorganization that reinstates the debt23 thereby trapping the third-party purchaser in its position as “de facto lender” and tying up the third-party purchaser’s investment for what could be a significant period of time.

Bankruptcy/insolvency law contains its own method of protecting third-party purchasers, however, which is the second analogical hook to which third-party purchasers of foreclosed property can look for protection against the forfeiture risk. Where a third party buys property, and a bankruptcy or insolvency court later concludes that the transaction was “constructively fraudulent” as regards the seller/debtor, such a sale can be unwound, but the third-party purchaser is protected by a lien on the property to the extent that the third-party purchaser gave value in good faith for the property. Both federal law24 and Georgia law25 recognize this principle.

Logically, third-party purchasers should be protected under this principle by means of a lien (superior to the lender’s security deed) to the extent of the third-party purchaser’s acquisition price for the foreclosed property. Because the lien primes the security deed being reforeclosed, this effectively converts the security deed being reforeclosed into a second mortgage at which bidders are bidding (if at all) for any equity that may exist in the property above the amount of the original third-party purchaser’s bid at the original foreclosure auction. In what is likely to be the common outcome, the lender will be the only bidder at the reforeclosure auction (at which it is essentially bidding against itself to reduce its deficiency to a palatable number to the confirmation court).26 Assuming that the lender “wins” the reforeclosure auction, equity should thereafter compel the lender to convey the property back to the original third-party purchaser in satisfaction of the third-party purchaser’s lien.27 To the extent that a new third-party purchaser is the winner at the reforeclosure auction, the original third party purchaser should be entitled to judicially foreclose its lien to acquire the property. Accordingly, the original third-party purchaser is protected once more from forfeiture of its investment.

Yet here too, the remedy is not perfect. The original third-party purchaser faces the prospect of having to judicially foreclose upon its lien unless the lender is the winner at the reforeclosure. Exercising such a remedy may have considerable costs. Further, in the unlikely scenario where a new third party is the
What About Sales of REO After the Foreclosure?

Thus far we have only considered the question of third parties who buy on the courthouse steps. Yet many sales of distressed property occur as “real estate owned” (REO) by the lender after it has taken title to the property at foreclosure. In such a situation, there seems less need for the protective methods set forth above, for at least two reasons: First, here it is possible for the potential buyer to underwrite the risk of a confirmation resale. The buyer can wait for the 30-day confirmation filing period to expire. The buyer can also obtain a representation and warranty in its contract that the lender has not filed for confirmation, and can obtain a contractual covenant that the lender will not do so.30

Second, the public policy ramifications here are less severe. The confirmation statute exists to ensure that properties sell for their “true market value.” But if third-party purchasers cannot show up at the courthouse steps with a reasonable degree of confidence that any investment they make there will not be wiped out by acts wholly beyond their control, such persons will either not bid at all or will greatly discount their bids to account for the risk. Without competitive bidding at the foreclosure auction, it becomes impossible to obtain the “true market value” of the property, and the confirmation statute becomes entirely self-defeating. But no such issues are found in the sale of REO—the lender has already acquired the property, and its potential deficiency amount is set. Although it is doubtless true that the law should encourage the sale of REO property to foster a return to healthy markets, it seems a bridge too far to try to apply the protective methods set forth above to parties who are in a position to protect themselves, and this is therefore a policy choice best left to the legislature.

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Conclusion

The confirmation statute, untouched since 1935, deserves
attention from the legislature. There is considerable
anecdotal evidence (to go along with the economic logic)
that the cloud on title represented by a possible confirmation
resale order continues to derail or delay sales of
distressed property in Georgia. With respect to sales of REO
this is a pure public policy problem, but with respect to
foreclosures at the courthouse steps, it is a legal
problem whose existence is belied by nearly 80 years of substantial silence
(save for some distressing dicta). Yet there are
common-law solutions that should
give courts, title companies
and foreclosure sale buyers comfort in
the interim. As long as a third
class acquires the property at
the courthouse steps in good faith and
for value, the law should respect and
protect the valuable market-clearing
function that such buyers serve by
means of subrogation to the lender’s
rights and/or an equitable lien on
the collateral property.

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Endnotes
2. O.C.G.A. § 44-14-161(a) (2002).
3. Id. § 44-14-161(b).
4. Id. § 44-14-161(c).
5. Id.
6. Debt is fully-recourse to a borrower
or guarantor when the borrower
or guarantor must repay the debt
regardless of the circumstances in
which the loan default occurred.
BLACK’S LAW DICTIONARY 955 (8th
ed. 2004) (defining “recourse loan”
as “[a] loan that allows the lender,
if the borrower defaults, not only to
attach the collateral but also to seek
judgment against the borrower’s
(or guarantor’s) personal assets.”
Debt can also be partially recourse,
in that the borrower or guarantor
must repay some portion (though
not all) of the debt, regardless of
the circumstances in which the loan
default occurred. Debt can also be
either fully- or partially-recourse
to a borrower or guarantor only
in certain circumstances, such as
when the borrower commits “bad
boy” acts enumerated in the loan
documents. See Alfred G. Adams,
Jr. & Jason C. Kirkham, The Real
Estate Lender’s Guide to Single
Asset Bankruptcy Reorganizations,
8 DePaul Bus. & Com. L.J. 1, 7
(2009). A full treatment of the
subject is beyond the scope of this
article, though for purposes here
it is important to bear in mind
that a deficiency judgment (and
therefore a confirmation action as
a condition precedent to such a
deficiency judgment) can only arise
in circumstances where some form
of recourse exists on the debt.
7. Georgia Title Standard 17.3,
org/public/pdf/SECTION5/
realproplaw/TitleStandards.pdf.
8. See Georgia Title Standard 1.1
(cmt. (“Title Standards are primarily
intended to eliminate technical
objections which do not impair
marketability and some common
objections which are based on
misapprehension of the law.”).
9. See, e.g., Chicago Title Ins.
App. 121, 122, 449 S.E.2d 681, 682
(1994) (noting that a marketable title is
not a flawless title, but rather one
that “can again be sold to a reason-
able purchaser or mortgaged to a
person of reasonable prudence”).
10. E.g., RTC v. Morrow Auto Ctr., Ltd.,
216 Ga. App. 226, 228-29, 454 S.E.2d
does not define what constitutes
‘good cause’ . . . . Discretion to grant
if the issues of ‘good cause’ and
resale are left to the ‘considerable
discretion’ . . . . Appellate courts do
not disturb that exercise of
discretion unless it is clearly,
patently, and manifestly abused.”)
(citation omitted).
11. The authors have been unable to
locate any legislative history or other
codified knowledge of the drafters’
debates. The authors have consulted
with several prior members of the
title standards committee (including
at least one prior chair thereof), and
in their experience, this question has
not heretofore been addressed by the committee.
13. See, e.g., Craig Pendergrast & Sara LeClef, Georgia Foreclosure Confirmation Proceedings in Today’s Recessionary Real Estate World: Back to the Future, 16 Ga. Bar J., Dec. 2010, at 12-13 (“If . . . the property is sold to a third party prior to the confirmation hearing . . . then the option of asking the court to allow a new foreclosure sale at a higher price is obviously lost . . . .”)
14. For example, given the obvious cloud on title created by the reforeclosure possibility, it seems a bit aspirational to conclude that the land itself is not under the court’s jurisdiction in some respect in a confirmation action. Indeed, the confirmation action is sui generis in Georgia law and “do[es] not fit neatly into the customary classification of actions in personam or actions in rem.” Henry v. Hiwassee Land Co., 246 Ga. 87, 89, 269 S.E.2d 2, 4 (1980); accord Wall v. Fed. Land Bank, 240 Ga. 236, 237, 240 S.E.2d 76, 77 (1977).
16. Cf. O.C.G.A. § 13-1-13 (2010) (“Payments of claims made through ignorance of the law or where all the facts are known and there is no misplaced confidence and no artifice, deception, or fraudulent practice used by the other party are deemed voluntary and cannot be recovered . . . .”).
20. See Dutcher v. Hobby, 86 Ga. 198, 200-01, 12 S.E. 356, 356-57 (1880) (“We think the authorities sufficiently answer this question . . . . [A] purchaser at a void judicial sale, under foreclosure, has the same rights as the original mortgagee himself.”); see also Ashley v. Cook, 109 Ga. 653, 658, 35 S.E. 89, 91 (1900) (noting that the statute is based on and is a codification of the reasoning of Dutcher).
21. See Ashley, 109 Ga. At 658, 35 S.E. at 91 (“The [code] section just cited . . . . is sufficiently broad to include judicial sales in pursuance of a judgment rendered setting up a special lien under the provisions of a security deed.”).
22. For example, suppose the original third-party purchaser paid $100,000 for a property on the courthouse steps. When reforeclosure is ordered, the original third-party purchaser steps into the shoes of the lender (up to this $100,000 amount) and conducts the reforeclosure, but in so doing it spends $5,000 in advertising costs and attorneys’ fees. While the original third-party purchaser should be entitled to “credit bid” up to $105,000 at the reforeclosure auction, unless someone actually bids greater than that amount, the $5,000 spent by the original third-party purchaser is a cost that will never be recouped.
24. Id. § 548(c) (West 2004) (“A transfer or obligation of [a fraudulent] transfer or obligation that takes for value and in good faith has a lien on . . . . [the asset] transferred . . . . to the extent that such transfer or obligation gave value to the debtor in exchange for such transfer . . . .”).
25. O.C.G.A. § 18-2-78(d) (2004) (“Notwithstanding voidability of a transfer or an obligation under this article, a good faith transferee or obligee is entitled to the extent of the value given the debtor for the transfer or obligation to . . . . [inter alia] a lien on . . . . the asset transferred . . . .”)
26. That is, suppose that the balance due on the loan resulting in the original foreclosure is $10,000,000. If the original third-party purchaser buys the property at foreclosure for $6,000,000, and holds a lien in this amount priming the original security deed, the lender at reforeclosure is essentially playing a game of “I’m thinking of a number” with the confirmation court as regards its potential $4,000,000 deficiency. If it bids too high, it reduces its deficiency, perhaps all the way to zero. But if it bids too low, it risks having its confirmation denied again—most likely for good this time—because the property did not bring “true market value” at the aggregated foreclosure sales.
27. See, e.g., Westmoreland v. Westmoreland, 280 Ga. 33, 35, 622 S.E.2d 328, 330 (2005) (Carley, J., concurring) (invoking the familiar maxim that “equity regards as done that which ought to be done”).
28. Indeed, this speaks to how unlikely it is that any new third party would show up to bid. It is worth questioning whether equity should compel the original third-party purchaser to allow the new third party purchaser to pay off the original third-party purchaser’s lien and take the property. Such a balance of harms is best left to individual fact patterns as they arise.
29. It is also worth questioning whether the dicta in Davie v. Sheffield, 123 Ga. App. 228, 180 S.E.2d 263 (1971), should be disavowed. If so, then the traditional protections given to bona fide purchasers may well be sufficient to give comfort to third-party purchasers, unless they had notice of the possible consequences (whether by some instrument affecting title or by actual notice that the lender intends to file for confirmation). It is also worth questioning whether, notwithstanding Davie, a court should ever find “good cause shown” where a third-party purchaser may be harmed. Of course, Davie says what it says until another court says otherwise.
30. To the extent that the lender breaches these contractual promises, this seems an example of the sort of “bad faith” that should result in a denial of confirmation without a resale. Cf., e.g., McDowell v. Regions Bank, 716 S.E.2d 638, ___, No. A11A1480, 2011 Ga. App. LEXIS 795, at *2 (Sept. 7, 2011) (“Because the record plainly shows that Regions did not act in bad faith and that the property failed to sell for its true market value, the trial court did not abuse its discretion in ordering a resale.”). In the alternative, the protective measures set forth above should be available to the third-party purchaser.
Thank you for the opportunity once again to present to this distinguished body the annual State of the Judiciary address. This yearly tradition underscores our commitment to work together as co-equal branches of government in our common mission of serving the citizens of this great state. Together we can achieve far more than we can alone.

I am privileged to report to you today our accomplishments of the last year, the challenges we face and our plans for the future. I am honored that joining me are my friends and colleagues on the Supreme Court of Georgia—Presiding Justice George Carley, Justices Robert Benham, Hugh Thompson, Harris Hines, Harold Melton and David Nahmias. I want to pay special tribute today to my dear friend, George Carley—now presiding justice but soon to be chief justice before he retires later this year after 32 distinguished years on the bench. We in the judiciary are going to miss this
brilliant jurist and wonderful colleague.

Also here are my friends and colleagues on the Court of Appeals of Georgia—including Chief Judge John Ellington, former Chief Judge Charles Mikell and the newly appointed Judge Michael Boggs. And we are honored to have in the gallery many judges from around the state.

On behalf of all these judges and the judiciary, I want to sincerely thank you for the work that you do. We are deeply appreciative to you in the Legislature and to Gov. Deal for your interest in—and ongoing support of—the judicial branch.

Above the bench of the Supreme Court of Georgia is a Latin phrase etched in stone. It says: “Fiat Justicia, Ruat Caelum.”

It means: “Let justice be done, though the heavens may fall.”

This pronouncement is the essence of an independent judiciary. It stands for the notion that above all else, the rule of law is the foundation of our nation, and regardless of anything else, we must protect it. That is our duty as judges. It is our job to uphold the law regardless of the outcome, regardless of public opinion, regardless of political favor. Our forefathers understood this principle through their embodiment in the United States Constitution of the three branches of government and the separation of their powers.

“In order to form a more perfect union,” our United States and state constitutions creatively check each branch’s authority and balance its limitations by guaranteeing its independence while at the same time ensuring the interdependence of all three branches.

You write the laws; the governor executes them; we interpret them. Simple but brilliant. In Georgia, at this time in our history, our three branches of government share a symbiotic relationship. Together as a whole, we can be stronger than our individual parts.

Never has this relationship come to greater fruition than through our work this past year on criminal justice reform. Nearly a year ago, I joined Gov. Deal, Speaker Ralston, Lt. Gov. Cagle, Rep. Jay Neal and others in an unprecedented news conference where all three branches of government stood as one in our pledge to reform Georgia’s criminal justice system.

Through legislation introduced by Rep. Neal, the Special Council on Criminal Justice Reform embarked upon a detailed analysis of Georgia’s sentencing and corrections system. Our primary goal was—and remains—the public safety of our citizens.

We began this process united in our conviction that our state can no longer afford to spend more than $1 billion a year to maintain the nation’s fourth highest incarceration rate and the nation’s No. 1 highest rate of people under some kind of correctional restraint. We began united in our belief that warehousing non-violent offenders who are addicted to drugs or are mentally ill does nothing to improve the public safety. Indeed, in the long run, it threatens it.

And we began united in our commitment to come up with alternatives to incarceration for non-violent offenders that protect the public safety by addressing the roots of crime and reducing recidivism.

Georgia has a rich history of being tough on crime. This state did not just settle for a “three strikes, you’re out” law. As a government, we must continue in our zeal to protect our citizens from violent and repeat offenders. Murderers, rapists, armed robbers and other violent felons deserve stiff prison sentences. No one suggests otherwise.

But if we truly want to be tough on crime, we must figure out how to reduce it. We now know that being tough on crime is not enough. We must also be smart about crime and criminal justice policy. If we simply throw low-risk offenders into prison, rather than holding them accountable for their wrongdoing while addressing the source of their criminal behavior, they merely become hardened criminals who are more likely to reoffend when they are released. The bottom line is that all those mandatory minimum sentences and get-tough prison measures did little to reduce our three-year recidivism rate, which has held steady for the last decade at nearly 30 percent.

Two months ago, the Special Council on Criminal Justice Reform published a report of its findings. The Council found that non-violent drug and property offenders represent 60 percent of all admissions to Georgia prisons. Between 1990 and 2010, their average time in prison tripled. In 2010, we who are judges sent thousands of low-risk drug and property offenders to prison—people who never before had been locked up. For those low-risk offenders, the taxpayers spent $49 a
day to house them in prison, versus $16 a day for community treatment at a Day Reporting Center or $1.50 a day for probation supervision.

The Special Council found that at least one in four who entered Georgia's prisons had mental health problems. In a special newspaper series this past fall, The Atlanta Journal-Constitution reported that Georgia’s “jails have become the new asylums” with more mentally ill people locked behind bars than all those being treated in state psychiatric hospitals combined. As I speak to you today, up to a quarter of the thousands sitting in our county jails are mentally ill. That is costing our taxpayers millions of dollars, from which they get little return on their investment.

The Special Council has looked to other states and their successes—notably Texas and South Carolina—in recommending a series of policy options that are now before you for your consideration. Texas, for instance, invested a sizable amount in diversion and treatment centers, even though it faced a shortfall in prison beds. As a result, that state estimates it has avoided the need for two billion dollars in new prison construction, and for the first time in its history, Texas is actually closing a prison. But most significantly, in 2010, Texas posted its lowest crime rate since 1973.

Following the examples of Texas and other states, Georgia’s Special Council recommends giving judges more sentencing options by creating a statewide system of accountability courts, which include drug courts, mental health courts and veterans courts. Our veterans have been overseas sacrificing their lives and protecting our country. Many come back changed by traumatic brain injury, chemical dependency and mental health conditions that can lead to erratic behavior and possible involvement in the criminal justice system.

These accountability courts have a proven track record of holding offenders accountable while reducing their likelihood of reoffending. A national report issued just last month by the U.S. Government Accountability Office found that re-arrest rates for drug court graduates were 26 percent lower than the rate of recidivism among comparison groups. The goal is to turn lawbreakers from tax burdens into taxpayers, and these courts have already proven their effectiveness in doing that.

Yes, they may be more compartmentalized, but they are more efficient. Not only are they specialized, but they free up judges whose dockets have been clogged with drug crimes to deal with other important criminal and civil cases, including the very important business disputes.

The Council recommends other crime-fighting measures for your consideration. One involves offenders who are about to max out of prison—many of whom have spent the majority of their lives locked behind bars. Rather than push them out the prison gate with a bus ticket, a travel kit and $25 in cash, the Council recommends that six months before their discharge date, they be released to parole supervision to oversee their transition back into society.

Minor traffic offenses also dog our Georgia courts. Many of our citizens don’t realize that Georgia criminalizes minor traffic offenses, entitling the offender to a trial by jury if requested. Most states treat these minor traffic offenses as violations penalized by a fine. The Council recommends in its report creating a new class of violations for less serious traffic offenses so they are no longer treated as misdemeanor crimes. This recommendation specifically excludes DUIs and other serious traffic offenses.

There are many more recommendations, and I urge you to read the entire report. I join Gov. Deal in saying this is an important first step.

But this is like steering a ship. Changing our course will take time. And it will not come without courage and controversy. As Woodrow Wilson said: “If you want to make enemies, try to change something.” But, as Dr. Martin Luther King Jr. said: “A genuine leader is not a searcher for consensus but a molder of consensus.” There are many consensus builders in this room, and I am confident in your ability to bring about significant reforms.

Gov. Deal urged the Special Council to limit its focus to changes that affect the adult prison population. I agree. We must take this one step at a time. But today, I would like to plant a seed for your future consideration. In the last year, I have heard from many of our state’s juvenile judges, who have the best interests of our young people and their families at heart. With state cuts in mental health services, child welfare services, group homes and alternatives for children who do not need to be behind bars, juvenile judges are too often faced with sending young people to locked facilities to get some kind of treatment, or sending them home to get nothing at all. So today I offer you a postscript: The same reforms we are recommending to you for adults must begin with children.

Perhaps you have heard theparable about the group of people who were standing at a river bank when they watched an infant floating by and drowning in the river. One person promptly dove in and rescued the child. But then another baby came floating by. And then another! Frantic, everyone jumped in to try to save the babies. But then noticed one person was walking away. Accusingly, they shouted, “Where are you going?” He answered: “I’m going upstream to stop whoever is throwing babies into the river.”

In Georgia, we are throwing children into youth prisons. They are technically known as Youth Development Campuses, but many YDCs look, feel and sound just like adult prisons. Some of our children are serious, violent, repeat offenders, and we must protect our citizens from them. But many are behind bars because juvenile
judges have nowhere else to send them; because no one intervened before it was too late.

According to the Georgia Department of Juvenile Justice, during the last three years, nearly two-thirds of the more than 10,000 youths locked behind bars have some kind of substance abuse problem; more than one-third have been diagnosed with mental health conditions. As with adults, we have learned that our get-tough tactics have failed to scare juvenile offenders straight.

A recent study by The Annie E. Casey Foundation found evidence that our reliance on incarceration for young people provides no benefit to public safety, does not reduce their future offending, wastes taxpayer dollars and perhaps worst of all, exposes children to high levels of violence and abuse. In other words, our youth prisons are a pipeline to adult prison. Consider this: Within three years of juveniles’ release from youth prison, up to 72 percent are convicted of a new offense, depending on the state.

Children who drop out of school, get involved in drugs, develop mental health problems, are unruly, disrespectful and out of control without ever getting any kind of intervention are strong candidates for becoming adult criminals. We must face the reality that for many of these children, Georgia’s youth prisons are mere incubators for adult crime.

Tasha Hamilton was well on her way down that path to adult prison. Tasha was 8-years-old when her mother abandoned the family, leaving her behind along with her baby sisters. Although their father worked, they had little money and at times they slept in a car. Tasha grew up angry and defiant. By 11-years-old, she was smoking marijuana. By 12, she was hanging out with an older crowd and drinking. By 13, she was hooked on methamphetamine.

Tasha bounced in and out of Georgia’s YDCs and boot camps—spending 90 days here, another few months there—often for minor infractions. By the time she was 16, Tasha had been in trouble so many times that she was committed to the state. And this time, they sent her away for nearly a year.

Tasha describes the YDC as a “miserable” place full of “miserable people wanting to do harm.” Tasha says youth prison “doesn’t bring out the good in anybody.” In her own words, she says: “You take away a little bit of bad with you. You come out knowing worse people than when you went in, and you build relationships with them.”

But something happened to Tasha that made all the difference. She had a probation officer, Jennifer King, who genuinely cared and refused to give up on her. Jennifer worked in the Douglas County Juvenile Court under Jenny McDade, director of juvenile programs. Together, they made sure Tasha got the help she needed.

Tasha got her G.E.D., she got drug
treatment and ultimately she got a job. Without Jennifer, she says, it would have been easy for her to graduate into adult prison. She sadly wonders how many are in adult prison today who never had a Jennifer in their lives—someone who said to them when they were teenagers: You can do it, when they had no hope that they could.

With the help of the Douglas County Juvenile Court system, under the able leadership of Judge Peggy Walker, Tasha was accepted into West Central Technical College. Today, she works full time in insurance, taking care of her two daughters—as a taxpayer, not a tax burden. Today, Tasha has that hope in her life she once lacked. And today, it’s still important to Tasha that she continues to make her probation officer proud.

Ladies and Gentlemen, it is my honor to introduce to you Tasha Hamilton, Probation Officer Jennifer King, Jenny McDade and Judge Peggy Walker.

Together, we can move this ship in a new direction. You have a challenge ahead, and I recognize you have difficult choices to make. I do not envy you. This year, as in the previous few years, you face what we hope is the end of a recession that has cost citizens their jobs, their homes and their hope in the American dream. This year, as always, you are charged with parsing out limited state funds to many worthy causes.

The judicial branch provides a core government function by protecting the public safety. We in the judiciary are grateful to you for understanding that we are bound by the Constitutions of our state and nation to uphold the rule of law and mete out justice in a fair and impartial way to all who come before us.

As I have said before, our courts are the emergency rooms of society: We must respond to all who come in front of us.

Yet in Georgia, our courts continue to struggle, putting justice in jeopardy.

State budget cuts, exacerbated by county cuts, have resulted in court backlogs across Georgia. DeKalb County has five pending death penalty cases that it cannot move forward due to a lack of resources. In some counties, including DeKalb, domestic violence cases have been delayed at the very time Georgia inches closer to the top in the rate of domestic violence homicides. According to the most recent FBI data, Georgia has gone from having the tenth-highest rate of domestic violence homicides to now having the sixth-highest rate. One metro Atlanta judge told me he worries about what could happen if a young mother found a locked courthouse door on the day she needed a temporary restraining order to protect her family from an abuser.

Civil trials in particular are being delayed in a number of jurisdictions. That is because our Constitution guarantees the right to a speedy trial in criminal cases. 

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Make it your Homepage!
In Georgia, we are committed to making our courts as open and as accessible to the public as possible.

As a result, some judges have been forced to delay civil matters.

We are all proud that Georgia was recently ranked the fourth most business-friendly state in the nation. We in the judiciary want to do everything we can to protect that ranking by guaranteeing that businesses can resolve their disputes in a timely fashion.

In addition, divorce cases and dispossessory cases—in which people have been evicted from their homes—have been affected by court delays from Jackson County to Houston County. In one Northeast Georgia court, people are now waiting up to four months just to get a temporary hearing in a divorce—a situation that can grow volatile when children are involved. For a landlord, court delays can mean an additional two-to-three weeks before a non-paying tenant is evicted and replaced with a paying tenant. For creditors, it can mean an additional three-to-four weeks before any collection efforts can be started.

As a superior court judge told me: “We are just one case away from a serious logjam if a major case is tried or defense attorneys start filing speedy trial demands.”

Today, Georgia’s entire judicial branch is funded with less than 1 percent of the state budget. Georgia’s judiciary has never resisted sharing the burden of difficult economic times. The fact is we were lean before they struck. At the Supreme Court of Georgia—the state’s highest court—until this year, we did not even have a paid employee to greet visitors or answer our phones in the main office. Our small staff of 51 is still fewer than we had a decade ago, yet our caseload—like that of other courts—has grown.

Justice is not a privilege; it is a right. Criminal cases must be heard; civil disputes must be resolved. Courts are critical to public safety. But in recent years, the erosion of budgets in the face of growing caseloads has put us perilously close to being unable to fulfill our constitutional mandates.

The good news is we have never idly sat by. I report to you today that even in the face of a mighty struggle, your court system remains sound, strong and stable. We are holding the line, doing more with less and moving forward.

Georgia’s courts and our 1,500 judges are problem solvers. It was a judge who first identified the need for a drug court back in 1994, when Bibb County created Georgia’s first. Since then, the number of accountability courts has grown to 100. We are greatly appreciative to you for your support of these courts in the past. The need now is to expand them statewide, along with the necessary treatment facilities, staff and security required to make them effective.

This year, we became one of the first states to move forward and create a new rule for the recusal of judges, following the U.S. Supreme Court’s landmark ruling in the 2009 case, Caperton v. A.T. Massey Coal Company. Thanks to the leadership of Rep. Ed Lindsey and my colleague Justice Harold Melton, we have amended by order of the Supreme Court of Georgia the Code of Judicial Conduct to ensure that judges disqualify themselves in any proceeding in which their impartiality could be questioned. Georgia’s rule has become a model rule and was recently adopted, with minor changes, by the American Bar Association.

We also continue to make strides in our efforts to switch from paper to the electronic filing of court documents. At the state Supreme Court, we are now close to 100 percent participation among attorneys in electronically filing their motions, briefs and applications to appeal.

Georgia’s judiciary has a nationwide influence. Juvenile Judge Peggy Walker of Douglas County is now in line to become president of the National Council of Juvenile and Family Court Judges in 2014; Juvenile Judge Michael Kay of Coweta County is the immediate past national president. This past summer, I was honored to co-host the annual conference of the nation’s Supreme Court justices, as well as the nation’s court administrators. Fully 75 percent of this country’s chief justices came to Atlanta where Gov. Nathan Deal graciously welcomed them. The theme of the conference was “A World of Change: Courts and the Media in 2011.”

In Georgia, we are committed to making our courts as open and as accessible to the public as possible. As someone once said, “One of our greatest freedoms is the right to know what our government is doing.” I believe that openness and accessibility are critical to winning our citizens’ faith and confidence in their justice system.

Our open-door policy extends to you. All of us who are judges would be honored to have you visit our courts. Especially as you consider the options now before you for reforming this state’s criminal justice system, a half-day visit to your local courthouse could help enlighten you about the types of cases our judges face each day. About the challenges before them. And about the need they have for sentencing options other than prison alone. Also, you might consider attending a drug court graduation.

Thank you for standing with us as partners as we stand with you in moving Georgia into a new age. Thank you for your support of the judicial branch. And thank you for your service to this great state.

God bless you. And God bless the state of Georgia.
Military Legal Assistance Program Aid Tops 500 in Two Years

When the State Bar of Georgia began its Military Legal Assistance Program (MLAP) in December 2009, former State Bar President Jeff Bramlett (2008-09) noted success would be measurable when one soldier had been helped. The program was designed to connect a cadre of 700 volunteer lawyers throughout the state with military service members and veterans seeking help with a variety of legal problems.

Over the past two years, more than 500 connections have been made, a remarkable achievement and a testament to Georgia lawyers who not only devote their expertise and energy to their private clients, but who also work for the public good. And as increased dedication and commitment has been demanded of our service members stationed here in Georgia and throughout the world, this legal assistance helps offset the sacrifices they and their families make.

A 2007 Department of Defense (DoD) fact-finding mission connecting American private-sector opinion leaders with deployed service members inspired the State Bar’s program. DoD invited a contingent of civilians, including Georgia attorney and Navy veteran Jay Elmore, to meet face-to-face with service members and commanders deployed across the Middle East.

Photo by Sarah I. Coole
“A program that was two years in the making and now two years in operation, MLAP is achieving precisely the goals and objectives its founders had in mind. All Georgia lawyers should be proud of it and what it does for our vets and service members. Their service and sacrifice is great.” — Kenneth L. Shigley, president, State Bar of Georgia

and the Horn of Africa. At the end of the mission, DoD challenged each civilian participant to return to their private-sector lives and ponder the question: “What can be done to support those serving in harm’s way?”

Elmore shared this challenge with his law partner, Jeff Bramlett, who was about to become president of the State Bar of Georgia. In response, Bramlett appointed a committee of lawyers chaired by Charles Ruffin to study the need and to develop a blueprint for recruiting, training and coordinating Georgia volunteer lawyers to meet the legal needs of service members and veterans.

“Enthusiasm for the concept among Georgia lawyers was infectious,” recalls Bramlett. “The special committee looked at how other bar associations across the U.S. went—or were not—addressing the legal needs of service members and their families. We realized early on that Georgia was well-positioned to pioneer a unique and comprehensive program to deliver excellence to clients who had earned our gratitude and who needed our help.” In June 2009, after months of thorough investigation, the State Bar’s Board of Governors approved the creation and funding of the Military Legal Assistance Program. Norman Zoller was retained as the coordinating attorney, and the formal program was launched in late 2009. Upon establishment of the program, MLAP Chair Ruffin said, “The Bar has been considering the mechanism for an effective program to address unmet legal needs for many months, and we now look forward to this program being able to translate Jeff Bramlett’s vision into operational reality.”

How does MLAP help?
What kinds of services are provided and who is eligible to receive them? Basically, help is furnished on any civil matter according to the following eligibility criteria:

- Active duty service members having pre- or post-deployment related legal matters.
- Veterans separated from the service with a service-connected disability who seek legal assistance directly related to that disability.
- Representation for the spouse of an active duty service member where the legal issue affects the well-being of the family as a whole and the interests of the spouse and service member are aligned.
- Eligible clients who physically reside in Georgia and require legal assistance where jurisdiction lies in the state or federal courts of Georgia.
- Legal assistance to National Guard members, Reservists and military retirees, as attorney resources allow.

Although the program does not provide direct assistance to individuals accused of a crime, it does help direct them to public defenders, legal assistance offices or to local bar associations.

The results so far have been gratifying. As noted above, through the end of 2011, more than 500 service members and veterans—our “clients”—have been connected with lawyers. About half of those cases have been family law matters (and regrettably about half of those have been divorces) and about a quarter of all legal help has been provided to veterans. (Approximately 774,000 veterans reside in Georgia.)

Phone calls and email messages are received every day, mostly from active-duty service members stationed at one of the 10 military installations located in Georgia. Additionally, phone calls and messages have been received from service members on active duty in Afghanistan, Iraq, Kuwait, United Arab Emirates, Japan, Italy, Germany and the Azores, to cite a few. Service members calling from abroad have reportedly heard about the program by word-of-mouth from their colleagues serving in Georgia. The word has gotten around and continues to spread.

Although two recent cases are both unusual in their complexity and the challenges they presented, the outcomes have proven particularly satisfying for the volunteer lawyers and their clients.

In the first, grandparents from Fayette County sought MLAP’s help in June 2010, following the sudden death in Tennessee of their son-in-law, a retired Army combat medic. Their daughter had died two years earlier and the eldest of her four children had been living with them in Georgia since her death. At the time the grandfather made contact with the MLAP office, he and his wife had been granted guardianship of all four children and were then living with them. As they began to look into what VA and other benefits the children might be entitled,
they promptly realized they needed an attorney whose expertise included military, veterans’ and Social Security benefits.

MLAP helped find them that attorney, and to the grandparents’ great relief, the children are now eligible to receive future educational assistance, as well as monthly and other VA benefits. Issues still unresolved continue to be shepherd through the system by their volunteer lawyer.

In the second case, through the efforts of an MLAP volunteer attorney, a Vietnam veteran from Fannin County suffering from post traumatic stress disorder (PTSD) and a traumatic brain injury has received a long overdue award of $25,000 in back pay for an Agent Orange claim, as well as monthly disability benefits for his PTSD claim, which had been denied many times before. Still being addressed is his claim for relief from the government’s attempts to recover an alleged overpayment of $124,000 in Social Security benefits, which he received after his VA benefits were terminated. His inability to have that demand reversed on his own had left him distraught.

Besides receiving and processing cases every day, MLAP has also sponsored or co-sponsored a number of continuing legal education programs with Georgia Institute of Continuing Legal Education and with the Bar’s Military/Veterans Law Section. Some have focused on the “Nuts and Bolts of Military Law” and with the accreditation process that qualifies a lawyer to practice before the U.S. Department of Veterans Affairs. Last year more than 200 lawyers attended the VA accreditation program and this past November nearly 200 more attended. Speakers at that symposium included Will A. Gunn, general counsel of the Veterans Administration and (former Chief) Hon. William P. Greene Jr. of the U.S. Court of Appeals for Veterans Claims.

Immediate Past President Lester Tate has observed, “Members of the armed services stand ready to protect the rights and liberties of Americans whenever and wherever needed. Wouldn’t it be ironic—and wrong—if we, as lawyers, were unwilling to protect the rights and liberties of soldiers, sailors, marines and airmen in American courtrooms? I think “returning the favor” to those who have given so much is what MLAP is all about.”

In recognition of the important service provided by the lawyers participating in this program, the MLAP Committee recommended and the State Bar of Georgia’s Board of Governors approved last year a special award to be presented annually to one outstanding lawyer. This recognition, called the Marshall-Tuttle Award, is named in honor and memory of both Army Corporal Evan Andrew Marshall, a soldier from Athens, Ga., who was killed in action in Iraq in 2008, and U.S. Circuit Judge Elbert Parr Tuttle, who served in the Army for 30 years, was a founding partner of a major Atlanta law firm and served as a federal judge for 43 years. Tuttle also provided pro bono legal services to many people, including John Johnson, a young Marine. In 1938, the U.S. Supreme Court held in the landmark and fundamental rights case, Johnson v. Zerbst, that counsel must be provided for all defendants in federal criminal trials who cannot afford to hire their own attorneys. The first recipient of this award was Drew N. Early, Lynch & Shewmaker LLC, Atlanta. During 2010, Early provided legal assistance without charge to several service members and veterans, in addition to teaching and mentoring other Georgia lawyers about military law to complement their civilian practices. Early is a 21-year active duty Army veteran and a graduate of the U.S. Military Academy at West Point and the Georgia State University College of Law, cum laude.

“Drew Early has been an example of what the State Bar hoped this program would become,” says Ruffin. “He not only has provided expert advice to our state’s service members, but he has also been an important adviser to our committee and to other lawyers throughout Georgia on the technicalities of military law to help ensure that the rights of service members and veterans are protected. His commitment to the program and to his fellow service members has been exceptional.”

A Significant Statistic

So what kind of measurable success is the program achieving? It has obviously exceeded Jeff Bramlett’s early requirement...
WHO ARE THE MURPHYS?

John and Jeanette Murphy are the proud parents to a big and loving Irish family with even bigger hearts! They first met as counselors at a group home for disabled adults. Their work fueled a passion to reach people with disabilities at a younger age in order to help them build the needed skills to become adults who can care for themselves and each other. Passion turned into action, and the Murphy family now numbers 23, with 4 birth children and 17 children adopted with special needs.

WHAT IS THE MURPHY HOUSE PROJECT?

While the Murphy’s have created a home full of love, their old home was in a serious state of disrepair and unfit for such a large family to live in. Over the past 4 years, the Keenan’s Kids Foundation has been working hard to build the Murphy’s a beautiful new home in McDonough, GA. We are happy to say that the construction of the 7,100 square foot home is now complete, due, in large part, to the charitable Atlanta legal community.

However, the work is far from done. The Keenan’s Kids Foundation has also taken on a substantial mortgage and is counting on your future support to help retire that debt. At the Keenan’s Kids Foundation, we believe that a strong, loving and secure family is easily the most important thing in shaping a child’s sense of the world and the most influential factor in developing them into adults they will become. John and Jeanette have devoted their lives to the care of their children and the well being of their family. Now we are asking our extended family to help us finish what John and Jeanette started over 20 years ago.

HOW YOU CAN HELP:

Big or small, every little bit goes a long way in helping the Murphy family continue to nurture and care for their children in the way every child deserves.

- $10 can help the Murphy’s buy school supplies for their 23 special needs children
- $25 can help buy seeds to grow the produce central to growing children’s dietary needs
- $50 will help maintain the family pool and yard used for physical therapy
- $100 will help with manage the cost of vitamins, prescriptions and medical attention for the family.
Norman Zoller has devoted the majority of his 36-year legal career to public service. He served as the first clerk of court for the U.S. Court of Appeals for the 11th Judicial Circuit from 1981-83, when he was named circuit executive, a post he held until his retirement in 2008. Previously, he managed the Hamilton County, Ohio, courts for nearly a decade. Zoller holds bachelor’s and master’s degrees (in public administration) from the University of Cincinnati and a law degree from Northern Kentucky University. He is admitted to practice in Georgia and Ohio. An Army veteran, Zoller served almost seven years on active duty as a field artillery officer, including two tours of duty in Vietnam, first with Special Forces and then with the 82nd Airborne Division in response to the Tet Offensive in 1968. He also served 15 years in the National Guard and Army Reserves as a judge advocate officer.

Endnotes
1. Table 520, Veterans by Selected Period of Service and State: 2010, U.S. Census Bureau Statistical Abstract.
3. H. Lane Dennard Jr., retired partner at King & Spalding, Atlanta, Georgia, along with other lawyers and staff at King & Spalding, who helped with this case.
4. M. Scott Holcomb, State Representative and General Counsel for J.P. Turner & Company, LLC, Atlanta, Georgia.
5. As noted in the main text above, one case involved the grandparents of four grandchildren, who were the children of their late daughter and his late son-in-law, a retired Army Sergeant First Class. In early 2008, the children’s mother (the grandparent’s daughter), died as a result of cancer. Her oldest daughter had been with the grandparents since then. The remaining three children lived with the father in Tennessee. He was a career soldier (hereafter the “father”) and had retired. In late April 2010, the children returned home to find their father had passed away in his bed. The grandparents then had a guardianship of the four children granted by the probate court in a Georgia county. The daughter and the children’s father were divorced at the time of both their deaths. The father left no will. The grandparents sought help from an attorney experienced with military and veterans benefits, including the following matters:
- Understanding as to what benefits the children were entitled;
- Guidance as to how to claim these benefits and secure them for the future. The veteran father was maintaining life insurance benefits for the children;
- The father was 95 percent disabled as a result of his service, and as a result, the children might be entitled to continuing dependent compensation;
- The children might be eligible to receive some survivor benefits from the father’s military retirement income;
- The children might be eligible to educational benefits currently and in the future;
- The children might be eligible to receive tri-care medical and dental insurance;
- The children might be eligible to receive continued Social Security benefits;
- Help is needed with the completion and processing of significant quantity of documents and paperwork received from the VA;
- Other benefits from the state and federal agencies; what are those and what are the sources?
At the time this case was received in June 2010, the representation was in three main areas:
(a) Claim before the VA for survivorship rights and other rights for the children. The attorney assisted the client in preparing the VA claim which was filed in October 2010. The claim included a Dependency and Indemnity Compensation (DIC) claim and a significant issue with this part of the claim is whether the father’s death was service-connected. To support this claim, the attorney requested the VA file and medical records from the VA Regional Office in Nashville, the VA Regional Hospital in Nashville, and the VA Records Management Center in St. Louis.
(b) Survivorship rights to retirement pay. As noted, the father was a retired sergeant first class and was receiving retirement pay at the time of his death. The attorney assisted the client in filing a claim for survivorship rights with the Defense, Finance and Accounting Service (DFAS). Soon thereafter, the client received an initial check for each of the children.
(c) Servicemember’s Group Life Insurance (SGLI). The father’s discharge record indicated that he had $400,000 of SGLI.
coverage, and the grandparents believed that the father had made the children the beneficiaries of this insurance policy. However, when the grandparents contacted SGLI, they were advised that the father had not converted this insurance to coverage under the Veterans Group Life Insurance Program (VGLI). Through contacts with the Office of Servicemember’s Group Life Insurance and research, the attorney determined that issues remained that might yet enable the grandparents to secure the proceeds of this policy. The attorney has argued that a Disability Extension of two years should apply because the veteran was totally disabled at the time of his discharge. Although the OSGLI agency rarely grants a disability extension, the attorney believes there is a fairly strong argument that it should apply in this case. Consequently, these matters are still being addressed by the attorney with SGLI officials.

In July 2011, a favorable decision was received from the VA Philadelphia Regional Office on the DIC claim. As was subsequently confirmed, the deceased veteran was a combat medic who fought in Iraq and the Balkans. He subsequently died of an overdose of medications. The attorney argued and the VA agreed that the death was service-connected because the medications were being taken for pain associated with service-connected physical injuries, as well as the anxiety associated with service-connected Post Traumatic Stress Disorder (PTSD). Based on the determination that the death was service-connected, the VA granted the four children Dependency and Indemnification Compensation (DIC) (a monthly benefit), as well as Dependents’ Education Assistance (GI Bill) for the four children.

Other aspects of this claim remain before the VA Philadelphia Regional Office. Although such claims may ultimately not have much monetary value per se, a ruling in the family’s favor, for example, could be presented to OSGLI as substantial support for the life insurance claim. As a result of this work by the attorney and others in his firm, the grandparents have written to the State Bar saying, in part . . . “This VA award was the most important issue for the children because among other things, it provides educational assistance . . . . This was a major win for Dennard and his group and provided (my wife) and I with a big sigh of relief regarding college expenses . . . . On behalf of the grandchildren, [we], want to thank you, the State Bar of Georgia Veterans group and Dennard for the untold hours that went into securing this decision by the VA. The services provided by the Military Services Program are vital in assuring that U.S. veterans and their families receive benefits due them under law.”

Judging Panel Volunteers Still Needed for 2012 State Finals Tournament

Saturday, March 17
Gwinnett Justice Center, Lawrenceville

At least two rounds of HSMT judging panel experience or one year of coaching experience required to serve at state.

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Contact the Mock Trial Office with questions:
404-527-8779 or toll free 800-334-6865 ext. 779
Email: mocktrial@gabar.org
Kudos

Kilpatrick Townsend & Stockton LLP announced that Co-Managing Partner Diane Prucino was named a 2011 “Most Powerful and Influential Woman” by the National Diversity Council. Prucino, one of only 15 women honored, was praised for being a “professional cream of the crop” and for her ability to gracefully balance work and life demands.

Partner Judy Powell was presented with the “Excellence in Intellectual Property Award” by the Association of Corporate Counsel (ACC) Intellectual Property Committee. Moving forward the award will be known as the “Judith Powell Excellence in Intellectual Property Award” and will be presented each year to the individual who brings excellence to the IP community through the ACC IP Committee.

Partners Dean Russell and Debbie Segal, and Sally Ridenour, counsel, were recognized by the Atlanta Bar Association at the annual Celebrating Service Luncheon. The luncheon honored lawyers in the legal community who have preformed extraordinary pro bono representation and service. Atlanta Legal Aid recognized Russell with its Pro Bono Volunteer of the Year Award for his decade of providing representation to low-income grandparents who adopt the grandchildren in their care. Atlanta Volunteer Lawyers Foundation recognized Ridenour and Segal for five and 20 years of participation, respectively, in its Saturday Lawyers Program.

Stan Blackburn, a partner in the firm’s Atlanta office, received the Boys & Girls Clubs of America National Service to Youth Award for his volunteer service as a board member and officer of Boys & Girls Clubs of Metro Atlanta, Inc. During his 30-year tenure on the board, Blackburn has been a champion of the Boys and Girls Club movement. He has served on various board committees of Boys & Girls Clubs of Metro Atlanta and as its corporate secretary and played an integral role in fostering the merger of Boys Clubs of Metro Atlanta, Inc., and Metro Atlanta Girls Clubs, Inc., that created the current organization.

Parker, Hudson, Rainer & Dobbs announced that Eric W. Anderson was elected for induction as a fellow of the American College of Bankruptcy. The college is an honorary professional and educational association of bankruptcy and insolvency professionals and plays an important role in sustaining professional excellence.

The Supreme Court of Georgia named W. Scott Henwood of Hall, Booth, Smith & Slover to the Board to Determine Fitness of Bar Applicants. Henwood is serving a five-year term. The board is composed of seven attorney members and three non-attorney members and is responsible for evaluating the character and fitness of applicants to practice law in the state of Georgia.

The American Intellectual Property Association elected Elizabeth Ann “Betty” Morgan as secretary. Morgan is the managing shareholder of The Morgan Law Firm P.C., a trial boutique in Atlanta. The firm concentrates on intellectual property litigation and business torts. Additionally, Morgan is experienced in alternative dispute resolution and is a registered mediator in Georgia.

The American Bar Association announced the second edition of RICO State by State: A Guide to Litigation under the State Racketeering Statutes by John E. Floyd, a partner at Bondurant Mixon & Elmore LLP. This fully updated edition is a comprehensive new collection and analysis of state RICO statutes and caselaw current through at least Sept. 30, 2010. It also sets forth the statutes and caselaw in each of the 33 states, as well as the Commonwealth of Puerto Rico and the Territory of the Virgin Islands, which have enacted statutes based upon the federal Racketeering Influenced and Corrupt Organizations statute.

On the Move

In Atlanta

Locke Lord LLP announced the addition of Kenneth B. Franklin as an associate in the litigation department of its Atlanta office. Franklin is a member of both Locke Lord’s business litigation and arbitration and construction practice groups. The firm is located at Terminus 200, Suite 1200, 3333 Piedmont Road NE, Atlanta, GA 30305; 404-870-4600; Fax 404-872-5547; www.lockelord.com.
Smith Moore Leatherwood LLP added five new attorneys to its Atlanta office. Robert B. Wedge, G. Marshall Kent Jr., R. Milton Crouch, J. Allen Cooper and Tracy A. Marion joined the firm. All were most recently with Shapiro Fussell Wedge & Martin, LLP, in Atlanta. Wedge and Kent joined as partners, Crouch and Cooper joined as of counsel and Marion joined as an associate. The firm is located at Atlantic Center Plaza, 1180 W. Peachtree St. NW, Suite 2300, Atlanta, GA 30309; 404-962-1000; Fax 404-962-1200; www.smithmoorelaw.com.

Burr & Forman LLP announced that intellectual property attorney Michael Lasky joined the firm as of counsel in the Atlanta office. Prior to joining the firm, Lasky was a partner at the national IP firm of Merchant and Gould for 22 years and then the founder of Altera Law Group, an IP boutique, where he remains principal owner.

In addition, three new associates joined the firm in the business and litigation practice areas. Tyler P. Stevens practices in the firm’s corporate section where he is a member of the banking and real estate practice group. Ryan D. Thompson practices in the firm’s creditors’ rights and bankruptcy practice group. Katie E. Wolf is a member of the firm’s commercial litigation practice group. The firm is located at 171 17th St. NW, Suite 1100, Atlanta, GA 30303; 404-815-3000; Fax 404-817-3244; www.burr.com.

Kilpatrick Townsend & Stockton LLP announced that Frank L. Bigelis was elected partner. Bigelis is a member of the infrastructure and construction team in the Atlanta office. Matthew Levin joined as a partner. Levin is a member of the bankruptcy and financial restructuring team. The firm is located at 1100 Peachtree St., Suite 2800, Atlanta, GA 30309; 404-815-6500; Fax 404-815-6555; www.kilpatricksandtownsend.com.

Laura R. Anthony joined Elarbee, Thompson, Sapp & Wilson, LLP, as an associate. Anthony’s practice focuses on representing private employers in labor and employment law litigation and on providing preventive training and other counseling services to employers facing labor and employment issues. She is also a member of the complex litigation group. The firm is located at 800 International Tower, 229 Peachtree St. NE, Atlanta, GA 30303; 404-659-6700; Fax 404-222-9718; www.elarbeethompson.com.

Ford & Harrison LLP announced the addition of Adam C. Keating as an associate in the firm’s Atlanta office. Keating’s practice is focused on the representation of employers in labor and employment disputes. The firm is located at 271 17th St. NW, Suite 1900, Atlanta, GA 30363; 404-888-3800; Fax 404-888-3863; www.fordharrison.com.

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Nelson Mullins Riley & Scarborough LLP announced that Erika Birg joined the firm as a partner. Birg focuses her practice on commercial litigation, alternative dispute resolution, business torts, contract disputes, trade secrets, computer fraud and non-compete matters. Tai Hyun “Alex” Shin joined the Atlanta office as an associate. He practices in the areas of debt finance and restructuring. Shin also focuses on Korean companies in the automotive industry. The firm is located at 201 17th St. NW, Suite 1700, Atlanta, GA 30303; 404-322-6000; Fax 404-322-6050; www.nelsonmullins.com.

Davis, Matthews & Quigley, P.C., announced that Mindy Pillow joined the firm as an associate in the domestic relations and family law group. She represents clients in all aspects of family law, including divorce, legal separation, paternity, legitimization, child custody, adoption and pre-nuptial agreements. The firm is located at 3400 Peachtree Road NE, Suite 1400, Atlanta, GA 30326; 404-261-3900; Fax 404-261-0159; www.dmqlaw.com.

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, announced that H. Fielder Martin and J. Ben Shapiro joined the firm’s Atlanta office. Martin and Shapiro, both of whom joined Baker Donelson as senior counsel, were previously named partners at Shapiro Fussell Wedge & Martin, LLP, in Atlanta. The firm is located at Monarch Plaza, Suite 1600, 3414 Peachtree Road NE, Atlanta, GA 30326; 404-577-6000; Fax 404-221-6501; www.bakerdonelson.com.

Schulten Ward & Turner, LLP, announced that William M. Joseph joined the firm as a partner. Turner’s practice focuses on domestic and international taxation, mergers and acquisitions and joint ventures. Corey N. Cutter, Brandon C. Hardy and Leslie A. Brooking joined the firm as associates. Cutter’s practice areas include commercial and business litigation and privacy law. Hardy practices in the areas of commercial real estate, business transactions, tax planning and controversies. Brooking’s practice concentrates in the areas of labor and employment, insurance and personal injury. The firm is located at 260 Peachtree St. NW, Suite 2700, Atlanta, GA 30303; 404-688-6800; Fax 404-688-6840; www.swtlaw.com.

James, Bates, Pope & Spivey, LLP, announced the addition of Alec N. Sedki and Michael A. Dunn as of counsel joining the firm’s litigation practice. The firm is located at The Lenox Building, 3399 Peachtree Road NE, Suite 1700, Atlanta, GA 30326; 404-997-6020; Fax 404-997-6021; jamesbatesllp.com.

Parks IP Law LLC announced the relocation of their offices. The firm is located at 730 Peachtree St. NE, Suite 600, Atlanta, GA 30308; 678-365-4444; Fax 678-365-4450; www.parksiplaw.com.

In Columbus

Whitney C. Johnson joined Page, Scrantom, Sprouse, Tucker & Ford, P.C., as an associate. She represents individuals and corporations in the areas of general corporate matters, taxation, acquisitions and dispositions of businesses, and estate planning and administration. The firm is located at 1111 Bay Ave., Third Floor, Columbus, GA 31901; 706-324-0251; Fax 706-243-0417; www.columbusgalaw.com.

In Macon

James, Bates, Pope & Spivey, LLP, announced the addition of associates Doroteya N. Wozniak and Corrie E. Holton to the firm’s litigation practice and Christopher E. Gilmore to the commercial real estate and transactional practice. The firm is located at 231 Riverside Drive, Macon, GA 31201; 478-742-4280; Fax 478-742-8720; jamesbatesllp.com.

In Nashville, Tenn.

Burr & Forman LLP announced that James M. McCarten joined the firm as a partner in the Nashville office. McCarten brings more than 27 years of experience as a tax attorney, with particular focus on business succession planning and trusts and estates. The firm is located at 700 Two American Center, 3102 W. End Ave., Nashville, TN 37203; 615-724-3200; Fax 615-724-3290; www.burr.com.
In Overland Park, Kansas
Lathrop & Gage LLP announced the promotion of A. Justin Poplin to partner status. Poplin’s practice focuses on transactional and litigated intellectual property matters, with emphasis on patent issues in a wide range of technologies. The office is located at 10851 Mastin Blvd., Suite 1000, Overland Park, KS; 913-451-5100; Fax 913-451-0875; www.lathropgage.com.

In Washington, D.C.
The U.S. International Trade Commission (USITC) announced that Hon. Thomas Bernard Pender became an administrative law judge. Pender manages litigation, presides over evidentiary hearings and makes initial determinations in the agency’s investigations involving unfair practices in import trade. Prior to joining the USITC, Pender served as an administrative law judge in the Office of Disability Adjudication and Review with the Social Security Administration in Richmond, Va. The USITC is located at 500 E St. SW, Washington, DC 20436; 202-205-2000; www.usitc.gov.

In Mexico City, Mexico
Littler Mendelson, P.C., joined with a prominent group of Mexican attorneys to open two offices in Mexico establishing the leading labor and employment specialty firm in the country, Littler, De la Vega y Conde, S.C. The office is located at Mario Pani 150, Col. Lomas de Santa Fe, Del. Cuajimalpa de Morelos, México D.F., C.P., 05300; +52 55 4738 4258; Fax +52 55 8000 7191; www.littler.com.

In Monterrey, Mexico
Littler Mendelson, P.C., joined with a prominent group of Mexican attorneys to open two offices in Mexico establishing the leading labor and employment specialty firm in the country, Littler, De la Vega y Conde, S.C. The office is located at Blvd. Díaz Ordaz 140, Torre II, Piso 20, Col. Santa María, Monterrey, C.P., 64650; +52 81 8665 4340; Fax +52 81 8665 4839; www.littler.com.

How to Place an Announcement in the Bench & Bar column
If you are a member of the State Bar of Georgia and you have moved, been promoted, hired an associate, taken on a partner or received a promotion or award, we would like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, the Georgia Bar Journal will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, Chambers USA, Who’s Who, etc.). Notices are printed at no cost, must be submitted in writing and are subject to editing. Items are printed as space is available. News releases regarding lawyers who are not members in good standing of the State Bar of Georgia will not be printed. For more information, please contact Stephanie Wilson, 404-527-8792 or stephaniew@gabar.org.
Mr. Sparks, I have already told you that I'm not going to take any action on your behalf until you pay the balance of my retainer,” your associate says into the telephone. “Your Answer is due next week. If you want me to file it, I’m going to need that last $500 before then. Otherwise, you’re on your own,” he finishes, hanging up with a satisfied smirk.

“What was that all about?” you ask.

“Just another one of those clients who thought he could get away with paying a partial retainer,” your associate responds. “He put his divorce on layaway, just like a Christmas present at Sears. He’s been paying me $500 every few weeks, trying to work up to my $5,000 retainer. Meanwhile, his wife filed first! He’s got an answer due Friday and he still owes me $500.”

“So what are you going to do if he doesn’t come up with the last $500? Let the case go into default?”

“I explained from the get-go that I don’t work for free,” your associate announces. “If he can’t afford me I don’t want to take the case.”

“Some would say you already have,” you respond.

Nothing in the Georgia Rules of Professional Conduct prohibits a lawyer from accepting partial payment of a fee. That practice can actually be helpful for people who cannot afford to pay all at once, or who cannot manage to save the full retainer on their own.

But taking the position that representation does not start until the retainer is paid in full is another matter—one that can be risky.

At the very least, a person who makes a partial payment of a fee is a potential client to whom a lawyer owes certain obligations. Clearly the lawyer has an ongoing obligation to avoid conflicts with other potential clients. Since the partial payment is an unearned fee, the lawyer also has an obligation to promptly refund the money at the potential client’s request.

The potential risk comes when the client claims he has relied on the lawyer to take action and has suffered harm as a result. One common example is the client who appears at his preliminary hearing and tells the judge he has a lawyer. In reality, the lawyer has refused to enter an appearance until he collects the balance of the retainer. The client might miss a deadline while accumulating the fee, or might assume that the lawyer will protect the client’s interests before the retainer is paid in full. A “layaway” situation can also drag on indefinitely and the delay might be harmful to the client’s interests.

For your own protection, if you are holding a potential client’s money you need to monitor their legal situation. If you are monitoring the situation you may as well admit that you are representing the client.

It might be easier to let the client save the retainer on his own.

Paula Frederick is the general counsel for the State Bar of Georgia and can be reached at paulaf@gabar.org.
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David Schultz, Client Advisor, SunTrust Investment Services, Inc.,
Savannah, 912.944.1214, david.schultz@suntrust.com
Discipline Summaries

by Connie P. Henry

Voluntary Surrender/Disbarments

Keesha Marie Brown
Atlanta, Ga.
Admitted to Bar in 2005

On Oct. 17, 2011, the Supreme Court of Georgia disbarred Keesha Marie Brown (State Bar No. 088440). The Court addressed seven matters involving Brown. In the matter involving her conviction, while working as a public defender in 2008 Brown agreed with an inmate, who was not her client, to accept calls from him with the costs of the calls being routed to another number. In regard to the other matters, while working in private practice Brown abandoned six clients from whom she had accepted fees, accepted representations that required travel when she did not have reliable transportation, accepted one representation in which she had no competence or experience, moved out of state and did not withdraw from cases pending in court, failed to return the clients' files and failed to return unearned fees.

The special master considered in mitigation Brown's statements that she did not have adequate financial resources, she had traveled to Wisconsin to care for her ailing father and she experienced her own health issues. The special master also considered that Brown had no prior discipline and seemed remorseful. In aggravation of discipline, the special master noted the pattern of misconduct and the existence of multiple offenses.

The Court accepted the special master's findings but also found that Brown failed to take responsibility for her actions and blamed others for her errors in judgment. Considering the record as a whole, the multiple offenses, the seriousness of the offenses, the importance of protecting the public from attorneys who are not qualified to practice law due to incompetence and the need for public confidence in the profession, the Court determined disbarment to be the appropriate sanction.

David Michael Fuller
Kennesaw, Ga.
Admitted to Bar in 1980

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary surrender of license of David Michael Fuller (State Bar No. 280100). On May 25, 2011, Fuller pled guilty in the Superior Court of Cobb County to four counts of forgery.

Paul T. Robinson
Atlanta, Ga.
Admitted to Bar in 1974

On Nov. 7, 2011, the Supreme Court of Georgia disbarred Paul T. Robinson (State Bar No. 610675). The following facts are deemed admitted by default: Robinson became ineligible to practice law on Sept. 1, 2008, because of his failure to pay his State Bar dues. He was placed on suspension for not complying with continuing legal education requirements effective May 21, 2009, and was also placed on administrative suspension for a period of one year, effective July 29, 2009. Robinson represented a client in a real estate matter during the time he was suspended.

Douglas Liddell Kirkland
Ocala, Fla.
Admitted to Bar in 1993

On Nov. 7, 2011, the Supreme Court of Georgia disbarred Douglas Liddell Kirkland (State Bar No. 423655). Kirkland was disbarred in Florida for making improper withdrawals from his attorney trust account, with the largest shortage amounting to approximately $93,000. He also inappropriately filed trust accounting certificates showing compliance with the rules.

Karen P. Cleaver-Bascombe
Baltimore, Md.
Admitted to Bar in 1995

On Nov. 7, 2011, the Supreme Court of Georgia disbarred Karen P. Cleaver-Bascombe (State Bar No. 129760). Cleaver-Bascombe was disbarred in the District of Columbia for submitting a fraudulent voucher seeking compensation for service she knew she had not rendered.

Antonio L. Toliver
Decatur, Ga.
Admitted to Bar in 2001

On Nov. 30, 2011, the Supreme Court of Georgia accepted the petition for voluntary surrender of license
of Antonio L. Toliver (State Bar No. 714222). On Sept. 12, 2011, Toliver pled guilty in the Superior Court of Fulton County to one count of homicide by vehicle in the first degree and two counts of serious injury by vehicle, all of which are felony counts.

**Suzanne Marie Himes**
Ocala, Fla.
Admitted to Bar in 1990

On Nov. 30, 2011, the Supreme Court of Georgia disbarred Suzanne Marie Himes (State Bar No. 355601). The State Bar of Georgia filed a Notice of Reciprocal Discipline after Himes was disbarred in Florida for failure to cease the practice of law after her indefinite suspension from practice in Florida.

**Steven F. Freedman**
Atlanta, Ga.
Admitted to Bar in 1973

**Thomas C. Sinowski**
Atlanta, Ga.
Admitted to Bar in 1982

On Nov. 30, 2011, the Supreme Court of Georgia disbarred law partners Thomas C. Sinowski (State Bar No. 649126) and Steven F. Freedman (State Bar No. 275350). In approving a special master’s report and a Review Panel’s report in the consolidated case, the Supreme Court found the lawyers violated Standards 13 (paying others to secure clients) and 26 (sharing fees with non-lawyers) of Bar Rule 4-102 (d). The Supreme Court concluded the lawyers did not violate Standard 12 (soliciting clients through direct personal contact) because the lawyers did not personally solicit the clients, though the runners who they paid did. The Supreme Court concluded the lawyers should be disbarred because their scheme, which the court observed was highly organized and very lucrative, involved paying runners at least $276,000 to solicit more than 1,300 clients. The Supreme Court also observed that the lawyers were motivated by greed and were not remorseful. Justice Nahmias was disqualified. Judge Kathlene F. Gosselin sat in for Justice Nahmias and concurred. Justice Hines and Justice Melton dissented.

**Suspensions**

**Michael Boyd Seshul Jr.**
Atlanta, Ga.
Admitted to Bar in 2002

On Oct. 17, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Michael Boyd Seshul Jr. (State Bar No. 617061) and suspended him until March 31, 2013, with conditions for reinstatement. On March 31, 2009, Seshul entered a guilty plea in the Superior Court of Fulton County to one felony count of aggravated assault and one misdemeanor count of battery.
The Lawyer Assistance Program (LAP) provides free, confidential assistance to Bar members whose personal problems may be interfering with their ability to practice law. Such problems include stress, chemical dependency, family problems, and mental or emotional impairment. Through the LAP’s 24-hour, 7-day-a-week confidential hotline number, Bar members are offered up to three clinical assessment and support sessions, per year, with a counselor during a 12-month period. All professionals are certified and licensed mental health providers and are able to respond to a wide range of issues. Clinical assessment and support sessions include the following:

- Thorough in-person interview with the attorney, family member(s) or other qualified person;
- Complete assessment of problems areas;
- Collection of supporting information from family members, friends and the LAP Committee, when necessary; and
- Verbal and written recommendations regarding counseling/treatment to the person receiving treatment.
Seshul, angry with his then-girlfriend who had thrown a brick that struck him on the arm, picked up the brick and threw it at her, striking the woman’s feet. He was given first offender treatment and received a five-year sentence, with one year commuted to time served and the balance to be served on probation. He was required to enter a specified program in Tennessee on June 1, 2009, and participate in the program for 90 consecutive days; to complete a family violence intervention program; and to pay $827.20 in restitution. While enrolled in the Tennessee program, he received clinical and therapeutic treatment for chronic post-traumatic stress disorder, panic disorder and alcohol abuse.

In mitigation of discipline, the Court found that Seshul had no prior discipline; he experienced personal and emotional problems during the relevant time period; and he has taken rehabilitative steps. Prior to reinstatement, he must, between Dec. 31, 2012, and March 31, 2013, present certification from a psychiatrist or psychologist licensed to practice in Georgia that he has no mental or emotional health condition that would adversely affect his ability to practice law and provide the record of his discharge and exoneration to the March 31, 2009, plea or other proof of his completion of his probationary period.

John R. Thompson
Swainsboro, Ga.
Admitted to Bar in 1966

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of John R. Thompson (State Bar No. 708600) and suspended him pending an appeal of his criminal convictions. On July 14, 2011, Thompson was found guilty in the U.S. District Court for the Southern District to four felony counts of conspiracy, bank fraud, wire fraud and mail fraud.

Review Panel Reprimands

Benjamin Christopher Free
Winder, Ga.
Admitted to Bar in 1995

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Benjamin Christopher Free (State Bar No. 275160) and ordered that he receive a Review Panel reprimand. In 2008 a client paid Free $2,500 to represent him in a prosecution for driving under the influence of alcohol, drugs or other intoxicating substances. Thereafter, he would not return the client’s phone calls and appeared two hours late for calendar call. The client terminated him and requested a refund of the fee and his file. He did not do so until after the client filed a grievance with the State Bar. In September 2011, he paid the client the $1,250 awarded to him in a fee arbitration proceeding. Free stated that he was going through a divorce at the time, which negatively affected his handling of the case.

Christopher David Elrod
Gainesville, Ga.
Admitted to Bar in 1996

On Nov. 7, 2011, the Supreme Court of Georgia accepted the petition for voluntary discipline of Christopher David Elrod (State Bar No. 246640) and ordered that he receive a Review Panel reprimand. A client paid Elrod $4,500 to represent him in a divorce case. Elrod performed some work in the case but later became inaccessible. Elrod received a letter from another attorney advising that the client had retained her to represent him in the divorce, but she was unable to reach Elrod to arrange for substitution of counsel and he did not provide her with the client’s file.

Elrod was cooperative with the State Bar and agreed to consult with the State Bar’s Law Practice Management Program before Dec. 1, 2011, and to implement the recommended changes in his practice.

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. 15, 2011, five lawyers have been suspended for violating this Rule and three have been reinstated.

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

“He who is his own lawyer has a fool for his client.”
With ever-busy schedules and the continual quest for work-life balance, today’s legal professionals often need special reminder tools and techniques to help keep organized. From writing down everything you need to utilizing tickler systems with automated pop-ups, below are some cool and useful tips and apps just to help you remember.

- Siri—You can add reminders to your iPhone 4s Reminder app just by simply asking Siri, the iPhone 4s voice-activated digital assistant, to remind you of something. The program confirms your reminder and when the reminder date and time arrives, your phone vibrates and displays a screen for you to either view or close the reminder.

- Remember the Milk—The online task system provides a free account to set up reminders for everything and easily makes sorting of tasks by priority settings, with breakout tabs for personal, study and work items. Remember the Milk is available in a free version or a $25/year Pro version. The Pro account provides apps for Android, iPhone, iPad, via MilkSync for Blackberry; and MilkSync for Microsoft Outlook. (www.rememberthemilk.com)
Need a reminder to help find where you parked? Try apps like: Where Did I Park? (Android; free and a Premium version for $1.85); VQ Car Finder (Blackberry, $4.99, requires in-car Bluetooth charger for automatic location using Blackberry GPS); and G-Park and Where Did I Park My Car? (iPhone/iPad/iPod Touch; $0.99 and $1.99 respectively). Another practice is if you are in a smaller parking deck with only a few levels up, you can make it a rule to drive all the way to the top level. No more going from floor to floor to look for your vehicle; just go directly to the top floor. You can also jot down a quick note on your phone or notepad—or better yet, snap a quick picture of the location of your vehicle with your mobile device. If you think that’s just too “low-tech,” you can use Google Maps “Star” system to mark your exact location as a favorite.

Still lost, but now just lost inside a big building? Google’s latest locator app for Android devices is the Indoor Maps feature. You can actually mark locations from indoor floor plans of select buildings and airports. In the Atlanta area, indoor maps are available for Atlanta Hartsfield-Jackson International Airport and may be coming for select major retail stores like IKEA, Macy’s and Home Depot.

If you are in a location where you need to remember to take something with you at the end of the day, like leftovers from lunch or a coat or sweater, you can use your car keys as the reminder. You can’t go anywhere without those. Just put keys in the refrigerator with the leftovers or the pocket of the sweater or coat to force their retrieval.

Todoist and Wedoist are online project and task managers that can be used individually or in groups as the names suggest to make to-dos that remind you of things. The service has built-in calendars and project and sub-project areas for task reminders. The service also features mobile apps, browser plug-ins and desktop widgets. (www.todoist.com)

Toodledo is another online to do list. The service features a Hotlist of important items that it automatically figures out from your input; filters for system lists; a scheduler that focuses on using available time; and alarms that come to you by email, text or tweet. The app is available for iOS, Android and Blackberry. (www.toodledo.com)

Use the advanced reminders and to dos in practice management software to be reminded of tracking time for work you’ve completed; stay in touch with key clients; pull files for review; or to alert you of upcoming events and to dos. Because practice management software programs are designed to manage matter/case files in their entirety, the reminder functionality allows for master reminder lists as well as event-specific reminders just minutes before their occurrence. Outlook Calendar and Task list integration is also usually featured. Outlook has reminder functionality as well.

BugMe! is one of the top iPhone/iPad reminder apps. This system creates a board of stickies that can be placed on your device home screen, Safari browser window or be sent to your wallpaper as a constant reminder. You can even pick ink and paper colors for the reminders. The app costs $0.99.

Most time billing and accounting packages can display reminders as soon as you enter the programs for items that are currently due or even overdue. You won’t have to trust your memory for making sure you track time or pay bills on time.

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

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There are, of course, many other reminder systems out there for you to review and add to your productivity toolbox. Now, if only you can remember...
What is an Institute?

by Derrick W. Stanley

There are many answers to the question. Merriam-Webster.com defines the first usage of institute as a noun: a (1): an elementary principle recognized as authoritative (2): plural; a collection of such principles and precepts; especially: a legal compendium. In the world of ICLE (the Institute of Continuing Legal Education) and Sections, we define an institute as a way to earn up to one year’s worth of Continuing Legal Education credit with a means to network with peers.

Section program chairs spend many months planning institutes. They work with ICLE to develop an agenda and secure top speakers to deliver the programming. A variety of formats are used during the course of an institute. For instance, there may be panel discussions followed by keynote speakers followed by a video replay. Some sections even tie all the sessions together with a common theme for illustration. For many sections, this is the flagship pro-
gram of the year, providing cutting edge information on current topics as well as specific information on trends in the field. In addition to spending time learning about the profession, the institutes also offer social events that facilitate peer networking. From cocktail welcome receptions to awards ceremonies and tennis to golf tournaments, there is always time to enjoy the destination location. The programs are usually held in cities that provide a host of entertainment options such as St. Simons, Amelia Island, Destin and Savannah. There are even opportunities to leave the county or take a cruise. Or you may stay close to home and experience a program at the Bar Center.

As a member of a particular section, you will receive a notification of the institute before it is marketed to the general membership of the Bar. This ensures you will be able to secure a hotel room at the venue as many properties sell out. Attendance is not limited to section members and is offered on a first come, first served basis. Many attorneys who practice across several areas will attend multiple institutes to stay abreast of changes. The institutes also offer attorneys who are looking to expand or change their area of practice a way to learn a good bit of information very quickly, while developing relationships with other practitioners.

Institutes are planned throughout the year. The table above lists the sections that currently host institutes and the months they are scheduled. ICLE does have other institutes that are not sponsored by the sections. They can be located by going to iclega.org/programs/institute.html. Here you will find brochures for the available institutes and an opportunity to register. Be sure to download the PDF versions of the brochures as they outline any extracurricular activities that may be taking place.

The institutes that are co-sponsored by ICLE and sections provide members an opportunity to gain large amounts of topical information about the practice of law in a short period of time. The quality of the programming is some of the best around, and with ICLE’s assistance, the institutes have developed quite a following as participants know they are the premier educational programs to attend.

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

<table>
<thead>
<tr>
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<tr>
<td>Estate Planning (Fiduciary Law)</td>
<td>February</td>
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<tr>
<td>Real Property Law</td>
<td>May</td>
</tr>
<tr>
<td>Family Law</td>
<td>May</td>
</tr>
<tr>
<td>General Practice and Trial Law</td>
<td>March</td>
</tr>
<tr>
<td>Fiduciary Law</td>
<td>July</td>
</tr>
<tr>
<td>City and County Attorneys (Local Government Law)</td>
<td>September</td>
</tr>
<tr>
<td>Insurance Law Institute (Tort and Insurance Practice)</td>
<td>September</td>
</tr>
<tr>
<td>Business Law</td>
<td>October</td>
</tr>
<tr>
<td>Workers’ Compensation Law</td>
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</tr>
<tr>
<td>Entertainment and Sports Law/IP</td>
<td>November</td>
</tr>
<tr>
<td>Corporate Counsel Law</td>
<td>December</td>
</tr>
</tbody>
</table>

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As we approach our first anniversary with Fastcase Legal Research, those who have taken advantage of this member benefit will testify that the smart design makes research faster and simpler. Fastcase has developed unique research tools that make your work simpler, smarter and more effective. Many users become familiar with basic case-law searching, but may not be taking full advantage of the features of Fastcase. This article will discuss ways that researchers can think outside of the box to make better use of Fastcase.

Use the Interactive Timeline to best advantage. The powerful sorting algorithms bring many pieces of information to your attention in one or two clicks, displaying the best results to the top of the list. The interactive timeline gives users the advantage of “stepping back” to see the big picture and then hone in on the most relevant information. One can see legal topics in their historical context while at the same time see the most highly cited cases that are both recent and relevant. Searching evidence and (roadblock* or sobriety checkpoint*) in Georgia, one can see the majority of cases are from 1990 through the present. The most highly cited recent and relevant case is clearly seen; it is the largest gold circle on the vertical axis (set to show relevancy) and toward the right side of the screen, Baker v. State, a 2001 case (see fig. 1). Using the drop down tool under “show” you are able to narrow to the top five, ten or 25 cases sorted by “cited in these results” to focus on the cases that will be of most help.

Dynamic link saves time. Later, if you want to recreate this search, go to Search>My Research Home and click on the search in the center column. The dynamic link will present the results from the original search as well as any new results. Keep in mind that the list holds up to the 10 most recent searches. If this is a search you intend to run later you may want to copy the link into a Word document or an email for later retrieval as it will “disappear” from the list in time.

Create an annotated list using the Code in “searching cases.” To pull a list of cases that refer to a Code section, enter the Code number in the case search field using Georgia as the jurisdiction. In searching 19-9-3, a list of 111 cases show up in the results (see fig. 2). It is not necessary to enter the O.C.G.A portion of the statute. You can enter the Code in quick caselaw search, Boolean (keyword) or Citation to pull all 111 cases.

Search names of parties in preparation for trial. You may enter the name of an attorney or a judge in the caselaw search field to find cases to which they were party. Perhaps you have an upcoming case and want to see how a judge has ruled on issues or you want to get an idea of how many times an attorney has tried cases in a particular jurisdiction. Enter the full name in the search field in either Boolean (keyword) or citation mode using the parameter filter of w/3 or enclosing the name in quotation marks. Example: enter the following query, Judge /3 Phipps and fourth /3 amendment and reversed with GA as the jurisdiction in Boolean (keyword) to find 29 cases (See fig. 3).

Each month our members have access to CLE-approved training on Fastcase. We offer Fastcase overview classes at the State Bar offices in Atlanta, Tifton or Savannah, at local bar association meetings or law firms. Many attorneys have expressed interest in training geared specifically to Boolean (keyword) searching in Fastcase. Natural language searching may seem easier but it is not usually the best approach. Fastcase has developed a webinar written by one of their leading attorneys, Christine Steinbrecker Jack, to provide this option. It’s a free one hour CLE-approved training that can be taken from home or office. For information on upcoming training opportunities, please check the website under “Bar News & Events” or contact Sheila Baldwin at sheilab@gabar.org or 404-526-8618.

Sheila Baldwin is the member benefits coordinator of the State Bar of Georgia and can be reached at sheilab@gabar.org.
Fastcase training classes are offered four times a month at the State Bar of Georgia in Atlanta. Training is available at other locations and in various formats and will be listed at www.gabar.org under the “Bar News & Events” section. Please call 404-526-8618 to request onsite classes for local and specialty bar associations.
Ah, the old days when, we've heard, a lawyer would send a piece of paper to the client with the five words “to fee for services rendered” and a dollar amount. Just a few days later, the lawyer would receive a check. No questions asked.

How times have changed. Today, clients pore over fee statements closely, checking for duplication, waste and other inefficiencies. Likewise, in determining attorneys’ fees awards in litigation, courts are more frequently rejecting “block billing,” non-contemporaneous time entries and amorphous descriptions. A fee statement is more likely to be challenged and reduced if it does not easily convey to the reader that the work performed furthered the client’s goals and was efficiently performed.

As a result of these factors and general bad economic times, the content and phrasing of fee statements has become much more important. This “Writing Matters” shows how persuasive writing techniques can be used to make time entries more informative, producing fee statements more likely to please a client or a court.

Tell the Client How Your Work Furthered the Client’s Goals

A client who understands not just what was done, but why, is more likely to grasp the reasonableness of the fee. The client will recognize that the lawyers were focused on the client’s needs.

A time entry that states, “researched summary judgment motion” may be accurate, but it is not persuasive. The client might wonder why this was necessary. So tell the client. Why did this further the goals of the representation? Transform the entry to the following: “researched whether statute of limitations barred plaintiff’s claim, for potential summary judgment motion.” This more completely explains not just what research was done, but how the research actually benefited the client. Likewise, “telephone conference with opposing counsel” is much less informative (and hence much less persuasive) than “consulted with opposing counsel to avoid preparation and filing of motion for summary judgment on limitations.”
Avoid Phrasing That Creates the Impression of Inefficiency

In these days of multitasking and economic pressures, everyone favors efficiency. Avoiding even the impression of inefficiency is therefore important. Several practices can lead clients to suspect that a lawyer was inefficient.

One arises in drafting documents. Often, of course, it is efficient for an inexperienced lawyer to draft the first version of a document and then for a more experienced lawyer to revise and improve it. The time entries that correspond to this work may bear duplicate entries for two attorneys with the cryptic phrasing “drafted document,” or, worse, “worked on document.” Those time entries do not inform the reader that the lawyers worked efficiently, dividing the work among an inexperienced lawyer (who brings a potentially fresh perspective and a lower billing rate) and an experienced lawyer (who brings the seasoned perspective, but a higher billing rate). So, convert the seemingly duplicated cryptic entries to a sequence of entries. A time entry from the young lawyer could read, “prepared first draft of the complaint” coupled with a time entry from the senior lawyer stating “revised and completed the complaint for filing.” Both entries are truthful and avoid creating the wrong impression.

Likewise, at times it’s necessary for more than one lawyer to attend a deposition, a closing or a hearing. A description from both lawyers simply stating “attended hearing” or “attention to closing” is likely to be perceived as duplicative. So, for example, each lawyer should include descriptive terms explaining why she was present. For example, one lawyer might enter the following description: “attended hearing on motion to dismiss for lack of personal jurisdiction to assist Ms. Smith with documents and witnesses.” The other lawyer’s entry might state, “Argued motion to dismiss for lack of personal jurisdiction, including presentation of documents and witnesses.”

A special risk for perceived duplication arises when one lawyer “talks to” another lawyer in the same firm. An entry that one lawyer talked to another lawyer reeks of duplication. In our experience, clients are particularly suspicious of intra-firm consultations. An entry that demonstrates that, rather than being inefficient or a justification of water cooler conversation, the consultation benefited the client would likely be more welcomed. Hence, if a younger lawyer had an office conference with another lawyer in the firm, the entry might state, “Consulted with Ms. Smith of our appellate practice group regarding strategy for ordering arguments in appellate brief.”

A final form of this perceived inefficiency is more substantive, but it is important to discuss it here because its use increases the likelihood of client suspicion. The appearance of inefficiency can arise when a lawyer bills short amounts of time spread out over several days on a single task. For example, a lawyer may bill “researched statute of limitations” for a tenth of an hour Monday, two-tenths on Tuesday, a half hour on Thursday. Lawyers should do their best to avoid this practice for two reasons: first, working in such short blocks of time on a single task may actually be inefficient and, second, even if efficient, it may lead many clients to more closely examine all other time entries.

Avoid Block Entries, or At Least Be Detailed About Them

Some clients may not question an entry of six hours for “research regarding summary judgment motion.” Nevertheless, very few will challenge a time entry that breaks out the issues further, stating for example:

6 hrs. Researched statute of limitations, personal jurisdiction, pleading requirements under Rule 9(b) and applicability of Pennsylvania law to the contract-in-dispute.

Being more specific can show the block of time was well spent on the law that is critical to the particular representation.

Use Strong, Active Verbs

Which would you rather pay for, a lawyer who gave “attention” to a brief or a lawyer who “drafted” or “revised” the brief? Verbs that indicate activity are more persuasive. Active verbs help the client visualize the action. Avoid non-descriptive verbs, such as “reviewed,” “attention to,” “worked on” and the like. Use the active voice, and words such as “analyzed,” “drafted,” “edited” and other concrete, active verbs.

Conclusion

An informed client is usually a happy client. We hope that this installment of “Writing Matters” will allow you to better explain to your client why you should be paid for the excellent work that you perform for your client.

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

Endnote

1. In disputes to recover attorney fees, courts often reduce fee requests that include block billing or discourage it in other ways. E.g., Farfaras v. Citizens Bank & Trust of Chicago, 433 F.3d 558, 569 (7th Cir. 2006) (affirming a reduction of 15% of fees, stating that “[a]lthough block billing does not provide the best possible description of attorneys’ fees, it is not a prohibited practice.”).
To maintain the highest levels of professionalism, the State Bar of Georgia maintains a committee on professionalism in addition to supporting the Chief Justice’s Commission on Professionalism (CJCP). The Committee on Professionalism’s charge, as posted on the State Bar’s website, www.gabar.org, is as follows:

This program committee shall consider and make recommendations to the Executive Committee and Board of Governors necessary to advance professionalism in the practice of law. It shall concern itself with the various facets of professionalism including knowledge, technical skill, integrity in relations with both clients and the courts, dedication to the law and public good, and ultimately the providing of competent legal services to the public.

The committee has developed several programs including: 1) Annual Law School Professionalism Orientation Programs; 2) Law Day activities for local, circuit and specialty bar associations; 3) Take Your Adversary to Lunch Program; and 4) Creative Connections. The committee works with CJCP staff to achieve their goals.

The Annual Law School Orientations on Professionalism program has a Hypothetical Subcommittee that reviews the program materials for relevance and currency. As necessary, the subcommittee proposes new hypothetical information and
modifies the program utilizing feedback from students and group leaders. Committee members welcome suggestions for new professionalism hypothetical problems.

Hon. Donald R. Donovan, Paulding County district attorney, has committed himself to the leadership of this committee for many years, including serving six years as chair. He encourages its members to develop program ideas and recruits volunteers to serve as group leaders and speakers for the orientation programs. He attends related meetings where he learns about new professionalism initiatives and shares his experiences. “I am involved in nothing so rewarding—or as important—as the professionalism movement begun nearly 20 years ago by our Bar’s leaders. Our society has grown more and more litigious and unfortunately our Bar members have grown less willing to recall what it means to be a professional. I’m dedicated to and willing to put forth whatever effort necessary to promote professionalism in the State Bar of Georgia,” Donovan said. He also stated he hopes the programs and ideas the committee has fostered over the years will continue to have an impact on the Bar.

U.S. Department of Homeland Security Attorney C. Joy Lampley Fortson currently serves as vice-chair of the committee. She has been managing and disseminating information to bar associations across the state to support Law Day activities. Local bars provide their information to the Law Day Subcommittee that in turn is posted on the Georgia map on the American Bar Association’s website, www.lawday.org, bringing attention to the projects and activities Georgia attorneys do to commemorate Law Day.

“Serving on the Committee on Professionalism,” says Fortson, “ranks as one of the most important ways that I serve within the legal community because the committee has the unique opportunity to help shape perceptions of lawyers amongst law students, practicing attorneys and the public. We take our work seriously because we know that if we consistently and conscientiously utilize various methods of encouraging professionalism and integrity, then we can truly effect change in our profession.”

Currently, committee members are from all parts of Georgia, representing the diversity of the State Bar. They include: David W. Adams (Atlanta); Fred V. Bauerlein (Marietta); Jennifer Blackburn (Atlanta); Joshua I. Bosin (Atlanta); Dean C. Bucci (Dallas); David Scott Crawford (Atlanta); Elizabeth L. Fite (Atlanta); Amanda J. Hanson (Alpharetta); Nicole G. Iannarone (Atlanta); Steven J. Messinger (Dallas); Denise A. Miller (Atlanta); William H. Pinson Jr. (Savannah); Prof. Alex Reed (Athens); Leah Fallin Sumner (Newnan); Gwendolyn S. Fortson Waring (Savannah); Erica L. Woodford (Macon); and Ruth W. Woodling (Atlanta).

The committee is also supported by Steven A. Moulds (Atlanta), who represents the YLD Ethics & Professionalism Committee and Jonathan A. Pannell (Savannah), the State Bar Executive Committee’s liaison. Advisors to the committee represent lay persons, Georgia law schools and other related entities. These include State Rep. Kathy Ashe; Associate Dean A. James Elliott (Emory University School of Law); Dean Sheryl E. Harrison (Atlanta’s John Marshall Law School); Prof. Patrick E. Longan (Walter F. George School of Law at Mercer University); Associate Dean Roy Sobelson (Georgia State University College of Law); Doug Ashworth (Associate Director of ICLE); and Charles C. Olson (Prosecuting Attorneys’ Council of Georgia).

The Committee on Professionalism welcomes suggestions from the bench and bar for activities and programs. Please feel free to contact them at professionalism@cjcpga.org or 404-225-5040.

Avarita L. Hanson is the executive director of the Chief Justice’s Commission on Professionalism and can be reached at Ahanson@cjcpga.org.

The Lawyers Foundation of Georgia Inc. sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 104 Marietta St. NW, Suite 630, Atlanta, GA 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

<table>
<thead>
<tr>
<th>Name</th>
<th>City, State</th>
<th>School of Law</th>
<th>Admitted Year</th>
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<td>Meshell Anne Bell</td>
<td>Saint Louis, Mo.</td>
<td>University of Texas School of Law (1997)</td>
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<td>Thomas Garrett Brooks</td>
<td>Tallahassee, Fla.</td>
<td>Atlanta Law School (1951)</td>
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<td>Richard D. Heller</td>
<td>Fort Lauderdale, Fla.</td>
<td>Indiana University Maurer School of Law (1975)</td>
<td>1983</td>
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<tr>
<td>John D. Jones</td>
<td>Atlanta, Ga.</td>
<td>Emory University School of Law (1957)</td>
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<td>John Henry Land</td>
<td>Columbus, Ga.</td>
<td>University of Georgia School of Law (1939)</td>
<td>1939</td>
<td>November 2011</td>
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<tr>
<td>Barry Phillips</td>
<td>Atlanta, Ga.</td>
<td>University of Georgia School of Law (1964)</td>
<td>1964</td>
<td>January 2012</td>
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Richard A. Rominger
Savannah, Ga.
Emory University School of Law (1971)
Admitted 1971
Died December 2011

Annie Ruth Simmons
Atlanta, Ga.
Woodrow Wilson College of Law (1979)
Admitted 1980
Died December 2011

W. Woodrow Stewart
Gainesville, Ga.
Tulane University Law School (1966)
Admitted 1967
Died January 2012

John R. Trapnell
Atlanta, Ga.
Emory University School of Law (1965)
Admitted 1966
Died December 2011

G. Stuart Watson
Albany, Ga.
Emory University School of Law (1947)
Admitted 1947
Died December 2011

David J. Bederman, K. H. Gyr Professor of Private International Law at Emory University School of Law, died in December 2011. Born and raised in Atlanta, Bederman was a true son of the new South. After graduating from The Paideia School, he attended Princeton University, the London School of Economics, University of Virginia School of Law and The Hague Academy of International Law. Bederman returned home to Atlanta in 1991 to teach at Emory until his death in 2011. During his 20 years at Emory, Bederman taught courses and seminars on international law, torts, admiralty, international institutions, law of international common spaces, legal methods, legislation and regulation, customary law, international environmental law and foreign relations power. He served as advisor to the Emory International Law Review and was director of international legal studies. He established the Supreme Court Advocacy Project at the law school, and was also an associated faculty member of the Center for the Study of Law and Religion.

Recognizing his extraordinary breadth as a scholar, author, legal historian, beloved teacher and expert litigator, Emory University School of Law established the David J. Bederman Distinguished Lecture, along with a summer fellowship at The Hague Academy of International Law, in honor of Bederman’s career and accomplishments.

Bederman’s mind was a storehouse of knowledge on legal history, constitutional law, admiralty and international law. He coupled that knowledge with a distinct capacity and passion to explore challenging legal questions ranging from how custom provides the basis for modern law to who owns the personal artifacts of the H.M.S. Titanic.

Bederman’s defense of Premier Exhibitions, an Atlanta company that held the salvage rights to the Titanic, helped him become one of a handful of lawyers in the world who could navigate the arcane legal realm surrounding shipwrecks. While he turned down the chance to see the Titanic wreckage in person, he was honored for his work on this and related admiralty cases by receiving a Mel Fisher Lifetime Achievement Award in Key West.

In 2006, Bederman joined the board of Odyssey Marine Exploration Inc., which conducts extensive search and archaeological recovery operations on deep-ocean shipwrecks around the world. Last year he became its chairman. Bederman had a passion for the company’s mission: to discover and share the riches of the ocean.

Bederman was counsel of record in 52 cases in the U.S. Courts of Appeals, and he argued four cases before the U.S. Supreme Court. His first case before the U.S. Supreme Court involved torts liability standards in the Antarctic.

Major (Ret.) Charles Alston Coffin died in December 2011. Born on June 7, 1945, Coffin was the son of Charles Alston Coffin and Alice Walker Coffin of Richland, Ga. Coffin attended the University of Georgia where he was a member of the Sigma Nu fraternity and earned his J.D. degree from Cumberland School of Law at Samford University in Birmingham, Ala. At the time of his graduation, he was the youngest graduate in the history of the law school.

After practicing law in Alabama and Georgia for a number of years, he entered the Judge Advocate General’s Corps of the U.S. Army. A highly successful criminal trial lawyer and prosecutor, his work resulted in many felony convictions, including murder.

Coffin was a devoted husband and father who served as a deacon in the First Presbyterian Church of Columbus. With a passion for history, he developed a detailed knowledge of his own Coffin family who left England in the 17th century to become one of the original families to settle Nantucket Island, Mass. This family helped initiate the whaling industry and played a major role in early American maritime commerce.

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6 CLE Hours

FEB 10  ICLE
Family Law
Columbus, Ga.
See www.iclega.org for location
6 CLE Hours

FEB 10  Atlanta Bar Association
Family Law
6 CLE Hours

FEB 10-11  ICLE
Estate Planning Institute
Athens, Ga.
See www.iclega.org for location
9 CLE Hours

FEB 13  Atlanta Bar Association
Managing Wage & Hour Risks
Live webcast
6 CLE Hours

FEB 16  ICLE
Health Law and the CDC
Atlanta, Ga.
See www.iclega.org for location
3 CLE Hours

FEB 16  ICLE
Elder Law
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

FEB 16  ICLE
Residential Real Estate
Statewide Satellite Broadcast
See www.iclega.org for locations
6 CLE Hours

FEB 16-18  ICLE
Winter Tropical Seminar
Grand Cayman Island
See www.iclega.org for location
12 CLE Hours

FEB 16-17  ICLE
Social Security Law
Atlanta, Ga.
See www.iclega.org for location
10 CLE Hours

FEB 17  ICLE
Banking and Finance Law
Statewide Satellite Broadcast
See www.iclega.org for locations
6 CLE Hours

FEB 22  ICLE
Negotiated Corporate Acquisitions
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

FEB 22  Atlanta Bar Association
Ethics for Corporate Counsel
Live webcast
3 CLE Hours

FEB 23  ICLE
Advanced Debt Collection
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours

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Employment Law for Pro Bono
Organizations
Part of Pro Bono March Madness
3 CLE Hours

MAR 27  Atlanta Bar Association
Representing Survivors of Intimate
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Part of Pro Bono March Madness
3.5 CLE Hours

MAR 27  Atlanta Bar Association
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Part of Pro Bono March Madness
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MAR 28  ICLE
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MAR 29  ICLE
Enhancing Your People Skills (Tentative)
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MAR 29  ICLE
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MAR 29  Atlanta Bar Association
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MAR 30  ICLE
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Trial Tips
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See www.iclega.org for locations
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APR 4  ICLE
Hot Topics in Public Interest
Atlanta, Ga.
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APR 5  ICLE
School and College Law
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APR 12  ICLE
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APR 13  ICLE
Child Welfare
Atlanta, Ga.
See www.iclega.org for location
6 CLE Hours
FORMAL ADVISORY OPINION NO. 10-2
Approved And Issued On January 9, 2012
Pursuant to Bar Rule 4-403(e)
By Order of The Supreme Court of Georgia
Supreme Court Docket No. S11U0730

QUESTION PRESENTED:

May an attorney who has been appointed to serve both as legal counsel and as guardian ad litem for a child in a termination of parental rights case advocate termination over the child’s objection?

SUMMARY ANSWER:

When it becomes clear that there is an irreconcilable conflict between the child’s wishes and the attorney’s considered opinion of the child’s best interests, the attorney must withdraw from his or her role as the child’s guardian ad litem.

OPINION:

Relevant Rules

This question squarely implicates several of Georgia’s Rules of Professional Conduct, particularly, Rule 1.14. Rule 1.14, dealing with an attorney’s ethical duties towards a child or other client with a disability, provides that “the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” Comment 1 to Rule 1.14 goes on to note that “children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.”

This question also involves Rule 1.2, Scope of Representation, and Rule 1.7, governing conflicts of interest. Comment 4 to Rule 1.7 indicates that “[l]oyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.”

Finally, this situation implicates Rule 3.7, the lawyer as a witness, to the extent that the guardian ad litem must testify and may need to advise the court of the conflict between the child’s expressed wishes and what he deems the best interests of the child. Similarly, Rule 1.6, Confidentiality of Information, may also be violated if the attorney presents the disagreement to the Court.

Statutory Background

Georgia law requires the appointment of an attorney for a child as the child’s counsel in a termination of
The statute also provides that the court may additionally appoint a guardian ad litem for the child, and that the child's counsel is eligible to serve as the guardian ad litem. In addition to the child's statutory right to counsel, a child in a termination of parental rights proceeding also has a federal constitutional right to counsel.

In Georgia, a guardian ad litem's role is “to protect the interests of the child and to investigate and present evidence to the court on the child’s behalf.” The best interests of the child standard is paramount in considering changes or termination of parental custody. See, e.g., Scott v. Scott, 276 Ga. 372, 377 (2003) (“[t]he paramount concern in any change of custody must be the best interests and welfare of the minor child”). The Georgia Court of Appeals held in In re A.P. based on the facts of that case that the attorney-guardian ad litem dual representation provided for under O.C.G.A. § 15-11-98(a) does not result in an inherent conflict of interest, given that: “the fundamental duty of both a guardian ad litem and an attorney is to act in the best interests of the [child].”

This advisory opinion is necessarily limited to the ethical obligations of an attorney once a conflict of interest in the representation has already arisen. Therefore, we need not address whether or not the dual representation provided for under O.C.G.A. § 15-11-98(a) results in an inherent conflict of interest.

Discussion

The child’s attorney's first responsibility is to his or her client. Rule 1.2 makes clear that an attorney in a normal attorney-client relationship is bound to defer to a client’s wishes regarding the ultimate objectives of the representation. Rule 1.14 requires the attorney to maintain, “as far as reasonably possible...a normal client-lawyer relationship with the [child].” An attorney who “reasonably believes that the client cannot adequately act in the client’s own interest” may seek the appointment of a guardian or take other protective action. Importantly, the Rule does not simply direct the attorney to act in the client’s best interests, as determined solely by the attorney. At the point that the attorney concludes that the child’s wishes and best interests are in conflict, the attorney should petition the court for removal as the child’s guardian ad litem, disclosing only that there is a conflict which requires such removal.

The attorney should not reveal the basis of the request for the appointment of a guardian ad litem to preserve confidentiality and so as not to compromise the child’s position. An exception to the duty of confidentiality may arise “[w]here honoring the duty of confidentiality would result in the children’s exposure to a high risk of probable harm.”
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The attorney should not reveal further information received during the representation, nor should the attorney otherwise use the information received from the child in confidence to advocate a position not desired by the child. This contrasts with the attorney’s ability to disclose such information to the court in service of the child’s wishes.

The attorney is under an affirmative ethical obligation to seek to have a new guardian ad litem appointed following his withdrawal as guardian, as Comment 3 to Rule 1.14 explains that “the lawyer should see to [the appointment of a legal representative] where it would serve the client’s best interests.” If the conflict between the attorney’s view of the child’s best interests and the child’s view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16 or seek to have a separate guardian appointed.

The attorney may not withdraw as the child’s counsel and then seek appointment as the child’s guardian ad litem, as the child would then be a former client to whom the former attorney/guardian ad litem would be adverse.

This conclusion is in accord with many other states. For instance, Ohio permits an attorney to be appointed both as a child’s counsel and as the child’s guardian ad litem. Ohio ethics rules prohibit continued service in the dual roles when there is a conflict between the attorney’s determination of best interests and the child’s express wishes. Court rules and applicable statutes require the court to appoint another person as guardian ad litem for the child. An attorney who perceives a conflict between his role as counsel and as guardian ad litem is expressly instructed to notify the court of the conflict and seek withdrawal as guardian ad litem. This solution (withdrawal from the guardian ad litem role once it conflicts with the role as counsel) is in accord with an attorney’s duty to the client.

Connecticut’s Bar Association provided similar advice to its attorneys, and Connecticut’s legislature subsequently codified that position into law. Similarly, in Massachusetts, an attorney representing a child must represent the child’s expressed preferences, assuming that the child is reasonably able to make “an adequately considered decision...even if the attorney believes the child’s position to be unwise or not in the child’s best interest.” Even if a child is unable to make an adequately considered decision, the attorney still has the duty to represent the child’s expressed preferences unless doing so would “place the child at risk of substantial harm.” In New Jersey, a court-appointed attorney needs to be “a zealous advocate for the wishes of the client...unless the decisions are patently absurd or pose an undue risk of harm.”

New Jersey’s Supreme Court was skeptical that an attorney’s duty of advocacy could be successfully reconciled with the client’s best interest.

In contrast, other states have developed a “hybrid” model for attorneys in child custody cases serving simultaneously as counsel for the child and as their guardian ad litem. This “hybrid” approach “necessitates a modified application of the Rules of Professional Conduct.” That is, the states following the hybrid model, acknowledge the “‘hybrid’ nature of the role of attorney/guardian ad litem which necessitates a modified application of the Rules of Professional Conduct,” excusing strict adherence to those rules. The attorney under this approach is bound by the client’s best interests, not the client’s expressed interests. The attorney must present the child’s wishes and the reasons the attorney disagrees to the court.

Although acknowledging that this approach has practical benefits, we conclude that strict adherence to the Rules of Professional Conduct is the sounder approach.

Conclusion

At the point that the attorney concludes that the child’s wishes and best interests are in conflict, the attorney should petition the court for removal as the child’s guardian ad litem, disclosing only that there is a conflict which requires such removal. The attorney should not reveal the basis of the request for the appointment of a guardian ad litem to preserve confidentiality and so as not to compromise the child’s position. The attorney should not reveal further information received during the representation, nor should the attorney otherwise use the information received from the child in confidence to advocate a position not desired by the child. The attorney is under an affirmative ethical obligation to seek to have a new guardian ad litem appointed following his withdrawal as guardian. If the conflict between the attorney’s view of the child’s best interests and the child’s view of his or her own interests is severe, the attorney may seek to withdraw entirely following Rule 1.16 or seek to have a separate guardian appointed.

Endnotes

4. O.C.G.A. § 15-11-98(a) (“In any proceeding for terminating parental rights or any rehearing or appeal thereon, the court shall appoint an attorney to represent the child as the child’s counsel and may appoint a separate guardian ad litem or a guardian ad litem who may be the same person as the child’s counsel”) (emphasis added).
5. Id.
8. Id., at *2.
9. See, e.g., Wis. Ethics Op. E-89-13 (finding no inherent conflict of interest with the dual representation of an attorney and guardian but concluding that if a conflict does arise based on specific facts, the attorney’s ethical responsibility is to resign as the guardian).
13. Id.
16. See Georgia Rules of Professional Conduct, Rule 1.6, specifically subsection (e).
17. See Georgia Rules of Professional Conduct, Rule 1.6(a) (permitting disclosure of confidential information “impliedly authorized to carry out the representation”).
18. See Rules 1.14 (b), 1.16 (b) of the Georgia Rules of Professional Conduct.
20. See, e.g., Wis. Ethics Op. E-89-13, Conflicts of Interests; Guardians (1989) (providing that dual representation as counsel and guardian ad litem is permitted until conflict between the roles occurs, and then the attorney must petition the court for a new guardian ad litem); Ariz. Ethics Op. 86-13, Juvenile Proceedings; Guardians (1986) (providing that a “lawyer may serve as counsel and guardian ad litem for a minor child in a dependency proceeding so long as there is no conflict between the child’s wishes and the best interests of the child”).
22. Id., at *2.
23. Id.
25. Id. See also Baxter, 17 Ohio St. 3d at 232 (“[w]hen an attorney is appointed to represent a person and is also appointed guardian ad litem for that person, his first and highest duty is to zealously represent his client within the bounds of the law and to champion his client’s cause”).
28. Mass Comm. for Public Counsel Servs., Performance Standards, Standard 1.6(d) at 11.
31. See Clark v. Alexander, 953 P.2d 145, 153-54 (Wyo. 1998); In re Marriage of Rolfe, 216 Mont. 39, 51-53, 699 P.2d 79, 86-87 (Mont. 1985); In re Christina W., 639 S.E.2d at 777 (requiring the guardian to give the child’s opinions consideration “where the child has demonstrated an adequate level of competency [but] there is no requirement that the child’s wishes govern.”); see also Veazey v. Veazey, 560 P.2d 382, 390 (Alaska 1977) (“[i]t is equally plain that the guardian is not required to advocate whatever placement might seem preferable to a client of tender years.”) (superseded by statute on other grounds); Alaska Bar Ass’n Ethics Committee Op. 85-4 (November 8, 1985)(concluding that duty of confidentiality is modified in order to effectuate the child’s best interests); Utah State Bar Ethics Advisory Opinion Committee Op. No. 07-02 (June 7, 2007) (noting that Utah statute requires a guardian ad litem to notify the Court if the minor’s wishes differ from the attorney’s determination of best interests).
32. Clark, 953 P.2d at 153.
33. Id.
34. Id.
35. Id., at 153-54, Rolfe, 699 P.2d at 87.

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