

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XVIII

Winter 2013

No. 1



Tech Tools to Help You Manage Discovery

See article on page 15

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to the*

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(Plaintiff)

The awards will be presented at the Section Breakfast
June 21st at 7:00am at the Hilton Head Resort and Spa
and a reception that evening at 5:00pm

CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XVIII

Winter 2013

No. 1



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Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be double-spaced, typewritten on letter-size paper, with the article on disk or sent via e-mail together with a bio and picture of the author and forwarded to Co-Editors: R. Walker Garrett, 200 13th St., Columbus, GA 31901, rwalkergarrett@gmail.com and David A. Sleppy, 649 Irvin St., P.O. Box #689, Cornelia, GA 30531, dsleppy@catheyandstrain.com.

Published by Appleby & Associates, Austell, Georgia.

Laura Austin
Section Chair



NEW ELECTRONIC CASE MANAGEMENT

Paperless, Cloud Based, Synchronized, Harmonized, Texted, E-Faxed, iPhone, iPad, Thumb Drive, Quad Drive, Scanned and Barcoded, E-Signature, E-File, and New Case Management

In 1979 when I entered the practice of law, as a Registered Nurse I had just offered a revolutionary concept to hospitals to save on Nursing hours by suggesting that they have dictation stations converted from janitorial closets in the halls and bedside dictation from the phones (if they were in private room) to maximize the use of the nursing professional skills and let the transcribers beat out the text for review and placement on the charts by the clerks – then all the nurses had to do was sign off on the typewritten notes that could actually be read by everyone. Smart thought – use the best skills of each in a cost effective manner. The learning curve for bedside computers was outrageous, as was the cost, and it prevented the ability of new staff members to quickly assimilate all the knowledge necessary to care

for patients because they had to focus on “legal documentation” for risk management purposes. Patients were being ignored while non-computer literate nurses at the time were struggling to come into the new age of technology at the bedside. They had just come out with rolling medication carts or medicine chests accessible in the patient’s rooms to allow an increased patient ratio per nurse because of the convenience. Things were rapidly changing.

So I came out and hung my shingle with Bill Bristow to learn the ropes. What a kind and gentle teacher was he. I had worked as a legal secretary in Dallas, Texas while going to nursing school and I was fascinated with the new “computers” that allowed you to put in cards where you could save your document and if you made a mistake, it could be

corrected without white-out and erasers on multiple carbon copies. Now, it was 1979, and the big disc was in. Bill’s wife was a master with the new technology and I was excited to learn that I would have the benefit of one of these new-fangled machines.

Blink and its 2013. OMG! People text and e-mail instead of talk. The level of professionalism is waning in the new young lawyers as “attitude” seems to be the order of the day to show that you really won’t take any guff and that you know what you’re doing.....but they seamlessly throw out dates from either of their electronic devices that they hold in their hand at calendar call and can forecast a year’s worth of leave time with programming of the court’s calendar dates. I thought I was cool with the net-book, but that led to the iPhone

and then the iPad and that decorate the bookshelves in my office. I haven't figured out how to get it all sync'd with the office computer and find my flailing fingers putting in 8 p.m. instead of 8 a.m., but I'm not the only one. Just got a Nisi for Juvenile Court for 8:30 p.m. – things are changing but hopefully not for longer days.

Technologically challenged folks like me could use every single CLE hour just to get up to speed, but by the time I got there – everyone would have moved past me. Then I'd be challenged to keep up with the new interpretations of the law on my own and that wouldn't be healthy for my clients. My 12 year old grandson knows more about iPhones and the internet than I've learned in the 33 to 34 years I've been practicing law. If I could just garner

some of his high energy, I bet I could utilize the programs and produce in a heartbeat.

I was just going over a suggested new case management program to manage heavy e-discovery documents and it seems like a yearlong project just to learn how to use it – UGH. David Boone so swiftly and proficiently utilizes deposition tracking programs that he knows in an instant on a continuing deposition whether the topic has been discussed in detail and opposing counsel is being repetitious in their questioning. I've watched the Malone's at trial and they seem so at ease with the use of their technology that always seems to work that I find myself envious. The last time I tried a slide show, the jury gave me the verdict but on talking with them, they sug-

gested I use old board and drawings until I got more proficient with the technology!

There are so many decisions to be made about programs to use – Good Heavens! There are so many choices and such competitive pricing it's hard to say what enough is and what needs to be added.

Ah well, it's been a long night and I'm headed home. I look forward to seeing you all at the Tradition of Excellence Awards ceremony at the Marriott Resort & Spa in Hilton Head, SC on June 21, 2013!

Understanding and Challenging Photographic Evidence Correctly

What the Camera *Really* Saw, And...How Best to Show It in Court!

George S. Pearl

Board Certified Evidence Photographer



George S. Pearl is an Evidence Photographers International Council Board Certified Evidence Photographer and life member of EPIC. He has taught crime scene and evidence photography as well as lectured broadly to photographers as well as lawyers. His business Atlanta Legal Photo Services, Inc. is still in operation from 1978 serving the legal community. Pearl was the recipient of the 2004 Nikon Evidence Photographer of the Year award, and has testified hundreds of times as an expert throughout his career.

Photographic evidence is important, and sometimes pivotal, in many types of cases: auto/truck accidents; premises cases; product liability; criminal cases – and even domestic cases. Challenges to the accuracy of, and techniques used taking, photographs can also be important under Daubert v. Merrell Dow Pharmaceuticals, 509 US. 579 (1993) and O.C.G.A. §24-9-67.1(b). It is essential that your photographic evidence be presented accurately and understood by the Court and most of all --- the Jury. There are several concepts you should understand in taking, using and presenting photographic evidence correctly.

First of all, the camera and the human eye are two separate things,

which do a similar task in totally different ways. The eye as outlined as an imaging device connected to a brain, as excellently explained by Richard L. Gregory in his book: the *Fifth Edition, Eye and Brain: The Psychology of Seeing*, can be tricked in what it is seeing if not having photographic images presented correctly¹. The eye has an image magnification of one, as we all see things in the real world around us. We perceive objects to be of certain sizes and distances from one another as we observe them from a vantage point. This is called perspective. The actual point in space from where we are looking at something is our perspective of that scene. This view of objects and their relationship to each other never changes unless we physi-

cally move from that vantage point to another one. It makes no difference how short a distance we have moved, our perspective has now changed.

Most of us have 2 eyes for seeing, which creates a stereoscopic view of the world around us in 3-D. Because our eyes are offset a bit from each other, each sees a little different perspective than the other. When the brain fuses these 2 images together we will see in a 3-D perspective. The normal camera just has one lens. It is like a one-eyed man seeing. When we take a picture of something with a camera of the type that has only one lens, we can visually record a scene that the viewer is looking at. The thing is, that the camera is not the eye and usually does not magnify

that image in the same amount as we are seeing with our eyes. Also, since with our two eyes we have a wider angle of view of about 140 degrees or more from left to right at any one time, most lenses do not record this angle of view either. The 3-D effect is also gone unless a special camera or procedure is used to record it. (The stereo 3-D imaging is very useful in showing depth such as steep stairways, by the way, and is held admissible when done properly.)

In order for us to “replay” the image we saw when we took the picture, we must make the proper adjustments for the magnification of the image made by that lens on the camera, and just how wide of an area of the scene we actually need to be observing to be relevant to the case at hand. We will lose the 3-D effect unless we

intentionally make it happen, and the angle of view may be different as well depending on the lens selected or the zoom of the lens set.

For us to make the picture look like the same perspective so that objects in the scene appear to be the correct sizes to us as if we were really there, and that their distances perceived from one another will be correctly perceived, *each photograph should be treated by itself for adjustment with its own magnification and the correct viewing distance to view the picture.*

Simply plopping one 4 X 6 inch photo after another on video presenters to be projected onto a large screen before the Court, without any understanding of the optical laws of perspective and lens magnifications, may create the risk of an objection, challenge or even exclusion of the photographs if the Court finds they are misleading or misrepresent the true image. This is especially true if your opponent has photographs of the same image showing a different perspective and explains to the Court (or jury) why your photos are not accurate.

For the opposing counsel who has

no knowledge of those issues, he/she will typically fail to properly object to the evidence or move to exclude it prior to the trial. The Court also has a problem here when it does not realize the photographic evidence may be inaccurate / misleading. The jury is working hard to ‘understand’ the evidence, but when the person on the front row is seeing and perceiving something entirely different than the Juror on the back row they are not seeing and perceiving the same evidence. This just goes on and on unless certain simple steps are taken to present the evidence correctly.

There has been much ado about one having their evidence photography shot on a 50mm lens because it is the “NORMAL” lens. Does that mean that there are some “ABNORMAL” lenses out there that we should be looking out for? No, not really. The idea that a 50mm lens is a *normal* one comes from the idea that if you are using a 50mm lens on a 35mm camera, then when one looks through the viewfinder he will see approximately the same size objects as he does while looking at the scene away from the camera with his one eye. This has absolutely nothing to do with the angle of view that is being recorded with this lens as compared to the scene that we are seeing with our eyes...just the magnification perceived.

Now, if that negative were to be printed as an 8 X 10 inch size print, and then if held at the normal viewing distance of 14 to 15 inches away from our eyes, we would see the correct perspective for that shot.

The formula for this little bit of optical adjustment to correct the lens used to the size of the print made and the viewing distance in which we should be looking at this particular print is:

$VD'' = FL'' \times M$, where VD'' = Viewing Distance In Inches equal the **Focal Length** of the Lens used in inches (or the zoom lens set focal length in inches), Times the

Magnification factor of the recorded size of that image to whatever size it has been enlarged to.

Using this simple formula, we are able to adjust each photograph requiring perspective adjustment so that it may be viewed correctly and perceived exactly as if one were standing where that picture had been taken and viewing the scene.

I say “requiring” perspective adjustment, because all photographic evidence does not need to be adjusted to be perceived correctly by the trier of fact.

A picture (or white print) of an X-Ray is solely for information purposes, as would be the picture of the gun used in the hold-up for identification sake. Pictures such as these do not require any special viewing rules because they are just for identification or the information they show of an object. Seeing them larger or smaller than they are in real life doesn't matter a bit.

But..., if there was some question if a person should see and understand how long the defendant's skid marks were before he T-boned your client's car at the intersection, and this picture is supposed to represent what a witness could have seen in distance, you better get your size of photo and viewing distance for this photo correct! It makes no difference if the photo was made with a 50mm lens or not, just that you have followed the steps that are required to make sure that photograph is really competent.

As an evidence photographer, I use all different lenses and specialized equipment to show the evidence required. I commonly present even panoramic wide-angle views of 180 degrees or more for viewing. When the photos are enlarged correctly and viewed correctly, it is uncanny how real the scene looks. The viewer gets the feeling like they are really there, and can actually turn their heads from left to right while looking at the picture just as they would do if at the

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What the Camera Really Saw

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scene. This view would be closer to what we see in real life would it not? My very wide panorama view is still very much admissible because the correct "Ortho" distance rules are being adhered to.

What happens to our formula if we shoot the picture with a 50mm lens on a Digital Nikon CoolPix Camera? Many people are using these types of small digital cameras in their work now, and even making the prints back in their office for use in court. In this case, do you know that you just made a TELEPHOTO picture? We used a 50mm lens didn't we... so all should be OK? It isn't all-OK because of the size of the pick-up device in this camera used being only 7.18mm wide and not the standard 36mm wide like it would have been in a 35mm film camera. The image is made 5 times larger due to the smaller size of the "film". If I used that same 50mm lens on my medium format professional Hasselblad film camera, then I would have just taken a WIDE ANGLE picture! So, you see that the size of the lens the picture is taken with is only a small part of the big picture for demonstrating the correct perspective of any photograph.

The same thing goes for those video cameras everyone is so quick to put into use zooming all over the place! The magnification is constantly being changed when a person starts this zooming stuff. If the viewer needs to see this scene in correct perspective, the playback will be impossible. Animations must also go by the same optical rules as well.² They are made up of 30 individually drawn pictures for each second of running video. Gee, that's a lot of pictures that need examination if you ask me.

Photos are all in the *same perspective* if one does not move the camera. If different focal length lenses are used or lens zoomed to, only different *angles of view* are being shown, but the perspective has not changed

in any of the pictures. Remember to change the perspective, by which we see things, we need to change our vantage position. We can change the amount of scene we can see from left to right in each picture by zooming in or out. This is only the angle of view being changed. If each of these different angle of view photos are enlarged for the average person's viewing distance of 14 inches, then the size of each would need to be different. The wide angle ones would need to be bigger and the more telephoto ones smaller to represent the view further away.

A huge error in photographic evidence presentation occurs when someone projects all of their little 4 X 6 inch photos with one of those video projectors no matter what the magnification was of the lens used to take each picture! This is an obvious error. To match the magnification of the eye, we must either view these pictures at different distances to adjust their perceived size optically or we must adjust the physical size of each picture so that the proper

magnification of each will be either increased or decreased according to each photo's lens magnification when shot. Doing this will either increase the sizes of the objects as seen in the picture or decrease them according to the correct amount required to make those objects seen to equal their true life perceived sizes and distance relationships as seen with our eye.

Remember, the normal viewing distance that most of us read a book, the newspaper, or look at our watch is about 14 ~ 15 inches.

Attempting to correctly view little 4 x 6 inch pictures at only 6 inches away is a real problem to most people to focus their eyes so closely. Just because it was made with the 50mm lens doesn't make it right.

Hopefully, you now get an idea of what all of those little 4 X 6 inch drug store pictures are doing to you and

your case. Not paying attention to the photographic evidence can make the difference between winning and losing.

Most, except the cheapest, modern-day lenses are made with extremely high corrections to provide sharp and well-defined images. By the incorrect printing and viewing of these images, ANY lens can be made to look as though it is doing something irregular when it is really the photographer and/or presenter who has erred. For this very reason, on the rear of every evidence photograph you, or your evidence photographer, should always type on the reverse side label the "Correct Perspective Viewing Distance" for that photo. Each shot must be recorded as to what focal length lens was used to shoot the picture. Other information should also be recorded so that when testimony is given about the image, all required data is recorded and filed forever. This can save your case.

In a case several years ago, I had been hired by the defense in a case where a man had been backed into by a tractor-trailer while standing at the loading dock wall and did not move for the truck when it backed up. In discovery, 4 x 5 inch snapshots of many angled views I had taken of the tractor-trailer rig were produced to opposing counsel. When they got to court they were faced with my life-size 13 1/2 foot tall photograph of one of those little 4 X 5 shots which clearly showed the rear view of that truck backing directly up to the loading dock. The Plaintiff's lost their case because of that one "little snapshot!" Be sure you do not lose your case this way --- as a result of improper understanding of photographic evidence.

Night and low light conspicuity views are another huge area where photographic land mines are at every turn for those not trained in this sort of photography. A camera shooting on automatic simply cannot, and does not, reflect what the human eye

sees at night. It is urgent that every proper technical step be taken to make nighttime/ conspicuity photos scientifically accurate and that issues with night/low light photos be explained to the judge/jury and understood especially by the counsel attempting to challenge them. Photos that supposedly show *SCALE* are another big problem. Photographs depicting injury to a person can be botched photographically in every way known to man. I believe the attorney who tells their client to “*Just make some ‘snapshots’ of your injury*”, is making a mistake in their client’s case. Often, attorneys with no photographic training or skills run the risk that they are doing this specialized work incorrectly, and worse yet may be required to actually testify to them in their own case. It doesn’t look good when the Judge asks who took these photos, and you have to say that you did. The Jury knows that you are biased and may suspect manipulation of the photographs in favor of your client.

In conclusion, when it comes to using photographic evidence in your case, this is *high stakes* for you and your client and is not the time to scrimp, especially on their evidence. It always pays you back many times over to hire a professional, who has the training, the equipment, and experience to do the job correctly. Just because advanced technology is now available for everyone, such as the digital camera where you can see your picture instantly and print it, is this really any different than shoot-

ing with a Polaroid from years ago?

The equipment alone does not give you the professional knowledge or abilities of the seasoned evidence photographer any more than a new golf club will place you in the Masters with Tiger Woods.

Make sure you are presenting the trial images correctly and do not have your photographic evidence questioned by the jury or even worse, excluded from evidence. I have seen attorneys actually lose their case because of poor evidence photography or total lack thereof. I

part is the part of the requirement to question. Sometimes you will need an expert to help you explain why the photo is not being truthful or misleading and should be excluded. Your opposing council may be doing this unintentionally due to his lack of photographic technical knowledge. However, if you don’t know yourself when to challenge incorrect and misleading photographic evidence, it could make a big difference in your case’s outcome.

I have only touched on the tip of this subject. Even after 34 years in

Past Executive Director, Robert F. Jennings, of the Evidence Photographers International Council, Inc., has said:

“Photographic Evidence can be a double-edged sword for those who do not understand evidence photography.

It’s nice to have a hobby of photography in general, but it is a miscarriage of justice to not capture and then present your case’s images correctly for your client.”

have also seen innocent people go to jail because of botched evidence photography as well as set free when presented correctly.

The requirements of competent, relevant and material for a photo to be entered into evidence can be misunderstood. Just because there is a witness that ‘says’ that the photo is a fair and accurate representation of what they saw....you should question; is it really? That ‘competent’

the business, I continue to see new areas of concern particularly with so many digital changes in photographic and video production at hand and available to anyone.

¹Fifth Edition, *Eye and Brain: The Psychology of Seeing*, by Richard L. Gregory, Princeton University Press, ISBN: 0-691-04837-1.

²The Georgia Supreme Court has cautioned about using such evidence pointing out that there is a “particularly great” danger that, due to the “vividness and verisimilitude” of such evidence, a jury may “confuse art with reality.” *Pickren v. State*, 269 Ga. 453, 455-466, (1998). Citing *McCormick on Evidence* § 241, p. 19 (4th ed. 1992). See also *Foster v. State* 275 Ga. 795, 797(2002).

Best Job I Ever Had

B. Chan Caudell



B. Chan Caudell serves as Chief Judge of the Superior Courts in Georgia's Mountain Judicial Circuit. The circuit is comprised of Habersham, Rabun and Stephens Counties. Judge Caudell was appointed to the judiciary by Governor Nathan Deal in December, 2011. Prior to his appointment, Judge Caudell practiced law in Cornelia with the firm of Caudell & Hotard, LLC which he co-founded in 1999. Judge Caudell's other public offices include past service as a Habersham County Commissioner, a Commissioner on Georgia's Government Transparency and Campaign Finance Commission (aka Ethics Commission) and current Chairman of the North Georgia Technical College Board of Trustees. Judge Caudell received his bachelor's degree in Criminal Justice from the University of Georgia and his juris doctorate from Mercer University's Walter F. George School of Law. He and his wife, Tammy, live in Cornelia with their two children.

When asked to consider my first year as a judge, one thing immediately came to mind: learning. During this first year as a judge I have learned more than I learned in three years of law school and 20 years of private practice combined. Not only have I learned more about the law, but I have learned more about myself, my community, and the legal profession in general.

I remember getting the news that Judge Linton K. Crawford, Jr., my predecessor, was retiring. I had previously considered applying for a judicial nomination, but at that time, I did not feel it was the right fit. However, in October 2011, I thought that this

was the appropriate time. After going through the appointment process, and sitting with a senior judge from my circuit, Judge Robert B. Struble, it was time to take the bench.

Putting on my robe for the first time felt almost surreal and looking out into the courtroom from chambers, honestly, was a little intimidating. Being an attorney in the courtroom is one thing, but being the judge, sitting in front of the masses, "piloting the plane" so to speak, with all eyes trained on you, for the entire day, is a very, very different experience. The robe does not function as an invisible cloak, however much you may want it to.

I survived my first month on the

bench with a less disastrous outcome than I had feared, thanks to the advice of Judge Struble, and help from the then Chief Judge, Russell W. Smith, not to mention our talented law clerk, Karen Platt, my experienced judicial secretary, Linda Hall, and my tireless court reporter, Lisa Short. A judge is only as good as his support staff, and I am fortunate to have employees who are arguably the best support team in Georgia.

Practicing in a relatively rural circuit is a unique experience, but serving as judge in a that same circuit is a completely different animal, especially if it is the area in which you were born and raised. I was raised in this circuit,

born here in a year long, long ago, before the Roman calendar was used, and before time was even recorded. I attended Habersham Central High School, walked to school five miles, uphill both ways, was raised by a cane switch and worked in my parents' restaurant in Baldwin, Georgia, where I met and served the majority of the circuit. Years later, I like to think I'm still serving the circuit, albeit in a substantially different capacity. Many of the faces and names are the same.

It is amusing to reflect back on law school, where I sat in Macon in my one-room apartment listening to the Allman Brothers, naively thinking that neither I nor southern rock could ever die, and dreaming of my future law career. I think if you ask most attorneys, whatever they imagined in their one-room apartments on the brink of their final semester, it is almost certainly not the career they have today. I can't exactly remember what kind of attorney I aspired to be at that point in my life, but I can promise you I did not dream that I would one day be a superior court judge in my hometown. After law school, I practiced in Gainesville and then in Atlanta, with my practice largely consisting of business and tort law. In 1999 my wife and I decided to move back to Habersham County where I opened a practice with my good friend from law school, T. Gabriel Hotard, Jr. Coming back to Habersham County was one of the best decisions I ever made because it began the path to where I am today, enjoying the best job I have ever had.

New judges face a daunting task: he or she must accept the responsibility of the judicial office. The acceptance of responsibility seems to be a process, divided into different stages. First, it is imperative to become comfortable on the bench. No one begins a judicial career knowing exactly what to do. It is impossible to transition from practicing before a judge to becoming a judge without some level of discomfort and insecurity.

The first stage is a sense of being

slightly overwhelmed. It is very rare that an attorney is well versed in both civil and criminal procedure, and additionally knowledgeable of the most relevant statutory and case law on contract law, family law, criminal law, and property law. Unless you have just finished your first year of law school, or have practiced in every single field and omnisciently retained all case law you've ever read, you are going to have some catching up to do. I think every new judge takes a different approach to familiarizing himself with whichever areas of law are new to him. Instead of dusting off my old hornbooks from law school, which are undoubtedly out of date and irrelevant anyway, I chose the mentoring system.

As I mentioned earlier, our circuit is blessed with the presence of a very distinguished and accomplished senior judge, Hon. Robert B. Struble. I cannot begin to explain what an asset Judge Struble has been to me during my first year on the bench. Along with so much other excellent advice, the way he helped me feel less overwhelmed was by encouraging me to make a decision and move on. After the order has been signed, the decision has been given from the bench, or the objection has been overruled, move forward. The appellate process exists for a reason.

This may sound to some as callous or indifferent. To the contrary, every person, every issue, every decision should be given equal weight and attention. A person's case or day in court is one of the most important things that will ever happen to that person. If you are too focused or concerned with a decision that you have already made, you will not give that next decision the attention it deserves.

The second stage is to overcome the burden of conscience. I am not talking about a burden in the sense of an annoyance, but rather the weight of the decisions a judge makes on a daily basis. Coming into this position, I must admit I anticipated the burden

to be much heavier than it ultimately proved to be. Rather than framing such responsibility as a burden, I have regarded it as a blessing. As an attorney, you are hired to argue one side of a case. Of course, if you are a good attorney, you anticipate and spend some time framing the opposing counsel's argument in order to strengthen your own case and to be fully prepared. However, as an attorney, you know the decision is ultimately up to someone else: the judge. An attorney argues his case the best that he can in court and then walks away. As an attorney there is always someone else to point to when a case does not end in your client's favor. Now, as the judge, there is nowhere else to point the finger. The buck stops here. Each decision, right or wrong, ultimately rests here, on my shoulders, in this office.

While observing Judge Struble, and practicing before other seasoned judges, I did not fully grasp the weight of the responsibility involved in making potentially life-altering decisions. These judges made it look so easy, sending down decisions instantly from their oak towers, so confident in their accuracy. Being a new judge, I have learned, requires the ability to be comfortable in your own skin, which, by the way, needs to be very thick. A judge is not an arbiter, which I believe is distinctly different from that of a mediator. In most instances, the case has reached the judge because mediation was not possible. When a case reaches the courtroom, a compromise is no longer on the table. A judge's job requires a decision in favor of one party over the other and necessarily involves someone not getting that which they feel they deserve. Thus, inherently, a judge is not everyone's, and sometimes not anyone's, favorite person.

As a new judge, one may notice a cooler reception from parties or attorneys which did not exist prior to taking office. Most attorneys are respectful of the office and the need to

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Best Job I Ever Had

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avoid even the appearance of ex-parte communications. The office can be an isolating experience. Becoming a judge can really free up a social calendar. In private practice I was accustomed to having lunch with other attorneys or just simply making personal phone calls to other lawyers to talk about Georgia football or catch up on life events. Now, as a judge, I have to avoid certain types of social engagements. Taking the judicial office is not only an adjustment for the new judge, but it is also an adjustment for the entire community, including the judge's friends, acquaintances, and colleagues. A judge goes from being that lawyer who is sought after to help others with favors, provide advice, or just listen, to that former lawyer who can't hear certain things, can't help with favors, and can't give advice. This is especially difficult to relate to non-attorney friends and family who do not have the same appreciation of the judiciary and the finer points of the Canons of Ethics.

A judge, as part of the judicial branch, is part of a delicate system of checks and balances which insures the operation of our government in the manner in which it was conceived by our founding forefathers. Thus, the judge is bound by a stricter ethical code than other citizens, the Canon of Judicial Ethics. In many ways, the transition from attorney to judge is a transition into a completely different way of living, not only in the social realm, but in the courtroom as well. The judge is charged with the interpretation of the laws made by the legislature and approved by the executive branch; he is not allowed to make capricious decisions based on his mood or moral proclivities, whatever they may be. This can become somewhat distracting in cases dealing with criminal defendants who have been convicted of seriously harming the circuit's citizens, or in cases involving the custody of a child where neither cus-

tody option seems particularly promising. Differentiation between what you as a person would decide and what you as a judge will decide and setting aside personal opinions and social calendars are learning processes, but absolutely necessary in order to become a fair and impartial judge.

Another important obstacle to overcome is the private practice mindset. The initial anxiety one feels when the phone is silent is not easily dismissed. In private practice, no phone ringing generally means no money coming in, but here, in the judge's office, no phone ringing means no urgent legal issues, no serious crimes, no children in danger. It was not an instant change, but I now understand that there can be solace in silence. Most importantly, billable time is a thing of the past; it was surprising how quickly I abandoned the practice of checking the clock while reading a brief. Or maybe it was not that surprising...

While on the subject of private practice, as a judge you have to adapt your writing style to that of the judicial opinion. As attorneys, we write argumentatively and find ways to slant each section of a brief in the favor of our client. However, as a judge, the opinion is grounded in law, usually as it has been interpreted by higher courts, and the facts, as they have been presented by the attorneys and witnesses. Didactic moral observations are neither necessary nor appropriate in a judicial opinion. To my delight and surprise, I have found that judicial opinion writing is somewhat easier than writing a brief precisely because of the restrictions involved.

As the reader is now well aware, becoming a judge is truly a transition in every aspect of your life. However, I will now bestow upon you the most important lesson learned: Through my position as a judge, I have finally realized how to be an efficient and effective attorney...slight tongue in cheek. I have compiled a handwrit-

ten list of observations made from the bench entitled: Things I Wish I Knew As An Attorney. Of course, this is a very subjective list and will not apply to all of the over two hundred Georgia superior court judges. Nevertheless, I think you will find most suggestions involve just exercising good old common sense.

1. Never be late to court. This makes the judge, the parties, the bailiffs, and essentially every person in the courtroom annoyed with you. Even if you are not holding up a proceeding and wasting the aforementioned parties' time, people are displeased with your lack of courtesy and the sense of unfairness. Everyone else woke up on time and made it okay, why shouldn't you have to do the same?

2. Never ask an open ended question to an adverse witness. These include questions starting with: Do you feel...; Do you think that...; What do you mean by that...; or, most importantly, the ultimate open-ended question, Why? Similarly, do not repeat a witness's answers to that witness. It wastes time and makes you seem like a slow thinker. Believe it or not, I have actually observed attorneys repeating witness's statements that completely obliterated the attorney's case. Do not say "OK" after every answer before asking your next question. The most effective attorneys have a fluid dialogue of questions and answers with the witness. As we were all taught in law school—Do not ask a question to which you do not already know the answer. It is also important to remember time when questioning a witness. Establish three or four main questions per issue and then move on. This is especially important when there is no jury. The judge can understand where you are going, and he does not need to hear the same responses repeated several times.

3. Always begin a hearing with the procedural posture of the case. This includes dates of filing, identification

of the parties, and, most importantly, what the parties are seeking in the hearing. You don't want the judge to leave the bench with no idea about what the parties were requesting the judge to do. In other words, do not be shy about telling the judge exactly what it is that you want the Court to do. Judges, and I would submit, especially new judges, are busy learning and trying to do the best that they can with every case. Make it clear to the judge what your client wants, needs or deserves. Make sure you clearly identify the law you are citing; it is helpful to have cases copied for the judge and his law clerk, and, if possible, highlight the portions to which you are referring. Judges enjoy being spoon fed. It's not because we are lazy. It's because we have ten to twenty different matters, ranging from alimony to zoning, which must be decided in a short period of time. If you do not have a physical copy of the authority, at least make sure you give the judge the correct cite. This will also please the court reporter, someone to whom you always want to appear accommodating. Be ready to explain why that law is important to your case and make factual similarities or distinctions between the facts of your case

compared to the cited case.

4. Also, bring your clients to court even if it's just a procedural hearing. This is especially important on motions for summary judgment. It is important to convey your case's human feel to the judge.

5. When corresponding with the Court, always identify which attorneys represent which parties. Also, it should be said, make sure you correspond with the Court. Allow me to clarify: Send copies of pleadings, motions (with copies of highlighted supporting authority), responses, etc. to the judge's office, with copies to the other parties of course. In our circuit, the clerks of court do not automatically send the judge (and recycle) a copy of everything received in the clerk's office. A judge is much happier to shred (and recycle) a document that is unnecessary to him than to track a needed document down on the morning of the hearing.

6. If you call the judge's office and request a hearing and tell the scheduling assistant that you need an hour to present your side, please be courteous and try to keep your word as best you can. If you see you are going to go beyond your requested time, acknowledge that fact and discuss the issue

with the Court. Otherwise, you will begin to lose credibility. Scheduling hearings and making the best use of the Court's limited time is a difficult job. That task is made almost impossible when the Court has no idea how long your hearing will last.

Although every judge will have his own style and preferences in his individual courtroom, these are the lessons learned and observations I have made thus far. In my new position as Chief Judge of the Mountain Judicial Circuit, I am sure there will be many more lessons learned. I have thoroughly enjoyed my first year on the bench and look forward to many more to come. I am sincerely grateful for the opportunity to serve my circuit, and I mean it when I say this is the best job I ever had. I recommend judicial office for any attorney who is serious about his community and making a difference in the lives of others on a daily basis; as long as that attorney is not planning on running for my seat...

Requests For Admission: Not Discovery, and Not Subject to Discovery Deadlines

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Buddy is a “Double Bear,” having graduated magna cum laude from both Mercer University’s College of Liberal Arts (in 2003) and the Walter F. George School of Law (in 2006).

After graduating law school, Buddy moved to Columbus to work with Butler, Wooten & Fryhofer, LLP. He is a member of the Columbus Trial Lawyers Association, the Georgia Trial Lawyers Association, and the American Association of Justice. For the past five years, Buddy has been a contributing author to the “Trial Practice and Procedure” article in the “Annual Survey of Georgia Law,” published by the Mercer Law Review.

Introduction

Many attorneys assume that there are three common types of written discovery: interrogatories, requests for production, and requests for admission. Requests for admission (RFAs), however, are nothing like their discovery counterparts. Interrogatories and requests for production are useful for discovering previously unknown information, thereby potentially expanding the issues relevant at trial. RFAs, however, have the opposite use: they use the information that is already known to reduce the number of issues that must be tried. As such, they should not be treated as a discovery device. In fact, the Uniform Superior Court Rules and

the Civil Practice Act treat RFAs differently from traditional written discovery, albeit in a convoluted manner. The rules are set up so that RFAs can be served any time before trial, thus maximizing their usefulness. Limiting RFAs to the traditional discovery period is a missed opportunity.

Georgia Law Provides No Deadline for Serving RFAs

The only clear limitation on the time when requests for admissions may be served is found in O.C.G.A. § 9-11-36. Rule 36(a) provides that RFAs may be served on the plaintiff after commencement of the action, and upon any other party “after service of the summons and complaint upon

that party.” Rule 36 does not provide a deadline for serving RFAs.

Many attorneys presume that Uniform Superior Court Rule 5.1 provides the deadline for serving RFAs in Georgia courts. That Rule provides:

Rule 5.1. Prompt completion

In order for a party to utilize the courts compulsory process to compel discovery, any desired discovery procedures must first be commenced promptly, pursued diligently and completed without unnecessary

delay and within six months after the filing of the answer. At any time, the court, in its discretion, may extend, reopen or shorten the time to utilize the courts compulsory process to compel discovery.

The wording of Rule 5.1 is curious upon first reading. Contrary to popular belief, it does not set forth a six-month discovery period. Instead, it provides prerequisites for a party to ask the court to *compel* discovery. In order to use that compulsory process, the underlying discovery procedures must have been pursued diligently, pursued without unreasonable delay, and pursued within six months after the filing of the answer. Discovery, however, can be pursued and completed without resorting to the Court for an order compelling discovery. Theoretically, parties can conduct formal written discovery at any time.¹

The “compulsory process to compel” clause plainly excludes RFAs from Rule 5.1’s purview. The court’s “compulsory process to compel discovery” is found in O.C.G.A. § 9-11-37, which provides the instances that a party “may apply for an order compelling discovery.” Those instances include depositions (Rule 30 and 31), answers to interrogatories (Rule 33), or responses to requests for inspection (Rule 34).²

Rule 37, however, does **not** provide a means to compel answers to requests for admissions. Instead, the procedure for responding to requests for admission is governed entirely by Rule 36. If a party completely fails to either respond or object to an RFA, then the request is automatically deemed admitted.³ In that case, there is no need to compel a response.

If the party propounding the RFA is dissatisfied with the answering party’s answer or objection, there is no procedure to compel a response.

Instead, the propounding party requests that the court “determine the sufficiency of the answers or objections.”⁴ If the RFA was objected to, the court decides the objection and requires that an answer be served if the objection is not justified. On the other hand, if the answering party made an answer, the court determines whether that answer complies with the requirements of Rule 36. If it does not, the court can either deem the RFA admitted or require an amended answer.

Because RFAs have nothing to do with the court’s “compulsory power to compel discovery,” it is clear that USCR 5.1 does not apply to RFAs. Indeed, there is no provision in Georgia law that puts a deadline on serving RFAs. In fact, while not going as far as stating that RFAs are not subject to discovery deadlines, the Georgia Supreme Court recently recognized that a mere timeliness objection to RFAs is improper. In *Simmons v. Community Renewal and Redemption, LLC*, a party sought a protective order from requests for admissions “filed after the discovery period had ended.”⁵ The trial court denied the motion for protective order, and the Supreme Court affirmed, holding that because the party “relied solely on his claim that the discovery request was untimely,” the party did not prove it was entitled to a protective order.⁶

RFAs Should Not Be Considered a Discovery Device

Perhaps the more interesting question is whether there *should* be a deadline for serving RFAs. The answer to that question lies in whether RFAs should be considered a discovery device. On one hand, Rule 36 is included under the heading “Depositions and Discovery” in the Civil Practice Act, and Rule 26(a) includes “requests for admission” under the heading “discovery methods.” On the other hand, the purpose of an RFA is

entirely different than any of the traditional discovery devices. RFAs are not intended to facilitate the discovery of information; instead, they are intended to narrow the issues for trial.

The question of whether RFAs should be considered discovery has been litigated in a number of federal courts, and the question remains open there.⁷ The leading federal treatise observes that “[s]trictly speaking Rule 36 is not a discovery procedure at all, since it presupposes that the party proceeding under it knows the facts or has the document and merely wishes its opponent to concede their genuineness.”⁸ A number of federal courts have relied on that logic to find that RFAs should not be subject to normal discovery deadlines under the Federal Rules.⁹ Many other federal courts have found that RFAs are subject to the deadlines. These courts have relied primarily on Rule 36’s position in the “Depositions and Discovery” section of the Federal Rules of Civil Procedure.¹⁰

The better approach is to elevate substance over form and conclude RFAs are not a discovery device, and that parties may serve RFAs anytime before trial. Such an approach allows parties to more robustly narrow issues prior to trial, thus saving the parties and the court from expending unnecessary time and effort.

There are a number of instances where RFAs can be helpful – if not necessary – after the discovery period has closed. First, if a party produces documents at the end of the discovery deadline, or supplements discovery requests after the discovery period has closed, the receiving party can serve RFAs to confirm the authenticity of those newly-produced documents. Next, cases routinely develop during summary judgment, when parties identify facts they contend are not in dispute. If both parties agree

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that a fact is not in dispute, then an RFA can conclusively establish that fact in a manner that can be used at trial. Finally, sometimes it is necessary to prove facts that happen after the discovery period closes. For example, a defendant may stubbornly deny liability throughout discovery, only to admit liability at the end of trial. That conduct can be relevant to a claim for attorney fees due to stubborn litigiousness under O.C.G.A. § 13-6-11. Proving the time at which a defendant admitted liability can be a logistical nightmare, requiring the submission of multiple pleadings to the jury. Well-drafted RFAs can easily solve this problem.

While the benefits of allowing RFAs throughout litigation are legion, the downsides are minimal. Compared to the efforts necessary to adjudicate motions to compel on interrogatories and requests to produce, motions practice regarding RFAs is much simpler. The only issues a court will ever have to decide are (a) whether an objection is justified, (b) whether an answer complies with Rule 36, and (c) how to deal with a noncompliant answer. The court can even defer the issue until the pretrial conference.¹¹ Further, there is much less room for abuse with RFAs than with interrogatories or requests to produce. If a party refuses to fulsomely respond to an RFA, the only hindrance to the opposing party is the additional time and effort required to prove a fact. If a party refuses to fulsomely respond to the interrogatories or document requests, then the opposing party does not have the materials necessary to prepare the case.

Practical Considerations

Although U.S.C.R. 5.1 does not apply to RFAs, an opposing party is likely to object to RFAs served after the discovery deadline has passed. Prudent counsel can take certain steps to ensure that the opposing

party properly responds to RFAs, whenever filed, and that the court allows RFAs to be used to their full potential.

- (1) **Address the issue with opposing counsel when extending the discovery deadline or discussing a scheduling order.** Many cases require an extension of the six-month discovery period, and a scheduling order is often helpful in more complicated cases. These are usually done by agreement of the parties with little court involvement. When discussing such an extension, counsel should state his position on RFAs and insist that any scheduling order or order extending discovery state that RFAs may be served at any time prior to trial. At best, the opposing party will agree. At worst, the opposing party will not be able to complain of “surprise” if and when it objects to RFAs served after the discovery deadline.
- (2) **Be specific in orders extending the discovery deadline.** Most consent orders extending discovery simply state that “discovery is extended until” a certain date. As discussed above, that’s a little inaccurate. What’s being extended is the time in which the parties can utilize the court’s compulsory power to compel discovery under U.S.C.R. 5.1. Counsel should say that in the consent order. Relying on the language of the rule instead of a generic “discovery” or “written discovery” will make the court more likely to require responses to RFAs. It is unlikely that an opposing party would object to a consent order that tracks the language of the Rule.
- (3) **Don’t overreach.** When serving RFAs after the written discovery period has passed, tailor the RFAs to matters that are plainly

not in dispute. Use the RFAs as they are intended – to dispose of issues at trial. If the RFAs legitimately require more than a straightforward “admitted” as a response, then they only multiply the issues that must be dealt with before trial. If the RFAs are kept simple, the court will be more likely to require answers.

Endnotes

- ¹ Although it is not the subject of this Article, U.S.C.R. 5.1 allows for truly odd responses to discovery. If discovery is served after the six month period, the responding party can (and will) completely refuse to respond, citing Rule 5.1. In essence, the objection is “I’m not responding because you can’t compel me to respond.” That is not a valid objection.
- ² See O.C.G.A. § 9-11-37(a)(2).
- ³ O.C.G.A. § 9-11-36(a)(2).
- ⁴ O.C.G.A. § 9-11-36(a)(3).
- ⁵ *Simmons v. Community Renewal and Redemption, LLC*, 286 Ga. 6, 8 (2009).
- ⁶ *Id.* O.C.G.A. § 9-11-26(c) provides that a court may enter a protective order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” The *Simmons* Court clearly surmised that merely responding to RFAs served after the discovery period had expired did not rise to that level.
- ⁷ Federal courts have significantly different rules for setting discovery deadlines than Georgia courts. Under Fed. R. Civ. P. 16(b), the court must issue a scheduling order, and the order “must limit the time to . . . complete discovery.” Fed. R. Civ. P. 16(b)(3)(A).
- ⁸ 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2253 (3d ed. 2012).
- ⁹ See *O’Neill v. Medad*, 166 F.R.D. 19 (E.D.Mich.1996); *Hurt v. Coyne Cylinder Co.*, 124 F.R.D. 614, 615 (W.D.Tenn.1989); *McFadden v. Ballard, Spahr, Andrews, & Ingersoll, LLP*, 243 F.R.D. 1 (D.D.C. 2007); *Bouchard v. U.S.*, 241 F.R.D. 72 (D. Me. 2007).
- ¹⁰ See *Gluck v. Ansett Australia Ltd.*, 204 F.R.D. 217, 218 (D.D.C. 2001); *Coram Health Care Corp. of Ill. v. MCI Worldcom Communications, Inc.*, 2001 WL 1467681, at *3 (N.D.Ill. 2001); *Revlon Consumer Prods. Corp. v. Estee Lauder Companies, Inc.*, 2001 WL 521832, at *1 (S.D.N.Y. 2001) ; *Toone v. Federal Express Corp.*, 1997 WL 446257, at *8 (D.D.C. 1997).
- ¹¹ O.C.G.A. § 9-11-36(a)(3).

Tech Tools to Help You Manage Discovery

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Active in the local community, Bin is a member of the Young Lawyers Division of the Columbus and Georgia Bar Associations, the Columbus Trial Lawyers Association, and Chattahoochee Bar Association. He has also served on the Board for the Columbus Museum's Young Contemporaries, is an Associate District Justice District for Phi Alpha Delta Law Fraternity, International, and has twice participated as a pro dancer for the Alzheimer's Association's Dancing Stars of Columbus Memory Gala charity event.

Over the last five years, a weak economy and an oversupply of attorneys have been forcing the legal industry to evolve. As clients of all stripes have sought to become more efficient, attorneys have had to follow suit. This article is the second in a series of three that will address technological solutions available for cost-conscious attorneys who want to improve their efficiency. It is written with mid-sized to small firm or solo practice attorneys in mind because they are less likely to have access to the best and latest legal technology (and more likely to find themselves at a technological disadvantage as a result).

You've just returned to the office after having lunch with a fellow attorney. As you walk through the door, the receptionist points to several boxes full of documents piled up against the wall behind her. "Mr. Badluck dropped all this off for you."

You sigh. Mr. Badluck is the managing member of a limited liability

company created to flip foreclosed commercial real estate in the Florida panhandle. Mr. Badluck persuaded several of his acquaintances to invest and become members of the LLC as well. The LLC's business model depended on flipping the Florida properties within a tight time frame to major retail chain stores. The purchase of those properties was done

through a separate company located in Westside L.A. (as in Lower Alabama). Through bad luck, bad business decisions, and possibly even embezzlement, the money invested through the second company was used up on properties that were eventually sold at a loss or lost out-

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right to foreclosure. As a result, your client's LLC has lost slightly over a million dollars.

Mr. Badluck called on you because five of his LLC's investing members sued him in a derivative action, claiming a host of business torts. You agreed to defend Mr. Badluck and the LLC and filed an answer to the plaintiffs' complaint accordingly, accompanied with a cross-claim against the Alabama company. Within a month of filing the answer, you received the plaintiffs' first discovery requests. You sent out requests on behalf of your client, and counsel agreed in advance to extensions of time for responding.

Your mind had been gleefully unoccupied with Mr. Badluck's case over lunch, and you sigh now because you do not want to go through his boxes of documents. Unfortunately, the plaintiff's document requests have to be answered, and you have to review the paperwork your client produced.

One of the countless things we never learned in law school was how much time we would spend on discovery. The discovery process, after all, is an integral aspect of the U.S. legal system, and it has become even more important as advances in computing technology have made document storage immeasurably more affordable over the last few decades. For better or worse, technology has also revolutionized the discovery process. Woe unto the attorney who lets his (or her) tech-anxiety prevent him from accepting today's document intensive cases. Though possibly anxious, you are not afraid to learn new tricks, especially when they can put money in your pocket. How, then, to best tackle discovery in Mr. Badluck's case?

We can characterize your tasks into two categories: Review and Production. Review encompasses review of not only the opposing party's docu-

ments, but also those of your own client. Production addresses the production of your client's documents after, ideally, you have reviewed them. Since Mr. Badluck has brought you "everything he had," as you instructed him, you begin with reviewing his documents before providing them to opposing counsel.

First, it will be helpful to learn what is in the boxes. If your client has not provided his documents to you in some kind of order, let him know how short his retainer will last if you have to spend your hours making sense of his paper chaos. Regardless of how you intend to review documents, organization is a crucial first step that will save you time in the long run. Fortunately, Mr. Badluck kept his files reasonably organized and also labeled the boxes he brought. As a consequence, you quickly learn that half of the boxes contain printed promotional materials: pamphlets, maps, and other materials used to lure investors. Of the remaining boxes, three contain various business records, another printed emails and letters, and the last is filled with bank and tax records. Lastly, per your instructions, Mr. Badluck also provided all his computer files on a portable hard drive.

(An important, non-technical aside: You could have left some or all of the pre-production review to Mr. Badluck, but this would have been very unwise absent a "clawback" provision agreed to by the parties and the court.¹ Claiming "inadver-

tent production" or "attorney-client privilege" does not put the proverbial cat back in the bag as some may think. Regarding the former, Rule 4.4(b) of the Georgia Rules of Professional Conduct mandates that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly *notify* the sender" (emphasis added). The second comment to Rule 4.4 is particularly instructive:

"Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. *Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.* Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully

Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.

obtained by the sending person. For purposes of this Rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.” (Emphasis added.)

In other words, Rule 4.4 only requires opposing counsel to *tell* you she has your cat *if* she knows or reasonably should know you did not mean to let it out of the bag in the first place; but Rule 4.4 does *not* require her to put the cat back.

As for attorney-client privilege, “the party asserting the attorney-client privilege has the burden to establish its applicability”; “stating a privilege claim and meeting the burden of showing by evidence that privilege applies are not the same.”^{2,3} The attorney who would rely on a post-production claim of attorney-client privilege would have to establish 1) that the privilege, not broadly construed, applied in the first place, but also 2) that the privilege had not been waived by the client.^{4,5} All this to say, the chore of reviewing your client’s documents is well worth the trouble.)

First, you may want to begin with Mr. Badluck’s hard drive. Starting with the “soft copies,” or electronic files, could obviate the need to review most of the “hard copies,” or paper documents in the boxes because much of the latter material is likely just a print-out of something saved electronically. Thus, you start with e-discovery, or electronic discovery. One of the most daunting things about e-discovery is the jargon. For many, talking about computers evokes the same powerless feeling as asking for directions in Paris or pretending to understand a mechanic’s explanation for an expensive repair. What is a .PDF and how does it differ from a .DOCX file?⁶ Is a Bit Stream Backup what happens

when you lose the Bitmap that shows you where to find the Bits? Rather than using Google to search for definitions, you can download the free E-Discovery & Digital Information Management glossary provided by The Sedona Conference®, an Arizona research and educational institute dedicated to the advancement of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights. The glossary is a handy tool even for someone who grew up on computers. The third and most recent edition of the glossary is available for download at the following link: <https://thesedonaconference.org/download-pub/471>.

The true advantage of reviewing documents electronically is the ability to conduct searches more efficiently. There are now countless companies offering e-discovery software or outsourcing services that have made a science of searching. Some programs enable searching that is not only linguistic but sociological and analytical as well.⁷ Unfortunately, the more advanced programs are generally too expensive a luxury for small to mid-size firms, so when it comes to analysis, most attorneys will still have to rely on their heads. Word searches can nonetheless help identify text in documents more reliably than your tiring human eyes.

To search for words in a PDF (Portable Document Format) or Microsoft Office file such as Word (.DOC, .DOCX) or Excel (.XLS, .XLSX), simply hold down the Control button on your keyboard and type F. A navigation window should appear on your screen. The search bar in the navigation pane is not case sensitive by default, and whatever you type there will be highlighted in the text of the document. You can click on the arrow buttons in the navigation pane to go through each “hit” or instance where the highlighted language is found. You may find it confusing

to navigate large electronic documents in this fashion. It can be difficult keeping your place, especially if you have multiple windows open on your screen for email, other file folders, or other documents. To make life easier, why not get a second computer screen?

A dual-screen set up allows you to have two full screen images open at the same time, a feature that benefits your everyday practice far beyond conducting discovery. For instance, you can draft a brief on one screen while doing research on the other, or keep one devoted to email. It facilitates e-discovery by letting you conduct word searches on one screen while keeping your place in the other, or by letting you compare two documents at the same time. Assuming your office computer is run on Microsoft Windows, you can learn how to set up your computer for dual-monitors at Microsoft’s support website, or simply rely on your firm’s usual IT resource. (Depending on your computer’s age, you might need to install hardware updates, an updated display driver, or perhaps even purchase a new graphics card, but the bottom line will still be cheaper than a quality 20” LCD or LED monitor.)

Frustration may also arise when your word search in a PDF document does not produce any results . . . for any word. This is because not all PDFs are created alike. At this point, it helps to think about how you will produce documents to the plaintiffs in Badluck’s case. If there are paper documents for which there are no corresponding electronic versions, you could either send physical copies of them to opposing counsel, or scan them using an office image scanner. The scan will create either a PDF or an image file such as a JPEG, and will essentially exist as a photograph of the document. When you left-click with your mouse in a .PDF that was

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created this way, it selects the entire page you are looking at or nothing at all (depending on what program you use to view PDFs).

If, on the other hand, you want to produce an electronic document such as one created using Microsoft Word, you should save a copy of the document as a PDF. You might do this in order to protect the copy from being unintentionally edited or altered. When you left-click on text in a PDF created this way, it places a cursor in the document. Thus, you can copy and paste (or search for) text from the second type of PDF file but not from the first.

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FOOTNOTES

¹ A good example of a clawback provision can be found in the opinion at *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051-RWS, 2007 U.S. Dist. LEXIS 40280, at *21-23 (N.D. Ga. June 4, 2007) .

² *Zielinski v. Clorox Co.*, 270 Ga. 38, 40 (1998).

³ *GMC v. Conkle*, 226 Ga. App. 34, 47 (1997).

⁴ *Tenet Healthcare Corp. v. La. Forum Corp.*, 273 Ga. 206, 208 (2000).

⁵ *Mikart, Inc. v. Marquez*, 211 Ga. App. 209, 211 (1993).

⁶ Format suffixes are not typically capitalized.

⁷ John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. Times, March 4, 2011, at A1, available at http://www.nytimes.com/2011/03/05/science/05legal.html?pagewanted=all&_r=1&

⁸ Available at <http://www.tracker-software.com/product/pdf-xchange-viewer>

⁹ Available at <https://www.acrobat.com/exportpdf/en/pricing.html?trackingid=JZBCX>

¹⁰ For security reasons, be sure to download any program from its company website, and not from a third-party site.

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