TRIAL AND ERROR

March 8, 2019

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LIVE: Friday, March 8, 2019

TRIAL AND ERROR

6 CLE Hours Including
1 Ethics Hour | 1 Professionalism Hour | 4.5 Trial Practice Hours
Who are we?

SOLACE is a program of the State Bar of Georgia designed to assist those in the legal community who have experienced some significant, potentially life-changing event in their lives. SOLACE is voluntary, simple and straightforward. SOLACE does not solicit monetary contributions but accepts assistance or donations in kind.

How does SOLACE work?

If you or someone in the legal community is in need of help, simply email SOLACE@gabar.org. Those emails are then reviewed by the SOLACE Committee. If the need fits within the parameters of the program, an email with the pertinent information is sent to members of the State Bar.

What needs are addressed?

Needs addressed by the SOLACE program can range from unique medical conditions requiring specialized referrals to a fire loss requiring help with clothing, food or housing. Some other examples of assistance include gift cards, food, meals, a rare blood type donation, assistance with transportation in a medical crisis or building a wheelchair ramp at a residence.

Contact SOLACE@gabar.org for help.
A solo practitioner’s quadriplegic wife needed rehabilitation, and members of the Bar helped navigate discussions with their insurance company to obtain the rehabilitation she required.

A Louisiana lawyer was in need of a CPAP machine, but didn’t have insurance or the means to purchase one. Multiple members offered to help.

A Bar member was dealing with a serious illness and in the midst of brain surgery, her mortgage company scheduled a foreclosure on her home. Several members of the Bar were able to negotiate with the mortgage company and avoided the pending foreclosure.

Working with the South Carolina Bar, a former paralegal’s son was flown from Cyprus to Atlanta (and then to South Carolina) for cancer treatment. Members of the Georgia and South Carolina bars worked together to get Gabriel and his family home from their long-term mission work.

The purpose of the SOLACE program is to allow the legal community to provide help in meaningful and compassionate ways to judges, lawyers, court personnel, paralegals, legal secretaries and their families who experience loss of life or other catastrophic illness, sickness or injury.

In each of the Georgia SOLACE requests made to date, Bar members have graciously stepped up and used their resources to help find solutions for those in need.

Contact SOLACE@gabar.org for help.
Dear ICLE Seminar Attendee,

Thank you for attending this seminar. We are grateful to the Chairperson(s) for organizing this program. Also, we would like to thank the volunteer speakers. Without the untiring dedication and efforts of the Chairperson(s) and speakers, this seminar would not have been possible. Their names are listed on the AGENDA page(s) of this book, and their contributions to the success of this seminar are immeasurable.

We would be remiss if we did not extend a special thanks to each of you who are attending this seminar and for whom the program was planned. All of us at ICLE hope your attendance will be beneficial as well as enjoyable. We think that these program materials will provide a great initial resource and reference for you.

If you discover any substantial errors within this volume, please do not hesitate to inform us. Should you have a different legal interpretation/opinion from the speaker’s, the appropriate way to address this is by contacting him/her directly.

Your comments and suggestions are always welcome.

Sincerely,

Your ICLE Staff

Jeffrey R. Davis
Executive Director, State Bar of Georgia

Rebecca A. Hall
Associate Director, ICLE
AGENDA

PRESIDING:
Christopher R. Abrego, Program Co-Chair; Abrego Law Firm LLC, Atlanta
John D. Hadden, Program Co-Chair; The Hadden Firm, LLC, Atlanta

8:30 REGISTRATION (All attendees must check in upon arrival. A jacket or sweater is recommended.)

8:55 WELCOME AND PROGRAM OVERVIEW
Christopher R. Abrego

9:00 FEDERAL VS. STATE COURT
Jason Alloy, Robbins Ross Alloy Belinfante Littlefield LLC, Atlanta

9:45 WRITTEN DISCOVERY
Erica L. Morton, Swift Currie McGhee & Hiers LLP, Atlanta

10:15 EVIDENCE
Alfred L. Evans III, Evans Litigation and Trial Law, LLC, Atlanta

10:45 BREAK

11:00 DEPOSITIONS
Michelle I. King, Speed + King Law, Atlanta

11:30 ETHICS
Angela M. Forstie, The Linley Jones Firm PC, Atlanta

12:30 LUNCH

1:30 COUNTDOWN TO TRIAL
Andrew E. Goldner, Law Offices of Andrew E. Goldner LLC, Atlanta

2:00 APPELLATE PRACTICE
Hon. Kenneth B. "Ken" Hodges, III, President, State Bar of Georgia; Judge, Georgia Court of Appeals, Atlanta

2:30 BREAK

2:45 JUDICIAL PANEL DISCUSSION
Moderator: Christopher R. Abrego
Hon. Jane P. Manning, Judge, State Court of Cobb County, Marietta
Hon. Pandora E. Palmer, Judge, State Court of Henry County, McDonough
Hon. Ronda S. Colvin-Leary, Judge, State Court of Gwinnett County, Lawrenceville

3:45 LEGISLATIVE UPDATE
William T. “Bill” Clark, Georgia Trial Lawyers Association, Atlanta

4:30 ADJOURN
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FEDERAL VS. STATE COURT
FEDERAL VS. STATE COURT – CIVIL PROCEEDINGS

Jason S. Alloy, Robbins Ross Alloy Belinfante Littlefield LLC

Introduction

Handling cases in federal and state court can be tricky due to having to keep up with the significant differences in rules and procedures. The reputation of the federal court among practicing attorneys is generally that the court rules contain additional and more restrictive requirements on pleadings, discovery, filing motions, and trying cases than do state court rules. Similarly, the reputation of many federal judges is they more stringently run their cases than state court judges.

In some respects, these are true statements. However, with an understanding of the differences in practicing in federal versus state court, attorneys can relieve their anxiety that comes along with appearing in federal court and in front of federal judges. Below is an outline of some of the basic and fundamental differences between practicing in state and federal court.

I. Timing and Content of Pleadings

A. Initiating a Lawsuit (with Discovery)

   i. State Court

   In state court, a lawsuit is initiated with a complaint, and discovery can be served with a complaint.

   ii. Federal Court

   In federal court, a lawsuit is initiated with a complaint, but discovery cannot be served with a complaint in federal court since discovery does not begin until later in the case, as set forth below.

B. Responding to a Complaint

   i. State Court

   Answer Deadline. The answer is due 30 days after service of the summons and complaint, unless proof of service is not filed with the court within five business days after service was made, in which case the answer will not be due until 30 days after proof of service is filed. O.C.G.A. §§ 9-11-12(a), 9-11-4(h).

   Motion to Dismiss; Crossclaim; Counterclaim. If a defendant files a motion to dismiss, a defendant must still file an answer. O.C.G.A. § 9-11-12.

   No answer is required to a cross-claim or counterclaim unless ordered by the court. O.C.G.A. § 9-11-12(a).
ii. Federal Court

Answer Deadline. In federal court, the answer is due 21 days after service of the summons of complaint. FED. R. CIV. P. 12(a)(1)(A).

If a party is ordered by the court to reply to an answer, that reply will be due within 21 days after being served with the order, unless the order specifies a different time. FED. R. CIV. P. 12(a)(1)(C).

Motion to Dismiss; Crossclaim; Counterclaim. Generally, where a party files a motion to dismiss under Rule 12 in lieu of filing an answer, the due date for the responsive pleading will be 14 days after receiving “notice” that the court has denied the motion to dismiss or postponed disposition of the motion until trial. FED. R. CIV. P. 12(a)(4)(A). Any party served with a counterclaim or crossclaim must serve an answer to the counterclaim or crossclaim within 21 days. FED. R. CIV. P. 12(a)(1)(B).

C. Asserting Defenses

A key difference between state and federal court exists with regard to asserting certain defenses and whether failing to assert those defenses in an initial responsive pleading or contemporaneous motion will amount to waiver of the defense. Another difference is how and when affirmative defenses must be raised.

i. State Court

Waiver of Certain Defenses. The following defenses are waived if not raised in the initial responsive pleading or written motion before or at the time of the initial pleading:

- Lack of personal jurisdiction;
- Improper venue;
- Insufficient process; and
- Insufficient service of process. O.C.G.A. § 9-11-12(h)(1).

Affirmative Defenses. In the initial defensive pleading, a party must¹ assert the affirmative defenses of:

- Accord and satisfaction;
- Arbitration and award;
- Discharge in bankruptcy;
- Duress;

¹ Note, however that Phillips v. State Farm Mut. Auto. Ins. Co., 121 Ga. App. 342, 345-46 (1970) may indicate that these defenses may be asserted for the first time in a motion for summary judgment, but it is still wise to assert these defenses in an initial pleading.
• Estoppel;
• Failure of consideration;
• Fraud;
• Illegality;
• Injury by fellow servant;
• Laches;
• License;
• Payment;
• Release;
• Res judicata;
• Statute of frauds;
• Statute of limitations; and
• Waiver.

O.C.G.A. § 9-11-8(c). Other defenses, whether affirmative defenses or otherwise, need not be asserted in a defendant’s answer and can be raised for the first time in a motion for summary judgment or other motion, or even at trial.

ii. Federal Court

Waiver of Certain Defenses. A party may assert the following defenses through a motion filed before pleading (if a responsive pleading is allowed):

• Lack of subject-matter jurisdiction;
• Lack of personal jurisdiction;
• Improper venue;
• Insufficient process;
• Insufficient service of process;
• Failure to state a claim upon which relief can be granted; and
• Failure to join a necessary or indispensable party.


A party waives the defenses of lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process by omitting it from a motion
under Fed. R. Civ. P. 12(g)(2) or failing to (1) make it by a motion under Rule 12 or (2) “include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.” Fed. R. Civ. P. 12(h)(1).

**Affirmative Defenses.** “[E]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.” Fed. R. Civ. P. 12(b). To be clear, a party “must affirmatively state any avoidance or affirmative defense” in responding to a pleading. Fed. R. Civ. P. 8(c)(1) (emphasis supplied). Rule 8(c) contains a list of affirmative defenses that must be asserted in responding to a pleading, but it is important to remember that list is not exhaustive and that all affirmative defenses must be asserted in responding to a pleading (e.g., in an answer to a complaint). Typically, failure to raise an affirmative defense in one’s answer or other responsive pleading will result in waiver of the defense.

**D. Asserting/Waiving the Right to Trial by Jury**

The right to a trial by jury is more easily waived in federal court than in state court.

1. **State Court**

In state court, a party is entitled to a jury trial unless the parties stipulate otherwise in writing or in open court and on the record. O.C.G.A. § 9-11-39(a).

2. **Federal Court**

In federal court, a party must make a demand for jury trial within 14 days after service of the last pleading directed to the issue on which jury trial is demanded, otherwise the right is waived. Fed. R. Civ. P. 38(b), (d).

**E. Third Party Complaints**

1. **State Court**

In state court, a third-party complaint may be filed without leave of court within 10 days after filing of the initial answer and otherwise requires leave of court. O.C.G.A. § 9-11-14(a).

2. **Federal Court**

In federal court, the deadline for filing a third-party complaint is 14 days after service of its original answer, after which time leave of court is required. Fed. R. Civ. P. 14(a)(1).
F. Amending Pleadings

i. State Court

Amendment Deadline. In state court, a party may amend pleadings as a matter of course, without leave of court, any time before entry of a pretrial order. O.C.G.A. § 9-11-15(a).

Response Deadline. No response is required to an amended pleading unless ordered by the court. Id.

ii. Federal Court

Amendment Deadline. A party generally may amend its pleading once, either within 21 days after service of the initial pleading or within 21 days after the earlier of service of the responsive pleading or service of a motion to dismiss, motion for more definite statement, or motion to strike. Fed. R. Civ. P. 15(a)(1). Otherwise, a party may amend its pleading only with written consent from the opposing party or leave of court, the latter of which should be freely given when justice requires. Fed. R. Civ. P. 15(a)(2).

Response Deadline. Unless the court orders otherwise, any required response to an amended pleading must be made within the remaining time to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later. Fed. R. Civ. P. 15(a)(3).

G. Pleading/Formatting Requirements

i. State Court

In terms of the content of a state court complaint, there are few requirements. However, venue is a very important consideration, and facts on which venue depends must be alleged in the complaint. O.C.G.A. § 9-11-8(a)(2).

ii. Federal Court

Corporate Disclosure Statement. In federal court, any nongovernmental corporate party must file a disclosure statement that either identifies any parent corporation and any publicly-held corporation owning ten percent or more of its stock or state that there is no such corporation. Fed. R. Civ. P. 7.1(a). The statement must be filed at the time of a party’s first appearance, pleading, petition, motion, response, or other request to the court, and “prompt” supplementation of the disclosure statement is required if any of the required information changes. Fed. R. Civ. P. 7.1(b).

Standing Order. It is fairly typical for Federal Judges to issue a lengthy order at the beginning of a case governing the conduct of the parties and counsel and various procedures and requirements during the litigation. In some instances, this is accomplished through a “standing order” issued in every case.
Northern District of Georgia Requirements:

Certificate of Interested Parties. Parties also are required to file a “certificate of interested parties” consisting of (i) “[a] complete list of other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of th[e] particular case; and (ii) “[a] complete list of each person serving as a lawyer in th[e] proceeding.” N.D. Ga. L.R. 3.3(A).

Formatting Requirements. There are stringent formatting requirements which must be complied with regarding margins, font size and type, page numbering, citations, and other matters. See N.D. Ga. L.R. 5.1(C).

N.D. Georgia Standing Orders. In the Northern District of Georgia, many of the judges’ standing orders regarding conduct and court procedures typically can be found here: http://www.gand.uscourts.gov/standing-orders.

Southern District of Georgia Requirements:

Special Pleadings. Local rules impose pleading requirements for “special pleadings,” which are defined as those alleging violations of the federal Truth-in-Lending Act, Regulation Z, RICO, or other similar federal or state statutes. S.D. Ga. L.R. 9.1. Any pleading alleging such a violation must “specifically state each alleged violation” or else it will be dismissed without prejudice by the court upon motion by any party. Id. The party alleging the violation will have 14 days from the date of the order of dismissal to amend its pleading or to respond in writing to the motion. Id. In any action in which a RICO claim is asserted, the party asserting the RICO claim must, upon filing or within 14 days of removal or transfer, file a “RICO statement” summarizing the basis of the claim. Id.

Middle District of Georgia Requirements:

II. Scheduling and Discovery Procedures

Some of the most notable differences between practicing in state and federal court appear in the areas of scheduling and discovery. The Federal Rules impose significant additional requirements on litigants as far as what must be disclosed—regardless of whether it has been requested by another party—and when such information must be disclosed.

A. Initial Disclosures and Scheduling Requirements

a. State Court

None, unless the Judge requires it.

b. Federal Court

Initial Disclosures. In federal court, parties are required to make certain “initial disclosures” even without being served with any written discovery requests. The information and documents that must be provided in these initial disclosures include:

• The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, and the subjects of that information, unless the use would be solely for impeachment;

• A copy, or a description by category and location, of all documents, electronically-stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

• A computation of each category of damages claimed by the disclosing party, and a copy (or the right to inspect and copy) all documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

• A copy of (or the right to inspect and copy) any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.


Initial Disclosures Deadline. Generally, a party must serve its initial disclosures within 14 days after the parties’ Rule 26(f) initial planning conference, as outlined below, unless the parties stipulate or the court orders otherwise. Fed. R. Civ. P. 26(a)(1)(C).

Failure to Disclose. Importantly, failure to provide information or to disclose a witness in a party’s initial disclosures will result in exclusion of that information or
witness on a motion, at a hearing, or at trial, unless the failure was “substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

B. Initial Planning Conference

a. State Court

State courts do not hold initial planning conferences.

b. Federal Court

Initial Planning Conference Deadline. The Federal Rules require an initial “planning” conference and related report. The conference must include every party in the case (either personally or through counsel) and must be held “as soon as practicable” and, in any event, no later than 21 days before a scheduling conference is set to be held or the scheduling order is due under Rule 16(b). Fed. R. Civ. P. 26(f)(1).

Northern District of Georgia Deadline:

In the Northern District of Georgia, the Rule 26(f) conference must be held within 16 days after appearance of a defendant by answer or motion. N.D. Ga. L.R. 16.1.

Southern District of Georgia Deadline:

In the Southern District, in removed cases, the conference must be held by the earlier of 21 days after filing of the last answer of the defendants named in the original complaint or 45 days after the first appearance of a defendant by answer or Rule 12 motion. S.D. Ga. L.R. 26.1(e).

Nature of Conference. During the Rule 26(f) conference, “the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan.” Fed. R. Civ. P. 26(f)(2). The conference may take place by phone unless the court orders the parties or their attorney to confer in person. Id.

Discovery Plan. The parties’ discovery plan is due 14 days after the Rule 26(f) conference and must state “the parties’ views and proposals” on the following matters: (i) any changes to be made to the timing, form, or requirement of the parties’ initial disclosures, as well as a statement of when the parties’ disclosures will be made; (ii) the subjects on which discovery will be needed, the proposed deadline for discovery, and whether discovery should be conducted in phases or limited in scope in some way; (iii)

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2 In the Northern District, the initial discovery plan must be filed within 30 days after appearance of the first defendant by answer or motion or 30 days after removal. N.D. Ga. L.R. 16.2, Appx. B.
any issues regarding disclosure or discovery of electronically-stored information, including the form of production thereof; (iv) issues pertaining to claims of privilege or protection of trial preparation materials; (v) any other limitations that should be imposed on discovery in the case; and (vi) any protective orders under Rule 26(c), scheduling orders under Rule 16(b), or pretrial orders under Rule 16(c) that the parties believe should be issued in the case. Fed. R. Civ. P. 26(f)(3).

In both the Northern and Southern Districts of Georgia, there is a specific form which must be used for such plan. N.D. Ga. L.R. 16.2, Appx. B; S.D Ga. L.R. 26.1(b), Appx. of Forms.

A federal court may award attorney’s fees and other reasonable expenses due to the failure of any party or its attorney to participate in good faith in developing and submitting a proposed discovery plan. Fed. R. Civ. P. 37(f).

C. Scheduling Orders and Sanctions for Noncompliance

a. State Court

Scheduling orders are not mandated in state courts, though an increasing number of state court judges have begun conducting them.

b. Federal Court

On the other hand, federal courts issue scheduling orders.

Scheduling Order Deadline. Federal courts are required to issue a scheduling order “as soon as practicable,” but in any event, unless the judge finds good cause for delay, no later than 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared, whichever is earlier. Fed. R. Civ. P. 16(b).

Content of the Scheduling Order. The district court’s scheduling order must provide deadlines for joining other parties, amending pleadings, completing discovery, and filing motions. Fed. R. Civ. P. 16(b)(3)(A). The scheduling order may also modify the timing of disclosures under Rules 26(a) and 26(e)(1), modify the extent of discovery, provide for disclosure or discovery of electronically-stored information, include any agreements reached by the parties regarding assertion of claims of privilege or protection as trial-preparation material after information is produced, set dates for pretrial conferences and for trial, and “include other appropriate matters.” Fed. R. Civ. P. 16(b)(3)(B). Once it has been issued, a scheduling order may be modified only for “good cause” and with the judge’s consent. Fed. R. Civ. P. 16(b)(4).

Failure to Comply with Scheduling Order. The Federal Rules permit the imposition of Rule 37(b)(2)(A)(ii)–(vii) sanctions for failure to comply with the court’s scheduling order. Fed. R. Civ. P. 16(f)(1)(C). Moreover, the Federal Rules specifically provide that “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply
evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1).

D. Written Discovery

There are substantial differences between state and federal court in the discovery process, both in terms of deadlines and the substantive requirements imposed on parties. One of the most elementary differences is in the length and timing of the discovery period itself.

As a practice point, it tends to be more difficult to obtain extensions of the discovery period in federal court than in many state courts. This is not always true, however, as many state and superior court judges have begun using federal court-style scheduling orders in some or all of their cases, and those judges often are less willing to grant discovery extensions once such an order has been entered. At the very least, while it is never wise to assume that a court will grant a discovery extension in any case, this is particularly true in federal court and those state courts where scheduling orders are used.

a. State Court

Discovery Period. The discovery period generally begins upon filing of a defendant’s answer and lasts for six months, although the court has discretion to shorten, extend, or reopen the discovery period. Ga. Unif. Super. Ct. R. 5.1.

Limit on Written Discovery. The only real limit on the amount of written discovery that may be served, absent some more specific court order in a particular case, is that no party may serve more than 50 interrogatories, including subparts, on any other party without leave of court. O.C.G.A. § 9-11-33(a)(1).

Response Deadline. Parties have 30 days (plus mailing) to respond to written discovery.

Non-Party Discovery. Parties may request production of documents from a nonparty in the same manner as from a party. See O.C.G.A. § 9-11-34(c).

Duty to Supplement. There is generally no duty to supplement prior discovery responses to include information acquired after the responses are served, but such duty may be imposed by the court or an agreement between the parties. O.C.G.A. § 9-11-26(e). A duty to supplement does exist as to: (1) any question directly addressed to the identity or location of persons with knowledge of discoverable matters; (2) expert witnesses who will be called at trial; and (3) any situation in which later-obtained information reveals that the earlier response was incorrect when made, or that although the response was correct when made, it is no longer true and “the circumstances are such that a failure to amend the response is, in substance, a knowing concealment.” Id.

b. Federal Court
**Discovery Period.** The discovery period typically does not begin until after the Rule 26(f) conference. See Fed. R. Civ. P. 26(d)(1).


**Northern District of Georgia Discovery Period:**

In the Northern District, cases will be assigned a different length of discovery period depending on the type of case, most typically four or eight months, although the parties may request more time “prior to the expiration of the existing discovery period”. N.D. Ga. L.R. 26.2(A), (B).

The discovery period begins in the Northern District of Georgia, 30 days after appearance of the first defendant by answer. N.D. Ga. L.R. 26.2(A).

Note that in the Northern District, parties must have a post-discovery conference within 14 days after the close of discovery. N.D. Ga. L.R. 16.3.

**Southern District of Georgia Discovery Period:**

In the Southern District, unless the court provides otherwise in its scheduling order, all written discovery must be served and all depositions must be completed within 140 days after filing of the last answer of the defendants named in the original complaint. S.D. Ga. L.R. 26.1(d)(i).

A request for extension of discovery made at or near the expiration of the discovery period in federal court often will meet with resistance. See N.D. Ga. L.R. 26.2(B); S.D. Ga. L.R. 26.2.

**Limit on Written Discovery.** The Federal Rules limit a party to serving no more than 25 interrogatories, including discrete subparts, on any other party without leave of court. Fed. R. Civ. P. 33(a)(1).

**Southern District of Georgia Limits:**

In the Southern District of Georgia, a party may only serve 25 requests for admission, including discrete subparts, without leave of court or consent of the responding party. S.D. Ga. L.R. 36.

**Middle District of Georgia Limits:**

No more than 15 requests for admission to each party are permitted without court permission in the Middle District. M.D. Ga. L.R. 36. Parties are also limited to serving 10 requests for production of documents and things to any party without prior permission of the court. M.D. Ga. L.R. 34.

**Non-Party Discovery.** In federal court, document requests may only be made of a nonparty by subpoena. See Fed. R. Civ. P. 34(c), 45.
Method of Production; Electronic Production. The Federal Rules specifically describe the way in which responsive documents or electronically-stored information must be produced in all federal courts. Specifically, unless otherwise stipulated or ordered by the court, parties are required to produce documents “as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.” FED. R. CIV. P. 34(b)(2)(E)(i). Electronically-stored information must be produced either in the form specified in the request for production or “in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.” FED. R. CIV. P. 34(b)(2)(E)(ii). However, Rule 34 also specifies that a party is not required to produce the same electronically-stored information in more than one form. FED. R. CIV. P. 34(b)(2)(E)(iii).

The comments to Federal Rule 37(e) also specifically provide a clear, concise standard for potential spoliation claims involving electronically-stored information: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”

Supplementing and Correcting Disclosures. A party must supplement or correct any statement made in a disclosure or a discovery response “in a timely manner” either if ordered by the court or upon learning that the disclosure or response is incomplete or incorrect “in some material respect” if the additional/correct information has not otherwise been provided to other parties during discovery or in writing. FED. R. CIV. P. 26(e)(1).

E. Deposition Practice

Conduct of parties and their attorneys in depositions tends to be governed more strictly in federal court than in the state and superior courts. Another key difference exists in the context of how and when a deposition may be used as evidence.

a. State Court

Speaking Objections. “Speaking objections” during depositions are unprofessional and improper, but state courts may be less likely to reprimand attorneys for doing so.

Use of Deposition. The deposition of a party or witness may be used if the court finds that the witness is outside the county. O.C.G.A. § 9-11-32(a)(3)(B). The Civil Practice Act provides for the use of a deposition of a witness where “because of the nature of the business or occupation of the witness it is not possible to secure his personal attendance without manifest inconvenience to the public or third persons.” O.C.G.A. § 9-11-32(a)(3)(E). This provision is often used to present the testimony of treating physicians or other medical professionals at trial. See, e.g., Pembroke Mgmt., Inc. v. Cossaboon, 157 Ga. App. 675, 676 (2) (1981). The deposition of a party or witness also may be used if the party or witness is a member of the General Assembly and that
body will be in session during the trial. O.C.G.A. § 9-11-32(a)(3)(F). Lastly, O.C.G.A. § 9-11-32 provides a “catch-all” provision: “The deposition of a witness, whether or not a party, taken upon oral examination, may be used in the discretion of the trial judge, even though the witness is available to testify in person at the trial.” O.C.G.A. § 9-11-32(a)(4) (emphasis supplied). If the court permits use of a deposition at trial under that provision, a party will thereafter be permitted to present that witness’s oral testimony in open court. Id.

b. Federal Court

Speaking Objections. Federal courts may be more likely to reprimand attorneys for “speaking objections” during depositions.

Use of Deposition. A deposition of any person may be used for any purpose if the witness is dead or cannot attend or testify due to age, illness, infirmity, or imprisonment; the witness is more than 100 miles from the place of hearing or trial or outside the U.S. (unless the witness’s absence was procured by the party offering the deposition); the party offering the deposition could not procure the witness’s attendance by subpoena; or on motion and notice, the court finds that “exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.” FED. R. CIV. P. 32(a)(4).

Number of Depositions. Any party must obtain leave of court to take more than ten depositions either by the plaintiffs, defendants, or third-party defendants in any case or to take the deposition of the same person more than once. FED. R. CIV. P. 30(a)(2)(A).

III. Motion Practice and Deadlines

a. State Court

Motion Deadlines. Deadlines for filing motions can vary wildly in state court depending on a number of factors, most important of which is whether the court has entered a case management or scheduling order. Otherwise, a motion generally must be filed sufficiently early that the time for response will elapse prior to trial. Motions for summary judgment, in particular, must be filed “sufficiently early so as not to delay the trial,” and “no trial shall be continued by reason of the delayed filing of a motion for summary judgment.” GA. UNIF. SUPER. CT. R. 6.6.

Response to Motions. Any response to a motion filed in superior court must be filed and served within 30 days after service of the motion. GA. UNIF. SUPER. CT. R. 6.2.

Deciding Motions. Most motions generally will be decided without a hearing unless the court orders otherwise. GA. UNIF. SUPER. CT. R. 6.3. An exception exists for motions for new trial, motions for judgment notwithstanding the verdict, and motions for summary judgment. GA. UNIF. SUPER. CT. R. 6.3. As to motions for summary
judgment, oral argument must be permitted if a party requests oral hearing through a written pleading entitled “Request for Oral Hearing” which is filed either with the motion or no later than five days after the time for a response. *Id.*

**b. Federal Court**

Deadlines for filing motions may be set either by the court’s scheduling order or by local rule. Motions are generally decided without a hearing.

**Northern District of Georgia Rules:**

**Motions Deadlines:**

If a motion is pending upon removal to federal district court, the movant must serve a memorandum in support of the motion within 14 days after removal, and responses will be due within 14 days thereafter (or 21 days thereafter if a motion for summary judgment). N.D. Ga. L.R. 7.2(A), 7.1(B).

Motions to compel discovery typically must be filed prior to the close of discovery or within 14 days after service of the disclosure or discovery response at issue. N.D. Ga. L.R. 37.1(B).

Motions for summary judgment must be filed as soon as possible but no more than 30 days after close of discovery unless otherwise ordered by the court. N.D. Ga. L.R. 56.1(D).

Motions for reconsideration, which “shall not be filed as a matter of routine practice” and should only be filed when “absolutely necessary,” must be filed within 28 days after the order or judgment to be reconsidered; responses must be filed within 14 days after service of the motion. N.D. Ga. L.R. 7.2(E).

*Daubert* motions generally must be filed no later than the date the proposed consolidated pretrial order is submitted. N.D. Ga. L.R. 26.2(C).

All other motions must be filed within 30 days after the beginning of discovery absent prior leave of court. N.D. Ga. L.R. 7.1(A)(2).

**Briefs Regarding Motions:**

Briefs in support of and in opposition to motions are limited to 25 pages, and reply briefs are limited to 15 pages. N.D. Ga. L.R. 7.1(D). “At the end of each brief, counsel must certify that the brief has been prepared with one of the font and point selections approved by the court in LR5.1B or, if
Southern District of Georgia Motions Rules:

Motions Deadlines:

Motions to add or join a party under Federal Rules 19 through 22 or to amend the pleadings under Federal Rule 15 must be filed within 60 days after the filing of an answer by a defendant. S.D. Ga. L.R. 16.3. All other motions, other than motions in limine, must be filed no later than 30 days after the close of discovery. S.D. Ga. L.R. 7.4.

Motions in limine must be filed no later than five days before the pretrial conference, “if practicable,” and otherwise may be filed up until the time of trial unless the court orders otherwise. Id.

Briefs Regarding Motions:

All briefs filed in the Southern District are limited to 26 pages without prior permission from the court, including any title pages, tables of contents, tables of cases, or “other pages prefatory to the main body” of the brief. S.D. Ga. L.R. 7.1(a).

A party intending to file a reply brief in support of its motion, must notify the clerk of court “immediately” and “shall serve and file the reply within fourteen (14) calendar days of service of the opposing party's last brief.” S.D. Ga. L.R. 7.6.

Middle District of Georgia Motions Rules:

Motions Deadlines:

Most motion deadlines will be set in the court’s scheduling order in each individual case or by default under the Federal Rules. The timing for filing and responding to motions for reconsideration (14 days after entry of the order and 14 days after service of the motion, respectively), as well as the admonition against filing them as a matter of course, are identical in the Middle District to those outlined above for the Northern District. M.D. Ga. L.R. 7.6.

The court can rule immediately after filing on motions for extension of time, motions to exceed page limitation, motions for hearings, motions to file surreply briefs, “motions which clearly have no basis in law,” and “such
other motions as the Court may otherwise determine from the parties to be unopposed or which the Court may clearly determine from the record before it the relative legal positions of the parties so as to obviate the need for the filing of opposition thereto.” M.D. Ga. L.R. 7.7. Objections to such motions must be filed within seven days after service of the motion and “will be entertained even after entry of an order on the motion.” Id.

Responses to motions are due within 21 days “after service of movant's motion and brief.” M.D. Ga. L.R. 7.2.

**Briefs Regarding Motions:**

Briefs in support of and in response to motions for reconsideration are limited to five pages in the Middle District, however, and no reply briefs are permitted on such motions. Id.

In the Middle District, briefs in support of or in response to motions are limited to 20 pages, and a movant’s reply brief is limited to ten pages, unless given prior permission from the court. M.D. Ga. L.R. 7.4.

The Middle District’s local rules permit the clerk or any deputy clerk may grant a single extension of up to 14 days to file any brief. M.D. Ga. L.R. 6.2. Any additional extensions must be granted by the court and must be requested by written motion filed no less than five days before expiration of the extension granted by the clerk. Id.

**IV. Dismissal, Adding/Dropping Parties, and Consolidating Cases**

**a. State Court**

**Voluntary Dismissal.** A plaintiff may dismiss its case voluntarily and without prejudice once at any time prior to the first witness being sworn at trial. O.C.G.A. § 9-11-41(a)(1)(A).

This advantage can be significant, particularly given that Georgia’s renewal statute, O.C.G.A. § 9-2-61, applies both in state and federal court. See *Scott v. Muscogee County*, 949 F.2d 1122, 1123 (11th Cir. 1992).

**Consolidating and Joining.** The Supreme Court of Georgia has held unequivocally that under O.C.G.A. § 9-11-42, “the parties must consent before a trial court may consolidate or join related actions for trial.” *Ford v. Uniroyal Goodrich Tire Co.*, 267 Ga. 226, 229 (2) (1996). “Although patterned after the federal rule, the state...

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3 The Georgia renewal statute provides that the statute of limitations is satisfied if a plaintiff files a valid action within the limitations period, that action is later dismissed, and the plaintiff files a new action (that would otherwise be time-barred) within six months of the dismissal.
provision differs from the federal rule in one way: it requires the parties’ consent to either consolidation or a joint trial.” *Id.* at 228-29.

b. Federal Court

**Voluntary Dismissal.** After an opposing party has filed an answer or a motion for summary judgment, a plaintiff may only dismiss its case either by court order or by a stipulation of all parties in the case. Fed. R. Civ. P. 41(a)(1)(A).

**Consolidating and Joining.** A trial court may consolidate any actions before the court which involve a common question of law or fact, join for hearing or trial any or all matters at issue in the actions, or issue any other orders to avoid unnecessary cost or delay. *Fed. R. Civ. P.* 42(a). The court also may order separate trials of one or more issues or claims for convenience, to avoid prejudice, or to expedite and economize. *Fed. R. Civ. P.* 42(b).

V. Pretrial Procedure

a. State Court

**Pretrial Conference.** Whether to hold a pretrial conference is within the court’s discretion, but a party can move to do so. *O.C.G.A.* § 9-11-16(a). “[F]ailure of counsel to appear at the pretrial conference without legal excuse or to present a proposed pretrial order shall authorize the court to remove the action from any trial calendar, enter such pretrial order as the court shall deem appropriate, or impose any other appropriate sanction, except dismissal of the action with prejudice.” *Ga. Unif. Super. Ct. R.* 7.1.

**Pretrial Order.** State court pretrial order forms are less complex than federal forms.

b. Federal Court

**Pretrial Conference.** Whether to hold a pretrial conference is within the court’s discretion. *Fed. R. Civ. P.* 16(a). Where a pretrial conference is scheduled, a represented party must authorize its attorney “to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference.” *Fed. R. Civ. P.* 16(c)(1). The court also may order a party or its representative to be present or “reasonably available by other means” to discuss or consider potential settlement. *Id.* The Federal Rules set forth a long list of topics that may be addressed by the court and the parties during a pretrial conference: (i) formulating and simplifying issues and eliminating frivolous claims or defenses; (ii) amending the pleadings; (iii) potential admissions or stipulations, or rulings on the admissibility of evidence; (iv) avoiding unnecessary proof and cumulative evidence, including expert testimony; (v) potential summary judgment; (vi) controlling and scheduling discovery, including sanctions or other orders if necessary; (vii) identifying witnesses and documents, scheduling the filing and exchange of pretrial briefs, and
setting dates for further conferences and trial; (viii) referring certain matters to a magistrate judge or special master; (ix) settlement discussions; (x) form and content of the pretrial order; (xi) any pending motions; (xii) adopting special procedures for managing potentially difficult or protracted actions involving complex problems of proof; (xiii) ordering separate trials under Rule 42(b) of one or more claims or issues; (xiv) ordering presentation of evidence early during trial on “a manageable issues that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c)”; (xv) setting a reasonable limit on time to present evidence at trial; and (xvi) “facilitating in other ways the just, speedy, and inexpensive disposition of the action.” Fed. R. Civ. P. 16(c)(2).

**Pretrial Order.** If a pretrial conference is held, the court must issue a pretrial order reflecting all actions taken during the conference, which order then will govern the action unless modified by the court. Fed. R. Civ. P. 16(d).

The pretrial order form used in federal court tends to be substantially more complex and time-consuming than the state court forms. See Ga. Unif. Super. Ct. R. 7.2; Fed. R. Civ. P. 26(a)(3). In the Northern District of Georgia, in particular, nearly all pretrial matters must be addressed in the consolidated pretrial order filed by the parties, including a listing of the parties’ proposed voir dire questions and objections, a complete list of exhibits and documentary evidence to be used and objections to other parties’ exhibits, any trial briefs to be submitted by the parties, all requested jury charges, and a proposed verdict form. See N.D. Ga. L.R. 16.4(B).

**Pretrial Disclosures.** Parties are required to make pretrial disclosures about the evidence they may present at trial other than solely for impeachment purposes. These pretrial disclosures must include: (i) the name and, if not previously provided, the address and telephone number of each witness, as well as stating whether the party “expects” to call each witness or whether the party “may call” the witness “if the need arises”; (ii) a list of witnesses whose testimony the party expects to present by deposition, and a transcript of the pertinent parts of the deposition if not taken stenographically; and (iii) a list of each document or other exhibit, including summaries of other evidence, the party will or may present at trial, stating for each whether the party “expects” to offer it or whether the party “may offer” the evidence “if the need arises.” Fed. R. Civ. P. 26(a)(3)(A).

Generally, pretrial disclosures must be made at least 30 days before trial. Fed. R. Civ. P. 26(a)(3)(B). Within 14 days after a party makes its pretrial disclosures, a party may serve and file any objections to presentation of a witness’s testimony by deposition or to the admissibility of any items of evidence identified in the disclosure. Id.

**Failure to Comply.** Failure to comply with the court’s pretrial instructions may result in more serious sanctions, including dismissal of the case or entry of a default judgment. See, e.g., N.D. Ga. L.R. 16.5.
WRITTEN DISCOVERY
Effective Use of Written Discovery

Presented By:
Erica Morton

TRIAL:
It’s not about what you know, it’s what you can prove!
What Tools Do You Have?

- Interrogatories
- Requests for Production of Documents
- Non-Party Requests for Production of Documents
- Requests to Admit
- Depositions
Interrogatories

• Responses should be verified, i.e. sworn
  • O.C.G.A. § 9-11-33
  • If they are not, follow up

• Might contain admissions against interest

• Can also be used as impeachment
  • Even if from a different case
    • Robert R. Sizer & Co. v. G.T. Melton & Sons, 129 Ga. 143 (1907)

Interrogatories

• Legal conclusions in Interrogatory Responses are NOT binding judicial admissions

• BUT can be used to show prior inconsistent opinions or conclusions, i.e. impeachment

• Can be read into evidence but do NOT go out with jury
  • Shedden v. Stiles, 121 Ga. 637 (1905)
Slip & Fall at “Frankie’s Fashions”

- **Plaintiff’s Complaint:** “Plaintiff fell due to a slippery, slick substance on the floor of the store.”

- **Plaintiff’s Interrogatory Responses:** “As Plaintiff was shopping at Frankie’s Fashions, she stepped from carpet on to tile floor and slipped on the slick tile, falling to the floor and landing on her shoulder.”

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**Plaintiff’s Deposition:**

Q: From the time you walked into the store up until the point where you fell, were you on the tiled walkway the whole time?
A: Yes.

Q: And from the time you walked into the store up until the point where you fell, had you noticed anything about the tiled walkway that gave you any concern?
A: No, not that I – not that I recall.
Q: You don’t remember seeing any wet spots or debris on the floor or anything like that?
A: No, I don’t recall that.

Q: Well, let me ask you this. As we sit here today, do you know why you fell?
A: No.

Q: You didn’t feel anything unusual under your feet?
A: I didn’t feel anything unusual.

Q: Nothing slippery, or sticky, or – I mean, you didn’t feel anything underfoot that would have explained your fall?
A: No.
Requests for Production

- Documents produced in discovery
  - O.C.G.A. § 9-11-34

- Can also use Notice to Produce at Trial
  - O.C.G.A. § 24-13-27
  - Producing party is admitting correctness of copies produced; no further proof of authenticity is needed to introduce them into evidence

A Picture is Worth 1,000 Words...
Requests for Admissions

- Purpose: expedite and clarify issues
  - O.C.G.A. § 9-11-36

- RFAs under § 9-11-36 are comparable to admissions in pleadings or stipulations of fact

- Generally treated as judicial admission, i.e. unless withdrawn it is conclusive (vs. evidentiary admission, which can be explained)
Requests for Admissions

- But RFA responses are NOT pleadings; must be introduced in evidence

- Generally not binding on co-party

- Cannot be used in other actions, including renewal action
  - O.C.G.A. § 9-11-36(b)

Non-Party Discovery

- My most utilized forms of written discovery at trial
  - Medical records
  - Employment records
  - Accident/Incident Reports

- Saves parading records custodians through courtroom

- Have to comply with Evidence Code!
  - O.C.G.A. § 24-9-902(11)

- Make sure your records are properly certified
Using Non-Party Discovery

- During Opening Statements
  - Preview inconsistencies and impeachment
  - CAREFUL – make sure you can successfully tender the evidence you discuss in openings
  - Don’t overpromise…your opponent will use that against you

Using Non-Party Discovery

- During Cross-Examination of Party (usually plaintiffs) to impeach
  - Be prepared to field the following objection…
Using Non-Party Discovery

- Tender during case-in-chief (either side)
  - Once tendered, flag critical portions to point out to jury in closing
Notes from Closing in MVA Case

- Same day to chiro; same chiro she'd been seeing for 4 years before
- Allegedly just for maintenance
- But look closely at the chiro records from < accident
  - 2/10-5/10 pain in neck and back
  - That's all within a month leading up
  - Week at the chiro DAY BEFORE
- Look at pre-accident dx
- Want to chiro x16; DISCHARGED 4/28/10
- 'No ongoing complaints'
- 'Condition appeared to be resolving'
- Chiro clearly thought she was back to her baseline condition
- So did PT
- Back to camping, back to power hikes

- Further evidence she was back to baseline:
  - Look carefully at pre-DOB dx and compare to her dx when she restarted 1 month later — IDENTICAL
    - Cervical segmental dysfunction; Muscle spasm; Lumbosacral segment dysfunction; Shoulder pain
  - Look at the frequency of the visits
  - Look at the gaps in chiro treatment — 1 mo, 2 mos, more!
  - Doesn't see an MD for two full years — TWO YEARS
  - What does she do instead?
  - Camping
  - Power Hikes at K-saw Mtn
  - Hiking Cooper's Furnace
  - Overnight Biking trips
  - LEADING mountain biking trips at Cline Horse Mill Park
    - MULTIPLE
    - You've seen those trails
    - Ms. Herrera talked in jury selection about how hard that was
  - Advanced hikes at Amicalola Falls
Parting Thoughts

- Written discovery is important!
- Be mindful when responding and think about how your client will sound when cross-examined with his/her responses.
- Analyze your opponent’s responses carefully
  - When they initially come in (for deficiencies)
  - As supplemented and amended throughout the case
  - Re-read them while preparing for trial.
- Valuable trial nuggets are often found in forgotten discovery responses!

THANK YOU!

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EVIDENCE
EVIDENCE: PRACTICAL TIPS FOR USE AT TRIAL

MEDICAL BILLS AND RECORDS

O.C.G.A. § 24-8-803
O.C.G.A. § 24-9-902
HEARSAY EXCEPTIONS:
AVAILABILITY OF DECLARANT IMMATERIAL
O.C.G.A. § 24-8-803

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:

(6) Records of regularly conducted activity.

....a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if:

ESSENTIAL REQUIREMENTS
O.C.G.A. § 24-8-803

(A) Record made at or near the time of the described acts, events, conditions, opinions, or diagnoses;
(B) Record made by, or from information transmitted by, a person with personal knowledge and a business duty to report;
(C) Record kept in the course of a regularly conducted business activity; and
(D) it was the regular practice of that business activity to make the record, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902
MEDICAL RECORDS AND BILLS
O.C.G.A. § 24-9-902

Extrinsic evidence of authenticity shall not be required with respect to the following:

(A) If the record as made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;

(B) If the record was kept in the course of the regularly conducted activity;

(C) If the record was made by the regularly conducted activity as a regular practice.

ESSENTIAL REQUIREMENTS
O.C.G.A. § 24-9-902

1. The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed.

2. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration.
IN PRACTICE: PRE-SUIT

• START DURING MEDICAL RECORD COLLECTION PROCESS:
  • BE VERY SPECIFIC THAT YOU WANT CERTIFIED RECORDS.
  • REVIEW RECORDS AND BILLS WHEN THEY COME IN FOR PROPER CERTIFICATIONS.
  • MAKE SURE THAT BILLING STATEMENTS CERTIFIED AS WELL.
  • SEND CERTIFICATIONS TO PROVIDERS IF NECESSARY.

LITIGATION

PLACE DEFENDANT(S) ON NOTICE OF INTENT TO INTRODUCE MEDICAL BILLS AND RECORDS IN LAWSUIT ITSELF.

PLACE DEFENDANTS ON NOTICE OF INTENT TO INTRODUCE MEDICAL BILLS AND RECORDS IN DISCOVERY RESPONSES.
IN THE LAWSUIT

20.
As a direct and proximate result of Defendant’s negligence, Plaintiff sustained injuries to her person for which she is entitled to compensation. Plaintiff received treatment at the following facilities following the collision:
• Barrow County EMS;
• St. Mary’s Hospital;
• Athens-Clarke Emergency Specialists;
• Athens Radiology Specialists;
• Athens Orthopaedic Clinic; and
• Emory Orthopaedic and Spine.

Pursuant to O.C.G.A. § 24-8-803 and/or O.C.G.A § 24-9-902, Plaintiff places Defendants on notice that she intends to introduce the medical records and bills identified above at trial. Plaintiff agrees to make the identified records, as well as the applicable certifications, available for inspection.

IN DISCOVERY INTERROGATORIES

13.
Please describe each health examination and any care or treatment you have received from any practitioner of the healing arts since the incident forming the basis of the complaint, the identity of each individual who administered each such examination, care or treatment.
RESPONSE: Plaintiff received treatment at the following facilities following the collision:

- Barrow County EMS;
- St. Mary’s Hospital;
- Athens-Clarke Emergency Specialists;
- Athens Radiology Specialists;
- Athens Orthopaedic Clinic; and
- Emory Orthopaedic and Spine.

Pursuant to O.C.G.A. § 24-8-803 and/or O.C.G.A § 24-9-902, Plaintiff places Defendants on notice that she intends to introduce the medical records and bills identified above at trial. Plaintiff agrees to make the identified records, as well as the applicable certifications, available for inspection.

Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that:

MEDICAL BILLS
O.C.G.A. § 24-9-921
FIRST REQUIREMENT
O.C.G.A. § 24-9-921

That the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial

SECOND REQUIREMENT
O.C.G.A. § 24-9-921

The bills were received from:
- (1) A hospital;
- (2) An ambulance service;
- (3) A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or
- (4) A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist
IMPORTANT CONSIDERATIONS
O.C.G.A. § 24-9-921

Client or family member can testify about bills.
Not need for expert to testify that charges reasonable and necessary.
HOWEVER, thorough and sifting cross-examination permitted.

IN PRACTICE: PRE-SUIT

• EXPLAIN THIS REQUIREMENT TO CLIENTS DURING INITIAL MEETING.
• CLIENTS GET BILLS, TELL THEM TO HOLD ON TO THEM. THEY ASSUME YOU ARE REQUESTING INDEPENDENTLY, WHICH YOU DO, AND JUST THROW THEM AWAY.
• WANT CLIENT TO HOLD ONTO BILL SO THEY ARE ABLE TO ACCURATELY TESTIFY THAT THEY RECEIVED THE BILL FROM THE MEDICAL FACILITY.
• HAVE SUBSEQUENT PRACTITIONERS ACTUALLY SEND BILL TO CLIENT AT CONCLUSION OF TREATMENT.
• LET CLIENTS KNOW WHY THIS IS HAPPENING.
IN PRACTICE: DEPOSITION PREPARATION

SHOW CLIENTS THE BILLS AGAIN. PRINT THEM OUT AND SHOW THEM

WANT TRUTHFUL TESTIMONY THAT THEY HAVE RECEIVED BILLS, AND THAT THEY HAVE REVIEWED THEM

IN PRACTICE: CROSS EXAMINATION

- REMEMBER ALLOWANCE FOR THOROUGH AND SIFTING CROSS:
  
  - CLIENT NOT PRESENTED WITH MENU OF SERVICES.
  
  - CLIENT EXPECTS MEDICAL TREATMENT TO BE EXPENSIVE.
  
  - CLIENT JUST FOLLOWED DOCTOR’S ORDERS (DR. KNOWS BEST).
PHOTOGRAPHS
O.C.G.A. § 24-9-901

ESSENTIAL REQUIREMENTS
O.C.G.A. § 24-9-901

The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

Testimony of a witness with knowledge that a matter is what it is claimed to be
FOUNDATIONAL REQUIREMENTS
WHAT YOU DON’T NEED TO SHOW

NO REQUIREMENT
THAT WITNESS TOOK
PHOTOGRAPH

NO REQUIREMENT
WITNESS KNOWS
WHO TOOK
PHOTOGRAPH

NO REQUIREMENT
THAT WITNESS
KNOWS WHEN
PHOTOGRAPH TAKEN.

FOUNDATIONAL REQUIREMENTS
WHAT YOU NEED TO SHOW

THAT THE WITNESS
RECOGNIZES THE
PHOTOGRAPH.

THAT THE PHOTOGRAPH
REPRESENTS TRUE AND
ACCURATE DEPICTION OF
THE OBJECT AS IT EXISTED
WHEN PHOTOGRAPH
WAS TAKEN.
IN PRACTICE: DEPOSITION OF YOUR CLIENT

- Go over photographs with client before deposition.
  - Photographs of injuries and vehicles.
  - Satellite view of scene.
  - Street view.
- Make sure they can testify regarding authenticity.
- Examine client regarding authenticity if opponent does not.

IN PRACTICE: DEPOSITION OF OPPONENT

Have adverse party testify as to authenticity of photographs, including scene of incident and vehicles.
AFFIRMATIVE MOTIONS IN LIMINE:
FILE EARLY

FOLLOWING DEPOSITIONS, FILE A MOTION IN LIMINE REQUESTING AN ORDER REGARDING THE AUTHENTICITY OF DOCUMENTS YOU NEED TO PRESENT AT TRIAL.
• REDACTED MEDICAL BILLS AND RECORDS (WITH CERTIFICATIONS).
  • REFERENCE NOTICE IN COMPLAINT, WRITTEN DISCOVERY AND NON-PARTY REQUESTS.
  • PUT IN OTHER SIDE’S COURT TO CONTEST.
  • ONLY HAVE TO GIVE OTHER SIDE OPPORTUNITY TO REVIEW AND OBJECT.

• PHOTOGRAPHS OF VEHICLES:
  • CITE DEPOSITION TESTIMONY
  • CAN THEN USE IN OPENING

IF OPPOSING COUNSEL OBJECTS, YOU HAVE TO OPPORTUNITY TO FIX THE PROBLEM LONG BEFORE TRIAL

NOTHING WORSE THAN FINDING OUT YOU HAVE A PROBLEM IN FRONT OF CLIENT IN THE MIDDLE OF TRIAL
DEPOSITIONS
Depositions

Michelle King
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1. Deciding who to depose:
   a. People generally to always depose:
      i. Opposing party- If you are representing the Plaintiff you should always depose your Defendants and vice versa.
      ii. Corporate Representative- If there is a corporate defendant, you should request a 30(b)(6) deposition regarding their policies and procedures. This deponent will speak for the corporation and their testimony is binding on the corporation.
      iii. Expert- If there is an expert identified in your case, generally, you should depose them to find out their opinions and the basis for their opinions.
         1. Exception- On occasion you will have attorney identify numerous experts, some of whose testimony is duplicative or very basic. However, if you want any chance of excluding the witness via a Daubert challenge you need to depose the expert.
      iv. Eye Witnesses- If your claim has an eye witness that is not a party to the litigation, you should depose them or get an affidavit from them. Preserve the testimony in case of death or unavailability.
   b. Discretionary:
      i. Fact witnesses
      ii. Treating providers
         1. If you represent the injured party, you can speak to the provider (with a valid medical release) and decide whether or not you want to depose them.
         2. If you do not represent the injured party, then without a Qualified Protective Order your only way to speak to the provider is via deposition or agreed upon meeting with Plaintiff’s counsel.
      iii. Damages witnesses

2. When to Videotape your Deposition:
   a. When should you videotape your deposition?
      i. Elderly witness- It is important to preserve the testimony of an elderly or sick witness. Elderly or sick witnesses could die during the litigation or become otherwise unavailable. Should you need to use the testimony at trial, jurors prefer to see a video deposition rather than listen to a transcript being read.
      ii. An unavailable witness- witnesses that will likely be difficult to subpoena or considered unavailable for purposes of trial. If
you had a difficult time getting the witness deposed than you probably will have a difficult time getting them to trial.

iii. A rude witness- if you know that a witness will be difficult, angry, rude, etc... Video their deposition to memorialize their actions. Witnesses tend to be better prepared and better behaved at trial.

iv. A key witness- you never know what may happen in the years it takes to get a trial. If you have a witness that is essential to your case, videotape their deposition.

3. Deposition Technology.
   a. Video Teleconference- Travel to and from depositions can be time consuming and impractical. Video teleconferencing for depositions is easy, relatively inexpensive and modern technology allows for seamless transition.
      i. Tip- if possible, send your exhibits ahead to the location or court report for even easier use.
   b. Live transcripts- Allow you to see the rough version of the transcript live during the deposition.
   c. Document repository- Many court reporting companies will keep all of your depositions and accompanying exhibits in an online repository for easy access and reference.
   d. Deposition software- Deposition tagging and tracking software is popular. This allows you to tag issues and track issues in any given case.

4. Preparing for depositions.
   a. Preparing yourself to take a deposition:
      i. preparation in my opinion is the most important thing you can do to have a successful deposition. You cannot be too prepared, and you can certainly be unprepared.
      ii. Outlines- do not use the same old outline for ever deposition. Ever case is unique, ever witness is different, and it should be treated that way.
         1. If using medical records or large volumes of records, make sure your copies are Bates stamped so that you can refer to specific page numbers. It will help the witness, and it will make the transcript easier for future use.
      iii. Know your exhibits.
         1. Knowing what exhibits you intend to use and have sufficient copies of them will make the deposition faster, run more smoothly and it will show that you are prepared.
         2. I create my own binder of exhibits with my notes for myself and then have copies of each exhibit for the witness and opposing counsel.
iv. Know your witness.
   1. Do some research on your witness, check Facebook, Google them.

b. Preparing your witness:
   i. Tell them the basics of a deposition—most witnesses have never been deposed. Just by telling them the basics of how a deposition works, who will be in the room and what to expect will give them confidence.
   ii. Explain to them they are under oath and telling the truth is the most important thing they can do.
   iii. Explain to them how objections work. Explain that objections do not necessarily mean that they do not answer the question but will be frequently be for preservation.
   iv. Only answer questions they understand. Explain to the witness that they need to understand each and every question they answer.
   v. Answer the question and explain when needed but do not tell your life story. Explain to your witness that being evasive is not helpful and that they should answer the question to the best of their ability.
   vi. Documents do not always tell the truth. Explain to your client that just because a document says something does not make it true. If their recollection conflicts with a document, they should testify as they remember and not simply agree with a record.
   vii. Let your witness know that this is a deposition, not a quiz. “I don’t know” is a perfectly acceptable answer.

5. Taking a Deposition:
   a. Be yourself-
      i. Use your personality to your advantage. Do not try to be someone you are not.
   b. Know your Judge.
      i. Many judges are using standing orders which contain very specific instructions regarding depositions.
      ii. Attached as Exhibit A is a copy of Judge Dax Lopez’s standing order. Section 5 discusses conduct in depositions. These standing orders give very specific instructions as to how attorneys should conduct their depositions and how they should deal with any disputes during depositions. Knowledge is power and knowing what the Judge will do in a discovery dispute before there is an actual discovery dispute puts you and your client at an advantage.

6. Objections

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1 Sharon Zinns of Beasley Allen and Jennifer Kurle of Kurle Law, LLC made the original version of this table!
<table>
<thead>
<tr>
<th>Objection</th>
<th>GA Citation</th>
<th>Federal Citation</th>
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<tbody>
<tr>
<td>Relevance*</td>
<td>O.C.G.A. §§24-4-401 &amp; 402</td>
<td>FRE 402</td>
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<tr>
<td>Hearsay*</td>
<td>O.C.G.A. §24-8-801</td>
<td>FRE 801</td>
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<tr>
<td>Privilege</td>
<td>O.C.G.A. §24-5-501</td>
<td>FRE 501</td>
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<tr>
<td>- Spousal</td>
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<td>- Clergy</td>
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<tr>
<td>- 5th Amendment</td>
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<tr>
<td>- Vague</td>
<td></td>
<td>FRE 602 (personal Knowledge)</td>
</tr>
<tr>
<td>- Compound</td>
<td>O.C.G.A. §24-6-611 (leading and harass)</td>
<td>FRE 611(c) (leading)</td>
</tr>
<tr>
<td>- Argumentative</td>
<td></td>
<td></td>
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<tr>
<td>- Asked &amp; Answered</td>
<td></td>
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<tr>
<td>- Assumes Facts</td>
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<tr>
<td>- Misstates prior testimony</td>
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<tr>
<td>- Misleading</td>
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<td>- Lacks Foundation</td>
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<td>- Calls for Speculation</td>
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<tr>
<td>- Leading</td>
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<tr>
<td>- Intended to harass or intimidate</td>
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<tr>
<td>Non-expert witness</td>
<td>O.C.G.A. §24-7-701</td>
<td>FRE 701</td>
</tr>
<tr>
<td>- Calls for expert opinion</td>
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<td>- Calls for legal conclusion</td>
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<tr>
<td>Expert Witness</td>
<td>O.C.G.A. §24-7-702</td>
<td>FRE 702</td>
</tr>
<tr>
<td>- Outside the scope of expertise</td>
<td></td>
<td></td>
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<tr>
<td>- Calls for a legal conclusion</td>
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</table>

* Not waived if objection not made during deposition.
EXHIBIT A
DEKALB STATE COURT
JUDGE DAX LOPEZ
STANDING ORDER
IN THE STATE COURT OF DEKALB COUNTY  
STATE OF GEORGIA  
DIVISION 6

FIRST AMENDED STANDING ORDER IN ALL CIVIL CASES  
INSTRUCTIONS TO PARTIES AND COUNSEL

This case has been assigned to Judge Dax E. López. The purpose of this Order is to inform the parties and their counsel of the Court's policies, practice and procedure. It is issued to promote the just and efficient determination of the case. This Order, in combination with this Court's Local Rules and the Georgia Civil Practice Act shall govern this case.

CASE ADMINISTRATION

1. Contacting Chambers

Summer Schmidt, our Civil Case Manager, is your principal point of contact on matters relating to this case. Where possible, communication with Ms. Schmidt should be by telephone (404-687-7135) or by e-mail (slschmidt@dekalbcountyga.gov). Mailed, couriered, and hand delivered communications should be addressed as follows:

Ms. Summer Schmidt  
Civil Case Manager  
556 N. McDonough St.  
DeKalb County Courthouse  
Decatur, GA 30030

Any documents required to be filed in this case should be addresses and delivered to the Clerk of State Court rather than Ms. Schmidt.

The Court's staff attorney is Ana Maria Martinez. She can be reached by telephone (404-687-7134) or e-mail (ammartinez@dekalbcountyga.gov). Neither the parties nor their counsel should discuss the merits of the case with Ms. Schmidt or Ms. Martinez.
2. **Courtesy Copies**

   Parties are not required to forward courtesy copies of motions and other filings directly to chambers. However, in large cases, courtesy copies of substantive motions are appreciated via email to Ms. Martinez.

**CASE MANAGEMENT**

1. **Extension of Time**

   The Court, along with counsel for the parties, is responsible for processing cases toward prompt and just resolutions. To that end, the Court seeks to set reasonable but firm deadlines. Motions for extensions, whether opposed, unopposed or by consent, will be granted only upon a showing of good cause. In the event the parties need an extension of the discovery period past their third request, the Court requires that a proposed Consent Scheduling Order be filed alongside the motion addressing all significant remaining deadlines.

2. **Conferences**

   Scheduling, discovery, pre-trial and settlement conferences promote the speedy, just and efficient resolution of cases. Therefore, the Court encourages the parties to request a conference when counsel believes that a conference will be helpful and counsel has specific goals and an agenda for the conference.

3. **Candor in Responsive Pleadings**

   In accordance with O.C.G.A. § 9-11-8 (b), a party’s responsive pleading must admit or deny the averments of the adverse party’s pleading. A party may not deny, in his responsive pleading, an averment in his opponent’s pleading on the grounds that the averment raises a matter of law rather than fact.
4. Discovery Responses - Boilerplate and General Objections

Boilerplate objections in response to discovery requests are strongly discouraged. Parties should not carelessly invoke the usual litany of rote objections, i.e., attorney-client privilege, work-product immunity from discovery, overly broad/unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, unless the responding party has a valid basis for these objections.

Moreover, general objections are disfavored, i.e., a party should avoid including in his response to a discovery request a “Preamble” or a “General Objections” section stating that the party objects to the discovery request “to the extent that” it violates some rule pertaining to discovery, e.g., the attorney-client privilege, the work-product immunity from discovery, the requirement that discovery requests be reasonably calculated to lead to the discovery of admissible evidence, and the prohibition against discovery requests that are vague, ambiguous, overly broad, or unduly burdensome. Instead, each individual discovery request should be met with every specific objection thereto - but only those objections that actually apply to that particular request. Otherwise, it is impossible for the Court or the party upon whom the discovery response is served to know exactly what objections have been asserted to each individual request. All such general objections may be disregarded by the Court.

Finally, a party who objects to a discovery request but then responds to the request must indicate whether the response is complete. For example, in response to an interrogatory, a party is not permitted to raise objections and then state, “Subject to these objections and without waiving them, the response is as follows” unless the party expressly indicates whether additional information would have been included in the response but for the objection(s).

Evidence introduced at trial which was requested but not disclosed during the discovery
5. **Conduct During Depositions**

   (a) At the beginning of the deposition, deposing counsel shall instruct the witness to ask deposing counsel, rather than the witness’s own counsel, for clarifications, definitions or explanations of any words, questions or documents presented during the course of the deposition. The witness shall abide by these instructions.

   (b) All objections except those that would be waived if not made at the deposition under O.C.G.A. § 9-11-32 (d) (3) (B) and those necessary to assert a privilege or to present a motion pursuant to O.C.G.A. § 9-11-30 (d), shall be preserved. Therefore, those objections need not be made during the course of depositions. If counsel defending a deposition feels compelled to make objections during depositions, he or she should limit the objections to only “objection to form.” Defending counsel should only elaborate on his/her objection upon the request of deposing counsel. Defending counsel should avoid speaking objections except in extraordinary circumstances.

   (c) Counsel SHALL NOT instruct a witness not to answer a question unless that counsel has objected to the question on the ground that the answer is protected by a privilege or a limitation on evidence directed by the Court. And the objection had better be good.

   (d) Counsel shall not make objections or statements that might suggest an answer to a witness. Counsel’s statements when making objections should be succinct and verbally economical, stating the basis of the objection and nothing more.

   (e) Counsel and their witness-clients SHALL NOT engage in private off-the-record conferences during depositions or during breaks regarding any of counsel’s questions or the witness’s answers, except for the purpose of deciding whether to assert a privilege. Any
conferences that occur pursuant to, or in violation of, this rule are a proper subject for inquiry by
deposing counsel to ascertain whether there has been any witness-coaching and, if so, what. Any
conferences that occur pursuant to, or in violation of, this rule shall be noted on the record by the
counsel who participated in the conference. The purpose and outcome of the conference shall also
be noted on the record.

(f) Deposing counsel shall provide to the witness’s counsel a copy of all documents
shown to the witness during the deposition. The copies shall be provided either before the
deposition begins or contemporaneously with the showing of each document to the witness. The
witness and the witness’s counsel do not have the right to discuss documents privately before the
witness answers questions about them.

(g) Depositions are limited to no more than seven hours of time on the record. Breaks do
not count when calculating the duration of the deposition.

6. Serving Discovery Prior to Expiration of the Discovery Period

All discovery requests must be served early enough so that the responses thereto are due on
or before the last day of the discovery period.

7. Extensions of the Discovery Period

Motions requesting an extension of the discovery period must be made prior to the
expiration of the existing discovery period, and such motions ordinarily will be granted only in
cases where good cause is shown.

8. Motions to Compel Discovery and Objections to Discovery

Prior to filing a motion to compel discovery, the movant - after conferring with the
respondent in a good faith effort to resolve the dispute by agreement - should contact Ms. Martinez
and notify her that the movant seeks relief with respect to a discovery matter. Ordinarily, Ms.
Martinez will then schedule a conference call or meeting in which the Court will attempt to resolve the matter without the necessity of a formal motion. This process shall not apply to post-judgment discovery.

9. Motions for Summary Judgment and Daubert Motions

All Motions for Summary Judgment and Daubert Motions should be filed within 30 days of the close of discovery.

10. Pretrial Orders

The statement of contentions in the Pretrial Order governs the issues to be tried. The plaintiff should make certain that all theories of liability are explicitly stated, together with the type and amount of each type of damage sought. The specific actionable conduct should be set out, and, in a multi-defendant case, the actionable conduct of each defendant should be identified. The defendant should explicitly set out any affirmative defenses upon which it intends to rely at trial, as well as satisfy the above requirements with respect to any counterclaims.

The exhibits and witnesses intended to be introduced at trial shall be specifically identified. It is not sufficient to include boiler plate language covering groups of potential witnesses, such as “all individuals identified during discovery.” Instead, witnesses to be called at trial must be identified by name. Failure to identify a witness, including expert witnesses, by name in the consolidated pretrial order may result in the exclusion of the undisclosed witness’ testimony from trial. In listing witnesses or exhibits, a party may not reserve the right to supplement his list, nor should a party adopt another party’s list by reference.

Witnesses and exhibits not identified in the Pretrial Order may be excluded, unless it is necessary to allow them to be introduced to prevent a manifest injustice.

In preparing the Pretrial Order, each party shall identify to opposing counsel each
deposition, interrogatory or request to admit response, or portion thereof, which the party expects to or may introduce at trial, except for impeachment. All exhibits, depositions, and interrogatory and request to admit responses shall be admitted at trial when offered unless the opposing party indicates an objection to it in the Pretrial Order. The Pretrial Order will be strictly adhered to during the trial. Any witness, evidence or claim not contained therein shall be excluded.

11. Pretrial Conference, Motions in Limine and Pretrial Matters

Normally, the Court will conduct a pretrial conference. The purpose of the conference is to simplify the issues to be tried and to assist in settlement negotiations where appropriate.

The parties will be required at the pretrial conference to identify the specific witnesses they will call in their case in chief at trial.

Motions in Limine and responses thereto shall be filed before or at the pretrial conference. General Motions in Limine will be argued and ruled upon the first day of trial. Motions in Limine regarding case specific evidentiary issues should be brought to the attention of the Court at the pretrial hearing as a special hearing may need to be scheduled prior to trial. Motions in Limine filed the day of trial may be reserved.

Prior to trial, counsel shall make a good faith effort to resolve any objections in depositions to be presented at trial. All unresolved objections, together with argument and citations, shall be filed, with a copy to the Court, no later than five (5) business days prior to trial.

12. Trial

Requests to charge and proposed verdict forms are required to be submitted to the Court, via email to Ms. Martinez, in Word format, one (1) business day before the first day of trial. The original request to charge shall be filed with the Clerk of Court. The Court has a standard charge in civil cases covering subjects such as the standard of proof, experts and witness credibility. The
Court encourages the parties to refer to the Suggested Pattern Jury Instructions by the Council of Superior Court Judges of Georgia. Charges for which there is not a pattern charge must contain citations to the legal authorities supporting the charge requested.

13. Technology

Our courtroom has various electronic equipment for use by counsel at trial. For more information about the equipment, please contact Ms. Schmidt. It is the parties’ responsibility to make sure they know how to use the equipment available, to have the cords necessary to hook up to the equipment and for ensuring that the parties’ equipment interfaces with the Court’s technology.

SO ORDERED, this 28th day of September, 2016.

Dax E. López, Judge
State Court of DeKalb County
ETHICS
I MESSED UP: NOW WHAT?

ETHICAL CONSIDERATIONS FOLLOWING PROFESSIONAL ERRORS

Angela Forstie
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Atlanta, Georgia 30326
(404) 418-0000

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Bio of Angela Forstie

Angela Forstie is a Junior Partner at the Linley Jones Firm, PC, where she focuses on professional malpractice, wrongful death, and catastrophic personal injury claims. The bulk of Ms. Forstie’s practice is committed to pursuing justice for clients who have been harmed by the actions of their former attorneys.

Ms. Forstie grew up in the small towns of St. James, Minnesota and Cartersville, Georgia. She attended Auburn University from 2001 through 2003 before transferring to Old Dominion University, where she earned a degree in Biology with a pre-med concentration. Ms. Forstie then attended law school at Georgia State University College of Law, receiving her juris doctorate in 2009.

Prior to joining the Linley Jones Firm, Ms. Forstie worked for a mid-sized defense firm in Atlanta, where she litigated legal malpractice and medical malpractice claims for several years. The time spent as a defense attorney gives Ms. Forstie a unique perspective on professional malpractice claims, providing her with insight into the other side of the case. In 2014, Ms. Forstie switched to the plaintiff’s side and joined the Linley Jones Firm.

Ms. Forstie has been recognized as a Super Lawyers Rising Star each year since 2017. She was also selected to the National Trial Lawyers Top 40 Under 40 list in 2016. With the Linley Jones Firm, Ms. Forstie has achieved seven-figure settlements and verdicts on behalf of deserving clients.

Ms. Forstie may be reached via email at angela@linleyjones.com.
ETHICAL CONSIDERATIONS FOLLOWING PROFESSIONAL ERRORS

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I MESSED UP: NOW WHAT?

ETHICAL CONSIDERATIONS FOLLOWING PROFESSIONAL ERRORS

“Ethics is knowing the difference between what you have a right to do and what is right to do”

- Hon. Potter Stewart

In practicing law, the line between ethical conduct and unethical conduct is seldom a crisp divide. Lawyers are often comfortable in the grey area, as the bulk of legal practice revolves around attempting to establish clear boundaries where precedent is anything but clear. When it comes to a lawyer’s personal conduct and reputation however, proceeding ethically is anything but easy. A lawyer is often required to put the interests of his client first, take responsibility for his own errors (as pricey as they may be), and advise the client of potential legal malpractice claims against other attorneys when he recognizes such claims may exist.

Ethical Considerations Following Professional Errors is divided into two sections: the first discusses common pitfalls resulting in legal malpractice claims and the second addresses ethical guidelines for conduct following an error.

I. Common Errors Resulting in Legal Malpractice Claims

Errors in practicing law are not uncommon. Not every error, however, rises to the level of a legal malpractice claim. For a legal malpractice claim to be valid, the client must demonstrate: (1) the existence of an attorney-client relationship; (2) a breach of the standard of care; and (3) damages caused by the breach. Rogers v. Norvell, 174 Ga. App. 453, 457 (1985). In establishing damages, the Plaintiff must demonstrate that but for the attorney’s error, the outcome would have been different. Duncan v. Klein, 313 Ga. App. 15, 19 (2011).
Some common errors that clearly give rise to legal malpractice claims include missed statutes, conflicts of interest, improperly terminating client relationships, and errors in release language. Each of these pitfalls is addressed below.

a. **Missed Deadlines**

Missed deadlines come in a variety of contexts, including missed statutes of limitations, statutes of repose, ante litem deadlines, and refiling deadlines. Common Georgia statutes of limitations are as follows:

<table>
<thead>
<tr>
<th>Claim</th>
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<tr>
<td>Personal Injury</td>
<td>2 years</td>
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<tr>
<td>Injury to Reputation/Defamation</td>
<td>1 year</td>
<td>O.C.G.A. § 9-3-33</td>
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<td>Workers’ Compensation</td>
<td>1 year</td>
<td>O.C.G.A. § 34-9-82</td>
</tr>
<tr>
<td>Medical Malpractice</td>
<td>2 years</td>
<td>O.C.G.A. § 9-3-71 (a)</td>
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<tr>
<td>Foreign Object Left in Body</td>
<td>1 year</td>
<td>O.C.G.A. § 9-3-72</td>
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<tr>
<td>Breach of Contract</td>
<td>6 years (written)/4 years (oral)</td>
<td>O.C.G.A. § 9-3-24 / O.C.G.A. § 9-3-25</td>
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</table>

In some instances, the statute of limitations may be tolled, such as when the claimant is a minor or when the claim involves an unrepresented estate. See, O.C.G.A. §§ 9-3-90, 9-3-92. It is important to remember that certain claims have statutes of repose, which may operate to bar claims after a certain period of time, despite the tolling statute. One such example is the medical malpractice statute of repose, which bars medical malpractice claims brought more than five years after the negligence occurs, regardless of whether the statute would otherwise be tolled. See, O.C.G.A. § 9-3-71.

Ante litem deadlines also operate to alter the general statute of limitations. In Georgia, claims against a city must be presented via ante litem notice no later than six (6) months after the occurrence. O.C.G.A. § 36-33-5. Notice of claims against the state or a county must be given no
later than twelve (12) months after the occurrence. O.C.G.A. §§50-21-26(a), 36-11-1. Strict compliance with the ante litem notice requirement is necessary to prevail in litigation over the injury. See Bd. of Regents of Univ. Sys. of Ga. v. Myers, 295 Ga. 843 (2014). An ante litem notice must include the following to be valid: (1) the entity whose acts or omissions are the basis for the claim; (2) the date and place of the incident; (3) the nature and specific amount of the loss suffered; and (4) the acts or omissions that caused the injury. Id. at 845 (discussing ante litem requirements for claims against the state). Failure to comply with the ante litem requirements will result in the dismissal of a subsequent lawsuit arising from the claim. Id.

Finally, deadlines associated with the dismissal and refiling of a lawsuit frequently give rise to malpractice claims. Georgia law allows a plaintiff to dismiss a timely filed lawsuit without prejudice and refile that same suit within the original applicable statute of limitations or within six months after the dismissal, whichever is later. O.C.G.A. § 9-2-61. Prior to dismissal, it is imperative that perfected service of process has been verified. Absent prior service in the first action, the renewal action is void. See Stephens v. Shields, 271 Ga. App. 141 (2004).

In some claims, O.C.G.A. § 9-2-61 is overcome by other statutes. For instance, in a medical malpractice claim, the statute of repose supersedes the renewal statute, such that if the renewal statute would run more than five (5) years after the malpractice occurred, the deadline to refile the case is controlled by the statute of repose, not the renewal statute. See Carr v. Kindred Healthcare Operating, Inc., 293 Ga. App. 80 (2008).

b. Conflicts of Interest

The Georgia Rules of Professional Conduct address conflicts of interest and provide, “A lawyer shall not represent or continue to represent a client if there is a significant risk that the lawyer’s own interests or the lawyer’s duties to another client… will materially and adversely
affect the representation of the client.” Rule 1.7(a). In Cohen v. Rogers, 338 Ga. App. 156, 170 (2016), the court cited Comment 2 to Rule 1.7, stating “[l]oyalty to a client is impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other competing responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.”

Scenarios where conflicts may arise include representation of numerous parties to the same lawsuit, representation of both a husband and wife in what appears at the outset to be an uncontested divorce, and in the tripartite relationships, often seen in personal injury claims where one lawyer represents both the interests of the insurance company and the defendant in the case.

When a conflict of interest arises, it is imperative that an attorney ascertain whether the conflict is waivable or not. If continued representation of both clients is permissible with informed consent, the attorney must explain the potential conflict and associated risks to his clients, provide them with a written conflict waiver explaining those risks, and give the client the opportunity to consult with independent counsel about the conflict before proceeding with the representation. Georgia Rule of Professional Conduct 1.7(b). Representation may continue only if both clients give informed consent. Id. If one client declines to do so, the attorney must withdraw from representation of both clients.

Some conflicts cannot be waived. See, Georgia Rules of Professional Conduct 1.7 and 1.8. If a lawyer is faced with a conflict that cannot be waived under Rule 1.7 or a prohibited conflict under Rule 1.8, he must decline or withdraw from the representation. Id.

Consider a scenario where a husband and wife hire an attorney for an uncontested divorce. During the course of the representation, the parties refuse to agree on the division of marital assets and move toward litigation. The lawyer, who has learned confidential information
from both parties in conjunction with his representation, has a conflict and must withdraw from
the representation of both parties to the divorce.

Should the lawyer proceed by representing one of the parties to the divorce against his
former client, he could be facing a legal malpractice claim down the road arising from the
conflict of interest. In legal malpractice claims, conflicts of interest provide a basis for actual
damages suffered by the client as well as punitive damages and attorney’s fees. See, e.g., Peters

c. Improperly Terminating Client Relationships

A common misconception among lawyers is that an attorney must have a written
agreement before an attorney-client relationship is established. This is incorrect. An attorney-
client relationship may be created expressly by written contract or inferred from the parties’
relationship exists, the basic question is whether the advice of the attorney is both sought and
(recognizing that the test of whether a duty is owed is one of foreseeability, and if an attorney
volunteers to act, or otherwise gives the plaintiff justifiable grounds for relying on him, he may
be liable for malpractice). All that is necessary is a “reasonable belief” on the part of the would-
be client that he or she was being represented by the attorney. Calhoun v. Tapley, 196 Ga. App.
318, 319 (1990). A “reasonable belief” is one which is “reasonably induced by representations
or… conduct” on the part of the attorney. Id. at 319.

Under Georgia law, it is possible to establish an attorney-client relationship on oral
and/or written communications alone, despite the lack of a formal fee agreement. If an attorney
has reason to believe that a potential client thinks he is a client and the attorney does not want to proceed with the representation, it is important that he clearly conveys his decision declining representation to the potential client. Declining representation in writing is the best method to ensure that the potential client has not misunderstood the relationship.

Similarly, if a lawyer has an established attorney-client relationship and wishes to terminate or withdraw from that representation, it is important that the termination be clearly conveyed to the client. Although it may seem that an oral communication will suffice in some instances, these verbal messages are not always as clear to the client as the attorney believes them to be. If the case is in litigation, the attorney must follow the proper withdrawal procedures with the court. Outside of the litigation context, best practice involves terminating the relationship in writing and sending the correspondence in a manner that may be tracked (i.e. certified mail or Federal Express) to ensure that it is received by the client.

Failure to clearly terminate the relationship may result in a claim down the road for a missed statute or other allegations of malpractice. Absent written verification of the termination, the matter is a fact dispute that will be resolved by the jury.

d. **Overly Broad Releases**

Finally, improperly drafted releases give rise to malpractice claims. This is particularly true in the personal injury context, when layers of insurance may be applicable to a particular claim. Specifically, O.C.G.A. § 33-24-41.1 allows a party injured in a car wreck to resolve his case for the insurance policy limits of the liability carrier, while at the same time, giving him the right to pursue recovery under other available insurance policies. In this context, the release with the primary liability carrier must be carefully drafted to ensure that it is a *limited release* under the statute. If the claimant inadvertently signs a general release rather than a limited release, he
is barred from pursuing other insurance, including his own uninsured/underinsured motorist coverage applicable to the wreck. See, Rodgers v. St. Paul Fire & Marine Ins. Co., 228 Ga. App. 499 (1998). The lost claim against additional carriers is a basis for a legal malpractice claim against the attorney.

II. Obligations Following an Error

Following an error, a lawyer must continue to comply with his ethical obligations, even though the error may give rise to a legal malpractice claim or a bar complaint. More often than not, it is a lawyer’s conduct following an error that puts his career in jeopardy, not the error itself.

a. Advising the Client of the Error

A lawyer is required keep his client reasonably informed about the status of his matter. Georgia Rule of Professional Conduct 1.4. In the event of an error, particularly one that has harmed the client’s case or resulted in a total loss of the claim, this means that the attorney must timely advise his client of the mistake. Importantly, a lawyer cannot avoid disclosing the error from his client, despite that the disclosure could result in a civil claim or a bar complaint, as the Rules of Professional Conduct are clear that a lawyer is prohibited from withholding information from his client to benefit his own interests. Georgia Rule of Professional Conduct 1.4, Comment 7.

After a critical error in representing a client, lawyers often get into trouble when they attempt to conceal the mistake. The lawyer not only has a duty of communication with his client, he also has a duty of truthfulness to third parties. Georgia Rule of Professional Conduct 4.1(a) provides, “In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.” When a lawyer misrepresents what
happened in a case to his client or another third party seeking information on behalf of the client (an attorney the client has consulted for malpractice advice, for instance), he is not only violating the ethical rules, but also laying the groundwork for potential punitive damages claim arising from his attempt to cover up his error. It is always best practice to be straightforward with your client, even when doing so is personally a very challenging undertaking.

b. Providing the File to your Client

An attorney has an ethical obligation not to cause prejudice to his client. See, Formal Advisory Opinion 87-5. Consequently, when an attorney’s error results in termination of the attorney-client relationship, or if the client wishes to consult with independent counsel regarding his ongoing claims or potential claims against the attorney, it is the attorney’s obligation to provide a complete copy of the file to his client. The file associated with a claim is the property of the client, including all work product created in conjunction with the representation. See, Swift, Currie, McGhee & Hiers v. Henry, 276 Ga. 571 (2003).

Importantly, when a client requests his file, he is entitled to the original file and cannot be charged to obtain it, nor can the file be withheld pending payment of outstanding fees. Formal Advisory Opinion No. 87-5. Should the attorney choose to keep his own copy of the file, he may do so, but cannot charge the client copy fees associated with retaining a copy of the file, absent a prior agreement regarding those fees. Id. Failure to provide the client file upon request of the client is not only problematic because it could prejudice the client’s ongoing claim, this failure could also give rise to a bar grievance.

c. Notifying Your Insurer

When an attorney makes an error that could give rise to a legal malpractice claim, it is important that the attorney notifies his professional liability carrier. Typical policy language
defines potential claims as “any circumstances that may reasonably be expected to give rise to a claim being made against an insured.” Most professional liability policies require that actual claims and potential claims be reported “as soon as practicable.” Failure to timely report claims and potential claims to your carrier could result in a denial of coverage, should the error give rise to litigation in the future.

Similarly, it is imperative to disclose potential claims when applying for coverage. If an attorney does not disclose a potential claim of which he is aware on his insurance application and the error later becomes a claim, the insurer will rely on the failure to disclose the claim as a basis to deny coverage. In the event an attorney is unsure as to whether an error is a “potential claim,” it is always best to err on the side of caution and disclose it, rather than risk the loss of coverage down the road.

III. Conclusion

Attorneys are only human and are bound to make mistakes. A large part of preventing mistakes is being cognizant of the most common circumstances giving rise to errors so that precautionary measures can be implemented to avoid those mistakes. When a costly error is made, resulting in damage to a client, it is important that an attorney take responsibility for the mistake, comply with his ethical obligations, and report the problem to his insurance carrier. To the extent an attorney has questions about his ethical obligations, the attorney may always contact the ethics helpline at the State Bar of Georgia through email or via telephone at (404) 527-8741.
COUNTDOWN TO TRIAL
Hopefully, this outline will provide assistance when counsel considers the larger and important topics as they approach trial. There are plenty of papers floating around which provide step-by-step guidance on smaller issues and “to-do’s” like how to pack trial boxes and the importance of testing out courtroom technology (both of which are important)—this is not that sort of paper. Rather, the goal of this outline is to focus upon broad topics that will likely impact the outcome of the trial and/or counsel’s chances to secure the hoped-for result.

I. Take a timeout - Is this a case that should be tried?
   a. If not, consider approaching opposing counsel about a resolution and have reasons to articulate that are well thought out before the phone call.
      i. Is this a time for mediation? Talking amongst counsel?
   b. If the case will be tried, see below.

II. You are going try the case. The Countdown To Trial…

III. Is The Case What You Thought It Was (Or, Do You Need A Major/Minor Strategy Shift?)
   a. Don’t let inertia carry you through trial. THINK about what the case actually is, not what you thought it was or what it should be.
      i. Remember Tom Cruise’s famous quote from A Few Good Men:
         1. Lt. Kaffee: “You and Dawson, you both live in the same dream world. It doesn't matter what I believe. It only matters what I can prove! So please, don’t tell me what I know, or don't know; I know the law.”
ii. Read deposition transcripts and make sure that you are not missing a big point and/or problematic testimony.
   1. Have a plan to deal with the problems in your case…they will come out and it is best to be upfront with the jury about the issues.

iii. Go over documentary evidence for the same reasons.

IV. Special Setting v. Trial Calendar.
   a. Will your Judge give the case a special setting and does your case justify it (out of town witnesses, experts, parties).
   b. Is there a strategic reason to have the case on a simple trial calendar?

V. You Have A Trial Date / Calendar, Now What?
   a. Are there other documents or witnesses that you need to secure?
      i. If discovery is over, how are you going to get documents?
         1. Are the documents complete and certified?
      ii. If discovery is over, how are you going to compel witnesses, if needed?
      iii. Discovery Supplements – Yours and the other side’s.
      iv. Supplemental medical records and bills, if needed.
   b. What Is Your Order Of Proof / List Of Witnesses?
      i. This is a good time to come up with a case outline.
   c. How will your witnesses be presented at trial? Live, deposition transcript, or video?
      i. For transcripts and videos, note O.C.G.A. 9-11-32(2), (3).
         1. Evidentiary depositions needed?
         2. Live vs. video presentation of a witness at trial?
      ii. Subpoenas - O.C.G.A. 24-13-21

VI. Pre-Trial Order.
   a. Sometimes, this is the Judge’s first real look into the case, so draft the document accordingly.
   b. Do you need all of the claims/defenses that you have asserted?
   c. Are all of the necessary documents and witnesses listed?
   d. Have you discussed stipulations with the other side?
   e. The PTO “controls the subsequent course of the action unless modified at the trial to prevent manifest injustice.”
   f. Be sure that your case synopsis does not overreach, particularly if the Judge plans to read it to the jury.

VII. Motions In Limine.
   a. Identify important issues and decide if you want to try to preemptively keep them out of the case.
   b. Stop and think! Do you want the other side to open the door or offend the jury? Sometimes, Motions in Limine are overused.
VIII. **Witness Examinations.**
   a. Construct direct and cross-examinations.
   b. Be sure that you are not wasting the jury’s time with either redundant witnesses and/or redundant testimony. (Big complaint from jurors).
   c. Which exhibits will you use with which witnesses?
   d. What evidence will come in through a particular witness?

IX. **Jury Selection Considerations.**
   a. Who do you want/not want on your jury?
   b. Write voir dire questions tailored to your case.
      i. Find out how your Judge conducts jury selection.

X. **Practice Your Opening & Closing – Say Them Out Loud.**
   a. Writing the opening statement and closing argument before trial helps you narrow down the issues.
   b. Actually speaking the words lets you know whether what is in your head is translating into believable, respectful, and persuasive argument.
APPELLATE PRACTICE
Special Contribution

Open Chambers Revisited: Demystifying the Inner Workings and Culture of the Georgia Court of Appeals

by Stephen Louis A. Dillard*

I was sitting in my cluttered but comfortable office, preparing for what would ultimately be my last hearing as a lawyer, when the phone rang. On the other end of the line was Governor Sonny Perdue’s executive assistant: “Mr. Dillard, do you have time to speak with the governor?” I did, of course. And less than two weeks after that brief but life-changing conversation with Governor Perdue, I was one of Georgia’s two newly-appointed appellate judges (and the seventy-third judge to serve on the court of appeals since 1906).  

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I am grateful to my friends and colleagues Justice Keith Blackwell, Chief Judge Sara Doyle, and Judges Michael Boggs, Lisa Branch, Christopher McFadden, Carla McMillian, Billy Ray, and Nels Peterson for their thoughtful comments on earlier drafts of this essay. I am also indebted to my staff attorneys, P. Robert Elzey, Mary C. Davis, and Tiffany D. Gardner, as well as Michael B. Terry and Benjamin R. Dinges, for their invaluable feedback and helpful suggestions. I also offer my sincere gratitude to Lydia Cook, my administrative assistant, for her encouragement and support throughout this process and for everything she does to make my chambers run as smoothly as possible. Finally, I am eternally grateful for the patience and loving support of my wife (Krista) and children (Jackson, Lindley, and Mary Margaret) in this endeavor, as well as in everything I do in my capacity as a judge.

1. The other judge appointed that day was my dear friend and colleague, Justice Keith R. Blackwell, who was later appointed by Governor Nathan Deal to the Georgia Supreme Court.
Over six years have passed now, and during that time a great deal has changed at the court of appeals. Indeed, after spending less than two months as the junior judge, five additional judges were either elected or appointed to the court in just over two years. Then, in April 2015, the Georgia General Assembly enacted legislation (House Bill 279) expanding the court of appeals from twelve to fifteen judges (as of January 1, 2016), which Governor Deal signed into law just a few weeks later. In other words, more than half of the court of appeals turned over in a very short period of time; and this has undeniably impacted the nature and personality of the court in a number of ways. But one constant remains: Much of what we do as appellate judges on the court of appeals is shrouded in mystery. I am not entirely certain why this is the case. It could be that (until recently) the culture of the court over the years has been for the judges to be fairly tight-lipped about our internal operating procedures. It may also have something to do with the practice of Georgia’s appellate courts hiring permanent staff attorneys. Thus, unlike the federal judiciary, we do not send a wave of law clerks out into the workforce every year with “insider knowledge.” But regardless of the reasons for its enigmatic character, my hope is that this Article will continue the process of demystifying some of the inner workings of Georgia’s intermediate appellate court.

This Article, then, is distinctly personal in nature. Suffice it to say, my perspective of the internal operations of the court of appeals is just that: mine and mine alone. And while I am certainly hopeful that the insights and observations I offer prove to be of some use to the bench and bar, they should in no way be understood as being universally accepted or endorsed by my distinguished colleagues. The reader should also understand that this Article is not intended to be academic or comprehensive.
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in nature. It is meant to give practical advice to lawyers who regularly appear before the court of appeals on unique aspects of the court’s internal operations, or, at the very least, provide practitioners with a useful perspective on certain practices from the viewpoint of a sitting appellate judge.

I. THE COURT OF APPEALS CASELOAD, THE TWO-TERM RULE, AND “DISTRESS”

It has been said before, but it bears repeating: The Georgia Court of Appeals is one of the busiest intermediate appellate courts in the United States,6 and the court’s considerable caseload7 is only exacerbated by the two-term rule mandated by the Georgia Constitution, which requires that “[t]he Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court’s docket for hearing or at the next term.”8 This constitutional rule “imposes strict and (almost) immutable deadlines upon the merits decisions of [Georgia’s appellate courts],”9 and the draconian remedy for the failure to abide by this rule is “the affirmance of the lower court’s judgment by operation of law”10 (something that has never occurred in the history of Georgia’s appellate courts). It should come as no surprise, then, that many of the court’s operations are reflected to some degree by the pressure placed upon the

6. See CHRISTOPHER J. McFADDEN ET AL., GEORGIA APPELLATE PRACTICE WITH FORMS 25-26 (2013-14) (“The record makes clear that both Georgia appellate courts regularly remain in the top four state supreme and intermediate appellate courts in opinion load . . . .”); MICHAEL B. TERRY, GEORGIA APPEALS: PRACTICE AND PROCEDURE WITH FORMS 12 (2016) (“The Court of Appeals of Georgia has been for years and remains the busiest intermediate appellate court in the country, with more cases per judge than any other.”); J.D. SMITH, HOW TO WIN/LOSE YOUR CASE IN THE GEORGIA COURT OF APPEALS: KNOWING HOW THE COURT DOES ITS WORK CAN MAKE THE DIFFERENCE 4 (11th Annual General Practice & Trial Institute, Mar. 15-17, 2012) (noting that the court of appeals caseload, “by many measures, is the largest of any appellate court in the country, and in terms of published opinions per judge, it is unquestionably the largest”). And while the addition of three new judges to the court of appeals in January 2016 has undoubtedly provided some degree of relief, the court continues to be one of the busiest intermediate appellate courts in the nation. Moreover, as discussed in greater detail infra, recently enacted legislation has shifted the jurisdiction of several categories of cases from the Georgia Supreme Court to the Georgia Court of Appeals, which will increase the workload of the court of appeals significantly.

7. In 2014, each of the court of appeals (then) twelve judges handled 263 filings, the bulk of which were direct appeals. See COURT OF APPEALS OF GEORGIA, http://www.gaappeals.us/stats/index.php (last visited Sept. 9, 2016).

8. GA. CONST. art. VI, § 9, para. 2.

9. See TERRY, GEORGIA APPEALS, supra note 6, at 33.

judges and staff by an extremely large caseload and the two-term rule.\textsuperscript{11} For example:

\begin{itemize}
\item Unlike many appellate courts, the court of appeals randomly and immediately assigns each case docketed to a judge for the purpose of authoring the opinion.
\item There is currently no \textit{formal} conferencing between the judges,\textsuperscript{12} regardless of whether a case is scheduled for oral argument.
\item Oral argument is entirely discretionary,\textsuperscript{13} is only granted in about one-third of the cases in which it is actually requested by the parties, will rarely be rescheduled due to personal or professional conflicts,\textsuperscript{14} and is not permitted for "applications or motions."\textsuperscript{15}
\item There are strict time limits for oral argument, strict page limits for appellate briefs,\textsuperscript{16} and strict deadlines for filing motions for reconsideration, interlocutory applications and responses, and responses to discretionary applications.\textsuperscript{17}
\end{itemize}

\textsuperscript{11} Michael B. Terry, \textit{Historical Antecedents of Challenges Facing the Georgia Appellate Courts}, 30 GA. ST. U. L. REV. 965, 976 (2014) ("This constitutional rule imposes strict deadlines on the merits decisions of the Georgia Supreme Court and Court of Appeals . . . That the Georgia appellate courts continue to function given the caseload and diminished resources is amazing. That they always meet the constitutional imperative of the Two-Term Rule is even more so.").

\textsuperscript{12} There is, however, a considerable amount of \textit{informal} conferencing that goes on between the judges. See ALSTON & BIRD, LLP, \textit{GEORGIA APPELLATE PRACTICE HANDBOOK} 147 (7th ed. 2012) ("Unlike the Supreme Court, the Court of Appeals does not hold regular decisional bancs. Informal bancs do occur, however.").

\textsuperscript{13} See Ct. APPEALS R. 28(a)(1) ("Unless expressly ordered by the Court, oral argument is never mandatory and argument may be submitted by briefs only.").

\textsuperscript{14} See Ct. APPEALS R. 28(c) ("Postponements of oral argument are not favored, and no postponement shall be granted under any circumstances that would allow oral argument to take place during a term of the Court subsequent to the term for which the case was docketed.").

\textsuperscript{15} Ct. APPEALS R. 28(a)(1); see also Ct. APPEALS R. 37(b) (disallowing oral argument on motions for reconsideration); Ct. APPEALS R. 44(c) (disallowing oral argument on motions to recuse).

\textsuperscript{16} See Ct. APPEALS R. 24(f) ("Briefs and responsive briefs shall be limited to 30 pages in civil cases and 50 pages in criminal cases except upon written motion filed with the Clerk and approved by the Court. Appellant’s reply brief shall be limited to 15 pages. . .").

\textsuperscript{17} See Ct. APPEALS R. 4(e) ("Motions for Reconsideration that are received via e-filing or in hard copy after close of business (4:30 p.m.) will be deemed received on the next business day"); Ct. APPEALS R. 16(a) ("Requests for extensions of time to file discretionary applications must be directed to this Court and should be filed pursuant to Rule 40 (b). All extensions shall be by written order, and no oral extension shall be recognized."); Ct. APPEALS R. 16(c) ("No extension of time shall be granted to file an interlocutory application or a response thereto. An extension of time may be granted . . . to file a discretionary application, but no extension of time may be granted for filing a response to such application."); Ct. APPEALS R. 32(a) ("An application for interlocutory appeal shall be filed in this Court
The court frequently remands a case when there has been a significant delay in transmitting the transcript or some other part of the appellate record.\textsuperscript{18}

- The court is often unable to hold or delay consideration of a case involving an issue under consideration by the Georgia Supreme Court or the United States Supreme Court.\textsuperscript{19}
- The court is often unable to give multiple extensions of time to file an appellate brief.
- The court is often unable to hold a case when there are ongoing mediation or settlement efforts.\textsuperscript{20}
- Cases that are ultimately considered by a nine-judge or fifteen-judge “whole court” (discussed \textit{infra}) are not re-briefed or re-argued, and the parties are not informed that their case has moved beyond the consideration of the initial three-judge panel until the court’s opinion is published.

\textsuperscript{18} See \textsc{Ct. Appeals} R. 32(b) (“An application for discretionary appeal shall be filed in this Court generally within 30 days of the date of the entry of the trial court’s order being appealed. . . .”); \textsc{Ct. Appeals} R. 37(b) (“Motions for reconsideration shall be filed within 10 days from the rendition of the judgment or dismissal . . . No extension of time shall be granted except for providential cause on written motion made before the expiration of 10 days. No response to a motion for reconsideration is required, but any party wishing to respond must do so expeditiously.”); \textsc{Ct. Appeals} R. 37(d) (“No party shall file a second motion for reconsideration unless permitted by order of the Court. The filing of a motion for permission to file a second motion for reconsideration does not toll the 10 days for filing a notice of intent to apply for certiorari with the Supreme Court of Georgia.”).

\textsuperscript{19} But see \textit{In the Interest of J.F.}, 338 Ga. App. 15, 20, 789 S.E.2d 274 (2016) (certifying question and case to the Georgia Supreme Court under Georgia Constitution article VI, § V, ¶ IV and Georgia Constitution article VI, § VI, ¶ III (7)).

\textsuperscript{20} See \textsc{Terry, Georgia Appeals}, supra note 6, at 36-37 (“Another example of the courts ‘working around’ the Two Term Rule involves settlements reached during the appeal of cases of types requiring trial court approval of any settlement. This would include, for example, cases where one party is a minor, cases involving estates, and class actions. If a settlement requiring trial court approval is reached while the case is pending in the appellate court, the court generally will not stay the appeal to await trial court approval. . . . The appellate court may, however, dismiss the appeal with leave to re-appeal if the trial court fails to approve the settlement.”).
During the final month of a term (which, as explained infra, the court refers to internally as “Distress”), the judges are extremely focused on circulating their colleagues’ cases and are often unable to spend as much time as they would like reviewing those cases (while still spending as much time as is needed to thoughtfully consider the merits of each case).

In the rare cases in which the judgment line “flips” after a motion for reconsideration has been filed and granted, the losing party may be effectively deprived of the opportunity to file a motion for reconsideration from this revised decision. The internal pressures placed upon the court of appeals by the two-term rule culminate three times a year with the constitutional deadlines for the December, April, and August terms. Indeed, while the court remains busy year-round, things get especially hectic the month before these deadlines—a time period we refer to as “Distress.” Any opinion that circulates during this period is embossed with the attention-getting “DISTRESS” stamp in bright red ink, and is addressed immediately by the judges charged with considering the merits of that case. As my colleague, Presiding Judge John J. Ellington, is fond of saying, “Distress brings with it great clarity.” And this is absolutely true. Our Distress periods seem to fly by, and there is simply no delaying the inevitable. The judges have to make a decision in each Distress case by the deadline, whether we like it or not. And in most cases, the two-term rule works perfectly and (no doubt) as intended. But in a handful of cases each term, I am reminded (sometimes in rather stark terms) that the tremendous efficiency brought about by the two-term rule can come at a steep price in especially complex cases that—notwithstanding every effort to resolve those cases at an earlier time—are decided during the waning days of Distress. Thus, while I am a strong supporter of the two-term rule, I also

21. See ALSTON & BIRD, LLP, supra note 12, at 148 (“In the vernacular of the appellate courts, ‘distress’ cases are those cases that have reached the second term without being decided, and ‘distress day’ is the last day on which opinions can be issued for distress cases.”).

22. See Rodriguez, 321 Ga. App. at 627 n.20, 746 S.E.2d at 372 n.20 (Dillard, J., dissenting) (“In referencing the time constraints placed upon the Court in this case, I am not only referring to the limited amount of time that many members of the Court had to consider the complex issues presented by this appeal, but also to the fact that our decision to adopt this new, substituted opinion precludes Rodriguez from filing a motion for reconsideration.”).


24. See TERRY, GEORGIA APPEALS, supra note 6, at 39 (“On the positive side, the Two Term Rule keeps the courts from falling behind. It imposes discipline and efficiency. It keeps the litigation process moving. It introduces an element of predictability into the timing of judicial decisions that is lacking in other jurisdictions.”).
firms firmly believe that litigants are not well served when judges do not have the time they need to thoughtfully reflect upon the merits of an appeal decided during Distress. My hope is that the forthcoming changes to the court’s operating procedures (as outlined in this article) will begin the process of addressing this problem.

In any event, what lawyers should take away from the foregoing discussion is that the court of appeals continually operates under enormous internal pressures, and that it is absolutely crucial for practitioners appearing before the court to expend a considerable amount of time and effort preparing their appellate briefs and oral-argument presentations with these pressures in mind.

II. BRIEFING TIPS

A great deal of ink has been spilled in recent years offering lawyers advice on crafting the perfect appellate brief, and I will refrain from rehashing these important but all-too-familiar pointers in this essay. Instead, I will offer just a few suggestions to lawyers who regularly submit briefs to the court of appeals.

First, consider giving the court a roadmap of your argument at the outset of the brief. Specifically, I strongly recommend including a "Summary of Argument" section, even though our rules do not currently require it. I am amazed at how many times I read briefs that only get to the heart of the argument after spending ten to fifteen pages recounting largely unimportant background information and procedural history. Get to the point quickly. You do not want our judges and staff attorneys reading and re-reading your brief in an attempt to figure out the basis (or bases) of your client’s appeal, especially given the severe time constraints placed upon the court by its heavy docket and the two-term rule.

Second, and I cannot emphasize this enough, be generous and precise with your record and legal citations. The quickest way to sabotage your appeal is to fail to substantiate legal arguments or key factual or procedural assertions. Court of Appeals Rule 25(a) requires that appellant’s brief, among other things, “contain a succinct and accurate statement of . . . the material facts relevant to the appeal and the citation of such parts of the record or transcript essential to a consideration of the errors complained of,” as well as the argument and citation of authorities, and

25. While there are many excellent books and essays on the art of brief writing, I highly recommend ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008).

26. Id. at 97 (noting that many judges “consider the Summary of Argument indispensable—indeed, the most important part of the brief”).

27. CT. APPEALS R. 25(a).
that “[r]ecord and transcript citations shall be to the volume or part of the record or transcript and the page numbers that appear on the appellate record or transcript as sent from the trial court.” And when an appelleant fails to support an enumeration of error in its brief by (1) citation of authority or argument, or (2) specific reference to the record or transcript, “the Court will not search for or consider such enumeration,” which “may be deemed abandoned.”

Finally, lawyers who regularly practice before Georgia’s appellate courts need to understand the significant impact that the court of appeal’s “physical precedent” rule has on our state’s body of jurisprudence, and briefs to our court should specifically identify these precedents when they are used to support an argument.

A physical precedent of the court of appeals is neither binding on the state’s trial courts nor on the court of appeals itself, but the opinion is instead merely persuasive authority. Typically, a published opinion becomes a “physical precedent” when an opinion of a three-judge panel.

28. Id.; see also Ct. Appeals R. 25(b)(1) (requiring the appellee to “point out any material inaccuracy or incompleteness of appellant’s statement of facts and any additional statement of facts deemed necessary, plus such additional parts of the record or transcript deemed material,” and noting that “[f]ailure to do so shall constitute consent to a decision based on the appellant’s statement of facts,” and that “[e]xcept as controverted, appellant’s statement of facts may be accepted by this Court as true”).


30. See Eugene Volokh, Supermajority Rules for Court Opinions, and “Physical Precedent,” VOLOKH CONSPIRACY (July 13, 2011), http://www.volokh.com/2011/07/13/supremajority-rules-for-court-opinions-and-physical-precedent/ (“Georgia seems to be one of the few American jurisdictions that requires a supermajority on a court to reach a binding decision—if the three-judge panel splits 2-1, the case must either be reheard by a larger court (if the one judge is in the dissent) or at least will lack full precedential value (if the one judge concurs only in the judgment).”). As noted infra, the court of appeals’s operating procedures will be more in line with other jurisdictions in the near future.

31. Chaparral Boats, Inc. v. Heath, 269 Ga. App. 339, 349-50, 606 S.E.2d 567, 575 (2004) (Barnes, J., concurring specially) (noting that a physical precedent “may be cited as persuasive authority, just as foreign case law or learned treatises may be persuasive, but it is not binding law for any other case.”).

includes a “concurrence in the judgment only,”33 which is referred to internally as a “JO,” or “a special concurrence without a statement of agreement with all that is said [in the majority opinion].”34 As to the former, it is not always readily apparent that a published opinion includes a concurrence in judgment only by one of the three panel members. This is because the majority of concurrences in judgment only are done without an opinion, so the only way an attorney can identify an opinion as being or including a physical precedent is to read the judgment line (which is easy to overlook).35 This is why I often write a separate opinion highlighting my concurrence in judgment only in order to make it clear to the bench and bar that the majority opinion is or includes36 a physical precedent and is not binding authority.37 The only way to tell if a special concurrence triggers the court’s physical-precedent rule, then, is to carefully read that concurrence and make sure that it can be reasonably understood as containing a statement of agreement with all that is said in the majority opinion. If no such statement is included, then the opinion (or any identified division of that opinion) is not binding in future cases.38 And, as noted infra, when the court starts publishing 2-1 decisions, these opinions will also constitute physical precedents and be of no precedential authority.

That said, I do not believe that a lawyer should shy away from citing a physical-precedent opinion to our court or the Georgia Supreme Court

33. See Ga. Farm Bureaus Mut. Ins. Co. v. Franks, 320 Ga. App. 131, 137 n.14, 739 S.E.2d 427, 433 n.14 (2013) (“When a panel judge concurs in the judgment only, a case serves as physical precedent only, which is not binding in subsequent cases.”).

34. Ct. Appeals R. 33(a); see also Whitfield v. Tequila Mexican Rest. No. 1, Inc., 323 Ga. App. 801, 803 n.2, 748 S.E.2d 281, 284 n.2 (2013) (noting that “u[nder Court of Appeals Rule 33(a), a special concurrence that does not agree with all that is said renders the opinion to be physical precedent only”).


36. It is important to keep in mind that many of the opinions published by the court of appeals have separate divisions and that our judges can and often do concur in judgment only as to a specific division (rather than the entire opinion). See, e.g., Monitronics Int’l, Inc. v. Veasley, 323 Ga. App. 126, 142, 746 S.E.2d 793, 807 (2013) (Boggs & McMillian, JJ., concurring in judgment only as to Division 2 of the majority opinion).


38. In opinions published by a nine-judge or fifteen-judge “whole court,” there must be a majority of the judges fully concurring in the opinion or any particular division of that opinion for it to be binding precedent in future cases (five judges and eight judges, respectively). See Alston & Bird, LLP, supra note 12, at 148 (“W[hen fewer than a majority of the judges sitting as a [nine]-judge or [fifteen]-judge court concur with all that is said in the decision, the decision constitutes a nonbinding ‘physical’ precedent only.”).
(especially if you believe the reasoning contained in that opinion is persuasive), so long as you clearly designate the opinion as being or containing a physical precedent.\footnote{39. See, e.g., \textit{Whitfield}, 323 Ga. App. at 803 n.2, 748 S.E.2d at 284 n.2 (adopting the reasoning of a physical precedent because “we find the majority's discussion of an owner or occupier of land's potential liability for criminal acts of third parties to be highly persuasive, particularly in light of the similar fact pattern in this case”); \textit{Muldrow v. State}, 322 Ga. App. 190, 195 n.29, 744 S.E.2d 413, 418 n.29 (2013) (“This is not to say, however, that a party on appeal should shy away from citing physical precedent as persuasive authority… Nevertheless, it is crucial that litigants explicitly designate physical precedent as such, and thoroughly explain why this Court should adopt the reasoning from that particular opinion.”). Even the Georgia Supreme Court has recognized and relied upon the physical precedents of our court from time to time. \textit{See, e.g.}, \textit{Couch v. Red Roof Inns, Inc.}, 291 Ga. 359, 365, 729 S.E.2d 378, 383 (2012) (noting that “there is already persuasive Georgia precedent on this issue,” citing a physical precedent of the court of appeals).} Indeed, at least some of my colleagues (and yours truly) believe that the physical precedents of our court are entitled to a greater degree of consideration and respect than opinions from other jurisdictions.\footnote{40. \textit{Muldrow}, 322 Ga. App. at 195 n.29, 744 S.E.2d at 418 n.29 (noting that “some of the judges on this Court are of the view that our physical-precedent cases should be afforded greater consideration than decisions from appellate courts in other jurisdictions”).} And once a physical precedent has been adopted by a unanimous three-judge panel of our court, by a majority of the judges in a nine-judge or fifteen-judge “whole court” decision, or by our supreme court, that precedent then becomes binding authority in future cases.\footnote{41. \textit{Johnson v. Butler}, 323 Ga. App. 743, 746 n.13, 748 S.E.2d 111, 113 n.13 (2013) (“Assuming arguendo that \textit{Tanner v. Golden}, 189 Ga. App. 894, 377 S.E.2d 875 (1989) is only physical precedent, it is ultimately of no consequence because a subsequent, unanimous panel of this Court fully adopted the reasoning of \textit{Tanner} in \textit{Troup Cty. Bd. of Educ. v. Daniel}, 191 Ga. App. 370, 381 S.E.2d 586 (1989) the opinion noted supra. The District’s contention that Court of Appeals Rule 33(a) precludes a panel of this Court from fully adopting, and thus making fully precedential, a prior physical precedent is wholly without merit.”).}

The foregoing briefing suggestions, of course, only begin to scratch the surface of what is necessary to craft a persuasive, “winning” brief with the court of appeals, but they are, in my view, the most overlooked or least-known tips. To put it plainly, a lawyer’s likelihood of success on appeal before our court is largely dependent upon the substance of the appellate brief(s). As my former colleague, Judge J. D. Smith, has rightly and astutely observed, “[t]he court's procedures and its institutional culture mean that the brief is almost always far, far more important, [and] far more likely to be outcome-determinative than oral argument.”\footnote{42. \textit{SMITH}, supra note 6, at 8.}
III. ORAL ARGUMENT

Nevertheless, oral argument is of great significance to the lawyers who appear before the court of appeals and plead their client’s case. Indeed, as anyone who regularly practices before our court is well aware, the vast majority of oral-argument requests are denied. Naturally, practitioners assume that this is due to the court’s heavy docket. And while this assumption is perhaps accurate as to a minority of the requests, the bulk of motions for oral argument that I deny are rejected because they are either untimely or fail to comply with Court of Appeals Rule 28(a)(4), which provides that

[a] request shall contain a brief statement describing specifically how the decisional process will be significantly aided by oral argument. The request should be self-contained and should convey the specific reason or reasons oral argument would be beneficial to the Court. Counsel should not assume the brief or the record shall be considered in ruling on the request for oral argument.

Most of the requests we receive, however, disregard the requirements of this rule, averring nothing more than the desire to have oral argument or offering some generalized assertion that the case is “complex” and that the court will “benefit” from discussing this nondescript complexity with the designated attorneys. These generic requests are ultimately denied for failing to comply with the rule, rather than denied on the merits.

In contrast, a persuasive request for oral argument draws the judge into the case after the first few sentences. A good appellate practitioner treats a request for oral argument as an opportunity to pique the court’s interest in his client’s story and the issues presented by the case. And while this list is far from exhaustive, here are some categories of appeals that, in my view, have a strong likelihood of being granted oral argument:

● A case involving an issue of first impression;
● A case involving conflicting lines of jurisprudence;
● A case presenting an issue with statewide implications;

43. TERRY, GEORGIA APPEALS, supra note 6, at 205 (“The Court of Appeals grants oral argument in only about one third of the cases where a request is received.”).
44. See CT. APPEALS R. 28(a)(2) (“A request for oral argument shall be filed within [twenty] days from the date the case is docketed in this Court. An extension of time to file brief and enumeration of errors does not extend the time to request oral argument.”).
45. CT. APPEALS R. 28(a)(4).
46. Id. (emphasis added).
47. ALSTON & BIRD, LLP, supra note 12, at 118 (“[C]ounsel should explain what distinguishes this case from the normal one in which oral argument is not helpful. Statements that oral argument is warranted ‘because the case is an important one’ or that oral argument ‘is necessary to clarify the issues’ are not adequate.”).
A case involving the application of settled legal principles to a novel set of facts;

- A case involving an area of law with a dearth of precedent;
- A case involving an area of law in serious need of clarification.

But the reality is that there is no magic formula for getting your oral argument request granted. All you can do is present your self-contained request\textsuperscript{49} in the most compelling manner possible and hope for the best. The good news is that it only takes one judge to grant oral argument,\textsuperscript{50} so you have three opportunities to convince the court that your appeal satisfies the dictates of Rule 28(a)(4).\textsuperscript{51}

Once oral argument is granted, the case is then placed on the oral-argument calendar (usually several months from the date of the order), and the appeal then recedes to the back of my mind until a few weeks before the argument is held. Then, about two weeks or so in advance, my administrative assistant emails me PDF versions of the briefs filed in the cases set for oral argument, and shortly thereafter I download those briefs to my laptop, iPad, or iPhone. I then do a “quick read” of the briefs to estimate the amount of time I need to set aside to adequately prepare for the arguments, which on average is about one and one-half to three hours per case (depending on the complexity of the case). And because the authoring judges are assigned prior to the cases being argued, I often spend additional time on any cases assigned to me, knowing that in just a few months I will prepare drafts of those opinions for the panel’s consideration.

If I have more than three cases scheduled for oral argument (usually no more than six), my general practice is to spend the entire day before oral argument reading the briefs and relevant authorities, identifying any key issues of concern in each case, and drafting questions for the attorneys at oral argument. On the other hand, if I have three or fewer cases

\textsuperscript{48} According to court folklore, one practitioner’s request for oral argument was based entirely on the fact that the copy of the plat at issue in the appeal was impossible to understand unless viewed as a large exhibit and oral argument was necessary to walk the court through the details of the plat. A quick glance of the record confirmed the truth of this assertion, and the request for oral argument was granted.

\textsuperscript{49} \textsc{Alston & Bird, LLP, supra} note 12, at 118 (“The request for oral argument should be self-contained, and counsel should not assume that the appellate brief will be considered in ruling on the request.”).

\textsuperscript{50} \textit{Id.} at 119 (“The Court of Appeals has indicated the request will be granted if any of the three judges on the panel to which the case is assigned believes oral argument is warranted.”).

\textsuperscript{51} It should be noted, however, that as a matter of courtesy, a judge who wishes to grant oral argument in a case that he or she is not assigned to author typically confers with the assigned judge before granting oral argument in that case.
cases, then a half-day before oral argument often allows enough time to adequately prepare for the cases being argued. Either way, I do a mini-review of the oral-argument cases the morning of the arguments. I do not want any distractions during this review or before oral argument. Indeed, to the greatest extent possible, I try to be entirely focused on the issues presented by the appeals and the questions I am interested in discussing with the parties’ counsel at oral argument.

And that’s exactly what a productive oral argument should be: a discussion. Counsel should reserve the emotion and theatrics for juries. Appellate judges are neither swayed by nor pleased with such tactics. We are there, primarily, to (1) determine whether the trial court committed a reversible legal error (namely, to ensure fair proceedings and uphold the right to a fair trial), and (2) ensure that the law is consistently followed and fairly applied in each case. It is not the role of an appellate court to “micromanage the manner in which a trial court conducts its proceedings.” As a result, attorneys who spend precious oral-argument time attempting to make an emotional appeal to us, or suggesting that we act as a de novo appellate fact-finder, waste a valuable opportunity to converse with the judges about the merits of their client’s case.

Instead, you should be prepared to speak at length with the judges about your and opposing counsel’s strongest arguments. Do not prepare a speech ahead of time or read from your brief to the court, and you should fully expect to receive questions from the bench. A good oral advocate directly answers the judges’ questions, concedes arguments that are not outcome determinative (and should be conceded), and knows when to conclude the argument and sit down. And most importantly, an effective appellate practitioner presents his client’s arguments in an honest and forthright manner, scrupulously describing the relevant facts and legal authorities to the court.

52. See, e.g., Alston & Bird, LLP, supra note 12, at 219 (“The rule of law is about independent judges applying the law to the facts without passion or prejudice. So if you try to be dramatic or appeal to emotion, for example by focusing on the horrible facts of a case and ignoring the applicable law, it may backfire, because you are implicitly telling the judge that passion rather than law should dictate the result.”).
53. Id. at 35 (“Georgia’s appellate courts do not sit as fact-finding bodies and generally review appeals for correction of errors of law.”).
55. Ct. Appeals R. 28(d) provides, inter alia, that “[a]rgument is limited to [thirty] minutes for each case,” and that each side will be given [fifteen] minutes to argue, “unless by special leave an enlargement of time is granted.”
56. For additional advice on presenting an effective oral argument in Georgia’s appellate courts, see generally Alston & Bird, LLP, supra note 12, at 217-24; Terry, Georgia Appeals, supra note 6, at 205-11.
But does oral argument really matter? Yes, I think it matters greatly at the court of appeals because it can actually have an impact on the outcome of the case. To be sure, in many cases, I already have an idea of how the appeal will ultimately be resolved; but in some cases, oral argument causes me to rethink matters. And even when I do not change my mind as to the ultimate judgment line, oral argument will often impact the content, reasoning, or scope of the resulting opinion. I almost always learn something new and interesting about the case from the parties’ counsel during oral argument. This is because, in contrast to the federal judiciary, the amount of time spent by the judges and their staff preparing for oral argument is severely constrained by the court’s heavy caseload and the two-term rule, as discussed supra.

Indeed, when I clerked for Judge Daniel A. Manion of the United States Court of Appeals for the Seventh Circuit, our chambers spent a considerable amount of time on each case prior to oral argument. In addition to Judge Manion’s extensive preparations, I would also read the briefs, exhaustively research the relevant issues, examine the entire record, and write a detailed bench memo for each case. Then, the day before oral argument, Judge Manion and I would spend anywhere from five to six hours discussing, among other things, the issues presented by those cases. As a result, by the time oral argument occurred, Judge Manion was already prepared to begin drafting an opinion for each case. In stark contrast, as a judge on the Georgia Court of Appeals, I typically do almost all of the preparation for oral argument by myself. I generally do not have the benefit of much (if any) input from my staff attorneys because they are busy assisting me with draft opinions for the current term and working diligently on my behalf to ensure that the court meets its constitutional deadline for these cases. Thus, while I always strive to be well prepared for oral argument, the reality is that only so much can be done in advance given the current time constraints placed upon the court. And what this means for you, the advocate, is that oral argument is likely to be of much greater importance at the court of appeals than in any federal court in which you will ever practice. Indeed, if you are intimately familiar with the record and relevant authorities, you will not take too much comfort in (or walk away dependent upon) the questions posed by the judges at oral argument. Until the judges have had an opportunity to fully immerse themselves in the case, it is simply premature to conclude that the case has either been won or lost.

For this reason, lawyers should not take too much comfort in (or walk away dependent because of) the questions posed by the judges at oral argument. Until the judges have had an opportunity to fully immerse themselves in the case, it is simply premature to conclude that the case has either been won or lost.

Because I believe very strongly in the absolute confidentiality of the judge-law clerk relationship, I received permission from Judge Manion to disclose, in very general terms, the preparations that he and his law clerks go through in preparing for oral argument, as well as the term his clerks use for spading, i.e., “clerkulation.” See also infra note 64.
you will be in a unique position to educate the court about your case before the judges on the panel have made up their minds. So, yes, Virginia, oral argument matters greatly at the court of appeals.

And there are other reasons, entirely unrelated to the merits of an appeal, why holding oral argument on a regular basis is important. For example, the practice of holding oral argument by an appellate court further the worthy goal of professionalism in the practice of law. It is absolutely essential for Georgia lawyers to understand how to present a compelling and effective appellate argument, and this simply cannot happen if the court of appeals, which handles approximately eighty-five percent of all appeals in Georgia,\textsuperscript{59} does not hold oral argument on a regular basis. Thankfully, Georgia is blessed to have many outstanding appellate practitioners, and I am grateful for the amount of time and effort these lawyers expend in their preparations for oral argument. As Justice David Nahmias of the Georgia Supreme has aptly noted, “good oral advocacy improves the quality of Georgia’s appellate courts and the decisions that they issue.”\textsuperscript{60}

Finally, oral argument is a vital aspect of the court’s transparency to the people we serve. At least four to five times per month, nine months per year, any citizen can attend our oral arguments and witness their judges in action. And thankfully, as of September 2016, our citizens no longer have to travel to Atlanta to watch these arguments. The court of appeals, like our supreme court, now broadcasts live video-streaming of oral arguments over the Internet and maintains archives of those arguments on our website. Suffice it to say, it is absolutely crucial for Georgia’s appellate courts to do everything in their power to educate our citizens about the manner in which these courts operate and the important role that they play in the state’s tripartite system of government. And by holding oral argument on a regular basis, Georgia’s appellate courts play an integral role in educating the public in this regard, as well as providing a significant degree of transparency when it comes to the judiciary’s operations.

IV. OPINION WRITING

A month or so after oral argument, the most important part of the appellate process begins: the drafting of the appellate opinion. And it is

\textsuperscript{59} SMITH, supra note 6, at 3 (“[R]oughly 85% of Georgia’s appellate business is handled by the Court of Appeals.”). The percentage of the state’s appeals handled in the first instance by the Georgia Court of Appeals will increase in 2017 as a result of the jurisdictional shift of certain categories of cases from the Georgia Supreme Court to the Georgia Court of Appeals (which is discussed in detail infra).

\textsuperscript{60} ALSTON & BIRD, LLP, supra note 12, at 217.
this aspect of my job that garners the greatest interest from lawyers at seminars and bar-related functions. “Do you write your own opinions?” “What tasks do your staff attorneys perform to assist you in drafting opinions?” “Do you conference with the other judges on the panel about your opinions?” These are just a few of the questions that lawyers ask about the opinion-writing process, and I hope this Article will offer some degree of insight as to how at least one appellate judge approaches the task of drafting opinions.

So, do I write my own opinions? Yes, I do. To be sure, I have a tremendous amount of assistance in drafting these opinions. Indeed, it would be virtually impossible for me to publish approximately fifty-six opinions per year—which is my publication rate since joining the court—without any assistance and to have those opinions be of any use to the bench and bar. Thankfully, I have three extremely talented and dedicated staff attorneys who are intimately involved in the opinion-writing process. This process, of course, varies from chambers to chambers, and I am in no way suggesting that my method of opinion writing is superior to that of my colleagues. What follows, then, is simply the process that works best for my chambers.

But at the outset, it is helpful to first understand how cases are assigned to each judge. First, the clerk’s office randomly assigns a proportional share of the court’s cases for each term to the judges via a computer-generated system, or “wheel.” After those assignments are made, every judge’s chambers receives a “yellow sheet” for each case that identifies the parties, the attorneys involved in the appeal, and the trial judge who handled the case below. In my chambers, upon receiving these documents, my administrative assistant immediately and randomly assigns a staff attorney to assist me with these cases in a proportional manner (after any necessary recusals are made). She does this by creating “term sheets” for each staff attorney, which list the assigned case numbers, style of the cases, and status of the cases (that is, not drafted, drafted, circulating, dismissed, withdrawn, transferred, and clerk/publication). And while my assistant is busy making the foregoing arrangements for the upcoming term, the court’s central-staff attorneys are skillfully examining each and every appeal and application to determine whether the

61. Id. at 147 (“Cases are assigned to the judges of the Court of Appeals through the use of four “wheels,” one each for: (i) direct appeals for criminal cases; (ii) direct appeals for civil cases; (iii) interlocutory applications; and (iv) discretionary applications. The clerk uses the wheels to assign cases as they are docketed to the [five] divisions of the court. The first four cases are assigned to the presiding judges, the next four cases are assigned to the second-most senior judges on each panel, and the next cases are assigned to the least senior judges on each panel. The cycle then repeats itself.”).
jurisdictional requirements have been satisfied.\textsuperscript{62} If so, then a purple check mark is placed on the first volume of the record to indicate to the judges that the case has passed the initial jurisdictional review (along with a brief note or memorandum explaining the staff attorney’s reasoning).\textsuperscript{60} If not, then the case is dismissed by the court on jurisdictional grounds.

Each term begins with my administrative assistant retrieving the original briefs and records for all of my cases from the clerk’s office (or electronically) and then delivering those documents to the staff attorneys assigned to assist me with those cases. My staff attorneys are then charged with drafting memoranda that summarize the cases assigned to my chambers. This allows me to identify cases that may be more complex in nature and to formulate a game plan for the best way to approach drafting the opinions. In some (rare) cases, I may draft the opinion without any initial assistance from the assigned staff attorney. And in other cases (indeed in the vast majority of cases), I direct the assigned staff attorney to prepare an initial draft of the proposed opinion, which then serves as a starting point or template for my own drafting and review process. But regardless of the manner in which the initial draft opinion is prepared, I personally work through numerous drafts of any opinion before it ever circulates to my colleagues for their consideration.

In preparing an initial rough draft of an opinion, my staff attorney and I will, without exception, perform the following tasks: (1) thoroughly examine the appellate record, (2) carefully and repeatedly read the parties’ briefs, (3) copiously outline the parties’ arguments, (4) exhaustively research the relevant issues, and (5) extensively cite the relevant parts of the record and applicable legal authorities. This initial draft opinion then goes through a rigorous vetting process that we refer to internally as “spading,”\textsuperscript{64} which, in a nutshell, involves the other two staff attorneys

\textsuperscript{62} In addition to conducting an initial jurisdictional review of every appeal and application docketed with the court, our central-staff attorneys also assist the judges in reviewing the merits of discretionary and interlocutory applications, occasionally serve as “floating” staff attorneys to the judges (i.e., they temporarily work “in chambers” when one of the judge’s staff attorneys is sick or is taking an extended leave), and sometimes assist the judges in drafting (mostly) per curiam opinions in cases that meet certain criteria (i.e., routine cases that can be handled in a fairly expeditious manner).

\textsuperscript{63} Each judge conducts a separate and distinct jurisdictional review of each appeal and application, and, on occasion, this review results in the dismissal of the case.

\textsuperscript{64} The origin of “spading” at the court of appeals is a bit of a mystery, but it is a fairly common term that derives from the idea of “digging” into a case. \textit{See} Darby Dickerson, \textit{Citation Frustrations—and Solutions}, 30 STETSON L. REV. 477, 478 (2000) (referring to “spading” as the “process through which law review members check the substantive accuracy of articles, place citations in the proper form, ensure that cited sources are still good
mirroring the aforementioned tasks—that is, thoroughly examining the appellate record, carefully reading the parties’ briefs, extensively researching the relevant issues, Bluebooking, and the like. This process also often involves extended discussion with my staff attorneys both before and after a draft opinion is produced. Indeed, it is not unusual for me to conference with all three of my staff attorneys in particularly difficult cases. This does not happen every day or even every week because many of our cases are fairly straightforward; but, when the issues presented in an appeal are novel or especially complex, I do not hesitate to collaborate with my entire staff.65

Throughout the drafting and review process, there are core principles of my judicial philosophy that my staff attorneys employ when providing assistance in each and every case when those principles are applicable. They are aware, in no uncertain terms, that I am an originalist and a textualist with an abiding commitment to (1) adhere to the plain or original meaning of the statutory and constitutional provisions that I am charged with interpreting;66 (2) faithfully follow and apply the precedents of the Georgia Court of Appeals, the Georgia Supreme Court, and the Supreme Court of the United States;67 (3) clarify and stabilize, to the greatest extent possible, the court of appeals’s caselaw;68 and (4) honor the separation-of-powers doctrine by respecting the strict demarcation line between judicial interpretation and legislative policy making.69 My

65. I also do not hesitate to consult with my colleagues or their staff attorneys if they have previously dealt with or have specialized knowledge in certain areas of law, or if I want a perspective from someone outside of my own chambers. It sounds trite, but there really is a familial-like collegiality at the court of appeals. And while the court’s judges may operate as “fifteen sovereigns,” we all have the same goal—to get it right.

66. State v. Able, 321 Ga. App. 632, 636, 742 S.E.2d 149, 152 (2013) (Dillard, J.) (“A judge is charged with interpreting the law in accordance with the original and/or plain meaning of the text at issue (and all that the text fairly implies), as well as with faithfully following the precedents established by higher courts.”).

67. See id.; State v. Smith, 308 Ga. App. 345, 352, 707 S.E.2d 560, 566 (2011) (“[T]he doctrine of stare decisis prohibits this Court from ignoring the valid precedent of a higher court.”).


69. See, e.g., Able, 321 Ga. App. at 636, 742 S.E.2d at 152 (“Suffice it to say, it is not the role of a judge to ‘interpret’ constitutional or statutory provisions through the prism of his or her own personal policy preferences.”); see also Colon v. Fulton Cty., 294 Ga. 93, 97, 751 S.E.2d 307, 311 (2013) (citation and punctuation omitted) (noting that “under our system of separation of powers this Court does not have the authority to rewrite statutes”).
staff attorneys, then, are guided by these core principles in each opinion with which they assist me in drafting, and these principles are reflected in the opinions I author.

After an initial draft opinion is completed, I then go through several levels of review before circulating that final draft opinion to the other judges on the panel (in order of seniority) for their consideration. Initially, my primary focus is to reconsider whether the judgment line is correct. And in all but a small percentage of the cases, I come away from this reading of the opinion with the same view I held after my initial examination of the case. This is because, as noted supra, any particularly difficult cases are thoroughly discussed in my chambers and vetted long before I begin my final examination of the draft opinion.

If, for some reason, I do have any lingering questions about the judgment line, I will confer with my staff attorneys to discuss these concerns. This conversation almost always results in my delving even deeper into the research conducted thus far, or in directing a staff attorney to conduct additional research to determine whether my concerns are valid. In rare instances, these discussions and additional work result in a revised judgment line. But in most cases, I conclude that the proposed judgment line is correct, and my attention then turns to the readability, structure, and reasoning of the draft opinion.

My goal is to issue opinions that any person of reasonable intelligence (with no legal background) can understand. I firmly believe that the law should be accessible to the people, not just to a small group of specialists who “speak the language.”70 That said, I am well aware that my opinions are primarily read by judges and lawyers, and therefore need to be written in a way that provides the bench and bar with as much clarity and stability in our jurisprudence as possible. Thankfully, there are very few cases in which the readability of an opinion must suffer to clearly and precisely analyze the legal issues presented by the appeal.

In addition to the time dedicated to addressing readability and clarity concerns, I also spend a great deal of time immersed in the relevant and applicable case, statutory, and constitutional law cited by the parties in their briefs and those citations included in the draft opinion. It is imperative that I fully understand the legal landscape at issue in the appeal before I can have complete confidence that the reasoning contained in the draft opinion, and for that matter the proposed judgment line, is correct.

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70. One of the methods I use to ensure that my opinions “sound” more conversational in nature is to read them aloud. I find that doing this helps me to remove the more formal or stilted language in a draft opinion, as well as identifying areas of the opinion in need of better transition sentences.
And to do that, I frequently spend a considerable amount of time analyzing the relevant statutory frameworks (far beyond the specific subsections being relied upon by the parties), re-examining our state and federal constitutions, and tracing jurisprudential lines back to their origin.

My approach to opinion writing is a bit organic. At the risk of sounding like a child of the 1960s, I try to get the “feel” of a case before delving into the merits. This means that in some cases I may follow a more traditional method of review by reading the trial court’s order, the parties’ briefs in the order they were filed, any relevant record excerpts, and the accompanying caselaw and statutes, and in other cases I may start the process by reading the appellant’s reply brief. It all depends on the particulars or nature of the case before me. I believe there is great value in “mixing things up,” as it were, and that using the same analytical approach in every case runs the risk of squelching creative and outside-the-box thinking.

One important decision to be made for each case is whether the opinion will be designated for publication. Indeed, I almost always have a discussion with a staff attorney about the pros and cons of publishing the opinion in question. And the overarching question I ask before recommending that any opinion be published is whether it clarifies, changes, or adds to, in any respect, the existing body of caselaw. This is because whenever an opinion is published there is always a danger that it will make the law less clear. And for this reason, among others, I strongly believe that appellate judges should be very deliberate and cautious before deciding to publish an opinion.

At the end of the day, each opinion bears my name as author for time immemorial, and, accordingly, I take my duty to provide clarity and stability in our caselaw seriously. This is also why I am selective in the opinions I choose to publish. And while I understand that some of my colleagues believe that publishing the overwhelming majority of the court’s opinions ensures the greatest amount of transparency, I am convinced that the manner in which the court currently operates—with a considerable case load and the two-term rule—which makes it virtually impossible to do

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71. An unpublished or “unreported” opinion is “neither a physical nor binding precedent but establishes the law of the case as provided by O.C.G.A. § 9-11-60(h) (2015).” Ct. APPEALS R. 33(b); see also Ct. APPEALS R. 34 (“Opinions are reported except as otherwise designated by the Court. The official reports shall list the cases in which opinions were written but not officially reported and shall indicate the authors and participants in the opinions.”).
so while maintaining a desirable level of quality control. And thus, in my view, the court of appeals publishes far too many cases.\textsuperscript{72}

Thankfully, the court of appeals has a means for disposing of more routine appeals without the need to draft a published or unpublished opinion. Court of Appeals Rule 36\textsuperscript{73} provides for an “affirmance without opinion” in cases in which:

1. The evidence supports the judgment;
2. No reversible error of law appears and an opinion would have no precedential value;
3. The judgment of the court below adequately explains the decision; and/or
4. The issues are controlled adversely to the appellant for the reasons and authority given in the appellee’s brief.\textsuperscript{74}

Rule 36 cases “have no precedential value,” and typically involve a one-page order relying on one or more of the criteria noted above.\textsuperscript{75}

In Rule 36 cases, I speak with a staff attorney at the outset of the review, and before any written work is done, about disposing of the appeal in this manner. And if I decide that a Rule 36 “opinion” is appropriate, the staff attorney will then prepare two documents for my—and, ultimately, the other panel members’—consideration: (1) a memorandum explaining why the case is one in which a written opinion is unnecessary and how the designated Rule 36 criteria have been satisfied,\textsuperscript{76} and (2) a one-page opinion outlining the grounds for disposing of the case by way of Rule 36.

After the foregoing documents are prepared, I then read the proposed memorandum, proposed opinion, and parties’ briefs to ensure that I still agree with this method of handling the case. If so, I reread the memorandum to determine if any revisions are necessary, and I carefully ex-

\textsuperscript{72} See RUGGERO J. ALDISERT, OPINION WRITING 7 (3d ed. 2012) (“No one, not even the most fervent supporter of publication in every case, can seriously suggest that every one of these cases . . . has precedential or institutional value.”).

\textsuperscript{73} CT. APPEALS R. 36.

\textsuperscript{74} Id.

\textsuperscript{75} See id.

\textsuperscript{76} This does not mean that a case disposed of by way of Rule 36 never results in a published opinion. See, e.g., City of St. Marys v. Brinko, 324 Ga. App. 417, 422, 750 S.E.2d 726, 729 (2013) (affirming the trial court’s grant of summary judgment to the defendants on certain tort claims in a consolidated appeal pursuant to CT. APPEALS R. 36); Lexington Ins. Co. v. Rowland, 323 Ga. App. 191, 746 S.E.2d 924 (2013) (a published Rule 36 opinion with a dissenting opinion); Jones v. Forest Lake Vill. Homeowners Ass’n, 312 Ga. App. 775, 720 S.E.2d 174 (2011) (a published Rule 36 opinion sanctioning the appellant for bringing a frivolous appeal).
amine the controlling legal authorities. I do not, however, spend significant time worrying about whether the memorandum conveys my “voice” or whether certain passages are particularly eloquent. It is, after all, an internal memorandum that the parties will never see. To put it plainly, a Rule 36 memorandum needs to be substantively accurate, not Shakespearean verse.

With all of that said, parties receiving a Rule 36 opinion should understand that there has, nevertheless, been a great deal of work and consideration by the judges and staff attorneys leading up to that opinion. And while I certainly understand the frustration many lawyers feel when they receive a one-page opinion, rather than a detailed opinion, the unfortunate reality is that Rule 36 is a crucial time-management tool for judges in addressing the court of appeals’s considerable caseload77 and the always-creeping deadlines imposed by the two-term rule.

V. CONCURRENCES AND DISSENTS

In addition to the approximately 120 opinions I am assigned to author or dispose of every year, I am also required to carefully examine and consider the merits of approximately 240 opinions or orders drafted by my colleagues on the panel, as well as those that currently “roll over” to my division as a result of a dissent or are considered en banc. To be sure, most of the opinions issued by our court are not particularly controversial and result in unanimous decisions with full concurrences from the other judges.78 But occasionally, we do disagree with one another. And when that happens, a judge who takes issue with the proposed opinion has numerous options.

If a judge agrees with the judgment line in a proposed opinion, but not all of the reasoning contained therein, he or she can (1) draft a memorandum to the authoring judge outlining the problems or concerns with the opinion, and identifying any language that needs to be added or omitted in order to obtain the full concurrence of that judge;79 (2) draft a special

77. See ALISERTE, supra note 72, at 4 (“As courts have gotten busier . . . the pace of opinion publishing has not been able to keep up with the rate of incoming cases.”).

78. ALSTON & BIRD, LLP, supra note 12, at 142-43 (“The Court of Appeals is divided into ‘rotating’ three-judge ‘panels’ or ‘divisions.’ These three-judge panels ordinarily render the decisions of the Court of Appeals. . . . The Court of Appeals decides cases with panels of more than three judges only in limited circumstances.”).

79. Occasionally, a judge will simply pen a brief handwritten note to the authoring judge, outlining any areas of concern. These notes are treated no differently than a more formal memorandum and they are circulated along with the file for the other judge or judges’ consideration.
concurrence that includes a full concurrence, but which provides additional reasoning for or commentary concerning the court’s decision; (3) draft a special concurrence that does not include a full concurrence (thus making the opinion or any disputed division of the opinion a “physical precedent” and of no precedential value), but outlines entirely separate reasoning for concurring in the judgment line; (4) draft a concurrence dubitante, which is a full concurrence, but one that is done doubtfully; or (5) simply concur in judgment only with or without a separate opinion, which also renders the opinion a “physical precedent” and of no precedential value.\footnote{There is even one extraordinary occasion in which I published an opinion “concurring dubitante in judgment only,” which meant that I had serious doubts in that case about not only the reasoning of the majority opinion but also the judgment line. See Nalley v. Langdale, 319 Ga. App. 354, 372-73, 734 S.E.2d 908, 922 (2012) (Dillard, J., concurring dubitante in judgment only). This type of concurrence has only been used once in the history of the court of appeals in a published opinion and is affectionately referred to by one of my colleagues as “concurring Dillardtante.” See Alyson M. Palmer, Judges, Lawyers Mull Possible Changes to State Appeals Court, FULTON COUNTY DAILY REP., Feb. 13, 2014 (“Dillard said in his concurrence that the two-term rule precluded him ‘from engaging in the type of extended study necessary to achieve a high degree of confidence that my experienced, able colleagues are right.’” McFadden quipped that it was a ‘concurrence Dillardtante,’ adding, ‘if he didn’t pull an all-nighter before he did that, it was pretty darn close.’”).}

If a judge on the original panel joins the special concurrence of another judge, the case is then reassigned to the author of the special concurrence and that concurrence becomes the majority opinion.

If a judge disagrees with the judgment line, he or she may author a dissenting opinion, which will, for the time being, then cause the case to transition to a nine-judge “whole court,” consisting of the original panel members and two backup panels of judges.\footnote{See O.C.G.A. § 15-3-1(b) (2015 & Supp. 2016) (“The court shall sit in divisions composed of three Judges in each division. The assignment of Judges to each division shall be determined by the Chief Judge, and each Judge shall be assigned to one division for the term. The Chief Judge shall notify the Judges assigned to each division of their assignment by such time as to allow the Judges assigned to a particular division to attend all cases assigned to that division during said term.”).} For example, if a judge on the First Division dissents from an opinion authored by one of the other panel members, the case will then be voted on by all three judges of the First Division, all three judges of the Second Division, and all three judges of the Third Division.\footnote{The chief judge of the court of appeals, currently the Honorable Sara L. Doyle, appoints the presiding judges and assigns the remaining judges to serve on one of the court’s five divisions. See O.C.G.A. § 15-3-1(c)(2) (2015 & Supp. 2016) (“The Court of Appeals may provide by rule for certain cases to be heard and determined by more than a single division and the manner in which those Judges will be selected for such cases. When a case is heard and determined by more than a single division, Judges shall be selected in a manner that is consistent with the rules adopted.”).} Currently, a majority opinion or dissent
will only trigger the consideration of the entire (fifteen-judge) court when it seeks to overrule a prior precedent, or when the majority of the original panel of judges or those of a nine-judge “whole court” conclude that the case is of such importance that it warrants en banc consideration (something that rarely happens). If the court sitting en banc considers a case and is “evenly divided,” the case is then transferred to the Georgia Supreme Court (without the opinion being published).

Unlike the majority opinions I author, I often draft concurrences and dissents with less assistance from my staff attorneys. To be sure, I ask my staff attorneys for their assistance in drafting concurrences and dissents, and I always confer with one or more of them before any opinion leaves my chambers, but I generally do not confer with my staff attorneys about other judges’ opinions. My intent is to handle as much of the “other judge” work as possible, which allows my staff attorneys to primarily focus on assisting me with the opinions I am assigned to author.

With all of that said, practitioners should understand that even when the court issues a unanimous decision, the other judges on the panel are always fully engaged in the opinion-writing process. Indeed, there is often a great deal of informal conferencing, exchanging of back-and-forth memoranda, and substantial revisions to the proposed opinion, all of which the parties never see. There have even been cases in which the proposed opinion triggered a dissent, was circulated as a nine or fifteen-judge decision, and then, after numerous concurrences and dissents were made by the Chief Judge, and the personnel of the divisions shall from time to time be changed in accordance with rules prescribed by the court. The Chief Judge shall designate the Presiding Judges of the divisions and shall, under rules prescribed by the court, distribute the cases among the divisions in such manner as to equalize their work as far as practicable.

83. See O.C.G.A. § 15-3-1(c)(2) (2015 & Supp. 2016) (“The Court of Appeals may provide by rule for certain cases to be heard and determined by more than a single division and the manner in which those Judges will be selected for such cases. When a case is heard and determined by more than a single division, nine Judges shall be necessary to constitute a quorum.”); O.C.G.A. § 15-9-1(d) (2015 & Supp. 2016) (“The Court of Appeals shall provide by rule for the establishment of precedent and the manner in which prior decisions of the court may be overruled.”); COURT OF APPEALS OF GEORGIA, http://www.gaappeals.us/operating_procedures.pdf (last visited Sept. 9, 2016) (“Consistent with this new statutory authority, the Judges of this Court adopted, effective July 1, 2016, new operating procedures. Those procedures shall remain in effect until such time as new rules are adopted. These procedures include: . . . [2] In the event of a case involving the overruling of a prior decision of this Court, all 15 Judges of this Court shall participate (provided, however, that the disqualification of one or more Judges in such a case shall not prevent the overruling of a prior decision so long as at least nine Judges participate).”).

84. See GA. CONST. art. VI, § 5, para. 5; see also GA. CONST. art. VI, § 5, para. 4 (authorizing the court of appeals to certify questions to the Georgia Supreme Court to aid its decisional process).
drafted, returned to the original three-judge panel and was issued as a unanimous decision. Those who regularly practice before our court should not assume that the only time the other panel members are fully engaged in another judge’s case (that is, one they are not assigned to author) is when they publish either a concurrence or dissent. I spend a considerable amount of time each term working on opinions authored by my colleagues, and they do likewise.

VI. INTERLOCUTORY AND DISCRETIONARY APPLICATIONS

As with direct appeals, an application for a discretionary or interlocutory appeal is randomly assigned to a judge by the court’s computer-generated “wheel.” The application is then immediately and randomly assigned to an attorney in central staff to carefully review the application and accompanying materials, conduct any additional and necessary research (time permitting), and draft a memorandum on behalf of the assigned judge recommending the grant or denial of the application. All of this work must be done within a very condensed period of time. Indeed, O.C.G.A. § 5-6-35(f) provides that our court must either grant or deny an application for discretionary appeal within thirty days, and O.C.G.A. § 5-6-34(b) requires that we must either grant or deny an application for interlocutory appeal within 45 days. Suffice it to say, this does not give the central-staff attorneys or judges a significant amount of time to consider the merits of these applications.

A lawyer hoping to have a discretionary or interlocutory application granted, then, needs to understand just how important it is to present a concise and self-contained application to the court. Indeed, regardless of whether you are filing a discretionary or interlocutory application, there are steps you can take to increase your client’s chances of receiving the highly sought-after “grant” from our court.

First and foremost, you need to make sure that your application is narrowly tailored to meet the criteria established by our court in its rules. Court of Appeals Rule 30(a) provides that an application for an interlocutory appeal will be granted only when it appears from the documents submitted that:

1. The issue to be decided appears to be dispositive of the case; or

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85. O.C.G.A. § 5-6-35(f) (2013).
86. Id.
87. O.C.G.A. § 5-6-34(b) (2013).
88. Id.
89. Ct. Appeals R. 30(a).
2. The order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appealing party until entry of final judgment in which case the appeal will be expedited; or

3. The establishment of precedent is desirable.90

Put another way, is there some compelling reason to stop the proceedings below and have the court of appeals intervene? It is not enough to demonstrate that the trial court erred. An application for interlocutory appeal must show that the trial court erred and that there will be unjust consequences resulting from that error unless the court of appeals immediately steps in and corrects it, or, conversely, that judicial-economic concerns warrant granting the application.91

Court of Appeals Rule 31(a)92 provides that an application for discretionary appeal will be granted only when “reversible error appears to exist”93 or “[t]he establishment of a precedent is desirable.”94 My colleague, Judge Christopher J. McFadden, takes issue with the nomenclature of applications for “discretionary” appeal, rightly noting in his well-regarded treatise that there is “no discretion to deny an application for ‘discretionary review’ when reversible error appears to exist.”95

The other basis for granting an application for discretionary appeal, which is also a ground for granting an application for interlocutory appeal, is when the “establishment of precedent is desirable.”96 Of course, what is or is not desirable is entirely in the eye of the beholder. As a result, lawyers seeking to have an application for discretionary or interlocutory appeal granted need to understand that it will almost certainly be more difficult to receive a grant on this basis, or, at the very least, that there will be greater uncertainty as to the prospect of the application being granted on this ground. Indeed, when I discussed this aspect of the

90. Id.
91. See generally O.C.G.A. § 5-6-35 (2013).
95. McFadden, supra note 6, at 437-38; see also Sup. Ct. R. 34 (“An application for leave to appeal a final judgment in cases subject to appeal under O.C.G.A. § 5-6-35 shall be granted when . . . [r]eversible error appears to exist . . . .”); PHF II Buckhead LLC v. Dinku, 315 Ga. App. 76, 79, 726 S.E.2d 569, 572 (2012) (“Thus, in reviewing discretionary applications for appeals, our rules require us to grant the application when the trial court appears to have committed reversible error. Consequently, when this Court examines a request for a discretionary appeal, it acts in an error-correcting mode such that a denial of the application is on the merits, and the order denying the application is res judicata with respect to the substance of the requested review.”).
application process with a central-staff attorney, she quipped, “It seems a little cruel to grant an application to establish precedent if you know up front that the outcome is likely to be the same.” To which I responded, “True, but the rule does not say that we will grant an application to establish precedent only when doing so will benefit the appealing party.” An appellate practitioner should be careful, then, not to conflate the “establish precedent” prong with the other, and entirely distinct, prongs of Rules 30(a) and 31(a). It is important to understand that if your application is granted for purposes of establishing precedent, it may not ultimately be to your liking.

That said, I am sympathetic to applications for discretionary and interlocutory appeal that declare the need for precedent in a particular area of the law, while candidly acknowledging that the establishment of such precedent may very well result in a loss for the attorney’s client in that particular case. The key question I ask when considering applications requesting the establishment of precedent is whether the case is a good vehicle for addressing the issue. A good practitioner, then, explains not only why the establishment of precedent is desirable, but also why that case is a suitable vehicle for clarifying the issue.

As previously mentioned, the other key to filing a successful application is to make absolutely sure that the application is self-contained and includes everything needed for the central-staff attorneys and judges to examine its merits. In this regard, you must include all necessary documents in the application, while also taking care not to clutter the application with extraneous parts of the trial record. You also need to be precise with your record citations and make it as easy as possible for the court to confirm that your assertions about the proceedings below are accurate. Finally, given the severe time constraints on the court in evaluating these applications, you should not expect the central-staff attorneys or judges to spend any considerable amount of time doing additional research on the issues raised by your application. Indeed, while my staff attorneys and I conduct extensive research in direct appeals, we will not—and cannot—exert anywhere near that amount of effort with regard to discretionary and interlocutory applications. To put it plainly, your application is going to be treated as a “closed memo” of sorts. If you cannot make your case within the confines of your application, you are not likely to receive grant from our court.97

97. It only takes one judge to grant a discretionary or interlocutory application, and an application is only denied when all three judges on the assigned panel are in agreement as to the denial of that application.
If your application is granted, it will, of course, be handled in the same manner as a direct appeal.98


The first version of this article was published in 2014. Since that time, the Georgia Court of Appeals has undergone transformational changes. In 2015, the Georgia General Assembly enacted legislation (“House Bill 279”) expanding the court of appeals from twelve to fifteen judges, which means the court now has five (rather than four) divisions.99 The three additional judgeships created by this legislation were filled by Governor Nathan Deal under the appointment power granted to him by the Georgia Constitution100 and O.C.G.A. § 15-3-4 (b).101 These newly created judgeships are “for a term beginning January 1, 2016, and continuing through December 31, 2018, and until their successors are elected and qualified.”102 At the time my new colleagues joined the court (Judges Brian M. Rickman, Amanda H. Mercier, and Nels S.D. Peterson), we were halfway through our final term with four panels, so they were each substituted in as authors and voting judges on a designated number of randomly assigned cases (which allowed them to become acclimated with the work of the court before their first full term). Judges Rickman, Mercier, and Peterson will stand for election to retain their seats in 2018.

98. Every once in a while, an application for discretionary or interlocutory appeal that is granted is later dismissed on the basis that it was “improvidently granted.” This is referred to internally as a “DIG” (“dismissed as improvidently granted”). And if your case is DIGed, you should not take it personally. It does not mean that your brief was unpersuasive or that you offended the court. A dismissal on this ground simply means that the court, after a thorough review of the briefs and record, has concluded that the application should have never been granted.


100. GA CONST. art. VI, § 7, para. 3 (“Vacancies shall be filled by appointment of the Governor except as otherwise provided by law in the magistrate, probate, and juvenile courts.”).

101. See generally Clark, 298 Ga. at 893, 785 S.E.2d at 525 (upholding the legality of Governor Deal’s appointments).

On October 1, 2015, Governor Nathan Deal issued an executive order creating the “Appellate Jurisdiction Review Commission” 103 in order to “review the current jurisdictional boundaries of our appellate courts and make assessments about modernizing those courts for efficiencies to achieve best practices in the administration of justice.” 104 The commission issued its report on January 12, 2016, 105 and recommended, among other things:

- The Georgia General Assembly provide by law (effective January 1, 2017), under Article VI, Section VI, Paragraph III of the Georgia Constitution, that “the following types of cases are within the appellate jurisdiction of the Court of Appeals, rather than the Supreme Court: 1. Cases involving title to land; 2. All equity cases, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death; 3. All cases involving wills; 4. All cases involving extraordinary remedies, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death; 5. All divorce and alimony cases.” 106

- The Georgia General Assembly provide by law (effective July 1, 2016) that O.C.G.A. § 15-3-1 be amended to “allow the Court of Appeals to enact, by published rule, procedures relating to when the Court should decide cases with a panel consisting of more judges than its standard three-judge panel and when and how Court precedent is established and overruled.”

103. Governor Deal appointed the following individuals to the commission: Justice David Nahmias (Georgia Supreme Court), Justice Keith Blackwell (Georgia Supreme Court), Chief Judge Sara Doyle (Georgia Court of Appeals), Vice Chief Judge Stephen Dillard (Georgia Court of Appeals), Rep. Jon Burns (Majority Leader, Georgia House of Representatives), Senator Bill Cowsert (Majority Leader, Georgia State Senate), Ryan Teague (Executive Counsel, Office of Governor Nathan Deal), Thomas Worthy (Director of Governmental and External Affairs, State Bar of Georgia), Kyle Wallace (Appellate Partner, Alston & Bird, LLP), Darren Summerville (Solo Appellate Practitioner, The Summerville Firm), Chuck Spahos (Executive Director, Prosecuting Attorneys Council of Georgia), and Bryan Tyson (Executive Director, Public Defenders Standards Council of Georgia).


106. Id. at 7.
The two remaining central-staff-attorney positions cut from the court of appeals’s budget during the recent recession be restored, and that additional central-staff attorneys be funded in the near future in order to allow the court of appeals to restructure its Central Staff Attorney Office to “more closely resemble that of other busy state and federal courts (i.e., one that shifts some cases to a central staff to assist in the drafting of opinions).”

Then, during the 2016 legislative session, the Georgia General Assembly enacted House Bill 927, entitled the “Appellate Jurisdiction Reform Act of 2016,” which, among other things, adopted several of the Appellate Jurisdiction Review Commission’s recommendations:

- “The Court of Appeals may provide by rule for certain cases to be heard and determined by more than a single division and the manner in which those Judges will be selected for such cases. When a case is heard and determined by more than a single division, nine Judges shall be necessary to constitute a quorum.”

- “The Court of Appeals shall provide by rule for the establishment of precedent and the manner in which prior decisions of the court may be overruled.”

- “[T]he Court of Appeals rather than the Supreme Court shall have appellate jurisdiction in the following classes of cases: (1) Cases involving title to land; (2) All equity cases, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death; (3) All cases involving wills; (4) All cases involving extraordinary remedies, except those cases concerning proceedings in which a sentence of death was imposed or could be imposed and those cases concerning the execution of a sentence of death; (5) All divorce and alimony cases; and (6) All other cases not reserved to the Supreme Court or conferred on other courts.”

These changes are nothing short of revolutionary. The Georgia Court of Appeals now has the operational flexibility (as of July 1, 2016) to consider other methods of handling cases when a judge on a three-judge panel dissents. And currently, the court of appeals is maintaining the status quo with a slight modification: If a judge dissents from a three-judge panel decision, two back-up panels are brought in to decide the case.

107. Id. at 8.
109. Id. § 2-1(c)(2).
110. Id. § 2-1(d).
111. Id. § 3-1.
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(i.e., a “whole court nine” decision).112 But in the near future, the court of appeals will dramatically change the manner in which it operates. On September 1, 2016, the court adopted an operational model similar to that used by the federal circuit courts.113 Under this model, the court will allow panel decisions with a 2-1 outcome and abolish back-up panels altogether. A 2-1 decision—like a 3-0 decision with a judge concurring in judgment only—will be a “physical precedent” that is not binding authority. And while there will be procedures adopted in the near future for considering 2-1 decisions en banc, en banc consideration of those decisions will involve the entire court (all 15 judges), rather than just 7 or 9 judges. In my view, this manner of handling dissents not only maximizes the efficiency of the three-judge-panel model, but also ensures that en banc review will occur almost exclusively in cases where this level of review is actually warranted.114 And given the heavy caseload of the court of appeals and the pressures brought on by the two-term rule, the implementation of these efficiency measures is crucial.

The General Assembly and Governor Deal are to be applauded for permitting the court of appeals to design and implement its own operational

112. See O.C.G.A. § 15-3-1(c)(2) (2015 & Supp. 2016) (“The Court of Appeals may provide by rule for certain cases to be heard and determined by more than a single division and the manner in which those Judges will be selected for such cases. When a case is heard and determined by more than a single division, nine Judges shall be necessary to constitute a quorum.”); COURT OF APPEALS OF GEORGIA, http://www.gaappeals.us/operating_procedures.pdf (last visited Sept. 9, 2016) (“Consistent with this new statutory authority, the Judges of this Court adopted, effective July 1, 2016, new operating procedures. Those procedures shall remain in effect until such time as new rules are adopted. These procedures include: [1] In the event of a dissent, the two divisions immediately following the original division shall also participate. . . .”).

113. See COURT OF APPEALS OF GEORGIA, http://www.gaappeals.us/news2.php?title=Court%20of%20Appeals%20New%20Operating%20Procedures (last visited Sept. 9, 2016) (“On September 1, 2016, the Judges of this Court approved changes to its operating procedures, which the Court plans to implement no later than the December Term of 2017. They are as follows: [1] The Court will allow 2-1 decisions in the event of a dissent, without requiring two additional divisions of the Court to participate. A 2-1 decision will constitute physical precedent only and be of no precedential value. See Court of Appeals Rule 33. [2] The Court will establish operating procedures to poll the entire Court to determine whether the Court desires to hear the case en banc in the event precedent is proposed to be overruled or a judge wishes to have the entire Court consider a case en banc. [3] The Court is also considering procedures by which a party may request a rehearing en banc, consistent with the two-term rule.”).

114. See Wright v. State, No. A16A0240, 2016 Ga. App. LEXIS 455, at *25 (July 15, 2016) (Peterson, J., concurring fully and specially) (noting that “[c]onvening an en banc court at any time is ‘costly to an appellate court in terms of consumption of its always limited resources of judicial time and energy’” (citation omitted)).
model of handling cases with dissents and to “provide by rule for the est-
ablishment of precedent.” They are also to be commended for adopting
the recommendation of the Appellate Jurisdiction Review Commission to
shift the jurisdiction of several categories of appeals from the supreme
court to the court of appeals. This historic jurisdictional shift not only
brings Georgia’s appellate judicial system more in line with other states
(i.e., one with a truly intermediate appellate court and a more certiorari-
based supreme court), it will also greatly reduce the amount of time and
effort our appellate courts typically spend resolving the jurisdictional
demarcation line in those particular cases. And while these seismic
changes will undoubtedly make Georgia’s appellate courts more stream-
ilined and efficient, the state’s growing population (currently just over ten
million) and ever-increasing caseload will continue to present challenges
for the court of appeals and those who practice before it.

115. See O.C.G.A. § 15-3-1(d) (“The Court of Appeals shall provide by rule for the estab-
ishment of precedent and the manner in which prior decisions of the court may be over-
ruled.”); COURT OF APPEALS OF GEORGIA, http://www.gaappeals.us/operating_procedures.pdf
(last visited Sept. 9, 2016) (“Consistent with this new statutory authority, the Judges of
this Court adopted, effective July 1, 2016, new operating procedures. Those procedures
shall remain in effect until such time as new rules are adopted. These procedures in-
clude: . . . [2] In the event of a case involving the overruling of a prior decision of this Court,
all 15 Judges of this Court shall participate (provided, however, that the disqualificat
ion of one or more Judges in such a case shall not prevent the overruling of a prior decision so
long as at least nine Judges participate).

116. See Wallace et al., supra note 104, at 949 (“There is no principled reason for the
Supreme Court to serve as an error-correcting court over the vast majority of cases that are
currently [i.e., in 2014] within its jurisdiction—equity cases, divorce cases, habeas corpus
cases, cases involving extraordinary remedies, cases involving title to land . . . and cases
involving the construction of wills. Moving direct appeals of these cases to the Court of
Appeals will resolve the current confusion over the scope of the Supreme Court’s jurisdic-
tion, and it will allow the Supreme Court to focus on serving the function that it should
serve—creating a coherent, uniform body of legal precedent in Georgia.”).

117. Id. at 946-47 (“The most alarming waste created by the archaic jurisdictional split
in Georgia’s appellate system is the time that the Supreme Court and Court of Appeals
spend considering which appellate court has jurisdiction over the appeal to hear it on the
merits. This issue often results in transfers from the Court of Appeals to the Supreme
Court, which sometimes result in transfers back to the Court of Appeals . . . resulting in a
tremendous waste of Georgia’s already taxed judicial resources.”); ANDY CLARK LAW
http://andyclarklaw.com/potential-realignment-of-the-georgia-appellate-courts-jurisdic-
tion/ (visited Sept. 9, 2016) (“A big benefit to the judicial system [of a significant jurisdic-
tional shift of cases from the Supreme Court to the Court of Appeals] will be that it spends
far fewer resources deciding which court has jurisdiction. For parties, that means some
cases will get to the briefing stage faster, for better or worse. Far fewer cases will be trans-
ferred from the Court of Appeals to the Supreme Court and then back again.”).

118. See State v. Int’l Keystone Knights of the Ku Klux Klan, Inc., 299 Ga. 392, 398 n.19,
788 S.E.2d 455, 461 n.19 (2016) (“Although OCGA § 5-6-35 (a) undoubtedly has helped with
VIII. CLOSING THOUGHTS

The Georgia Court of Appeals is one of the busiest intermediate appellate courts in the country and faces unique challenges as a result of its heavy caseload and our state’s constitutional two-term requirement. Practitioners who understand these challenges and craft their briefs, presentations, and applications with these challenges in mind can more effectively represent their clients and ensure that their arguments are given the greatest consideration possible.

the ‘massive caseload of Georgia’s appellate courts,’ this Court and our Court of Appeals both continue to manage very heavy caseloads.”); TERRY, GEORGIA APPEALS, supra note 6, at 12 (“Despite these additions of judges [i.e., expansion of the Court of Appeals from 12 to 15], the growth of the court had not remotely kept up with the growth of the state and of the appellate caseload. The Court of Appeals of Georgia has been for years and remains the busiest intermediate appellate court in the country, with more cases per judge than any other. Each judge must finally dispose of more than four cases per week, and review and vote upon more than twice that many written by other judges. That does not include orders, motions, and interlocutory and discretionary applications.”).
THE CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM  
(Founded 1989)

A Brief History of the Chief Justice’s Commission on Professionalism

Karlise Y. Grier, Executive Director

The mission of the Commission is to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts and the public, and to fulfill their obligations to improve the law and legal system and to ensure access to that system.

After a series of meetings of key figures in Georgia’s legal community in 1988, in February of 1989, the Supreme Court of Georgia created the Chief Justice’s Commission on Professionalism, the first entity of this kind in the world created by a high court to address legal professionalism. In March of 1989, the Rules of the State Bar of Georgia were amended to lay out the purpose, members, powers and duties of the Commission. The brainchild of Justice Thomas Marshall and past Emory University President James Laney, they were joined by Justices Charles Weltner and Harold Clarke and then State Bar President A. James Elliot in forming the Commission. The impetus for this entity then and now is to address uncivil approaches to the practice of law, as many believe legal practice is departing from its traditional stance as a high calling – like medicine and the clergy – to a business.

The Commission carefully crafted a statement of professionalism, A Lawyers Creed and Aspirational Statement on Professionalism, guidelines and standards addressing attorneys’ relationships with colleagues, clients, judges, law schools and the public, and retained its first executive director, Hulett “Bucky” Askew. Professionalism continuing legal education was mandated and programming requirements were developed by then assistant and second executive director Sally Evans Lockwood. During the 1990s, after the Commission conducted a series of convocations with the bench and bar to discern professionalism issues from practitioners’ views, the State Bar instituted new initiatives, such as the Committee on Inclusion in the Profession (fka Women and Minorities in the Profession Committee). Then the Commission sought the concerns of the public in a series of town hall meetings held around Georgia. Two concerns raised in these meetings were: lack of civility and the economic pressures of law practice. As a result, the State Bar of Georgia established the Law Practice Management Program.

Over the years, the Commission has worked with the State Bar to establish other programs that support professionalism ideals, including the Consumer Assistance Program and the Diversity Program. In 1993, under President Paul Kilpatrick, the State Bar’s Committee on Professionalism partnered with the Commission in establishing the first Law School Orientation on Professionalism Program for incoming law students held at every Georgia law school. This program was replicated at more than forty U.S. law schools. It engages volunteer practicing attorneys, judges and law professors with law students in small group discussions of hypothetical contemporary professionalism and ethics situations.

In 1997, the Justice Robert Benham Community Service Awards Program was initiated to recognize members of the bench and bar who have combined a professional career with outstanding service to their communities around Georgia. The honorees are recognized for voluntary participation in community organizations, government-sponsored activities, youth programs,
religious activities or humanitarian work outside of their professional practice or judicial duties. This annual program is now usually held at the State Bar Headquarters in Atlanta and is co-sponsored by the Commission and the State Bar. The program generally attracts several hundred attendees who celebrate Georgia lawyers who are active in the community.

In 2006, veteran attorney and former law professor, Avarita L. Hanson became the third executive director. In addition to providing multiple CLE programs for local bars, government and law offices, she served as Chair of the ABA Consortium on Professionalism Initiatives, a group that informs and vets ideas of persons interested in development of professionalism programs. She authored the chapter on Reputation, in Paul Haskins, Ed., ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER, ABA Standing Committee on Professionalism, ABA Center for Professional Responsibility (July 2013) and recently added to the newly-released accompanying Instructor’s Manual (April 2017). Ms. Hanson retired in August 2017 after a distinguished career serving the Commission.

Today, the Commission, which meets three times per year, is under the direction and management of its fourth executive director, attorney Karlise Yvette Grier. The Commission continues to support and advise persons locally, nationally and globally who are interested in professionalism programming and maintains a resource library to support its mission. The Chief Justice of the Supreme Court of Georgia serves as the Commission’s chair, and Chief Justice P. Harris Hines currently serves in this capacity. The Commission has twenty-two members representing practicing lawyers, the state appellate and trial courts, the federal district court, all Georgia law schools and the public. (See Appendix A). In addition to the executive director, the Commission staff includes Terie Latala (Assistant Director) and Nneka Harris Daniel (Administrative Assistant). With its chair, members and staff, the Commission is well equipped to fulfill its mission and to inspire and develop programs to address today’s needs of the legal profession and those concerns on the horizon. (See Appendix B).

The Commission works through committees (Access to Justice, Finance and Personnel, Educational Video Projects, Professionalism Curriculum, Benham Awards Selection) in carrying out some of its duties. It also works with other state and national entities, such as the American Bar Association’s Center for Professional Responsibility and its other groups. To keep Georgia Bar members abreast of professionalism activities and issues, there is a regular column on the Professionalism Page of every issue of the Georgia Bar Journal. Current Commission projects include: globalization of the law, the delivery of legal services, addressing issues of lawyers aging in the practice of law, intergenerational communications, innovations in professionalism law school curriculum and supporting access to justice initiatives.

After 29 years, the measure of effectiveness of the Chief Justice’s Commission on Professionalism may ultimately rest in the actions, character and demeanor of every Georgia lawyer. There remains work to do. The Commission’s leadership and dedication to this cause, along with Georgia’s capable, committed and innovative bench and bar, will continue to lead the charge, movement and dialogue on legal professionalism.

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THE MEANING OF PROFESSIONALISM

The three ancient learned professions were the law, medicine, and ministry. The word profession comes from the Latin *professus*, meaning to have affirmed publicly. As one legal scholar has explained, “The term evolved to describe occupations that required new entrants to take an oath professing their dedication to the ideals and practices associated with a learned calling.” Many attempts have been made to define a profession in general and lawyer professionalism in particular. The most commonly cited is the definition developed by the late Dean Roscoe Pound of Harvard Law School:

> The term refers to a group . . . pursuing a learned art as a common calling in the spirit of public service - no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.2

Thinking about professionalism and discussing the values it encompasses can provide guidance in the day-to-day practice of law. Professionalism is a wide umbrella of values encompassing competence, character, civility, commitment to the rule of law, to justice and to the public good. Professionalism calls us to be mindful of the lawyer’s roles as officer of the court, advocate, counselor, negotiator, and problem solver. Professionalism asks us to commit to improvement of the law, the legal system, and access to that system. These are the values that make us a profession enlisted in the service not only of the client but of the public good as well. While none of us achieves perfection in serving these values, it is the consistent aspiration toward them that defines a professional. The Commission encourages thought not only about the lawyer-client relationship central to the practice of law but also about how the legal profession can shape us as people and a society.

BACKGROUND ON THE LEGAL PROFESSIONALISM MOVEMENT IN GEORGIA

In 1986, the American Bar Association ruefully reported that despite the fact that lawyers’ observance of the rules of ethics governing their conduct is sharply on the rise, lawyers’ professionalism, by contrast, may well be in steep decline:


Although lawyers have tended to take the rules more seriously because of an increased fear of disciplinary prosecutions and malpractice suits, . . . [they] have also tended to look at nothing but the rules; if conduct meets the minimum standard, lawyers tend to ignore exhortations to set their standards at a higher level.  

The ABA’s observation reflects a crucial distinction: while a canon of ethics may cover what is minimally required of lawyers, “professionalism” encompasses what is more broadly expected of them – both by the public and by the best traditions of the legal profession itself.

In response to these challenges, the State Bar of Georgia and the Supreme Court of Georgia embarked upon a long-range project – to raise the professional aspirations of lawyers in the state. Upon taking office in June 1988, then State Bar President A. James Elliott gave Georgia’s professionalism movement momentum when he placed the professionalism project at the top of his agenda. In conjunction with Chief Justice Marshall, President Elliott gathered 120 prominent judges and lawyers from around the state to attend the first Annual Georgia Convocation on Professionalism.

For its part, the Georgia Supreme Court took three important steps to further the professionalism movement in Georgia. First, at the first Convocation, the Supreme Court of Georgia announced and administered to those present a new Georgia attorney’s oath emphasizing the virtue of truthfulness, reviving language dating back to 1729. (See also Appendix C). Second, as a result of the first Convocation, in 1989, the Supreme Court of Georgia took two additional significant steps to confront the concerns and further the aspirations of the profession. First, it created the Chief Justice’s Commission on Professionalism (the “Commission”) and gave it a primary charge of ensuring that the practice of law in this state remains a high calling, enlisted in the service not only of the client, but of the public good as well. This challenging mandate was supplemented by the Court’s second step, that of amending the mandatory continuing legal education (CLE) rule to require all active Georgia lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder].

GENERAL PURPOSE OF CLE PROFESSIONALISM CREDIT

Beginning in 1990, the Georgia Supreme Court required all active Georgia lawyers to complete one hour of Professionalism CLE each year [Rule 8-104 (B)(3) of the Rules and Regulations for the Organization and Government of the State Bar of Georgia and Regulation (4) thereunder]. The one hour of Professionalism CLE is distinct from and in addition to the required ethics CLE. The general goal of the Professionalism CLE requirement is to create a forum in which lawyers, judges and legal educators can explore the meaning and aspirations of professionalism in

contemporary legal practice and reflect upon the fundamental premises of lawyer professionalism – competence, character, civility, commitment to the rule of law, to justice, and to the public good. Building a community among the lawyers of this state is a specific goal of this requirement.

DISTINCTION BETWEEN ETHICS AND PROFESSIONALISM

The Supreme Court has distinguished between ethics and professionalism, to the extent of creating separate one-hour CLE requirements for each. The best explanation of the distinction between ethics and professionalism that is offered by former Chief Justice Harold Clarke of the Georgia Supreme Court:

“... the idea [is] that ethics is a minimum standard which is required of all lawyers, while professionalism is a higher standard expected of all lawyers.”

Laws and the Rules of Professional Conduct establish minimal standards of consensus impropriety; they do not define the criteria for ethical behavior. In the traditional sense, persons are not “ethical” simply because they act lawfully or even within the bounds of an official code of ethics. People can be dishonest, unprincipled, untrustworthy, unfair, and uncaring without breaking the law or the code. Truly ethical people measure their conduct not by rules but by basic moral principles such as honesty, integrity and fairness.

The term “Ethics” is commonly understood in the CLE context to mean “the law of lawyering” and the rules by which lawyers must abide in order to remain in good standing before the bar. Legal Ethics CLE also includes malpractice avoidance. “Professionalism” harkens back to the traditional meaning of ethics discussed above. The Commission believes that lawyers should remember in counseling clients and determining their own behavior that the letter of the law is only a minimal threshold describing what is legally possible, while professionalism is meant to address the aspirations of the profession and how we as lawyers should behave. Ethics discussions tend to focus on misconduct -- the negative dimensions of lawyering. Professionalism discussions have an affirmative dimension -- a focus on conduct that preserves and strengthens the dignity, honor, and integrity of the legal system.

As former Chief Justice Benham of the Georgia Supreme Court says, “We should expect more of lawyers than mere compliance with legal and ethical requirements.”

ISSUES AND TOPICS

In March of 1990, the Chief Justice’s Commission adopted A Lawyer’s Creed (See Appendix D) and an Aspirational Statement on Professionalism (See Appendix E). These two documents should serve as the beginning points for professionalism discussions, not because they are to be imposed upon Georgia lawyers or bar associations, but because they serve as words of encouragement, assistance and guidance. These comprehensive statements should be utilized to frame discussions and remind lawyers about the basic tenets of our profession.
Specific topics which can be the subjects of Professionalism CLE include:

- Access to Justice
- Administration of Justice
- Advocacy - effective persuasive advocacy techniques for trial, appellate, and other representation contexts
- Alternative Dispute Resolution - negotiation, settlement, mediation, arbitration, early neutral evaluation, other dispute resolution processes alternative to litigation
- Billable Hours
- Civility
- Client Communication Skills
- Client Concerns and Expectations
- Client Relations Skills
- Commercial Pressures
- Communication Skills (oral and written)
- Discovery - effective techniques to overcome misuse and abuse
- Diversity and Inclusion Issues - age, ethnic, gender, racial, sexual orientation, socioeconomic status
- Law Practice Management - issues relating to development and management of a law practice including client relations and technology to promote the efficient, economical and competent delivery of legal services.

Practice Management CLE includes, but is not limited to, those activities which (1) teach lawyers how to organize and manage their law practices so as to promote the efficient, economical and competent delivery of legal services; and (2) teach lawyers how to create and maintain good client relations consistent with existing ethical and professional guidelines so as to eliminate malpractice claims and bar grievances while improving service to the client and the public image of the profession.

- Mentoring
- Proficiency and clarity in oral, written, and electronic communications - with the court, lawyers, clients, government agencies, and the public
- Public Interest
- Quality of Life Issues - balancing priorities, career/personal transition, maintaining emotional and mental health, stress management, substance abuse, suicide prevention, wellness
- Responsibility for improving the administration of justice
- Responsibility to ensure access to the legal system
- Responsibility for performing community, public and pro bono service
- Restoring and sustaining public confidence in the legal system, including courts, lawyers, the systems of justice
Roles of Lawyers

The Lawyer as Advocate
The Lawyer as Architect of Future Conduct
The Lawyer as Consensus Builder
The Lawyer as Counselor
The Lawyer as Hearing Officer
The Lawyer as In-House Counsel
The Lawyer as Judge (or prospective judge)
The Lawyer as Negotiator
The Lawyer as Officer of the Court
The Lawyer as Problem Solver
The Lawyer as Prosecutor
The Lawyer as Public Servant

Satisfaction in the Legal Profession
Sexual Harassment
Small Firms/Solo Practitioners

Karl N. Llewellyn, jurisprudential scholar who taught at Yale, Columbia, and the University of Chicago Law Schools, often cautioned his students:

The lawyer is a man of many conflicts. More than anyone else in our society, he must contend with competing claims on his time and loyalty. You must represent your client to the best of your ability, and yet never lose sight of the fact that you are an officer of the court with a special responsibility for the integrity of the legal system. You will often find, brethren and sistern, that those professional duties do not sit easily with one another. You will discover, too, that they get in the way of your other obligations – to your conscience, your God, your family, your partners, your country, and all the other perfectly good claims on your energies and hearts. You will be pulled and tugged in a dozen directions at once. You must learn to handle those conflicts.4

The real issue facing lawyers as professionals is developing the capacity for critical and reflective judgment and the ability to “handle those conflicts,” described by Karl Llewellyn. A major goal of Professionalism CLE is to encourage introspection and dialogue about these issues.

4 MARY ANN GLENDON, A NATION UNDER LAWYERS 17 (1994)
CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM

APPENDICES

A – 2018-2019 COMMISSION MEMBERS

B – MISSION STATEMENT

C – OATH OF ADMISSION

D – A LAWYER’S CREED

E – ASPIRATIONAL STATEMENT ON PROFESSIONALISM
APPENDIX A

CHIEF JUSTICE’S COMMISSION ON PROFESSIONALISM

2018 - 2019

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Italics denotes public member/non-lawyer
MISSION STATEMENT

The mission of the Chief Justice’s Commission on Professionalism is to support and encourage lawyers to exercise the highest levels of professional integrity in their relationships with their clients, other lawyers, the courts, and the public and to fulfill their obligations to improve the law and the legal system and to ensure access to that system.

CALLING TO TASKS

The Commission seeks to foster among lawyers an active awareness of its mission by calling lawyers to the following tasks, in the words of former Chief Justice Harold Clarke:

1. To recognize that the reason for the existence of lawyers is to act as problem solvers performing their service on behalf of the client while adhering at all times to the public interest;

2. To utilize their special training and natural talents in positions of leadership for societal betterment;

3. To adhere to the proposition that a social conscience and devotion to the public interest stand as essential elements of lawyer professionalism.
HISTORICAL INFORMATION ABOUT THE COMMISSION’S ROLES IN THE DEVELOPMENT OF THE CURRENT GEORGIA ATTORNEY OATH

In 1986, Emory University President James T. Laney delivered a lecture on “Moral Authority in the Professions.” While expressing concern about the decline in moral authority of all the professions, he focused on the legal profession because of the respect and confidence in which it has traditionally been held and because it has been viewed as serving the public in unique and important ways. Dr. Laney expressed the fear that the loss of moral authority has as serious a consequence for society at large as it does for the legal profession.

For its part, the Georgia Supreme Court took an important step to further the professionalism moment in Georgia. At the first convocation on professionalism, the Court announced and administered to those present a new Georgia attorney’s oath emphasizing the virtue of truthfulness, reviving language dating back to 1729. Reflecting the idea that the word “profession” derives from a root meaning “to avow publicly,” this new oath of admission to the State Bar of Georgia indicates that whatever other expectations might be made of lawyers, truth-telling is expected, always and everywhere, of every true professional. Since the convocation, the new oath has been administered to thousands of lawyers in circuits all over the state.

Attorney’s Oath

I, ______________, swear that I will truly and honestly, justly, and uprightly demean myself, according to the laws, as an attorney, counselor, and solicitor, and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.

In 2002, at the request of then-State Bar President George E. Mundy, the Committee on Professionalism was asked to revise the Oath of Admission to make the wording more relevant to the current practice of law, while retaining the original language calling for lawyers to “truly and honestly, justly and uprightly” conduct themselves. The revision was approved by the Georgia Supreme Court in 2002.
APPENDIX C

OATH OF ADMISSION
TO THE STATE BAR OF GEORGIA

“I,___________________, swear that I will truly and honestly, justly and uprightly conduct myself as a member of this learned profession and in accordance with the Georgia Rules of Professional Conduct, as an attorney and counselor and that I will support and defend the Constitution of the United States and the Constitution of the State of Georgia. So help me God.”

As revised by the Supreme Court of Georgia, April 20, 2002
APPENDIX D

A LAWYER’S CREED

To my clients, I offer faithfulness, competence, diligence, and good judgement. I will strive to represent you as I would want to be represented and to be worthy of your trust.

To the opposing parties and their counsel, I offer fairness, integrity, and civility. I will seek reconciliation and, if we fail, I will strive to make our dispute a dignified one.

To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice.

To my colleagues in the practice of law, I offer concern for your welfare. I will strive to make our association a professional friendship.

To the profession, I offer assistance. I will strive to keep our business a profession and our profession a calling in the spirit of public service.

To the public and our systems of justice, I offer service. I will strive to improve the law and our legal system, to make the law and our legal system available to all, and to seek the common good through the representation of my clients.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

ASPIRATIONAL STATEMENT ON PROFESSIONALISM

The Court believes there are unfortunate trends of commercialization and loss of professional community in the current practice of law. These trends are manifested in an undue emphasis on the financial rewards of practice, a lack of courtesy and civility among members of our profession, a lack of respect for the judiciary and for our systems of justice, and a lack of regard for others and for the common good. As a community of professionals, we should strive to make the internal rewards of service, craft, and character, and not the external reward of financial gain, the primary rewards of the practice of law. In our practices we should remember that the primary justification for who we are and what we do is the common good we can achieve through the faithful representation of people who desire to resolve their disputes in a peaceful manner and to prevent future disputes. We should remember, and we should help our clients remember, that the way in which our clients resolve their disputes defines part of the character of our society and we should act accordingly.

As professionals, we need aspirational ideals to help bind us together in a professional community. Accordingly, the Court issues the following Aspirational Statement setting forth general and specific aspirational ideals of our profession. This statement is a beginning list of the ideals of our profession. It is primarily illustrative. Our purpose is not to regulate, and certainly not to provide a basis for discipline, but rather to assist the Bar’s efforts to maintain a professionalism that can stand against the negative trends of commercialization and loss of community. It is the Court’s hope that Georgia’s lawyers, judges, and legal educators will use the following aspirational ideals to reexamine the justifications of the practice of law in our society and to consider the implications of those justifications for their conduct. The Court feels that enhancement of professionalism can be best brought about by the cooperative efforts of the organized bar, the courts, and the law schools with each group working independently, but also jointly in that effort.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

GENERAL ASPIRATIONAL IDEALS

As a lawyer, I will aspire:

(a) To put fidelity to clients and, through clients, to the common good, before selfish interests.

(b) To model for others, and particularly for my clients, the respect due to those we call upon to resolve our disputes and the regard due to all participants in our dispute resolution processes.

(c) To avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me.

(d) To preserve and improve the law, the legal system, and other dispute resolution processes as instruments for the common good.

(e) To make the law, the legal system, and other dispute resolution processes available to all.

(f) To practice with a personal commitment to the rules governing our profession and to encourage others to do the same.

(g) To preserve the dignity and the integrity of our profession by my conduct. The dignity and the integrity of our profession is an inheritance that must be maintained by each successive generation of lawyers.

(h) To achieve the excellence of our craft, especially those that permit me to be the moral voice of clients to the public in advocacy while being the moral voice of the public to clients in counseling. Good lawyering should be a moral achievement for both the lawyer and the client.

(i) To practice law not as a business, but as a calling in the spirit of public service.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

SPECIFIC ASPIRATIONAL IDEALS

As to clients, I will aspire:

(a) To expeditious and economical achievement of all client objectives.

(b) To fully informed client decision-making.

As a professional, I should:

(1) Counsel clients about all forms of dispute resolution;
(2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes;
(3) Maintain the sympathetic detachment that permits objective and independent advice to clients;
(4) Communicate promptly and clearly with clients; and,
(5) Reach clear agreements with clients concerning the nature of the representation.

(c) To fair and equitable fee agreements.

As a professional, I should:

(1) Discuss alternative methods of charging fees with all clients;
(2) Offer fee arrangements that reflect the true value of the services rendered;
(3) Reach agreements with clients as early in the relationship as possible;
(4) Determine the amount of fees by consideration of many factors and not just time spent by the attorney;
(5) Provide written agreements as to all fee arrangements; and,
(6) Resolve all fee disputes through the arbitration methods provided by the State Bar of Georgia.

(d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve the fidelity to clients that is the purpose of these obligations.

As to opposing parties and their counsel, I will aspire:

(a) To cooperate with opposing counsel in a manner consistent with the competent representation of all parties.

As a professional, I should:

(1) Notify opposing counsel in a timely fashion of any cancelled appearance;
APPENDIX E

(2) Grant reasonable requests for extensions or scheduling changes; and,
(3) Consult with opposing counsel in the scheduling of appearances, meetings, and depositions.

(b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice.

As a professional, I should:

(1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response;
(2) Be courteous and civil in all communications;
(3) Respond promptly to all requests by opposing counsel;
(4) Avoid rudeness and other acts of disrespect in all meetings including depositions and negotiations;
(5) Prepare documents that accurately reflect the agreement of all parties; and,
(6) Clearly identify all changes made in documents submitted by opposing counsel for review.

As to the courts, other tribunals, and to those who assist them, I will aspire:

(a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.

As a professional, I should:

(1) Avoid non-essential litigation and non-essential pleading in litigation;
(2) Explore the possibilities of settlement of all litigated matters;
(3) Seek non-coerced agreement between the parties on procedural and discovery matters;
(4) Avoid all delays not dictated by a competent presentation of a client’s claims;
(5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual; and,
(6) Advise clients about the obligations of civility, courtesy, fairness, cooperation, and other proper behavior expected of those who use our systems of justice.

(b) To model for others the respect due to our courts.

As a professional I should:

(1) Act with complete honesty;
(2) Know court rules and procedures;

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
APPENDIX E

(3) Give appropriate deference to court rulings;
(4) Avoid undue familiarity with members of the judiciary;
(5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary;
(6) Show respect by attire and demeanor;
(7) Assist the judiciary in determining the applicable law; and,
(8) Seek to understand the judiciary’s obligations of informed and impartial decision-making.

As to my colleagues in the practice of law, I will aspire:

(a) To recognize and to develop our interdependence;

(b) To respect the needs of others, especially the need to develop as a whole person; and,

(c) To assist my colleagues become better people in the practice of law and to accept their assistance offered to me.

As to our profession, I will aspire:

(a) To improve the practice of law.
   As a professional, I should:
   (1) Assist in continuing legal education efforts;
   (2) Assist in organized bar activities; and,
   (3) Assist law schools in the education of our future lawyers.

(b) To protect the public from incompetent or other wrongful lawyering.
   As a professional, I should:
   (1) Assist in bar admissions activities;
   (2) Report violations of ethical regulations by fellow lawyers; and,
   (3) Assist in the enforcement of the legal and ethical standards imposed upon all lawyers.

As to the public and our systems of justice, I will aspire:

(a) To counsel clients about the moral and social consequences of their conduct.

(b) To consider the effect of my conduct on the image of our systems of justice including the social effect of advertising methods.

Entered by Order of Supreme Court of Georgia, October 9, 1992, nunc pro tunc July 3, 1990; Part IX of the Rules and Regulations of the State Bar of Georgia, as amended September 10, 2003 and April 26, 2013
As a professional, I should ensure that any advertisement of my services:
(1) is consistent with the dignity of the justice system and a learned profession;
(2) provides a beneficial service to the public by providing accurate information about the availability of legal services;
(3) educates the public about the law and legal system;
(4) provides completely honest and straightforward information about my qualifications, fees, and costs; and,
(5) does not imply that clients’ legal needs can be met only through aggressive tactics.

(c) To provide the pro bono representation that is necessary to make our system of justice available to all.

(d) To support organizations that provide pro bono representation to indigent clients.

(e) To improve our laws and legal system by, for example:

(1) Serving as a public official;
(2) Assisting in the education of the public concerning our laws and legal system;
(3) Commenting publicly upon our laws; and,
(4) Using other appropriate methods of effecting positive change in our laws and legal system.
LEGISLATIVE UPDATE
2019 Georgia Legislative Update

The 2019 meeting of the Georgia General Assembly began on January 14, and will last for 40 days of business. This year’s session is the first of the two-year 2019-2020 term of the General Assembly, meaning that bills introduced this year may be considered during the 2020 session. Thursday, March 7, 2019, is “Crossover Day,” the day by which bills must pass one house in order to have a possibility of being passed by the other house.

The following bills relating to civil practice have been considered by this year’s General Assembly (HB – House Bill; SB – Senate Bill; HR – House Resolution; SR – Senate Resolution):

**HR256** is a resolution calling for a constitutional amendment that would allow the Legislature to cap damages of any kind in civil cases of any kind. This resolution was assigned to the House Judiciary Committee where it remains without a hearing. Two of the original co-signers of this resolution have taken their name off the bill. For now, it remains before the House Judiciary Committee and has not received a hearing.

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**SB135** is a bill to increase the maximum income benefits payable under the Workers’ Compensation Act to injured workers and to create exceptions to the 400-week cap on medical benefits so as to require employers and their workers’
compensation insurers to be responsible for paying for repairs and replacements of prostheses, durable medical equipment, and other medical devices. This bill passed the Senate Judiciary Committee unanimously last past week and will be on the Senate floor this week before Crossover Day.

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**SB189** is a bill to lower the amounts healthcare providers can charge for medical records. Healthcare providers have lobbied against the bill and raised numerous questions and concerns in the Committee’s meeting on the bill last Wednesday. Thus far it remains before the Health and Human Services Committee.

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**HB457** would allow the non-usage of seatbelts to be admissible in evidence in auto wreck cases under certain conditions. This bill was heard in a Subcommittee of the House Judiciary Committee yesterday. Ultimately, the Chairman of the Subcommittee decided not to take a vote on the bill so it remains in that subcommittee.

---

**SB148** would allow the non-usage of seatbelts to be admissible in evidence in all cases. This bill was heard by a subcommittee of the Senate Judiciary Committee. The Chairman of this Senate Subcommittee also declined to call for a vote on this bill so it remains in that subcommittee.

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**HB454** addresses the ability of cities to regulate the use of scooters and provides cities certain immunity for harm caused to anyone by the use of scooters. This bill was heard in the House Transportation Committee on Monday.

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**HB311** would waive sovereign immunity to enable citizens to bring equitable actions against governmental actors’ violations of the US Constitution or the Constitution, laws, rules or regulations of the State. This bill was heard in subcommittee three times last week and eventually passed out of subcommittee unanimously yesterday. It was heard in the full House Judiciary Committee on Monday.

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**HB499** would expand access to broadband and immunity for Electric Membership Corporations (EMCs) whose power lines are used for same. As introduced, this bill had broad immunity language that could have immunized EMCs if their power poles fell on passersby and harmed them, but this language has been amended to limit the immunity provided. The bill passed subcommittee last week and was heard by the full Energy, Utilities & Telecommunications Committee on Monday.

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**SB58** would allow taxpayer whistleblower actions to proceed without having to obtain permission to do so from the Attorney General. The bill was heard Monday by the Senate Judiciary Committee.

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**SB155** would prohibit plaintiffs from putting into evidence the full amount of medical bills charged and allow only the amounts that have been paid by a third party, even if the provider has lien rights for the full amount charged. This bill would also allow for a post-verdict attack on the reasonableness of outstanding medical bills. The bill was heard by a subcommittee of the Senate Judiciary Committee last week. After a healthy debate, the Chairman of the subcommittee decided not to hold a vote, so the bill remains in the subcommittee.

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**SB203** would make wide-ranging changes to the Civil Practice Act, the Evidence Code and other key parts of the Georgia Code relevant to civil practice. However, the author of this bill decided to ask the Senate Judiciary Committee Chairman to not hold a hearing on the bill at this time. So, it remains in that committee.

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NOTE: If significant changes occur between the submission of this paper and the seminar, an updated version will be available at https://haddenfirm.com/2019GA
APPENDIX
### ICLE BOARD

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Term Expires</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ms. Carol V. Clark</td>
<td>Member</td>
<td>2019</td>
</tr>
<tr>
<td>Mr. Harold T. Daniel, Jr.</td>
<td>Member</td>
<td>2019</td>
</tr>
<tr>
<td>Ms. Laverne Lewis Gaskins</td>
<td>Member</td>
<td>2021</td>
</tr>
<tr>
<td>Ms. Allegra J. Lawrence</td>
<td>Member</td>
<td>2019</td>
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<tr>
<td>Mr. C. James McCallar, Jr.</td>
<td>Member</td>
<td>2021</td>
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<tr>
<td>Mrs. Jennifer Campbell Mock</td>
<td>Member</td>
<td>2020</td>
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<tr>
<td>Mr. Brian DeVoe Rogers</td>
<td>Member</td>
<td>2019</td>
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<tr>
<td>Mr. Kenneth L. Shigley</td>
<td>Member</td>
<td>2020</td>
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<tr>
<td>Mr. A. James Elliott</td>
<td>Emory University</td>
<td>2019</td>
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<tr>
<td>Mr. Buddy M. Mears</td>
<td>John Marshall</td>
<td>2019</td>
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<tr>
<td>Daisy Hurst Floyd</td>
<td>Mercer University</td>
<td>2019</td>
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<tr>
<td>Mr. Cassady Vaughn Brewer</td>
<td>Georgia State University</td>
<td>2019</td>
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<tr>
<td>Ms. Carol Ellis Morgan</td>
<td>University of Georgia</td>
<td>2019</td>
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<tr>
<td>Hon. John J. Ellington</td>
<td>Liaison</td>
<td>2019</td>
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<tr>
<td>Mr. Jeffrey Reese Davis</td>
<td>Staff Liaison</td>
<td>2019</td>
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</tbody>
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