



The YLD Review

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More Lawyer-Legislators: A Top Priority

by William Fagan and Thomas Worthy

Although summer is nearly upon us, this November's elections will be here before we know it. And while the deadline for qualifying to run in this year's elections has already passed, there is a glaring need in our state government for more lawyer-legislators. The decline of lawyer-legislators in Georgia's General Assembly has been a topic at the forefront of conversations among members of the YLD, the State Bar of Georgia and under the Gold Dome.

In fact, only 17 percent of the General Assembly's members are lawyers, a number that has been well over 50 percent at some points during Georgia's history. While our Legislature should obviously include members from diverse professional backgrounds, this diminished number of legally-trained representatives and senators can and does lead to a number of issues at the Capitol.

Some current lawyer-legislators graciously took time to recently address the 2014 YLD Leadership Academy class in February. Rep. **Ronnie Mabra** (D-Fayetteville), said, "Having so few elected lawyers in the Legislature means some committees take up valuable legislative time discussing ideas for bills which are obviously unconstitutional. If we had more lawyer-representatives at the Capitol, I think that we could provide more informed guidance on legal matters and the constitutionality of proposed legislation." He continued, "A greater legal focus at the discussion stage would make the entire General Assembly more effective."

"We joined a profession with a strong tradition of service. Not merely to our clients, but to the greater community. Whether as a candidate or just an engaged citizen, your specialized knowledge and skills should be put to use to improve, correct and shape the law in a way that benefits others," said Sen. **Charlie Bethel** (R-Dalton), who also addressed the YLD Leadership Academy. "None of us have the capacity to understand all subjects governed by the law. When we engage in the political process we find an opportunity to both learn and teach with the ultimate purpose of building something together that is better than any of us could build alone. When you sit on the sidelines, you deprive the process of your valuable contributions."

In addition to the legal need in the General Assembly, serving in elected office can be a key step in long-term career advancement and overall satisfaction. On a recent visit to the U.S. District Court for the Southern District of Georgia in Augusta, Judge **J. Randal Hall** addressed the members of the 2014 YLD Leadership Academy class and urged them to consider running for office. "Becoming a licensed attorney in this state is a high calling in and of



(Front row, l-r) Speaker of the House David Ralston; 2013-14 State Bar President Charles L. Ruffin. (Second row) Sen. Jesse Stone; Rep. Rich Golick; Rep. Wendell Willard; Sen. John Crosby; Rep. Christian Coomer. (Third row) Rep. LaDawn Jones; Rep. Regina Quick. (Fourth row) Rep. Mike Jacobs; Rep. Mary Margaret Oliver; Rep. Dar'shun Kendrick; Rep. Ronnie Mabra. (Fifth row) Sen. Ronald Ramsey; Rep. Pam Stephenson; Sen. Curt Thompson; Rep. Dusty Hightower; Rep. Stacey Evans; Rep. Brian Strickland. (Sixth row) Rep. Alex Atwood; Clerk of the House of Representatives Bill Reilly; Rep. Tom Weldon; House Minority Leader Stacey Abrams; Rep. Andy Welch. (Seventh row) Sen. Charlie Bethel; Rep. Jay Powell; Rep. Scott Holcomb; Rep. Chuck Efstration. (Eighth row) Sen. Bill Cowsert; House Majority Leader Larry O'Neal; Rep. Barry Fleming; Rep. Trey Kelley. (Ninth row) Sen. William Ligon; House Majority Whip Matt Ramsey; Sen. Josh McKoon, Chairman, Judiciary. Not pictured: Rep. Stephen Allison; Rep. Johnnie Caldwell; Sen. Jason Carter; Sen. Judson Hill; Rep. Edward Lindsey; Rep. BJ Pak; Sen. Lindsey Tippins.

itself. However, too few of us use our considerable gifts to give back to our citizens in a way we are uniquely qualified, by serving in elected office. My time serving as a state senator in the early 2000s was one of the most rewarding in my legal career. All young lawyers should consider running for office as part of their career path."

The YLD continues its efforts to get its membership actively involved in the political process, regardless of their party or ideology. This could mean encouraging members to run for office or, at the very least, assisting in engaging with the State Bar's Legislative and Grassroots programs. As part of this effort, interested readers are invited to attend a happy hour and discussion with lawyer-legislators on June 19 in Atlanta. Readers should be on the lookout for future emails and other notifications about this event and are encouraged to come out and join the discussion.

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From the President

Just One More Moment

by *Darrell L. Sutton*

For as long as I can remember I have had a passion for U.S. history. The history of our country is fascinating in so many respects, and there are few individuals who have done more to shape that history than the 44 men who have served as our nation's chief executive. It is no wonder, then, that my passion for American history has led to an equal, if not greater, passion for American presidential history.

Save for one, the beginning of each presidency coincides with the end of another, and the transition of presidential power is almost as interesting as the presidents themselves. After all, in only a matter of a few hours one man's belongings are packed and moved from the Oval Office while another's are brought in, unpacked and set-up. The transition is seamless, especially for the incoming president, who returns from his inauguration to an Oval Office in every respect ready for him to begin work.

As you can imagine, some have been less willing than others to leave the post of the most powerful man on Earth. For example, it is well-documented that Bill Clinton had to be all but forcibly removed from the Oval Office; his desire to remain in power so great that he simply could not bring himself to relinquish it when the time came for him to do so. A photographer with a keen eye captured Clinton's reluctance to leave perfectly when, on the morning of George W. Bush's inauguration, he photographed Clinton at his desk in the Oval Office going over papers that long before should have been packed and readied for removal; seeking to prolong, by even just a moment, his time in office.

There is certainly no comparison between my office and that of the president of the United States. The latter is filled with power, significance and consequence, while the former is filled with, well, none of those. But just as Clinton did in late January 2001, I now find myself at the precipice of transition. And albeit to a much lesser degree, for me, too, it is bittersweet. How could it not be when I look back on all that the YLD has accomplished during my year at its helm?

We committed this Bar year to serving Georgia's current and future young lawyers, and set out to do so through five initiatives: create and implement a Law School Fellows program; outreach to the YLD's local affiliates; expand the YLD Leadership Academy; endow the YLD Public Interest Internship Program; and recruit more young lawyers to participate in the legislative process. To borrow the words of Clinton's successor: mission accomplished.

With the cooperation of each of Georgia's five law schools, a 2L and 3L from each school were selected to serve as the inaugural class of YLD Law School Fellows. Each 3L has served this year as his or her school's YLD Executive Council Representative, while each 2L has served alongside them in preparation for serving in that role next year. In August, a new class of 2L fellows will be selected, finally creating continuity among the law student representatives to the YLD Executive Council that has for so long eluded us.

Just as elusive has been sustained outreach to our affiliate YLDs. Acting under the premise that all Bar involvement is local, while at the same time understanding that an inability to consistently get the state's young lawyers from the local YLD to the state YLD requires a bringing of the state YLD to the local level, this year we renewed and revamped our effort at outreach to our local YLD affiliates. Outreach cannot be done well unless you actually reach out, so over the course of this Bar year the YLD officers visited our local affiliates. We began with a visit to the Cobb County

Bar Association YLD in August, and concluded with a visit to the Savannah Bar Association YLD in April. In between we traveled to Macon, Decatur, Augusta, Columbus, Rome and St. Simons Island. We also hosted members of what we hope will be a new affiliate YLD in Dalton at our Fall Meeting in Chattanooga, and in May we granted affiliate status to the new Houston County YLD.

The YLD has long been distinguished by its award-winning programs, and the YLD Leadership Academy is first among those. We sought this year to expand its reach by increasing the number of scholarships available to young lawyers who qualify for participation in the Leadership Academy but otherwise cannot afford its tuition. Thanks to the generosity of the Board of Governors, 11 (or 20 percent) of the 55 members of the 2014 Academy class received scholarships so that they could obtain the training and tools necessary to propel them into leadership roles in the YLD, State Bar and their communities.

Also an award-winning and signature program of the YLD, the Public Interest Internship Program (PIIP) was founded during the 2009-10 Bar year to help alleviate coinciding decreases in the number of legal employment opportunities for young lawyers and in staffing at Georgia's public interest legal organizations by providing law students and new lawyers with funding to pursue internships at these organizations. Funding for PIIP expired with the placement of the 2014 class of PIIP interns, so it was necessary for PIIP's long-term continuation that permanent funding be secured this year. PIIP was therefore designated the beneficiary of the 2014 Signature Fundraiser, which raised a record amount of more than \$96,000, nearly \$24,000 more than any prior fundraiser, and resulted in a record donation of \$66,000 to the PIIP endowment. These funds were then used to pursue a grant from CCLC, which on April 17, approved a \$100,000 grant to the PIIP endowment; bringing the total contribution to the PIIP endowment to nearly \$170,000 this year!

Lawyers are essential to the legislative process. This year the YLD set out to increase the involvement of Georgia's young lawyers, and in the process increase their interest in offering themselves for elected office. After months of planning, our Legislative Recruitment Committee will host its first lawyer-legislator outreach happy hour from 5:30-7:30 on June 19, at the Lawyers Club of Atlanta. Georgia's lawyer-legislators will be invited to attend and connect with young lawyers interested in public office and to otherwise encourage young lawyers to become civically involved. Meanwhile, in November, young lawyer **Graham McDonald** was elected to a seat on the Sandy Springs City Council, and in December, young lawyer **Chuck Efstraction** won a special election to represent District 104 in the Georgia House of Representatives. And young lawyers **Catherine Bernard** and **James Clifton** waged campaigns to become the next representative from Georgia House District 80 and senator from Georgia Senate District 16, respectively.

There is no reason for a photographer to be nearby on [June 30] as I empty the YLD president's office of my personal belongings and prepare for my great friend **Sharri Edensfield** to assume the YLD presidency. But if there is, he or she will find me at the desk going over papers that long before should have been packed and readied for removal; reluctant to relinquish my role at the helm of this incredible organization and finding every way I can to prolong my time as YLD president by just one more moment.

Judge's Chambers:

Social Networking's Impact on Today's Law Practice

by Hon. Willie J. Lovett Jr., CWLS, Juvenile Court of Fulton County



I do not profess to be an expert on social networking. Indeed, before writing this article, I Googled the question “what is social networking,” and found an interesting webpage, www.whatissocialnetworking.com, which helped assure me that my understanding of social networking is consistent with the topic. For the purposes of this article, I will use the term “electronic social media” (ESM) to describe social networking, as that is the term defined in the American Bar Association’s (ABA’s) Formal Opinion 462, Feb. 21, 2013: “refers to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons.”

My observations about ESM are presented from the perspective of a newly-minted judge. My term began in May 2013. Before becoming a judge, I maintained Facebook and LinkedIn accounts with many of my contacts being members of the legal profession. I must confess that my utilization of ESM does not extend to Twitter, Instagram and other trendier networking forums.

After becoming a judge, I thought long and hard about maintaining my accounts. I asked many colleagues about their utilization of ESM and received advice ranging from “completely shut it down” to “keep it, but be careful about your postings.” On Feb. 21, 2013, the ABA published Formal Opinion 462, Judge’s Use of Electronic Social Networking Media. Based on the ABA Model Code of Judicial Conduct, Formal Opinion 462 provides:

A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.

Using Formal Opinion 462 as a guide, I am comfortable maintaining my Facebook and LinkedIn accounts. I don’t post as much and I am cautious about “undermining [my] independence, integrity or impartiality or creating an appearance of impropriety.”

However, the use of ESM by lawyers appears to be more complicated and possibly more perilous. For example, the “CWLS” behind my name communicates that I am a Child Welfare Law Specialist. I have successfully completed a program of legal specialization certified by the National Association of Counsel for Children, the ABA and the State Bar of Georgia. As a CWLS, I can hold myself out as an expert in various areas of child welfare law. Is this CWLS certification equivalent to the unsolicited endorsements I have received on my LinkedIn page? If an attorney gets heavily endorsed on LinkedIn for an area of practice wherein they possess no advanced level of skill, does that lawyer violate Georgia Rules of Professional Conduct, Rule 7.4? Rule 7.4 provides:

A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.

The maximum penalty for a violation of this Rule is a public reprimand.

Pursuant to the Rule, lawyers should exercise caution that their LinkedIn endorsements do not create the appearance that the lawyer is an expert in an area where he or she rarely practices.

Similarly, lawyers must exercise caution when communicating about their cases on ESM, lest they run afoul of Georgia Rules of Professional Conduct, Rule 1.6, which provides:

A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court.

The maximum penalty for a violation of this Rule is disbarment.

War stories are crafted from our clients’ experiences and their communication with us. A Feb. 1, 2011, article in the *ABA Journal* entitled “Seduced,” by Steven Seindenberg, outlines several circumstances where judges and attorneys were reprimanded because of their activities on ESM. Georgia’s judges and attorneys should heed these examples, and remain guarded about the material they share on ESM. Understanding the ESM you are using and exercising common sense about the information you share on your profiles will go a long way toward avoiding trouble.

Caselaw Update

by Stephanie L. Wilson and Corey A. Aitken

Rose v. Rose

S14F0181, March 6, 2014

After the parties separated, Wife and the minor child moved from Gwinnett to Henry County. Wife filed for divorce in Gwinnett County. At the temporary hearing, Husband agreed to award temporary primary physical custody to the Wife.

At the final hearing, the Husband sought permanent primary physical custody of the minor child. He argued that he should be awarded primary physical custody because: (1) the school in Gwinnett County was superior, (2) Wife fed the child fast food frequently, while the Husband fed the child home-cooked meals, (3) that Husband had a more flexible work schedule, which would prevent the child from having to attend afterschool care and (4) that the child was better behaved while in his custody. As a result, the trial court awarded the Husband primary physical custody of the minor child. Wife appealed this decision based on the fact that the trial court focused on factors other than the best interests of the child, specifically, the superior school in Gwinnett County.

An appellate court will not interfere with an award of custody unless the trial court clearly abused its discretion. The Supreme Court found ample evidence to support the trial court’s ruling in association with O.C.G.A. § 19-9-3, including the benefits of Husband’s employment schedule, the more nutritious meals that Husband provided and the better behavior of the child while in the Husband’s custody. Therefore, the Supreme Court affirmed the trial court’s ruling.

Crutchfield v. Lawson

S13A1611, Jan. 23, 2014

In 2008, the parties were divorced in Paulding County. In 2011, Wife filed an application for contempt against Husband in Cobb County. Husband then answered that application for contempt in Cobb County and filed a cross-application for contempt in which he challenged the Cobb County court’s jurisdiction. At the 2012 hearing, both parties consented to the jurisdiction of the Cobb County in open court under oath, and the Husband was ultimately found in contempt.

Husband then filed a motion to set aside and argued that the Cobb County court lacked jurisdiction, and Wife should have brought her contempt action in Paulding County. The Superior Court of Cobb County determined that Husband participated in the Cobb County proceedings, was equitably estopped from challenging subject matter jurisdiction, and denied his motion to set aside. Husband then appealed that decision.

The Supreme Court determined whether a trial court’s entitlement to enforce its own orders is a matter of subject matter jurisdiction or venue. The Supreme Court found that the superior court which entered the original order does not have exclusive subject matter jurisdiction to enforce its original order. As a result, Husband was not appealing what type of court, but rather which superior court, which is a question of venue.

The Supreme Court found no authority for removing the case from the venue of Cobb County, and held that because Husband agreed and announced in open court under oath that he consented to the jurisdiction of Cobb County, that he thereby waived any subsequent objection. As a result, the trial court’s ruling was affirmed.

Committee Updates

Women in the Profession Committee

by *Jennifer Nichols*



(L-R) The Women in the Profession Committee Judicial Panel included Co-chair Jennifer Nichols (moderator), Hon. Susan Edlein, Hon. Stacey K. Hydrick, Hon. Carla McMillian, Hon. Pamela South, Co-chair Nadia Deans and Hon. Adele Grubbs.

On the evening of April 16, the Women in the Profession Committee Co-chairs, **Jennifer Nichols** and **Nadia Deans**, hosted a Judges' Panel CLE and catered reception. The panel was comprised of Hon. **Carla Wong McMillian**, judge, Court of Appeals of Georgia; Hon. **Pamela D. South**, chief judge, State Court of Gwinnett County; Hon. **Susan E. Edlein**, judge, State Court of Fulton County; Hon. **Stacey K. Hydrick**, judge, State Court of DeKalb County; and Hon. **Adele P. Grubbs**, chief judge, Superior Court of Cobb County. Each judge shared the personal story of her journey to the bench and provided insight and practical tips for young attorneys regarding written discovery, motions practice and trial techniques. The judges also offered advice on how to address the challenges of balancing a family with a busy career and professional life and brought their own unique background, expertise, personality and humor to the event, which the attendees found both informative and entertaining.

Intrastate Moot Court Committee

by *Katie Dod*

With the help of more than 50 volunteer lawyers and judges, the YLD Intrastate Moot Court Committee hosted its annual competition March 21-22, at Emory University School of Law. Each Georgia law school sent two teams to argue the legal issues surrounding Georgia's mandatory reporting statute. The team from John Marshall made history by beating a team from the University of Georgia in the final round to become the first team from John Marshall to win the annual Intrastate Competition. Additional awards were provided to **Edgar Neely**, Georgia State, for best oralist and to a team from Georgia State for best brief. The final round was judged by Hon. **Horace Johnson** of the Superior Court of the Alcovy Judicial Circuit, Hon. **Rueben Green**, Cobb County Superior Court; Hon. **Dax Lopez**, DeKalb County State Court; and **Jamie Woodard** and **Allen Wallace**. On behalf of the committee, Competition Co-chairs **Katie S. Dod** and **Emilia C. Walker** would like to thank all of the attorneys, judges and sponsors who made this year's competition a great success.

Litigation Committee

by *Ryals Stone and Kevin Patrick*

The final speakers for the Litigation Committee's annual "War Stories" Lecture Series were **Chief Justice Hugh Thompson** of the Supreme Court of Georgia and Hon. **Elizabeth L. Branch** of the Court of Appeals of Georgia. Chief Justice Thompson spoke at the April 30 event and Judge Branch closed out the series on May 28.

For information about the committee, please contact the co-chairs **John Jett**, jjett@kilpatricktownsend.com or **Brandon Smith**, bsmith@cssfirm.com.

Ethics & Professionalism Committee

by *Neal Weinrich*

On March 6, the Ethics and Professionalism Committee hosted its annual CLE featuring a distinguished panel speaking on a timely and engaging topic: the ethical considerations of cloud computing and other new technologies. The moderator facilitated the program by posing several hypotheticals raising interesting ethical issues. One hypothetical involved a law firm contemplating moving its server to the cloud following several server outages due to inclement weather. Another hypothetical involved an associate tasked with managing a massive electronic production that includes documents and files containing sensitive banking information. Forty attorneys attended a thought-provoking program. At the conclusion of the CLE, attendees and panelists moved from the State Bar to Hudson Grille for happy hour. By all accounts, the event was extremely successful.

The Ethics and Professionalism Committee concluded its year with a joint lunch-and-learn with the Real Estate Committee on May 8.

Intellectual Property Committee

by *Clark Wilson*

On April 3, the IP Committee hosted "Lunch with Atlanta IP Legends: War Stories & Career Advice." Thank you to Taylor English Duma LLP for sponsoring this event. The panel of legends, including **Joan Dillon**, **Miles Alexander** and **Tony Askew**, told stories about what practicing law was like in the late 1950s and early 60s. For example, the largest law firm in Atlanta in the late 1960s had only 20 people. The panel further offered some excellent wisdom about how to navigate a legal career as Alexander implored younger lawyers to keep their options open and to be civil to one another.



(L-R) Miles Alexander, Clark Wilson, Tony Askew and Joan Dillon.

Tips for Better Appellate Advocacy

by Titus Nichols

The skills necessary to try a case are different than those necessary to draft an appellate brief. The appellate level does not give you the chance to “re-try” your case. Irrespective of how great the lawyer’s oratorical skills, the outcome of most appeals are driven by the facts, the law and what happened in the trial court. As Supreme Court of Georgia Justice **David Nahmias** has stated, “A bad brief is hard to salvage at oral argument.” Therefore, it is even more important to craft an effective brief in order to advocate for your client.

1. **The Appellate Court’s time is limited**—the Supreme Court of Georgia and the Court of Appeals of Georgia operate within three terms of court: January, April, and September. They are obligated by the Georgia Constitution to decide an appeal by the end of the second term after it is docketed for hearing. If a case is docketed during the September term, then it must be decided by the end of the January term. As a result of this rule, the final weeks of a term are known as the “distress” period.

Appellate caseloads have increased while the number of appellate judges in Georgia has remained the same. Ohio has 69 intermediate appellate judges in addition to seven on the

Ohio Supreme Court. Conversely, Georgia’s appellate court is made up of seven justices on the Supreme Court and 12 judges on the Court of Appeals. It is imperative that you check your brief, check it again, then have someone else check it before you submit it, because submitting typos to the appellate court can easily discount your brief and waste the precious time of the court.

2. **Plan before you write**—Focus on important factors before you start your brief. First, was the error properly preserved? If not, then you will not be able to raise it on appeal. Second, what is the standard of review? More often than not, an appeal will be decided with a *de novo* standard of review as opposed to an abuse of discretion. Third, if the trial court did commit error, was it harmless? If so, then there is very little advantage in arguing that cause. Fourth, if the issue you raise is inconsistent with prior case law, then *stare decisis* becomes a significant hurdle for you to overcome.
3. **Be strategic in your arguments**—Your goal should be to make a persuasive statement of facts section. A mentor once told me that your statement of facts should be a color pallet where each fact is an individual color that you will interweave to create a legal portrait for the appellate court. Your brief should only include your strongest arguments. Doing otherwise could diminish the effectiveness of your brief by diluting the strong facts that support your argument and wasting the court’s time as it wades through extraneous information.

Hopefully these tips will help other young lawyers as they begin to develop their skills and make for better experiences in their respective appellate practices.

Affiliate Updates

Savannah YLD

by Lindsey Hobbs

In February, the Savannah YLD visited Savannah’s first microbrewery, Southbound Brewing Company. Attendees enjoyed a tour of the facility, learning about the brewing process, as well as tasting some of Southbound’s various brews on tap.

In March, the YLD participated in the statewide YLD ethics CLE by video conference at the Coastal Georgia Office, followed by a happy hour for participants. To kick-off spring, Savannah young lawyers enjoyed a happy hour, graciously hosted by Savannah attorney **Bryan Schivera**, and DJ’ed by the Savannah YLD’s own DJ Southpaw, **Zack Howard**.

The exciting events continued in May as the YLD tied in their Tailgate in the Park with the Savannah College of Art and Design’s spring commencement concert in Forsyth Park on May 30. On June 6, they hosted their annual Golf Tournament at The Landings, benefiting the Chatham County Guardian Ad Litem program. At the same time the golfers teed off, other participants took to the courts for the inaugural tennis tournament.

The Savannah YLD continues to make plans for summer events, including a happy hour to welcome summer associates. For more information about Savannah YLD events or to become a member, please contact membership co-chairs, **Zach Thomas** at zhthomas@aol.com or **Carson Penney** at cpenney@huntermaclean.com.

Glynn County YLD

by Melissa Cruthirds

The Glynn County YLD hosted its inaugural YLD Ides of March Invitational on March 15, at Sea Palms Golf and Tennis Resort, organized by **Jason Hodges**. The weather was perfect for 18 holes of golf with friends. The YLD raised \$800 for the



Inaugural YLD Ides of March Invitational hosted by Glynn County YLD.

Davis Love Foundation, a nonprofit institution committed to ensuring the progress of society through the support of both national and community-based programs focusing on children and families. The first place team was made up of **Clement Cullens**, **Grier Williford**, **Tommy Stroud** and **Troy Anderson**.

The following sponsors made this tournament a great success: Crabdaddy’s Seafood Grill; Compass Law Group, LLC; Gilbert & Jones Court Reporting; Hall Booth & Smith, P.C.; Atwood Choate, P.C.; The Half Shell Restaurant; and Indigo Coastal Shanty.

Cobb YLD

by Will Davis

The Cobb County YLD had an active winter and spring and hopes to carry over its activities into a busy summer. They continue to hold monthly luncheons at Willie Rae’s on Marietta Square on the third Tuesday of every month. In January, the YLD hosted **Brantley Rowlen** who spoke about how one can become involved with the State Bar and YLD. In February, Senior Assistant Attorney General **Joe Drolet** spoke about his involvement with the prosecution of the Atlanta Child Murders in the 1980s. **Nicole Leet** visited the group in April and spoke on the State Bar’s SOLACE initiative. In March, the YLD elected its officers for the 2014-15 year.

Continued on page 6

Confidentiality Promises Hard to Keep, Thanks to Facebook

by Christine White

Facebook does it again . . . disclosing to the world that which would otherwise be private, and getting all involved in trouble in the process. Facebook posts and pictures have destroyed marriages, careers and now the bond between father and daughter. In *Gulliver Schools, Inc. v. Snay*, a former headmaster alleged age discrimination when the school did not renew Snay's employment contract. The parties came to a settlement agreement and general release for a settlement amount of \$150,000. \$60,000 was allocated as attorney's fees, \$10,000 was considered back pay to Snay and another \$80,000 was to go to Snay as full and final settlement. Included in the settlement agreement was a confidentiality provision, which provided that the existence and the terms of the agreement between Snay and the school be kept strictly confidential. The contract instructed that Snay could only discuss the existence and terms of the agreement with his attorneys, his wife and his professional advisors. Further, if Snay or his wife disclosed the settlement to any other person or entity other than those permitted by contract, the Plaintiff's portion of the settlement payments would be disgorged.

Four days after the agreement was signed, Gulliver Schools notified Snay that he was in breach of the settlement agreement because a Facebook post of Snay's daughter evidenced that Snay had disclosed the existence of the settlement.

Apparently, sometime after the settlement was finalized, Snay's college-aged daughter posted on Facebook the following:

"Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

According to the opinion of the Florida District Court of Appeals, the Facebook post went out to approximately 1,200 of the daughter's Facebook friends, many of whom were either current or past Gulliver students.

Gulliver Schools promptly refused to pay Snay the \$80,000, claiming breach of the settlement agreement. Snay filed a motion to enforce the settlement agreement and recover the \$80,000 based on the argument that his statement to his daughter and her post on Facebook did not create a breach of the settlement agreement. The lower court allowed Gulliver to take depositions of the Snays and their daughter. In his deposition, Snay said he told his daughter that "it was settled and we were happy with the results."

The lower court found for the Snays, finding that neither Snay's comment to his daughter nor the daughter's post on Facebook constituted a breach of the confidentiality clause of the settlement agreement. The appeals court did not agree and reversed.

This case is not so much about social media as it is about what constitutes breach of a confidentiality agreement. The nuance of this case is that, without social media, the school probably would not have known about the conversation between the father and daughter.

The lesson in this case for attorneys is, that which may have been considered or expected to be kept private before the advent of social media, now has a high probability of being disclosed to the world in mass broadcast fashion which was previously unavailable.

Would Snay have been guilty of breach of confidentiality before Facebook? Yes. But in this case, he was caught breaching confidentiality because of Facebook. And therein lies the rub. Before social media, only celebrities and those with access to traditional media had to be hyper-careful about what they said in "private" conversations. Now everyone must be aware about what they say and do. Attorneys must take extra care when drafting or reviewing confidentiality agreements for clients. If your client is expected to keep something such as the existence of a settlement confidential, you should discuss with your client what exactly that means and whether the expectation is realistic.

Snay testified that he needed to tell his daughter something but the appeals court was not sympathetic. The court responded that if Snay *had* to say something to his daughter he should have discussed that during the settlement so that it could have been provided for in the agreement.

No one knows how many confidentiality contracts have been quietly breached over the years, but with little consequence, as the opposing party never discovered the breach. Now, in the age of social media, the volume on all conversations has increased. As a result, attorneys must give more attention to confidentiality and non-disclosure agreements so clients understand the consequences of their conversations in a world where everyone has a bullhorn.

The new officers are President **Soo Hong**, Treasurer **Bert Hummel** and Secretary **Stephanie Carman**. The group recognizes outgoing President **Chase Swanson**, this year's recipient of the Cobb County Bar Association's Ross Adams Younger Lawyer Award, for outstanding service over the past year to the Cobb YLD.

In April, group members volunteered at The Extension's Men's Campus. The Extension provides shelter for homeless men dealing with substance abuse issues, and YLD members prepared and served a meal and visited with the residents during the service project. For information on how to become more involved with the Cobb YLD, please email Soo Hong at shong@cobbcountytlaw.com.



(L-R) Cara Convery and Leslie O'Neal help prepare meals for residents at The Extension's Men's Campus.

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iSpy With My Little Eye:

What You Can and Can't Get from a Forensic Investigation

by Jessica Reese Fagan and Sean Ditzel

Everyone has caught an episode of *Cheaters* but how much of that is real and, furthermore, how much is legal? Perhaps surprisingly, under Georgia law, quite a lot.

Under Georgia law, every individual has a reasonable expectation of privacy. *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1904) (The right of privacy is embraced within the absolute rights of personal security and personal liberty. . . . Personal liberty includes not only freedom from physical restraint, but also the right “to be let alone”. . .). Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs, is a tort that dates back to the late 1960s. *Cabaniss v. Hipsley*, 114 Ga. App. 367, 370, 151 S.E.2d 496 (1966).

That said, as private lives become more public and advances in technology diminish expectations of privacy, the law races to catch up. And for attorneys who can use social media to help defend an employment law case or prove a personal injury claim, this is a good thing.

A new issue emerging in privacy law is how much privacy someone has to information shared on social media. For example, if someone posts a picture to Facebook that is blocked from the public but is widely available: Does that person have a reasonable expectation of privacy with regard to that photograph? At least one court has said no, they likely do not.

In 2013, a high-school student sued her school district and technology administrator after a picture of her in a bikini was used in a school-wide PowerPoint presentation on internet safety under the caption “Once It’s There—It’s There to Stay.” She claimed a violation of her right to privacy under the Fourth and 14th Amendments, as well as under state laws. (*Chelsea Chaney v. Fayette County Public School District and Curtis R. Cearley*, U.S. Dist. Ct., Northern Division, CAFN: 3:13-CV-89). In a Sept. 30, 2013 order, the District Court found that 17-year-old Chaney permitted access to her Facebook page using a semi-private setting that allowed her Facebook “friends” and “friends of friends” to view her page, including her pictures. The District Court noted that because she was a minor, this was the most inclusive privacy setting she could choose (i.e. she could not choose “public” as a minor). The District Court concluded that “[b]y intentionally selecting the broadest privacy setting available to her at that time, Chaney made her page available to potentially hundreds, if not thousands, of people whom she did not know (i.e., the friends of her Facebook friends).” (Order at p. 10, citing *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010) (“A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).) As a result, the District Court held that Chaney intentionally “surrendered any reasonable expectation of privacy when she posted a picture to her Facebook profile, which she chose to share with the broadest audience available to her” (Order at p. 12); the case against the school district and the administrator in his official capacity were dismissed.¹

Accordingly, when investigating an individual’s social media footprint (or advising a client), it will be important to determine what that person chooses to make visible. For example, if a client tags her location on a picture (“Photo Map” on Instagram or “Check-In” on Facebook), or adds a hashtag (#ShakyKneesFestival), it may make a previously private photo searchable. In other words, a court could conclude that the owner intentionally and voluntarily surrendered some of her privacy rights so it would not be considered an invasion of privacy for an attorney or a private investigator to locate the image, video or data and include it in a report.

Individuals also have a right to privacy with their computers and cell phones. Georgia’s Computer Systems Protection Act, O.C.G.A. § 16-9-90, *et seq.* expressly protects against computer invasion of privacy (O.C.G.A. § 16-9-93(c)), and defines “computer” very broadly.² The main question on whether the information obtained may be admissible is whether or not the person who retrieved it had authority. The code section defines “without authority” to mean using a computer or computer network “in a manner that exceeds any right or permission granted by the owner.” O.C.G.A. § 16-9-92(18).

In other words, if the computer or tablet was left on the kitchen table and was not password protected, there is a good chance a spouse or family member had authority to use the tablet. If, however, your client had to “guess” about the password—or only knew it because when they first started dating years ago her husband asked her to log on to get a confirmation number (and she wrote the password down “just in case”)—there is a good chance a court would conclude that her access was “without authority.”

Additionally, many phone applications have a host of privacy concerns. What about the “Find My Phone” application? Is it an invasion of privacy for a man’s wife to look at an iPad, which he knows she uses nightly to find recipes for dinner, to check and see if he has left the office? Does that conclusion change if the husband has filed for divorce, but left the iPad in the home and so the spouse is now trying to use the application to find out where he is and where he is staying?

The concept of privacy is very malleable and fact-specific, and can come with civil and criminal sanctions if not handled appropriately. If a client presents you with electronic information, it is wise to review all the facts surrounding how it was obtained, including who, what, where, when, why and how. If a client presents you with actual digital evidence, it is wise to consult with a state-licensed forensic examiner to ensure the fragile evidence is not damaged, destroyed or altered in any way, which inadvertent alteration could affect its authenticity rendering it inadmissible in court.

Endnotes

1. Although Ms. Chaney stated she would be continuing against the administrator in his individual capacity, a review of the docket shows the case was dismissed with prejudice by stipulation of the Chaneys and closed on Dec. 26, 2013.
2. O.C.G.A. § 16-9-93 (c): Computer Invasion of Privacy. Any person who uses a computer or computer network with the intention of examining any employment, medical, salary, credit, or any other financial or personal data relating to any other person with knowledge that such examination is without authority shall be guilty of the crime of computer invasion of privacy.

YLD Summer Meeting Save the Date!



August 14 – 17
Lowes Don CeSar Hotel
St. Pete Beach, Fla.



Editor's Block

Crystal Conway

As you have discovered by reading this edition of the newsletter, our theme is social networking. Today, technology is ineluctable. With the proliferation of wireless hotspots, network keys to access our work computers from anywhere and the constant competition to be the first to respond to anything we receive, it's no wonder that we keep running to be more connected. We try to immediately respond when our phone or email summons, and rarely take time to detach from the constant state of being "on." But while we adhere to the demands of technology, it's important that we investigate and remember the constraints that being a lawyer impose on our social networking abilities.

A character trait I have found to be closely intertwined with attorney social networking savvy is wisdom. A wise attorney will advise

their client on how best to behave on social media and will know how to conduct themselves appropriately on the same. Conversely, an unwise attorney will care little for what their clients may post, or how they are perceived online. So, I urge you to use wisdom in evaluating your clients' and your own actions in social networking posts.

As stated in **Christine White's** article, it would behoove all of us to have conversations with our clients informing them that what is posted on the Internet may end up being in violation of a confidentiality agreement. Also, it's wise to remember that social networking postings are discoverable. There is nothing worse than thinking your client has acted appropriately in preparing for trial, only to see it undone by prior social media postings. The best advice you can give your clients is to delete or deactivate their accounts while the litigation is pending.

As attorneys, we should remember that professionalism rules apply to online social networking. There are attorneys who unwisely take out their frustrations with their clients on the Internet and in the process can break attorney/client privilege. And there are attorneys who bemoan their jobs and post defamatory statements about their employers while walking directly into labor and employment complications and litigation. While it's possible that your client or employer may never find out about your posts, it's wise to remember that someone is always watching on the Internet and your reputation to either trash your clients, the court or your employer will precede you.

In matters of social networking, I apply a rule learned many years ago: always err on the side of caution. It is better to retain your job and dignity instead of losing everything over a thoughtless post. As a good friend has said, "It is better to remain silent and have people think you are a fool, than to open your mouth and remove all doubt."

As I close in my final remarks as co-editor I will leave you with what you already know; it is a blessing to be a lawyer and have access to the freedom of building the kind of life you want to lead. But the blessing also comes with the responsibility of acting in a manner that holds you to a higher standard. In wisdom, we should in all of our endeavors, whether in the virtual or real world, aim to represent ourselves to clients, employers, families and friends as a person with principles of discernment and the ability to be counted on to wisely do the right thing.

I recently celebrated a very important anniversary of what is, by far, my longest relationship—10 years on Facebook. Since 2004, I have been party to countless status updates, likes, pokes, tagged photos, untagged photos and more overshares than I can begin to count. When I was introduced to Facebook as a junior in college, I do not think that I realized just how far-reaching becoming a member would still be a part of my life 10 years later, especially in relation to my career as an attorney. Sure, social media has made our lives much easier as it has become a basic communication platform in recent years, but I often wonder if it has hurt our non-virtual communication skills as much as it has helped them.

In a recent conversation with my oldest niece, I was explaining to her how we used to have to remember phone numbers (the horror!) in order to talk to our friends. "Well, Uncle Will, why couldn't you just text them," she wondered. Before explaining how my old phone was plugged into a wall in our kitchen, I began to think about her question. At six years old, she is less concerned with actually talking to her friends and more concerned with the ease of sending a text just to get a quick response. I then realized that at 30 years old, many of my quick communications among friends also rely on Facebook, text messaging and emails. Instead of calling a friend, leaving a message and hoping for a quickly returned call, I can make plans for an evening with close friends in one message sent to everyone. I never have to speak with them, or even see them, in order to communicate.

This lack of personal communication has certainly bled over into my professional life as well as I find I rely more on email and texts with clients and other attorneys versus face-to-face communication. In a profession that relies so much on negotiation and mediation, are we doing our colleagues a disservice by limiting ourselves to social media and e-communication? How can we truly work for our clients and network among other lawyers without regular in-person meetings and conversations? In order to truly develop our professional skills, I am a firm believer that we need get out from behind the desk and actually get to know those people we see on a regular basis but then send messages to once we are back in the office. I have reiterated it in most issues of this year's *YLD Review*, and I will so do again as we approach the end of this Bar year, but the YLD and other Bar organizations provide numerous opportunities to get to know those with whom we share this wonderful profession.

The YLD Summer Meeting will be held Aug. 14-17 in St. Pete Beach, and if you have not been to a meeting yet, this will have something for everyone, with a few days at the beach as well! Take a few days to unplug from Facebook, Twitter and your cell phone and join the YLD in Florida. I hope to see you all there.



Editor's Block

Will Davis